INSTITUTES

OF THE

LAWS OF CEYLON,

BY

HENRY BYERLEY THOMSON,

SECOND PUISNE JUDGE OF THE SUPREME COURT OF CEYLON,

AUTHOR OF THE CHOICE OF A PROFESSION,
THE LAWS OF WAR AFFECTING SHIPPING AND COMMERCE,
ETC. ETC.

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PREFACE

TO THE

FIRST VOLUME.

THIS work has its origin in a digest of numerous unpublished judgments of the Supreme Court of Ceylon, which the author had made for his own private use. The Supreme Court has, by its decrees, been declaring the law of Ceylon, since the Charter of Justice granted to Ceylon, for nearly forty-three years; but only a portion of those decrees have been made public in a printed form. There are in Ceylon no periodical law reports similar to those published in England; the law laid down by the Supreme Court has hitherto been partially known to the public by limited collections of decrees, copied from the records of that court, and unaccompanied (except in one instance) by any report of the arguments of counsel. The first of these collections is that of Sir Charles Marshall, late Chief Justice of Ceylon, and known as "Marshall's Judgments." It in-

cludes only decrees pronounced between the 1st of October, 1833, and March, 1836; but it is especially valuable, on account of its excellent arrangement, and the learned and lucid comments passed by that able judge upon the decrees contained in it—comments that have always been treated as of high authority by the Supreme Court.

Another compilation is the "Digest of the Decisions of the Supreme Court, from 1833 to 1842, compiled conjointly by Messrs. Morgan, Conderlag, and Beling," commonly known as "Morgan's Digest." This book is a compilation of all decrees deciding any point of law between those dates, with marginal notes and an index.

From 1842, down to the present time, there has been no full printed publication of the decisions of the Supreme Court. Isolated collections of cases have been published, such as Mr. Lorenz's "Reports for 1856;" Mr. Nell's "Collections of Decisions in Appeals from the Courts of Requests down to 1855;" Messrs. Beling and Vanderstraaten's "Collection of Police Court Cases;" and Mr. Austin's "Collection of Cases relating to the District Court of Kandy." An attempt has also been made to publish recent cases in a periodical publication termed "The Legal Miscellany;" but the mode of publication has, up to the present time, left the different portions of its plan incomplete, and difficult to refer to.

It will be seen from the above that, with a small ex-

ception, the decrees on appeals from the District Courts to the Supreme Court, for a period of twenty-four years, have not been hitherto made public in any available form. Every one of the unpublished cases of any value as legal authority will be found to have a place in the present work.

Not only is so large a portion of the District Court appeal cases now for the first time printed, but also the few collections or digests above referred to are for the most part out of print, and can only be procured fortuitously; even some of those that the author has used for this work he was obliged to borrow, as they were not to be bought. The present work is, therefore, not only a first publication of the larger body of decrees on appeals from the District Courts, but is a fresh and needful republication of decrees not now readily to be referred to.

The absence of a complete publication of these decrees has led to litigation and error. The decrees of the Supreme Court, when unprinted, cannot afford instruction to the profession generally; and, consequently, that court has had to decide the same points, often elementary points, over and over again, because the district judges, magistrates, advocates, and proctors, have had no proper reports to refer to; indeed, even the judges of the Supreme Court itself, having no index to its decisions, have elaborately adjudged many questions of law, in ignorance that those very questions had been as

elaborately adjudicated upon years before by their predecessors; or have unwittingly overruled those predecessors, and even themselves.

Under these circumstances, then, the usefulness of a complete digest of the decisions of the Supreme Court, arranged according to subjects, was obvious. The idea, however, of a digest soon expanded into the present work. The legal profession of Ceylon possesses no single text book of the law, as a whole, as it is administered in Ceylon. Compounded as the law is in Ceylon of the Roman-Dutch law, equity, and large portions of English common law, a lawyer in Ceylon requires a very composite library, the most important portion of which, that relating to Roman-Dutch law, is difficult to obtain. The *Code Napoleon* having been introduced into Holland in 1811, there have been, with the exception of two or three translations, no publications on Roman-Dutch law since that period; consequently books on that subject have been daily growing more scarce, and are now excessively expensive.

The object of this work is, then, to supply a very apparent want; and its plan is to present a very condensed account of the law as it is now administered in Ceylon.

The first book comprises an introduction, describing the relation of Ceylon to Great Britain; prerogative in Ceylon; the royal revenue of that colony; and the civil and criminal jurisdiction and practice of its courts.

The second book describes the civil jurisprudence of Ceylon; the third, the native laws. The work concludes with addenda, and an appendix of forms. The author regrets that the magnitude to which this work has extended, and the limits of his leave of absence from Ceylon, has prevented him from adding chapters on criminal jurisprudence and evidence.

This arrangement of the work, which is not the most philosophical, was necessitated by the limited time the author has had to complete the work in England, and which made it desirable so to arrange the work, that, if it were not completed, any volume might be taken as a complete work in itself. This first volume is therefore a work complete in itself, on prerogative, revenue, local government, and practice. Similarly, the second volume will be mainly a work on the principles of Roman-Dutch jurisprudence, following the arrangement of Grotius' Introduction to that subject.

The Roman-Dutch law, the basis of the law of Ceylon, is composed of the civil law, and of such ordinances and edicts as the supreme authority in Holland from time to time enacted. As those ordinances related in a large measure to the feudal tenure, the regulation of dyke rights, and other matters which can have no application in Ceylon, the Roman-Dutch law, as administered there, approaches more nearly to civil law than it did when administered in Holland. Works therefore on the civil law are of high authority in Ceylon, and the pro-

fession there are under an obligation for the publication of such accessible volumes as those of Mackeldy, Maynz, Phillimore, and Sandars, and which accordingly will be found to be largely referred to in this work.

The Roman-Dutch law is founded upon such admirable principles that much of it remains unaltered, and it contains, as portions of its very frame, many of those "improvements" which English law reformers are arguing for, and which are so reluctantly accorded: thus there is a complete and intimate union of law and equity under that law; and every court in Ceylon is a court both of law and equity, and decides every question before it on the principles of equity when applicable. Accordingly the reader will find in this work the standard treatises on equity largely referred to.

Again, there is no distinction between real and personal property, except as to the form of the conveyance; and, consequently, both kinds of property pass to the executor or administrator, and not to the heir, and both real and personal property are liable to be taken in execution in a given order.

In Ceylon, no jury is necessary in civil cases; consequently, justice is not defeated by the absence of material witnesses at critical portions of a trial; as, by the necessarily large power of adjournment, the Court can, under terms, always allow a party time and opportunity to bring his whole cause before the Court.

The law of delict may in several points be said to

have the advantage over the English law of *tort*. For example, the law of Ceylon does not demand proof of a *scienter*, in the case of injury by savage animals; and it makes no distinction between slander and libel, giving both at the same time a wider basis, and looking to the injury to the honour, rather than the material loss derived from those wrongs.

The Roman-Dutch law contains no distinction between felony and misdemeanour; and at no time followed the barbarous rule (now happily about to be abolished) of the English criminal law, which indiscriminately forfeits the property of the felon, however lightly justice may visit him with other punishment, involving his innocent family in one common ruin.

No fraudulent trustee act is necessary under this system, as by its definition of theft (*furtum*) every species of dishonesty is punishable at common law.

There are a few other points that are well worthy the attention of English law reformers, which have operation in the law of Ceylon.

For example: under the English law, the person who can first snatch a judgment is entitled to execution against all property subject to such process; but by the Ceylon law, all other creditors are entitled to concurrence, that is, to share with the judgment-creditor proportionally to their claims—of course, giving preference to secured creditors according to the security. The concurrent claims are proved summarily, and, unless

disputed, are at once allowed. Thus there is no use in collusion between the debtor and the judgment-creditor; nor is one person, by collusion or surprise, allowed to seize the lion's share of that which, in reason and equity, is the common fund of all who trusted the debtor upon the faith of that fund.

Another feature of this law is the power of placing the property and even the persons of *prodigals* (that is, persons scandalously wasting their property) under the care of curators. Did such a law exist in England, many an estate would have been saved to the family of a wasteful owner.

In the law of Ceylon, the English mortgage, which conveys the legal estate to the mortgagee, does not exist, but is replaced by a simple deed of hypothecation, which has the effect of tacking the debt to the property, so that a creditor obtains a right to follow it through whatever hands it may happen to pass, and may obtain a decree for its attachment and sale in satisfaction of and discharge of the debt; so that by a very simple deed the Ceylon mortgagee obtains all the advantages of the English mortgagee, with but one exception, that the Ceylon mortgage, in general, gives to the mortgagee no power of sale on failure of interest or redemption; but he must foreclose in a court. This, however, is an advantage in Ceylon, as a safeguard against fraud. The Ceylon mortgage is, therefore, much simpler in its form and meaning than the English mort-

gage. It has been objected to it, that it enables one man to have the visible ownership, and another the secret power of the disposal of property; but the same may be said of the English mortgage, especially as that generally contains a power of sale, whereas the Ceylon mortgage can only be foreclosed in a court: it must be publicly registered, and can only be fully executed in the presence of a judge or notary public.

One of the most peculiar features of the Roman-Dutch law is the relation of husband and wife. In this there is, no doubt, room for improvement; but some of the elements of that relation are not unworthy of consideration. The wife is personally looked upon as a minor, and is, in liberty and in the disposal of her property, as completely subject to her husband as in England; nevertheless, as regards property, she and her husband are in the light of partners—man and wife have no separate property; so that when a dissolution of the marriage takes place by the death of one of the spouses dying *intestate*, the surviving spouse is bound to surrender one half of the common property to the representative of the deceased. That this is felt to be an injustice, is evidenced by the circumstance that the effect of this rule is put on one side by a system of *ante-nuptial contracts*, and that its introduction into the Kandyan provinces, in respect of the English residents there, has always been resisted. In fact, in those provinces, it would work very badly for the

English; for, under the community of property, one half of the Englishman's estate would, on his wife's death, without a will of hers, be claimed by her representatives; and, as the property is generally acquired by the labour of the English planter only, such a law would be hard upon English estate owners in the Kandyan hills.

Yet this law has its good side; for as even a portionless bride (where there is no ante-nuptial contract) obtains, by her marriage, an interest in the common property, the law protects her in it, and affords her the means of checking her husband if he makes a manifest misuse of the marital power that he possesses over their means. So, also, if she obtains a divorce *a mensâ et thoro*, she is not entitled to a mere alimony, but to one half of the joint property. So that there is a strong motive for an unaffectionate husband not to drive family differences to extremities. Again, under this law, the wife cannot selfishly be left unprovided for, as the husband can only will away one half of the property the wife and husband possess together, if there is no ante-nuptial contract; and if there is, the wife will be provided for in that deed.

The Roman-Dutch law, however, having had no place in Holland since 1811, has not advanced with the times; and, consequently, two principal portions of jurisprudence, which since that date have largely occupied the attention of legal philosophers and legislators—

namely, commercial law, and the law of evidence—have, in the Roman-Dutch law, fallen behind the requirements of the age: accordingly, nearly the whole of the English commercial law and the English law of evidence have been adopted into the system of Ceylon.

Notwithstanding some advantages in its principles over the English criminal law, there can be no doubt that the criminal law of Ceylon requires much reform and re-casting, or at least to be statutably declared in a codified form.

The first part of this first volume presents to the reader the condition of a Crown Colony. The prerogative will be observed to be very absolute in its effect, and it may be noticed that many duties fall upon the government that, in constitutional colonies, are chiefly left to the enterprise of the public: such as making public roads, building bridges, digging canals, establishing railroads, and even erecting churches, providing rest-houses for travellers, and aiding in the importation of labour. And it will be seen that the government derives a revenue from sources unknown, as sources of revenue, in England: such as the sale of waste lands, the ancient eastern tithe of the grain produce, and fishing for pearls.

The second portion of this first volume is, in effect, a work on the practice of the courts, and develops a simple and effective system of pleading and trial in civil cases, which, being without a jury, permits the remedial

and protective powers of the court to work well concurrently.

One portion of this volume, namely, that relating to the Post-Office, has, since it was in print, been superseded by a recent Post-Office Ordinance (No. 27 of 1865); but the changes introduced will be noticed in the Addenda.

The Author has to offer his thanks to the Right Hon. Edward Cardwell, late Secretary of State for the Colonies, and to the Government of Ceylon, for their liberality, in affording him, by extended leave, an opportunity of completing this book in England. Without that extension, the publication of this work must have been abandoned.

He has also to offer his acknowledgments to Mr. W. M. Conderlag, for reports of cases decided since his residence in England; and also to Mr. H. W. Gillman, for the use of an able, condensed digest of the laws of the Kandyans.

HENRY BYERLEY THOMSON.

London, July, 1866.

TABLE OF ABBREVIATIONS IN THE FIRST VOLUME.

ALL cases cited, that have no reference to any collection of cases, must be held to be taken from the Author's own manuscript notes; or, if they are cases decided in the years 1865 and 1866, from the numbers of the "Legal Miscellany." All District Court appeals from 1842 to 1864 (excepting the year 1856) are taken from the Author's notes.

English decisions and statutes are cited in the form usual in English legal text books.

The Ceylon Ordinances, &c. are in general cited by their date and number.

Marsh. or *Marshall*, means, "Marshall's Judgments."

Morg. D.—The "Digest of Supreme Court Decisions, up to 1842," of Messrs. Morgan, Conderlag, and Beling.

Austin.—Mr. Austin's "Collection of Appeal Decisions from the District Court of Kandy."

Lor. R.—Lorenz's Reports for 1856.

Lor. Civ. Pract.—Lorenz's "Civil Practice under the Roman-Duch Law."

Nell.—Mr. Nell's "Collection of Decisions in Review and Appeal from the Courts of Requests, up to the 11th Dec. 1855."

P. C. Ca.—"The Handy Book of Police Courts." By Messrs. Beling and Vanderstraaten.

Inst.—"Institutes of Justinian," and which are cited by book, title, and section.

Sandars.—Quotations from the notes of Mr. Sandars, in his "Translation of Justinian's Institutes."

Grot.—"Grotius' Introduction to Dutch Jurisprudence," translated by Herbert.

V. Lwn.—Van Leuween's "Commentaries on the Roman-Dutch Law."

V. Lwn. Cens. For.—Van Leuween's "Censura Forensis."

V. d. K.—Van der Keesel's "Select Theses on the Laws of Holland and Zeeland."

V. d. Ldn. or *Ln.*—Van der Linden's "Institutes of the Laws of Holland."

TABLE OF ABBREVIATIONS IN THE FIRST VOLUME.

Voet.—Voet's "Commentaries on the Pandects," cited by book, title, chapter, section, and page.
Groenewegen.—Groenewegen de legibus abrogatis.
Domat.—Domat's "Civil Law."
Matthaeus.—Matthaeus de Criminibus.
Bynkershoek.—Bynkershoek Quaestiones Juris Privati.
Bl. or *Bl. Com.*—"Blackstone's Commentaries," according to the original paging.
Kerr.—Mr. Malcolm Kerr's edition of "Blackstone's Commentaries."
Ste. Com.—Mr. Serjeant Stephen's "Commentaries."
St.—Story's "Commentaries on Equity Jurisprudence."
Sp.—Spence's "Equitable Jurisdiction."
Mackenzie.—Lord Mackenzie's "Readings on Roman Law."
Broom. Com.—Broom's "Commentaries on Common Law."
Add. Contr.—Addison on Contracts.
Add. Torts.—Addison on Torts.
Best.—Best on Evidence, 3rd edition.
Sm. M. Eq.—Smith's "Manual of Equity."
Sm. M. C. L.—Smith's "Manual of Common Law."
Phill. R. P. L.—Phillimore's "Private Law amongst the Romans."
Mackeldey.—Mackeldy's "Manuel de Droit Romain."
Maynz.—Maynz's "Elements de Droit Romain."
Browne. C. L.—Browne's "Compendious View of the Civil Law."
Burge.—W. Burge's "Commentaries on Colonial and Foreign Laws."
S. C.—Supreme Court.
D. C.—District Court.
D. J.—District Judge.
C. R. or *C. of R.*—Court of Requests.
P. C.—Police Court.
J. P.—Justice of the Peace.
Q. A.—Queen's Advocate.
D. Q. A.—Deputy Queen's Advocate.

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THE

INSTITUTES OF THE LAWS

OF

CEYLON.

BOOK THE FIRST.

CHAPTER I.

INTRODUCTION.

Ceylon as a British Dependency.

CEYLON is what is termed a "crown colony;" that is, it is a dependency of the British Crown, obtained by conquest and cession: the Maritime Provinces by conquest, and the Kandyan Kingdom by cession. The laws in force respectively in the Maritime Provinces and Kandy, at the times of the conquest and cession, remain, except where changed by competent authority; the laws of a conquered or ceded country remaining in force until altered by the conqueror or acquisitor. And the common law of England, as such, has no allowance or authority in Ceylon; even to this extent, that the Queen herself can only recover her own debts in accordance with such laws. "It is impossible that the laws of England, by mere conquest or cession without more, should take place in a conquered or ceded country; because for a time there must want officers, without

which, English laws could have no force. Even in an infidel country, their laws do not cease by conquest, but only those opposed to the law of God; and where their laws are rejected or silent, the conquered or ceded country is governed according to natural equity. *(Blanchard v. Galdy*, 2 *Salkeld*, 411. *Per Lord Mansfield, Campbell v. Hall; Cowper*, 209; *Rex v. Vaughan*, 4; *Burrows*, 2500; *Chalmers, Op.* I, 38; *Steph. Com.* I, 99.)

The Supreme Power in Ceylon.

The supreme executive and legislative power in Ceylon is vested in the Sovereign of Great Britain and Ireland: the Queen, in fact, possesses an exclusive prerogative over Ceylon, and may change and remodel the whole or part of its laws and form of government, and may govern it by regulations framed by herself *(Chitty on Prerogative*, 29); but only on the principle that her dominion is in right of her Crown, and is necessarily subordinate to her own authority in Parliament. Thus Her Majesty cannot make any new changes contrary to fundamental principles, nor exempt the inhabitants from the power of Parliament; nor legally disregard the articles on which Ceylon was surrendered or ceded; such articles being inviolable according to their true intent. *(Idem.)*

The political and military administration is thus vested in the Sovereign, who executes the Law by means of a Governor appointed by her, in Her own name, and by executive and judicial officers acting under the Crown. But though the Queen has, in Ceylon, the above power to alter the laws as an absolute sovereign, she is bound

to administer the laws as they are at any given time established. (7 *Rep.* 17; *Bla. Com.* I, 107-8.)

The Crown the Supreme Legislative Authority.

The Crown, as the supreme legislative authority in Ceylon, has the above qualified power to impose any law or laws upon the colony. (*Chalmers, Op.* I, p. 267.) This legislative power has frequently been directly exercised in Ceylon. Once the legislative power was delegated to the Governor alone, then to the Governor and a Council, and now to a Governor, an Executive, and a Legislative Council. Ever since the establishment of the latter, the scope of its authority has been from time to time altered and extended. It is quite competent to the Crown to sweep this latter system away, and to govern, legislate, and fundamentally to change the terms of its authority.*

The Crown has indeed legislated in a direct manner by Charters of Justice; by which it has, under the great seal, established Courts, and directed their proceedings. It retains, by a special proviso, the power to repeal or alter these Charters at pleasure; and alterations have been made in them at very recent periods.†

The Legislative Council is not a permanent institution, but is in effect often reconstituted, and not always with identically the same powers. With every commis-

* There can be no doubt that the Queen may alter the constitution of a colony, when such constitution has not been granted by charter, and is not founded on, or fixed by, any legal and confirmed act of colonial assembly, but merely by her Majesty's instructions to the Governor. (*Chalmers' Opinions*, I, p. 267.)

† The last was on the 22nd of June (23rd Vict.), 1860.

sion issued to a new Governor, it is in the commission itself reconstituted, and is only a legislative functionary, with no greater hold on legislative existence than belongs to the executive functionaries, the Governor and the Executive Council. The Crown, too, though deputing large powers to the Legislative Council, has retained its veto, and has placed many of the functions, that in England belong to Parliament at large, in the hands of the Governor. The consequence is, that the Crown, through its Secretary of State for the Colonies, in despatches to the Governor, habitually advises and controls the legislation of the colony. The Crown is therefore, not merely in theory, but in fact, the supreme legislative authority in Ceylon. Should it, however, once grant a representative council to the colony, that could only be withdrawn by Parliament. (*Att. Gen. v. Stewart*, 4; *Merivale*, 168.)

But even to the discharge of such absolute authority as appertains to a British sovereign over a Crown colony the constitution has assigned limits, by assigning the Crown certain councils, in order to assist the Crown in the discharge of its duties, the maintenance of its dignity, and the exertion of its prerogative.

Parliament. The first of these is the High Court of Parliament. The colony of Ceylon has been, and will be, as part of the British dominions, subject to the legislative authority of Parliament, by whose power (paramount, where all the three Estates apply, to that of the Sovereign in Council) its existing laws may in all cases be wholly or

in part repealed, and new laws or a new constitution may be imposed. However, acts of Parliament passed before the attaching of Ceylon to the British Crown have no force, unless they have been adopted or incorporated, by royal or parliamentary authority, or by the local legislature, into the local code, or unless they are in affirmance of the common law of England with respect to the Royal Prerogative (194–5; *Chalmers, Op.* II. *Bla. Com.* I, 107–8); with the exception, that all statutes manifestly of universal policy, and intended to affect all dependencies, at whatever period acquired, are part of the law of Ceylon.

Acts passed since the acquisition of Ceylon, unless expressly intended to extend to it, do not apply to it, except as above excepted. This intention may appear by mentioning the colony by name, or by general designation, such as "the Colonies," or "the dominions of Her Majesty," or "the British possessions abroad;" or when the Act is in its nature obviously intended to affect all the British possessions. (*Stephens, Com.* I, 106, 4th ed.)

Privy Council.

The other Council is the Privy Council. All the more important matters of state are constitutionally determined by the Sovereign, with the advice of the Privy Council, and as a matter of practice, no matter largely affecting a colony, would be determined by the Sovereign alone, but by the Privy Council. Its authority as to colonial matters is almost universally applied. The legislative ordinances of Ceylon are in the Privy Council approved or disallowed.

Judicial Committee.

In colonial causes, in which an appeal formerly lay to the Sovereign in Council, an *appellate* jurisdiction (in the last resort) was formerly vested in the same tribunal, which usually exercised this judicial authority in a committee of the whole Privy Council, who heard the allegations and proofs, and made their report to the Sovereign in Council, by whom the judgment was finally given.

All the powers and authority of the Queen in Council, of a judicial character, are now however delegated to the *Judicial Committee of the Privy Council.* This Court was created by the Statute 3 and 4 Willm. IV. c. 41, and consists of the Lord President of the Council, the Lord Chancellor, and such members of the Privy Council as from time to time hold any of the following offices; viz. the Lord Keeper, or First Commissioner of the Great Seal; the Lord Chief Justice of the Queen's Bench; the Judges of the Court of Appeal in Chancery; the Master of the Rolls; the Vice Chancellor; the Chief Justice of the Common Pleas; the Lord Chief Baron of the Exchequer; the Judges of the Prerogative and Admiralty Courts, and the Chief Judges of the Bankruptcy Court; with all the members of the Privy Council who have been Presidents or Chancellors, or who have held any of the above offices; and any two other persons, being Privy Councillors, whom the Sovereign may think fit to appoint, and two retired East Indian or Colonial Judges, being also members of the Privy Council.

The Judicial Committee has power to hear and determine all appeals, on applications, in Prize suits, and in all other suits or proceedings in the Courts of Admiralty or Vice-Admiralty, or in any other Court of Her Majesty's dominions abroad; and all appeals, or complaints in the nature of appeals, which may be brought before the Queen in Council against the sentence or order of any judge or judicial officer; and all other matters which Her Majesty may refer for their decision. (See *post*, *Supreme Court.*)

We have before stated that the laws of a conquered or ceded country remain in force until altered by the conquerors or acquisitors; and even these cannot be altered in disregard or violation of articles on which the country was surrendered or ceded. It is on this principle that most of the law of Ceylon rests; therefore upon:

First. The twenty-third article of the Capitulation of Colombo, which granted that "all civil suits depending in the Council of Justice shall be decided according to the laws of the Maritime Provinces;" "but within twelve months from the date of that treaty." And

Secondly. The fourth clause of the convention of Kandy, which "saved to all classes of the people their civil rights and immunities, according to the laws, institutions, and customs established and in force amongst them (the Kandyans)." These two provisions were guarantees in law to the several peoples that their laws would not be changed, except constitutionally; but were

not necessary to continue the former laws under the new Sovereignty. Similarly, the 1st § of Regulation 18 of 1806, which confirms the These Walema or customs of the Malabar inhabitants of the Province of Jaffna, must be regarded as a declaration, not a grant of that law. The principle was applied in a direct manner to the Mahommedans, whose laws were in the first instance simply collected into a code and published, but not enacted, and are yet considered as having force. This code was by express enactment (sec. 10 of 5, of 1852) extended to the Mahommedans of the Kandyan provinces.

Further, the Singhalese generally have had all their special customs and customary law conceded to them.

English common and commercial law have been also introduced, within certain limits.

Equity is part of the common law of Ceylon, in respect of its derivation from the Roman law, and forming a portion of the common law of the United Provinces.

We have thus six systems, or portions of systems, of municipal common law, besides equity, and statute, and admiralty law, in operation within the island; and in this manner its inhabitants may be said to be variously governed, as between themselves.

As between the Crown and the subject, they are of necessity controlled by one and the same system.*

* These subjects will be more fully developed in Part II.

CHAPTER II.

PREROGATIVE.

ALL the prerogatives vested in the Crown by English law are exercisable over individuals in Ceylon. But those merely local to England, and which do not fundamentally sustain the existence of the Crown, or form the pillars on which it is supported, are not, it seems, *primâ facie* prerogatives in Ceylon. The minor prerogatives and interests of the Crown are governed by the common law of Ceylon. Though if the law is silent on the subject, the prerogative established by English law prevails in every respect; subject, perhaps, to exceptions which the difference between the constitutions of England and Ceylon create. (*Chitty on Prerog.* 25-6; *Campbell v. Hall, ante.*)*

* I have adopted this view of Mr. Chitty, believing it to be sound; but I do not agree with the wider and almost inconsistent doctrine expressed by him, page 32 of the same work. He has there cited an opinion from Chalmers, and has applied to *all* colonies an opinion intended only for the *West Indies*, which, though conquered, were treated as unoccupied countries, and whose common law is the common law of England.

Prerogative.

Prerogatives are either *direct* or *incidental.*

The *direct* are such positive substantial proofs of the Sovereign character and authority as are vested in, and spring from, the Sovereign's political person, considered by itself, without reference to other extrinsic circumstances, as the right of sending ambassadors, appointing governors, and the like. *Incidental* prerogatives always bear a relation to something else, distinct from the person of the Sovereign, and are, indeed, only exceptions, in favour of the Crown, to those general rules which are established for the rest of the community: such as, that the Crown's simple debt shall be preferred before the subsequent specialty debt of any subject (*Ord.* 14 of 1843, § 5). These, and an infinite number of other instances, will better be understood when we come regularly to consider the rules themselves, to which these incidental prerogatives are exceptions; but at present we speak only of the substantive or direct prerogatives.

Direct prerogatives.

Direct prerogatives exist in regard to the royal *character;* the royal *authority;* and the royal *income.*

The Queen can do no wrong; which means that whatever is questionable in the conduct of public affairs is not to be imputed to the Sovereign, nor is she answerable personally for it to her people: and this maxim also means that the prerogative of the Crown extends not to do any injury: it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.

From this maxim (and also because no court can have jurisdiction over the Sovereign) has arisen the English rule that no suit or action can be brought against the Sovereign, even in civil matters; yet in matters of *private injury* a petition of right is allowed. If any person has, in point of *property*, a just demand upon the Crown, he must petition the Crown in the Court of Chancery, where the Chancellor administers right as a matter of grace, though not upon compulsion. But there does not seem to be any petition of right for personal wrongs.* By Mr. Bovill's Act, petition of right is now conducted according to the form of an ordinary action. Suits against the Crown.

The Ceylon government, however, having no Chancellor, a suit against the Government has been permitted, and the Queen's Advocate is the public officer who is sued on behalf of the Crown. (*Ord.* No. 12, 1843, § 4, vol. ii. p. 163; 16,588 *D.C. Galle, Lorenz R.* 12.) In such actions the Crown both takes and can be condemned in costs. (*Marshall*, 7,540; 24,470, *D.C. Kandy, Austin*, 168.) Yet, except in land cases, where the plaintiff is quieted, or put in possession, and where those disturbing that judgment would, though agents of the Crown, be deemed trespassers, this action gives little more than is given by

* This rule so far applies to Ceylon, that it is impossible to conceive almost any personal wrong, in which the actual wrong-doer would not be liable; but now that the Government have become carriers by railway, a question may arise, whether the Crown will not be liable for personal injuries by railway accidents.

the Petition of Right, especially in its modern form; for no execution can issue against the Crown (*Marshall*, 75); or against the Queen's Advocate, who is only its public officer, to sue, or defend, on its behalf. And even if execution could issue against the Crown for costs or damage, the Crown possesses no funds available; for all its revenue, even that unappropriated, is supposed to be dedicated to public purposes, and cannot in any way be disposed of, but by a vote of the Legislative Council. In practice, the Goverment does, on the recommendation of the Queen's Advocate, pay both costs and damages, and covers the expenditure by a vote of the Legislative Council.

Nonsuit.

It is an English prerogative that the Crown can never be *nonsuited;* for a nonsuit is a desertion of the suit, by the non-appearance of the plaintiff in court. (*Co. Litt.* 139.) But as a nonsuit in Ceylon does not proceed on the same principle, but is rather a dismissal of the cause, or dissolution of the instance for want of evidence, by the court, and not at the election of the plaintiff, this prerogative may not apply to Ceylon.

Its application to Crown grants.

The Crown not only can do no wrong, but cannot even think wrong; it can accordingly never mean to do an improper thing. Therefore, if the Crown is induced to grant any franchise or privilege to a subject contrary to reason, or in anywise prejudicial to the common wealth, or to a private person, the law will not suppose the

Sovereign to have meant either an unwise or an injurious action, but declares that he was deceived in his grant; and thereupon such grant is rendered void, merely upon the foundation of fraud and deception, either by or upon those agents whom the Crown has thought fit to employ. (*Bl. Com.* I. 246; *Kerr*, I. 240.)

No laches imputed to the Crown.

On the same principle, the Crown cannot be guilty of neglect, or *laches*, and therefore no delay will bar a Crown right. This is the rule "*nullum tempus occurrit regi.*" No prescription runs against the Crown as regards the general prerogatives, nor by the Ordinance of Prescription. As to the Common law, see "Prescription." (*Ord.* 8 of 1834, § 12; 6,418, *G. S. Ratnapoora*, 1 *Nov.* 1833; *Morg.* 3.)

The Sovereign perpetual and absolute.

The *Monarch never dies;* that is, the regal office and the royal dignity are perpetual: and the Monarch is *an absolute sovereign;* that is, in the exercise of lawful prerogative, no legal authority can delay or resist the Crown. The Queen rejects what bills may come to her, and pardons what offences she pleases, except where the law has expressly, or by evident consequence, laid down some boundary or exception, declaring that thus far the prerogative shall go, and no farther.

Ambassadors and consuls.

The Crown has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home. Also of accepting consuls and consular agents.

In respect to *civil* suits, neither an ambassador nor any of his train or *comites* can be prosecuted for any

debt or contract in the courts of that country wherein he is sent to reside. This does not apply to consuls.

Treaties, alliances, and war.

It is also the prerogative of the Crown to make treaties and alliances with foreign states and princes. And the sole prerogative of making peace and war is vested in the Crown; but as the delay of making war may sometimes be detrimental to individuals who have suffered by depredations from foreign potentates, our laws have in some respects armed the subject with power to impel the prerogative, by directing the ministers of the Crown to issue letters of marque and reprisal, upon due demand; the prerogative of granting which being nearly related to, and plainly derived from, the other of making war; this being only an incomplete state of hostilities, and generally ending in a formal declaration of war. See *post*, under title "Governor."

Safe-conducts.

Upon exactly the same reason stands the prerogative of granting safe-conducts, without which, by the law of nations, no member of society has an absolute right to intrude into another country. (*Bl. Com.* I, pp. 250-5.)

Prerogative in domestic affairs.

The Sovereign, as already pointed out, is the supreme legislative authority in Ceylon. As a deduction from this, the Crown is not bound by any ordinance, unless named therein by special and particular words. For example, the Crown, not being expressly named in the Insolvent Ordinance, is not bound thereby, although it may (if it think fit) avail itself of the provisions of the ordinance. Thus an insolvent would not be entitled to discharge

from a Crown debt under that ordinance. (21,663, *D.C. Kandy*, 3, *Dec.* 1853; *Austin*, 130.) The most general words that can be devised (as "any person or persons, bodies politic or corporate") do not in the least affect the Crown, if they tend to restrain or diminish any of its rights or interests. Yet where an ordinance is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the Crown, it is said to be binding as well on the Sovereign as upon the subject; and generally the Sovereign may take the benefit of any particular statute, though she be not expressly named. (*Bl. Com.* I, 261, 2; *Kerr*, I, 256.)

The Sovereign as generalissimo.

The Sovereign is generalissimo, or first in the military command within the empire, and has the sole power of raising and regulating fleets and armies; of building forts and other places of strength within the realm; as well as manning and governing them, in the capacity of generalissimo of the empire. (*Bl. Com.* I, 262, 3; *Kerr*, I, 256, 7; and see *post*, title "Governor.)"

Ports and havens.

Partly on the same grounds, and partly upon a foundation to secure the marine revenue, the Sovereign has the prerogative of appointing *ports* and *havens*, or such places only for persons and merchandise to pass into and out of the realm, as the Crown in its wisdom sees proper; yet, if the Crown had not the power of resumption or of narrowing or confining their limits when

once established, and if any person had a right to load and discharge in any part of a haven, the customs revenue would be much impaired and diminished by fraudulent landings in obscure and private corners. Accordingly the power of appointing proper ports and their limits, and assigning proper wharves and quays in each port for the exclusive landing and loading of merchandise, is now vested, in Ceylon, in the Governor. (*Ord.* 18 of 1852, § 66.) The Collector of Customs may appoint sufferance wharves. (*Ib.* § 67.) No pier, jetty, or embankment can be erected in or near any public harbour without giving one month's notice to the Secretary of the Admiralty, under a penalty of £200, to be recovered by action or information. (46, *Geo.* III, c. 153.)

Beacons and lighthouses.

The erection of beacons, lighthouses, and sea-marks, is also a branch of the royal prerogative. The Crown has the exclusive power, by commission under the great seal, to cause them to be erected in fit and convenient places, as well upon the lands of the subject as upon the demesnes of the Crown; which power is usually vested by letters patent in the Lords of the Admiralty. (3 *Inst.* 204; 4 *Inst.* 148-9; *Siderfin*, 158.)

Importation and exportation of arms.

The Crown may prohibit (or license) the importation, and prohibit the exportation, of arms, ammunition, gunpowder, and military and naval stores, and any article (except copper) convertible into military or naval stores. (8 *and* 9, *Vic.* c. 86.)

Writ, *ne exeat regno.*

The Crown has the power, whenever it sees proper, of confining its subjects within the realm. At present, everybody assumes the liberty of going abroad as he pleases; yet, undoubtedly, if the Sovereign, by the writ of *ne exeat regno*, under the great seal or privy seal, thinks proper to prohibit him from so doing, and if the subject disobeys, it is a high contempt of the royal prerogative, for which the offender's lands are liable to be seized until he return, and then he is further liable to fine and imprisonment. This writ, which was first intended to restrain churchmen from going to Rome, was afterwards applied to laymen for great political purposes, and became part of the system of Chancery to detain persons withdrawing from the jurisdiction of that court *in meditatione fugæ*. In another form, it is now part of the process of the Courts of Ceylon. (See *Arrest*, and 25,440, *D. C; Kandy*, 3 *Feb.* 1852.)

The Sovereign the fountain of justice.

The Sovereign is *the fountain of justice*, and the conservator of the peace of the realm. That is, not the *author, or origin*, but the *distributor*. The Queen has, alone, the right of erecting courts of judicature and exchequer; and hence, all jurisdictions of courts are mediately or immediately derived from the Crown under the modifications of the Colonial councils. (*Chalm. Op.* II, p. 176; *Id.* I, pp. 182-3; *Id.* II, p. 242.) All courts in Ceylon have been created by charter, or by ordinance, with the prior consent of the Crown. The

Governor could not, constitutionally, propose the erection of a new jurisdiction to the Legislative Council without the prior consent of the Crown; and if that council were to create a new court without such prior consent, the ordinance would necessarily be disallowed, as abridging the prerogative of the Crown without its own previous consent.*

Moreover, the courts erected by the Sovereign can only proceed according to the course of common law, without the consent of Parliament. Thus the courts in Ceylon have an equitable jurisdiction; but this they derive from the Roman-Dutch law, and not from their royal foundation. By the Charter of 1833 the Supreme Court is a Court of Equity; but that does not make it a Court of Chancery, in its wider sense, but only leaves intact its fundamental equitable jurisdiction; equity being common law under the law of the United Provinces. (*Chitty on Prerog.* pp. 75-6.) See *Supreme Court.*

Appoints the judges.

As the fountain of justice, the Crown appoints the judges, who hold their places *durante bene placito* under a warrant, bearing the sign manual of the Sovereign, directing the Governor to issue letters patent, nominating and appointing as a judge the person named in the royal warrant. The Governor may, however, appoint

* A Patent Act, passed in Calcutta, was disallowed for a similar reason; and the Wreck Ordinance was sent back to be amended, because it gave the proceeds of wreck to the colonial revenue; thus, without prior consent, taking them from the Lord High Admiral, i. e. the Crown.

an *acting* judge, in the case of the death, resignation, incapacity, absence, or suspension of any judge. The Governor may also, with the advice and consent of the Executive Council, until the royal pleasure is known, provisionally suspend a judge, for misconduct or incapacity, from the discharge of his duties.* (*Charter*, §§ 87, 81.)

The Crown the public prosecutor.

The Crown is also the *public prosecutor*. All offences are, in theory, either against the Sovereign or her crown and dignity. She is therefore the proper person to prosecute all public offences and breaches of the peace, being the person injured in the eye of the law. Her responsible officer for this purpose is the Queen's Advocate, who informs the Queen's courts of all offences triable before the Supreme and District Courts; and, either in person or by deputy, conducts the prosecution; and though in the police courts the prosecutor makes his complaint in his own name—on the principle that the Crown is also injured,—the Queen's Advocate may take it into his own hands.

Prerogative of pardon.

Hence also arises another branch of the prerogative, that of pardoning offences. This is transferred to the Governor, who can pardon or commute all sentences of death, and transportation, imprisonment, and corporal punishment, and can remit all fines under *fifty pounds*.†

The Crown the fountain of honour.

The Crown is the fountain of honour, and bestows honors, titles, and offices. This prerogative does not

* But not his pay.

† See *post*, "Criminal Jurisdiction of the Supreme Court."

seem ever to have been permitted to the governors of colonies, except under special instruction; for though Governors are invested with royal authority, they are but the servants and representatives of the Crown. Yet it has been the opinion of certain Law Officers of the Crown (in England) that the Governor can determine, even if he cannot create, precedence in a colony. And directions are given him, as to the exercise of this prerogative, in the Colonial Regulations. (Ch. v. § 146, *et seq.*) See also *post*, under the title of "Governor."

The Crown may erect charters.

The last prerogative that we shall refer to, is, the power of the Crown to erect corporations by letters patent under the great seal, commonly called charters. The chartered banks in Ceylon are examples of the exercise of this prerogative in Ceylon.

The incidental prerogatives, and any direct prerogatives unnoticed in this chapter, will be found described in the proper places.

CHAPTER III.

ROYAL REVENUE.

Revenue, ordinary or extraordinary.

THE Revenue is either *ordinary*, or *extraordinary*. The *ordinary* revenue is such as subsists to the Crown by royal right; and the *extraordinary*, such as has been granted by the legislature in the form of customs, tolls, stamps, assessments, &c.

The Revenue is generally recoverable by civil process; but all infraction of the revenue laws, on which penalty, fine, or any other punishment whatever is imposed, should be proceeded against criminally. (*Charter*, §§ 28, 98, *D. C. Colombo*, 16 *Dec.* 1835; *Morg. D.* 69.)

Ordinary Revenue; Crown lands: how sold.

The first source of ordinary revenue is the sale of Crown lands, which indeed still comprise the greater portion of the surface of the island of Ceylon. For this purpose the Governor may, in the Queen's name, and under the public seal of the island, make grants of waste lands to private persons, and for the public uses of the Queen's subjects in Ceylon. No grant of lands can be made to, or in trust, or for the use of any private person, unless in consideration of payment in money for the same, after such lands shall have

been previously put up for sale by public auction at the upset price per acre of *twenty shillings* at least, though a higher upset may be appointed. No bidding is finally accepted until the bidder has actually paid a deposit of *ten per cent.* on the amount of his bidding, and shall have signed a contract for the payment of the balance within one calendar month next thereafter.

Crown lands may be exchanged.

Under the direction of the Secretary of State, however, lands may be granted in exchange for other lands, or in satisfaction of any equitable claim for lands.

Grants of land, their form.

All grants of land made in consideration of payment of money, are made to the purchaser or purchasers, and to him, her, or their heirs and assigns, to be by him, her, or them, held in fee and common socage, yielding and paying to the Queen, her heirs and successors, a quit rent of one pepper-corn by the year for the same; every such grant passes in the name of the Queen under the public seal of the island, and is executed and delivered to the purchaser in such manner as has been customary, or as the Governor deems fitting, on the payment of the purchase money for the same, and not before; and then, and not before, the purchaser is let into the possession of the land bought by him; and for the delivery of every such grant, and the preparing the same, the purchaser must pay a fee to the Colonial Treasury of not more

than forty shillings, or some lesser sum appointed by the Governor and the Executive Council. Every such grant, previously to its being so delivered, must be enrolled in the Court of the District where such land is situated; and for making every such enrolment the Registrar of such Court may receive from the grantee a fee of five shillings, and no more. (*Queen's Instructions*, §§ 40 and 41.)

Sale, how regulated.

The Surveyor General, in conjunction with the Government Agents, makes arrangements for bringing forward for sale, from time to time, such portions of waste land as may be deemed by them to be expedient. And any party desirous of purchasing any particular tracts of land, may apply to the Government Agent for the sale of them. But the Surveyor General and Government Agent may exercise their own discretion in respect to complying with any such application; and the applicant is not at liberty to enter on the land for any purpose without the permission of the Government Agent. Making such application gives the applicant no claim whatever to the land, if put up to sale, in preference to other persons.

Survey fees.

The purchaser of Crown lands, in addition to the fee for the grant, has to pay survey fees on the following scale. *Five* shillings an acre if the lot is not more than *ten* acres; *six* shillings, if not more than *fifteen* acres; *Five* shillings, if between *fifteen* and *twenty* acres. The scale gradually diminishes to less than half-a-crown an

acre as the number of acres in a lot increases up to seven hundred. There are several other special rules as to details, copies of which are obtainable from the proper office. (*Minute, Aug.* 31, 1861. See, also, *Minutes of* 24 *Nov.* 1845, and 14 *Jan.* 1857.)

Military and naval settlers.

Waste lands are sold to military and naval settlers on the same terms as to others; but such settlers are entitled to remissions of purchase money on compliance with the necessary regulations. The highest remission is £600 to field officers of twenty-five years' standing, and the lowest, £200 to subalterns of seven years' standing. Subalterns under seven years are not allowed the benefit of the system. Regimental staff officers, and medical officers of the army and navy, are allowed the benefit of the rule; but military chaplains, commissariat officers, and officers of any of the civil departments of the army, pursers, chaplains, midshipmen, warrant officers of every description, and officers of any of the civil departments of the navy, are not allowed the benefit of the rule. Mates in the royal navy rank with ensigns in the army; and mates of three years' standing, with lieutenants in the army; and are entitled respectively to corresponding privileges in the acquisition of lands. (*Secretary of State's Minute.* See *Colonial Office List.*)

What are Crown lands, forests, &c.

All forest, waste, unoccupied, or uncultivated lands are presumed to be the property of the Crown until the contrary is proved (*Ord.* 12 of 1840, § 6). But the

character of waste and uncultivated land must attach to the land *generally*, and not to any small portion of it, more particularly where the reason of such portion having been allowed to become waste is satisfactorily explained. (30,963 *D. C. Kandy*, 17 *Jan.* 1860; *Austin*, 223.) The presumption that waste land belongs to the Crown throws the onus of proving the opposite on any one claiming the land, whether as plaintiff, defendant, or intervenient. Thus, where a plaintiff claimed waste land granted to him by the Crown, which land was alleged to have belonged to the defendant at the time of the grant, it was held that the defendant could not rest his defence on the weakness of the evidence of the witnesses for the plaintiff, because the *onus* lay upon him to adduce sufficient proof to rebut the legal presumptions of the land being the property of the Crown. (33,173, *D. C. Colombo*, I, *N.* 6, *July*, 1843.)

Chena lands.

All chenas and other lands which can only be cultivated after intervals of several years, are, if the same be situate within the districts formerly comprised in the Kandyan provinces (wherein no Thombo Registers have been heretofore established), deemed to belong to the Crown, and not to be the property of any private person claiming the same against the Crown, except upon proof only by such person of a sannas, or grant for the same, together with satisfactory evidence as to the limits and boundaries thereof, or of such customary taxes, dues, or services, having been rendered within

twenty years for the same, as have been rendered within such period for similar lands, being the property of private proprietors in the same districts. And in all other districts of this Colony (*i. e.* districts not in the Kandyan provinces) such chena, or other lands, which can only be cultivated after a term of several years, shall be deemed to be forest, or waste lands, within the meaning of this clause. (*Ord.* 12 of 1840, § 6.)

It has been held that this clause refers only to suits in which the Crown is a party. (10,227, *D. C. Kornegalle*, 24 *Dec.* 1845.)

The proof of the sannas, or other grant, for chenas in the Kandyan provinces, with other satisfactory evidence, has always been insisted upon. (88 *C. R. Newera Ellia*, 31 *Oct.* 1854; *Nell.* 239.)

Sannas. A *sannas* is an ancient Singhalese grant, engraved usually on copper; it in length and breadth closely follows the ordinary talipot piece used for writing. In order to determine its genuine character, the evidence concerning its genuineness should relate to the language in which the *sannas* is expressed, and its correspondence with the style used in like instruments of the same period; and the opinion of learned persons skilled in the Pali language should be taken upon this point; it should also be ascertained whether the description of the high lands by boundaries, as given in the *sannas*, was customary; and comparison should be made with other *sannasses* of unquestioned genuineness; and the

evidence should show in what custody the *sannas* has remained, and should account for long delay (if any) in giving notice of its existence. (28,620, *D. C. Kandy*, 18 *Jan.* 1860.)

Encroachment on Crown lands.

The immense amount of wild land in Ceylon has encouraged every kind of encroachment on Crown property, which has called for extraordinary remedies, which it is in place to notice here. The District Court, upon information supported by affidavit charging any person with having, without probable claim or pretence of title, entered upon or taken possession of any land belonging to the Queen, may issue its summons for the appearance of the party alleged to have so acted, and of any other person necessary as a witness. The Court must proceed in a summary way in the presence of the party, or, in the case of his wilful absence, then, in his absence, to hear and determine the information. If on the hearing it appears that the party charged has entered upon or taken possession of the land without probable claim, or pretence of title, and that such party has not cultivated, planted, or otherwise improved, and held uninterrupted possession of the land for *thirty* years and upwards, then, and not otherwise, the Court may make an order directing such party to deliver up to the Queen peaceable possession of such land, together with all crops growing thereupon, and all buildings and other immoveable property upon and affixed to the land,

to pay the costs of the information. (*Ord.* 12 of 1840, § 1.)

Under this clause, the Crown must first prove that the land is Crown land, or that it is such under the 6th clause, and then the encroachment. This clause also further specially declares that, on the hearing, on its appearing to the Court:

First, "That the party had entered, or taken possession without any probable claim or pretence of title;" and, *Secondly*, "that such party had not cultivated, planted, or otherwise improved, and held uninterrupted possession of such period of thirty years and upwards." Then, and not otherwise, the Court may order the defendant to deliver up possession. Now, as the Court may proceed in the absence of the defendant, and in such an event it is not declared that less evidence would suffice, it can give no judgment for the Crown without sufficient evidence on the above two points; it follows that the *onus probandi* in these summary proceedings lies on the Crown to adduce *prima facie* evidence on these two points. (6,108, *D. C. Kandy*, 23 *Dec.* 1846, *Coll.*)

In the same case the Court also held that the words "probable claim, or pretence of title," amounted closely to the English term *colourable title*, that is, a reasonable ground of title. (*Rushworth v. Craven, McClellan's R.* 442.) To show a colourable title, there must be some *prima facie* evidence, affording a fair presumption of title. In another case ($\frac{1879}{11986}$ *D. C. Negombo*, 6 *Jany.* 1847,

Coll.), proof of long cultivation by the defendants, and the payment of the tax of one tenth, according to the rate payable on private lands; and also old deeds adduced in favour of the defendants; were held sufficiently to show a *prima facie* title in the defendants, as to amount to a "probable claim, or pretence of title." The case also shows that the District Court should not, under these summary proceedings, proceed to decide whether, upon the true construction of an old deed apparently genuine, and where possession has accompanied it, the original grant was absolute, or conditional only, and whether any condition contained therein had been since duly fulfilled or not by the grantees.

In the former case, it was also held, that though, when a title to property comes in question, this summary jurisdiction is ousted, yet it was not to be so ousted by a mere fictitious pretence of title, or an assertion of right, when the party's own showing, or other manifest circumstances, prove the claim to be groundless.

The proceedings taken against parties under this ordinance (12 of 1840) should be by information, exhibited by the Queen's Advocate, or any Deputy Queen's Advocate, according to the form prescribed by the Rules of the 16th December, 1842, for regulating proceedings under this ordinance—p. 130. (See *Appendix* A; 7,443, *Matura*, 18 *May*, 1857; *P. C. Ca.* 109.)*

* According to the reporters of the P.C. Ca. it has been further de-

Within fourteen days after the service of any notice made upon them, the parties must give up the land, under the penalty of a sum of five pounds, or fourteen days' imprisonment, with or without hard labour; a further order being then made, which has the same effect as the first. (12 of 1840, § 1.) Yet any person, against whom such an order has been made, may, if he can, recover possession in ordinary course of law, and compensation for dispossession. The party preferring the information also may proceed in due course of law, notwithstanding his information has been dismissed (*Idem*, § 2); and in case of dismissal, the Court may order the Government to pay costs. (*Idem*, § 3.) The proceedings under this summary process by information must be according to the rules of Court. (*Idem*, § 4.)

Certificate against the right of the Crown.

Any person in possession of land may make an application in writing to the government agent of the province for a certificate that the Crown has no claim to the land. This application must contain a full description of the land, a Surveyor General's survey, and a declaration by the applicant, stating the nature of his rights, or the manner in which he acquired possession. If the government agent, on investigation, is satisfied that the Crown has no claim, he may, with the consent of the Governor, grant a certificate to that effect. A

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cided by the Supreme Court, sitting collectively, in No. 10,424, D. C. Negombo, 8th January, 1853, that proceedings under No. 12 of 1840 are civil and not criminal. I have no note of the case.—H. B. T.

copy-certificate is previously entered in a book kept in the office of the government agent for that purpose; and such certificate, or any copy from the entry thereof, attested by the government agent, is to be received by any court as a good and valid title to such land, against any right, title, or claim of the Crown. (*Idem*, § 7.)

For the purposes of colonization, it has been enacted that whenever any person, without grant or title from the government, takes possession of, and cultivates, plants, or otherwise improves any crown land, and has held uninterrupted possession for not less than ten, and for not more than thirty years, that person shall be entitled to a grant from the Crown for that land, on payment of half the improved value of the land, unless the land is required for public purposes, or the use of the Crown; and then such person is liable to be ejected from that land, on being paid by the Crown one half the improved value, and the full value of buildings erected upon it (12 of 1840, § 8); but this does not apply to land claimed under the waste land clause (§ 6). A mere application to government does not constitute this right to the ground, unless accompanied by after possession; but it raises a strong presumption of possession. (4,459, *D. C. Uttuan—Kandy*, 20 *May*, 1837; *Morg. D.* 155.)*

Grants of Crown lands on account of possession.

* Although the government could resume, as between party and party, it requires but little more to establish the fact of possession—as, for example, a renter's receipt, as a party, would scarcely pay the government, if it had no share in the produce. (*Ibid.*)

Land tax. Under the Ordinance No. 14 of 1840 (§ 1), it was enacted that there should continue to be levied by and payable to the government a tax of one tenth, or such other proportion of the crops of paddy and dry grain grown upon all lands then liable to the tax as by law, custom, or usage, were then payable. Consequently, no tax is payable if the crop is destroyed by nature, as by a flood, not even to a renter. (8,929, *C. R. Matura*, 14 *Aug.* 1855; *Nell.* 249.)

Exemptions. This section has no application to a case of land cultivated by leave and license of a government agent, on the terms of half the crop being paid to the Crown. (1,448, *C. R. Avishawelle*, 20 *May*, 1862.) But, in the case of a grant from the Crown, it has been held that the grantee is not exempt from paddy tax, unless there are express words exempting the land granted from the usual payment. (22,777, *Caltura*, 10 *Jany.* 1860.)

As to coffee and pepper lands. In the maritime provinces, the only general exemptions were in favour of lands planted with coffee or pepper; but this does not affect or extend to any low lands applied to the culture of paddy. It has also been the invariable custom in Ceylon for paddy lands to pay a share of the produce to government.

As to temples. In the Kandyan provinces, the proclamation of 21st Nov. 1818 (§ 21) declares the property of Temples exempt from all taxation whatever;—but as certain inhabitants of those villages are liable to perform fixed gratui-

tous services also to the Crown, this obligation is to continue unaffected.*

As to lands of certain loyal chiefs.

All lands belonging to certain loyal chiefs named in that proclamation were declared free of duty during their lives, and it was also proclaimed that their heirs should enjoy such land free of duty, except such as paid pingo duty, which were thereafter to pay one tenth, unless exempted under the succeeding clause. That clause (§ 23) exempts all lands belonging to chiefs holding offices, either of the superior or inferior class, and also to inferior headmen, during the time they are in office. (See also §§ 28 and 29.) The above immunities to chiefs and headmen are personal immunities, and are not immunities given simply to the lands which they hold in the districts in which they bear office. (2,477, *C. R. Harrispattoo*, 14 *Aug.* 1862.)

Cost of collecting land tax in Kandy.

This tax is still further lowered in the Kandyan provinces. The services of the inferior chiefs are compensated, not only by exemption from taxation, but also by one twentieth of the revenue paddy which they collect from the people under them, to be allotted in such portion as the Government regulates.† (§ 29.) This clause gives the inferior chiefs an absolute right to this twentieth as a compensation for their services. But this right, like every other claim for remuneration, can only

* This does not read intelligibly; but it is an exact transcript of the proclamation.

† Formerly the Board of Commissioners under the Government (now abolished).

be supported by first showing that the services for which it is given have been duly and faithfully performed; and that such performance has been complete, not partial, nor imperfect: the headman is not in a more favourable situation than any other servant, public or private. The percentage can only be claimed on proof of performance of every part of the contract into which the claimant has entered. For example, no percentage is payable or deductible whilst any revenue grain is outstanding, even without fault in the headman. The whole percentage, it is said, is usually paid over to the Koralle, in confidence that he will pay over to the subordinates their respective shares; but the Crown remains equitably liable for any shares the headmen may fail to receive from the Koralle. (1,386, *Kornegalle*, 30 *Nov.* 1833; *Marshall*, 381; *Morgan*, *D.* 8.)

Method of Collection. Notice to be given before crop cut.

In every case wherein no special agreement in respect to the tax on a crop has been made between the government agent or other person authorized on that behalf,* and the proprietor or cultivator of the crop; it must not be cut until notice of the intention to cut the crop has been given to the headman, or other person in that behalf authorized. (14 of 1840, § 2.) The notice must be in writing, and must specify the name and extent of the land; the name and place of abode of the proprietor or cultivator; the day on which the crop is intended to be cut (which must not be less than five

* That is generally the renter.

days from the date of the notice); and lastly, the date on which the notice is given: the receipt of such notice must be acknowledged by the headman, or other person authorized to receive the same, by endorsement thereon, to be dated and signed; and such notice must thereupon be returned to the proprietor or cultivator. (*Idem*, § 3.) No custom to the contrary can dispense with the above last clause. (28,309, *P. C. Galle*, 10 *Jany.* 1860; *P. C. Ca.* 138.) Nor does the fact that the crop was cut with the knowledge of the renter dispense with the necessity of giving such notice (13,419, *P. C. Bentotte*, 8 *Jany.* 1857, *P. C. Ca.* 103): yet, if the renter "gives permission to thrash," that permission amounts to such an agreement as to dispense with the strict observance of the formalities in the other case required by the ordinance. (16,572, *P. C. Chavagacherry*, 9 *Aug.* 1858; *P.C. Ca.* 118.)

If the crop is not cut on the day specified, a renewed notice (in like manner as before provided) must be given. In such case the crop must not be cut within less than two days from the date of the renewed notice. (§ 4.)

Onus of proof of notice.

When a defendant pleads not guilty to a charge of cutting (and thrashing) without legal notice, all that the complainant has to prove, is, that the defendant cut (and thrashed) the crop; and it is incumbent on the defendant to prove that he complied with the Ordinance by giving the notice, on the rule that "burden of proof lies on the person who has to support his case by proof of a

fact which lies peculiarly under his own knowledge, or of which he is supposed to be cognizant." *(Philip and Amos on Evidence*, p. 829; 316, *Ratnapoora*, 1 *Aug.* 1846; *P. C. Ca.* 5.)*

Thrashing crop.

When it is the custom to thrash the crop immediately after it is cut, the crop, when the whole is cut, and not sooner, must be thrashed without unnecessary delay (§ 5); but when it is the custom to stack the crop, on the whole being stacked the proprietor or cultivator must deliver to the headman, or other person in that behalf authorized, a description of the quantity of the crop, in the terms customary in that place in respect to crops in such a state. Before thrashing, a notice, in the manner above provided, must be given, and at the time appointed the whole crop must be thrashed without unnecessary delay. (§ 6.)

Mode of ascertaining tax.

The mode of ascertaining the tax (unless it is otherwise agreed on) is by actual division by the proprietor or cultivator (after deduction of the usual seed grain, where such deduction is customary) of the crop into equal heaps, in number proportioned to the rate of tax payable, of which the headman, or person authorized, selects one. (§ 7.)

Renter.

In the case of the tax upon the crops of any village or district being rented out by government, and due public notice of that being published, the renter holds

* The rule quoted in the above Ratnapoora case is also quoted by Best, in his Princ. of Evidence, § 276, p. 364, 3rd Ed. from Ph. and Amos, as *the* rule on this point.

the position of the headman, &c. in the foregoing provisions. (§ 8.) The circumstance of parties to a suit having been joint purchasers of rent of paddy tax, does not preclude one from purchasing all or part of the interest of the other, and suing for breach of contract. (*C. R. Ratnapoora*, 871, 24 *Sep.* 1850; *Nell.* 159.)

Delivery of tax.

The tax, if deliverable to the government agent, must be delivered at the place at which government has been accustomed to receive the tax; and if to the renter, on the land where it was thrashed. A receipt must be given by the receiver, specifying date, quantity, name, and extent of the land, and the year and harvest. (§ 9.)

Notice when to be given to headman.

If the renters neglect or refuse to receive and acknowledge the receipt of the notices, or be absent from the limits of his rent, or if only a portion of a village is in those limits, and he be absent from the village, the notices may be given to the nearest headman, who must endorse and return them as before. This is of the same effect as notice to the renter, and the headman must inform the renter on the first opportunity, and must receive, endorse, and return the notices, under pain of a fine, at the discretion of the Court.

Renter neglecting to attend.

On any headman, renter, or person authorized, &c. neglecting or refusing to attend at the appointed time, to see the crop cut or thrashed, or to receive the government share, the proprietor, &c. may cut, thrash, and set apart that share, in the presence of two respectable persons, and obtain from them a certificate, signed by them,

specifying its date, the name and extent of the land, the quantity of the crop, its year and harvest, and the government share. This certificate is deemed sufficient evidence of a fair allotment of such share, and must be afterwards produced, on application being made for the share. (§ 11.)

Penalty on extortion by renter.

Any renter, wilfully exacting or extorting from the proprietor, &c. more than the government share, is liable to a fine not exceeding £10; and, in default of payment, to imprisonment, with or without hard labour, for not more than twelve months.

Appointment of agent by renter.

The renter must appoint an agent to exercise all the renter's powers, and the renter must notify the appointment, in writing, to the principal headman of the division in which the agent is to act. The acts of the agent are the acts of the renter. (§ 13.)

Penalties on proprietors.

Any proprietor or cultivator cutting or thrashing crop without due notice (that is, the notice set out in the 3rd §), which must be given, even if the renter knows the crop is being cut (13419, *Bentotte*, 8 *Jan.* 1857; *P. C. Ca.* 102. See also 16,572, *Chavagacherry*, 16 *June*, 1858; *P. C. Ca.* 117), or before delivery of the government share, removing any portion of crop; or neglecting or refusing to cut, thrash, and divide crop, or to deliver the government share, shall be fined double the value of such share, to be reckoned according to the extent of land, and at the highest rate in proportion to the extent at which the tax shall have been received or

ascertained for the same harvest, for any land in the same village. On default of payment, he may be imprisoned, with or without hard labour, at the discretion of the Court: no fine to be less than one shilling and sixpence. The fine must not be in kind, but in money (10,905, *Galle*, 21 *Jany.* 1851; *P.C. Ca.* 33), and the fine must not be less than one and sixpence, even if double the share is less than that sum. (14,266, *Caltura, P. C. Ca.* 76.) And the imprisonment to be one day for every penny, when the fine is under one and sixpence; and one month for five shillings in all other cases, not in the whole to exceed twelve months. (§ 14.)*

Penalty on breach of agreement.

Where a special agreement of commutation exists between a government agent and the proprietor, &c. the latter, on committing any breach of the agreement, shall be fined double the sum payable by such agreement for tax in the year in which such breach is committed; on default, imprisonment as above stated. (§ 15.)

Further demand of tax barred.

Any proprietor, &c. paying fine, or suffering imprisonment, is not liable to pay the tax on account of which he was fined or imprisoned. (§ 16.)

Tax may be recovered by civil action.

Nothing in the Ordinance prevents the government or renter from instituting a civil action for the recovery of the tax due upon any crop, if expedient. (§ 17.) This can only be for the amount of tax itself, and not

* This would seem as if the only discretion left to the Court is the question "with or without hard labour." The cases between one and sixpence and five shillings are unprovided for.

double* tax (928, *C. R. Galle*, 8 *Sept. Nell*, 101): and this action is not barred after two months, like a prosecution under the 20th clause. (1,047, *C. R. Jaffna*, 26 *May*, 1846; *Nell*, 95; 420, *C. R. Matura*, 16 *March*, 1847; *Nell*, 113; *Ratnapoora*, *C. R.* 2,714, 13 *Nov.* 1855; *Nell*, 252.)

Renter receives half the fines.

When the tax is rented, the renter is to receive half the fines. (§ 18.)

Penalty on resistance to collection of tax.

Any person making or inciting resistance or obstruction to the collection of tax is liable to a fine of ten pounds; and, in default, to imprisonment, with or without hard labour, at the discretion of the Court, not exceeding twelve months. (§ 19.)

Limitation of prosecution.

No prosecution under this Ordinance can be commenced after two months from the offence, if the tax be rented; nor after six months, if the tax is to be collected by government. (§ 20.)

ARRACK, RUM, AND TODDY.

Distillers to have license.

No person may have or keep a still for spirits without first obtaining a license, signed by the government

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* When the value of the tax is sued for civilly, if the defendant pleads payment, he admits in *that* plea the plaintiff's valuation (but of course not if he adds the plea of "never indebted").

If the government conditions show that the plaintiff's valuation is too high, the defendant should call for their production. (420 *C. R. Matura*, *March* 16, 1847; *Nell.* 113.)

agent of the province. One license is sufficient for a partnership; and the license applies only to the house or premises mentioned in it. (*Ord.* 10 of 1844, § 2.) The license is granted only for the produce of the cocoa-nut or other palm, or of the sugar cane. (*Ib.* § 3.) Before granting the license, the government agent must be furnished with a description of the still, setting forth its shape, dimensions, and proportions, also of the premises on which it is to be erected. (*Ib.* § 4.)

Distiller to make declaration of name and residence.

Before granting a license, the government agent must be furnished by the distiller with a declaration in writing, setting forth his own and his manager's names and residences; and that the distiller is the owner of the still, or duly authorized by the owner to apply for a license. If the distiller ceases to be the owner, or agent of the owner, or if the manager be changed, a further declaration must be made. Each declaration must be signed by the declaring party, and must be registered by the government agent in a register kept for that purpose. A person making a false declaration is guilty of an offence, and is liable to a fine of twenty pounds. (*Ib.* § 5.)

Premises to be secured.

The premises in which the business is to be carried on must be secured by a wall or otherwise (before license) to the satisfaction of the government agent. (*Ib.* § 6.)

Distiller to have store.

There must be constructed on the business premises one or more secure storehouses, a description of which must be furnished to, and registered by, the

government agent; and all spirits distilled must be deposited therein. Any spirits found on the premises, except in the stores (unless lawfully possessed under the Ordinance) are forfeited; and every *actual* manager on whose premises such spirits are found (whether he be the licensed distiller or only the manager) is guilty of an offence, and liable to a penalty not exceeding five shillings for every gallon of spirit so found. (*Ib.* § 7.) To support a charge under this clause, the defendant must have notice in the charge of the capacity in which he is charged, and there must be evidence as to whom the premises belonged where the spirits are found. (13,176 *Galle*, 7 *Jan.* 1852. *P. C. Ca.* 39.)

Spirits found out of store.

No tree, plant, or shrub, is permitted within twenty feet of the distillery buildings and stores; any distiller or manager allowing it, is guilty of an offence, and liable to a fine of five pounds. (*Ib.* § 8.)

Licenses.

The license is issued by the government agent to the applicant within ten days of the application. The government agent may refuse a license, but must report his reasons with all convenient despatch to the Governor, who may confirm or reverse his refusal. (*Ib.* § 39.) No license can be issued for any still the body of which, without the head thereof, shall be of less capacity than 150 gallons, unless the still is of such peculiar construction as in opinion of the government agent renders it unnecessary to require so large a capacity. (*Ib.* § 10.)

Size of still.

Each license is according to the form given in Schedule A of the Ordinance, and lasts from the day it is granted to the 31st of December then next following. The government agent demands for it the sum of *three pounds*. (§ 11.) But the government agent may grant licenses free of charge to any apothecary, chemist, or druggist (for such time as may appear expedient, and which must be stated in the license), to keep a still on his premises, the body of which, exclusive of the head, shall not hold more than *eight gallons*, for distilling spirit for his trade only; and if such tradesman keeps a still without such license, or uses or permits the use of his still except for *bonâ fide* medical purposes, he is guilty of an offence, and liable to a fine of *fifty pounds;* and the still and all spirit distilled by such person is forfeited. (§ 12.)

Form of license.

License for medical purposes.

Whoever distils any spirit from any other substance than the produce of the cocoa-nut, or other description of palm, or of the sugar-cane, unless under the preceding clause (*i. e.* § 12), or who, without obtaining a license, unless acting for and by the authority, and for the benefit of, and in conformity with the license granted to any licensed distiller, &c. or distils, &c. or who, after the 31st of December next after the date of his license, and until he has obtained a new license, continues to keep any still, &c. or to distil; or any licensed distiller, &c. or manager, or superintendent, who erects places, or uses any still, &c. other than those mentioned in the

Illicit distillation.

license, is guilty of an offence, and is liable to a fine of *one hundred pounds*, or to imprisonment, with or without hard labour, for *six months;* and to a further fine of *five shillings* for every gallon of spirits proved to have been so distilled. And every person knowingly procuring, or inciting to, or aiding, or abetting in the commission of any such offence, is equally guilty with the principal offender, and punishable in like manner. Every such still, &c. and all such spirits, are forfeited. (§ 13.)

Aiders and abettors.

Distiller not to sell less than *thirty-five gallons.*

Every licensed distiller, &c. and every manager, &c. who sells or disposes of, or knowingly causes and permits to be sold, &c. on his account, any spirits in less quantity than *thirty-five gallons* at one time, is guilty of an offence, and liable to a penalty of *five pounds.* (§ 14.) Three defendants were charged with selling arrack under thirty-five gallons. They were joint keepers of a distillery, and were all found guilty of the offence, and fined five pounds each. The Supreme Court ruled that "where the offence is in its *nature single*, and cannot be severed, then *penalty* shall be only *single;* because, though several persons may join in committing it, it still constitutes but one offence." The sentence was modified by ordering the defendants to pay the sum of five pounds as one forfeiture for one offence. (23,132, *Ballepittymodere*, 2 *December*, 1862; *P. C. Ca.* 189.)

Certain districts are mentioned in § 15 which are ex-

cluded from the operation of certain provisions as to the distillation of *arrack; i. e.* spirit from the cocoa nut or other palm.

Wholesale sale of spirits.

2. We now pass on to the second part of the Ordinance relating to the "wholesale sale of spirits." No sale of spirits is wholesale unless the quantity sold amounts to or exceeds *thirty-five gallons*. Any wholesale dealer who sells, or knowingly causes, or permits to be sold on his account less than thirty-five gallons, is liable to a fine of *five pounds*. (§ 17.)

Wholesale dealer to be licensed.

No person, other than a licensed distiller, can deal by wholesale in spirits, unless he first obtains a license from the government agent of the province. And any person, except a licensed distiller, selling, or causing to be sold, spirits by wholesale on his account, without a license (unless he is the dealer's agent, acting in conformity with the license), is liable to a fine not exceeding *fifty pounds*, and a further fine of *five shillings* for every gallon unlawfully sold by him. (§ 18.)

Storehouse.

No person may deal by wholesale in spirits unless he has one or more secure storehouses, but not within any part of his dwelling house. Any wholesale dealer's spirits found on his premises, and not in his storehouse, unless during actual removal, or otherwise unlawfully possessed by him, are forfeited. (§ 19, and see *ante, note to* § 7.)

License for wholesale, how obtained.

To obtain a license to deal wholesale in spirits, an application in writing must be made to the government

agent, and must contain a description of the name and residence of the applicant, and the place where his storehouse is situate; and the applicant must pay the agent *three pounds*. The agent must, within ten days of the application and payment, issue a license in due form to the applicant to deal wholesale in spirits. The license is in force until the 31st of December next after its issue. The agent may refuse the license, and must report his refusal to the Governor, who may reverse or confirm the agent's refusal. (§ 20.)

Dealer must deal at storehouse.

No wholesale dealer may deal in spirits except at the storehouse mentioned in his license, under a penalty of *fifty pounds*. (§ 21.)

Locks and keys of storehouse.

The government agent, if he sees fit, may have locks placed on the door of the storehouse, and entrust the keys to any one he thinks fit: the dealer has free access to the storehouse, and, on his application, the person trusted with the keys must attend with the keys at reasonable times. Any dealer removing the locks, or entering, or permitting any one to enter, without application, or the attendance of the key-keeper, is liable to a fine of *fifty pounds*. (§ 22.) The storehouse is to be kept clear of jungle. (§ 23, as in § 18.)

Entry upon storehouse.

Any person, authorized in writing by the government agent, may at any time enter any premises of any licensed distiller or wholesale dealer used in the business, and may measure and take account of all spirits and every still and utensil therein; but the per-

son must produce his authority when called upon. Any one molesting, obstructing, or hindering such person in the execution of his powers, is liable to a fine, not exceeding *twenty pounds*, or to imprisonment, with or without hard labour, not exceeding six months. (§ 24.)

Reference to the Q.A by J.P. before committal for trial.

On any breach of the above clauses, no Justice of the Peace must commit for trial until he has referred the proceedings to the Queen's Advocate, or some other Deputy Queen's, and has been instructed to commit for trial. (§ 25.)

Retail of arrack and rum.

No person may deal by retail (*i. e.* in less quantity at any one time than thirty-five gallons) in arrack and rum, without first obtaining a license from the government agent, or unless he is acting in conformity with the Ordinance for the retail dealer; and any one so dealing, or causing or permitting such dealing on his own account, without license, or contrary to the tenor thereof, is liable to a fine of *five pounds*. (§ 26 ; see *ante*, § 7.) This section enacts two offences, one "dealing without a license," and the other "dealing contrary to the tenor of a license;" and they must each be charged in any plaint as separate offences. (1,152, *P. C. Negombo*, 17 *Sep.* 1862; *P.C. Ca.* 176.) The sale of brandy in the public streets is forbidden under this clause. (1,191, *P. C. Colombo*, 13 *Jany.* 1846 ; *P. C. Ca.* 1.) The evidence of "permission" under this clause must be express, and cannot be inferred from a bare sale. (51,079, *P. C. Kandy*, *P. C. Ca.* 157.)

Retailer to sell, on application, any quantity less than two quarts.

And every licensed retailer must, at all times during the day, sell spirits, not exceeding two quarts, immediately on application for the same; and every retail dealer not so doing is liable to a fine of *five pounds*. (§ 27.)

Certificate to purchase.

When he sells spirits in a quantity exceeding two quarts, he must grant a certificate of such sale to the purchaser, signed by the retailer, or person acting for him, specifying date, quantity purchased, name of purchaser, the period within which it is to be removed, and the places from and to which it is to be removed: both these places must be within the district that the retailer is licensed to sell in, and the certificate must be given on receipt of the value of the spirits; and any retailer or person acting for him, not so granting the certificate, is liable to a fine of *five pounds*. No certificate for a quantity exceeding *three* gallons continues in force, or legalizes the possessisn of spirits for more than forty-eight hours, unless under special license from the government agent. (§ 28.)

License to retail for drinking wine and spirit on the premises.

No wine or spirits shall be sold to be consumed on the premises where sold, unless the seller first obtains a license from the government agent, or unless he is acting for some licensed retailer. Every person so dealing, or causing or permitting such dealing on his own account, without a license, or contrary to the tenor thereof, is liable to a fine of *five pounds*. (§ 29; as to proof of permission, see *ante*, § 26.)

Application for license.

Any one wishing a licènse to sell wine or spirits (not being rum or arrack), to be consumed on the premises,

must apply in writing to the government agent, with a description of the name and residence of such person, and of his place of sale. The license costs *two pounds*, and must be given within ten days of the application, and lasts until the thirty-first of December next following the date of the license. The license may be refused with the usual report to the Governor. (§ 30.) If any licensed wholesale or retail dealer is convicted of an offence, the government agent has discretionary power to withdraw his license. (§ 31.)

Government agent may withdraw licenses.

The possession by any person of any arrack or rum is unlawful, except under the following circumstances; that is to say: except the spirit is in the possession of any licensed distiller, or wholesale or retail dealer, in conformity with the Ordinance:—or of any person legally empowered to remove the same:—or except such spirit is possessed by the authority of the government agent of the province within which it is possessed:—or except such spirit has been legally sold to the person in whose possession it is found, provided that the possessor of any such spirit has taken out the certificate or certificates required by the 28th clause of the Ordinance. And any one possessing arrack, under any circumstances not specified in these exceptions, is liable to a fine of *five pounds;* and *five shillings* further for every gallon so illegally possessed; and the spirits are forfeited.

Possession of arrack and rum.

The possession under this clause means an unlawful possession; and does not include innocent and uncon-

scious possession; for, strong as the words of the Ordinance are, they must not be construed so that an innocent person shall receive any damage by a literal construction. Generally speaking, finding prohibited quantities of arrack in a man's dwelling house is by itself sufficient and cogent evidence for a conviction; for a man may, as a general rule, be fairly presumed to know what the things are which he has in his house in which he is living at the time; but it is quite open to him to show that the possession was innocent and unconscious. (16,940, *P. C. Ca. Kaigalle*, 29 *Oct.* 1861; *P. C. Ca.* 160.)

Removal of arrack and rum.

No arrack or rum can be removed without a permit accompanying, specifying its date, name of remover, for whom removed, quantity, the period within which it is to be removed, the places to and from, and mode of removal. Permits are granted by government agents, licensed retailers, and persons authorized in writing by the former. No permit can be issued, except by the government agent, to any one not a licensed distiller or dealer, for a quantity exceeding thirty-five gallons; or, if less than thirty-five gallons, by no retailer, for removal beyond the limits of his license district. (§ 33. See also 13,520, *Bentotte*, 18 *Feb.* 1857; *P. C. Ca.* 105.)

Though the form of permits given in the schedule of the Ordinance mentions the number of casks—as the § 33 does not require it to specify the vessels, but only the quantity—the remover is not bound by the casks,

&c. mentioned in the permit, but may legally remove in other vessels, if the quantity is right. (3,914, *P. C. Pangwelle*, 28 *March*, 1865.)

Authority to demand permit.

Any person authorized in writing by the government agent may stop, on any reasonable grounds, at any time, any one removing arrack or rum, and may demand the permit; the remover is bound to produce the permit. (§ 34.)

and examine spirits.

Any person, duly authorized, may satisfy himself that the removal of arrack or rum conforms to the permit. If he finds anything wrong, he may detain the spirit, and without delay place the spirit and its vehicle in charge of the government agent. (§ 35.) Offences against this clause are subject to a *five pounds* fine, or three months hard labour. (§ 35.)

Officer refusing permit.

Any officer refusing to grant permits is liable to a *five pounds* fine. (§ 36.)

Penalties for illegal removal.

All arrack and rum illegally removed, and the vehicles containing them, are liable to forfeiture. (§ 37.) And the owner and every person so removing spirit is liable to a fine of thirty shillings a gallon, whether more or less, upon the quantity removed. A police court cannot impose a mitigated fine in such a case. (11,302, *P. C. Galle ; P. C. Ca.* 33.) And every person engaged in illegal removal, and not giving up the name and address of the owner, is liable to a *five pounds* fine.

A person who removes arrack without a permit, though proved to have purchased it from the retail dealer, and not to have removed it beyond his divi-

sion, is liable, under § 37, to be fined thirty shillings a gallon. (30,029, *P. C. Kandy*, 9 *April*, 1836; *P. C. Ca.* 91.) Under the above clauses the value of the arrack is to be estimated.

License to retail toddy.

No one can sell toddy in less quantity than fifteen gallons without license from the government agent, unless in conformity with his license. (§ 38.) No one can draw toddy without a previous license from the government agent, or from the licensed retail dealer in toddy of the district; the license is in force until the thirty-first of December next thereafter inclusive. A license subsequently obtained on the evening of the same day will not legalize the drawing of toddy in the morning thereof, previously to such license having been issued. (7,996, *P. C. Caltura*, 16 *Nov.* 1852, *P. C. Ca.* 61.)

Possession and removal of toddy.

No one, not being a licensed dealer, may retail toddy. (*Ibid.* § 42.) No person may remove it in any quantity exceeding one gallon. (§ 43.)

Permit for removal and possession of toddy

The government agent, or any one authorized by him in writing, or a licensed retail dealer in toddy (within his district), may grant permits for the removal and possession of any quantity of toddy, specifying places to and from, or where it is kept, and is in force for the period named therein; but must expire on 31st Dec. next after the date of it. (§ 44.) Any of the above persons neglecting or wilfully delaying to issue permits, *gratis*, is liable to a fine of *five pounds*, over and above damages recovered. (§ 45.)

Illicit dealing with toddy.

Any person drawing, selling, removing, or possessing

toddy, contrary to the Ordinance, is liable to a fine of *five pounds*, and the toddy is forfeited (§ 46): the Ordinance does not apply to sweet toddy. (§ 471.) A person may prosecute for drawing toddy without having an authority for doing so from the government agent. (41,305, *P. C. Galle*, 5 *Nov.* 1861; *P. C. Ca.* 163.)

Penalties, except as to sweet toddy.

The legal representative of a deceased person, who lawfully possessed arrack or rum, may, within one week of the death, apply to the government agent, in writing, to be placed in the place of the deceased as to such spirit. And the agent, unless he doubts that the applicant is *bonâ fide* such legal representative, may grant the application, under his hand, ten days after its receipt. The applicant is then in the position of, and under the same restrictions as, the deceased, as to such spirits. A false application subjects the applicant to a fine of *twenty pounds*, or to imprisonment, with or without hard labour, for a period not exceeding twelve months. (§ 48.) If no application is made, or the agent doubts the right to apply, or a dealer holds such spirit when his license is withdrawn, the agent may, in all these cases, sell the spirit held by auction, at his discretion. After deducting all costs, he is to pay the balance to the Loan Board, to the credit of the legal representative; or, where a license is withdrawn, to the dealer. If the quantity taken is under thirty-five gallons, he may hand it to the retailer of the district, and make his payment to the Loan Board, or the ex-dealer, at the rate of twenty per cent. under the retail price. (§ 49.)

Extension of license to representative of deceased party.

Where no application.

License withdrawn.

Forgery.

Forging, inciting, or assisting to forge, or uttering forged licenses, or permits, subjects the offender to a *twenty pounds* fine, or to imprisonment, with or without hard labour, for any period not exceeding twelve months. (§ 50.)

Seizures of forfeitures.

Seizures of spirits, toddy, or stills, are to be made by police or peace officers, and are handed to the agent for safe-keeping until final judgment. (§ 51.) But

Seizures taken as condemned.

seizures are to be taken as condemned by final judgment, if unclaimed from the agent in writing within one calendar month of the seizure, and also unless the owner within ten days from his claim give security, satisfactory to the agent, for the costs occasioned by the claim. The claim, to be sufficient, must give the real names of the owners, their residence, and business or profession, and must be accompanied by a declaration, signed by some

Declaration of ownership.

owner, or his manager of the ownership. (§ 52.) The declaration must set forth that the seizure was the *bonâ fide* property, at the time of the seizure, of the owners mentioned therein; and if it is signed by the manager, the declaration must be to the best of his knowledge and belief; and the maker of any declaration wilfully false is liable to a fine of *twenty pounds*.

Proceedings in condemnation.

The forfeiture of any spirit, &c. may be declared by any court, at the time of the conviction of any offender against the Ordinance; but the Queen's Advocate may sue for the forfeiture in a civil way, notwithstanding that the offender is acquitted, or no forfeiture decreed upon conviction. (§ 54.)

Seizures to be sold.

Condemned seizures are to be sold by the government agent by auction; but the sale is to be arrested, in case of appeal, until a final decision. (§ 55.)

Liability as to seizures.

In case of any seizure being destroyed by fire, stolen, or roasted, while in custody of the government agent, the owner is to have no remedy against the Crown; but embezzlers are both criminally and civilly liable. (§ 56.)

Restoration of seizures.

The government agent, with the sanction of the Governor, may restore seizures, upon terms and conditions prescribed by the Governor; and if an owner accepts this qualified restoration, he has no further remedy. (§ 57.)

Seizures not effected.

If spirits, stills, &c. liable to forfeiture, cannot be seized, the owner is liable in double their value. (§ 58.)

Value, how estimated.

In this, and in cases of seizure, the value of the spirits is to be estimated at what it is worth at the place of seizure, or, if not seized, at the place where it is liable to be seized. (3,960, *C. R. Bentotte, Nell*, 221.)

Bribery.

Any police or peace officer, having good reason to believe that any spirits, stills, &c. forfeited and liable to be seized, may, day or night, enter and search such premises and seize such things. Any such officer receiving any bribe, and any person bribing or attempting to bribe any such officer, is liable to be fined *ten pounds*, or to be imprisoned, with or without hard labour, for any period not exceeding *six* months. (§ 60.)

Vexatious conduct.

Every police and peace officer, and person acting in

their aid, and every other person, who, under pretence of performing any duty, or exercising any authority imposed upon him, or vested in him by the Ordinance, using unnecessary violence, or wantonly doing any injury, or giving uncalled-for and vexatious annoyance, is liable to a fine not exceeding *five pounds*, or to imprisonment, with or without hard labour, not exceeding three months. (§ 61.) The offence intended in this clause is *abuse of power*, and the words "pretence of performing a duty," &c. must be restrained to the excess which is made penal, and does not extend to the case of a person guilty of vexatious conduct, but having no power to do the act in which such vexatious conduct is used. (4,740, *P. C. Galle*, 5 *Oct.* 1847; *P. C. Ca.* 15.)

Probable cause.

Where, in any suit or information arising out of a seizure, the judge certifies on the record that there was probable cause for seizure, the claimant is entitled to no costs or damages; and the person making the seizure is freed from all suits on prosecution of seizure. (§ 62.)

Half fines to informer.

Half of the fines go to the Crown, and half to the informer. If the fine is not paid, the informer is entitled to receive from the government agent his share; saving that the agent is not bound to pay more than seven pounds and ten shillings. (§ 63.)

The informer is a competent witness. (§ 64.)

Onus.

Whenever, in the Ordinance, any person or thing is declared liable to any punishment, penalty, or forfeiture, but certain exceptions are therein expressed excepting

such person or thing from liability, the onus of the proof lies upon the defendant. (§ 65.)

Any thing that may be done by the government agent may be done by his assistants. (§ 66.) Deputy agent.

TOLLS.

All tolls are now collected under the "Toll Ordinance, 1861" (No. 22 of 1861)—all subsequent toll ordinances having merely created new toll stations. It is necessary, first, to notice the interpretation clause (§ 3), by which the word

"*Horse*" includes pony, ass, or mule; "*ox*," any bullock, buffalo, or any other beast of burden, except an elephant: the word "*load*," all description of goods, but not passengers: "*vehicle for passengers*," includes carriages, hackeries, and vehicles capable of carrying passengers, and commonly used for such purposes, though not actually carrying passengers at the time; "*vehicle for goods*," includes carts, waggons, and all vehicles capable of carrying loads, and commonly used for that purpose, although not actually carrying goods at the time: "*boat*," includes padda boats, batel, lighter, single or double canoe, scooped dhoney, ballam, raft, tug, catamaram, collah, and all other boats, whether of European or native build. Interpretation.

Tolls at roads, bridges, ferries, and canals.

Tolls are levied in respect of certain specified roads, bridges, ferries, and canals, at such rates as the Governor, from time to time, in the Government Gazette, is pleased to appoint, provided the same must in no case exceed the rates below specified; that is to say:—

Passenger vehicles.

	£.	s.	d.
Every vehicle for passengers, drawn by one horse, driver and passengers included } with two wheels	0	1	8
Ditto ditto .....with four wheels	0	1	6
Every vehicle for passengers, drawn by two horses, driver and passengers included ..... }	0	2	0
For every additional horse used in drawing such vehicle ...	0	0	8
Every vehicle for passengers, drawn by one ox, driver and passengers included ..... }	0	1	0
Every additional ox attached thereto.....	0	0	1½

The word "passenger" applies to any person travelling in the vehicle; and thus a bullock cart, when used for the conveyance of one or more passengers, is a vehicle for passengers; even if the cart passes the toll without the passengers, if they came to toll in the cart, and afterwards went on in the cart, the cart would be a vehicle for passengers. (43,342, *Colombo*, 24 *June*, 1857; *P. C. Ca.* 112; and *Nell's Toll, Ca.* 5.)

A cart actually carrying passengers, though in other respects unloaded, must pay as a cart for passengers, of whatever kind the cart may be. (3,515, *P. C. Pantura*, 13 *June*, 1862.)

The Ordinance intends to make a great distinction between carts generally used for loads of dead weight, and regular vehicles for passengers, so far as the tolls they respectively pay when empty are concerned. Full

toll is to be paid for the regular passenger carriage, whenever it passes a toll bar, whether it is full or empty. But an empty cart is allowed to pass, on payment of a reduced toll. If, however, a cart-owner takes passengers in his cart, he makes his cart, for that occasion, a vehicle for passengers, and must pay accordingly. (70,275, *P. C. Colombo*, 10 *Sept.* 1863; and 26,010, *P. C. Balepitty, Modera*, 12 *April*, 1864.)

Thus a small market cart, in which only one person could sit with the driver, and that with the legs hanging down behind, and a person so sitting as a passenger, was held to be a vehicle for passengers. (34,939, *P. C. Colombo*, 14 *Aug.* 1855: *P. C. Ca.* 77; *Nell's Toll, Ca.* 26.)

	£	s.	d.	
Every horse, carrying a load, or not carrying a load, with or without a rider	0	0	6	Loads.
Every ox, carrying a load	0	0	3	
Every ox, *not* carrying a load	0	0	1½	
Every vehicle, carrying a load, and drawn by one horse or ox	0	0	9	
Ditto, drawn by two horses or oxen	0	1	0	
Every additional horse or ox	0	0	3	
Every vehicle, *not* carrying a load, and drawn by one or more horse or ox	0	0	3	
Ditto, drawn by two horses or oxen	0	0	4½	
Every additional horse or ox	0	0	1½	
Every vehicle, carrying a load, and drawn by two elephants	0	2	0	
Every vehicle, *not* carrying a load, and drawn by two elephants	0	1	0	
Every vehicle, carrying a load, and drawn by one elephant	0	1	6	
Every vehicle, *not* carrying a load, and drawn by one elephant	0	0	9	
Every elephant, carrying a load	0	0	9	
Every elephant, *not* carrying a load	0	0	6	

A load means goods only, and consequently a loaded or unloaded vehicle is one with or without goods. (*Interpretation, ante;* and 26,386, *P. C. Colombo*, 13 *Sep.* 1853; *P. C. Ca.* 69; and *Nell's Toll, Ca.* 17.) If some person happens to be riding on a loaded cart, that would not make it less a loaded vehicle; and a vehicle carrying one or more passengers, would not be a loaded vehicle, and not the more so because each passenger may happen to carry with him his own personal luggage. (42,433, *P. C. Colombo*, 24 *June*, 1857; *P. C. Ca.* 113.)

So, also, a cart would not be a loaded cart because it contains a few necessaries for the carter and his family. (69,807, *P. C. Colombo*, 8 *Sep.* 1863.

	£	s.	d.
Every palanquin with bearers not exceeding twelve	0	1	0
Every ox, cow, calf, sheep, goat, or pig	0	0	0½
Every leaguer or cask not carried in a vehicle	0	0	2
Every vehicle not enumerated above	0	1	0
Every foot passenger crossing ferries, except children under twelve years of age, and keepers and leaf-cutters attending elephants, horses, and cattle	0	0	0½

TOLLS ON CANALS.

Tolls on canals.

		£	s.	d.
Padda boat, battel, or lighter, of and under 50 feet in length	loaded	0	8	0
	unloaded	0	1	6
Padda boat,* battel, or lighter, over 50 feet in length	loaded	0	5	0
	unloaded	0	2	6
Double canoe scooped, dhoney, or collah	loaded	0	1	4
	unloaded	0	0	8
Every additional canoe supporting a platform		0	0	8

* In Ord. 8 of 1858 (repealed), this word did not appear; and it was held a toll of five shillings was not payable for a padda boat (49271, *P. C. Colombo*, 3*rd June*, 1859). Consequently the word was inserted in 4 of 1859 (repealed), and 22 of 1861 (in force).

		£	s.	d.
Single canoe or ballam with freight or passengers		0	0	9
Single canoe or ballam.....		0	0	4
Raft or catamaram, 30 by 10 feet, and under ...	loaded	0	2	0
	unloaded	0	1	0
For every additional foot over 30 feet in length and 10 feet in breadth	loaded	0	1	0
	unloaded	0	0	6
Every boat not enumerated.....		0	1	0

Fishing boats not conveying loads and passengers are exempt; boats with manure or unmanufactured cocoa-nut husks, and with no goods, except the necessary tackle, apparel and provision of the boat and her crew, pass as unloaded boats.

A loaded raft is a raft made and a load placed upon it. (3791. *P. C. Pantura.*)

Bridges and ferries.

If a future bridge costs less than five hundred pounds, the Governor may place tolls upon (not exceeding the above) by proclamation, and similarly on any future ferry whatever. (§ 5.) The provisions of the ordinance are applicable generally to future tolls. (§ 6.)

Exemptions.

The Governor and his suite, the Government agents, Civil Engineer, Commissioner of roads, the Surveyor General, and their respective staffs, soldiers and officers, their horses and baggage, on duty, and carriages and horses employed in the Queen's service in carrying them, are exempt from toll. The public mails are also exempt; but mail coach horses passing the toll bar, while returning from one station to another after conveying the public mails, are liable to toll: only horses *actually* drawing the mails are exempt. (§ 7. 41238,

Colombo, P. C. May 18, 1857; *Nell's Toll. Ca.* 31; and *P. C. Ca.* 108.)

Prisoners are not entitled to pass without payment of toll. (40194, *P. C. Kandy*, 9 *Sep.* 1858; *P. C. Ca.* 119.)

The government agent may direct the toll-keeper in writing to permit cattle or sheep driven to grass, persons with cattle, agricultural instruments, manure or seed grain for the cultivation of their lands, children going to and from school, persons employed in the telegraph department travelling on duty, headman's and fiscal's messengers travelling on duty, and ministers of religion, to pass without payment of toll; and all persons, vehicles, or animals, employed in the repairs of any road, bridge, canal, or ferry within ten miles of the toll station, shall pass without payment of toll, on production of a certificate of such employment from the officer superintending the work. (§ 7.) Also all volunteers, &c. on military duty are exempt. (§ 8.)

Toll stations.

The Governor, by proclamation, determines the places where toll shall be collected, and may alter them or establish others (§ 8); and if a toll bar is put upon a place different from that appointed by the proclamation, no fine attaches. (26639, *P. C. Caltura*, 14 *May*, 1862; *P. C. Ca.* 167.)

Return toll.

No return toll can be levied on the same day (computed from twelve o'clock at night to twelve o'clock of the succeeding night, and only half-toll for passing in a

like direction on the same day) on any passenger, nor on any vehicle, animal, or boat, unless it carries a different load. The party claiming total or partial exemption must produce a ticket signed by the toll-keeper. No toll paid for an unloaded vehicle, &c. affects its toll when it is loaded (§ 10).

In applying this clause, it must be observed that the schedule in clause the fourth levies the toll upon the vehicle drawn by a horse, and not upon the horse itself. The vehicle then only is free, and the horse, no toll having been paid upon him, is not free upon return, except he returns with the same vehicle. Such being the construction put upon the Ordinance, it follows that no previous payment of tolls for a horse can operate as an exemption for any portion of toll demandable upon a vehicle drawn by such horse, although the horse itself might pass toll free. (6095, *P. C. Colombo*, 18 *May*, 1847; *P. C. Ca.* 11.) In computing the day under this Ordinance, the day *begins* at twelve o'clock at night, and *ends* at twelve o'clock next night; thus, half the night, all the day-time, and half the following night, form one toll day; so that exemption from a payment at three p. m. expires at twelve o'clock at night next following, and not at three p. m. the next day. (13349, *P. C. Galle.* 7 *Jan.* 1852; *P. C. Ca.* 39.)

One station clearing another station.

The Governor may proclaim that toll paid at one given station may clear another given station. (§ 11.)

Toll-keepers.

The toll-keepers are appointed by the government

agent, or his assistant. If there are more than one keeper at a bar, the one wearing the badge must take the toll. If the toll is let, the toll-keepers are (on the renter's nomination) still appointed as before; they may also be removed by the renter on ten days' notice to the agent; and any one removing a toll-keeper without such notice is liable to a fine not exceeding *five pounds* (§ 12). The toll-keeper must wear a metal badge, engraved, in the English and native languages, with the name of his toll and station; he must suspend at the toll station a legible copy of the fourth clause, in the English and native languages, and a notice, with the names of the toll-keeper (§ 13). Tickets in the above languages, consecutively numbered, acknowledging the toll, the date thereof, and the road, &c. cleared by it, must be delivered gratis to any one paying toll. The agent may permit such tickets in the native languages only (§ 14). The collection of toll without *wearing* a badge, not suspending a copy of the fourth section and notice of the names of the toll-keepers, or wilfully removing, concealing, alterin or defacing them, or permitting them to become illegible, or demanding or taking toll not payable under the Ordinance, or a greater or less toll than authorized, or not granting a pass ticket, or subjecting any passenger, vehicle, animal, or boat, to unreasonable delay or detention, or taking or demanding toll from one exempt, are offences in a toll-keeper, for which he is liable to a fine not exceeding *five pounds;*

and on a subsequent conviction, not exceeding *ten pounds*. (§ 15.)

As to *illegal detention*, in one case where the toll-keeper demanded and took threepence as toll, but afterwards perceiving that one shilling was the toll, ran after, and seizing the passenger's bullock, stopt him, and for a quarter of an hour made him a prisoner, and collected a crowd about him, it was held that, as the passenger was liable to pay the toll demanded from him, the toll-keeper did not subject the passenger to any unreasonable delay or detention in breach of the Ordinance. (34,957, *P. C. Colombo*, 14 *Aug.* 1855, *P. C. Ca.* 78; *Nell's Toll, Ca.* 38.)

Evasion of toll.

Any one, not a toll-keeper, collecting tolls, or personating a toll-keeper, or wearing his or a counterfeit badge to get toll, is liable to a fine not exceeding *five pounds*. Any toll-keeper, parting with his badge for such purpose, or accessory to the illegal collection of toll, is liable to a similar fine.

Any person, liable to payment of toll, passing from any road, over any land, near or adjoining thereto (not being a public highway), with intent to evade such payment, or fraudulently or forcibly passing or taking his vehicle, goods, or boat, by, over, or through, any place duly appointed for the collection of tolls, or shall resist or make forcible opposition to any person duly appointed to collect tolls, in the execution of his office, is liable to a fine not exceeding *five pounds*. (§ 17.) * * *. In

making any charge for the evasion of toll, the *act done* must be specified, otherwise the charge will be too vague. (2,066, *Manaar*, 6 *Apr.* 1852; *P. C. Ca.* 41.) And the defendant should also be charged with passing, &c. "with intent to evade the payment of toll" to which he was liable. (24,890, *P. C. Negombo*, 19 *July*, 1859; *P. C. Ca.* 133.) It would seem that a person using a *road* is not liable to pay toll, unless he has passed the toll bar fixed by the Governor. (1,373, *Navellepittia*, 19 *Mar.* 1856; *P. C. Ca.* 89.) Thus, where a person drove within ten or fifteen fathoms of a toll bar, and walked over the bridge without paying toll, to a court-house to which he had to go every day as clerk, it was held that this was no evasion of toll. (*P. C. Ballepittymodere*, 28,118, *Apr.* 4, 1865.) But as *bridge and ferry* tolls, by the Ordinance, "shall be levied in respect of" the bridges and ferries specified therein, if a person crosses or passes over any bridge or ferry, he is liable to pay the toll for it, and cannot be free from or evade the same by stopping at the toll-collector's house on the other side of the river, and not passing through the bar placed there. (13,712, *P. C. Caltura*, 5 *July*, 1855; *P. C. Ca.* 75.) In this 17 clause of Ord. No. 22 of 1861, the words "not being a public highway" are to be read in conjunction with the word "land," and not with the previous word "road," which meant here the turnpike road itself. The clause is intended to prevent the evasion of the payment of toll by a trick, which is doubtless as common in Ceylon

as in England. A man who has used a turnpike road tries to avoid paying toll by turning off the turnpike road when he gets near the toll bar, and skulks round the toll station till he can get to the turnpike road on the other side of the toll bar, is, very properly, made liable to a fine. If there is a public highway running out of the turnpike road, a traveller may turn off into that public highway without being liable; but if he shirks the toll by turning off the turnpike road over any adjacent land, not being the soil of a public highway, he is liable to the penalty. (203, *P. C. Negombo*, 18 *July*, 1862, *P. C. Ca.* 171.)

If any one, not a toll keeper, conveys any passenger not in his service, or any vehicle or animal not his property, across any stream within a mile of any road, bridge, ferry, or place at which tolls are leviable, he is liable to a fine not exceeding *five pounds*. (§ 18.) To bring a case within this section, both the starting and landing place must be within a mile of the ferry; and if there is no evidence to show how far either is from the ferry, the case will be remanded for further evidence. (12,766, *Batticaloa*, 14 *June*, 1856; *P. C. Ca.* 93.) As a man may not hire his boat out to carry passengers, it is inferred that he may cross himself in his own boat, and therefore may also on his own legs on a sandbank. This is in fact the common law of England, in cases where tolls are not levied by Act of Parliament, but by a kind of presription by time out of mind. A fisherman

residing on the sea-shore has a right to pass along the shore to his canoe: it is no evasion of toll. (1,086, *Caltura*, 1 *Nov.* 1856; *P. C. Ca.* 99.) (See also 6,460, *P. C. Balticaloa*, 10 *Jnne*, 1857, ruling that a man may cross in his own boat within one mile of a ferry.)

No person, in order to avoid all or part of a toll, may remove goods from any animal or vehicle, brought to any road, bridge, ferry, canal, or toll station, to any other animal or vehicle on the opposite side, unless on payment of toll for the former as a loaded animal or vehicle; nor may any unload any so brought to reload them upon the animal or vehicle that brought them after it has passed the toll station, &c. except on payment of toll for an animal or vehicle with a load. Any one so transferring goods is liable to a fine not exceeding *five pounds*. (§ 19.) If goods are removed from a carriage on one side of a bridge, and loaded on a hackery on the other side, this is a clear evasion under the last above clause: it is not necessary that they should be removed in a vehicle of a similar description to create an evasion. (22,571 *Matura*, 21 *Sept.* 1858; *P. C. Ca.* 120.)

Prosecutions within one month.

Prosecutions under the Toll Ordinance, 1861, must be commenced within one month from the time of the commission of the offence. (§ 20.) A portion, not exceeding one half, of any fine recovered may be awarded to the informer. (§ 21.)

TIMBER.

Revenue from timber.

To preserve the Crown lands, and to protect the revenue derived from the timber grown on them, provision has been made relative to the felling and removal of such timber, and also relative to the removal of timber felled on the lands of private parties, in Ordinance No. 24 of 1848, and Ordinance No. 4 of 1864.

No one to cut timber on Crown lands without a license.

No person may fell or remove timber from any Crown land without obtaining a license from the Government agent, or some assistant Government agent of the province, specifying the name and residence of the licensee, the number and descriptions of the trees to be felled, the place where, the time when, and the terms on which the trees are to be felled or removed. The license is directed to a headman of the district or place where the Crown land is situate, and is paid for at a rate fixed by the Governor and Executive Council. The license may be refused by the licenser, if deemed advisable (§ 2). Any one felling timber without a license on Crown forests, is clearly liable under the Ordinance, whether he fells to remove it, or to clear the land; but a finding against him is only for the purposes of that case, and does not effect his claim to the land, if otherwise good. (*No.* 5561. *Chilaw, Apr.* 1857. *P. C. Ca.* 106.)

License to be produced to headman it is addressed to.

The licensee must himself, or by his servant or

agent, before felling, produce the license to the headman, with a list of the persons to be employed in felling and removing. The headman then dates and signs the license, and returns it to the licensee (§ 3). The licensee must not remove the felled timber without notice to the headman, who must inspect the timber, and who, if it is conformable with the license, grants to the licensee a permit of removal, and sends a duplicate permit to the licenser. (§ 4. For Form of Permit, see *Schedule B.*) If the permit is informal by the fault of the headman, the licensee will not be made to suffer for it. (20849 *P. C. Negombo.; 24 June*, 1857; *P. C. Ca.* 112.)

No removal without notice to headman, who inspects, &c.

Any person felling or removing timber on Crown lands without or contrary to the conditions of a license; or any licensee felling before producing his license to the headman, with a list of those intended to fell and remove; or so employing any person not on the list; or felling timber at a place not specified in his license; or any description or larger number of trees than such specified therein; or felling or removing after expiration of, or before the commencement of, the license; or removing without the notice to the headman; or, when removing timber, not producing the permit when required by the headman, or any justice of the peace, constable, or peace officer of the district or place where the removal is taking place; or any person having in his possession any timber felled on, or removed from,

Crown land, knowing the same to have been felled or removed contrary to the Ordinance, is liable, on conviction, to such punishment, by fine or imprisonment, with or without hard labour, as it is competent to the Court to award.* The timber must be confiscated. The court trying the offence may (if the timber has been seized) adjudge and determine whether it has been legally seized.

Nothing in the above clause extends to any person *bonâ fide* the servant or agent of any licensee. (§ 5, and see No. 4 of 1864, §§ 1 and 2.)

Under this clause, it has been determined that the prime mover is guilty as well as those actually engaged in breach of it. A headman caused timber to be felled, yet was acquitted by the magistrate on the ground that he himself did not engage in felling and removing, but only caused others to perform the work; the headman was, however, present directing his men, and afterwards himself adzed often and hoisted the timber, and felled and removed. The Supreme Court said "that all present at the time of committing an offence are principals, although only one acts, if they are confederates, and engage in a common design, *of which the offence is part.*" (*Russell on Crimes*, vol. i, p. 27.) And that though it is true that penal statutes are to be strictly construed, they must be so construed as not to

* Yet this clause, though not so expressed, leaves it to the Court to award less than its maximum fine or imprisonment at its discretion.

render them "inconvenient and against reason, or so as to *admit of any absurd consequences.*" (*Dwarris on Statutes*, pp. 754-5.) Further, they may even be taken by intendment to the end that "they should not be illusory, but should take effect according to the express intention of the makers of the statute." It would be inconvenient and unreasonable that the prime mover of the act should escape punishment, whilst the servants employed by him should be made liable. It would render the Ordinance illusory, if it were held not to apply to the very parties against whose malpractices it was necessary to provide, but only to his agents, possibly innocent agents in point of fact. Even the Ordinance in its context shows that the party employing others to fell and remove timber was as much brought under, and intended to be brought under, its provisions as the parties actually felling and removing such timber. See Sections 4, 5, and 7, and Schedule 4, where reference is made as well to the party licensed "to fell and remove any timber," as to the individuals "whom he intends employing to fell or remove the same;" the former being nevertheless always spoken of (the person licensed to fell and remove) as himself the feller and remover. The headman was accordingly found guilty, and, being a headman, fined five pounds. (19058, *P. C. Kowregalec*, 1 *Dec.* 1859; *P. C. Ca.* 135.)

Police Courts can try timber cases.

Doubts were entertained whether the police courts

had power to try offences against this ordinance, which are punishable under it by fine of five pounds, and also by confiscation or forfeiture of the timber. It is now determined that they have full jurisdiction in such cases to award both punishments. (952, *P. C. Avishawelle*, 10 *Sept.* 1850; *P. C. Ca.* 30.) Thus, the imposition by a police court, under the Ordinance, of several fines of three pounds, and confiscation of timber to the value of *thirty pounds*, has been upheld. (25471, *P. C. Colombo*, 8 *Jan.* 1853; *P. C. Ca.* p. 64.) When defendants have been acquitted of illegally removing timber, the police court clearly cannot seize and confiscate the timber, and the same should be forthwith returned to the defendants. (9779, *P. C. Avishawelle*, 8 *Jan.* 1857; *P. C. Ca.* p. 103.) But it must, at the same time, be observed that it does not follow that because the defendants are *convicted* the court can of necessity confiscate the timber. It would seem that it must, in certain cases, simultaneously or previously determine the legality of the seizure (§ 5). For example: suppose the headman granted a permit for the removal of timber felled contrary to the license, that it was removed under the permit, and then *bonâ fide* sold to another who had seen the permit; the licensee would be liable for infringing the license; but could the timber be seized? Plainly such a question must be determined before confiscation could take place.

Confiscation.

Possessing timber knowing it to have been improperly felled or removed.

One of the offences under the above clause is the

possession of timber, knowing it to have been felled or removed contrary to the Ordinance. In connection with that offence is the provision (in § 12) that "if in any prosecution or proceeding any question shall arise as to whether the timber felled or removed was felled or removed from Crown land, the proof that the same was not felled or removed from Crown land shall be on the party against whom such proceeding or prosecution shall be had." On this it has been held that the fact of finding any timber on any man's premises would not throw on him the burden of proving that the timber was *not* felled on or removed from Crown land. Such a consequence would be most oppressive and injurious to trade; nor can it be reasonably deduced from the language of the Ordinance. The Crown must first establish by evidence such a *prima facie* case of possessing timber, knowing it to have been improperly felled or removed, as will throw on the defendant the necessity of proving that the same was not felled or removed from Crown land. (7253, *P. C. Chilaw*, 7 *Jan.* 1859; *P. C. Ca.* 125.) Thus, when the timber seized was of a peculiar character, and the circumstances under which it was found buried in the ground, and submerged in a pond, might fairly have constituted a *prima facie* case of guilty knowledge, if the yard and pond had been proved to have been under the control of the defendant at the time the timber was supposed to have been buried, and at the time when it was found, as to have made him

accountable for the possession. Wanting such proof, no *prima facie* case was established. (7352, *P. C. Chilaw*, 17 *Jan.* 1859; *P. C. Ca.* 126.)

In cases of emergency, certain formalities may be dispensed with by the licenser.

Any licenser, unable from unforeseen accident or misfortune to remove timber lawfully felled by him, may leave it in the forest for removal at a time to be appointed by a note on the license by the licenser, who may, however, refuse the note. (§ 6.) As it is difficult in some places to furnish lists of intended workmen, the licenser may state in writing, or on the license, that such a list, or notice of removal, or a headman's permit, shall be required; and then the licensee may proceed without these formalities. (§ 7.)

Forging licenses.

Any person forging or counterfeiting, or causing to be forged or counterfeited, any license or part of a license, or any writing or signatures which the licenser is by the Ordinance authorized or required to make or put on any license, or if any person *shall, knowingly and without lawful excuse (the proof of which excuse shall be upon the party accused)*, have in his possession any false, forged, or counterfeit license, or any genuine license, containing any such forged or counterfeit writing or signature, resembling, or intended to resemble, either wholly or in part, any license, or any writing or signature of any licenser put on any license, is liable, with his aiders and abettors, to be imprisoned, with or without hard labour, for a term not exceeding five years. (§ 11.)

In any prosecution or proceeding under the Ordinance, the proof that a license has been obtained lies on the defendant. And proof that timber was not felled or removed from Crown lands also lies on the defendant. (§ 12; see *ante*, p. 74.) And if any question arises in such prosecution or proceeding as to the title to land on or from which timber has been felled or removed, the Court having jurisdiction to impose the fine shall, *for the purposes of the prosecution*, have jurisdiction to try and determine any such question of title. The decision is not to be received as evidence of title, or pleaded in bar, in any civil suit or proceeding in which the title is in issue. (§ 12.)

Removing timber from private land.

Much valuable timber is felled on Crown lands, and removed under pretext that it has been felled on private lands. To prevent these frauds, no one may remove timber from his own or another private person's lands *which may have been felled thereon*, without a permit, which must accompany the timber. A permit would not be required for the removal of wood openly purchased from a trader in a town, the timber not having been felled on the trader's lands, but brought from elsewhere, and sold to the trader by another party. (20,881, *Negombo*, 18 *May*, 1857; *P. C. Ca.* 108.)

The form of the permit is in schedule of the Ordinance: the permit is granted by the headman of the district or place where the land is, on the joint application of the timber-owner and land-owner, or occupier,

when different, or on the application of the owner or occupier when not. Any so removing timber, without a permit, or after its expiration, or not producing the permit to any justice of the peace, headman, constable, or police officer of the district, or place of the removal, is liable, on conviction, to such punishment, by fine or imprisonment, with or without hard labour, as it is competent for the Court convicting to award. (4 of 1864, §§ 1 and 2. See note, *ante*, p 71.) The timber may be confiscated; and the Court may determine whether it has been legally seized. (See cases cited above, p. 73, § 8.) To prevent inconvenience by these restrictions, the Governor and Executive Council may, by proclamation, exempt particular districts, or particular timber, from their operation. (§ 9.)

Governor may exempt certain districts.

All headmen and police officers within their jurisdictions must arrest and take before the police court any person (not a servant or agent of a licensee) whom they find felling or removing timber on or from Crown land without or contrary to a license, or removing timber without a permit, when it is required. The headmen or police officers must seize confiscated timber, and also all timber not removed from Crown lands in proper time. All timber so seized is deemed and taken to be forfeited to the Crown, and may be sold under the orders of the government agent, or assistant agent, unless the person from whom it is seized, within fourteen days from the seizure, gives the govern-

Headman to arrest unlicensed persons felling timber,

and seize timber illegally felled, or unduly removed.

ment agent, &c. notice in writing that he disputes the legality of the seizure; then the sale is to be stayed until that is determined by the Court before which the person may be tried for any offence against the Ordinance. Any headman or police officer (without lawful excuse) omitting to perform the above duties, is liable to a fine not exceeding *five pounds*. (§ 10.)

Informer's share.

The informer is entitled to one half the fines and forfeitures actually recovered under this Ordinance. (§ 13.)

Limitation of prosecution.

No prosecution can be instituted against any person for any offence against the Ordinance cognizable by the police court, unless the same is commenced within two years from the commission of the offence. (§ 14, and § 3 of 4 of 1864.) On this account, the date of the offence should be stated in the plaint. (5,034, *P. C. Manaar*, 15 *Aug.* 1861.)

Ordinance not to extend to cocoa-nut trees, &c. nor to firewood.

This Ordinance does not extend to cocoa-nut or areca-nut trees; nor to brushwood, or wood commonly used for and cut for firewood; nor for stakes cut for fencing land; nor to wood cut for making ploughs or agricultural instruments in common use; large timber cut for such marketable purposes as staves for coffee casks, coffins, &c. under this exception. (4,642, *Avishawelle*, 18 *Dec.* 1852; *P. C. Ca.* 63.) But this proviso does not allow satin-wood, iron-wood, ebony, jackwood, or other valuable description of timber trees, being cut or removed contrary to the Ordinance, on the excuse that it has been cut or removed for fencing land. The Governor

and Executive Council may proclaim tracts of forest, in which no wood shall be cut or removed for firewood, fencing, or making ploughs or agricultural implements, or for any purpose whatever: and also may proclaim tracts in which no satin-wood, iron-wood, ebony, jack-wood, or other valuable description of timber tree, shall be cut, or removed for making ploughs or other agricultural instruments. (§ 15.)

STAMPS.

General provisions.

Duties specified in the schedule to be levied.

The instruments mentioned and described in the schedule to the "*Stamp Ordinance*, 1861" (except those exempted), must be written or printed upon paper, or other material, stamped with the amounts respectively set out in the schedule. (§ 4.)

Writing not duly stamped.

Except as otherwise provided, no deed, instrument, or writing unduly stamped,

Civil proceedings.

can be received as creating, transferring, or extinguishing, any right or obligation, or as evidence in any civil proceeding in a Court, or can be acted upon by such Court; though they are receivable as evidence in a criminal proceeding. (§ 6.)

Criminal proceedings.

The words of this clause are not so strong as similar clauses in former stamp statutes, nor in the English Acts, which are that these writings shall "not be pleaded, or given in evidence, or admitted, in any civil proceeding in Court, to be good or available in law or equity, unless the same be duly

stamped. (17 and 18 *Vict.* c. 83, and *Stamp Ordinance*, 19 of 1852.)

Why this well-known form of words has been superseded is not clear; but two rules founded on the old form still plainly are in force: these are, *First*—a document which is lost, or not produced on notice, will be presumed to be duly stamped until the contrary is shown. (See *Best*, 310, citing *Pooley v. Goodwin*, 4 *A. and E.* 94; *Hart v. Hart*, 1; *Hare*, 1; *R. v. Long Buckley*, 7 *East*, 45.) *Secondly*—although unstamped documents are not admissible in evidence for the purpose of proving any fact *directly*, yet it is otherwise for collateral purposes; as, for instance, to show illegality or fraud in a transaction of which the document forms a part. (*Marshall*, 640; *Best*, 310.) It may be said that in that case the document would be admitted to extinguish a right or obligation; but that is not so, any more than under the old clause it was by such a rule made available in law; the rights and obligations referred to in § 4 are plainly rights and obligations on the face of the document itself. Both the above authors cite *Coppock v. Bower*, 4 *M. and W.* 361, as the leading case on this point; and also the following passage from Lord Abinger's judgment. "The object both of the statute and common law would be defeated, if a contract void in itself could not be impeached because the written evidence of it is unstamped and therefore inadmissible. If that were so, a party entering into such agreement might avoid the consequences

Two leading rules as to stamps.

of its illegality by taking care that no stamp should be affixed to it. I think, therefore, that in all cases where the question is whether the agreement is void at common law, or by statute, and the party introduces it, not to set up and establish it, but to destroy it altogether, there is no objection to its admissibility. As in the case of a conspiracy, or an agreement to commit a robbery, on no principle could it be contended that a contract between the parties for the commission of such an offence would be admissible without a stamp. I think the stamp acts are made for a different purpose—they are made to prevent persons from availing themselves of the obligatory form of agreement, unless the agreement is stamped."* The following examples of this principle may be given: A paper writing acknowledging a balance due is admissible for the collateral purpose of showing the balance due, though not as a promissory note. (*Marshall*, 83 *and* 641.) So a memorandum of payment of interest on the back of an unstamped promissory note is admissible as an admission of the principal sum. (*Manley v. Peel*, 5, *Esp.* 121.) So an entry in a sales' book, though containing mention concerning time of payment, is admis-

* This is a plain rule of *justice;* and if the words "no deed, &c. shall be received as extinguishing any right," unless duly stamped, be taken to exclude unstamped documents tendered for *collateral* purposes, that would be a reading "leading to manifest injustice," contrary to the doctrine laid down by Parke. B. in *Perry v. Skinner.* Z. M. and W. 476.

sible to prove the sale, though not as a promissory note. (*Marshall*, 641.) So an acknowledgment of a loan, which *per se* required no stamp, was admitted, though it had an agreement added to it as to the mode of re-payment. (3367, *D. C. Colombo*, *Feb.* 1851.) Unstamped receipts are admissible to prove over payments, or to refresh a witness's memory. (*Clarke v. Hougham*, 3, *D. and K.* 323; *Maugham v. Hubbard*, 8, *B. and C.* 14.) So a letter would be admissible, if produced not for the purpose of an agreement, but to increase by its collateral evidence the probability of an event having taken place; as, for example, that certain freight to which the letter alluded had been earned. (*Morgan, Dig.* 70; *Marshall*, 641.) Similarly, letters which contain an agreement which is invalid at common law, or by statute, or which are not in law sufficient evidence to prove even a binding agreement (as, for example, if they show a guarantee, but not its consideration), are admissible without a stamp. (13871, *D. C. Badulla*, 30 *June*, 1852.) Generally unstamped documents are admissible to prove fraud. (*R. v. Gompertzy*, 16 *L. J. A. B.* 121; *Holmes v. Sixsmith*, 21 *L.* 7, *Exch.* 312; *Watson v. Poulson*, 15 *Jnr.* 1111.)*

Effect of unstamped documents admitted in pleadings.

As a corollary to the above principles, may be added this: "That where a document requiring a

* For further cases on this important subject, see Tilsley on Stamps, 2nd Ed. 298, and Tilsley's Stamp Acts, p. 63.

stamp is admitted in pleading, the opposite party is not bound to produce it; and he cannot be damaged by the stamp being insufficient. (930, *C. R. Mallagam*, 6 *June*, 1862.) And similarly any objection to the want of a stamp must be disposed of before the papers are read; and where a paper has been read in evidence to which counsel's* attention has been directed, he would not be allowed to object afterwards to the want of a stamp. (13871, *D. C. Badulla*, 17 *Oct.* 1851, citing *Tasso v. Wagner* 1, *A. and E.* 116.)

Erroneous stamping.

Documents stamped with stamps of an improper rate of duty, but in the whole of equal or greater value, are valid. (§ 7). The court, as a court of equity, has treated erroneous stamping with leniency, and also because the stamp laws in Ceylon do not render deeds, &c. void when stamped insufficiently, but only prohibit them to be received as directly effectual or read in evidence until they have been duly stamped; and the proper time to take the objection to the insufficiency of the stamp is at the trial before the instrument is read in evidence. In the English courts of equity a cause has been allowed to stand over to enable a party to get an instrument properly stamped. (11323, *D. C. Caltura* 31, *Dec.* 1844, differing from 2734, *D. C. Batticaloa*, *Morgan Dig.* 95.) Thus, if a suit is instituted in a wrong class under the table of stamps, that is not of itself sufficient ground for a dismissal;

* It would now be the secretary's.

but the plaintiff ought rather to be called upon to supply the additional stamps required (378, *D. C. Matura*, 20 *Aug.* 1834; *Morg. Dig.* 19); and the court will stay proceedings to enable him to stamp even documents necessary in the case. (20831, *D. C. Kandy Austin*, 121.) Thus, also, when a professed deed of revocation turned out to be a deed of sale, the stamp being sufficient for the latter purpose, it was held good. (25217, *D. C. Kandy Austin*, 173, *vide etiam*, 29420, *D. C. Kandy*, *Aug.* 25, 1857; *Austin*, 212.) On the similar principle it has been held that when a document has a two-fold operation, and the stamp is sufficient to protect one of the objects which it contemplates, it may stand good for so much as is protected by the stamp. (6814, *Prov. Court, Jaffna*, 9 *Dec.* 1838; *Morg. Dig.* 11.)

All writings, &c. to be on or near the stamp.

All writings or printings must be as near as conveniently may be to the stamp; upon that, any person writing or printing anything contrary to the law and meaning of the Ordinance, shall be liable to a penalty not exceeding *five pounds*. (§ 8.)

No document to be issued by public officer unless stamp duty is paid.

No document requiring a stamp is to be issued by any public officer, unless the duty is first paid, or until a paper, properly stamped, has been supplied and delivered to the public officer. (§ 9.)

Blank stamps not to be annexed to instruments.

It is not lawful to annex to any document, stamped paper, or other material, to make up the duty required, nor will it, by such means, be deemed to be made up;

but every paper, &c. forming part of the document liable to be stamped must have the whole or part of the instrument upon it. (§ 10.) This is the same as the first part of § 19 of *Reg.* 4 of 1827, on which it was decided that a document was insufficiently stamped where there was another half-sheet of the same paper on which the instrument was written, and hence not annexed; but the Court thought that, according to the latter clause, the instrument itself must bear the proper stamp, which it did not in that case. (28,096, *D. C. Colombo*, 8 *July*, 1840; *Morg. Dig.* 297.)

Printed forms may be stamped before use.

Printed forms of instruments liable to stamp duty may be stamped before they are used. (§ 11.)

BILLS, NOTES, DRAFTS, RECEIPTS, ETC.

Foreign bills.

The duties imposed on bills drawn out of the colony are payable by affixing adhesive stamps on all such bills as shall be paid or negotiated in the colony. (§ 12.) A bill purporting to be a foreign bill must be stamped as a foreign bill, though drawn within the colony. (§ 13.) The holder of an unstamped foreign bill must, before he presents it for payment, or negotiates it, affix to it a proper adhesive stamp; and any person negotiating a foreign bill must, before he delivers it, cancel the stamp by writing his own name or initials, or those of his firm or principal on it, and the date of the day and year that he

does so. A person not duly stamping a foreign bill, or cancelling a stamp, is liable to a penalty not exceeding *twenty pounds*. And any one taking a foreign bill unduly stamped, or with an uncancelled stamp, cannot recover upon it, or make it in any way available. (§ 14.)

Any person drawing a foreign bill purporting to be drawn in a set, and not drawing and issuing the whole set duly stamped, and any person negotiating such bill in the colony and not *at the same time* delivering the whole set duly stamped, must forfeit *fifty pounds;* and any one taking any such bill as payment, security, or by purchase, or otherwise, without receiving the whole set, cannot recover upon it, or make it available for any purpose. (§ 16.)

Inland bills, &c.

Inland bills of exchange, drafts, cheques, orders, or promissory notes for the payment of money, must be made on paper already duly stamped; except the person making, signing, issuing, accepting, such unstamped bills, &c. or permitting, or paying, or causing any of these things to be done, can persuade the Commissioner of stamps that such things took place from urgent necessity or unavoidable circumstances, and without any intention to evade the stamp laws; otherwise such person is liable to a penalty not exceeding *twenty pounds*, and the unstamped bill cannot be recovered upon or made available. The Commissioner of stamps, when persuaded as above, and if the bill, &c. is not accepted or paid, and is brought to him within *fourteen* days of its date, may stamp the bill, &c. on the payment of the proper stamp

duty and *five shillings* extra. (§§ 15 and 29.) These clauses do not apply to foreign bills of exchange, nor to cheques or orders for payment of money to bearer or order on demand: the latter may have an adhesive stamp fixed on them for a duty of one penny. (§§ 15 and 21.)

Post-dating bills, cheques, notes, &c.

Any one making and issuing, or causing to be made and issued, any post-dated bill of exchange, draft, cheque, or order, or promissory note for the payment of money, unless *duly** stamped as a *bill* or *note*, forfeits a sum not exceeding *twenty pounds*. (§ 17.) And any person making or issuing, or causing to be made or issued, any post-dated bill, draft, cheque, or order, for the payment of money *to bearer on demand* upon any banker or person acting as a banker, or which shall not truly specify and express the place where it is issued, unless duly stamped as a bill or note, forfeits a sum not exceeding *twenty pounds:* any person knowingly taking any such document in payment or as security, forfeits the same; and any banker paying, or causing or permitting to be paid, any such document, knowing it to be post-dated, forfeits *one hundred pounds*, and shall not be allowed the moneys so paid in account against the person by or for whom such document is drawn, by his executors, administrators, creditors, or persons representing creditors in case of bankruptcy or insolvency, or any other person claiming under him. (§ 18.)

Stamp on bank notes and bank bills.

Notes and bills issued by bankers, or in circulation

* *i. e.* stamped from its true and real date.

when the Ordinance came into force, are liable to stamp duties, or composition for stamp duties, as promissory notes for payment on demand. (§ 19.)

The penny stamp may be impressed or adhesive.

The penny stamp on drafts, cheques, or orders to bearer, or to order on demand, and on receipts, may be denoted either by an impressed or adhesive stamp. The Commissioner of stamps must provide both kinds. (§ 20.)

Cancelling adhesive stamp.

Where the penny adhesive stamp is used on draft, cheque, order, or receipt, the person signing, making, or giving such, must, before delivering it out of his hands, custody, or power, cancel the stamp, by writing thereon his name, or that of his firm, or part of such name, so that the stamp cannot be used again: any such person not *bonâ fide* effectually cancelling the stamp forfeits *ten pounds.* (§ 22.) And where any bill, draft, cheque, or order, with an adhesive stamp on it, is presented for payment, the person paying it must write, or impress, or cause to be written or impressed on the stamp, the word "paid," so as effectually to cancel it, under a penalty not exceeding *twenty pounds.* (§ 23.)

Banker may affix stamp to drafts, &c.

When any unstamped draft, cheque, or order, requiring a penny, comes to a banker (or person acting as such), he may put the stamp upon it, cancel, and pay it, and the draft, &c. is then valid; but this does not relieve any person from any penalty incurred. (§ 23.)

Frauds in the use of adhesive stamps; penalty.

Frauds in the use of adhesive stamps, such as fraudulently removing them from any document, &c. or fixing the removed stamp on another document, so that the

stamp is used again, or selling, offering for, or uttering any removed stamp, or uttering any instrument with a removed stamp, with guilty knowledge, or causing, procuring, or assisting in the above acts, or any fraudulent act intended to defraud the Crown in respect of adhesive stamps, subjects the offender, over and above any other penalty, to a fine of *twenty pounds*. (§ 25.)

Indorsements, purporting to be true, on drafts, &c. on banks, to order on demand, authorize payment.

Any draft, cheque, or order, payable to order on demand, presented for payment, and purporting to be endorsed by the payee, is sufficient authority to a banker to pay it to the bearer; and the banker is not bound to prove the genuineness of the indorsement. (§ 26.)

Writing, &c. unstamped receipts, &c. Penalty.

Any one writing or signing a receipt, discharge, or acquittance (or causing the same to be done), on unstamped paper, is liable to a forfeit not exceeding *five pounds*, if the receipt, &c. is for a sum under a hundred pounds; or not exceeding *twenty pounds*, if over the hundred pounds. (§ 28.)

In case of necessity, &c. Commissioner of stamps may stamp unstamped receipts, &c.

When the Commissioner of stamps is satisfied that any bill of exchange, draft, cheque, order, promissory note, or receipt given upon a payment, is unduly stamped from urgent necessity, or unavoidable circumstances, and not to evade duty, and that such bill, &c. has not been accepted or paid, and if it is brought to him to be stamped within fourteen days from its date, he may, on payment of the proper duty, and a further sum of five shillings, cause the bill, &c. to be stamped; and it then becomes valid. (§ 29.)

CONSIDERATION AND VALUE IN DEEDS AND INSTRUMENTS.

Consideration and value to be truly set forth in instruments.

In all cases of sale or gift, where the duty (in case of sale) is in proportion to the purchase, or consideration money expressed in the instrument, or (in case of gift) to the actual value of the property, the purchase or consideration money, or the said actual value, must be truly set forth and expressed at length *in words* in the instrument of conveyance. If this is not done, or if the true transaction between the parties is in any way concealed or misrepresented to evade stamp duty, the purchaser, seller, donor, or donee, each forfeits a sum not exceeding *fifty pounds*, and are each liable to *five* times the excess of duty payable on the instrument, beyond the duty actually paid. This quintuple duty is a Crown debt. (§ 30.)

Parties informing indemnified.

Any one of the above parties turning informer is not only to be indemnified and discharged from his liability, but shall be rewarded out of the penalty or quintuple duty, to such extent as the Governor shall think fit. (§ 31.)

Purchaser may recover back consideration not stated.

Where the full purchase or consideration money is not truly expressed, &c. the purchaser, or his heirs, executors, or administrators, may recover from the seller, or his heirs, executors, or administrators, the difference not expressed, or the whole, if no part is expressed. (§ 22.)

Penalty on notaries and others not inserting true consideration.

Notaries and others, employed in preparing instruments, knowingly and wilfully inserting, &c. or causing to be inserted, other than the true purpose or consideration money (however paid, secured, or agreed), or the actual value in the case of gift, or assisting in the above acts, forfeit *one hundred pounds.* (§ 33.)

No penalty if no evasion of duty.

But no one is liable to any such penalty unless less than the true duty is paid, even if the full purchase money, &c. or value, has not been expressed. (§ 34.)

PROBATE AND LETTERS OF ADMINISTRATION.

Duty on probates, &c.

No court can grant probate or letters of administration without first requiring and receiving from the applicant, or other competent person, an affidavit that the deceased's estate, exclusive of that the deceased held as trustee and not beneficially, and without deducting his debts (except those due on mortgage or notarial bonds), is of the value of a sum specified to the best of the deponent's knowledge, &c. so that the proper stamp duty may be paid by the executor or administrator. (§ 35.)

Proceedings where too much duty is paid on probates, &c.

If, from too high an estimate of the deceased's estate, too much duty is paid, the person paying the same may, within six months after the true value has been ascertained, produce the probate or letters to the Court which granted them, and, on proof of excess duty, that Court may write on such instrument the true dnty, and

on production of that to the Commissioner of stamps, he may restamp the instrument, and repay the difference of duty in excess. (§ 36.)

The same where too little duty.

In like manner, when too little duty has been *ignorantly* paid on a probate or letters of administration, the Court may, on proof as above, send the instrument to the stamp office, without exacting penalty; and on the payment of difference deficient, it may be fully restamped. (§ 37.)

Duty allowed when paid on probate, &c. more than once.

If probate or letters of administration in respect of the same estate are inadvertently taken out in more than one Court, or more than once in the same Court, or if administration has been obtained in ignorance of an existing will requiring probate, and more than one duty has therefore been paid, the Commissioner of stamps, on proof on oath to him, and satisfactory delivery to him of the useless instrument, and production of that valid, may cancel that which is useless, and repay the stamp duty. (§ 38.)

Penalty for not getting proper stamp affixed to probate.

When too little duty has been paid on probate or administration, the executor or administrator must, within six months after the discovery, apply to the proper Court to have the proper stamp affixed; otherwise, in addition to the penalty in § 41 *(post)*, he is liable to a further penalty of *twenty pounds;* and the Court must not transmit the instrument to be properly stamped unless the penalties have been paid into Court; and the Commissioner of stamps must not affix the proper

stamp unless on a certificate of that payment under the hand of the Judge of that Court. Upon the production of such a certificate, and payment of duty, the said Commissioner may stamp the instrument. (§ 39.)

Duty returned on account of debts, if claimed within three years.

If it is proved to the Commissioner that an executor has paid debts other than those first scheduled and deducted from the estate, such debts (being payable by law) and amounting to such sum as being deducted from the estate shall reduce the duty to a less sum than was actually paid, the Commissioner must return the difference, if claimed within three years after probate, letters of administration, or record of inventory; and where the executor or administrator has been prevented by legal proceedings from settling the estate, the Commissioner may grant further reasonable time. (§ 40.)

Terms on which instruments may be stamped after execution.

Where an instrument is made or signed on paper, &c. before it is duly stamped, the whole or deficiency is recoverable as a Crown debt; with an additional penalty of *ten pounds* for every sheet or piece of paper, &c. on which the instrument is written. The Commissioner, on payment of the deficiency and penalty, may cause the document to be stamped. (§ 41.)

Documents innocently unduly stamped.

If a document has been innocently unduly stamped, and not to defraud the revenue, and is brought to the stamp Commissioner within twelve months of execution, and these facts are proved on oath to his satisfaction, then, on payment of the full stamp duty, the Commissioner of stamps may, with the sanction of the Governor,

on full payment, remit the whole or any part of the penalty, and fully stamp the instrument. (§ 41.)

Instruments executed abroad stampable within two months after arriving in colony.

The Commissioner of stamps may stamp any instrument legally made out of the colony, upon payment of proper duty and without penalty, within two months of the document coming to Ceylon, proof being first made to the Commissioner of all the facts. (§ 42.)

Instruments may be sent to the government agent to be stamped.

If it is inconvenient to send an instrument to the Commissioner of stamps to be stamped, or to pay to him duty or penalty, the party may pay the duty to the government agent or his assistant. The government agent then must transmit the instrument to the Commissioner, and when duly returned shall deliver it to the party. (§ 43.)

STAMPING DOCUMENTS TENDERED AS EVIDENCE.

Stamping documents at a trial.

On any document liable to duty, but unduly stamped, being produced at a trial as evidence, the officer of the court bound to read the document must call the Judge's attention to the deficiency, if not already noticed by the Judge; and the instrument cannot be received in evidence until the stamp duty deficient, and the penalty incurred, together with an additional penalty of ten shillings, are paid into court.*

* Full opportunity for stamping must be given, an unstamped document cannot be treated as a nullity. (*Delay v. Alcock*, 24, *L.* 7, *A. B.* 68; *R. v. Watts*, 28, *L.* 27, *M. C.* 56.)

For these payments the officer of the court gives a receipt; the document (save on other just grounds) becomes admissible, and an entry is made on the record. A return is made by the court monthly of all such payments. (§ 45.) These clauses do not extend to documents that cannot be stamped after execution.

On payment into court of duty and penalty, document becomes receivable.

The judge may allow a party tendering a document unduly stamped (but stampable after execution), and previously ignorant of any objection on account of insufficient stamping, time (not exceeding seven days) for the payment of the deficiency and penalties, on the party's own undertaking to pay at the appointed time. The document is then admissible (save on other just grounds), and the trial proceeds. On payment, the above receipts are given and recorded; but if payment does not take place, all evidence relating to the document is struck out, judgment ensues, and the duty, &c. is levied by *parate* execution, free of duty. (§ 46.)

Judge may sometimes allow time to pay duty and penalties.

REMOVAL OF DOUBTS AS TO SUFFICIENCY OF STAMPS.

Any party to an instrument (stamped or unstamped) other than probate or letters of administration, may before execution apply in writing to the Commissioner for his opinion, which the Commissioner must give in writing, and must assess the duty and penalties, if any. (§ 47.) If the party does not like his opinion, he may,

Any party may apply to Commissioner to declare the duty upon any instrument.

Appeal.

within ten days of his knowing it, appeal to the Supreme Court (giving due notice to the Queen's Advocate). That court determines the question and the costs. (§ 48.)

Stamp to remove all doubts.

On a tender of ten shillings to the Commissioner, and of the deficient duty and penalty, the latter must stamp such instrument with "Stamp duty finally settled," and it must be exhibited to the District Court to have that stamp recorded on the duplicates. (§ 49.)

Commissioner may require proofs before assessing duty on an instrument.

Where application is so made, the Commissioner, before assessing the duty upon any instrument, may require proof by affidavit that the facts upon which the duty depends are truly stated. He may also direct an appraisement to be made, and may refuse stamp, except the full duty leviable, if the contents were true, is paid.

Proviso as to proof.

(§ 50.) The affidavits cannot be used against the party making it, for any other purpose; and on such full payment, the party is relieved from all penalty, &c. incurred by him by reason of any defective statement in the instrument. (§ 51.)

LICENSED DEALERS IN STAMPS.

License to deal in stamps.

The Commissioner of Stamps may license persons to deal in stamps. The licensee enters into a bond with the Crown of £100 not to sell, offer for sale, exchange, keep, or have in his possession, any stamps except those obtained from the government or a licensed dealer.

The license is revocable by the Commissioner. (§ 52.) The license specifies the name and address of the licensee, and truly describes the house and shop where he may sell stamps, and not elsewhere. (§ 53.) Any person selling or exchanging without, or except in the terms of, the license, forfeits five pounds for each offence (§ 54); though any one employed to prepare an instrument liable to stamp duty may charge his employer with the stamp impressed thereon without a license. (§ 55.) Each stamp vendor before delivering stamps or stamped paper, must write his name or initials and the date of sale thereon. (§ 56.) The government discount allowed to stamp vendors *on prompt payment* is *two and a half* per cent. on sums amounting to *ten* pounds and under *twenty* (in cases authorized by the governor), and *five* per cent. on sums of twenty *pounds* and upwards. (§ 57.) The vendors must paint their names (in letters an inch high and broad in proportion) on a conspicuous part of the place of sale, with the words "licensed to deal in stamps," with similar words in Singhalese and Tamul. Any vendor omitting this forfeits *ten* pounds. If there are partners, the name of one of them is sufficient. (§ 58.) Any unlicensed person painting these or any other words exposed to public view, importing that he deals in stamps, forfeits *ten* pounds for every day he so offends. (§ 59.) If the legal representative of deceased, bankrupt, or insolvent licensed vendors, or

Particulars in license.

Dealing in stamps without license.

Stamp vendors to endorse stamps.

Government discount to dealers.

Licensed dealer to paint his name on his door.

Pretended vendors punishable.

Return of stamps, value to deceased and other vendors.

if a vendor whose license has been revoked, within three calendar months of the expiration or revocation of the license, transmits his stamped paper to the stamp office, the stamped duty thereon, less the discount, will be returned. But proof may be demanded that such paper was actually in the possession of the person whose license has expired, or been revoked, and that it was purchased from the proper authority. (§ 60.)

Commissioner may grant search warrant against licensed dealers.

If the commissioner is informed, on oath, that any licensed vendor has any counterfeit stamp, he may issue his search warrant, and cause doors to be broken open to effect the search, and all officers of the police or of the peace are bound to assist. (§ 61.) The officers executing this process are, if required, to give acknowledgment of the stamps seized, and any licensed vendor whose premises may have been searched is entitled to be paid by the commissioner the amount of genuine stamps seized, or to have them returned to him. (§ 62.)

OTHER PENAL PROVISIONS.

Fraudulently affixing stamps or erasing names, &c.

Any person fraudulently using stamps torn, &c. from other paper; or fraudulently erasing any thing on a stamp so as to use it again, then he and his abettors are liable to seven years transportation, or to imprisonment, with or without hard labour, not exceeding five years. (§ 63.)

Unlawfully hawking of stamps.

Any licensed or unlicensed person hawking stamps away from the place of business specified in his license is liable to five pounds fine over and above other penalties, and any one may arrest him and take him before a magistrate in that jurisdiction; and if he does not pay up his penalties immediately on conviction, he may be committed for not less than one, nor more than three, months, until the penalty is paid. All stamped paper found upon him is to go to the Commissioner; and if the offender cannot be taken, the penalty is recoverable in the same manner as other penalties. (§ 64.)

Perjury.

Perjury under this Ordinance is punishable in the same way as other perjuries. (§ 65.)

Forgery.

Forging a stamp die, or any part of it, or any stamp instrument used by the Commissioner; or causing such an offence; or knowingly and without lawful excuse (the *onus* lying on the accused) possessing any or part of any stamp die, or any instrument intended to forge stamps; using any forged die, or knowingly using, selling, or or having in possession any paper stamped with a forged die; or having in possession any paper fraudulently stamped, subjects the offender to be transported for life, or any period not less than seven years, or to be imprisoned (with or without hard labour) for any period not exceeding five years, nor less than two years. (§ 66.)

Misappropriating money received for stamp duties.

All persons receiving moneys for stamp duties and neglecting or omitting to appropriate such money to the

payment of such duty, or improperly withholding or detaining the same, is responsible for it, and it becomes a Crown debt. And, on application by the Queen's Advocate upon sufficient affidavit, the District Court having jurisdiction may issue a rule to the defaulter to show cause why he should not deliver an account on oath to the Commissioner, and pay to him the duty wanting. The Court may examine the defaulter as to the account, make the rule absolute, and enforce payment by attachment or otherwise. (§ 67.)

Spoiled stamps, allowance for.

Persons possessing stamped paper, &c. unintentionally spoiled, unfitted for use, not used for any other purpose, or which have been used for inchoate instruments, bills, and promissory notes, may, within two months of the date or making of the instrument, obtain good stamped paper in exchange from the commissioner; the spoiled stamps being by him cancelled. (§ 68.) He may also, with the sanction of the Governor, refund the value of the spoiled stamps, less the percentage; and may do the like with the like sanction for stamps not immediately wanted and purchased within the three months next preceding. (§ 69.)

Suitor *in formâ pauperis.*

When a suitor *in formâ pauperis* has recovered judgment for costs, and failed to repay the value of the stamps advanced to him, or to take proper steps to recover it from the losing party, the court may order him to pay within a month of the service of the order, and in default may issue parate execution against the person

and property, free of duty. (§ 70.) The same when the pauper has not either repaid the stamp duty, or duly prosecuted his suit to judgment within a reasonable time. (§ 71.)

The court may decree any portion of a fine actually recovered, not exceeding one half, to the informer, at discretion. (§ 72.)* Informer's share.

ROYAL REVENUE.—THE POST-OFFICE.

The privilege of carrying letters in Ceylon belongs to the Crown; except (1) Letters carried on a line of road now a post line. (2) Letters concerning goods sent *gratis* with goods to be delivered.† (3) Letters sent by a friend on a journey, to be delivered by him to the receiver, or by any messenger on the private affairs of the sender or receiver.‡ But no collection of such letters may be made. Privileges of the Crown.

But common carriers, and their servants, may even carry letters *gratis*, except on a public road from one station to another, where there is no post-office at either. Common carriers may carry letters.

* For stamp duties, see Appendix.

† The circumstance of a letter being sent with goods is *primâ facie* evidence that the letter relates to the goods. (*Bennet v. Clough B. and A.* 401.)

‡ The friend, as a gratuitous bailee, is bound to take as much care of the letter as if it were his own. If lost, when he does take such care he is not responsible. (*Tindall v. Hayward*, 7, *U. C. L. J.* 243.)

When masters, &c. may.

Neither may owners, or commanders of ships, boats, or other vessels, or their servants or agents, except as to goods on board.

Penalty.

Carrying letters contrary to the above provisions subjects the offender to a fine not exceeding *one pound* for each offence, and any number of such offences may be included in the same plaint. (*No.* 14 *of* 1856, §§ 1 *and* 2.)

Post-Office staff.

Post-office officials are appointed by the Governor, with such powers as he deems expedient. (§ 3.)

Postage.

Postage, as far as the boundaries of the island, on prepaid letters is charged by weight, as follows: letters under half an ounce, *one penny*; above that and under one ounce, *two pence*; the postage then increases *two pence* for every additional ounce, or fraction of an ounce. Letters not prepaid are charged double on the receiver, or if not received by him, on the sender. (§ 4.)

Newspapers.

One half-penny is charged on every printed newspaper, prices current, or commercial list, posted to a place in the island, and one penny if to a place beyond the island. These rates must be prepaid by stamps. Newspapers, &c. received from places beyond the island are free of island postage. At the same any one may send newspapers, &c. in any other way than through the post. (§ 5.)

Newspapers, &c. must be sent uncovered, or in a cover open at the sides; they must bear only the name and address of the receiver and sender; and must have

nothing enclosed. If posted without these conditions, they will be charged as letters. (§ 6.) To carry out the last clause, the Post-master General may examine or authorize the examination of newspapers, &c. If the person to whom any newspaper, &c. is sent refuses to pay for it as a letter, it is to be returned to the General Post-Office. All official gazettes sent from the Government printing office pass postage free. (§ 7.)

Letters insufficiently stamped are charged double the difference between the value of the stamps affixed and the true postage. (§ 8.) Double postage.

Book packets may be sent by the post to any place within the colony at the following rates; *i. e.* Book post.

Weighing not more than 2 oz. 1d.
Weighing 2 oz. and not exceeding 4 oz. 2d.
Weighing 4 oz. and not exceeding 8 oz. 4d.
Weighing 8 oz. and not exceeding 1 lb. 8d.

And so on, increasing 4d. for every additional quarter of a pound, or any less weight.

The postage must be prepaid by stamps. The packet must contain nothing of the nature of a letter, save entries as to sender and receiver. It must not exceed 3 lbs. If not open at the ends, or containing anything in the nature of a letter, it will be charged double letter postage. If insufficiently stamped, the deficiency as double book postage. (§ 9.)

Other kinds of parcels may be sent under regulations determined by the Governor in council. (§ 10.) Parcel post.

Examination for customs duty.

Parcels suspected to contain goods subject to custom duty may be sent to the nearest collector or sub-collector of customs to be examined. Notice thereof, and of the postage, being sent to the consignee of the parcel, who must pay any duty due and postage to such collector, &c. (§ 11.)

Re-directed letters.

Letters re-directed by the Post-Office are re-charged with further postage, as well as the first postage. (§ 12.) Unopened newspapers re-directed pass free for the second journey, but if opened, not so. (§ 13,)

Unpaid letters.

Unpaid letters refused, or whose receivers cannot be found, are charged upon the senders. (§ 14.) Any person opening any letter to his address must pay postage, unless it has been sent maliciously to annoy. (§ 15.)

Explosive things not to be sent by post.

Any one sending explosive or dangerous things by post and likely to injure the mail, forfeits for each such offence £20. (§ 16.)

Money and valuables sent by the post are at the risk of the sender. (§ 17.)

Letters, packets, or parcels cannot be re-called. (§ 18.)

Official letters.

Official letters franked as on Her Majesty's service by any one authorized to do so, pass free. Writing any private matter in such franked letter subjects the writer to a penalty of £5. (§ 19.) And the Post-master General, &c. may require the receiver to open any suspected official letter in the principal office of the post-office to which it has been sent. (§ 20.)

Her Majesty's Post-master General (*i. e.* of Great Britain, &c.) may direct the Post-master General of Ceylon to levy rates of outland postage on letters, newspapers, book packets, &c. sent to and from Ceylon, in addition to the inland and island postage; but the orders cannot extend to the latter. These outland rates are gazetted, and are then recovered in the same way as inland postage. (§ 21.)

Authority of the Post-master General of Great Britain.

All letters, &c. to and from India and transmitted by land are charged to and from the boundary. (§ 22.)

Indian letters.

The master or commander of every vessel sailing from a Ceylon port must receive mail bags delivered to him by the Post-master General or any deputy, under a penalty not exceeding £20. (§ 23.) And on any vessel arriving off Ceylon, the master, &c. must collect all letters on board and send them ashore in his own or the pilot's boat, at the first port he makes, or signals, or on any other good opportunity. And at the first regular port at which the vessel reports, he signs a declaration in the presence of the Post-master of that place (who also signs it) that to the best of his knowledge he has delivered all the letters on board. And, until this declaration, the customs officer must not allow the vessel to report, break bulk, or make entry in any port. A false declaration subjects the master of it to a fine of £5. (§ 24.) Any customs or revenue officer finding letters unlawfully on board may seize them and forward them to the Post-master General or his deputy at the port or place. (§ 25.)

Mail bags of ships.

Stamps.

A letter, &c. is prepaid when it has stamps fixed outside it to the amount of the postage. (§ 26.) The stamps are provided under regulations from the Governor, and if not provided, *newspapers* may be prepaid in money. (§ 27.)

Separate accounts are to be kept by the Commissioner of the different stamp duties. (§ 28.)

The duty expressed by a postage stamp is stamp duty, and is under the management of the Commissioner. Former powers and forfeitures in respect of postage stamp duties given in former Ordinances are preserved, &c. (§ 29.)

Penalties.

Forgery, or causing to be forged or uttering anything connected with postage stamps, subjects the offender or abettor to imprisonment, with or without hard labour, for a period not exceeding seven years, or to a fine. (§ 30.)*

Evading postage by removing stamps, using removed stamps, or fraudulent erasure, &c. subjects the offender to a penalty not exceeding £20. (§ 31.)

Registered letters.

A letter may be registered on payment of sixpence over and above the postage (the registry only gives security by extra care, but throws no responsibility on the post-office). (§ 32.)

Officers exempt from jurors.

Further: Officers of the post-office are exempted from serving as jurors. (§ 33.)

Penalties on officers.

Any one employed in the post-office stealing, muti-

* But see the clause itself before prosecuting.

lating, or opening any letter, or post parcel, or stealing the contents of a letter, or not accounting for postage received, is liable to transportation, or imprisonment at hard labour, for any period not exceeding *seven* years. (§ 34.)

Any post-office carrier guilty of drunkenness, carelessness, or other misconduct endangering a post bag, or letter, or dealing with letters out of the ordinary course of the post, or not being diligent according to regulations, is liable to a fine not exceeding £5. (§ 35.)

Any post-office official opening, detaining, or wilfully delaying a letter is liable to a fine not exceeding £20, or imprisonment, with or without hard labour, not exceeding twelve months. This does not apply to letters opened or detained by order of the Post-master General, or to "dead" letters. (§ 37.)

Any one in any way detaining a post-office messenger is liable to a fine not exceeding *five* pounds. (§ 38.)

Prosecutions.

In post-office prosecutions the property in question (such as letters, post bags, &c.) is laid in the Queen, and it is not necessary to the prosecution to prove that such things had a real value, in any complaint preferred against a post-office official. (§ 39.)

The Post-master General may accept payment to the highest amount of fine in lieu of fine, against post-office offenders, and the offender by payment bars further prosecution. (§ 40.)

Postage duties may be recovered by the Post-master

General, his deputies, or his attorneys, as a Crown debt. (§ 41.)

Informers get a share not exceeding half fine, at the discretion of the court. (§ 42.)

Any Deputy Post-master General or his assistant may exercise all the powers of the Post-master General within his limits appointed by the Governor. (§ 43.)

The Governor and Executive Council may from time to time make rules for the transmission of letters, &c. the sale of stamps, the hours of business of the post-offices, and for extra payments for letters, &c. posted out of regular hours. (§ 44.) Also for extra rates for expresses, *i. e.* whenever any messenger, coach, vessel, or other conveyance is specially employed to carry letters for a particular occasion. (§ 45.)

Liabilities of Post-masters.

By English law (and probably it would be so held in Ceylon) a post-master is bound to deliver all letters to the several inhabitants within a post town or place, at their respective places of abode at the rate of postages established by law, and if prepaid, *gratis*. Nor can he detain a letter for non-payment of anything beyond such rate of postage. But the post town is the limit within which he is bound to deliver (*Smith v. Powditch*, *Comp.* 182; *S. P. Smith v. Dennis Lofft*, 753; *Stock v. Harris*, 5; *Burr.* 2709; *Barnes v. Foley*, 4, *Burr.* 2147; 1, *W. Black*, 643), and a suit lies against him for non-delivery in the post town. (*Rowning v. Goodchild*, 2 *W. Black*, 906; 3 *Wils.* 413.) But where a post-master

agreed to deliver letters in a particular manner and by mistake omitted to deliver one for two days, which contained a returned bill, he was held not liable for the amount of the bill, if the plaintiff could give notice of dishonor in time by a special messenger, though too late for the post. *(Herdern v. Dalton*, 1 *Car. and P.* 181.) It would seem that a suburb connected with the town by a contiguous line of houses is part of the post town. *(James v. Walker, Comp.* 624.)

The Post-master General is not liable for things stolen by a sorter out of a letter delivered into the post-office. *(Whitfield v. Lord De Spencer, Comp.* 754.)

Contractors for mails.

The Ceylon Government contract for the conveyance of portions of the mails; if then the contractors are prevented from performing their obligations by the neglect or default of a servant of the post-office, they are not liable upon their bond, unless something is specially excepted therein. (*Atty. Gen. v. London and North Western Railway Compy.* 1 *Johnson*, 28.)

THE RAILWAY FROM COLOMBO TO KANDY.

The railway Crown property.

This railway belongs to the Crown, and its proceeds are part of the general revenue of Ceylon.

Railway staff.

This railway is managed by a manager, assistant managers, clerks, and other officers appointed by the

Governor. The powers of the manager may be exercised by an assistant manager. (*No.* 6 *of* 1864. § 21.)

Regulations. The railway is also managed and worked by rules and regulations established by the Governor and Executive Council. The fares and rates are, however, determined in the schedule to the Ordinance. (§ 3.)*

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* RATE OF RAILWAY FARES.

PASSENGERS.

1st Class from 3 pence to 4 pence per mile.
2nd „ „ 1½ „ 2 „ „
3rd „ „ ¾ „ 1 „ „

Gangs of Coolies of not less than 12 in number, each one farthing per mile.

Reductions to be made for children and for return or periodical tickets.

GOODS.

1st Class from 4 pence to 7 pence per ton per mile.
2nd „ „ 3 „ 5 „ „
3rd „ „ 1 „ 3 „ „

Special rates to be charged for Live Stock, Specie, Plate, Carriages, Firearms, Machinery or articles exceeding 3 tons in weight, or measuring more than 200 cubic feet or 20 feet in length, and Gunpowder, Vitriol, Lucifer Matches, and other articles which, in the judgment of any of the Railway Officials, may be of a dangerous nature.

No package less than 56 lbs. in weight to be charged as goods.

Single and separate parcels under 56 lbs. in weight to be charged parcel rates.

Articles not herein enumerated to be charged according to any of the above classes, or at special rates according to the provisions to be made from time to time in the Rules and Regulations.

As respects goods, the fractional part of half a hundred weight shall be reckoned as half a hundred weight.

DEFINITIONS OF CLASSES.

Class 1.—Furniture, Pianos or other Musical Instruments, Wine or other Liquors in bottle, Groceries, Oilman's Stores, Millinery, Glassware, Crockery, Meat, Fish, and Game.

2.—Coffee, Rice, Grain of all kinds in bags or packages or in bulk,

Passengers.

The passenger fare must be prepaid before the passenger enters a railway carriage. On payment, he receives a railway ticket, which he must, when called upon, show or deliver up to the proper railway official; any one not doing so is charged with the fare from the place the train started from, unless he can prove that he has travelled a less distance. (§ 4.) And the fare so charged may be enforced in the same manner as any fine under the Ordinance. (§ 32.)

The fare for passengers and the freight for goods are accepted on the condition only that there is room in the train they are paid for. If there is not room, the passengers going the longest distance have the preference in the order of their tickets. The same as to goods. But officers and troops on duty, and others travelling on Government business, have in all cases priority over the public. (§ 5.)

Passengers defrauding or attempting to defraud the Government by not prepaying fare;* or using a higher

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Oil, Wine or other liquid in cask, Jute, Horns, Jaggery, Sugar, Cocoanuts, Tobacco, Cinnamon, Vegetable and Agricultural produce generally, Bales of Cotton or textile fabrics, Cordage, Machinery not included in special rates, Manufactured Metals, Coir Matting, Castings, Soap, Hardware, Tools, and Agricultural Implements.

3.—Coke, Coal, Minerals, Building Materials (except Timber in bulk), unworked Metals, Manure, and Firewood.

* The forgery of a railway ticket is an offence at common law; but merely uttering it, is not so, unless some fraud is actually perpetrated (*R. v. Boult*, 2 *C. and K.* 604). Also stealing a ticket or obtaining one by false pretences is an offence, even though it is delivered up at the journey's end. (*R. v. Beecham*, 5 *Cox. c. c.* 186; *and R. v. Boulton*, 19, *L. J. M. C.* 67.)

class carriage than they have paid for; or going beyond the distance paid for, with intent to avoid full payment;* or knowingly and wilfully refusing and neglecting to quit his carriage at his journey's end; or in any way attempting to evade paying his fare, is liable to a fine not exceeding £5. (§ 6.)

Any one entering or quitting a carriage in motion, or riding on any but the proper part of a carriage, or attempting these acts, is liable to a fine not exceeding £2 (§ 7). So also is any one riding on the engine, tender, or in the goods or luggage vans without special license of the locomotive engineer.† (§ 8.)

Any one smoking or chewing betel in the railway premises or carriages, except in those places or carriages set apart therefore, is liable to a fine not exceeding £2; if he does not leave off after being warned by any railway official or passenger, he may be removed and forfeits his fare. (§ 9.)

Any one intoxicated, or insufficiently or indecently clad, or committing any nuisance or indecency in a railway carriage or premises, or wilfully and without lawful excuse interfering with the comfort of any passenger, is liable to a fine not exceeding £5, or to imprisonment,

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* See *R. v. Frere*, 4 E. and B, 598, a case which would apply if the Government ever established *through* fares at low rates.

† It is not pointed out who the locomotive engineer is; but it is to be presumed that he is one of the officers appointed under the second clause, and who has charge of the rolling stock.

with or without hard labour, for a term not exceeding three months, or both, and may be removed from the railway, and forfeits his fare. (§ 10.)

Any male person without lawful excuse entering a carriage or room provided for the exclusive use of females, knowing it to be so appropriated, or remaining there after being informed of such appropriation, is liable to a fine not exceeding ten pounds, and may be removed from the railway and forfeits his fare. (§ 11.)

Goods.

The Government is not liable for loss or injury to goods carried by railway, unless caused by gross negligence or misconduct of their agents or servants, and unless the goods have been booked and paid for, in conformity with the Ordinance and rules. (§ 12.)

If the conveyance of goods is not paid for on demand, the manager, &c. may detain any part of the goods, or, if removed, of any other goods of the same owner, on the railway premises, or which afterwards may come into their possession; and, after reasonable notice to the owner, the goods may be sold by public auction for freight and expenses, handing the balance, if any, to the owner; or the manager may recover by suit at law. (§ 13.)

The owner, or any person having the care of goods carried on or brought to the railway for carriage, must, on demand by a railway official for receiving goods, deliver an exact account in writing, signed by him, of their number, quantity, and description (§ 14). And if he wilfully fails to give, or wilfully gives a false account,

he is liable to a fine not exceeding five pounds per ton, or two pounds for less than a ton. (§ 15.)

Dangerous goods, or which a railway official deems dangerous goods, are not to be carried on the railway; and any one so carrying or delivering dangerous goods to a railway official to be so carried without distinctly marking their nature outside the package, and giving notice in writing of the nature thereof to the official he delivers them to, is liable to a fine not exceeding £20. Any goods suspected dangerous may be refused carriage, and may be opened for examination; and if received, may be stopped *in transitu* until examined. (§ 16.)

Certain acts declared illegal.

Any one doing any one of the following acts (except bare trespass) is liable to a fine not exceeding *five* pounds:—

1. Wilfully obstructing or impeding a railway official in discharging his duty on the railway, or works, stations, or premises connected therewith. (§ 17.)

2. Removing any stakes, pegs, or other marks placed for the purpose of setting out the line. (§ 18.)

3. Trespassing on the railway, or the lands, stations, or premises appertaining to it, and refusing to leave when lawfully requested; the offender may be immediately removed from the railway, &c. (§ 19.)

Bare trespass, however, subjects the trespasser to a fine not exceeding *two pounds* only. (§ 19.)

4. Wilfully riding, leading, or driving upon or across

the railway, any animal, except in crossing it at a road or place appointed for that purpose at the time he is lawfully authorized to do so. (§ 20.)

Animals trespassing on railway.

If animals trespass or stray upon the railway or its lands, the owner is liable to a fine not exceeding *one pound* for each. Any railway official may pound any such animal at the nearest police station until the fine and expenses of keeping it are paid, or until a police magistrate otherwise orders. The magistrate may, upon proof of trespass, order the animal to be sold by auction, and order the proceeds, less the fine and expenses, to be returned to the owner. (§ 23.)

Gates on level crossing.

Gates are to be erected by the manager at level crossings, and to be constantly closed; if across the road, or path crossed, only to be opened for the passage of the traffic; and if across the railway, only to be opened for the railway traffic. The gates are to be shut across the road or across the railway as the Government may think fit. If the manager of the railway does not comply with this section, he is liable to a fine not exceeding £20, and the magistrate or justice may order him to erect gates within a time specified in the order; and the manager then becomes liable to a similar fine for every day's failure after the expiration of the order. (§ 21.)

Railway fences.

When the line is open for traffic, the manager must fence it on each side, and on failure is liable to a fine not exceeding £5 for each offence; and the magistrate, &c. may order it to be fenced within a specified time,

and beyond that time, the manager is liable to a similar fine for each day he fails to do so. (§ 22.)

Unlawful damage on railway.

Any one unlawfully and wilfully removing or defacing number plates, or removing or extinguishing any lamp in a railway carriage, or wilfully or negligently damaging any rolling stock, building, machine, fence, or matter of the railway, is liable to a fine not exceeding £20. (§ 24.)

Opening accommodation gates.

Any one opening any accommodation gates, and crossing or driving any carriage or animal, &c. across the line when a train or engine is in sight, or attempting the same, or neglecting to shut the accommodation gate after crossing, is liable to a fine not exceeding £10. (§ 25.)

Endangering passenger.

Any one wilfully doing any act, or omitting to do what he is legally bound to do, intending thereby to cause, or knowing that he is like to endanger any railway passenger, is liable to transportation at discretion, or to imprisonment, with or without hard labour, for any term not exceeding five years. (§ 26.)

Railway official endangering passenger.

If any railway official, by wilfully doing any act which he is legally prohibited from doing, or wilfully, or negligently omiting to do what he is legally bound to do, endangers any railway passenger, he is liable to imprisonment, with or without hard labour, for a term not exceeding *three years*, or a fine not exceeding £100. (§ 27.)

Misconduct by railway officials.

Any railway official—

1. Intoxicated when actually on duty on the railway, or works;

2. Or negligently omitting to perform his duty;

3. Or performing his duty in an improper manner; is liable to a fine not exceeding £5. And if in any of the three above cases his misconduct tends to endanger any railway passenger travelling, he is liable to imprisonment, with or without hard labour, for a term not exceeding one year, or to a fine not exceeding £20, or both. (§ 28.)

Act likely to endanger railway passenger.

If any one, rashly and without lawful excuse, does anything likely to endanger any railway passenger, he is liable to imprisonment, with or without hard labour, not exceeding six months, or to a fine not exceeding £10, or both. (§ 29.)

What railway officials are bound to do.

Every railway official is bound to do everything conducive to public safety, which he is required to do by the Ordinance, or by any railway rule or regulation, and of which he has notice; and is prohibited from every thing likely to cause danger, and by which railway rule or regulation he is prohibited from doing. (§ 30.)

Who are railway officials.

Every person employed on behalf* of such railway to do any act upon the railway is deemed a railway official. (§ 30.)

Jurisdiction over railway offences.

Any one punishable under the Ordinance by fine *only*, is punishable by a *police magistrate* within the limits of whose jurisdiction the offence was committed, or the offender was apprehended. (§ 31.)†

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* The Ordinance says "by or on behalf," &c.; but how can a person be employed *by a railway?*

† This clause gives the P. C. extended jurisdiction in cases of fine

Tables of rules &c. to be exhibited.

A copy of this Ordinance, the rules, regulations, time tables, and tariff of charges for the time being, must be conspicuously exhibited at each station (so as to be easily read), in English and the vernacular of the district, or any other language required by the Government. (§ 33.)

CUSTOMS.

Customs.

The Ordinance (No. 18 of 1852) concerning customs is so long and minute that it would be impossible to give the same analysis of it as is given of the other Revenue Ordinances in this work; nor is it needed; for those requiring information for the purposes of business must study the Statute itself. A general account, only, with tables and cases, will be given in this work.

Heads of the ordinance.

The Ordinance is divided into nine heads:—1, Management; 2, Port dues; 3, Regulations inwards; 4, Regulations outwards; 5, Regulations coastwise; 6, Warehousing; 7, General Regulations; 8, Seizures; 9, Schedule of duties.

Establishment.

1. The customs establishment is under the control and management of the Colonial Government, and the Colonial Legislature is empowered to establish their own

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without the certificate required in revenue cases in *Ord.* 18 *of* 1861, § 13, and would *seem* to give power to fine beyond the usual £5.—For § 32 of railway Ord. see *ante*, at § 4.

customs, regulations, and rates of duty. (*Col. R. and R.* § 300); with the restriction that no duty may be imposed on transient traders, or upon persons residing or carrying on business for a short time within Ceylon, from which other persons carrying on the like business are exempt. (*Instr. to Gov.* § 25.)

Management.

Officers of customs are either appointed by or with the previous or subsequent concurrence of the Governor. They are allowed to take no fees from the public but their salaries, and are exempt from serving in local offices, juries, or inquests. Other points of general management are determined by the principal officer of customs, with the sanction of the Governor. (*Customs Ord.* 18 of 1852, §§ 2—6; and *C. R.* and *R.* §§ 300—1.)*

Port dues.

Port dues are twopence per ton inwards and outwards, in no case to exceed five pounds in all, for all ships except those in ballast, or those reported for exportation, and which depart without breaking bulk or shipping goods. These two classes are free of port dues. Coasting vessels may compound for port dues annually at the rate of one shilling per registered ton. The Ordinance directs how the tonnage is to be reckoned in all cases. (*Idem*, §§ 11—14.)

Regulations inwards.

The moment a vessel comes within a league of the coast, she is so far under the jurisdiction of the customs that she cannot in any way, either in port or on the coast, or at sea, break bulk, unload, alter stowage, or

* The table of duties will be found in the Appendix.

stave, destroy, throw overboard, or alter any goods, before the ship is reported (in forms provided by the Ordinance) to the customs, and a sufferance granted to her to unload or break bulk. Bullion or coin may, however, be unladen before report. The report must be made within *twenty-four* hours after arrival within the league, and before bulk is broken. The Ordinance minutely describes the manner in which the master is to make his report, and subjects him to various penalties if he fails to do so. (*Idem*, §§ 15 to 17.)

When the ship arrives within the league, the officers of customs may board it, and remain on board till it is fully unladen. They have a right of free access to every part, and may (if of rank superior to tidewaiters or boatmen) seal, lock, or secure goods, or batten down hatchways. The master is responsible in various penalties that access is allowed, and that the seals, &c. are not broken, and that the officers are made comfortable on board. Concealed goods are forfeited. (*Idem*, §§ 18—20.)

The report being duly made, the collector grants a general sufferance to land, though certain goods may be excepted from it. The goods are then landed and conveyed to the Queen's warehouse; and the importer must within seven days make a complete *entry* of them, and either pay down the duty or warehouse the goods. The Ordinance describes how the entry is to be made, and provides certain forfeitures and penalties in case of failure. (*Idem*, §§ 21—23; 24, 25; 28, 29.)

If the duties are not paid within three months, the goods are sold, and the proceeds applied to pay the duties, warehouse rent, and other charges, the overplus being handed to the owner. (*Idem*, § 23.) If the duties are charged *ad valorem*, the importer or owner must make a declaration of the value; and if he undervalues them, they may be sold for the benefit of the Crown. The collector then pays to the importer or owner the amount of his own valuation, together with the duties already paid. This is a full satisfaction of the Crown's claim upon the importer, &c. (§§ 26,27.)

The Ordinance then provides for the case of goods not being known, for the stamping of cotton cloths, not British, and for a drawback of duty for goods damaged on the voyage. (*Idem*, §§ 28—34.) It further provides for fraud on the customs by treating unnecessary stores as merchandise (*Idem*, § 35), and for the expenses of unshipping, which are at the cost of the importer. (*Idem*, § 36.)

Public property is free under the customs Ordinance. (*Idem*, § 37.)

Then follow provisions to prevent native sugar, rum, and shrub, from being exported as foreign goods (*Idem*, §§ 39,40); and for the removal of goods by land from port to port, under rules sanctioned by the Governor. (*Idem*, § 41.)

Regulations outwards.

The regulations outwards are intended to prevent the shipping of goods subject to export duty without previous payment, and the shipping of goods the export-

ation of which is prohibited. The master, therefore, first delivers to the collector an entry, that is, a general account of the goods intended to be shipped, and a victualling bill for stores. Upon that, the collector grants him a sufferance to ship; and the goods being shipped, the master then delivers a "*content*," or minute description of the cargo and stores. The collector may examine the ship and ask any questions; and if he is satisfied that a true account has been given of the cargo and stores, and that all duty has been paid and the requirements of the law carried out, he grants a "*clearance*," and the ship may sail; but even then, if there is suspicion of foul play, the officers of the customs may board the ship within the league. (*Idem*, §§ 42—47.)

Regulations coastwise.

Goods laden to be carried coastwise, that is, from port to port in Ceylon, are under the control of the customs, under rules issued by the Governor. (*Idem*, §§ 48, 49.)

Warehousing.

Colombo, Jaffna, Trincomalie, and Galle, are free warehousing ports, but others may be appointed. The free warehonses (when established) will be governed under rules issued by the collector. Goods may be warehoused under bond, without payment of duty on first entry; but if entered to be warehoused, and not duly warehoused, they are forfeited. When in the warehouse, full powers are given to the collector to ascertain quantities, &c. Owners, &c. may abandon whole packages for duty and thus cease to be liable for duty. (§§ 50—58.) Warehoused goods may be removed from port to port. They

must be removed within two years, or they will be sold, though further time may be granted. Goods are warehoused at the risk of the owner, who is however protected against embezzlement by customs officers. (§§ 59—63.)

Detention for freight.

An important point is, that goods (not being goods seized as Crown forfeitures) lodged in the Queen's warehouse are liable for freight, as if they were still aboard ship, and may be detained by the collector until freight is paid, or until a deposit sufficient to cover the claim is made with the collector. This of course provides for disputed claims. (§ 64.)

General regulations.

Under the general regulations, powers are given to appoint ports, legal quays, and sufferance wharves. They also regulate the times and places of landing, the transhipment of goods, the permission of ships to be hauled on shore, the keeping of wharves clear, weights and measures, and bonds taken by the collector. They also give power to charge rent for the Queen's warehouse, and to customs officers to board ships in port or when hovering on the coast within the league, and to return overpaid duty. They also make the falsification of stamps or documents connected with the customs punishable, declare bonds entered into with the collector under the Ordinance to be valid in law. (§§ 65—81.)

Definition of the time of an importation.

The time of an importation is deemed to be the time at which a ship importing goods has actually come within the limits of a port at which the ship is in due course reported, and the goods discharged.

and of an exportation;

The time of an exportation is deemed the time at which the goods have been shipped on board the ship in which they are exported.

and of an arrival;

The time of an arrival is deemed to be the time at which the report of a ship shall have been, or ought to have been, made.

and of a departure.

The time of a departure is deemed to be the time of a last clearance of the ship, with the collector, for the voyage upon which she has departed. (§ 82.)

Seizures.

Ships, boats, and goods, declared by the Ordinance to be forfeited may be seized. Ships and boats include guns, tackle, and furniture. Goods include other goods packed with them and their packages. (§ 83.) Seizures may be made by land or water by any officer of the customs or police, or by any headman, or by any person employed for that purpose, by or with the concurrence of the Governor. Any one resisting, or rescuing, or destroying to prevent a seizure incurs a penalty of £100. (§ 88.)

Any officer of customs, or any one acting in his aid or assistance, or duly employed for the protection of the revenue, may, on reasonable suspicion, stop any conveyance and search for smuggled goods; and if the person driving or conducting the conveyance refuses to stop, he is liable to a penalty not exceeding £100, nor less than £10. (§ 84.)

Ships, boats, carriages, cattle, and other means of removal of goods liable to forfeiture, and employed in their removal, are also forfeited. Any one assisting

in unshipping or harbouring such goods is liable to treble the value, or £100, at the election of the customs officers. (§ 83.) Goods stopped or taken by persons other than the customs officers must be (within a reasonable time) taken to the nearest customs, under a penalty not exceeding £100, nor less than £10, for neglect. (§ 90.)

Power of searching persons.

The customs officers also have the power to search all persons suspected of having uncustomed or prohibited goods secreted about their persons, either on board ship or on land, or any such person who has passed through the custom-house; but before search, the person may demand to be taken before a justice of the peace or a superior officer of customs. Females can be searched only by females appointed for that purpose. Officers misconducting themselves in respect of a search of the person incur a penalty not exceeding £10. And persons on board ship falsely denying that they have foreign goods about them, forfeit their goods and also treble their value. (§ 92—95.)

Penalties and forfeitures.

Penalties and forfeitures are recoverable in the name of the Queen's Advocate; and it is sufficient if the offence is alleged to have been committed within the limits of any port, without proof of the limits, unless the contrary be proved; and in the case of goods* seized for forfeiture, the legality of which seizure is disputed, the *onus probandi* lies on the claimer or owner; and if several

* This clause is not made to apply to ships, boats, or means of removal.

persons are concerned in the same offence, they are jointly and severally liable to the penalty, and may be sued either by one or by separate informations (§ 96—99); the seizing officer is entitled to half the forfeiture or penalty. (§ 100.)

Seized goods how dealt with.

It is also enacted that seized goods, if unclaimed for a month, may be dealt with as condemned goods. Any one claiming seized goods must do so in writing. The claim must be in the name of the owner, and will not be allowed until the claimant has given security not exceeding £40 for the costs of the claim; which security must be given within fifteen days after notice of filing information. Having made such claim, he can get back a ship or a boat by giving a bond in double its value with two or more approved sureties. (§ 101—103.)

Actions against customs officers.

No summons can be sued out against or process served upon a customs officer for any thing done in the execution of his duty, under a month's notice in writing; an action cannot be brought against him after three months after cause, and must be laid and tried in the district where the facts were committed; if the plaintiff is nonsuited, discontinues, or has judgment against him, the defendant can recover treble costs. (§§ 104, 105.)

Tender of amends.

Within one month of notice of action, the officer may tender amends, and plead such tender. He may also, by leave of the court, pay money into court. In either case, if successful, he may recover costs as in § 105.

The Judge may certify that there was a probable cause of seizure, and in such case the plaintiff is entitled only to the thing seized, and to no damages or costs. (§ 107.) Probable cause of seizure.

All actions and prosecutions under the Ordinance (except as above) are limited to three years from the offence. (§ 108.)

In cases of forfeiture of goods, or of detention for undervaluation, or where a person landing, shipping, or passing goods has incurred a penalty, the collector may mitigate the forfeiture to a fine not exceeding one tenth of the value of the goods, or of the penalty, subject to revision by the Governor. (§ 112.)

The Governor, with the advice of the Executive Council, may restore seizures, and mitigate or remit punishments and penalties under £50, upon condition. (§ 113.)

In the above Ordinances, "ships" include ships, dhoneys, or vessels generally. Interpretation.

"Master of a ship" means the person commanding the ship.

"Owner" includes all joint owners.

"British possession" means any colony, territory, &c. belonging to the Crown, and "Her Majesty" includes her successors.

"Collector" includes also the collector's deputy, assistant, or sub-collector of the customs of the port intended.

"Officer" means the officer for the time being.

"Warehouse" means *any* place in which goods entered to be warehoused may be secured without payment of duty, or although prohibited.

"Queen's warehouse" means any place provided by the Government for lodging goods therein for the security of the customs.*

Duty on exports.

Allied to the customs duties are the duties upon exports, raised for the special purpose of aiding the general revenue to pay the interest on the capital expended on the construction of the railway between Colombo and Kandy. (*Ord. No.* 2 *of* 1856. *Preamble.*) Like the customs, stamp duties, post-office, &c. it forms part of the extraordinary revenue. It is levied upon all articles exported beyond seas, of the growth, produce, or manufacture of Ceylon. The duties will be found in the Appendix. (§ 1.) The exporter delivers to the collector of customs a bill of entry of the value, quantities, and denominations of the goods exported, and makes a declaration of value; he also delivers duplicate entries; and the entry signed by the collector is warrant for the examination and shipment of the goods. (§ 2.)

In the same manner as under the customs Ordinance, goods undervalued may be detained and sold for the benefit of the Crown, the amount of exporter's own valuation, together with the duties paid, being handed over to the exporter. (§ 3.) Also goods laden before

* For table of prohibitions and customs duties, see Appendix.

entry are forfeited. (§ 4.) Goods free on exportation, *i. e.* coffee, cocoa-nut oil, coir, yarn, rope and twine, copperas, and pepper, must be warehoused in order to be exempt from export duty. (§ 5.) This Export-duties Ordinance must be read as part of the Customs Ordinance, No. 18 of 1858. (§ 6.)

SALT DUTIES.

Salt duties.

Two following portions of the ordinary revenue of the Crown were omitted to be noticed in their proper place; viz. the revenue from salt, and that from the pearl fisheries.

The salt duties are regulated by Ordinances No. 3 of 1836, No. 26 of 1852, and No. 2 of 1864.

Salt to be sold by weight.

The two latter Ordinances ordain that salt shall be sold by weight and not by measure, and that any storekeeper or other person selling salt on behalf of the Government, and every licensed retailer of salt convicted of selling salt by measure, or of issuing salt by short or false weight, or of demanding more than the price fixed by Government, shall be subject to a fine not exceeding £10 for each offence; and half of all fines actually recovered are to go to the informer.

Collection and manufacture of salt.

The following is an abstract of Ordinance No. 3 of 1836:—

Collection and manufacture of salt.

No one may collect or attempt to collect salt naturally formed, or manufacture or attempt to manufacture salt, except on account of government, or under the written license of the government agent or assistant government agent for the province in which it is collected or manufactured; and any person convicted of collecting, &c. salt, except as aforesaid, is subject to a fine not exceeding five pounds for each offence, and ten shillings in addition for each bushel* of salt so collected, &c. and if the quantity exceed one bushel; and, in default of payment, to imprisonment, with or without hard labour, not exceeding twelve months; and the salt so collected, &c. and any apparatus used in the manufacture, are confiscated; and the occupier of any premises upon which salt has, with his privity or consent, been illegally collected or manufactured, is subject to a fine not exceeding ten pounds for each offence, and, in default of payment, to imprisonment, with or without hard labour, not exceeding five months. (§ 2.)†

Possession of salt in districts enumerated.

No person (unless duly licensed as hereinafter mentioned) may possess salt in greater quantity than two pecks,‡ in manner hereinafter expressed, within the undermentioned districts, according to the limits of their respective judicial jurisdictions; viz.—Districts

* 1 paarrah $10\frac{8}{8}$ seers.

† Offences under this clause must be tried before the District Court. (3071, *P. C. Manaar; P. C. Ca.* 79.)

‡ 17 8-16 seers.

of Colombo No. 1 North and No. 1 South,* No. 4, otherwise called Caltura, Amblangodde, Galle, and Matura; and than three quarts† in the districts of Colombo No. 2, otherwise called Negombo, Putlam, and Chilaw; Manar, Jaffna, Walligammo, Waddimoratchie, Tenmoratchie and Patchelapalle; the Islands, the Wanny, Trincomalee, Batticaloa, Hambantotte, and Tangalle. (§ 3).

Restrictions as to quality.

The possession of any salt in the districts named in the third clause, unless duly accounted for, of a description different from that issued from the government stores for sale within the limits of the village, district, or province in which such salt is found, is unlawful. (§ 4.) (See 8156, *P. C. Point Pedro, P. C. Ca.* 74).

Government agents to grant licenses for possession.

Within the districts in the third clause, the government agents or assistant agents in their respective districts may grant licenses for the possession of salt, if purchased of government. In the license must be defined the purposes for which the salt is required, the quantity, from what government store purchased, and for what period (which shall not in any case exceed twelve months from the date thereof) it is to be in force. (§ 5.)

And retailers.

And it is further enacted that, within the districts enumerated, persons authorised by government to retail salt may grant licenses in their respective districts for the possession of salt purchased of themselves in quan-

* These districts have since been changed; it is believed amalgamated.

† 3 7-32 seers.

tities not exceeding three pecks,* and for a period not exceeding fourteen days. (§ 6.)

Illegal possession of salt, earth, &c.

Every person possessing salt contrary to these provisions, or possessing earth, or sand, or water, impregnated with salt, for the purpose of making salt, and the occupier of any house or premises in which is found any salt or any earth, &c. which he is unable satisfactorily to account for, is liable to a fine not exceeding twenty shillings for every bushel† thereof, and proportionably for less than a bushel; and, in default of payment, to imprisonment, with or without hard labour, not exceeding twelve months; and the salt must be seized and confiscated, as well as all instruments and utensils, or earth, &c. used for manufacturing salt illegally; and the person in whose possession any such is found is liable to a penalty not exceeding five pounds, and, in default of payment, to imprisonment, with or without hard labour, not exceeding five months. (§ 7.) (See 345, *P. C. Ratnapoora*, *P. C. Ca.* also 14006 *Chavagacherry*, *P. C. Ca.* 101, also 19541 *P. C. Jaffna*, *P. C. Ca.* 114.)‡

Disposal of salt on expiration of license.

Any salt purchased from government remaining at the expiration of a license, if tendered to the government agent or his assistant, and if unadulterated, may be received and be paid for at the rate at which it was originally sold. Any salt so remaining and adulterated must be seized and confiscated. (§ 8.)

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* 1 parrah 1¾ seers. † 1 parrah 10⅜ seer.

‡ Offences under this clause must be tried before the District Court. (3071, *P. C. Manaar*, *P. C. Ca.* 79.)

Concealment of salt.

Every person burying, concealing, or assisting in or privy to burying, &c. any salt illegally collected, manufactured, or possessed, or not satisfactorily accounted for, is liable to the same fine as for illegal possession of salt. (§ 9.)

Possession in non-enumerated districts.

Any government agent or assistant agent, district judge, or local headman, in any of the districts not enumerated in the third clause, may call upon any person possessing salt exceeding four bushels* within the non-enumerated districts to account for the same. And if he shall fail to show that such salt was lawfully removed, he is liable to the penalties attached to the illicit possession of salt. (§ 10.)

Persons found in the vicinity of a salt pan.

Any person found in the immediate vicinity of any salt pan or salt leway at a suspicious hour or under suspicious circumstances, may be brought before the District Court, to investigate the matter of suspicion; and if he gives not a satisfactory account of himself, and there is, in the opinion of the Court, reasonable ground to believe that he was in such place with intent to collect or remove salt, it may require him to give security for his good conduct; and, in default of security, must sentence him to be imprisoned for a period not exceeding six months, with or without hard labour, at the discretion of the Court. (§ 11.)

Removal of salt.

The removal of salt in any quantity exceeding three quarts† in the districts in which the possession of three

* 5 parrahs 17½ seers. † 3 7-32 seers.

quarts is allowed, and two pecks* in any other district, at one time, and the export and import thereof, except under the permit of a government agent, assistant agent, or licensed retailer, to the extent of three pecks, are unlawful; the permit is to specify the date thereof, the quantity removed, the person removing, the places from and to, the conveyance, and the period within which it is to be removed; the period must not, in case of a permit granted by a government agent or assistant agent, exceed three calendar months; or, of a licensed retailer, fourteen days. Salt removed illegally is confiscated, and the person removing it is liable to the penalties against illegal possession of salt. (§ 12.)†

Shipment.

Any salt landed or shipped without license, unless on account of government, is confiscated, and the commander or principal person on board or belonging to the vessel is subject to a fine of three shillings per bushel‡ confiscated, and, in default of payment, to imprisonment, with or without hard labour, not exceeding twelve months; and every person knowingly assisting in such shipping or landing is liable to a fine not exceeding ten pounds, and, in default of payment, to imprisonment, with or without hard labour, not exceeding six months. By permit of any collector or assistant collector of customs, salt purchased from the government or licensed retailer

* 17 3-16 seers.

† Offences under this clause must be tried before the District Court. (3071, *P.C.Manaar; P. C. Ca.* 79.)

‡ 1 parrah 10⅝ seers.

may be shipped on board any vessel for the use of the crew. (§ 13.)

Sale.

The sale of salt within the districts enumerated, except on account or by license of the government agent or assistant agent, is unlawful; and any person selling salt is subject to a fine not exceeding five pounds for each offence, or, in default of payment, to imprisonment, with or without hard labour, not exceeding twelve months; and the purchaser is liable to a fine not exceeding twenty shillings for each offence; or, in default of payment, to imprisonment, with or without hard labour, not exceeding two months. (§ 14.)

Retailer to affix notice to place of sale.

Every licensed retailer must affix in front of his place of sale a board having painted or legibly written thereon his name and the words "Licensed to sell salt," in English, Singalese and Malabar; and any retailer selling salt without such a board, or in any other place than that in which he is licensed to sell, is liable for every offence to a fine not exceeding the rate of twenty shillings for every bushel* sold. (§ 15.)

Search or seizure.

In all cases requiring any search or seizure without delay, the constables or police vidhans, or other proper officers, may, on information before them showing just ground of suspicion, and that the object of the search would probably be defeated by the delay of applying to the district court for a warrant, make such search or seizure without warrant, between sunrise and sunset

* 1 parrah 10⅝ seers.

only; they *must* exercise such authority, report their proceedings and the result of their search or seizure to the nearest district court without unnecessary delay; and any officer failing to make report is liable to a fine not exceeding five pounds; and if any officer does not apply for a warrant in due course, there being sufficient time for application, or wantonly, maliciously, or corruptly exercising any power or authority confided to him, or wilfully exceeding it, must, besides the liability in damages to the party injured, suffer punishment on conviction awarded. (§ 16.)

Adulterated salt sold by retailer.

Any storekeeper, or person authorised or licensed to sell salt, selling adulterated salt, is liable to fine and imprisonment, with or without hard labour; and any government or assistant agent, district judge, or superintendent of police, may direct, by order under their hands, competent persons to examine salt in possession of any licensed retailer; and if salt be found adulterated, the retailer is liable to like fine and imprisonment, and the Judge, by order under his hand, may direct the storekeeper by whom such salt was issued to such retailer to attend at the Court with a sufficient specimen of the salt so issued. (§ 18.)

Or by government storekeeper.

The Judge may direct a fair sample of salt issued from any government store to be examined; and if it is found to contain any impurity exceeding in weight four per cent. it is taken to be adulterated. (§ 19.)

Informer's share of fines.

A portion, at the discretion of the Court, not ex-

ceeding one-half of all fines, must be paid the person or persons first giving such information leading to the conviction of an offender; and if the offender has no property, the government agent must, on behalf of government, pay the informer his share due, but not in any instance to exceed ten pounds, provided the Court, after hearing cause to the contrary, certifies that such informer has not acted in collusion with the offender, and that it does not appear that such offender has property from which such portion can be levied. (§ 20.)

PEARL FISHERIES.

The Royal Revenue in the pearl fisheries of Ceylon is protected by Regulation No. 3 of 11, by which any boat or other vessel found within the limits of the pearl banks, anchoring, or hovering, and not proceeding to her destination as wind and weather permit, may be seized and condemned to forfeiture, two thirds of her value going to the Crown, and one third to the seizer. Also Ordinance No. 11 of 1843 makes the possession *on land* of any drifting net, or other net not being such as are used by men walking in the sea, or of any dredge or similar instrument, within twelve miles from Talavite and Talmanar, or at any place twelve miles from low water mark, between those places, unlawful; and every such net,

&c. so found is forfeited; and any one possessing, moving, or concealing such net, &c. or assisting, or procuring such movement or concealment, is liable to a fine not exceeding £10, or to imprisonment, with or without hard labour, not exceeding six months. Peace officers may make search for such nets, &c. and seize offenders.*

* Cases relating to *agreements* connected with Pearl Fisheries will be found under the title "Agreement."

CHAPTER IV.

CIVIL GOVERNMENT.

THE GOVERNOR.*

General powers of the Governor.

THE duty and powers of the Governor are defined in his commission and the royal instructions. The following are the general powers with which he is invested, subject to the special law of the colony:—

He can pardon or respite any criminal *convicted*† in the Courts of Justice, and may remit any fines, penalties, or forfeitures, payable to the Queen (not exceeding £50), and may suspend payment of any fine, &c. exceeding that amount, until royal pleasure is known.

Moneys expended for the public service are issued under his warrant, as the law in each case directs.

He has also, generally speaking, the presentation to benefices of the church endowed by the colony, subject to rules hereafter laid down. *(Chalm. Op.* 18, 23.)

He also assembles and adjourns the Councils.

He appoints to offices in the colony, either absolutely, where warranted by his instructions or local law, or temporarily and provisionally, until a reference to Her Majesty.

* The contents of this chapter are principally taken from the Colonial Rules and Regulations, Chapters I—IV.

† Therefore he cannot pardon, &c. *before* sentence; but can he grant a general amnesty?

He has the power of suspending public servants from their functions under regulations, which must be strictly observed. (See *post.*)

He administers the appointed oaths to all persons, in office or not, whenever he thinks fit.

He grants or withholds his assent to bills passed by the Legislative Council. (See *Legislative Council.*)

He directs his particular attention to the erection and maintenance of schools, and to measures for the conversion of Aborigines to Christianity, and for their advancement in civilization.

He executes all laws for the suppression and punishment of every species of vice, profaneness, and immorality.

He sends home, punctually, copies of the journals and minutes of the Councils, together with lists of the members of both.

If anything happens which is for the advantage or security of the colony, and is not provided for in his commission and instructions, he may take order for the present therein.

He may not declare or make war against any state, or the subjects of any foreign state. Aggression he must at all times repel to the best of his ability; and must use his best endeavours for the suppression of piracy.*

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* The Governor is Vice-Admiral of Ceylon; but does not sit in the Court of Vice-Admiralty. In war-time, letters of marque are issued by the Judge of that Court, on warrants from the Governor. (*Stokes*, 238—241.)

His attention is at all times to be directed to the discipline and equipment of any militia forces; and he has the appointment of all militia officers *(Stokes on Cal.* 185—190); and whenever the militia is embodied, he sends home monthly returns of their arms and accoutrements.

Periodical reports on this subject, which may not call for immediate attention, may be included in the annual "Blue Book."

He may on no account absent himself from the colony without Her Majesty's permission.

He is prohibited from receiving presents, pecuniary or valuable, from the inhabitants of tho colony, or any class of them, during the continuance of his office, and from giving similar presents; and this rule is to be equally observed on leaving his office.

In cases where money has been subscribed, with a view of marking public approbation of the Governor's conduct, it may be dedicated to objects of general utility, and connected with the name of the person who has merited such a proof of the general esteem. *(C. R. R. ch.* 1, §§ 1—34, and *Royal Instructions.*)

Power of the officer commanding the forces.

THE OFFICER COMMANDING THE FORCES* attends to

* The Governor of Ceylon, when a civilian, a naval officer, or of military rank below that of colonel, is not invested with the command of the forces; but (except in case of invasion, &c.) he issues, to the officer in command, orders for the march and distribution of the forces, for the formation and march of detachments and escorts, and for such military service as the safety and welfare of the colony may require. The Governor also gives the *word.*

the military details necessary to carry out the instructions issued to him by the Governor. He also carries into execution on his own authority the sentences of courts-martial, excepting sentences of death, which must first be approved, on behalf of the Queen, by the officer administering the civil government.

He makes to the Governor returns of the state and condition of the troops, of the military departments, of the stores, magazines, and fortifications, and furnishes duplicates of all returns sent to the military authorities at home, or to any officer under whose general command he is.

On the receipt of the annual Mutiny Act, the officer in the forces communicates to the civil authorities the "general orders" in which it is promulgated.

And in the event of invasion, or assault by a foreign enemy, and active military operations, the officer in command of the forces assumes the entire military authority and command over the troops.

THE CONSTITUTION OF THE COLONY.

Ceylon being a colony acquired by conquest and cession, and called a Crown Colony, is under the legislative power of the Crown, who exercises that power by orders in Council, and, concurrently therewith, through laws framed by the local legislature, consisting of the Governor and the Legislative Council nominated by the Crown.

The Executive Council has the general duty of assisting the Governor by its advice. In various cases, by local enactment, he is required to act with this advice; but, generally speaking, although highly desirable, it is not compulsory on him to do so if he thinks the public interest requires an opposite course, in which case very special rules are laid down for his guidance in his instructions; which likewise prescribe the course to be taken by the Councillors in recording their opinion in opposition to the Governor's. The Executive Council.

The Executive Council comprising the Governor as president) consists of a specially limited number of the officers of the Local Government; viz. the Officer commanding the land forces, the Colonial Secretary, the Queen's Advocate, the Treasurer, and the Auditor General.

The Councillors are appointed by warrant from the Crown, the Governor having the power of making such appointments, subject to the Crown's confirmation.

The Governor has the power of suspending Executive Councillors, following, as far as the nature of the case will allow, his general instructions as to the suspension of public officers; but the power of dismissal rests with the Crown.

To the Executive Council, associated with the Chief Justice, is also entrusted the duty of administering to the Governor, on his arrival, the usual oaths of office; which being done, the Governor administers to the

members of the Executive Council, and others, the oaths of office to be taken by them respectively. Each new member of Council, on his appointment, is also required to take the oaths applying to his particular case. (*C. R.* and *R.* §§ 54, 56, 57, *and* 60, and see *Royal Instructions.)*

The Legislative Council.

The Legislative Council for the island is constituted as directed by the Queen's instructions, or according to such further powers, instructions, and authorities, at any future time granted to or appointed for the Governor under the royal sign manual and signet, or by order in Privy Council, or by the Queen, through one of the principal secretaries of state. The Legislative Council of Ceylon consists of fifteen persons, of whom nine are persons holding offices within the island at pleasure, and the remaining six are persons not holding any such offices. (*Royal Instructions*, § 4.)

Its constitution.

The senior officer for the time being in command of the land forces in the island, and not being in the administration of the government, the Colonial Secretary, the Queen's Advocate, the Auditor General, the Colonial Treasurer, the Government Agent for the Western Province, the Government Agent for the Central Province, the Surveyor General, and the Collector of Customs at Colombo, are the nine official members. When the senior officer in command of the land forces is in the administration of the government, his place in the council is filled by the next senior officer in com-

mand. Any persons lawfully executing the duties of the several offices during the absence, or suspension, or incapacity, or upon the death or resignation of any such officers, during their performance of such duties, are official members of the Legislative Council, as fully and effectually as though appointed to such offices. *(C. R.* and *R.)* (§ 5.)

Unofficial members.

On the appointment of a new governor, the six unofficial members who have been appointed under the public seal of Ceylon under the former governor continue to be the unofficial members during pleasure. (*Idem*, § 6.) Upon the death, incapacity, absence from the island, suspension or resignation of any of the unofficial members, the governor may nominate and appoint, by a commission issued under the public seal, any fit and proper person to fill such vacancy, who is so appointed only until the royal pleasure is known. (§ 7.) The governor is required immediately to signify to the Queen any such appointment, to the intent that it may be confirmed or disallowed. *(Idem*, § 8.)

Quorum.

The Legislative Council is not competent to act in any case unless six members at least of the council, in addition to the governor or the member who may preside therein in his absence, be present at and throughout any meeting of the council. (*Idem*, § 9.)

Precedence of members.

In the Legislative Council, the official members take precedence of the unofficial members, and the official members between themselves take precedence

according to the order in which their respective offices are above enumerated; and the unofficial members among themselves take precedence according to the priority of their respective appointments. (*Idem*, § 10.)

President.

The Governor presides in the Legislative Council, except when prevented by some insuperable impediment; and at any meetings of the council held during his absence, the senior member present presides. All questions proposed for debate in the Legislative Council are decided by the majority of votes, the Governor, or the member presiding in his absence, has an original vote in common with other members of the council, as also a casting vote, if upon any question the votes be equally divided. (§ 11.)

Rules and orders.

For ensuring punctuality of attendance of the Members of the Legislative Council, and for the prevention of meetings of the council being held without convenient notice to the several members, the governor is directed to frame and propose to the Legislative Council for their adoption such standing rules and orders as may be necessary for those purposes, with any other standing rules and orders best adapted for maintaining order and method in the despatch of business and in the conduct of all debates in the council, which rules and orders (not being repugnant to the commission appointing the governor and commander in chief, or to the royal instructions accompanying the commission, or to any other instructions he may receive from the Queen)

must at all times be followed and observed, and are binding upon the Legislative Council, unless disallowed by the Queen. (§ 12.)

Power to legislate.

By the commission appointing the governor and commander in chief, full power and authority is granted, with the advice and consent of the Legislative Council, to make, enact, ordain, and establish laws for the order, peace, and good government of the island, subject nevertheless to all rules and regulations, by the royal instructions accompanying the governor's commission, prescribed in that behalf. The following are the several rules and regulations so mentioned and referred to in the commission. (§ 13.)

Title and form of ordinances.

All Laws enacted by the Legislative Council are styled "Ordinances enacted by the Governor of Ceylon with the advice and consent of the Legislative Council thereof," and that no other style or form can be observed in such enactments, and all ordinances must be drawn in a simple and compendious form, avoiding prolixity and tautology. (§ 14.)

Any member, if seconded, may initiate business.

It is competent for any member of the council to propose any question for debate in the council; and if such proposal is seconded by any other member, the question must be debated and disposed of accordingly. No ordinance can be enacted, and no vote or resolution can be passed at the council, and no question be admitted to debate there, when the object of such ordinance, resolution, or question is to dispose of or

charge any part of the revenue arising in the island, unless such ordinance, resolution, or question shall have been first proposed by the governor. (§ 15.)

Minutes.

Minutes must be regularly kept of the proceedings of the Legislative Council by the clerk to the council, and the Legislative Council cannot proceed to the despatch of business until the minutes of the last preceding meeting have first been read over, confirmed, or corrected as may be necessary. Twice in each year the governor must transmit to the Queen, through one of the principal secretaries of state, a full and exact copy of the minutes for the last preceding half year, with an index. (§§ 15 & 17.)

Certain ordinances forbidden.

The governor must not propose or assent to any of the following ordinances: viz. any respecting the constitution, proceedings, numbers, or mode of appointing, or electing, any of the members of the council, or otherwise in relation to any of the matters mentioned or referred to in his commission, or in the royal instructions, in any wise repugnant to or inconsistent with

Those repugnant to authority.

such commission or instructions, or repugnant to any Act of Parliament, or to any order of the Privy Council, extending to, or in force in the island. Any such ordinance would be absolutely null and void to all intents and

Those against religious liberty.

purposes (§ 18). Nor any ordinance whatever, whereby any person may be impeded or hindered from celebrating or attending the worship of Almighty God in a peaceable and orderly manner, although such worship

may not be conducted according to the rites and ceremonies of the Church of England (§ 19). Nor any ordinance whereby any new rate or duty might be imposed or levied, or by which the revenue may be lessened or impaired, or whereby the prerogative may be diminished, or in any respect infringed, or whereby any increase or diminution may be made in the number, allowances, or salaries of any public officers, which have received the royal sanction, without special leave or command first received from the Queen (§ 20). Nor any ordinance whereby bills of credit or debentures, or other negotiable securities of whatever nature, may be issued in lieu of money on the credit of the island, or whereby any government paper currency may be established therein, or whereby any such bills or any other paper currency, or any coin, save only the legal coin of the realm, may be made or declared to be a legal tender for the payment of money, without special permission from the Queen in that behalf first obtained (§ 20). Nor any ordinance, by which persons *not* of European birth or descent may be subjected or made liable to any disabilities or restrictions to which persons of European birth or descent are not also subjected or made liable (§ 22). Nor to any ordinance whatever for raising money by any lotteries (§ 23). Nor any ordinance for the divorce of persons joined together in holy matrimony, or to establish a title in any person to lands or other immoveable property acquired by any

Those imposing new taxes without permission.

Those creating debts without permission.

Those lessening the liberties of natives only.

Those creating lotteries.

Those for divorces, and giving land title to aliens.

Those erecting duties unequal to foreign traders.

alien before his or her naturalization (§ 24).* Nor any ordinance whatever by which any tax or duty may be imposed upon transient traders, or upon persons residing, or carrying on business for a short time, within the island, from which other traders or persons carrying on the like business are exempted (§ 25).

Those giving gratuities to council, &c.

Nor any ordinance whereby any grant of money, or other donation or gratuity, may be made by the Legislative Council to the governor or any member of the council (§ 26).

Private ordinances.

Nor any private ordinance whereby the property of any individnal may be affected, in which there is not a saving of the rights of the Crown, and of all bodies, politic and corporate, and of all other persons, excepting those at whose instance, or for whose special benefit, such ordinance may be passed, and those claiming by, from, through, and under them (§ 27).

Those already disallowed, without leave.

Nor any ordinance whatever, to which the royal assent has once been refused, without express leave for that purpose first obtained from the Queen. (§ 28.)

Ordinances affecting private property.

For the sake of orderly despatch, and prevention of all undue precipitation in the enactment of ordinances intended to affect the property of individuals, the governor is required from time to time, as occasion may require, to frame and propose to the council for adoption, standing orders, rules and forms of proceeding, as

* This clause has evidently been dropped in, in ignorance of the Roman-Dutch law; as, by that law, an alien friend can acquire land before naturalization.

may be best adapted for those purposes; and also for ensuring, previously to the passing of any ordinance intended to affect or benefit private persons, that due notice is given to all parties concerned of the provisions thereof, with ample opportunity for opposing the same; and that a full and impartial examination may take place of the grounds upon which the same may be proposed or resisted. And he is authorized from time to time, with the consent of the council, to revoke, alter, or renew such rules, orders, and forms, and, when adopted by them, the same must be duly observed in all their proceedings.

Allowance, &c. of ordinances.

When any ordinance has been passed, it must be forthwith laid before the Queen, for final assent, disallowance, or other direction thereupon, to be signified through the governor; for which purpose he is hereby required, with all convenient speed, to transmit to Her through one of the principal secretaries of state a transcript, in duplicate, of every ordinance, duly authenticated under the public seal of the island, and by his own signature; and every such transcript must be transmitted by the earliest occasion next after the enactment of the ordinance. Every ordinance passed takes effect, and comes into operation as law, from and after the date of the promulgation thereof, or from and after the time at which it is enacted, in it, that the ordinance is to take effect and come into operation as law. The Crown reserves full power and authority to confirm,

and finally to enact, or disallow, any ordinance, either in whole or in part; such confirmation or disallowance being from time to time signified through one of the principal Secretaries of State. And there is further reserved full power and authority to amend any ordinance in such manner as may be necessary and expedient; although, if, on any occasion, the royal pleasure is not signified upon any ordinance within three years next after the date thereof, then, from and after the expiration of such term of three years, such ordinance is deemed to be disallowed, and thenceforth ceases to have any force or effect. (§ 30.)

Ordinances to be enrolled in the Supreme Court.

The Governor must transmit to the Chief Justice of the Supreme Court, to be enrolled in that Court, a transcript, duly authenticated in the manner before mentioned, of every ordinance passed. And also, from time to time, a certificate, under the Governor's hand and seal, of the effect of every order for confirming or disallowing, in the whole, or in part, or for amending the provisions of any ordinance; which certificate must, in like manner, be enrolled in the Supreme Court, to remain on record, to the intent that the Judges of the Court may, without further or other proof, take cognizance of all ordinances made and promulgated for the peace, order, and good government of the island. The Judges of the Supreme Court have no right or authority to prevent or delay the enrolment of any ordinance; and its validity does not depend upon the enrolment. (§ 31.)

Collection of ordinances.

In the month of January, or at the earliest practicable period at the commencement of each year, the Governor must cause a complete collection to be published, for general information, of all ordinances enrolled during the preceding year. (§ 32.)

Numbering of ordinances.

All ordinances, when passed, must be distinguished by numerical marks, commencing in each successive year with number one, and proceeding in arithmetical progression to the number corresponding with the total number of ordinances enacted during the year; and every such ordinance must be divided into successive clauses or paragraphs, distinguished in like manner by numerical marks; and to every clause must be annexed, in the margin, a short summary of its contents: and subjects, which have no proper relation to each other, must not be comprised in one and the same ordinance; and no enactment can be introduced into any ordinance which is foreign to its professed scope and object: nor can any perpetual clause be part of any temporary ordinance: and no ordinance can be suspended, altered, continued, revived, or repealed by general words, but the date and title of every ordinance must be particularly mentioned and expressed in the ordinance suspending, altering, continuing, reviving or repealing it. (§ 33.)

Publication of draft ordinances in the Gazette.

No ordinance can be proposed to the Legislative Council, or enacted by them, unless the draft of it has first been published in the Gazette of the island, or

otherwise made publicly known, for at least three weeks next before its enactment. (§ 34.)

PUBLIC OFFICERS.

Offices are granted and holden at the pleasure of the Crown, with some few exceptions established by local laws.

Of offices held at the pleasure of the Crown, some few are filled up by the Governor or by the Governor in Council, in pursuance of special enactments authorizing, in these particutar cases, such a deviation from the established form. In the absence of such enactments, public offices are usually filled up in the name of Her Majesty. All offices of considerable rank, trust, and emolument, are filled up by appointments either provisional or final—provisional, when they are made by the Governor on any sudden emergency, subject to Her Majesty's approbation—final, when they are made in obedience to Her Majesty's commands. The right of appointment to such offices is vested, as a general rule, in the Crown. Nevertheless, under local enactments, the right of appointments is occasionally vested in the Governor or Governor in Council.

All public offices of considerable rank, trust, and emolument, are granted by an instrument under the public seal of the colony in Her Majesty's name. When

the Governor makes a provisional appointment he issues such an instrument in pursuance of Her Majesty's general instructions. In the case of a final appointment, the instrument is issued in pursuance of Her Majesty's special instructions, which special instructions are conveyed to the Governor generally in the form of warrants under the royal sign manual and signet.

Offices are classed under three heads:—1, those of which the emoluments do not exceed *one hundred* pounds per annum; 2, those of which the emoluments exceed *one hundred* and do not exceed *two* hundred pounds per annum; 3, and those of which the emoluments exceed *two* hundred pounds per annum.

In the case of the first or lowest of the three classes, the Governor, as a general rule, has the absolute disposal, subject only to the condition of reporting every such appointment by the first opportunity. In the case of the third or highest class, the Governor is to make a special report of the grounds of his appointment, and is distinctly to apprise the object of his choice that he holds the office in the strictest sense of the word provisionally only until his appointment is confirmed by Her Majesty. The confirmation is by warrant under the royal sign manual and signet.

When a vacancy occurs in the second or middle class, the Governor reports it to the Secretary of State, together with the name and qualifications of the person whom he has appointed provisionally and intends to fill

it finally, which recommendation is almost uniformly followed.

When a vacancy occurs in the higher class, the Governor follows the same course as to reporting the vacancy and provisional appointment; he may recommend a candidate for final appointment, but the Secretary of State can recommend another instead.

Her Majesty is advised to regard more favourably appointments which are promotions of meritorious public servants, than those in favour of persons new to the public service. When any new office is created, the Governor's recommendation has less weight than in the case of those offices already established. In the case of new offices there is always reason to anticipate that an appointment will be made directly from England.

In determining appointments from England or from the colony, regard will probably be had to the wealth and population, and to the number of properly qualified candidates among whom the local authorities can make a selection.

In the distribution of the patronage of the Government in the colony, great weight must always be attached to local services and experience. The Governor therefore makes, once in each year, a *confidential report* of the claims of candidates, whether already employed or not, in order that, when a vacancy or an opportunity for promotion occurs, the Secretary of State may have

before him means, beside the recommendation of the Governor, for judging how far the candidate recommended by the Governor is best qualified, and whether a proper candidate is in the colony or in any adjacent colony. The Governor inquires about and reports upon other candidates, of whom he has less knowledge, when he sees reason; but, in the application of these rules, much must be left to the Governor's discretion.

Whenever officers borne on the half-pay of the army or navy, or in the military and commissariat departments, are appointed to a civil situation, a report, specifying the date and the amount of salary, is made immediately to the Secretary of State, which will be remitted by him to the proper authorities in this country. Promotions of half-pay officers in the civil service are also to be notified forthwith to the Secretary of State, for the information of the respective authorities.

The governor, on the vacancy of any cure of souls to which any stipend is attached by law, presents to the Bishop, for institution to such vacant cure, any Clergyman of the United Church of England and Ireland, whom, upon the recommendation of the Bishop or other sufficient grounds, the governor may deem to be the most proper person to fill such cure, and who has been actually resident within the diocese, and officiating as a clergyman for six calendar months at least next before such cure shall have become vacant, or who, if not so

resident or officiating, shall have been absent with the leave of the Diocesan or other lawful authority.*

But if, at the time of the vacancy, there is no resident clergyman so circumstanced, whom the governor deems proper to fill such benefice, then he forthwith reports to the Secretary of State, that Her Majesty may nominate some person to fill the vacancy. (*C. R. R.* §§ 62 *to* 77.)

Suspension from office.

The offence with which an officer is charged must be communicated to him in writing, with the grounds on which it rests, and he must answer the charge in writing. If the answer is not so satisfactory as to obviate, in the governor's opinion, the necessity of proceeding to suspension, the governor must apprise the officer, on a day to be named, and which must be after such an interval as will allow the officer a reasonable time for preparing his defence, that the question whether he shall be suspended or not will be brought before the Executive Council; he must defend himself before the Council, orally, or in writing, according to the rule laid down by such Council.† If, in course of inquiry before the Council, new charges or new evidence are adduced against the accused officer, they must be fully communicated to him, and sufficient time must be allowed him to meet them before final decision. If the decision is for suspension, the

* The C. R & R. do not point out the exact course, in the cases of Government benefices of other denominations.

† In Ceylon, generally in writing.

governor's report must be accompanied by copies of the minutes of council, and of all documents material to it, that the Secretary of State may confirm or disallow it.

No suspension must take place unless the defence has been heard and considered, or unless the party makes default when called upon.

When it is inexpedient for the public service to leave an officer to whom a very serious offence is imputed in the execution of his functions (as, for instance, in the custody of public money) during the time necessary for regular proceedings to his suspension, the governor may at once forbid him the further exercise of his functions, as a provisional measure; but he cannot be formally suspended from office or salary, except by a regular proceeding already described, which must in all cases be taken with as little delay as possible.

An officer who has been suspended is not entitled to absent himself from the colony during the interval before his ultimate dismissal or re-instatement, without the leave of the governor, as in ordinary csses; if leave of absence is granted to him, half salary is not payable to him if he is ultimately dismissed, nor in case of his re-instatement, unless so ordered by the Secretary of State. If the suspension is not approved and confirmed in England, the officer suspended is entitled, unless otherwise ordered by the Secretary of State, to the full amount of salary which he would have received if he had not been suspended. If the suspension is approved and

confirmed, all salary will cease from the day of suspension; and although the officer should be subsequently restored (as an act of indulgence), he will not be entitled to any portion of salary during the period of his suspension.

An officer whose suspension is approved and confirmed forfeits all claim to a retiring allowance.

These regulations relate to the suspension of public officers whose salaries exceed £100 per annum; the regulations affecting the suspension of officers with salaries under £100 per annum, are contained in a circular dispatch to governors of colonies of November 10, 1860.

Salaries and half-salaries.

On appointments to offices, half salary is allowed, as a rule, from the date of embarkation, and full salary from the date of arrival in the colony. If, however, the officer previously holding an appointment continues in his office until the arrival of his successor, the latter officer is not entitled to any portion of salary until he has assumed the duties of his office. No advance of salary is allowed, except in very special cases, to be determined by the Secretary of State, with the concurrence of the Lords of the Treasury.

If an office is vacated by death or removal, or by temporary absence, the person appointed to act receives half the salary of the office. But if he is the holder of another situation, he may receive half the salary of the office in which he acts, together with half the salary of his own office.

Should the person so appointed to a vacant office be required at the same time to perform the duties of his own office, he may be allowed half the salary of the temporary office, together with the whole salary of his own office. Though, as a general rule, no person is appointed at the same time to two distinct offices whenever any other arrangement is practicable.

Should the officer whom the governor has appointed temporarily to a vacant office be confirmed, he draws the full salary of that office from the date at which he entered on the duties, if no portion of the salary during that period has been drawn by the former occupant; but, from the date from which he draws full salary, he is not entitled to salary on account of any other office he may have held at the same time.

Leave of absence may be granted after a period of six years' continuous service in the colony, or may be given before the expiration of that period in cases of serious indisposition, or of "urgent private affairs," by the governor and council. In cases of serious indisposition, the officer's health must be certified by his medical attendant. In cases of "urgent private affairs," the nature of such urgent affairs must be stated to the governor. The term of leave must in no case be more than twelve months, *i. e.* granted in Ceylon. The governor may report to the Secretary of State the period for which the leave may be extended without injury to the public service, but must not recommend extension.

Leave of absence.

An officer on leave of absence is entitled to half salary during his absence from the colony. The governor furnishes every officer proceeding on leave of absence with a duplicate of the dispatch to the Secretary of State, reporting his leave, and a duplicate certificate; and an absent officer cannot receive his half salary, unless he produces such certificate. The rule respecting the stoppage of the half salaries of civil officers on obtaining leave of absence is equally applicable to the case of ministers of religion receiving salary from colonial or imperial funds. Leave in these cases is granted by the governor on the recommendation of the Bishop or other superintending authority (if any) of the body to which the minister belongs, and subject to the same rules as in the case of civil officers in regard to the confirmation and extension. To whatever extent the authority of the Queen, or of Her Majesty's officers, may be competent to enforce it, the further rule must be observed, that no minister of religion must be permitted to absent himself from the colony, until adequate and satisfactory provision is made for the performance of his clerical duties during his absence.

The same rules extend to leave of absence granted to judicial functionaries of every class.

On his arrival in England the officer on leave must report himself to the Secretary of State, transmitting the governor's dispatch, and mentioning the place of his residence; and should he subsequently change his

residence, he must notify the same to the Secretary of State. Public accountants should also leave their address at the Audit Office.

The preceding regulations are not to be understood as applying to, or as designed to prevent, or to regulate, any vacation not exceeding six weeks in the whole of any one year, during which any civil officer may apply for and obtain leave of absence for the purpose of relaxation from business. In such cases, no report to the Secretary of State is necessary, nor is any abatement of salary to be made, it being understood that the officer absenting himself will, with the concurrence or sanction of the governor, have made such arrangements as may be necessary for the intermediate and gratuitous discharge of his duties by some one of his brother officers.*

Leave of absence will be extended by the Secretary of State in cases of serious indisposition, or urgent private affairs, but not as a matter of course, nor unless the public convenience admits of it. Such extension will not, in the first instance, be given for more than six months. Further extensions may be given; but, except in very special cases, no officer on leave will be allowed to receive half salary at any one time for more than twenty-four months. Nor for a period which,

* Officers going on leave of absence with their families (not exceeding five persons), receive from colonial funds one-third of the cost of their passages to England and back for every six years' residential service. Colonial officers retiring on a pension are entitled to a similar indulgence.

added to his previous absences on leave on half salary, would exceed by six months one-sixth of his resident service in the colony.

Pensions and retiring allowances.

It is to be understood, as a general rule, that no colonial officers of any rank or description are entitled as of strict and absolute right to retiring pensions.

Each case must be specially considered and treated on its own merits, and the pension granted will be regulated by the principles of the British Superannuation Act; the maximum rate of pension established by that act is not, in practice, the minimum rate also.

A governor bringing under the consideration of Her Majesty's government the application of any officer for a retiring allowance is required to furnish certain particulars and to accompany any recommendation with a certain statement.

Pensions on the ground of ill-health are subject to the condition, that should the officer's health be re-established, he is bound to accept, in lieu of his pension, any office offered, not inferior in value to that from which he retired, due regard being had to climate.

Precedency.

The following is the table of precedency in Ceylon:

The Governor, Lieutenant-Governor, or Officer administering the Government.

The Chief Justice.

The Lieutenant-Governor (not administering the Government), or the Senior Officer in command of troops, if he is to succeed to the administra-

tion of the Government in case of death or absence of the Governor, Lieutenant-Governor, or Officer administering the Government.*

In the event of hostilities, the Senior Officer in command of the troops will take the precedency under any circumstances.

The Bishop.

The Puisne Judges.

The Members of the Executive Council.

The Colonial Secretary.

The Queen's Advocate.

The Treasurer.

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* The following rules are to be hereafter observed in the colonies in regard to the precedency of military and naval officers in command of Her Majesty's forces:—

1st. The Senior Officer in command of troops, if of the rank of a General, and the Officer in command of Her Majesty's naval forces on the station, if of the rank of an Admiral, are to have precedency next after the Governor, their own relative rank being determined by the Queen's Regulations on that subject.

2ndly. The Senior Officer in command of the troops, if of the rank of Colonel or Lieutenant-Colonel, and the Officer in command of Her Majesty's naval forces on the station, if of equivalent rank, are to have precedency next after the Bishop and the Chief Justice, their own relative rank being determined by the Queen's Regulations on that subject.

3rdly. If below the rank of Colonel or Lieutenant-Colonel, the Senior Officer in command of the troops, and the Officer in command of Her Majesty's naval forces on the station, are to continue to take rank, as has heretofore been the case, next after the Solicitor-General.

Whilst, however, these Rules will take effect in every place in which Her Majesty's Instructions, communicated through the Secretary of State, avail for the purpose, they will not override the precedency which in a few colonies is conferred on certain offices either by Law or by the terms of Letters Patent from the Crown, which instruments cannot be set aside or altered except by the issue of others having the same form and equal authority.—27th August, 1864.

The Auditor-General.
The Government Agent for the Western Province.
The Government Agent for the Central Province.
The Surveyor-General.
The Collector of Customs at Colombo.
The Unofficial Members of the Legislative Council according to appointment.
The other Government Agents.
The Archdeacon.
Clerk of the Councils.

Beyond this the table is not settled.

Correspondence of individuals.

Persons in a colony, whether public functionaries or private individuals, who have any representations of a public or private nature to make to the Government, should address them to the Colonial Secretary, requesting him to lay the case before the governor.

The duty of the governor is to receive and act upon each such representation as public expediency or justice to the individual may appear to require, with the assistance, in such cases as hereinbefore specified, of his Executive Council; and, if he doubts what steps to take thereupon, or if public advantage may appear to require it, to consult or report to the Secretary of State. Every individual has, however, the right to address the Secretary of State, if he thinks proper. But in this case he must transmit such communication, *unsealed*, to the governor or administrator, applying to him to forward it in due course to the Secretary of State.

Every letter, memorial, or other document which may be received by the Secretary of State from a colony otherwise than through the Governor, is, unless a very pressing urgency justifies a departure from the rule, referred back to the Governor for his report.

Petitions addressed to the Crown, or to the Crown in Council, memorials to public officers or boards in Her Majesty's government, &c. must in like manner be sent to the Governor for transmission home. The Governor is bound to transmit to the Secretary of State every communication so received by him, accompanied by such report as its contents may appear to him to require. He is to do this with all reasonable dispatch, consistently, however, with the delay requisite for the preparation of such report.

CHAPTER V.

THE SUPREME COURT IN ITS CIVIL CAPACITY.

Supreme Court as a Court of Appeal.

THE Supreme Court, as a Court of Appeal in civil cases, is empowered and regulated chiefly by the Charter,—by Ord. No. 9 of 1843,—by Ord. No. 20 of 1852,—and Ord. No. 8 of 1859. It is an Appeal Court to the District Court, to the Court of Requests, and to the Police Courts.

For the District Courts.

In reference to the District Courts, the Supreme Court is a court of appellate jurisdiction for the correction of all errors, in *fact* or in *law*, committed by the District Courts; and has sole and exclusive cognizance, by way of appeal, of all causes, suits, prosecutions, and things of which the District Courts may, in pursuance of the powers given them by charter or any ordinance, take cognizance, by way of original jurisdiction. (*Charter*, § 31.)

The Supreme Court is also empowered to affirm, reverse, correct, or alter every sentence, judgment, decree, or order, according to law; and, if necessary, to remand to the District Court for a further hearing, or for the

admission of any further evidence, any cause, suit, or action, in which any appeal shall have been brought; and, upon hearing every such appeal, it is competent for the Supreme Court to receive and admit, or to exclude and reject, new evidence touching the matters at issue in such original cause, suit, or action, as justice may require. (*Charter*, § 35.)

For the Court of Requests.

With regard to the Court of Requests, "any party dissatisfied with any *final judgment*, or *order having the effect of a final judgment*, pronounced by the Commissioner of any Court of Requests, may appeal to the Supreme Court against any such judgment or order, for any error in law or fact committed by such commissioner in any action. (§ 19 of 8 of 1859.) And the Supreme Court is a court of appellate jurisdiction for the correction of such errors, and must, on appeal, affirm, reverse, correct, or modify any such judgment, or make order according to law, or order a new trial, or a further hearing, upon such terms as the court thinks fit. (§ 20, *Id.*)

Supreme Court decides strictly according to law.

The Supreme Court corrects errors in the judgments of other courts; but it has no discretionary authority to alleviate those hardships which a strict enforcement of the law will sometimes produce, further than the other courts possess that power. (115, *D. C. Manaar*, 16 *Dec.* 1835; *Morg. Dig.* 67.)

But is not guided by mere technicalities.

On appeal from the District Court, the Supreme Court is to decide as "justice may require;" and on appeals

from the Court of Requests, according "to law;" but, in reference to both, the higher court is precluded from being guided by mere technicalities, by a statute (6 of 1854) which provides that "no judgment, decree, or order, of any court of civil jurisdiction in this colony shall, on appeal, be reversed, altered, or remanded, on account of any error, defect, or irregularity not productive of injury to either party."

Difference between appeals from the D. C. and the C. of R.

There is thus a difference between appeals from the District Court, and those from the Court of Requests. The very general terms in which appeals from the District Court are given, makes it difficult to imagine any decree, or order, interlocutory, or final agreement, in which an appeal would not lie (*Marsh.* 12); whereas appeals from the Court of Requests are confined to final judgments, or to orders having that effect. And it has been held that even the 29th order of 9 of 1859, though expressed in general terms, does not extend the power of appeal given in § 19 of 8 of 1859 (*C. R. Galle.* 2202, 19 *March*, 1861). The question as to whether a judgment or order is final, or interlocutory, will be found in another part of this book. The cases relating to Courts of Requests have not always been sufficiently recorded to be of service. (See *Nell*, 210, 211, 223, 224, and 246.) The refusal of a commissioner to dismiss a case is not a final judgment, nor an order bearing the effect of a final judgment. (1045, *Charagacherry*, 10 *July*, 1861.) Neither is an order overruling a motion

a final judgment, unless it have that effect. (17508, *C. R. Calpentyn*, 14 *Oct.* 1862.)

Interlocutory orders of the C. of R.

Nevertheless the Supreme Court has considered interlocutory orders of Courts of Requests (see *Lor. R.* 1856, pp. 20, 21, 123); though never until a final judgment or order has been given. Then, indeed, the court has dealt with interlocutory orders *in connection with* the final order, but not *per se*; thus, if error in the interlocutory order has led to error in the judgment, or if it should be necessary to amend the interlocutory order to make it consistent with the decree upon the judgment; in such cases the Supreme Court takes jurisdiction to decree upon the interlocutory orders of Courts of Requests.

The appeal from the D. C. very wide.

Every order of the District Court, of whatever nature (even a postponement, 13,263, *D. C. Colombo; Morg. D.* 186), may be appealed against, either by a separate and distinct appeal at the time of making the order, or by general appeal after the decision of the case. Even an award made under an order of court, is liable to appeal; for the award may be contrary to law, or to the terms of the submission to arbitration. (*Marsh.* 13.)

Interlocutory appeals from the D. C.

In cases of appeals against interlocutory orders, where a question arises whether the District Court should proceed at once, or stop the case in order to have the interlocutory appeal first heard, the District Court should consider what is best for the ultimate

justice of the case; and, in general, should not postpone a case for the hearing of an interlocutory appeal, unless of necessity; as otherwise these appeals may be made the means of defeating justice by constant delays. But though the District Judge should proceed with the hearing of the case, and in that (if desirable) the Supreme Court will (on motion) assist him, by ordering the case to be returned to the District Court* for the purpose of being heard, reserving the point of appeal for argument before itself (4919, *D. C. Colombo, N. Sept.* 14, 1836; *Morg. Dig.* 96); yet, at the same time, it will be safer for him to permit his interlocutory order to be contested in appeal before pronouncing judgment, unless the interlocutory order can be set right by the definitive sentence. (1146, *D. C. Amblangodde*, 15 *June*, 1836; *Morg. Dig.* 85; see also *Marshall*, 14.) If, however, an interlocutory appeal is actually pending, the Supreme Court will not sanction or recognize further proceedings pending appeal (as, for example, the making a survey), unless, as above stated, by its own authority. (12,685, *D. C. Batticaloa*, 19 *Jany.* 1859.)

Interlocutory orders and appeals are more freely dealt with than final appeals. Thus the Supreme Court will decide upon all interlocutory orders of the District

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* An appeal from an interlocutory order does not preclude a D. C. from proceeding to trial, as fixed for the next day, notwithstanding his duty to transmit the record with as little delay as possible. (19865, *D. C. Galle*, 28 *Novr.* 1846.)

Court, without the consent of parties (8644, *D. C. Kandy*, 25 *Oct.* 1837; *Morg. Dig.* 200; see also *Groenewegen de Leg. Abrog.* and *Dig.* xlii, i, 14). Again, though a final decree cannot be altered by a District Court, yet judgment preparatory and interlocutory may at any time previous to the final decree be altered, amended, or retracted (803, *D. C. Matura*, 9 *Aug.* 1837; *Morg. Dig.* 193). Yet it is ruled that appeal ought not to be taken against an interlocutory order, or a decision overruling an objection taken during the hearing of the suit, but it ought to be brought, on the same ground, against the final decree (15820, *D. C. Kandy*, 23 *July*, 1844; *Austin*, 75). Whatever may be the weight of the objection taken during the trial of a case, it ought not to be allowed to stop the progress of the case by an *immediate* appeal to the Supreme Court. By rule 21 of § 1, the objecting party has the opportunity reserved to him of appealing, after the decree is passed, against any evidence improperly received. (706, *D. C. Caltura*, 9 *May*, 1835; *Morg. D.* p. 44.)

Prevention of speciality for appeals for delay.

In order to prevent appeals for mere delay, by an order of 9th May, 1835, on all appeals against interlocutory orders the registrar is directed to send the proceedings forthwith to one of the judges, without keeping them eight days in the registry, as in other cases, unless the judge shall otherwise order (*Marshall*, 14). In order to discourage delay, the Supreme Court has taken occasion to censure the party appellant in

the order of affirmation, and to direct him to pay the costs of the appeal, without reference to the ultimate decision of the case, where the appeal was obviously for delay. The Court has also similarly visited the proctors who drew and promoted such appeals. (*Id.* 15, and see *title* "Proctor.")

The Supreme Court also discourages motions which interrupt the regular course of a suit, and which, unless clearly tenable, always increase the expense unnecessarily to the suitors. (6418, *D. C. Ratnapoora.* 29 *Apr.* 1853.)

Appeal must be on some judgment, order, &c.

The Supreme Court is a Court of Appellate Jurisdiction, for the correction of all *errors, in fact or in law, committed by the District Court;* and, as that Court can only exemplify its errors in some judgment or order, an appeal must be against some judgment or order. (*Charter*, § 31; *March* 19.) Thus a mere expression of opinion by the District Court, and of advice to a party, is no ground of appeal. (*Marsh.* 19, citing 442, *Jaffna*, 20 *Feb.* 1834; *Morg. Dig.* 33; and 1652, *Negombo*, 6 *Jan.* 1836; and see 5326, *D. C. Matura*, 14 *Jan.* 1857.) In this last case, however, to save expense, the S. C. decided the point of law in the decree over-ruling the appeal. Similarly, though there is an appeal against the verdict of the court below, it is no ground of appeal that the evidence was false, especially without proof. (1502, *D. C. Seven Korles*, 8 *June*, 1836, *Morg. Dig.* 84.) Though, if a party can show that he has discovered

tampering, bribery, or corruption, the Supreme Court will assist him by reference to the District Court. (*Morg. D.* 283.) So also, for the same reason, there is no appeal by an officer of the District Court against an order directing certain duties to be done, as this is not an order in the nature of a decision. Similarly the Supreme Court will not entertain petitions against the *conduct* of the District Judges, unless that conduct is part of the grounds of a regular appeal, though the Court may retain such petitions for the purpose of enquiry, if it sees fit. (*Marsh.* 19 and 20.) So also as an appeal against opinion: when the appeal is against credibility, the Supreme Court considers it always better to confirm the court which has had the opportunity of examining the witnesses and judging from their demeanour those who were most deserving of credit. (1761, *D. C. Seven Korles*, 9 *Nov.* 1831; *Morg. D.* 103.) So, also, a question of *onus* is not appealable, as it cannot involve a judgment or order, strictly speaking. (15074, *D. C. Badulla*, 23 *July*, 1859.)

There are certain other appeals not allowed. Thus the Supreme Court will not take it as a good ground of appeal that a party had witnesses ready who were not examined, unless he called them, or requested the Court to hear them (684, *P. C. Jaffna*). Also, where the judgment of the Court below was written in pencil, corrected and explained in pencil, especially in places where the notes did not appear in the judge's hand-

writing, the Supreme Court held the proceedings to be slovenly, and refused to act upon them. (255, *C. R. Point Pedro*, 2 *June*, 1863.) The Supreme Court will not treat that, as an error of the District Judge, which was done by the conduct of the counsel for the defendant. (37255, *D. C. Kandy*, 15 *Oct.* 1863.) The Supreme Court does not recognize the marginal notes of opinions, not even when signed by the District Judge, with his official description; as, for example, an order of the Court allowing the taxation of the secretary. (14163, *D. C. Galle*, 16 *Nov.* 1852.) A plaintiff has no appeal where his proctor has submitted to a nonsuit. (5730, *D. C. Caltura*, *Lor. R.* 23.)

As a general rule, the Supreme Court will not alter that part of a judgment that the party aggrieved has not appealed against (1083, *D. C. Amblangodde*, 20 *Dec.* 1837; *Morg. Dig.* 202); nor will it, in general, entertain an objection which has not been urged in the Court below, especially if the objection is on a matter of form. (20994, *P. C. Galle*, *Lor. R.* 103, and *P. C. Ca.* 90.) On the same principle, if a party makes no defence, nor pleads prescription in the court below, he may not raise a defence, nor the question of prescription in appeal. (31401, *P. C. Kandy*, *P. C. Ca.* 94; *Nell*, 168, and *Lor. R.* 156.) But where a joint judgment was given against parties whose liabilities were several and not joint, the judgment was reversed; even the misjoinder, not objected to in the Court below (18767, *D. C. Trincomalie*, *Lor. R.* p. 200).

Again, by the charter (§ 31), the Supreme Court has cognizance, by way of appeal, of all causes, suits, &c. of which the District Court may take cognizance; this is interpreted to mean that the judgment or order appealed against must be in a suit or other matter *pending before the District Court.* (*Marsh.* 19.) Thus, in an appeal upon a decree of an abolished court, the court would not allow any appeal against the justice of the decree sued upon, as *that* was not pending in the court below. (1486, *Jaffna*, 20 *May*, 1835; *Morg. Dig.* 46.) Though, probably, as in the case of a suit upon a foreign judgment, the Supreme Court would see that the first decree was not opposed to natural equity, though it might be to Ceylon law.

And made in some pending suit.

Such being the powers of the Supreme Court in civil appeals, we now come to consider the mode of appealing from decisions in the District Court.

Mode of appeal from the D. C.

Every party intending to appeal from any judgment, decree, sentence, or order of any District Court, is allowed *ten* days (exclusive of Sundays and public holidays, and of the days on which the judgment is pronounced and the petition lodged) to file his petition of appeal in the District Court; and, on failure thereof, the same cannot be received. (*Rule* 1, 12 *Dec.* 1843.)

The rule means literally what is here expressed, and is intended to follow the English practice and construction. (14332, *D. C. Galle*, 21 *Dec.* 1850.) Yet any party appellant, who fails to file his petition of appeal within the periods for that purpose limited, may be

allowed his appeal, if it is proved to the satisfaction of the District Court that such omission is not imputable to any omission or delay on the part of the appellant; if it is so proved, the matter must be referred to the Supreme Court, to decide on the allowance or rejection of the appeal. (*R. and O. Sect.* 8, § 5, p. 83.)

Object of the Rules.

The object of these rules of limitation is the protection of the respondent, and not the sparing of the time or trouble of the courts; accordingly the Supreme Court has ordered an appeal to be received, *with the consent of the respondent*, though no satisfactory reason was assigned for the appellant's delay. (*Marsh.* 23: 6975, *D. C. Kandy*, 30 *June*, 1835; *Austin*, 28.)

Delay by Court or its officers excuses appellant.

When the delay is occasioned by want of stamps in the office of the District Court, or by the negligence or misconduct of the officers of the court, or by any act of the court itself (such as the adjournment of the District Court during the session of the Supreme Court, 1258, *D. C. Amblangodde; Morg. D.* 285), it is scarcely necessary to say that appeals are admitted without a moment's hesitation, on the appellant complying with the rules as to security. (*Marsh.* 23; 9119, *D. C. Jaffna*, 21 *Oct.* 1862.) Thus, where a party presented an unstamped petition of appeal to the D. C. which was not returned to him till *nine* days afterwards, and he afterwards filed a petition of appeal in form, but out of time, the Supreme Court ordered it to be received, observing that the appellant might not unnaturally have concluded

that if unnecessary delay were permitted to the officers of the D. C. his own want of punctuality should not be too severely criticised. (*Marsh.* 23.) So, where the appellant had furnished money for stamps, which the Secretary of the District Court was *supposed* to have embezzled, the appeal was allowed with the necessary documents on blank paper. (*Marsh.* 24.)

Appeals, when allowed after the proper time for filing.

The principles on which appeals are to be allowed after delay occasioned by the appellant, were laid down in a case in which it was attempted to bring in appeal a case from a District Court after a lapse of three years, on the usual reference to the District Judge. The judge only stated that to the best of his belief and knowledge the omission to file the petition of appeal was not imputable to any negligence on the part of the appellant. That report was held not to fulfil either the letter or the spirit of the rule. The rule should be construed that proof must be given before the District Judge, accounting for the non-filing of the petition of appeal within the prescribed time. It is both negligence and delay not to file within that time, unless upon good cause* (which must be shown) for not so doing. Mere ignorance that the judgment is unsound is not such a cause. And the court remarked that, were any other principle admitted,

* Some *good obstructing cause* to have prevented the filing, *s. ca.;* but see also 31535, *D. C. Colombo*, 29 *Dec.* 1847, *Coll.*, which seems to imply that an appeal will be allowed after long lapse of time, in case of fraud, or of the discovery of fresh evidence.

"no man, who has his title to land established by a judgment of a District Court not appealed against, could consider himself the owner thereof, even for a day, nor enter with safety upon any improvement of his estate." (11988, *D. C. Kornegalle*, 24 *Dec.* 1852.)

D. J. need not forward an appeal filed too late.

If the District Judge is not satisfied that the omission to lodge a petition in time is not imputable to any neglect or delay on the appellant's part, the District Judge is clearly not bound to forward the petition of appeal to the Supreme Court; he being only bound to do so by the rule (§ 8, *par.* 5, p. 83) when he finds no negligence or delay. (300, *D. C. Galle*, 28 *Oct.* 1854.)

The S. C. looks to the merits of an appeal when too late.

The Supreme Court, on deciding upon the allowance or rejection of an appeal not lodged in time, may examine the merits of the case, to see if there exists any ground for the appeal. (152, *D. C. Matelle.*)

Petitions must be drawn and signed by advocate, proctor, or secretary.

Every petition of appeal from a District Court* must be drawn and signed by some advocate or proctor, or else it cannot be received, unless drawn and signed by the secretary in the manner hereafter stated. (*Rule* 2 of 12 *Dec.* 1843, p. 133.) If a petition of appeal *purports* to be signed and drawn by a proctor, that has been held to be sufficient under the rule. (11832, *D. C. Jaffna*, 1 *July*, 1862.) Probably this case means *primâ facie* sufficient; for of course it is open to the respondent to

* This rule was introduced in the hope that professional men would not give their aid to vexatious and frivolous appeals. (4401, *D. C. Colombo*, 10 *Aug.* 1846.)

show that the signature is not genuine, if he can. A petition of appeal may be duly signed, even though the proctor signing is not a proctor of the Supreme Court. (4424, *D. C. Amblangodde*, 27 *May*, 1844.) On the principle that proctors are privileged to sue and be sued in their own courts in person, a proctor appellant is not obliged to employ another proctor to draw and sign his petition of appeal, his own signature, with the addition, "Proctor of the District Court," being sufficient. (18649, *D. C. Kandy*, *Aust.* 99.) Also, to meet the wants of the poor litigant, it is provided always that any party desirous to appeal shall (within the time limited for filing petitions of appeal, and upon his producing the blank paper with the proper stamp required for drawing out his petition of appeal) be allowed to state, *vivâ voce*, his wish to appeal, together with the particular grounds of such appeal; and the same shall (so far as they are material) be concisely taken down in writing by the Secretary of the District Court, in the usual form of a petition of appeal; when it shall be signed by such party, and attested by the secretary, and be received as the petition of appeal of such party, without the signature of any advocate or proctor. (*Rule* 2 of 12 *Dec.* 1843, p. 133.)

A petition of appeal will be rejected for irregularity, if it has not been taken down from the mouth of the party in the manner prescribed by this rule. (12411, *D. C. Chilaw* and *Putlam*, 5 *Dec.* 1845.)

Petitions to be concise.

All petitions of appeal must set forth truly and concisely the specific grounds of appeal; or, in default thereof, the appellant is liable to be disallowed the whole of his costs, or any part thereof, as the Supreme Court may direct. (*Rule* 3 of 12 *Dec.* 1843, p. 133.) And the court will disallow costs in all cases where the petition of appeal grossly violates this rule. (33585, *D. C. Kandy*, 9 *July*, 1862.) This rule gives a control over the limits of appeal. Thus, in the case of frivolous appeals,

Frivolous appeals.

The Supreme Court will disallow frivolous appeals. As, for example, if the appellant object that the Court below was satisfied with the evidence of only one witness. (29666, *C. R. Jaffna*, 1 *Sept.* 1863.) Where an appeal was very frivolous, the appellant was punished, not only by the affirmation of the judgment against him, but also by double costs of suit. (5608, *D. C. Jaffna*, 19 *Sept.* 1838; *Morg. D.* 243.)

Improper and defamatory appeals.

Appeal petitions should be expressed in proper language and respectful towards the District Judge. Where an appeal petition contained grossly impertinent language, the Supreme Court disallowed the proctor to the appeal all his costs in appeal, and ordered him to be publicly reprimanded. (5659, *D. C. Jaffna*, 30 *June*, 1841, *Morg. D.* 309.) So also the Supreme Court will order scandalous and defamatory words to be struck off an appeal petition by the Registrar. (33585, *D. C. Kandy*, 24 *June*, 1862.)

If an appeal is very improperly drawn, the Supreme

Court will disallow the proctor his fees for drawing and copying it, if he has not already received them; and if he has received such fees, it will order them to be refunded to the client. (10883, *D. C. Negombo*, 14 *Nov.* 1845.)

Assertions in appeals require affidavits.

Also, where an appeal is founded on assertions in the petition, those assertions should be supported by affidavit, and must not be contradicted by the report of the Court below; unless, so supported and uncontradicted, the Supreme Court will not consider them. (284, *P. C. Calpentyn*, 17 *Sept.* 1862; 244, *P. C. Calpentyn*, 2 *Sept.* 1862; 32,288, *P. C. Jaffna*, 19 *Aug.* 1862; see *P. C. Ca.*: 11159, *D. C. Jaffna*, 31 *Oct.* 1861.) Also parties making untrue statements in appeal petitions are liable to be made to appear before the Supreme Court by themselves or counsel, to explain gross mis-statements. (11774 *P. C. Galle.* 21 *Oct.* 1851.) And the court will not permit the evidence transmitted to it by the District Court to be amended on affidavit, but will refer to that court for information and explanation. (29942, *D. C. Kandy*, 27 *June*, 1851.)

The Supreme Court is generally guided by the record, and the proceeding forwarded to them, and will not admit that there is any error in them on the bare assertion of the appellant. If he has to complain of the conduct of the court below, or other defects, he must support his assertions by an affidavit. (32288, *P. C. Jaffna*, *P. C. Ca.* 172; 246, *P. C. Calpentyn*, *P. C. Ca.* 175 : 6955, *P. C. Tangalle. Lor. R.* 100.)

Assertions in petitions of appeal that are untrue will lead to the appeal being rejected. (17590, *P. C. Chavagacherry P. C. Ca.* 123; 244, *P. C. Calpentyn*, 175.)

And an assertion (even on affidavit) that the appellant's witnesses were not heard is not regarded unless supported by due assertion that the witnesses unexamined were tendered or called by the appellant, or that the court below forbade the appellant to call more witnesses (684, *P. C. Jaffna, P. C. Ca.* 172; 14253, *D. C. Badulla, Lor. R.* 192); and if he prove that legal evidence tendered was rejected, or that no legal evidence has been taken, a new trial will be granted. (See *last case cited;* and *No.* 4531, *C. R. Awishawelle, Lor. R.* 101.)

Objections on appeal not specified in petition.

By enlarging on the principle that where a party has taken no appeal against a decree it becomes final and irrevocable (1960, *D. C. Matura*, 2 *Mar.* 1837, *Morg. D.* 141), the court formerly refused to amend errors in judgments not noticed in the appeal petition, and generally would not allow an objection to be taken for the first time in appeal (see *Morgan's Digest*, pp. 325, 203, *and* 95; and *Austin*, p. 9), though the necessities of justice had induced some of the Judges to declare a case in appeal to be open to revision on both sides. (*Morg. D.* p. 8.) This is, however, now settled by the proviso of the rule last cited, which states "that no party shall be precluded of availing himself of any objection on appeal at the hearing thereof by reason of the same not having been specified in the petition of

appeal; but if the Supreme Court shall consider such objection material, and that it ought to have been stated in the petition of appeal, its omission therein may and shall affect the right of the appellant to his costs on the appeal, at the discretion of the Court." (*Rules* 3 of 12 *Dec.* 1843, p. 133.)

Security in cases of appeal.

Within *twenty* days from pronouncing the judgment or order appealed against, to be computed in the manner directed by the first rule (see *ante*, p. 177), the appellant must give security for the prosecution of his appeal—for the performance of the judgment which may ultimately be pronounced by the Supreme Court—and for payment of all costs which may be awarded. No security is required on any appeal from an interlocutory order, or where an appeal is prosecuted in *formâ pauperis*. (*R. and O.* § 8, *par.* 3, p. 83.) The giving security in appeal implies and works a stay of execution pending the appeal; but it is clear from the rules that, if the party gives security for costs only, such security does not suspend the execution to which he is by the judgment in his favour entitled. (14894, *D. C. Kornegalle*, 26 *June*, 1864, and see *Rules*, 6 *and* 7, § 8, p. 84.)

Form of security.

The security must be by bond (see *App.*), with one or more good and sufficient securities, or by way of mortgage of immovable property of the full value of the subject of litigation over and above all previous mortgages and charges affecting the same; or by depositing in court the amount disputed, with a sum sufficient to cover the costs in appeal.

Notice of security where required.

A general practice prevails in the District Courts of directing the appellant to give notice, and refusing to accept the securities unless such has been given. But *Appeal Rule* 3, § 8, does not require such notice in ordinary cases, though notice is required in the special case provided for in the 7th and 8th *Appeal Rules* in § 8. The Supreme Court, however, does not disapprove of the practice on the ground that it is the duty of the District Judge to be satisfied of the sufficiency of the securities before they are accepted; and the Judge may well be dissatisfied when the appellant has wilfully withheld the best means of testing his securities. (17418 *D. C. Caltura*, 14 *May*, 1862.)

In cases of litigation of immovables.

If the subject of litigation consists of immovable property, and the judgment or order appealed from do not change, affect, or relate to the actual occupation of that property, no security can be demanded for the performance of the ultimate judgment of the Supreme Court, but only for costs. But if the judgment or order of the court below changes, affects, or relates to the actual occupation of the immovable property in litigation, then security must be taken sufficient to ensure the restitution free from all damage or loss of that property, and of the immediate profit expected to accrue from its occupation pending appeal, and also sufficient to cover "*as above directed*," and to no greater amount. (*R. and O.* § 8, *par.* 4.)

Security when dissolved.

The appellant and his sureties are bound "well and

truly to perform and abide by the judgment which shall ultimately be pronounced by the Supreme Court." (*Section* 8, *Appeal form* 2.) So that the sureties are not released until an ultimate decree is pronounced, and they have performed. Thus, if a case is referred back to the District Court to receive further evidence, and thereupon to give judgment, that subsequent judgment becomes virtually the judgment of the Supreme Court and is binding on the sureties. (6220, *D. C. Kandy*, 20 *May*, 1835, *Morg. D.* 45.)

In cases of sequestration

Where, however, the property of the defendant in a cause (being the appellant's) is sequestered, and it is made to appear to the satisfaction of the District Court that the property sequestered is sufficient to satisfy the amount of the judgment, and such costs as the plaintiff may probably be put to by the appeal, leave may be obtained from ihe Supreme Court to prosecute the appeal without giving security. (13536, *D. C. Kandy* 14 *June*, 1841, *Morg. D.* 307.) If the sequestered property is insufficient to cover the whole judgment and costs in appeal as above, the Supreme Court will direct that the appellant shall be called on to give security, but only for so much of the amount of the judgment and cost in appeal as the sequestered property is insufficient to cover. (318, *D. C. Kandy*, *May* 17, 1834. *Austin*, 2.)

Security not given in time.

The rule (§ 8, *par.* 5) that applies to delay in appealing, also applies to not giving security in time. Where

the security in appeal has been received by the District Court, though the time prescribed has elapsed, it is presumed that it has been proved to the satisfaction of the District Court, according to the rule (§ 8, *par.* 5) that the omission is not imputable to any negligence on the part of the appellant; and the Supreme Court will not hesitate to receive the appeal. (1869, *D. C. Chilaw*, 28 *Jan.* 1835; *Morg. D.* 31; and 459 *D. C. Amblangodde*, 18 *May*, 1835; *Morg. D.* 45.)

Omission from ignorance has been held not to be imputable to neglect; so that where the Supreme Court has been inclined to believe that the appellant was not aware that he must give security, it has ordered the appeal to be allowed, provided the appellant gave the requisite security within fourteen days after the communication of the order to him (1034, *D. C. Amblangodde* 5 *Aug.* 1840; *Morg. D.* 298). But where the security in appeal has been offered *long after* the due and affixed time, it cannot be accepted without the express assent of the plaintiff (1333, *D. C. Amblangodde*, 15 *Sept.* 1837; *Morg. D.* 194); and presumably of the defendant, if the plaintiff appeals. If, however, the delay is the act of the Court, as, for example, if it postpones the consideration of the security, the appellant is not to suffer (9119, *D. C. Jaffna*, 21 *Oct.* 2, 1862). And where an order of the Supreme Court requires security, but does not require it to be completed within any specified time, the District Court ought, upon the motion of the

opposite party, to fix a limited time for the appellant's completion of the security, and due notice given; sometimes even to the proctor. (6971, *D. C. Jaffna*, 11 *Dec.* 1855.)

Appeal without stay of execution.

But, as it may sometimes happen that a party, having a good cause of appeal, may yet be unable to furnish security for the full amount of the subject of litigation, if any appellant gives good security to answer the costs which may be *incurred by the respondent*, he is permitted to carry on his appeal; but without any stay of execution, which may proceed as if no petition of appeal had been filed, unless, and until, the appellant gives full security, as provided by the fourth rule; in which case execution shall be stayed from the time of such security being given, till the decision of the case in appeal, as in ordinary cases. (*R. and O.* § 8, *par.* 6.) Appeal, however, does not operate as a stay of execution, except as regards the removal and sale of the property. (*Marsh.* 25.) The costs *incurred by the respondent*, mean those incurred in consequence of the appeal; and the appeal is to be allowed upon the defendant (*i. e.* the appellant) giving security, for such costs only, to the full satisfaction of the District Court, without stay of execution pending the appeal. (6771, *D. C Jaffna.*)

In cases *in formâ pauperis.*

By the 3rd rule of section 8 it is provided that, in case of an appeal being prosecuted *in formâ pauperis*, no security shall be required from the appellant; consequently the respondent cannot proceed to execution

under the above 6th rule, as in cases of partial failure by the appellant to give the required security except as to costs. (23861, *D. C. Kandy*, 17 *Feb.* 1862.)

In consequence of this privilege, the Supreme Court is very particular in allowing appeals *in formâ pauperis*. An application to sue *in formâ pauperis* must be received and decided upon in the same way as those to sue or defend. (*Marsh.* 472; *Macqueen's, H. of Lords R.* 249; 3806, *D. C. Colombo*, 21 *Dec.* 1850.) A petition of appeal by a pauper cannot therefore be entertained before the petitioner has made application to appeal *in formâ pauperis*. The proctor selected to report on a petition to appeal *in formâ pauperis*, should always specify the ground on which he considers that the pauper has a good right of appeal. As a pauper having a good cause of action, may not have a good ground of appeal, the proctor selected to report ought to be some other than the one who has acted for the pauper, who might possibly favour an appeal for the mere chance of getting costs. (15885, *D. C. Caltura*, 29 *June*, 1854; 14296, *D. C. Badulla*, 27 *Jany.* 1855; 4936, *D. C. Manaar*, 23 *March*, 1855.) And when the application to appeal was three months after the decision, and the reporting proctor was the proctor of the pauper, the appeal was disallowed. (13164, *D. C. Korngalle*, 18 *Nov.* 1854.)

Rule to prevent fraudulent alienations pending appeal.

As the stay of execution pending appeal affords an opportunity to dishonest debtors, against whom judgments have been obtained, of defrauding their creditors

by alienating their property while the case is pending in appeal, so that when such judgments are affirmed, there often remains nothing to satisfy them, it is therefore ordered that whenever final judgment is given against a party in any District Court, execution may forthwith issue against the property of such; which property may be seized and sequestered, but shall not be removed or sold, and shall be kept in safe custody till the time for appealing is expired: and, in case of appeal, till the decision of the Supreme Court thereupon. But if no appeal be entered, then such property shall be sold or otherwise dealt with, as in other cases of execution. (*R. and O.* § 8, *par.* 7.)

Execution to issue: but property not to be removed till decision, &c.

Provided that if the party appellant shall, at the time the execution shall be so moved for, tender good and sufficient security to the requisite amount, as directed by the *fourth* rule, two days' notice having been given to the party respondent of the day on which such security would be tendered in court, in order that such respondent may have an opportunity of questioning the solvency, and objecting to the sufficiency thereof (of which solvency and sufficiency the District Court shall decide without appeal): in such case, no execution shall issue till after the decision of the Supreme Court. (*R. and O.* § 8, *par.* 8.)

But not if appellant give execution.

This last rule must not be taken as requiring notice to the opposite party of tendering security in appeal in ordinary cases; though notice is required by it in the

special case provided for in the two rules last cited. (17418, *D. C. Caltura*, 14 *May*, 1862.)

Execution stayed for re-hearing.

There is one other case where the Supreme Court will order execution to be stayed, if it sees necessary, and that is where it reverses a judgment, in order to send the case back for another hearing; it will in that case order the execution to be stayed until such hearing. (24601, *D. C. Colombo*, *S.* 6, *May*, 1840, *Morg. D.* 294.)

Rule as to furnishing stamp.

By the stamp ordinance, 1861 (see *Stamps*), certain stamps are required, which must be supplied by the appellant. If the petition of appeal or the security bond are written on paper not duly stamped, the appeal will be rejected. (242, *C. R. Badulla*, 7 *Jany.* 1859.) As great delays have occurred in the transmission of appeals from some of the District Courts to the Supreme Court, owing to appellants neglecting to furnish the necessary stamps for the certificates in appeal, it is therefore ordered that from henceforth every party appellant shall be required to furnish the necessary stamps for the certificate of appeal (required by the 10th rule of the 8th section of the Rules and Orders, see *post*) within the same time as the appellant is required by the 3rd rule of that section to give security. And the failure of any appellant to furnish such stamp shall be attended with the same penalty as is awarded by the 5th rule of that section against parties appellant failing to file their petitions of appeal and to give security

within due time, subject to the proviso declared by the 6th rule. (*Supplementary Rule, No.* 3, 25*th April*, 1834.)

An appellant is not required to take out a stamped copy of the judgment in order to appeal. (542, *C. R. Kaigalle*, 23 *June*, 1863.)

Rule as to the transmission of proceedings to the S. C.

As soon as possible, after the necessary preliminary steps have been gone through, the proceedings in the case appealed must be transmitted to the Registrar of the Supreme Court, and accompanied by a certificate (Form No. 3) from the Secretary of the District Court, stating the dates of the institution and decision of the case; in whose favour it was decided; the respective days on which the petition of appeal was filed, and the security, when necessary, was given; and shall also state if either party sued, or defended, *in formâ pauperis*. (*R. and O.* § 8, *Rule* 10.)

Arrangements of proceedings previous to transmission.

To save the time formerly consumed in copying the depositions on stamps, the originals are now transmitted in appeal to the Supreme Court. (See *Marshall* 27, *and his reasons thereon*.) But the Secretary of the District Court should always see that the depositions are in a handwriting easily legible; if they are not, it is his duty to have them fairly copied, so as to be readily read by the Judges of the Court above, or otherwise they are liable to be sent back, with a reprimand for sending illegible depositions without a fair copy.

In order to enable the Supreme Court to under-

stand the proceedings in each case with greater facility, and to see whether those proceedings have been regularly conducted, it is ordered (*R. and O.* § 8, *Rule* 11) that the Secretary of the District Court shall note in legible characters, at the top of every pleading and of every document, of whatsoever description, which shall be filed in the case, the day on which it was so filed; and, with respect to documents, the party by whom filed. The proceedings shall be thus arranged in their order with respect to their respective dates. And before any case is sent up in appeal to the Supreme Court, a short summary or abstract of every step taken by the parties, or of every order made by the court, with the respective dates thereof—but without encumbering the summary or abstract, by repeating the names of the parties, or of the judge at each day's proceeding—shall be affixed to the record. (*R. and O.* § 8, *Rule* 11.)

Previous to the transmission of the proceedings, the Secretary to the District Court should examine them carefully, to see that they are arranged in proper order; and, also, should never fail to note on petitions of appeal, and indeed upon all other documents received by him, the day of the month and year at the moment of receiving them. (*Marsh.* 30.) It is the duty also of the secretary to see that each pleading and document is bound up, from the very commencement of the suit, as each is filed; and, if that duty is performed, nothing remains for him to do at the last, but to annex his own

certificate, and the proceedings on the very day on which security is given. (*Marsh.* 28.)

Civil case postponed for criminal case.

Important, however, as is a speedy decision, the Supreme Court will, if special circumstances make it desirable, order the hearing of a case in appeal to be postponed. Thus, if both a civil and criminal case arise out of the same facts, or if a criminal case becomes engrafted upon the civil case, the Supreme Court will generally, as a satisfactory course, desire the civil case not to be decided until the criminal case is disposed of. (*Marsh.* 30.)

District Judges, and not subordinate officers, responsible to the S. C. in appeal cases.

The Supreme Court never fails to call upon the District Judges for explanation of any delay; there seems indeed no good reason why a single day need intervene between the giving the security and stamps, and the transmission of the proceedings. The District Judge, and not his subordinates, is held to be immediately responsible to the Supreme Court for the efficient discharge of the duties of the District Court. The superior court looks to the judge only, and it is for him to keep his officers at their respective posts, and to ascertain, by personal superintendence, that their several functions are punctually and faithfully discharged. If his officers are negligent, he should complain to the Government. (*Marsh.* 28.) There are two other points District Judges should attend to in respect of Appeals. *First:* In carrying a decree of the Supreme Court into execution, the District Court should be careful to make

no order, if possible, from which the party may appeal; for that would, in effect, be admitting an appeal against a decree of the appellative court, which is final. The proper course is to let the Fiscal follow the very words of the decree of the Supreme Court; taking care that he be furnished, in cases affecting land, with all plans and other documents necessary to enable him to fulfil its directions; and, if it should become necessary to explain a decree, care must be taken, in doing so, not to vary it. *Secondly:* When a case is referred back to the District Court for further evidence, that court should never fail to record its opinion on the case as it presents itself after such new evidence has been gone through, even though the order of reference by the Supreme Court should not expressly so direct; for otherwise the Supreme Court would often be obliged to decide on the value of evidence, and the credit due to witnesses, without having the advantage of seeing and hearing them give their evidence. (*Marsh.* 30—31.)

Mode of hearing appeals.

The appeal now being before the court, we now come to the mode of hearing appeals from the District Court. The Supreme Court must hear and determine all such appeals at Colombo. (*Ord.* 20 of 1852, § 7.) They are heard without assessors; any two judges forming a quorum, with all the powers of a full court. If the two do not agree, the case must be deferred for a full court; the decisions of the quorum, when unanimous, or of a majority of the full court, form the judgment. (*Ibid.*

§ 8.) If the court requires further evidence, it may order the appeal to be heard and determined by one judge on circuit, whose judgment is then the judgment of the Supreme Court.

Sittings and order of hearing.

The court sits on days appointed by the judges and advertised by the registrar in the Government Gazette. The registrar makes out lists of appeals, and places a copy in come conspicuous place in the court house. The appeals are heard in their order, unless the court makes some other disposition. (*Ibid.* §§ 9, 10, 11, 12.) The order of appeals is, generally:—1. Police Court cases; 2. Interlocutory Orders; 3. Court of Requests cases; 4. Final Decree of the District Courts. But sometimes the court, after police and interlocutory cases, takes only final decrees; it also appoints special days for cases of known importance.

Effect of judgments of S. C.

The judgments of the Supreme Court are very various in effect, and if it does not affirm or directly reverse the judgment of the court below, it amends usually by reversing the judgment and making a further order. As we have seen in another place (p. 187), sometimes, when the order is complied with, the final judgment of the court below becomes in effect the judgment of the Supreme Court. Nevertheless the District Court cannot in any way alter a decree of the Supreme Court: thus, when the Supreme Court has affirmed a judgment for a principal amount only, it is not competent to the District Court to add the interest. (18840, *D. C. Galle*, 25

Oct. 1860.) Where a judgment is set aside, all that follows as a consequence falls with it. (22111, *D. C. Kandy*, 1 *June*, 1852.)

Clerical errors in judgments of S. C.

Where a clerical, numerical, or other error has crept *per incuriam* into a judgment of the Supreme Court, the Supreme Court, will on its being pointed out by the court below, or by motion, amend it. (8708, *C. R. Matura*, 3 *July*, 1860; 34313, *D. C. Kandy*, 19 *July*, 1864.)

Striking off appeals.

The practice as to striking off appeals, which was formerly somewhat uncertain (see 21876, *D. C. Colombo*, 6 *Jan.* 1847), is by the last-mentioned Ordinance rendered precise. "In any case in which an appellant shall unduly neglect or fail to take the necessary steps for the prosecution of his appeal, the Supreme Court may, on the motion of the respondent, make an order on the appellant to show cause why the appeal should not be dismissed for want of due prosecution; and if the appellant shall not, after service of such order, show sufficient against the same, the said court shall order such appeal to be dismissed for want of prosecution, and that the appellant do pay the cost incurred." (*Ord.* 20 of 1852, § 13.)

Correction of decrees and cancelling of orders.

The Supreme Court has no power to *alter* or *amend* its own decrees, except with the consent of all the parties; but it may give any explanatory direction which may be necessary in order to carry out a decree properly into effect. (973, *D. C. Matura*, 15 *June*, 1836;

Morg. Dig. 87.) But this disability does not apply to a clerical or manifest error in a decree, whether arising *per incuriam* of the Court or its officers: such as an error in a date, or manifest misdescription. (2689, *D. C. Galle, Dec.* 28, 1836; *Morg. Dig.* 115.) It will also cancel its own order *quid improvide emanavit.* (8043, *C. R. Putlam,* 5 *July,* 1854.)

Power of review.

Also, since the Ordinance No. 20 of 1852, all power to review cases in General Session of the Supreme Court has ceased (except in the review preliminary to an appeal to the Privy Council. *Charter,* § 52; 28503, *D. C. Kandy,* 5 *Nov.* 1856; *Lor. R.* 209.)

Appeals to the Queen in Council.

The course to be pursued in appealing to the Queen in Council is laid down with great particularity by the 52nd clause of the Charter.

When allowed.

Appeals are allowed to the Queen in Council against any final judgment, decree, or sentence, or against any rule or order made in any civil suit or action having the effect of a final or definite sentence, and which appeals are subject to the rules and limitations following:—

Cause to be first heard in review by the Supreme Court collectively.

FIRST. That before any such appeal shall be so brought, such judgment, decree, sentence, rule or order, shall be brought by way of review before the Judges of the Supreme Court collectively holding a general sessions at Colombo, at which *all* the said Judges of the Supreme Court shall be present and assisting, which Judges shall, by such rules and orders as aforesaid, regulate the form and manner of proceeding to be ob-

served in bringing every such judgment, decree, sentence, rule, or order, by way of review before them, and shall thereupon pronounce judgment according to law. The judgment of the majority of the Judges shall be taken and recorded as the judgment of the said Court collectively. (*Charter*, § 52.) Even where the case has already been heard before a full court of three Judges, it has been held the safer and more satisfactory course that the case should be again heard in review. (6047, *D. C. Kandy*, 20 *June*, 1835; *Morg. D.* 50; and see *Marsh.* 31.)

When a judgment of the Supreme Court is brought into review before going up to the Privy Council, the appellant is not allowed to adduce fresh evidence in support of his case. (*Ibid.*)

Amount appealable.

SECONDLY. Every such judgment, decree, order, or sentence from which such appeal shall be admitted to the Queen, must be given or pronounced for or in respect of a sum or matter at issue above the amount or value of *five hundred pounds sterling*, and must involve directly or indirectly the title to property or to some civil right exceeding the value of *five hundred pounds sterling*. (*Charter*, § 52.) Where the value of the property in dispute in a case does not appear in the proceedings, but the appellant alleges that it exceeds £500, the Supreme Court, previous to sitting in review on appeal to the Privy Council, will order that the District Court shall ascertain, by commissioners, or other satisfactory

means, the value of such property, and report to the Supreme Court thereon. (646, *D. C. Kandy*, 26 *Aug.* 1835; *Morg. D.* 56.)

In divorce and such other cases.

Sometimes a case, though of great importance, cannot be measured by money. Thus, in suits of divorce, at first sight there appears to be no appeal to the Queen in Council, as no value appears as the measure of the injury sought to be redressed; the Supreme Court supplies the omission by considering every such case as above the value of £500, since questions of this nature cannot be measured as to their importance by any amount of money. (11016, *D. C. Colombo; Morg. D.* 77; *Marsh.* 32.)

Application for leave to appeal to be made within 14 days.

THIRDLY. The persons feeling aggrieved by such judgment, decree, order, or sentence, must within fourteen days next after the same shall have been pronounced, made or given, apply to the Supreme Court at general sessions, by petition for leave to appeal therefrom to the Queen in Council. If this petition is presented by two persons, appointed "Attorneys or Attorney to prosecute the appeal," it must be signed by both. (26656, *D. C. Kandy*, 2 *Ap.* 1856; *Lor. R.* 108.)

Judgment to be executed on securities being given for restitution.

FOURTHLY. If leave to appeal is prayed by any party adjudged to pay any sum of money or to perform any duty, the Supreme Court must direct that the judgment, decree, or sentence appealed from, shall be carried into effect, if the party respondent shall give security for the immediate performance of any judgment, decree,

or sentence, which may be pronounced or made by the Queen in Council upon auy such appeal; and until such security is given, execution of the judgment, &c. appealed from must be stayed. The usual course is to make an application, supported by affidavits, to place the security proposed before the Judges; an order is then made that the security tendered shall be produced before the Judges collectively at chambers at a given hour on a given day. If the Judges at chambers are satisfied with the sufficiency of the security proposed, on the motion of the respondent an order is made that the respondent, on entering into the security, be allowed to sue out execution for the amount of the judgment in his favour, and costs. (84, *D. C. Manaar*, 19 *and* 22, *Nov.* 1841; *Morg, D.* 323.)

This practice is, however, sometimes varied by the *consent of parties*, the security is taken by the District Court, and the security bond is forwarded to the Supreme Court before the day on which it is ordered that the case shall be heard in review, provided the security shall have then been perfected; in default of which, the court will entertain the motion for declaring the appeal abandoned for want of compliance with the eleventh condition of § 52 of the Charter. (4048, *D. C. Kandy*, 10 *June*, 1835; *Morg. D.* 4749.)

If a surety die, the appeal will be allowed on another being supplied in lieu of the one dead. (84, *D. C. Manaar*, 30 *June*, 1842; *Morg. D.* 330.)

FIFTHLY. Provided, nevertheless, that if the party appellant shall establish to the satisfaction of the Supreme Court that real and substantial justice requires that, pending such appeal, execution should be stayed, it shall be lawful for such Supreme Court to order the execution of such judgment, &c. to be stayed pending such appeal, if the party appellant shall give security for the immediate performance of any judgment, &c. which may be pronounced by the Queen in Council upon any such appeal.

Court may stay execution when justice requires it, appellant giving security.

SIXTHLY. In *all* cases security shall also be given by the party appellant for the prosecution of the appeal and for the payment of all such costs as may be awarded by the Queen in Council.

Appellant to give security for prosecution of appeal and payment of costs.

The remainder of this subject is quoted from the Charter verbatim.

SEVENTHLY. The court from which any appeal, as aforesaid, shall be brought, shall, subject to the conditions hereinafter mentioned, determine the nature, amount, and sufficiency of the several securities so to be taken as aforesaid.

Court to determine security.

EIGHTHLY. Provided, nevertheless, that in any case where the subject of litigation shall consist of immoveable property, and the judgment, decree, order, or sentence appealed from shall not change, affect, or relate to the actual occupation thereof, no security shall be demanded, either from the party or parties respondent, or from the party or parties appellant, for the perform-

If title to immoveable property be subject of appeal, security not required; if occupation, how to be determined.

ance of the judgment or sentence to be pronounced or made upon such appeal; but if such judgment, decree, order, or sentence shall change, affect, or relate to the occupation of any such property, then such security shall not be of greater amount than may be necessary to secure the restitution, free from all damage or loss of such property, or of the intermediate profit which, pending any such appeal, may probably accrue from the intermediate occupation thereof.

If moveable property be the subject of appeal, bond to be given.

NINTHLY. In any case where the subject of litigation shall consist of money or other chattels, or of any personal debt or demand, the security to be demanded, either from the party or parties respondent, or from the party or parties appellant, for the performance of the judgment or sentence to be pronounced or made upon such appeal, shall be either a bond, to be entered into in the amount or value of such subject of litigation by one or more sufficient surety or sureties; or such security shall be given by way of mortgage or voluntary condemnation of or upon some immoveable property, situate and being within such island, and being of the full value of such subject of litigation over and above the amount of all mortgages and charges, of whatever nature, upon or affecting the same.

Security for prosecution of appeal never to exceed £300.

TENTHLY. The security to be given by the party or parties appellant for the prosecution of the appeal and for the payment of costs, shall in no case exceed the sum of three hundred pounds sterling; and shall be

given either by such surety or sureties, or by such mortgage or voluntary condemnation as aforesaid.

Appellant to be allowed three months to enter into securities.

ELEVENTHLY. If the security to be given by the party or parties appellant, for the prosecution of the appeal, and for the payment of such costs as may be awarded, shall, in manner aforesaid, be completed within three months from the date of the petition for leave to appeal; then, and not otherwise, the said Supreme Court shall make an order allowing such appeal, and the party or parties appellant shall be at liberty to prefer and prosecute his, her, or their appeal to us, our heirs and successors, in our or their Privy Council, in such manner, and under such rules, as are observed in appeals made to us in our Privy Council from our plantations or colonies.

Application may be made to His Majesty in Council against orders on the subject of securities.

TWELFTHLY. Provided, nevertheless, that any person or persons, feeling aggrieved by any order which may be made by, or by any proceedings of the said Supreme Court, respecting the security to be taken upon any such appeal, as aforesaid, shall be and is hereby authorised by his, her, or their petition to us in our Privy Council to apply for redress in the premises.

Reservation to His Majesty the right of admitting appeals without regard to these rules.

53. Provided always, and we do further ordain, direct, and declare, that nothing herein contained doth or shall extend to take away or abridge the undoubted right or authority of us, our heirs and successors, to admit and receive any appeal from any judgment, decree, sentence, or order of the said Supreme Court, on the

humble petition of any person or persons aggrieved thereby, in any case in which, and subject to any conditions or restrictions upon and under which, it may seem meet to us, our heirs and successors, so to admit and receive any such appeal.

Transcripts of records to be transmitted to His Majesty in Council.

54. And we do further direct and ordain that, in all cases of appeal allowed by the Supreme Court, or by us, our heirs and successors, such court shall, on the application, and at the costs of the party or parties appellant, certify and transmit to us, our heirs and successors, in our or their Privy Council, a true and exact copy of all proceedings, evidence, judgments, decrees, and orders, had or made in such causes so appealed, so far as the same have relation to the matter of appeal; such copies to be certified under the seal of the said court.

Supreme Court to execute judgments pronounced by His Majesty in Council on appeal.

55. And we do further ordain and direct that the said Supreme Court shall, in all cases of appeal to us, our heirs and successors, conform to, execute, and carry into immediate effect such judgments and orders as we, our heirs and successors, in our or their Privy Council, shall make thereupon, in such manner as any original judgment or decree of the said Supreme Court can or may be executed.

Course when appeal to the Privy Council is not followed up.

It would seem, from the proceedings in one case, that, if the appeal to the Privy Council is not duly followed up, but allowed to grow stale, the respondent can move for a rule *nisi*, calling upon the appellant to show

cause why the appeal should not be declared abandoned. Such a rule was actually issued by Oliphant, C. J. sitting alone; but it is a matter of great question if the appeal has been fully allowed, under the conditions of the charter, whether the Supreme Court has the power to issue such a rule: certainly if the petition of appeal has been lodged in the Privy Council office, the case is clearly out of the hands of the Supreme Court, and no such rule could be issued. If, on the completion of the full security for the prosecution of the appeal and costs, and on the judgment of the Supreme Court, as a Court of Review sitting collectively, leave has been granted to prosecute the appeal, it is a question whether even the Supreme Court can withdraw its leave, *i. e.* set aside its own decree, by declaring it to be abandoned by laches. It is a question whether, in both cases, a rule *nisi* for abandonment must not be moved for before the Privy Council, and not before the Supreme Court. Certainly it would seem to be wrong for a single judge to issue a rule tending to nullify or limit the decree of the collective Court of Review. There would seem to be only one case in which the Supreme Court could interfere, and that is where it grants leave conditionally.* It could, of course, declare the condition not to be fulfilled; but it seldom or never has done this, being careful to see that all the conditions of the charter are

* *Query.* Is not leave in fact given under the implied condition that it shall be prosecuted within reasonable time.

fulfilled before granting leave. In the case referred to, no judgment was given, as the rule *nisi* was withdrawn by consent. (84, *D. C. Manaar; Morg. D.* 318 and 320.) The proper course for the respondent would seem to be, not to move either court, but to sue upon the security given for the prosecution of the appeal; unless, indeed, the appeal has been granted without security, under the reservation of § 53 of the charter.

Same appeal on final matters as from the S. C.

In general, there is the same appeal to the Queen from the Supreme Court, on final matters, as there is to the Supreme Court itself. Thus we have seen that there is an appeal to the Queen in cases of divorce; but it has been held that the 52nd clause of the charter gives no appeal, *as a matter of right*, in cases of insolvency, although in important cases of that nature the appellant will have little difficulty in obtaining special permission from the Privy Council to appeal under the right reserved in the 53rd clause of the charter. (120, *D. C. Colombo*, 19 *July*, 1859.)

Police Courts, appeals from.

The Supreme Court also hears appeals from the Police Courts. And although this is not strictly in its civil jurisdiction, yet, as the principles on which appeals from these courts are conducted are in many respects similar to those from other courts, and as the Police Courts have some duties of a civil nature, it will be convenient to consider appeals from Police Courts in this place.

Appeals from Police Courts.

Any party, who is dissatisfied with any final judgment or sentence pronounced by a police magistrate, may appeal against the same to the Supreme Court; but against a final judgment or sentence *only*. (2817, *P. C. Matura*, *P. C. Ca.* 146; *Police Court Ord.* No. 13, 1861, § 23.) The appeal is by petition to the Supreme Court; which petition must be delivered to the chief clerk within ten days from the day on which the judgment or sentence shall have been pronounced. The Police Magistrate must forthwith forward the petition, the record, and documents, and processes connected therewith, to the Supreme Court. (*R. and O. of P. Crts.* No. 18 of 1861, § 28 and 29.)

Staying execution on recognizance.

No such appeal has the effect of staying the execution of the judgment or sentence, unless the magistrate sees fit to make an order to that effect; in which case the party appellant enters into a recognizance, with or without sureties, as the magistrate considers necessary, to appear when required, and abide the judgment of the Supreme Court. (*Idem*, § 24.) The recognizance is in form a bond, conditioned "that if the above-named A. B. (*the defendant*) shall, within the prescribed time, call the sentence into review, and abide in that respect the decision of the Honourable the Supreme Court, then the recognizance shall be void, or else remain in full force." To forfeit this recognizance, the defendant must be, in express terms, called upon to surrender, and notice to that effect ought to be given at the same time,

or even previously, to the sureties; and if they do not get such a prompt notice, they ought to be allowed a reasonable time for bringing up the prisoner, before declaring the penalty of their recognizance forfeited. (2354, *Galle*, 21 *July*, 1846; *P. C. Ca.* p. 5.)

Staying execution of corporal punishment.

In cases of corporal punishment, the execution is in all cases stayed pending the appeal; but it is competent for the magistrate, in case the defendant cannot give a recognizance, to detain the prisoner in prison until the result of the appeal is known. (*Pol. Crt. Ord.* 1861, § 24.) And any proceeding, therefore, tending to evade or defeat such a merciful provision, must be regarded as irregular and illegal. (17464, *P. C. Negombo*, 29 *March*, 1856; *Lor. R.* 101.) And, whether notice of appeal is given or not, it is decidedly beyond the power of a Police Magistrate to carry a sentence of corporal punishment into effect until after the lapse of the ten days' grace provided for by the ordinance. (12918, *P. C. Batticoloa*, 16 *July*, 1856; *Lor. R.* 156; *P. C. Ca.* 94.)

Appeals on points of law, and on final judgments only.

The Supreme Court is a Court of Appellate Jurisdiction, for the correction of any errors *in law* committed by the respective Police Courts in any *final* judgment or sentence pronounced by them. (*Idem*, § 25.) Accordingly there is no appeal to the Supreme Court from a Police Court upon any interlocutory order. (15527, *P. C. Chavagacherry*, 28 *Apr.* 1858; *P. C. Ca.* 115.) From these courts the Supreme Court cannot entertain any appeal on *facts*: but only on points of *law*. (41692,

P. C. Kandy, 21 *Jany.* 1859; *P. C. Ca.* 126; 19825, *P. C. Matelle*, 17 *June*, 1862; *P. C. Ca.* 168.)

What the S. C. may decree.

The Supreme Court may, on appeal, affirm, reverse, correct, or modify any judgment or sentence of a Police Court, according to law; but without regard to errors or defects which have not prejudiced the substantial rights of parties; or may (if the evidence be sufficient) direct a further hearing, upon such terms as the court shall think fit. (*Idem*, § 25.)

Under this power, it has been held that the Supreme Court cannot mitigate a sentence, or remit a fine of a Police Court. (6955, *P. C. Tanyalle*, 19 *March*, 1856; *P. C. Ca.* 89: 12622, *P. C. Jaffna*, 5 *March*, 1856: *Lor. R.* 27.) But where the sentence, or part of a sentence, is irregular, the Supreme Court will set aside that which is irregular. (15929, *P. C. Bentolle*, 25 *May*; 116, *P. C. Ca.* 116.)

The Supreme Court will look into the regularity of the proceedings of a Police Court. For example: as if the magistrate himself gives evidence without being sworn. (20979, *P. C. Galle*, 19 *March*, 1856; *P. C. Ca.* p. 88.) Or if the defendant is not allowed time to bring his witnesses, or to subpœna them. (2787, *P. C. Mudletivoe*, 16 *Sept.* 1856; *P. C. Ca.* 98.) So, also, if the summons does not name the complaint or the offence charged. (9534, *P. C. Matelle*, 8 *Oct.* 1856; *P. C. Ca.* 99.)

Appeals from prisoners to be received.

A magistrate's clerk is not justified in refusing to

accept appeal petitions from prisoners in gaols because they happen not to be forwarded by the fiscal; if there is any doubt as to the authenticity, that can easily be ascertained by reference. (14698, *P. C. Chavagacherry*, 25 *June*, 1857; *P. C. Ca.* 113.)

Original civil jurisdiction of the Supreme Court.

The Supreme Court, or any Judge thereof, is by the charter (§ 49) authorized to grant and issue mandates, in the nature of writs of *habeas corpus*, and to grant or refuse such mandates, to bring up the body of any person who shall be imprisoned within any part of the Island of Ceylon and its dependencies, and to discharge or remand any such person so brought up, or otherwise deal with such according to law.

The law of *habeas corpus* in Ceylon chiefly follows the law *and equity* of England. (see *post*, p. 215.)

There are several kinds of writs of *habeas corpus;* but the only one that can be regarded as attaching to the civil jurisdiction of the Supreme Court, is the writ of *habeas corpus ad subjiciendum*, which is the remedy used for deliverance from illegal confinement. This is directed to any person who detains another in custody, and commands him to produce the body of the prisoner, with the day and cause of his caption and detention, to do, to submit, and receive whatever the court or judge awarding the writ shall consider in that behalf.

This existed in England at common law; but the right to it has been formally declared, and the procedure regulated, by certain statutes, particularly the

Habeas Corpus Act, 31 Car. II. c. 2, and the Stat. 56 Geo. III. c. 100. The former relates to illegal confinement for criminal, or supposed criminal, matters; and the latter to illegal confinement in other cases, except for debt, or process in any civil suit. It is the latter, then, that will be first noticed in this place; but this latter act relates principally to making the writ issuable in vacation; and as there is no legal vacation in Ceylon, a great part of it does not apply.

The writ is granted upon motion, yet not as of course, but on showing probable cause, inasmuch as, when once granted, the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner, except that the prisoner is not in his power and custody. With that exception, the return that is made to it is made by proceeding, and setting forth the grounds and proceedings upon which he is in custody. If this return presents sufficient matter to justify the detention, the prisoner is remanded to his former custody; if insufficient, he is discharged.

If the return is made by producing the prisoner and proceedings, it cannot be traversed, and need not be verified by affidavit; but its validity is determined upon argument on the day of the return, though sometimes new matter is allowed to be introduced to guide the discretion of the court. A writ of *habeas corpus* may be quashed for irregularity or fraud, but not for matter properly returned to it.

Wilful disobedience of the writ is deemed a contempt of court; and re-imprisoning, on the same excuse, a person delivered by *habeas corpus*, would call down on the person so doing the highest penalties. Also, if the respondent should deny, on affidavit or otherwise, that the prisoner is not in his possession, custody, or power, the court will severely punish him, should the assertion prove to be untrue. (*Re Seevery Amna*, 18 and 22 of *Dec.* 1862.)

Most of the civil cases of *habeas corpus*, in Ceylon, arise upon the right to the custody of children; on which subject the following cases may be cited:—

Production of child.

The court generally makes no order until the child is produced in court, especially where the parties agree that the child cannot be found. (*Re Catchy Hamy*, 28 *Oct.* 1862.)

The child's wishes.

If the court is convinced that the child is of an age and intelligence to choose for itself with whom it will live, and if that person is respectable and able to maintain the child, it will leave the choice to the child. (*Re Mastan*, 16 *Nov.* 1854.) And even if the child is not of such an age, if the applicant for the writ cannot maintain the child, and the child is unwilling to go with the applicant, the court will make no order. (*Re Justina*, 28 *Oct.* 1862.)

Course when the child is in good hands.

Even if the applicant is the mother, and the child is in good hands, the court will only order that the mother may have access to the child. (*Re Manhamy*, 7 *Nov.* 1862.)

In any case (whatever the religion of the relatives), where a child's relation has consented to the child being taken, at the time of its extreme need, by a person who has maintained it, and is willing to continue to maintain it with all proper kindness, and in comfort and respectability; and where that relation, after a long time, comes forward at a very suspicious period of a female child's life to claim possession of it, though utterly unable to maintain it, the court will not misuse the writ to take the child from a good and virtuous home, and deliver it over to misery and want, probably to vice, and certainly to grievous temptations. (*Re Ceysa Malitia*, 17 *June*, 1862.)

Roman-Dutch law of parental authority to be followed.

In cases where the writ of *habeas* is issued to settle the custody of the children where the father and mother are living apart, the Supreme Court is guided by the Charter and the Roman-Dutch law, and not by the English law of parental authority. The Ceylon Judges exercise, of course, a much larger discretion in this matter than the judges allow themselves in England. By English law the wife has no power over the child during the father's lifetime; and, until lately, could be denied access to it; but under Roman-Dutch law the mother has an authority equal with the father. In such cases, the Supreme Court, for the above reasons, and because it is a Court of Equity, has exercised a discretion much resembling that exercised by the Lord Chancellor, who, as *parens patriæ*, looks to the

interests of the children, as well as to the circumstances and wishes of the parents. Therefore, if the court sees reasons for such a course, they will decide that the mother shall have the custody, instead of the father. (*Re Greig*, 13 *Jany.* 1859, *J. and B. Rep.* 4; *Farmer v. Farmer*, *Menzies R.* 251—278; *Re Alicia Race*, *Q. B.* and *Chancery*, 26 *Law Journal*, *Q. B.* 176.)

And Kandyan law in case of Kandyans, &c.

Of course, in the cases of Kandyans, Mahommedans, and persons under the Thesawalemme, the court will have regard to their laws; but though, by such laws, one relative may have preference over another, the Supreme Court does not necessarily follow that preference. (*Aya Natchia, &c.* 6 *Aug.* 1861.)

Habeas corpus in criminal matters.

With regard to writ of *habeas corpus*, relating to illegal confinement for criminal or supposed criminal matters, or to bring up a prisoner to receive sentence, there can be no doubt that the Supreme Court has power to issue such a writ, and to punish for contempt of it; but whether it has the power to inflict the penalties contained in the Habeas Corpus Act for disobedience to the writ, or violation of liberty obtained under it, is extremely doubtful. That act is not extended to the plantations, and refers only to writs issued *in England*, and not from a court in a colony having the right to issue writs of *habeas corpus*. The question has not in form yet arisen in Ceylon.

Injunctions.

Also, by the 49th clause of the Charter, the Supreme Court, or any judge of it, is authorized "to grant and

issue *injunctions* to prevent any irremediable mischief which might ensue *before* the party making application for such injunction could prevent the same by bringing an action in any District Court."

It has been decided that this points, not merely to a limited injunction protecting applicant *ad interim* until he can protect himself by an injunction in the District Court, which he can obtain on filing the libel as the very first step in the cause, but that it also requires that the applicant should, as a condition precedent to the obtaining a writ from the Supreme Court, show that he is prevented, by some substantial cause, from applying at once to the District, instead of coming to the Supreme Court at all. As, for example, in cases where the District Court is not sitting, or the absence of documents expected to arrive from abroad. (*Re Rev. Joseph Baly, J. and B. Rep.* 23 *July*, 1859.)

CHAPTER VI.

SUPREME COURT.

CRIMINAL JURISDICTION.

Criminal jurisdiction of the Supreme Court.

THE Supreme Court has power, jurisdiction, and authority to hold an original jurisdiction for enquiring of all crimes and offences committed throughout Ceylon, and for the hearing, trying, and determining all prosecutions commenced against any person or persons for, or in respect of, any crimes or offences, or alleged crimes or offences. To provide for the due execution of the powers, authorities, and jurisdictions so vested, the Supreme Court is to be held, by some one of the Judges of it, in each of the circuits into which the island is divided. (*Chart.* § 31.)

The Governor, with the concurrence of a major part of the Judges of the Supreme Court, by proclamation apportions the island into the District of Colombo and three or more circuits for the criminal sessions of the Supreme Court, and in a like manner alters these ap-

portionments as occasion may require. (*Ord*, 18 of 1865, § 2.)

Until such division, the present circuits, i. e. the northern, midland, and southern are to remain, except those portions of the midland and southern included in the district of Colombo.

The District of Colombo above referred to includes the districts of the District Courts of Colombo, Negombo, Caltura, and Ratnapoora; and criminal sessions of the S. C. for that district are held at Colombo, quarterly, commencing on the 12th day of each of the following months, i. e. January, March, July, and October. The Governor can alter the limits of this district, and appoint additional sessions at Colombo, or sessions at either of the other three above-mentioned places, by a process similar to that for altering the circuits. (*Idem*, § 3.)

A criminal sessions of the Supreme Court is also held three times a year at Kandy, commencing on the 5th day of each of the following months, viz. March, August, and December, unless any of these days is a Sunday, or public holiday, then on the following day.* The Governor may, by the process above mentioned, order other sessions to be held at Kandy. (*Idem*, § 4.)

Circuits, how often held.

The circuits are held twice a year,† at such places and at such particular times as the Governor, after con-

* This necessary proviso does not apply to Colombo in § 3 of this Ordinance, although it was applied to Colombo in No. 20 of 1852, § 1.

† No. 18 of 1865, § 4, does not alter this, except so far as it appoints a third sessions at Kandy.

sultation with the judges, shall appoint by proclamation. But the circuits must be so arranged that all the judges shall never at the same time be all absent from Colombo. The chief justice first chooses his circuit, then the senior puisne his, the third remaining to the junior puisne. (*Charter*, § 32; *Ord.* 9 of 1843, § 3.)

On every circuit, the Supreme Court is to enquire of all crimes and offences committed within the limits of any such circuit, for the trial of which the original jurisdiction is by the charter vested in the court. (*Charter*, § 40; *Ord.* 9 of 1843.)

Transfer of prosecutions.

The Supreme Court, or any judge thereof, may order the transfer of any prosecution depending before the Supreme Court at any circuit to any other circuit; or to the sessions at Colombo, held under § 3 above, and may transfer any prosecution depending for trial in the said session of Colombo to any circuit, if in the discretion of the court or judge such transfer is required for the public convenience, and for the ends of justice; and such transfer is to be made on such terms, as to payment of expenses and otherwise, as the court or judge appoints. (18 of 1865, § 5.) Then the Supreme Court upon the circuit to which it is transferred may hear, try, and decide the case as effectually as the Supreme Court on the original circuit might have done. (9 of 1843, § 12.) It is also provided that a case transferred from the Colombo quarterly sessions to a circuit, is triable with the full powers of the Circuit Court. The judges

also have always exercised the power of transferring cases from one town to another on the same circuit.

The Governor, after consultation with the judges, may proclaim a special session for any or any portion of a district, and also that the December Kandy sessions shall be for such or such portions of districts as are in the proclamation directed. The S. C. has the same power at such sessions as it has on circuit. (18 of 1865, § 7.)

Objections to jurisdiction must be taken before plea.

Whenever any prisoner, defendant, or accused party has pleaded to any information exhibited against him at any sessions of the Supreme Court, without pleading to the jurisdiction of the court, although it may appear in evidence at the trial, or afterwards, that the crime or offence with which such prisoner is charged was committed within the limits of another circuit (or, in the case of a sessions at Colombo, or elsewhere, without the limit sover which the Supreme Court at such sessions has jurisdiction), such court (on circuit, or at a sessions at Colombo, or elsewhere) has jurisdiction over such prosecution, crime, or offence, as if the person were charged within its jurisdiction. (9 of 1843, § 12; 18 of 1865, § 8.)

The Judge at the Criminal Sessions is to issue a mandate to all jailors within the circuits to return a calendar of prisoners.

Any judge of the Supreme Court, *after* any criminal sessions to be holden *before him** has been appointed by proclamation (and at a convenient time before the dates

* Nevertheless it has been for many years the custom for the chief justice to sign the mandates, which is clearly against the charter.

fixed by law for the sessions at Colombo and Kandy, *R. and O. in* 28 *of* 1865, R. 1), must issue his mandate under his hand, directed to all and every of the fiscals and other keepers of prisons within his circuit, to certify to him the several persons then and there in any of their custody, committed for and charged with any offences.

The contents of the calender.

And the fiscals and other keepers of prisons are required to make, certify, and transmit due returns to such mandate by specifying, in a calendar or list to be annexed to such mandate respectively, the time when each of the persons so in their custody was committed, and by whose authority particularly, and on what charge, in writing.

The information on oath against any prisoner to be attached to it.

And to the list or calendar must also be annexed such informations upon oath as may have been taken against any of them, and then remaining in the hands of the fiscals or keepers of prisons, or true copies attested by the fiscals or keepers of prisons respectively.

The jailors to bring prisoners before the Judge holding Criminal Sessions, with the witnesses endorsed on the commitments.

And, if need be (according to the tenor and exigency of such mandate), such fiscals or keepers of prisons must bring the persons so in their custody before the judge, wheresoever the judge shall then be holdidg the criminal sessions of the Supreme Court, together with the witnesses whose names appear to be written or endorsed on the respective commitments, by virtue of which such prisoners were delivered into their custody respectively, in order that such prisoners may be dealt with according to law, provided always that wherever any party shall, after the making out of any such calender or list,

Proviso for the insertion in the calendar of the names of persons com-

and while such judge is holding the criminal sessions of the Supreme Court in the town or place wherein such calendar or list was delivered, be apprehended or committed on any criminal charge, it shall and may be lawful for the officer of the Supreme Court to insert the names of such persons in the calendar or list. (*Charter*, § 45, p. 10.) mitted during the sessions.

A criminal sessions of the Supreme Court opens, after the judge is seated, with the presentation by the fiscal to the court of the return to the mandate in the form of a calendar. The judge is also presented with a list of the witnesses.

The indictments, or informations, or libels of accusation, must be prepared by the Queen's Advocate, or the Deputy Queen's Advocate, or by the direction of either, and must be allowed and signed by one of these officers. (*R. and O.* in 28 of 1865, R. 3.) Indictments, how preferred.

Offences cognizable before the S. C. must be prosecuted in the name of the Q. A. and by him, or by some D. Q. A. by an information to be exhibited without the previous finding of any inquest by any grand jury or otherwise. (*R. and O.* in 28 of 1865, R. 3.)

The court regulates its own business, and when a case is called on, and no reason is assigned for postponing the trial, and the Q. A. or D. Q. A. does not state that the charge is withdrawn, the trial must proceed. (*Ibid.* RR. 4 and 5.) Trial.

A trial in the Supreme Court commences, therefore,

by the presentation of an information in the name of the Queen's Advocate, and allowed and signed by him, or the Deputy Queen's Advocate.

Venue. The venue may be named in the margin instead of in the body of the information, except where local description is required; then such description must be given in the body (12 of 1852, § 17); and the information is not insufficient for want of a proper or perfect venue (*Idem*, § 18).

Names. Formerly it was required in all informations to set forth the Christian name, surname, and addition of the state and degree, occupation, town, place, and district of the offender, and all this to identify his *person*. Now, however, no information is to be held insufficient for want of, or imperfection in the addition of, any defendant, nor on account of any person mentioned in the information being designated by a name, office, or other descriptive appellation, instead of his proper name. (*Idem*, § 18.)

Time. Sometimes time may be very material where there is any limitation in point of time assigned for the prosecution of offenders; but no information is insufficient for omitting to state the time at which the offence was committed, in any case where time is not the essence of the offence; nor for stating it imperfectly; nor that the offence was committed on a day subsequent to the presentment of the information, or on an impossible day, or on a day that never happened.* (*Idem.*)

* See limitation of offences.

Value.

The value of the thing which is the subject or instrument of the offence must formerly have been sometimes expressed; but now it is not necessary to state the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence. (*Idem.*)

The body of the information.

The body of the information is the statement of the offence, and it must contain such ingredients as are essential, either at common law or by statute, to constitute it. Thus, where by statute a particular act is punishable when done with a particular intent, such intent must be alleged in the information, conformably to the statute. And, in alleging a statutable offence, care must be taken so to allege it that it may be brought within the meaning and purview of the statute; it is always best to use the precise words of the statute. The information must further charge the defendant directly and positively with having committed the offence alleged, so that the court may see such a definite crime, that it may apply the punishment which the law prescribes.

The Roman-Dutch and English laws agree in the particularity of the description of a crime; and, therefore, where crimes are defined by particular words of art, which are appropriated by the law to express the precise idea which it entertains of the offence, those words must be used in describing it: and no other

words, however synonymous they may seem, are capable of doing it. (*V. der Ldn.* pp. 530-1; *Bl.* iv. 306.) *This rule* is further confirmed by implication in the ordinance to improve the criminal judicature; namely, No. 12 of 1852.

Information for murder or manslaughter.

Thus, in any information for murder or manslaughter, the manner or means of the death of the deceased need not be set forth; but, in an information for murder, it is sufficient to charge that the defendant did unlawfully and wilfully, and of his malice aforethought, kill and *murder* the deceased; and in case of manslaughter, that he did unlawfully and wilfully kill and slay the deceased. (No. 12 of 1852, § 4.)

For forgery, &c.

So also, in an information for *forging*, uttering, stealing, destroying, or concealing any instrument, the instrument may be described by its usual name and designation, or by its purport, without a copy or facsimile of it. (*Idem*, § 5.) And the same applies generally where any averment is made as to an instrument. (*Idem*, § 6.)

Again, in informations for forging, uttering, offering, disposing of, or putting off any instrument, or for obtaining or attempting to obtain any thing under false pretences, it is sufficient to allege the intent to defraud generally, without naming any particular person to be defrauded; and it is not necessary to prove an intent to defraud any particular person, but only the act charged with an intent to defraud. (*Idem*, § 7.)

Also any money, bank or treasury note, may be described simply as money, without specifying any particular coin or note. Such an allegation is sustained by proof of the amount only, although the particulars of the coins or notes are not proved. Money, how described.

And in the cases of theft by clerks, servants, and others trusted with money, and of obtaining money or bank or treasury notes by false pretences, the allegation is sustained by proof that the offender stole or obtained any coin or note, or any portion of the value thereof; although the coin or note was delivered to him in order that some part of the value might be returned to the party delivering it, or to another, and such part shall have been returned accordingly. (*Idem*, § 14.) Informations of thefts by servants, and false pretences.

In an information for perjury, or for unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly taking, making, signing, or subscribing an oath, affirmation, declaration, affidavit, deposition, or other writing, it is sufficient to set forth the substance of the offence, and by what court, and before whom, the oath, &c. was taken, &c. without setting forth the information, declaration, or any part of any proceeding, or the commission or authority of that court or person. (*Idem*, § 15.) Informations for perjury.

In an information for subornation of perjury, or for corrupt bargaining, or contracting with any one to commit perjury, or for inciting, causing, or procuring any one unlawfully, &c. to take, &c. any oath, &c. (*as above*, For subornation of perjury.

in § 15), it is sufficient (wherever any such perjury or offence has actually been committed) to allege the offence in the manner above (§ 15), and then to allege that the defendant unlawfully, wilfully, and corruptly did cause and procure the said person the said offence in manner and form aforesaid to do and commit; and whenever such perjury or other offence has *not* been actually committed, it is sufficient to set forth the substance of the offence charged without any of the matters above rendered unnecessary to be set forth in the case of perjury. (*Idem*, § 16.)

Certain defects do not vitiate an information.

No information is held insufficient for want of the averment of anything unnecessary to be proved, nor for the omission of the words "as appeareth by the record" —nor of the words "with force and arms." (*Idem*, § 18.)

Conclusion of information.

No information now requires to conclude with the words "against the peace," &c. so that no proper or formal conclusion is necessary; yet this must not be understood as affecting the practice as concluding the information *contra formam statuti*, where the offence charged is founded on the statute law (*Arch. Cr. Pl.* 12*th ed.* pp. 56, 57); yet the words "against the form of the statute, &c. or ordinance, or regulation," as the case may be, is sufficient, instead of "against the form of the statutes" (or "ordinances, or regulations"), and *vice versâ*. (*Idem*, § 18).

Objection, when taken.

Every objection to a formal defect on the face of an information must be taken before the jury are sworn,

and, if necessary, may be amended by the officer of the court, and the trial proceeds. (*Idem*, § 19.)

Amendment of variances.

Whenever, on a trial of an offence, there appears to be a variance between the statement in the information and the evidence offered, the court, if it considers the variation immaterial to the merits, and the defendant cannot be prejudiced thereby in his defence, must order the information to be amended according to the proof, by an officer of the court or other person, both in that part where the variance occurs, and wherever else it is necessary, on postponing the trial, before the same or another jury, as the court thinks reasonable. After amendment, the trial proceeds (whenever it is proceeded with) in the same manner in all respects, and with the same consequences as to the liability of witnesses and other things, as if no variance had occurred. (*Idem*, § 1).

Trial postponed on account of variance.

Where the trial is upon a variance postponed, the court may respite the recognizances of the witnesses, the defendant, and his sureties, if any, and such parties are bound in respect of the postponed trial, in the same manner they were originally bound. (*Idem*, § 1.)

If the postponed trial is had before another jury, the Crown and the defendant are respectively entitled to the same challenges as they were before the first jury were sworn. (*Idem*, § 1.)

Verdict and judgment after variance.

The verdict and judgment given after any amendment have the same force and effect as if the amended form of the information was in its original form. (*Idem*, § 2.)

If it is necessary to draw up a formal record in any case where there has been an amendment, it must be in the form the information bears after amendment, without noticing the amendments. (*Idem*, § 3.)

A plea of not guilty having been recorded, the jury is to be called upon to try the case. (*R. and O.* in 28 of 1865, R. 11.)

Jurors, how chosen.

The jurors are chosen in the following manner. Every man between the ages of twenty-one and sixty years, of sufficient intelligence and respectability, resident in Ceylon, and able to speak either English, Singalese, or Tamul, not incapacitated by crime, or bodily or mental incapacity, or by religious tenets as render him unfit to discharge the duties of his office, is liable to serve as juror, if he resides within the circuit and within *twenty* miles of the court; but no one resident more than *ten* miles from the court is obliged to serve at more than one sessions in the same year. (19 of 1844, § 1; 2 of 1854, §§ 3 and 4; 18 of 2865, § 10.)*

Exemptions from service as jurors.

The following persons are exempt:—The members and the clerks of the two Councils; the Judges of all Courts, their secretaries and officers; advocates and proctors; the clerks and interpreters of justices of the peace; coroners, and deputy coroners; all peace officers; naval and military persons in active service;

* He may be summoned as a bystander, though he does not so reside, if a qualified juror. (*Id.*)

ministers of religion who follow no lay occupation except that of schoolmaster; medical men in active practice, and schoolmasters; jailors, turnkeys, keepers of houses of correction and of lunatic asylums. (19 of 1844, § 2.) Also all persons employed in the post office. (*Ord. No.* 27 of 1865, § 46.) But even the excepted persons may serve, if willing to serve (except perhaps officers of the post office). A justice of the peace is not now exempt, unless he took the informations, or committed or bailed the prisoner. (No. 2 of 1854, § 1.)

List of jurors.

The government agents respectively prepare three lists:—A list of those who can speak English; a list of those who can speak Singalese; a list of those who can speak Tamil. If a man speaks two or more of these languages, the government agent, on request, places him on the list that seems most convenient. A juror can serve only on one list, unless allowed by the court. (*Ibid.* § 3.)

Jurors to read and write.

The Governor may, with the advice of the Executive Council, by proclamation, require that jurors should be able to read and write in the language of their list, to be eligible as a juror. (*Ibid.* § 5.)

Persons qualifying after formation of lists.

The government agents may (in places convenient) insert in their lists the names of persons qualifying after the formation of the lists, and may also strike out the names of persons becoming disqualified. (*Ibid.* § 6.) But they are, in this duty, very properly controlled by the Supreme Court, which may make orders for the

revision of the jury lists; but in doing this, the court is addressing these officers as government agents, and not as fiscals, and accordingly can act only under the terms of the Ordinance. (*Ibid.* § 7.) An extensive power is also given to the Governor to order the amendment of jury lists. (*Ibid.* § 8.) And the government agents are required to revise the jury lists every third year. (*Ibid.* § 9.) The government agents must send their amended, &c. lists to the fiscals of their provinces respectively. (*Ibid.* § 10.)

Order of serving.

The jurors are to serve in the order their names stand in the list, unless summoning in such order appears to be attended with peculiar hardship or inconvenience;* then they may be summoned under special orders of the government. (*Ibid.* § 11.)

Drawing jury and selection of list.

The jury is called by drawing thirteen names indifferently from a box, and are chosen from such class or classes as the Queen's Advocate, or Deputy Queen's Advocate, and the accused, may agree on; or, if they should not agree, as the judge may direct. (*R. and O.* in 28 of 1865, R. 11.)

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* It is difficult to say how a jury list can be best made up. In England, it is usual to make them up by streets, or villages, or neighbourhoods; this gives the advantage that the jurymen often know one another, though at the same time opening a door to party feeling. In Ceylon, they are generally made up in alphabetical order; which has the great disadvantage of bringing too many of the same family or connections into the jury box at the same time, so that a man may by chance be tried by his own relations, or even by the enemies of his family.

Tales.

When jurors are set aside or withdrawn, other names must forthwith be drawn in their place, and if the number of the class from which the jury is drawn is reduced below the number of thirteen, others shall be forthwith summoned or called by the fiscal from the by-standers. Or, if, on any trial in the Supreme Court, a sufficient number of lawful jurors are not in attendance, by reason of challenges or other good cause, the judge may order neighbours qualified and liable to serve as jurors, sufficient to make up a full jury, to be summoned; and every such person is liable to be challenged the same as other jurors. (§ 13, 19 of 1844, *R. and O.* in 28 of 1865, § 14.)

Juror incapacitated during trial.

If any juror dies, is taken seriously ill, or is otherwise incapacitated during a trial, the judge may order the fiscal to summon a bystander or neighbour qualified and liable to serve as a juror, and to whose serving no objection or challenge is made, to serve in his place. The jury so re-constituted is to be re-sworn, and the evidence of the witnesses already taken is to be read over from the judge's notes, and the trial is to proceed as if no such interruption had taken place. (19 of 1844, § 14, and *R. and O.* in 28 of 1865, R. 19.)

Non-attendance of juror.

Any juror not attending pursuant to summons, or, being thrice called, not answering to his name, or, after appearing, refusing to be sworn, or affirmed, and to act as a juror, or wilfully withdrawing without leave of the court, or unless upon excuse to the satisfaction of the

court, is liable to be fined by the court a sum not exceeding *five pounds*. (19 of 1844, § 16.)

Corrupting jurors.

Any one corruptly influencing, or attempting to corruptly influence, a summoned juror, and any summoned juror consenting to such influence, and any one threatening any summoned juror, or assaulting a juror on account of his vote, really or supposed to be given, is liable to imprisonment, with or without hard labour, not exceeding three years, or to lashes not exceeding one hundred. (*Ibid.* § 17.)

When thirteen jurors have appeared, the accused is informed of his right of challenge in this form:—

"The good and lawful men, whose names you shall hear called, are the jurors, who are to decide between our Sovereign Lady the Queen and you, upon your trial (or your respective trials). If you object to them, or any of them, your time is as they stand up to be sworn or affirmed, and before they are sworn or affirmed, and you shall be heard."

The officer of the court then calls upon each juror by name to stand up to be sworn or affirmed. And the right of challenge, both of the accused and the Crown, must be exercised as each juror is about to be sworn, and not otherwise. (*R. and O.* in 28 of 1865, RR. 12 and 13.)

Challenges.

The Crown is allowed five peremptory challenges, and as many, upon good and sufficient cause shown, as the judge shall *allow*. (19 of 1844, § 19.) Where two or more prisoners are tried together in one information,

they must agree together as to their peremptory challenges; and the number of such challenges must not, in any case, exceed the number of such challenges allowed to one single party. (2 of 1854, § 5.)*

The thirteen jurors *severally* take the following oath or affirmation, to be administered according to the religion which each respectively professes :—

"I solemnly and sincerely swear (or affirm) that I will well and truly try the prisoner (or prisoners) according to the evidence. I will not reveal my own vote or opinion, or that of any of my fellow jurors, unless required to do so by law." (*R. and O.* in 28 of 1865, R. 15.)

Of giving in charge to the jury.

The accused is given in charge to the jury by the officer of the court briefly stating to the jury the charge and the plea of the accused, as follows, or in words to like effect :—

"Gentlemen of the jury, the prisoner, A. B. is indicted for manslaughter (or for aggravated assault, or for receiving stolen property, knowing it to have been stolen, or for cattle stealing, or as the case may be). To this indictment he has pleaded not guilty; your duty, therefore, is to listen to the evidence, and to find by the verdict of seven or more of you whether he is guilty or not guilty." (*Ibid.* R. 16.)

* By R. and O. Sect. 1, Oct. 1833, R. 4, p. 58, the *prisoner* was allowed five peremptory challenges, and as many for cause as the judge shall decide to be good and sufficient; but this rule is repealed by 28 of 1865, and no provision is made in its place, either by that Ordinance or by 18 of 1865—so that the *prisoner's right of challenge* is at present unprovided for. (*May*, 1866.)

Plea.

The registrar, or deputy-registrar, must read the libel of accusation aloud in English, and if the accused does not understand English, it must be interpreted to him in a language which he understands. He must then be asked by the officer of the court (the question to be interpreted if necessary) whether he is guilty or not guilty. (*R. and O.* in 18 of 1865, R. 6.)

If he plead guilty, the plea must be recorded; and when recorded, the judge must pass sentence, either forthwith or at some subsequent period of the sessions. (*Id.* R. 8.)

Demurrer.

If the prisoner, instead of pleading, demurs to the indictment as wholly insufficient in law, after argument, the judge must give judgment, forthwith or at some other time of the sessions. Objections of mere form cannot prevail on demurrer; and the judge can then and there amend all clerical or technical errors in the indictment. If the indictment is adjudged substantially bad, judgment may be given for the accused, and he may be discharged, or the indictment may be quashed, and another directed forthwith to be prepared. If the indictment is adjudged substantially good, judgment may be given for the Crown, and the accused again called upon to plead. (*R. and O.* in 28 of 1865, § 7.)

Pleas in criminal cases.

If the prisoner pleads not guilty, or if he refuses to answer at all, or gives a mere vague answer which shall be considered equivalent to a plea of not guilty, such

plea must be recorded, and the trial proceeds. (*R. and O.* in 28 of 1865, R. 10.)

Besides pleading "guilty," or "not guilty," the defendant may plead "*autrefois convict*," or "*autrefois acquit*;" and this he may do by stating that he has been lawfully convicted or acquitted (as the case may be) of the offence charged in the information. (12 of 1852, § 21.) These pleas are founded on the maxim that no one is to be brought into *jeopardy* more than once for the same offence; so that when a man is once fairly found not guilty upon any prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime. The question is, is he brought into the same jeopardy; so that the plea of *autrefois acquit* does not apply to a case that has been reversed by the Supreme Court—the defendants having never been in peril. (22135, *P. C. Matura*, 30 *July*, 1858.) If, by reason of some defect in the record, either in the information or the plaint, the place of trial, the process, or the like, the defendant was not lawfully liable to suffer judgment upon the offences charged upon him, he has not been *in jeopardy* in the sense which entitles him to plead the former acquittal or conviction in bar of a subsequent accusation. The pleas of *autrefois acquit* and *autrefois convict* must be upon a prosecution of the same identical act and crime, or for such a charge as that by statute or otherwise the defendant might have been

convicted upon it of the identical act and crime subsequently charged against him. (41291, *P. C. Galle, P. C. Ca.* 10 *Dec.* 1861, p. 164; *R. v. Drury*, 3 *C. and K.* 193; *R. v. Clark*, 1 *Brod. and B.* 473; *R. v. Bird*, 2 *Den. C. C.* 94.)

Where a plea of *autrefois acquit* or *autrefois convict* is put in by a prisoner who is arraigned before a jury, the jury must be first charged to try that plea.

Of opening the case, of calling witnesses for the defence, and reply.

The Q. A. or D. Q. A. then, in his discretion, opens the case against the accused. He then calls the witnesses in support of the charge, who are examined, cross-examined, and re-examined, according to law. At the close of the case for the Crown, the accused, or his advocate or proctor may address the jury, and call witnesses for the defence. Evidence in defence gives the prosecutor a right of reply. (*R. and O.* in 28 of 1865, R. 17.)

Exception rules of evidence in criminal cases

The rules of evidence are, in general, the same in criminal proceedings as they are in civil proceedings;* and bind alike the Crown and the subject, the prosecutor and the accused, the plaintiff and the defendant; —counsel and client. There are, however, some exceptions. Thus, the doctrine of estoppel has much larger operation in the former than in the latter system. And an accused person may, at least if undefended by counsel, rest his defence on his own unsupported statement of facts, and the jury may weigh the credit due

* For law relating to witnesses, see "Witnesses."

to that statement. Again, confessions, or other self-disserving statements of prisoner, will be rejected, if made under the influence of undue favour or threats of punishment; but there is no such rule in civil cases. (*Best on Ev.* § 94, p. 120.)

But these questions will be found to be more fully treated in the latter part of this work, under the title of "Evidence."

The evidence and addresses being closed on both sides, the judge proceeds to sum up the evidence. (*R. and O.* in 28 of 1865, R. 17.) But it must be understood that the whole course of the trial is under the direction of the court: it decides all questions of law and practice, including the admission and rejection of evidence, and when the case is ripe for adjudication, sends it up to the jury—explaining the questions in dispute, with the law as bearing on them, pointing out upon whom the burden of proof lies, and recapitulating the evidence, with such comments and observations as may seem fitting. Moreover, as the decisions of tribunals on facts ought to be based on reasonable evidence, the decision as to what is reasonable is matter of law, and consequently within the province of the court. (*Michell v. Williams, per Alderson, B.* 11, *M. and W.* 216.)

The judge's summing-up.

Whether there is *any* evidence is a question for the judge: whether *sufficient*, for the jury. (*Carpenters' Company v. Hayward, Douglas, R.* 375.) "*Ad quæstionem facti non respondent judices; ad quæstionem juri, non re-*

spondent juratores." Facts, however, on which the *admissibility* of the evidence depends are determined by the court, not the jury. Thus, whether a sufficient foundation is laid for the reception of secondary evidence, is for the judge; and if the competency of a witness turns on a disputed fact, the judge decides. (*Best on Ev.* § 82, p. 103.) So, whether a confession is receivable (*Ibid. R. v. Warrington*, 2 *Den. C. C.* 447, *and* 15 *Jur.* 318): and whether, on a charge of homicide, a dying declaration was made by the deceased at a time when he was under the conviction of his impending death, in which case alone it is admissible. (*Ibid. Bartlett v. Smith*, 11 *M. and W.* 483; *Bennison v. Jewison*, 12 *Jur.* 485.) Upon the judge also devolves the duty of allowing amendments on the record (*Broom's Com.* 222, and *ante*, p. 230); and of permitting adjournments of the trial. (12 of 1852, § 20.)

Verdict.

If the jury wish to retire, they must be conducted to a room kept for that purpose, where they must remain, without having communication with any other person, except by express permission of the court, until the majority of them shall have agreed to a verdict. The verdict shall in all cases be pronounced in open court, and in the presence of the prisoner, by the foreman of the jury, and in the hearing of all the rest of the jury. The officer of the court will make an entry of the verdict, and will then say to the jury the words following, or to the like effect:

"Gentlemen of the jury, attend while your foreman signs your verdict. The finding of you or of the greater part of you is, that the prisoner A. B. is 'guilty' (or 'not guilty')."

The foreman will sign the verdict so entered, and the verdict, when so entered and signed, but not before, will be final. (*R. and O.* in 28 of 1865, R. 17.)

The verdict is either "guilty" or "not guilty," on such and such counts, or upon the whole information.

A person prosecuted for any offence may be found guilty of the attempt only,

However, if it appears to the jury that the prisoner did not complete the offence charged, but that he was guilty only of an attempt to commit it, the jury is at liberty to return as their verdict that the defendant is not guilty of the offence charged, but of an attempt to commit it. The defendant is then liable to be punished as if he had been indicted and convicted upon an information for attempting to commit the offence charged. No person so tried and convicted is liable to be afterwards prosecuted for an attempt to commit the offence for which he was tried. (12 of 1852, § 8.)

and cannot then be tried for the attempt.

A person indicted for robbery may be convicted of an assault with intent to rob.

Similarly, upon the trial of any person for robbery, the jury may convict him of an *assault with intent to rob*,* and he is punishable as if he had been so indicted, and he cannot afterwards be tried for the latter offence. (*Idem*, § 9.)

Persons accused of jointly receiving may be

Again—if, upon the trial of two or more persons for

* But not of a common assault, but only of assault with that intent.

found guilty separately.

jointly receiving any property, it is proved that one or more such persons separately received any part of such property, the jury may convict the persons who have received any part of the property. (*Idem*, § 10.)

Motion in arrest of judgment.

When any prisoner is before the court for the purpose of receiving sentence, he may move in arrest of judgment for any error in matter of law; but it is not necessary to call upon him to do so. And no judgment can be arrested or set aside for matter of form, or for any error or defect of pleading, or of proceeding, or otherwise, whereby the substantial rights of the prisoner have not been prejudiced, nor for any error or defect in the indictment, unless such error or defect would have been fatal, and incurable by amendment if objection to it had been taken on demurrer. (*R. and O.* in 28 of 1865, R. 20.)

No provision for writ of error, bill of exceptions, or for new trial in minor offences.

The rules and orders make no provision for a writ of error, when error is apparent on the record; or for a bill of exceptions to the ruling of the judge; or for a new trial in the case of lesser offences, when the prisoner has been taken by surprise, &c.; probably because these protections are supposed to be supplied by the reservation of points for the collective court; but it can scarcely be expected that a judge would report against his own ruling.

Sentences to be pronounced in open court.

All sentences are to be pronounced in open court by the judge who tried the case. The sentences are inserted in the calendar, and signed by the judge, which

insertion and signature are the fiscal's warrant for carrying the sentences into execution, except in the cases in which any person is adjudged to die, the execution of which sentence is respited as follows :—

Sentence of death.

In every case where any one is adjudged to die, and the execution of such sentence has been respited, as required by the 44th clause of the Charter, for the purpose of a report of the case being laid before the governor and considered by him, the fiscal must not execute such capital sentence, notwithstanding that the period named in such respite may have elapsed and no further respite have been received, unless the fiscal shall have been informed, according to the Government Minute of 6th July, 1865, that the case has been reported to the governor by the judge, and the governor considers the case one in which the law must have its course. (*Charter*, § 44 : *R. and O.* in 28 of 1865, R. 21.)

Sentence of death may be recorded.

Whenever, on the conviction of any person for any crime punishable with death (except murder), the court thinks that, under the circumstances of the case, the offender is a fit subject to be recommended for mercy, it may direct the proper officer then present in court to ask the prisoner if he has any thing to say why judgment of death should not be recorded against him ; and if the prisoner alleges nothing in law to arrest or bar the judgment, the court may abstain from pronouncing judgment of death upon him, and, instead thereof, may order it to be entered of record ; and the proper officer

must record death *in the usual and accustomed form now used* as if judgment had actually been pronounced in open court. And such a judgment has the same effect to all intents as if the judgment had been pronounced and the sentence respited until report to the governor. The judge must report the case, with the grounds for thinking the prisoner a proper subject for royal mercy. (*Ord.* No. 6 of 1856.)

Other punishments.

The other punishments inflicted by the Supreme Court are transportation, imprisonment, with or without hard labour, whipping, and fine. It also has the power of inflicting simple banishment in certain cases (*Charter*, § 25); though this punishment is now disused.

Of binding over to receive sentence when called on.

In cases of assault, libel, nuisance, or the like, and generally, where the offence is not from its nature or circumstances of a heinous or aggravated character, the judge, if neither party asks for immediate judgment, may bind a convicted person over to appear to receive sentence when called on, and may discharge him, subject to such obligation; and the judge may also bind him over to keep the peace, or to be of good behaviour, or both, and may also order such convict to pay expenses, and to make compensation to injured parties, and the like; and if any such person, contrary to his obligations, not obeying such orders, or grossly misconducting himself in any matter of the old case, the Q. A. or D. Q. A. may call on him, by notice in writing, to

appear at any Sessions of the Supreme Court at the place where he was convicted, or at Colombo, and receive judgment; and the court or any judge may inquire summarily into the matter, either by receiving affidavits or by hearing witnesses, and pass such sentence as might have been passed by the judge who tried the case, and such judgment must be recorded and entered in the calendar or in the minutes of the court, and signed by the judge or one of the judges passing the sentence; and such calendar or any exemplification of such signed minute is sufficient warrant to all fiscals and other officers for carrying such sentence into effect. If any person so noticed does not appear, the court or any judge, besides estreating the recognizance, may issue a bench warrant for the apprehension and detention in custody of such person, until such person can be brought up for judgment before the Supreme Court or some judge thereof; and the court or any judge, on such person being so brought up, may enquire and pass sentence as aforesaid. (*R. and O.* in 28 of 1865, R. 22.)

Proceedings on reserving questions of law on conviction.

When any person is convicted of any offence before the S. C. and the judge who tries the case reserves any such question, as by the 47th clause of the Charter he can reserve for the S. C. sitting collectively, such judge may respite execution or postpone judgment until such question is decided; and may commit the convict to prison, or take bail from him with one or more sufficient sureties, and in such sum as he thinks fit, conditioned

to appear at such time or times, and at such place as that or any other judge of the S. C. at any Criminal Sessions of the court directs, and to receive judgment or to render himself in execution, as the case may be. And such question must be reported to and brought before the S. C. at some general sessions after the trial, and the decision of the S. C. must be given in open court and recorded by the registrar; and if the conviction is held good and no judgment given, the judge before whom the case was tried, or, in case of his absence, any other judge of the S. C. must, either at Colombo or at the place where the case was tried, pronounce judgment on the person convicted, and such judgment is recorded, entered in the calendar, signed by the judge, and executed as in other cases: or, if the conviction is not held good, and the person has been committed, the judge before whom the case was tried, or any other judge, may order his discharge. (18 of 1865, § 11.)

Of points of law reserved.

When the judge (as directed by the 47th clause of the Charter, and by the 11th clause of Ordinance No. 18 of 1865, or in any Ordinance to be in that behalf hereinafter enacted) reserved for the collective court any question of law decided adversely to the prisoner at the trial, such question reserved must be heard and determined by the judges collectively, at Colombo, on some day for hearing Crown cases reserved, and duly noticed in the *Gazette*. The hearing need not be in the presence of the prisoner, but any advocate appearing

may be heard; and if no advocate appear for the prisoner, the court may assign council to argue in his behalf. (*R. and O.* in 28 of 1865, R. 23.)

Prisoner committed for trial before Supreme Court to be tried at first session thereof.

If any prisoner, committed for trial before the S. C. is not tried at the first criminal session after his commitment, at which he might be tried (provided twenty-one days have elapsed between the commitment and the first day of such session), the court or any judge must bail him, unless good cause be shown to the contrary, or unless the trial has been postponed on the application of the prisoner. And if the prisoner is not tried at the second session of the S. C. holden after his commitment at which he might be tried, unless by reason of his insanity or sickness, or of his application for postponement, provided six weeks have elapsed since the close of the first session after commitment before the commencement of such second session, and six months has elapsed between the commitment and the commencement of such second session, the judge of the court presiding at such last-mentioned session must issue his order to the fiscal for the discharge of such prisoner.

And if not brought to trial at second session after commitment, to be discharged from imprisonment.

Power to any judge of the Supreme Court to order restitution of property charged to have been stolen.

When any person has been tried before the S. C. for stealing, or in unlawfully taking, obtaining, extorting, embezzling, converting, disposing of, or knowingly receiving any property, any judge, whether or not the person tried was convicted, may award writs of restitution for the property or the proceeds thereof, or in a summary manner to order its restitution to its owner. If, before any award or order made, any valuable

Provisions as

to valuable and negotiable securities.

security has been *bonâ fide* paid or discharged by somebody liable to the payment thereof, or, being negotiable, has been *bonâ fide* taken or received by transfer or delivery by somebody for consideration, without notice or reasonable cause to suspect that the same had been stolen, &c. in such case no award or order must be made for the restitution of such security.

Recognizances of accused parties and witnesses may be respited.

When any person has entered into recognizance to appear and take his trial for the same, or to give evidence at the trial of any person charged, and the court before which such person is bound to appear and take his trial or to give evidence postpones the trial, the court may order the recognizance to be enlarged till such time as it appoints.

"Fines and Penalties" will be found to be discussed in a subsequent separate chapter.

Pardon.

The effect of a pardon, if absolute and unconditional, is to make the offender a new man, to acquit him of all corporal penalties and forfeitures annexed to the particular offence, and to give him a new credit and capacity. A pardon, however, may be, and very frequently is, conditional only, in which case it operates to purge the particular offence upon the performance of the condition, *i. e.* upon suffering the punishment imposed, in lieu of the original penalty by the Crown. (4, *Bla. Com.* ch. 31.)

NOTE. The six rules and orders relating to appeals to the Privy Council, and promulgated 16th Dec. 1842, R. and O. p. 132, having been accidentally omitted, will be found in the *Addenda*.

CHAPTER VII.

ORIGIN OF THE DISTRICT COURTS.

WHEN the western maritime border of Ceylon was surrendered to the English, there existed, in Colombo, Jaffna, and Galle, certain courts called the "Court of Matrimonial and Petty Causes," and also called the "Civil or Town Courts." These courts had cognizance of civil causes to the amount, in value, of one hundred and twenty rix dollars, or nominally £9. They had, no doubt, been established in imitation of similar Small Causes Courts in the chief towns of Holland. After the capitulation, they suddenly discontinued their judicial functions.

The Council of Justice, a superior court, was stipulated to be continued to exist only for twelve months from the date of the capitulation, for the decision of all civil suits depending in it at the time of the capitulation.

Besides these Town Courts, and the Councils of Justice, there were certain Country Courts, called Land Raads, which had been administered, in the time of the

Dutch, according to the Regulations published and established by William Jacob Vander Graaff—a former Dutch Governor. These courts ceased, apparently, to exercise jurisdiction at the time of the capitulation.

The capitulation was in February, 1796; and in 1799, the colony being settled, and there being no hope of a European peace, the Government of Ceylon, under authority from the Crown, determined to re-erect a temporary system of civil judicature; and, for that purpose, to utilize the Town Courts, and call back the Land Raads into life. Accordingly the jurisdiction of the Town or Civil Courts was extended to all civil causes whatsoever arising within the local limits of their former jurisdiction. These courts were to be styled "Civil Courts," only; and exercised their new jurisdiction in the same manner and with the same powers as they formerly exercised to the limited amounts before mentioned, and with the additional power of decreeing the execution commonly called *parata executio*, a summary course of proceeding without the previous stages of a suit, whereby the creditor is at once entitled to execution.

The quorum of judges was reduced from five to one in civil cases; although more than one judge might be appointed, the court thus having a president who had a casting vote.

In addition to the Civil Courts in towns, the Land Raads were re-established in their old jurisdictions.

But as, from the then circumstances of Ceylon, the observation of all the formal parts of proceeding practised under the ancient Government of the United Provinces had become impracticable, and to render the administration of civil justice as plain and simple as possible, with such forms only as were essential to the ends of justice and the investigation of truth, the proceedings in all courts of civil judicature were made summary, and without such delays and formal proceedings as were not conducive to the merits of the case. Examination of witnesses *vivâ voce*, and upon oath, in open courts was established; and also the reduction of the *depositions* to writing, by an officer of the court, for the information of the Court of Appeal, which was established by the same proclamation. (*Capitulation of Colombo, Art.* 23; *Procl.* of 23 Sept. 1799.)

Prior to the re-establishment of these courts, after the Dutch settlements in Ceylon had submitted to the Crown of England, a Court of Equitable Jurisdiction had been established at Colombo by the then existing British Government, to dispense justice in the place of the Land Raads, which had ceased their judicial proceedings. This court continued after the establishment of the Civil Court at Colombo, apparently for native causes beyond the jurisdiction of the Civil Court of Colombo; and subsequently an appeal to the Governor from this court was given. (*Procl.* 14 *Oct.* 1799.)

In the course of a couple of years it was found that

the practice of the courts had become diverse, and had largely followed the ancient forms of procedure under the United Provinces. A more precise proclamation was therefore issued, with improvements which remain to this day.

Under the Dutch Government, it had been usual and necesary to obtain permission from the Presidents of Courts, and even from the Governor, to sue, which usage many thought to be still in force. This usage was expressly declared to be no longer in force; but that every person might apply for redress to a court without hindrance. By the general regulations in this proclamation, a system of procedure, beginning with a plaint, was laid down; and the Civil Courts at Colombo, Jaffna, and Galle had exclusive civil jurisdiction given to them within the forts and their gravets; and a number of new Land Raad Courts were established, and the old ones confirmed. Each court had power to form its own bye-rules, consistent with the regulations, under the sanction of the Governor. This proclamation also provided for appeal. (*Procl.* 22 *Jan.* 1801.) In the subsequent August, the English language was fully established as the language of the courts. (*Procl.* 20 *Aug.* 1801.) In the same year a Supreme Court was established by charter. (18th, 1801.) This court had a limited original civil jurisdiction in Colombo; but the Land Raad Court of Colombo was continued in cases where a native was defendant.

In matrimonial and testamentary cases, the English law was secured to Europeans, the Dutch law to the Dutch, and their own several laws of inheritance, succession, and contract, to the Singalese and Mahomedans.

On the 5th of June, 1802, were established Courts of Sitting Magistrates, to whom was subsequently given a civil jurisdiction to the amount of fifty rix dollars; and, in November of the same year, the Fiscal's Courts (established in 1800) were converted into "Courts of Justices of the Peace," held, not before the fiscal as before, but before a justice of the peace appointed for that purpose.

In the year 1805, however, on the ground of expense, and the insufficient number of the civil servants, all courts of justices of the peace were abolished,* and a Provincial Court with one judge, with a limited civil and criminal jurisdiction, was established in each of the five provinces into which the maritime provinces was then divided. But, in 1810 (*Charter*, 6 *Aug.* 1810, § 14), these courts were abolished, and the *Land Raad* Courts which they had superseded were re-established by the Governor in such districts and with such jurisdiction as the Chief Justice deemed expedient. In the following year, however, the scale went up in favour of the Provincial Courts, which were revived and restored; con-

* Not those of the Sitting Magistrates.

tinuing, however, to the Governor power to continue the re-establishment of the Land Raad Courts, and giving him the power to regulate both classes of courts as he deemed for the good of the island.

Besides the above courts, there existed Revenue Courts, and several junior courts of appeal in revenue cases.

The annexation of the Kandyan provinces introduced three other systems of courts for those provinces; so that there were, in 1833, no less than six, or, including the Court of Mahabade, seven systems of courts, having each a separate formation, with different, and often clashing, jurisdictions.

The *Land Raad* Courts had, however, not been re-established under the Charter of 1810, or 1811, or had otherwise ceased. The other courts were abolished by the Charter of Justice now existing of the 18th of February, 1833, § 2, to make room for the present District Courts.

Civil jurisdiction.

Civil jurisdiction is given by the 24th clause of the Charter to each District Court to hear and determine all suits,* &c. in which the defendants are resident within the district in which any suit is brought, or in which the act, matter, or thing in respect of which each suit is brought, has been done within that district;† that is,

* It seems it was once necessary to assert that a District Court has no power to inflict the fines and penalties of *martial law*. (6231, *D. C. Kandy*, 8 *Nov.* 1853.)

† Accordingly the District Court cannot make good or confirm a

civil jurisdiction is given *either* where the defendant resides, or when the act is done within the district. (*Marshall*, 257.) If the cause of action arises within the district (which is the second alternative in clause 24), the plaintiff is entitled to sue, the same as if the defendant were resident within it (2099, *Jaffna*, 30 *Apr.* 1834; *Marshall*, 257; *Morg. Dig.* 13). But in the case of an account consisting of items arising in different districts, some modification is requisite. Thus, the plaintiff may choose to commence his suit in any one of the districts where an item was incurred. With this possibly the defendant will be dissatisfied, and he may plead that he resides in another district, and that only a few of the items arose in the district chosen. In answer to this the plaintiff may reply and give evidence that the majority of the transactions arose in the district chosen, and may also demand that the defendant should answer to the merits of the action. The court then, in deciding on the jurisdiction, must not allow the plaintiff merely to suit his own convenience, but must decide on the general weight of the case, remembering that if the defendant is resident in a remote district, it will be hard on him to be sued in another court merely because one item of a long account had its origin within its jurisdiction; for where the

decree of the Supreme Court. The lower court cannot affirm or interfere with the adjudication of the higher; it cannot even change the decree of a co-equal court unappealed against. (1114, *D. C Amblangodda*, 12 *Oct.* 1836; *Morg. D.* 100.) Nor can it set aside its own judgment. (3628, *D. C. Ratnapoora*, 9 *June*, 1864.)

defendant resides in an adjoining district, it can be no hardship to him to be called upon to answer. (1434, *D. C. Galle*, 31 *Dec.* 1834; *Morg. Dig.* 29; *Marshall*, 257, 258.) And, in general, it is not necessary that *all* the cause of action arising out of any transaction should be within one district, to give it jurisdiction in respect of so much as did really there arise. Thus, where the plaintiff agreed in Colombo to make advances to the defendant to purchase coffee in Kandy, and certain advances only were made in Colombo, and an action was brought for not accounting for those made in Colombo, it was held that, although there was cause of action for other advances elsewhere, an action would lie in Colombo for the advances made in Colombo at least, inasmuch as that act, matter, or thing, in respect of which the action was brought, was done and performed within the jurisdiction of Colombo. (18709, *D. C. Colombo*, 20 *June*, 1856; *Lorenz*, 147, *upheld in* 14797, *C. R. Colombo*, 28 *Nov.* 1862.) This is indeed the test —thus a cheque was drawn at Badulla and made payable at Colombo; the Colombo court had jurisdiction, because it was not in respect of the drawing of the cheque at Badulla, but its dishonour at Colombo, that the action was brought. (34542, *D. C. Colombo*, 26 *Jan.* 1864; *Legal Miscellany*, 38.) Similarly, in a suit to recover a balance due on the sale of timber shipped from Trincomalie to Colombo and consigned to the defendant, *on his request* in a letter written from Colombo, as factor or

agent, and who sold the timber and paid most of the proceeds, but neglected to pay the balance, the court held that according to these facts the cause of action arose at Colombo, where the defendant also resided, and that the jurisdiction of the cause was at Colombo. (18631, *D. C. Trincomalie, Lorenz, R.* p. 4.) But where the defendant resided in another district, and the bond in suit was also executed in another district, the court was held to have no jurisdiction. (22248, *D. C. Kandy, Austin*, p. 136.)

The plaintiffs must not be allowed, to suit their own convenience, or perhaps for worse purposes, to bring their actions under fictitious pretences in courts to which the jurisdiction does not fairly belong under clause 24. (*Marshall*, 258.) Thus, in a suit where it appeared that the land in question was situated in the district of Madewelletenne, and the second defendant, who was the only *real* defendant in the case dwelt in that district, the Supreme Court ordered the case which had been instituted in the District Court of Matelle, to be transmitted to the District Court of Madewelletenne, to be there proceeded with and decided. If the plaintiff were permitted to carry on the suit in the former court merely on the ground that the first defendant (who it appeared had no claim to the land) had been joined in the action, a plaintiff might always choose the court in which he would prefer his action to be tried, by including as defendant a person wholly uninterested in the

matter in issue. (632, *D. C. Matelle*, 16 *May*, 1835; *Morg. Dig.* 45.) This case, observes Marshall, is not a transfer of a cause under the 36th clause, but on a different principle, of which presently. It was merely declaring to what court jurisdiction in the first instance belonged.

Jurisdiction as to claimants.

Claimants in opposition to execution, are, in a suit, parties defendant against the plaintiff, and are also entitled to consideration. Thus, in a foreclosure suit brought in Colombo, on a mortgage of land in Putlam, several claimants appeared and stopped the sale in execution, and petitioned the Supreme Court that their claims might be heard and decided at Putlam, on the ground of the expense which would be occasioned by the examination of their witnesses at Colombo. The court was inclined to accede to this petition; but the plaintiff consented that the witnesses should be examined on interrogatories at Putlam. (See *Marshall*, 259.)

Jurisdiction where the judge is a party.

The 24th clause of the charter further provides that no District Court shall hold jurisdiction of any suit in which the judge is a party, nor even where he sues in a different capacity; thus, if the same person is both District Judge and Customs Master, he cannot sue in his latter capacity before himself in the former. (*No.* 1, *D. C. Amblangodde*, 30 *Dec.* 1837; *Morg. D.* 203.) Any such suit must be cognizable in the court of any district immediately adjoining. In that case the plaintiff may elect the district immediately adjoining; and the court in that district is bound to hear and determine the

cause, unless some very strong reason is shown for transferring it to another court. (2432, *D. C. Trincomalie*, 6 *Jan.* 1836; *Morg. Dig.* p. 71; *Marshall*, 260.) Indeed, the only limitation imposed by the charter is, that the action should be brought in some district immediately adjoining that over which the judge who is a party presides; but if the plaintiff's choice of an adjacent District Court is made evidently with a view to produce vexatious inconvenience, or if such choice is likely to prevent justice being done between the parties, the Supreme Court will not hesitate to exercise the power vested in them by the 36th clause of the charter, and transfer the case to some other court, notwithstanding the literal compliance with the terms of the charter. (*Marshall*, 260.)

Equitable jurisdiction.

Sir Charles Marshall, the principal framer of the charter, says that *equitable* jurisdiction, as distinguished from *civil* jurisdiction, is not given by the charter in express terms; it having been considered by the framers of that instrument that all cases brought before the District Courts should be decided, as in the civil law, according to the rules of equity blended with those of strict law. (*Marshall*, 261.) An equitable jurisdiction was inherent by the Roman law in every magistrate, and this was, by the operation of the last charter, tacitly restored to the District Courts.

The District Court is not, by the 24th clause, established as a court of law, or as a court of equity, or

as a court of law and equity, as the former Supreme Court had been; but as a *court of civil jurisdiction*, with full power to try *all pleas, suits, and actions.* "Plea" is an ancient law term for a cause or complaint, still existing in the term "the Court of Common Pleas." "Suit" is the term given to causes in the equity and civil law courts in England. "Action" is the term applied to a cause in a court of common law in England. Thus the District Courts possess all that is possessed by the courts in England, except the power to issue the high prerogative writs, which are *commands* issued on petition and put in force, no cause being shown to the contrary, and are not either pleas, suits, or actions, and do not demand that anything should be heard and determined by the court issuing them; but only exercise control over other inferior authorities, courts, and persons.* The words of the 24th clause are quite sufficient to confer on the District Court an equitable jurisdiction; but the charter elsewhere expresses this jurisdiction. By compelling parties to reveal what their adversaries are in justice entitled to know, by the examination of parties by each other, and by the court to obtain admissions, it confers a power similar to a bill of discovery in a court of equity, though in a simpler, speedier, and more effective manner. Again, the 49th clause of the charter expressly acknowledges

* It was held, in 6625, *D. C. Kandy*, 5 *Dec.* 1861, that the District Court has no power to issue writs of *habeas corpus ad subjiciendum.*

that a person can obtain the benefit of an injunction by bringing an action in the District Court; that is, in other words, the District Court may issue an injunction —an essentially equitable process.

Matrimonial jurisdiction.

In another part of the charter (§ 49) the word "action" is evidently used, not in the English sense, but in the meaning attached to it by the Roman law; and it would clearly appear that the framers of the charter did not merely confine actions to the technical words "pleas, suits, and actions," but to such "actiones" of the Roman law as attained in the courts of Holland. Accordingly the Supreme Court, acting upon this view, not only admitted the ordinary matrimonial actions of the Ecclesiastical Courts, the highest of which was (in 1833) the suit for divorce from bed and board (judicial separation), but also the suit for a divorce *a vinculo matrimonii*, as part of the jurisdiction of the District Court, although, in 1833, in England, such a divorce could be obtained only by Act of Parliament in the mother country. This was accorded on the ground that the District Court had, under its general powers, a right to try all Roman-Dutch actions; and that the matrimonial branch of jurisdiction, even to dissolving the matrimonial tie altogether, would seem to have been exercised by the courts of ordinary jurisdiction in Holland, subject, no doubt, to appeal. (*Voet. lib.* 24, *tit* 2.) The District Courts, therefore, have jurisdiction over matrimonial causes, and possess the power of

dissolving a marriage, and possess this jurisdiction *exclusively*. (11016, *D. C. Colombo*, 6 *Feb.* 1836; *Morg. D.* 76.) For a converse reason, the court refused to admit a suit for the restitution of conjugal rights, as not maintainable in Ceylon; for, taking the words "pleas, suits, and action" as intended, in English phraseology, to comprehend the "actions" of the Roman-Dutch law (which included equity and divorce *a vinculo*), they laid down the principle that they would admit no actions unknown to that law, unless given in express words; and refused, therefore, the action for conjugal rights, inasmuch as it was a suit known only to the English law, and not to any derivative form of the Roman Civil Law. (67665, and 19934, *D. C. Galle*, 19 *June*, 1862; also see *Marshall*, 262 *et seq.*)

Testamentary Jurisdiction is conferred by the 27th clause, and proceedings under it are fully discussed in a subsequent chapter.

The jurisdiction over *idiots* and *lunatics*, given by the 26th clause, is discussed in the chapter, "Guardians, Curators, and Wards."

The power to administer "*Insolvent Estates*" is given by Ord. No. 7 of 1853, § 5, and will be described in its proper place.

The *Revenue* and *Criminal* Jurisdiction will be considered under heading "District Court—Criminal Jurisdiction."

On the subject of transferring cases from one court

to another, the reader is referred to the chapter on the "Jurisdiction of the Supreme Court."

PROCEEDINGS IN A CIVIL ACTION.

Friendly demand.

Any person who conceives he has any legal claim or demand against another, ought first, in a friendly manner, to apply to the other party to satisfy the same, either verbally or in writing, or to make this application by means of a notarial act or summons. The personal demand is termed an *interpellation*, the notarial demand an *insinuation*. The latter, as furnishing proof of a previous application or demand before bringing action, is most advisable. In case the action is brought without such previous demand, and the defendant offers to pay the plaintiff, he would not be entitled to costs; but, on the contrary, would be liable to pay those of the defendant. (*V. de Lind, B.* 3, c. 2, § 1, 395.) The demand should also contain a warning, that, in case of refusal, the plaintiff will be obliged to resort to legal proceedings against the defendant. Such a demand is unnecessary, in strict rule, in the case of money payable on a day certain; but it is usual, and becoming to make it. (*Lorenz's Civil Practice*, 12.)

The friendly demand takes the place, in a civil suit in Ceylon, of the writ in England; the latter, indeed, being also considered a demand made by the court; so that (for example) a promissory note payable on demand required no demand prior to the writ, the writ itself being the demand; but, in Ceylon, in such a case,

a demand by interpellation, or insinuation, would be necessary before commencing a suit.

Commencement of suit.

The plaintiff or complainant must, either by himself in person, or by his advocate or proctor, duly admitted to practice in the District Court in which the suit is brought, and who has received due authority from the plaintiff in writing (but by no other advocate, proctor, or attorney), may state his case, *vivâ voce*, in open court, in the manner directed in Rule 10, hereinafter referred to; or he must file his libel in writing (according to a given form), by delivering the libel to the Secretary of the Court. The libel must state the cause of action, or complaint, as shortly as the nature of the case will admit, and the relief or remedy that the plaintiff seeks. (*R. and O. Sect.* 1, *R.* 1, p. 60.)

Oral pleading.

The above rule permits an oral complaint and libel; and it is laid down, in Rule 10 (*R. and O. Sect.* 1, p. 63), that "in any case in which it appears to the District Judge, on the application of one or more of the parties to the suit, or otherwise, that, from the nature of the case, from the practice which has existed in the courts of the district, from the situation of the parties, or from any other cause, it would conduce to the more speedy and effectual attainment of justice if the respective statements of the parties were taken *vivâ voce*, he may so receive them, either from the mouths of the parties themselves, or from their advocates or proctors, reducing them to writing, and causing them to

be read over and explained to, and signed by, the parties making them, when they are so received; provided that each party, or his advocate or proctor, is present when the statement of an adverse party is received; or else that it is read over and explained to him, or to his advocate or proctor, so soon afterwards as he appears in court. And such statements, when so reduced to writing, and read over, explained, and signed by the parties making them, are to be taken as the pleadings of the parties respectively: no such statement, nor any subsequent step in the suit, can be taken, except in open court. And if, as often happens, the facts of the case, on the statement of the parties, and on their examination by the court as to the points in issue; and the cross-examinations of each other by themselves, or their respective advocates and proctors, to such points as in the Rules and Orders directed are so plain as to require no further evidence; the court must state the case to the parties, provided they are all present in court at the time, either personally or by their advocates or proctors, and must decide the case summarily, without further delay or proceedings. And in all cases, even though it should not be apparent to the court that no further light could be thrown on the case by evidence; still, if all parties, either on their own judgment or that of the court, consent freely and voluntarily to take the judgment of the court on the case as it stands on their own respective statements and admissions, which consent is

to be entered on the records of the court, the court is authorized to decide summarily. If either party appeals from such summary judgment, the appeal is only allowed against the decision on the case as it presented itself to the court, and does not entitle the appellant to call for evidence, unless the Supreme Court, on such appeal, consider that evidence ought to be adduced.

Sir Charles Marshall on pleadings.

Before entering into detail as to pleadings, the following remarks of Sir Charles Marshall may well be perused: "The first rule of the first section directs that the plaintiff's libel shall state the cause of action on complaint as shortly as the nature of the case will admit, and the relief or remedy he seeks. The fifth rule directs "that by the answer of the defendant, all the material facts alleged in the libel, and all the written documents therewith filed, shall be either *admitted or denied, or confessed and avoided;** so as to throw the utmost light possible upon the merits, and to ascertain and shorten the proofs necessary to be adduced on either side." By the seventh rule, "the replication shall admit or deny the material facts alleged in the answer, and any written documents therewith filed; but shall not state any new matter, not arising directly out of the answer." "And no further pleading is to be admitted, unless by permission or order of the court." From

* A fact alleged by a party is said to be *confessed and avoided* when the opposite party admits it to be true, but adds some other fact by which the effect of the first is destroyed or neutralized.

these few plain and very simple rules for regulating written pleadings, the enforcement of precise accuracy of language, which is so conspicuous in the English law, and in different countries where the civil law prevails, is not to be expected. Nor, even admitting the same degree of accuracy to be adapted to the state of society in Ceylon, would it be possible to expect it, at all events at present, in many of the District Courts. But rude and artificial as the rules above extracted would appear to an English special pleader, they would still be sufficient, if the directions thereby conveyed were pursued in the fair spirit of them, to prevent any illogical results. The obvious intention is to bring the parties to issue as speedily as possible; and, by obliging each of them to state unreservedly the facts and circumstances on which he rests his own case, and either to admit or deny those alleged by his adversary, to simplify and render plain both to the litigants and to the court the evidence requisite on either side, according to the first general rules of evidence."

"Simple as the rules of pleading are in Ceylon, and wide as is the latitude allowed to parties, in explaining their ground of complaint, or in repelling the claims made against them, questions must constantly be arising, rarely indeed on any nice technicalities of construction, but as to the effect of the respective allegations as regards the evidence to be adduced or permitted to be received; and this is unavoidable. For it is obvious

that if a party was not held to be bound by his own statements in the pleadings, all pleadings would be useless, as serving only to mislead both the court and the litigants. The courts, therefore, must frequently be called upon to decide on this connection between the pleadings and evidence; that is, to pronounce what proofs became necessary or admissible from the mutual averments of the parties, as well as to decide on averments of pleadings, and other points of minor importance." (*Marshall*, 477-8-9.)

The libel.

The libel consists of the commencement—that is, the title of court in which the suit is brought—and the names and residence of the parties; the cause of action, or complaint, stated as shortly as the nature of the case will admit; and, lastly, the relief or remedy sought.

The commencement.

The commencement is the heading of the libel, and contains, first, the name of the court in which the suit is instituted, and secondly, the names and residences of the plaintiff and defendant; that is, their simple names, without the addition of any titles of honour or distinction, unless where it is necessary to describe them by some calling, office, or other quality, for the purpose of distinguishing them from others.* If parties sue, or are sued in their representative characters, and not in their own behalf,

* Mr. Lorenz says that where the party is a widow the name and quality of her late husband must be appended to her name; but this can only be necessary where she sues for her rights or inheritance as a wife, or in some representative character.

the representative characters must be added to their own name. These representative characters are husband, guardian, curator, executor, administrator, public officer, attorney, agent, and next friend. Sometimes these representatives may sue in their own names; and as to that point, the reader must look to the title "Parties to Actions." Where they sue as representatives, the titles would run as follows: A. B. as husband of C. D. or as agent or attorney of C. D. or as guardian of the minor children of C. D.; or as executor of the testament of C. D.; or A. B. Advocate of our Sovereign Lady the Queen; and the like. The form of representation must be always stated. Thus, if a party sues or is sued as "heirs and representatives," not stating that they are sole heirs, or how representatives, as executors, &c. the plaintiff will be allowed to amend his libel within a certain time (generally fourteen days from notice of the order of amendment); otherwise the defendant will be absolved from the instance. (33878, *D. C. Colombo, N.* 30 *June*, 1842; *Morg. Dig.* 331.) The reason of this particularity is, that the defendant is allowed to dispute by his answer the representative character, and therefore the plaintiffs must show title to sue. For a similar reason, if the plaintiff sues as the assignee of a right of action ceded to him, it ought to be so stated in the libel, that the assignment may be open to dispute if it can be denied. (*V. de Lind* p. 401; *Lorenz's Civil Practice*, p, 14.)

The narration of the cause of action.

The cause of action, or complaint (*intentio*), is to be stated as shortly as the nature of the case will admit; it need not be drawn with the legal nicety a professional man would observe, but should be plainly stated* (12079, *D. C. Colombo*, 9 *July*, 1850): it should be expressed in language neither insensible nor ambiguous, and in such a shape that the plaintiff will, in point of law, and the absence of any good and sufficient defence, have a right to some redress (*Brooms. Com.* p. 185); for if the libel is unintelligible, the defendant should be absolved from the instance. (8342, *D. C. Colombo*, 14 *Sept.* 1842; *Morg. Dig.* 331.)

But in one case the S. C. departed from this rule, though acknowledging that in strictness the defendants were entitled to be absolved; the libel, filed by a proctor, did not set forth the real facts, and in neither the libel nor the answer were the rights of the parties properly brought before the District Court. The pleadings being thus defective, the S. C. ordered they should be struck off the record, and that the District Judge should question the parties, and make the issue of the case himself, and give judgment anew. (7960, *D. C. Colombo*, 29 *Sept.* 1841; *Morg. D.* 318.)

The court probably took this course, instead of ab-

* The courts are bound by the rules of the court directing the manner in which pleadings shall be drawn, and which are perfectly sufficient, if closely followed, to bring the cause to an issue in a satisfactory manner, and at the least possible expenses to the parties.—Per Oliphant, C. J. (12494, *D. C. Colombo*, 13 *Jan.* 1851.)

solving the defendant, because the plaintiff's proctor had glaringly neglected his client, who was a widow. But in general pleadings that give neither the adverse party nor the court an insight as to right of the parties, are not encouraged. (23541, *D. C. Negombo*, 13 *Sept.* 1859.) Similarly, where a libel was very ill-written, and full of interlineations and blots, the S. C. ordered it to be taken off the proceedings, and a fair copy to be put; —and the expenses to be paid by the plaintiff's proctor. (9575, *D. C. Badulla*, 15 *Jany.* 1840; *Morg. D.* 284.)

The following is taken principally from Mr. Lorenzy's Civ. Pract. p. 15, citing *Voet ad Pand.* ii. t. 13, § 7 and § 5.

As regards the cause of action,* it may be laid down as a general rule that in real actions a general statement of it is sufficient; while in personal actions the statement should be special: that is to say, in a real action it is sufficient to state generally the plaintiff's right to the thing in question, as that he is entitled to the property, or to a servitude, or a right of mortgage therein, without specifying the mode in which he has acquired it, as by sale and delivery, or by exchange, or bequest, or donation; but in a personal action, it is not sufficient to state the plaintiff's claim generally, as that he claims a certain sum of money in which the defendant is indebted to him; but a more special statement of the

Statement in real action.

Statement in personal action.

* As to the distinctions of actions, see, *post*, the chapter on "Remedies."

obligation is necessary, as that the defendant is indebted to him for money lent, for goods sold, or the like. And as regards the *thing claimed*, the rule regarding certainty and precision is subject to a few exceptions, where, namely, a more precise description or definition of it is either impossible, or unnecessary for the settlement of the question: as in what is called *universal* actions or proceedings, such as a claim of inheritance, or an action to divide an estate, or for delivery of an inheritance sold; as also in *general personal* actions, as on guardianship, on a general mandate, on partnership, and the like: in all which cases it is sufficient simply to claim the inheritance, or the division, or the rendering of accounts and payment of the balance, &c. So also, in an action to recover damages, or the fruits or the proceeds of property possessed by the defendant, or satisfaction for verbal injury. So, where anything is due in kind, or where two things are due in the alternative, the defendant having the election of delivering either; in which case the libel ought to make mention of the kind of thing due, or the two things due in the alternative. Lastly, in suing for remedy against *enormis lœsio*, the libel may conclude in the alternative, in the same manner as where the plaintiff is uncertain whether the thing claimed is in existence or not, he may pray for the restitution thereof or for payment of its value.* The

* *Lorenz's Civil Prae.* p. 16; citing *Voet ad Pand.* ii. 13, § 5; *Voet*, v. 1, §§ 25, 26, 27; see further, *Bort. Nagel. Werk.* p. 32, i. vi. obs. 1 *Voet*, v. 1, § 27.

plaintiff should, however, be careful not to claim more than he is actually entitled to, nor to sue for anything, the payment or delivery of which is subject to a condition still pending. For, where a plaintiff has claimed more than he is entitled to, if the defendant tenders the amount which he maintains to be actually due, and the court passes judgment only for the amount so tendered, the plaintiff will be condemned in the costs (but see "*Costs*"); and, similarly, where he brings his action before the period or condition fixed or agreed upon for payment has expired, the defendant will be entitled to absolution from the instance, even though such period or condition may have expired since the institution of the action—reserving, however, to the plaintiff his right of suing the defendant at the proper time. In some cases, however, a creditor *may* claim that which is not yet due; namely, where the future debt is connected with or depends upon the one already due; as where he claims not only the interest which has already accrued due, but also future interest until payment of the principal amount. The same rule obtains in respect of fruits and other *accessions* or increase of the principal thing claimed, as well as in respect of annual rents. So also, where a debt is due in a certain number of instalments, and the debtor has committed default in the first instalment, the creditor may not only sue for payment of the instalment already due, but may also pray for condemnation in the further instalments, and issue execu-

Extent of claim.

tion for them when and as they fall due. In respect also of aliment due on a testament or a contract, the defendant may similarly be condemned to pay the amount already due, and also the future instalments as they fall due. And where a creditor has brought several actions for portions of the same debt (which he is not prohibited from doing), the defendant may legally claim that the controversy regarding the entire debt may be investigated and decided in one proceeding; and this, for the same reason, viz. that the connexity or *continency* of the cause may not be severed, and in order to avoid the confusion and expense of a plurality of actions.

Joinder and non-joinder of actions.

Several actions may also be joined in one and the same libel, provided they are not repugnant to each other. So the possessory action of *immission* (to obtain possession), or of *complainte* (to recover possession), may be joined with the petitory action; or a personal with an hypothecary action, where the debtor is in possession of the property mortgaged; but not an action of *maintenue* (to retain possession), with the petitory action, nor a claim of inheritance under a testament with one *ab intestato*, nor an action of slander with an action *ex lege defamari*, for these are repugnant to each other in their nature; nor several actions in respect of the same cause and tending to the same object, as an action under a testament and a *rei vindicato* (to recover the thing bequeathed); for one, if successful, destroys the other; nor several actions against several persons on different claims, for this would lead to much confusion.

"In drawing the statement of the case, the facts should follow each other in logical order: as, for instance, where the plaintiff proceeds in a case of *Maintenue*, to be quieted and maintained in the possession of any property, he first recites such possession, and then the disturbance thereof by the defendant; or where he sues for the fulfilment of an obligation, he first recites the contents of the instrument on which his claim is founded (without, however, copying at unnecessary length all the matters therein contained, when by merely referring to the instrument itself he might make himself much better understood), and then states the non-fulfilment of the obligation, adding that the defendant has been frequently requested thereto, and that, in consequence thereof, he, the plaintiff, finds it necessary to resort to legal proceedings. And so in other cases, according to the particular circumstances of each case."*

The complaint may be stated in several different ways, or counts; so that, on the failure of the proof in support of one, the plaintiff may proceed into evidence to maintain his other title. But a count once waived is lost. (7519, *D. C. Kandy*, 28 *Sept.* 1836; *Morg. D.* 99; 111, *Austin*, 32, 33.)†

The conclusion consists generally of a prayer calling Conclusion.

* *Lor. Civ. Pr.* p. 17, citing *Voet ad Pand.* v. I. § 25; ib. xliii. I. § 5; ib. ii 13, § 14, and the authorities there cited; *Vander Linden, Jud. Pr.* ii. 1, § 2; *G. Grot. Isag.* i. 4, § 6.

† The injury committed by each defendant, where more than one, need not be stated, as the object can be attained by the examination of the plaintiff in Court. (1784, *D. C. Caltura*, 14 *Oct.* 1835; *Morg. D.* 60.)

upon the court to decree the relief sought for: as, for example, where the plaintiff sues for the payment of a debt due on an obligation:—

That the defendant may be condemned to pay and deliver to the plaintiff, under the restitution of the obligation herein-before mentioned, to be properly receipted if required, the sum of ——— mentioned in the above obligation, with interest thereon, computed at ——— per cent. a year, from the ——— till the day of full payment: together with the costs herein incurred.

Or, where the plaintiff sues in *Rei vindicatio*:—

That the defendant may be forthwith ejected from the said house and garden, and that the plaintiff may be placed and quieted in the possession thereof; and also that the defendant may be condemned to pay and deliver to the plaintiff the profits and income he has derived, or will, pending this suit, continue to derive from the said premises, or the value thereof, being £ ——— a month, from the ———, together with the costs herein incurred. (*Lor. Civ. Pr.* p. 18.)

The claim or prayer for relief or remedy sought.

This prayer for relief, if it is a prayer for a sum of money, also generally contains a claim for interest; but though no interest is claimed in the libel, if the principal is, the interest (which, when legally due, is nothing but a legal penalty, recoverable for undue delay in the payment of the principal) can be decreed, though not claimed (2886, *D. C. Galle*, 27 *June*, 1838; *Morg. Dig.* 338). But where the interest is not due in law, it must be claimed in the libel, that the grounds of the

claim may be the subject of proof (794, *D. C. Ratnapoora*, 26 *Apr.* 1837; *Morg. D.* 147). So also when interest was due in law, but a stipulated interest was so unintelligibly claimed as not to be assignable, the court supplied the want of clearness by decreeing the usual legal interest. (4824, *D. C. Manaar*, 29 *Oct.* 1853.) The libel may not only claim interest up to the institution of the suit, but may also pray for "*further interest* from that day until the day of full and effectual payment." The forms in Vander Linden (*Jud. Pract.* 185, *et seq.*) always contain that prayer. This is consistent with the English statute law, by which judgment debts bear interest (*Sm. M. C. L.* 186), and not inconsistent with the Regulation No. 18 of 1823, which provides for interest from certain specified dates; and a decree of interest generally, with no mention of a date for its termination, can only imply interest until full and effectual payment. (29137, *C. R. Colombo*, 29 *Nov.* 1856; *Lorenz. R.* 227; see also "Interest.")

The prayer of the libel also ends with the words "and for such other relief as to this court shall seem meet." This is termed *the prayer for further relief (clausula salutaris.)* It leaves the judge at liberty to alter or amend any too general or doubtful expression, or to supply anything in the wording. (*V. d. Lind*, 406.)

Thus, in an action for a transfer of land in consideration of a sum of money paid to the defendant and admitted by him, it was held that though the plaintiff

failed in his suit for the land, yet he was still entitled to recover back, in the same suit, under the prayer in his libel for further relief, the sum advanced by him to the defendant, delivering back to the defendant the title deed which had been deposited with him (3100, *D. C. Chilaw*, 3 *Aug.* 1836; *Morg. D.* 91). So if an action is brought for rent, it would seem that subsequent arrears might also be decreed, under the prayer for further relief, but not if the libel contains no such prayer. (12126, *D. C. Colombo*, 14 *Dec.* 1836; *Morg. D.* 113.)

This prayer enables the Judge to supply omissions in respect of the law, which, though not stated by the advocates, the Judge ought to be aware of; but it is equally clear that it does not authorize him to supply omissions of fact, as it cannot confer upon him greater powers than the law confers upon him. (*Lor. Civ. Prac.* p. 18.)

Written documents attached to libel.

At the time of making a vivâ voce statement, or of filing a libel, the plaintiff must produce and deposit in court any vouchers or written documents to which the statement or libel refers; or copies of such as may be in the hands of third persons, and of which the originals cannot be produced until the trial; nor shall any vouchers referred to in the trial be received in evidence at the trial unless so filed, nor unless the plaintiff shall satisfy the court that he was unable to file either originals or copies at the time of making his

complaint. But this is not to preclude the plaintiff from giving any documents in evidence other than those so referred to, subject to other subsequent rules. (*R. and O. Sect.* i, *R.* 1.) It is no objection to a libel, as such, that all the documentary evidence mentioned in it is not filed. The libel has nothing to do with the evidence which is to support it. (5316, *D. C. Ratnapoora*, 2 *Feb.* 1849.) If the plaintiff has not an original document because it is in the possession of the defendant or other party to the suit, he is not bound to produce and deposit copies, as the rule only requires that when the document is in the possession of third parties, *i. e.* of persons *not parties to the suit.* (28075, *D. C. Kandy, Lorenz, R.* 134.)

Summons.

On the filing of the libel and documents, the court will order a summons (Form No. 2) to issue, signed by the secretary, requiring the appearance of the defendant on such certain day as shall be reasonable* with reference to the distance from which he may have to come. The summons shall intimate the cause of action set forth in the libel, and must be directed to the fiscal of the district, who shall cause a copy of the same to be duly served on the defendant (subject to the laws and rules and orders relative to fiscals and their officers), and shall return the summons and the execution thereof, duly verified by the oath (or affirmation) of the officer to whom the actual service thereof has been entrusted, to

* No arbitrary rule can be laid down as to what is *reasonable.* (11124, *D. C. Jaffna*, 15 *Oct.* 1861.)

the court. (*R. and O. Sect.* i, *R.* 1.) This summons must properly be directed to the fiscal; but there is no objection to the deputy, by whom the orders of the court are mostly carried into execution, making his *return* to them; and the process, though directed to the fiscal, may be issued at once to the deputy fiscal for execution. (*Marshall*, pp. 193-4.)

Arrest on mesne process.

If a plaintiff in any action, either at the commencement, or at any subsequent period before judgment, by his own affidavit and examination, if necessary, satisfies the District Judge that he has a sufficient cause of action against the defendant, to the amount of £10 or upwards, or has sustained damage to that amount, and that he has no adequate security to meet the same, and that he verily believes, and if he shows by the oath or affidavit of any third person that there is probable cause for believing, that the defendant is about to quit the island unless he be forthwith apprehended, such judge may order a warrant to arrest the defendant, until he shall give bail in, or make deposit of, such an amount as the judge considers reasonable and adequate, and which amount the judge, at the time of making the order, must set out on the face of it; and the warrant must be in form No. 1, and may be executed within one calendar month from the date thereof, including the day of such date, and not afterwards. If the plaintiff is in possession of any security in part, he, or the person making the application on his behalf, must, on pain of punish-

ment as for contempt of court, as hereafter directed for such false statement and concealment (see *post*, p. 375, *et seq.*), set forth the same particularly in his application, and the amount thereof; and which amount must be deducted from the amount of security to be required from the defendant.

The defendant, being arrested on such warrant, must be brought up before the court in the custody of the fiscal, unless he shall give reasonable security (Form No. 2*) to the fiscal, to appear and answer the plaintiff's libel; in which case the fiscal may discharge him. If he is brought before the court under the warrant, or if he appears in discharge of the bail taken by the fiscal, he must give bail (Form No. 3) to abide by and perform the judgment of the court, and pay any sum or sums which may be awarded against him, or to surrender himself, or be surrendered by his sureties, to be charged in execution for the same; or if he is unable or unwilling to give such bail, he must be committed to prison (Form No. 4) until he complies.

The defendant may, instead of giving bail, deposit with the fiscal, or in court, the sum mentioned in the warrant, and thereupon he must be discharged from custody, and a minute of the same must be made on the judgment; and the sum so deposited must be applied in satisfaction of the judgment, should it pass against

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* See Appendix.

the defendant, and the surplus, if any, must be refunded to the defendant. (See Form No. 5 for his release.*) (No. 15 of 1856, Schedule.)

To justify an arrest under these rules, that is, of a defendant *in meditatione fugae*, there must be a debt due, or some enormous personal wrong done to the plaintiff by the defendant. And, in the case of debt, the plaintiff must aver that he does verily believe, and also show upon the oath or affidavit of a third person that he has good grounds for believing, that the defendant intends to abscond or to leave the jurisdiction of the court. There must be an averment of debt due to the plaintiff by the defendant, or of some such enormous personal wrong done to the plaintiff by the defendant, as to render the arrest of the defendant necessary for the purposes of justice—something, perhaps, on which an indictment would lie, or some punishment of the plaintiff for a crime—not, for example, a mere injury by words. (25440, *D. C. Kandy*, 3 *Feb.* 1852.)

In another case, a defendant, being brought up on a warrant of arrest on mesne process, and being unable to give security, was committed. The plaintiff not being ready for trial, the case was postponed: the defendant thereupon moved for release; but the Supreme Court held "that the postponement being discretionary with the District Court, it had also a discretion to reject the motion for release, made only on the ground of post-

* But see *post*, p. 375 *et seq.* as to the affidavit, &c.

ponement. The defendant should have applied for an early day for hearing; and if that could not be granted, or if any further postponement were obtained by the plaintiff, the defendant would then have strong grounds for release. (14655, *D. C. Kandy*, 31 *Aug.* 1842; *Austin*, 60.)

The affidavit, in such a case, should set forth *facts* indicative of the defendant's intention to abscond; a general statement that the plaintiff believes the defendant is about to abscond is not sufficient. (10883, *D. C. Galle*, *Dec.* 1844.)

As to the question at what time the bail should surrender the defendant, so as to discharge themselves, it would seem that, according to the English rule, the principal must be surrendered within *eight* days after the issue of the process against the bail, or the latter would be fixed; and even that is a relaxation of the strict rule, according to which a surrender is no discharge of the bail after a return of *non est inventus* against the principal; for, looking at the bail-bond, the sureties have clearly broken the condition of the bond. (*Marshall*, 53, citing 1154, *Galle*, 6 *March*, 1835.)

Appearance.

When the defendant appears, whether under the warrant of arrest, or in obedience to the ordinary summons (or *gratis*, as he is entitled to, without a summons, 12977, *D. C. Colombo*, 24 *Sept.* 1851), which he may do either in person or by advocate or proctor duly admitted to practice in the District Court, and

having received due authority in writing from the defendant to act in that behalf (but by no other advocate, proctor, or attorney), the appearance shall be recorded by the secretary, who shall, if required so to do, furnish him with a copy of the libel: or, if he prefers it, he may obtain such copy from the plaintiff's proctor, provided it bear such stamp as would be re-

Admission. quired if furnished by the Secretary of the Court. If the defendant admits the claim against him, which admission shall either be filed in writing by the defendant or his proctor, or shall be taken down by the Secretary of the Court, and shall in either case be signed by the defendant, or by some person duly authorized by him, or if such defendant, being absent, shall transmit to the Secretary of the Court an admission in writing, signed by himself, and duly certified by the Judge of some other District, or by any person duly authorized by the court for that purpose, such admission shall be recorded, and the court shall forthwith pronounce judgment for the amount so admitted.

If the admission is not signed by the defendant, the judgment may be set aside; and if there is error in the admission, the case may be proceeded with, and evidence be taken. (1992, *D. C. Kandy*, 15 *Aug.* 1834; *Austin*, 17.)*

* In 24069, *D. C. Kandy*, 25 *Mar.* 1852; *Austin*, 161; an admission turned out not to be that the defendant, and the defendant was allowed to proceed, *on giving security;* but this is not an authority to show that security should, in such case, be required, as this case was mixed up with a question of arrest under mesne process.

Answer.

The defendant may, at any time within eight days after entering his appearance, file with the secretary his answer, or claim in reconvention, as the case may be; and in default of filing such answer, or claim in reconvention, he shall be barred from answering, or making claim in reconvention. And every such answer shall admit, or deny, or confess and avoid, all the material facts alleged by the plaintiff, and shall clearly and concisely state and set forth the same. And every such claim in reconvention shall state truly and concisely the nature, extent, and grounds of the said claim, and the relief prayed.* (*R. and O.* 2 *July*, 1842, § 1, p. 128.)

Admissions in the answer.

An admission of a claim should be accompanied with payment into court; for, if not, the admission will not deprive the plaintiff of his title to costs of subsequent proceedings, in respect of the claim admitted. (13592, *D. C. Galle*, 25 *Mar.* 1835; *Morg. D.* 37; 3100, *D. C. Chilaw*, 3 *Aug.* 1836; *Morg. D.* 92.) Admissions are often accompanied by that which amounts almost to a plea of confession and avoidance tacked to it; in such a case, the admission is to be taken as *entire*, and not *several*; that is, not split into parts to the defendant's disadvantage. (3648, *D. C. Putlam; Morg. D.* 161.) And a defendant's admission can charge only himself; thus the admission of one co-defendant cannot bind

* An answer, alleging that the defendants were not guilty, and that the act complained of amounted to a criminal charge, was held not to be the distinct admission, or denial, of the libel required. (9335, *D. C. Colombo*, 17 *Sept.* 1844.)

another, if they put in separate answers. (14978, *D. C. Colombo*, 16 *Jan.* 1839; *Morg. D.* 256.)

As to the effect of admissions as evidence, it must be observed that, in 1839, it was laid down as a general rule that a defendant, or other party, is not bound by or estopped by admissions in pleadings as against *third persons;* that is, persons other than the opposite party; but is at liberty to prove the admissions mistaken or untrue. (2503, *D. C. Amblangodde*, 27 *Feb.* 1839; *Morg. D.* 260: 19271, *D. C. Kandy*, 1848; *Austin*, 108.) And even as against *plaintiffs*, it would seem that defendants are not bound, or estopped, if they are able to prove that they have been misled by fraud, mistake, or ignorance of facts, to make the admissions, and can prove their case by general evidence; but, though not bound or estopped, the admission is strong evidence for the plaintiff, and will require very satisfactory proof to rebut it. (2503, *D. C. Amblangodde*, 27 *Feb.* 1839; *Morg. D.* 260.) But, since that day, the English law of evidence having been admitted by statute as the law of Ceylon (No. 3 of 1846, § 3), it is a question whether the latter rule, as to plaintiffs, is by the English law continued as the law of Ceylon. The English law of evidence is that the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly so by the denial of some other facts, cannot be again litigated between the *same* parties, and are *conclusive evidence* between them; but only if the denial is found

against the party making it. Still, whether, and to what extent, the admitting or passing over a deniable allegation in pleading is to be deemed an admission of it for the purposes of *evidence* at the trial, is a question which has given rise to a considerable conflict of authority or opinion. (*Best on Evidence*, 657.) Inasmuch as fraud vitiates all acts, however solemn, or even judicial, no doubt the rule of 1839 applies when the admission was induced by "*fraud.*" On the other hand, a party is not in general prejudiced by admissions made under a *mistake* of fact, according to the maxims, "*ignorantia facti excusat,*" "*non videntur qui erant consentire,*" and "*non fatetur qui errat.*" So that it may be laid down that material facts admitted in pleadings cannot again be litigated between the same parties, and are conclusive evidence between them, with the qualification that they have not that effect when induced by fraud, or mistake, or ignorance of facts; and the same applies to indirect admissions made by the denial of other facts, when the denial is found against the party making it. One effect of admissions in pleadings is to preclude other pleas of prescription, when the prescription is founded on a presumption that amounts to a contradiction of the admission; thus, in *debt*, prescription (which is a presumption of payment) cannot be pleaded to set aside the admission. (1926, *D. C. Matura*, 22 *Apr.* 1837; *Morg. D.* 143.)

The other part of the answer must (if the defendant Exceptions.

has a defence) deny or confess and avoid all the material allegations of the libel. All denials are defences or pleas to the action. Answers by way of confession and avoidance include both exceptions and defences, also called *dilatory* pleas, and pleas *to the action*. Dilatory pleas confess or tacitly admit the complaint, and avoid by taking exception:—(1) To the ability or qualification of the defendant. (2) To the ability or qualification of the plaintiff. (3) To the jurisdiction of the court.* The pleas ought always to be pleaded in this order, and all pleas subsequent in the series to the plea pleaded are held to be avoided for the time being; and also all pleas not of the series. Thus, it is no use enquiring into the power of the court, if the defendant is a partner; or enquiring into the question of payment, if the court has no jurisdiction to entertain the suit at all.

Disability or non-qualification of the defendant.

A dilatory plea to the *disability* of the defendant can only be pleaded in one case, that of the non-joinder of a defendant in an action of contract. In an action on *tort* (*i.e. ex delicto*), the plaintiff can always remedy the non-joinder by disclaiming any suit against the defendant not joined. The *non-joinder* of a defendant can be pleaded in actions on *contract;* but it is seldom pleaded, as the plaintiff is nearly always allowed to amend his libel by adding the names of the persons not joined; sometimes he is ordered to do so by the court; and if he

* Mr. Lorenz, in his *Civ. Pract.* p. 24, mentions seven exceptions; but they are all included in one of these three.

refuses to amend it accordingly, he is liable to a non-suit with costs. (23521, *D. C. Kandy*, 18 *Sept.* 1851; *Austin*, 151.) A plea to the defendant's *qualification* would be his denying that he is such executor, agent, &c. as stated in the libel.

Disability and non-qualification of the plaintiff.

The disability of the plaintiff exists where he is by law incapable to commence or continue a suit; as, for example, if he is a minor, an alien enemy, or civilly dead, or if she is a married woman. A plaintiff may also be disabled by the non-joinder of a co-plaintiff. This non-joinder is, in cases of *contract*, a ground of *non-suit;* for the defendant did not contract with the plaintiff, if he contracted with him and others; but if the plea is well founded, the plaintiff may, on payment of costs, amend, by adding those not joined; and in such case the defendant must plead *de novo*. If the defendant unfairly waits until the trial, in the hopes of non-suiting the plaintiff, the amendment may be made at the trial; unless a notice has been given by the defendant that he objects to the non-joinder, which notice has the same effect as a dilatory plea; and it is questionable whether, in all cases, if the defendant neither pleads a dilatory plea nor gives notice, he will be allowed to take the objection: but now amendments are so freely allowed, that perhaps he might. (460, *D. C. Caltura*, 9 *May*, 1835; *Morg. D.* 44.)

Plea of non-qualification.

The ability of the plaintiff to sue is also disputed by the exception of *non-qualification*, or a plea in abatement

on the ground that the plaintiff has not the quality he has thought proper to ascribe to himself in his libel, as "that he is not such executor," &c. or "such guardian," &c. or "such agent," &c. and so on. (*V. d. Lind. B.* 3, Part I. p. 415.)

Exceptions to the jurisdiction and authority of the court.

Exceptions to the jurisdiction include:—first, those to the absolute jurisdiction of the court, *i. e.* that the court is not competent to try, and that the case ought to be sent to another tribunal; and secondly, those that allege that the jurisdiction is suspended, or ousted: these latter comprise:—The plea *lis pendeus*, or an allegation that the same case between the same parties is depending in another court of concurrent jurisdiction; or even in the same court in a different form; or that the question in dispute has been submitted to arbitration:—and also the plea of *lis finita*, or that the same question and between the same parties has already been decided by a sentence that has become a judgment; or that there has been a valid award of arbitrators in the same matter; or that there has been a compromise, and mutual release by agreement between the parties.

Plea to absolute jurisdition.

Pleas to absolute jurisdiction are of two kinds; pleas arising from "the nature of the case," or established for the "convenience of parties." The former exist where the law has said that in such and such a case the court shall have no jurisdiction; then no act or consent, or laches of the parties, can confer jurisdiction, the proceedings are rotten throughout; and in that case a plea

to the jurisdiction may be urged before or after issue, or in appeal, and ought to be supplied by the court, if overlooked by the parties. Such exceptions to the jurisdiction occur often in cases in the Courts of Requests, the Police Courts, and in the District Courts in its criminal jurisdiction; but the original jurisdiction devolving on the District Court in its civil capacity is so extensive that they seldom occur in civil suits. They may occur where the Judge is a party in the suit, or where the court assumes admiralty jurisdiction, or where it entertains suits that have no place in the jurisprudence of Ceylon; as, for example, one for the "restitution of conjugal rights."

Exceptions, however, to the jurisdiction established for the convenience of parties must be pleaded *in limine litis*, or before discussing the merits; for, as between District Courts themselves, the defendant may waive the privileges established by the 24th clause of the Charter, which are principally, if not exclusively, in his favour—every District Court having jurisdiction of cases of a like nature; and the court is not expected to know where parties come from, or where an act was performed. It follows, therefore, that a plea to the jurisdiction founded on the evidence of the defendant, or the place of the cause of action, must be pleaded before discussing the merits:—that a party having pleaded to the merits cannot afterwards plead to the jurisdiction; and this even applies to an intervenient, who by his petition of intervention

pleads to the merits. (6961, *D. C. Colombo, S.* 1 *Mar.* 1858; *Morg. D.* 223; all the Judges concurring.)

Lis pendens.

The plea of *lis pendeus* is a plea on the ground that the same case between the same parties, and arising from the same cause of action, is already pending before another Judge. (*V. de Ldn.* p. 414.) This plea, it must be observed, can only be pleaded when the second action is between the same parties actually: thus, if B and C both claim a sum in the hands of A, and being separate suits, B *versus* A and C *versus* A,—A cannot, in suit C *v.* A, plead *lis pendeus* in suit B *v.* A. (30287, *D. C. Kandy, Austin*, 219.)

Lis finita.

The plea of *lis finita* is a plea on the ground that the same question, and between the same parties, has already been decided by a sentence which has become a judgment. (*V. de Ldn.* p. 414.)

Arbitration.

It can also be pleaded that the cause has been submitted to arbitration; or that arbitrators have given an award in the same matter.

Compromise.

It may also be pleaded that the case is settled by compromise and mutual release by agreement between the parties.

Above pleas do not require to be answered over.

In all the above cases the defendant can plead without answering over, *i. e.* to the merits; and if he is beaten, he then can claim and can be called upon to plead to the merits. (*V. d. Ldn.* 413; *Lor. Civ. Pract.* 24-25.)

Require no affidavit.

There is no law or rule of practice in Ceylon requiring a dilatory plea or exception to be verified by affidavit. (12149, *D. C. Caltura*, 15 *July*, 1845.)

Pleas in bar

We now come to answers to the merits, or, as they are technically termed, "pleas in bar." They are divided into "*denials*" (or pleas by way of traverse), and "pleas by way of *confession and avoidance.*" A plea which answers the libel by a "denial" may either contradict specifically, in terms, one or more essential or material allegations, or it may deny generally its entire allegations, or the principal fact or facts on which it is founded. The former mode is called a common denial, the latter the "general issue." A common denial denies one or more of the facts essential to the cause of action, and may be accompanied with pleas (to make up the case) of confession and avoidance; but the general issue denies the whole libel *in toto.*

Now, although pleading in Ceylon is not technical, yet the answer must not be made the means of concealing the truth, and must throw the utmost light possible upon the merits, and ascertain and shorten the proofs necessary to be adduced. (*Marshall*, 484; *Rule* 5.) The defendant must admit or deny, or confess and avoid, in a clear, and consistent, and intelligible manner, not couched in ambiguous or indirect terms, so that the plaintiff can with certainty understand his meaning; all the material facts must be dealt with, and from the answer it must be gathered what the defendants mean to say; there must be no ambiguities, and the plaintiff is not bound to waste time in endeavouring to unravel the pleadings of the defendants; he is entitled to a

clear and concise answer, free from technicalities, circumvention, and doubt. (12494, *D. C. Colombo*, 12 *Jan.* 1851; *Per Oliphant, C. J.*)

General issue.

The general issue, therefore, when it conceals the defence, though constantly used in Ceylon, is not admissible. Thus, in all actions on simple contract, a plea denying the contract or agreement set forth in the libel operates only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract, promise, or agreement alleged may be implied by law. Thus, in an action for a debt, a defendant may plead that he "*never was indebted*," because that denies the debt *in toto;* but he may not plead that he is "*not indebted*," because such a plea is vague and misleading, and gives no notice to the plaintiff. It may mean that the debt was never owing, or that it had been paid, or balanced, or forgiven by deed, or that it is a fraud, &c. (13086, *C. R. Matelle*, 1 *Sept.* 1863.)

By the same case it is shown that the general issue of "never indebted" must not be pleaded to a bill of exchange, promissory note, or cheque; for it does not inform the plaintiff on which of the many circumstances that may extinguish the note the defendant relies upon; whether its "making," or its "acceptance," or its "endorsement," or "payment," or its "equities," &c. Generally, a defendant, if he relies on a general denial of the plaintiff's case, may plead the "general

issue;" but if he relies on other facts, he ought to state them in his answer; and, at the trial, evidence of other facts, which might form a special defence, would not be admissible. (363, *D. C. Manuar*, 18 *Nov.* 1835; *Morg. D.* 62: *Marshall*, pp. 484, 485.) As Sir C. Marshall puts it, "The answer should state the real ground of the defence intended to be insisted on;" and if other facts are the real ground, the general issue does not state them, and the defendant will be confined to contradicting the plaintiff's case. Thus, no set off or reconvention can be proved under the general denial. (2499, *Ruanwelle*, 24 *June* 1835; *Marshall*, 486.) Neither can a partnership be set up under that plea. (460, *Callura*, 9 *May*, 1833: *Marshall*, 486; *Morg. D.* 44. See also 5420, *Kandy*, 27 *May*, 1835; *Marshall*, 487.) The proper general issue to any form of debt is, "that the defendant *never was indebted.*" This denies those matters of fact from which the liability of the defendant may arise; thus, if the debt arise on a contract, it will put the plaintiff to prove both the contract and that he has performed his part: *ex. gr.* In suit for goods "sold and delivered," the contract of sale must be proved, and *also* the delivery. In suits on deeds, the proper general issue is, "that *it is not his* (the defendant's) *deed*," which denies the execution in point of fact only. Again, in a suit to recover a moveable thing, as a jewel, the general issue is "that he (the defendant) *does not detain*," which puts in issue the detention; but not the plaintiff's property in the goods.

The general issue in all suits *ex delicto* is "*not guilty.*" This will be held, on the same principle, to deny the *delict* (breach of duty, or wrongful act only), and not the *inducement;* and no other defence is admissible under that plea. When pleaded to a tort done in respect of land, such as, *ex. gr.* taking produce wrongfully, "not guilty" puts in issue the title to the land, as well as the taking. (5046, *Colombo*, 30 *Apr.* 1834; *Marshall*, 487.) But the court would give judgment only for the *trespass*, and not for the land, unless the defendant by special plea denied the plaintiff's right altogether, and claimed it as his own. (241, *Ratnapoora*, 22 *Dec.* 1834.) In a case in which the plaintiff alleged title, but did not prove it, and the defendant denied all the allegations in the libel, the latter was held to be at liberty, therefore, under such circumstances, to show a title in himself, or that the parties held in common. The courts here are not bound by the new rules of pleading in the English Courts, and would rather follow the less arbitrary principle of the old practice therein, that the defendant might give such proof in defence, under the general issue, as that (unless the lands belonged to the plaintiff) the acts of the defendant would constitute no trespass—the defendant's evidence of title in himself would negative the trespass. (23600, *D. C. Kandy*, 17 *Sept.* 1851; *Austin*, 155.)

Pleas in confession and avoidance.

Pleas in confession and avoidance may be:—1. In justification and excuse. 2. In discharge; or 3. To

the foundation of the action. These three classes are clearly distinguishable from each other. Pleas in the first class admit the allegations in the libel to be true; but put forth new matter to excuse or justity the act charged against the defendant; such as a plea of a counter assault, or that the defendant had the leave and license of the plaintiff. In pleas of the second class, the libel is also admitted to be true; but the discharge, as, *ex. gr.* payment, set-off, prescription, or insolvency, is put as the defence to the action.

Payment.

If the payment results from a ready-money transaction, or a prepayment of money before delivery, it is plain that the defendant has in fact "*never been indebted*," and he may plead the general issue, and prove a ready-money or previous payment, under that plea. But if payment is subsequent to the contract, it must be specially pleaded. Payment may be made after action brought, in satisfaction and discharge of the debt, damages, and costs. Payment by a bill or promissory note may also be pleaded in discharge, if taken by the payee as money for the debt, even though the debt be greater than the amount of the bill given. But a sum of money cannot be paid by a less sum of the same coin. (3149, *D. C. Amblangodde*, 3 *Sept.* 1834; *Morg. D.* 21: *Broom, Com.* 200.)

Payment where there are several debts or items.

The general rule as to the appropriation of payments is:—that when there are distinct debts, or accounts, the creditor, if nothing be said or agreed upon

at the time of payment, may apply such payment to whichever of the debts or accounts he thinks proper; but if there is only one debt, or general account, all payments must be applied to the former items in the account, according to their respective dates. These rules are of course subject to any special agreement or stipulation which either party may have made at the time of payment. (418, *D. C. Kandy*, 4 *Dec.* 1835; *Austin*, 5.)

Tender.

A plea of tender must be accompanied, in actions *ex contractu*, by payment of money in court, otherwise it avails nothing, unless it is a tender before action. It can only be pleaded for a claim in the nature of a debt certain, and not for unliquidated or unascertained damages; and only when the tender is unconditional. The object of a tender after action brought is to avoid further costs; so that an admission without tender will not avoid costs. (7820, *D. C. Ratnapoora*, 1 *Feb.* 1835; *Morg. D.* 31; 918, *D. C. Negombo*, 1 *Apr.* 1835; *Morg. D.* 37: 3100, *D. C. Chilaw*, 3 *Aug.* 1836; *Morg. D.* 91; *Marshall*, 73, 659: *Broom, C. L.* p. 200.)

Payment into court.

The plea of payment into court is to admit some cause of action. In a general action on promises or debt this plea admits only a cause of action to the amount paid into court, and no more. If, in such a case, the payment be made by two or more defendants jointly sued, it does not admit any partnership, or joint contract between them, which could render them liable beyond the

amount so paid in; so that if the plaintiff seeks to recover an additional amount, he will have to prove a contract under which the defendants are jointly liable to an amount exceeding that paid in. If, however, the libel is framed on a special agreement, payment into court will admit the contract, and the breach of it as alleged. In a suit *ex delicto*, when the libel is general and unspecific, the payment into court admits a cause of action, but not the cause of action sued for; but if the libel is specific, this plea admits the cause of action sued for, and so specifically stated in the libel, although even then, in some cases, it may be necessary for the plaintiff to prove his cause of action, with a view to the amount of damages. (*Broom's Com. Tit. Action at Law.*) Also see "Costs."

Prescription, how pleaded.

In general, prescription, to be a bar, must be specially pleaded. But as, owing to ignorance of this rule, many persons lose their prescriptive rights, a rule was made (*R. and O. 23rd June*, 1842, p. 133),* that if, at the trial of any cause in which the right of *immoveable property*, evidence be given setting up or suggesting a title by prescription in any party to the suit who has not pleaded the same, or who has pleaded the same invalidly, the District Court shall stay the further hear-

* This rule applies also to the Court of Requests (266, *C. R. Newera Ellia, Lor. R.* 7.) And accordingly, in an appeal against a judgment, the S. C. gave the defendant the choice between altering the judgment into a nonsuit, or allowing the defentant to amend and plead prescription. (28098, *C. R. Colombo*, 26 *July*, 1865.)

ing of the case, and shall give leave to amend the pleadings by putting such title by prescription in issue, and allow all parties to file fresh lists of witnesses, and proceed as in other cases where amendments of pleadings are allowed.

This rule, however, does not apply o *moveable property*, and the above rule only gives further power to plead prescription in land cases; so that the rule still holds good that, in general, prescription must be specially pleaded. (4408, *D. C. Amblangodde*, 1 *June*, 1844; 7476, *D. C. Kandy*, 7 *May*, 1836; *Austin* 32; and *Morg. D.* 80; 14532, *S. M. Caltura*, 20 *Nov.* 1833; *Morg. D.* 4, and *Morg. D.* par. 39, p. 7; 956, *D. C. Walligamme*, 25 *May*, 1836; *Morg. D.* p. 81.) And it would seem that the party must plead the proper clause of the ordinance applicable to his case. (2163, *D. C. Colombo*, 9 *Dec.* 1842; *Morg. D.* 344.) Yet, as to the form of plea in the case of land; if undisturbed possession for ten years is set out in the answer, or is put in issue by the pleadings, *that* is sufficient, without formally pleading § 2 of 1834 in bar. And this also applies to the plaintiff if prescription is so inserted in the replication. (7519, *D. C. Kandy*, 28 *Sept.* 1836; *Morg. D.* 99: *Austin*, 32.)

When prescription may not be pleaded.

But prescription need not be pleaded if the witnesses for the plaintiff prove a prescriptive title in the defendant;—then the latter is entitled to judgment in his favour, with costs:—the rule that a party must plead

prescription being that his evidence is inadmissible without such plea; but if the proof comes from the other side, he can have judgment. (3603, *D. C. Seven Korles*, 23 *June*, 1863; *Coll.*)

Compensation or set-off.

In all actions *bonâ fide*, full power is given to the court to determine, according to the rules of equity, how much ought to be restored to the plaintiff; therefore, when the plaintiff is indebted to the defendant, the latter ought to be allowed to set off the sum due to him, and to be condemned to pay the difference only. Actions, real or personal, of whatever kind, are *ipso jure*, reduced by the claim of set-off, with the exception only of the action of deposit, against which a claim of set-off is not allowed, lest any one should be fraudulently prevented from recovering the thing deposited. (*Inst.* iv. 6, 30. See also *Inst.* iv. 6, 39.)

The full nature of compensation, and of the debts that may be set-off one against another, will be found under the head "Compensation," in the chapter on "The Extinction of Obligations." The plea of *set-off* is an answer to part or the whole of the claim; and no debt can be so pleaded unless it can be brought into account under compensation. Set-off is not to be confounded with reconvention; for there can be a reconvention for damage as against a liquidated claim. Ordinance No. 5 of 1852, introducing English commercial law, does not alter this principle, even in commercial cases. (20467, 20466, *D. C. Galle*, 27 *Nov.* 1862.)

Though there is no case on the subject, set-off should be specially pleaded, for the same reasons that reconvention must.

Reconvention.

It frequently happens that the defendant has some demand against the plaintiff, in which case he is at liberty to bring it before the same court. His claim is by a cross action, termed *reconvention*, and the plaintiff is not entitled to plead other jurisdiction in this case, nor any declinatory exception against the reconvention, but is bound to answer, before the same court in which he has cited the defendant, any claim which the defendant may thus make against him. (*V. d. Ldn.* iii. 1, 18, p. 417; *Lor. Civ, Prac.* p. 26, citing *Merula* iv. 43, 1, § 1; *Voet.* v. i. § 78; *V. d. Ldn. Jud. Pr.* ii. 4, § 12.)

A claim in reconvention is pleaded before the answer in original action, and in the same manner as an answer; and then the pleadings go on together, and in one and the same conclusion; as in the following form:—

E. F. Proctor for the Plaintiff, previous to answering in convention, saith—

1. (Stating the grounds of the claim in reconvention.)

2. *In convention* (stating the grounds of the Answer in Convention.)

Wherefore, and for other reasons to be hereafter alleged, the said Proctor, concluding in Reconvention, prays that the plaintiff may be condemned in Reconvention to, &c.; and in

Convention, that the claim and conclusion of the plaintiff may be rejected.

And the said Proctor prays also for the costs in Convention as well as in Reconvention; and for such other, &c. (*Lor. Civ. Prac.* p. 26.)

The defendant not only may, but must, reconvene, if he has a counter claim; it is wrong for him to institute a fresh suit, when the same question might, and far more easily, be tried in the former suit by reconvention. If the former suit is still pending, the cross suit will be dismissed; but the defendant, on application to the court, is allowed to amend his answer in the first suit, and to reconvene. (18658, *D. C. Trincomalie*, 15 *Aug.* 1857.) In one case, the defendant was allowed to bring a cross action, after a decree against him, in which he ought to have reconvened, on proof to the satisfaction of the District Court that the evidence in support of such counter claim was not within his reach at the previous trial. (5889, *D. C. Kandy*; *Morg. D.* 11.)

Van der Linden (*V. d. Ldn. Inst.* iii. 1. 18, p. 417; *Jud. Pract.* ii. 4, 13) says as follows:—

"There are some cases in which no *reconvention* takes place.

Cases where reconvention cannot be pleaded.

"1. When the plaintiff, in the original action, does not sue on his own account, but as agent for another, and the claim is against him individually.

"2. When the judge, before whom the original trial is brought, is incapacitated, by the limited nature of

his jurisdiction, from taking cognizance of the claim in the cross action.

"In some possessory cases, as, for instance, of *complaint*, and *spoliation*, reconvention is not admissible; for the nature of these cases does not admit of delay, on the principle that '*spoliatus ante omnia est restituendus.*'

"4. In appeal cases, since the inquiry in appeal should be limited to the question decided by the court below. However, reconvention, on sufficient grounds being shown, is sometimes permitted in this case, under the benefit of relief.

"5. In cases of personal interdict, or injunctions, no reconvention is allowed; but if the defendant conceives that he also has a right to obtain a penal interdict against the plaintiff, he must do so by a separate proceeding.

"6. Neither can re-convention be admitted in execution, or proceedings by *gyzeling*, or civil attachment.

"7. Nor in reversion, or new trial.

"8. Nor, lastly, in criminal cases."

Then follows this order:—

Replication. "If the answer merely puts in issue the facts alleged by the plaintiff, the court shall, on the motion of either party, enter on the record a joinder of issue; and the cause shall thereupon be deemed to be at issue. But if otherwise, the plaintiff may, at any time within eight days after the filing of the answer, or claim in reconvention, and notice thereof, file with the secretary his

replication, or answer in reconvention, as the case may be; and in default of filing such replication, or answer in reconvention, he shall be barred from replying, or answering in reconvention; and ever such reply shall admit, or deny, all the material facts alleged by the defendant, clearly and concisely; and every such answer in reconvention shall be in conformity with the rule relative to answers." (*R. and O.* 5 *July*, 1842, § 3, p. 129.)

If the replication is absolutely unnecessary, as, for instance, if a general denial has been entered, such a replication will only be reluctantly allowed, as only intended to swell the costs, and may be rejected even by the District Court, as an irrelevant allegation. Yet it must be observed whether there are not circumstances stated in the defendant's answer which the plaintiff may not unnaturally consider as requiring to be replied to. (296, *Pantura*, 14 *May*, 1834: *Marshall*, 491; *Morg. Dig.* 15.) For example, if the answer puts in issue several new facts, the plaintiff ought specially to reply. (14954, *D. C. Caltura*, 17 *June*, 1851.) A replication may sometimes be useful in sparing the unnecessary cost of proving facts stated in the defendant's answer, by admitting them to be true. (918, *Negombo*, 1 *April*, 1835: *Marshall*, 73—491; *Morg. Dig.* 37.)

"The replication is drawn with or without separate heads, according to the nature of the answer filed by the defendant. Where, namely, it is necessary to state

any facts in refutation of the allegation in the answer, and which the plaintiff will afterwards have to support by proof, the replication is drawn with separate heads; but when the answer may be simply traversed or denied on legal grounds, the plaintiff merely files a *persistit*, in the following form:—

"*E. F. for the plaintiff, rejecting the defendant's answer as untrue and irrelevant, and also rejecting the tender made by him as unsatisfactory, and persisting in his claim, prays as in his claim and conclusion he has already prayed.*" (*Lorenz. Civ. Pract.* p. 27.)

"If the Plaintiff finds, from the defendant's answer, that he ought to reduce his claim in any degree, or that the defendant's tender may be accepted, subject to some condition or limitation, he makes a counter-tender or *counter-presentation*, and under benefit thereof persists in replication." (*Ibid.*)

Rejoinder. If the replication contain any new matter, or if therewith the plaintiff also answer in reconvention, the defendant may rejoin, or reply in reconvention, as the case may be, but not otherwise. Every such rejoinder or replication in reconvention of the defendant must be filed within eight days after the filing of the replication or answer in reconvention of the plaintiff, and notice thereof. And the plaintiff, in like manner and within the same time, may rejoin in reconvention. In default thereof, the said defendant, or plaintiff, as the case may be, is barred from rejoining, replying in reconvention,

or rejoining in reconvention, as the case may be. (*R. and O.* 2 *July*, 1842, § 3, p. 129.)

According to the Roman-Dutch practice, in order to compel a plaintiff to reply, or a defendant to rejoin, an application was made by the party who last pleaded, praying for a *bar of replication, or rejoinder*, against the party in default. (*Lor. Civ. Pract.* p. 27.) But the above order would seem to render such an application unnecessary, as the defaulting party is barred by his own *laches*. Also, by the same practice, "a rejoinder is the last term of pleading allowed in a case; for after this no further pleadings can be received on the roll, unless the court, upon weighty reasons, sees fit to allow it; as where new facts are alleged in a rejoinder on which it is necessary to obtain an issue." (*Ibid.* 28.) The above rule, however, also allows the plaintiff to rejoin in reconvention, which is a step further in the cause than rejoinder; but, practically, it is seldom necessary to go beyond the above step.

Further time to plead.

Either party may, by motion to the court, and once or oftener, as he may have occasion, obtain time to answer, make claim in reconvention, reply, rejoin, or demur, or an order to amend his pleadings, or list of witnesses, upon affidavit of merits, or other sufficient cause shown to the satisfaction of the court, and upon such terms as the court shall impose; and no party shall be deemed to have made default in, or shall be barred from, answering, making claim in reconvention,

replying, rejoining, or demurring, who shall have obtained time for so doing, provided he shall have complied with the terms imposed by the court in granting his application. (*R. and O.* 6 *July*, 1842, § 4, p. 129.) But a party cannot, under this rule, apply for further time *after* he has been barred; *i. e.* after the time last allowed him to plead has expired. (15696, *D. C. Kandy*, 30 *Jan.* 1844; *Austin*, 72.*

Demurrer.

Either party, instead of answering, replying, or rejoining, may at any time within eight days after the filing of the preceding pleading of the adverse party, and notice thereof, file a demurrer thereto, in which shall be clearly stated the matters of law intended to be argued; and if, within four days after the filing of such demurrer, and notice thereof, the adverse party take no step thereupon, the court shall, on motion of either party, enter on the record a joinder in demurrer. (*R. and O.* 6th *July*, 1842, § 5, p. 129.)

The term *demurrer* is a word of art, borrowed from the English law, and means an issue upon a matter of law; and it confesses the facts to be true, as stated by the opposite party; but denies that by the law arising upon those facts the plaintiff shows a good cause of

* In all cases in which, by the rules and practice of the District Courts, any act is required to be done within a particular number of days, the time should be reckoned exclusively of the first day, and of any intervening Sundays or holidays, and inclusively of the last day, unless the last day shall happen to fall on a Sunday, or public holiday, in which case the time shall be reckoned exclusively of that day only. (4346, *D. C. Jaffna*, 23 *Apr.* 1853, *Coll.*)

action,* or that any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse. (*Bla. Com.* iii. 314, and see 130, *D. C. Pantura*, 13 *Aug.* 1834; *Morg. Dig.* p. 19; 14786, *D. C. Kandy*, 30 *Jan.* 1844; *Austin*, 63: 26452, *D. C. Kandy*, 3 *Dec.* 1853; *Austin*, 187.) If a libel is founded on a document insufficiently stamped, that is good ground for demurrer. (29219, *D. C. Kandy*, 3 *Nov.* 1856; *Coll. Austin*, 211; *Lor. R.* 204; also 14437, *D. C. Kandy*, 23 *Aug.* 1843; *Austin*, 60.) But this only applies to documents on which a pleading is founded, and not to the pleading itself. If any pleading is insufficiently stamped, the party pleading will be allowed to amend the pleading, on the payment of costs. (17348, *D. C. Galle*, 26 *Nov.* 1856; *Lor. R.* 223.)

Any objection to an improper stamp on a pleading, should be taken by the opposite party moving for the production before the court of the pleading; and if not properly stamped, that party is not bound to plead further, until the pleading is amended by proper stamping. (2993, *Jaffna*, *June* 6, 1857.) Similarly, the insufficiency of a proxy is not a ground for demurrer. (8512, *D. C. Jaffna*, 18 *June*, 1856; *Lor. R.* p. 142.)

Since the above rule, it has not been the practice of the District Court of Colombo to allow *general* demurrers, excepting to the sufficiency in the libel in

* As, for example, a demurrer for misjoinder of a wife as defendant. (16914, *D. C. Galle*, 12 *March*, 185 ; *Lor. R.* 94.)

general terms, without showing specially the nature of the objection; on the same principle that, in England, general demurrers must be accompanied with the exceptions intended to be argued entered on the margin of the demurrer book. (16016, *D. C. Kandy*, 30 *July*, 1844; *Austin*, 78.)

Again, it is a ground of demurrer if a misjoinder of parties appears on the face of the libel; as if the plaintiff appeared on the libel to be partner with the defendant and another, and sued the defendant alone for non-performance of the partnership agreement. (4818, *D. C. Manaar*, 3 *June*, 1851.) Or if it appeared on the libel that one defendant was only the agent of another defendant. (14786, *D. C. Kandy*, 30 *Jany.* 1844; *Austin*, 63.) So, also, if it appear on the face of the libel that a defendant is a married woman, and no grounds are set forth for joining her in the suit, there will be good ground for demurrer (16914, *D. C. Galle*, 12 *Mar.* 1856; *Lor.* 94):—so, also, where the action is for damages, and defendants are joined in the suit against whom no damage is claimed. (1995, *D. C. Jaffna*, 3 *Jany.* 1851, *Coll.*)

The following have also been held good grounds of demurrer:—that the date of the defendant's entry on the land in dispute was not stated; that land and personal property cannot be recovered in the same action; that a libel did not set forth the injury complained of with sufficient distinctness (11284, *D. C. Kornegalle*, 8 *Dec.* 1847); and that the answer did not

refer to the land stated in the libel (29369, *D. C. Kandy; Austin*, 212).

Effect of demurrer.

The effect of a successful demurrer, in Ceylon, does not necessarily entitle the party demurring to judgment, but obliges the opposite party to put in a better plea, or to amend his pleadings, if he is able—the rules of pleading, in Ceylon, having in view an explicit statement of all the facts of the case, which are material to a just judgment on the merits. (19630, *D. C. Kandy*, 8 *Nov.* 1848; *Austin*, 110.) Even if a party demurs to a pleading on one point, and the pleading is also defective on other points, the party tendering the defective plea will be allowed to amend it on all points: if he does not choose so to amend it, leave will be given to the demurring party to amend his demurrer. If the other party chooses to amend his pleadings, leave is given to the other party to withdraw his demurrer, and to file such other pleading as he may deem necessary. (16885, *D. C. Kandy*, 23 *Sep.* 1845; *Austin*, 83.) Of course, if the facts of a pleading form no valid cause of action or defence, and those facts cannot be altered, or added so as to make the pleading valid, the opposite party must succeed: in the case of a libel, the suit must be dismissed.

In one case, where it was doubtful whether a demurrer had been adjudicated upon, the court allowed it to be re-heard, and the S. C. upheld that course, on the ground that the D. C. did not re-judge the case, but only determined (as it must continually do) whether an order

on the record closed the case or not. (6903, *D. C. Ratnapoora*, 8 *Sept.* 1863.)

Evidence confined to the point in issue.

In order to save the unnecessary waste of time to the court, and expense to the parties, occasioned by summoning and examining witnesses to prove facts immaterial to the real point at issue, the District Judge must, whenever it appears to him that any of the allegations contained in the pleadings, whether of the plaintiff, or defendant, or of any third party, are irrelevant to the question, declare to the respective parties, or their proctors, that he will not admit evidence to prove or to contradict such irrelevant allegations. And if, after such declaration by the judge, either party summons witnesses to or against such allegations, the expenses of such witnesses must be borne by the party summoning them, whether he succeed in the suit or not. Such allegations must only be marked by the secretary, but not be struck out of the pleadings; and it is open to parties to appeal against such declaration of irrelevancy.

Judge may examine parties.

And in order to enable the District Judge to ascertain with precision the real question in dispute between the parties, he must, whenever he deems it expedient so to do, examine, but not upon oath, all or any of the parties who may be in attendance in court, or their respective proctors, as far as such proctors may consider themselves at liberty to answer the questions so put to them, as to any fact or facts which are material, but are not stated, or are not stated with sufficient clearness, in the pleadings; and any declara-

tion, admission, or denial, given in answer to such examination, shall be entered in the proceedings, as part of the pleadings of the party making it. (*R. and O. Sect.* 1, § 8, p. 63.)

This rule authorizes the judge to examine parties to ascertain the real issue; and although this power is, and can only be seldom exercised by the judge, *mero motu*, yet there is nothing to prevent a party, who deems the pleadings of his opponent defective in not containing all necessary information or otherwise, from examining such opponent under the comprehensive words of the 29th Rule (see, *post*, "Mutual examination of parties"); and if any *declaration*, *admission*, or denial is obtained by such examination, which should properly form part of the pleading, and would serve to explain or illustrate it, he may move the judge to exercise the power given him by the 8th rule, and to enter such *declaration*, *admission*, or *denial*, as part of the pleadings of the party making it. Such examinations must, of course, take place at an early stage of the case, for they will show the evidence necessary at the trial. (28098, *D. C. Kandy*, 21 *Febr.* 1857; *Coll. Austin*, 201.)

As to the examination of proctors in reference to this rule, it has been laid down that the proctor cannot equitably claim an exemption beyond that which is given to his client. The court itself must decide upon the relevancy of the questions put, and on the expediency of their answer. (3469, *D. C. Ruanwelle*, 20 *Sept.* 1837; *Morg. D.* 195.)

Notice of pleadings.

Upon any pleading other than the libel being filed, the party filing such pleading shall cause a notice, setting forth a copy thereof, and the date on which it was filed, to be served upon the adverse party within forty-eight hours after filing such pleading; and if such notice shall not be given, the adverse party may treat such pleading as a nullity, and proceed as though no such pleading had been filed. (*R. and O. 5th July*, 1842, § 6, p. 129.) And in every case in which no proctor is employed for a party upon whom a notice and a copy of a pleading is to be served under the above rule, such notice may be served within eight days from the filing of such pleading. (*R. and O.* 17 *June*. 1844, § 3, p. 134.)

At this point in the Rules and Orders, follow questions of "amendment," "arrest," "sequestration," &c.; but, as these break the continuity of the course of a trial, they have been inserted in a chapter by themselves, immediately after the present chapter.

Judgment in case of default.

Whenever it appears, by the return to the summons, that the defendant has been duly summoned, and he fails to enter his appearance within four days after the return day of the summons, or whenever either party, by his default, is barred from answering, replying, or rejoining, the adverse party may apply, by motion, for judgment; and if, on the hearing of such motion, the party in default, having received due notice thereof, does not appear, or, having appeared, does not satisfy the court, upon affidavit of merits or other sufficient grounds,

that he ought to have leave to purge his default, and to be admitted to enter his appearance, answer, reply, or rejoin, within such time, and upon such terms as the court shall impose; then the court shall forthwith give judgment in the cause upon the pleadings as they stand, and without the production of any evidence, by the party making such motion, in proof of the facts alleged in his pleadings, other than the examination of such party or his proctor, if such examination should be deemed necessary or expedient by the court before judgment. (*R. and O. 5th July*, 1842, § 7, p. 129.) Yet it was thought expedient that the court should be allowed to call for evidence, even in a case of judgment by default, and accordingly the following order was made, adding to the above.

If any judgment by default be moved for against any defendant in any case in which the court deems it necessary or expedient that further evidence should be adduced by the plaintiff, before judgment of his right to the relief prayed for, or of the nature and extent of the wrong he has sustained, the court shall require him to give such further evidence, either at the time when the motion for judgment is made or thereafter, on a day to be appointed by a judge for that purpose; and after the hearing of such proof, such judgment shall be given as the justice of the case shall require. And if judgment by default shall be given against any plaintiff or claimant, if he is in a like position to a plaintiff (4285,

D. C. Galle, 17 *June*, 1854), the same shall be only as in a case of a non-suit. Provided further, that were there are several defendants, one or more of whom shall be in default, and it shall appear to the court that any defendant on the record has pleaded, or is not barred from pleading, or, if barred, that judgment is not moved for against him; the judgment obtained against the defendant or defendants in default shall be interlocutory only, and, at the trial of the cause between the plaintiff and any defendant who shall have pleaded such final judgment, shall be given upon the merits, for or against the defendants, as justice shall require, and without reference to the default which has been committed. (*R. and O.* 17 *June*, 1844, § 4, p. 134.)

By the first clause of the *R. and O.* 2*nd July*, 1842, p. 128, a defendant, in default of answering, is actually barred, and no rule is necessary for him to show cause why he should not be barred. Being thus in default, the rule should rather be served upon him to show cause why judgment should not be given against him for his default. (6229, *D. C. Jaffna*, 22 *January*, 1855.) This rule does not entitle the plaintiff to move at the trial to withdraw his case against, or to waive any of the defendants *not in default*, in order to obtain a final judgment thereon against the remaining defendants, against whom interlocutory judgment had been entered. Such a motion would be an evasion of the rule: nor should the D. C. assent to any course that would preclude the

last-named defendants from the benefit, under that rule, of final judgement "being given upon the merits, for or against the defendants as justice shall require, and without reference to the defaults of some of them which had been committed." (13407, *D. C. Colombo*, 30 *June.* 1852; *Coll.*)

Evidence in judgment by default.

As to evidence, under the above rules; evidence *must always* be required in cases where the title to land is in issue. (*Ibid.*: 11094, *D. C. Batticaloa*, 10 *Sept.* 1850; and see *Austin*, 91.)

If the defendant is present at the hearing of the case, the plaintiff is entitled to examine the defendant; and upon the defendant's admissions, if sufficient, to get judgment without further proof. Whenever the plaintiff is required to adduce further evidence, under the above fourth rule, the defendant should not be precluded from being present thereat, nor from cross-examining the witnesses adduced by the plaintiff. The proceedings, however, would be *ex parte* so far as that the plaintiff's case could be alone gone into,* and, on its being closed, the defendant could not be allowed to enter into a defence. (19642, *D. C. Kandy*, 23 *Mar.* 1850; *Austin*, 111.)

Days for hearing cases by default.

It must also be observed that, where further evidence is required under the above fourth rule, it should be taken at the time, or on a day to be appointed by the

* Though, in an old case before these rules, "a defendant, in default, was allowed to go into evidence to *disprove* the evidence adduced by the plaintiff." (1134, *D. C. Caltura*, 24 *June*, 1835; *Morg. D.* 52.)

judge; and that the plaintiff has a right to expect some *early* day to be specially named for that purpose, and not to have the case set down on the trial roll, which would delay it for months, unless advanced by a subsequent motion at the plaintiff's own cost. (*Ibid.*)

Defence admitted after judgment by default.

If the defendant has not appeared to purge his default, and judgment has gone against him, he still has an opening, if it is not his fault, by *R. and O. Sect.* 1, § 38, p. 70, which says that "If any defendant, against whom judgment shall have been obtained by default, shall, within reasonable time after judgment, provided he shall not previously have appealed from such judgment, appear and satisfy the court, by good and sufficient evidence, that he was prevented from appearing in due time by accident or misfortune, or by not having received information of the proceedings, and shall give good and sufficient security to satisfy the original demand, with interest, and any damage which may have accrued to the plaintiff by the delay, and all costs which shall have already been, or which may thereafter be, incurred; the court, being satisfied of the premises, shall be authorized to admit such defendant to make his defence, upon such terms and conditions as such court shall think it just and right to impose."*

* According to one case, the seventh section above quoted is the rule under which a party must apply to open up a judgment by default; but this is an error, as that section only gives power to pronounce judgment, not to open it up. (706, *D. C. Negombo, 24th Octr.* 1862.)

If no default has occurred, the case proceeds, and the witnesses are next looked to.

List of witnesses.

*At the time of filing any pleading, the party filing the pleading must annex to it a list of the witnesses he may deem necessary; and must, at the same time, produce and deposit in court any vouchers, or written documents to which such pleading refers, or copies of such thereof as may be in the hands of third parties; and inspection or copies of the same must be given by the secretary to any party in the suit, or his proctor, at his request, and at his expense. And no witness can be examined, nor any document or paper be given in evidence at the trial, at the instance of either party, unless the name of such witness appears in some list or amended list of witnesses, or unless such document or writing has been duly deposited, or unless the party tendering the same in evidence satisfies the court that he is unable either to file the original or a copy thereof, as the case may be, at the time of filing his pleading. It is, however, in the discretion of the court to examine any witness, or to call for the production of any document or paper, as to the court may appear just and expedient, and to permit the parties, or either of them, to produce further evidence, having relation, so received by the court as aforesaid, or not, as to the court appears just and expedient. (*R. and O. 2nd July*, 1842, § 8.) As in the repealed rule (21, sec. 1, of the *R. and O.*),

Deposit of documents.

* See title, "Evidence."

there is nothing to oblige a party to deliver up witnesses in person, or by proctor; nor does the nature of the document require it: and there seems, therefore, no reason why this document should not be sent by a servant, or even by the post, provided it show upon the face of it enough to inform the officer of the court in what case and in whose behalf it is sent—the party, of course, taking the risk of the instrument not arriving. (1195, *D. C. Caltura*, 9 *May*, 1835; *Morg. D.* 44: *Marshall*, 123.) And as to the power of the court to call, or to let in witnesses not on the list, see 191, *D. C. Colombo*, 20 *Febr.* 1840; *Morg. D.* 305; and 2783, *D. C. Colombo*, 5 *Dec.* 1842; *Morg. D.* 342. It was held (but prior to the date of the above rule) that, if a trial *is* postponed for the examination of an additional witness, a party cannot summon additional witnesses. (8597, *D. C. Kandy*, 4 *Oct.* 1887; *Austin*, 38.)

Amended lists.

The above order implies that lists of witnesses may be amended; but before allowing the amendment, the D. J. should be satisfied that no injustice should be sustained by the opposite party in consequence of the amendment, which must depend on the stage of the case. (*Marshall*, 123.) But see *post*, p. 392.

Witnesses how summoned.

Witnesses are summoned by citations, issued by the secretary, and served and returned by the fiscal; though the circumstance of a witness not being cited is no objection to his evidence, provided his name appears in some list. (4782, *D. C. Jaffna*, 24 *June*, 1854.) If the

witnesses are in a district different from that in which the suit is instituted, the citations must be directed to the fiscal of the district in which the witnesses shall be found, and must be served by such fiscal, and returned by him to the court out of which the citations originally issued. The citations command the witness's presence at the place and time specified, under a penalty of five pounds.

Attachment for non-attendance.

And if any witness refuses or neglects to obey the citation, the court must, on the motion of the party summoning, and proof that the citation has been duly served, issue a warrant of attachment against the witness, who must forthwith be brought before the court, and committed to prison until he pays the penalty; and must suffer such other punishment for his contempt as the court considers necessary for the vindication of its own authority, unless he can prove to the satisfaction of the court that he was prevented by illness or other insuperable obstacle from attending. (*R. and O.* § 1, par. 23.)

Payment of witnesses.

All witnesses whose homes are more than four miles from the court are entitled to receive such sums as are now allowed to witnesses in the respective districts and provinces; they are necessarily absent from their homes in obedience to citations. (*R. and O.* sect. 1, § 23, p. 66; see 6206, *D. C. Colombo*, 11 *June*, 1843; *Morg. D.* 328.)

Deposit of witnesses' money.

Every party to a suit, on applying for citations to his witnesses, must either deposit in court or give

security for the payment of such a sum as the secretary (who must refer to the District Judge in case of dispute) considers necessary for the purpose, with regard to the number of witnesses, and the distances from their several houses. Which sums must be included in the taxed costs, except when the court considers that witnesses have been summoned unnecessarily, the allowance to whom must in all cases be borne by the party summoning them. (*R. and O.* sect. 1, par. 23.)

Witness entitled to expenses, though not sworn.

A witness is entitled to his taxed expenses for attending the court in obedience to a subpœna, even if his evidence turns out at the trial not to be required. (14684, *D. C. Kandy*, 1 *Feb.* 1844; *Austin*, 61.) If, in consequence of the plaintiff's refusal or neglect to admit any facts admitted in the defendant's answer, evidence has become necessary to establish those facts, and such facts appear to be truly stated, the expenses of the defendant's witnesses (to those facts) must be borne by the plaintiff. (918, *D. C. Negombo*, 1 *Apr.* 1835; *Morg. D.* 37.) If the trial of a case is postponed owing to the absence of the plaintiff's proctor, and not in consequence of any fault of the plaintiff, the proctor must pay the witnesses' batta, and not the plaintiff. (6823, *D. C. Galle*, 24 *June*, 1840; *Morg. D.* 295.)

Entering cause for trial.

When a case is at issue, and the facts alleged in the pleadings are disputed, either party may set it down for trial, by entering it with the secretary; who is required to enter it in a book, or list of cases for trial, to be kept

for that purpose, in the order, according to priority of time, in which such causes are brought to him to be entered. The causes must be called on, heard, and tried in the order in which they are enterd. (*Rules of 2nd July*, 1842, § 9, p. 130.) And the court has no power to advance any cause in the list for hearing without the consent of the parties. (26,203, *D. C. Colombo*, 7 *Dec.* 1842; *Morg. Dig.* 343. But see below.)

Notice of trial, and order of hearing.

The party entering the cause must give the adverse party, or to his proctor (the latter is sufficient—34674, *D. C. Kandy*, 22 *Octr.* 1861), a notice, that he has set down the cause for trial, of fourteen days, at least, before the day it is called on for trial. (*Rules 2nd July*, 1842, § 9, p. 130.) If he neglects to give notice, and the other party is present on the day of trial, the cause must be struck off, and the former pay the costs, and the latter may prevent further delay by setting down the cause himself. (13927, *D. C. Galle*, 24 *Dec.* 1850, *Coll.*) If full notice has not been given, and the defendant is not ready to proceed, any judgment for the plaintiff will set aside (19886, *D. C. Kandy*, 25 *March*, 1850; *Austin*, 114), unless, on motion, and sufficient cause shown by affidavit or otherwise, to the satisfaction of the court, the court has allowed it to be heard and tried out of the order it stands on the trial-roll (although fourteen days' notice has not been given), and provided the adverse party has received such notice of trial as the judge considered reasonable and proper. (*Rules of*

17 *June*, 1844, § 5; *R. and O.* p. 134.) Also, this clause does not give a party a right to fix his own day for the hearing of a case; and the S. C. will not, on appeal, alter the day fixed by the D. C. unless that day is not in accordance with the state of business on the general trial roll on which it should be entered. (26452, *D. C. Kandy*, 14 *May*, 1853; *Austin*, 187.) And, in general, the S. C. will not interfere with the discretion of the D. J. in marshalling the business of his court; but where a party has been ready, and was prevented doing so by the absence (even necessary) of the judge, the S. C. will order the case to be advanced. (9693, *D. C. Jaffna*, 8 *Septr.* 1858.) The D. C. may also proceed with the cases in the list *for the day*, if it appears that hardship would result from their delay—although in the usual course it should first dispose of the *remanets*, or causes not heard on the previous day;—but such a case is not suddenly to be called on, if the witnesses are out of court; but time must be allowed to collect them. (22249, *D. C. Kandy; Austin*, 139.) When the case is once set down, the plaintiff is not entitled to withdraw it from the trial roll, unless the court sees sufficient cause for allowing it. (*Gen. Rule*, 6 *Dec.* 1845, p. 156; 13871, *D. C. Badulla*, 21 *Octr.* 1851, citing 13927, *D. C. Galle; Coll.*)

Entering cause for argument.

When a cause comes to an issue of law, it may be entered for argument with the secretary, in the book of cases for argument, the party entering giving *eight* days'

notice to the opposite party, or his proctor; and the case may be advanced or postponed by the order of the court, in the same manner as a case entered for trial of facts. (See *ante*, p. 320, *R. 2nd July*, 1842, § 10; *R. and O.* 130, and *R.* 17 *June*, 1844, § 5, *R. and O.* p. 134.)

Cause at issue —when.

It is competent to either party, who may be in doubt whether a cause is at issue, before entering it for trial or argument, to move the court to declare it at issue; and if, on the hearing of such motion, it appears to the court to be at issue, it may make an order to that effect, and the cause is thereupon at issue. (*R. 2nd July*, 1842; *R. and O.* 130.) It is, however, not competent for the court to try a cause because it is at issue, the parties are entitled to have the case set down for trial or argument. (11736, *D. C. Batticaloa*, 14 *Oct.* 1853.)

Course where parties do not appear.

When the plaintiff, having set down the cause for trial, or received due notice that it had been set down for trial by the defendant, does not appear on the day of trial, but has summoned his witnesses, and the defendant appears; and when the plaintiff, having set down the cause for trial, or received such notice as aforesaid, does not appear, and has not summoned his witnesses, whether the defendant appears or not, the court must forthwith give judgment against the plaintiff, as in case of a nonsuit. When neither party appears, and the plaintiff has summoned his witnesses, the case must be struck out of the list. When the plaintiff appears, and the defendant, having set down the cause for

trial, or received due notice that the cause had been set down for trial by the plaintiff, does not appear, the court must hear and decide the plaintiff's case *ex parte*.*

When the cause has been once withdrawn by the plaintiff from the trial roll and re-entered, and the plaintiff fails to proceed to trial duly after such re-entry, or a second time withdraws the cause from the trial roll, the court must, upon motion of the defendant, give judgment against the plaintiff, as in case of a non-suit, unless good and sufficient cause be shown to the contrary. (*R. and O.* 17 *June*, 1844, RR. 7 and 8, p. 135.)

Postponement of hearing.

No postponement of the trial of any cause shall be allowed, except by consent, for any reason save the absence of a material witness, and unless the party applying for such postponement forthwith pays into court the expenses of all the witnesses who are in attendance.† And in every affidavit for founding a motion for such postponement, it is necessary to state that the witness is not kept away by collusion, and also the points to which such witness is to testify, so as that the court may be enabled to judge whether the witness is or is not material:—Provided, however, that it shall be competent for the judge (should he see occasion)

* This rule is imperative; but in a case where the plaintiff appeared, but did not summon his witnesses, on account of a letter from the defendant, and the cause was struck off, with costs to the plaintiff, the S. C. re-instated the case without ordering reimbursement of costs. (3234, *D. C. Jaffna*, 26 *July*, 1837; *Morg. D.* 184.)

† If this is not done, the S. C. will, on an appeal, return the case until this condition is complied with. (3545, *D. C. Four Korles*, 18 *May*, 1836; *Morg. D.* 81.)

to order that any cause do lie over for hearing for such time, on the same or any future day, as he shall direct. (*R. and O.* 17 *June*, 1844, R. 9, p. 135.) Though no postponement is allowed, unless upon cause shown to the satisfaction of the court. (9, R. 6 *Dec.* 1845, p. 156.)

It is left to the discretion of the D. C. under the conditions imposed by the rules and orders, and subject to appeal, to determine how often postponement of a case may be allowed. (2502, *D. C. Ruanwelle*, 18 *Dec.* 1835; *Morg. D.* 69.) The S. C. thought *nine* postponements a sufficient ground for allowing no more. (143, *C. R. Galle*, 28 *Aug.* 1863.) Parties may not even postpone cases by arrangement amongst themselves without the consent of the judge, which should be given only for strong reasons. (10250, *D. C. Jaffna*, 8 *Nov.* 1861.)

A postponement may be moved for, and granted, *at the trial*, after the plaintiff has closed his case, if the defendant's proctor had been only then informed that his witnesses were absent. (15823, *D. C. Kandy*, 22 *April*, 1845; *Austin*, 76.) When a postponement arises from some defect in or of the court, and not from the fault of any party, the written order of postponement should also contain an order for the attendance of witnesses. If the court omits so to order, it is the proctor's duty to move the court for such order; without which the attendance of the witnesses cannot be enforced, except by the issue of fresh subpœnas, an

expense which would be a hardship to the parties. (16322, *D. C. Kandy*, 21 *Dec.* 1850; *Coll. Austin*, 80.)

Postponements at the discretion of the court.

By the proviso to *Rule* 8, p. 135, the judge may (if he sees occasion) order a cause to be laid over for hearing at some future appointed time. Under the rules prior to 1844 it was held that the S. C. will consider in appeal the justness of the exercise of the D. J.'s discretion in ordering postponement. (13263, *D. C. Colombo*, 2 *Aug.* 1837; *Morg. D.* 186: 1814, *D. C. Matura*, 9 *Aug.* 1837; *Morg. D.* 193.) But since the rules of 1844, the S. C. in one case "declined to interfere with the ruling of the D. C. with regard to a postponement, such being a matter in which the D. C. should be left to its own discretion."* (6868, *D. C. Colombo*, 9 *Dec.* 1850.) But in 1858 the collective S. C. did interfere with the discretion of the D. C. where it appeared to have been used without equal justice; inasmuch as postponement had been accorded to others on the same ground of postponement, viz. the Singalese new-year holidays;—and that the party was taken by surprise. (26041, *D. C. Kandy*, *Coll.* 13 *Aug.* 1858; *Aust.* 181.)

The following circumstances have been held to justify the D. C. in postponing, as a matter of discretion; but not as a matter of right:—The unavoidable absence, as from illness or other uncontrollable cause, of counsel,

* The suit seemed, however, to have been vexatious, as the plaintiff admitted tender of his debt to him.

proctor, or agent, is a sufficient reason for *delaying* a hearing, if the joint interest of the parties and the public are not materially prejudiced by the delay. And the party applying for the delay must pay the costs of the day, or any others arising from the postponement. (13,263, *D. C. Colombo*, 2 *Aug.* 1837; *Morg. Dig.* 186: 6105, *D. C. Colombo*, 8 *July*, 1835, *Morg. D.* 54.)

Postponement on ground of absence of party.

Although a D. C. is always at liberty, subject to control, in appeal, to grant a reasonable time to the plaintiff or the defendant for the purpose of bringing all parties together (which is generally the most convenient course), yet the circumstance of one or more joint defendants being absent, or not to be found, by no means renders continued postponements an incumbent duty. The case can be decided between the parties present, leaving it to the plaintiff to follow his proceedings by default against the absentees, and to the latter when they appear. (1814, *D. C. Matura*, 9 *Aug.* 1837; *Morg. D.* 193.)

Postponement on account of illness of proctor.

The illness of the proctor of any party to a suit, if known to the court at the time, is a good cause for postponing the trial, on judgment of the costs of the day. (3582, *D. C. Ratnapoora*, 9 *July*, 1845.)

Proceedings at trial.

At the trial of any cause, the party upon whom, in the opinion of the court, the burden of proof lies, must first state his case, the nature of the evidence in support of it, and the law applicable thereto, and must then produce his evidence. The adverse party must, after him, in like manner, should he consider it necessary, state

his case, the nature of the evidence already adduced, as may appear to him requisite, and must then produce his evidence. It is then competent for the party who commenced to reply generally, and to produce evidence in reply. And if any question of law arises for adjudication, upon the evidence adduced in reply, it is competent to the adverse party to address the court thereupon. (*Rule*, 18 *Dec.* 1845; *R. and O.* p. 156.)

Right to begin.

It must be observed that, under this rule, the right to begin, which carries with it in general the last word, *i. e.* the right of reply, depends upon the burthen of proof, or *onus;* the question of *onus* is therefore always of importance, but will not be discussed in this place, as it is in reality a question of evidence, and will be developed under that head. But the question upon whom the burden of proof lies should be disposed of with reference to the pleadings of the parties, and "any declaration, admission, or denial," given in answer to *vivâ voce* examination, under the 8th rule, p. 63, with a view to explain the pleadings, or supplying any defects in them, and "entered in the proceedings as part of the pleadings of the party making them. (16308, *D. C. Caltura*, 14 *Jan.* 1857: 28098, *D. C. Kandy*, 21 *Jan.* 1857; *Austin*, 200.)

In consequence of the frequency of appeals as to the right to begin, and the order in which evidence should be given, the S. C. has ruled that these and all other matters in the conduct of a cause are things in which

the presiding judge ought to be intrusted with very large discretionary powers, and that that court will not interfere with the mode in which those discretionary powers are exercised, except in cases of gross error and serious hardship arising from such error. (15830, *D. C. Kornegalle*, 15 *July*, 1862.)

The form of trial above given is practically much modified by the 10th (*ante*, p. 262) and by the following rule.

Mutual examination of parties.

"Any party to a suit, or his advocate or proctor on his behalf, shall be allowed to examine, with all the latitude of cross-examination, any adverse party to a suit, not only at the commencement thereof, as provided by the 10th rule, but at any subsequent stage thereof, if the Judge shall consider that it would conduce to the purposes of justice: provided that no questions shall be put which the court shall not consider strictly relevant to the point at issue, or which shall be abusive or insulting in their nature or language, or the answer to which would have the effect of criminating the party answering: and provided, also, that no party to a suit, whether plaintiff, defendant, or third party, shall be examined upon oath.*

Punishment for false statement.

But if such party shall, in his answers to such questions, or to any questions which may be put to him, either at the commencement or in the progress of a suit, state that which the court shall be satisfied, by other evidence, is false; or if he shall, by evasive, contradictory, or prevaricating answers, at-

* *I. e.* as a party (No. 9 of 1852, § 3).

tempt to deceive or mislead the court, and the judge and two of the assessors (if any) be satisfied that such was his intention, the court shall and may forthwith sentence such party to such punishment as shall be considered adequate to the nature of the offence; taking into consideration always that there has been no violation of the sanctity of an oath, and mitigating such punishment accordingly. Provided further, that such examination of a party shall not preclude the party so examining him from adducing any further evidence, if necessary, to the point on which such examination shall have taken place." (*R. and O. Sect.* 1, R. 29, p. 68.)

In consequence of these rules, a trial very often commences by the party having the right to begin, examining the opposite party; and if the former considers that the examination of the latter renders it unnecessary for him to call further evidence, he should *close his case* (27217, *D. C. Kandy*, 21 *Jany.* 1857; *Coll. Austin*, 194), and call upon the defendant to enter into his defence. The answers given are evidence in favour of the plaintiff, and not statements in the pleadings which can affect the question as to the burden of proof. The whole of a party's admissions must be taken together, and not a part only of them (16308, *D. C. Caltura*, 16 *Jany.* 1857: 20179, *D. C. Colombo*, 27 *May*, 1839; *Morg. D.* 279); and the last cited rules leave to the District Judge an entire discretion as to allowing or disallowing the cross-examination of the litigant parties at any time required

(2153, *D. C. Matura*, 4 *Jan.* 1837; *Morg. D.* 129); and he should be careful not to allow an examination under *these* rules, at the commencement of a trial, for the purpose of trying to throw the burden of proof upon the defendant; the plaintiff would thus be able to divide his case, and to adduce that evidence, after the defendant's witnesses have been heard, with which he ought to have led in the first instance; and, indeed, to do so with the sanction of the judge, who, having ruled that the *onus* was on the defendant, cannot properly refuse afterwards to hear evidence for the plaintiff. Undue weight is also thereby attached to isolated answers, drawn by questions skilfully framed by cross-examining counsel; and parties are thus held bound by admissions which they never intended to make, and which may be quite opposed to the real facts of the case. By an adherence to the course here prescribed—a course quite in accordance with the rules and orders—this inconvenience, and the injustice to which it may sometimes give rise, may easily be avoided. At the trial, the issues should be well ascertained, and the party who is to begin should come prepared to do so. The examination that takes place *then*, is not in the view of explaining the pleadings, but of supplying the evidence. (28098, *D. C. Kandy*, 21 *Febr.* 1857; *Coll. Austin*, 200.)

Judge may summon parties, &c. to attend.

And, in order to give the greater effect to the preceding provision, the judge may require the attendance in court, at any time, of all the parties to a suit, and of

all persons called upon to make affidavit in the progress of a suit, in order to their mutual examination; provided they be at or near the place where the court is holden. If they, or any of them, be at a distance, it shall be discretionary with the court to require or dispense with such attendance, reference being had to the importance of the case, the necessity of such attendance, and the degree of inconvenience to which it would subject such absent parties or deponents. (*R. and O. Sect.* 1, § 31, p. 69.)

Mutual examination allowed at any stage.

Looking to the general and extensive powers given under the 29th and 31st rules, and the 14th clause of No. 12 of 1843, which enacts that every party to a civil suit, in the District Court, shall be liable to be summoned and examined, either *vivâ voce* in open court, or by interrogatories to be issued by the court, but not upon oath, if the court considers any such examination necessary; and to be punished for any false statement as for contempt.* The Supreme Court has held that the mutual examination of parties may be allowed at any time by the court (even before appearance, or issue joined), if it thinks fit, with all the latitude of cross-examination. (20044, *D. C. Kandy*, 28 *Mar.* 1848; *Coll. Austin*, 114; 14526, *D. C. Chilaw*, 23 *Sept.* 1851.)†

* This clause is not repealed by 9 of 1852, § 3.

† Of course in these examinations a party is not bound to criminate himself; and it has been held that when he is examined as a *party* his counsel can take the objection, though he must take it himself if examined as a *witness*. (27168, *D. C. Kandy, Austin*, 183.)

It may happen that the party who begins may rely on the admissions of the other party, and close his case after examination under the above rules, and that the examined party may call no witnesses. On such an event, in deciding the case, whether on pleadings only, or with examinations of parties (but without witnesses), the D. C. should only decide on the law, and on the facts established by admission, or the documents produced, or admitted by them. (3046, *D. C. Wellegame*, 2 *Oct.* 1838; *Morg. D.* 247.)

In applying the above rules, it should always be remembered that the examination of a party at all is at the discretion of the judge, and that his discretion will not be overruled, if founded on good reason; as, for example, in a suit for divorce *a mensa et thoro*, a refusal to allow the defendant to be examined is good, as every such separation assumes the possible reconciliation of the parties. (16975, *D. C. Galle*, 12 *Nov.* 1856; *Lor. R.* 219.)

Of course, if an examination *vivâ voce* is required at any other time than at the trial, the party to be examined must have notice to attend, and that notice must be personal:—(*semble*)—unless otherwise ordered. (16500, *D. C. Galle*, 26 *Jan.* 1856; *Lor. R.* 16.)

Judgment.

The evidence being closed on both sides, or on behalf of the party appearing in cases heard ex-parte, and the opinion of the District Judge and of the assessors having been taken and recorded, when necessary,

as directed by the charter (§ 30, p. 8), the judge shall pronounce judgment *vivâ voce* in open court; or, if the judge shall require time to consider of such judgment, he shall postpone the decision of the case till the following day, on which day he shall pronounce his judgment in the presence of the assessors (if any) who heard the evidence; which judgment shall be reduced to writing and recorded, and shall state the grounds of his decision, whether such decision be in accordance with the opinion of the assessors (if any) or not, and shall also state by whom the costs shall be paid, according to the 40th rule provided in that behalf. (*R. and O. Sect.* 1, § 34, p. 69.)

Grounds of.

Judgments are either interlocutory or final; interlocutory judgments, which are in the nature of exceptional proceedings, are treated of in the chapter following this.

Final judgments.

A final judgment is such as at once puts an end to the action, by declaring that the plaintiff either has or has not entitled himself to recover the remedy he sues for. (*Bla. Com.* iii. 398; *Voet ad P.* xlii. 1, 17.) A final judgment against the plaintiff may either be a final decree or a nonsuit, dismissal of the case, or an absolution from the instance of the defendant.

Nonsuit, dismissal, and absolution from the instance.

A nonsuit, dismissal, and absolution from the instance, are all, practically, the same decree. (11470, *C. R. Batticaloa*, 10*th Oct.* 1862: 8881, *D. C. Jaffna*, 4 *Nov.* 1862: 2027, *D. C. Islands*, 6 *May*, 1835; *Morg.*

D. 42: 1981, *C. R. Galle, Nell.* 126; and see *Nell.* 217, 242, 245, 249.) The term "nonsuit" means a dismissal of the plaintiff's claim, and cannot be applied to a judgment against the defendant. (2989, *D. C. Galle*, 30 *July*, 1834; *Morg. D.* 19.)

Grounds of nonsuit.

A nonsuit ought only to take place on the ground that the plaintiff has not adduced legal evidence to support his cause of action—either from his evidence being defective, or from the absence of his witnesses, if he declines to pay the costs of the defendant's witnesses, or from their absence when they cannot be found, or from his admitting his inability to complete his case—but not on the ground of the want of credibility or equivocation of the witnesses, or parties, if their evidence is legally sufficient, nor on the ground that certain witnesses were not summoned, unless the evidence is legally insufficient; nor on the ground that he has claimed more than his due (that question affecting the costs only). (1270, *D. C. Putlam*, 27 *Aug.* 1834: 124, *D. C. Amblangodde*, 14 *Oct.* 1835; *Morg. D.* pp. 21 and 59: 21550, *D. C. Colombo*, 8 *Dec.* 1842; *Morg. D.* 343: *Marshall*, 507-8.)*

A dismissal of the case, as above stated, is no more than a nonsuit, especially where evidence has been

* Nor can a plaintiff in trespass—his title being put in issue by the answer—be nonsuited because he has not joined co-heirs; he is entitled to judgment *pro tanto*, with reservation of the rights of co-heirs. (12227, *C. R. Harrispattoo*, 26 *Jany.* 1864.)

given only for the plaintiff. A court, therefore, if it intends its decision to be final, should give judgment for the plaintiff, or the defendant, in express and unmistakable terms. (16002, *D. C. Caltura*, 15 *Oct.* 1861.) Conversely, if the defendant succeeds upon evidence called for himself, an express final judgment, and not a nonsuit, should be recorded for the defendant. (16509, *D. C. Galle*, 3 *Dec.* 1858.)*

Plaintiff may consent to nonsuit.

A plaintiff may elect to be nonsuited before evidence has been called on the part of the defence (7696, *C. R. Negombo*, 5 *June*, 1855; *Nell.* 247); but it is not competent for a court to nonsuit a plaintiff present in person, or by counsel, without hearing his evidence, except with his consent. (18802, *D. C. Colombo*, 19 *July*, 1856; *Lor. R.* 157.)

One effect of consenting to a nonsuit, either personally or by proctor, is to deprive the plaintiff of any right of appeal. (5730, *C. R. Caltura*, 9 *Feb.* 1856; *Lor. R.* 23.)

Effects of nonsuit.

A dismissal or nonsuit in a former action (even if there has been no appeal, and costs have been paid) is not conclusive against the plaintiff, and does not bar him from establishing his claim in another action, if he can show, by evidence not in his possession at a former trial, that he has a good cause of action. (84, *D. C. Caltura*, 22 *Dec.* 1834; *Morg. D.* 29: 2027, *D. C.*

* In land cases, the court ought so to frame a decree of nonsuit as not to infer title in the defendants.

Islands, 6 *May*, 1835; *Morg. D.* 42: 3263, *D. C. Batticaloa*, 12 *Nov.* 1836; *Morg. D.* 104: *Marshall*, 508: *Nell.* 165.) Even more than one nonsuit is no bar. (*Nell.* 192.)

Exceptions to the above rule.

An exception is, however, made in very extreme cases; as, for example, where a case is kept hanging over for a long time by adjournments on the motion of the plaintiff, especially if the plaintiff has not paid the *batta* of the defendant's witnesses, and if the suit appeared to originate in malice. Under such circumstances, the S. C. will order a nonsuit or dismissal to be considered completely final. (*Marshall*, 509.)

Another exception is, where there is more than one defendant in an action of contract; as, for example, a sale. If the plaintiff gets judgment against one defendant, and nonsuit as to the other, he cannot afterwards bring another action against the defendant who was nonsuited—as, in that case, he would recover twice on the same cause of action: nor is this mended by a judgment in the second suit, "that he is not to recover more than so much, and costs, in both judgments put together," as that would be both allowing the court to alter its own decree (as the first was for the whole sum) and the fiscal to apportion execution. (8970, *C. R. Matelle*, 29 *Nov.* 1859.) This, however, would not apply where the S. C. affirmed a nonsuit, but set aside a counter-claim in reconvention. (24119, *C. R. Colombo*, 6 *Sept.* 1863.)

Nonsuit set aside.

Nonsuit can of course be set aside in appeal, and the S. C. will do so (if it approves) on the recommendation of the court below, and send it back for rehearing. (31101, *D. C. Kandy*, 24 *June*, 1862.)

Judgment must not be *ultra petita*.

A judgment cannot be given for more than is claimed, or *ultra petita;* for that is, in effect, adjudicating on that which is not in suit before the court; though such a judgment would be bad for the excess only, and not altogether. (31897, *D. C. Kandy*, 23 *July*, 1860: 2127, *D. C. Wadimoratchy*, 27 *Nov.* 1840; *Morg. D.* 284: 2462, *D. C. Matura*, 29 *June*, 1837; *Morg. D.* 166: 84, *D. C. Manaar*, 1 *Mar.* 1837; *Morg. D.* 140: 3803, *C. R. Jaffna; Nell.* 125.)

But may be *pro tanto*.

But a judgment may be given *pro tanto*, where another heir or plaintiff ought to have been joined, and subject to that other's interest. (1903, *C. R. Badulla*, 3 *Dec.* 1855; *Nell.* 252.)

Judgments to be definite and certain.

Judgments should be definite and certain; either *per se*, or in relation to something else; as where the defendant is condemned in a claim comprehended in a will or any other instrument; or to interest from a given period, on an ascertained sum, and where the rate of interest is determined either by law or local custom. For if the judgment is such that it does not put an end to the litigation, it may afford the material itself for a second suit. (*Voet*, xlii. 20-1.) As if a judgment on a dispute concerning boundaries did not settle the boundaries. (16241, *D. C. Kandy; Austin*, 79.) Thus

a judgment that decrees land in favour of the plaintiff "until the defendant can show a better title," is bad in law, as uncertain, and not putting an end to the contest between the parties. (90, *C. R. Jaffna*, 12 *Jan.* 1857: 3323, *Chavagacherry; Nell.* 218.) If, however, a judgment has been reversed by the S. C. upon a condition—if the condition is not fulfilled, the original judgment of the court below revives. (10196, *D. C. Caltura*, 14 *Jan.* 1857.) Indefinite and uncertain judgments are generally remanded back to the court below by the S. C. for amendment.

Yet certain uncertain judgments can be upheld; as, if a thing is claimed in kind, or two things in the alternative; or if the claim is for *res universalis*, as the restitution of a dowry, or inheritance; or specific performance, or the payment of arrears; and like things, which can acquire certainty in execution. (*Voet*, xlii. 1, 20.)

A District Court cannot set aside, alter, or erase the whole or any part of its own decree. (803, *D. C. Matura*, 9 *Aug.* 1837: 1624, *D. C. Walligamme*, 20 *Aug.* 1836: 1859, *D. C. Caltura*, 28 *Oct.* 1835: 6499, *D. C. Colombo*, 26 *Nov.* 1836: 2992, *D. C. Ruanwelle*, 6 *July*, 1836; *Morg. D.* 193, 79, 60, 111, 90.)

A D. C. cannot set aside its own decree.

But to this rule there are exceptions. 1. It has, in common with other courts, the power of rectifying a *mere mistake per incuriam* in its own decree—any party, thinking himself aggrieved by the amendment, having the power to appeal. Thus, though it cannot annul a

Exceptions to the above rule.

decree on the ground of erroneous computation, it may correct it by correcting the computation, similarly with regard to mere verbal mistakes. (*Marshall*, 250-1; *See. tit.* "*Supreme Court.*")

The principle would seem to be, that this power must apply to open and palpable mistakes, and not to points that *may* be mistakes, and yet may not. Thus, if a decree says nothing about "costs," an addition, decreeing costs, cannot afterwards be added, for *non constat* it was not the intention of the court to give costs, and if not given, there is no right to recover them. (*Marshall*, 251-2: *Voet*, xlii, 1, 21.) A District Court has also full power to set aside a judgment, on proof that the proceedings on which that judgment was obtained were altogether irregular; especially if that irregularity is referable to the act of the officer of the Court itself. (6669, *D. C. Ratnapoora*, 8*th July*, 1859; *Coll.* and see 26621, *D. C. Kandy; Austin*, 89.)

Reasons for a judgment, when necessary.

In order to give more certainty to final judgments, or definitive sentences, the D. C. J. whether he sits with or without assessors, and whether his decision follows the opinion of the assessors or not, must state in his judgment the grounds of his decision. (*R. and O. Sect.* 1, R. 34, p. 69; No. 21 of 1852, § 1.) But such a judgment would not be *no* judgment because unaccompanied by reasons. Where the D. J. simply states the way he finds, and gives no reasons for the finding, the S. C. will send back the case for the reasons of the

judge below; except where it is very clear, from the evidence and proceedings, that the judgment is right, in order to avoid delaying the successful party. (27966, 10 *June*, 1864; and *Austin*, 59, 48; 14099, 16 *Dec.* 1844; 11760, 7 *Febr.* 1843; all of *D. C. Kandy:* and 25569, *D. C. Colombo*, 15 *Apr.* 1840; *Morg. D.* 285.)

As, in this chapter, it is intended only to trace the ordinary course of a suit in the District Courts up to judgment, nothing is said about the effect of a judgment, as *res judicata* in Ceylon or elsewhere; but that subject will be discussed in a separate chapter.

CHAPTER VIII.

DISTRICT COURTS.—EXECUTION.*

Execution, what?

EXECUTION is the legal term to denote the writ which a court grants to a party, to satisfy any judgment which may have been recovered against the adverse party, whether by putting him in possession of land, or by realizing the sum of money awarded to him, or by any other mode which the terms of the judgment may render necessary. (*Marshall*, 159.)

Three modes of execution.

It is in the discretion of the District Court to grant execution in any one of three modes.

1. Simple process against property.

2. Simple process against the person.

3. Compound process, consisting of a writ against property, and a writ against the person.

In which case the writ against property must be executed first, and the writ against the person must be executed only when the writ against property has been tried and found to be insufficient to procure prompt satisfaction. (21310, *D. C. Galle*, 30 *June*, 1864; and *R. and O.* 11*th July*, 1840, R. 4, p. 123.)

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* In this chapter, the words "fiscal, &c." mean, "the fiscal, his deputy, or officer acting under his authority."

The granting or withholding the twofold execution is discretionary, in the first instance, in the District Judge; subject, of course, to appeal to the Supreme Court as to the exercise of that discretion. (*Marshall*, 159.)

Writs of possession (to put parties in possession of land, or trees, &c.) are in truth writs against property, and must be treated as such. (*Marshall*, 159.)

Further execution.

Execution may be issued for the balance of a sum decreed, and the forms may be altered to meet that case. (*Marshall*, 159.) And, similarly, a creditor may proceed against property, although he has previously gone against the person of his debtor. (11608—11717, *D. C. Batticaloa*, 20 *Marshall*, 1854.) Where compound process has been granted, if the writ against property is in force and unsatisfied, no rule is necessary before issuing the writ against the person: and if the writ against the person has been executed, and the prisoner is let go, or escapes, he may be re-arrested under fresh writs, until the debt is satisfied, or he be discharged by insolvent process. (62, *D. C. Colombo*, 23 *Dec.* 1854.)

Stale writs, how renewed.

If no execution is taken out within twelve months after judgment, it must not issue without a previous rule on the opposite party to show any cause he may have against its issuing. (*R. and O.* Sect. 1, R. 35. p. 69.) And if a year expire after one writ sued out, another rule must issue.

Execution and against married persons.

When judgment is obtained against husband and wife, execution can issue against both the person and property of the husband, and against the property, but

not against the person, of the wife during coverture. (4086, *D. C. Batticaloa*, 24*th Apr.* 1839; *Morg. D.* 271.) Also, where the law admits such an absolute and distinct separation of interest and property between husband and wife that the wife can sue the husband, she can obtain execution against his property, but not against his person. (*Marshall*, 160.)

Execution in the case of paupers.

Where a party obtains judgment in *formâ pauperis*, execution should be issued without a stamp; because, until execution is productive, the pauper must be supposed to have no more means to pay the costs than before judgment recovered. (*Marshall*, 161.) Execution may issue against the person of a pauper for costs. (See "Costs.")

In the case of conflicting suits.

Where there have been two suits between the same parties, respecting the same object, and the decrees are conflicting with each other, the decree prior in date has the preference, without reference to the second, unless the first has been obtained by fraud. The second may be enforced as far as the execution of the first has left that practicable. (*Marshall*, 162. See "Preference.")

Execution in other districts.

If a defendant, against whom there is a judgment, resides in another district, or has not sufficient property in the district in which judgment was obtained to satisfy the judgment and costs, the plaintiff may, on the return of the writ to that effect, move for execution against the person or property (or both), within any other district, for the amount, or for any unsatisfied balance of the judgment. The writ must be transmitted to the judge of the other district, who must endorse it, and direct it to

the fiscal of his district, and, when executed and returned, transmit it, with the sum leased, or the body of the defendant, to the court out of which execution issued. (*R. and O. Sect.* 1, *Rule* 36.) This rule must be strictly adhered to in all its particulars. (See *Marshall*, 162.)

What may be subject to execution.

All property, moveable or immoveable, debts due to a defendant, even though not yet recovered from his debtors, and property which has been decreed to a defendant, are subject to be levied in execution. (*Marsh.* 163.) Even goods bought and not paid for are liable in execution; and if bought on a covenant of resumption on non-payment, they become liable, if the privilege of resumption has not been legally exercised. (1735, *D. C. Kandy*, 9 *Dec.* 1835; *Austin*, 16: *Marsh.* 163,) So, also, where a donor makes a valid gift, being in debt at the time of the gift, the property so transferred is liable to be sold in satisfaction of his debts. (20929, *D. C. Kandy*, 27 *March*, 1850; *Austin*, 123.)

Mode of execution.

In execution against property, the fiscal without delay requires the debtor to pay the amount of the writ, or to point out and surrender unclaimed property sufficient to satisfy it; if the debtor fail to do so, the party suing out process may point out the debtor's property, and in default of any being pointed out, he may be arrested by process of execution against his person. (*R. and O.* 11 *July*, 1840, R. 4, p. 123.) As soon as property is seized, a list of it must be forthwith made and signed by the fiscal, &c. to be delivered to the person in possession, or, if no one is in possession, to the headman or constable

of the division, and copies must be deposited in the fiscal's return and annexed to the writ. (*Idem*, R. 5.)

Order of execution.

The fiscal ought to be careful only to take that property which he has good reason to believe belongs to the person against whom execution has been issued. (*Marshall*, 163.) And it is proper and usual to take the moveable property first, and not to touch land unless the other property is insufficient.

Claimants.

When the fiscal seizes property which other parties claim, the claim to the property seized cannot be disposed of in a summary manner; but the right of the claimant must be ascertained and adjudged, in a suit for that purpose, in accordance with the clear meaning of § 15 of Ord. 1 of 1839. (14245, *D. C. Chilaw*, 25 *May*, 1852: 14432, *C. R. Galle*, 3 *Dec.* 1860.) If the claimants against execution are out of possession, they must be the plaintiffs in such a suit; but if they are in possion, the parties out of possession must commence such actions to try claims made upon executions. (534, *D. C. Jaffna*, 1*st Oct.* 1850); but whether the plaintiff or defendant, the case does not say. Marshall (p. 164) argues that it would defeat justice to call upon a plaintiff to sue the claimants. By § 15 of 1 of 1839, the person in possession is, for the purposes of execution, to be considered the proprietor, until the contrary is shown, or his title is so suspicious, from force or fraud, that the court may call upon him to prove it. If a groundless claim is put in to defeat or delay execution, the claimant is liable to treble costs;

or, in failure of payment, to imprisonment, with or without hard labour, at discretion. (§ 16, of 1 of 1839.) According to the old practice before 1839, the claimant was obliged to give security on instituting proceedings to try his right (2339, *D. C. Colombo*, 27 *Feb.* 1839);* but there is no case to show what the modern practice is. A claimant in execution cannot object to his claim being set aside on the ground that he had not been noticed, when once he has withdrawn his claim and failed a second time to establish it. (8224, *D. C. Jaffna*, *Lor. R.* p. 141.)

Bill of sale implies ownership.

In conformity with the rule that the person in possession shall be considered the *primâ facie* proprietor, it has been decided that the holder of a bill of sale shall be considered such *primâ facie* owner; and that, where land is seized by virtue of an execution against such holder, a claimant is bound to show *his* title. (*Marshall*, 165.)

Stay of execution.

On the other hand, the non-production of the title-deeds of the lands seized is not, of itself, a ground for postponing the sale of it in execution. In a case in which the fiscal objected to sell the land without the title-deeds being produced, or unless the plaintiff gave security to indemnify him against any damage, the Supreme Court held that the fiscal was sufficiently secured by statute; and that, if he followed the rules laid down for his guidance, it was difficult for him to go wrong; but that, if any difficulties should arise, as from

* Ord. 1, of 1839, is dated 18th Dec.

the boundaries of the land being too undefined to permit of the proper notice being given, or in similar cases, the fiscal should then report the difficulty to the District Court, which would issue such orders as might be necessary. (*Marshall*, 165.)

Security for stay of execution.

By the 6th rule of the *R. and O.* of 11 *July*, 1840, p. 132, the fiscal must not stay the seizure, unless the claimant, if not in possession, furnish the fiscal forthwith with a statement of the nature and particulars of his claim, and give good and sufficient security, to the satisfaction of the fiscal, to be responsible for the consequences to the fiscal for such stay. Nor unless the claimant, if in possession, gives security for costs and damages and for delivering over the property in the same condition, or, if perishable, its value. In either case, the fiscal may then hand over the property to the claimant, after making an inventory: he must also make a special return to this court. The fiscal is entitled to reasonable time to satisfy himself concerning the security. (*Marsh.* 166.) The above rule contemplates a *claim of right*, made by a third person, to the property seized; but the court may be moved for, without any reference at all to the property seized or to be seized, to stay execution, on the ground of the judgment having been obtained by fraud, or for many other reasons, each of which must be decided on its own merits; but the prosecution, by the losing party, of a witness for perjury, is not necessarily a ground for staying execution. (*Warwick v. Bruce*, 4, *M. and S.* 140; *Marshall*, 166.)

Securing property seized in execution.

As it may happen that property may be seized or sequestrated in places where there are no adequate means for securing it; in such case, the fiscal or his officer may cause the seized property, &c. to be removed to some fit place of security (the expense of removal to be borne by the debtor in the first instance, and, if not previously paid by him, out of the first proceeds of the seizure, or sequestration, or may be recovered by process, or *parate* execution, at the suit of the fiscal, against any other property of the debtor), or may require the owner or possessor of the property to take charge of it until the sale, on giving satisfactory security. And if such person fail to give such security, the party suing out the writ may be required to take charge of the property, giving the like security; and if, on being thus required, he fail to take such charge, or to give such security, the fiscal, or his deputy, must make a special return thereof to the court, and is no longer responsible for any injury, &c. to such property. (*R. and O. July* 11, 1840, R. 7, p. 123.)

The property being duly seized, the fiscal or his deputy must proceed to sale, in manner following:—

Notice of sale.

1st. In the case of moveable property, he must give the usual notice of sale, by beat of tom-tom, both at the place of sale and of seizure, not less than ten days, and not exceeding thirty days, before the day of sale, unless the time be enlarged by order of court, and must specify the property as to suit, and the place, day, and hour of sale.

In the case of immoveable property, the like notice

must be given, and the fiscal or his deputy must cause three copies of notice of sale, both in English and in the native language prevailing within the district, one of which he must transmit to the government agent, or his assistant, who is required forthwith to affix it at his office, or usual place of publishing notices; one, the fiscal, &c. must cause to be fixed at the Court House; and the other to be delivered to the principal headman of the village, or constable of the division in or nearest to which the property is situated, to be by him affixed on some conspicuous spot on the property for sale; each of which publications must be made ten days, at least, before the sale.

Advertising sale.

Whenever the property seized under one writ exceeds one hundred pounds, the fiscal, &c. must, from time to time, as most convenient, advertise its sale, enumerating briefly the goods, the nature and situation of immoveable property, and the time and place of sale, in the Government Gazette, and in any other Ceylon newspaper. And no such sale shall take place until it has been so advertised once, at the least, twenty days prior to the sale. And all cost of advertisements must be deducted out of the first proceeds of sale. The fiscal, &c. is at liberty, at the request of either party, on payment to him of the cost of the publication by the applicant, to advertise any sale of property in the same manner, although less than one hundred pounds; and the fiscal, &c. may, in like manner, advertise such sales without any requests from either party, if he consider it

beneficial, and the costs may be deducted out of the first proceeds of sale.

Stay of sale by fiscal.

If any property, after seizure, but before sale, is claimed by any person not in actual possession, the fiscal, &c. must not stay the sale, unless the claimant furnish the fiscal, &c. with the statement and security required by the 6th rule, when the claimant is not in actual possession; and if such claim be made by any person in the actual possession, then the fiscal must not stay the sale unless the claimant give that security.

Fiscal's fees.

The sale must be by an officer of the fiscal, or a person authorised by the fiscal, &c. under his hand; and the fiscal, &c. is entitled to three per cent. on the proceeds actually recovered, and return thereof to the court, in respect of sale and re-sale of moveable property, and two per cent. on the sale of immoveable property, when the proceeds do not exceed seven hundred and fifty pounds; but when they exceed that sum, the fiscal, &c. is entitled to fifteen pounds, and ten shillings per cent. on every hundred pounds over seven hundred and fifty pounds. And after the seizure and publication of sale, in which the sale is postponed or stayed at the request or with the concurrence of the party suing out the writ, the fiscal, &c. is entitled to half of the above fees, on the estimated value of such property, from the party at whose request the writ is stayed; and, in default of immediate payment, such fees may be recovered by process of parate execution, at the suit of the fiscal, provided such half does not exceed five pounds sterling.

Mode of payment for property sold.

The sale of moveable and immoveable property (the value of which latter does not exceed five pounds) is for ready money only; but when any immoveable property, sold in one lot, amounts to more than five pounds, a deposit of one fourth of the amount of sale must be made, with sufficient satisfactory security for the residue. And where immoveable property, sold in one lot, exceeds four hundred pounds, the payment of the residue must be made by three equal quarterly instalments, with interest at nine per cent. per annum, charged from the sale until the price is paid; and, in case of non-payment of any instalments, the property may, after one month's notice from the fiscal, &c. be re-entered on and re-sold at the risk of the purchaser.

Course in case of non-payment of deposit, &c.

If, at the sale of immoveable property, the declared purchaser does not forthwith pay the deposit required, and give satisfactory security for the residue, the next highest bidder shall be declared purchaser, and required to make like deposit and security, and similarly the other bidders in rotation: and each person failing to make deposit and give security is liable to the difference between his offer and the sum finally settled at the sale, to be levied, on non-payment within one week after demand in writing, by parate execution on the plaint of the fiscal, which plaint the fiscal must make forthwith, supported on the affirmation of the fiscal, &c. or officer who conducted the sale, and parate execution then issues.

If the purchaser of any immoveable property does

not pay the instalments, or the amount due according to the conditions of sale and the security given, and on a second sale (publication whereof is made the same as the first sale) the amount of the purchase falls short of the first sale, parate execution, on the plaint of the fiscal, in manner above mentioned, issues against the property and person of the first purchaser and his sureties, if any, to recover for the person suing out the writ the difference between the second and first sale; and the like course is to be observed in any subsequent sale, necessary by failure in payment.

The sale of immoveable property must be conducted on the spot, unless the court otherwise directs, or unless, on application in writing to the fiscal, &c. the parties consent to its being elsewhere.

When the purchaser of immoveable property has paid the price, and furnished the fiscal with stamped paper of the amount by law required, the fiscal must make, execute, and deliver to the purchaser a conveyance of the property on such stamped paper, and a duplicate, executed without stamp, and transmitted to the District Court, as is required to be done by notaries in respect of deeds executed before them; and the fiscal's officer, by whom such conveyance and duplicate are drawn up, is entitled to charge the purchaser, when the purchase is under three pounds, one shilling; when it exceeds three pounds, two shillings; ten pounds, three

shillings; twenty pounds, five shillings; and fifty pounds, seven shillings and sixpence, and no more.

A map of the premises, on the application of the purchaser, must be annexed to the conveyance by the fiscal, upon the purchaser paying, in advance, the expenses thereof.

If the party who issued execution purchases any of the property, the amount is allowed in reduction of his claim; and if it exceed his claim, he only pays the residue, unless otherwise directed by the court. No conveyance, in any such case, is made by the fiscal to him but under order of the court; and the fiscal, &c. is entitled to his fee, as if the amount allowed were paid into court.

Copies of the foregoing rules, together with forms translated into the native language in each province, must be suspended in the office of every fiscal and deputy fiscal, and circulated by the fiscals amongst the headmen in their provinces.

The above is an abridgment of the rules of 11th July, 1840 (p. 123), relating to sales by fiscals. The following points have been decided by the Supreme Court upon the same question.

Cases.

A sale in execution is an assignment by operation of law, and the purchaser must take the property, subject to the same conditions and liable to the same forfeitures as it was subject and liable to in the hands of the original owner:—it does not give an irresponsible title

to the purchaser against all claimants: it is no bar to the claims of other parties merely because they have not contested it previously to the suit; and where the plaintiff had a previous interest in and knowledge of the land in dispute, and consequently of the real claims of all the parties interested, or had a title thereto, he could have no possible reason to allege peculiar hardship in his case for ignorance of other claims existing. (266, *D. C. Tangalle*, 29 *Oct.* 1836; 7989, *D. C. Negombo*, 16 *Dec.* 1833: 5663, *D. C. Matura*, 20 *Apr.* 1836; *Morg. D.* 12—78—103.)

Again, the non-payment of the purchase-money within the stipulated time does not exact an absolute forfeiture, but merely subjects the purchaser to the risk of a re-sale at the discretion of the fiscal. (2563, *D. C. Ruanwelle*, 30 *Sept.* 1835; *Morg. D.* 59.) Also, it by no means follows that, because a creditor did not assert his right at a fiscal's sale so earnestly as he might have done, he has forfeited his right to recover the debt due on a mortgage of the land sold. (2507, *D. C. Chilaw*, 13 *Jan.* 1836; *Morg. D.* 72.)

Arrest of the person.

As to the arrest of the person, it is enacted, by No. 1 of 1839, § 14, R. 7, that, after any person has been taken into the custody of any fiscal under civil process, he shall not be allowed, by any fiscal, deputy fiscal, or gaoler, upon any pretence, to go beyond the walls or other enclosed limit of the prison in which he is confined, except under the order of a competent court

requiring his attendance, or on the application of such person to be carried before any such court for the purpose of preferring any complaint or application, on pain that the fiscal, in whose custody such person may be, shall be answerable to the party at whose suit he shall have been confined for the full amount for which he was in custody; if on a final judgment or otherwise, for such damages as the court may award thereon.

In reference to this rule, and to the forms 20 and 21 in the schedule to the *R. and O. Sect.* 1, p. 92, which are, first, a form of writ of arrest (20), which directs the fiscal to "seize and take A. B. and keep him safely, so that you have his body before this court *forthwith to satisfy, &c.*" and, secondly, a form of commitment under warrant of arrest, it has been decided as follows:—

The usual practice has been for the fiscal's officer, when he has arrested a debtor, to bring him to the District Court; but if neither the plaintiff, nor any one on his behalf, is in court, the debtor and the return to the writ are not actually brought to the notice of the District Judge on that day; but the debtor is taken to gaol, and brought up on the following day, when, if the plaintiff, or his representative, are still absent, the debtor and the writ are brought to the notice of the judge, and the debtor is discharged.

The 6th rule of § 14 applies to prisoners brought in on writs of commitment, and not to persons arrested merely on process against the person.

The law evidently intends that there should be a warrant of commitment before a debtor is permanently imprisoned, and the form thereof is given in the schedule to No. 1 of 1839, &c.

The 6th rule applies only to cases where the debtor has been committed by the court, and is meant to explain and enforce the duty imposed on fiscals by the last branch of the first section of the ordinance.

The execution of process, and making return thereof, are separately enjoined by the first branch of the clause of the ordinance.

The writ under which a fiscal arrests a debtor directs that the debtor shall be brought before the court forthwith; it certainly empowers the fiscal to keep him safely until brought before the court; but still the man is to be brought before the court *forthwith*, that is, with all reasonable possible speed; and that does not mean merely leading the man to the precincts of the court, and taking him away again if the adverse party is not present; but bringing him *into* court, and bringing the matter before the notice of the judge, with whom it rests to determine whether the warrant of commitment to gaol is to be made out or not. And this ought to be done on the same day, and in the course of the same sitting of the court, during which the debtor is brought in — the hour of the sitting being left to the court below.

The plaintiff should take care to lodge with the

secretary the proper stamp for commitment, which may be taken as a *caveat* against the prisoner's discharge, and might itself be considered as a motion on behalf of the creditor that the debtor should be committed, unless he showed cause to the contrary. The judge is not bound to ascertain whether batta is lodged or not. (33749, *D. C. Colombo*, 12 *July*, 1864.)

The fiscal may, however, permit arrested debtors to attend the public worship of their religion once in every fortnight, between the hours of 9 A. M. and 2 P. M. under a proper guard; and also, if there is no bathing place in the prison, to allow them out, under guard, once a week, to bathe at the nearest bathing place; but to go nowhere else, under pain of punishment to the guard. (No. 1 of 1839, § 14, R. 7.)

Civil process —when it may be served.

Civil process, whether at the suit of the Crown or not, cannot be served or executed between sunset and sunrise; nor on Sunday, Good Friday, or Christmas day; nor on any Christian clergyman, or any minister of any other religion performing public worship; nor on any one attending public worship. (*Idem.* R. 2.)

Forcing outer doors.

The outer door of any dwelling house must not be forced open in order *to seize the person* under civil process, issued at the suit of a *private individual.** But doors

* Query—does this imply that the door may be broken at the suit of the Crown, as in criminal process? Probably, in the case of the recovery of revenue debts, the non-payment of which are breaches of duty, *i. e.* delicts against the Crown, and quasi-criminal, breaking

may be forced open in execution of process against property; but not until admittance shall have been first demanded by the fiscal, or his officer, in the presence of the constable, police vidahn, or other headman of the division or village in which the dwelling is situate; in whose presence, also, if admittance be not granted, whether there is any person therein or not, the fiscal or his officer must force open the same. (No. 1 of 1839, § 14, R. 5.)

No arrest for debt under £10.

No person can be arrested in *mesne process*, or taken or charged in execution, upon any judgment obtained in any court in the colony, in any action for the recovery of any debt contracted since the 1st July, 1835, wherein the sum claimed or recovered does not exceed *ten pounds*, exclusive of interest and the costs recovered by such judgment. (No. 7 of 1853, § 104.) Under this clause, a person cannot be arrested for *mesne profits*, or for costs under ten pounds. (14015, *D. C. Kornegalle*, 18 *May*, 1860.)

NOTE.—The Articles of War and the Mutiny Act allow an action being entered, but do not permit execution against the person, or, as a necessary consequence, against the effects belonging to a defendant *as a soldier*. (6181, *D. C. Trincomalie*, 27 *June*, 1838; *Morg. D.* 238.)

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doors might be allowed in cases not provided for by special statute; but, query, would it be so in cases of contract, where the Crown bargains with the subject as if *both* were individuals?

CHAPTER IX.

DISTRICT COURTS.

EXCEPTIONAL PROCEEDINGS.

In the previous chapters has been traced the course of a suit, from libel to execution, nearly in the simplest form that a suit can take place; but the direct course of a suit is often diverted and interrupted by certain exceptional proceedings, which it will be the object of this chapter to describe.

Motions.

These proceedings are generally brought before a court by motion. All motions made to the court in the progress of a suit, to which the adverse party *has a right to object*, must be duly notified to such adverse party two days, at least, before they are made, in order that he may, if he think fit so to do, show cause at once against such motion being granted. But if he do not show cause in the first instance, then an order must issue, calling on him to show cause against the same within four days; and if he do not then show good and sufficient cause, the rule must be made absolute. (*R. and O. Sect.* 1. R. 33, p. 69.)

Motions need not be made in writing, except in some few special cases, where, from their nature, they necessarily require to be reduced to writing, in which case stamps are necessary. All other motions may be made *vivâ voce;* and no proctor is allowed to charge for drawing an application, unless where it is necessary to be reduced to writing. The proper proof of applications (and, if written, of their delivery) is the entry, by the judge, in the proceedings, of the motion made, and of its being granted or refused; which entry ought to be made of all applications, whether written or verbal. (*Supp. R. and O.* 9 *Oct.* 1834, p. 112; *Marshall*, 422-3.)

Notice of motions.

As to motions that require notice, the following motions have been decided to require notice:—a motion to file an amended answer; a motion to recall a writ of possession. (18337, *D. C.* 3 *June*, 1845: *Kandy, Austin*, 94, 36.)

According to English practice, a rule is not generally made absolute until two or three days after it is returnable. If a rule is made absolute in such a manner that either party may be said to be taken by surprise, the court will order the rule to be opened. It is not competent in any case to make a rule *nisi* absolute until the day after the day for which the rule is returnable, thereby giving the party on whom the rule has been served, grace until the sitting of the court on the fifth day. (27853, *D. C. Kandy*, 26 *July*, 1856; *Lor. R.* 160: *Austin*, 197.) Similarly, it is laid down in 20757, *D. C.*

Kandy, Austin 119, that a rule is not to be made absolute until *on* or *after* the day next after the fourth day.

A party in default is, *on the hearing of the motion* (of which he is to receive due notice), to show cause against the same; and if the plaintiff fails to make his motion on the day specified in the notice, he must re-issue the same for another day; and cannot, upon a subsequent day, in the absence of the party in default, and without any notice thereof to him, make such motion for judgment in default. (15938, *D. C. Kandy*, 10 *Oct.* 1844; *Austin*, 78.)

Whole day to show cause.

A party called upon to show cause upon any fixed day, is entitled to the whole of that day to do so. (15921, *D. C. Galle*, 23 *Dec.* 1854.)

The first and principal divergence from the ordinary course of a suit is called "Intervention," by which a new party may be introduced into the suit.

Intervention.

In any stage of a suit, *before execution*,* any third party may intervene in the suit, either in support of the claim or of the defence, or adverse to both; and such intervenient is subject to all the rules to which the plaintiff or defendant would be liable, as applicable to the case and relative situation of such intervenient. (*R. and O. Sec.* 1, § 32, p. 69.) This rule, following the civil law, in order to prevent multiplicity of suits, allows

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* See *post*, pp. 370-2.

a person, having an interest in the subject matter between litigants, to become a party to a suit already established. (1465, *D. C. Caltura*, 14 *Oct.* 1836; *Morg. D.* 59.)

Principle of intervention.

The principle of the law of intervention may also be stated thus:—that, if any third party considers his interest will be affected by a cause which is depending, he is not bound to leave the care of his interest to either of the litigants; but has a right to intervene, or to be made a party to the cause, and to take upon himself the defence of his own rights, provided he does not disturb the order of the proceedings, nor stop the progress of the case. The intervenients may come in at any stage of the cause, and even after judgment, if an appeal can be allowed against such judgment. It is immaterial in what state the cause is, if, at the time of the intervention, the proceedings are not deranged by it. (*Members of the Orphan Board v. Van Reewen*, 1 *Knapp's Privy Council Reports*, pp. 91-92; *Chilaw*, No. 13115, in appeal: *Voet*, B. 1, T. 1, Sec. 37, p. 249: *Gaile*, B. 1, Sec. 69, p. 125: 18321, *D. C. Matura*, 8 *Dec.* 1854:* 8628,

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Is Intervention to be compared to interpleader?

* In 28134, *D. C. Colombo*, 25 *March*, 1847, intervention is thus described: "The whole case ought to be viewed in the nature of a bill of interpleader (see *Drinkwater v. Goodwin*, *Corop.* R. 251, 255), which is stated to be similar in some measure to the *tertius interveniens* of the civil law (1 *Mod.* p. 239), and wherein the separate claimants can be compelled by the court to interplead, so that the court may adjudge to whom the debt is due, and the third person applying for relief indemnified and protected against their separate actions, if they have commenced the same." Now the following is the definition of interpleader:

D. C. Ratnapoora, 9 *June*, 1864.) There is no limit to the number of intervenients; and every person who takes part in a suit, who is not either plaintiff or defendant, is an intervenient. (2225, *D. C. Jaffna*, 19 *July*, 1837; *Morg. D.* 173.)

Voet's description of intervention.

"Besides there being a plaintiff and defendant in a cause, a third party, whenever occasion arises, may intervene, or make himself a party in it to protect his own right. Any one, indeed, can intervene, either with the purpose of shutting out any one of the litigants and of transferring himself into the cause, or that he may assist a party to a suit already commenced. When a third person transfers himself into the cause, he intervenes on the contention that the principal interest is his, and not that of the excluded litigant, who was trying his right in it. As, for example, if a father, on the divorce

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In *Smith's Manual of Equity*, "A bill of interpleader is one that is filed by a person from whom two or more other persons, whose titles are connected by reason of one being derived from the other, or of both being derived from a common source, and whose rights he cannot readily determine, have claimed the same thing, *wherein he himself claims no interest, and the object of which is to compel them to contest the matter between themselves, without involving him in any vexatious litigation.*" (See *St.* § 806, and notes, and 807, 810, 816, 820, 824; *Jones v. Thomas*, 2 *Sm. and Gif.* 186.)

By which it will be seen that the comparison of intervention to a bill of interpleader is not a happy one, as the several elements of an interpleader are the exact negative of the several elements of intervention. Intervention may, in an indirect manner, effect the same as an interpleader. Thus, if two supposed landlords both claim rent from a tenant, the tenant, by refusing payment, may bring a suit upon himself, at the hands of one, and then the other may intervene and put the tenant out of the cause. But, under interpleader, the tenant may *himself commence a disclaiming suit.*

of his daughter, seek to recover her dowry from her late husband, the daughter may intervene that the dowry may be returned to her and not to her father, on the ground that she has been emancipated from paternal control. And the like obtains generally in those cases in which any one wishes, as plaintiff or defendant, to maintain a suit concerning a cause of action the prosecution or defence of which primarily belongs to another, and where a decree against the former would affect him, who, whilst the prosecution or defence of the case would in the first place belong to him, suffered the institutor* of the cause to fight it; as if a creditor should suffer his debtor to try the right concerning the property in a pledge; or, as if a husband should allow his father-in-law, or his wife, to litigate concerning something received in dowry; or, as if the buyer or possessor of a thing sold should let the seller contend concerning property therein. So, also, in any case where any one holds a right derivatively (*ex capite*), suffers that other, from whom he derives title, to litigate it.

Further, a third party thus intervening in those cases in which he desires that a suit, commenced against another, should be transferred to himself as principal, may also demand that the case should be transferred to his own particular court, when the court in which the cause was first instituted is not competent to make him

* "Sequentem," literally the "pursuer," a term used in Scotch law.

the intervenient; as where a tenant, being sued concerning the property of a thing, the lessor intervenes, as the *dominus* about to dispute the property with the plaintiff. Whoever, indeed, seeks to intervene in such a form that he may exclude one or other of the litigants from the cause, the moment he knows another to be in suit on that cause of action, he ought to intervene, and to interfere, lest the parties should take further steps; for, if cognizant, he should suffer another to contest the cause, he cannot afterwards put out any one against his will; but as between those who, with his knowledge and permission, a suit has been commenced, the suit will be carried to an end on what would have been its ordinary course, even should the decree be injurious to him. (*Voet*, v. 1, 34.)

"Again, any one may intervene in a twofold manner to aid and assist another; that is to say, whether one or other of the litigants are consenting to and desiring it, or both not assenting and opposed to it.

"A vendor, or previous owner, of property which has passed by sale, or other similar title, to the purchaser or holder, intervenes with consent when he is cited by the latter to warrant and defend his title thereto, and to assist him in the suit and take up the defence. Similarly, where a principal debtor is cited by his surety to take up his defence, where the principal debtor would be safe on account of a personal exception, that it is not competent to the surety to plead. A third party inter-

venes without consent, where, in a suit pending between others, in which he also has an interest, and the judgment pronounced between the original litigants would affect him also; and he joins one or other of the litigants to prevent collusion between them; as where property bequeathed to a legatee is in suit, and the legatee joins the heir or executor who is conducting such suit, in order to prevent collusion, and also because he alone is the party most concerned in the event of the suit, and would, in the event of the heir or executor succeeding therein, take the property in dispute, or, in the event of failure, loose it. So sureties may join the party for whom they have stood security, if the debtor has been injured in his credit, and is suspected of foul play to the prejudice of the sureties; especially a surety who, having taken security for any judgment against him, believes, supposing a suit to be commenced by the buyer of the thing sold, that both the seller and the buyer would not uphold the matter in question under sound advice. (*Voet*, v. 1, 35.)

It will thus be seen that intervention is of two kinds: viz. first, where one of the parties is removed from the cause, and a third party allowed to take a like place; or, secondly, where a third person joins the litigation as co-party, to aid and assist a party in his suit or defence.*

* This is by some authors termed joinder (*Voeging*). (*Lor. Civ. Prac.* p. 30.)

Intervenient's interest.

The intervenient must have the same cause of litigation as, and interests identical with, the party he exempts or joins; and if his right is separate from that of the party on whose behalf he wishes to intervene, he will not be permitted to assist in the cause. (*Voet*, v. 1, § 37.) Hence, if two contest the property in a thing, and a third asserts himself to be the owner, he cannot intervene; for if he is the owner, he has nothing in common with either; but he should either, in a prior pending cause, try his right against the actual holder of the thing, or, the case being finished, contest the question of property with the successful party. (*Ib.*) Thus, where a person had a general interest in the funds of the defendant, but no special interest in certain jewels which were the cause of litigation, and execution against which would lessen, to his prejudice, the general fund, he was held not to be entitled to intervention. (4860, *D. C. Manaar*, 24 *Aug.* 1852.) The person, however, might have a remedy by action and injunction, on showing the injury by affidavit. (*Ibid.*)

No intervention as a matter of course.

A person can never be allowed to intervene as a matter of course; he must show a clear title by his articles of intervention; and may be summarily examined as to his interest before he is permitted to intervene. (8049, *D. C. Colombo*, No. 4, 28 *Nov.* 1843: 8178, *D. C. Jaffna*, 5 *Nov.* 1860: 8049, *D. C. Colombo*, 28 *Nov.* 1843: 1108, *D. C. Caltura*, 13 *July*, 1836; *Morg. D.* 90.) It follows, therefore, that if his evidence is inad-

missible, he cannot be summarily examined; and it would seem that, in such a case, he could not intervene. (24783, *D. C. Kandy*, 16 *Sept.* 1852; *Austin*, 170.)

Articles of intervention.

The Roman-Dutch law requires a party, seeking to intervene, to file his articles of intervention, showing summarily his interest, to justify such intervention. The practice in Colombo, accordingly, has been for the intervenient to commence with his petition of intervention; which sets out his interest, and ends with a prayer asking for leave to intervene, and that his petition may be accepted, and the parties noticed thereof. The District Court then gives, or refuses, him leave to intervene. Either party may appeal against that order. (30819, *D. C. Kandy*, 12 *Apr.* 1860.)

This petition must, in general, follow the rules of pleading. Thus, if an intervenient comes in to displace the defendant, his petition must plead all exceptions: as, for example, to the jurisdiction before pleading to the merits: and if he pleads to the merits, and they are gone into, any subsequent plea of jurisdiction will be regarded as a substantive and subsequent motion, which may be successful or not. (6961, *D. C. Colombo*, 1 *Mar.* 1838; *Coll. Morg. D.* 225.)

However, when an intervenient comes in aid and assistance of the plaintiff, or defendant, he is not bound to file new pleadings. (26428, *D. C. Kandy*, above.) And lengthy pleadings in intervention are never allowed. (8178, *D. C. Jaffna*, above.)

An intervenient is never allowed to delay a case; if he chooses to intervene, he must take the case up in the state in which he finds it. (8178, *D. C. Jaffna*, 5 *Nov.* 1860: 26428, *D. C. Kandy*, 2 *March*, 1860.)

Intervention is a voluntary and not a compulsory act in the first instance; though, after a person has once intervened, he becomes liable to process in default like other parties. (19557, *D. C. Colombo*, 19 *Sept.* 1840; *Morg. D.* 299.)*

Still less will an intervenient be allowed to delay the plaintiff or defendant by his neglect, or claims irregularly put forward in irregular and informal pleadings. (28,228, *D. C. Colombo*, 23 *June*, 1841; *Morg. D.* 308.)

Where an intervenient's plea or petition is perfectly regular, he ought to be admitted to prove the allegations contained in it; leaving it to the opposite party to meet his proof in the usual way by counter evidence. (2702, *D. C. Colombo*, 26 *June*, 1839; *Morg. D.* 281.)

The question, when does right to intervene terminate?

Now arises the question, when does the right to intervene terminate?

Voet writes as follows:—"It does not concern a

* But, in one case of a sale, a course equivalent to a compulsory intervention was allowed. In that case it was laid down that "The proper course, where any vendor is required to be a party to a suit, is *not* to order him to intervene, but to order the plaintiff to amend his libel by making such vendor a co-defendant; and then compulsory process, in default of appearance or answer, can be correctly enforced against him. As no decree ought to be made without all proper parties being before it, the defendant can always avail himself of the objection of the want of parties, so as to force the plaintiff to bring such before the court. (*Idem.*)

person wishing to join in a suit, at what stage the litigation may be; for, both before and after the cause has been contested, nay, also after the cause is concluded, nothing forbids a third party from mixing himself up with another man's cause to defend his own right; or even after appeal made by one or other of the litigants before a superior judge. When, therefore, appeal has been made, the cause will be looked upon as if no decree has yet been given, and the decree pronounced is extinguished by the remedy of appeal." (*Voet*, 5th, v. 1, 36.)

Now, according to Sir C. Marshall, there is a mistake in the 32nd rule; and that, consistently with former practice, intervention should be allowed even after execution, though before complete payment of proceeds; or, in other words, for the purposes of intervention and the above rule, execution is not to be considered to have taken place until the proceeds of the seizure are actually paid over to the person at whose suit the execution is issued. But where the property has been sold, and the proceeds actually paid over to the party suing out execution, it may be considered as a general rule that a claimant cannot call on such party to refund. Thus, if goods are seized and sold in execution, and a preferable claim is put in, and notwithstanding the fiscal pays over the proceeds to the creditor suing out execution, the preferable claimant will have no ground of action against that creditor, whatever he may have against the fiscal,

per Marshall, C. J. (6063, *Matura on circuit*, 19 *March*, 1835; *Marshall*, 168.)

In reference to this question, it has been decided by the Supreme Court that "it may be doubtful whether there is any reason to suppose that any mistake has occurred in framing the 32nd rule, because it is in strict accordance with the Roman-Dutch law on the subject—"*non etiam interest*," &c. *Voet*, v. 1, 36.* (31533, *D. C. Colombo, per Stark*, p. 7.) Apparently following up this doubt, the Supreme Court, in a later case, said that intervention after judgment is in strictness irregular; but, as the parties raised no objection on the pleadings, the case between the plaintiff and the intervenient might proceed as an incidental suit. (19155, *D. C. Matella*, 15 *June*, 1848; *Austin*, 105.) And in another case it was held that, on the principle that intervenients must go on with a case as they find it, if they intervene after judgment they have no right to file a new libel: and all they can do regularly is to appeal. (23022, *D. C. Kandy*, 8 *March*, 1851; *Austin*, 145.) And, again, though it has been held that intervention can take place before execution, it is barred after the judgment is given and the time of appeal has expired. (14714, *D. C. Kandy*, S. 3 *June*, 1844.) So that it seems by later cases that the view of Sir C. Marshall has been overruled, and the 32nd rule upheld literally.

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* The passage above cited.

Judgment in intervention.

If an intervention is *set aside* on the ground of any default, that judgment is considered as a nonsuit, and final in respect of the intervenient's claim for interest in the suit; the court cannot, therefore, give a subsequent judgment against the intervenient. (5690, *D. C. Jaffna*, 8 *Jan.* 1856; *Lor. R.* p. 1.) But, *setting aside* is only nonsuit when the intervenient comes in on the plaintiff's side, an intervenient who intervenes to fortify the *defendant's* title cannot be nonsuited. (8563, *D. C. Colombo*, 23 *Nov.* 1843.) From which it may be presumed that setting aside such latter intervention would have the same effect against the intervenient as a judgment would against a defendant.

An intervention cannot be set aside by the reconciliation and disclaimer of the original parties. *Renunciatio principalis non nocet intervenienti.* (*Gaile's Lib. Pract. Observ.* p. 125: *Bourd v. Van Rumer;* 1 *Knapp's R.* p. 93: 961, *C. R. Chavangacherry*, 19 *June*, 1861.)

A judge cannot give judgment for the plaintiff without hearing the intervenient, even if he orders that the judgment shall not affect the intervenient, and that he shall be able to bring an action of his own. The intervenients are withdrawn by such a judgment; but they have a right to be fully heard. (*See last case cited.*)

Stamps in intervention.

A question was once raised whether intervenients who came into the suit on the side of the defendant, to defend the titles of properties sold by them to him, are to provide stamps on their pleadings, of their re-

spective values of the land sold by each, or of the value of the whole land, as stated in the libel. The amount in the claim has hitherto (unless disputed as excessive) been held invariably to regulate the stamps on all proceedings in the suit, and the S. C. thought that practice ought not to be departed from. (25719, *D. C. Kandy*, 24 *Dec.* 1852; *Coll.*)

The next exceptional processes are those intended to compel the defendant to appear, and to prevent his absconding from the jurisdiction. The first and principal of these is arrest on *mesne process*, which, for obvious reasons, was necessarily discussed in the last chapter, pp. 278—280.

Process into other districts on return of *non est inventus*.

If the fiscal returns, either to the summons or the warrant of arrest, or of attachment, that the defendant is not to be found within his district, the summons or warrant must, on motion of the plaintiff, be transmitted to the judge of any other district; who must thereupon endorse and direct it to the fiscal of his district for execution; and when duly executed and returned, must transmit it, with the body of the defendant, or with the bond or other security which he may have given for his appearance, to the judge out of whose court it originally issued; and the case is thus to be proceeded with in such original court as if the defendant had been found within its jurisdiction. (*R. and O. Sect.* 1, R. 14, p. 64.)

In the case, however, of the defendant not being found, and arrest impossible, the defendant is pressed

to appear, and the plaintiff protected by the process called "Sequestration."*

Process of sequestration where the defendant is not to be found.

In case of the fiscal returning to the summons or warrant that the defendant is not to be found,† if the plaintiff, by his own statement, subject to punishment and action in case of making a false statement (see *ante*, pp. 277-8), verify his demand to the satisfaction of the court, a mandate of sequestration (Form No. 13 ‡), must, on motion of the plaintiff, issue to the fiscal, directing him to seize and sequester the houses, lands, goods, moneys, securities for money, and debts§, wheresoever or in whose custody soever the same may be within his district, to such value as the court shall think reasonable and adequate to the cause of action so verified, and to detain or secure the same till the defendant appears and answers. And the fiscal must cause due notice in writing to be served on all persons (in whose possession or power such property of the defendant, whether moveable or immoveable, shall be) of the sequestration having issued, requiring them to reserve and retain the same and all issues, rents, profits, and interest accruing therefrom, to abide the further order of the court. And if

* In one case, the Supreme Court remarked that sequestration is a burdensome and expensive process, which should not be granted unless under an imperative necessity. (10324, *D. C. Colombo*, 24 *Nov.* 1843); but the rules and orders keep it within its proper limits.

† Being in prison under a warrant does not amount to not being found. (*Marshall*, 627.)

‡ See Appendix.

§ *I. e.* due to the defendant.

the property levied under one sequestration should not be of sufficient value to afford security adequate to the cause of action, one or more further sequestrations may, on like motion, issue, by an endorsement (Form No. 14) on the original process of sequestration, to be signed by the judge, and specifying the further amount of property to be sequestered, till security to the necessary amount is obtained. (*R. and O. Sect.* 1, R. 15, p. 64.)

As, however, it was not always possible for a plaintiff to make an affidavit, &c. on his own knowledge, as, for example, if he was a public officer of government, or of a corporation, or simply a public officer to sue, or the agent or attorney of a principal abroad:—it was enacted by the Ord. 18 of 1864, that

"The plaintiff's own statement or affidavit to cause of action or damage sustained shall not be indispensably necessary for obtaining a warrant of arrest or mandate of sequestration under the rules in any of the following cases:—

"A. Where the action is brought by the Queen's Advocate.

"In such case the affidavit of any officer of the Crown who has personal knowledge of the cause of action or damage sustained, may be received instead of a statement or affidavit by the plaintiff himself.

"B. Where the action is brought by a corporation.

"In such case the affidavit of a manager or agent of the said corporation, having personal knowledge

of the cause of action or damage sustained, may be received instead of a statement or affidavit by the plaintiff.

"C. Where the plaintiff is absent from the island, or is unable, from bodily or mental infirmity, to make the required statement or affidavit.

"In such case the District Judge may receive, instead of a statement or affidavit by the plaintiff, the affidavit of any agent of the plaintiff, having lawful authority to bring and conduct the action, and having personal knowledge of the existence of the cause of action or damage sustained.*

"Provided that, in all and each of the above-stated cases, the person making the affidavit, instead of the plaintiff, shall expressly swear that he deposes from his own personal knowledge to the matters therein contained.

"And that every person making such affidavit instead of the plaintiff, shall be liable to be examined as to the subject matter thereof, at the discretion of the District Judge, as the plaintiff would have been if the affidavit had been made by the plaintiff. And every person who, in the course of any of the proceedings aforesaid, makes wilfully any false statement, may, besides his liability to be tried and punished for perjury in a Criminal Court, be summarily punished by the District Court Judge for

* This ordinance does not provide for the case where an executor, or other legal representative, is the plaintiff.

contempt of court; and nothing herein contained shall deprive any party, aggrieved by such false statement, of any other redress which may be open to him according to law."

Sequestration where defendant is fraudulently alienating property.

"If a plaintiff in any action, either at the commencement or before judgment, by his own affidavit* and examination, if necessary, satisfies the District Judge that he has a sufficient cause of action, or has sustained damage to the amount of £10 or upwards, and that he has no adequate security to meet the same, and that he believes, and if he shows, by the oath or affidavit of a third person, that there is probable cause for believing, that the defendant is fraudulently alienating his property to avoid payment of the debt or damage, such judge may order a mandate (Form No. 6†) to issue to the fiscal, directing him to seize and sequester the houses, lands, goods, moneys, securities for money, and debts, wheresoever or in whose custody soever the same may be within his district, to the value the court thinks reasonable and adequate, and to detain or secure the same to abide the further orders of the court; and if the property in dispute consists of houses or land, the plaintiff must satisfy the court that the defendant would be unable to make satisfaction for the issues, rents, and profits thereof, if judgment should pass for the plaintiff; or, if the court be satisfied that sequestration will tend

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* See *ante*, pp. 277-8. † See Appendix.

to prevent new or further litigation, then, and in any such case, such issues, rents, and profits thereof shall be sequestered; provided that such sequestration shall in all cases be dissolved, on the defendant giving security, to the satisfaction of the court, equal to the value of the property sequestered.

"Before making the order for a warrant of arrest, or a mandate of sequestration, the judge shall require the plaintiff to enter into a bond* (Form No. 7), with or without sureties, in the discretion of the District Judge, to the effect that the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of such arrest or sequestration; and the court may award such damages as costs of suit, either to the defendant or to those in whose possession such property shall have been so sequestered.

"Any plaintiff, or third person, wilfully making a false statement, in the course of any of the proceedings aforesaid, may be punished as for a contempt of court; provided that nothing herein contained shall deprive any party aggrieved by such false statement of any other redress which may be open to him according to law." (No. 15 of 1856, *Schedule.*)

A practical sequestration may also issue similar to an injunction; thus, there may be a sequestration of land, pending action, having the effect of an injunction,

* See *ante*, pp. 277-8.

to restrain a party from making away with the crop before the case is decided. (*Marshall*, 626.)

The following cases have been decided on the above rules and orders concerning sequestration :—

A sequestration, granted on affirmations that the defendant was not possessed of sufficient property to satisfy a judgment for rents and profits, and that he was committing waste, was set aside ; the grounds of appeal being that no rents or profits appeared to be due to the plaintiff, and the plaintiff was contradicted in all material points by the defendant. (28190, *D. C. Kandy*, 15 *Jan.* 1856 ; *Lor. R.* 5.)

Where a plaintiff averred only that he had reason to believe that the defendants would conceal their property, and the third party merely swore that the defendants had declared that they would not allow the plaintiff to recover anything from them ; such averments were held not to prove such a fraudulent alienation as would uphold a sequestration. (13764, *D. C. Kornegalle*, 17 *May*, 1856 ; *Lor. R.* 116.)

A sequestration cannot issue for numerous defaults in a defendant in filing his list of witnesses ; but if issue has been joined, it would be open to the plaintiff to try ex-parte. (11969, *D. C. Ruanwelle*, 2 *Dec.* 1835; *Marshall*, 627.)

Neither can sequestration be issued by a District Court, under the fifteenth rule, to compel appearance, to be put in force *out* of its own district (*Marshall*, 628

and 2429, *D. C. Negombo; Morg. D.*); but, if its object is to prevent property from being fraudulently made away with, there would seem to be no objection to an injunction in the place of sequestration, either by application supported by affirmation or affidavit in the district in which it is situated (*Marshall*, 628), or from the Supreme Court, under clause 49 of the Charter.

Cancelling sequestration.

If the plaintiff's affidavit of the cause of action is, on the face of it, satisfactory, and if there is also no objection apparent on the plaintiff's libel to the plaintiff's right to recover, the defendant is not at liberty, except in very rare and exceptional cases, to anticipate the trial of the merits of the case, and to go on with the question of the existence of the cause of action, by any thing out of the course of the suit; such as, for example, a motion to cancel the sequestration. If he can show clearly, simply, and conclusively to the court that there is no debt due, as by producing a letter of plaintiff's (the genuineness of which is not disputed) stating that there is nothing due, or by producing an undisputed regular receipt for the very debt, or the like, the court may properly attend to such proof on the defendant's part, and may cancel the writ, which has palpably been issued in gross abuse of the process of the court.

Such is the practice of the English courts as to the discharge of debtors arrested under writs of *ca. sa.* and the Supreme Court thinks that the analogous rule, which has been generally followed in Ceylon, as to mandates

of sequestration, ought to be upheld. Otherwise there would be the obvious inconvenience and mischief of trying the case twice over, and in such a manner that the decree on the interlocutory trial, although on imperfect materials, would have a natural and almost inevitable tendency to influence the decision on the second trial. (13726, *D. C. Jaffna*, 12 *July*, 1864.)

Pointing out property to be sequestered.

With respect to the information, which the party obtaining sequestration ought to give to the fiscal, of the persons in whose possession property is to be found; the plaintiff should point, or at least specify, the property which he alleges to be in the possession of the third parties, belonging to the defendant. This is necessary, to enable the fiscal to give proper notice to the party in possession, and also to make his return to the mandate as required. With respect to the *proof* of property belonging to the defendant, this can scarcely in all cases be expected, and, if required, might defeat the object of this precautionary process of sequestration; for, if the ownership were disputed, the person in possession would demand counter proof, and thus a preliminary trial would become necessary, to establish to whom the property really belonged. A plaintiff, in pointing out property as belonging to the defendant does so at his own peril, and on his own responsibility, as under writs of execution. (*Marshall*, 631.)

Proof.

Proceeding on sequestration.

The property so sequestered must either remain under sequestration, or be sold, at the discretion of the

court; regard being had to the nature of the property, and the interests of all parties concerned. As soon as conveniently may be, after sequestration, written notices in English and the native languages of the district must be affixed at the court house, and at such other public and conspicuous places as the court directs, stating the name and designations of the parties, the cause of action, that such sequestration has issued, the description of the property sequestered, and calling on the defendant to appear. Proclamation must also be made two several days in open court, at such intervals as the court in its discretion considers fit and just towards all parties, calling on the defendant to appear, on pain of the court proceeding *ex-parte*. (*R. and O. Sect.* 1, R. 16, p. 65.)

Dissolution of sequestration.

If the defendant appears on or before the day of last proclamation, and gives such security as the court considers the nature of the case requires, the sequestration must thereupon be dissolved, and the suit proceed as in ordinary cases: and, in default of his giving such security, he must be admitted to appear and defend such action; but the property remains under sequestration. If the defendant does not appear on or before such day of last proclamation, the court must, on motion of the plaintiff, proceed to hear the case *ex-parte*. (*R. and O. Sect.* 1, R. 17, p. 65.)

Claims on sequestered property.

If the property sequestered be claimed by a third party, the right thereto must be tried between the claimant and the plaintiff, as an incidental suit; and the

proceedings in the original suit are stayed, if the court considers such stay necessary for the purposes of justice; but not otherwise. (*R. and O. Sect.* 1, R. 18, p. 65.)*

Proceedings where personal service cannot be effected, but defendant knows thereof or evades service.

But, as the defendant may be neither absconding nor alienating his property, but merely hiding:—in order to make more effective provisions with respect to the appearance of the defendant, in civil actions, before District Courts, and the proceedings of the plaintiff in default of such appearance, it was enacted, by No. 8 of 1856, that "Service of the summons on the defendant must, wherever it is practicable, be, as heretofore, personal; but the plaintiff may apply, from time to time, on affidavit, to the court out of which the summons issued. And in case it appears to that court that reasonable efforts have been made to effect personal service, and either that the summons has come to the knowledge of the defendant, or that he wilfully evades service, and has not appeared thereto, such court may order that a copy of the summons be posted by the fiscal upon some conspicuous part of the court-house premises, and that the plaintiff may then proceed as if on personal service, subject to such conditions as to the court may seem fit. (§ 1.)

Indorsement of debts, or liquidated demands, may be made on summons.

Also, in all cases where the defendant resides within the jurisdiction of the court, and the claim is for a debt or liquidated demand in money, with or without interest,

* As to the effect of sequestration on appeals, see "Appeals."

arising upon a contract express or implied; as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt, or on a bond or contract in writing for a liquidated amount of money, or on a guarantee where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note, the plaintiff may make, or may require the proper officer of the court to make, upon the summons and copy thereof, an endorsement of the particulars of his claim, in the form (A) in the Schedule to the Ordinance, or to the like effect. (§ 2.)

Final judgment upon summons so endorsed, in default of appearance.

Further, in case of non-appearance by the defendant within four days after the return day of the summons, when the summons is so endorsed, the plaintiff may, on filing an affidavit of personal service, or an order of court for leave to proceed under the Ordinance, at once sign final judgment, in form (B) (on which judgment no appeal shall lie), for any sum not exceeding the sum endorsed on the summons, with interest at the rate specified, if any, to the date of the judgment, and a sum for costs, to be forthwith taxed by the secretary; and the plaintiff may, upon such judgment, issue execution at the expiration of eight days from the last day for appearance, and not before. The court, either before or after final judgment, may let in the defendant to defend, upon an application, supported by satisfactory affidavits accounting for the non-appearance, and dis-

closing a defence upon the merits, on such terms as to the court shall seem just. (§ 3.)

Appearance may be entered at any time before judgment.

The defendant may appear at any time before judgment. If he appear after the time specified, either in the summons or in any order to proceed as above, he, after notice of appearance to the plaintiff or his proctor, is in the same position, as to pleadings and other proceedings, as if he had appeared in time. A defendant appearing after the time appointed by the summons is not entitled to further time for pleading, or other proceeding, than if he had appeared within the appointed time. (§ 4.)

Appearance in person, to give an address at which proceedings may be served.

Every appearance in person must give an address at which it will be sufficient to leave notices and other proceedings not requiring personal service. If such address is not given, the appearance cannot be received or entered; and if illusory or fictitious, or uncertain and vague, the appearance is irregular, and may be set aside by the court, and the plaintiff may be permitted to proceed by sticking up the proceedings at the court-house premises, without further service. (§ 5.)

Appearance to summons.

Appearance to a summons is effected by delivering a memorandum, in writing, to the secretary, dated on the day of delivery, or by an entry on the record, by the secretary, at the request of the defendant, according to the following form, or to the like effect.

"A, plaintiff against C. D. / *or* / Against C. D. and another. / *or* / Against C. D. and others. { The defendant C. D. appears in person. / *or* / E. F., proctor for C. D. appears for him.

"[*If the defendant appears in person, here give his address; as thus, No.* 15, *Main Street, Pettah, Colombo;* or, *House of Meera Lebbe Marka, Marandahn, Colombo;* or, *Garden Polwatte, in the village of Cotta, in Salpitty Korle.*]

"Entered the day of 186 ." (§ 6.)

Proceedings where only some of the defendants appear to a summons endorsed.

In an action against two or more defendants, where the summons is endorsed as above, if one or more defendants only appear, and others do not, the plaintiff may sign judgment against such only as have not appeared for the amount due, and may issue execution. He is then taken to have abandoned his action against those who appeared; or he may, before issuing execution, proceed with his action against the defendants who appeared, in which case the judgment against the defendants who have not appeared operates as a judgment by default, obtained before the Ordinance came into operation. (§ 7.)

Proceedings where personal service of notice cannot be effected.

After entering appearance, if the defendant is in default in answering or rejoining, the plaintiff, in any case in which service of the notice of motion for judgment by default must be personal, may apply, from time to time, on affidavit, to the court: and if it appear to the court that reasonable efforts have been made to

effect personal service, and either that the notice has come to the knowledge of the defendant, or that he wilfully evades service of it, the court may order that a copy of such notice be left by the fiscal at the address given by the defendant; and the plaintiff may then proceed as if personal service had been effected. (§ 8.)

Special trial-roll of money cases to be kept.

A special trial-roll must be kept in every District Court of cases of the nature mentioned or referred to in the second section of this Ordinance in which issue has been joined. And it is competent for the judge of such court to order the said cases to be set down for hearing on such days; and, on the day fixed for the hearing of any such case, to direct the same to be called on for trial, in such order as to him appears best for the ends of justice; any rule or practice of the said court to the contrary notwithstanding. The parties to any such case must receive reasonable notice of the day of hearing.

The next class of motions relate to amendment of pleadings.

Amendment of pleadings.

The power to amend the libel was enunciated in the civil law by Justinian; who, speaking of the *intentio*, says, "When a plaintiff demands one thing instead of another, he incurs no risk. For, if he discover the truth, he is allowed to correct his mistake in the same action." (*Inst.* iv. 1, 35; *Sandars*, 515.) This power of amendment was partly declared by *R. and O. Sect.* 1, R. 9, p. 63. This rule has been revoked by orders of

5th of July 1842, p. 128; and the fourth rule of those orders ordains, instead, that "either party may, by motion to the court, and once, or oftener, as he may have occasion, amend his pleadings, or lists of witnesses, upon affidavit of merits, or other sufficient cause shown to the satisfaction of the court, and upon such terms as the court shall impose. Unless this rule is complied with, the amendment ought not to be allowed; and if it is, through the proctor's mistake, disallowed, he will be called upon to pay the costs of the motion, and of the appeal, if any. (4201, *D. C. Colombo*, 3 *Nov.* 1842; *Morg. D.* 341.)

The following is the account of the law of amendment given by Mr. Lorenz, in his Civ. Pract. p. 19:—

"The libel, after it has been filed, may, according to the Roman law, be amended or altered, not only before, but after *litis-contestatio;* for, since it is human to err, and since in cases of error in the libel, whether as to the thing claimed or the form of action, or the cause of action, the defendant would be entitled to an absolution from the instance (for the judge cannot condemn a party in other than what is claimed in the libel). Hence it is permitted to a plaintiff, who has committed an error therein, to amend and alter it at any time previous to judgment; the defendant being entitled to the costs already incurred by him, and also to answer to the new matter, in the usual manner. According to the practice of the Court of Holland, however, no amendment or

alteration of the libel is permitted after full *litis-contestatio*, or after filing of rejoinder or duplication, unless with the consent of defendant, or after obtaining restitution *in integrum*, with payment of costs. An amendment or alteration may, under these circumstances, be allowed not only once, but oftener, according to the discretion of the judge, if the equity of the case warrants it. But where the plaintiff is desirous, not of altering the libel, but only of explaining some obscurity, the defendant is not entitled to his costs; for no new matter is hereby introduced, and no error corrected, but only an obscurity explained, which, if not explained, would at all events have received the construction most favourable to the plaintiff. And it is held to be "explanation," and not alteration, to define a thing more particularly, or to mention the time and place of an act done; or, where the party has brought his action for the fulfilment of a contract, subsequently to tender fulfilment thereof on his own part, which he may have omitted to do at the commencement."

A party is entitled to amend his libel, provided the proposed amendment be such as, if introduced in the first instance, would not have rendered the libel inadmissible. (6776, *D. C. Colombo*, 13 *Jan.* 1836; *Morg. D.* 72.) For example, a plaintiff sued upon a bond granted to him individually, but for a debt due to his deceased father, and the court below dismissed the suit; the S. C. on appeal, allowed the plaintiff to amend his

libel by suing as executor. (16051, *D. C. Galle*, 22 *May*, 1856; *Lor. R.* 117.)

So if, by error, two plaintiffs are mentioned in the libel; as, for example, two purchasers, and only one appears in the deed of sale, the unnamed purchaser may be struck out as plaintiff from the libel, and the case may be proceeded with. (17092, *D. C. Kandy*, 9 *Mar.* 1846; *Austin*, 85.) The plaintiff ought, also, to amend his libel, if he wishes to sue for increased damages, as he cannot claim them in the replication or a subsequent examination. (3697, *D. C. Four Korles*, 3 *Aug.* 1836; *Morg. D.* p. 91.)

Fresh summons sometimes on amended libel.

It is a matter of practice that, where a plaintiff amends his libel after answer, and requires a further answer from the defendant to such amendments, he must take out a fresh summons for the defendant to appear and answer to the amended libel. (35460, *D. C. Colombo*, 15 *Sept.* 1842; *Morg. D.* 334.)

Amended answer.

If the answer is amended, the plaintiff is entitled to notice of it. (5587, *D. C. Manaar*, 20 *Apr.* 1860.)

If the plaintiff, before replication, objects to the sufficiency of the answer, he is entitled to specific answers from the defendant to all the material facts alleged by the plaintiff in his libel, as it may tend to shorten his proof; but if he has replied, and the parties are sufficiently at issue on the pleadings, the defendant should not be allowed an order to file an amended answer. The proper course is to examine the defendant,

if his admissions are on any point required in aid of the plaintiff's evidence or case. (15820, *D. C. Kandy*, 23 *July*, 1844; *Austin*, 77-8.)

Amending lists of witnesses.

It is laid down in the same rule that lists of witnesses may also be amended "upon affidavit of merits, or other sufficient cause shown to the satisfaction of the court, and upon such terms as the court shall impose." (See also *ante*, p. 318.)

Commission to examine witnesses.

Another exceptional proceeding is the issue of a commission, or order to examine witnesses otherwise than in open court, and otherwise than *vivâ voce;* but as it is much more convenient to discuss this proceeding in the chapters on evidence, it will only be noticed here as being one of the exceptional proceedings in a suit.

Surveys—court cannot order.

In an early case, it was held that "if the court considers, after the filing of the list of witnesses, that a survey is absolutely necessary, to come to a satisfactory decision of the case, it is perfectly at liberty to make an order to that effect, care being taken to direct the witnesses on both sides to be present at the survey, in order to enable them to speak, when they come to give their evidence, with precision and accuracy with respect to the boundary, extension, and possession of the land. (6933, *D. C. Galle*, 6 *May*, 1840; *Morg. D.* 286.) And from a passage in Marshall (*Tit. Survey*, p. 649), it seems, at one time, the general practice for the courts to order surveys, and for the parties to pay for them jointly, or as costs in the cause. (103, *C. R. Calpentyn*, 19 *July*, 1864.)

But this practice has since been overruled in two hitherto unpublished cases, which lay down that, "though it is very desirable, in all cases where boundaries of land are in dispute, that the parties should acquiesce in having a joint survey made in the presence of the parties and their respective witnesses, yet the court cannot compel the unwilling party to join in such survey or commission; nor has it power to order surveys. If it is necessary for the proper understanding of a case on the day of trial, then the plaintiff should have a chart or diagram, and a surveyor to explain the same as his witness; and if he be not so provided, the defendant should either be absolved from the instance, or the plaintiff should be allowed another day to prove his case, on payment of all costs.* And the court has no power to interfere, by dismissing a case because a party cannot pay the costs of a survey which the court has ordered. (15977, *D. C. Galle*, 12 *May*, 1854: 7653, *D. C. Negombo*, 14 *April*, 1845.)

Rough plan where parties are too poor to have survey.

Nevertheless, if the parties are too poor to afford a survey, a rough plan of the premises should be prepared by some one commissioned by the court, in the presence of the parties and the witnesses, so that the exact situations of the land, &c. can be determined. (18845, *D. C. Matura*, 25 *Apr.* 1860.)

Court no power to, &c. alter survey.

Further, the court has no power to cancel, obliterate, or alter any private map, or survey, which a party may

* This, probably, intends only all costs of the day.

have had made of his land, merely on account of the respective boundaries of the portions which he holds separately and in common not being correctly defined therein; though the court can reject any such survey in proof, or record its opinion upon the general evidence showing its incorrectness. (9247, *D. C. Colombo*, 31 *Aug.* 1843.)

Reports accompanying surveys.

Surveys, especially if they have been made by the consent of both parties, have often remarks or reports of the surveyor annexed, explanatory of the survey. These reports and the surveys cannot found decrees, or be received in evidence, unless both the facts reported and the survey are sworn to in open court by the persons stating the facts, and by those who made the survey. When a plan, or survey, pointing out the spot in dispute, is prepared in the presence of the parties, they cannot refuse their assent to its correctness. (*Marshall*, 35.) But this dictum must be accepted with great caution; and if any party in any case protested, it does not hold good at all. It is more satisfactory, if possible, in all cases to prove surveys and such reports in the usual way.

Evidence of reports and survey must be certain.

The reports and evidence of the surveyor should, moreover, be accurate, or his labour will be lost. Thus, where a surveyor could not speak certainly as to who were present to point out the lands, his evidence and survey were held to be of little value, and the case was remanded to give the parties an opportunity to call

such other evidence as might be deemed necessary. (20808, *D. C. Kandy*, 7 *Dec.* 1849; *Austin*, 121.)

Concocted surveys.

Again, cases are found, in almost every District Court, where parties, preparatory to the institution of actions, or anticipated disputes, get surveys made in their own names, in the absence of the actual owners, in order to produce them afterwards in support of their title. Such documents invariably meet with little or no weight; unless, indeed, it can be shown satisfactorily that it took place with the consent or cognizance of the parties affected, without their offering any opposition. (22111, *D. C. Kandy*, 13 *Dec.* 1853; *Austin*, 135.)

Amicable settlement.

A case may be terminated, not only by being tried out, but also by an amicable settlement. This must take place between the parties themselves. If the dispute is about money, an amicable settlement can take place by the defendant paying to the plaintiff the sum he agrees to accept, and the plaintiff moving, on the ground of the amicable settlement, to withdraw his case. An order is then made to allow the case to be withdrawn, on the ground of the amicable settlement. To bring a second action afterwards for the same cause of action would be a breach of faith, and a contempt of court. (19591, *D. C. Galle*, 18 *June*, 1863.) The parties could also agree to a decree; and, with the consent of the court, that agreement would be entered as a decree, and be binding accordingly.

But, except in carrying out, or refusing to carry out,

the wishes of the parties, the court must not interfere. If the amicable settlement fails, the cause ought to proceed in the usual course. (10250, *C. R. Kandy*, 30 *Sept.* 1851; *Nell.* 174.) Thus, where, before a cause was set down for trial, plaintiff and defendant came to a settlement, on the terms of which they afterwards differed, and a judge fixed a day to hear evidence as to the terms of such settlement, it was held that such a proceeding was irregular, and that the court should have left the plaintiff to accede to the defendant's offers and demands, or to proceed with the case, if not satisfied therewith. (15638, *D. C. Galle; Coll.* 11 *Oct.* 1853.) On the other hand, the parties to an amicable settlement cannot withdraw a case, or otherwise settle it, without the consent of the court, except by silently dropping it altogether, under some binding agreement; and even then, if either choose to resume, they could do so in spite of the agreement, only rendering himself liable for an action on the agreement.

Assessors.

By section 20 of the Charter, every District Court was to be held by and before one judge and *three assessors* (see 5159, *D. C. Badulla*, 4 *June*, 1834); but now, by *Ord.* No. 21 of 1852, § 1, the District Court may be held before the judge, or any additional judge of such court, without any assessors; and the decrees and orders of the judge alone are as valid as if he sat with assessors. But, by section 2 of that ordinance, the judge, at his own instance, or upon application in

any cause wherein assessors had theretofore been associated with the judge, may order assessors to attend for the purpose of being associated with him at the hearing and decision of the cause, in the same manner as if that ordinance had not been passed. The application must be made to the judge so long before the time fixed for the hearing of the cause as not to delay the hearing. It is discretionary with the judge to grant, or refuse, any such application.

Assessors are chosen and distributed in the same manner as jurors (see *ante*, p. 231, *et seq.*) under Ord. 19 of 1844, § 1, and Ord. 2 of 1854, §§ 3 and 4; but beyond that, the former ordinance, which does not contain any repealing clause, does not seem to interfere with the Rules and Orders respecting assessors, the first rule only excepted, which is superseded by 19 of 1844, § 1.

How many and in what order to be summoned.

The list of all such assessors must be carefully kept in distinct classes, as the lists of jurors are at present; copies of which shall be transmitted from time to time, as the same shall be enlarged or amended, to the Registrar of the Supreme Court. Each fiscal must summon, from and out of one of his lists, nine persons, giving them (after the first month in which the District Courts shall come into operation) at least one month's notice, for every successive Monday in the year; which nine persons shall serve as assessors in the District Court of that district till the end of the week. And each fiscal must arrange his lists, taking each successive set of

assessors from a list different from the last, and shall so make his selections therefrom, with reference to the numbers contained in each list, that the duty shall fall equally upon all, and that, if possible, no person shall be called upon to serve a second time, before all the others shall have served in their turns.

And in what manner.

Assessors must be summoned in like manner, and under the same penalty for non-attendance, as jurors are now summoned to attend the Supreme Court in its criminal jurisdiction: and if one or more of those summoned shall be proved to the satisfaction of the fiscal, before the time for their attendance has arrived, or to the court after that period, to be unable by sickness or other insuperable obstacle to attend, the fiscal shall summon others to supply the places of such as shall be so prevented from attending.

Provision for immediate attendance.

And, to prevent the loss of time which the several District Courts might, on the opening thereof, sustain, from the non-attendance of assessors for want of due notice, the respective fiscals are by the rules directed to summon forthwith nine assessors from the Burgher List, or from any other list from which assessors may be selected, resident in or near the place where such District Court shall be holden, to serve during the week commencing Monday, 7th of October, and so for the following Mondays, till the month's notice, as above directed, may be regularly given.

How empanelled and sworn.

From the nine assessors so summoned and in atten-

dance, the District Judge must direct the secretary each day,* on opening the court, to draw from a box, as is now done for empanelling juries in the Supreme Court, the names of three, who shall sit on all the proceedings of the court, till changed by order of the court: and on being so drawn and impanelled, the following oath must be administered to them severally.

"I do swear (*or*, solemnly declare and affirm) that I will faithfully and diligently attend to the proceedings of this court, while acting as assessor thereof; and that I will give a true and impartial opinion on every question which shall be referred to me. "So help me God."

And challenged.

No party to any suit is allowed to object to any assessor on the ground of caste or rank. Nor can any challenge be allowed, except on the ground of direct interest, or near relationship to one of the parties.

Parties may agree on their own assessors.

But if, in any suit, all the parties thereto shall agree among themselves that three persons chosen by themselves shall sit at the hearing of such case as assessors, in preference to those who may be in regular attendance; and if, when such case is called on for hearing, the parties produce such assessors in court, they being of good character and competent age, and expressing themselves willing to sit during the whole hearing of the case, the judge must admit them to act in that

* These rules of course are now modified in practice, inasmuch as the judge now acts generally without assessors.

capacity. Provided always that, if in such case the assessors chosen by the parties shall not be in attendance, no postponement of the case shall be allowed on that ground; but the same shall be heard before three of the assessors in attendance. Nor shall the attendance of any such extra assessors be enforced by process of court or the fiscal; but they must appear voluntarily, at the request of the parties. Provided that, having once taken upon themselves to sit in any case, they must not be allowed to leave the court till such case is decided, or till the court adjourns.

The whole case to be heard by the same assessors, if possible.

In order to ensure, as far as is practicable, the entire hearing of each case before the same set of assessors, it is ordered that no case be entered into on any Friday or Saturday, which the District Judge may not reasonably expect, from the nature of it and the number of witnesses, to bring to a conclusion before the rising of the court on Saturday. Provided always that this Rule shall not be applied to criminal cases under investigation, previously to commitment for trial before the Supreme Court.

On what questions to vote. Judgments of District Courts, how to be pronounced.

Those sentences, judgments, orders, and questions, on which the District Judges are to take the opinions of the assessors, and the mode in which those opinions are to be delivered and recorded, are defined by the 30th clause of the charter. By that clause every final sentence, judgment, and every interlocutory order of the District Courts, having the effect of a final sentence

or judgment, and every order of such court, postponing the final decision of any cause or prosecution there pending, and any other order which to the judge of any such court may appear of adequate importance, shall by such judge be pronounced in open court. And such judge must in all such cases state, in the presence and hearing of the assessors, the questions of law and of fact which have arisen for adjudication, and which are to be decided upon any such occasion, together with his opinion upon every such question, with the grounds and reasons of every such opinion. And every assessor must, also in open court and in the presence and hearing of the judge and the other assessors, declare his opinion and deliver his vote upon each and every question which the judge shall have previously declared to have arisen for adjudication, whether such questions shall relate to any matter of law or to any matter of fact.* In case of any difference of opinion between the judge and the majority of the assessors upon any question, whether of law or of fact, the opinion of such judge prevails, and is taken as the sentence, judgment, or order of the whole court; but, in every such case, a record must be made, and preserved among the records of the court, of the questions declared by the judge to have arisen for adjudication, and of the vote of the judge and of every such assessor upon each such question.

Assessors to give their opinions and votes.

In case of a difference of opinion, that of the judge to prevail.

But record to be made of questions and votes.

* The S. C. will only interfere with the finding of assessors on clear proof of gross misconduct or blunder on their part. (34311, *D. C. Colombo*, 12 *Nov.* 1863; *Col.*)

Judge to state his opinion before or after assessors, as he thinks fit.

Now, however, when any question of law or of fact arises for adjudication before any District Court, the judge thereof may state his opinion upon every such question, either *before or after* the assessors have respectively given their opinions and votes, as appears most conducive to the ends of justice.

Interlocutory judgments or orders.

An interlocutory judgment is an order in the course of a cause made in the beginning or the middle of a litigation, and which does not fully determine or complete the principal cause of action. (*Voet*, xlii. 1, 4, p. 153: *Bla. Com.* iii. p. 396-7.)

All orders upon pleas in abatement, sequestration, amendments, amicable settlements, are interlocutory orders: such as these are really and truly interlocutory orders, yet a judgment; in appearance an interlocutory order may have the effect of a final order, inasmuch as it may determine the principal cause of action; for example, if an interlocutory order is in such a form that it renders any further judgment unnecessary; or where, by reason of an interlocutory order, the judge becomes *defunctus officio*, or has no other point to decide in the case; or where it definitely settles any essential point in the case; or where it decrees either of the parties to give or to do something, as in the case of provisional payment, or of provisional possession, and the like. (*Lor. Civ. Pract.* 35.)

A final decree, or an order having the effect of a final decree, cannot be altered by a District Court. But judgments preparatory and interlocutory may, at any time

previous to the final decree, be altered, amended, or even retracted. (803, *D. C. Matura*, 9 *Aug.* 1837; *Morg. D.* 193.) But if an interlocutory order is really made, and entered regularly, it should be rescinded only in writing —against which rescindment a dissatisfied party may appeal; so that it is irregular for a judge to pass over and avoid, without notice, his own previous order. (1145, *D. C. Amblangodde*, 15 *June*, 1836; *Morg. D.* 86.)

It is to be observed that, by the above cases, an interlocutory order can be dealt with by the D. C. at *any time before final judgment.* Now, according to Merula (see *Lor. Civ. Pract.* p. 34, citing *Merula, Man. v. Prac.* iv. 91, 1, 2; 92, 1, 2, 3, 6, and 7), "an interlocutory order may be revoked or cancelled by the judge who pronounced it, either at the request or instance of either of the parties (in which case, however, the revocation should take place within ten days from the day on which the sentence was pronounced, for, after the lapse of this period, it acquires the force of *res judicata*), or at his own instance, and at any time previous to final judgment, on the ground of any error committed therein; and this, whether with or without the consent or knowledge of the parties: where, namely, the case is one of little importance, and the revocation does not require further investigation, and would not affect or prejudice the parties; whilst, on the other hand, if it is likely to affect or prejudice the parties, or if a further investigation is necessary, the parties ought to be pre-

viously heard." It may be doubtful how far the distinction contained in this passage applies in practice to Ceylon, there being no decision on the subject—the two cases cited above, from Morgan's Digest, being cases in which the judge dealt with his interlocutory order at his own instance.

As to appeals against interlocutory orders, see *ante*, pp. 171, 172, and 173; observing, at the same time, that it is in the discretion of the District Court to allow or disallow an appeal against an interlocutory order. (*Per Rough. J. L. B.* 1836, p. 156; *Morg. D.* p. 85, note.)

Nantissement. It is often the custom to annex to the claim and demand a request of *provision*, or *namptissement*;* that is, that the defendant shall, during the proceedings and before final sentence, be decreed by an interlocutory or provisional sentence to pay to the plaintiff the sum in question, under proper security to be repaid, with interest, in case by the final judgment on the merits the sum shall not be found due, or the judgment goes for the defendant. (*V. d. Ldn.* iii. 1, 12, p. 407.)

Its principle. And the principle seems to be this :—that where a defendant admits his signature to certain instruments or vouchers, which naturally, and certainly among mercantile men, import that he acknowledges a pecuniary obligation, he shall be liable to have this provisional

* This mode of spelling is a corruption of the French word, which is spelt by Pothier *nantissement*. Voet denotes *nantissement* as a decree of fiduciary payment.

judgment pronounced against him. (33194, *D. C. Colombo*, 7 *July*, 1863.)

"To determine whether or not provision should be granted, the two following rules are to be observed :— Van der Linden's two rules :—

"1. That, with respect to the plaintiff, a provision should never be granted in his favour, unless he be provided with a clear proof, in law, of his demand; for example, an acknowledged signature of the defendant's to a bond or other instrument; a merchant's account books, when the sale and delivery is not denied by the plaintiff. But declarations, and other vague evidence, are not sufficient. With respect to the plaintiff.

"2. On the part of the defendant, to prevent provision, or *namptissement*, being decreed against him in such cases, he must produce such counter-proofs as appear to the judge to render it probable that the plaintiff will not succeed on the merits. This, therefore, depends less on the nature of the proofs than on the effect they produce on the mind of the judge. Provision is, therefore, properly refused to a swindler, although he produce an instrument with the acknowledged signature of the defendant, when the latter brings forward such proofs as make it appear probable to the judge that there has been some fraud or deceit in the transaction." With respect to the defendant.

Now, with regard to the first rule, it must be observed as follows :—1. That the debt must be unconditional, and reduced to certainty; and that this should appear, either by the admission of the opposite party, or by some

instrument, public or private, acknowledged by him, or by the merchant's book, or by other documents of a like nature, to which a somewhat greater authority attaches than to mere private accounts, and which should be confirmed by the oath or the death of the party. (*Voet*, xlii. 1, 6, vol. iv. p. 153.)

Nantissement. Bills and notes.

Amongst these documents are included promissory notes and bills of exchange; as they must be taken to have been issued with a knowledge that they will be endorsed, and pass from hand to hand, and form part of the circulating medium; so that makers of notes and acceptors of bills, when they have admitted their signatures to such instruments, and when the notes or bills purport to have been regularly endorsed, are liable to orders of nantissement when sued by the holders. (33194, *Colombo*, 7 *July*, 1863.)

Instrument must be complete.

Where an instrument, which forms the basis of an application for nantissement, is one which, according to the plaintiff's own showing, is not so complete in itself as to raise a strong presumption in favour of the plaintiff's claim (as in the case of bonds, notes, bills for money lent or goods sold, &c.), but is connected with others, and calls for further enquiry, nantissement should not be granted upon it. (27514, *D. C. Colombo*, 7 *March*, 1860.)*

And not prescribed.

A decree of nantissement was refused to an instrument on the face of it prescribed—and which apparently

* In this case, from the plaintiff's own admission, no money passed at the time the note was given by the defendant; it was given in pursuance of a certain arrangement to supersede and annul a bankruptcy.

was not saved from prescription by payment of interest —on the ground of no high probability. (19043, *D. C. Galle*, 29 *Feby.* 1860.) And also to an account rendered, where figures had been erased and others substituted. (3670, *D. C. Colombo*, 5 *Dec.* 1845.)

No nantissement where good defence in writing, &c.

It is also refused if the defendant has a good defence, supported by writing, or the admissions of the plaintiff, though by witnesses.* Thus, a receipt, or an admission of money due, is sufficient to prevent nantissement. (*Voet*, xlii. 1, 10, vol. iv. p. 155, and also last case cited.)

It may be further stated, that proof of the liability of the defendant to pay the amount of a note or bill forms an essential part of the plaintiff's case, and is not evidence to be adduced on the defendant's side—the plaintiff not being entitled to provisional judgment, unless he shows a clear *primâ facie* right to his demand. For example, a note or bill is not allowed any days of grace in the Cape of Good Hope, and therefore a presentment three days after the bill is due, which would be good by English law, is no presentment, and the endorsees are not liable; so that a plaintiff could not have nantissement against them. (*Randall v. Hampt. Menzies R.* and 16732, *D. C. Colombo*, 19 *Oct.* 1852.)

* But Van der Keesel (527) and Van der Linden (Pr. 408), differ in this from Voet. If witnesses were allowed, they would probably be required *instanter* (see *post*, p. 408-10); so that this interlocutory question might not drift into a full trial. Menzies may, or may not, determine the point. Unfortunately no copy of Menzies' Report is to be procured in London, not even at the law-libraries, or the British Museum. The S. C. *seems* to have adopted Voet's view (see the cases in pages 408-10, *post*).

Appearance to nantissement.

As to the second rule, it may be observed "that the defendant, after one citation, may be decreed to make provisional payment, unless, indeed, he appear and show good and sufficient ground for resisting the plaintiff's application. (*Voet*, xlii. 1, 6, vol. iv. p. 154.)

If the defendant appears and denies his signature, nantissement is delayed for the plaintiff's proof. The defendant is allowed one postponement, to make acknowledgment, if asked for without fraudulent intention. And if he neither admits nor denies the writing, he is condemned, without right of appeal. (*Ibid.* § 7.)

Nantissement —when not refused.

A decree of provisional payment cannot be refused on the ground that the defendant, though admitting his signature, pleads that he did not read the instrument before he signed it (*Ib.* § 8); or that he does not owe the amount mentioned therein (*Ib.*); or has paid it (31285, *D. C. Kandy, Coll.* 8 *Nov.* 1858; *Austin*, 223); or that a second note (which had been subsequently paid) had been substituted for the note attached to the citation (same case); or that a second note and a cheque had been given for the note in court (21768, *D. C. Colombo*, 18 *Oct.* 1856; *Lor. R.* 199); or that he did not receive *full* consideration for the same, unless there is liquid evidence, *instanter*, to show that the part failure of consideration was the fault of the plaintiff (*Collison & Co. v. Ekoteen, Menzies' R.* p. 46: 27660, *D. C. Kandy, Coll.* 8 *Dec.* 1854; *Austin*, 196); or that some other party had, unknown to him, signed his name; or that the instrument has been falsified (unless from

difference of ink, or from any alteration in the document, or from the character of the plaintiff, or other circumstances, to be left to the discretion of the judge, no light presumptions of fraud militate against the instrument); or that an error in account has been made concerning the debt comprehended in the writing; considering that it would be easy for any one to allege all such things for the sake of delaying payment. (*Voet*, xlii. 1, 8, vol. iv. p. 155.)

The above cases support the view of Voet, in opposition to Van der Keesel, that that is not allowed as an exception to nantissement which, "if pleaded to nantissement, would so far abate the cause of action as to absorb or devour all the vigour of the principal suit, or would leave nothing more to be disputed by a defendant, thus provisionally condemned." Thus the defendant cannot set up, against nantissement, insanity, minority, want of consideration, where the *onus* is on the defendant, payment, discharge, notation, compensation, or set-off, agreement of non-claim, or the like, if the truth of the allegations is not supported by writing or by the admission of the opposite party, but can only be proved by witnesses.* Similarly, the defendant cannot urge *restitutio in integrum*, nor a right to remission of rent, mentioned in an admitted lease. (*Voet*, xlii. 1, 9, 10, 11, vol. iv. p. 155 : *Id.* p. 158.)

* But see *ante*, p. 407.

But it is open to the defendant, if he can, by writing or the admission of the plaintiff, to show that, when he is summoned on a contract *binding on both parties*, the contract has not yet been fulfilled on the part of the plaintiff, unless in the contract itself this defence (*contractus non impleti*) has been renounced. (*Voet*, xlii. 1, 15, vol. iv. p. 158.) Thus, where the goods, for which a promissory note was given, were, though sold, not delivered to the purchaser, such non-delivery being evidenced by the admission of the vendor and payer, a good defence was held to be afforded to a claim for provisional judgment. (22326, *D. C. Colombo*, 17 *June*, 1857.)

The defence also will succeed, if "the instrument does not contain any express consideration, *causa debiti*; or if that cannot with sufficient accuracy be presumed from circumstances; or if the consideration on the face of the writing is unlawful; or if the plaintiff is a bare holder, unempowered, either by cession of action or power of attorney from the creditor, unless the document is payable to bearer* (*Voet*, xlii. 1, 15, vol. iv. p. 158: *V. d. Kl.* 526); generally speaking, where the defendant could not be liable upon final decree.

Practice as to nantissement.

When nantissement for payment under security *de restituendo* is prayed for in the libel, the defendant may

* And therefore, of course, in the case of a bill or note, where such has been sold without endorsement

be called on to plead, by verbal answer, to such claim, without the delay and form of filing a written answer thereto, according to the rules of the court in ordinary cases; and the court may thereon grant nantissement without issue being joined between the parties on the general merits. The plaintiff must annex to the libel a copy of the instrument upon which his claim for nantissement is founded; and the summons, in addition to the usual matter contained in it, should call upon the defendant to appear and answer, on some certain day, to the plaintiff's claim for nantissement contained in the libel, and to acknowledge or deny his signature to the instrument, and to show cause, if he has any, why nantissement should not be granted as prayed for. If the defendant appears on the day so fixed, and acknowledges his signature, the plaintiff is entitled to nantissement; unless the defendant, on the facts alleged in the libel, or inspection of the instrument, shows that the plaintiff is not so entitled; or unless the defendant produces some instrument or document in the handwriting of, or signed by, the plaintiff, or obtains an admission from the plaintiff, on his being then examined, from which the court shall be satisfied that the plaintiff is not likely to succeed in the action. (35001, *and* 35460 *D. C. Colombo*, 6 *Oct.* 1842; *Morg. D.* 332-5.)

Effect of default in appearing.

If the defendant does not appear on the appointed day, he is taken to have admitted the instrument; nor is he in practice allowed to purge his default, or order

to oppose or prevent a decree of provisional judgment. (*Voet*, xlii. 1, 6, vol. iv. p. 153.)

Nantissement —at what stage it may be granted.

Nantissement may, undoubtedly, be made at any stage of the suit, even after appeal; nor will the refusal of the court to grant it at an early stage of the suit, even though acquiesced or affirmed in appeal, debar the party from repeating his application at a subsequent period, if circumstances shall have so changed as to give him a better right to demand it. (*Marshall*, p. 439: *Voet*, xlii. 1, 12, vol. iv. p. 156.) And whether the plaintiff prays for nantissement, by moving to amend his libel, or whether he merely prays for a citation or summons against the defendant, he must in each case annex to the amended libel, and to the citation or fresh summons, a copy of the instrument relied upon. (35001, *and* 3560, *D. C. Colombo*, cited above.) And it would seem that, if there are other defendants, they should have notice of the prayer or citation for nantissement against any defendant; and that the plaintiff is bound to prove that they had notice, or waived it. (39616, *D. C. Kandy*, 10 *June*, 1864.)

Attachment in nantissement.

The proper process to enforce sentence of nantissement is attachment, as for contempt, inasmuch as the sentence is only interlocutory, like sequestration. (37269, *D. C. Colombo*, 14 *Febr.* 1844)

Suit for nantissement under power of attorney.

If the plaintiff sues under a power of attorney, he may prove the power in a summary manner; and unless he can do so, no judgment of any sort can pass in his

favour; but should the defendant plead in abatement, and the plaintiff accept that challenge, and join issue in form on that plea, his title to sue must be decided on that issue, and the plaintiff cannot claim to prove his right in the more summary manner allowed by the law. (23681, *D. C. Colombo*, 9 *June*, 1858.) Also any objection to the proctor's* authority should be taken by oral application to the court, not by plea, and in the earliest stage of the proceedings in nantissement, so that the court might, in its discretion, set aside the matter altogether, or permit the plaintiff to rectify the error, if such it be. (24440, *D. C. Colombo*, 16 *Aug.* 1858.)

Staying proceedings.

In some cases, the D. C. is entitled to stay proceedings in an action; as, for example, where a second action for the same cause appears to have been brought vexatiously. The D. C. will then order the proceedings thereon to be stayed until the costs in the former suit are paid, although the plaintiff be a pauper, or in execution for such costs. (*Wild v. Hobson*, 21, *V. and B.* 112: *Archbold, Q. B. Pr. title*, "*Staying Proceedings:*" 1124 *and* 18235, *D. C. Trincomalie*, 7 *Apr.* 1863; *Coll.*) And in a former decision it was held that the court should not stay proceedings, on the second petition of a pauper, until the costs of a nonsuit in a prior case on the same

* It is doubtful whether this does not refer to a proctor, not *qud* proctor, but as a person holding a power of attorney.

cause of action have been paid, *unless* his conduct appears vexatious. (11446, *D. C. Batticaloa*, 23 *Sept.* 1851, citing *Archbold, Q. B. Pr.* 1124; *Har. Dig.* 1853; and *Hulton v. Culboy*, 1, *Tidd. Pr.* 94.) If the judge stays the proceedings upon a point of evidence, or in a case where there are counter-suits, one for land and the other, by the person in possession, for damage, and there being nonsuit in the former case, the judge orders stay of the second action until a suit is brought, by either party, to try the title to land: in either of such cases, the S. C. will order the case to be sent back to be tried out. (20378, *D. C. Matura:* 10792, *D. C. Kornegalle*, 9 *Apr.* 1851.)*

Reviving judgment.

If a plaintiff seeks to recover a debt due on a judgment obtained by him many years ago, his first step should be to make application to the court to revive the judgment (24390, *D. C. Kandy*, 17 *June*, 1851; *Austin*, 167); that is to say, he should not bring a fresh action, but should simply move for a rule to show cause why the former judgment should not be revived, and execution issued thereon. (1814, *D. C. Matura*, 9 *Aug.* 1837; *Morg. D.* 193: see also *V. d. Ldn.* p. 424.) A judg-

* The above principles must not be taken as precluding the discretion given to the D. C. to stay proceedings in the case of interlocutory appeal. (See *ante*, pp. 171, 172.) The principles laid down by Sir Charles Marshall (*Marshall*, p. 13) should be adhered to; namely, that where the practice of the case requires the immediate settlement of the point, or points, raised in any interlocutory order, the proceedings should be stayed, to allow a judgment on the appeal therefrom. (10965, *D. C. Galle*, 28*th Nov.* 1846; *Coll.*)

ment becomes superannuated and requires revival after five years. (*V. d. Ldn.* 425: *V. Lwn.* 656.)

Citation to revive judgment when party is dead.

Van der Linden (p. 425) says, "when the party condemned is dead, or, being placed under curatorship, has lost the *legitimam personam standi in judicio*, the decree, before it can be put into execution, must be declared executable against the heir, or curator." Such a process would probably be held necessary against the executor or administrator also (especially against an executor *de son tort*), to bring the executor or administrator's name and liability upon the record before issuing execution against property in his legal custody.

Reviving abated suits.

In case one of the parties, either plaintiff or defendant, dies during the proceedings, the suit abates, and the proceedings cannot be continued against his heirs without an order of revivor against them. (*V. d. Ldn.* p. 248.) Though there is no rule or order on this point, it is allowed in practice; and the executor or administrator should apply for revivor. Revivor is the proper course; and if a plaintiff should persist in bringing a fresh suit, without being able to show good cause for so doing, the costs incurred by such unnecessary proceeding should be borne by the plaintiff. (2847, *D. C. Negombo*, 14 *Dec.* 1835; *Morg. D.* 113.) Van der Linden adds that the heirs are allowed *two* defaults; the effect of the last being to bar the heirs from being heard on the point last in issue between the original

parties, and on which a day of hearing had been appointed. (*V. d. Ldn.* p. 428.)

Reviving power, or procuration.

As by the death of one of the parties his power or procuration becomes void, so, in like manner, it becomes void by the death of the party to whom the power was given, or by his giving it up. In this case, the opposite party is under the necessity of citing or summoning the other to appoint a new attorney, in order to proceed in the cause. The proceedings in this case are similar to those in revivor, only with this difference, that but one default is granted against the defendant, who, if he appears, has no right to demand *a day of deliberation;* and the benefit of this default is to bar him on the lost question, for which a day had been appointed. (*V. d. Ldn.* p. 429: 1679, *D. C. Jaffna*, 25 *Nov.* 1853.)

Restoring cases to the roll.

It is not necessary for a plaintiff to institute a fresh suit, if his original case has been struck off on account of his *laches* for a year and a day. The court has power to strike cases off the roll when no steps have been taken for a year and a day. This is not affected by the rules of 1842 (pp. 128-130). The party can get his case restored by showing tolerably fair excuse for his delay. This ought not, however, to be a mere motion of course on a separate proceeding. Notice of the intended application should be given, or else only a rule to show cause, in the first instance, should be granted. (*Isagoge of Grotius*, p. 301: *Groenewgen de judicies*, p. 74: 69, *D. C. Colombo*, 26 *June*, 1863.)

Ancient suit.

Where a claim had been pending thirty years, and some of the parties (but it did not appear which of them) were dead, there having been a plaintiff, defendant, and claimant in the case, the S. C. ordered the writ to re-issue upon proper application, when the claimant, or any one interested, could make a fresh claim, which could be adjudicated in the usual way, the fiscal reporting as to the person in possession. (5579, *D. C. Jaffna*, 20 *Feb.* 1862.)

New trial and re-hearing.

Another exceptional proceeding is the allowance or order of the Supreme Court for a re-hearing, or new trial. A re-hearing, or further hearing, so far differs from a new trial, that, in the former case, the S. C. generally orders certain additional witnesses to be heard, or former witnesses to be re-heard on certain points; whereas a new trial implies, in all cases (except where the parties agree to admit the evidence taken on the former trial by mutual consent), that the whole of the evidence should be taken afresh. (26428, *D. C. Kandy, Coll.* 24 *Sept.* 1858; *Austin*, 187.) See *post*, p. 420.

A new trial may be ordered upon so many grounds that it is impossible to lay down exact principles; but new trials have been granted in the following cases:—

Allowed, for want of notice.

A decree will be set aside, and the case remanded for new trial, where the defendant has not received proper notice of trial.

On account of ignorance.

In one case, the S. C. allowed a re-hearing, on payment of costs of appeal and the costs of the witnesses

on the day of trial, where the plaintiff erred only through ignorance, and contested his claim against *primâ facie* fraudulent parties. (14326, *D. C. Colombo*, 16 *Jan.* 1839; *Morg. D.* 257.)

For new evidence.

On the discovery of new evidence *since judgment*, parties will be allowed to adduce such evidence on the payment of the costs of the day and appeal, though it cannot be called for by the court *mero motu*. (28616, *D. C. Matura*, 4 *Dec.* 1862: 5916, *D. C. Ratnapoora*, 19 *Feb.* 1850.) And in a case of prescription, the court went further, and allowed re-hearing on payment of all costs, to enable the plaintiff to produce evidence of a promise ousting prescription, although he must have known of the promise before. But there is nothing to show, in that case, that the defendant pleaded prescription, the objection appearing to have been taken by the court below, so that the plaintiff was not bound to be ready with such a piece of evidence. (2728, *D. C. Galle*, 23 *Feb.* 1837; *Morg. D.* 137.) Again, a re-hearing will be allowed where a material witness, as, for example, a surveyor, is unable to attend the court below on the day of trial, on that point being satisfactorily proved, and on payment of the costs of the day and appeal for the indulgence. (11195, *D. C. Jaffna*, 4 *Dec.* 1862.)

Where witnesses are not fully discredited.

A re-hearing will be granted where witnesses are not fully discredited. The Supreme Court is, in general, very unwilling to over-rule the finding of the court

below on questions of fact; but where the D. J. does not say that the witnesses for the plaintiff have given their evidence in such a manner as to disentitle them to credit, and a case is made out for a plaintiff which would warrant a verdict for him, in the absence of contradiction from the other side—in such a case, the S. C. will order a re-hearing. (19857, *D. C. Galle*, 5 *Nov.* 1861.)

Delayed decision.

Where a decision in a case has not been given for several months, and the court below has not expressed a strong opinion of the strength of the plaintiff's evidence, it is considered more satisfactory to have his case re-heard. (864, *C. R. Chavagachery*, 27 *Feb.* 1862.)

New trial refused.

The Supreme Court has repeatedly refused to grant a new trial where a party has evidence ready but does not produce it, relying on the weakness of the other side. Parties, when they go to trial, ought to call all their witnesses, and give all their evidence, *pro* and *contra*, unless they are stopped by the court. (30099, *D. C. Colombo*, 18 *Dec.* 1862: 17678, *P. C. Kaigalle*, 6 *Nov.* 1862.)

Similarly, a new trial will be refused where the non-production of the necessary evidence arises from the negligence of the party who ought to produce it; as if, for example, he neglected to file certain necessary proceedings, or to produce further evidence in support of his case. (665, *D. C. Negombo*, 13 *Feb.* 1837; *Morg. D.* 135.)

The naked assertion, in a petition of appeal, that the witnesses have sworn falsely, is no ground for a new trial. (4489, *D. C. Kandy*, 18 *Nov.* 1833: *Austin*, 21.)

Where a party has admitted an instrument at a trial, he cannot be allowed, after the decision of the case, to retract such admission as a mode of obtaining a new trial, unless it can be shown that he had been imposed upon—a supposition which would be negatived if the admission had been made in open court. (5080, *D. C. Kandy*, 2 *Nov.* 1833; *Austin*, 22.)

New trial by acquiescence.

If, after evidence and judgment, the plaintiff moves the D. C. that the case be heard *de novo*, and the defendant acquiesces in that motion, and on the day of trial both parties appear, and evidence is adduced and judgment is given afresh; that is a new trial, and the first judgment is over-ruled. (1126, *D. C. Kandy*, 16 *Dec.* 1844.)

CHAPTER X.

DISTRICT COURTS.

REMEDIES—~~OTHER THAN BY LIBEL AND SUIT.~~

REMEDIES may be divided into remedies by—

1. A mere personal act.
2. By the act of the parties.
3. By the mere operation of law.
4. By action; and
5. By process *quasi* action.

Remedy by mere personal act.

There are two modes in which private wrongs are prevented by a mere personal act; namely, defence, and stoppage *in transitu*.

Defence.

1. The defence, by force, of oneself, or the mutual and reciprocal defence of such as stand in the relation of husband and wife, parent and child, master and servant, is a preventive course which the law allows; and the breach of the peace which results is chargeable upon him who began the affray. But care must be taken that the resistance does not exceed the bounds of mere defence and prevention; for then the defender

would himself become an aggressor. (*Sm. M. C. L.* 267, citing 3 *Bl. Com.* quoted in 3 *Ste. Com.* 338.)

Stoppage in transitu.

Stoppage in transitu is the resumption by a vendor of the possession of the goods which have been transmitted to, but which have not yet come into, the actual or constructive possession of a purchaser who has become insolvent. The vendor is not obliged to seize the goods on the road: notice to the carrier is sufficient. (*Sm. M. C. L.* p. 267, citing *Sm. Merc. Law*, 553-4, 559, 562; *Tudor's cases on M. L.* 549.)

Remedy by the act of the parties.

Redress of private injuries by the mere act of the parties is of two sorts; first, that which arises from the act of the injured party; and, secondly, that which arises from the joint act of both, or all the parties.

Of the former, redress by the act of the injured party, there are several modes: reception or reprisal, entry on lands, abatement or removal of nuisances, distress, and seizure. (*Sm. M. C. L.* 268.)

Reception.

Reception, or reprisal, is the recovery by the act of the party deprived of his moveable property, or of his wife, child, or servant. This personal recovery is allowable, provided it be not done in a riotous manner, or attended with a breach of the peace, or a violation of legal rights. If, therefore, a man's horse is taken away, and the owner finds him in some public place, he may lawfully seize it to his own use; but he must not break open a private stable, or trespass on the grounds of a third

person to take him, except he has been stolen, but must have recourse to an action.

A similar remedy is that of re-entry on land, when another person, without any right, has taken possession or held over; in which case the party entitled may make a formal but peaceful entry on the lands, declaring that he thereby takes possession. He may enter on any part, declaring it to be in the name of the whole. (4591, *D. C. Jaffna*, 30 *June*, 1852; *Coll.*) Entry.

If by this act he retains quiet and undisturbed possession for more than a year and a day, he cannot be dispossessed without a previous decree.

Another species of remedy by the act of the party injured is the abatement of nuisances.

If a man apprehends that a nuisance *will* be committed, he has no right to enter upon his neighbour's land to prevent it; but he may make a peaceable entry to abate and put a stop to an *existing* private nuisance. The occupier should, however, be first required to abate it himself; unless the nuisance causes such imminent danger to life as to render it unsafe to wait for its removal by the occupier. And a public nuisance cannot be abated by a private person, unless it injures him in some particular manner, distinct from that in which the public generally are affected by it; in which case, he may abate it so far as may be necessary to the enjoyment of his own rights. (*Sm. M. C. L.* 270; *Add. Torts.* 99-100.) This applies also to nuisances which Abatement of nuisance.

arise from the excessive use of limited rights, which may, if necessary, be entirely stopped until confined within its proper limits. (*Add. Torts.* 101.)

Distress.

Another mode of redress by the mere act of the parties is by distraining for damage done by cattle or animals trespassing on land. This right to seize and distrain cattle, *damage feasant*, existed under the Roman-Dutch law. (*V. Lwn.* p. 491: 30619, *C. R. Kandy*, 30 *June*, 1863.) And, in all cases where cattle are seized and impounded for trespass, it is the duty of the *owner*, and not of the distrainer, to take notice thereof, and to look after such cattle; that is to say, if they are kept in an open pound or place where the owner can enter to them; and therefore, if the distrainer deliver the cattle over to the headman, as is customary in cases of cattle trespass, the distrainer discharges himself from all responsibility for the cattle; and if any of the cattle die, without the fault of the distrainer, the latter is not only not liable in damage, but has still his action against the owner for the trespass. (*Com. Dig.* "*Distress:*" 49, *C. R. Gampola*, 2 *June*, 1846; *Nell.* 95: 117, *C. R. Kandy*, 6 *May*, 1845.) Yet it would seem that, if the distrainer cannot pound them publicly, and is obliged himself to detain them, he is bound to exercise ordinary care towards the animals whilst in his charge. (18333, *D. C. Kandy*, 11 *March.* 1846; *Austin*, 93.)

The land owner cannot distrain, if the cattle are under the personal care and immediate control of some

one. And, also, he must distrain them at the time, and before they leave his land. (*Sm. M. C. L.* p. 270.)

No damages where trespass occurs through owner's fault.

In one case, the law of Ceylon awards no damages: *i. e.* if the custom of the country require that lands of a certain description should be fenced, the plaintiff cannot recover damages which are caused by his own neglect in not properly fencing his land. (4711, *C. R. Batticaloa*, 12 *July*, 1854.)

Tender of sufficient amends before distress makes the distress wrongful, so as to found a cause of action; as also does tender of sufficient amends after distress, and before the things are impounded (that is, put into a place of security). The demand of an exorbitant sum for a compensation does not exempt the person whose cattle are seized from the necessity of tendering a proper compensation. (*Sm. M. C. L.* p. 271.)

In connection with this subject, it will be convenient to describe in this place the summary remedy for cattle given by statute.

Remedy for cattle trespass by ordinance.

By *Ordinances No. 2 of 1835, § 2, and No. 5 of 1849, "any proprietor or tenant (or other person, by his direction) of any land, garden, plantation, or field under cultivation and fenced in such a manner as the local custom may require, or without any fence, if by the

* By No. 2 of 1835, cattle trespass, under this ordinance, was under the District Court; by No. 5 of 1849 it was transferred to the Police Courts, who now have the sole power to hear and determine such cases. (1724, *Avishawelle*, *P. C.* 19 *Nov.* 1850; *P. C. Ca.* p. 32.)

established local custom no fence is required;—and, in respect to the Government preserved cinnamon plantations of Marandahn Ekele, Kadirane, and Morotto, any person thereto duly authorized may seize any cattle, goats, sheep, or pigs found straying therein, and tie and detain such cattle, &c. until the owner thereof is ascertained, and the damages, if any, occasioned by such trespass assessed in manner hereafter mentioned; and the fair expense of the keep of each and every such cattle, &c. during their lawful detention, may be recovered as hereafter mentioned.

Mode of procedure when damage is sustained.

By § 3 of No. 2 of 1835, and by No. 5 of 1849, "The owner or person in charge of such stray cattle, &c. shall be liable to the proprietor or tenant of such land for the full damages by him sustained from the trespass; and if the trespass shall have been committed in the night time, he shall be further liable to pay a fine to the Crown equal to the amount of the damages awarded; the damages to be assessed and levied in the manner following, that is to say: notice of seizure of such cattle shall forthwith be given to the nearest constable, police vidahn, or local headman (who, if he be not the principal resident headman in the village or district, shall without delay give information thereof to the principal headman of the village or district, if such principal headman be resident within ten miles); and such headman shall, as soon as may be, repair to the spot, and, with the assistance of three or more respectable persons of the neighbourhood,

if the attendance of such persons can be procured (otherwise without their assistance), ascertain, to whom the cattle, &c. belong, and the nature of the trespass committed, and assess the amount of damages thereby sustained, and forthwith furnish the land proprietor, or other person in his behalf, with a report of such trespass, and the amount of such assessment, and the names of the persons by whom such assessment shall have been made for production before the Police Court: and, unless the parties agree in the amount assessed, the report shall be produced before the Police Court; but shall not be received in evidence, unless verified on the oath of such headman in open court: and the Police Court, after summarily hearing the parties, and the witnesses whom they may bring with them, or any others whose evidence the court may think fit to require, shall award such damages as shall be proved to have been sustained, together with the charges for keep above mentioned, and, further, a fine of equal amount in case the trespass shall have been committed in the night time; which damages and penalty shall be levied by distress, if not otherwise discharged. And (No. 2 of 1835 § 4) where no damage is proved, a fine, not exceeding ten shillings for each head of cattle, &c. found trespassing may be awarded, to be paid by the owner or person in charge thereof: a share, not exceeding one half the fine, to be paid to the owner or occupier of the land, and the remainder to the Crown. Where (*Ib.* § 5) the cattle

Procedure when no damage.

Procedure when cattle cannot be seized.

cannot be seized, the owners or persons in charge thereof are, nevertheless, liable (notice as above being given) to the like penalty and damages; and the proceedings in respect thereof are similar, as far as circumstances admit. All right to the benefit of the Ordinance is forfeited unless the required notice* (*Ib.* § 6) is given, within forty-eight hours from the time of seizure, or trespass done, to the constable, police vidahn, or local headman, if any be resident within ten miles, or, if not, within a reasonable period after damage done or seizure, and unless the land is fenced according to the local custom.

Notice of seizure.

The statutable remedy cumulative only.

A right to seize and distrain cattle found *damage feasant* existed under the Roman-Dutch law, and the remedy given by this ordinance to holders of land is cumulative only, and does not take away the old remedy by distress when cattle are taken *damage feasant*. (49, *C. R. Gampola*, 2 *June*, 1846; *Nell.* p. 95: 18947, *D. C. Kandy*, 10 *Oct.* 1846; *Austin*, p. 102: 30619, *C. R. Kandy*, 30 *June*, 1863.)

Nor does the remedy given by this Ordinance take away the old right of instituting an action for damages for the trespass. (17452, *C. R. Caltura*, 24 *Nov.* 1863; *Coll.*: 34163, *C. R. Colombo*, 29 *June*, 1858: see also 2578 *D. C. Ruanwelle*, 15 *July*, 1835; *Morgan, D.* 54.) In the last case cited, it is said "that when a

* See 2238, *Galle*, 12 *May*, 1846; *P. P. Ca* p. 3.

party has elected to proceed under the Ordinance and procures a fine to be imposed, part of which he himself became entitled to, and instead of proving his damages at the same time, which he had the means of doing through the headman's assessment, lays by for six months, and then brings suit, such a vexatious proceeding is contrary to the whole tenor of legislation on this subject and will not be upheld." But this must merely be taken as meaning that the court will look unfavourably on such a case, as the Supreme Court cannot take away a clear right, or create a statute of limitations.

Cattle—where to be pounded.

The Ordinance does not state where cattle seized trespassing are to be detained—whether in the common pound (if there is one), or in a special pound, or in the custody of the person making the seizure. It is not unusual to impound cattle at the cutcherry, or the police station; but if the authorities there refuse to receive the cattle, their detention by the party seizing the cattle is not illegal, and he is bound only in ordinary care to the animals while remaining in his charge. (18333, *D. C. Kandy*, 11 *March*, 1846; *Austin*, p. 94.)

Evidence.

In a complaint under the Ordinance, if the defendant pleads not guilty, it is incumbent on the plaintiff to prove, either that the land was not fenced in such a manner as the local custom requires, or that by such local custom no fence is required. (14091, *Chavaga-*

cherry, 24 *Feb.* 1857; *P. C. Ca.* 106.) He must also prove that the land trespassed on was under cultivation. (309, *Chavagacherry*, 20 *May*, 1862; *P. C. Ca.* 167.)

Who to assess damages.

The Ordinance is imperative in requiring that the damages shall be assessed by "the principal resident headman of the village or district," and three or more respectable persons of the neighbourhood, if their presence can be procured. The words "principal headman of the village or district" do not necessarily refer to the modliar of the entire district. It is sufficient if the local headman, the principal one in the village, assesses the damage. (18570, *Ballepitty Modere*, 21 *Feb.* 1860; *P. C. Ca.* 139.)

Cattle trespass —when criminal.

Cattle trespass and damage done are only a ground for a civil action, unless they are expressly charged to be in breach of some clause of the Ordinance No. 2 of 1835, which renders them punishable as criminal offences. (10658, *Batticaloa*, 25 *Aug.* 1855; *P. C. Ca.* 79.)

Redress by the joint action of the parties.

Accord is an agreement between the party injuring and the party injured, that the party injuring shall make satisfaction to the injured party, by doing something in lieu of some other thing which the former had failed to do; and satisfaction is the fulfilment of such an agreement. But as there must be some consideration for such an agreement, the taking of a smaller sum of money in lieu of a greater, unless the time or

place of payment is different from that of the debt, does not amount to a legal satisfaction. So that a man may give, in satisfaction of a debt of £100, a horse worth five pounds; but if he gives five pounds, it is not a satisfaction. (*Sibree and Tripp*, 15 *M. and W.* 38, *where all the cases are collected:* 3, *Bl. Com.* 15 and 16.) This species of redress is called, in the Roman-Dutch law, *transactio*, and is defined by Voet "to be a covenant with a consideration of something given, withheld, or promised, concerning a matter in doubt or in litigation." *Transactio* is therefore accord, and the fulfilment of it is satisfaction; and, as it is a *conventio non gratuita*, it so far agrees with the English law. It will be treated of more at large under the head of "Extinction of Obligations."

Arbitration—how made.

"The settlement of disputes by arbitration, that is, by referring them to one or more arbitrators, is very common in Ceylon; and that particular kind of arbitration called *gangsabe*, by which, in some districts, the matter in dispute is referred to the inhabitants of a village, is generally specially reserved, by the 4th clause of the Charter, from the effect which the exclusive jurisdiction conferred on the District Court by that clause might otherwise have had in preventing the continuance of that custom. The submission, as it is called, or reference to arbitration, may either be made without any suit pending between the parties, and then either by verbal agreement, or, which is a much preferable

course, by bond or contract; or it may be made after action brought, at any time during the progress of it, by order of the court."* But this expression "by order of the court" must by no means be taken to mean as giving the courts authority, of their own mere will, to *order* the arbitration. The reference, to be legal and binding, must *be strictly voluntary*, and should indeed be so expressed in the order of reference. A court of justice may *recommend* the adoption of this course, not for the purpose of saving its own time and trouble, but where the subject in dispute and the facts to be enquired into are of a nature to convince the court that arbitrators would be more likely to come to a satisfactory conclusion than the court itself could do. But if the parties, or either of them, be unwilling to accede to this proposal, the court is bound to proceed with the case to a decision, however difficult it may appear to be to form a correct conclusion. And so completely unfettered ought parties to be left in this respect, that even the *recommendation* of the court to refer ought not to be pressed upon them too warmly; for the party who was

Arbitration must be voluntary.

* Sir C. Marshall is here speaking only of the District Court. The Supreme Court has said, "it is *questionable* whether a commissioner of the Court of Requests has power, under any circumstances, to enter on its records a formal submission to arbitration, such submission, and the subsequent award, to be made rules of court; although he may undoubtedly at any time enter up a judgment by consent. (298, *C. R. Badulla*, 21 *Jan.* 1859.) Still less has a commissioner power to *direct* an arbitration, which must be by consent. (17569, *C. R. Jaffna*, 1 *July*, 1859.) This last case, however, implies that he can act upon an award fairly given.

dissatisfied with the award would rarely fail to endeavour to set it aside, on the ground that he had been persuaded to go to arbitration against his own judgment." (*Marsh.* pp. 33-34.)

Referring land cases to commissioners.

Thus, for a court to refer a land case to "commissioners, without either the assent of the parties, or allowing them to nominate the persons selected, would be merely delegating to other persons the duties which ought to have been performed by the court itself, and would be an act wholly void. (91, *D. C. Tennoratchey*, 30 *July*, 1834; *Morg. D.* 18.) Even the award of a gangsabe does not bind a party, unless it appears that he made an agreement to refer the matter to the arbitration of that species of tribunal. (5173, *Jud. Com. Kandy*, 6 *Dec.* 1833; *Morg. D.* p. 3.) In the same case, the decree of a District Court was founded, not on evidence, but on the report of commissioners appointed by the court; and no agreement or consent by the parties appearing on the proceedings, the Supreme Court referred the case back for evidence. (*Ibid.*; *Marshall*, 34.) The evidence of a person to whom a matter has been referred for investigation may be of great weight; but it must be taken on oath or affirmation, and be subject to cross-examination. The importance of this is shown in a case cited by Marshall, where it was proved that the report of such commissioners was founded on a survey that appeared to be imaginary. (*Marshall*, 35.)

The true use of land commissioners.

"The only, or at least the chief, use of such references to commissioners by the court, without the consent of parties, is to ascertain what the precise object of litigation may be; so that the court may be sure that the parties and witnesses, having been present at the inspection, are speaking of the same object. And thus a plan or survey may be prepared, pointing out the spot in dispute, to the correctness of which the parties, having been present when it was made, cannot refuse their assent." (*Marshall*, 35.)

Arbitration *without* suit pending.

Arbitration may determine a matter in dispute, without any suit pending, by a person or persons appointed for that purpose. In some cases, a single arbitrator is appointed; in other cases, two or more arbitrators are appointed: and it is generally provided that, if they should not agree, another person shall be called in as umpire, to whose sole judgment the matter shall be referred.

The decision is called an award. The submission to arbitration may be by word or by deed; yet both of these being revocable in their nature, it is the better practice to enter into mutual bonds, with condition, under a penalty, to stand to the award.* This condition will not, however, pass land, which of course can

* Now, by the statute law of England, an agreement to refer cannot be revoked, and any such agreement may be made a rule of court; but *compromissum* under the Roman law was entered into in the form stated. (*St. Eq.* § 1461.)

pass only under a notarial or judicial execution; but an arbitrator may award the conveyance of land, and the party awarded to convey must convey. (*Sm. M. C. L.* p. 273.)

Awards so made are subject to be set aside by the District or Supreme Court, as courts of equity; nor can anything in the agreement of reference oust their jurisdiction. (See *St. Eq.* ch. 40. vol. ii.)

Arbitration with suit pending.

When an arbitration of a matter which is the subject of a suit is ordered without the consent of the parties, or where it is doubtful whether the submission was entirely voluntary, the Supreme Court will set aside both the submission and the award, and will generally order the District Court to take the evidence itself; but allowing it to make such legal use of the reports of the arbitrators as it thinks fit. (1539, *D. C. Walligamme*, 7 *May*, 1836; *Morg. D.* 80.) Or the Supreme Court will set them aside, and remit the case for hearing, with liberty to the parties to enter into an agreement or acts of submission to refer the matter in dispute to such arbitrators as they may choose to name; in which case, the agreement or submission should be made a record of the court, and be signed by the respective parties. (5464, *D. C. Matura*, 24 *June*, 1840; *Morg. D.* 296)

Consent should be expressed in the reference.

As cases before a court can only be referred to arbitration with the full consent of both parties; if that consent is not freely given, the court must proceed,

and decide upon the evidence. (1882, *C. R. Dambool*, 11 *Dec.* 1862.) And further to secure this question of consent from doubt, the consent should be expressed in the order of reference itself, clearly taken down and signed by the parties. (303, *D. C. Matura*, 20 *Jan.* 1857: 1139, *D. C. Walligamme*, 20 *June*, 1835; *Morg. D.* 50.) But though this practice is recommended by the Supreme Court, yet, even if the parties do not sign, that court would no doubt take a record of consent in the proceedings as *primâ facie* evidence of consent. And if a reference is signed only by a party's proctor, and who has no proxy authorizing him to refer to arbitration, the party can subsequently ratify his proctor's act; and his attending before the arbitrators and taking part in the proceedings will be evidence of such a ratification. (36396, *D. C. Colombo*, *Lor. R.* p. 9.)

Order of reference should be unambiguous.

Further, the order of reference should be free from ambiguity, or, if it is not, it is liable to be referred to the court below to explain its intention. (2228, *D. C. Caltura*, 22 *May*, 1837; *Morg. D.* 158.) The District Judges should not content themselves with a bare entry of such consent in the proceedings; but, if there be no regular bond of submission executed, should record the terms of reference plainly and explicitly without unnecessary language, thus:—

Form of order of reference.

"It is ordered, by and with the consent of both parties, that the matters in dispute between them in this suit be referred to the award and final determina-

tion of (*insert the names of the arbitrators*),* whose award the said parties do hereby agree and consent to abide by, provided the same be legally made on or before the day of next, or such other day as this court, on motion, may order."

The terms of this order may easily be altered according to circumstances. And the terms of the agreement to refer, and this order, should not be made without notice to all the parties to show cause at a reasonable time after the motion for the rule. (23496, *C. R. Jaffna*, 28 *July*, 1859.)

Parties bound by the order.

When the parties have once agreed to be bound by the above, or any other form of submission, neither can afterwards dissent from the decision because it happens to be made against him. (20941, *D. C. Colombo*, No. 8, 31 *Oct.* 1838; *Morg. D.* 252; and 8364, *D. C. Tenmoratchy*, 17 *June*, 1835; *Morg. D.* 48.)

Award out of time.

An award out of time cannot be upheld; when the time has run out, there ceases to be any valid submission to arbitration. (35870, *D. C. Kandy*, 23 *Sept.* 1863.) Yet it would *seem* that an award will be upheld against an appellant, if he attended and took part in the proceedings before the arbitrators after the lapse of time limited for the award. (10,715, *D. C. Jaffna*, 14 *Aug.* 1862.)

Conversely, when a submission to arbitration is

* It is not proper or regular for the D. J. to be one of them. (20941, *D. C. Colombo*, 31 *Oct.* 1839; *Morg. D.* 252.)

made, the court, until the award made or the reference taken is ousted from the case, has no power to order further proceedings to be taken—any such order would be declared void. (13507, *D. C. Kandy*, 18 *Jan.* 1841; *Austin*, 52.)

Award, how signed.

An award must be signed by all the arbitrators; and consequently, if one or more of them, from death or any other cause, cannot sign, the award is void. (732, *D. C. Chavagacherry*, 6 *May*, 1837; *Morg. D.* 154.)

Umpire.

The District Judge can no more appoint an umpire than he can arbitrators, unless by the consent of all parties to the submission. It is advisable for the parties either to name an umpire at the time of submission to decide the question in dispute, in case the arbitrators differ in their opinion; or to vest the arbitrators (also at the time of the submission) with the power of choosing an umpire before they enter into the investigation of the matter in litigation. (5464, *D. C. Matura*, 24 *June*, 1840; *Morg. D.* 296.)

Whether award is duly made, ascertainable by D. C.

Although an award, when duly made, should be held final, as respects the District Court, yet it is competent for that court to enquire and ascertain whether it has been duly made or not. (*Marshall*, p. 37.) Nor does the fact of its having been made a rule of court furnish of itself a reason why it may not be set aside. (9310, *D. C. Jaffna*, 24 *Oct.* 1862.)

Award, how set aside.

It is open to all parties to move to set aside an award for irregularity of proceeding, or other sufficient

cause; and such motions have been made in the District Court, and sanctioned by the Supreme Court. (*Marshall*, p. 37.) But any party to an arbitration who has an objection to make to an award must do so before the court below in the first instance; he is not to raise objections for the first time before the Supreme Court under the guise of an appeal. (27420, *C. R. Jaffna*, 22 *July*, 1862.)

Grounds for setting aside award.

The usual grounds for setting aside an award are fraud, partiality, *exparte* hearing, *ultra vires*,* and the like strong circumstances. If the court below impeaches an award on insufficient grounds, the Supreme Court will set aside the decree and uphold the award. (*Marshall*, 37; affirmed in 21484, *C. R. Jaffna*, 20 *June*, 1859: see also 4462, *Jud. Com. Kandy; Morg. D.* 3.)

The precise time at which an arbitrator should summon the parties is discretionary, yet the notice given to the parties must be reasonable; and if such short notice is given that one party cannot, on account of distance, attend and the case is heard in his absence, the award will be set aside as being *exparte*. (32402, *D. C. Kandy*, 20 *April*, 1860.)

Equitable principles with regard to awards.

These cases are, no doubt, based on equitable principles, relating to awards, &c. Those principles are

* In the civil law, an award exceeding the powers of the arbitrators is wholly void. (*Dig. L.* 4, c. 8, l, 32, § 14.)

laid down in Story's Equity, chapter 40, and may be briefly stated thus:—

In cases of fraud, mistake, or accident, equity interferes to set aside awards; and this notwithstanding that it is covenanted not to impeach the award.

If, upon the face of the award, there is a mistake of law or fact, which misled the judgment of the arbitrator, equity will grant relief.

Under a general submission, the arbitrators are judges of both law and fact, and are not bound to award on mere dry principles of law, but according to equity and good conscience, subject to the following qualifications:—

First, with regard to law. If the arbitrators refer any point of law to judicial enquiry, by spreading it on the face of the award, and mistake the law in a palpable and material point, their award will be set aside. If they admit the law, but decide contrary to it on principles of equity and good conscience, it will constitute no objection to it. If they mean to decide strictly according to law, and they mistake it, although the mistake is made out by extrinsic evidence, that will be sufficient to set it aside. But their decision on a doubtful point of law, or in a case where a question of law itself is designedly left to their judgment and decision, will generally be held conclusive.

Secondly, with regard to fact, the judgment of the arbitrators is generally held to be conclusive. If, how-

ever, there is a mistake of a material fact apparent upon the face of the award; or if the arbitrators are themselves satisfied of the mistake (although it is not apparent on the face of the award); and if, in their own view, it is material to the award; then, although made out by extrinsic evidence, equity will grant relief.

The arbitrators are bound by the legal rules of evidence. (*Att. Gen. v. Davidson*, 1, *McCl. and S.* 160; *Banks v. Banks*, 1 *Gale*, 46.) And, by the Roman-Dutch law, having once taken upon themselves the office, they are compellable to make an award, though not so in equity. (*Voet*, 4 lib. 8 tit. § 14; *St. Eq.* § 1457.)

An award actually made, unimpeached and unimpeachable, is a bar to any suit for the same subject matter, and specific performance of it may be decreed, if there are no just exceptions to it; or, even if there are, if it has been long acquiesced in. (*St. Eq.* §§ 1458 and 1459.)

Remedy by action.

The next class of remedies is remedy by action: the form of, and practice relating to, this remedy has been fully set forth in this volume; but it will be more convenient to describe the divisions of the *right of action* in another portion of this work, as belonging rather to jurisprudence than to the technicalities of practice.

Remedy by injunction.

An injunction is a judicial process whereby a party is *required to refrain* from doing a particular thing (alleged to be hurtful to another) in the exercise of

real or supposed rights. (*St.* §§ 861, 862; *Marshall*, 229.) Marshall adds, "until the right to do it, or to prevent its being done, is finally decided." This order is, in England, called the *remedial* writ of injunction; but there is another kind, *commanding a thing to be done*, called the *judicial* writ, which issues after a decree, and is in the nature of an execution to enforce the same (*St.* 861). This is, in fact, identical with ordinary execution in Ceylon, by which a decree is enforced, and therefore, in Ceylon, it may be considered that the remedial injunction only is usual.

Injunctions, in Ceylon, must be prayed for in the form of a suit; and the District Court has jurisdiction to that effect under its common law jurisdiction. This power is also implied by the 49th clause of the Charter, which enables the Supreme Court 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 any District Court." The District Court also possesses the power of injunction in right of its equitable jurisdiction.

Injunctions in English equity are common or special, and temporary or perpetual. The first are used to restrain proceedings at law, and therefore are not applicable to Ceylon, as not only unnecessary, since a party can obtain all that injunction could, or would, afford him, by the very extensive power that he possesses of appealing, at any stage of the case, against any judg-

ment or order, final or interlocutory. And, in any case of usurpation or encroachment on the jurisdiction of one District Court by another, the Supreme Court would, if necessary, issue its writ of prohibition. Besides, injunction implies superior authority, and the District Courts are co-equal. Nor can they issue injunctions to the minor courts, as that would constitute them courts of appeal on points of jurisdiction, a power reserved to the Supreme Court.

By *injunction*, in Ceylon, is generally meant *temporary injunction;* as perpetual injunctions form a part of the decree after hearing, and amounts to a perpetual prohibition. (*St.* § 873.) And Sir Charles Marshall accordingly treats of temporary injunctions only.

Injunctions may be, also, either *total* or *partial, qualified* or *unconditional.* (*St.* § 886.)

Sir C. Marshall says, "the occasions on which injunctions may be beneficially granted by the District Courts are to prevent *irremediable mischief*, which might ensue before the party applying could prevent the same by an action in the regular course (p. 231). But, according to Story (959, *b.*), "it may be remarked, upon the subject of special injunctions, that courts of equity constantly decline to lay down *any rule* which shall *limit* their power and discretion as to the particular cases in which such injunctions shall be granted or withheld." And yet the American Courts seem to have favoured certain *principles.*

The right must be clear, and the injury so threatened or impending as to be averted only by the protective and preventive process of injunction. It must not be awarded in doubtful cases, or new ones not coming within well-established principles. The court should be satisfied that the case before them is of a right about to be destroyed or irreparably injured, or that a great and lasting injury is about to be done by an illegal act. (*St.* 959, *b.* note 1; and see Lord Cottenham's remarks in *Brown v. Newhall*, 2: *Mylne and Craig*, 570-1.)

Waste.

An injunction will be granted to restrain voluntary waste.* (*Re William Fernando*, 28 *Oct.* 1837; *Morg. D.* 200: *Re Anthonella Conderlag*, 16 *June*, 1842; *Morg. D.* 330: *Re H. C. Bird*, 21 *Dec.* 1837; *Morg. D.* 203.) As to prevent the removal of crops, breaking down fences, cutting down trees, &c. (see also *St.* § 912-919, and *Marshall*, 231: 28190, *D. C. Kandy*; *Austin*, 201). But an injunction cannot issue in a case of permissive waste. (*Powys v. Blagrave:* 1 *Kay*, 495; 4, *D. M. and G.* 448.)

Equitable waste.

The courts will sometimes interfere to prevent what is termed *equitable waste;* that is, where the party committing waste has a clear *legal* right to do the destructive or injudicious acts, but which are considered as

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* Waste is either *voluntary* or *permissive;* the former is a crime of commission, as pulling down a house; the latter is a matter of *omission* only, as by suffering it to fall for want of necessary reparations. (*Bl. Com.* ii. 281.)

waste, and unjustifiable in the view of equity, as occasioning an unconscientious and irreparable injury to the rights of other parties. As in the case of a person who has an estate for life, with liberty to use it exactly as his own, except that he cannot sell more than his life interest; or where a person will become the owner of an estate on the happening of some contingencies, such as coming of age; or where land is given to another upon a *condition* that if he dies without particular heirs, such as sons, the estate shall go back to the donor: in cases such as these, if the party attempts or intends to destroy a wood, or to cut down trees which were planted, though even by himself, or were left standing for the shelter or ornament of the house or its grounds, an injunction may issue. (*Sm. M. of Eq.* p. 393; citing *St.* § 915; 2, *Sp.* 570, 571: *Micklethwait v. Micklethwait*, 1 *D.* and 7: 604, *Turner v. Wright;* 1, *Johns*, 740: 2, *D. F.* and 7, 234.)

Generally, injunction will not issue to prevent waste, as between tenants in common, or joint tenants; because they have a right to enjoy the estate as they please, and partition it when they choose, so far as to prevent future waste; yet it will issue in special cases, as where the waste is destructive of the estate, and not within the usual legitimate exercise of the right of enjoying the estate. (*St.* § 916.)

Injunction may be granted to restrain vexatious alienations of property *pendente lite*, whether lands or Sales.

goods. (*St.* 908, *Re Wijesekere Haminey*, 19 *April*, 1837; *Morg. D.* 142: *Re Donald Davidson*, 4 *Feb.* 1841; *Morg. D.* 325.) Or even to prevent the delivery of a conveyance. (*Re W. Don Jeronis*, 4 *Dec.* 1837; *Morg. D.* 201.) As the injunction is only *pendente lite*, if the injunction is issued prior to proceedings being commenced, it would be a ground for dissolving the injunction, if they are not commenced within a reasonable time, or properly prosecuted. (107, *D. C. Ratnapoora*, 14 *Aug.* 1851.)

Injunction against minors.

An injunction against minors must remain until after the appointment of a guardian *ad litem*, which the District Court must make forthwith, and upon which the court will either dissolve the injunction or continue it, at its discretion. (10613, *D. C. Chilaw*, 3 *Aug.* 1852.)

Proceedings in injunction.

The process of injunction in the District Court commences with a libel: such a court has no power to grant an injunction, unless after libel delivered to the secretary of the court; even delivery to the judge in chambers is insufficient. (6508, *D. C. Ratnapoora*, 21 *Oct.* 1853; *Coll.*) On the other hand, injunctions in the Supreme Court commence by petition, or motion for a rule to show cause why injunction should not issue.

Injunctions are, as orders of court in general, enforceable as such; but, under the Roman-Dutch law, when they order any particular thing to be done that is something active in itself, and not merely ancillary to

restraint, the remedy would seem to be by *gyzeling*. Thus, if a person is ordered to abate a nuisance by clearing a cesspool, the clearing is the restraint of the nuisance, and is enforceable as an order; but if a person is ordered to cease from infringing a copyright, and *to render an account of sales*, it would seem that the latter part of the order could only be enforced by *gyzeling*. (See *post*, *Gyzeling*.)

Injunction not to be stayed during appeal.

Where an injunction is issued to restrain an injurious act, it should not be stayed during appeal; for it may be rightly granted, and the stay of the writ may be the cause of further injury, as, for example, further waste. (6616, *D. C. Ratnapoora*, 6*th Nov.* 1855.)

Specific performance.

By English common law, if a party who ought to perform a contract or covenant fails to do so, no redress can be had except in damages. And it is said, in the Roman-Dutch law, that "the consequence of an obligation, by which any one binds himself to do anything, consists in this, that he must do the act stipulated for, and, on failure, is liable in damages and interest to the person in whose behalf he has bound himself. (*V. d. Ldn.* p. 197, *Sm. M. Eq.* p. 213.)

Nevertheless, both by equity and the Roman-Dutch law, a specific performance of a contract, covenant, or duty, will be decreed where damages would not afford an exact compensation for the non-performance thereof, whatever may be the form or character of the instrument containing such contract or covenant, or giving

rise to such duty. (*Sm. M. Eq.* p. 213, 7th ed.) But for this purpose, the contract, covenant, or duty imposed, must not be vague and the subject of mere inference, even if it is in writing. (4821, *D. C. Colombo*, 19 *Dec.* 1851; *Coll.*) (*Sm. M. Eq.* 7th ed. p. 220.)

Specific performance is decreed in all cases of contract respecting land; because the local character, neighbourhood, soil, servitudes, or accommodations of the land may give it a peculiar value in the eyes of a purchaser; so that damages, which would enable the purchaser to buy other land of the very same marketable value would not, or might not, be a complete compensation. (*Sm. M. Eq.* 7 ed. p. 214.)

But specific performance will not be decreed where damages would amount to a complete compensation. (*Ibid.*)

Also the performance of a contract may be decreed, not according to the letter of the contract, if it would be unconscientious, but according to the change of circumstances. (*Sm. M. Eq.* 7th ed. 219.)

So, also, no contract will be enforced which is against law or equity, or public policy or morality.

As to the prescription of a claim for specific performance, it has been held that, "without giving a positive limit, which must much depend upon circumstances, to the period within which may be claimed the specific performance of a prospective stipulation, a period as long as *nine* years' forbearance must, under

nearly any circumstances, be considered in itself as amounting to an abandonment. (4919, *D. C. Colombo*, 26 *April*, 1837; *Morg. D.* 145.)

Gyzeling.

Of course, if a party to a suit is in a decree ordered *to do a particular thing in the course* of the cause (see *post*), and, being able, he does not do it, he is liable to the court as for contempt; but it does not follow that, if specific performance is ordered in a final decree enforceable by definite powers of execution, the District Court can, as a court of equity, effectualize its own decrees by commitment for contempt in a manner similar to the commitments of the Court of Chancery. The District Court is a court of equity under the Roman-Dutch law, not a court of chancery on the full English model. Accordingly it enforces specific performance under the Roman-Dutch law; and under that law there existed a process to procure the performance of certain acts, termed gyzeling, or civil compulsion, a process which, though infrequently used in Ceylon, cannot be considered as obsolete.

Thus, in cases where a party is decreed *to do any particular act*—for example, to account and answer—and in sentences against any public or corporate bodies, guardians, curators, treasurers, attorneys, or others, in their respective qualities, the mode of proceeding is by *gyzeling*, or *civil confinement*. As a general rule, if the decree or sentence is such as can be enforced by ordinary execution, gyzeling ought not to issue; and this even

if the decree is, in the alternative, ordering a particular act or a money payment. (16764, *D. C. Caltura*, 22 *Jan.* 1857.)

Gyzeling commences by *sommation*, *i. e.* a summons served by the marshal (or officer answering thereto in the District Court) on the defendant, calling upon him to comply with the sentence within *twenty-four hours*, and to pay the costs on pain of further execution. The *sommation* expresses literatim with the sentence, what is required of the defendant, and at the same time a copy of the sentence and order of execution is served. The twenty-four hours being expired, and the defendant failing to comply with the sentence, the *sommation* is repeated: and this second act is termed *renovation*. Under the Roman-Dutch law, sommation and renovation were the commencement of all execution.

These summonses are followed by an order, served upon the party by the officer answering to the marshal, fourteen days after the renovation, to appear in *gyzeling* or *civil confinement* in the evening before sunset, at the gaol or prison mentioned in the renovation, and there to remain in *gyzeling* until he shall have done the act for the non-performance of which he is *gyzeled*. Previous to the day fixed for the party appearing in *gyzeling*, the other party, who obtains the order, must settle or ascertain the amount, and give security for the costs. (*V. d. Ldn.* pp. 494 to 496.)

On the day appointed for appearing, the marshal

visits the gaol in the evening, and also on the following morning, to ascertain whether the defendant has appeared in gyzeling, and makes his return to the court, reporting the result of his visit; and on the defendant failing to appear, the court grants default against him, and orders him to be apprehended. He is thereupon arrested and lodged in gaol; and when he has thus remained in confinement for a month, if he still neglects or refuses to carry out the judgment pronounced against him, the plaintiff applies to the court that the value of the act decreed to be done may be assessed and ascertained, and the judgment converted into a pecuniary condemnation. For this purpose the plaintiff files a bill or account, which, after fourteen days' notice thereof to the defendant, is taxed by the court, and recovered by ordinary process of execution, the defendant still remaining in confinement until the execution shall have been fully carried out and satisfied. These proceedings are, however, of rare occurrence, as the defendant generally appears on the day appointed. And on appearance the court allows him fourteen days for the performance of the judgment; and, in case he still remains in default, decrees apprehension, and proceeds to assess the value of the judgment, as above.

The ordinary proceeding in assessing the value of an act decreed to be done, is, for the defendant, on the day appointed, to apply to be heard on the justice or injustice of the gyzeling; and that being allowed, the plaintiff

makes his claim in gyzeling, to which the defendant files his answer at once: the defendant is generally at once provisionally released. The question being at issue, the parties are allowed three weeks for the exchange of vouchers; and thereupon the court proceeds to a hearing. And if the defendant's offer has been found a sufficient satisfaction of the judgment, the court decrees accordingly, and releases the defendant from further gyzeling; or otherwise condemns him to remain in gyzeling until he shall have satisfied the judgment. This is termed a *decreed gyzeling;* and in this case the plaintiff's proctor serves a notice on the proctor of the defendant, requesting him to notice his client to appear in gyzeling within eight days, on pain of default. If the defendant fails to appear, the court grants apprehension against him; but if he appears, he generally files what is termed an act of compliance, with which, if the plaintiff is not satisfied, he must state his reasons in writing; on which the defendant may, if he chooses, file a further act of compliance; and if the plaintiff still remains dissatisfied, the court proceeds summarily to enquire into the matter, and determines definitely what could be considered a compliance or satisfaction of the judgment; and which the defendant is bound to perform *ipso facto.* (*V. d. Ldn.* pp. 496 and 497; *Lor. Civ. Pract.* 55 and 56.)

Edictal citation.

An edictal citation is a proceeding by which a person who is in possesston of land, but is without a valid documentary title to it, seeks to confirm himself in pos-

session by publicly calling on all persons who have any claim to come in and establish it; and in default of any claimants appearing, or having appeared, being able to establish any legal claim, such possessor "seeks to be quieted" in his possession by the authority of the court, as lawful owner, or at least as having the best apparent right to the land. This proceeding, if allowed to confer a valid title, requires strict regulation as to the conditions, and to be vigilantly watched, lest by collusion it be made an instrument of fraud and injustice, easy of execution, and difficult to detect or remedy.

This process is now regulated by Ord. No. 7 of 1835, by which any person in the possession of immoveable property may, by himself, his tenant, or other person on his behalf, apply in writing to the Court of the District where the property is situate for a general citation, containing a full description of the property, with a map or plan and survey thereof, showing the extent and boundaries, and containing an affirmation that the applicant is in *bonâ fide* and exclusive possession thereof, and stating the nature of his right, or the manner in which he acquired possession, together with the affidavits of *two* respectable persons that he is in exclusive possession. In the case of a false affirmation by the applicant, he is punishable by fine or imprisonment, and the certificate (hereafter mentioned) is null and void. (§ 2.)

Upon any such application, the District Court must issue citation to all persons having, or pretending

to have, any right to the property described in the application, to appear before the court to establish their claims, or to be for ever debarred therefrom. The citation must be fully published in the manner described in the section. (See § 3.)

If any claim is preferred to the property, the claimant must state the nature of his claim, orally or in writing, as plaintiff, in the manner allowed by the rules of court on commencing a suit; and such statement, being recorded, must be taken as a libel, to which the applicant for citation must plead as defendant, and the further proceedings are those of an ordinary suit. (§ 4.) Such claims may be made at any time before the certificate of the District Court is granted; for claims ought to be received as long as the application is kept open, whatever may be the day mentioned in the citation, and although the application is suspended in order to await the decision upon other claims. (976, *D. C. Amblangodde*, 25 *Nov.* 1835, *Morg. D.* 63.)

The above requisites being observed, the title of all persons failing to prefer a claim within eighteen months from date of citation is absolutely barred, save remaindermen, reversioners, persons absent from the island, minors, women under coverture, and persons under other legal disability, who are entitled to prosecute their rights within eighteen months from their possession accruing, or from their absence or disability ceasing, and not afterwards. (§ 5.)

On all requisites being observed, the District Court grants a certificate under the hand of the judge, which certificate is a good and valid title to the property, save as hereinbefore excepted. (§ 6, *and for form of certificate see Appendix.*)

Amendment of application.

On an application for edictal citation, where, the citations having been duly returned, the certificate had been refused, on the ground that there was another equally interested with the applicant, who had not joined and whose share had not been set apart, the applicant was allowed to amend, as in ordinary suits; where a party has been omitted by inadvertence, such other party should be called in to have an opportunity of joining in the application; and if he refuses, his share may be excluded from the proceedings. (436, *D. C. Amblangodde*, 17 *June*, 1835; *Morg. D.* 49.)

As to the effect of edictal citation, and certificates of quiet possession, issued under the Reg. No. 5, of 1819, see the following cases: 2354, *D. C. Chilaw:* 276, *D. C. Amblangodde:* 565, *D. C. Tangalle: Morg. D.* pp. 59, 64, and 236.

Preference and concurrence.

There is a difference between the English and the Dutch civil laws in regard to the performance of judgments. By the latter law, when goods are exposed for sale under execution on judgment obtained by a creditor, other creditors may come in and claim them, in which case preference and a judicial adjudication of the money is observed, and the same is adjudged to him who has

the *best* and *oldest* right, or among those having the *same* or *equal* rights it is divided equally according to his share; and he who *first* obtained judgment, and took out *execution* upon it, does not acquire more right in consequence thereof than another, so long as the proceeds of the execution are not legally given to him, and a proper account made thereof. (*V. d. Ldn.* 492; *V. Lwn.* 656: 8142, *D. C. Kandy*, 12 *Nov.* 1836; *Morg. D.* 105.) So that he that obtains execution first, does not acquire any right over all others, as long as the property seized or the proceeds produced therefrom have not in fact been delivered over to him, up to which time every one is at liberty to interpose his claim; because until such time it is considered that the preference and concurrence have place, and that the execution was made *on behalf of all and every of the creditors*, saving to each, however, his right as it has been adjudged. (4011, *D. C. Jaffna*, 12 *July*, 1843; *Coll.*)

To be decided summarily.

Claims of preference and concurrence should be decided summarily by the court which issues the writ of execution under which the claims are made; and parties should not be referred to a new suit, unless they are at issue upon material allegations which cannot be conveniently tried and determined in the original cause. (24540, *C. R. Jaffna*, 1860.)

Does not apply to personal arrests.

There can be no concurrence for the proceeds of an execution against the *person*. A debtor's property may

be said to be pledged to all his creditors in return for the credit given, and therefore all are entitled in a certain order to share in it; but this does not apply to a payment under a personal arrest, which is of a different nature. (No. 37578, *D. C. Kandy*, 4 *Aug.* 1864.)

PARATE EXECUTION is a summary process issuable for the recovery of public taxes (*Voet*, l. 42, § 1, par. 48;* and to the Secretary of the Supreme Court for moneys borrowed from the Loan Board. (*Reg.* 9 of 1824.) Also the amount of all allowances paid for the maintenance of any prisoner is recoverable against him and his property by process of parate execution on the plaint and affirmation of the person detaining. (*Ord.* 1 of 1839, § 18.)

This process, called by Voet "*executio parata sine forma judicii*," or ready execution without the form of a judgment (that is, without *previous* judgment), is in fact a decree or judgment, and can only be issued, in Ceylon, in the cases above mentioned. It would seem that this process can be set aside by the District Court on the ground of misstatement by the party applying for it, supposing that such ground, if disclosed to the court in time, would have been sufficient to prevent the execution issuing (*Marshall*, 174 and seq.); but, as there is no *judgment* of the Supreme Court upon this question, it must be considered to be still open.

* Also "for the expenses of repairing the roads, for fines for neglecting such repairs, and the like;" but, for such matters, scarcely applicable to Ceylon.

CHAPTER XI.

DUTIES OF THE DISTRICT JUDGE, AND CONTEMPT OF COURT.

Duty of the judge.

THE duty of the District Judge is to *hear* and *determine* the cause (*Charter*, § 24); that is, that the judge who decides the case should decide after himself seeing and hearing the witnesses examined, such being the only satisfactory method of enabling him to judge of their credibility. (26428, *D. C. Kandy*, 24 *Sept.* 1858; *Coll. Austin*, 187.) And he cannot refuse to hear further evidence on the ground that he disbelieves the witnesses previously called. (6104, *C. R. Chavagacherry*, 20 *June*, 1857.) Thus, in any case of *a new trial*, the whole evidence should be taken afresh, unless the parties mutually consent to admit the evidence taken on the former trial: but this entire re-hearing is not necessary in the case of a *further hearing*. However, the above rule points out that, if the judge is changed between the hearing and the fresh hearing, the case ought to be entirely re-heard, unless the parties mutually agree to admit the former evidence. (See "New Trial.")

The judge should not only hear the case entirely himself, but, when the case is once brought to a trial, he should in general try it to an end: thus, whatever conclusion the judge may come to, as to allowing or

rejecting evidence, the case should be proceeded with to an end, and an appeal allowed upon the whole case. (13459, *D. C. Badulla*, 12 *July*, 1831.)

Judge's notes of the trial.

The judge is bound to take ample notes of the trial; but it is a mere vulgar error to suppose that he is bound to write down all that is asked by the advocates, and all that is said by the witnesses. It is the duty of the judge to take down only that which is material and relevant. Of course nothing should be omitted that is even likely to be material and relevant; and almost every judge would take care to make a note of a particular statement, if distinctly requested to do so by the advocate, unless, indeed, that the advocate had previously abused the confidence of the judge in the honour of the advocate; and in the implied assurance that the matter which then appeared irrelevant would ultimately prove relevant and important. (*Re Dharmeratne, Proctor*, 20 *June*, 1862.)

Cases cited to be noted.

The suitors, however, are entitled to have all cases cited by them entered in the proceedings, especially such as are stated to affect the judgment. (14919, *D. C. Galle*, 18 *May*, 1852.)

Evidence refused to be noted.

A District Judge is not entitled to refuse any evidence offered in his court without recording the refusal and its reasons. If he omits so to record, the record will be held to be imperfect, and will be returned to the judge, with directions to take the evidence previously offered, and to report accordingly, so as to enable the

Supreme Court to proceed to a review of the matter on a record properly closed. (2256, *D. C. Islands*, 22 *Apr.* 1837; *Morg. D.* 143.)

The judge's duties at the trial.

His duties *during* the trial may be thus summed up. To rule, as to all questions of law which present themselves (or to reserve them for future consideration, and determination in his decree); to decide the admissibility of evidence; to allow amendments in the record; to permit adjournments of the trial; to add pleas, and to determine the various other matters that may arise in the course of the cause.

The cause being ended, if there are assessors, it is a convenient course for the judge to sum up the evidence, and to explain the law to them; but there is no rule of law to that effect, as the assessors are judges themselves. (*R. and O. Sect.* 1, R. 34, p. 69.)

If the judge is sitting with assessors, he must take care to record both his own and their opinion; and whether with or without assessors, or whether he decides at once, or takes time to consider, he must pronounce his judgment in open court. (*Rule last cited.*)

Judge's duties as to record.

He must record his reasons for his judgment (see *ante*, p. 340); and, if any appeal takes place, he must see that the record is properly made up, with proper index and fair copies.

Not only the trial, but also all other proceedings, are under the judge's control; and, accordingly, this control must be evidenced by his signature appearing to

every order made by him. (4261, *D. C. Colombo*, 3 *Nov.* 1842; *Morg. D.* 339.)

He has the power to fine and imprison for contempt of his authority and jurisdiction. Contempt of court.

It will be convenient here to treat of contempt generally, and not merely of contempt of the District Court.

Contempts of court are either *direct*, that is, those which openly insult or resist the power of the court, or the persons of the judges presiding in the court; or else contempts are *consequential*, which (without such gross insolence or direct opposition) plainly tend to create an universal disregard of their authority. Contempts defined.

Contempts of court are principally of the following kinds:— Contempts by inferior judicial officers.

1. Those committed by inferior judges and magistrates, by acting unjustly, oppressively, or irregularly, in administering those portions of justice which are entrusted to their distribution; or by disobeying orders of the Supreme Court in reference to any cause that has been in appeal, either on interlocutory or final orders; or by disobeying wilfully general directions of the Supreme Court. The Supreme Court (principally by way of appeal) has a general direction over all inferior jurisdictions, and any corrupt or iniquitous proceedings of lower judges may be treated as contempts of the higher court, which is bound to keep them within the limits of their jurisdiction.

2. Those contempts committed by fiscals, fiscals' Contempts by fiscals, &c. &c.

deputies and officers, gaolers, and other officers of the court; by abusing the process of the law, or deceiving parties by any acts of oppression, extortion, collusive behaviour, or culpable neglect of duty. (*Bl. Com.* iv, 284.)

Contempts by proctors, &c.

3. Those committed by proctors who are also officers of their respective courts; by gross instances of fraud and corruption, injustice to their clients, or other dishonest practices. (*Ibid.*)

Contempts by jurors and assessors.

4. Those committed by jurymen or assessors, in collateral matters relating to the discharge of their office; such as making default, when summoned, refusing to be sworn or to give any verdict, eating or drinking without leave of the court, and especially at the cost of either party, and other misbehaviours or irregularities of a similar kind; but not in the mere exercise of their judicial capacities, as by giving a false or erroneous verdict. (*Ibid.*)

Contempts by witnesses.

5. Those committed by witnesses; by making default when summoned,* refusing to be sworn, affirmed, or examined, or prevaricating in their evidence when sworn. (*Ibid.*) This power, however, of punishing witnesses for prevarication should be sparingly exercised, and never, excepting where it is clear that the party punished prevaricated with a view of misleading and deceiving the court, and not from mere carelessness,

* This is held differently in 10635, *P. C. Ratnapoora*, *P. C. Ca.* 152; but undoubtedly Blackstone is correct as far as English law is concerned, and by which generally these questions of contempt in Ceylon are determined.

and without deliberate attempt to deceive. (188333, *P. C. Chavagacherry*, 13 *July*, 1860; *P. C. Ca.* 143.) Mere discrepancies in evidence are not contempts in themselves, unless they afford evidence of prevarication. (596, *P. C. Pangwelle*, *P. C. Ca.* 152.) Prompting a witness is a contempt of court. (8436, *P. C. Kaigalle*, *Nov.* 1852, *P. C. Ca.* 61.) A witness under sharp cross-examination is not liable for contempt, but to admonition, in giving a sharp answer to the examining counsel. (7923, *C. P. Chavagacherry*, 28 *July*, 1859.) A person is not liable for not attending as a witness unless he is regularly summoned; nor is an officer of the court bound by his duty to give information to the court. (1630, *P. C. Matura*, 9 *March*, 1847, *P. C. Ca.* 11: *P. C. Plopalle*, 23 *July*, 1860, *P. C. Ca.* 144.) Thus headmen of villages must be subpœnaed, if wanted as witnesses. (*Ibid.*)

Contempts by parties.

6. Those contempts committed by any party to any suit or proceeding before the court; as disobedience to any rule or order made in the progress of a cause; non-payment of costs awarded by the court upon a motion; or non-observance of awards duly made by arbitrators or umpires, after having entered into a rule for submitting to such determination. (*Bl. Com.* iv, 285.) But a party should not be proceeded against for contempt, unless it is clear beyond all doubt that, without any right whatever to do so, he disobeys the orders or defies the process of the court. (303, *D. C. Matura*, 20

Jan. 1857.) If a party in one court sell the subject matter of the suit (as, for example, an estate) *pendente lite*, by means of proceedings in another court, it is a contempt of the former court. (3435, *D. C. Galle*, 3 *Jan.* 1838; *Morg. D.* 204.) So also, if property which has been decided, both by the District and Supreme Court, to belong to the plaintiff, should be again claimed by the defendant, or by any person acting in his behalf, such claim must necessarily be considered a contempt of both courts. (12029, *D. C. Colombo*, 30 *April*, 1834; *Morg, D.* 16.)

Contempts by strangers to the cause.

7. Those contempts committed by any other persons under the degree of a peer, and even by peers themselves, when enormous, and accompanied with violence, such as forcible rescue and the like; or when they import a disobedience to the Queen's great prerogative writs, of prohibition, habeas corpus, and the rest.

In face of the court.

Some of these contempts may arise in the face of the court; as by rude and contumelious behaviour, such as interrupting the court (181, *C. R. Point Pedro*, 17 *Oct.* 1862); or by obstinacy (as, for example, pertinaciously resisting a final decree of the Supreme Court by frivolous motions, or by remonstrances (*Morg. D.* 175); or by perverseness, or prevarication; by breach of the peace, or any wilful disturbance whatever. (*Bl. Com.* iv, 285.) But it is not a contempt of court in a defendant to call his witnesses, and contest his case, after his

proctor gives it up. (11328, *D. C. Batticaloa*, 25 *Nov.* 1853.)

Every insult offered to a judge in the exercise of his judicial duties is a contempt. It is not on his own account that a judge commits, for that is a consideration which should never enter his mind; but, though he may despise the insult, it is a duty which he owes to the station to which he belongs not to suffer those things to pass which will make him despicable in the eyes of others. It is his duty to support the dignity of his station, and to uphold the law. (*Charlton's case*, 2 *Mylne and Craig*, 239; *R. V. Dawson*, 4 *B and A*, 329.)

Not in face of the court.

Other contempts may arise, *not* in the face of the court; as by disobeying or treating with disrespect the rules and process of the court; as by resisting process, or threatening violence to officers executing the process of the court (9516, *D. C. Galle*, 18 *Dec.* 1862: 6503, *D. C. Kandy*, 21 *June*, 1858); but if the officers exceed their authority, it is no contempt to oppose acts not authorized by the court. (6355, *D. C. Jaffna*, 28 *Oct.* 1854.) It would seem, moreover, that if third parties, *bonâ fide* claiming property about to be seized by the fiscal, resist him, they will not generally be punishable for contempt. (303, *D. C. Matura*, 20 *Jan.* 1857: 19011, *D. C. Matura*, 20 *May*, 1857.) And where third parties opposed commissioners of appraisement, on a plea of right, and detained property thereupon, it was held that the right of the opponents should first be tried in an action, and

if they were defeated, and they still refused to deliver, then (and not till then) they would be in contempt. (303, *D. C. Matura*, 20 *Jan.* 1857.)

Contempts by perverting process, or libelling a court.

Other contempts are by perverting the process of the court to private malice, extortion, or injustice.

Other contempts, by speaking or writing contemptuously of the court, or judges acting in their judicial capacity. Thus, making indecorous remarks about a District Judge in a petition of appeal have been held to be a contempt of the Supreme Court. (1437, *D. C. Wadimoratchy*, 21 *June*, 1837, *Morg. D.* 162.) But the words must be clearly indecorous: thus, in a petition of appeal from a Court of Requests it was stated that on a certain day the court-house was excessively crowded, upwards of 100 causes being fixed for hearing on that day, and "that the commissioner, to get rid of these cases, paid less attention than he would have done at other times," and that this accounted for a defective record. For this paragraph the petition-drawer was committed for a contempt, and the judgment was refused to be stayed during appeal; as it was true the record was defective, these words were not held to be sufficiently disrespectful to justify an appeal. (18928, *C. R. Jaffna*, 24 *March*, 1857.)

Other contempts are by printing false accounts (or even true ones), in defiance of the prohibition of the court, of causes then depending in judgment; and by anything, in short, that demonstrates a gross want of

that regard and respect which when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost amongst the people.

Contempts of the Supreme Court.

That the Supreme Court possesses all the usual and accustomed rights and powers of courts of appeal generally, as well as that the tribunals established under the charter possess all the various rights and powers universally attaching to courts of law and courts of equity, appears beyond doubt or question. (*Morg. D.* 174.) The Supreme Court possesses, therefore, in a peculiar degree, the power of punishing contempts against it; nevertheless it seldom, as a civil court, exercises those powers, generally proceeding by a reversal in appeal, unless it were to perceive that a lower court was wilfully infringing its jurisdiction, or defying its authority. Thus, a District Court cannot issue *habeas corpus*, and cannot try certain crimes; and the higher court would generally restrain the lower courts attempting such action, by reversing the judgment of the lower court in that behalf, as simply erroneous; but if the lower court wilfully and knowingly trespassed on the jurisdiction of the Supreme Court, it would be open to the latter court to treat the matter as a contempt. So wilfully proceeding with a case which is before the Supreme Court in appeal, would be a contempt of that court.

Contempts of the District Court.

But it must not be supposed that the above passage gives a similar power to the District Courts. Courts of

equity *universally* possess the same powers in respect of their original jurisdiction; but the powers that are universal, or common to all courts of law, do not include those superintending powers which belong to the superior courts of common law only. It has been supposed that the District Courts represent in a limited area the courts at Westminster; but that is not so; they have all the powers that attach or are common to *all* courts of law; but the courts of law at Westminster have several powers not common to all courts of law. The District Courts cannot issue writs of habeas corpus, prohibition, or mandamus, which are the instruments of the superintending authority of the superior courts.

How to be dealt with in criminal matters.

By the 19th Rule for the criminal jurisdiction of the District Courts, in all cases of contempt of a District Court, its process, or officers, the party charged with the offence must be committed to prison, or give security till the next day, when he is to be called upon to answer interrogatories touching the contempt; and if he fail to satisfy the court that no contempt was intended, judgment shall be passed upon him as therein directed. But it is plain that this rule applies to the court only in its criminal jurisdiction. At common law it possesses the usual powers of punishing contempt; by Reg. No. 2 of 1816, this was wholly taken away in *criminal* proceedings from inferior tribunals, but restored under the above qualifications by No. 15 of 1820, and in that form continued by Rule 19 of § 2 of the *R. and O.* Its

common law powers in *civil* matters, therefore, have never been touched; and to this effect the collective court held, in 13788, *D. C. Galle*, 24 *Dec.* 1850, where the District Judge, having committed on the spot in a civil case, the Supreme Court said "that it knew of no law or ordinance which prevented the District Court from acting as it had done.

Contempts of the Courts of Requests.

A Commissioner of a Court of Requests may punish, by a fine not exceeding *one pound*, or by imprisonment not exceeding fourteen days, any person guilty of contempt *before* any such court, with a proviso similar in effect to the 19th Rule of § 2 of *R. and O.* above referred to; if this proviso is not attended to, the fine will be set aside. (3748, *C. R. Bentotte*, 13 *Aug.* 1853; *Nell.* 211: 1054, *Hambantotte*, 18 *Aug.* 1853; *Nell.* 213.)

The proviso is, that every person charged with contempt must give bail, either on his own recognizance or that of another person (as the commissioner of the court considers necessary) for his appearance on the following day; and, in default of giving such security, must be committed to prison till the following day. And if, on such following day, such person fails by his answers to satisfy the commissioner that no contempt was intended, the commissioner may pass such sentence on such person as above stated. (No. 8 of 1859, § 16.) Proceedings under this proviso against a party should be taken at the close of the day, as immediate commit-

ment may prejudice his case on the merits. (694, *C. R. Chavagacherry*, 23 *July*, 1859.)

The Court of Requests has, therefore, the power of punishing for contempts committed in the court; but not for contempt beyond its precincts. (18928, *C. R. Jaffna*, 10 *June*, 1857.)* And though it has the power to enforce its orders against the *party* in default by attachment (*Ord.* 9 of 1859, *Sched.* § 8, *Rule* 39), yet it has not the power of committing a person not such party for contempt of its process beyond its precincts, or for the publication of anything defamatory, or libellous matter touching the court itself: the court can protect itself by prosecution.

Contempts before Police Courts.

Contempts committed before Police Courts are on a principle similar to, and with a similar proviso as to those committed before Courts of Request. (See *Ord.* 13 of 1861, § 22.) A police magistrate, also, can only punish for contempts in the face of, or within the precincts of his court, and not out of court. (1284, *P. C. Chavagacherry*, 28 *Nov.* 1862.)

Mode of proceeding in contempt.

As to the general mode of proceeding upon contempts, if the contempt is committed in the face of the court, the offender may be instantly apprehended, and, except in the case of the Court of Requests, the Police Court, and the District Court in its criminal capacity,

* This decision, which is almost a treatise on contempts, may be well referred to on many other points.

the offender can be imprisoned at the discretion of the judge, without further proof or examination. In the excepted cases, by the rules applying thereto as seen above, the judge is bound to enquire, by interrogatories, whether a contempt was intended or not. (Marshall omits this point—*Marshall*, 61.) In matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges, upon *affidavit*, see sufficient grounds to suspect that contempt has been committed, they either make a rule on the suspected party to show cause why attachment should not issue against him, or, in very flagrant instances of contempt, the attachment issues in the first instance, as it also does if no sufficient cause be shown to discharge the offender; and thereupon the court confirms and makes absolute the original rule. This process of attachment is merely meant to bring the party into court; and when there, he must either stand committed or put in bail, in order to answer upon oath to such *interrogatories* as shall be administered to him for the better information of the court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation, and must, according to the practice of the courts in England, be exhibited within *four* days; and if any one of the interrogatories is improper, the defendant may refuse to answer it, and move the court to have it struck out. If (except

in the cases above excepted) the contempt be of such a nature that, when the fact is once acknowledged, the court can receive no further information by interrogatories than it is already possessed of, the defendant may be admitted to make such simple acknowledgment, and receive his judgment without answering to any interrogatories; but if he wilfully and obstinately refuses to answer, or answers in an evasive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court. (*Marshall*, 64; *Bl. Com.* 287.)

Those contempts which are not punishable by a court of inferior jurisdiction, not being committed *before* it, but which may be made the subject of prosecution, must be prosecuted in a court of superior, and not of equal or inferior, jurisdiction. Thus a contempt committed before a District Court of Requests cannot be tried before the Police Court. (22759, *P. C. Kandy*, 29 *May*, 1854; *P. C. Ca.* 70: 15056, *P. C. Tangalle*, 24*th Sept.* 1860.) Thus, also, a contempt of a general court martial, which is a court having power of life and death, cannot be tried before the District Court, which can fine and imprison only, and is therefore, as a criminal court, of inferior jurisdiction.

CHAPTER XII.

COSTS.

Costs, what?

Costs are the expenses to which parties are put in the prosecution and defence of actions. Costs, in England, are the creatures of Acts of Parliament, and therefore English decisions turning upon those acts do not furnish much guidance, except by analogy, to costs in the courts of Ceylon.

Costs are between party and party, or between proctor and client.

The expenses of litigation consist of money paid to the government for the support of the machinery of justice, advocates and proctors' fees, expenses of witnesses, surveyors, &c. The first item is now paid entirely by stamps, and is noticed* under the head of "Stamps."

Costs are also divisible into costs between party and party, and costs between proctor and client.

In taxing costs, it often becomes necessary to distinguish between the charges which should fall upon the losing party and those which ought to be borne by the successful party himself. For instance, costs incurred by postponements by the absence of the plaintiff

* See Appendix.

or his witnesses (though inevitable) ought not to entail additional expense upon the defendant. So, also, the costs of any motion made in the progress of a suit, which appears to the judge unnecessary, and of any rule or order consequent thereon, is paid by the party making it, without reference to the ultimate result of a suit, and a minute thereof is entered on the proceedings. Thus every objectionable and every unnecessary motion ought to be charged against the party making it, even though he is ultimately successful in the cause. Accordingly, the Secretaries of the District Courts are ordered in all cases to tax the bills of costs, as between party and party, and separately as between the party and his proctor; but without the necessity of two different bills being given. (*R. and O. Sect.* 1, R. 40: *Sup. Rule* No. 5, 9 *Oct.* 1834.) Costs, then, between party and party are those paid by the loser to the other party; those between client and proctor are those paid by a party (winner or loser) to or through his proctor at all events.

Costs are interlocutory or final.

Costs are also either interlocutory or final. The former are those awarded on some interlocutory or special order in the progress of the case. The latter those awarded at the termination of the cause.

General rule as to costs.

In decreeing payment of costs, the general rule is, that the party against whom judgment is given pays the costs on both sides, subject to taxation. It is, however, in the discretion of the court to modify this rule, by

making each party pay his own costs, or in such other way as the justice of the case may require. "But this discretion, as in every other instance, must be exercised on good and solid grounds, and not on a mere fanciful view of the case by a District Court." (*Marshall*, 71.)

If a plaintiff is nonsuited, with costs, he is liable to pay the defendant's costs, but not necessarily those of intervenients, unless expressly named, or unless they are intervenients introduced to the suit by the plaintiff. (17600, *D. C. Galle*, 11 *June*, 1860.)

Parties needlessly joined pay no costs.

Also, where, by the fault of the plaintiff, defendants have been needlessly or vexatiously joined in the suit, the plaintiff will be ordered to pay the costs of defendants so joined. (633, *D. C. Negombo*,* 20 *May*, 1835; *Marshall*, 71: 3657, *D. C. Colombo*, 9 *June*, 1842; *Morg. D.* 328.) So, when one of five defendants was the sole cause of an action, he was decreed to pay all the costs incurred in the case. (1 *D. C. Pantura*, 29 *Oct.* 1834; *Morg. D.* 26.)

Costs of parties dropped out of suit.

Not only parties improperly joined, but those dropped out of the proceedings, are, to a certain extent, excused costs. Such a party can only be rendered liable for the costs incurred in his presence, and when he had notice to attend. (2225, *D. C. Jaffna*, 31 *May*, 1837; *Morg. D.* 158; see also *Morg. D.* case 513, p. 172.)

The party causing costs pays those costs.

Of several losing parties, he who has made the

* Query "Colombo," Morg. D. 46.

action necessary should bear the costs. (*Marshall*, 72.) Thus, where two plaintiffs had without fraud purchased land from a third, but it turned out that the defendants were the legal owners, and judgment went against all the plaintiffs, the third plaintiff alone was ordered to pay the costs, unless she could show good and sufficient cause, before the District Court, why the other plaintiffs should pay any. (3200, *D. C. Matura*, 11 *Nov.* 1835; *Morg. D.* 62.) So, where a breach of contract was clearly proved, though there was no actual damage, costs were directed to be borne by the second defendant, at whose instigation her daughter, the first defendant, had been induced to break her promise of marriage. The Supreme Court, however, awarded nominal damages in order to avoid the inconsistency of giving costs without damages. (*Marshall*, p. 72.)

Not only must a party unnecessarily causing suit pay costs, but also any party who, in the course of a suit, occasions costs must bear the expense, whatever may be the ultimate decision. As if a plaintiff, by refusing or neglecting to admit the facts stated by the defendant's answer, and which have been truly stated, make it necessary for a defendant to call witnesses for the purpose of establishing those facts, the plaintiff will be liable for the costs of those witnesses. (*Marshall*, 73.) And where an executor vexatiously opposed probate to his co-executor, he was condemned personally in costs. (336, *D. C. Matura; Lor. R.* p. 27.) So in

appeal, if the point on which the case turns is not taken in appeal, the appellant will be ordered to pay the costs of the appeal, as having by the omission caused the respondent expense. (31606, *D. C. Colombo*, 12 *Dec.* 1862.)

Division of costs.

It, however, happens that sometimes the justice of the case requires each party to pay his own costs, though the decision is in favour of one of them; as where a party sequesters property in error as to the ownership, if there are circumstances of suspicion sufficient to justify the sequestration, and collusion is suspected among the other parties, each party would have to pay his own costs, though the party sequestering would have the facts in his case. (*Marshall*, 73.)

So also, where a plaintiff claims more than his right, and at the same time delays instituting his suit, leaving the defendant in quiet possession for some years, the costs will be divided. (784, *D. C. Ratnapoora*, 24 *Aug.* 1836; *Morg. D.* 93.) Generally, if a plaintiff claims more than is due, or his share, it may affect his claim to *full* costs, though it does not debar him from recovering what is due to him *with* costs, according to the value of his real share, or in the class in which judgment is given for him. (21550, *D. C. Colombo*, 8 *Dec.* 1842; *Morg. D.* 343.) Also, where a plaintiff sued upon an assignment of property which turned out to be sequestered, and his suit was dismissed, there being no legal proof that he took the assignment under which he

claimed with a knowledge of the sequestration, the costs were divided. (2697, *D. C. Batticoala*, 25 *Aug.* 1836; *Morg. D.* 94.) A dishonest concealment in a case (659, *D. C. Caltura*, 30 *Nov.* 1836; *Morg D.* 107): —an improper resistance to another party's claim to participate in produce (24094, *D. C. Kandy*, 16 *Sept.* 1851; *Austin*, 163):—bringing unnecessarily a second action; as, for example, for mesne profits which might have been recovered in the principal suit (26750, *D. C. Kandy*, 12 *Aug.* 1857; *Austin*, 190):—have been grounds for either dividing costs, or saddling the party in fault with them. Also where a plaintiff made numerous contradictory and untrue statements, and his original demand was exorbitant, the court condemned him in costs, except those of appeal, which were divided (1056, *D. C. Maddewelletenne*, 19 *July*, 1837; *Morg. D.* 177). Again, where the defendant succeeded, but failed to tender or pay into court a sum admitted in his answer, the costs were divided (3100, *D. C. Caltura*, 3 *Aug.* 1836; *Morg. D.* 92). And where a plaintiff had improperly set a case down for trial before issue joined, he was, on appeal, ordered to pay his own costs. (20937, *D. C. Kandy*, 24 *July*, 1849; *Austin*, 124.) So it seems that costs would be divided if plaintiff were in quiet possession of the land in dispute, the being quieted in possession forming part of the libel; but not if he were not in possession at the time of filing his libel. (26923, *D. C. Kandy*, 19 *Dec.* 1855; *Austin*, 191.)

Costs upon interlocutory orders are sometimes given at the time when the orders are issued; but if they are not expressly so given, the party in whose favour the order is made cannot claim them as a matter of course, but they must be left to abide the result of the action, or such order respecting costs as may ultimately be made. (*Marshall*, 74: 955, *D. C. Caltura*, 28 *Sept.* 1835; *Morg. D.* 58.)

Costs on interlocutory orders.

The term, "all costs up to that day," include costs of the libel. (11636, *D. C. Colombo*, 6 *Aug.* 1844.)

If a demurrer is held good, the party filing the defective pleading may amend, on payment of the costs of the demurrer and of the appeal, if any. (18136, *D. Kandy*, 3 *June*, 1845; *Austin*, 92.)

The general rule is, that costs are awarded in the class in which judgment is given, unless special circumstances appear to take the case out of the rule. (418, *D. C. Kandy*; *Austin*, 5.) But the class in which costs ought to be charged sometimes becomes a matter of doubt. The test by which this question, as a matter of general principle, is to be tried, is whether the plaintiff is justified, by the general result of the suit, in bringing his action in a higher class than that in which he has recovered judgment. If he is not so justified—that is, if he materially fails to prove that his loss amounts to the extent claimed by him—he will be deservedly made to pay the whole extra costs occasioned by his having wrongfully brought his suit in a higher class. The

Class in which costs are to be charged.

judgment recovered is an important criterion in awarding costs; yet it is not conclusive, as the court will look to the whole merits of the case, and the conduct of the parties, and will not reduce the case to a lower class. If not reduced, the proctor is entitled to the higher scale; otherwise, only to those of the class in which judgment is recovered. This, however, does not affect the defendant, who is only liable for costs in the class in which judgment is recovered: the difference must be taxed as between proctor and client. (*Marshall*, pp. 75 and 76: 3697, *D. C. Four Corles*, 3 *Aug.* 1836; *Morg. D.* 91: 20079, *D. C. Colombo*, 17 *Oct.* 1838; *Morg. D.* 251.)

Increased costs, when decreed.

The District Court, as a court of equity, can, in cases of palpable fraud, award damages under the name of increased costs. (801, *Uttuan Kandy*, *D. C.* 17 *May*, 1837; *Morg. D.* 155.)* It may also award the same against a person endeavouring to mislead the court by

* Sir William Carr said, in 14025, *D. C. Kandy*, 24 *Aug.* 1842; *Austin*, 56: "The District Court has not the power to impose double or extra costs *in poenam*, payable to the opposite party, though it may punish by fine, payable to the Queen, any party wilfully attempting to deceive the court by false statements." This is, however, the dictum of one judge, reversing the expressed opinions of the Supreme Court. The law was laid down in 1835, and confirmed in 1837, and if reversed, should have been so by the collective court; but there is no such reversal between 1837 and 1842, or afterwards. On the 12 July, 1843, however, the collective court, on a reserved case, decided "that there is no authority in the *Roman-Dutch law* to award *triple* costs to any party." (8931, *Coll. D. C. Colombo*, No. 4, 12 *July*, 1843.) It is uncertain whether this judgment goes to the whole question of increased costs, or only that of costs increased to triple costs.

his answers, when under examination as a party. But it is doubtful whether it can do so merely because an action is brought on insufficient grounds, or even on no real grounds at all, unless the action were attempted to be supported by false statements made by himself in court, as that offence cannot be ascribed to any ill advice. (*Marshall*, 77; *Morg. D.* 53.) The Supreme Court has awarded increased costs for a frivolous appeal. (5608, *D. C. Jaffna*, 19 *Sept.* 1835; *Morg. D.* 243.) That court also often makes it a condition, on allowing a case to be re-heard, that the appellant, in the event of his being again defeated in the District Court, shall pay double costs to the adverse party. (*Marshall*, 76.)

Increased costs are generally *double* costs, which, as taxed in England, are the amount of the taxed costs, and half that amount added. (8409, *D. C. Walligamme*, 17 *Oct.* 1834; *Morg. D.* 25.) They must not be triple costs. (8931, *D. C. Colombo*, No. 4, 12 *July*, 1843.)

Security for costs.

By the civil law, a foreigner having no property within the jurisdiction of the court, may be called upon to give security for costs; but if he is unable to find such security, he may be admitted to swear to such security. As formerly parties in a civil cause could not be sworn in Ceylon, it was the custom to demand a personal bond, instead of an oath; but as now parties can be sworn, the civil law could be entirely carried out in such a case, unless it should be thought better to require a bond. (See *Marshall*, p. 77.)

The poverty or insolvency of a party furnishes no ground to compel him to find security for costs, and any interlocutory order to that effect upon that ground will be set aside. (5497, *D. C. Jaffna*, 23 *April*, 1840; *Morg. D.* 286; *Marshall*, 78.) Similarly with a rule directing a person suing *in formâ pauperis* to give security for his adversary's eventual costs; but if the adversary is successful in his suit, he will always be at liberty to sue out execution for costs against the person, and thus punish him by imprisonment, if he cannot pay. (4885-6, *D. C. Chilaw*, 9 *May*, 1838; *Morg. D.* 231.)

Cases may, however, present themselves in which other grounds, as suspected fraud or the like, might justify the precaution of ordering security; as, to give an extreme case, where a plaintiff in England, after the case was ready for hearing, was convicted of felony and sentenced to transportation, the court required security for costs, both retrospective and prospective. (*Harvey v. Jacob*, 1 *B and A*, 159; *Marshall*, 78.)

Rules as to cases when costs of previous suit are unpaid.

In general, the costs of a former suit which has been withdrawn must be paid before a new suit can be instituted. (8815, *D. C. Colombo*, 20 *Oct.* 1841; *Morg. D.* 320.) But this rule is open to qualification. The stay of proceedings until costs are paid does not only operate often as a security for the payment of the costs of a former suit upon the same matter, but also prevents the vexatious accumulation of costs upon a party touching a matter which has been, or might have been, fully heard

and determined. (15108, *D. C. Galle*, 28 *Sept.* 1852.) But the courts will only be careful in enforcing the rule if the previous case came to an end on the merits, not if it terminated on an irrelevant issue thereto; as, for example, the question of pauper or no pauper. The tests are:—1. Has the action been tried? 2. Has it been proved to be vexatious? (16937, *D. C. Galle*, 12 *March*, 1856; *Lor. R.* p. 95; *and see English cases in usual text books.*)

Taxation of costs.

All bills of costs, whether between party and party, or between proctor and client, are taxed by the secretary of the court; and every party dissatisfied with his taxation may refer it to the judge for decision, which decision may be appealed against like any other. (*R. and O. Sect.* 1, *Rule* 41, p. 70.) This rule is explained and enlarged by the *Supp. Rule No.* 9, *of* 19 *Oct.* 1834, p. 112; and the table of fees is given in a Rule dated 6 *Jan.* 1846.* Bills of costs must be prepared in duplicate, one copy being sent to the S. C. by the Secretary of the D. C.: unless so prepared, they are not received. (*Supp. R.* No. 4 of 4 *June*, 1834, p. 110.) The criterion of the class in which any appeal on taxation is brought, must properly be the amount of costs taxed, as that will be the only subject in litigation between the parties. When a bill of costs has been taxed by one of the registrars of the Supreme Court, an order is issued as a matter of course for the proctor to refund such

* See Appendix.

charges as, upon that taxation, have appeared not to be warranted by the table of fees. (*Marshall*, 80.) The Supreme Court exercises extreme vigilance as to exorbitant charges as affecting the conduct of the proctors: also because ignorant parties are so liable to be misled as to costs, from the proctors not objecting to one another's charges, and therefore the parties often know nothing about the bills of costs until execution issues for their recovery. (11002, *D. C. Galle*, 26 *Nov.* 1861.)

Where no proctor is employed.

Where a party employs no proctor, he is entitled to make no charges except for sums actually expended by him in the progress of the suit—for stamps, for instance, and for drawing pleadings; provided, with respect to this latter item, he produces vouchers to show that he has actually disbursed money with that object: if a party draw his pleadings himself he ought not to be allowed to charge for his own labour in his own cause. (*Marshall*, 80.)

Fees for pleadings.

No fees for drawing pleadings are allowed to any persons other than advocates and proctors. (*R. and O. Sect.* 1, *R.* 41, p. 70: 10635, *D. C. Matura*, 27 *May*, 1844.)

Advocates' fees.

Some voucher should be adduced to show the receipt of the fees by the advocate; or, in default thereof, there should be proof of their payment, by the oath or affirmation of the proctor or the party; that is to say, the attendance of the advocate being proved, and the registrar having certified that the fees are fair, it should be shown to the taxing officer, by the endorsement on the brief, or other proof, that the fees were actually paid, or

else a door is opened for fraud upon the advocate. (1967, *D. C. Jaffna*, 29 *Aug.* 1850.)

No consultation fee is allowed when there is only one advocate in a case. (5720, *D. C. Jaffna*, 28 *Nov.* 1855.) Costs in appeals.

The practice having varied considerably in taxing costs on appeals, in those cases where the Supreme Court had not seen cause to give specific directions with regard to them in its decrees, and it being advisable to establish a perfect conformity in this respect, the judges have laid it down, "that in all cases of appeal, when the costs are not mentioned in the decree of the Supreme Court, the following rules shall be observed:—

1. When the decree is entirely affirmed, the respondent shall be entitled to recover *his* costs.

2. When it is entirely reversed, the appellant shall recover.

3. When the decree is modified, then, if the appellant has obtained the full prayer of his petition of appeal, he is entitled to the costs. In other cases, no costs are due on either side. (*Miscellaneous R. and O.* 24 *May*, 1837, p. 115; *and see* 14213, *D. C. Galle*, 26 *Nov.* 1851.) These rules apply only to decrees of the Supreme Court, and not to mere orders silent about costs. (1969, *D. C. Jaffna*, 2 *March*, 1852.)

Any person wishing to obtain permission to institute proceedings in *formâ pauperis* in any District Court, whether in its ordinary civil jurisdiction, or in any other branch of its jurisdiction, shall present a petition to the court to that effect, together with a statement of such Petition to sue in *formâ pauperis*.

person (Form No. 22*), and also an affidavit by two headmen or respectable persons of the place at which such applicant resides (Form No. 23*) verifying his poverty. (*R. and O. Sect.* 8, R. 42, p. 71.)

This rule must be strictly adhered to. If there has been a previous application, the order referring that application to a proctor ought to have been recorded; and if so, witnesses should not be heard upon that point until the records are duly searched. Still less ought a case to be disposed of upon *its merits*, when the petition is merely to be permitted to sue as a pauper. (*Re Pomser Wyrewenaden*, 12 *July*, 1837; *Morg. D.* 170.)

This application cannot be admitted if there is a former decree against the plaintiff, which the District Court considers decisive of his claim; but the party is still at liberty to commence his action in the ordinary way. (445, *D. C. Walligamme*, 6 *May*, 1835; *Morg.D.* 42.)

To be referred to a proctor for report.

Such petition must forthwith be referred to one of the proctors of the court, who shall be selected in rotation for this purpose, and who shall inquire of such applicant what are the grounds of his proceeding, and the proofs by which he proposes to support it; and after examining any documents or other evidence which the applicant may produce to him, he shall certify to the court, by endorsement on the petition, whether he believes the applicant to have a good cause of action or not. (*R. and O. Sect.* 8, R. 43, p. 71.)

If such proctor shall certify his belief that the

* See Appendix.

applicant has a good cause of action, the applicant shall be allowed to state his complaint *vivâ voce*, or to file a written libel in manner directed by the first rule, free of expense; whereupon a summons shall issue to the defendant, as in ordinary cases. (*R. and O. Sect.* 8, R. 44, p. 71.)

Although these applications are to be referred to the proctors in rotation, yet such reference ought always to be made to some proctor who has no interest in the event of the suit, and can act independently between the parties. It is a public duty he has to perform, and one that is imposed upon him under the rules of court to secure the more effectual administration of justice between the parties. (10256, *D. C. Negombo*, 31 *Oct.* 1845.)

Nevertheless, if the application to sue in *formâ pauperis* is rejected, on the report given by the proctor to whom it was referred, the District Judge is at liberty, in the exercise of his discretion, to refer the enquiry, if he sees fit, *de novo*, to another proctor. (*Re Maartensz*, 18 *Aug.* 1836; *Morg. D.* 92.)

It is absolutely necessary that the proctor should, in his certificate, certify that the alleged pauper has a good ground of action. (*Caderyamer v. Jyaati, D. C. Wadimoratchy*, 7 *Oct.* 1835; *Morg. D.* 59.) For every permission to sue or defend as a pauper, unless the applicant shows himself strictly entitled to it, and has a good cause, is an injustice to the opposite party, who has

to contend at a great disadvantage. Thus, where an action brought by a party in *formâ pauperis* appeared to have been a vexatious and dishonest suit, the Supreme Court directed the District Judge to call upon the proctor, who had certified that the plaintiff had a good cause of action, for a full explanation upon what grounds he had done so. (1737, *D. C. Tenmoratchy*, 26 *Nov.* 1836; *Morg. D.* 106.)

The proctor ought to enquire whether the applicant has a good *primâ facie* case; but he need not go into the possible answer in the case, by means of information obtained from the opponent. Paupers and their witnesses wilfully deceiving the court can be punished; but for a proctor to investigate both sides before the pauper can bring his case into court, is to make him an additional judge in the cause, which was never contemplated. (No. —, *D. C. Walligamme*, 19 *Sept.* 1838; *Morg. D.* 243: 37, *D. C. Jaffna*, 12 *Sept.* 1838; *Morg. D.* 242.)

A party applying for permission to sue as a pauper is entitled to a reasonable time only for establishing his poverty; but, at the same time, there ought to be some limit to the length of the investigation into the value of his property; and the District Court cannot be required in every case of contested pauperism to enter into a trial of title to land. (1238, *D. C. Negombo*, 25 *Nov.* 1835; *Morg. D.* 64.)

If the applicant, either to sue or defend in *formâ*

pauperis, has any objection to make to the proctor's report —as, for example, that the proctor had not made proper enquiries—it is the applicant's duty to state fully his objections to the report before the District Court; and that court should, upon satisfactory proof of any neglect by such proctor in the performance of his duty, take the proper steps to correct it. But the Supreme Court will not order the petition to be referred to another proctor upon a mere general and vague assertion in the petition of appeal, and where no previous objection or proof appears to have been offered to the District Court. (1127, *D. C. Wadimoratchy*, 28 *Sept.* 1836; *Morg. D.* 98.)

The court, however, ought to be fully satisfied that the proctor has made proper enquiry into the applicant's case, and has not grossly neglected his duties thereon; for if it should turn out that the suit, or defence, in *formâ pauperis* is vexatious and dishonest, that proctor would be made to pay the opposite party's costs. (173, *D. C. Tenmoratchy*, 26 *Nov.* 1836; *Morg. D.* 106.)

Opposition by the defendant.

When the defendant appears, whether in person or by advocate or proctor, he must be asked by the court whether he has any opposition to offer to the plaintiff being allowed to proceed in *formâ pauperis* on the ground of the pecuniary circumstances of such plaintiff. And if the defendant shall offer such opposition, and shall show to the satisfaction of the court that the plaintiff is possessed of property sufficient to pay the costs of pro-

ceeding, the court must intimate to the plaintiff that his case will be dismissed, unless, within fourteen days, he shall pay the costs of such proceedings as shall have been already instituted. And if the court shall believe that the statement of such plaintiff was made knowingly, and for the purpose of imposing on the court, the plaintiff shall be liable to punishment for such false statement, as directed by the 29th rule, provided that such applicant shall be entitled to appeal against any such rejection of his application. If no opposition be made to the plaintiff so suing, or if such opposition be overruled, he shall be allowed to proceed with his case in *formâ pauperis*, either in person or by advocate or proctor. (*R. and O. Sect.* 8, R. 45, p. 71.)

Under this rule, no such things as pleadings and counter-pleadings are to be allowed. The facts are to be found by a *summary* enquiry when the defendant enters appearance. (6267, *D. C. Jaffna*, 1 *Sept.* 1855.) Indeed, any objection which a defendant has to offer against the plaintiff suing in *formâ pauperis*, on account of his pecuniary position, should be made on his *first appearance*. To allow objections to be taken in succession, upon a failure of a previous appeal respecting the proctor's report, would be to contravene the rule requiring objections to be made upon the appearance of the defendant, and to sanction litigious procrastination in the subsequent proceeding in *formâ pauperis*. (3861, *D. C. Walliyame*, 8 *Jan.* 1839; *Morg. D.* 253.)

In order to support such an objection as the above to a party applying for the indulgence to sue as a pauper, it is not usual, nor necessary, to frame a list of property and to file the same in court, and thereby put the party to a needless expense. (493, *D. C. Amblangodde*, 27 *May*, 1835; *Morg. D.* 47.)

In taking evidence that "the plaintiff has property sufficient to pay costs of proceedings," the D. C. is not to include property which belongs to the applicant's wife, and which is under her sole control. (6008, *D. C. Jaffna*, 8 *Dec.* 1853.)

The Supreme Court never encourages an application to sue in *formâ pauperis* where the District Court has, with all regularity, decided against it, especially where the applicant can employ a proctor in the case. (6268, *D. C. Ratnapoora*, 4 *Nov.* 1851.)

Defence in *formâ pauperis.*

So, if any person, being sued before a District Court, shall wish to obtain permission to defend such suit in *formâ pauperis*, he shall present a petition, statement, and affidavit, which petition shall be referred and decided upon in like manner. (*R. and O. Sect.* 1, R. 46, p. 71.)

It has been held that the District Court is bound by the rules of practice to reject a petition to defend in *formâ pauperis*, unless the defendant can show a good *primâ facie* case for defence (as, for example, proving undoubted possession, and the production of deeds), in order to be allowed to defend in *formâ pauperis*. (414, *D. C. Wadi-*

moratchy, 17 *Dec.* 1834; *Morg. D.* 28: 1277, *D. C. Wadimoratchy*, 23 *Feb.* 1837; *Morg. D.* 136.) Yet, if the proctor reports that the defendant has not a good *primâ facie* defence, and if the defendant files an affidavit of want of property, and credit is given to such an affidavit, it has been held better that the case should be tried out; and without prejudice to the case of the plaintiff, defendants have been allowed to file their documents as paupers, subject to the final decree of the District Court treating the case as a whole. (1149, *D. C. Wadimoratchy*, 3 *May*, 1837; *Morg. D.* 147-8.)

Dispaupering a party.

The practice of dispaupering a party in the Colombo Court is as follows:—

The applicant files an application and affidavit setting forth that the pauper has property above the value of *five pounds*, and thereupon moves that a day may be fixed to adduce evidence to that effect; and notice thereof is given to the pauper; and on the day fixed evidence is heard, and an order is made, such as the circumstances of the case require. But it must be made to appear that the pauper is worth five pounds; and the mere possession of property, as, for example, the possession of a house and garden, is not sufficient to dispauper him, unless that the property is worth five pounds. This practice it is also believed is adopted in other courts, and should be followed in all. (15636, *D. C. Caltura*, 21 *Sept.* 1852: 12506, *D. C. Colombo*, 6 *Aug.* 1850.)

May be at any stage.

Further, a party is not precluded from moving to dispauper at any stage of the case; and if evidence has been fully taken by the District Court, the Supreme Court will not interfere. The question must be left to the discretion of the District Judge. (13759, *D. C. Chilaw*, 26 *Jan.* 1856; *Lor. R.* 15.)

Appeal as to costs.

The Supreme Court does not often interfere with the judgment of the court below as to costs, except in manifest cases of hardship. (16941, *D. C. Galle*, 3 *July*, 1863.)

Execution as to costs.

It is the established practice in Ceylon to consider costs as a joint and several debt, which may be levied from either of the parties, at the creditor's option; the debtors being left to their remedy against each other for reimbursement of the shares overpaid. (1676, *D. C. Amblangodde*, 28 *Dec.* 1837; *Morg. D.* 203.)

When a pauper obtains judgment, he may take a copy of it, and sue out execution, in blank. A sum, sufficient to cover the stamps required, had he not sued as a pauper, may be added to the execution. The first amount levied is applied to the purchase of such stamps, to be cancelled by crossing, &c. Where a proctor is employed, his costs are paid first; next, stamps are purchased, and the surplus is paid to the party, if a plaintiff.

If both parties are paupers, and the winner undertakes to point out property of the other, execution will issue on blank against property; but not against the person, unless the party liable in execution is secreting his property. (*Sup. R.* No. 6, 4 *Aug.* 1834, p. 110.)

CHAPTER XIII.

DISTRICT COURTS.

CRIMINAL JURISDICTION.

Criminal jurisdiction of District Courts.

EACH of the District Courts is a Court of Criminal Jurisdiction. Every offence for which no express punishment has been provided by statute,* and which is not usually, at the time of the commission of the offence, punished by death, transportation, or banishment, or by any higher punishment than District Courts are, by the Ord. No. 5 of 1846, or any subsequent statute, empowered to impose, is cognizable by the District Court of the district in which the offence has been committed, wholly or in part, or by any District Court to which the trial of the offence has been lawfully transferred.

By the ordinance mentioned, a District Court can punish a person, for any offence, by imprisonment, with or without hard labour, for any period not exceeding twelve months, and by fine or forfeiture not exceeding twenty pounds; or by imprisonment, as before, and by

* *I. e.* Proclamation, Regulation, Ordinance, or Act of Parliament.

corporal punishment not exceeding *fifty* lashes, or by any *one* of the above-mentioned punishments. But in no case can the District Court (unless authorized by statute subsequent to the above) impose, for the same offence, the three punishments of fine, imprisonment, and corporal punishment.

Every offence and every act of commission or omission made punishable by statute by no higher punishment than such imprisonment, and such corporal punishment as above mentioned, or by such imprisonment and fine, penalty, mulct, or forfeiture, not exceeding twenty pounds, is within the jurisdiction of the District Court of the district in which it was committed, wholly or in part, or of any district to which the trial of the offence has been transferred. (*No.* 5 of 1846, § 1; and see *Charter*, § 25.)

In determining the question of jurisdiction, it must be observed that the Queen's Advocate (and of course any private prosecutor) has. no right, in prosecuting a case in the District Court, to restrict his libel or accusation to an arbitrary punishment, and to reduce the charge so as to render the offence punishable only as a minor offence, and thus to prosecute in the District Court. The Lord Advocate of Scotland is master of his instance, and can restrict the punishment so that, in a capital offence, the court can pass sentence for transportation. (*Hume's Com. on Crimes*, ii. p. 131.) But no such practice ever prevailed in Ceylon; the Q. A. only moves for

the prisoner to be brought up to receive his sentence: and, in cases where no *express* punishment is provided, the discretionary power of punishment must not be interfered with or restricted by any motion of the Q. A. to have such punishment only passed on the prisoner as he deems proper in the particular case. And if he cannot exercise this power directly, by restricting his libel or by special motion in the Supreme Court, he clearly cannot do so indirectly by prosecuting only in the inferior courts. (1308, *Batticaloa*, 7 *Sept.* 1855: *R. v. Capper*, 11 *Jan.* 1864.)

If, on appeal, it is determined that the District Court has no jurisdiction, the S. C. will quash the proceedings and discharge the prisoner, who is then liable to be indicted before the Supreme Court. Thus an accused party may pass through two trials; and the best for him, in order to save anxiety and expense, would not be to wait for an appeal, but to apply, in the first instance, for a prohibition.

Revenue offences.

The District Court has, also, a general power to try *all* offences whatsoever against the revenue, committed wholly or in part within its district: so that it may, in revenue cases, fine over twenty pounds, imprison over one year, and inflict more than fifty lashes, if the revenue law permits or orders such higher punishment. (*Ord.* 12 of 1843, § 2:* 1959, *D. C. Chilaw*, 13 *May*, 1852.)

* The proviso, in 12 of 1843, § 2, relating to revenue offences, is not repealed or altered by 5 of 1846, § 1.

When D. C. can try an accused person.

The District Court cannot try any prisoner who has not been committed for trial before it by some justice of the peace, or unless an information, in the name of the Q. A. and signed by him or some deputy Q. A. empowered to act within the district, is exhibited in court against the accused. And the Q. A. or any such D. Q. A. may appear in the District Court by himself, or any advocate or proctor authorized by him in that behalf in writing under his hand, and take up a private prosecution at any stage, and assume the entire management of it, or move the court to stop proceedings, that the case may be prosecuted in the S. C. or recommenced at the like instance in the D. C. or until the private party produces a certificate in court, signed by the Q. A. or some such D. Q. A. that the private party is at liberty to recommence such prosecution; and the judge must make an order in compliance with such motion, and the proceedings so stopped are null and void. (*Ord.* 12 of 1843, § 3.)

The Q. A. may intervene.

When one of two punishments enacted by statute in respect of any offence is, and the other is not, within the jurisdiction of the court, the court may take cognizance of the offence, and award the full punishment provided. (5 of 1846, § 3.)

Where the court, by statute, can impose a fine in respect of any offence, but not the extent of imprisonment provided in default of payment of the fine, and where it can impose the imprisonment provided for

default of payment of fine, but not the fine itself, the court has jurisdiction, and may impose the full punishment provided. (5 of 1846, § 4.)

Any District Court, having jurisdiction over any matter complained of, has also power to abate it. (5 of 1846, § 5.)*

Jurisdiction according to want of plea.

If there is no plea to the jurisdiction, and it turns out at the trial that some other District Court has jurisdiction, the court trying the case retains its jurisdiction, unless it appear that the parties had previous knowledge of that defect, and omitted to plead by mutual consent, or connivance. (12 of 1843, § 7.)

Informations.

All criminal informations, exhibited against any person in any District Court by any public prosecutor, must be lodged with the Secretary of the court, and must describe the accused person by his name and place of abode; and must set forth shortly and distinctly the nature of the crime or offence of which he is accused, and the time and place at, and the manner in which, the same was committed. (*R. and O.* 21 *Oct.* 1844, R. 2, p. 142.)

Private prosecution.

Whenever any person is duly committed by any justice of the peace for trial before any District Court, for any crime or offence cognizable by such court, the District Judge of such court must, unless an information

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* These three clauses (3, 4, and 5) are repealed by the Police Ordinance, 1861, as regards Police Courts; but not as regards District Courts, to which they also apply.

in the name of the Queen's Advocate shall have been previously exhibited in such court in respect of such crime or offence, take the complaint in respect of such crime or offence from the mouth of the party injured, or of any person whose name appears as a witness for the prosecuttion in the proceedings relating thereto, and transmited to the court by the justice of the peace before whom such proceedings have been had. And the D. J. must thereupon proceed with the hearing of the complaint, without any information or other similar formality being necessary. (*Ord.* 12 of 1843, § 3, altering the Charter, § 41.) And by the *R. and O.* the D. J. must cause the secretary to take down in writing the name and place of abode of the accused, the nature of the crime or offence with which he is charged, and the time and place at, and the manner in which, the same was committed; and the statement shall be after the manner in the examples following:—

District Court of day of
A. B. of complains that C. D.
of on the day of
at within the jurisdiction of this
court, assaulted him, and with a stick struck him several blows on the head and body (or stole from the dwelling house of the said A. B. three comboys and two shawls, the property of him the said A. B. or the property of

him the said A. B. and E. F. or of one or other of them).

Witness. (*Signed.*) L. M. *Secretary.*

G. H. of

And such statement, as taken down, shall stand for, and must be taken as the charge against the accused person. (*Ibid.* R. 3, p. 142.) There may be several counts in such an indictment, as in one before the S. C. (392, *D. C. Kornegalle*, 3 *June*, 1857.)

Witnesses. The public prosecutor must endorse on every information the names of the witnesses whom he requires to be summoned, together with their respective places of abode; and, in private complaints, the party making the charge must at the same time inform the secretary of the names and places of abode of his witnesses; and the secretary must, in like manner, endorse the same on the back of the charge. (*Ibid.* R. 4, p. 142.)

Adjournment. All persons prosecuted upon any criminal charge in any District Court must be brought to trial at some early convenient day, appointed by the District Judge at the time when the information is lodged or the charge recorded; but whenever it appears on oath, to the satisfaction of the judge, that any criminal case cannot be proceeded with upon the day appointed, without danger of defeating the ends of justice, he may adjourn the hearing thereof to some other court day specified

by him, and the adjournment and the cause thereof must be recorded in the minutes of the proceedings. (*Ibid.* R. 5, p. 142.)

Issue of process.

The secretary must, upon or so soon as may be, after the lodging of the information, or the recording of the charge, issue and deliver to the fiscal the process of the court for the appearance of the accused, to answer the information or charge, and of the witnesses in support thereof, on the day appointed by the judge, together with as many copies thereof as there are persons to be summoned: and the fiscal must serve a copy thereof on the accused, and obtain from him the names and places of abode of any witnesses he requires to be summoned; and the summons must be in the form following: that is to say,

In the District Court of the
day of
To
The fiscal of the district of
or his lawful deputy
Summon C. D. of that he appear personally before this court on the
day of next, at o'clock in the forenoon, then to answer and abide the judgment of this court upon the information of the (public prosecutor) (or upon the complaint of A. B. of) that the said C. D. on or about the day of

assaulted A. B. of &c.
(or as the case may be), and summon, also, G. H. of
and I. K. of &c. and
such persons, if any, as may be required by the said C. D. to be summoned on his behalf, that they and each of them be and appear personally at the place and day aforesaid, to testify and declare all they and each of them know concerning the said charge, and return to this court on that day what you have done hereon.

By order of court,

(*Signed*)

Secretary.

(*Ibid.* R. 6, pp. 42-3.)

Subpœna. Either party desiring to compel the attendance of any person not summoned to give evidence in any criminal case before the District Court may take out process for that purpose, in the form following: that is to say,

In the District Court of
the day of
To
The fiscal of the district of
or his lawful deputy
Summon A. B. of and C. D.
of &c. that they and each of them
appear personally before this court on the
day of at o'clock in the forenoon,

to testify and declare all that they and each of them know concerning a certain charge preferred against of and return to this court on that day what you have done hereon. By order of court,

(*Signed*)

(*Ibid.* R. 6, p. 143.) *Secretary.*

All criminal processes for any District Courts, either against persons accused, or for compelling the attendance of witnesses, may be issued, and shall be carried into execution, in any other district. (*Ibid.* R. 8, p. 143.)

Warrant on non-appearance.

If, upon the day appointed for the appearance of any person to answer to any criminal charge, he neglects to appear, and the court is satisfied, upon a return by the fiscal, that he was duly summoned, the court must issue a warrant for his apprehension; provided that the information or complaint be supported by oath. (*Ibid.* R. 9, p. 143.)

If the *prosecutor* do not appear on the day appointed for appearance, the case must be dismissed;* and when the prosecutor, being a private person, does not appear, or appearing, the court, upon hearing the charge, shall pronounce the same to be *unfounded and vexatious*, the court may award to the accused such costs as it thinks reasonable. (*Ibid.* R. 10, p. 143.)

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* The dismissal, however, will not prevent the case being reinstituted. (1860, *D. C. Ratnapoora*, 22 *May*, 1855.)

In case of the non-attendance of any person duly summoned to give evidence, and not having any lawful excuse allowed by the court, the court must fine him such sum, not exceeding five pounds, as appears necessary. (*Ibid.* R. 10, p. 143.)

On the day of hearing, the court must enquire into the charge, and read, or cause the secretary to read, over the information or statement of the prosecutor, and call on the accused to plead to it, and hear such legal evidence as the prosecutor may produce in support of the charge; and thereafter the court must hear any statement made by the accused relevant thereto, and his witnesses (if any) in support thereof. When any person accused refuses to plead, he is deemed to have pleaded "not guilty."

All persons sentenced to imprisonment must be committed to gaol by warrant, under the hand of the judge, in the form following: that is to say,

In the District Court of

To the fiscal of

Whereas C. D. stands convicted before me of theft (or as the case may be), and was thereupon sentenced to You are, therefore, hereby required to cause the said sentence to be carried into execution.

Given at under my hand this day of

(*Signed*)

District Judge.

Appeals from the District Court in criminal cases.

Any party desiring to appeal against judgment or sentence in any criminal case, may declare such orally to the District Judge (at the time of judgment given or sentence passed), who must record the same; or may, at any time within *ten* days after the judgment or sentence, lodge with the secretary a petition of appeal addressed to the Supreme Court; and the secretary must forthwith transmit the proceedings, with the petition (if such there be), with the certificate of the Q. A. when such is required, and a certificate of the judge, that they are the true proceedings in the prosecution, and contain true notes of all evidence received by the court, and objected to, or offered by either party and rejected by the court on the hearing of the case. (*R. and O.* of 21 *Oct.* 1844, R. 14, p. 144.)

It is a general principle that no appeal lies, except where expressly given by the legislature; and that where the right of appeal is given subject to conditions as to time, &c. those conditions must be strictly followed. The legislature has not given the S. C. power to allow appeals in criminal cases, notwithstanding lapse of time, and it has no power to allow such an appeal. (21228, *P. C. Point Pedro*, 4 *May*, 1864.) This, though a Police Court case, applies to the D. C. in criminal cases, as there is no relaxing a rule similar to *R. and O. Sect.* 8, R. 5, p. 83, in civil cases.

The court decides, in criminal cases of appeal, without the assent of parties. (8644, *D. C. Kandy*, 25 *Oct.* 1837; *Morg. D.* 200.)

Execution and recovery of fines.

Appeals from judgments in criminal cases pronounced by District Courts may be heard before a single judge of the Supreme Court at Colombo, who may reserve such appeal for a quorum of the court. (*Ord.* 18 of 1865, § 16.)

There is no provision for delaying corporal punishment in case of appeal, as in the case of Police Courts; but no doubt, on application, it would be delayed.

CHAPTER XIV.

DISTRICT COURTS.

TESTAMENTARY JURISDICTION.*

Production of will, where party dies in his domiciled district, or is a stranger.

WHEN any person dies leaving a will, the person in whose keeping or custody it shall have been deposited, or who shall find it after the testator's death, must produce the will to the court of the district in which the testator has been last domiciled for the space of one year or more, or to the court of the district in which the testator died, if he is a stranger, or if his last place of domicile is 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 occasioned by the delay.. And such person must make an oath, or produce an affidavit verifying the time and place of the death; and stating, if such be the fact, that the testator has left property within the jurisdic-

* This chapter relates only to the jurisdiction of the court; and must not be taken as dealing with wills and their solemnities, or with the powers and duties of executors and administrators.

tion of the court. (*Rules and Orders*, 1 *Oct.* 1833, § 4. Rule 1, p. 76: *Charter*, § 27.)

Course taken where deceased died abroad, or in district where no property, or leaves property in more than one district.

In the case, however, of a person dying out of Ceylon, and leaving property therein; or where one dies leaving property in a district of Ceylon other than that in which he died, or in more than one district, the Supreme Court, or any judge thereof, may appoint the District Court appearing most convenient, to have sole testamentary jurisdiction in respect of any such property, and may transfer any suit for probate or administration relating to such property to the D. C. so appointed, which then has sole testamentary jurisdiction in respect of such property. (*Ord.* 12 of 1843, § 6.) Of course, in such case, the will must be produced before the appointed court.

Will, how proved.

The will, so produced, must be proved by the witnesses (if any) thereto, on oath in open court, if they are at or near the place where the court is held, or by affidavit, sworn before a person duly authorized to take the same, if at a distance. If there are no witnesses to a will, then it is proved by proof of the handwriting of the testator, if written and signed by himself; or if neither written nor signed by the testator, then by the person who wrote it; provided that the law by which such will must be governed will admit of such proof. (*R. and O. Sect.* 4, R. 2, p. 76.)

There must have been witnesses to the will; and, if the will is not signed by the testator, it must have been

signed by his direction. (7 of 1840, § 3; and see "Wills.")

After the will is so proved, the oath* is administered to the executor or executors in open court, if present; or by a person duly authorized thereto, if at a distance. (*R. and O.* 1 *Oct.* 1833, § 4, R. 3.) Executors.

An executor is a person to whom a testator commits the execution of his will. All persons are eligible who may by law undertake the administration of other persons' affairs, even females, though these are incapable of becoming guardians. (*V. d. L.* 1, 9, 10, p. 148.) In England, even married women and infants may be executors, though no person can act until the age of twenty-one years. (2 *Kerr's Bl.* 533.) And the same would appear to be the law in Ceylon, where no prohibitory clause is added to the will or letters of administration limiting a woman's power to the period that she remains unmarried. (9564, *D. C. Kandy*, 3 *Sept.* 1838; *Austin*, 234.) An infant can be an administrator or executor, and he administers through his guardian, to whom should be granted limited administration *durante minore aetate.* (20627, *D. C. Kandy; Austin*, 238.) But it is doubtful whether even married women can be executors in Ceylon. The executor is appointed by will, testament, codicil, or other special act, and is at liberty to decline the office. (*V. d. L.* 1, 9, 10, p. 148.)

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* See Apendix.

Executor *de son tort.*

The law of Ceylon recognizes the executor *de son tort.* That is, persons who, not being appointed by will or letters of administration, meddle with or administer the property of a deceased person. Such a person is only liable for the assets which come to his hands. (380, *C. R. Maturalla*, 29 *Sept.* 1862; and 14879, *D. C. Galle*, 23 *Dec.* 1854, citing *Freyhaus v. Cramer*, *Knapp's Reports*, 115; *Herbert's Dutch Executor's Guide*, 118.) And though such a person is bound to fully administer assets coming into his hands, he cannot collect assets by bringing actions, nor is any one bound to pay him debts due to the testator. (8414, *C. R. Caltura.* 20 *Jan.* 1857.) So, also, a suit will be dismissed if a plaintiff has not taken out administration to the estate of the party under whom he claims. (14333, *D. C. Caltura*, 14 *May*, 1834; *Morg. D.* 15.)

No administration to small estates.

The law so far encourages this kind of executorship, in that it discourages the issue of administration to very small estates. (11294, *C. R. Galle; Lor. R.* 92.)

Probate.

The oath being so taken in or returned to the court, probate (Form No. 4 *App.*) must be granted to such executor or executors under the seal of the court. But if any of the executors named in the will are out of the island, or do not appear at the time of granting such probate, a clause (Form No. 5 *App.*) must be inserted therein, reserving a power to grant like probate to such absent executor, when he appears and sues for the same.

If any part of a will is valid, accompanied with the appointment of executors in the will, probate is necessary; thus a legacy, and the appointment of executors in the will, render probate necessary to sustain the will *pro tanto*, though the remainder may be invalid. (51, *D. C. Amblangodde*, 21 *June*, 1843; *Coll.*)

A grant of probate is a final and not an interlocutory judgment. It operates as a judgment *in rem;* that is, it is an adjudication pronounced on the *status* of the subject matter by a competent tribunal, and is invested with a conclusive effect against all the world. (20264, *D. C. Colombo*, 29 *June*, 1858; 2784, *D. C. Colombo*, 24 *July*, 1863.)*

Practice where executor dies before probate.

The practice in cases where the appointment of executor fails by the sole executor appointed in the will dying before probate, is to require the will to be similarly proved as though probate were taken of it by the executor, and to grant administration, with the will annexed, to the residuary legatee, or person entitled to the greatest interest under the will, who is preferred to the next of kin; and the representative of the residuary legatee has, in such cases, the same right to administration. As the next of kin, however, has a *primâ facie* right, the burthen of proof lies on the party claiming derivatively from a residuary legatee. (See *Williams' Executors*, 285: 85, *D. C. Ratnapoora*, 17 *Apr.* 1847.)

Probate appeal.

* As to security required to prosecute an appeal against a definitive sentence of probate (see the case last cited).

Administrator.

Where there is no executor appointed by will, the court appoints a person, termed an administrator, to manage the affairs of the testator or intestate, as the case may be. They are appointed in two cases :—

1. Where the will names no available executor.
2. Where there is no will of a deceased person.

Administrator, where no executor.

If there is no executor named in the will, or if none of the executors named therein are within the island at the time of the testator's death; or if, being within the island, they refuse or neglect to appear, or renounce their respective trusts; in any such case a citation to the next of kin issues, directed to the fiscal of the district of the court in which such will shall have been produced, or to the fiscal of any other district in which such testator's property shall be situated, or into which the judge shall think it expedient to issue such citation; which citation must be made returnable within such time as the court shall judge reasonable, and must be executed by the fiscal to whom it is directed, whether within or without the jurisdiction of the judge issuing it. (*R. and O.* 1 *Oct.* 1833, § 4, R. 4, p. 77.)

Where the creditors oppose probate, a creditor may, by order, be appointed administrator without security, in order to carry out an agreement between the parties to that effect. (*Morgan's Dig.* 16792, *D. C. Colombo*, 18, 20 *July*, 1837.)

But if there is no will, and the widow or widower, or next of kin, applies for administration, he or she

must file an affidavit in the court of the district where the deceased shall have been domiciled, or in which he shall have died, as directed by the first rule on this subject, stating the death of the intestate, and that the deceased left property within the jurisdiction of the court, or within any other district, as the case may be; and must move for a citation and commission as above directed. (*Ibid.* R. 6.)

Administrator, where no will.

A suit for administration therefore commences with a citation to the next of kin. As regards the next of kin for the purposes of citation, the English law, which follows the computations of the civil law in regulating the propinquity of kindred, may be followed, at least as regards Europeans, European descendants, and Singalese. The order of precedence may be briefly stated thus:—

Next of kin.

1st. The widow or widower of the deceased.

In default of whom, come

2nd. The children; then

3rd. The parents;

4th. Brothers and sisters;

5th. Grandparents;

6th. Uncles and aunts, nephews and nieces;

7th. First cousins of both sexes. (*Marshall*, p. 3.)

For kindred beyond this degree the reader may consult Blackstone, vol. 2, 504 (2 *Kerr's Bl.* 533), where a complete table of consanguinity is given.

Commission of appraisement.

At the same time that citation to the next of kin

issues, a commission must issue to two creditable persons to appraise the property left by the deceased. (*Sect.* 4, R. 4.) The secretary of the court is not a proper person to be appointed appraiser; and if he is, the Supreme Court will disallow his appointment. (235, *Kandy*, 2 *Apr.* 1856; *Austin*, 231.) The commission is made returnable within such time as the court shall judge reasonable, and shall be executed by the appraisers to whom the commission is directed, whether within or without the jurisdiction of the judge issuing it. If the commissioner is opposed in his appraisement by any party on a plea of right, and property is detained from him, the right to the property must be determined by an action brought for the purpose, and should not be summarily disposed of on a representation in the testamentary case of the commissioner. If, in such action, judgment goes against the opponents, they will not only be liable to the judgment, but, if they still refuse to deliver, they will be in contempt. (303, *D. C. Matura*, 20 *Jany.* 1857: see also *Marshall*, pp. 6 and 7.) The appraiser's list is presumed to be the property in administration; but if the appraisers, by mistake, omit to insert property in their list of appraisment, the list may be amended, even though some years have elapsed since the first appraisement. (*Marshall*, p. 6.) It will be seen hereafter that in certain cases the appraisers take possession of the property.

The appraisers are entitled to a fee, which is a

charge upon the estate, to be paid by the administrator. (*Morg. Dig.* 307; 7998, *D. C. Jaffna*, 6 *March*, 1841.) This fee is one half per cent. on all immoveable property, and bonds, money, or other property of which the value is fixed and ascertained, and one per cent. on all other moveable property. (*Marshall*, 7.)

Where circumstances render it necessary, the court may sanction appraisers taking possession of property, notwithstanding the widow or next of kin appear and apply for administration.

Application for administration.

On the return of the citation (or, where there is no will, the citation *and* the commission, *R. and O.* R. 6, § 4, p. 77), if the widow, or widower, or next of kin of the deceased, appears, and applies for administration, and no opposition is made thereto; or if such opposition is made, and overruled by the court; then letters of administration (and if there is a will, letters with the will annexed) are granted to the widow or widower, or next of kin, on his or her giving a bond, with two good and sufficient sureties, for due execution of the will, and on taking the oath of administration prescribed. In requiring the security, reference is had to the amount of the property returned by the appraisers. (R. 4.) *R. and O.* § 4, R. 4, p. 77: *Forms*, 9 and 10, *App.*)

As to the district in which administration should be sued out under this rule, the district in which an intestate was last domiciled and in which his property is situated should be that in which administration

should be sued, rather than that in which he died. (*Marshall*, 7.)

Husband as administrator.

The Ecclesiastical Courts in England give preference to the husband before all other claimants for administration, and the practice in Ceylon appears to have been similar; and the Testamentary Court should not depart from this practice, even though the husband has misconducted himself in other cases in which he was executor; but the court should attend strictly to the security taken being sufficient. (540, *D. C. Galle*, 23 *May*, 1853; *Coll.:* see also 9828, *D. C. Jaffna*, 19 *Jan.* 1859.) Nor can the husband be deprived of his preferable right on account of delay in applying for administration, which may have arisen from error, if he is willing to give security and take out administration within a short time (twenty days). (10, *D. C. Amblangodde*, 21 *Dec.* 1836; *Morg. Dig.* 114.) But though the husband is entitled, the opponents may deny his marriage, and in that case it must be proved. Their not doing so in the first instance furnishes a presumption against them, but cannot dispense with proof. (8399, *D. C. Jaffna*, 5 *Feb.* 1857.)

If the husband refuse to take out administration when there is a necessity, for the interests of others, that he should do so, administration may be granted to the secretary, or other fit person (1502, *D. C. Caltura*, 1 *July*, 1835; *Morg. D.* 52), as a man cannot be compelled to administer against his own wish. (403, *D. C.*

Caltura, 24 *March*, 1857). But if he neglects to take out administration (say for three years), and opposes relations doing so, he will have administration, but must pay the costs. (*Marshall*, 4.)

Widow administratrix.

When it is the husband that is dead, the widow has priority and preference in administration (16939, *D. C. Kandy*, 4 *Sept.* 1841; *Austin*, 234), even where the interest of the other heirs is greater than that of the widow. (972, *D. C. Galle*, 21 *June*, 1857; *Lorenz*, 144.)* And it is but reasonable that her right in this behalf should not be put aside without some valid and definite ground of objection assigned upon oath; especially where she is prepared to give the required security. Thus the allegation of a headman, "that he does not think her a fit and proper person," &c. (without any cause assigned) was too vague and general to be allowed. (10547, *D. C. Colombo*, 6 *July*, 1836; *Morg. Dig.* p. 90.) Nor is her being childless a ground for disturbing her claim. (171, *D. C. Kandy*, 2 *Dec.* 1856; *Austin*, 231.) But the court may, if it entertains any doubt of the safety of leaving an estate under the sole control of the widow, join such other persons in the administration as may appear right and fitting to the court. (1, *D. C. Amblangodde*, 3 *May*, 1834; *Morg. Dig.* 15.) And in one case the court joined two adopted sons with the widow, thinking it safe to unite two parties in the office. (*Marshall*, 3; *Morg. D.* 73.)

* But see Mohammedan law.

The widow will of course have to prove her marriage, if denied; and she must prove her marriage, to have a *locus standi* as an opponent. (3835, *D. C. Trincomalie; Morg. Dig.* p. 94.)

It would appear that, although the court has a final discretion to refuse administration to the widow, the reasons must be very strong indeed. Thus, in a case where administration was granted to the next of kin, in preference to the widow, under very strong circumstances of suspicion in regard to her having been concerned in procuring a false registry of marriage to be entered in the thombo, the letters were granted to the next of kin, without prejudice to any suit which such alleged widow might afterwards institute to establish her marriage, and her claims as widow to a portion of the intestate's property. (54, *D. C. Caltura*, 21 *Sept.* 1836; *Morg. Dig.* 97.)*

A widow may waive her right, and another may be appointed in her stead. (5073, *D. C. Manaar*, 15 *March*, 1855.)

Children as administrators.

The males and females of the next degrees are equally entitled. Thus, where a daughter claimed exclusive right to administer as eldest child, her brother was held to be equally entitled, and the administration was made joint. (42, *D. C. Galle*, 2 *Dec.* 1835; *Morg. D.* 65: see also same case in *Marshall*, p. 5.) A son is entitled to

* See Kandyan law as to administration of a re-married widow.

administration, even if a minor. But, in that case, the court should, under *Rule* 18 of *Sect.* 4, appoint a person nominated by the minor, or other proper person, to be his guardian, and grant the guardian limited administration *durante minore aetate*, until the administrator is of full age. (20627, *D. C. Kandy*, 26 *Nov.* 1836; *Austin*, 238.)* If the child of a fresh marriage applies to be joined in administration, letters having been already granted to the widow, the child applying must resort to a separate action to establish his relationship to the deceased. (58, *D. C. Badulla*, 11 *Oct.* 1848.)

Other kindred as administrators.

Other kindred are entitled according to their degree —male and female equally in the same degree, the one without excluding the other. (*Marshall*, p. 3.)†

Next of kin being incapable, secretary to be appointed.

If there are good reasons why the next of kin should not be appointed, then the secretary of the court can be appointed; but it is only in extreme cases that the Supreme Court will be inclined to sanction the granting of letters of administration to the secretary of any court, in preference to the next of kin entitled to the same. (22, *D. C. Galle*, 24 *March*, 1841; *Morg. D.* 307.)

Also, when, from the staleness of a claim, it is clear that the applicant only wants to annoy the party in possession of the intestate's estate, the latter party, if com-

* As to adopted children administering, see Kandyan law.

† A nephew-in-law has not any right to administration, if the intestate left a son or other nearer relation, nor unless he shows an interest in the estate. (378, *D. C. Matura*, 24 *March*, 1857.)

petent, or if not, the secretary of the court, may properly be appointed administrator. (19, *D. C. Negombo*, 5 *Nov.* 1860.)

Administration, when granted.

Administration can clearly only be granted on the return both of the citation and the commission; though it is not intended by the orders that the citation and commission should be returnable on the same day, as they are not made returnable together, but "respectively," on such days as the court thinks fit. But administration is coincident with the security; and the amount of the security depends upon the appraisers; so that grant of administration must await the return of the commission.

Security for due administration.

Letters of administration are granted upon the person selected as administrator giving bond, with two good and sufficient sureties, for due administration, reference being had, in requiring such security, to the amount of the property returned by the appraisers. (*R. and O.* § 4, RR. 4 and 6.) So that, where the applicant for administration fails to tender security to the satisfaction of the court on the day appointed for that purpose, the administration may be granted to some person better able and willing to perform the duties of the office. (1923, *D. C. Chilaw*, 1 *Apr.* 1835; *Morg. D.* 37.) The security pointed out by the fourth rule of the fourth section, is that of two sureties, to be carefully examined by the court as to their solvency; but title deeds and other valuable deposits, being often

very preferable to personal security, ought not to be refused when offered. (*Marshall*, p. 6.)

Administration to the secretary of the court.

If no next of kin appear, or if, having appeared and being opposed, the court considers such opposition to be well founded, then letters of administration with the will annexed must be granted to the secretary of the court, provided he shall have given the security hereafter mentioned; or to such other person as the judge shall think better fitted for the office. (*R. and O.* § 4, R. 4, p. 77.)

Where no will and no next of kin appears.

If there is no will, and no widow, widower, or next of kin appear, it is the duty of the secretary of the court, on receiving notice of the death of such person, to obtain and file an affidavit of such death, and of the time and place thereof, as above directed, from some person acquainted with the facts; whereupon the citation and commission of appraisement must issue as before; but the commission shall give authority (Form No. 13, *App.*) to the appraisers (care being taken in all cases that the appraisers are respectable and trustworthy persons), to take and keep possession of the property till further orders. And in case of a stranger to the district dying suddenly therein, or in any other case in which the property might be endangered by delay, the court, on being informed thereof as hereinafter directed, or otherwise, must forthwith issue a commission to such appraisers to take charge of the property, without waiting for the affidavit of death, or for any other preliminary

Administration to the secretary.

form of proceeding. Such citation and commission being returned, and no widow, widower, or next of kin appearing within the time limited, letters of administration must be granted to the secretary of the court, or to such other person as the District Judge shall appoint as above directed. (*R. and O. Sect.* 4, R. 7, p. 78.)

Security by secretary.

The secretary of each District Court must, either on receiving his appointment to that office, give good and sufficient security, to be approved of by the judge of such court, for the true and faithful administration of all estates which shall be committed to his charge; or, if he do not furnish such general security, he must, before letters of administration are granted to him in any particular case, enter into bond with good and sufficient securities, as is provided by the 4th Rule with respect to ordinary administrators, for the true and faithful administration of such estate. Which bond must be executed in favour of such officer of the court or other person as the judge shall direct, and shall be put in suit by such officer or other person, when directed by the court so to do, and not otherwise. (*R. and O. Sect.* 4, R. 8, p. 78.)

Constables, &c. to inform District Courts of all deaths.

In order to give more general force and effect to this branch of jurisdiction, it is directed that the several District Judges shall give orders to all constables, police vidahns, or other headmen, on whom that duty would properly fall, to give immediate notice to the court of all deaths which shall occur within their respective

towns, villages, and divisions, under pain, in default thereof, of such punishment as the court shall consider adequate to the neglect. And if the person so dying shall be a stranger, or shall leave no friends or relatives in the place at which he shall so die, orders shall in like manner be given to such constable, police vidahn, or headman, to call in another officer of the same description; and they shall together inventorize and seal up the property so left, or otherwise secure it for those who may ultimately be declared entitled to the same, or until further orders. (*R. and O. Sect.* 4, R. 9, p. 78.)

Creditors:—administration to;

In cases in which the deceased has left no will, or executors are not named, or have renounced their trusts, and no person has applied for administration, any creditor or creditors, who shall satisfy the court by his or their statement, supported by documents or the affidavit of other persons, that the deceased was really and truly indebted to him or them, may apply for and obtain the usual citation and commission of appraisement; which being returned, if no next of kin shall appear, or even if such shall appear, and the court shall in such latter case be satisfied that the debts so established or sworn to amount in all to more than the value of the appraised property, in such case the court shall and may, at its discretion, grant letters of administration to one or more of the principal creditors, on his or their giving good and sufficient security (Form No. 14, *App.*)

Security by;

that he or they will duly administer the estate, and pay the debts fairly and justly, according to their respective degrees, without favour or partiality; or in equal proportions, if the estate should prove insufficient to satisfy all the debts in full; and on his or their taking the oath of administrator. (*R. and O. Sect.* 4, R. 11, p. 79.)

If none of the next of kin will take out administration, or some good reason exists why it should not be granted to them, it is then granted to a creditor, on the sole ground that he cannot be paid his debt unless a representative to the deceased is created; and where administration has been granted without the citation required in the above rule having issued, administration should be revoked. (7157, *D. C. Jaffna*, 14 *Dec.* 1855; citing 1 *Williams on Exors.* 262.) In one case, administration to a creditor with the will annexed was allowed under an order agreed upon between the executor named in the will and the creditor opposing. (16,792: 1677, *D. C. Colombo*, 20 *July*, 1837; *Morg. D.* 181.)

Administration to executor of an executor or administrator.

Letters of administration may be granted to the executor of an executor or administrator, as no personal unfitness is imputed to the executor of an administrator; and indeed he ought to be preferred. (1712, *D. C. Galle*, 15 *Oct.* 1863; *Coll.:* 726, *D. C. Galle*, 1858.)

Parties dying abroad.

Administration can be granted to the estates of persons dying abroad, who have left property in Ceylon. (13732, *D. C. Colombo*, 7 *Sept.* 1836; *Morg. D.* 94.)

No administration to corporation sole.

There can be no administration to a corporation sole (as a terronanse, a Buddhist chief priest is); but in the case of Buddhist priests, the successor is entitled to the management and custody of all property inventorized as Sangeke property. (374, *D. C. Matura*, 6 *Jany.* 1858.)

Nor to the effects of a soldier.

Administration cannot be granted in contravention of the Act of Parliament (6 Geo. IV. c. 61), which provides for the care and collection of the effects of officers and soldiers dying in the service out of the United Kingdom; and that no registrar of any court in the colonies shall in any manner interpose in relation to any such effects, unless required or authorized so to do by any such officer or persons under the provisions of the act.

The act excludes official administrators from interposing, unless required as above. Any letters of administration even then granted must be limited to demand and receive over the balance in the hands of the paymaster, and to administer the same, and pay the remaining debts of the deceased. (1046, *D. C. Colombo*, 23 *Dec.* 1853.)

Buddhist priest cannot be administrator.

Administration has also been refused to a Buddhist priest, on the ground that he is avowedly a pauper; for whom, therefore, especially if he cannot legally possess property, no solvent person can reasonably be expected to give security. (32, *D. C. Matura*, 9 *Dec.* 1835; *Morg. D.* 66.)

Separate estates not to be clubbed in one administration.

Administration cannot for any reason be granted to more than one estate under one grant of letters of administration, since it would lead to confusion to mix up or club together estates to which different people are entitled in different degrees. (7855, *D. C. Jaffna*, 12 *Oct.* 1855: 7793, *D. C. Jaffna*, 30 *June*, 1855.)

Administration should not be granted to any party until the following questions are disposed of:

1. Is there a will; and if there is, is it valid according to law?

2. Who is the proper person to be administrator? taking into consideration whether a person claiming to be administrator as having a particular character, has that character or not; *e. g.* was a woman, claiming as widow, wife or not?

Until these questions are decided, the estate should be attached in the hands of appraisers. (201, *D. C. Ratnapoora*, 22 *May*, 1855.)

Stale applications for administration.

Although there is no prescription as regards applying for or issuing letters of administration, yet the practice of the D. C. of Colombo is to refuse stale applications for letters of administration after the intestate has long been dead, unless they appear to be required for an especial purpose; otherwise they are only then sought to foment family disputes and litigation. (4195, *D. C. Negombo*, 13 *June*, 1838: *Morg. D.* 235: 1923, *D. C. Chilaw*, 3 *June*, 1835; *Morg. D.* 47: 14103, *D. C. Chilaw*, 18 *June*, 1850: 15756, *D. C. Galle*, 3 *Dec.* 1853.)

And when, from the staleness of a claim, it was clear that the applicant only wanted to annoy the party in possession of the intestate's estates—that party, if competent, or if not, the secretary to the court, was ordered to be appointed administrator. (19, *D. C. Negombo*, 5 *Nov.* 1860.)

The Supreme Court refused administration after the lapse of fifty-five years, following the then practice of the then Prerogative Court of Canterbury, which did not grant probate after five years, unless satisfactory reason was shown for the delay. (484, *D. C. Caltura*, 18 *Nov.* 1852.)

Practice in such cases.

The practice of the Colombo District Court in such matters is to refuse the application for citation and commission of appraisement in the first instance, unless the applicant accounts for his delay, and shows the need of administration being granted, though so long after the death. This is the right practice, as it saves the expense of citation and appraisement where it is not proved administration ought to issue. (342, *D. C. Badulla*, 6 *July*, 1864.)

Administration a definitive decree.

And the S. C. also refused administration where the ancestor had been dead fifty years, and the estate had been divided. (255, *D. C. Colombo*, 15 *Apr.* 1840; *Morg. D.* 285.)

Grant of administration a final decree—costs.

The decree granting letters of administration to a party, establishes the *status* of such party, and has often been held, on appeal, to be of a definitive and not of an

interlocutory nature: and any such decree, in regard to costs or in any other respect, cannot be effected by appeal grounded upon an interlocutory motion at the trial, on which no separate order is made distinct from the decree.

Whenever a D. C. wishes to reserve to itself the further consideration of costs, it should expressly retain to itself in the decree a power to give further directions as to such costs. (121, *D. C. Badulla*, 16 *March*, 1852.)

When necessity of administration cannot be questioned.

Where a party appears to a citation, and prays that administration may be granted to himself, he cannot afterwards question the necessity of administration.

Letters *ad colligenda*, where property is in different districts.

If a person shall die leaving property within one or more districts, other than that in which he shall have been domiciled before his death, the judge of such district shall, on those facts being verified to his satisfaction, issue letters *ad colligenda* (Form No. 15) to one or more creditable persons, to take charge of such property until the same shall be claimed by the executor, administrator, or other person lawfully entitled to demand the same. (*R. and O. Sect.* 4, R. 12, p. 79; and see *ante*, pp. 507-8.)

Caveat, allegations in support of it.

If it is intended to oppose a will, a caveat must be entered before probate is granted: and allegations in support of the opposition must be filed within one month after entering the caveat; in default of which, proof of the will shall be received as in ordinary cases. (*R. and O. Sect.* 4, R. 13, p. 79.)

The above rule refers only to opposition made before probate upon caveat entered, and cannot be construed to debar the court from exercising the right of revoking probate upon due cause shown. (39, *D. C. Kornegalle*, 23 *May*, 1853; *Coll.*)

Proving will after caveat entered

If a caveat is entered against a will, the will should be proved with great exactness: all the attesting witnesses should be called, as well as the notary, and the will should be shown to them, and they should point out their signatures. (169, *D. C. Kandy*, 6 *Nov.* 1855.)

Penalty on executors, &c. not filing inventories and accounts in due time.

If an executor or administrator shall fail to file his inventory, or account, within the time prescribed by his bond or by his oath, the secretary shall, immediately after such default made, report the same to the court, and an order shall issue to such executor or administrator to appear on a day certain, and either file such inventory or account, or show good and sufficient cause why he has not done so: and in default of so filing or showing cause, he will be committed to prison till he shall comply. Nor shall any prolongation of time be allowed for filing inventories or accounts, unless on strong grounds shown, to the satisfaction of the court. And in order to give the greater force and effect to this rule, it is ordered that the secretary shall, on every Monday, present to the court a list of all executors, administrators, and guardians, who shall have made default in filing any inventories or accounts, showing the

time at which the same ought respectively to have been filed, and what orders have already been made in each case. (*R. and O. Sect.* 4, R. 14, p. 79.)

But this rule does not give the D. C. power to make an order "that an executor be imprisoned if he does not file a satisfactory account within a given time, in default to be committed to gaol." (17542, *D. C. Trincomalie*, 31 *Dec.* 1851; *Coll.*)

Account, &c. how framed, filed, and sworn to.

Every inventory and account shall be delivered into court one week, at least, before it is sworn to, in order that the secretary may examine the same. Every such account shall state distinctly the dates of all receipts and disbursements, and shall in all other respects be clear, distinct, and full. If such inventory or account shall be in proper form, and if such account be correct, the executor or administrator shall be sworn to such account, as the case may be. (*R. and O. Sect.* 4, R. 15, p. 79.)

The heirs are entitled to require the executor, &c. to include in the inventory all the property belonging to the estate, and to examine the executor as to admissions made by him. (1636, *D. C. Galle*, 27 *Oct.* 1860.)

A surviving spouse, as administrator, is only bound to render inventory of the estate as it exists at the time of the death of the predeceased spouse, though many years may have elapsed before the grant of administration. (216, *D. C. Colombo*, 28 *Aug.* 1849; *Coll.*)

Inaccuracies, how corrected.

If the secretary observes any incorrectness or in-

accuracy in such account, he shall point it out to such executor or administrator for correction; and if they disagree upon any point, it shall be referred to the court, who shall decide the same, subject to appeal. (*R. and O. Sect.* 4, R. 16, p. 79.)

Commission of five per cent. to executors, &c.

Executors and administrators shall be allowed to charge a commission of five per cent. as well on property not sold but retained by the heirs, as on property sold by such executors or administrators; but they shall only be allowed to charge two and a half per cent. on cash found in the estate, and on property specifically bequeathed to legatees. And in all cases in which, by the death of husband or wife, the community of goods between them has ceased, executors and administrators shall be allowed to charge their commission only on the share of the person deceased, unless in special instances, in which it shall be made apparent to the court that, in order to ascertain the share of the deceased, such unusual trouble has fallen upon such executors and administrators as to entitle them, in the opinion of the court, to receive a further remuneration. (*R. and O. Sect.* 4, R. 10, p. 78.)

Exception.

No commission to creditor.

No creditor receiving letters of administration as creditor, is entitled to any per centage or commission on his administration. (*R. and O. Sect.* 4, RR. 10 and 14, pp. 78, 79.)

If an executor charges the above commission, he is not allowed to charge for drawing accounts. (329, *D. C. Matura*, 2 *Dec.* 1859.)

Executors' costs.

The general rule is, that executors and administrators, like other trustees fairly conducting themselves, are entitled to their costs; and even if they take an erroneous course, if they appear to have acted only from a wish to discharge their trust and to benefit the parties beneficially interested, the S. C. will, in its discretion, hold them to be entered entitled to their costs out of the estate. (2316, *D. C. Jaffna*, 13 *Aug.* 1850.) But not if they do not conduct themselves fairly; *e. g.* if an executor pleads a false plea (565, *D. C. Mandr.* 6 *Jan.* 1836; *Morg. D.* 71); or vexatiously opposes probate in his co-executor. (336, *D. C. Matura; Lor. R.* 27.)

Sales by executors, &c.

In referring to sales by executors, it is not intended to go out of the scope of this chapter by entering on the duties of executors, &c. but the power of the District Court to enforce those duties.

An administrator is, in general, entitled to alienate or encumber the whole estate; and the proper remedy to prevent that, is, not by calling on the court to interfere with him, but by praying out an injunction. (4416, *D. C. Chilaw and Putlam*, 24 *Oct.* 1838: 277, *D. C. Colombo*, 31 *May*, 1842; *Morg. D.* pp. 252, 326.) Nevertheless, as a check against improper sales by administrators, the D. C. of Colombo inserts a provision in the letters of administration prohibiting the administrator from selling real property without leave of the court. (*D. C. Galle*, 584, 7 *Apr.* 1853; *Coll.*)

In one case an administrator obtained an order for

the sale of real property, which was opposed, not on the grounds of his having funds in hand, or of no more funds being wanted for the winding up of the estate, or of there being moveable property which ought to be disposed of first, but on an immense number of objections raised to his original right to administration, and to his conduct since he had been administrator. The S. C. said if a man misconducts himself as administrator, the court can, upon proper application and proof, remove him, and should be applied to to do so. But, as a general rule, his whole conduct should not be the subject of adjudication in a proceeding such as the above. There may be cases in which, in order to prevent immediate mischief, and where the misconduct of the administrator has only just come to the objector's notice, the court may properly decline, or delay to strengthen his hands in dealing with the estate. But, as a general rule, it seems against principle and against the true interest of all concerned, to keep a man in office as administrator, and yet to cripple him in the performance of his duty by not allowing him powers which are necessary to wind up the estate. (421, *D. C. Caltura*, 29 *Sept.* 1863.)

Revocation of administration.

An administration can be revoked, upon good grounds being shown, or where they have issued by the mistake of the court. It would not be good grounds for revoking administration given jointly to a widow and her brother, that the latter had no interest in the estate,

and was not even authorized to apply for joint administration. But before an administration can be revoked, notice must be given to the administration already appointed to show cause against the revocation; and if he has given security, injunction and sequestration cannot in the mean time be issued against him. (119, 17 *June*, 1854, and 18469, 12 *June*, 1849, *D. C. Kandy; Austin*, pp. 230, 235: 8001, *D. C. Kandy*, 17 *Feb.* 1865.) Not filing final account, or settling the estate, combined with a precarious state of health, has been held good ground for removal and sequestration of the estates of the intestate, and the defaulting administrator and his sureties. (*Marshall*, 10.)

Re-granting administration.

And administration cannot be re-granted until the former letters are revoked. (17328, *D. C. Kandy*, 12 *June*, 1849; *Austin*, 235.)

Quarrelsome administrators.

An administration given jointly to parties between whom there exists excessive bad feeling, cannot be advantageous to the administration. The D. C. should, in such case, make choice of one or other of the applicants, of course giving the preference to the spouse, unless good reason exists why other kindred should be preferred. The Supreme Court will be very slow to interfere with this appointment when made, as the D. C. must be the best judge of the matter. (12412, *D. C. Chilaw and Putlam*, 12 *Nov.* 1844.)

Where administrators have been appointed and differ, the D. C. should decide between them as between

two litigants with power to appeal, unless it can persuade them to arbitrate. (*Marshall*, 9.)

Revocation by consent.

The District Court can, upon consent of the administrator and the heirs, revoke letters granted to the former, and appoint another administrator. The subsequent appointment cannot be set aside on the mere application of the previous administrator, on the ground that the re-grant was irregular for want of fresh citations. (479, *D. C. Galle*, 3 *Dec.* 1856; *Lor. R.* 241.)

INSOLVENCY JURISDICTION.

It was originally intended to add a chapter on the jurisdiction of the District Courts over the estates of insolvents; but, in view of the probable changes in respect of this subject, it was thought advisable to defer this part of the work to a later period, as it would only be needlessly enlarging the present volume.

CHAPTER XV.*

SUMMARY JURISDICTION OF THE DISTRICT COURTS.

THE preceding chapters describe the regular process of the District Courts; but it has been found necessary to establish a summary form of process for civil cases of undoubted urgency, and which it is the purpose of this chapter to set forth.

Deviations from the usual form of process are authorized in the cases following, under Supp. Rules of 5th March, 1838, p. 117:—

1st. In all actions for the rent and hire of houses, with or without land, provided the same be situated within the limits of any town or station in which a District Court is established.

2dly. For the wages of domestic servants, artificers, or labourers, engaged by the year, or for any less period.

3dly. For the payment of seamen's wages, freight, or other maritime suits causing the detention of shipping.

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* No doubt this process has fallen into some disuse; but the author cannot find that it has been anywhere recalled.

4thly. Whenever a person, in confinement on civil process, claims his discharge, except on the ground of insolvency.

All the following rules, except No. 7, are nevertheless extended to all cases of the then first class (*i. e.* suits for sums under two pounds), except when the permanent title to land, or other immoveable property, is in dispute. (*Supp. R.* 20 *June*, 1838.)

A summons having been issued in the usual form; on the day fixed for hearing, such cases are to be taken before any other civil business. The defendant shall then put in his answer immediately, whether in writing or *vivâ voce;* and the plaintiff shall also be required to reply forthwith. The documents, if any, on both sides are likewise to be immediately produced; and if, on the statements and examinations of the parties, and on inspection of the documents, the court considers that further proceedings are unnecessary, the decree may be at once pronounced. (R. 1.)

Whenever the court sees occasion to order a postponement, whether for the purpose of examining witnesses or for any other cause, it is by its judgment to that effect to appoint a day for a further hearing, which further hearing shall be within the fourteen days next ensuing, except there shall be strong grounds for an increased extension of time, in which case these grounds are also to be set forth in the judgment. (R. 2.)

The lists of witnesses are to be filed within two days,

exclusive of Sundays and holy-days, next after the day on which the judgment, ordering witnesses, is pronounced. (R. 3.)

If at any time, when the case is called, either of the parties is absent without sufficient cause shown, the court may proceed in absence; the sole remedy against any judgment or decree then pronounced is by appeal.

Should one or more witnesses be absent on the day fixed for hearing, the court is to proceed to examine the witnesses in attendance; and if, having heard them, it considers the testimony of an absent witness material, it will direct the witness to be brought before it within the shortest practicable period, even by attachment if requisite: if the evidence of such witness be not material, it may proceed at once to a decision; but the penalty for absence is not the less recoverable from the absentee. (R. 4.)

Applications to sue or defend in *formâ pauperis* may be granted provisionally on examination of the party making it; but the examination is to be in writing, and an applicant wilfully misleading the court as to his circumstances is, in addition to all other liabilities, to suffer imprisonment for the contempt, which shall not be less than fourteen days, nor exceed two months. (R. 5.)*

The District Judge may, either at the time of grant-

* Revoked 11th July, 1840, as to powers of contempt.

ing the original summons, or at any subsequent period, order, on motion of the plaintiff, sequestration to issue, in manner set forth in Rule 15; but, if it afterwards appear that the mandate has been sought for and obtained on grounds frivolous or vexatious, the court will, by its final decree, assess the damages due to defendant owing to such proceeding. (R. 6.)

In all actions for non-payment of rent, the court, in pronouncing its final decree, or at any time thereafter, so long as the judgment remains unsatisfied, may, if the decision be in favour of the landlord, order a writ of ejectment to issue, subject to such conditions as it may consider fair and reasonable. In case of an appeal, however, the ejectment is not to be carried into effect until the appeal is determined, provided appellant give security, in manner provided by the last paragraph of the 4th Rule of the Eighth Section of the General Rules and Orders. (R. 7.)

Petitions of appeal are to be filed within two days, and security, in the usual form, is to be given within five days next after the date of the judgment or decree.

Appeals from judgments, preparatory or interlocutory, are not to stay proceedings.

Appeal cases, under this rule, need only remain one day in the Registry of the Supreme Court before the hearing. (R. 8.)

CHAPTER XVI.

ADVOCATES AND PROCTORS.

THE seventeenth clause of the Charter authorizes the Supreme Court to admit as advocates or proctors in that court "all such persons, being of good repute, as shall, upon examination by one of the judges, appear to be of competent knowledge and ability; and in case of refusal to admit any person applying for admission, the judges shall, in open court, assign and declare the reason of such refusal." According to Sir C. Marshall, the judges have exercised a discretionary power to refuse admission with reference to the number already practising, and the quantity of business to employ them. But such a discretionary power is now taken away by the rules and orders respecting advocates and proctors.

Advocates.

Every person, not a minor, can be admitted as an Advocate of the Supreme Court, who has been admitted as an advocate or barrister in any of the Superior Courts in Great Britain or Ireland, or who, upon examination by one or more of the Judges of the Supreme Court, is

found proficient in classical attainments and the general subjects of a liberal education, and to have a competent knowledge of the English and Roman-Dutch law. As to the mode of examination, see *post*, p. . (*Gen. R. and O.* 30 *Dec.* 1841; R. 2, p. 126.)

Certificate stamp.

The advocate must, prior to being sworn, provide a stamp of twenty-five pounds' value, upon which the Registrar of the Supreme Court engrosses his certificate of admission. The advocate cannot act unless he has duly obtained such a certificate of admission. (*Ord.* No. 12, of 1848, § 1.)

Order of precedence.

The following is the right of precedence and of pre-audience amongst the advocates:—

1st. Queen's Advocate.

2nd. Deputy Queen's Advocate.

3rd. Advocates in the order of their admission respectively. Provided that any members of the English, Irish, or Scotch bars, not being Queen's Advocate or Deputy Queen's Advocate, shall rank with advocates of Ceylon, according to the time at which they shall have been respectively called to the bar. (*Gen. R. and O.* 25 *Nov.* 1843, R. 4, p. 115.)

The office of counsel.

The office of counsel consists, in general, in giving advice in all legal questions; to draw and sign petitions of appeal; to advise the pleadings which ought to be entered on the record; to plead in court; and further to use every other legal means for the interest of his client. (*V. der Lind.* p. 398.)

Van Leuwen, in his Commentaries, and Van der Linden, in his Practice, lay down certain rules for the conduct of the advocate; but those rules are so entirely a matter of personal conscience, and so patent to every thinking man, that it is unnecessary to repeat them here.

Honorarium.

Originally nothing was due to an advocate for services in a cause; but by degrees it became the custom to bestow a gift for work earnestly done, until at last the *honorarium* grew into a right, under the taxation of the court, and the advocate can sue for the same in the court in which he advocated the cause. He has no lien over the documents of the cause coming into his hands, and no right of preference over other creditors. His right to sue for fees is prescribed in two years, computed from the completion, or final break off, of his services, unless he is secured under the signature of his client, or other lawful acknowledgment of debt; and this prescription does not seem to be disturbed by the Ceylon prescription ordinance. (*Voet*, i. 3, 1, §§ 6, 7, v. 1, p. 264.)

If an advocate holds an annual retainer, his executor can hold the whole retainer, if paid; and sue for it, if not paid. (*Id.* § 8, p. 265.)

The advocate's fee is a matter of right, not of contract, and he can even claim it if he is a party to a cause, succesful or unsuccesful, if he in any way acts for others. (*Id.* §§ 6 and 7.)

Also, if he loses or delays his client's cause by manifest fraud and perverseness, he is lialble to an action, and in gross cases may be punished criminally; but he is not liable for loss occurring to the client through his inexperience, or even mistake, whether of fact or law. (*Id.* § 10, p. 266.) The advocate's liability.

It will also be seen, from the perusal of this chapter of Voet, that an etiquette similar to that of the English bar etiquette existed in Holland to the extent that, though the advocate is not bound to take a cause manifestly unjust as to facts, or hollow in point of law, yet that he is bound to accept cases founded on *primâ facie* good cause of action; that he is not to tout, solicit, or otherwise obtain business in an unprofessional manner; that he is not to accept a case subject to a condition, as, for example, that he is only to be paid in the case of success; but there is no objection to an *honorarium* over and above the fee taxable, or to the advocate receiving special retainers. Etiquette.

No advocate is allowed to practise as a proctor. And if, prior to his admission as advocate, he has practised as a proctor, he must at once relinquish all business, whether in or out of court, in that capacity, saving his right to costs due to him at the time of his admission. (*R. and O.* of 25 *Nov.* 1835, R. 1, p. 114.) May not practise as proctor.

The following are fees payable to advocates as costs in the cause:—

In the District Courts:

	£	s.	d.	£	s.	d.
Advising action, or defence, according to the length or difficulty of the case.....	1	1	0	to 3	3	0
Retaining fee (where given).....	1	1	0			
For perusing, settling, and signing any pleading, according to length or difficulty.....	0	10	6	to 2	2	0
For perusing, settling, and signing interrogatories.....	0	10	6	to 3	3	0
Consultation fee, when necessary...	1	1	0	to 3	3	0
For any special motion, which is opposed, made in the progress of a cause.....	1	1	0	to 3	3	0
Brief fee, on trial or argument, unless when the proceedings are voluminous, or unusually important or difficult.....	1	1	0	to 5	5	0
If the proceedings are very voluminous, or unusually important or difficult.....	5	5	0	to 10	10	0
In the Supreme Court, the same fees as in the District Courts, when applicable.						

Admission of proctors of the Supreme Court.

Every person, not a minor, may be admitted as a Proctor of the Supreme Court. (*Supp. R.* 30 *Dec.* 1844, p. 155.)

1st. Any one who has been admitted as a solicitor, attorney, writer to the signet, or proctor, in one of the

superior courts in Great Britain or Ireland, or as procurator in any Court of Record in Scotland; or to practise, and who has practised in any District Court of Ceylon for not less than five years.

2nd. Any one who has served not less than five years as an articled clerk, or apprentice, to any attorney, &c. as aforesaid.

3rd. Any one who has been bound by notarial contract to serve as an articled clerk to any advocate or proctor actually practising in the Supreme Court five years subsequent to the date of such contract, and who, during the whole of such term, has been actually employed as clerk in the proper business of such advocate or proctor, and instructed in the knowledge and practice of the law by him. If any such advocate or proctor dies before the expiration of such term of service, or discontinues practice, or if the contract is by mutual consent cancelled, or if the clerk is legally discharged by order of court before the expiration of such term, and the clerk in any of the said cases becomes bound by another notarial contract to serve, and accordingly has served as clerk to, and has been instructed by, any other practising advocate or proctor of the Supreme Court during a term equal to the unexpired part of his former term, then such last-mentioned service is available to render such clerk eligible to be admitted as a proctor in the Supreme Court, as if he had continued to serve as clerk to, and to be instructed by, the same person to whom he was originally bound.

4th. Any one who has served as a student or apprentice in terms of the 1st clause of the Rule of the 5th March, 1838,* above mentioned, or as an articled clerk to any advocate or proctor of the Supreme Court for a period not less than three years, and who has been duly admitted to practice and has actually practised for a period not less than two years in any District Court.

Admission of proctors of the District Court.

Every person, not a minor, can be admitted as a proctor in any District Court who has served as a student or apprentice, or articled clerk, in manner last above mentioned, for a period not less than three years.

Mode of application for admission as advocate or proctor.

Every person, excepting a Queen's Advocate or Deputy Queen's Advocate, who intends to apply for admission as an advocate or proctor, must, six weeks before he applies, give notice of his intention to the Registrar of the Supreme Court, and cause his name and place of abode, written in legible characters, to be affixed in the office of the Supreme Court, and also on the outside door of the court house, and must also cause notice of his intended application to be published, once at least, in some public newspaper of the colony between the time

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* That rule is as follows:—

It is ordered that whoever shall make application to be permitted to practice as a proctor in any District Court, shall lay before the Judges of the Supreme Court collectively a certificate, signed by a proctor of some court, attesting that he has remained for three successive years as a student or apprentice under the said proctor; or a certificate from a proctor of the Supreme Court, attesting that he has remained for two years as a student or apprentice under the said proctor at Colombo.

when he shall give such notice and the time of making his application.

Every such application must be in the form of a petition to the Supreme Court, with a certificate or other documentary proof of the applicant's admission as an advocate, barrister, solicitor, attorney, writer to the signet, or proctor in one of the superior courts in Great Britain or Ireland, or as a procurator in any Court of Record in Scotland, or that the applicant has practised as a proctor in a District Court in Ceylon for not less than five years, together with an affidavit that the applicant is the person named in the certificate or documentary proof, and that he has not done anything which would cause his name to be struck off the roll of the court in which he has been admitted, and that, to the best of his knowledge and belief, his name still remains in the said roll; or an affidavit that he has served as a student, apprentice, or articled clerk, in one or other of the modes above mentioned, as the case may be, together with such documentary proof thereof as he shall be able to adduce; and where having been enrolled for two years in any District Court forms part of the ground of application, a certificate of the Judge of the District Court in which he has been so enrolled, that he has actually practised for the space of two years, and that his name still remains on the roll of his court.

Enquiry and report.

The Supreme Court makes an order, on such petition, directing the registrar, or a deputy registrar, and any

advocates or proctors who may be named in the order, to enquire and report to the Court whether the applicant is of the age of twenty-one years and of good repute, and whether there exist any impediment or objection to the admission of such applicant, and (excepting in the case of persons previously admitted in the Courts of Record of Great Britain or Ireland, as hereinbefore mentioned) to examine and report whether such applicant be fit and qualified, in respect of a competent knowledge of the English and Roman-Dutch law, to be admitted as an advocate or proctor in the Supreme Court, or district Court, as the case may be.

Examination.

On such report being made, the Supreme Court either direct the applicant to be examined by any advocates or proctors specially named for that purpose, or by one or more of the judges, or to be sworn, admitted, and enrolled, or makes such order as the circumstances of the case may require.

Articled clerks.

Every advocate and proctor of the Supreme Court is allowed to appear, plead, and act as an advocate or proctor respectively in any District Court of the colony.

No advocate or proctor of the Supreme Court is allowed to have more than three articled clerks at one time; and before any person can be articled with a view to his admission as an advocate or proctor, he must be introduced to the judges by his intended master, and produce certificates of the tutors, or others under whom

he has been educated, of the regularity and propriety of his conduct whilst under tuition, and of his academical acquirements under such tuition, as shall satisfy the judges, and shall be approved of by the judges, before entering into articles.

No person, during the time he shall be articled to an advocate or proctor with a view to his admission, must pursue any trade or business other than the proper business of an advocate or proctor.

Fee for admissions.

The position of the proctors is further regulated by the Ord. 12 of 1848, by which they are bound to provide a five-pound stamp for their certificate of admission to practice. (§ 1, and *Sched.*)

Rules as to annual certificate.

By the second clause they are bound to obtain from the Registrar of the Supreme Court, or from the Judge of their District Court, on or before the 25th March, an annual practice certificate, in force for one year, for which they pay according to the following scale:—

Certificate to be taken out by every person practising as a Proctor in any Court in this Island.

	£	s.	d.
If he shall practise in Colombo, Kandy, Galle, Jaffna, or Trincomalie, and shall have been admitted for the space of three years or upwards.....	3	0	0
Or if he shall not have been admitted so long,	1	10	0
If he shall practise elsewhere in this island,			

and shall have been admitted for the space of three years or upwards.....	2	0	0
Or if he shall not have been admitted so long,	1	0	0

If the proctor practises in more than one court, one certificate is sufficient; and if one of his courts demand a higher scale of fee than another, his certificate must be taken out in the higher scale.

On application for certificate, a declaration, signed by the proctor or his partner, containing his name, residence, court or courts, and date of admission, must be delivered by him to the Registrar of the S. C. or the D. J. who causes these particulars to be entered in a book; and, if correct, delivers to the proctor his certificate. (§ 3.*) If the proctor neglect to obtain his annual stamped certificate within the proper time, it cannot be issued to him without an order of the S. C. or a judge thereof. (§ 4.) A proctor practising without a certificate cannot obtain taxation of his costs, or recover them by suit, and is liable to a fine of twenty

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* I, A. B. Registrar of the Supreme Court (*or District Judge of Kandy*) do hereby certify that C. D. of hath this day delivered, and left with me, the declaration in writing signed by him (*or by E. F. his partner, on his behalf*), required by the Ordinance No of the year 1848; and I further certify that the said C. D. is duly enrolled as a proctor in the Supreme Court of this Island (*or in the District Court of Kandy*), and authorized to practise as such therein.

In wituess whereof, I have, this 25*th* day of *June*, 1848, at *Colombo*, set my hand to this stamped certificate.

(Signed) A. B.
Registrar.

pounds. (§ 5.) If the Registrar of the S. C. or a D. J. refuse the proctor his certificate, he cannot apply to the S. C. or any judge thereof for redress. (§ 6.)

The proctor's proxy.

A proctor, in order that he may be entitled to appear before the District or Supreme Court, must be provided with a written mandate, commonly termed a proxy, from his client, and which must be exhibited to the court. (*Voet*, i. iii. 3, 9, *V. Lwn. Comm.* 532; *Cens. For.* part 2, i. 5, 8.)

A proxy for the District Court does not enable a proctor to appear before the Supreme Court; he requires a fresh proxy.

By the Schedule to the last Stamp Ordinance, proxies for either court are required to be stamped.

The proxy is signed by the client. If the client signs for a firm, he must sign his own name as a partner of the firm, as for the firm, thus:—"A. B. partner in, and for the firm of C. D. and Co." (11613, *D. C. Kandy*, 3 *Sept.* 1841; *Austin*, 48.) Also, if there are two plaintiffs (not partners having authority to sign for one another), though they be joint creditors on a notarial bond, they must both sign the proxy, if they jointly employ a proctor, to render the proxy valid. (15441, *D. C. Kandy*, 23 *Aug.* 1843; *Austin*, 67.)

Amongst the Kandyans, a wife may sue and be sued alone, without joining the husband; yet a proxy to a proctor, signed by a husband for his wife, and in her name, is sufficient. (8825, *D. C. Kandy*, 20 *Sept* 1837; *Austin*, 40.)

By an ordinary proxy, for a District Court, only the proctor is retained, and he can charge for his own fees solely, and not for those of an advocate, unless the proxy expressly authorizes the proctor to retain an advocate. (21886, *D. C. Kandy*, 4 *Dec.*; *Austin*, 132.)

If a proctor has a case in his hands, and is provided with the necessary documents belonging thereto, but has not received the proxy, or a defective one, time may be allowed to him to apply for and produce a good proxy, under sound security to procure approval, and confirmation of whatever has been done in the case; or, in failure thereof, whether prosecuting the original suit or an appeal, he must bear the costs decreed; nor can he recover them from the parties he professed to act for. (*Voet*, iii. 3, 13, v. 1, p. 279; *V. Lwn. Comm.* p. 53; and *Cens. For.* i. 5, 4, part 2, p. 18.)

Proctor's liability.

Proctors are very strictly overlooked by the Supreme Court, and have, from time to time, been visited with the payment of the costs of their clients where they have neglected their duty. No private interests ought to induce a proctor to quit his post without either obtaining the consent of all parties to the postponement of such cases as might otherwise come on in his absence, or else transferring the cases, with the consent of his respective clients, to other trustworthy hands. (12241, *D. C. Caltura*, 1 *April*, 1835; *Morg. D.* 38.) A proctor who quits the district in which he is practising, leaving his business undone and unprovided for, renders himself

liable for any damage which his clients may sustain by such dereliction. (*Morg. Dig.* p. 39.) In all such cases the proctor will be ordered to pay the costs (and even the batta of witnesses—6823, *D. C. Galle*, 24 *June*, 1840; *Morg, D.* 295) consequent on his default; and if no damage has been sustained beyond loss of time, he will only be required to account for money received by him, and costs caused by him, but in no further damage. (See above cases, and 12413, *D. C. Caltura*, 18 *May*, 1836; *Morg. D.* 81.) Also, similar to the case of the English attorney, where a proctor has been wanting in due skill, or in the management of a suit, he is liable to his client for any damages arising therefrom, provided the client can prove such neglect. (3001, *D. C. Ruanwelle*, 24 *Aug.* 1836; *Morg. D.* 93.) Therefore, where such remedy has arisen (unless the proctor's conduct were to disqualify him to be a proctor at all, or is an offence against the court), the court should not listen to complaints, but refer the party to his remedy. (3057, *D. C. Caltura*, 13 *Jan.* 1838; *Morg. D.* 215.)

Proctor's costs disallowed for neglect.

Proctors have also, from time to time, been visited with the disallowance of their own costs; especially where a case has stood over for years, on account of numerous postponements effected by the mutual consent and application of the proctors: in such case the costs of the proctors on both sides have been disallowed up to the date of appeal. (4982, and 4853, *D. C. Jaffna*, 22 and 19 *Dec.* 1855.) So, also, where a proctor filed

an answer for the first defendant, and the next day filed another answer for the second defendant in precisely the same words, he was disallowed both the stamp and his own fee for the second answer. A separate answer only being necessary where the defendants make distinct and several defences. (406, *D. C. Amblangodde*, 6 *May*, 1835; *Morg. D.* 43.)

Proctor's authority.

The proctor stands in the place of his client: the consequences of the proctor's non-appearance in court when his appearance is required, are the same as if the party himself, when not represented by a proctor, were absent. (*Marshall*, 544.) And the proctor of the plaintiff being present is tantamount to the presence of the plaintiff himself, except when the plaintiff is required by the rules to be present in person. (1662, *Tangalle*, 21 *April*, 1853.) So that the illness of a party's proctor is always considered a sufficient cause of postponement; and if not accorded, the Supreme Court will order a new trial. (6241, *D. C. Ratnapoora*, 29 *Dec.* 1852.) As a consequence of the rule that the proctor stands in place of his client, every party is considered bound, as between him and his opponent, by the acts of his proctor within the scope of the proxy in the regular course of practice, and without fraud and collusion, however injudicious such acts may be. These acts must be within the scope of the proxy; thus, a proxy, to defend and carry on a suit, does not empower a proctor to make admissions, even though the proxy conclude with an undertaking to

ratify all the proctor's acts by virtue of the proxy. (12184, *D. C. Kornegalle*, 21 *April*, 1853; citing *Marshall*, 544, and *Archbold's Pract.* p. 71.) But if it is within the scope of his proxy, the proctor may waive witnesses; consent, with binding effect, to a claim in an agreement; or make an important admission in a cause. (*Marshall;* 545.)

And a proctor is not, in a civil suit, bound to uphold a case which he conceives to be perfectly groundless, or iniquitous; though, where there is a fair and reasonable ground of defence, he is at full liberty to act in a cause, whatever may be his private opinions of the case. But he should first state that opinion to his client, though he is not required to express it elsewhere. (3319, *D. C. Caltura; Morg. D.* 186.)

A proctor retained to prosecute or defend a cause, accepts it as a trust, which he can renounce on good grounds, such as deadly quarrels between him and his client, severe illness, necessary journeys, and absence on account of the public, and such other good reasons. (*Voet*, l. 3, t. 3, § 22.) So that where a proctor gave no reason for abandoning his cases, but contented himself by giving a general notice that he was about to leave his district, and called on persons who had claims against him to prefer them for settlement; the Supreme Court held that, both by the Roman-Dutch and the English law, a proctor could not abandon the conduct of his client's suits under such circumstances; and, further, *seemed*

inclined to adopt the English practice, which forbids a party to change his attorney without leave of the court, and an attorney (who has entered an appearance for his client) from striking it out without the same leave. (11148, *D. C. Chilaw*, 3 *Jan.* 1851; citing *Iwort. v. Dayrell*, 13 *Vesey*, 195: *Menzies v. Rodriques*, 1 *Price*, 92: *Voet*, vol. 1, l. 3, *Tit.* 3, § 22: *Gayl.* l. 1, § 1: 2 *Obs.* 45: *Har. Dig. Tit. Attorney Arch. Pr.* p. 71: and *Nichols v. Wilson*, *L. J. Ex.* 1843, *Jan.* 26.) Similarly he must not discontinue a case because he thinks the evidence he tenders improperly rejected; he should appeal. (12029, *D. C. Jaffna*, 13 *Nov.* 1863.)

Proctor's office, how dissolved.

His office is dissolved by his own death, and by the dissolution of the purpose for which he was retained; also by the death of his client. (*Voet*, i. 3, 3, § 21, p. 284.)

The client can also recall his proxy at any period of the cause, without the consent of the opposite party; but *perhaps* not without the consent of the proctor, unless upon the same good causes as those mentioned before. (*Ibid.* § 23; see also *V. Lwn.* pp. 522-3.)

Proctor has no lien or preference.

The proctor has no lien on the *instruments of the cause;* and his costs are not a preference debt, also they are barred by a two-years' prescription, unless lawfully acknowledged by the signature of the client; or otherwise. (*Voet*, i. 3, 1, § 6, vol. 1, p. 264.)

A proctor may be em-

A party has a clear right to employ a proctor in any stage of a cause during its progress, even if he is first

retained after judgment, as it often happens that the proceedings necessary to enforce a judgment are the most complex and difficult in the suit; when so retained, the proctor must be allowed his proper costs for business actually performed by him. (6143, *D. C. Ratnapoora*, 11 *Nov.* 1851.)

ployed at any stage of the proceedings.

Proctors ought not to be security for their clients. And it is improper for a proctor, acting as Secretary of a District Court, to undertake practice in that court. (*Marshall*, 547-8.)

Capacities in which proctor should not act.

A District Judge possesses, at his discretion, ample power over the proctors of his court to enforce their personal and due attention to the orders of the court. (12413, *D. C. Caltura*, 18 *May*, 1836; *Morg. D.* 81.) But it cannot dismiss or suspend a proctor, as that would be reversing the order of the Supreme Court, by which the proctor is appointed: the proper course is, if a District Court Proctor does any thing deserving dismissal or suspension, for the D. J. to investigate the case, and to report it to the Supreme Court.

District Judge's power over proctors.

CHAPTER XVII.

COURTS OF REQUESTS.

Courts of Requests.

THE Courts of Requests are continued, or established, and regulated by the Ordinances No. 8 of 1859, and No. 9 of 1859. These courts had been established in 1843, and regulated by several ordinances, all of which were consolidated into one statute in 1859; and the courts were improved by the enactment of rules for their practice and guidance. When the Ordinances were consolidated, the then existing courts, commissioners, and other officers, were continued; and all judgments and proceedings had or commenced under any of the repealed ordinances were declared to remain valid to all intents and purposes, and were continued and enforced in the same manner as if they had been commenced under the authority of No. 8 of 1859 (§ 2).

The Governor was, however, empowered to establish, by proclamation, other Courts of Requests in addition to those previously existing: every such court to be held at such places, and to have jurisdiction within the limits

appointed in the proclamation. The Governor may also revoke, alter, or amend any proclamation then already or thereafter to be issued under No. 8 of 1859 (§ 3). The "proclamations already issued" of course mean those issued under the authority of the repealed Ordinances.

Commissioners of Courts of Request.

The Governor may also, by his warrant, appoint a fit person to preside over any one or more of the Courts of Requests. This person is called the Commissioner, and holds office during the pleasure of the Crown. The Governor may also appoint more than one commissioner to preside over the same Court of Requests; and in that case each commissioner has the power to sit apart from the other, and to exercise all the powers and jurisdictions vested in the court, or in the commissioner thereof. The Governor may also, with the advice and consent of the Executive Council, suspend any commissioner from his office until the pleasure of the Crown is known (§ 5). Of course subject to the rules laid down in the Colonial Regulations.

Commissioner's oath.

Every person appointed a commissioner, before beginning to execute the duties of office, takes and subscribes the following oaths of allegiance and office :—

I, A. B. do sincerely promise and swear that I will be faithful, and bear true allegiance to Her Majesty Queen Victoria.

So help me God.

And the oath of office, as follows :—

I, A. B. do sincerely promise and swear that I will faithfully and diligently execute, to the utmost of my abilities, the several duties of a Commissioner of a Court of Requests.

So help me God.

Any District Judge, Commissioner of a Court of Requests, or Police Magistrate, is empowered and required to administer these oaths upon application being made to him, on that behalf, to administer them. Such oaths are to be enrolled, as of record, in the court of the judge, commissioner, or magistrate administering them. And a copy of such enrolment is to be forthwith transmitted to the Registrar of the Supreme Court, to be filed of record in that court. (§ 6.)

Chief clerk and court officers.

There is attached to each court a chief clerk, and such other officers as may seem necessary to the Governor. The chief clerk and other officers are appointed to, and removed from, their offices in such manner as the governor directs. The commissioner of any court may suspend his chief clerk, or other officer, for misconduct, or any other sufficient cause; and, by a writing under his hand, appoint some other person to act in his stead until the governor's pleasure is known. The commissioner may also, in the case of the temporary absence of the chief clerk, by a writing under his hand, appoint some other

person in the chief clerk's place to do his duties during his absence. (§ 7). No provision is made as to the absence of the other officers, probably as they have not the same legal function as the chief clerk, and absence could be granted them and a substitute appointed without express permission of the law.

Court of Requests a Court of Record.

Each Court of Requests is a Court of Record. (§ 8.) Which means that it is a court where the judicial proceedings are enrolled or recorded for a perpetual memory and testimony: its rolls and books of proceedings are called the records of the court, and are of such high and preeminent testimony that their truth is not to be called into question. For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary. And if the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection, whether there be any such record or no; else there would be no end of disputes. But if there appear any mistake of the clerk in making such record, the court will direct him to amend it. All Courts of Record are Courts of the Sovereign, in right of the crown and royal dignity, and no other court has authority to fine or imprison; so that, in general, the very erection of a new jurisdiction with power of fine and imprisonment makes it a Court of Record. (3 *Bla. Com.* iii. 26: *Rex v. Clement*, 4 *B and Al.* 218: *Rex v. Davison*, 4 *B. and Al.* 329.)

Jurisdiction other than as to land.

Courts of Requests have cognizance of, and full powers to hear and determine, all actions in which the debt, damage, or demand does not exceed *ten pounds*, and in which the party or parties defendant are resident within the jurisdiction of such court, or in which the act, matter, or thing, in respect of which such action is brought, shall have been done or performed within such jurisdiction. (§ 8.)

No jurisdiction in certain suits not relating to land.

The C. of R. has, therefore, no jurisdiction in questions of alimony; for a court that can only award ten pounds in the whole, cannot decree a sum to be paid at certain periods for life, and which may amount in the whole to more than ten pounds. (25491, *C. R. Jaffna*, 20 *Apr.* 1860: 5590, *C. R. Putlam*, 11 *Feb.* 1851; *Nell*, 167.) Nor do the words, "in actions where the debt, damage, or demand," include an abatement of nuisance. (2849, *C. R. Matura*, 28 *Aug.* 1849; *Nell*, 135.)* Yet a Court of Requests is allowed to decree interest, from the institution of the suit until recovery, without limitation. (29137, *C. R. Colombo*, 29 *Nov.* 1856; *Lor. R.* 227.)

A Court of Requests has, also, no cognizancs of any action for any malicious prosecution, or for false imprisonment, or for any libel or slander, or for criminal conversation, or for seduction, or for breach of promise of marriage, or for separation *a mensâ et thoro*, or for

* This case occurred under No. 10 of 1843, § 5, where the words were, "for the payment or recovery of any debts;" but these are, in substance, the same as those in the text.

divorce *a vinculo matrimonii*, or for avoidance of marriage. (8 of 1859, § 8: 2107, *C. R. Pantura*, 15 *Aug.* 1861.)

Influence of residence over jurisdiction.

The C. of R. has the above jurisdiction "where the party or parties defendant are resident within the jurisdiction of the court" (see *ante*, p. 562), and when the party defendant pleads to the action, and is present at the trial, and it does not appear that the defendant was *not non-resident* in the district, and it does not appear that the cause of action arose out of the district, the court has jurisdiction. (13295, *C. R. Matelle*, 28 *Aug.* 1863.) And it would seem that, in this matter, the court cannot determine whether it has jurisdiction or not, without both plea and evidence being taken. (2603, *Matura*, 17 *March*, 1849; *Nell*, 129.)

Jurisdiction as to land suits.

A Court of Requests has also cognizance of, and full power to hear and determine, all actions in which the title to, interest in, or right to the possession of any land is in dispute; provided the value of such land does not exceed *ten pounds*, and the same or any part thereof is situate, or the party or parties defendant are resident, within the jurisdiction of the court. (8 of 1859, § 8.) So that the jurisdiction of the Court of Requests is ousted by a successful plea grounded on this clause; or if even the defendant dispute the plaintiff's title in any cause—*e.g.* for a ground share—and it appear that the land is worth more than ten pounds. (4680, *C. R. Kaigalle; Lor. R.* 23.) But, where one who held a mortgage from another for an amount above ten

pounds, and sued, not to recover the mortgage debt, but merely the value of the produce (below ten pounds) in lieu of interest, the C. R. has jurisdiction. (2728, *C. R. Ratnapoora*, 15 *Jan.* 1856; *Lorenz. R.* p. 6.)

Jurisdiction must appear in the plaint.

Where any such title is in dispute, the value of the land should be alleged in the record not to exceed ten pounds, so as to show that the court has jurisdiction (5965, *C. R. Bentotte*, 12 *July*, 1854), for no intendment can be made in favour of its jurisdiction. (3890, *C. R. Chilaw*, 8 *March*, 1853; *Coll. Nell*, 197: 54, *C. R. Kaigalle*, 30 *Nov.* 1853; *Nell*, 223: see *Lor. R.* 208: and see 13727, *P. C. Matelle*, 4 *July*, 1859.)

Therefore, to oust this jurisdiction, the defendant must deny that allegation: a denial of the plaintiff's title is not a plea to the jurisdiction. (2263, *C. R. Kornegalle*, 6 *Aug.* 1850; *Nell*, 154.) And such a plea being put in, the court should call upon the plaintiff to prove the land to be of such value as will bring the case within the jurisdiction of the court; the defendant being at liberty to call counter evidence, when the court will decide whether it has or has not jurisdiction. (8814, *C. R. Calpentyn*, 14 *June*, 1835; *Nell*, 247.) There should be also evidence of the site and the boundaries of the land, if they are disputed, and necessary to be ascertained to know the value of the land. (2468, *C. R. Tangalle*, 27 *June*, 1855; *Nell*, 248.)

Practice as to the value of land in suit.

It is the practice of the Supreme Court to send back cases to ascertain the value of the land, where that is

the substantial matter, though the plaint be laid for damages only. If the land be found to be worth more than ten pounds, the Court of Requests has, of course, no jurisdiction. (16555, *C. R. Calpentyn*, 25 *Oct.* 1860.) And the value of the land at the time of action brought is to be its value for estimating jurisdiction. (24, *C. R. Matelle*, 9 *Feb.* 1856; *Lor. R.* 21.)

The jurisdiction of the Court of Requests is only ousted by the land being worth more than ten pounds, when its title is in dispute. Thus an interest—as, *e. g.* a right of public highway—in land may be worth less than ten pounds (the land being worth more); then the court has jurisdiction. (903, *C. R. Matura*, 24 *March*, 1857: 410, *C. R. Putlam*, 23 *June*, 1863.) Similarly, with regard to mortgages, a suit may be brought to recover the money lent upon a mortgage, if under ten pounds, even if the land mortgaged is over ten pounds, provided the land is not in dispute (1019, *C. R. Point Pedro*, 24 *July*, 1863); but not if the mortgage bond sets up a title to the possession of the land until the debt be paid, or affects its title. (336, *C. R. Tangalle*, 20 *May*, 1845: 1710, *C. R. Avishawelle*, 8 *July*, 1851; *Nell*, 87, 173.) As to interest, see *ante*, pp. 362-3.

Interest in land what?

As to what is an interest in, or right to, the possession of land, will be found fully discussed under its proper head, in the second volume of this work. It may be mentioned here that trees, fruit, and grass, still growing upon the land, and cereal crops not yet in

existence, are an interest in land: although trees, fruit, and grass, severed from the land, and growing cereal crops, are not such an interest. (10286, *D. C. Negombo*, 3 *July*, 1845: 5670, *C. R. Negombo*, 16 *Aug.* 1853; *Nell*, 212: 1056, *C. R. Ratnapoora*, 31 *Oct.* 1861.)*

Trespass.

A Court of Requests has full power to try questions of trespass on lands worth more than ten pounds, when the title is not in issue, and if the damage do not exceed ten pounds. (859, *C. R. Ratnapoora*, 15 *July*, 1861.) Thus, in one case, the plaintiff was decreed to recover the value of paddy taken by the defendant; but the plaintiff was dismissed in respect of damages for pulling down a barn, as the title to it was in dispute between the parties, and it was appurtenant to land worth more than ten pounds. (2798, *C. R. Kornegalle*, 18 *Dec.* 1852; *Nell*, 191.)

Collateral purpose.

A Court of Requests is not ousted of its jurisdiction over a case (otherwise within its jurisdiction) because, for a collateral purpose in the course of the suit, it becomes necessary to enquire into the respective shares of parties in land worth more than ten pounds, where such enquiry does not decide any right to the land, no such right being in dispute. (160, *Mallagam*, 7 *May*, 1850; *Nell*, 152.)

No jurisdiction conferred by consent.

Where the debt, damage, or demand, or the value

* So that the decree in 903, *C. R. Matura*, 24 *March*, 1857, must be considered erroneous, unless the trees therein mentioned were severed from the soil at the time of the agreement.

of land in dispute exceeds ten pounds, the consent of parties cannot confer jurisdiction. (7208, *C. R. Avishawelle*, 10 *Sept.* 1859: 2974, *C. R. Chavagacherry*, 18 *Dec.* 1852; *Nell*, 191.)

Splitting the cause of action.

No plaintiff may divide any cause of action for the purpose of bringing two or more suits in the Courts of Requests. (8 of 1859, § 9.) In ordinary phrase, a plaintiff may not split his action; but an action for a month's rent (say January's), commenced before rent for the succeeding month (say February) becomes due, is not a splitting of action. (12539, *C. R. Matelle*, 29 *Sept.* 1863.)

Abandoning the excess.

Any plaintiff having a cause of action for more than ten pounds, for which a plaint might be entered under the ordinance, if not more than ten pounds, may abandon the excess; and thereupon the plaintiff, on proving his case, may recover to an amount not exceeding ten pounds; and the judgment of the court upon such plaint is in full discharge of all demands in respect of such cause of action; and entry of the judgment must be made accordingly. (8 of 1859, § 9.)

Minors may sue for wages.

A minor may prosecute any action in any Court of Requests for any sum, not exceeding ten pounds, which may be due to him for wages, or piece work, or for work as a servant, artificer, or labourer, in the same manner as if he were of full age. (8 of 1859, § 10.)

Commencement of suit—plaint, how preferred.

Any person bringing an action in a Court of Requests, must either himself state his case to the chief clerk, who

must enter the same, by way of plaint, in a separate sheet of paper; or deliver to the clerk a plaint written on a separate sheet, and signed by himself or his proctor or advocate. (*R. and O. for C. of R.* R. 1.)

Form of plaint.

Every plaint must bear the date of the day and year on which it is entered, and state the names and residences of the parties, and the substance of the action intended to be brought, and be, as near as is material, in the form and according to the precedents contained in the Schedule of Forms for Crts. of R. (B). (*Ibid.* R. 2.)

It is not a ground for stopping a case, if the plaintiff is not explicit in the statement of his demand. (5932, *C. R. Galle*, 23 *Feb.* 1853; *Nell*, 197.) The proper course would be, to allow him to amend his plaint, on paying any necessary expenses incurred by his error. The greatest indulgence is to be allowed to ignorant parties, in Courts of Requests, in regard of amendments. (1593, *C. R. Ratnapoora*, 27 *June*, 1853; *Nell*, 210.) And if the defendants have pleaded, the amendment of course can only be made subject to amendments necessary in the pleas; for if the plaintiff, after plea or at the hearing, changes his plaint into one to which the defendants have not pleaded, he ought to be nonsuited. (2285, *C. R. Chilaw*, 8 *Aug.* 1850; *Nell*, 154.)

The record.

Every plaint must be numbered in the order in which it is entered or delivered in, and is the commencement of the action and of the record thereof. (R. 3.)

Summons.

Upon a plaint being entered or delivered, the chief

clerk, by a note on the record, appoints a day for the appearance of the defendant, and informs the plaintiff or his advocate or proctor thereof; and also issues a summons for the appearance of the defendant, stating therein the names and residences of the parties, and the substance of the action, and the number of the plaint on the margin thereof. And every summons must be in the form C in the Schedule of Forms for Crts. of R. *App.* (R. 4.)

If the summons does not follow the statement in plaint, so that the defendant could not go to trial prepared with evidence to rebut the plaintiff's claim, and the case proceeds to judgment, that judgment will be set aside for irregularity, and the case will be remanded for further hearing and judgment *de novo.* (771, *Galle*, 14 *July*, 1846.)

If the summons is not served upon the defendant, no proceedings in default can be had against him: the defendant is not bound to regard any verbal notice of the process server, nor any informal note written on the summons. In such case the summons should be extended. (7175, *C. R. Kandy*, 20 *Aug.* 1850; *Nell*, 157.) On the summons being returned not served, it should be re-issued without stamp. (24509, *C. R. Colombo*, 27 *March*, 1855; *Nell*, 244.)*

* No summons, subpœnas, warrant of arrest or in execution, nor any other citation or writ whatsoever which has once been issued out of the court and returned by the officer to whom it was directed, shall, on any pretext whatever, be re-issued, unless any such process has been returned not served, or executed, by reason that the party could not be

Process—service of process, through whom.

All summonses, orders, and other process must be signed by the chief clerk, and transmitted by him to any fiscal or deputy fiscal throughout the island for service or execution. Where it appears to the commissioner that service of any summons, &c. (excepting writs of execution and of possession) may be more conveniently or speedily effected otherwise, he may, by a note on the back of such summons, &c. direct that the same may be served by any person therein named. (R. 5.)

Mode of service.

Every summons, order, or process must be accompanied with a copy, or a translation thereof, in the language of the party on whom it is to be served; which copy or translation must be delivered either personally to such party, or to some person of his household apparently sixteen years old, at his dwelling-house or place of business. But if such dwelling-house or place of business is kept closed in order to prevent such delivery, the said copy or translation may be affixed on some conspicuous part thereof; or, if the said party have not a known place of residence or of business, it must be left at his last known place of residence or of business. And every such delivery, affixing, or leaving of any summons, order, or process, as respectively aforesaid, is deemed good service thereof. (R. 6.)

Service in case of partners.

Where two or more persons are partners *in trade*,

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found, or had left the jurisdiction of the court, or by reason that no property of the debtor, or none sufficient to satisfy the exigency of any writ of execution, could be found. (*Stamp Ord.* 1861, *Schedule.*)

and jointly sue or are jointly sued as such, the like service upon one of them shall be deemed good service as against the other or others of them. (R. 7.)

Misdescriptions not to vitiate the process.

No misnomer or misdescription of any person or place in any such summons, order, or process, vitiates the same; so that the person or place be therein described so as to be commonly known, and such misnomer or misdescription is not calculated to mislead the party served. (R. 8.)

Service, how proved.

Form of return.

The service or execution of any summons, order, or other process as aforesaid, may be proved by affidavit, purporting to be sworn before any person having by law the right to administer oaths; and the return thereof must be, as near as is material, in the form and according to the precedents contained in the Schedule of Forms for Crts. of R. *App.* (D). (R. 9.)

Admission by the defendant.

On the day named in the summons, if the plaintiff appear, the defendant must be called upon to answer the plaint; and if he admit the claim of the plaintiff, the chief clerk or the commissioner must enter such admission on the record, in the form E, in the Schedule of Forms for Crts. of R. *App.* and must cause the same to be signed by the defendant. Where a defendant resides at a distance from the court-house, or cannot conveniently attend, he may forward his admission to the chief clerk, signed by himself in the presence and under the attestation of some proctor or Justice of the Peace. And upon any such admission, as respectively aforesaid, the commis-

sioner must enter judgment against him. But a bare admission of the claim of the plaintiff, unless the plaint shows a complete cause of action, is not sufficient: thus a defendant's father was indebted to the plaintiff, and the defendant simply admitted the claim, which was held, under the circumstances, only to be an admission of *a debt being due* to the plaintiff, and not the defendant's liability, inasmuch as being heir to his father did not make the defendant liable, unless he accepted the inheritance, or intromitted with the deceased's property, and there was no allegation to that effect on the record, or evidence to prove it. (797, *Galle*, 1 *Aug.* 1846; *Nell*, 99.)

If the answer admits only part of a claim, the plaintiff must prove the rest of the claim, or must be nonsuited as to that not proved. (2248, *Madewelletenne*, 12 *Nov.* 1850; *Nell*, 163.)

Answer.

But if the defendant deny the claim, he must either himself state his answer to the chief clerk, who must enter it on the record; or he must deliver to the chief clerk an answer in writing, signed by himself, or his proctor, or his advocate.

Where a party gave in a verbal answer, and the chief clerk did not demand the stamp, the Supreme Court would not allow judgment against the party for the omission of the officer; but set aside the judgment and allowed the defendant a week's time to file a properly stamped answer. (7045, *C. R. Navellepittia*, 11 *Nov.* 1862.)

Every answer must bear the date of the day and year on which it is entered or delivered; and must admit or deny, or confess and avoid, the cause of action in the plaint; and must clearly and concisely state the defence intended to be relied on. And every such answer must follow, as near as material, some one of the forms of answer given in the Rules for Courts of Requests. *App.* Form of answer.

The defendant must plead to the jurisdiction, and also prescription, and other special pleas, as in the District Court. (266, *C. R. Newera Ellia*, 19 *Jan.* 1856; *Lor. R.* p. 8.) And where he pleads to the merits, but on the day of trial pleads to the jurisdiction, on the ground that any land in question was worth more than ten pounds, he will be disallowed his last plea. (8390, *C. R. Negombo*, 22 *May*, 1856; *Lor. R.* p. 116.)

The parties may thereupon be examined either by the commissioner, or by each other (if the commissioner shall consider such examination necessary), with the view of ascertaining the points at issue between them, and of dispensing with any unnecessary evidence. (*Ord.* 9 of 1859, § 13.) Examination to ascertain issues.

Immediately after the answer, or the examination above provided for, the parties must furnish the chief clerk with a list of their witnesses, and of their documentary evidence, respectively. And no witness can be called, nor any documents admitted at the trial, other than those appearing in such list, unless the commis- List of witnesses and documents.

sioner, on cause shown, sees fit to direct otherwise. (*Ord.* 9 of 1859, R. 14.)

Fixing the cause for trial.

The chief clerk must thereupon, by a note on the record, fix a day for the trial of the cause, and apprise the parties, or their proctor or advocate, thereof. And all causes so set down for trial must be entered in their proper order, in a separate book, to be for that purpose kept by that clerk, and must be taken up for trial in the order in which they are entered. The commissioner, upon cause shown, may advance any cause, and try the same before its turn. (*Ibid.* R. 15.)

Default—Proceedings in case of non-appearance of plaintiff, or on failure in proof,—nonsuit.

If, upon the day of the return of the summons, or upon any day appointed for the trial of the cause, the plaintiff do not appear, or sufficiently excuse his absence, the cause must be struck off, and a nonsuit entered against the plaintiff. And if the plaintiff do not appear when called upon, and the defendant admits the claim of the plaintiff, the commissioner must enter judgment for the plaintiff, according to law. (*R. and O. for C. of R.* R. 16.)

On default of appearance or answer by defendant,—judgment.

And if, on such day, the defendant do not appear, or sufficiently excuse his absence, the commissioner, upon due proof of service of the summons, notice, or order, requiring such appearance, may enter judgment by default against him. In all cases wherein the title to, interest in, or right to the possession of land, is in dispute, and in other cases in which the commissioner

deems it necessary or expedient to hear evidence in support of the plaintiff's claim, he must order the plaintiff to adduce such evidence on any day appointed for that purpose; and, after hearing such evidence, the commissioner must give judgment on the merits, and without reference to the default that has been committed. (*R. and O. for C. of R.* R. 17.)

Judgment by default may be opened up, in certain cases.

But if the defendant, within a reasonable time after such judgment or order, by affidavit *or otherwise*, satisfy the commissioner that he was prevented from appearing in due time by accident or misfortune, or by not having received sufficient information of the proceedings, and that he did not absent himself for the purpose of avoiding service of the summons or notice, and that he has a good and valid defence on the merits of the case, then the commissioner may set aside such judgment or order and any proceedings had thereon, and may admit the defendant to proceed with his defence upon such terms, as to costs and notice to the plaintiff, as the commissioner may think fit. (*R. and O. of C. R.* R. 18.)

This rule applies, although the defendant may have appeared on the summons in the first instance, if he is absent on the day fixed for trial, which is only an extension of the day for appearance. No affidavit is absolutely necessary; the defendant may be called upon to show cause verbally,* and need not be put to the

* Of course, on oath or affirmation, as the "or otherwise" must be of a like nature to an affidavit.

expense of an affidavit. (2757, *C. R. Ratnapoora*, 5 *Nov.* 1856; *Lor. R.* 208.)

Trial—Record of the proceedings.

A complete record must be kept of the examination of the parties, the evidence of witnesses, and of all the other proceedings had in a cause.

The commissioner may amend pleadings and proceedings.

The commissioner may at all times amend, or allow the amendment of all defects or errors in any pleadings or proceedings in a cause; which amendments must be made with or without costs, and upon such terms as to the commissioner may seem fit.

Attendance of parties.

He may also, in any case in which he is satisfied that the examination of any party would conduce to the ends of justice, require the personal attendance of any such party, provided such attendance can be reasonably obtained; and, if need be, may postpone the hearing, or further hearing, of the cause, in order to secure the personal attendance of such party. And every notice requiring such personal attendance must be in the form G, in the Schedule of Forms for Crts. of R. *App.*

Mutual examination of parties.

Every party to a suit, in attendance, whether upon such requirement or not, may be examined *vivâ voce* by the commissioner, or by the opposite party, or his proctor or advocate; but not upon oath. No questions must be put to such party, not strictly relevant to the matter in issue, nor any answers required from him which may have the effect of criminating him. (*R. and O. for C. of R.* RR. 19, 20, 21, 22.)

Attendance of witnesses.

The process for compelling the attendance of witnes-

ses is by subpœnas, with or without a clause requiring the production of documents in their possession or control. Every subpœna must be, as near as material, in the Form H, in the Forms for C. of R. *App.* (*R. and O. of C. R.* R. 23.)

A witness, however, ought not to be rejected because he has not been subpœnaed—the only use of a subpœna being to insure his attendance. (643, *C. R. Galle*, 24 *Feb.* 1846; *Nell*, 93: see also *Lorenz*, *R.* p. 8.) The judge can always call a bystander to give evidence. It is not irregular for a witness to be present during the examination of others, unless all witnesses were previously ordered out of court. (760, *C. R. Newera Ellia*, 25 *Nov.* 1851; *Nell*, 179.)

The commissioner cannot refuse to hear evidence legally admissible; and if he refuses it on the ground of inadmissibility, he must enter his reasons on the record. (2348, *C. R. Negombo*, 19 *June*, 1849; *Nell*, 133: 6596, *C. R. Jaffna*, 21 *May*, 1850; *Nell*, 152: 2762, *C. R. Avishawelle*, 23 *July*, 1863: see also *Lorenz*, R. p. 21.)

Postponement of trial.

It is irregular to admit any documentary, or to record parol evidence, and then to call upon the other party to begin. (21, *C. R. Point Pedro*, 17 *Sept.* 1860.)

Wherever the commissioner is satisfied, by affidavit or otherwise, that either party is not ready to proceed to trial, by reason of the absence of any material witness (such witness not being kept away by collusion), or for

Postponement.

other sufficient cause, he may postpone the trial once, or oftener, upon such terms as may be necessary. However, he may examine any witnesses present, and defer the further hearing until the absent witness has been obtained. The mere consent of the proctors or advocates of the parties is not sufficient ground for adjournment, unless some sufficient cause for adjournment is shown to the commissioner. (*R. and O. for C. of R.* R. 24.)

If the plaintiff, instead of applying for postponement in the first instance, allows his cause to be called on without opposition, examines one witness who is not worthy of credit, and then states that his other witnesses are not to be found, he ought to be nonsuited. (1966, *P. C. Trincomalie*, 19 *Oct.* 1848; *Nell*, 128.)

If a case is decided in the absence of witnesses, and there is no entry on the record as to whether they are material or not, they will be assumed to be material. (2804, *P. C. Galle*, 5 *June*, 1849; *Nell*, 132.)

Semble—that, before postponing a case under this clause, the commissioner may require the party whose witness is absent, to swear or affirm that that witness was material and necessary. (1722, *C. R. Mallagam*, 4 *Oct.* 1853; *Nell*, 217.)

Trial and judgment.

On the day of trial the commissioner must hear and determine the cause, according to law: and all judgments given by him must be pronounced in open court, and reduced into writing on the record, and signed by him. (*R. and O. for C. of R.* R. 25.)

Interlocutory judgments.

The commissioner should be careful not to award interlocutory judgment against a defendant not hit by the evidence, though the other defendants may have been (10885, *C. R. Jaffna*, 19 *Oct.* 1852; *Nell*, 190); and such an order would be set aside, as informal, if the plaintiff's evidence has not been first heard. (14112, *C. R. Jaffna*, 7 *Nov.* 1854; *Nell*, 240.)

Nor must an interlocutory judgment be given on the plaintiff's bare statement, and without any evidence adduced in proof. (1189, *C. R. Matura*, 22 *Feb.* 1848: 2809, *C. R. Galle*, 8 *May*, 1849; *Nell*, pp. 125, 132: see also *Lorenz*, R. p. 20.)

Final judgments.

Of course judgments that do not determine the issue will be set aside, as if, for example, a judgment did not decide whether a debt is owing or not. (3803, *C. R. Jaffna*, 26 *April*, 1848; *Nell*, 125.)

An order calling upon the defendant to commence, is not an order having the effect of a final judgment. (21, *C. R. Point Pedro*, 17 *Sept.* 1860.)

Translations of documents.

No translation of any document tendered in evidence can be read, unless signed by an interpreter of the Supreme Court, or by a government sworn translator, or by a sworn translator or interpreter of some District Court, or of the said Court of Requests.

Who shall be deemed a translator.

No person other than an interpreter of the Supreme Court, or a government translator, or a translator or interpreter of any District Court, is deemed a translator of any Court of Requests, unless he has received a cer-

tificate from the commissioner of such court that he is a competent translator, and has taken the oath of office before such commissioner.

Fees of translators.

No such translator can recover, in respect as fees for translation, any sum in excess of the rates in the table of costs and expenses for the Courts of Requests. *App.* (*R. and O. for C. of R.* RR. 26, 27, 28.)

Appeal—Petition of appeal.

Any party may appeal from any judgment or *order** of the court, by petition delivered to the chief clerk within seven days from the day on which such judgment or order has been pronounced.

Security in appeal.

No appeal suspends the execution, unless the appellant, within fourteen days from the day of the judgment or order, has entered into a bond, together with a surety approved of by the commissioner, for the due performance of the judgment in appeal. Every such bond must be, as near as material, in the Form I, in Schedule of Forms for C. of R. *App.*

Omission to appeal or give security in due time.

Any appellant who fails to file his petition, or give such bond, within the periods respectively limited, is not allowed his appeal, unless the omission is not from any negligence on his part. The commissioner must forward the application for leave to appeal, together with his report thereon, to the Supreme Court, to decide on its allowance or rejection.

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* That is, any order having the effect of a final judgment. (See *ante*, p. 170.) And otherwise, as to appeals from Courts of Requests, see *ante*, ch. 5, p. 168, *et seq.*

If security is duly given, the commissioner must forthwith transmit the petition, together with the record of the action, and all the documents and processes connected therewith. (*R. and O. of C. R.* RR. 29, 30, 31, 32, and *ante*, pp. 169, 170, 171.) Record to be transmitted to the Supreme Court.

The appeal is both for error in law and in fact, and the Supreme Court may affirm, reverse, correct, or modify any judgment or final order having that effect, and may order a new trial or further hearing on such terms as it thinks fit. (*Ord.* 8 of 1859, §§ 19, 20.)

The commissioner may pronounce judgment or make order respecting costs, subject to the limitation in the 12th section of the Ord. (*post, same page*), and to the Rules for Courts of Requests. Costs.

Any party to an action may appear by his proctor or advocate (duly authorized in writing in that behalf), or by any person allowed by the commissioner (on sufficient cause) to appear instead of such party; but no person, not being a proctor or advocate, may recover any money for appearing or acting on behalf of a party; and no proctor or advocate may recover from the *adverse* party any costs where the debt, damage, or demand, does not exceed forty shillings. Where the debt, &c. exceeds such sum, and where title to, interest in, or right to the possession of land, is in dispute (whether its value exceeds such sum or not), the commissioner may award the cost of employing a proctor or advocate according to the scale in the Rules for Courts of Requests. (*Ord.* 8 of 1859, § 12; and see *App.*) Appearance by advocate, proctor, or deputy. Costs.

What advocates or proctors entitled to appear.

Advocates and proctors of the Supreme Court may practise in any Court of Requests; and proctors of any District Court may practise in any Court of Requests held within the jurisdiction of such District Court. (*Ibid.* § 13.)

Who may represent the crown.

In every case instituted in a Court of Requests, where the Crown is a party interested, the Queen's Advocate, or any Deputy Queen's Advocate empowered to act within the province or district in which such court is held, or the Government Agent, or Assistant Government Agent, or collector of customs of such province or district, or any person authorized in that behalf, by writing under the hand of the Queen's Advocate, or of any such Deputy Queen's Advocate, Government Agent, Assistant Government Agent, or collector of customs, may appear and represent the Crown in such cases. (*Ibid.* § 14.)

Judgment, how enforced.

The judgment pronounced in any Court of Requests must, on application of the party interested therein, be enforced by execution against the property, or against the property and person of the party condemned therein, subject, however, to the provisions of the 165th section of the Insolvent Ordinance, No. 7 of 1853.*

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* That clause is as follows:—

Power of imprisonment for fraud.

"Provided that if at any time it shall appear to the court before which such action for the recovery of a debt not exceeding ten pounds shall be tried, that the defendant, in incurring the debt or liability which may be the subject of demand, has obtained credit from the plaintiff under false pretences, or with a frrudulent intent, or has wilfully contracted such debt or liability without having at the same time a reasonable assurance of being able to pay or discharge the same, or

Execution—Writ of execution against property.

Where a party has obtained judgment decreeing the payment of money, he may, unless previously paid, or there is an appeal taken and security given in respect thereof, obtain a writ of execution; and the amount of the judgment is recoverable by seizure and sale of property, moveable and immoveable.* Every such writ must be, as near as material, in the Form K, in the Schedule of Forms. (*Forms for C. of R. App. R. and O. for C. of R.* R. 33.)

Writ of execution against the person.

Where a commissioner, under the 165th section of Ord. No. 7 of 1853, has ordered a defendant to be taken and detained in execution, the party recovering such judgment may, unless it is previously satisfied, or an appeal taken and security given, obtain a writ of execution against the person of the defendant, and cause it to be executed. Every such writ must be, as near as material, in the Form L, in the Schedule. (*Forms for C. of R. App.* R. 34.)

Taxation of costs.

Before any writ of execution is issued, the clerk of

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shall have made or caused to be made any gift, delivery or transfer of any property, or shall have removed or concealed any property with an intent to defraud his creditors or any of them, it shall be lawful for such court, if the judge thereof shall think fit, in giving judgment, to order that such defendant may be taken and detained in execution upon such judgment, in like manner as he might have been if this Ordinance had not been enacted, for any time not exceeding six months, whether or not execution against the property of such defendant shall be issued in virtue of such judgment."

* Formerly land could not be seized in execution under writs of execution from Courts of Requests. (73, *C. R. Gampola*, 6 *Jan.* 1847; *Coll. Nell*, 107.)

the court must, at the request of the party issuing it, forthwith tax the costs of suit against the party to be charged therewith, and enter a note of such taxation and of the amount allowed on the record. Such costs are taxed according to the rates specified in the Table Q. (*Forms for C. of R. App.* R. 35.)

Writ of possession.

Where a commissioner has decreed a party to be the owner of any property, moveable or immoveable, such party may obtain a writ of possession, to be enforced according to the terms thereof. Such writ must be, as near as material, in the Form M, in the Schedule of Forms. (*Forms for C. of R. App.* R. 36.)

Executions, how conducted.

Executions must be in conformity with the rules set forth in Ord. No. 1 of 1839, entitled, "To amend the laws relative to fiscals and their officers," and the General Rules, respecting fiscals, of the 11th of July, 1840, or of such other ordinance or rules as may be enacted in respect thereof.* (R. 37.)

Moneys recovered, how disposed of.

All moneys recovered under any such execution must be forthwith paid by the fiscal, &c. to the party entitled thereto, and a return made to the court from which the writ issued; anything in the 21st and 22nd sections of the Ord. No. 1 of 1839 to the contrary notwithstanding. If the moneys remain unclaimed for longer than one month, the fiscal, &c. must pay the same to the Government Agent, or some Assistant Government Agent of the

* See *ante*, ch. 8, on "Execution."

province, who must hold them subject to the order of the court. (R. 38.)

Attachment

The orders of the court are enforceable by an attachment, as near as material, in the Form N, in the Schedule of Forms. (*Forms for C. of R. App.* R. 39.)

Commitment.

Where a party is committed by a Court of Requests, a writ of commitment must be issued to the fiscal, directing him to receive such party into his custody, in terms of the order. Every writ of commitment must be, as near as material, in the Form O, in the Schedule of Forms. (*Forms for C. of R. App.* R. 40.)

Release.

And every release from commitment must be, as near as material, in the Form P, in the Schedule of Forms. (*Forms for C. of R. App.* R. 41.)

Penalty on witnesses not attending, or on parties guilty of contempt.

The commissioner may punish, by a fine not exceeding one pound, or by imprisonment not exceeding fourteen days, any person summoned or noticed to attend his court and not attending, or any person guilty of contempt before his court. Every person charged with contempt must give bail, either on his own recognizance or on that of another person (as the commissioner considers necessary), for his appearance on the following day; and, in default of security, must be committed to prison until the following day. If, on the following day, the person fail by his answers to satisfy the commissioner that no contempt was intended, the latter may sentence such person as before declared.* (*Ord.* 8 of 1859, § 16.)

* See "Contempt," *ante*, ch. 11.

Fines, how recovered.

Any fine imposed by a Court of Requests may be enforced in the manner provided for by the Ord. No. 6 of 1855. (*Ib.* § 17.)

Persons committing perjury, how dealt with.

If it appear to a commissioner that any person, examined on oath or making affidavit, has in any proceeding connected with his court committed wilful and corrupt perjury, he must forthwith give information thereof to the Queen's Advocate or Deputy Queen's Advocate empowered to act within the district. And until the decision of such Q. A. or of some D. Q. A. is known to him, the accused must give bail, either on his own recognizance, or on that of another person (as the commissioner thinks necessary), for his appearance at such time and place as the said Q. A. or D. Q. A. may direct; or, in default of bail, must be committed.

Judgment in appeal, how enforced.

The commissioner must conform to and execute all judgments, orders, and decrees of the Supreme Court, made and pronounced in any appeal, in like manner as any original judgment or order pronounced by the commissioner could or might have been executed. (*Ord.* 8 of 1859, § 21.)

On abolition or alteration of courts, suits and records how disposed of.

When any C. of R. is abolished, or its jurisdiction altered by proclamation, every cause, suit, action, matter, or thing then depending before it must be proceeded with in the court in which it ought to have been instituted, if it had been instituted after such proclamation issued; and all proceedings which are thereafter had in such cause, &c. must be conducted as if the same had been instituted in such last-mentioned court; and all

records, muniments, and proceedings appertaining to any such cause, &c. must, after such proclamation issued, be delivered by the court in which it was then depending, to that court in which it ought to have been instituted after the time at which such proclamation issued. (*Ib.* § 22.)

Certain things required to be done by District Courts, to be done by commissioners.

Where, by any ordinance enacted before the C. of R. certain things are required to be done before a District Court, or by or before a judge or other officer of a District Court, in relation to any cause, &c. which by the Ord. for C. of R. is cognizable by Crts. of R. such thing must be done in like manner, or as near as may be, compatibly with the true spirit of such Ordinance, and with the constitution of the Crts. of R. before such Crts. of R. or by or before the commissioner or corresponding officer of such courts. (*Ib.* § 23.)

Supreme Court may grant injunctions, &c.

The Supreme Court, or any judge thereof, may grant injunctions to prevent any irremediable mischief which might ensue before the party making application for such injunction could prevent the same, by bringing an action in any Crt. of R. The Supreme Court, or any judge thereof, may not grant an injunction to prevent any person from suing in a Crt. of R. or from insisting on any ground of action or defence. (*Ib.* § 24.)

Supreme Court may grant mandamus, &c.

The Supreme Court, or any judge thereof, may inspect the Records of the C. of R. and issue writs of mandamus, procedendo, and prohibition, against any commissioner or other ministerial officer of any Crt. of

R. and order the transfer of any cause, &c. pending in a C. of R. to some other C. of R. or, if expedient, to some D. C. if it appears to the Supreme Court, or judge thereof, that there is reason to conclude that in such cause, &c. justice would not be done in the C. of R. in which it was commenced. The court to which any such cause, &c. is transferred, must hear, try, and decide the same. (*Ib.* § 25.)

CHAPTER XVIII.

POLICE COURTS.

Existing Courts, and past and pending proceedings, continued.

The Police Courts are regulated by "The Police Courts Ordinance, 1861"—and the Rules and Orders for Police Courts contained in Ordinance 18 of 1861.

This Ordinance applies to all Police Courts, whether then already established, or to be thereafter established. Nothing therein contained can be taken to abolish any then existing Police Court, or to cancel the appointment of any police magistrate or other officer. All judgments pronounced, and all proceedings then commenced, continue valid. (*Ibid.* § 2.)

The Governor may establish, alter, and abolish Police Courts.

The Governor may, by proclamation, establish Police Courts, in addition to those now existing, within such limits as the governor shall appoint, and may also revoke or amend any proclamation already or hereafter issued under this Ordinance. (*Ibid.* § 4.)

He may appoint police magistrates.

He may also, by warrant, appoint a fit and proper person to be the magistrate of any one or more Police Court or Courts, to hold office during the pleasure of

And appoint more than one magistrate for the same court.

the Crown; and he may appoint more than one magistrate to preside over the same Police Court; and in every such case each of the magistrates may sit apart from the other, and exercise all the powers and jurisdiction vested in the Court or the magistrate thereof.

The Governor may suspend magistrates.

And the Governor may, with the advice and consent of the Executive Council, suspend any magistrate from his office until the pleasure of Her Majesty shall be known. (*Ibid.* § 5.)

Magistrates to take certain oaths.

Every person appointed a magistrate must, before he begins the duties of his office, take and subscribe the oaths of office and of allegiance, in the forms set forth in the schedule, before some District Judge, Commissioner of a Court of Requests, or Police Magistrate; and every such judge, commissioner, or magistrate, is empowered and required, upon application made to him, to administer the oath. Such oaths must be enrolled in the court of such judge, &c. and a copy of such enrolment must be forthwith transmitted to the registrar of the Supreme Court, to be filed on the record of that court. (*Ibid.* § 6.)

Clerk and other officers.

There is attached to each court a chief clerk and other officers, determined by the governor; and such clerk and officers may be appointed to, or removed from their offices as the governor directs.

The magistrate may suspend clerk or other officer, and appoint others to act for them.

The magistrates of any court may suspend any clerk or officer for misconduct or other sufficient cause, and, by a writing under his hand, appoint some other person to act in his

stead, until the governor's pleasure be known; also, the magistrate may, in case of the temporary absence of the chief clerk, by a writing under his hand appoint some other person in his stead, who shall thereupon perform the duties of the chief clerk. (*Ibid.* § 7.)

Jurisdiction of the court.

Each court has full power and authority, and is required to hear, determine, and dispose of, in a summary way, all crimes and offences committed wholly or in part within its jurisdiction, which by law are cognizable by a Police Court; and also all crimes and offences committed as aforesaid, for which no express punishment is provided by law, and which are not usually punishable by death, transportation, or banishment, or by any severer punishment than those hereafter mentioned; and also all crimes and offences committed as aforesaid, which are by law punishable by no higher punishment than those hereafter mentioned—that is to say: imprisonment for a period of three months; fine or forfeiture to the amount of five pounds; and corporal punishment to the extent of twenty lashes. (*Ibid.* § 8.)

If the law has appointed a punishment for any offence, and it is not higher than the punishments mentioned in the last section, then that offence is within the jurisdiction of the Police Court.

But if the law has not appointed an express punishment for any given offence, and that offence is *not usually punishable* by death, transportation, or banishment, or by any punishment more severe than imprisonment for

three months, fine or forfeiture of five pounds, and corporal punishment to the extent of twenty lashes, then the offence is within the cognizance of the Police Court. The words "not usually punishable" must be taken to mean "not usually at the time of the commission of the offence *punished*" (see No. 5 of 1846, § 2); or otherwise it is difficult to give them a meaning; for as the Supreme Court may try *all* offences, and may (where not restrained by statute) punish those not imperatively appointed to be punished with death, transportation, or banishment, with any fine or imprisonment, of the lowest or highest amount, all offences not punishable with death, &c. are *always*, and therefore *usually punishable* by punishment beyond the jurisdiction of the Police Court; and therefore unless we read the word "punishable" as "punished," the Police Courts have no jurisdiction whatever. Thus reading them, the words "not usually punished" must be taken in reference to the punishment usually imposed by the Supreme Court (8231, *P. C. Ratnapoora*, 6 *July*, 1859; *P. C. Ca.* 131); or if an offence has been never before, or very rarely, tried before the Supreme Court, then in reference to the punishments usually imposed by the Courts of Gaol delivery in England. (*Queen v. Capper*, 5 *Jan.* 1864.)

Accordingly, the Supreme Court, taking judicial notice of its own practice, has held that any charge for causing the death of another (20047, *P. C. Matelle*, 28 *Sept.* 1862; *P. C. Ca.* 176); or any charge for burglary

(10515, *P. C. Galle*, 20 *Aug.* 1850; *P. C. Ca.* 29: 3510, *P. C. Badulla*, 12 *March*, 1856; *P. C. Ca.* 87); or for receiving stolen property, knowing the same to have been stolen in a burglary (*case last cited*); or for stabbing, cutting, and wounding (10657, *P. C. Galle*, 17 *Sept.* 1850; *P. C. Ca.* 30); or for aggravated assault, with earcutting (15121, *P. C. Mallagam*, 14 *Aug.* 1855; *P. C. Ca.* 77); or for assault and robbery on the high road, gang robbery, or robbery in general (9331, *P. C. Chavagacherry*, 20 *Nov.* 1854; *P. C. Ca.* 72: 702, *P. C. Matura*, 3 *March*, 1846; *P. C. Ca.* 2; *and see next case cited*); or for assault with intent to commit rape (3111, *P. C. Galle*, 1 *Dec.* 1846; *P. C. Ca.* 7); or with intent to do grievous bodily harm (13958, 6 *July*, 1859; *P. C. Point Pedro*, *P. C. Ca.* 131); or for arson, or maliciously firing buildings, other than dwelling houses (21056, *P. C. Chavagacherry*, 30 *Sept.* 1851; *P. C. Ca.* 35); or for riot* (7077, 4 *April*, 1853; *P. C. Point Pedro*, *P. C. Ca.* 66; 8231, *P. C. Ratnapoora*, 6 *July*, 1859; *P. C. Ca.* 129), is beyond the jurisdiction of the Police Court.

And, on the other hand, the Supreme Court has held unlawful detention of the person in the nature and within the legal signification of a false imprisonment (12438, *P. C. Galle*, 31 *Dec.* 1851; *P. C. Ca.* 37), even

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* Yet any person injured in a riot may charge a person who assaulted him during the disturbance with an assault in the Police Court. 71036, *P. C. Colombo*, 15 *Oct.* 1863: *Coll.*

though the imprisonment be by a police officer (20876, *P. C. Galle*, 13 *Feb.* 1856; *P. C. Ca.* 85); and also assaults arising from disputes regarding land, whether of more value than £10, or not (6666, *P. C. Chavagacherry*, 24 *Feb.* 1852; *P. C. Ca.* 40: 2831, *P. C. Calpentyn*, 31 *Oct.* 1854; *P. C. Ca.* 71); and also riotous conduct tending to a breach of the peace (3282, *P. C. Badulla*, 30 *Jan.* 1856; *P. C. Ca.* 84; to be within the jurisdiction of the Police Court.

A Police Court cannot try a title to land; and whenever a question of title is *bonâ fide* raised before a police magistrate, his jurisdiction ceases, unless there be—as, for example, in the Timber Ordinance—a statutable power given to him of trying title (49586, *P. C. Colombo*, 7 *June*, 1859; *P. C. Ca.* 127: 21934, *P. C. Negombo*, 2 *July*, 1858; *P. C. Ca.* 117), though it is laid down in one case that, if a defendant sets up his title to land as a defence—as, for example, to a charge for trespass and malicious injury—the Police Court may enquire whether there is such a *colour of title* in the defendant as to deprive the act charged, of criminality (14139, *P. C. Galle*, 31 *Aug.* 1852; *P. C. Ca.* 58); and this, probably, on the principle that no party trespassing can be found guilty, when acting under a fair and reasonable supposition that he had a right to do the act charged as a trespass. (*Ord.* 6 of 1846, § 6: 47691, *P. C. Colombo*, 17 *Sept.* 1858; *P. C. Ca.* 119).

Police magistrates often exceed their jurisdiction,

when by a little caution that excess might be avoided; thus they should be careful not to be led into trying titles to land, under the cover of a plaint for malicious trespass, but should always consider whether the defendant acted under a fair and reasonable supposition that he had the right to act as he did, and was, therefore, civilly liable only. Again, the magistrate should not suppose that he can promote the *ends of justice*, except according to law; and thus, if he finds a party not guilty, he should not order something not legal, with a view to the ends of justice; as, for example, binding over both parties to keep the peace when no one has been found to be in fault. Also, he should be cautious not improperly to apply that which he has a right to use, lest he in fact do something really illegal; for example, if the magistrate fines and imprisons a party found guilty, he has no right to order the party to find bail; because, if he cannot find bail, his imprisonment would appear to have no limitation. (See 21934, *P. C. Negombo*, 2 *July*, 1858: 2378, *P. C. Kaigalle*, 20 *Dec.* 1848: 3499, *P. C. Kaigalle*, 20 *Dec.* 1848; *P. C. Ca.* pp. 22 and 117.)

Jurisdiction must appear on the face of plaint.

The jurisdiction of a Police Court must appear *on the face* of the plaint; and if the jurisdiction is doubtful, no intendment can be made in its favour. (13737, *P. C. Matelle*, 4 *July*, 1859; *P. C. Ca.* 128.)

Amount of punishment.

Every Police Court can punish (where no other pun-

ishment is by law provided in respect of any offence) either by imprisonment, with or without hard labour, for any period not exceeding three months, and by fine or forfeiture not exceeding five pounds; or by imprisonment as last aforesaid, together with corporal punishment not exceeding twenty lashes; or by any one of the above-mentioned punishments; but the court, unless express authority be hereafter given in that behalf, cannot impose in respect of the same offence, the three punishments of imprisonment, fine, and lashes. (13 of 1861, § 9.)

This clause does not authorize the punishment of corporal punishment and fine together. (7025, *Point Pedro*, 14 *March*, 1853; *P. C. Ca.* 65.)

With regard to corporal punishment, assaults on unprotected females at night, within their own house, is punishable corporally. (17740, *P. C. Negombo*, 28 *May*, 1856; *P. C. Ca.* 91.) But a common assault on a soldier does not call for corporal punishment, because he was also in uniform. (126222, *P. C. Jaffna*, 5 *March*, 1856; *P. C. Ca.* 86.)

Corporal punishment is generally administered with a whip, and flogging with a rattan is an illegal punishment. (4654, *P. C. Ratnapoora*, 8 *March*, 1855; *P. C. Ca.* 74.)

Where one of two punishments is, and

Whenever any offence is by law punishable by one or both of two modes of punishment, whereof one is,

and the other not, within the jurisdiction of the Police Court (whether the infliction of both or either of such punishments be left to the discretion of the court, or the one is made contingent on the non-fulfilment of the other), the Police Court may take cognizance of, determine and dispose of, such offence, and award the full amount of the punishment appointed. (13 of 1861, § 10.)

the other is not, within the jurisdiction of a Police Court.

Every Police Court having cognizance of any offence for the first time, has like cognizance of such offence upon any subsequent commission thereof by the same offender, and power to impose any punishment to which such offender shall be liable, whether the same would otherwise be beyond the jurisdiction of such court or not. (*P. C. Ord.* 1861, § 11.)

Police Court having cognizance of any offence on its first commission, shall have cognizance thereof on any subsequent commission.

A Police Court legally exercising jurisdiction in respect of the punishment for any offence, also has jurisdiction to remove or abate the act, matter, or thing, complained of. (*P. C. Ord.* 1861, § 12.)

Police Court may remove or abate the matter complained of.

In the case of the breach of any enactment for the protection of the revenue, or making penal any act not in itself an offence, and not cognizable by a Police Court by reason of the punishment declared in respect thereof, if a certificate is presented to any Police Court, signed by the Queen's Advocate, or by some competent Deputy Queen's Advocate, or (in case of offences against the revenue) by the Government Agent of the province,

Police Court may in certain cases take cognizance of matters not within its jurisdiction.

or any of his assistants, to the effect that such officer is content that such offence or act shall be prosecuted before such court, the court (having in other respects jurisdiction to try the same) may take cognizance of such offence, and award as much punishment as a Police Court can award. (*P. C. Ord.* 1861, § 13.)

Commencement of proceedings—who may be prosecutor.

Any person may complain to a Police Court of any offence cognizable by such a court (*R. and O.* of *C. R.* R. 1); that is, a criminal complaint can be preferred by any one, and not by the party injured only (9949, *P. C. Gampola*, 14 *Feby.* 1860; *P. C. Ca.* 138), though the Queen's Advocate alone can sue as complainant for forfeitures and penalties under the Customs Ordinance, 1852, even to the exclusion of the comptroller of the customs. (43262, *P. C. Galle*, 26 *Aug.* 1862; *P. C. Ca.* 173.)

Complaint, how preferred.

The person making complaint must either state the same orally to the chief clerk, who must enter it by way of plaint in a separate sheet of paper; or he must deliver to the clerk a plaint written on a separate sheet of paper, and signed by himself. (*R. and O.* of *P. C.* R. 2.)

Form and contents of plaint.

Every plaint must bear date of the day and year in which it is entered, and state the names and residences of the parties complainant and defendant, the offence complained of, and the time and place of its commission, in such language or by such description as will show

that it is punishable by law, and is within the jurisdiction of the court. And every plaint must be, as near as material, according to the precedents in the Schedule of Forms for P. C. Fm. (B). *App.* No complaint shall be held insufficient by reason of a departure from the letter of the Forms, or of any defect or imperfection which does not prejudice the substantial rights of the defendant upon the merits (*R. and O.* of *C. R.* R. 3); and, in reference to the last sentence, it may be observed that where a date is not material, and need not be proved, its omission is not so material as to be allowed to defeat substantial justice. (2238, *P. C. Galle*, 12 *May*, 1846; *P. C. Ca.* 3.)

Plaints founded on Ordinances.

When a charge is not criminal at common law, but under an ordinance only, the plaint will be substantially bad, nnless the ordinance is cited in it. (28826, *Kandy*, 26 *Jan.* 1856; *P. C. Ca.* 83.) And it is not sufficient merely to cite the ordinance infringed, but a distinct charge must be set out. (531, *P. C. Matelle*, 4 *April*, 1848; *P. C. Ca.* 19.) And the charge should follow *all the essential and material* words of the ordinance. (9328, *P. C. Kandy*, 7 *June*, 1850: 8427, *P. C. Matura*, 30 *June*, 1852: 14943, *P. C. Galle*, 23 *Sept.* 1852: 4374, *P. C. Ratnapoora*, 19 *Dec.* 1854; *P. C. Ca.* pp. 29, 57, 59, 73.)

Irregular plaints.

If a plaint discloses no legal offence, the police magistrate ought to dismiss the case. (1497, *P. C. Chavagacherry*, 2 *Dec.* 1862.) But a plaint will be upheld, if

there is no error or defect *substantially* prejudicing the rights of the accused, even though the plaint be very irregular in form, especially if in effect it gives the defendant notice of the offence that he is to answer, and he accordingly comes into court fully prepared. (136, *P. C. Matura*, 17 *Sept.* 1863.)

The record.

Every plaint must be numbered in the order in which it is entered or delivered in, and forms the commencement of the record and the proceedings; and such record must be open to the inspection of either party at all reasonable hours. (*R. and O. of P. C.* R. 4.)

If, on an appeal, a record is asserted to be erroneous, it cannot by the rules of evidence be controverted by affidavits or witnesses, but must be returned to the magistrate to correct it; and if the record be correct, he should return the record to the Supreme Court. (5430, *Matura*, 2 *Feb.* 1850; *P. C. Ca.* 27.) The proceedings are null and void unless entered in the record book. (14036, *P. C. Kornegalle*, 12 *March*, 1856; *P. C. Ca.* 87.) But the proceedings taken before any justice of the peace ought not to appear on the record book of the Police Court. (2831, *Calpentyn*, 31 *Oct.* 1854; *P. C. Ca.* 71.)

Summons.

Upon a plaint being entered or delivered, the chief clerk must forthwith, by a note on the record, appoint a day for the appearance of the defendant and for the hearing, and must intimate the same to the complainant,

his proctor or advocate, and must issue a summons under his hand for the appearance of the defendant on the appointed day. (*R. and O. of P. C.* R. 5.)

Any objection to a want of a summons must be taken in the court below, and cannot be taken for the first time in appeal. (12092, *P. C. Jaffna*, 9 *Feb.* 17740; *P. C. Negombo*, 22 *May*, 1856; *Lor. R.* pp. 24, 122.)

On the subject of the summons, the following questions have arisen:

1. Is a summons *ever* absolutely necessary?

2. Is a summons *always* necessary?

3. What proceedings in a Police Court case are fatal?

These questions have been thus answered.

If the proceedings before one of these minor tribunals have been so irregular as to deprive the defendant of any substantial safeguard or privilege which the law intended to give him, a conviction based on such proceedings ought to be set aside.

Trifling irregularities which do not prejudice any substantial rights are not fatal, especially if they were not objected to at the time.

The object is two-fold:

1. To ensure to the accused parties a fair trial according to law.

2. To prevent justice from being defeated by mere special pleading about unimportant technicalities.

The want of a summons may not be fatal, when it is

clear that the defendant has not only come before the court without a summons; but that he also has stood there with as full advantage for his defence as he could have enjoyed if a summons had been served upon him. (67670, *P. C. Colombo*, 7 *July*, 1863.)

The cases of trial before a Police Court, without summons, generally occur where persons have been arrested by police constables, and brought as early as possible before the sitting magistrate. The prisoner of course knows what he is arrested for, and, if he has witnesses to call, always obtains a remand. But it is different where a person is taken up on a J. P. warrant, and being bailed, and appearing on the day appointed before the J. P. and is then and there, without summons, transferred to the Police Court. This course, though common, is wholly illegal; for the proceeding has about it such irregularity as to prejudice the accused in his substantial rights; for a man ready to submit to be committed, reserving his defence, would not necessarily be ready with a defence before a Police Court. (18266, *P. C. Kaigalle*, 8 *Dec.* 1862; *P. C. Ca.* 190.)

Form and contents of summons.

And every summons must contain the number of the plaint, the names and residences of the complainant and defendant; a statement of the offence, and the time and place of its commission. And every summons must be, as near as material, in the form C, in the Schedule of Forms. (*R. and O. of P. C.* R. 6. P. C. Forms. *App.*) If the summons does not follow this rule, and state the

points therein named, the case will be set aside, even after conviction. (1086, *P. C. Caltura*, 1 *Nov.* 1856; *P. C. Ca.* 99: *Lor. R.* 192.)

Defendant may in certain cases be apprehended.

On complaint made to any court, the complainant is entitled to a summons against the defendant; but if the magistrate, at any time previous to the hearing day, is satisfied, by the oath or affidavit of any person, that there is probable cause for believing that the defendant is about to leave the jurisdiction of the court, or is concealing himself to evade the process of the court, the magistrate may grant a warrant for the apprehension of the defendant. If any party making such oath or affidavit wilfully states a falsehood to obtain the warrant, he is guilty of contempt.

Form of warrant.

Any such warrant must be, as near as material, in the form D, in the Schedule of Forms. (P. C. Forms. *App. R. and O. of P. C.* RR. 14, 7.) The warrant must fully disclose the offence charged, or else the judgment following will be set aside. (38823, *P. C. Galle*, 7 *May*, 1860; *P. C. Ca.* 141.)

Defendant when brought up on warrant, how disposed of.

The defendant, being brought up on warrant, must either be tried at once, or on an adjournment be committed, unless he enter into a recognizance, with or without sureties at the discretion of the magistrate, conditioned for his appearance on the day appointed, or to be then appointed, for the hearing of the complaint. And every such commitment and recognizance must be,

as near as material, in the forms E and F respectively, in the Schedule of Forms. (*P. C. Forms. App.*)

Proceedings upon apprehension.

Every person apprehended within the jurisdiction of any Police Court, for an offence cognizable by the court, must be brought before such court, if then sitting, immediately, or if otherwise on the first sitting thereof after his apprehension: and the magistrate of such court must proceed forthwith to try him, or, on a postponement being necessary, may bind him over in recognizances to appear before such court on some early day to take his trial; or, on his failing to enter into such recognizance, may commit him until such early day. If any such person be apprehended as aforesaid, and lodged in any place of detention on the night preceding any Sunday or public holiday, the magistrate may cause such person to be brought before him at an early hour next morning, and, after summary investigation, commit him to prison till the next court day, or hold him to bail, or discharge him. (*R. and O. of P. C.* RR 8, 15.)

Process—service of process, through whom effected.

All summonses, warrants, subpœnas, or other process issuing from any Police Court, may be issued into, and be served and executed in any district of the island, by or under the orders of such person as shall be named therein.

Mode of service.

Every summons or warrant shall be accompanied with a copy, or a translation thereof, in the language of the party to be served, which copy or translation must

be served personally on such party; and every subpœna or other process must be accompanied with a like copy or translation, which shall be delivered either personally to the party to be served, or to one of his household apparently sixteen years old, at his dwelling-house or place of business; and such delivery shall be deemed good service.

Misnomer or misdescription not to vitiate the process.

No misnomer or misdescription of any person or place in any summons, warrant, subpœna, or other process, as aforesaid, and no defect or imperfection therein, vitiates it, provided it is not calculated to mislead the party on whom the same has been served or executed.

Service, how proved.

The service or execution of any such summons, warrant, subpœna, or other process as aforesaid, may be proved by affidavit, purporting to be sworn before any one entitled to administer oaths; and the return thereto must be, as near as material, in the form and according to the precedents in the Schedule of Forms (G). (*R. and O. of P. C.* RR. 9, 10, 11, 12, *P. C. Forms. App.*)

On non-appearance of complainant, the complaint may be dismissed.

If, upon the return day, or the hearing day, the complainant does not appear, and his absence shall not be sufficiently accounted for, the complaint must be dismissed. But the absence of the *defendant* is no ground for dismissing a case. (8310, *P. C. Galle*, 3 *July*, 1849, *P. C. Ca.* 24.)

Adjournments.

The magistrate may adjourn the hearing to another day, and cause a notice to be issued to the complainant, requiring him to attend before the court on the day to which the hearing has been ad-

journed; which notice must be, as near as material, in the form H, in the Schedule of Forms. (*R. and O. of P. C.* R. 13, *P. C. Forms. App.*) The magistrates should show firmness in refusing applications for adjournment, except in very special instances, and when the interests of justice evidently require more time to be allowed. (19860, *P. C. Chavagacherry*, 1 *Oct.* 1861; *P. C. Ca.* 157.)

Magistrate may, on adjournment, release defendant from custody.

If at the time of adjournment the defendant is in custody, the magistrate may discharge him, upon his entering into a recognizance, with or without sureties, conditioned for his appearance on the day to which the hearing has been so adjourned; and every such recognizance shall be, as near as material, in the form E, in the Schedule of Forms. (*R. and O. of P. C.* R. 14, *P. C. Forms. App.*)

On non-appearance of defendant, warrant.

If, upon the return day, or the hearing day, the defendant does not appear, and his absence is not accounted for, the magistrate, upon proof of service, must, on the motion of the complainant, grant a warrant for the apprehension of the defendant; and such warrant must be, as near as material, in the form I, in the Schedule of Forms, *P. C. Forms. App.* (*R. and O. of P. C.* R. 15.)

Defendant, when brought up, how disposed of.

The defendant being brought up on a warrant, must either be tried at once, or committed, unless he enter into a recognizance, with or without sureties, at the discretion of the magistrate, conditioned for his appearance on the day of hearing. Every such commitment and recognizance must be, as near as material, in the forms

E and F, *P. C. Forms. App.* (*R. and O of P. C.* R. 16.)

Subpœna to witnesses.

Either party may at all times summon any witnesses he may deem necessary for his case; and the chief clerk must, whenever required, issue a subpœna under his hand to each witness, requesting his attendance in court on the day of hearing. Such party must previously either state the names and residences of his witnesses to the clerk (who must enter them on the record), or deliver to him a list, or additional list, of their names and residences. And if required by the magistrate, must make affidavit that any person whom he desires to subpœna is a material and necessary witness. Every subpœna must be, as near as material, in the form K, *P. C. Forms. App.* (*R. and O. of P. C.* R. 17.) If time is not allowed to the defendant to obtain the attendance of his witnesses, the conviction will be reversed. (2787, *P. C. Mulletivoe*, 18 *Sept.* 1856; *Lor.* R. 187.)

List of witnesses.

Adjournment of hearing, on cause shown.

When the magistrate is satisfied, by affidavit or otherwise, that either party is not ready for a hearing, by the absence of any material witness (such witness not being kept away by such party), or for other sufficient cause, the magistrate may allow the hearing to stand over once, or oftener, upon such terms as may be necessary, and he may examine any witnesses present, and adjourn the case until the evidence of the absent witness is obtained. The mere consent of the parties or their proctors or advocates is not sufficient ground for

adjournment, unless sufficient cause is shown to the magistrate. (*R. and O. of P. C.* R. 18; and see 18550, *P. C. Caltura,* 13 *June,* 1857; *P. C. Ca.* 111; *Coll.*) The magistrate may postpone a case at his discretion, if the prisoner alleges that he has engaged counsel, who is absent, to give time for counsel to appear. (2944, *P. C. Pangwelle,* 6 *June,* 1864.)

Defendant in custody, or under recognizance, how disposed of, on adjournment.

If, at the adjournment, the defendant is in custody, the magistrate may, by endorsement on the commitment, remand him to prison; or, in case he has given recognizance for his appearance, may order the recognizance to be renewed, or, in default of renewal, may commit him until such adjourned day. (*R. and O. of P. C.* R. 19.)

Proceedings on the day of hearing—plea, how taken down.

If on the day in the summons, or on any day of hearing, the defendant is present in court, and both parties are ready to proceed to trial, the magistrate must cause the plaint to be read to the defendant,* and must call upon him to plead thereto, and take down his plea in writing on the record. If the defendant refuse to plead, or be silent, or state matters not amounting to a plea of *guilty* or *not guilty*, the magistrate must record a plea of *not guilty*. (*R. and O.* of *P. C.* R. 20.)

Plea of guilty.

The plea of *guilty*, to be available for conviction, must, if expressed in the form of an admission, fully

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* Most properly from the record, as ruled in *R. and O. for P. C.* 17 *June*, 1844, and 1180, *P. C. Negombo; P. C. Ca.* 2.)

confess the charge: an admission that would be strong evidence under a plea of *not guilty*, is not necessarily a plea of guilty. So, also, an admission of the act without any admission of the *mens rei*, is not a plea of guilty: as if a defendant were to admit the asportation in a case of theft, but in such a form as not to admit the *animus furandi*—or were to confess a criminal act, but pleaded, at the same time, facts in exculpation—such admissions would not be pleas of guilty. (3898, *P. C. Jaffna*, 5 *Oct.* 1852: 10922, *P. C. Colombo*, 9 *May*, 1848: 21988, *P. C. Jaffna*, 12 *May*, 1858; *P. C. Ca.* pp. 5920, 116.)

Plea of not guilty.

The plea of *not guilty* denies the whole charge; and if the court views a plea which is or which amounts to *guilty*, as a plea of *not guilty*, the proceedings will be set aside for irregularity by the Supreme Court. (7431, *P. C. Galle*, 17 *July*, 1849: 20979, *P. C. Galle*, 19 *March*, 1856; *P. C. Ca.* pp. 25, 88.)

If a defendant pleads to the name by which he is called upon to plead, he cannot, on appeal, object to any error therein. (3069, *P. C. Newera Ellia*, 19 *Dec.* 1855; *P. C. Ca.* 81.)

Hearing and judgment.

The magistrate, upon recording the plea, must proceed to hear the complainant and his witnesses; and then any statement which the defendant or his proctor or advocate may make with reference to the evidence, and also any witnesses called for the defence. (*R. and O. of P. C.* R. 21.)

Though several not incompatible counts may be con-

tained in the same plaint, and be tried at the same time; yet distinct charges preferred by different complainants against the accused cannot be contained in the same plaint and be the subject of only one trial. (8092-3, *P. C. Galle*, 3 *July*, 1849; *P. C. Ca.* 24.) And, indeed, distinct and disconnected charges should be properly preferred in different plaints, and tried in separate trials. A defendant cannot be examined in a criminal case (*P. C. Ca.* pp. 76, 145); and if an improper number of persons are made defendants, in order to exclude them as witnesses, the magistrate should exclude those so made, and allow them to be called as witnesses. (*P. C. Ca.* 126; also see "Evidence.")

Parties may employ counsel.

The defendant may defend himself; and the complainant may conduct the prosecution personally, or by a proctor, or by an advocate; but nothing can dispense with the presence of the complainant or* defendant at the hearing. (*Ord.* 13 of 1861, § 16.)

Judgment.

After the defence is fully gone into, the magistrate must thereupon pronounce his judgment. The rules do not provide for any reply by the complainant where the defendant calls witnesses. (*R. and O. of P. C.* R. 21.) If the proceedings are so far irregular as to contain no formal decree, and the Supreme Court can gather the intention of the Police Magistrate, the Supreme Court will enter a decree in accordance with that intention.

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* Query, "and."

(47019, *P. C. Galle*, 25 *Sept.* 1863.) If a man is charged and tried upon one offence, it is erroneous to find him guilty on another. (2691, *P. C. Pangwelle*, 27 *Oct.* 1863; *Coll.*)

On acquittal, defendant shall be discharged.

If the defendant be found not guilty of the complaint, he shall, unless there be any other cause of detention, be at once discharged. (*R. and O. of P. C.* R. 22.)

Sentence, upon conviction.

If the defendant be found guilty, the magistrate must pronounce sentence on him as the circumstances of the case, in his judgment, require; but must not exceed the legal amount of punishment. (*R. and O. of P. C.* R. 23.)

Conviction.

The judgment, together with the sentence, forms the conviction; and if there is any fatal variance between that and the charge, the proceedings will be quashed. (21390, *P. C. Negombo*, 7 *June*, 1858; *P. C. Ca.* 116.) Nor can the charge be altered after conviction, either to amend any fatal defect in the charge, or to make it agree with the conviction; any such alteration would make the conviction irregular. (8281, *P. C. Matelle*, 8 *Jan.* 1856; *P. C. Ca.* 82.) Nor can the magistrate find a person guilty of two distinct offences contained in one charge, and impose upon him the double punishment. (555, *P. C. Jaffna*, 17 *June*, 1851; *P. C. Ca.* 35.) Nor can a party, charged under one clause of an ordinance, be found guilty and sentenced under another. (527, *P. C. Badulla*, 21 *March*, 1848; *P. C. Ca.* 19.)

Conviction.

Convictions should be full, clear, and complete; thus a fine of "two £," instead of two pounds; and also of "ten shs. stgs." have been held to be unintelligible, informal, and fatal to a conviction. (7008, *P. C. Point Pedro*, 21 *Dec.* 1852; *P. C. Ca.* 63: 4185, *Point Pedro*, 12 *Nov.* 1850; *P. C. Ca.* 31.)

The sentence of a criminal court, if illegal in part, is illegal *in toto*. (13240, *P. C. Batticaloa*, 8 *Dec.* 1856; *P. C. Ca.* 100.)

Acquittal, and reinstating case.

In one case it was held that a discharge after a plea of not guilty, and no evidence *received*, was equivalent to an acquittal; but, in a similar case, it was held that, if a prisoner is discharged, even after a plea of not guilty, no evidence being heard, the complainant can move to reinstate his case. (17050, *P. C. Matura*, 8 *April*, 1857: 29045, *P. C. Kandy*, 12 *March*, 1856; *P. C. Ca.* pp. 106, 87.) But both these cases were, in reality, mis-trials, as the P. M. was in fault in not taking the evidence tendered, which he is bound to do. If a party pleads not guilty, and the complainant tenders no evidence, and the defendant is discharged, he is to all intents acquitted, and can plead in a second case on the same complaint *autrefois acquit*.

Amendments.

The magistrate may amend any error in recording the complaint at any time before judgment: if such amendment is in matter of substance, he must, if required by the defendant, postpone the hearing, so as to give him reasonable time for his defence on such new

matter. (*R. and O. of P. C.* R. 24; and see *ante*, under "Conviction.") But he cannot alter the charge after conviction (8281, *P. C. Matelle; Lor. R.* p. 2); nor after evidence (*P. C. Ca.* 147).

Record of the proceedings.

A full and complete record must be kept of the evidence and other proceedings; and judgments and sentences must be pronounced in open court, and reduced into writing on the record, and signed by the magistrate. (*R. and O. of P. C.* R. 25.) And the proceedings are not valid unless entered in the record-book. (14036, *P. C. Kornegalle*, 12 *March*, 1856; *Lor. R.* 94.)

The calendar.

The chief clerk must also keep a book, to be called the "Calendar," and therein enter each complaint in the order of its date, the names and residences of the parties, the offence, the dates of adjournments, and the judgment and sentence, with their date; also any appeal, its result, and the date of the judgment in appeal. The calendar must be, as near as material, in form L, *P. C. Forms. App.*

The trial roll.

Also keep a book, called the "Trial Roll," wherein he must enter the number of all cases set down for hearing, in the order in which they shall have been set down: and cases so set down shall be taken up for hearing in the order in which they are entered. The magistrate, upon cause shown, may advance any cause, and try it before its turn. (*R. and O. of P. C.* RR. 26, 27.)

Appeals.

On the subject of appeals from Police Courts, the reader is referred to page 208 *et seq.* The following points may be added.

One judge may exercise appellate powers.

The powers of the Supreme Court in respect of appeals from Police Courts may be exercised by any one Judge of the Supreme Court sitting at Colombo, without assessors. That judge may reserve any question upon any appeal for the decision of the collective court.

Judgments in appeal, how enforced.

The Police Court must conform to and execute all such judgments or orders of the Supreme Court, pronounced on any appeal, as an original judgment or sentence might have been executed. (*P. Crt. Ord.* 13 of 1861, §§ 26, 27.)

Any appellant who has paid a fine, subsequently set aside or modified in appeal, is entitled to have back from the magistrate the amount remitted in appeal. (*R. and O. of P. C.* R. 31.)

When a Police Court imposes a fine above its jurisdiction, the S. C. does not *lower* the fine, but *sets it aside.* (4402, *P. C. Mulletivoe.*)

Where the decision of the Police Court amounts to a decision on the merits that there is no guilty intent, the Supreme Court will not interfere; nor can it interfere on the ground of credit not being due to the witnesses in the court below. (45997, *P. C. Galle,* 28 *Aug.* 1863: 9695, *P. C. Jaffna,* 21 *Aug.* 1855.) The Supreme Court has, indeed, only to consider whether the

evidence is legally sufficient to go to a jury. (29579, *P. C. Colombo*, 21 *Dec.* 1853.)

Execution—Fine, how recovered.

All fines and recognizance forfeited may be recovered in manner provided for by the Ordinance No. 6 of 1855, "To amend the Ordinance No. 11 of 1844."*

Sentence of imprisonment, how carried out.

When any party is sentenced to imprisonment, a writ of commitment must be issued to the fiscal, under the hand of the magistrate, directing the fiscal to receive and detain such party in his custody in terms of the sentence. This writ must be, as near as material, in the form M, P. C. Forms. *App.*

Sentence of corporal punishment, how carried out.

Sentence of corporal punishment is executed under an order granted under the hand of the magistrate. This order must be, as near as material, in the form M, P. C. Forms. *App.* (*R. and O. of P. C.* RR. 32, 33, 34.)

The Queen's Advocate may take up prosecution, or stop proceedings.

The Queen's Advocate, or any Deputy Queen's Advocate empowered to act within the district, may appear in the Police Court at any time, and, either by himself or by some person authorized by him in that behalf in writing under his hand, commence therein and carry on the prosecution of any offence cognizable by such court; or to take up, at any stage thereof, the prosecution of any offence already commenced by any private party, and assume the entire management of such prosecution; or may apply, by motion, to the magistrate to stop all

* See "Criminal Jurisprudence."

further proceedings, that a prosecution for the offence may be instituted at the instance of the Queen's Advocate, in the same or before some Superior Court, or until the private party who commenced the prosecution shall produce to the magistrate a certificate, signed by the Queen's Advocate, or such Deputy Queen's Advocate, that he is at liberty to recommence such prosecution: and such magistrate must, in every such case, make an order in compliance with such motion. And all proceedings so stopped are null. (*P. Crt. Ord.* 13 of 1861, § 17.)

Where the charge appears to be beyond his jurisdiction, the magistrate shall refer it to a Justice of the Peace.

If, in any trial, it appears that the offence is beyond the jurisdiction of the court, or that an offence beyond such jurisdiction was committed in the course of the same transaction and by the same person (the injured party being also the same), the magistrate must stop the trial, and either himself take proceedings as a Justice of the Peace, or order that the party charged must, together with all the proceedings, be forthwith taken before some competent Justice of the Peace. (*Ibid.* § 18.)

Magistrate may, in certain cases, bind over parties to keep the peace.

The magistrate, where he is satisfied that justice would be met by both or either of the parties being bound over to keep the peace, may require such parties or party to enter into a recognizance to Her Majesty, Her Heirs and Successors, in any sum not exceeding thirty pounds, and with or without sureties, to keep the peace towards the Queen and all her subjects, for a time not exceeding three months. And on default of any party

entering into such recognizance, the magistrate may sentence him to be imprisoned for a period not exceeding one month. (*Ibid.* § 19.)

Persons committing perjury, how to be dealt with.

If it appear to the magistrate that any person has, in any proceeding connected with the court, committed perjury, he must forthwith give information thereof to the Queen's Advocate, or to some Deputy Queen's Advocate empowered to act within the district. And until the decision of the Queen's Advocate, or such Deputy Queen's advocate, is made known to the magistrate, every such person must give bail, either on his own recognizance or on that of another person (as the magistrate shall consider necessary), for his appearance at such time and place as the Queen's Advocate, or Deputy Queen's Advocate, may direct, or, in default of bail, must be committed. (*Ibid.* § 20.)

Penalty on false or frivolous prosecutions.

When it appears to the magistrate that any prosecution has been instituted on false, frivolous, or vexatious grounds, he may adjudge the party who instituted it to a fine not exceeding one pound, as well as the reasonable expenses of the defendant, and of the witnesses who attended at the prosecution. And if a party adjudged to pay such expenses fail to pay at the time and place by the magistrate directed, the magistrate may enforce payment as in case of fine. (*Ibid.* § 21.)

This power should only be exercised in clear cases. (596, *P. C. Pangwelle*, 15 *April*, 1861; *P. C. Ca.* 152.) It should appear not only that the charge when investi-

gated was erroneous, but that it was false to the prosecutor's knowledge at the time that he instituted proceedings. (41179, *P. C. Galle*, 29 *Oct.* 1861, *P. C. Ca.* p. 159.) Nor is the magistrate in a position to find a charge to be false and frivolous without first hearing the complainants' witnesses. (13959, *P. C. Chavagacherry*, 24 *Feb.* 1857; *P. C. Ca.* 105.) The charge must be in its own nature frivolous, without foundation, instituted on vexatious grounds, or with a view to vex and harass the defendants. (3022, *P. C. Matura*, 15 *March*, 1848; *P. C. Ca.* 18.) And though it is not necessary that the evidence on which the complainant is fined should be sufficient to support a charge for perjury, yet there must be something more than a mere suspicion of falsehood. (28925, *P. C. Galle*, 24 *April*, 1860.) There should be a distinct adjudication, and an express finding on the record, in the terms of the Ordinance, that the "prosecution has been instituted on false, frivolous, or vexatious grounds." (2767, *P. C. Pantura*, 5 *Dec.* 1861; *P. C. Ca.* 164.) On behalf of the complainant, it may be laid down that the Supreme Court will remit a fine for a frivolous charge when (even if the magistrate disbelieves the evidence) the prosecutor has fair and reasonable grounds for making the charge. (29419, *P. C. Jaffna*, 27 *Aug.* 1860: 18166, *P. C. Kaigalle*, 15 *Jan.* 1863.) And it should appear in the proceedings that the complainant has been called upon to show cause, or for a defence,

why he should not be fined; allowing him to call evidence, if he desires it; and then the magistrate should adjudicate upon the question in a separate judgment, as if the fine were the result of a separate and distinct complaint. (4705, *P. C. Harrispattoo*, 3 *March*, 1863: 39128, *P. C. Matura*, 7 *March*, 1864: 57837, *P. C. Kandy*, 23 *Feb.* 1864.) If the above is not fully done, the case is sometimes sent back to be reheard, and for fresh and regular adjudication in that respect. (796, *P. C. Calpentyn*, 4 *May*, 1864.) In the following later cases, the judgment of fine was set aside. (6511, *P. C. Pantura*, 28 *March*, 1865: 4677, *P. C. Pangwelle*, 11 *April*, 1865: 7211 and 7212, *P. C. Jaffna*, 24 *Jan.* 1865; *Coll.*)

If there are several complainants in the same case guilty of the offence, they may be each severally fined to the extent of one pound; and they are jointly and severally liable to pay the witnesses' expenses. (11323, *P. C. Chavagacherry*, 6 *Nov.* 1855; *P. C. Ca.* 80.) There being no appeal as to facts, the S. C. does not look at the evidence in support being insufficient for a conviction, but only to the *face of the proceedings*, to see if the charge is false, frivolous, or vexatious. (43398, *P. C. Galle*, 17 *Sept.* 1863.)

The above clause does not empower the Police Court to punish a person making a false and frivolous complaint before a Justice of the Peace. (6761, *P. C. Galle*, 3 *Oct.* 1848; *P. C. Ca.* 21.)

Penalty on disobedience or contempt.

The magistrate may cause to be apprehended, and punish by a fine not exceeding one pound, or by imprisonment not exceeding fourteen days, any person summoned or noticed to attend his court, and not attending in pursuance of such summons or notice, or any person guilty of contempt* *before* such court. Every person charged with contempt must give bail, either on his own recognizance, or on that of another person (as the magistrate considers necessary), for his appearance on the following day; and, in default of bail, be committed until such following day. And if on the following day such person fails by his answers to satisfy the magistrate that no contempt was intended, the magistrate may pass sentence as in this clause limited. (*Ibid.* § 22.)

On abolition or alteration of Police Courts, suits and records how disposed of.

When any Police Court is abolished, or its limits altered, every cause, matter, or thing then depending shall or may be proceeded with in the court in which it ought to have been instituted. If instituted after the Proclamation, all proceedings thereafter had in such cause, matter, or thing respectively, must be conducted as if instituted in the last-mentioned court; and all records, muniments, and proceedings appertaining to such cause, matter or thing, shall, after any proclamation, be delivered over by the court in which the same is then depending, to the court in which it ought to

* See Chapter on "Contempt," ch. 11.

have been instituted after the time at which such proclamation issued. (*Ibid.* § 28.)

Certain things required to be done by District Courts may be done by Police Courts.

Where, before the Police Ordinance, certain things were by any ordinance required to be done before a District Court, or by or before a judge or other officer of a District Court, in relation to any cause, matter or thing, which by the Police Ordinance is made cognizable by Police Courts, every such thing must be done, as near as may be, compatibly with such ordinance and the constitution of Police Courts, before such Police Courts, or by or before the magistrate or corresponding officer of such courts. (*Ibid.* § 29.)

Supreme Court may inspect records, grant mandamus, &c.

The Supreme Court, or any judge thereof, may inspect and examine the records of any Police court, to issue writs of mandamus, procedendo, and prohibition against any magistrate, or other ministerial officer of any Police Court, and may order the transfer of any cause depending in a Police Court to some other Police Court, or to some District Court, if there is any sufficient reason to conclude that in that particular cause justice would not be done in that Police Court. The court to which any such cause is so transferred must and may take cognizance thereof, as if such court originally had jurisdiction. (*Ord.* No. 13 of 1861, § 30.)

Commencement of Ordinance.

The Police Ordinance took effect from and after the 1st of January, 1862.

Commencement of prosecution, what.

The proceedings before a magistrate are the commencement of a prosecution (9973, *P. C. Galle*, 25 *May*,

1850), unless the prosecution commenced before a Justice of the Peace, then the information and the issue of a warrant of arrest, or at least the apprehension of the prisoner, are the commencement of a prosecution. (*R. v. Brooks*, 1 *Den. C. C.* 217, and 2, *C. and K.*—*Queen v. Mennedoome Walegey Don Louis*, 29 June, 1864.)

Oaths taken by Police Magistrates on assuming office.

Form of Oath of Allegiance.

I do sincerely promise and swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria.

So help me God.

Form of Oath of Office.

I do sincerely promise and swear that I will faithfully and diligently execute, to the utmost of my abilities, the several duties of Police Magistrate for

So help me God.

(*No.* 13 *of* 1861, *Schedule.*)

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