REPORTS

OF

CASES

HEARD AND DETERMINED

SUPREME COURT OF CEYLON

SITTING IN APPEAL

IN THE YEAR

1877.

V. 5.

BY P. RAMA-NATHAN, Esq.,

ADVOCATE.

COLOMBO.

PRINTED AT THE COLOMBO PRINTING OFFICE, FORT.

1878.

PREFACE.

I cannot issue this volume without tendering my acknowledgments to the Government of Ceylon for the support they have given me in the publication of these reports, by taking fifty copies of them for distribution amongst the members of the public service.

With respect to the present year, 1878, the honorable the Judges of the Supreme Court have arranged with the government to print the law reports at the Government Printing Office, and to circulate them with the *Gazette*, mainly for the guidance of judicial officers. These "*Gazette Reports*," as they will be called, will comprise only a certain class of cases, selected by the Judges themselves, relating chiefly to matters of practice, and to the more important of the local Ordinances. I have my own share of labour assigned to me in the publication of these authorised reports. Above and beyond it, I may feel it necessary to report, in my own Reports, cases, which, though not essential to the guidance of judicial officers, may yet be useful to the profession, not merely from the subject matter of the decision, but also from the value of arguments of counsel.

Colombo, June 1878. P. RÁMA-NÁTHAN.

JUDGES DURING THE PERIOD EMBRACED IN THIS VOLUME.

CHIEF JUSTICES.

The Honorable Sir George Anderson, Kt. *(Acting.)*

The Honorable Mr. Stewart *(Acting.)*

The Honorable Sir William Hackett, Kt.

The Honorable Mr. Clarence, *(Acting.)*

The Honorable Sir John Budd Phear, Kt.

PUISNÉ JUSTICES.

The Honorable Mr. Stewart.

The Honorable Mr. Clarence.

The Honorable Mr. Dias. *(Acting.)*

The Honorable Mr. Lawrie. *(Acting.)*

ERRATA ET ADDENDA.

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1. Line 5 from top, for *22 of 1837* read *22 of 1873.*
2. Line 2 in P. C. Matara, L. X., for *tresspass* read *trespass.*
2. Line 3 in P. C. Matara, L. X., for *bordered in* read *bordered on.*
8. Line 5 for *upwards* read *forwards.*
8. Line 7 in marginal note, for *nonsent* read *non-suit.*
16. In C. R. Colombo, 110968, add "*VanLangenberg for respondent.*"
70. Add just above "C. R. Batticaloa 8275," *March 22, Present : Stewart, J.*
70. Add just above "P. C. Ratnapura 1307", *March, 27, Present : Stewart, J.*
73. In C. R. Galle 52902, line 4, for "28 days" read *21.*
74. Add just above "P. C. Chavakacheri 28482," *March 29. Present : Stewart, J.*
75. For "D. C. Negombo" read *P. C. Negombo 36186.*
85. The ending letters of lines 15, 14, 13 and 12 from bottom have run into each other. Read "*The notice of action of.....is substantially.....distinctly set forth the grounds of.....of action &c.*"
87. Line 4 in "D. C. Batticaloa 17825" for "the acts of the case" read *the facts &c.*
89. Line 5 in marginal note. For "frandulent preferance," read *fraudulent preference.*
99. Line 21 in marginal note. For "judicailly" read *judicially.*
122. To "Newara Eliya No. 5261," add *C. R.*
123. *Dele* the first 8 lines.
123. For "P. C. Galle 38788" read *D. C. Galle &c.*
154. Middle, after "the Supreme" add *Court.*
163. Line 9. For "but was threatened to be whipped", read *but threatened to whip him.*
164. Line 14 from bottom in marginal note. For "defendant" read *plaintiff.*
228 Line 4 from bottom, for "is he disallowed" read *he is disallowed.*
246. Line 14 from bottom add *not* before "intended"

255. In "P. C. Mannar 4723" for "14th clause" read *19th clause.*

256. In "P. C. Galle 98593", for "Plaint, 1st May" read *Plaint, 4th May.*

316. Line 7 in marginal note, for "mortgagor" read *mortgagee.*

325. Line 6 of note attached to D. C. Kandy 67167. For "so," read *as.*

370. Line 15 from top, for "the defendant," read *the plaintiff.*

410. Lines 10 and 7 from bottom for "instrutment" read *instrument,* and for "fac" read *fact.*

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THE APPEAL REPORTS

1877.

January, 4.

Present :—ANDERSON, C. J., and STEWART, J.

P. C. Colombo, 2591.

Retailing arrack after hours. Offence single, under c. 37 Ord. 7 of 1873.

The defendants were charged with having retailed arrack after hours, in breach of c. 37 of Ordinance No. 7 of 1873.

After hearing the case, the P. M. amended the plaint in view of the Supreme Court decision in *P. C. Colombo* 1683, by adding the words 'and of the 4 sec. of Ordinance 22 of 1837,' and sentenced the defendants to pay a fine of Rupees fifty each.

On appeal, ***Layard*** for appellants contended that according to the case cited by the Police Magistrate, and also *P. C. Colombo* 1922 (30 November 1876), the plaint as laid was defective. If it was to be amended the accused ought to have been allowed to plead over [*Stewart J.* The amendment might be made at any stage before judgment, in terms of c. 24 of Ordinance 18 of 1861]. That clause ought to be read with c. 20. Moreover, the offence was single, and the punishment also must be single.

Per STEWART J.—Amended by sentence being altered into one fine of Rupees 50 on both defendants. The offence committed by them in breach of c. 37 of Ordinance 7 of 1873 appears according to the evidence to have been in its nature single. Consequently only a single penalty should be imposed.

(The following were the cases cited.)

P. C. Colombo, 1683. 30th November 1876.

Set aside and proceedings quashed. Appellants are charged under the § 37 of Ordinance No. 7 of 1873 with keeping open their tavern after hours for the purpose of selling liquor. The offence punishable under the clause is keeping open the premises for the sale of *intoxicating* liquor, so that the charge as laid under the clause is defective. Moreover the evidence on which the Magistrate convicts the appellants proved merely that the appellants were selling arrack, which under the interpretation clause of the Ordinance is not an intoxicating liquor. It is not necessary to consider whether the conviction could have been upheld under the § 4 of the amending Ordinance 22 of 1873, because the charge is not laid under that clause.

P. C. Colombo 1922, 30th November 1876.

Set aside and proceedings quashed. This is a similar case to No. 1683, P. C. Colombo. The plaint charges defendants with keeping open the tavern after hours for the sale of arrack, which is not an intoxicating liquor under the interpretation clause of the Ordinance. For the same reasons as those stated in case No. 1683, the conviction is set aside and the proceedings quashed.

January 8.

Present :—ANDERSON C. J. and STEWART, J.

P. C. Matara, Lr. X.

Cattle trespass on land abutting on a river.

The complainant charged defendant with having allowed his bull to tresspass, in breach of cc. 2 and 3 of Ordinance No. 2 of 1835, and stated that his garden bordered in the river and had fence on the three remaining sides, and that the trespassing animal did not break the fence, but walked round one of the ends of the fence.

The P. M. upon this refused summons, holding that the garden should have been properly fenced.

On appeal, per STEWART, J. : set aside and case remanded. The examination of the complainant does not necessarily shew, beyond any doubt, that no offence was committed. He should be allowed the opportunity of proving his charge. It may become important to enquire what custom prevails in regard to the fencing of lands abutting on rivers.

P. C. Mallakam, 9581.

False information. Reasonable opportunity for shewing cause.

Per ANDERSON C. J. The complainant charged the defendants with drawing fermented toddy in contravention of Ordinance No. 10 of 1844. The Magistrate acquitted them and, expressing an opinion that the charge was a false one, he called on the complainant at once to shew cause why he should not be fined under clause 106 of Ordinance No. 11 of 1868 for instituting a false and frivolous case. The complainant denied that the case was a false one, and stated that if postponed, he could shew the trees from which the toddy was drawn. The Magistrate proceeded however at once to convict the complainant and sentenced him to the payment of ten Rupees.

These proceedings are irregular. The clause expressly requires that a party, charged with having instituted a false frivolous or vexatious case, should have a reasonable opportunity for shewing cause. Such reasonable opportunity does not appear to have been afforded the complainant in this case, and the judgment against him is consequently set aside.

P. C. Galle, 8534.

Grenier for appellant was not called upon.

Set aside and proceedings quashed, and per STEWART, J :—

A. P. M. has no power after dismissing a plaint, to order its resumption in the same case, or its re-institution in another.

This plaint in which 17 persons are charged with gaming in breach of the 4 sec. of Ordinance No. 4 of 1841, was instituted so long ago as May 7th 1874. Three of the defendants were tried and convicted on the 3rd August following, and subsequently the case came on for trial against the 13th defendant on the 23rd November 1874, the other defendants being reported to be in concealment.

On the last mentioned day we find an order [made by P. M. Murray] as follows : "complainant absent, case dismissed against the untried defendants."

Nothing seems to have been done from the date of this order for upwards of two years, until 27th November 1876, when the following order was made [by P. M. Neville] : "warrants to issue for all, but the 5th, 7th, 9th and 13th defendants (those above referred to). Complainant to issue prosecution. Case re-opened."

The case was hereupon resumed, five of the untried defendants brought up, tried and four of them convicted.

It appears to us that the Police Magistrate [Neville] had no authority to order the resumption of these proceedings, under the 13 sec. of the Rules and Orders for the Police Courts, the Magistrate, instead of (in the absence of the complainant) dismissing the complaint, might once or oftener adjourn the hearing. But there is no provision for the Magistrate, *ex mero motu*, after the dismissal, to order the resumption of the plaint in the same proceedings, or its reinstitution in another case.

The Ordinance No. 18 of 1871 sec. 5 explicitly enacts that no complaint, once dismissed, shall be reinstituted, without express leave from the Magistrate having been first obtained : a provision dependent on a prior application.

P. C. Ratnapura, 915.

Timber case. Plaint defective, in that *timber* trees were not laid.

On appeal against a conviction, under clause 5 of Ordinance No. 24 of 1848, *Langenberg* for appellant contended that the plaint was defective, in that it recited the felling of "*wild trees*," and not *timber* trees. The description of trees was very necessary, because, under the Ordinance, "wild" trees might mean firewood, wood suitable for ploughing &c. all which were exempted by the 15 sec.

The D. Q. A. (*Ferdinands*) being called upon to support the Magistrate's finding, urged that the objection ought to have been taken in the Court below.

But their *Lordships* quashed the proceedings. For any thing that appeared to the contrary, either in the plaint or evidence, these "wild" trees might have been of a description exempt, under sec. 15, from the operation of the other clauses of the Ordinance, per STEWART J.,

set aside.

D. C. Negombo, 331.

In an indictment for theft or guilty receipt, ownership, if known, must be laid. When the ownership is misnamed, the variance unless amended will be fatal.

The complainant, the superintendent of the Kimbulapitiya Cinnamon estate, charged the first accused with stealing a quantity of cinnamon, and the second accused with unlawfully receiving and possessing the same, knowing it to be stolen, from the said estate.

On appeal by the 2nd defendant against a conviction by the D. J., *Grenier* for appellant, without going into the merits, argued that the indictment was defective, because ownership was not laid, as it ought to have been, in distinct and unequivocal terms: "*from* Kimbulapitiya estate" did not mean *of or belonging to* the said estate; and cited ii. *Russel on Crimes* 282, 312, also *Sill v. Reg.* 1 E. & B. 553; proceedings ought to be quashed.

Langenberg for respondent (being called upon): objection comes too late. Accused were aware of the charge. Clear information was given them and they pleaded. Evidence in the case establishes ownership and supplies whatever defects there may exist in the indictment; and c. 19 of Ordinance No. 12 of 1852 is applicable equally to District Courts. [STEWART J. must you not read c. 19 with c. 18?] I submit not; cases not falling within clause 18 would be provided by clause 19. [STEWART J. Our Ordinance is more or less a mere enactment of the English Statute. English cases would therefore apply in this instance. You ought to have laid ownership clearly.] That objection, as I have said, comes too late. If the accused took that objection *in limine*, the indictment could have been amended. [The CHIEF JUSTICE: it was not his duty to shew you the necessity for an amendment.] Under the 1st clause of Ordinance 12 of 1852, the amendment could be made by the D. J. even after the case for the prosecution has been closed, and your Lordships could rectify the error now, under clause 20 of Ordinance No. 11 of 1868, as the substantial rights of the defendant have not been prejudiced.

Grenier (in reply): the 19th clause of Ordinance 12 of 1852 must be read with the 18th clause. It is essential that ownership should be laid. *P. C. Panedura* 22541. Grenier's Rep. 1874, p. 22, and *Matalle* 13016, 14 Nov. 1876. The objection is not

to the form, but to the substance of the indictment. It is no part of our duty to aid the prosecutor by shewing him the defects of the indictment. Defendant's substantial rights have been prejudiced.

The judgment of the Court below was set aside and proceedings ordered to be quashed, and per Stewart J :

We are of opinion that (the defect being one of substance, not merely formal, and not having been amended) the objection must be sustained. It is unquestionable that in an indictment for theft or receiving stolen property, the owner of the goods should, if known, be named ; or if unknown, the property should be stated to belong to some person or persons unknown. 1 Hale 513. *R. v. Jenks*, 2 East P. C. 514. It is also equally clear that if the owner be misnamed, the variance, unless amended, will be fatal *Reg. v. Vincent*, 3 Car. 246.

In the present case, the cinnamon might have been laid as either the property of the owner of the estate, or of the superintendent. But in the charge, neither mode has been adopted, nor is it even alleged that the cinnamon belonged to the estate, the mere statement that it was stolen from the estate not being necessarily inconsistent with its being the property of some person unconnected with the estate.

January, 12.

Present :—ANDERSON, C. J. and STEWART, J.

On the assembling of the Court, the Queen's Advocate (Hon. Mr. Cayley) rose and said :—

MY LORD CHIEF JUSTICE,

Leave-taking of Sir George Anderson.

As we understand that this is the last occasion on which you will preside in this Court, I trust that you will allow me, in the name of the Bar and in my own, to express to your Lordship our sincere regret at your approaching departure, and our best wishes for your happiness and prosperity in the new sphere to which you are about to proceed. Your Lordship has been a year only amongst us ; but, though your stay has been too short when measured by our wishes, it has been long enough for your Lordship to have won by your strict impartiality and uniform kindness and courtesy the esteem—I may be pardoned if I add the affection—of the entire profession, and at the same time the unqualified respect of the community at large. We cannot expect to see you again amongst us ; but as you carry away with you the esteem of all, we trust you will also carry away some pleasant memories associated with your sojourn in this Island. My Lord, we bid you a hearty farewell, and pray that many years of health and strength will yet be spared you to enable you to fulfil the duties of your new office

with satisfaction to yourself; for, from what we have learned of you during your stay amongst us, there can be no doubt that you will perform them to the satisfaction of the public.

The Chief Justice replied :—

Mr. Queen's Advocate, and the other gentlemen of the Bar, it is with difficulty that I respond to the very kind sentiments expressed by my esteemed friend the Queen's Advocate. I assure you that my short stay amongst you has been a very happy one. The intercourse between us has always been of a pleasant nature, and I shall ever remember with pleasure the few months during which I have had the honour of presiding in this Court. I was aware, when I first came here, that I had many and great difficulties to overcome. As a perfect stranger, without any practical experience of your laws, I feared that to give satisfaction would be no easy task. But, gentlemen, at the very threshold I was received with kindly feelings, which made my business a pleasure, and the kindness with which I was welcomed has been extended to me throughout my sojourn amongst you. If I have given satisfaction in the discharge of my duties I have had my reward. When I first came amongst you I told you of my determination to administer the laws righteously and without fear, favour, or affection. I am glad to see from what has fallen to-day from my esteemed friend, the Queen's Advocate, that my efforts to do my duty have met with your approbation. To one distinguished gentleman of your community I am indebted for much kindness and assistance in mastering the laws that were new to me. I refer to my friend the Senior Puisne Justice. In public life I have met with many men of high character and learning, but never with any person more deserving of public estimation than my esteemed friend on the right; and I trust that before long he will have received the due reward of the very eminent services he has rendered this country. I shall always look back with satisfaction and pleasure upon the few months I have spent amongst you, and I assure you I shall be always glad to hear of your success and well-doing collectively and individually. I pray God that your welfare may be advanced and that your happiness and prosperity may increase. As this is the last occasion on which I shall sit on this bench, allow me to wish you all an affectionate farewell."

JAN. 16. The Hon. C. Stewart, Senior Puisne Justice, was sworn in as Acting Chief Justice, before H. E. the Lieutenant Governor, at Queen's House.

JAN. 17. Mr. Henry Dias was sworn in as Junior Puisne Justice, before Mr. Stewart A. C. J.

January, 23.

Present :—DIAS, J.

C. R. Haldamulle, 2129.

Where the defendant trespassed upon plaintiff's property and cut down a tree standing thereon, and pleaded he had the authority of the government to do so, *held* that such a defence was not legitimate, and that he was liable as being the immediate wrongdoer.

The plaintiff sued the defendant for the value of a tree cut and removed illegally from his (the plaintiff's) property.

The defendant admitted that he felled the tree, but stated that, as contractor for the construction of Laymas and Wellawaya road, he had permission from the Government to fell and remove, if necessary, all such trees as stood within 24 feet of the central line of trace, and that the tree in question was one such.

The Commissioner (J. Gibson) having partially heard the case, dismissed it, holding that Government was responsible for any loss sustained by private individuals, since one of its officers traced the road, and the defendant, under his contract with the Government, was bound to follow in that line and make the road.

On appeal, *Grenier* for appellant was not called upon.

DIAS J., Set aside the judgment and sent the case back for evidence and judgemnt *de novo*. The defendant being the immediate wrongdoer, the plaintiff has a right to proceed against him, and the defendant is not entitled to set up the authority of the Government as a defence. The Commissioner should in the first place call upon the plaintiff to prove his right to the tree in question, and should the plaintiff satisfy the Commissioner on that point, and no valid defence be established by the defendant, he (the plaintiff) would be entitled to judgment.

set aside.

C. R. Jaffna, 5003.

Guaranty. A promise charging oneself with the debt or default of another, to be valid, must be in writing.

This was an action for the recovery of Rs. 21, which was alleged to be a balance due by the defendant on the purchase of tobacco from plaintiff, who stated in his examination that the second defendant bought tobacco, but that the first defendant, three days after such purchase, came forward and guaranteed the payment of the money due by the 2nd defendant.

The Commissioner (Hopkins) entered up judgment against both defendants as prayed.

On appeal by the first defendant, the Supreme Court, per DIAS J., affirmed the judgment as regards the 2nd defendant, but held the action against the first not maintainable ; the undertaking not being in writing as required by clause 21 of Ordinance 7 of 1840, no valid obligation could be created by a parol undertaking.

modified.

January, 25.

Present :—STEWART, A. C. J. and DIAS, J.

C. R. Panedura, 18329.

A dismissal based on evidence adduced only for the plaintiff, operates as a nonsent, and cannot be regarded as *res judicata*.

To a claim for the recovery of the value of a bullock cart, the defendant pleaded res judicata in case No. 18008 of the same Court, which had been dismissed by Mr. Commissioner Green in the following terms :

"Plaintiff has lied so backwards and upwards that I cannot believe him. His witnesses contradict one another materially ; claim dismissed with costs."

When the plea came to be argued in the Court below, the plaintiff put in his affidavit, stating that his claim in case No. 18008 was for the recovery of the identical amount due on the identical cart as that mentioned in the present case, and that he had discovered some further evidence than that produced before, in support of his present claim.

The Commissioner upheld the plea, observing "It is, as far I can see, founded, not on the insufficiency of the evidence, but on the fact that, in my predecessor's opinion, the evidence was false. Judgment could not be entered for defendant as defendant claimed nothing : his answer was a total denial. If a dismissal is ever to be considered a bar to a further action, I think it should be held so in this instance, where it had been given entirely on the merits, with the distinct expression of opinion that plaintiff's evidence is unworthy of belief."

On appeal, *Ferdinands* for appellant : The dismissal in case No. 18008 must operate as a nonsuit, as evidence was adduced only for the Plaintiff, 1 *Thomson* 334. Not even was the Defendant sworn, nor judgment entered for him, *ib*, 335, 336. *D. C. Batticaloa* 17363, Grenier pt iii. p 50. *C. R. Panadura* 12466, 8th December 1870.

The Supreme Court reserved judgment and this day held as follows: Set aside and remanded for hearing. In the former case, 18008, evidence having been adduced only by the Plaintiff, the judgment of dismissal thereon cannot be regarded as equivalent to a judgment for the Defendant, see *Grenier's Rep.* 3. p 50, D. C. Batticaloa 17363, June 19, 1874. C. R. Panedura 12466, December 8, 1870. (Per *Stewart* A. C. J.)

set aside.

C. R. Kalutara, 37841.

Where the plaintiff, a peon of the court, sued defendant for the upkeep of defendant's cattle, which had been entrusted to him by the Court, *held* that the action was not maintainable for want of privity of contract.

The plaintiff, a peon of the Court, sued defendant for the upkeep of defendant's cattle which had been entrusted to him by the Court, when they were brought up upon a warrant in a J. P. case against defendant for cattle stealing. The J. P. case against defendant had been dropped, one of the animals had died while in plaintiff's charge, and the other had been sold by him. The Commissioner gave judgment for plaintiff.

But on appeal (*Browne* for appellant, *Grenier* for respondent), the Supreme Court reversed it and nonsuited plaintiff with costs, and per STEWART J:—There is nothing to shew that the defendant had anything to do with the delivery of the bullocks or either of them, to the plaintiff. To entitle plaintiff to recover, a contract with the defendant, either express or implied, should have been proved.

C. R. Kalutara, 37417.

Partition. When in a C. R. case, parties consented to an appraisement for purposes of partition, objections as to irregularities of procedure or as to jurisdiction of the Court will not be allowed.

Plaintiff alleging himself to be owner of a portion of a garden prayed, in terms of Ordinance No. 10 of 1863, cl. 2, that defendant the owner of certain trees in the garden, should be decreed to sell them to her.

Defendant in answer denied the right of plaintiff's vendors to sell him the land, inasmuch as the same was entailed property, and traversed the valuation by plaintiff of the trees in question.

On the day of trial, an order, was made *by consent* that certain persons should appraise the value of the trees. The appraisers filed their report and the Commissioner made the following order: "Let this be considered equivalent to order of Court with costs against defendant; judgment accordingly."

On appeal, *Browne* for appellant, urged 1st, that the proceedings were irregular in consequence of the plea to plaintiff's title not having been disposed of in the Court below, as should have been done in the first instance. The Court and the parties erroneously entered first of all into the question of the value of the trees, but under Ordinance No. 10 of 1863, sec. 5, the Court could not pronounce judgment, before it had decided upon the question of title. 2ndly, that the appraisement was irregular, the Commissioners not having given 30 days notice. And 3rdly, that Courts of Requests had no jurisdiction to try cases of partition. *C. R. Panedura* 16635, December 1, 1874.

Grenier for respondent, cited *C. R. Matale* 2938, 11th May 1875: Courts of Requests had jurisdiction when land had already been partitioned, and the parties had not objected in the first instance to the appointment of a Commissioner.

Per Curiam affirmed.

C. R. Matara, 32871.

1. Where prescription is not expressly pleaded, but is urged for the first time at trial, the claim ought not to be dismissed. *

In 1873, Defendant sold a land to Plaintiff, who improved it, but was evicted therefrom in August 1876, by a decree of Gansabawa. Plaintiff now sued to recover the purchase money and the cost of improvements.

The Commissioner held "the money was paid in July 1873 and the case was instituted in August 1876. The action is prescribed, plaintiff's claim is dismissed."

2. Against an action for the restitution of purchase money, after eviction, prescription runs, not from the date of the payment of the purchase money, but from the date of the ouster.

On appeal (*Browne* for appellant), the following cases were cited 28383 D. C. Kandy, ii Lorenz 120 ; 28204 C. R. Matara, 26, June 1872, and 1047 C. R. Kaigalle.

Per DIAS J. The plaintiff should have been allowed to go into the case, and the Commissioner had no right to dismiss it on an objection (viz. prescription) not taken in the answer, but urged for the first time at the trial. Besides the Commissioner is wrong in fixing 1873 as the date from which prescription would begin to run. The correct date is the date of the ouster, which, according to the petition of appeal, only took place 3 months ago.

Set aside and remanded for evidence.

P. C. Hambantota, 6851.

A Proclamation issued by the Governor in the name of H. M. may be taken judicial notice of without proof.

This was a charge under the Opium Ordinance (No. 6 of 1867 cl. 6), in that defendant possessed a larger quantity of opium than was permitted by his license.

The Magistrate acquitted the defendant, on the ground that the complainant should have shewn that the Ordinance in question was in force in the District, as required by sec. 3 of the Ordinance, under which the charge was laid, on the same analogy as in case No. 6770 *P. C. Hambantota*, in which the Supreme Court set aside the judgment for want of evidence as to what was the "close season."

On appeal by the complainant, *Grenier* for respondent (who was called upon to support the judgment) : The proclamation must be proved. Without proof, a Judge cannot take judicial notice of it. Before the passing of the Act 31 and 32 Vict. c. 37, a Judge at *nisi prius* would not take judicial notice of Royal Proclamations, *Van Omeron and Dowick*, 2 Camp. 44. [STEWART J. (citing 1 Taylor on Evidence § 5) : Royal proclamations may be

* [but pleading should be amended and postponement granted, if necessary. See *C. R. Newera Eliya* 266, i Lorenz 7, and *C. R. Galle* 30814, iii Lorenz 28.—ED.]

taken notice of without proof, by the Judge, and this is a royal proclamation as published in the Gazette of 6th June 1868.] Then, what is the necessity for this act of 1862 ? [STEWART J. Where the Judge's memory is at fault, it may be necessary to prove the fact which he is called upon to notice.] The notice referred to by Taylor, is evidently notice after due proof, as required by the Act.

His Lordship gave judgment as follows :—

Set aside and case remanded for further hearing and judgment to be given on the evidence. The Ordinance No. 29 of 1867, as provided by the 1st sec., may be brought into operation in any place and at such time as the Governor with the advice of the Executive Council shall, by Proclamation in the Government Gazette, appoint : a provision which the Supreme Court finds carried out as respects the town of Hambantotte, by a Proclamation dated June 2, 1868, duly made and issued by the Governor in the name of Her Majesty, and published in the Government Gazette of June 6th 1868.

Such a Proclamation, Courts are bound to take judicial cognizance of, and it does not require being proved.

The *Hambantota P. C. case* 6770, referred to in the judgment of the Magistrate is inapplicable, that being a case in which the requisite notification is to be made by a Government Agent, introducing a new fact, viz. a particular time, as the close season, during the year, not specified in the Ordinance, whereas the Proclamation in the present case only gives effect to an existing law.

It will be open to all parties to adduce further evidence, if so advised.

set aside.

January, 30.

Present :—DIAS, J.

P. C. Avishawelle, 6087.

The defendants were charged with keeping a house for the purpose of common and promiscuous gaming, in breach of Ordinance No. 4 of 1841, clause 19, and were found guilty.

A charge of common and promiscuous gaming, under cl. 19 of Ord. 4 of 1841, is beyond jurisdiction of P.C, without a certificate from the Q. A.

On appeal, *Langenberg* for appellants, cited *P. C. Colombo* 5400, *Grenier's* Rep. 1873. p. 23, and urged that the Police Court had no jurisdiction to try and determine such a charge, without a certificate from the Queen's Advocate.

DIAS J. held accordingly and quashed the proceedings.

P. C. Jaffna, 11743.

Common or promiscuous gaming. Construction of sub-section 4 of Ord. 4 of 1841.

The plaint was laid under the subsection 4 of sec. 4 of Ordinance No. 4 of 1841, charging the defendants with gaming in a place kept or used for common or promiscuous gaming.

The Police Magistrate acquitted the defendants, being of opinion that the 4th sub-section applied only to public and open air gaming, which in this case had taken place in a walled building: "the master of any gaming house is punishable under the 19th clause of this Ordinance, but I do not see that the other gamblers can be convicted. Sub-section 4 seems to be a provision against extremely public and open air gaming, as, by a previous decision of the Supreme Court in *D C. Negombo* 24583, 3 *Lorenz's* Rep. p 174, a shed with low walls was held not to be 'an open and public place.' Hence it appears to me that the master of a gaming *house* can be convicted under the words in clause 19, 'house or other place, open or enclosed,' but the other gamblers must escape, because they are not gambling in an open and public place."

On appeal by the complainant, DIAS J. held the construction put upon the Ordinance by the Police Magistrate erroneous. The sub-section 4 contemplated two classes of places, where gaming might be carried on, viz. (1) any street &c. or other open and public place, and (2) any tavern &c. or place kept for common and promiscuous gaming. The present case fell under the second class, and the case from 3 *Lorenz*, referred to by the Magistrate, would fall under the first class of cases provided for in the Ordinance. Judgment set aside and the defendants severally adjudged guilty and sentenced to pay a fine of Rs. 20 each.

set aside.

P. C. Jaffna, Lr. C.

Public street in cl. 2 of Ord. No. 4 of 1841 includes all public streets, whether in or out of towns.

The Police Magistrate rejected the plaint, which charged the defendant with having behaved in a disorderly manner in a public street at Navatkuly, in breach of Ordinance No. 4 of 1841, clause 2, for the reason that the matter complained of happened in the country, and did not therefore come under the Ordinance.

On appeal, per DIAS J. set aside and case sent back to be proceeded with. The public street referred to in clause 2 of Ordinance No. 4 of 1841 takes in all public streets, whether in or out of towns.

set aside.

P. C. Matale, 13454.

Gross irregularity in proceedings.

The defendants pleaded guilty to a plaint (dated 14th Dec. 1876) which charged them, 9 persons in all, indiscriminately, under sec. 4 of clause 4, as also under the 19th clause of Ordinance No. 4 of 1841.

The following were the notes made by the Police Magistrate and which were quashed by the Supreme Court on the ground of gross irregularity :—

"14 12 1876. 1, 2 and 8 accused present, plead guilty, first conviction, fined Rs. 10 each. One-third to complainant, R. S. Sinclair.

"10th January 1877. 4, 5, 6 and 7 present, plead guilty. 5 & 6 convicted. 4 and 7 not previously convicted. 4 and 7 accuseds will pay a fine of Rs. 20 each. 5 and 6 will undergo 4 months hard labour each."

On appeal by the 5th and 7th defendants against the severity of the punishment, DIAS J. held as follows :—

The plaint contains two counts, one under the 4th sub-section and the other under section 19 of the Ordinance No. 4 of 1841, but it does not shew which of the defendants are charged under the 19th sec. Under this sec., the Police Court has no jurisdiction, without a certificate from the Queen's Advocate, which does not appear to have been given. Some of the defendants have pleaded guilty, and only two of them have appealed, but the proceedings are so grossly irregular that they must be altogether set aside. (*Langenberg* for appellant.)

Quashed.

P. C. Balapitiya, 48215.

Timber Ord. plaint defective.

Plaint : that the defendants were on the 17th instant found in possession of timber belonging to Her Majesty, felled from crown land, as per annexed testimonial [of the Deputy Queen's Advocate], in breach of clause 5 of Ordinance No. 24 of 1848.

The Police Magistrate found the accused guilty, but on appeal, per DIAS J :—Set aside and proceedings quashed. The plaint is substantially bad, in that it does not set out that the defendants had possession of the timber, knowing the same to have been felled on, or removed from, any crown land, contrary to the provisions of the Ordinance.

set aside.

P. C. Kalutara, 56916.

Under the arrack Ord. cl. 26 and 27, licensee is not bound to sell *toddy*, which is not a spirit.

The complainant, a baker, charged defendants who were arrack renters, with having refused to sell two gallons of toddy, in breach of cc. 26 and 27 of Ordinance No. 10 of 1844.

The Police Magistrate, holding that the defendants were bound to sell *spirits*, and not toddy, which was not a spirit, rejected the plaint as disclosing no offence.

On appeal (*Langenberg* for appellant),

Affirmed.

P. C. Mullattivu, 9083.

A charge for false information, rebutted by good faith.

Set aside and defendant acquitted. This is a charge against the defendant under clause 166 of Ordinance No. 11 1868, for giving false information to a Justice of the Peace. The alleged false information is contained in an affidavit which the defendant swore against the present complainant and others, charging them with cattle stealing. When the defendant made that charge, he seems to have acted in perfect good faith, and this seems to be also the opinion of the Magistrate, who, however, convicts the defendant apparently on the ground that the defendant had persevered in his charge after the accused parties had conclusively established their right to the cattle. The Supreme Court thinks that this circumstance should not have been allowed to influence the Magistrate in deciding the case. Per DIAS, J.

P. C. Colombo, 2424.

Under cl. 26 of arrack Ord. a P. M. may not inflict imprisonment, unless the plaint recited the amending Ord. 8 of 1869.

The charge was made under the 26th clause of Ordinance No. 10 of 1844, in that defendant sold 1 bottle of arrack for 57 cents, instead of 39 cents., which were all he could demand under his license.

The Police Magistrate convicted the accused and sentenced him to pay a fine of Rs. 50, and be imprisoned at hard labour for three months.

On appeal *Grenier* for appellant, contended that it was not competent for the Police Magistrate to inflict imprisonment under the 26th clause. True the Ordinance No. 8 of 1869 augmented the punishment in such cases, but the plaint did not recite that Ordinance. *P. C. Colombo* 1922 & 1783, 30th November 1876. [DIAS J. the judgments you cite appear to me to be too technical] However that might be, on the merits, the sentence was clearly excessive. The defendant was not the actual licensee, but only a servant who had acted under instructions from his employers.

Modified, by sentence of imprisonment being remitted.

February, 1.

Present :—STEWART, A. C. J. and DIAS, J.

C. R. Colombo, 108961.

Plaintiff moved for, and obtained on the 15th August, a notice on the claimants in execution, to appear before the Court and establish their claim to certain moveable property which had been seized under the above writ.

In a claim in execution, the judgment creditor should established the title of his debtor in a separate suit.

When the matter was inquired into, the Commissioner, in the absence of one of the claimants, ordered the hackery (claimed by the absentee) to be sold.

On appeal against this order, (*Browne* for appellant), the Supreme Court set it aside, in these terms :—The application of the plaintiff of the 15th August, 1876, was irregular. The claimant having duly made his claim and given security, the plaintiff should proceed by action to establish the right of his execution debtor to the property in dispute.

February, 2.

Present :—STEWART, A. C. J. and DIAS, J.

FEB. 2.

P. C. Kandy 5347.

This was a charge under cl. 15 of Ord. No. 14 of 1867, in that the defendant had demanded and taken toll from two carts belonging to Mr. Reed, Contractor of Roads.

The Director of P. W. D. is a "Superintending Officer" within the meaning of cl. 7 of Ord. 14 of 1867.

The Police Magistrate acquitted the defendant, on the ground that the permit to pass the two carts free of toll was not in accordance with clause 7 of the Ordinance, which required a certificate (of their having been employed on a road or other work within 10 miles of the toll station), from the hands of the officer *superintending* the work, whereas in the present case it was from Mr. Mosse, the Director of Public Works, and professed to be a general order to pass all "carts employed" (*i. e.* whether really or not) within 10 miles.

On appeal, *Langenberg* for appellant, contended that the Director of Public Works was a superintending officer within the meaning of the Ordinance, and that his certificate was quite sufficient, and cited *P. C. Nuwera Eliya* 9700, 29 Feb. 1876, and *P. C. Colombo* 6429, Grenier p. 39, 1873.

The judgment was set aside and defendant adjudged to pay a fine of ten rupees, and per STEWART J :—

The evidence establishes that the carts referred to were being employed on work connected with the repair of a public road within one mile of the toll station, of which the defendant is the toll-keeper.

It appears to the Supreme Court that the Director of Public Works, an officer at the head of his department, having the general superintendence of all public works in the Island, must be taken to come within the description of officer mentioned in sec. 7 of the Ordinance No. 14 of 1867. See Grenier's Rep. 1873, pt. 1, p. 39, *P. C. Colombo* 6429, in which it was held that a certificate from the Provincial Assistant of the Public Works Department at Colombo was sufficient to exempt from toll a Contractor carrying on works at Hendella. See also Gren. Rept. 1876, pt. 1, p. 13. *P. C. Nuwera Eliya* 9700, where the decision of the Police Magistrate, holding that indisputable authority was given to the document (certificate), by the signature of Mr. Mosse, who is of course superintending officer of all public works in this Island, was affirmed by the Appellate Court.

C. R. Colombo, 110968.

Where the articles sold were so bad that they could not be put to the use they were manifestly bought for, *held* that the vendor could not recover, unless he shewed that they reasonably answered the description given at the sale.

The plaintiffs sold at a public auction, among other things, 11 boxes of cigars to the defendant, who denied his liability to pay for the same on these special pleas, (1) that he was in error of the quality of the cigars sold, and (2) that they were so bad that they could not be put to the use they were manifestly bought for.

It appeared from the evidence that the cigars in question were sold in boxes, not opened, and were described by the plaintiff as good.

On appeal against the finding of the Commissioner (Boake), who gave judgment for plaintiffs, on the principle of ***caveat emptor***, *Browne* for appellant: Error in quality vitiates sale, 1 *Fothier on Oblig.* 12, Vanderlinden p. 228; moreover, the articles sold were so bad that they could not be put to the use they were manifestly bought for, Vanderlinden p. 238, sec. x, Domat's *Civil Law*, Bk. i. tit. 2. sec. 11, §3: such defects will vitiate the sale as render things altogether unfit for the use for which they are brought.

The Supreme Court set aside the judgment and remitted the case for evidence in these terms: The proof, so far as it has gone, shews that the cigars sold were worthless, and unless the plaintiffs can shew that they reasonably answered the description given at the sale, they will not be entitled to recover. per DIAS J.

C. R. Kalutara, 35368.

Plaintiff sued the Defendant on the following "Pro note:"—

No particular form of words is requisite to constitute a pro. note, if it

"I Suban Appoo do hereby declare to have borrowed and received from H. G. the sum of Rs. 24, on condition to pay and settle the same within one year from the date hereof. In default, it is agreed to pay and settle the same with interest thereon

@ 25 o/o per annum for the months and years that may elapse from them."

contain a promise to pay a certain sum of money unconditionally.

The Commissioner, without hearing evidence, nonsuited the plaintiff, observing that, inasmuch as there was a clause to pay interest at an agreed rate on the non-payment of the note at due date, the stamps attached, viz 10 cts., should have been for an agreement.

On appeal, per STEWART, J., no particular form of words is requisite to constitute a pro. note, if it contain a promise to pay a certain sum of money unconditionally. The undertaking to pay interest at a stipulated rate does not in itself change the character of the document. Set aside and case remanded for hearing.

C. R. Matara, 30252.

Where judgment was entered for principal and interest at 12 per cent. on a bond which stipulated interest at 32 per cent, and the plaintiff granted a receipt to defendant in full settlement of his claim, as decreed, it was held irregular to subsequently order the payment of the balance interest, when the question of interest was authoritatively settled in favour of the position that any stipulated rate was recoverable.

On an action on a bond which stipulated payment of 32 per cent, judgment had been entered on the 11th February 1875 for the principal and interest at 12 o/o, which the defendant paid, filing of record a receipt, dated 26th April 1875, from the plaintiff, "in full settlement of the principal, interest and costs due in the said case."

On the 20th July 1876, plaintiff moved for a notice on the defendant to shew cause why he should not pay the balance interest stipulated on the bond, the Supreme Court having held any rate of interest to be recoverable.*

The Commissioner allowed the motion, and on its being argued, ordered 20 per cent, the balance of interest to be paid.

These proceedings were set aside on appeal as irregular, and per DIAS, J :—The Commissioner had no right to make the order appealed from. On the 11th February 1875, judgment was entered against defendant for principal with interest at 12 o/o, and on the 26th April 1875, the defendant makes a full payment to the plaintiff's proctor of the amount of the judgment. This is a final settlement of the judgment, and all subsequent proceedings are irregular.

C. R. Matale, 34526.

In an action for the recovery of the value of certain jewels, entrusted to the defendant and which he unlawfully detained and would not produce, STEWART, J. on appeal, entered up judgment for the amount claimed, holding *inter alia*, that where a party did not produce property proved to be in his possession, the law raised a strong presumption in favour of the opposite party.

Langenberg for appellant, *Dornhorst* for respondent.

*By its judgment, dated 8th July 1875, in *D. C. Colombo* 63436, Cayley, J. *dissentiente*—ED.

P. C. Colombo, 2925.

Under the licensing Ordinance of 1873, a license to sell liquor to be consumed on the premises includes a license to sell liquor to be consumed off the premises.

Defendants, who were hotel keepers and licensed "to sell intoxicating liquor to be consumed on the premises," were charged with having sold 25 cts. worth of gin, and having allowed it to be removed for consumption to a place other than that allowed by the license, in breach of Ord. No. 7 of 1873 cl. 10, and Ord. No. 22 of 1873 cl. 9.

The P. M. (Ellis), was of opinion that, as cc. 13 and 14 attached penalties to the sale of liquor (to be consumed on the premises) by a person who holds a 25 Rupees license, but attached no penalty to the sale of liquor (not to be consumed on the premises) by a man holding a 50 Rupees license, the defendants were entitled to an acquittal.

On appeal against the acquittal, *Dornhorst* for respondent, (being called upon), cited P. C. *Kandy* 25, July 8th 1875. which was as follows:—

The license to sell liquor to be consumed on the premises, for which a duty of Rs. 50 is payable, covers the sale of liquor for consumption off the premises, for which only Rs. 25 is payable. The defendant has committed no breach of the 10th cl., and it is clear from cl. 13 that, though it is made an offence to drink liquor on the premises when the seller is not licensed to sell liquor to be so drunk on the premises, the converse is not provided for. Per MORGAN, C. J.

Affirmed, per STEWART J., citing P. C. *Kandy* 25.

February, 3.

Present:—HACKETT, C. J. STEWART, J., and DIAS, J.

The Hon'ble Sir William Hackett produces in Court a warrant under the hand and Colonial Seal of His Excellency, the Hon'ble Arthur N. Birch, Companion of the Most Distinguished Order of Saint Michael and Saint George, Lieutenant Governor in and over the Island of Ceylon, with the Dependencies thereof, dated at Newera Eliya, the 2nd February instant, appointing him, the said Sir William Hackett, Kt., Barrister-at-law, to be Chief Justice of the Island of Ceylon.

The said warrant is read and filed.

The said Sir William Hackett thereupon takes the oath of Office and of Allegiance in such manner and form as the same are by law appointed to be taken or made, which oaths were administered by the Hon'ble the Senior Puisne Justice.

February, 9.

Present:—HACKETT, C. J. and STEWART, J.

C. R. Mallakam, 7159.

This was a claim for the recovery of Rs. 55, balance due upon a dowry deed, dated 3rd December 1858, and the plaintiffs alleged that, in lieu of the interest due thereon, they had been put in possession of certain land by 2nd defendant's deceased husband, under a verbal agreement that they were to take the profits thereof.

Against an action upon a deed, prescription will not avail, if, in lieu of interest, there has been enjoyment of lands, even though under a subsequent verbal agreement.

The defendant denied plaintiff's possession of the land in question, and pleaded, inter alia, prescription, which the Commissioner (Hopkins) upheld, being of opinion that the verbal agreement was bad in law, as opposed to cl. 2 of Ord. 7 of 1840, and he nonsuited the Plaintiff, without hearing their evidence.

On appeal, the Supreme Court set aside the judgment and remitted the case for evidence on the alleged occupation and enjoyment. Such evidence, if satisfactory would bring the case within the 7th cl. of Ord. No. 8 of 1834, and shew that the debt was still unpaid. Per HACKETT, C. J.

C. R. Galle, 52408.

In a C. R. case, it is not necessary to file, before trial, the documents intended to be put in evidence, but only to file a *list* of them.

After the filing of the answer, plaintiff moved for a notice on the defendants to file in the case any documentary evidence they might have in their possession, and that, failing to produce the same in time, they might be barred from doing so on the trial day.

The Commissioner allowed the motion, and in due course ruled (3rd Oct.) that the defendants, not having acceded to the motion, were barred from filing the documents on the trial day. This order he confirmed on the trial day itself, by rejecting not merely the original documents tendered on behalf of the defendants, but also the secondary evidence of their contents, and, deciding the case on the parol evidence adduced by them on other points, entered up judgment for plaintiff.

On appeal, *Layard* for appellant:—Under cl. 91 of Ordinance No. 11 of 1868 no appeal lies from an interlocutory order, so that this appeal is against the interlocutory order of 3rd October as well as against the final judgment. There is no provision in Ord. No. 9 of 1859 to bar the production of documents at the trial which had not been filed before. The 14th cl. of that Ordinance only provides for a *list* of the documentary evidence to be handed in with the answer, and, even if this be not complied with, the Commissioner has the power to admit the documents tendered.

The Supreme Court set aside the judgment and remanded the case for further hearing, defendant being allowed to put in receipts to prove payment.

C. R. Kandy, 2855.

A mere assertion of title to land, without prima facie proof, will not oust the jurisdiction of a C. of R.

Defendant denied plaintiff's title to the land, the ground share of which he claimed, and on the admission of the plaintiff that the land was worth about Rs. 1,000, the Commissioner ordered that the suit do abate for want of jurisdiction.

On appeal, *Ramanathan* for appellant, cited *C. R. Colombo* 35113, 3 Lorenz 107: a mere assertion of title, without prima facie proof, will not oust jurisdiction.

Per STEWART, J :—Set aside and remanded for further hearing. The Commissioner should make further inquiry in order to ascertain whether the objection to plaintiff's title is bonâ fide, or a groundless assertion merely put forward to defeat the plaintiff's claim. Costs to abide result.

February, 13.

Present :—HACKETT, C. J. STEWART, J. and DIAS, J.

C R. Batticaloa 7408.

Meerwald's case. Liability of the Secretary of the Court to monies received by him in Crown suits, under Ord. No. 11 of 1861.

The defendant (Mr. Meerwald), late Secretary of the Batticaloa District Court, was sued as such by the Queen's Advocate, on behalf of the Crown, for Rs. 5, being stamp moneys recovered in a Crown suit wherein the Crown obtained judgment, and which it was contended should have been paid to the Chief Commissioner of Stamps, but was not. It was proved that the D. Q. A. having received the Rs. 5, as stamp money in the Crown suit in question, paid it to defendant.

The defence set up by defendant's answer was that, by a certain distribution of work in the District Court of Batticaloa, the then Head Clerk, Mr. De Niese (since convicted of embezzlement), was entrusted with the conduct of all money transactions, and accordingly the amount in suit was paid into his hands, and received by him, for the purpose of forwarding the same to the Commissioner of Stamps. No evidence was however called in support of this defence.

The transaction in question, having taken place before the passing of the present Stamp Ordinance of 1871, was admitted to be governed by the old Ordinance, No. 11 of 1861. In part ii of the schedule to that Ordinance (the portion referring to District

Court suits), it is directed that stamp monies, such as those in the present case, should be paid "to the Commissioner of Stamps or to the Secretary, for and on behalf of such Commissioner," thus rendering it the Secretary's duty to remit monies, so received, to the Commissioner.

Judgment was given for plaintiff, but on appeal, the Supreme Court, while observing that the duty of the defendant was prescribed by Ordinance, and that judgment was rightly entered for plaintiff, in the absence of any evidence for the defendant, granted a second hearing of the case, on a satisfactory affidavit being tendered by defendant.

On this occasion, the then Commissioner (Mr. Worthington) stated on oath that no departmental order issued from him, delegating the duties of the defendant to De Niese, though the evidence of the Court officers, including a few proctors, who were called, shewed that very generally it was De Niese who received the moneys paid into Court.

The Commissioner (Atherton) held that the amount claimed by the Crown was paid into Court, that it was the duty of the defendant, under Ord. No. 11 of 1861, as Secretary of the Court, to pay such sum to the Commissioner of Stamps, that he failed to do so, and that there was no departmental order transferring his duties to the clerk De Neise, and entered up judgment as prayed.

On appeal, *Grenier* appeared for appellant: Onus lay on the plaintiff to shew payment to the Secretary and the Secretary only. This has not been done. The evidence shews a well understood arrangement in the Court that De Niese, and not defendant was to receive the monies. Defendant ought not to be held responsible for another man's defalcations. Is the Secretary liable for anything more than he *actually* received? The entries on the reverse side of the motion paper shew that De Niese received the Rs. 5 in question, and the defendant the fiscal's schedule money only. The Fiscal's Ordinance No. 4 of 1867, sec. 16, cl. 2 makes it imperative on the Secretary to merely see that no processes issued from his Court without the schedule being properly stamped. He cannot be held liable under a strict construction of the Stamp Ordinance.

Ferdinands contra: The case was sent back on a former occasion mainly for the departmental order which was alleged to distribute the work among the officers of the Court. There is nothing in it to exonerate the Secretary from his duties. Even if such an order existed, it would be no defence at all, being opposed to the Ordinance. But payment was in fact made to the Secretary himself, for on the back of the motion of the D. Q. A., there is the

handwriting of the Secretary ordering 10 shillings to be sent to the Commissioner. [DIAS J. The Secretary virtually came in contact with the money.] His liability under the Ordinance is therefore clear.

Affirmed.

C. R. Colombo, 1648.

Procedure under cl. 19 of the Police Ordinance. House rate and capitation tax.

This was a plaint for damages brought against the Government Agent and 4 others, for wrongful seizure of certain moveables belonging to the plaintiff, who, it was alleged, had improperly refused to pay tax. It appeared that plaintiff's village Ampatalenpaletta had been proclaimed under cl. 10 of Ord. No. 16 of 1865, that the Government Agent had fixed the amount which each male over 18 years was to pay, that notices to this effect were distributed, that the Mudaliyar was furnished with receipts and directed to collect the respective sums, and that on plaintiff refusing to pay the tax, the Government Agent authorised the seizure of his property and had it advertised, but the sale thereof was stayed, in obedience to an injunction, which plaintiff had obtained from the Court of Requests.

The Commissioner (*Boake*) held that the Government Agent ought to have proceeded under cl. 27, which required the intervention of a Police Court to recover the sum due, and gave nominal damages for 5 cents.

On appeal, *Ferdinands* for defendant and appellant, contended that the proceedings were perfectly regular under cl. 41, but their lordships (without hearing *Grenier* for respondent) affirmed the judgment, being of opinion that cl. 41 contemplated a house rate, and could not apply to what was in the nature of a capitation tax.

Affirmed.

[The question whether Courts of Requests had power to issue an injunction was not argued, as not being in issue.]

P. C. Matale, 12973.

In a plaint for false information, it is sufficient if the nature of the false informatioin is laid out.

Plaint :—that defendant did on the 20thJuly 1876, wilfully give false information to Mr. Williams, J. P. with intent to support a false accusation, in that she did on the said day wilfully and falsely charge the complainant and two others T. B. and P. B. with forgery, in breach of cl. 166 of Ord. No. 11 of 1868.

On appeal against a conviction, *Grenier* for appellant (*Dornhorst* with him) : where the information impugned is alleged to be false as a whole, the proper course is to proceed under an

indictment for perjury. *Grenier's Rep.* 1874, pp. 59 and 77; moreover the false information is not fully laid out in the plaint, *ib.* p. 4. Proceedings therefore must be quashed. [The CHIEF JUSTICE: The cases you cite are different from the present case, wherein the nature of the false information appears in the words "in that she did" &c.] Even that is not sufficient, the particulars of the forgery must be laid out. [DIAS, J. your substantial rights have not been prejudiced by this omission.] On the merits the case must be set aside. The circumstances connected with it do not warrant a sentence of 3 months' hard labour and a fine of Rs. 50.

Affirmed, but punishment reduced to a fine only of Rs. 25.

P. C. Puttalam, 8145.

Set aside and case remanded for hearing. The preliminary examination under sec. 2 of Ord. No 18 of 1871 is a proceeding only with regard to the refusal or allowance of process. Here, process having already issued, and the case having been fixed for hearing, the trial should proceed in due course.

Examination under sec. of Ord. 18 of 1871.

P. C. Anuradhapura, 8830.

The defendants were found guilty of unlawfully felling and otherwise destroying some trees standing in the crown forest &c. in breach of cl. 5 of Ord. No. 24 of 1848 and 4 of 1864.

On appeal (*Langenberg* for appellant), the proceedings were quashed, and per STEWART, J. the plaint is defective, in that it does not set out the kind of trees felled. The evidence goes to establish that the defendants, or some of them, cleared portions of a chena. But clearing a chena, which in this case consisted chiefly of low jungle, is in itself not an offence under the Ord. No. 24 of 1848. If timber trees of the description comprised in that Ordinance were felled, the plaint should have so specified the trees as to shew that they came within the Ordinance.

Timber Ordinance.
1. Plaint must set out the kind of trees felled.
2. Clearing a chena is not in itself an offence under the Ordinance.

P. C. Mallakam, 5810.

Set aside as to the fine imposed on the complainant. He should have been allowed, as required by sec. 106 of Ord. No. 11 of 1868 to shew cause why he should not be fined. We do not consider that calling upon him to shew cause immediately after the dismissal of the plaint, was allowing him the requisite opportunity. He should have been allowed, unless he dispensed with further time, at least until the next day to make his defence. Per STEWART, J.

Contempt of Court.

February, 16.

Present :—HACKETT, C. J. STEWART, J. and DIAS, J.

C. R. Colombo, 109016.

The jurisdiction of a C. R. will not be ousted by the mere setting up of a claim in reconvention in excess of £10, not even where such claim is believed by the Commissioner to be *bona fide* ; but he should make an incidental inquiry into defendant's case, and then adjudicate upon the claim of the plaintiff.

Plaintiff, as Manager of the Gas and Water Company, sued the defendant for Rs. 82.64, balance found to be due on the following account :—

1875, 11 Oct.		1875, 11 Oct.	
To balance on Gas fittings	Rs. 356·64.	Value of Gas fittings removed to the Works	Rs. 334·41.
„ Gas a/c. due till May	„ 44·54.		
„ Workmanship removing Gas fittings from Hindue Temple. . .	„ 15·82.	Balance due	„ 82·64.
	Rs. 417·05.		Rs. 417·05.

The defendant denied to be indebted as alleged, but stated that plaintiff was indebted to the defendant in a sum far in excess of the jurisdiction of the Court, consequent on the removal of the Gas fittings.

It appeared that defendant, as Director of a Hindu Temple, had agreed with the plaintiff to have it fitted up with Gas, and to pay the expenses of the fittings, etc., (duly assessed beforehand at Rs. 715.35) by instalments. The plaintiff alleged that as the defendant had failed to pay the instalments, he was obliged, in terms of the agreement, to remove the Gas fittings, and to credit the defendant with their deteriorated value.

On the other hand, it was contended for the defendant that the deterioration was not so great as alleged, and that even if a percentage was allowed for the deterioration, his claim against the Company would be beyond the jurisdiction of the Court. No evidence, however, was called to rebut that of the plaintiff. Defendant had been merely examined, and he put in the correspondence which had passed between him and the plaintiff, from which he argued that the charge made against him for the consumption of the gas was not due as alleged, because, owing to the negligent fitting up of the lamps, of which he had repeatedly complained to the plaintiff, gas had escaped, without being actually burnt.

The Commissioner (Boake) held that the defendant had made out a *prima facie* case in favour of his claim, and "dismissed the suit" for want of jurisdiction.

On appeal, *Langenberg* for appellant : There is no claim in reconvention actually made by the defendant. The amount in suit being clearly within the jurisdiction of the Court, it ought to have

given judgment for plaintiff on his evidence. Plaintiff ought not to wait till defendant chooses to bring an action in the District Court. Supposing he does not institute it, is plaintiff to go without his remedy? The proper course is to enter up judgment for plaintiff and to leave the defendant to have his remedy in the District Court.

Ramanathan for respondent: True the defendant does not make a substantial claim in his pleadings, but the pleadings ought to be read with his examination (C. R, *Kandy* 51530, 8th December 1864). When so read, his claim determines itself in an amount, which at once throws him out of Court. As defendant could not recover in the Court of Requests all that was due to him, without going to a superior Court, he was not bound to go into his case, standing as he did on his right to carry his claim to the superior Court; nor indeed could the inferior Court entertain any evidence in support of his claim, for then that Court would assume to itself the power of deciding upon the question of alleged negligence and deterioration of value, and thus would materially prejudice the rights of the defendant, if he went before the District Court to have the same issues tried. He need only show his claim to be *bona fide*, and this the Commissioner expressly holds he has done.

Judgment was reserved and delivered this day, as follows:—

It appears to us that the claim of the plaintiff is one cognizable by the Court of Requests, and accordingly the case is remanded for further hearing and decision. The case C. R. *Colombo* 35113, 3 Lorenz 107, quoted in the judgment of the Commissioner, is not in point. That was an action for use and occupation of land, where it was held that the mere assertion of title, though the premises be over £10 in value, does not oust the jurisdiction of the Court of Requests. But the Commissioner argues "that it is manifest that, if mere assertion of title will not oust the jurisdiction, *prima facie* proof of title will &c." We agree in this view, so far as title to land is involved, inasmuch as where the ownership is *bona fide* disputed, if the land really belongs to the defendant, the claim, whether it be for rent, use and occupation, or anything else founded on ownership, must necessarily fail. And moreover, in such cases, it is within the power of the plaintiff, his title being disputed, to sue the defendant before the District Court.

By sec. 81 of the Ord. No. 11 of 1868, Courts of Requests have "cognizance and full power to hear and determine all actions in which the debt, damage or demand shall not exceed ten pounds."

In the present case the claim of the plaintiff is undoubtedly within the cognisance of the Court of Requests, and to permit the defendant, by questioning an item exceeding Rs. 100 in the account,

to oust the jurisdiction of the Court, would in effect be to leave the plaintiff, if not entirely without remedy, in a very embarassing situation, driving him to the District Court to recover, it may be, only a few shillings, there being no mode of procedure provided, by which he could compel the defendant to institute an action in the higher Court for the amount alleged to be due to him.

The judgment of the Court of Requests will not of course operate as an estoppel in respect of any suit the defendant may bring in the District Court for any claim above Rs. 100. But it will be competent for the Commissioner to make such incidental enquiry in regard to the item already referred to as may be necessary to enable him to adjudicate upon the claim of the plaintiff. Costs to abide result. Per STEWART, J.*

Set aside.

D. C. Badulla, 501.

A widower has a preferent right over all others to the administration of his deceased wife's estate.

The mother of the deceased applied for letters of administration, but was opposed by the bina married widower and the deceased's first cousin of full blood.

The D. J. (Gibson) decided that the applicant's claim should have precedence.

On appeal, (*Langenberg* for appellant), this finding was set aside in the following terms:—

The Rules and Orders, which are of general application, evidently regard (see sec. 4 c. 6) the widower as having a preferent right over all others to the administration of his deceased wife's effects.

It may be that formerly, in Kandyan Districts, owing to a Beena husband being liable to be discarded at any moment by his wife, the right of such a husband was deemed inferior to that of near relatives of the deceased wife. But in the present case, the first opponent was legally married to the deceased, the marriage being duly registered, and consequently as indissolubly allied as other married persons.

Further it is alleged that the deceased left a minor adopted child, who is in the charge and custody of the appellant.

Under these circumstances, without being understood to express an opinion as to the validity or otherwise of the alleged adoption, it appears to us that administration should be granted to the husband of the deceased; and it is accordingly ordered that letters of administration do issue to him, on his complying with the requisite preliminaries. Per STEWART, J.

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* See *Smart vs. Wolf*, 3 T. R. 343: wherever jurisdiction vests as to the principal question, it applies to all incidental points connected with it, per ASHHURST, J.—ED.

D. C. Colombo 64163.

Plaintiff having been allowed to join the Fiscal as one of the defendants in the case, his proctor made the necessary amendment on the face of the libel already filed. On the trial day, when all parties were ready, the District Judge ordered the case to be struck off the roll, and the plaintiff's proctor to pay the costs of the day "for the unauthorised tampering with the libel."

It is not tampering with the libel, if the Proctor, with the authority of the Judge, makes an amendment on its face.

On appeal, (*Browne* for appellant), this order was set aside and case sent back to be proceeded with. The Supreme Court could not agree with the learned District Judge in the view he took of the proctor's conduct in the alteration of the libel. What he did with the libel was fully authorised by the order of the 3rd June 1875. Per DIAS, J.

D. C. Jaffna 3396.

Plaintiff, under his writ of execution, purchased defendant's land for Rs. 1000, and was given credit by the Fiscal for the full amount of the judgment debt, viz. Rs. 439. Before the time arrived for the payment of the balance purchase money, the defendant became indebted to the plaintiff upon a promissory note, in respect of which plaintiff, with defendant's consent, moved the Court, on the 7th July 1876, to be allowed further credit for the amount of the promissory note (viz. Rs. 425) on the unpaid balance. The District Judge allowed this motion and ordered the Fiscal to give credit to plaintiff as prayed. But the Fiscal objected to this course on the ground that, if additional credit were given, the class of the case would be raised from the second to the third, and would render additional stamps necessary; moreover he was bound to give credit only for the amount mentioned in the writ and nothing more.

A judgment creditor who became purchaser, under his writ, of defendant's property, is entitled to credit not merely for the amount due on the writ, but also for any other amount that may be admitted to be due.

The Court thereupon called the Fiscal's attention to sec. 58 of the Fiscal's Ordinance (No. 4 of 1867), and made an endorsement on the back of the writ, directing the Fiscal to give credit to the plaintiff for the further sum of Rs. 425 due upon the promissory note.

The Fiscal however did not see the application of the section cited, but, by his letter, suggested to the Court that the plaintiff should deposit the money due on the purchase, and then draw the amount of the claim from the Government Agent, on the usual order of Court.

The District Judge did not think it necessary to act on the suggestion, but merely ordered the parties to be noticed.

Nothing having been done for some time, the Fiscal again wrote to the District Judge applying for a re-issue of the writ, in order to fix the resale of the property, with a view to recover the balance purchase money due from the plaintiff. The District Judge allowed the application, against which order, plaintiff appealed.

Per STEWART J. Set aside. The plaintiff was entitled to credit for the full amount of the promissory note, and the District Judge should have enforced his order of the 7th of July 1876. (*Ferdinands* for appellant).

D. C. Kalutara 29947.

Where all the heirs at law appear to be parties to a suit, it is not necessary to take out letters of adm. to entitle them to recover a debt due to the intestate.

The plaintiff in this case, as one of the heirs in possession of the property of the deceased, sued the defendant for the recovery of an amount due upon a bond in favour of the said deceased.

The defendant pleaded that there were other heirs to the property, to one of whom he alleged he had made a part payment, and brought into Court the balance said to be due.

Plaintiff admitted that the deceased creditor left two other heirs besides himself, and stated that the deceased (before his death) had authorised him by deed to attend to his affairs generally, and to administer to his estate.

The other heirs intervened and became co-plaintiffs. The D. J., finding the Estate "to be of value," struck the case off the trial roll and ordered plaintiff, if so advised, to take out letters of administration within 30 days; in default of such action, nonsuit to be entered.

On appeal, this was set aside, on the ground that all the heirs at law appeared to be parties to the record and could give defendant a valid discharge. (*Grenier* for appellant, *Langenberg* for respondent.)

D. C. Jaffna, 4946.

A motion for prov. judgment must be made on the returnable day of the summons.

Plaintiff moved for and obtained provisional judgment, on the 25th October, though the defendant contended that the summons praying for it, having been made returnable on the day previous (the 24th October), it was irregular for plaintiff to make his motion, on the 25th, and that if he were allowed to do so, he (the defendant) was entitled to oppose the motion on certain (technical) grounds which he specified.

The D. J. ruled that as defendant did not appear on the returnable day of the summons, his opposition came too late.

On appeal, *Langenberg* for appellant, referred to the practice of the District Court of Colombo: a formal motion was necessary on the returnable day, at the close of which, the defendant's name would be called, and if he appeared and had cause to shew, he would have an opportunity of doing so on the following or any other day, when the motion came up before the judge for discussion. It did not appear that such a formal motion was made, or that the defendant's name was called.

Per DIAS J., order set aside. Plaintiff having failed to make his motion on the 24th, the defendant was in time on the 25th, when the motion was in point of fact made.

D. C. Galle, 40256.

Requisites for obtaining a warrant of arrest, under cl. 1 of the Sch. of Ord. 15 of 1856.

Plaintiff filed his libel with affidavits, as required by the first clause in the Schedule of Ord. No. 15 of 1856, and moved for a warrant of arrest. It was allowed.

Defendant thereupon entered appearance, and moved that the warrant be recalled on the ground of insufficiency of the affidavits filed with the libel.

On the motion being argued, it was contended for defendant that it was not sufficient to state that "the defendant was about to leave the Island," but that circumstances in regard to it must be mentioned, and that in expressing the belief of the "probable cause," the reasons which induced that belief must be detailed.

The D. J. held accordingly, after the examination of the third party who swore the affidavit, which did not, in the D. J.'s opinion, disclose sufficient grounds, on which to base an intention on the part of the defendant to leave the jurisdiction of the Court.

On appeal, the order was affirmed.

D. C. Negombo, 7318.

Where a judgment is on an indivisible contract, the liability of the debtors is also indivisible.

On the breach of an agreement to purchase tobacco from plaintiff, judgment was entered against both defendants, against whom writs issued. The first defendant, paid his moiety to plaintiff and moved for a rule on him to shew cause cause why the the seizure of land belonging to him (1st defendant), should not be set aside, and he himself discharged as to his obligation.

The D. J. ruled that the writ should issue against the 2nd defendant, and on the Fiscal reporting that he had no property, the Court held the first defendant liable for the other moiety also.

On appeal, *Browne* for appellant, cited *Lindsay vs. The Oriental Bank Corporation*, where a general judgment is pronounced against more than one defendant, each defendant is liable only for a moiety.

Grenier for respondent, contended that that decision had been overruled by the Privy Council.* Where a contract was indivisible, the liability was also indivisible, *Voet*, 19.1.1., Pothier *On Oblig.* p. 191. Of course, the paying debtor had his right of contribution against the other co-debtor who was in default.

Affirmed.

D. C. Kandy, 68128.

Proceedings in case of forfeited recognizance.

On an action by the Queen's Advocate upon a recognizance of bail, the D. J. (Mr. Lawrie) mitigated the forfeiture on cause shewn, and disallowed costs in this and another case, but allowed costs in a third case, because the bonds of the sureties referred to the same accused and might have been put in suit in the same action. The D. J. also held: "I see no reason why there should be a formal summons and so much expense incurred in these cases. On the production of the recognizance endorsed by the Magistrate, I would be prepared to write another endorsement on it, addressed to the Fiscal, directing him to cite the parties who had made default to appear, and the cause why the penalty should not be recovered. If they made appearance and showed cause, the Court would dispose of it summarily, without pleadings; if they did not appear, the Fiscal would then be instructed to recover the amount in the ordinary way."

On appeal against so much of the order as disallowed costs, the order was set aside on that point, and case remanded for the D. J. to hear parties, and determine the amount which plaintiff would be entitled to as reasonable costs under the circumstances, and per STEWART J:—The recognizance in this case not being signed by the same bailsmen as in the other cases, a separate suit was necessary. The mode of procedure adopted appears to the Supreme Court to be in accordance with the Ordinance No. 6 of 1855, the 11th sec. of which requires the Queen's Advocate to apply to the Court, and the Court to issue its summons, in conformity with such application. The 12th sec. apparently contemplates a written application. (*Ferdinands* for appellant.)

D. C. Kandy, 270.

1. The husband is the proper person to wind up an estate, which had

After the death of Dona de Silva, the administratrix of her brother's estate, an application was made by the niece of the intestate for letters of administration *de bonis non*, alleging that she and one Louisa Caldera were the sole heiresses at law of the said intestate.

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* See Moore's Reports, vol. 13 p. 401, but the principle referred to by Mr. Browne does not appear to have been questioned. The decision was reversed on the ground that the English Law should govern the case, and not the Roman Dutch Law.—ED.

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But a counter application was made by husband of the late administratrix, who stated that he and the minor children left by the late administratix, were the heirs at law.

been administered by the wife (deceased.)

The main ground on which the niece opposed the appointment of the counter applicant was that the late administratrix was married in diga, and therefore that neither she nor her children were heirs of the intestate.

2. This is so, even where the administratrix had been married in diga, *etc.*

The D. J. held that, as the late administratrix was a low-country woman, the Kandyan Law of Diga and Bina marriage did not apply to her, though a resident of the Kandyan District, and granted letters of administration to the husband.

On appeal, *Langenberg* for appellant : parties domiciled in the Kandyan Provinces are governed by the Kandyan Law, *Kershaw's case*, *Trowell's case* (D. C. Kandy 55070, 21 Sep. 1875), D. C. *Kandy*, 31944. 5th Nov. 1863. That law is operative as a whole or is not operative at all. Portions of it cannot be exempted as having no effect. If the Kandyan law is to rule this case, the late administratrix, as married in diga, is subject to all its incidents. Her husband is not entitled to administration.

Ferdinands, contra : The judgment of the District Court is right, but its reasons are wrong. The husband is the proper person to wind up an estate which had been administered to by the wife. Even if the administratrix had been married in diga, it would not create a forfeiture of her brother's acquired property, as this was, Perera's *Armour* p. 30. In a case of administration, the D. J. ought not to have entered upon the difficult question of domicile. It was premature and—

STEWART J. did not want to hear him further, but agreeing with the learned counsel, affirmed the judgment, but not for the reasons given by the District Judge.

D. C. Kandy, 1038.

On Louisa Rosine Solomons, the widow of the late Frederick Charles Solomons, applying (23rd July 1874,) for letters of administration, Mr. William Henry Solomons, the brother of the deceased, opposed the application, stating :—

1. A will last seen in the custody of the testator, and not forthcoming at his death, is presumed to be destroyed by himself *animo cancellandi*.

(1.) "that the deceased died leaving a last will and testament which was executed by him and his then wife, the applicant, of which the opponent was appointed the executor : which said will is not forthcoming ;

(2.) That the will was executed before Mr. Andreas Van Twest, notary public, who, as the opponent is informed, has the written instructions of the said deceased, according to which the said will was prepared ;"

2. But such presumption

may be rebutted by evidence.

and the opponent prayed that the Court might fully investigate all matters relating to the said will, and upon being satisfied either that the will was lost, or that it was improperly made away with, the Court might allow the opponent to prove the said will by the production of secondary evidence, or that the Court might be pleased to make such order as it should deem meet.

It was admitted that on the 5th July 1871, the deceased executed with his wife a mutual and joint will and testament making disposition of their common estate under certain terms, which were embodied in the following document, in the handwriting of the deceased :—

Frederick Charles Solomons,
Louisa Rosine Solomons.

My brother William Henry Solomons, sole Executor.

On the death of F. C. S. all property to be sold, debts to me to be recovered and proceeds to be divided into equal portions, ½ to be lent out on mortgage of household property in Kandy by my Executor on behalf of my Sisters ; the other ½ for L. R. S. All jewelry to go to L. R. S. All books to my brothers. On the death of L. R. S. all property to F. C. S.

My dear T,

Herewith particulars. Kindly go a-head. Mum's the word.

Yours truly,
F. C. SOLOMONS.

A. Van Twest, Esq.

The deceased was a Proctor practising in Kandy, and having been very unwell for some time, left Kandy for Colombo, and there died within a week after his arrival. His death took place on the 15th July 1874. The evidence shewed that the deceased had spoken about the will as in existence to some of his friends three or four days before he left Kandy, and had alluded to his having cut off his child, a boy of 4 years old, with a shilling, in order that he might make his way up in the world just as he himself had done : in fact, while arranging his papers in the iron safe, just before he left Kandy he had read the will, and restored it to its former position. At that time, he was in very feeble health, unable to move about, and his wife had helped him to a chair in front of the iron safe. There were no traces in the room of his having burnt the will or torn it. He seemed to have taken the key of the safe with him to Colombo, for it was found by a servant under his death-bed, and handed over to the widow, who it seems never parted with the key till she returned to Kandy and saw the safe opened in the presence of Mr. Proctor Beven and her father Mr. Shaw. Mr. Shaw, had gone down to Colombo on a Sunday to see the deceased, but had returned on the Tuesday following before Mr. Solomon's death, of which he was apprised by telegram from his daughter. It was true that he had forwarded a registered letter, containing a *key*,

to his daughter at Colombo, but that was alleged to be the key of the tin box in which some clothes of Mrs. Solomons had been packed up. On the day after the funeral, Mr. Proctor Beven, at the request of the deceased's father, who feared the will would be destroyed, went to the deceased's house and asked Mrs. Solomons to produce it. The iron safe was opened but the will was not to be found, when Mrs. Solomons or her father, Mr. Shaw, suggested that the Manager of the Oriental Bank Corporation should be written to, as it was possible the deceased might have left it there for safe keeping. This too was of no avail.

Such being the main facts of the case, the District Judge considered the evidence of the opponent insufficient to repel the presumption, which the law raised, that a will, last seen in the custody of the testator and not forthcoming upon his death, was destroyed by himself, *animo cancellandi*, and granted letters of administration to the widow.

On appeal, (*Ferdinands* D. Q. A. appearing for the applicant and *Grenier* for the opponent) the Supreme Court referred the case back for further evidence in the following terms :—

"From the conversation and manner of the widow, when she was advised by Mr. Beven to produce the will, it seems probable that she knew nothing of the destruction of the will, and that she believed it was in the iron safe. The place where the key was kept and the means of access to the safe become, therefore, important subjects of inquiry. According to the widow, the deceased always kept the key of the safe with him and brought it with him when he came to Colombo. Hendrick, the servant, says that he picked up this and other keys from under the bed and handed them to the widow. It seems to have been rumoured at Kandy that the father of the widow, when he came to see his sick son-in-law, took with him to Kandy a key, which he returned to his daughter in a registered letter. What key was this? When Dr. Andree mentioned the rumour to Mrs. Solomons, she replied, according to the Doctor, that this was the key of the Ayah's clothes' basket, which was sent to Kandy, as the Ayah wanted some clothes. When examined in Court, she said that the key sent by her father was the key of a tin box of his own, in which the father had packed up and sent some of her clothes which she wanted in Colombo. This seeming discrepancy calls for explanation, and all particulars connected with the key brought by the father should be fully enquired into and tested.

"The precise time when the telegram reached Kandy and was handed to Mr. Shaw, communicating the intelligence of Mr. Solomon's death, should be ascertained, as also when he asked Mr. Woutersz to seal up the things in the house. Did the servants know of the death, before Mr. Woutersz came to the house, and did Mr. Shaw come to the house previously?

"With the view to ascertain the motive of the deceased in destroying or standing by the will, it is necessary to ascertain the precise ages of the children and of the deaths of any of them, and the terms in which he lived with his wife, and the causes of difference which he had with his brother and sisters and his father-in-law. The particulars as to Mr. Solomon's complaint, that Mr. Shaw wanted to go into the room and removed the seal from the iron safe, should also be enquired into.

"The Supreme Court has indicated some of the particulars, which the evidence already taken suggests, respecting which further enquiry should be made. It will be open to the parties to adduce evidence of such further facts as may tend to throw light on the question at issue."

After the second hearing of the case, the learned District Judge (Lawrie) held as follows :—

3. Where the will has, after death of the testator, been irretrievably lost or destroyed, its contents may be proved by secondary evidence, and probate granted of a copy embodying the terms of the will.

I must preface this judgment with an apology for the delay in pronouncing it.

In October 1874, I granted administration to the widow of Mr. Solomons, pending farther enquiry into the loss of the will, because it was necessary that the Estate should be taken care of, and she was the legal administratrix, if there was no subsisting will, and the joint executrix, if there was one.

The Supreme Court, on the 22nd June 1875, affirmed that order and remanded the case for further enquiry. Additional proof was led on the 10th November 1875, but before I had time to write a judgment, the English news papers came out, containing the report of the judgment of Sir James Hannen on *Lord St. Leonards'* missing will. That judgment was pronounced in the middle of November. The circumstances then seemed to me so similar to those in the case before me relating to Mr. Solomons' will, that I thought it right to defer until the case was finally decided. Sir James Hannen's judgment was affirmed by the Court of Appeal on 13th March, and I have now no longer any excuse for delay.

Following that judgment as a precedent, I shall recall the letters of administration granted to Mrs. Solomons, and grant probate of the will.

In *Lord St. Leonards' case*, the Will was last seen on 20th August 1873, while the testator died on the 20th January 1875. The Will had been kept in a locked box, but when that box was opened after his death, it was not found. Lord St. Leonards had been in the habit of talking about his Will, and shortly before his death had said he was satisfied in having settled all his earthly affairs. If any man in England could be said to be a good man of business, Lord St. Leonards was. These and other particulars which I need not allude to, satisfied the Court that he had not

destroyed the Will. Chief Justice Coleridge said "under these "circumstances, it was utterly impossible to suppose that a man "such as Lord St. Leonards was, could have voluntarily destroyed "this Will. The mind revolted from such a proposition." The other judges came to the same conclusion.

Now it seems to me that very similar circumstances exist in this case. The Will was last seen on the day it was executed, 3rd July 1871, Mr. Solomons died on 15th July 1874. It was understood to be kept in a safe in his bed room, but when that safe was opened after his death it was not found. But Mr. Solomons, like Lord St. Leonards, had been in the habit of speaking of the will from time to time and there is evidence, which I see no reason to doubt, that he spoke of his Will as still existing, a very few days before his death, and to carry the comparison farther, I think it may be admitted that Mr. Solomons was an able and experienced man of business, who was not likely to destroy one will without making another, nor to destroy a will he had often spoken of so secretly that he did not say a word even to his wife on the subject, and it is to be kept in mind that the only object of destroying it would be to enlarge the provisions for her and his child. The impression on my mind is that Mr. Solomons did not destroy this Will. There is no proof that he did, there is no likelihood that he did. Before the judgment in the *Lord St. Leonards' case*, I should have held, in the absence of proof, I was not entitled to lay stress on likelihood or probabilities; for that, the law presumed that a Will, last seen in the possession of the testator and not forthcoming at his death, had been destroyed by himself *animo cancellandi*. The judgment in *Lord St. Leonards' case* does not deny that there is a certain presumption, but has greatly weakened it, for it allowed the presumption to be rebutted by comparatively slight evidence.

Proceeding on facts not probabilities, this seems to me a step in the right direction, that the sooner we would get rid of, what are called, legal presumptions, the better: they stand in the way of enquiry into, and decision on, the real facts. Courts of law ought, I think, to presume nothing, but endeavour to ascertain what the facts of each case are. Here attempting so far as I can to follow the decision in *Lord St. Leonards' case*, I find as matter of fact that there is no evidence to show that Mr. Solomons destroyed his will, on the contrary, that down to the time of his death he frequently spoke of it as still existing; that he died, leaving his wife and relations under that belief; and that he was a man of business habits and who was not likely to destroy his will secretly, nor to do so without making another, and I propose to find in point of law that the contents of that Will may be proved by secondary evidence. Before leaving this part of the case, I wish to say that, while I think that there is no evidence that Mr.

Solomons destroyed the Will, I equally think that there is no evidence indeed that it was destroyed by his wife or any of her relations. There has been some personal feeling introduced into the case, and the enquiry almost became, in a sense, a trial of Mrs. Solomons and Mr. Shaw, for destroying the Will: I was in a sense the jury at that trial, and my verdict on the evidence is not guilty.

If secondary evidence can be admitted there can be no better proof than we have here, for, the draft of the Will, corrected by the testator himself, has been preserved, and the notary who executed it has sworn to it. Lord Chief Justice Coleridge in *Lord St. Leonards' case*, and Lord Campbell in *Ooe v. Palmer*, speak of the evidence afforded by a well authenticated draft as being sufficient, when the Will has not been cancelled *animo revocandi*. Indeed the terms of the missing Will are not disputed.*

There is only one other point on which I wish to say a word. It is one to which I adverted in my former judgment, viz: whether Mr. Solomons had power to revoke or cancel this Will.

It was a joint Will by him and his wife; the term joint Will is however given to documents which have different legal effects.

Observations on the nature of joint wills.

A joint will may be no more than the will of two or more persons, written on the same piece of paper. Over such a will, each testator retains the power of revocation or cancellation, which will affect his own part of it only. Even in such a case, none of the testators have a right to destroy the paper, and the tearing or burning of such a will by one, without the consent of the others, must be held to be illegal, though it may be, that the legal effect of destroying it is, that the will of the man who destroyed it is cancelled, while the rest remains operative and can be proved by secondary evidence. But there are joint wills which are more than several wills written on the same paper, and wills which are onerous contracts between the parties, and these, I conceive, cannot be cancelled or revoked by one, without the consent of the other of the contracting parties. Take the case of two brothers making a joint will, under which the younger one engaged to pay the premiums of insurance on a policy on the elder's life, and to pay certain debts, and to leave his property to him on his death, if he died first, on condition that, if he survived the elder brother, he should be his heir and be entitled to draw the sum in the policy of insurance: can it be supposed that the man, whose debts had been paid, whose life had been insured, who had secured for himself the reversion of the property of another, could, secretly and without that other's consent, cancel and revoke the deed, which had secured to the other the *quid pro quo*? so that when he died, it was found he had destroyed the will, and others could step in and get his money: whether this be a good illustration or not, it may serve to show

* On probate of lost will, see recent authorities collected in the last edition of Taylor on Evidence sec. 406.—ED.

what I mean, namely that there are cases in which one of the makers of a joint will cannot revoke, without the consent of the other.

It is not necessary here to decide whether this will of Mr. & Mrs. Solomons was a joint will, or merely two wills on the same paper. But I could not close these observations, without intimating that I by no means think it is clear that Mr. Solomons had power to cancel the will, and that if it should be decided on appeal that my judgment on the facts is wrong and that he did destroy it *animo cancellandi*, the question of his power to do so must be met and decided. The prayer of the opponent, William Solomons, is granted, and he is required forthwith to submit to the Court the copy of the will, of which he desires to get probate. I think costs should be divided, but on this point I am ready to hear parties.

On appeal against this judgment, *Grenier* appeared for the applicant and appellant: *Lord St. Leonards' case*, upon which the judgment of the District Court is based, is not in point. It is widely different from the present case. In *Lord St. Leonards' case*, it was maintained (1) that the will which was frequently seen after its execution, (and to which there were no less than eight codicils in the handwriting of the deceased, undestroyed and produced at the trial) was well considered and equitable; (2) that the diminution of friendly feeling towards the grandson, and the undiminished affection for the son and daughter, rendered it extremely unlikely that the provisions in the will would be interfered with; (3) that there was no declaration by the testator of any intention to revoke; (4) that the testator's statements, indicating a belief in the existence of the will, long after he could possibly have had access to the box which contained it, were conclusive evidence of a non-revocation. In *Solomons' case*, on the other hand, (1) the will was never seen between the date of its execution, on the 5th July 1871, and the testator's death in July 1874, while the only document put in evidence (viz. the Essay on Married Life, marked X) which is in the testator's handwriting, is significantly suggestive of a motive for a revocation, rather than for a confirmation of the will. Further (2) the will was undoubtedly ill-considered and inequitable, in that the testator's only child and son, of tender years, was disinherited. Considering the proved dissatisfaction with his sisters (both parents of whom were living), and also the natural love and affection for his child, for whom he could not but yearn to provide in view of impending death, it was extremely unlikely that the testator would preserve, and not destroy, the will, which made no provision for his only surviving child. (3) The widow, who is not discredited, proves a declaration by Solomons of an intention to revoke. (4) The evidence establishes that Solomons had access to the will, after his statements to Dr. Andree and others concerning it, and indeed on the very morning of the day he left Kandy, when he desired

to be, and was in fact, left alone in the room containing the will. It is further shewn that there was but one key to the safe and that it was always kept by the testator, even up to his death; while in *St. Leonards' case*, a duplicate key was proved to have been left in the testator's escritoire, which could be opened by no less than five keys which were in the house. Under these circumstances, the law to govern a case like the present, is correctly laid down in *Eckersley vs. Platt*, 1 L. R. (Probate) 281, viz. that the presumption that a will which was in the testator's custody until his death, and could not then be found, was destroyed by him *animo revocandi*, must prevail, unless rebutted by clear and satisfactory evidence. *Welch vs. Phillips*, 1 M. P. C. C. 299. The same law has been applied in the case of *Sugden vs. St. Leonards*, where there was a clear rebuttal of the legal presumption, and not "comparatively slight evidence" only, as held by the District Judge. The evidence for the respondent at the second hearing did not carry his case any further than at the first hearing, while the further proof adduced by the appellant was both material and important, and therefore the original holding of the learned District Judge, that the legal presumption was unrebutted, should stand, more especially in view of the distinct finding that neither Mr. Shaw, nor Mrs. Solomons, nor any of their relatives destroyed the will, as suggested by the respondent.

Ferdinands D. Q. A. for respondent: The case is quite parallel to Lord St. Leonards' case, and goes beyond it, in that the will was a *mutual* will of husband and wife, and was admittedly unrevoked by one of the testators, and so far as that one is concerned it is a valid will to this day. To presume destruction by one testator, would imply a breach of trust in him. If the husband destroyed it to benefit his wife and child, what was the necessity of doing so in secrecy, and concealing it from the party benefited? The will was admittedly in existence after the slight disagreement with the sisters, and this could not have influenced its destruction. The testator was, like Lord St. Leonards, a man of methodical habits, fond of speaking of his will, and a lawyer, and as such, he knew the effect of a secret destruction of a will, and consequently would not risk the consequences. There was a *mystery* about the key of the iron safe, which the second inquiry has not cleared up. An intestacy would leave the management of the estate virtually in the father-in-law during the minority of the child, and this will supply the motive for its destruction. All that the Court desired to be satisfied was that this will was not destroyed by the *testator*. This is abundantly evident. He was at the iron safe before he left for Colombo, and then so unwell that he had to be led to it from his bed, and it was not then destroyed. At the second trial there is a *suggestion* that he went to the water closet before he got into his carriage, and consequently that he may have dropped it there.

This was a transparent fiction got up since the last inquiry. If it was necessary to lead him to the carriage, somebody must have accompanied him to the water closet and seen the act of destruction done. In *Podmore v. Whatton*, 13 W. R. p. 106, which was confirmed in *Finch v. Finch*, 36 L. J. Prob. pp. 78, 80, a will not forthcoming was held unrevoked, as deceased was not proved to have had access to it after illness. It was for the applicant to shew that the will was not in existence at the time of the testator's death, 45 L. J. Prob., 8 Moore's P. C. R. 502, N. S. The revocation of a will by burning, tearing or otherwise destroying, as provided by Ord. No. 7 of 1840, following the English Stat. 1 Vict. c. 26 sec. 20, referred only to single wills, and is of doubtful application in the case of destruction by one of a joint will. Mutual wills were unknown to the testamentary law of England. If such wills are destroyed, it should be by both.

Their Lordships reserved judgment and held this day, as follows: —

We have carefully considered these proceedings, and are of opinion that the evidence adduced rebuts the presumption that the missing will was destroyed by the deceased. It will be seen that the conclusion we have arrived at is in accordance with the tenor of the observations contained in the former judgment of this Court, —the views expressed in which, so far as applicable, we desire to be taken as embodied in the present judgment.

The evidence of Dr. Andree established beyond all doubt that the will must have been in existence two days before the departure of the deceased from Kandy—the deceased, in his conversation with Dr. Andree, indicating that he contemplated leaving an executor, consequently a will.

It is not pretended that Mr. Solomons brought his will to Colombo. If therefore he destroyed the document, it could only have been in the short interval comprised in the two days he remained in Kandy.

It is unquestionable that nothing took place (the cause of displeasure with one of his sisters occurred long previously) within these two days, which could in any way account for the deceased secretly, without the knowledge of his wife and joint testatrix, destroying a testamentary disposition, by the cancellation of which their child would be benefited.

It also seems clear, as pointed out in our previous judgment, that the will could not have been destroyed on the day the deceased came to Colombo, no pieces of torn paper being found in the room, wherein he was seated that morning, opposite the iron safe which held the remaining papers. The statement, at the second trial, that he went to the watercloset on this morning (considering his state of health), even if true, does not at all establish that he took the will with him.

Further, it is in the last degree improbable that a practising lawyer, of the methodical habits and precision in business as the late Mr. Solomons, would secretly destroy a formally executed notorial will in the manner suggested, proctors and notaries to any number being within call to draw in due form any instrument of revocation he might wish to execute.

The incident connected with the transmission of the key at this particular conjecture is certainly very remarkable. But having regard to the opinion, we have formed upon the other circumstances appearing in the evidence, we do not deem it necessary to enter further upon this feature of the case.

It also for the same reason becomes needless to consider the point referred to in the latter part of the judgment of the learned District judge, viz., whether the deceased had legally the power to destroy this joint will or his part of it, without the consent of his wife, the co-testator.

Costs of parties to be paid out of the estate.

February, 20.

Present:—HACKETT, C. J. STEWART, J. and DIAS, J.

P. C. Kalutara, 56739.

It is irregular to dispose of connected cases, by taking evidence only in one of them.

This was a case of assault and of resisting the complainant in the discharge of his duty as Peace Officer. His brother, who had been also assaulted, brought another action No. 56737, in the same Court against one of the defendants in the present case. There were three other connected cases. All these were disposed of, by evidence being taken only in the present case No. 56739.

On appeal against an order binding over the parties to keep the peace, the proceedings were quashed as irregular, and each case was ordered to be heard and determined separately. Per STEWART J. (*Grenier* for appellant, *Browne* for respondent.)

P. C. Kalutara, 57018.

A license issued without authority, does not exonerate the liability of persons acting under it, even though in good faith.

The plaint, under cl. 84 of Ord. No. 16 of 1865, charged defendants (seven in number) with having conducted or caused an elephant to be ridden or driven along the road, within the limits of the town, between 4 and 6 p. m, without obtaining a written license granted by the authority of the Governor.

It appeared that the elephant headed a procession of over 200 people, connected with a buddhist religious ceremony, that the accused were merely going along with the procession, and that a license for the purpose had been granted to one Baba Naida, who however was not among the accused in this case. It also appeared

that the complainant and his constables, had, at the direction of the District Judge, warned the defendants not to continue the procession, but that they paid no attention to the warning, relying on the strength of the permit.

The same P. M. (Williams) who issued the license, found the defendants guilty in these terms: "they all seem to have taken part in the procession and are therefore equally guilty. That the 1st and 2nd defendants should be pitched upon as leaders, is very natural from their position and respectability. With respect to the permit put in, no one but the Governor can sign it."

On appeal, *Grenier* for appellant, urged that the licensee was the proper party to be prosecuted. Defendants had nothing to do with the procession but being in it; they neither rode, drove nor conducted the elephant. [STEWART, J.—*that* they did, having taken part in the procession.] Even if they did so, they acted bona fide under the license and were entitled to an acquittal, *P. C. Colombo* 32513, Grenier's Rep. for 1872, p. 1. [STEWART, J. doubted the correctness of the judgment cited and would not agree with it.] That decision is one of Sir Edward Creasy's. If your Lordships will not be bound by it, I must rely on the merits of the case.

STEWART, J. affirmed the judgment, but reduced the fine from Rupees thirty to fifty cents, having regard to the circumstances of this case, and especially to the fact that a permit had been issued though erroneously.

P. C. Kandy, 5058.

The defendants in tis case were acquitted, but the P. M. having no doubt of the fact of a quarrel, which he thought might have been serious in its consequences, bound the complainant and the 1st defendant "in Rupees 200 and securities in same amount for six months."

A P. M. cannot, under s. 104 of 11 of 1868, bind over a party in a sum exceeding Rs. 300, nor for a period exceeding 3 months.

On appeal, this order was altered by the complainant and the 1st defendant being each required to enter into a recognizance in the sum of Rupees 300 for 3 months, that is, the complainant in Rs. 150, and one or more sureties in Rupees 150, and 1st defendant in like sum of Rs. 150 and one or more sureties in Rs. 150. The P. M. under sec. 104 of Ord. No. 11 of 1868, could not bind over a party in a sum, with or without sureties, exceeding Rs. 300, nor for a period exceeding 3 months. Per STEWART J.

P. C. Colombo, 3430.

The appellants had been convicted of retailing arrack, under cl. 26 of Ord. No. 10 of 1844, and sentenced to a fine of Rs. 50 and 3 months' imprisonment.

Under c. 26 of 10 of 1844,

imprisonment cannot be imposed, unless the amending Ord. be cited in the plaint.

On appeal (*Grenier* for the accused), the Supreme Court remitted the imprisonment, as the clause under which the charge was laid, did not authorise the imposition of imprisonment, there having been no reference in the charge to the Ord. No. 8 of 1869.

Modified.

P. C. Balapitiya, 48212.

1. It is irregular, after a plea of not guilty, to convict the accused on an admission by himself or his Proctor.

2. It is no evasion of toll for a passenger to get out of a hackery with his luggage, walk over the bridge, and get into another hackery.

3. A few trifles, besides his wearing apparel, in the luggage, do not convert it into "goods."

The defendant was charged with having evaded payment of toll, in breach of cc. 17 and 19 of Ord. 14 of 1869, in that he came in a hired hackery to the Colombo side of the Balapitiya bridge, close to the toll station, with a tin box, weighing over 31 lbs., and carried it over the toll bar and reloaded it in another hired hackery on the Galle side of the bridge, close to the toll station.

The defendant pleaded not guilty, but on the mere admission of his Proctor, that defendant came in a hackery to the bridge, carried the box through the toll bar and thence engaged another hackery, but had no intention whatever of evading toll, the P. M. found him guilty and sentenced him to pay a fine of Rs. 10.

On appeal, the Supreme Court (17 Oct. 1876) set aside the proceedings as irregular and remanded the case to be tried in the ordinary and proper manner.

On the case going back, the P. M. adopted a mode of procedure, which the Supreme Court, in the second appeal against a conviction, characterised as "even more irregular, for according to the record, the statement made by the defendant's Proctor, as recorded at the first trial, was translated to the defendant, who then made a statement, in which, it is alleged, that he admits every word of the above and wishes the statement to be taken as his own admission. On this, the complainant calls no evidence and the Police Magistrate seeing, as he says, no reason to alter his former decision, pronounces a similar judgment to that formerly given and set aside by the Supreme Court." The case was again remitted to be proceeded with in the usual manner.

The evidence that was taken on this occasion showed that the box contained wearing apparel for the most part, besides a very small quantity of 'el' rice and a few glass panes 10 × 6 ; and the P. M. being of opinion that the box contained clothing *and* goods, and that defendant wilfully evaded payment of toll, sentenced him to pay a fine of Rs. 10.

On appeal, set aside, and per STEWART J :—We do not consider the circumstance of there being a few trifles in the box, which unquestionably contained the defendant's wearing apparel, sufficient to convert the box, from one containing the traveller's luggage, into a box containing general "goods," within the meaning of sec. 19 of Ord. No. 14 of 1867. See Grenier's Rep. 1873 pt. 1 p. 34,

P. C. Kandy, 93455. We are also not prepared to hold that the defendant, a mere passenger, by getting out of the hackery and walking over the bridge and getting into another hackery on the other side, committed a breach of sec 19.

D. C. Kurunegala, 20344.

Prevention of further litigation, under certain circumstances, may be a ground for granting an injunction.

Certain lands, said to belong to plaintiff's minor nephew, had been seized as the property of defendant's execution debtor, under said defendant's writ No. 37640, and had been fixed for sale on a certain day.

Plaintiff, with the sanction of the Court, filed, on behalf of his nephew, a libel, with affidavits, claiming the lands in question, and prayed for an injunction on the Fiscal to stay the sale referred to. The minor had represented the claim to the Fiscal by petition, and had undertaken to enter into an indemnity bond, but the Fiscal, having accepted security from the defendant, signified his intention to go on with the sale.

The D. J. granted the injunction.

On appeal against this order, on the ground that no irreparable loss had been shewn to exist, if the sale were carried out, the Supreme Court affirmed the order, because, under the circumstances, it would prevent further litigation. (*Grenier* for appellant, *Ferdinands* for respondent.)

Affirmed.

D. C. Kandy, 692.

The lawful debts of the intestate are preferent to the claim of the administratrix for the maintenance (out of her own pocket) of the children the said intestate.

In this case of administration, final account had been filed on the 10th June, 1872, and passed by the Q. A., leaving a balance of nearly £200 in favour of the administratrix, for expenses incurred by her, chiefly for the maintenance of the children of the deceased, up-keep of the deceased's properties, and her commission. But the amount was defective, in that one debt at all events, of about £317 with interest, due by the Estate under a judgment, had not been inserted in it.

No steps had been taken by the creditor in that case to recover the money, from the date of the judgment in his favour, viz. August 1867, to July 1875, when, he assigned his interest to A. and B., who, obtained a rule on the administratrix to shew cause why they should not be substituted plaintiffs. The matters were, however, referred to arbitration. The award was given, on the 3rd May following, in favour of the assignees A. and B., making the Estate liable in a large sum.

On the 10th of May, before the award had been made a rule of Court, the administratrix applied for leave to sell two lands by public auction, to pay the debt due to her as administratrix and "other debts." This was allowed and the lands realised Rs. 1768.

In the meanwhile, the award was made a rule of Court, and the question arose whether the administratrix was entitled to enforce her claim in preference to that of the creditor's assignees.

The D. J ruled that the administratrix was entitled to take credit for the necessary expenses of the administration case, but not for the maintenance of the children, in preference to the claimants.

On appeal (*Langenberg* for appellant, *Grenier* for respondent.)

Affirmed.

D. C. Tangalla, 617.

Appeal in a D. C. criminal case.

Against a judgment of conviction entered on the 18th of January last, the accused gave notice on the 27th January, of his intention to appeal, and on the 5th of February, his Proctor (without filing Petition of Appeal) moved that the case might be transmitted to the Supreme Court.

The Supreme Court rejected the appeal, as the defendant did not comply with the R. and O. (21st Oct. 1844) as respects the mode of appealing. He ought to have intimated at once his intention to do so. See *Rules and Orders* p. 144.

D. C. Kandy, 664.

Where an insolvent's conduct has been honest, a total deficiency of assets is no ground for withholding a certificate.

In this case the D. J. ruled that, though he was satisfied that there was no ground for impugning the Insolvent's conduct as an honest trader, yet he (the D. J.) could not depart from the rule laid down by him in other cases, and grant a certificate of conformity to one who had no assets whatever; but that if the insolvent could obtain in writing the consent of the majority of the creditors, he would gladly issue the certificate.

On appeal (*Langenberg* for appellant, *Grenier* for respondent), the Supreme Court set aside the order and allowed a certificate of conformity of the second class to the insolvent, and per STEWART, J :—The learned District Judge states that he has laid down a rule "to refuse to grant a certificate except where there is a fund for distribution among the creditors," and he further adds "an Insolvent who pays nothing in the pound is not in my opinion entitled as a matter of right to get a certificate, however honest his conduct may have been."

No provision as above, however, occurs in the Insolvency Ordinance, and though, where there are no assets, such a fact would properly furnish an additional reason for all the more closely scrutinizing the Insolvent's affairs, it would be manifestly unjust, only because a man has been so unfortunate as to be thoroughly ruined, that he should, on that account, be denied the benefit of the Insolvency laws, which (inter alia) have been specially enacted for the relief of such persons as by misfortune may become insolvent.

But whatever may be thought of the expediency of the law, we are unquestionably bound to follow it as laid down.*

D. C. Colombo, 70075.

A written agreement to refer to arbitration is ineffectual, under the Ordinance, to base an award upon, unless such agreement has been, in the first instance, made a rule of court.

Under a notarial agreement entered into by the applicant (Mr. Bone) with the defendant (Mr. Home), the applicant served defendant as book-keeper and assistant manager in the trade and business of the defendant, but differences of opinion having arisen, the applicant, in terms of the said deed of agreement, referred the matters in dispute to an arbitrator and called upon the defendant to nominate another person to sit as joint arbitrator. On defendant failing to do so, the applicant, as provided by the said deed, referred the matters in dispute to the arbitration of one Mr. Bates, who, after notice to defendant, investigated the said matters in dispute and published an award.

Defendant refused to comply with the terms of the award, whereupon Mr. Bone applied to the Court and prayed "that notice do issue, under Ordinance No. 15 of 1866, clause 14, to the defendant, requiring him to shew cause within a specified time why the award should not be filed and enforced as an award, and, if no cause be shewn to the contrary, the said award might be so filed and enforced."

The defendant *inter alia* pleaded that the plaintiff could not maintain his action, he having failed and neglected, previous to the institution of the suit, to make the submission to arbitration by the said agreement a rule of Court.

The learned District Judge (Berwick) held as follows:—

This case would prima facie come under the 14th clause of the Ordinance as one "where the matter has been referred to arbitration without the intervention of any Court of justice." But although these words are general, it is clear they are not intended by the Legislature to be so and cannot apply to the present cause, because clause 13 makes special provision for the particular case where parties have agreed "by deed or instrument in writing" to a re-

* See also D. C. Colombo, 984, Vanderstraaten's Rep. i. p. 64.—ED.

ference to arbitration. In such cases, a special course is pointed out as that which should be followed: which course expressly requires the intervention of the Court of justice to a "reference" to arbitration.

In this case, the plaintiff ought not to have proceeded to make a "reference" or to obtain an "award" without the intervention of the Court, and to have then applied that the "award" be filed, as he has done. What he ought to have done is this: he ought to have first applied to the Court that the "instrument in writing" or agreement be filed; next (since counsel admitted during the argument that it was not provided in the agreement in this case that the "reference" be made a rule of Court), application should have been made that the agreement be filed. Then the Ordinance requires that, if no sufficient cause be shewn to the contrary, the Court should order such "agreement" to be filed, and should further make an "order of reference to arbitration."

These steps have not been adopted, and the Court has therefore no power to grant the present application, which is, that an "award" which has been made on a "reference," which in its turn has been made without the intervention of Court upon a written agreement, may be filed and enforced. The application must therefore be dismissed with costs.

On appeal, *Browne* for appellant: The 14th clause is independent of clause 13. In clause 13, it is not directed that, on a written agreement to refer, the parties or either of them must and shall, as a condition precedent, obtain a reference from the Court in manner therein provided; but the clause provides only that "application *may* be made" for enforcement of the agreement by the aid of the Court. This provision was necessary and might have been intended to apply to such cases as, for example, are mentioned in the Common Law Procedure Act 1854, 17 and 18 Vict. c. 125 sec. 12, Russell on "*Arbitrators*, 4th edition, p. 63, where an arbitrator originally appointed dies, or refuses, or becomes unable to act, in which cases, the agreement being inoperative of itself, the intervention of the Court becomes necessary. The language of clause 13 leaves the obtaining of the reference optional, and does not make it compulsory. The 14th clause is very wide and general in its terms. At the argument in the Court below, the District Judge admitted that, under this clause, on a *verbal* reference to arbitration, any award may be made a rule of Court, but it appears from his judgment that all awards under *written* references are excepted from that clause, by reason of their having been included in the provisions of the 13th clause. Why should a verbal reference be more favoured than a written reference? There is not such a compulsive inclusion, in clause 13, of all written references as would necessitate their rigid exclusion from clause 14.

Grenier for respondent : The 13th clause refers to a class of cases different from that contemplated in clause 14. [DIAS, J. You put a written agreement on a lower footing than a verbal agreement]. Not so. The law very properly draws a distinction between covenants contained in a deed or instrument in writing and mere verbal agreements as to arbitration. Parties may at any time withdraw from the latter before the arbitration is actually commenced, or by not appearing before the arbitrator and taking part in the proceeding. But under a deed or other instrument one party may compel the other to go to arbitration, and it is therefore that the intervention of the Court is wisely and justly provided for by the 13th clause. This view is further confirmed by the 8th clause of the Ordinance. The word "may" in the 13th clause is not merely permissive but obligatory. *MacDougal* v. *Paterson*, 11 C. B. 755. *Chapman* v. *Milvain*, 5 Exch. 61. *Crake* v. *Powell*, 2 El. & Bl. 210. The latter part of the clause quoted enacts that "if it appear from the agreement that the reference "shall or may be made a rule of Court, the Court *shall* make the "same a rule of Court forthwith." The practical value of this clause is fully illustrated by this case. Home declares that no differences have arisen between him and Bone, and that there is nothing to arbitrate upon. The Court alone can decide this point and determine whether a reference shall be allowed or not. It is different where parties have consented to, and taken part in, an arbitration and an award has been given. In such a case, the course prescribed in the 14th clause should be adopted, and neither party would have reason to complain, an opportunity being given them to shew cause, if any, why the *award* should not be enforced.

Per CURIAM : affirmed.

D. C. Colombo, 1004.

Under s. 97 of the Insolvency Ordinance, the three months' salary of clerks has preference over all the simple, but not the hypothecary, debts of the Insolvent.

On the motion of Mr. Proctor Keith, for the Insolvent's clerk, in the matter of the Insolvency of Messrs. O'Halloran Brothers, that the Assignee be directed to pay the three months' salary due, in preference to all other claims, the learned D. J. (Berwick) held as follows :—

The question raised here is whether the three months' salary allowed to clerks, under sec. 97 of the Insolvency Ordinance of 1853, is to be paid as a privileged claim in preference to all other claims, whether mortgage or other. It is quite clear from the terms of the section that such claim has preference over all *simple debts, not specially protected by either an hypothec or a legal preference.* The question is whether it ranks among *other* privileged debts or among hypothecary debts. I am of opinion that the Insolvency Ordinance has made no change in it

relation to these, under our Common, that is to say, the Civil Law on the subject, although certain modifications thereon have been introduced, in the case of domestic and the like servants and common labourers, by the Insolvency Ordinance, and the Servants' Ordinance, No. 11 of 1865.

Voet says (20.4.36): "After hypothecary creditors come chirographarii [those, to wit, who have no right of hypothec,] among whom, the privileged have preference over the unprivileged, and the more over the less privileged;" and in § 37, he says: "Further, among chirographarii, those are undoubtedly privileged, who are entitled to a right of retention by law or usage, until their claims have been satisfied, as to whom we have treated elsewhere . . . . . And also, independently of Roman Law, [domestic] servants (*famuli ac ancillae*) have in many places a preference for wages, if they were living with their master at the time of his death or bankruptcy, and have not agreed for interest on the wages previously due.' Among other authorities, he quotes Ant. Matthaeus *de Auction.* lib. 1 cap. 20 num. 6, who, upon the important question of the preference of servants and others for wages *etc.*, says: "By the usages of many nations, a preference among chirographarii is also conceded *famulis et operariis*, and generally to those who claim wages for their services; and indeed some even give precedence to the wages *famulorum domesticorum*, over hypothecary creditors; also to advocates, medical men, proctors, surgeons, apothecaries suing for their salaries and the price of their drugs. Those who have supplied aliment to a debtor are also preferred to others, viz., who have sold meat and drink that was necessary, and not for luxury. There are others who might be included in the list, but as these vary according to the customs of districts and provinces, the reader must be referred to the usages and statutes of the several places." There are special reasons for the preference given to the professional persons above mentioned, which would not apply to ordinary clerks; and as these latter cannot be classed among the *famuli et operarii* (excepting perhaps in the case of a domestic clerk or amanuensis,) I am not aware of any authority in the Civil or Dutch Law for giving them any preference over or among *hypothecary* creditors.

The changes made by our local law are as follows:—As to labourers, artificers, menial and other like servants, the Insolvency Ordinance has retained the preference which our Common Law gave to them over their non-hypothecary creditors, but has restricted this preference to wages for three months only; while Ordinance No. 11 of 1865 has moreover given to them a special and preferential mortgage over the landed estate or property on which the servant *etc*, was employed, for the wages due for the same period. With respect to clerks, the Insolvency Ordinance has given them a preference which it may be reasonably doubted

whether our Common Law accords to them; at the same time, giving them no greater preference than is given to servants, which, as we have seen, is limited to one over other *non-hypothecary* creditors only, and also restricting it (as in the case of servants) to salary for three months.

Mr. Proctor Keith's motion, on behalf of the Insolvents' clerk, must therefore be refused.

On appeal this order was affirmed. (*Langenberg* for appellant, *Ferdinands* for respondent.)

February, 22.

Present:—HACKETT, C. J. STEWART, J. and DIAS, J.

P. C. Kalutara, 55782.

The defendant was charged with having sold a quantity of arrack contrary to the tenor of his license, in breach of cl. 26 of Ord. No. 10 of 1844.

One may sell arrack by fancy measures, if only they are in conformity with the usual standards of capacity.

The P. M. found that the defendant sold the arrack for 8 cents, instead of 6 cents, and sold it by a fancy measure, to wit, a tumbler, with a private mark on it with sealing wax, instead of by a given standard measure, "such as the gallon or some well known part thereof, say the gill or half gill."

On appeal, *Grenier* for appellant, contended that neither the money nor the quantity of arrack sold, had been seized by the complainant, that the evidence for the defence proved the arrack to have been sold for 6 cents, and not 8 cents, and the glass to have contained 1/39 part of a gallon, and that 39 such glasses at 6 cents would make a gallon equal to Rs. 2·34, in terms of the license. There was nothing to prevent defendant from selling arrack by fancy measures, if only they were in conformity with the usual standards of capacity.

The judgment was set aside and it was held as follows:—

The Supreme Court does not agree with the Police Magistrate in thinking that it was incumbent on the defendant to use any particular measure, but considers that he would have complied with the Ordinance if he sold in any measure, the price for the quantity contained in which, was not more than that allowed by the Ordinance. The Supreme Court is further of opinion that it is not clearly shewn by the evidence that 8 cents, and not 6 cents, was the sum paid by the informant. †

† See also Grenier's Rep. 1874, p. 65, P. C. Kandy, 99453.—ED.

D. C. Colombo, 70833.

Requisites for a writ of sequestration.

Summons having issued in an action on a promissory note, the Fiscal of Colombo made a return of non est inventus, "as the within named defendant is said to have gone to Jaffna," and the Deputy Fiscal of Jaffna also made a return of non est inventus, "as the above named defendant is absent at coast."

Plaintiff filed these returns with his own affidavit, stating that the defendant was indebted to him, that he had no security, and that he was aware that defendant was not in Ceylon, but had gone to India, and moved for a mandate of sequestration.

The District Judge wanted "further information," against which order plaintiff appealed.

Ramanathan for appellant, said that the requisites of sec. 15 of R. and O. p. 64, had been attended to.

Per STEWART J : Set aside and plaintiff's motion allowed. Sequestration to issue to such value as the District Court shall direct. The plaintiff having complied with the requisites provided by the rules for obtaining process of sequestration, is entitled to the remedy applied for.*

D. C. Colombo, 1544.

Mode of service of summons in cases of forfeited recognizance.

This was a case of forfeited recognizance. On the plaintiff (the Queen's Advocate) filing the summons reported to have been duly served, and moving that a warrant of distress (see form G. Ord. No. 6 of 1855) do issue, the D. J. disallowed the motion in these terms :—

"The summons has not been personally served on the defendant as required by the Ord. No. 4 of 1867, cl. 30, sub sec. 5. It is urged that 6 of 1855 dispenses with personal service, but see the words "process" and "court" in the section cited from the Fiscal's Ordinance, and the definition of these words in the interpretation clause."

On appeal, ***Ferdinands*** for appellant : Under cl. 11 of Ord. No. 6 of 1855, summons may be served personally *or* left at his usual place of abode. This provision is not repealed by Ord. No. 4 of 1867, as subsequent statutes instituting new methods of proceeding, do not repeal methods of proceeding ordained by preceding statutes, without negative words, ***Dwarris*** on Stat. p. 674, also *Conservators of the River Thames vs. Hall*, 3 L. J. C. P. 315,421.

Set aside and plaintiffs motion allowed. The service of summons on the defendant is sufficient.

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* See also decision of the Supreme Court, per MORGAN, C. J. dated 24th August, 1875 in *D. C. Colombo*, 67918.—ED.

February, 27.

Present :—HACKETT, C. J. and DIAS, J.

P. C. Matale, 13573.

Plaint : that the defendant did, on or about the 22nd December last, wilfully and knowingly seduce and take a cooly named Adaki, who was bound by a contract to serve her employers on Makulasse Estate, and he did further wilfully and knowingly harbour and conceal the said Adaki in Ambokka Estate, after she absented herself from her said employer's service, without leave, in breach of cl. 19 of Ord. No. 11 of 1865.

A Police Magistrate cannot split up an offence under the same clause of an Ordinance into two charges, and punish the accused, under each of them, by sentences, which in the aggregate exceed his jurisdiction.

The P. M. found him guilty of the "two offences, viz. (1) seducing a servant from the employ of her master, and (2) harbouring and concealing a servant, who has absented herself without leave from her employer's service," and sentenced him to 3 months imprisonment at hard labour and Rs. 5 fine, on *each* of these charges, making an aggregate punishment of six months' imprisonment and Rs. 100 fine.

On appeal, (*Langenberg* for appellant, *Dornhorst* for respondent), the Supreme Court amended the sentences by altering them into one sentence of a fine of Rs. 50 and imprisonment with hard labour for 3 months ; the magistrate, by severing in his judgment the two charges laid in the plaint in this case, had in effect adjudged the defendant to pay a fine of Rs. 100 and to be imprisoned at hard labour for six months, a sentence which he had no jurisdiction to impose.

P. C. Panwille, 15816.

Recovery of fines.

In this case of assault, defendant was found guilty by the P. M. and fined Rs. 5, "in default of immediate payment, defendant to be imprisoned at hard labour for 14 days."

On appeal, the additional order was set aside. If the fine is not paid, the course pointed out by Ord. No. 6 of 1855 should be followed.

March, 1.

Present :—STEWART, J. and DIAS, J.

C. R. Maturatta, 2404.

A judgment of the Gansabawe does not affect civil rights.

Plaintiff prayed for a settlement of his water right in a certain tank, and also claimed damages arising from a denial of this right by the defendants, who claimed the tank as their own, and pleaded that plaintiff had no right to take water from it.

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At the hearing of this case, it transpired that plaintiff had made two complaints against the defendants to the village council, which had inquired into the question as to whether the plaintiff was entitled to participate in the water of the tank, and, being of opinion that he was so entitled, had fined the defendants.

The Commissioner thereupon thought himself concluded from going into the question of the ownership of the tank set up by the defendant, "in as much as the defence, in order to succeed, must endeavour to reverse the decision of the Gansabawe, which would amount to an appeal against its decision, which, according to cl. 24 of Ord. No. 21 of 1867 is not lawful." The Court, therefore, assuming the existence of the right in favour of the plaintiff determined the amount of the damages which he had suffered from defendants' interference, and entered up judgment for Rs. 12.

On appeal, *Grenier* appeared for defendants and appellants: The civil rights of the defendants are not prejudiced by a finding against them in a criminal case. [DIAS J. the finding of the Gansabawe is final and no appeal lies therefrom.] How can a criminal case affect civil rights? The precedent set up is most dangerous, as, if it were upheld, important rights to valuable lands, would be disposed of in this summary manner by a petty tribunal, without any hope of redress. The object of cl. 24, in shutting out appeals, is to carry out the sentence of the village council with promptitude. If appeals were allowed, the redress would come too late, when the matter complained of had irretrievably damaged paddy cultivation. The legislature never intended to give such importance to the Gansabawe as was suggested by the Commissioner. If that was its intention, it would have expressly provided for it. In the Service Tenures' Ordinance (4 of 1870), there is a special provision in cl. 10, empowering Commissioners to enquire into certain claims, and making their decision on the subject final and conclusive.

Their lordships set aside the case and sent it back to be decided on the merits, and per DIAS, J: The decision of the village council has not the effect which the Commissioner has given it, and the defendant should have been allowed to prove his title to the tank in question. Costs to abide result.

March, 6.

Present:—STEWART, J. and DIAS, J.

P. C. Kalutara, 54013.

Irregularity of proceedings,

This case of assault was partly heard on the 11th May last, when the P. M. thought fit to postpone it till the 16th June, to

enable the complainant to be ready with the rest of the witnesses. The record did not shew what appeared on that day, but on the 11th August following, the P. M. acquitted the defendants, it did not appear for what reason, as no evidence whatever was taken.

On appeal, the Supreme Court sent the case back for trial, enjoining the Magistrate to make more regular entries on the record.

P. C. Balapitiya, 48351.

Per Supreme Court: "The proceedings in this case are irregular. The Police Magistrate, after hearing the evidence for the prosecution, then took up the counter case No. 48352, the evidence given in which, he treated as evidence in this case. This was an irregular mode of procedure, and the judgment of conviction is therefore set aside and the case remanded for trial in the ordinary and proper way." Per ANDERSON C. J. 15th December, 1876.

1. It is irregular to treat evidence given in one case, as evidence in another.

On the case going back for rehearing, the evidence shewed that the first complainant had built, and was living, in a house, which the defendants were alleged to have entered forcibly. They had entered it during the absence of the first complainant, who on his return attempted to re-enter and take possession of the premises, when a mutual assault followed.

2. Assault on provocation, how far justifiable.

The Police Magistrate held that the defendants, having been in possession at the time (rightly or wrongly, he did not inquire), it was the complainant who provoked the assault by his attempt to enter, and accordingly he acquitted the defendants.

On appeal, set aside and defendant adjudged guilty and fined Rupees ten each. The assault has been clearly proved, and the provocation which the defendants have received, does not wholly exonerate them from liability, though it may go in mitigation of the punishment, per DIAS J.

P. C. Colombo, 4125.

The defendants in this case who were charged, under the 16th clause of Ordinance No. 14 of 1865, with using their carts without having obtained licenses for the current year, &c. pleaded guilty and were severally sentenced to pay a fine of Rs. 25 each.

No carrier, under the Ordinance, may ply his cart, before obtaining a license.

But having discovered, subsequently to the sentence, that they had been charged before the 40 days allowed under the 6th clause had fully expired, the defendants appealed.

Ramanathan for appellants contended that the 16th clause must be read subject to clause 6, which allows them 40

days from the commencement of the year, in order to obtain the license. Till these forty days had fully elapsed, the defendants could not be said to have infringed the Ordinance. They would be chargeable on the forty first day, but not on the fortieth day. A penal Ordinance must be constructed strictly and in favour of the parties accused. [DIAS J. It is true, 40 days are allowed for obtaining the license, but until such license has been obtained, no man can ply carts for hire. The 16th clause is absolute and does not depend on clause 6.] If that opinion were final, we should be responsible for the Government Agent's neglect. Supposing defendants had made a *bona fide* application to the Government Agent, and from the great number of licenses which he had to issue, he was unable to attend to our request, should defendants be deprived of their daily earnings? That surely could not have been the intention of the legislature. The 16th clause should therefore be read subject to the 6th clause. No offence was committed on the fortieth day. [DIAS J. If the Governmnt Agent does not issue the license, you may have an action for damages against him. Supposing the defendants never intended to obtain the licenses, are they to be allowed to ply carts for forty days, without payment to the Government? And STEWART J., it is to meet such cases of hardship that Magistrates are given a discretionary power of punishment.]

Per CURIAM : the fine being excessive, is reduced to Rs. 5.

D. C. Kandy, 28756.

1. The widow of a Kandyan, who left issue by another bed, has a life interest only in half the estate of the deceased; and such life interest may be prescribed against, whether the lands were the acquired or paraveny property of the deceased husband.

The circumstances under which this case were this day brought under the review of the Supreme Court, are briefly these :—

The plaintiffs, as sons of one Naida Durea, deceased, claimed certain lands, which were alleged to be in the forcible possession of the defendant, who, in his answer, denied that the first three plaintiffs were the issue of the deceased, and while admitting the remaining four as such, stated that, as son of Naida Durea by his first wife Rankirri, he was entitled to the lands in question and had possessed them for over 10 years.

Polwattegedere Punchee, as widow of Naida Durea, intervened in support of the plaintiffs' claim.

The D. J. held that the intervenient was the wife of Naide Durea ; that the plaintiffs were the issue of that marriage ; that the lands were possessed by them up to the forcible possession by the defendant ; and that the prescriptive possession of the defendant, even if satisfactorily proved, could not prevail or have any effect against the life interest of the widow, the intervenient,

2. A co-heir may prescribe against another co-heir in ten years.

3. Circumstances under which the Supreme Court will allow an appeal, notwithstanding the lapse of time.

The Supreme Court set aside (21st June, 1864) this judgment, and remanded the case for further hearing, on the ground that the D. J. had not adjudicated on the question, whether defendant was the son of Naide Durea by another wife, nor on the question of possession. "The widow, the intervenient, if there was issue by another bed, would only have a right over half the estate of Naide Durea. For the nature of her right, see 662½ *Ratnapura*, decided by the Supreme Court, 3rd December, 1861. Prescription, if satisfactorily proved, would prevail against it. If these lands were the acquired lands of Naida Durea, and not paraveny, the widow might have such a possessory right in them as to make her a tenant for life, and to make the plaintiffs mere remainder-men. In that case, prescription would not run against the plaintiffs, though it might run against the intervenient during her lifetime. Enquiry should be made as to whether these were the acquired or paraveny lands of Naida Durea, and in every point of view, it is material to ascertain whether defendant is Naida Durea's son by another marriage."

On the second trial, the D. J. was of opinion that the defendant had failed to prove that he was the son of Naida Durea and Rangkiria, and also his prescriptive possession. The lands in dispute were admitted to have been paraveny lands, and as there was no proof of the widow (the intervenient) having been provided for by her late husband, the D. J. following the judgment of the Supreme Court in *D. C. Ratnapura* 662½, held that the intervenient was entitled to maintenance and support, for which purpose she was to receive from the heirs of her deceased husband, Naida Durea, either a portion of the produce of his paraveny lands or the temporary possession and usufruct of a suitable portion of the said lands.

The Supreme Court set aside (4th October 1867) this judgment also and ordered the case to be heard de novo. Mr. Berwick held (28th November, 1867) that the plaintiffs and defendant were alike the children of Naida Durea, but as defendant had failed to prove 30 years adverse possession against the co-heirs, in terms of the Supreme Court decision in *D. C. Colombo* 38,329, June 21st 1866, the plaintiffs were entitled to half, and the defendant, as their step brother, to the other half, of Durea's estate.

No appeal was taken, but on the 29th September 1875, the defendant obtained permission from the Supreme Court to file his petition of appeal against the finding of Mr. Berwick, on the ground that Mr. Berwick's judgment was based on a misapprehension on the law of prescription in respect of co-heirs.

Upon the lodging of the appeal, the plaintiffs petitioned the Supreme Court to permit them also to appeal against Mr. Berwick's

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finding as to paternity, based as it was on evidence taken at the second trial, and read, but not heard, by Mr. Berwick.

Grenier and *Van Langenberg* for defendant and appellant, *Cayley* Q.A. and *Ferdinands* D.Q.A. for plaintiffs and respondents.

Per STEWART J. set aside; the decision in this case proceeded on a misapprehension of a judgment of the Supreme Court, the then District Judge of Kandy [*Mr. Berwick*] holding that, according to that judgment, a co-heir could not acquire, as against a co-heir, a title by prescription, although the party has been in undisturbed possession of land for the full period of ten years; a construction entirely erroneous, as pointed out by the Supreme Court in *C. R. Batticaloa* 9655, Vanderstraaten's Reports p. 44.

In view of the result of a subsequent case between the parties in respect of other lands (connected case No. 51506), in which the judgment was based on the ground that adverse possession for ten years was sufficient to give a prescriptive title, it appeared to the Supreme Court that it was only equitable, notwithstanding the lapse of time, to give the defendant in the present case (No. 28756) an opportunity of appealing from the judgment against him, in order that he might be placed, if the facts permitted, in no worse position than his co-heirs and co-litigants.

We were pressed by the learned counsel for the respondents to remand the case for another hearing. But having closely perused the proceedings, comprising no less than three trials, we are of opinion that there is no need for further protracting the litigation between the parties, which has already extended over a period of more than 20 years, the evidence adduced appearing to us satisfactorily to establish a title in the defendant by prescriptive possession.

It is accordingly decreed that the claim of the plaintiffs be dismissed and that judgment for the lands in question be entered for the defendant, the defendant being hereby declared to be disentitled to damage or compensation from the plaintiffs, in regard to their possession of the said lands up to the notification of this judgment.

Parties to bear their own costs.

D. C. Colombo, 68826.

Landing agents and carriers, and their responsibility on the *terms* of a

In this case, action was brought to recover Rs. 219, value of 48 pieces of regatta prints, stolen out of a case, which plaintiffs had employed defendants to land from the S. S. "Viceroy" on the 3rd December 1875 and to warehouse. The libel averred that the defendants did not so convey and warehouse the case as they had contracted to do, whereby, and by reason of their negligence

and want of due and proper care, in the charge and custody of the bale, this portion of their contents was stolen.

contract entered into.

The defendants in their answer denied that they were employed by the plaintiffs, and said they were employed by the Wharf and Warehouse Company, to land the case, and therefore denied their liability to the plaintiffs; and they further pleaded that by the terms of their contract, they were not liable for any loss or damage which might happen to goods and packages, entrusted to them to land, after the landing of the same was reported to the consignees, and that they, having reported the landing of this case to plaintiffs on the 4th December, and the loss or damage having occurred on the 9th December, they accordingly were not liable.

The defendants' landing report (Document A), referred to in the judgment of the District Court, is as follows:

No. 1 Boat Company.

Colombo Wharf, 3rd December, 1875.

Landed from the S. S. "Viceroy" from London, and warehoused for Messrs. Darley, Butler and Co.

P.S.—Immediate attention is kindly requested to damaged or bad order packages; the Company will take every precaution and care of goods and packages entrusted to them to land or ship, but will not hold themselves liable for any damage after they are reported.

(Then follow the marks, numbers, &c., of the packages).

The learned D. J. (*Berwick*) delivered judgment in these terms:—

Mr. Layard does not press the plea of their being no contract with plaintiffs, and I think there was no room whatever for further contending that there was no contract between the defendants and plaintiffs, the moment document A. was read.

On the facts I infer and find (1) that the loss in question was incurred by theft, committed between the 3rd and 9th days of December, while the goods were lying in the outer verandah of the Queen's Warehouse, and (2) that they had been "received" there by an officer of the Customs on the 3rd, and were in the custody of that department: received *there* in a part of the Queen's Warehouse premises; and being in a part of the Customs Warehouse premises, after receipt by the Customs officer, I consider they were in the custody of the Customs and "*warehoused*," warehoused in the sense intended by the use of the word in document A.

To condescend to a familiar illustration, goods are received in my premises, when they are received by me or by my servant in my verandah or in my compound, although not yet taken inside my house or locked up in my stores. Indeed, I presume there are many articles of import which it would be exceedingly in-

convenient, if not impossible, to take actually inside the Queen's Warehouse, and which must almost of necessity be left outside in the Warehouse premises, and still must be considered for all revenue and other purposes as "warehoused."

I hold therefore that the defendants have fulfilled their contract as carriers, and that the theft occurred after they had been delivered at the Warehouse.

It does not follow thence that they are not liable for the theft; for the question remains who is culpable, if there be culpability, for their not having been taken into a place of security or being better watched. Primarily the Customs authorities will be culpable for the want of careful watching and custody, unless they have directly thrown this risk upon the importer or his agents the landers. And I could hardly doubt, after perusing certain clauses in the Customs Ordinance, that, if the customs officers had directed the importer or his agents or coolies to carry and store these goods *inside*, where they would have been safe under lock and key, and if the coolies or their employers, from carelessness or any negligence, left them outside, the Customs department would be free from all liability. In this case there is no evidence, excepting a few words of Rodrigo, upon which I cannot place the slightest reliance, that the custom house had directed the coolies to take the goods inside. Then was there any obligation on the defendants, the landing agents and carriers, to take them inside spontaneously, and failing their doing so, to be responsible to their employers, the plaintiffs, for negligence?

I doubt very much whether this question of the *culpa* be in issue. The libel certainly charges negligence, but negligence before fulfilment of contract, because it says "want of due and proper care in the charge and custody." Now I hold that these goods were "warehoused" and out of the defendants' charge and custody on the 3rd December; I mean they were in the custody of the Customs at the time they were stolen. I think defendants' legal custody had ceased, when Rodrigo received them. I do not say whether, as between the Customs and the importers (plaintiffs), the *culpa* did or did not lie with the latter, in failing to see them locked up. I give no opinion upon that. Neither do I say, as between the landing agents and the importers, whether the blame was with the landing agents or not. All I do say is that the particular *culpa* which led to this loss arose after, and not before, the goods had been warehoused; and therefore that the defendants are not properly sued for this loss, upon that contract to deliver and warehouse, which has been made the cause of action.

Plaintiffs are nonsuited with costs.

On appeal, (*Browne* for appellants, *Layard* for respondents,) the judgment of the Court below was affirmed.

D. C. Kegalla, 2965.

Evidence of adoption, in Kandyan law.

Plaintiff, as adopted son of Pina Veda and Lapee, deceased, claimed certain lands which defendants kept possession of, as the only heirs and next of kin of the said Pina Veda and Lapee.

A third party also intervened in the case, claiming the lands in question as another of the adopted son of the said deceased's.

The plaintiff in support of his allegation adduced oral evidence and put in evidence deed A and case No. 694 of the District Court of Ratnapura, in which the suposed adoptive parents had admitted that they had a 'son' named Unga (or the plaintiff.) These circumstances, it was contended, added to the fact that the deceased had no children, and that the plaintiff was their nephew, proved the adoption. But the learned D. J. held as follows :—

The evidence has not established the alleged adoption of either plaintiff or intervenient. It is to say the least, weak and insufficient, to constitute adoption. The deed letter A. which is virtually a deed for assistance, speaks of plaintiff, not as adopted, but *as if* adopted Hence the reason for the deed, a fact at once shewing that there could have been no real adoption, but only a mere bringing up (but not from childhood, which is important) of the plaintiff, and therefore also the allusion to him in the former case of Pina or Lapee as their son. Case dismissed with costs.

On appeal, affirmed, (*Grenier* for respondent.)

March, 8.

Present :—STEWART, J. and DIAS, J.

P. C. Kalutara, 56981.

1. A nuisance committed on the border of a *foot-path*, used by the public, though to a limited extent, is punishable under sec. 1 and 7 of cl. 1.

2. The evidence of a witness in one criminal case is not

On a charge, under the 1st and 7th sec. of cl. 1 of Ord. No. 15 of 1862, of keeping the dwelling garden at Kathirkanunde in a most filthy and dirty state, the defendants contended that certain preliminary steps (by way of notice &c., under cc. 10 and 11), which ought to have been taken by the P. M. and other officers, who had the conservancy of the town, were not taken ; and secondly, that the nuisance was not in any road, street or public thoroughfare, but in a private garden, through which a private path led to the sea-shore.

The P. M. over-ruled these objections and found the defendants guilty.

On appeal, *Grenier* contended that the house or garden did not border on a road or public thoroughfare, but was a quarter of a mile away from it. There was only a private path leading from it, through the garden, to the sea-shore. [DIAS, J. it was a

public foot-path which was habitually used by the occupants of 15 or 20 families in the neighbourhood.] That made it merely a right of way in favour of a few persons. It could never be considered public. [DIAS, J. yes, public, in a limited sense.] The Ordinance No. 10 of 1861 defines what a thoroughfare is, and in a Badulla case a nice distinction was drawn by Sir Edward Creasy between *via vicinalis* and *via publica*. [DIAS, J. clause 1 of the Nuisances Ordinance has the restrictive words "road or street" before public thoroughfare, which clearly shews that the intention of the legislature was to include a case like the present.]

admissible in another.

The Supreme Court accordingly held that the above objections were properly over-ruled, but set aside the judgment and remanded the case for re-hearing, because the P. M. had acted upon the evidence of a Mr. Schokman, Medical Practitioner, who had been examined in another case, but not in the present one.

March, 9.

Present :- STEWART, J. and DIAS, J.

D. C. Matara. 28412.

Where a party proceeds in the District Court, when he might have proceeded in the Court of Requests, the D. J. has a large discretion in awarding costs

A certain land had been partitioned between the parties in this case. The plaintiff complained that the first defendant was encroaching on the eastern side, and the second defendant on the north-western side, of the portion allotted to her, the plaintiff, and she joined both defendants in the present action of trespass.

The defendants pleaded *inter alia*, that plaintiff could not maintain the suit, as she had improperly blended two separate causes of action.

The D. J. in entering up judgment for plaintiff, ruled that the encroachment having been on one and the same land, there were not two causes of action to blend.

On appeal, *Ferdinands* D.Q.A. for appellants, took the same objection that had been taken in the Court below. By consolidating the actions, defendants had been unnecessarily dragged into the District Court, whereas if an action was brought separately against each defendant, costs would have been less. [STEWART, J, cited Ordinance No. 11 of 1868 cl. 76, and said that such a case should be left to the discretion of the District Judge.]

Affirmed.

D. C. Tangalla, 188

Security for appeal to Privy Council.

Mr. H. Van Cuylenberg, Proctor for appellants, moves to tender securities in appeal to Her Majesty the Queen in Council, with an affidavit of their worth.

Motion disallowed. The security ought to have been completed within three months of the date of the petition for leave to appeal. Such petition was presented on the 27th November last: the security should therefore have been perfected on or before the 27th February last

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March, 13

Present :—STEWART, J. and DIAS, J.

P. C. Kalutara, 55475.

Their Lordships held as follows :—

Neither advocates' nor proctors' fees come within the reasonable expenses of the defendant, in false and frivolous charges.

Taxation of the bill of costs amended. It is ordered that the defendant's expenses recoverable from the complainant be reduced to Rs. 10.08.

The Supreme Court does not consider the fee paid to an Advocate for appearing in Colombo in appeal, a charge comprised in the expenses to which a complainant is made subject by section 106 of the Ord. No. 11 of 1868, that section rendering the complainant only liable to the payment of the reasonable expenses of the defendant, and of such of his witnesses as shall have attended at such prosecution.

The Proctor's charges in the Police Court are also disallowed. See judgment of Supreme Court in *P. C. Colombo*, No. 21824, July 13th, 1875.

P. C. Matale, 13781.

Arrack Ordinance.

Affirmed. The defendant (who was acquitted) was charged with selling brandy by retail in breach of cl. 26 of Ord. No. 10 of 1844, a clause relating to the sale of arrack and rum, and not of brandy.

P. C. Colombo, Lrs. W. X.

Abusive language sufficient to sustain a charge of disorderly conduct.

Complainant charged defendant with having behaved in a riotous and disorderly manner in the public street, in breach of cl. 2 of Ord. No. 4 of 1841, and stated "the defendant is a woman. She abused me."

On appeal against a refusal of process, per STEWART, J: set aside and ordered that process do issue. The examination of the complainant does not disclose that the abuse was not of such a character as to render the defendant punishable for behaving in a disorderly manner in the public street. See Beling's Rep. pt. 2 p 105, *P. C. Mullaitivu*, 5636

P. C. Colombo, 4197.

Charge of bribery, beyond the jurisdiction of Police Courts

Plaint: That defendant did tender a bribe of Rs. 10 to police sergeant 457, for the release of one Ebram, who was detained on a charge of theft.

Per Supreme Court: Proceedings quashed. The Police Court had no jurisdiction to try this case.

Bench of Magistrates, Galle, 5049.

Lapsed appeals from Police Courts will not be entertained under any circumstances.

On defendant's appeal petition being rejected in the Court below, on the ground of his having filed it a day behind time, he begged leave of the Supreme Court to appeal, filing an affidavit, stating that the one day's delay arose from ignorance in calculation.

But the Supreme Court rejected the appeal, and, per STEWART J.—The petition of appeal not having been delivered within the prescribed time, the appeal cannot be entertained. There is no provision for admitting appeals from the decisions of Police Magistrates, after the lapse of the time appointed for appeals being lodged.

March, 15.

Present :—STEWART, J. and DIAS, J.

D. C. Colombo, 66920.

The land-lord's lien over the *invecta et illata* is effectual as against the claims of the other creditors of the tenant, so long as the goods remain in the premises of the landlord under a judicial sequestration obtained by him.

On a writ of execution sued out by Messrs. Strachan & Co., against Mr. Peterson, the Fiscal seized certain goods, which included a printing press, as belonging to the defendant, in his place of business at Chatham Street. A little before the commencement of the sale, on the 30th October last, the defendant's landlord appeared, and, in the presence of intending purchasers, preferred his claim for rent of the said premises, and insisted upon his right of lien over the articles seized. Mr. Herbert (the Government Printer) became purchaser of the printing press, with full knowledge and notice of such claim and lien. The Fiscal accepted payment of the purchase money on the 4th November, but refused to grant a permit for the delivery of the press, pending the settlement by Court of the landlord's objection to its removal from his demised premises.

In the meanwhile, the landlord obtained judgment against the defendant for the rents due, and had the articles in his premises judicially seized; whereupon Mr. Herbert moved for notices on the Fiscal and the landlord, to shew cause why the printing press should not be delivered over to him, the purchase money having been already paid.

The learned District Judge *(Berwick)* discharged the rule, being of opinion, that the landlord, by the judicial seizure of the articles in question, under his own writ, had perfected his lien over them and was entitled to detain them from the purchaser. The judgment was as follows :—

There seems no reason to doubt that the sale was valid, the contract of purchase complete, and that the legal ownership of the printing press is now vested in the purchaser. It does not follow necessarily that he has full and absolute power over his property. He stands in the place of the execution debtor who was owner, but under whom the goods were subject to the landlord's lien, *provided that lien be made effectual while the goods remain in the premises*. The landlord contends that his lien was made so effectual in two ways, and that he is entitled to insist upon having the goods remain where they are, until his debt is discharged.

Certain affidavits have been put in on his behalf and are uncontradicted, which shew that his claim was openly advanced to the Fiscal before the sale was concluded, and upon this the question arises whether a mere verbal claim to a Fiscal is such a sequestration or *preclusio* as suffices to make the lien effectual. I am clearly of opinion that it is not. The seizure or *preclusio* must be by "public authority," that is to say, must be by a judicial proceeding. But in the second place, it is contended that they were seized under a writ of execution, at the landlord's instance, for the same rent on the 20th of November, three weeks after the sale indeed, but while the goods were still in the premises. There can be no doubt at all that this was a seizure by and under "public authority," and I am of opinion, it fully perfected the landlord's right to lien, and that he is entitled to insist on the goods not being removed by their owner, whoever he may be, until his claim is satisfied.

This may at first sight seem hard, but the answer is that it was the owner's fault in not having removed them after their purchase, before this seizure was made. It is said that the Fiscal refused to allow their removal, on account of the verbal claim, which I have held insufficient. Well, then, possibly, he has a right of action against the Fiscal, but the Fiscal replies by putting in a letter of 2nd November, by which the opposition to the removal was withdrawn, and told the purchaser that he might remove them at his own peril. To this I believe the purchaser's counsel rejoins some other fact, but in deciding the naked question before me, the Fiscal's liability to damages is not in question. The naked and only relevant facts are these : while goods, subject to hypothec, were still on the premises, the landlord made his lien effectual and perfected it by a judicial seizure under public authority. The rule must therefore be discharged with costs.

On appeal, *Ferdinands*, D. Q. A. (*Browne* with him), appeared for appellant: the right of tacit pledge in favor of the landlord is ineffectual, if the *invecta et illata* are not sequestered by public authority, while they are still in his premises, Voet *ad Pand.* 20, 2, 3. Vanderst. Rep. p. 103, Grenier's Rep. for 1874, pt. 3. p. 33. In the present case, the landlord's inchoate right had not been, on the day of the sale, perfected by a *preclusio*. The sale to the appellant is accordingly valid. The landlord may exercise his right of detention over the articles sold, but as soon as their value is tendered to him, his right becomes inoperative altogether. It is said that the landlord made a judicial seizure of the goods in question on the 20th of November, but at this time, it had ceased to be his tenant's property by the sale, and further, when the goods were in the possession of the Fiscal, he, for the time being, must be considered as the agent of the appellant. The landlord's subsequent seizure, therefore, is of no avail, and does not prejudice the original absolute right of the purchaser to remove them. How does the removal of the goods affect the landlord, if the proceeds thereof is paid to him? By his Proctor's letter to the Fiscal, dated 30th October, he claims the *proceeds* of the sale by way of preference, and yet, when the proceeds are given him, he does not accept them, but would have the goods themselves. If the landlord has still his lien, it is competent for this Court to annul the Fiscal's sale and place the parties *in statu quo*.

Grenier, contra: It is true that the goods were sold and their price paid to the Fiscal on behalf of the landlord, but so long as they have not been removed from his premises or delivered over to the purchaser, the right of the latter will not prevail against the right of the landlord, 1 *Bell's Principles*, 37, 3 *Burge's Commentaries*, 595. The landlord's Proctor certainly claimed the proceeds of sale, but that letter was never acted upon by the Fiscal, because it reached him two hours after the sale. The letter ought, therefore, to be thrown out of consideration. The case thus depends on the right of lien vested in the landlord. That right entitles him to detain the goods themselves, until his whole rent is paid.

Cur. adv. vult.

And their Lordships held this day as follows:—Affirmed, but the sale of the printing press in question is set aside, and the appellant declared entitled to be refunded the purchase money which he had given to the Fiscal. Appellant will pay the landlord's costs. The execution creditor will pay his own costs.

The Supreme Court agrees with the learned District Judge that the landlord had not done any act whereby he had parted with his lien. It was urged for the appellant that, by the letter of

the 30th October, the landlord had elected to take the proceeds sale. This letter seems to have reached the Fiscal some hours after the sale, and the Fiscal in his return of 6th November, says the terms proposed in that letter were not accepted by the Proctor for the execution creditor. We do not therefore think that this letter can be taken as amounting to an election on the part of the landlord to waive his lien and look to the proceeds sale for payment. It further appears, from the affidavits filed in this case that the landlord appeared at the sale, and, in the presence of the appellant and others, asserted his right of lien. Under these circumstances, we think all the parties should be left in the same position as they were in before the sale.

D. C. Kalutara, 29882.

Though a Mahomedan wife, is entitled to preference in respect of her *maggar* and *kaicooly*, yet if she chooses to sleep over her rights, she may not pursue her claim, to the detriment of *bona fide* mortgagees of her husband.

Plaintiff, a Moorish wife, had obtained judgment in two cases, instituted in the District Court of Colombo, against her husband, for *maggar* and for money paid. She now alleged that her husband, who was the third defendant in the present case, mortgaged, with the view of depriving her of the fruits of her judgment, certain lands of his, without consideration, to the first and second defendants, and she prayed that the said mortgage bond might be cancelled and declared void.

In answer, the 1st & 2nd defendants denied they were guilty, and charged the plaintiff and her husband with collusion.

Plaintiff's evidence was to this effect: I have been married to 3rd defendant for 25 or 26 years. Last year I brought a case against him to recover my *maggar*, as he had ruined me. He borrowed from Mr. Charles Dias £250, mortgaging two lands of mine. One was my dowry property, and the other I got by will from my grandfather. To pay Mr. Dias, we had to sell the mortgaged property for £600. Shortly after that it was I brought the case against my husband for the recovery of the *maggar*. When the case was ripe for trial, he consented to judgment. He also consented to judgment in the other case I brought against him for the recovery of the money I had paid to Mr. Dias. I do not know whether the 1st and 2nd defendants lent any money to my husband.

It was also proved that, prior to the institution of the case for the recovery of the *maggar*, plaintiff's Proctor served the 3rd defendant with a notice, stating she would dispute any alienation or encumbrance he made on his property.

The learned District Judge, without calling upon 1st and 2nd defendants for their defence, held as follows:—whatever the conduct of plaintiff's husband may have been, plaintiff has utterly

failed to affect the 1st and 2nd defendants with fraud, and the 3rd defendant has utterly failed to prove want of consideration for this bond. Plaintiff is non suited with costs.

On appeal, *Ferdinands* (*Grenier* with him) for appellant, cited *D. C. Colombo*, 3107, Testamentary, 28th February, 1871, and *D. C. Colombo*, 54376, Vanderstraaten's Rep. p. 196, also p. 163. *Langenberg* appeared for respondent.

The Supreme Court held as follows :—

Affirmed. We agree with the learned District Judge in the view he has taken of the case.

As regards the argument founded on the decision in *D. C. Colombo*, 3107, Vanderstraaten's Rep. pt. 2, p. 163, we are of opinion that that case only establishes the right of a Mohamedan wife to preference in respect of her *maygar* and *kaicooly* upon the unencumbered effects of her husband.

If a woman chooses to allow her *maggar*, which she may have claimed immediately after her marriage, to remain indefinitely with her husband, she cannot be permitted to pursue her claim to the detriment of *bona fide* mortgagees, whose money probably had been obtained for the purposes of both husband and wife.

P. C. Colombo, 1872.

Under cl. 37 of the Licensing Ordinance, the fine, where there are several co-defendants, is personal to each.

The following judgment of the Supreme Court explains the facts of the case :

The question in this case is as to the construction of the 37th section of the Licensing Ordinance, No. 7 of 1873, and whether, where there are several co-defendants, the fine may be single and personal to each, or whether the amount of fine must be restricted to a single sum, as for one offence.

We think that the fine is personal to each defendant, inasmuch as the concluding part of the section increases the fine in the case of a subsequent conviction, and unless the fine is to be considered personal, it would not be possible to adjust the computation, where, say, one defendant has been previously convicted and another not.

The present case is distinguished from that reported in Beling and Vanderstraaten, *P. C. Balapitimodera* 23132, and other previous decisions, those cases being in respect of infringement of Ordinances, making no distinction between first and subsequent offences. Per STEWART, J.

March, 16.

Present:—STEWART, J. and DIAS, J.

D. C. Jaffna, 2828.

Misjoinder of action or parties.

The libel alleged that plaintiff was the owner, by right of purchase, of seven parcels of land, all lying in one block, and stated that the defendants (eight in all), wickedly intending to injure his rights, executed two deeds amongst themselves, the first deed executed by 7th defendant in favor of the 6th defendant upon an improper schedule granted by the 8th defendant, and the second deed executed by the 2nd, 3rd & 4th defendants in favour of the 1st defendant upon an illegal schedule granted by the 5th defendant; and the plaintiff further stated that the defendants were in illegal possession of the lands in question, and prayed that the said deeds might be cancelled and he himself quieted in possession.

On the case coming on for trial, the District Judge thought that there was either "a misjoinder of action or a misjoinder of parties: the two deeds, which the plaintiff seek to set aside, are *separate and distinct*, granted for *different* parcels of land, in *different* years, and upon *different* schedules. The two sets of defendants and the Udeyars, who granted the respective schedules, ought to have been separately sued. They have no *joint* interest in the two sets of lands, and cannot therefore be jointly sued. And in the case of the Udeyars, who granted the schedules for the execution of the two separate deeds, how can they be joined in one action?" The District Judge accordingly non-suited the plaintiff.

On appeal (*Cayley*, Q.A. for appellants, and *Ferdinands*, D.Q.A. for respondents), set aside and remanded for hearing and decision, and per STEWART, J.—The claim of the plaintiff is not only in respect of one block of land, but further, the defendants are charged with acting in concert, in disturbance of the plaintiff's alleged right. The defendants [who moved the non-suit] to pay the plaintiff's cost in appeal.

March, 20.

Present:—STEWART, J.

P. C. Colombo, 4620.

In a charge of false pre-

Plaint:—That the defendant did on the 2nd of March, 1877, at the Fort, receive the sum of Rs. 5, under false pretences.

tences, the plaint must set out the false pretences, which should be as of an existing fact.

The following evidence was led :—

Complainant sworn: I engaged the defendant to take some cattle to Demetagoda. I advanced him Rs. 5. I told him that I would give him another rupee on delivery of the cattle. I returned at 10 P.M. to the Wharf. I found the cattle still at the landing place. The defendant was absent. I found him at the Wharf, he denied that he had received any money. Afterwards he took the money out of his pocket and handed it to the constable. [Here defendant states, " it is a fact that I received the Rs. 5 from the complainant, I did not know to what place to take the cattle. I waited."]

P. C. 644. affirmed: I arrested the accused. He gave back the money to the complainant and said the complainant's boy who was to have shewn the way ran away. The accused was found by the complainant about 10 yards from the cattle.

On appeal against a conviction, set aside, and per STEWART, J.—The plaint should set out the false pretence. But even supposing that the objection on this ground is too late after conviction, the evidence does not establish that the false pretence was of an existing fact by means of which the money was obtained.

All that is proved is, that the defendant received five rupees from the complainant, in order to take some cattle to a certain village, and that the defendant did not take them.

The pretence that a party would do an act, which he did not mean to do, is merely a promise for future conduct, and not a punishable false pretence.

Set aside.

P. C. Matale, 13783.

A kangany employed in the Fiscal's Office, does not come within cl. 11 of the Labor Ordinance.

Plaint: that the defendant, being a cangany employed in the Fiscal's Office, Matale, did on the 16th instant, wilfully disobey the orders of the complainant and grossly neglect his duty, in that he did, on the said day, fail and neglect to lock the door of the said office, and to order a peon to mount guard there, in breach of cl. 11 of Ord. No. 11 of 1865.

On appeal against a conviction, set aside and per STEWART, J : the defendant, who is described as a cangany employed in the Fiscal's Office, is charged in the plaint with neglect of duty in breach of the Ordinance No. 11 of 1865.

Under the repealed Servants' Ordinance, No. 5 of 1841, it was held by the Supreme Court (Beling and Vanderstraaten's Report, p. 29 *Ratnapura P. C.* 1376), that a peon of the District Court did not come within cl. 7 of that Ordinance.

This clause is substantially re-enacted in the Ordinance now

in force, and though to some extent made of wider operation, it is not so extended as to include such an employé of a Public Office as the defendant.

See Interpretation Clause of Ordinance No. 11 of 1865, according to which the word "servant" shall include "menial domestic and other *like* servants ; pioneers &c. and other labourers &c. employed in agricultural &c. or other *like* work."

P. C. Jaffna, 12391.

J. P. proceedings cannot be put in evidence in a P. C. case.

On appeal against a conviction on a charge of theft, the finding was affirmed, and per STEWART, J :—The production of the J. P. case, though with the consent of the parties, was irregular. But the depositions having only been put in as a matter of form and in no way acted upon, and full evidence having been adduced at the trial independently of the J. P. proceedings, this judgment is affirmed.

P C Batticaloa, 11016.

The proceedings in this case were quashed in the following terms :—

Under sec. 37 of the Licensing Ordnance, arrack is not an "intoxicating liquor."

The plaint charges the defendant with exposing "intoxicating liquor" for sale at his tavern after 8 o'clock in the night, in breach of sec. 37 of Ord. No. 7 of 1873, and sec. 4 of Ord. No. 22 of 1873.

The evidence adduced shews that arrack was sold. "Intoxicating liquor," however, as defined by the interpretation clause of the former Ordinance, does not include arrack.

The charge might have been laid under sec. 13 of Ord. No. 4 of 1841 and section 4 of Ordinance No. 22 of 1873.

P. C. Kegalle, 41512.

The Timber Ordinance, its scope.

The Police Magistrate acquitted the defendants of the charge of felling timber trees from crown land (in breach of cl. 5 of Ord. No. 24 of 1848 and cl. 2 of Ord. No. 4 of 1864), on the ground that the land appeared to be periodically cultivated, and that the jungle was not 20 years old.

The Deputy Queen's Advocate (*Ferdinands*) appeared for the complainant and appellant, but could not support the appeal.

His Lordship agreed with the learned counsel, and in affirming the judgment, observed that there appeared to be a general misconception as regards the scope of the Timber Ordinance, which was intended to check the felling of timber trees on crown

lands, and not to apply to cases where parties trespassed in crown land and carried on *chena* cultivation, and preparatory to such cultivation destroyed trees when clearing the jungle. The trespass should be dealt with under the Ord. No. 12 of 1840, and not under the Timber Ordinance. The Supreme Court had invariably declined to deal with cases of this kind under the Timber Ordinance.

P. C. Matale, 13688.

Timber Ordinance. Plaint defective

Plaint :—that the defendants did, on &c., fell timber on a land belonging to Her Majesty, to wit on the land called Pongalapitya, without having previously obtained a license, in breach of cl. 2 of Ordinance No. 24 of 1848.

The evidence shewed that the trees felled were one of them jack, and the other a liana tree. The defendants claimed the land as their own, but failed to prove their title.

On appeal against a conviction, the proceedings were quashed and per STEWART, J:—The charge is substantially defective, in that no trees whatever are specified or described in the plaint.

C. R. Batticaloa, 8275.

Where the action is for the recovery of a penalty, damages must be proved.

The 3rd defendant, the daughter of the first two defendants had been married to the plaintiff, and on the occasion of the dissolution of the marriage, (which was a Moorish one), the defendants, by their bond dated 21st September, 1870, agreed with the plaintiff, for a consideration, not to claim from him maintenance for his three children (by the 3rd defendant), nor to institute any action against him, for six years from the date of the bond. The plaintiff now claimed from the defendants the "penalty" of rupees 52, as stipulated, for having broken through the agreement and instituted an action in the Police Court for maintenance against him before the lapse of the said term of six years.

The Commissioner gave judgment for plaintiff.

On appeal (*Grenier* for respondent), set aside: the amount referred to in the agreement being in the nature of a penalty, damages should have been proved. No damage at all appearing to have been sustained by the plaintiff, the claim is dismissed. Parties to bear their own costs.

P. C. Ratnapura, 1307.

A plaint for pelting

Plaint:—that the defendant did on the night of the 6th instant, at Ratnapura, maliciously and wilfully pelt sones to the roof

of the complainant's boutique, in breach of the Ord. No. 6 of 1846, clause 19.

stones defective, if malicious injury is not laid.

On appeal against a conviction, *Layard* for appellant cited *P. C. Matara, Lr.* B., Grenier 1873, pt. i. p 61; the plaint did not allege that the defendant did commit injury to any real or personal property.

STEWART, J.—quashed the proceedings for the above reason.

C. R. Kandy, 3174.

A person having a claim against an execution creditor, who had made a levy in execution under a judgment in his favour, cannot prevent him from drawing the mo-

This was in the nature of a claim in execution. The claimant instituted case No. 68999 in the District Court against the execution creditor in the present case, and pending the decision of the District Court case, seized the money realized under the present case. The question for decision was, whether a person who has a claim against an execution creditor can prevent him from drawing money recovered by him, until that claim is adjudicated upon.

The commissioner held, that the claimant could not, under the circumstances, offer any opposition to the drawing of the money.

It was contended on appeal for the claimant, that the question raised above was analogous to that decided by the District Judge of Kandy in 56869.*

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* The following is the judgment in *D. C. Kandy*. 56869, delivered on the 10th Feb., 1873, by Mr. CAYLEY. It did not go up in appeal.

The plaintiff in this case obtained judgment against the defendant in July last; the plaintiff in 57760 (hereinafter called the claimant) brought his action against the same defendant in August last and has not yet obtained judgment. Plaintiff sued out his writ of execution and certain immoveable property of the defendant was sold, plaintiff himself becoming the purchaser. The claimant has put in a claim for concurrence, and objects to the plaintiff being credited with the full amount of his judgment towards the payment of the purchase money; and the plaintiff accordingly obtained a rule on the claimant to shew cause why his claim to concurrence should not be set aside and the plaintiff credited with the full amount of the purchase money, which is less than the amount for which he has obtained judgment. Neither the plaintiff nor the claimant is a secured creditor.

The question to be determined is whether the claimant, who has not obtained judgment, is entitled to concurrence; and if so, whether he can claim it at this stage and prove his claim in this case, before he has obtained judgment in the case which he has brought against the defendant.

I cannot find from the authorities, to which I had access, that a claimant must be himself a judgment creditor, before he can claim concur-

ney realized, so long as his own claim is not adjudicated upon.

The Supreme Court held as follows:

The case referred to in the petition of appeal was in respect of a claim against a party against whom judgment had been obtained, and proceeds realized by sale of his effects in execution. The Supreme Court can find no authority for applying the principle, on which that decision proceeded, to the case of a plaintiff who, having recovered judgment, has made a levy in execution, but against whom neither judgment nor execution has been obtained. Per STEWART, J.

C. R. Jaffna, 5553.

A fee due to a public officer, for

The Commissioner upheld the plea of prescription under the 9th clause of Ord. No. 22 of 1871 against the claim of the plain-

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rence with judgment creditors to the proceeds of an execution. Vanderlinden (p 492, Henry's translation) does not confine this right of creditors, but speaks generally of all creditors; so do Voet (xx. 4. 10), Matthaeus (*De Auct.* 1. c. 17) and Thomson (*Instit.* I. 455). Indeed, in practice, it not unfrequently happens that the claim of the mortgagee to the proceeds of a sale in execution is allowed, although no judgment has been obtained on the mortgage; and it appears from Voet and Matthaeus that creditors may come in at any time, even after the proceeds of the execution have been distributed; and that the creditors, who receive the money, are required to give security to meet the claims of other persons, who may subsequently prove their right to preference or concurrence.

In the present case, the debt alleged, to be due to the claimant is not admitted by the plaintiff, but Mr. Vanderwall (for plaintiff) stated that he was prepared with evidence to prove it. It would be extremely inconvenient, whenever a claim is made to the proceeds of an execution, to have to decide summarily upon the merits of another, perhaps several other actions, which ought properly to come on for trial in their regular course, I shall accordingly refuse to hear any evidence in the present case, and following the course prescribed by Voet and Matthaeus, I shall require the plaintiff, before he is allowed credit and to draw the balance proceeds, to give security to satisfy the claimant's demands for concurrence, when the latter has obtained judgment in the action which is now pending. I shall allow the claimant two month's time (subject to further extension, if such should be found necessary) to establish his claim in that action. A judgment in that case will probably be obtained by default, and I shall give the plaintiff an opportunity of impeaching that judgment, if he is so advised, before the claimaet's right to concurrence will be allowed. Each party to pay his own costs of the rule. It will accordingly be ordered that the plaintiff be entitled to credit as prayed, and to draw the balance proceeds, if any, when giving adequate security to the court to satisfy the claimant's claim for concurrence, in the event of that claim being established within 2 months of this date, or within such extended time as the Court may appoint.

tiff, which was for the recovery of Rs. 40 being money due to him as *Udeyar* for having granted a schedule of security in an administration case.

The Supreme Court held as follows:—

This is an action brought by a public officer for the recovery of a fee alleged to be due to him for discharging certain duties required by Ordinance. The Supreme Court does not consider such a claim to come within the provision of "work and labour" contained in sec. 9 of Ord. No. 22 of 1871. See *C. R. Matale*, 3027, Grenier's Rep. 1874, p 8, where it was held that the claim of a clerk for wages, does not fall within the above section. The respondent to pay costs of appeal. Remanded for hearing.

discharging duties imposed upon him by Ordinance, is not prescribed under sec. 9 of Ord. 22 of 1871.

C. R. Kandy, 3764.

This was an action brought on the 11th September, 1876, for rent due on a lease. The first year's rent had been paid, and the plaintiff now sued for the second year's rent, viz. Rs. 80, commencing from 18th October, 1872. The lease conditioned a payment of rent once in 4 months, in failure whereof the lease was to be declared cancelled, and the lessor entitled to resume possession of the demised premises.

The defendant pleaded payment and prescription, but the Commissioner entered up judgment for the amount claimed.

On appeal (*Layard* for appellant, *Van Langenberg* for respondent), amended by the amount of the judgment being reduced to Rs. 26.26, the sum payable for the last period of four months of the lease. The rest of the claim is prescribed by sec. 8 of Ord. No. 22 of 1871, more than three years having elapsed between the accruing of the cause of action, and the institution of suit.

Prescription against a sum due on a lease, conditioning payment of rent by instalments.

C, R. Galle, 52902.

Defendant pleaded that plaintiff could not recover on his promissory note, (which was one for Rs. 18.50, dated 25th January, 1876, and made payable a month thereafter), on the ground that the note was for less than Rs. 50 and for more than 28 days, and also on the ground that on the face of the note there were only the names and not the residences of the witnesses.

The Commissioner over-ruled these objections and gave judgment for plaintiff.

On appeal, it was contended that the promissory note was illegally drawn and endorsed to plaintiff, contrary to the provisions

17 Geo. 3. c. 30, &c., restraining negotiotion of bills and notes for a limited sum, suspended by 26 & 27 Vict. c. 105, &c.

of 17 Geo. 3 c. 30. ss. 1, 2, 4, made perpetual by 27 Geo. 3. c. 16. *C. R. Colombo*, 28578 was also cited.

Affirmed. The operation of Act 26 & 27 Vict. c. 105 suspending 17 Geo. 3. c. 30, has by Act 39 & 40 Vict. c. 69 been continued to 31st December, 1877.

D. C. Batticoloa, 15.

An application in an insolvency case to set aside a sale, neither in the course of the suit, nor by the Fiscal, ought not to be entertained.

The creditor of the insolvent in this case, moved on the 11th December last, that the sale of a certain land, belonging to the insolvent, be set aside, on the grounds that it was not held at the time it was announced to be held, and that it did not fetch as much as it was worth.

On the motion being discussed and evidence heard, the D. J. ruled, on the 2nd February following, that the said sale be confirmed, as no evidence of irregularity had been proved.

On appeal by the creditor against this order, the Supreme Court disallowed the motion of 11th December and condemned appellant to pay all costs. The sale in question was not one in the course of a suit, nor a sale by the Fiscal. The application ought not to have been entertained. (*Ferdinands*, D.Q.A. for appellant, *Grenier* for respondent.)

P. C. Chavakachcheri, 28482

Arrack Ordinance.

Set aside and defendant adjudged guilty and fined Rs. 10. The plaint seems to the Supreme Court to be sufficient. A permit or license is required both under the 39th and 40th sections. If the defendant came under any exception, the onus was on him to prove his exemption. See sec. 65 of Ordinance No. 10 of 1844.

C. R. Gampola, 31898.

No appeal from voluntary reference.

Appeal rejected. No appeal lies from a judgment on a voluntary reference to arbitration, where the judgment, as in this case, is according to the award.

D. C. Jaffna, 17515.

Where a writ of execution had been ordered, but the defendant dies before the sale, his

Judgment had been obtained against the defendants in November, 1868, and property sold in execution on the 30th August, 1876. The widow of the 1st defendant now moved (on the 16th December following) that the proceedings, including the sale, be quashed for irregularity, in as much as, *inter alia*, the 1st defendant had died in July, 1876.

The D. J. quashed the proceedings.

On appeal, *Grenier* for appellant, it was held as follows :

Set aside and motion of 16th December, 1876, disallowed. The above motion is substantially to the same effect as that of 26th September, 1876, which in the opinion of the Supreme Court was properly refused.

death is no ground for abating the suit.

Execution having been duly ordered before the death of the 1st defendant, his subsequent death before the sale furnishes no ground for holding the suit abated. See Archbold's Q. B. Pract. vol. 2 p. 819, and cases there cited.

D. C. Negombo,

Grenier for respondent.

Judgment set aside and judgment of guilty entered against the 1st, 2nd, 3rd, and 5th defendants who are sentenced each to pay a fine of one rupee.

1. Assault justifiable in self defence provided no more violence was used than was necessary.

The Magistrate finds that there was a mutual fight between the parti s, and that blows were exchanged. Assuming that this view is correct, the defendants who are proved to have struck the complainants would not legally be the less guilty of an assault unless it had been shewn (and that was not done), that they acted in self defence and used no more violence than was necessary to save themselves from their assailants.

2. Manner of conducting a case.

With respect to the remarks made by the Magistrate on the complainant's proctor, the Supreme Court can lay down no special or detailed rule as to the way in which a proctor should conduct his client's cause. The Magistrate, on the one hand, should remember that he is bound to hear patiently, and even with forbearance, the witnesses called and examined before him, and on the other hand, a proctor should equally bear in mind that the time of the public is not to be needlessly wasted, and that, consistently with his duty, he should neither examine nor cross-examine at greater length than is necessary, nor call more witnesses than such duty warrants.

If the evidence be relevant, the Magistrate has no power to refuse to hear the witness, and so far as the Supreme Court can form an opinion, no more witnesses were called in support of the charge than would seem to have been required.

3. Appeal petition to be signed by whom

The petition of appeal in this case is signed according to the rules by the appellant. But the Supreme Court has to point out that if the appeal petition was drawn by the complainant's proctor, or any other proctor, the proctor who drew the document ought to have appended his name to it. No proctor should abstain from putting his name to any pleading he has drawn or advised.

Set aside.

D. C. Galle, 35916.

The Cassa Marittima of Genoa .....Plaintiffs.

vs.

Emanuele Schiaffino.....Defendant.

Messrs. Kleinwort, Cohen Co., plaintiffs in civil suit, No. 35989.....Claimants.

Under what circumstances a bottomry bond, given by the Master of a ship, upon the ship and cargo, will be a good hypothecation as regards the cargo.

This case was carried on appeal to the Privy Council, and the judgment of the Supreme Court delivered on the 15th day of June, 1875, was reversed in the judgment appearing below and pronounced by the Lords of the Judicial Committee of the Privy Council, on the 18th day of January, 1877.

The facts which are material to the case are as follow :—

The Italian Barque *Maria Luisa*, of which the defendant Schiaffino was the Master, left Rangoon on or about the 28th June, 1872, with a cargo of 10,700 bags of rice, shipped at that port by Messrs. Gerber, Christien & Company and consigned to Messrs. Kleinwort, Cohen & Co. of London, to whose order, as indorsees of the bill of lading, the same was deliverable at Queenstown, Plymouth, Falmouth or Coves. The ship *en route* put in at Trincomalie in a leaky state, it was alleged, in September, 1872; and the defendant two days afterwards telegraphed to the shippers at Rangoon of his arrival there and "that the ship was leaking," without however giving any particulars or asking for any instructions. On the 19th September, the shippers, having in the meanwhile heard nothing further from the defendant, telegraphed to him at Trincomalie for information as to the damage to the cargo, but were favoured with no reply.

They subsequently wrote on the 1st November, 1872, on the same subject, and although the defendant in his evidence stated that he had replied, no copy of his letter had been produced or the contents thereof proved. But whatever the purport of the correspondence led might have been, the defendant admitted that he did not intimate therein or in any subsequent letter his intention to hypothecate the cargo, although the ship remained at Trincomalie until and after the 12th March, 1873, when he executed a bottomry bond over the ship and cargo in favour of the Cassa Marittima of Genoa. The cargo having been sold on the 30th August, 1873, the question arose as to the disposition of the proceeds, which were claimed by both the Cassa Marittima and the consignees, and on the 23rd October, 1874, the District Judge of the District Court of Galle upheld the claim of the consignees, and repelled that of the mortgagees, on the ground that the master having failed to communicate with the shippers of the cargo,

who, as far as his knowledge went, were also the owners, the bottomry bond as regards the cargo was invalid and void in law. The Cassa Marittima, however, having appealed, the finding of the Court below was reversed by the Supreme Court and the claim of the consignees dismissed with costs for the reasons given in the judgment of the said Court dated the 15th of June, 1875.

Grenier (*Layard* with him) appeared in the Supreme Court for Kleinwort, Cohen & Co., the consignees, and *Ferdinands* for the Cassa Marittima, the mortgagees.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kleinwort, Cohen & Co. vs. The Cassa Marittima of Genoa, from the Supreme Court of Ceylon: delivered, January 18th, 1877.

PRESENT:

Lord Blackburn.
Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

The question in this case is whether a bottomry bond given by the master of the "Maria Luisa" upon the ship and cargo to the respondents, who are a company at Genoa, is a good hypothecation as regards the cargo. The way in which the case came before the Lower Court for decision was this: an action was brought upon the bottomry bond by the respondents against the master of the ship, and judgment was given in favour of the respondents in that action. A second action was brought in the Lower Court by the present appellants, the owners of the cargo, against the master, for what they contended was an unauthorised sale of the cargo. In that action judgment was also given for the plaintiffs, the present appellants, but an order was made that the proceeds of the cargo should be sequestrated until the question as to the validity of the bottomry bond could be decided, and the rights of the plaintiffs, as owners of the cargo, and of the respondents, as the lenders upon the bottomry bond, could be ascertained. It is unnecessary to detail at any length what the proceedings were, but in this latter proceeding the question which has been already stated arose.

It is admitted that the law is now settled that a master cannot bottomry a ship without communication with his owner, if communication be practicable, and, *a fortiori*, cannot hypothecate the cargo without communicating with the owner of it, if communication with such owner be practicable.

The law has been thus laid down in several cases which have

been referred to at the Bar, and it is only necessary to take notice of one or two of them. One of those cases was the "*Bonaparte*," in which the judgment was delivered by Lord Justice Knight Bruce. In that judgment, according to the corrected report of it in the subsequent case of the "*Hamburg*" (Browning and Lushington, 273), it was said :—"That it is an universal rule that the master, if in a state of distress or pressure, before hypothecating the cargo, must communicate, or even endeavour to communicate, with the owner of the cargo, has not been alleged, and is a position that could not be maintained; but it may safely, both on authority and on principle, be said, that in general it is his duty to do so, or it is his duty in general to attempt to do so." Then follows the sentence which was not correctly reported in the original report of the "*Bonaparte*." The passage is this:—"If, according to the circumstances in which he is placed, it be reasonable that he should—if it be rational to expect that he may—obtain an answer within a time not inconvenient with reference to the circumstance of the case, then it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt."

This duty was affirmed, and the cases referred to, in a recent decision of this Committee in the case of *The Australasian Steam Navigation Company* v. *Morse*, Law Reports 4, Privy Council, 222.

The latest case on the subject, the "*Onward*," 4 Law Reports, A & E. 38, is in its facts extremely like the present, and there the law was thus stated by Sir Robert Phillimore. He cites the language of this tribunal in a judgment delivered by Sir John Jervis in the case of the "*Oriental*," 7 Moore, P. C. 398, to this effect:—"There was not only the power of communication, but an absolute communication made. It was made, and properly made, at the moment of the accident, communicated and received within a few hours, and by a means of communication in existence which must be taken to be the proper mode or channel of communication, not to send money, as suggested, because the electric telepraph will not carry money, but to send a communication on the one hand, and receive an answer on the other. Why, here bein · the means of communication, and the authority of the master being founded on the impossibility of a communication, their Lordships are of opinion that there was no authority in the master to raise money on bottomry." (p. 411). Sir Robert Phillimore's observations following that citation are: "In the opinion, therefore, of this Appellate Court, whose decisions are binding u; on me, a mere statement of injuries done to the ship and of the consequent necessity of repairs which would entail considerable expense, unaccompanied by a statement that a bottomry bond must be had

recourse to, was not a sufficient communication to the owners." In this view of the law their Lordships entirely agree.

It is not necessary to go at any great length into the facts of the case, but those which are material to be considered are as follow: the cargo, which was of rice, was shipped on board the "Maria Luisa," at Rangoon. The bill of lading stated that it was shipped by Gerber, Christien & Co., who carry on business at Rangoon. The cargo is stated to be "10,700 bags new Rangoon cargo rice," and the destination of the ship was "Queenstown, Plymouth, Falmouth or Cowes" for orders, and the rice was deliverable to order, that is, to the order of the shippers. It seems that the "Maria Luisa" sailed from Rangoon in July 1872, and it may be taken that in the course of her voyage she met with bad weather and received considerable damage. On the 7th September, 1872, she put into Trincomalie, and there, according to the evidence of the master—and he is supported to some extent by other witnesses—the vessel required very considerable repairs, she wanted re-coppering, new sails and other things. For the purposes of the present decision—although their Lordships do not intend to affirm the facts—it may be assumed that the ship was in a state of distress requiring considerable repairs, that it was not possible to raise the money upon the personal credit of the owners of the ship or of the master, and that the security of the ship alone was not sufficient for the advances which were required to repair the ship. It seems to have been thought by the learned Judges in the Court below that the cargo was in a damaged state, and that money was wanted either for the purpose of carrying the cargo on speedily, or for some necessary expenditure for the purpose of putting the cargo into better condition by drying it, or otherwise. Upon looking at the evidence, that appears to be a mistaken view of the facts. According to the master's evidence, the cargo was landed at Trincomalie, and remained there for a considerable time until he re-shipped it; but when he did re-ship it, the rice was in good condition, and for anything that appears, nothing had been done to it, except that of course when taken out of the ship it had been stored. A small quantity was thrown overboard, which appears to have been at the bottom of the ship, and damaged; but there is no evidence that the bulk of the cargo was in any way damaged so as to require its being carried on speedily, or any expenditure incurred for its preservation.

The master being at Trincomalie and under the necessity of raising money—which has been, for the purposes of this decision, assumed—it appears that he communicated with the agents of the present respondents, the Cassa Marittima, and agreed with them, on the 10th December, 1872, to hypothecate the ship, cargo, and freight. The bottomry bond which was executed in pursuance of

that agreement is dated the 12th March, 1873. Taking the earlier of these dates, the 10th December, their Lordships are of opinion that there was before that time a reasonable possibility of communicating to the owners of the cargo, or those who represented the owners, what was intended to be done, and that that communication not having been made, there was a want of authority on the part of the master to execute the bond on the 12th March, or indeed to enter into the agreement on the previous 10th December.

It may be stated that the ship sailed from Trincomalie on the 11th April, 1873, having re-shipped the rice; that she put into Point de Galle in May, 1873; and that in August of that year the cargo, being then, according to surveys made at Galle, in a perishable condition and unfit to be carried on, was sold. In the present appeal their Lordships have nothing to do with the question whether this sale was a justifiable one or not. The only question before them for determination is whether there was sufficient authority to execute the bottomry bond?

The duty of the master to communicate with the owners, or those who may be fairly taken to represent the owners, before taking this extreme step, being plain, let us see what he did. It appears that he considered Gerber, Christien & Company as the owners of the cargo, and he had reason to do so. He knew no other owners. They were the shippers of the cargo, and had taken the bill of lading from him making the cargo deliverable to their order, and throughout he appears to treat them as the owner of it, until, at a latter period, when probably the difficulty was made apparent, he says that he did not know who the real owners were; and therefore could not communicate with them. Mr. Webster, who appeared for the respondents, has very properly admitted that if communication were necessary, Gerber, Christien & Co were the persons to whom it should have been made; and he has not denied that the case resolves itself to the question, whether, they being the persons to whom the communication ought to have been made, that which was in fact made to them was sufficient or not? The master telegraphed to then shortly after his arrival at Trincomalie, he says two days after the ship had put into that port, that she was leaking, and in want of repair. It appears that Gerber, Christien & Co. telegraphed back to him requesting information with more particularity as to the state of the ship and cargo. That telegram is dated the 19th September, and no answer appears to have been given by the master to it. An important letter was put in evidence from Gerber, Christien & Co. to the master, complaining of his neglect in not giving them further particulars. The letter, dated 1st November, 1872, is as follows: "Our telegram of the 19th September, re-

questing you to be so good as to give us particulars of the damage suffered by your cargo, having remained unnoticed, we now beg to request you will be so good as to tell us when you intend to sail from Trincomalie after completing the repairs of your ship; if you are taking on all the rice shipped by us here; or, if any has been sold, or how much, and all the particulars which may be of interest to us as shippers of the cargo." Now what was the duty of the master when he received this letter? If his duty was not clear before, there was now a distinct request by the shippers of the cargo to know what the state of the cargo was; whether it would be taken on; if any had been sold, how much had been sold; and all other particulars which might be of interest to them as shippers of the cargo. The master at the time he received this letter, or shortly after, must have contemplated hypothecating the cargo, and instead of communicating to those who he knew to be the shippers of the cargo that he was going to hypothecate it, he maintains an absolute silence. This letter is dated the 1st November. The agreement to hypothecate is not made until the 10th December, long after its receipt. The rice was, upon the evidence, receiving no damage, yet the master undertakes to hypothecate it to the Cassa Marrittima upon this bottomry bond, without giving the slightest intimation to the shippers that he was going to do so. This appears to their Lordships to be a strong case of dereliction of duty on the part of the master, when about to take the extreme course of hypothecating the cargo for the needs of the ship. If Gerber, Christien & Company had been communicated with, they might have said, "We will advance the money rather than you should raise it upon bottomry interest; or they might have given him other directions, which it might have been more for their interest that he should have followed, than to have taken this unauthorised course.

Their Lordships cannot but observe that the learned Judge who decided this case on appeal from the District Judge seems to have given his decision under some mistake as to the facts. In one part of his judgment he says: "The shippers of the cargo therefore knew at a very early period that the cargo had suffered damage, and that the vessel wanted repairs. The telegram was sent, the defendant swore, as soon as he arrived at Trincomalie. Rice, when once heated and fermented, runs rapidly from bad to worse. Mr. Spence, one of the surveyors, says that the rice was much heated and discoloured, and the stench in the hold gave evidence of rapid decay going on in the cargo." It turns out that the rice was not heated and fermented at Trincomalie, although it was subsequently in that condition at Galle; and Mr. Spence was the surveyor, not at Trincomalie, but at Galle. Thus the learned Judge appears to have transposed the state of things

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which existed at Galle to Trincomalie. Then he goes on: "The master himself swears that, so far as he knew, the shippers were the owners of the cargo, and this evidence is unrebutted." The learned Judge, in that passage, seems properly to have taken the view that Gerber, Christien & Company were the right persons to be communicated with. Then he says: "From September, when he sent his telegram to Gerber, Christien & Company, till August, 1873, when the rice was sold, he received no instructions or offer of funds from them or from the parties who now claim the rice as consignees." Their Lordships cannot but observe that this passage involves an assumption which is erroneous in point of law. The judgment of the learned Judge really amounts to this: That Gerber, Christien & Company were the proper persons to be communicated with, but that the communication made to them was sufficient, and that it became their duty, upon the slight information they had, at once to offer money to the master for the necessary repair of the ship. Their Lordships think no such duty was imposed upon Gerber, Christien, and Company, and that they did what men of business might reasonably be expected to do. Upon having the general information that the ship had received damage and wanted repairs, and that the cargo might also be damaged, they wrote to the master to know the particulars, and as before observed, received no answer to that letter.

Under these circumstances their Lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court, and to affirm the decree of the District Judge of Galle. The respondents must pay to the appellants their costs of the proceedings in the Supreme Court, and of the appeal to Her Majesty.

April, 6.

Present :—STEWART, J.

D. C. Kandy, 7458.

Set aside and defendants acquitted.

Irregularity in a criminal case.

It was irregular for the District Judge, though after decision, to inquire from the Interpreter, whether he thought the charge true or false.

In view however of the doubts entertained by the learned District Judge, during the trial, as to the guilt of the appellants, and the opinion, subsequently formed by him after inspecting the locality, that he still doubts the case, the conviction is set aside.

D. C. Jaffna, 764.

Riot is a compound

Indictment: that Savari Theogo [and 13 others named] together with divers others evil disposed persons, did, on the 28th

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day of November in the year of our Lord, 1876, at Jaffna, unlawfully, riotously and routously did assemble and gather together to disturb the peace of our Lady the Queen, and being so then and there assembled and gathered together in and upon one Kritnan, in the peace of God of our Lady the Queen, then and there unlawfully, riotously and routously did make an assault and him, the said Kritnan, then and there unlawfully, riotously and routously did beat and wound, and other wrongs to the said Kritnan then and there unlawfully, riotously and routously did, to the great terror and disturbance of the liege subjects of our Lady the Queen, and then and there being and against the peace of our Lady the Queen, and to the evil example of all other in the like case offending.

offence including "unlawful assembly," and is beyond the jurisdiction of the District Court, under Ord. 7 of 1874.

The learned District Judge, before whom the case was committed, over-ruled the plea that he had no jurisdiction, under Ord. 7 of 1874, and on the evidence found most of the defendants guilty. The District Judge thought that the indictment charged the accused with "riot," and did not contemplate a case of "unlawful assembly" as provided in the schedule attached to the Ordinance quoted.

On appeal, ***Ramanathan*** appeared for the defendants and would support the objection as to the jurisdiction of the District Court, citing ***Reg. vs. Soley***, 2 Salk. 593, in which it was held that riot was a compound offence, and that unlawful assembly was necessary to constitute riot,--but his Lordship did not want to hear him and ***quashed*** the proceedings in the following terms:—

There cannot be a riot, unless there be three or more persons unlawfully assembled together.

The Ord. No. 7 of 1874 having specially provided that District Courts have no jurisdiction to try cases of unlawful assemblies, it follows that the District Court has no power to entertain a charge of riot, an offence which necessarily includes that of unlawful assembly. (***Ferdinands***, D.Q.A. for respondent)

April, 11.

Present :—STEWART, J. and DIAS, J.

P. C. Jaffna, 2838.

It is not gambling to hit at a five cent piece thrown towards a hole &c.

The defendants were charged under Ordinance No. 4 of 1841 sec. 4, with playing with money at a game of chance in an open and public place.

The evidence shewed that the 2nd defendant was trying to hit at a five cent piece thrown towards a hole, and that the other defendants were pointing out the coin to be hit.

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The Police Magistrate found the accused guilty in these terms:—It seems to me that since accused played in a barber's compound open to any persons who came to be shaved, they must be considered to have played in "an open and public place." It appears that money was staked on the game, which would bring it under the word "betting" in the Ordinance.

On appeal it was contended (in the petition of appeal) that the game in question was one of skill and corresponded to playing at marbles or quoits, precision being necessary in all these cases.

Per DIAS, J:—Set aside and the defendants acquitted: the game at which the defendants are alleged to have played is not such a game as is contemplated by the Ordinance.

P. C. Ratnapura, 1263.

Penalty under the Timber Ordinance.

On a charge of felling timber in breach of cc. 2 & 5 of Ord. No. 24 of 1848 and 4 of 1864, the Supreme Court modified the sentence which the Police Magistrate had passed, condemning the three defendants to pay a fine of Rs. 20 each, and sentenced them to one fine of Rs. 20 as for one offence.—(*Dornhorst* for appellants.)

D. C. Kandy, 67511.

What sort of notice of action must be given to the Fiscal, under cl. 21 of Ord. No. 4 of 1867.

This was an action against the Fiscal of Kandy for having released a civil prisoner from Jail without the consent of the incarcerating creditor, and without any legal cause or authority. The sum claimed was the amount of the debt for which the prisoner was imprisoned.

The Fiscal in defence pleaded (1) that he had not received due notice of action, as required by cl. 21 of Ord. No. 4 of 1867; and (2) that plaintiff, not having duly paid the batta as required by clause 68 of the Ordinance No. 4 of 1867, he (the defendant) as he lawfully might, moved for and obtained the release of the execution debtor.

With regard to the first plea, the plaintiff produced the following letter to the Fiscal, giving him notice of action, which notice the District Judge held sufficiently repelled the plea put forward.

DEAR SIR, Kandy, 15th January, 1876.

I am instructed by Coona Pana Sana Kana Nana Veleappa Chetty, to demand of you the immediate payment of Rs 540.82, with legal interest on Rs. 450 from 25th May 1874, in that you did on or about the 17th November last release from your custody Ramen Cangany, execution debtor of my client, Veleappa Chetty, under writ No,

65078 who had been committed to Jail for non-payment of the said sum to the said Veleappa Chetty.

On your failing to comply with this demand, I am further instructed to sue you at law for the recovery of the said amount, after the expiration of a month from this date."

With regard to the second plea the District Judge held as follows: —

"It is true that on the 16th of December, 1875, the Deputy Fiscal wrote to the District Judge in these terms:

'The plaintiff in the above case having failed to deposit the necessary monthly allowance for the maintenance of the above named defendant, as required by clause 68 of the Ordinance No. 4 of 1867, and the hour allowed by the Rules of the Supreme Court having expired, I have the honor to request the authority of the Court for the prisoner's discharge'

"On the same day, the D. J. granted the authority, and the man was discharged. But the requisite batta had not only been tendered, but had been accepted by and paid to the Jailer, on the afternoon of the 15th December; so that the authority of the Court on the 16th was obtained on a statement wholly incorrect in point of fact. The D. J. was entitled to take the report of the Deputy Fiscal as correct, and the responsibility for having misled the Court and the liability for damages for the release, lie on the Fiscal. The Fiscal is undoubtedly liable for his Deputy, and I have no alternative but to find that he must pay the damages sustained by the plaintiff. The 9th sub-section of cl. 30 of the Ordinance fixes the amount of damage at the full amount for which he was in custody."

On appeal against this finding, *Layard* appeared for appellant, and *Van Langenberg* for respondent.

The judgment of the Supreme Court was as follows:

Set aside and plaintiff nonsuited with costs. The notice of action of the 15th January, 1876, served on the first defendant is suds stantially bad, inasmuch as it does not distinctly set the grounn- of action intended to be relied on. The real ground of actioc against the Fiscal seems to be that he did, on the 16th December, 1875, discharge the plaintiff's debtor then in his custody, on the plea that the plaintiff did not supply him with the usual batta for his, the debtor's, maintenance, though in point of fact the Fiscal was then in possession of funds duly supplied by the plaintiff for that purpose. The only ground set out in the notice of action is that the Fiscal did release the debtor from his custody, which we think to be too general and vague, and wholly insufficient under the 21st clause of the Ord. No. 4 of 1867.

D. C. Colombo, 69239.

Evidence of usage of

This action was raised to recover the sum of Rs. 2986.56

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trade is properly admissible in an action which declares upon an express contract for work and labour done, [*semble*, where such usage is not inconsistent with the terms of the contract.]

"for work and labour done by the plaintiff, as a broker and otherwise, for the defendant, and at his request, in the sale of certain rice of the defendant to Messrs. Keir Dundas & Co., according to the particulars herewith filed," which shewed 20 different items of sale of about 45,000 bushels at 1½*d.* per bushel.

The defendant denied that plaintiff acted as broker for the defendant, or that he did any work for him at his request.

At the hearing of the case, the plaintiff's counsel, besides leading evidence of an *express* contract, attempted to lead evidence of the usual commission paid in Colombo to brokers, but this was disallowed by the District Judge, who held as follows:

"According to plaintiff's own shewing, his work and labour as broker was given only on 4 occasions out of the 20 items charged, and as to these four, the Court considers that no contract to pay brokerage has been satisfactorily proved," and the Court doubted "whether plaintiff could have recovered, if a direct contract had been proved: the contract is immoral, and I think is illegal.* The plaintiff's duty to his employers is to procure the rice as cheaply as he can for them; his duty to the rice dealer is to sell it to his employer for as high a price as possible. His assumed duties, in contracts like these, are utterly in conflict and inconsistent with honesty towards his employer." Being of this opinion, the District Judge dismissed plaintiff's claim with costs.

On appeal, *Cayley*, Q.A. appeared for the plaintiff and appellant, and after commenting upon the merits of the case, contended that even if there was no express agreement as to the brokerage, defendant would be liable upon an implied promise, found ed upon the usage of trade in Colombo, which the plaintiff at tempted to prove. Chitty *on Contracts*, p 58, (ninth edition).

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* On this point, Chitty, Jr. says:—"Much of the commercial business of this country is carried on by the medium of persons, who buy and sell goods for others on commission, and are called *brokers*; and *prima facie*, a broker is the agent only of the person who employs him. But where he is employed to buy or sell goods for one person, and he agrees with another for their sale or purchase, he is considered to be the agent of both" *On Contracts*, p. 356 (ninth edition). The learned District Judge's remarks are applicable to a class of men in Colombo who call themselves *brokers* by a strange perversion of language. These men, though paid monthly by the Merchants and have their counter in the offices of the Merchant who pay them, yet pass under the name of *brokers*. Really they are Merchant's *clerks*. The custom referred to by the District Judge of these clerks (so-called„ brokers") receiving a commission from the native traders who deal with their employers, is indeed "in conflict and inconsistent with honesty towards their employers." But in the case before us, the plaintiff was, what is known in Colombo (among native traders), a "commission broker." He received no pay from the merchant, but was entitled to a commission on all sales.—ED.

A contract might always be implied where there was a uniform and certain usage of trade. *Sutton vs. Tatham*, 10 Ad. & E. 27, and *Kempson vs. Boyle*, 34 L. J. Ex. 191. The learned District Judge had improperly rejected the evidence tendered on this point.

Ferdinands, D.Q.A. *contra*: plaintiff came into Court on an express contract. If no account particulars had been filed, the case might have been different. Here the libel proceeds upon the basis of an *express* contract, laying the brokerage fee at 1½d. per bushel. When plaintiff is discredited on this point, he ought not to be allowed the liberty of falling back upon an *implied* contract, and of attempting to lead evidence of usage. Plaintiff would then be taking defendant by surprise. Defendant came prepared to rebut an express agreement and not usage of trade. If plaintiff intended to lead evidence of usage, he ought to have given notice of it in his pleadings

Cur. adv. vult.

And now the Court gave judgment as follows:—

Set aside and remanded for re-hearing. The Supreme Court thinks that it is competent to the plaintiff to establish by evidence any usage by which the defendant is bound to pay him, the plaintiff, the commission which he claims. The evidence on this point should not have been excluded. †

D. C. Batticaloa, 17825.

Ferdinands, D.Q.A. for appellant, *Grenier* for respondent.

According to Mohemed an law, a deed of gift to a *son*, conditioned to take effect after the death of the donor, is good, and transmits the rights of the donee to his heirs, even though such

The following judgment of the Supreme Court, which set aside the judgment of the Court below, explains sufficiently the acts of the case:—

On the 8th January, 1850, one Isoepulle Mohamado Lebbe executed a deed of gift of a garden in favour of his son Pitche Tamby Lebbe, the possession of the donee to commence after the death of the donor. The donee died before the donor, and the plaintiffs are the widow and children of the former, and the defendant is a son of the latter. This action was instituted to establish the rights derived under the deed of gift.

The defendant questioned the validity of the deed on two grounds (1) that it was not duly delivered to the donee; (2) that being a

† See *Fleet vs. Murton*, 7 L. R. (Q. B.), 126, and *Humphrey vs. Dale*, 26 L. J. (Q. B.), 137: the evidence of the usage, whether treated as explaining the language of the written contract, or adding to it a tacitly implied incident beyond those which are expressed, is properly admissible.—ED.

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deed conditioned to take effect after the death of the donor, it is void, because the donee died before the donor.

donee predecease shis father.

On these issues, the case was heard before the District Court, and the learned Judge set aside the deed and dismissed the case on the second objection urged in the answer.

The learned counsel for the respondent contended that the deed being a deed to operate *in futuro* was void according to Mohammedan Law, and cited two cases in support of this proposition. The first is No. 29129 *D. C. Colombo*, reported in Vanderstraaten, appendix p. 31. The deed in question in the above case was in its terms the same as the deed in this case, and after evidence of the customary law amongst Mohammedans with regard to deeds of gift, the learned District Judge set aside the deed on the ground that immediate possession of the thing gifted is essential of the validity of the deed of gift. This finding was upheld by the Supreme Court. The next case is No. 55746 *D. C. Colombo* reported in Vanderstraaten, p. 175. The deed in this case is the same as in the previous case.

The Deputy Queen's Advocate for the appellant urged that the two cases above referred to were founded upon the usage of the Mohammedans of the District of Colombo, and were inapplicable to the District of Batticaloa, where the deed in question was executed.

The Supreme Court, however, thinks that the law laid down in these cases is not confined to any particular district, but is applicable to all the Mohammedans of this Island. The rule laid down in the above cases, which is supported by writers on Mohammedan Law, appears, however, to be subject to an exception in favour of the children of the donor. (Macnaghten, 51). This exception is recognized in the case No. 55746 already referred to; and the deed in question, being a deed in favour of a son of the donor, we think that, according to Mohammedan Law as obtaining in Ceylon, it is good, though the possession of the donee is postponed till after the death of the donor.

The delivery of the deed was already proved.

The decree of the District Court will therefore be set aside and judgment entered for plaintiff with costs as prayed for, but without damages.

D. C. Kandy, 66269.

Double rent, when enforcible.

The defendant, who had been occupying a house of the plaintiff at a rent of Rs. 40 a mouth, was served with a notice to quit before the end of the following month, on pain of double rent being enforced. The plaintiff brought the present action to re-

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cover such double rent, the defendant not having left the premises.

The District Judge entered up judgment for the amount admitted, which was at the usual rate of Rs 40 per month.

On appeal (*Grenier* for appellant, *Layard* for respondent), set aside and judgment entered for plaintiff as prayed for. The defendant having failed to quit the house after the notice of the 29th April, 1875, is liable to pay double rent, Rs. 80, for his occupation after the 30th of May.

D. C. Colombo, 70260.

The law to be applied in Ceylon in cases of frandulent preferance, when the debtor has become insolvent, is the law of England, and not either the Civil law or the Roman Dutch law, in the event of a conflict between them and the former.

This was an action on a mortgage bond dated 1st August, 1874, to recover the principal and interest due under it, and to have the property which was specially mortgaged thereby declared executable for the debt. The debtor, W. C. Brodie, was the senior partner of the firm of W. C. Brodie & Co., which firm (but not he personally,) was declared insolvent at Colombo, on the 16th December, 1874, about four and a half months after the date of the bond; and the action was against the assignees of that Insolvent Estate, as well as against the debtor. It appeared that the property which was sought to be made executable was Mr. W. C. Brodie's private property and did not belong to his firm; and the debt also appeared to be a private debt. But the debtor, Mr. Brodie, did not plead, nor did the other defendants, the assignees, resist the action on this ground; but their defence was that "the bond is void, having been executed while the debtor was in "insolvent circumstances, and in fraud of other creditors, and "being a fraudulent preference of the plaintiff."

In the replication, it was not denied, that the debtor was in insolvent circumstances at the date of the execution of the bond, but the plaintiff denied that he was aware of the insolvency of the *firm*, or that there was any fraud on his part, and alleged that the mortgage was given in consequence of pressure, exercised by himself, upon the debtor's attorney and partner, who executed the deed. These were the issues upon the pleadings.

The learned District Judge *(Berwick)* found the following as facts in the case:—

First, that both Mr. W. C. Brodie, and the firm of which he was a partner, were in insolvent circumstances at the date of the bond, to wit, 1st August, 1874.

Secondly, that this state of insolvency was known to the plaintiff, the mortgagee, at the date of the bond.

Thirdly, that the mortgage bond was given for an antecedent debt.

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Fourthly, that it was given without any pressure or request whatever for security from the creditor, either upon the debtor or the debtor's attorney, who signed the deed, and who was himself the son of the creditor, the present plaintiff.

And the District Judge pronounced the bond to be invalid, *under the Roman-Dutch Law*, as being a preferential mortgage given in fraud of creditors. He held as follows:

After the number of deeds which have been set aside in accordance with the principles of the Civil Law on the ground of their having been frauds upon creditors, and independently of the provisions of the Insolvency Ordinance, it would seem to me too late now to contend, that that Ordinance or the English Bankruptcy Act of 1869 has in any degree limited our common law upon this subject. Among so many, reference may be made more particularly to Colombo 61400, *Silva vs. Mack* (*Roche Victoria's case*), where an elaborate judgment was given by the District Court and affirmed by the Collective Court. There the rules of the Civil Law on the subject of deeds made to the fraud and prejudice of creditors, were distinctly recognized, and it was decided, altogether independently of the Bankruptcy law, but on the authority of the Civil law, as interpreted by Voet in 42. 8. 14 of his *Commentary on the Pandects*, and in opposition to the English Law, that a voluntary mortgage by a debtor in insolvent circumstances is void, not only against existing creditors, but against future creditors, if it was intended to defraud them, even although no particular creditor should have been in the debtor's contemplation as specially intended to be defrauded or prejudiced thereby. The rule laid down by Voet is so important that I make no apology for repeating it here in his own words. After distinguishing between the "actio Pauliana" or equitable action competent either to creditors or to the curator bonis of an insolvent estate, when such a fraud has been committed with the concurrence of the alienee or mortgagee, and whether before the *missio in possessionem* (that is to say) before the creditors or a curator on their behalf has been put by the Court in possession of an insolvent estate, or after such *missio*,—after distinguishing between that action and the "recissory action," which has for its foundation, not the fraud of the alienee but merely the judicial hypothec which arises from the *missio*, even in the case of an alienation accepted in good faith, (§ 12) – he proceeds in § 13 to point out certain features which these two actions have in common, and says in § 14 that "in both fraud *intervenire debeat ex parte debitoris alienantis*; *quæ ut intervenisse dicatur, duo concurrere necesse est, puta ut fraudandi animum seu consilium habuerit, sciens se non esse solvendo, & tamen bona diminuens, licet forte non præcise cogitaverit de hoc vel illo in specie fraudando; et ut eventus concilio responderit, adeoque creditores vere suum consequi nequeant; ac denique, ut fraudandi propositum et eventus in ejusdem creditoris personam concurrat, nisi ex creditoris effectu fraudati pecunia demissus sit ille, quem debitor ab initio fraudare in animum induxerat:* that is to say, "there must be fraud on the part of the alienating debtor; and two things are necessary before this can be alleged, to wit, that he should have had a fraudulent intention, knowing that he was not solvent and nevertheless diminishing his estate, although he may not have exactly intended to defraud this or that particular person; and

the result should have corresponded with the intention, so that the creditors are unable to obtain their own; and finally that the fradulent intention and the result should both meet in the person of the creditor, unless he, whom the debtor originally intended to defraud, has been paid from the money of the person whom he had defrauded in fact."

The case we have to deal with here is that of a preference given (whether fraudulently or not will presently be determined) to a bonâ fide creditor and near relative, without the latter's request or even knowledge at the time, by way of a special mortgage, by a debtor who was then in insolvent circumstances and on the verge of judicial insolvency, a little more than three months before he was actually adjudicated insolvent, or in the equivalent language of the Civil Law, before the *missio in possessionem* of the creditors or their representatives. Our common law is quite clear upon the point. In order to void the deed there must be, on the part of the debtor, a knowledge that he was insolvent and that he was thereby diminishing his estate, (which constitutes the *animus seu consilium, fraudandi)* and a result corresponding to this intention (Voet *ad Paud* § 14); and on the part of the alienee, or mortgagee, there must be a knowledge of the debtor's fraudulent intent, or the deed must have been wi hout valuable consideration (§ 3. 4 & 5.). But in the case of a preferred bona fide creditor before judicial, as distinguished from actual, insolvency, mere knowledge of the debtor's insolvency will not be deemed a fraudulent acceptance, so as to deprive the creditor of the fruits of his vigilance, even although he should recover payment of his claim in full, and a singularly apt illustration of this is quoted by Voet in § 17. Neither does it matter whether the debtor acted spontaneously or under pressure ; nor whether the debtor knew of his own insolvency and therefore spontaneously offered payment unasked for the purpose of preferring the creditor, or whether a demand had been made on him. Voet's actual words in § 17. are as follows: –

Neque distinguendum est, an debitor sponte obtulerit creditori, an vero creditor ei invito extorserit; nec, utrum creditor per gratificationem debitoris conscii forte sibi, quod solvendo non sit, & ita sponte debitum offerentis, acceperit, cum non interpellasset eum ad solvendum, an vero is interpellatus fuerit; cum omnes illæ distinctiones a jurisconsulto præmissæ rejiciantur tandem, ac simpliciter definiatur; sed vigilavi meliorem meam conditionem feci, jus civile vigilantibus scriptum est; ideo quoque non revocatur id quod percipi:— that is to say, "it makes no difference whether the debtor spontaneously offered payment to his creditor, or whether the creditor extorted it from him against his will ; nor whether the creditor received it by the favor of the debtor who knew that he was insolvent and spontaneously offered payment of the debt without its having been demanded from him, or whether demand had been made ; for the juris—consult has rejected all these distinctions, saying simply, I have been vigilant, and by my vigilance I have bettered my position ; it is written that the civil law is for the vigilant ; and therefore that which I have received cannot be recalled from me." That there is one exception to the rule as thus stated, and that is the case where several creditors are pressing the insolvent at the same time, and he gives a preference to one of them over the others ; in that case what the favored one has thus received by undue friendly preference must be shared with the others ; for it is just that it should be shared with those who were equally diligent with himself ; *Pandects* 42. 5. 6. § 2. and Voet 42. 8. 17., at the words "denique sententiam." There is therefore a wide conflict between our

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common law and the English law of Frauds on the Bankruptcy acts as to what constitutes a fraudulent preference, of one creditor over others. In Hazlett and Roches Law of Bankruptcy (p. 146, 2nd Ed.) it is stated with reference to the act of 1869 : "Fraudulent preference has now for the first time been defined by the Legislature. Contemplation of bankruptcy has nothing to do with the matter, which must be determined not by reference to decisions under Statutes which have been repealed, but by the words of the new enactment. The whole law of Bankruptcy is to be found in the Bankruptcy Act, 1869, and the whole law of fraudulent preference (*i. e.*, under Bankruptcy Law) in sect. 92 of that statute." *ex parte* Mathew *re Cherry* 19 W. R. 1005 and L. R. 7 Ct. App. 24. See also *Butcher v. Stead* 33 Law Times, page 541, and under that statute, according to the judgment of Lord Cairns in the case last quoted, it would seem that the only test now of whether a preference is void under that statute, as against the trustee in Bankruptcy, are 1st the debtor's inability to pay his debts as they become due from his own monies, irrespective altogether of whether at the time he meant to take advantage of, so thought he even likely to be brought under the Bankruptcy act ; 2nd, the fact of his judicial bankruptcy following within 3 months after the date of the transaction ; 3rd, the act must have been purely voluntary on the part of the debtor. But these three tests are mitigated in favor of innocent creditors by a provision, the effect of which is to require a 4th test to bring the transaction within the scope of the statutes, namely, knowledge on the part of the preferred creditor of the debtor's insolvency and of his intention to give him such preference. Our common law on the other hand, which distinguishes between transactions before, and those after, judicial bankruptcy, in the case of the first of these classes, takes no account of how soon judicial bankruptcy may have followed, nor of the creditor's knowledge of actual insolvency, nor of the absence of pressure, unless one or more creditors had been preferred over others who had been equally vigilant with these in the pursuit of their claims : thus rejecting all the tests of the English Act of 1869 excepting the first one, namely, Insolvency in fact, (not judicial Bankruptcy) ; and in respect to that, the English Law has now been exactly assimilated to the Civil Law in discarding all questions which turn upon a debtor's contemplation of judicial bankruptcy or the *missio in possession* of a curator bonis. That Act has further assimilated the English Bankruptcy Law to the Civil Law by the provision at the end of § 92 which has been construed, in *Butcher vs. Stead*, Law Journal Rep. 44 *N. S, cases in Bankruptcy p.* 133), as saving the rights of a bona fide creditor who did not know that he was being fraudulently preferred.

The Civil Law generally on the subject of transactions in fraud of creditors or undue preference of one of them over the others will be found in the following passages of the Digest (some of which are quoted in Story's Equity Jurisprudence §§ 350 351) and which still remain Roman Dutch Law. *Dig. Lib.* 42 *tit.* 8 *fr.* 1 ; *fr.* 3 ; *fr.* 6 ; §§ 6. 7. 8. 11 ; *fr.* 7, *fr.* 10 § 1 *and* 2 *&c., fr.* 15, *fr.* 16, *fr.* 17, *&c.* See also *Burge's Commentaries on Colonial and Foreign Laws, Vol.* 3 *p.* 616, and the first case there cited from *Sande.*

Now if I am to decide this case on the principles of the Civil Law, which undoubtedly takes a broad, a reasonable and an equitable view of acts in fraud of creditors and of fraudulent preferences of creditors, and which, in applying its doctrines to fraudulent transactions perpetrated before the judicial assignment of an Insolvent Estate to a trustee for

creditors, does not limit or narrow these doctrines by any question of subsequent judicial bankruptcy or of the accident of the date of the fraudulent transaction in relation to the date of the debtor's estate vesting in the creditors trustee *(the missio in possessionem)*: if I am to do this, I think it is clear that this deed must be set aside as a fraud upon other creditors, independently of any provision in our Bankruptcy Ordinance, or in other words, independently of the accident of whether the debtor has subsequently become bankrupt or not. For according to my findings on the facts, the debtor at the date of the transaction was actually insolvent, and knowing this and he (or his attorney which is the same thing) intending to diminish the estate available for equal distribution among his creditors, executed this mortgage unasked in order to give an unfair preference to a creditor who is the brother of the debtor and the father of the attorney, and (as respects the position of the favoured creditor and his right to have the advantage of it) at a time when this insolvent was in treaty with his other creditors for a composition at the rate of 7*s.* 6*d.*, in the £, and where therefore the case must reasonably be considered as in the same position as if a payment had been made or a security granted to one of a number of creditors who were there equally with him vigilant in the pursuit of their claims and indeed at a time when the debtor had been placed under *actual pressure* by one of them, as appears from Mr. Gordon's letter of 23rd July, 1874. It makes no matter in this case (excepting in so far as it strengthens the proof of an *animus fraudandi* on the part of the debtor's attorney, the son of the creditor) that the creditor himself was entirely innocent of any such intention or even knowledge of the execution of the mortgage in his favour, at the time.

If however I am to decide this case on the principle that the mortgage cannot be set aside as a fraud upon creditors unless it would be a fraudulent preference within the meaning of the English Bankruptcy Act of 1869 (the argument being that section 92 of that act is in operation here, by virtue of section 68 of our Ordinance 7 of 1853), I must arrive at a different decision, because, although every test under that Act is present save one,—for at the date of the transaction the debtor was unable to pay his debts as they become due from his own monies, and the transaction was purely a voluntary one without pressure or demand, and the creditor had been made aware of the debtor's insolvency in the month preceding the date of the mortgage,—yet one test, and one test only, fails this one, to wit, he did not become bankrupt, that is to say judicially bankrupt, within three months from its date. In point of fact the period is one of four months and a half. In strictness indeed he has never yet personally been declared bankrupt and it is only by overlooking this fact possibly, that I can deal at all with the matter under the English Law. But as said in the beginning of the judgment, all parties seem to desire that no account should be taken of this but the case decided on the substantial merits, and to do otherwise would effect nothing, as I presume the debtor would immediately be declared bankrupt and the plaintiff be simply put to the expense of a fresh action against the assignee of his estate. If the point were to be taken into consideration, the only effect would be that the plaintiff would have to be nonsuited in respect of this demand on the present assignees.

The failure then of one test under section 92 of the English Bankruptcy Act of 1869, and that act having been relied on by the learned Counsel for the plaintiff, forces me to proceed further to consider and

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History of the term "*fraudulent preference*."

or define. Accordingly transactions which were bona fide on both sides, in point of intention and had no element of fraudulent intent in them, have been set aside, when voluntary and made in contemplation of bankruptcy, and what was in that sense only a fraud against the policy of the Bankrupt laws, as calculated to defeat them and therefore called "fraudulent preferences," and even ignorance by the creditor that he was being fraudulently preferred did not (till 1869) protect him. It is easy therefore to see that the notion of "fraudulent preference," far from being intended to narrow the statute of Elizabeth or the Common Law, was meant to *enlarge* the range of what (in Bankruptcy) were to be deemed frauds, and it would have the very opposite effect if we were to say that no transactions are to be voided on the ground of being fraudulently intended to defeat or delay creditors but such as were made "in contemplation of bankruptcy" *i. e.*, "fraudulent preferences in Bankruptcy" or "frauds in the bankruptcy laws." In confirmation of this view I may cite a sentence from Archibold's Law of Bankruptcy (p. 279 of the 10 Ed.): "Property, voluntary conveyed by the bankrupt without a voluntary consideration and which conveyance would be void as against his creditors by Stat: 13 Eliz. c. 5, will pass to the assignees under their appointment and may be covered by them." Again in the same sense as I read it, Lord Cairns says in *Butcher vs. Stead*: "Before that Act (of 1869), payments by way of fraudulent preference were held to be void, but *were not forbidden by any express* enactment." This would be incorrect in the face of the acts of Edward III., c. 6, Henry VII., c. 4 and 13 Elizabeth c. 5, unless the term "fraudulent preference" were used by Lord Cairns in the special sense I have pointed out. I take it, the law stood thus down to the Bankruptcy Act of 1869; viz:—that the operation of the statute of Elizabeth was in no way limited in the voiding of deeds made fraudulently *with intent to defeat creditors* by the Bankruptcy Acts. Now, all that the latest act did in this respect was "to reduce into definite propositions the law that hitherto had to be derived from a comparison of decided cases. In the case of fraudulent preferences, in place of raising an enquiry whether it was done in contemplation of bankruptcy, the act provided certain definite tests, namely that the bankrupt should have been unable to pay his debts as they become due *and that he should have become bankrupt within three months from the date of payment.*" In other words instead of leaving the "Act of Bankruptcy" to draw the line of separation between property which might be disposed of by the bankrupt, and that which vested in the assignees, as the law originally stood, and instead of leaving that line to be drawn by the date of "contemplation of bankruptcy" (with its attendant difficulties) as became the principle by a process of equitable development of the law (not by legislation, but by decisions), the Act of 1869 drew that line by a fixed date of 3 months before bankruptcy or as Lord Cairns expresses it "changed the old rule as to contemplation of bankruptcy into a rule which exposed the payment to be impeached for a period so long as three months" There is nothing in this that can lead to the idea that the expression "fraudulent preferences" is there used in any other than its old sense of a "fraud on the Bankruptcy Laws"; nothing I think that derogates from the Stat: of Eliz: or the Common Law, but, on the contrary we have the culmination of a development which has *added* to the statutory and Common Law of fraud, made that fraud which they did not call fraud, and brought the law of England into greater approximation with the ethics and reason of the Civil Law. See

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further the judgment of Lord Giffard (both near the beginning and at the end of it) in the recent case of *Allen vs. Bennett, reported in* 18. *W. R.* 874. This principle is also confirmed by Burge in his Commentaries on the Colonial and Foreign Laws Vol. 3 p. 613, 614.

I apply precisely the same reasoning to our Ordinance. If in England the Statute of Elizabeth, which voids fraudulent alienations *intended to defeat creditors*, remains in force notwithstanding the special Bankruptcy enactments and judicial decisions, which 1st introduced a *new* class of frauds called "fraudulent preferences" or "frauds against the bankrupt laws," and which (after great uncertainty and fluctuations of decisions) have ended by the Act of 1869 defining (and somewhat restricting) that new class of frauds;—in the same way our Common Law, the Civil, in the larger view which it takes of equity and ethics in its wider definition of "fraud," which includes substantially the modern English notion and expression of "fraudulent preference," remains in force, notwithstanding that we have by an Ordinance imported the English Law, and I conceive that in this country, by the law as it now stands, every transaction that would be deemed in England a "fraudulent preference" at the corresponding date as being against the policy of the English Bankrupt law and voided accordingly, must be so deemed and voided here, and also every thing that would in England be void under the Stat: of Eliz: but that moreover every thing which would be deemed a fraud against creditors by the Civil Law (and that includes and defines the fraudulent preference of particular creditors over others) must also be deemed void here, for there are or may be things not void even by the Statute of Eliz: which would be by our Common Law.

Applying this rule, I hold that although the present mortgage cannot be deemed a fraudulent preference in respect to the Bankruptcy Ordinance in as much as there was an interval of 4½ months, instead of the arbitrary period of 3 months, between the date of its execution and the subsequent adjudication of insolvency, though it satisfies every other test of a fraudulent preference under § 92 of the Bankrupt Act of 1869 (made law here by § 52 of our Ordinance), nevertheless it is void independently of the Ordinance as a fraud upon creditors, by force of our more comprehensive Common Law, as that is set out further up, and which discards the accident of a purely arbitrary date as a test of fraud. Our Ordinance, it seems to me, has no more narrowed or abrogated our former law than the Act of 1869 has narrowed or abrogated the Act of Eliz: which indeed has been expanded, instead of contracted, by the Bankruptcy Acts and the decisions thereon. Were it otherwise we should be landed in this anomalous and unreasonable position—that we would have deeds in fraud of creditors, as in *Roche Victoria's case*, decreed void, if the alienator or mortgager happend not to have been formally adjudicated an insolvent upheld if he chanced to have been so adjudicated their validity and the rights of other creditor thus being made to depend on a pure accident. Until I had written thus far, I had not referred on this occasion to the notes on *Harman vs. Fishar* in Tudor's Mercantile Cases, and the following passage had escaped my recollection but though I do not think it necessary to erase all my own reasoning above on the subject, merely because I find the result of it so authoritatively and expressly confirmed, it will be satisfactory to subjoin the following extract from that work. "A conveyance or transfer of property by a trader may be fraudulent, and as such an act of bankruptcy, either as being within 13 Eliz. c. 5 or as being in contravention of the policy of the bank-

rupt laws. Any transfer which is fraudulent within the meaning of the Statute of Eliz. is also fraudulent and an act of bankruptcy under the Bankrupt Act (see Smith's *Leading Cases* Vol. 1 p. 16), and is void also against the assignees upon an insolvency *Doe d. Grimsby vs. Ball* 11 M. and W. 531), although a conveyance or transfer, fraudulent within the meaning of the bankrupt laws, would not necessarily be so under the statute of Eliz: in other words, the Bankrupt Act, which relates solely to conveyance or transfer by traders, is more extensive than the statute of Eliz., which relates to conveyances and transfers by debtors generally, independently of the fact whether they are traders or not." There is nothing (material to the present purpose in this passage) which would not apply equally to the Bankrupt Act of 1869, and nothing which would not equally apply to the relation of our Insolvency Ordinance to our Common Law.

The plaintiff's claim will be dismissed with costs.

On appeal, ***Edgcome*** appeared for the appellants: The Ordinance No. 7 of 1853, sec. 58 ought to govern the case, and the statutory time of three months having elapsed, the mortgage, which was executed four and a half months before insolvency, should hold good. *Secondly*, the mortgage in question was not purely voluntary, and however small may have been the pressure which was brought to bear upon the grantor, it was sufficient in law to protect the plaintiff. The amount of pressure is not a matter of considerable importance, *Johnson v. Fesenmeyer*, 25 Beav. 88 A mere request has been held to constitute pressure, *ex parte* Craven, 18 W. R. 1022, affirmed in appeal, 19 W. R. 137 L. J. *Thirdly*, knowledge of the plaintiff of the insolvency of grantors, at the time of the execution of the mortgage, not having been established, it cannot be held to be a fraudulent preference, *Butcher v. Stead*, L. T. n. s., 541, *re Craven and Marshall*, L. R. Ct. App. vi. 1870—1.

Ferdinands, D. Q. A. for respondent: This is a mortgage to defeat creditors, and, as such, bad under the Roman Dutch Law, both as against existing and future creditors. *Roche Victoria's case* (D. C. Colombo No. 61400), Voet, 42. 8. 16 and 17. Our Insolvency Ordinance has not expressly abrogated the Dutch Law. To hold that it did, would lead to the absurdity, that a deed, admittedly fraudulent and illegal at the date of its execution, would, by the lapse of a few months, become valid and legal by the debtor resorting to the Insolvency Court. Sec. 58 of Ordinance No. 7 of 1853 should be construed as applicable to fraudulent dealings not covered by the Common Law. The bond is also bad, as it was purely voluntary and not followed by delivery to the creditor, *Fernando vs. Thorpe*, D. C. Kandy 43296, Vanderstr, p. 13. Under the English Law, there must be more than colorable pressure, *Bell vs. Best*, Tudor's L. C. 540; *Fordyce vs. Fisher*, *ib.* 525, 536. The English Bankruptcy laws did not profess to dispense with the statute of Elizabeth, by which this bond would

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be void as against creditors, and this statute should govern the case, if resort must be had to the English Law.

Cur. adv. vult.

Their Lordships this day delivered judgment as follows :—

Affirmed. This case is in many respects similar to *D. C. Colombo* 70419, with the essential difference that the bond in the case before us, unlike the bond in the other suit, was given voluntarily and not under pressure.

We agree with the learned District Judge in his finding of the facts, and have arrived at the same conclusion (but not quite on the same grounds) that the action should be dismis-ed.

As pointed out in our judgment in case No. 70419, the law to be applied in Ceylon in cases of fraudulent preference, when the debtor has become insolvent, is, in our opinion, the Law of England, and not either the Civil Law or the Roman Dutch Law in the event of a conflict between them and the former.

The 58th section of Ordinance No. 7 of 1853 enacts that "every transaction, dealing, transfer, delivery, alienation, mortgage, pledge, or payment by any Insolvent, to or with any creditor of such Insolvent, or to or with any other person, which by the Law of England at that corresponding period would be, and be deemed to be, a fraudulent preference of one creditor before other creditors in any proceeding in bankruptcy, or in any suit or action, shall, in the like case arising within this Colony, be and be deemed to be, a fraudulent preference according to the true intent and meaning of this Ordinance."

The Law of England introduced here by the above section, it will be perceived, is not confined to the Bankruptcy Act or Acts that may be in force at the corresponding period, but comprehends all the English Law of Fraudulent Preference, and consequently* the salutary act of 13 Eliz. c. 5 referred to by the learned District Judge. Further, the Law of England, thus introduced, is not limited merely to proceedings in Bankruptcy, but is made of general application to suits and actions in transactions connected with the Insolvent.

The learned District Judge remarks that there was only one test wanting to bring the bond, now in question, within the English Bankruptcy Act of 1869, viz., that the debtor did not become judicially bankrupt within three months of the date of the bond, every other test of fraudulent preference, as specified by the Act, being present. But independently of the Bankrupt laws, the bond being proved to have been executed to defraud creditors, is void against them, under the statute of Elizabeth, a component part of the Law of England.

A bond given to a *bonâ fide* creditor and near relative, without the latter's request or even knowledge at the time, by way of a special mortgage, by a debtor who was then in insolvent circumstances and on the verge of judicial insolvency, four and a half months before he was adjudicated insolvent, is void as being fraudulent within the meaning of the Statute of Elizabeth and thus of the Bankruptcy Act.

* Bearing in mind that the term "*fraudulent preference*" is a creature of the Bankruptcy Acts, it is respectfully asked whether 13 Eliz: c. 5 is a part of the English Law of fraudulent preference. The system

D. C. Colombo, 70,419.

Where a mortgage bond was given under pressure to a bona fide creditor by one who, being in insolvent circumstances, had a short time previously to the execution of the bond proposed to compound with his creditors, but who was judicially declared an insolvent four months after its execution.

This was an action raised by John Gordon of London, as plaintiff, against W. C. Brodie and the official assignees of his insolvent estate, as defendants, for the recovery of Rs. 20,000 and interest due on a bond, dated the 1st August, 1874, which had been granted by Brodie to Gordon, mortgaging certain lands at Badulla as security for the debt. Brodie virtually admitted his liability, as he filed no answer; but the assignees pleaded that "the bond was fraudulent and void and of no force or avail in law as against them and as against the creditor of the 1st defendant, as the same was a fraudulent preference of the plaintiff by the 1st defendant over the other creditors of the 1st defendant and had been executed by the 1st defendant with the intention of defeating the rights of his other creditors." The plaintiff replied denying the alleged fraudulent preference and stating that the bond had been granted for private and not a partnership debt, and that the land mortgaged as security formed part of the private, and not the partnership, estate of Brodie.

On the issues thus raised, the case went to trial on the 26th October, 1876, when counsel on both sides admitted that Brodie was in insolvent circumstances as regarded his partnership property at the date of the execution of the mortgage in question. It was

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of law relative to bankrupts and insolvents is entirely an innovation on the common Law (of England), *Petersdorff's Abrid.* II. s. v. "Bankruptcy;" while 13 Eliz. c. 5 is declaratory of the Common Law regarding alienations intended to defeat creditors, *Twyne's Case*, 3 Coke 80. [See also a note in p. 625 of the second volume of Broom and Hadley's Commentaries, where all the Bankrupt Acts are enumerated from 34 Hen. 8. c. 4. the very first enactment on the subject, down to 32 and 33 Vict. C. 71. but 13 Eliz. C. 5 finds no place among them.]

Under the Bankruptcy Act of 1869, such a mortgage as was given by Brodie could not be strictly set aside as fraudulent, because the debtor was not adjudicated bankrupt within the period of three months from the date of the bond. On the authority however of *Doe dem Grimsby* v. *Ball*, 11 M. and W. 531, and other cases cited in Smith's *Leading Cases*, i. 16, it would have been set aside as being fraudulent *within the statute of Elizabeth*, because, as formulating the common law rules on the subject of alienations intended to defeat creditors, it was admitted (in *Doe dem Grimsby* v. *Ball*) to have an independent existence, notwithstanding the special bankruptcy enactments. If our Ordinance imported into Ceylon the English Law of bankruptcy, is it to be supposed that the law of alienations intended to defeat creditors, which has been shewn to be distinct and independent of the other, was also introduced? Or rather, should we not, from analogy and for very consistency, fall back upon our own common law, the Roman Dutch, which has been the guide of our Courts in all cases of fraud upon creditors? "Our Insolvency Ordinance," argued *Ferdinands, D. Q. A.* "has not expressly abrogated the Dutch Law. To hold that it did would lead to the absurdity that a deed, admittedly fraudulent and illegal at the date of its execution, would by the lapse of a few months become valid and legal by the debtor resorting to the Insolvency Court"—ED.

Held that it was not a fraudulent preference, under the English law, that being the law applicable to the case and not the Roman-Dutch or the Civil.

also agreed by them to receive in this case Brodie's evidence in No. 70,260, *Brodie vs. Brodie, (ante p. 89)* and all the evidence admitted or tendered in the previous *special case* between the same parties.

The learned District Judge *(Berwick)*, declared the bond fraudulent and void in the following judgment :—

This is an action on a mortgage bond dated 1st August, 1874 to recover the principal and interest due under it and to have the property which was specially mortgaged thereby declared executable for the debt.

The debtor W. C. Brodie was the senior partner of the firm of W. C. Brodie & Co., which firm (but not he personally) was declared insolvent by this Court on the 16th. December, 1874, about four and a half months after the date of the bond, and the action is against the assignees of that Insolvent Estate as well as against the debtor himself.

This case is very similar to that of *Brodie vs. Brodie*, &c., (No. 70260)in which I have given judgment to day, but there are points of difference in both the pleadings and the evidence ; and although I shall to a considerable extent, follow that judgment nearly verbatim, the terms of the present judgment will in all necessary respects be adapted to the difference of circumstances.

This action is against the debtor on the bond personally, and also against the assignees of the Insolvent Estate of the firm, of which he was the senior partner. The former has not pleaded. The latter have, and their defence is that "the mortgage bond sued on is fraudulent and void and of no force or avail in law as against the second and third defendants, the assignees of the first defendant, and as against the creditors of the first defendant, being a fraudulent preference of the plaintiff by the first defendant over the other creditors of the first defendant, and as being executed by the first defendant with the intention of defeating the rights of his other creditors. (1st) In the replication the plaintiff specially denies that the bond sued on by him was executed in fraudulent preference of the plaintiff by the first defendant, or that the same is void and of no force and avail in law as alleged in the first paragraph of the answer; (2nd) the plaintiff alleges that the bond in question was granted by the first defendant for a private and not a partnership debt, and that the land mortgaged to the plaintiff as security formed part of the private and not partnership property of the said defendant"; and (3rd), there is a general denial of all other things alleged in the answer. It is not specially pleaded in this case that the bond was obtained under pressure ; nor was it necessary to plead this, because, so far as the question of fraudulent preference has to be considered, in the sense of being in fraud of the Bankrupt Laws, the term *fraudulent preference* implies in law the absence of pressure ; and so far as it has to be considered in the sense of a transaction void under the Civil Law as a fraud upon other creditors, the existence or absence of pressure is immaterial. With respect to the plea in the replication that the bond was given for a private and not a partnership debt, and that the land mortgaged was the debtor's private property and not partnership property, it has to be observed that this appears to be the fact, and that the debtor personally has never been adjudicated insolvent, although the firm of which

he was the senior partner has, and that second and third defendants are the assignees only of the insolvent of that firm. But this is a defence which the assignees have not raised (desiring, as I understand, to have the opinion of the Court upon the substantial issues involved) while, as respects the plaintiff, if effect could be given to this, his own plea in the replication, it would only destroy his right of action against these assignees.

I find on the evidence, as facts in the case:

1st, that both Mr. W. C. Brodie, and the firm of which he was a partner, were in insolvent circumstances at the date of the bond, to wit, 1st August, 1874.

That the firm was then insolvent is clear from the whole of the Insolvency records in case No. 967, which were put in evidence ; but to give particular proofs, it is sufficient to advert to the facts that in July, 1874 Mr W. C. Brodie attempted to make arrangements with his creditors and to compound with them for 7*s.* 6*d.*, in the pound ; (the deed of composition signed by five of the creditors has been put in) ; and that the immediate cause of W. C. Brodie and Co's failure was the failure of Grant Brodie and Co., on the 16th or 18th of July. Mr. Brodie says in his evidence " up to the failure of that firm, I thought we would get over our difficulties."

" To Grant Brodie and Co., we were indebted between £9000 and £10,000. I advised my partner about the end of July about the composition I proposed."

That Mr. W. C. Brodie, as well as his firm, was then insolvent is clear by comparing the amount of the firm's debts with the assets, *inclusive of his private property*, and from his admission that in estimating the assets available to meet the composition of only 7*s.* 6*d.*, his *whole private* assets as well as those of the firm were included.

2. I find that this state of insolvency was known to the plaintiff, Mr. Gordon, at the date of the bond and before it. This is clear from Mr. Brodie's evidence in the present case with reference to the conversation they had together on the 19th of July, the day after the failure of Grant Brodie and Co., with reference to W. C. Brodie compounding with his creditors : and it appears from the evidence in No. 70260 that the proposal for composition emanated from the plaintiff, Mr. Gordon himself ; and that he agreed *at the end of July* to sign the composition deed, though he subsequently withdrew his promise.

3. I find that the mortgage bond was given for an antecedent debt.

4. But it was given under pressure from the plaintiff. This appears from Mr. Gordon's letter of 23rd July, 1874, filed in the " special case" and from Mr. W. C. Brodie's cross-examination in the present suit.

5. If it were necessary I should find also that it was given " in contemplation of bankruptcy," for the reason which I set out in my judgment on the " special case," but this is unnecessary, because contemplation of bankruptcy now, since the English Bankruptcy Act of 1869, does not form an element in what are fraudulent preferences under the bankruptcy law,* and neither is it necessary under the Civil

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* See *Butcher vs Stead 33*, Law Times, p. 541 and see Hazlitt and Roche's Law of Bankruptcy p.

I do not think the words " in contemplation of Bankruptcy" in the

Law in order to void a deed as a fraud upon creditors, or as a fraudulent preference of a creditor. These two systems are now at one in only requiring that the debtor should have been in actually insolvent circumstances, without reference to his having anticipated his being adjudicated bankrupt.

Neither is it of any consequence that a debtor sanguinely, and perhaps vainly, hoped to tide over his difficulties; for it has been settled that although a debtor's assets should be sufficient, ultimately, to pay more than 20*s.* in the pound, he is in point of law insolvent if unable to meet the claims upon him as they fall due; and that indeed is one of the tests given of a fraudulent preference in section 92 of the Act of 1869.

6. Lastly, it is a fact that the firm was adjudicated insolvent by this Court on the 16th December, 1874, being more than three months subsequent to the date of the mortgage, which was the first of August.

If I were to decide this case purely upon the question of what constitutes a fraudulent preference under *our Bankruptcy Ordinance*, that is to say, as a fraud against the policy of the Bankrupt Law, I should have to decide that the mortgage in question is *not* void. For by our Ordinance 7 of 1853, it is enacted that "every transaction, mortgage (&c., &c.) by any insolvent to or with any creditor of such insolvent, which by the Law of England, at the corresponding period, would be, and be deemed to be, a fraudulent preference of one creditor before other creditors *in any proceeding in bankruptcy or in any suit or action*, shall, in like case arising within this colony, be and be deemed to be a fraudulent preference according to the true intent and meaning of this Ordinance." Now (putting out of consideration the fact that the debtor, not having personally been adjudicated insolvent, is perhaps not within that Ordinance), the mortgage itself, otherwise, is not a fraudulent preference *under the English Bankruptcy Act of* 1869. "Fraudulent preference has now for the first time been defined by the Legislature: contemplation of Bankruptcy has nothing to do with the matter, which must be determined, not by reference to decisions under the statutes which have been repealed, but by the words of the new enactment. The whole law of bankruptcy is to be found in the Bankruptcy Act 1869, and the whole law of fraudulent preference," [*i. e.*, under Bankruptcy Law] in section 92 of that statute *ex. p. Matthew re Cherry* 19 *W. R.* 1005 *and L. R.* 7 *Ct. App.* 24, *Roche and Hazlitt's Law of Bankruptcy p.* 146 *(2nd Ed.)* And under that statute, according to the judgment of Lord Cairns in the case of *Butcher vs. Stead*, 33 *Law Times p.* 541, it would seem that the only tests now of whether a preference is void under that statute as against the trustee in bankruptcy are, 1st the debtor's inability to pay his debts as they become due from his own monies, without reference to any intention of being made subject to it, 2nd, the fact of his judicial bankruptcy following within three months after the date of the alleged transaction, 3rd, the act must have been purely voluntary on the part of the debtor, 4th, these tests are mitigated in favor of

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heading to the report of *ex parte* Craven in 10 Law Reports, Equity p. 648, are justified by anything that the Chief Justice is reported to have said—at least he did not expressly say that contemplation of bankruptcy was still an ingredient in fraudulent preference.

innocent creditors by another, the effect of which is that, to bring the transaction within the scope of the statute, there must have been knowledge on the part of the preferred creditor of the debtor's insolvency and of his intention to give him such preference. Now, one of these tests certainly fails, (to say nothing of those which depend on the fact of judicial bankruptcy), for I have found that the mortgage in question was not voluntary but was given under pressure exercised by the plaintiff.

But it would be a fallacy (I apprehend) to suppose that we are restricted to frauds on the Bankruptcy law in considering whether the mortgage is a fraudulent preference and void as having been executed with the intention of defeating creditors and followed by a result corresponding with such intention. It is noticeable that the defendants in this case have not pleaded fraud on the Bankrupt Laws specially, but have, pleaded in general terms that the deed is fraudulent and void as against the creditors of the first defendant being a fraudulent perference, &c. "*and has been executed by the 1st defendant with the intention of defeating the right of his other creditors*," we must discriminate between transactions which are void, generally, as being in fraud of creditors under the Common Law or previous Statutory Law (such is the statute of 13 Elizabeth) and fraudulent perferences or fraud, *within the meaning of the Bankrupt law especially*." There are many things which do not amount to "fraud" in the limited sense of this word in English Common Law Jurisprudence, and which are only so called in another sense, as being either constructive frauds against the policy of statutes, and among these are embraced what have acquired the special name of "fraudulent preferences," meaning merely as being frauds against the policy of the bankrupt laws. The latter only are within the Bankrupt Act, but the others, not the less, remain frauds under the Common Law or statute of Elizabeth, and void as such. The bankrupt law has enlarged (for certain purposes and in certain cases) the law of fraud, but has for no purpose and in no case restricted the law our own Ordinance contains, no words inferring, that what already under our Common Law, that is, the Civil Law, would be deemed a fraudulent preference of one creditor over another, or would on any other ground make a deed void as against creditors injured by it, is to cease to have that effect by virtue of that Ordinance, and I apprehend that the relation of our Insolvency Ordinance to our previous Common Law is precisely the same as the relation of the English Bankruptcy Law to the English Common Law and Statutes of Edward III. c. 6., Henry VII. c. 4, and 13 Elizabeth c. 5, which I have fully discussed in my judgment in No. 70260. I will not repeat here, but will only refer to, the reasoning contained there on the subject of the principles on which this point rests and the history and meaning of the term "fraudulent preference," when discussing in that case whether in England the Bankruptcy Law, when it introduced that term, *restricted* or *enlarged* the previous statutes and Common Law which voided all fraudulent alienations, &c., made "with intent to defeat creditors"; and will content myself by subjoining the following passage from the notes on *Harman v. Fishar*, in Tudor's Mercantile Cases. "A conveyance or transfer of property by a trader may be fraudulent, and as such an act of bankruptcy, either as being within 13 Elizabeth c. v., or as being in contravention of the bankrupt laws. Any transfer which is fraudulent within the meaning of the

statute of Elizabeth, is also fraudulent and an act of bankruptcy under the Bankrupt act (see Smith's *Leading Cases*. Vol. I. p. 16) and is void also against the assignees upon an insolvency *(Doe dem. Grimshy vs. Ball, 11 M. and W. 531)*, although a conveyance or transfer, fraudulent within the meaning of the bankrupt laws, would not necessarily be so under the statute of Elizabeth: in other words, the Bankrupt Act, which relates solely to conveyances or transfers by traders is more extensive than the statute of Elizabeth, which relates to conveyances and transfers by debtors generally, independently of the fact of whether they are traders or not." See also Lord Justice Giffard's judgment (near the beginning and also at the end) in *Allen vs. Bennet*, reported in 18 W. R. 874.

I see no reason why we should not apply the same rule to our Ordinance. If in England the statute of Elizabeth which voids all fraudulent alenations *intended to defeat creditors* remains in force notwithstanding the special Bankruptcy enactments and judicial decisions, w hich first introduced a *new* class of frauds, called "fraudulent preferences" or "frauds against the Bankrupt Laws," and which (after great uncertainty and fluctuations of decisions) have ended by the Act of 1869 defining (and somewhat restricting) that new class of frauds; in the same way, our Common Law, that is, the Civil Law, in the larger view which it takes of equity and ethics, and in its wider definition of "fraud," which includes substantially the modern English notion and expression of, "fraudulent preference", remains in force, notwithstanding that we have by our Ordinance imported the English Law, and I conceive that in this country, by the law as it now stands, every transaction that would be deemed in England a "fraudulent preference" at the corresponding date either as being against the policy of the English Bankrupt Law or as against the statute of Elizabeth and voided accordingly, must be so deemed and voided here; but that moreover every thing which would be deemed a fraud against creditors by the Civil Law (and that includes and defines the fraudulent preference of particular creditors over others), must also be deemed void here. Things are or may be void under our Common Law, which would not be so under the statute of Elizabeth.

Our Ordinance, it seems to me, has no more narrowed or abrogated our former law, than the Act of 1869 has narrowed or abrogated the Act of Elizabeth; which indeed has been expanded, instead of contracted, by the Bankruptcy Acts and the decisions thereon.

Were it otherwise, we should be landed in this anomalous and unreasonable position that we would have deeds in fraud of creditors, as in *Roche Victoria's case* decreed void, if the alienator or mortgagor happened not to have been formally adjudicated insolvent, and upheld, if he happened to have been so adjudicated,—their validity and the rights of other creditors as against the claim of another fraudulently preferred creditor thus being made to depend on a pure accident.

Moreover, after the number of deeds which have been set aside in accordance with the principles of the Civil Law on the ground of their having been frauds upon creditors, and independently of the provisions of the Insolvency Ordinance, it would seem to me too late now to contend that our Ordinance, or the English Bankruptcy Act of 1869, has in any degree limited our Common Law upon this subject: among so many, reference may be made more particularly to *D.C. Colombo*

61400, Silva v. Mack (Roche Victoria's case), where an elaborate judgment was given by the District Court and affirmed by the Collective Court.

There the rules of the Civil Law on the subject of deeds made to the fraud and prejudice of creditors were distinctly recognised, and it was decided, altogether independently of the Bankruptcy Law, but on the authority of the Civil Law, as interpreted by *Voet* in 42 8 14 of his *Commentary on the Pandects*, and in opposition to the English Law, that a voluntary mortgage by a debtor in insolvent circumstances is void, not only against existing creditors, but against future creditors, if it was intended to defraud them, even although no particular creditor should have been in the debtor's contemplation as specially intended to be defrauded or prejudiced thereby. The rule laid down by Voet is so important that I make no apology for repeating it here in his own words. After distinguishing between the "*Actio Pauliana*" or equitable action, competent either to creditors or to the curator bonis of an insolvent estate, when such a fraud has been committed with the concurrence of the alienee or mortgagee, and whether before the *missio in commissionem* (that is to say, before the creditors or a creditor on their behalf have been put by the Court in possession of an insolvent s estate), or after such missio—after distinguishing between that action and the "rescissory action" which has for its foundation, not the fraud of the alienee, but merely the judicial hypothec which arises from the *missio*, even in the case of an alienation accepted in good faith (§ 12), he proceeds in § 13 to point out certain features which these two actions have in common, and says in § 14 that in "both *fraus intervenire debeat ex parte debitoris alienantis quæ ut intervenisse dicatur, duo concurrere necesse est, puta ut fraudandi animum seu consilium habuerit, sciens se non esse solvendo, et tamen bono diminuens, licet forte non præcise cogitaverit de hoc vel illo in specie fraudando; et ut eventus concilia responderit, adeoque creditores vere suam consequi nequeant, ac denique, ut fraudandi propositum et eventus in ejusdem creditoris personam concurrat, nisi ex creditoris effectu fraudati pecunia demissus sit ille, quem debitor ab initio fraudare in animum induxerat:*"

A voluntary mortgage by a debtor in insolvent circumstances, is void, not only against existing creditors but against future creditors, if it was intended to defraud them, even though no particular creditor should have been in the debtor's contemplation, as specially intended to be defrauded or prejudiced thereby. (*Roche Victoria's case.*)

That is to say, "there must be fraud on the part of the alienating "debtor; and two things are necessary before this can be alleged, to wit, "that he should have had a fraudulent intention, knowing that he was "not solvent and nevertheless diminishing his estate, although he "maynot have exactly intended to defraud this or that particular per- "son; and that the result should have corresponded with the intention, "so that the creditors are unable to obtain their own; and finally that "the fraudulent intention and the result should both meet in the "person of the creditor, unless he whom the debtor originally intended "to defraud has been paid from the money of the person whom he had "defrauded in fact."

The case we have to deal with here is that of a preference given to a bonâ fide creditor, upon the latter's demand and pressure, by way of a special mortgage, by a debtor who was then in insolvent circumstances but before judicial bankruptcy, or in the equivalent language of the Civil Law, before the *missio in possession* of his creditors or their representative. Our Common Law is quite clear upon the point. The Civil Law, generally, on the subject of transactions in fraud of creditors or undue preference of one of them over the others will be found in the following passages of the Digest (some of which are quoted in

Story's Equity Jurisprudence §§ 350 351) and which still remain Roman Dutch Law *Dig. Lib. 42 til fr 1; fr 3; fr 6, §§ 6, 7, 8, 11; fr 7; fr 10 § 1 & 2 &c.; fr 15, fr. 16 fr 17 &c.*, see also *Burge's Com. on Colonial and Foreign Laws* vol. 3, p. 616, and the first case there cited from *Sande.*

In order to avoid such a deed as we have here, there must be on the part of the debtor a knowledge that he was insolvent and that he was thereby diminishing his estate (which constitutes the "animus seu consilium fraudandi)" and a result corresponding to this intention (Voet ad Pand § 14); and on the part of the alienee or mortgagee there must be a knowledge of the debtor's fraudulent intent, or the deed must have been without valuable consideration (§§ 3. 4, 5.) But in the case of a preferred bona fide creditor before *judicial*, as distinguished from *actual*, insolvency, mere knowledge of the debtor's insolvency will not be deemed a fraudulent acceptance, so as to deprive the creditor of the fruits of his vigilance, even although he should recover payment of his claim in full; and a singularly apt illustration of this is quoted by Voet in (§ 17). Neither does it matter whether the debtor acted spontaneously or under pressure; nor whether the debtor knew of his own insolvency and therefore spontaneously offered payment unasked for the purpose of preferring the creditor or whether a demand had been made on him. Voet's actual words in § 17 are as follows :—

Neque distinguendum est, an debitor sponte obtulerit creditori, an vero creditor ei invito extorserit; nec utrum creditor per gratificationem *debitoris conscii forte sibi, quod solvendo non sit et ita sponte debitum offerentis, acceperit, cum non interpellasset eum ad solvendum, an vero is interpellatus fuerit &c., cum omnes illæ distinctiones a juris consulto promissa, rejiciantur tandem, ac simpliciter definiatur; sed vigilari, meliorem meam conditionem feci, jus civile vigilantibus scriptum est; ideo quoque non revocatur id, quod percipi* :—that is to say, "it "makes no difference whether the debtor spontaneously offered payment "to his creditor, or whether the creditor extorted it from him against "his will, nor whether the creditor received it by the favor of the "debtor who knew that he was insolvent and spontaneously offered "payment of the debt without its having been demanded from him, "or whether demand had been made; for the Jurisconsult has "rejected all these distinctions, saying simply "I have been vigilant, "and by my vigilance I have bettered my position, it is written that the "Civil Law is for the vigilant; and therefore that which I have "received cannot be recalled from me."

But as already hinted at, there is one exception to the rule as there stated, and that is the case where several creditors are pressing the insolvent at the same time, and he gives a preference to one of them over the others: in that case what the favored one has thus received by undue friendly preference must be shared with the others; for it is just that it should be shared with those who were equally diligent with himself; *Digest 42. 5, 6. § 2* and *Voet 42. 8. 1 17.* at the words "*denique sententiam.*" There is therefore a wide conflict between our Common Law and the English Law as to what constitutes a fraudulent preference of one creditor over others *under the* Bankruptcy acts especially as it stood previous to the Act of 1869. In contrast with the test of a fraudulent preference *under the Bankruptcy Law*, our Common Law distinguishes between transactions *before* and *after* judicial bankruptcy, and in the case of the first of these classes

takes no account of how soon judicial bankruptcy may have followed, nor of a *creditor's* knowledge of actual insolvency ; nor of the absence of pressure, unless one or more creditors had been preferred over others who had been equally vigilant with these in the pursuit of their claims ; thus in this case, rejecting all the tests of the English Act of 1869 excepting the first, namely insolvency in fact ; and with respect to that the English Law has been exactly assimilated to the Civil Law in discarding all questions which turn upon a debtor's "contemplation of judicial bankruptcy." That act has further more nearly assimilated the English Bankruptcy Law to the general rule of the Civil Law (with a difference however), by the provision at the end of § 92 which has been construed in *Butcher vs. Stead*, (*Law Journal Rep, Vol. 44 N. S., Cases in Bankruptcy, p. 133*) as saving the rights of a bona fide creditor who did not know that he was being fraudulently preferred.

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Now, if I am to decide this case on the principles of the Civil Law, which undoubtedly takes a broad, a reasonable, and an equitable, view of acts done in fraud of creditors and of fraudulent preference of creditors, and which, in applying its doctrines to fraudulent transactions perpetrated before the judicial assignment of an insolvent estate to a trustee for creditors, does not limit or narrow these doctrines by any questions of subsequent judicial bankruptcy or of the accident of the period of time which has elapsed between the date of the fraudulent transaction and the date of the debtor's estate vesting in the creditor's trustee (the missio in possession),—if I am to do this, I think it clear that this deed must be set aside as a fraud upon other creditors, independently of any provision in the Bankruptcy Ordinance or, in other words, independently of the accident of whether the debtor has subsequently become bankrupt or not, for according to my findings on the facts, the debtor, at the date of the transaction, was actually insolvent, and knowing this, and intending to diminish the estate available for equal distribution among his creditors, executed this mortgage in order to give an unfair preference to his creditor ; and (as respects the position of the favored creditor and his right to have the advantage of it)—at a time when the insolvent was in treaty with his other creditors for a composition at the rate of 7s. 6d. in the pound and when therefore the case, must I think reasonably be considered as in the same position as if a payment had been made or a security granted to one of a number of creditors who were then equally with him vigilant in the pursuit of their claims. For I cannot consider but that the principles of natural justice make it a gross deception and fraud for an insolvent to be dealing with his creditors as a body, offering them a composition and while treating with them as a body for this, and while they are thus deceptively thrown off their guard and induced temporarily to abstain from pressing their claims declaring their debtor bankrupt pending these negotiations, to give a secret preference to one of their number. And the way it works is shown by the evidence in this very case.

The plaintiff himself set the negotiations on foot, was among the first to agree to the composition deed, takes advantage of the lull then created during negotiation to get a secret advantage over the

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creditors, and then so soon as he has secured this, refuses to sign the deed.

This, Mr. Gordon, the plaintiff, appears to have done; and however astute, I cannot say I think it free from the odour of deception of other creditors and a fraud upon them—as much as if they had been actually pressing the debtor. If his proposal for the composition deed kept the other creditors from pressing the debtors, it must be considered the same as if they were pressing him. So far as concerns Mr. Gordon at all events, it does not lie in his mouth to plead the very act whereby the other creditors may be presumed to have been kept back from pressing the debtor. I think this is a reasonable presumption. But even if it were not, the position of matters from the time the composition deed was started was one which exacted scrupulous mutual good faith on the part of all, and I think Mr. Gordon, was guilty of a breach of good faith to the other creditors in quietly getting a security for himself after having proposed or even agreed to the composition.

It calls indeed for passing notice that the very fact which under the Civil Law invalidates the present mortgage, viz a friendly preference of one creditor, *pending pressure by other creditors as well as the one preferred* (or something which I consider rests on the very same principle)—was urged unsuccessfully in *Brown and others v. Kempton 19 L. J. (C. P. 169)*, but in that case, there was an express finding that the payment had not been a voluntary one and the decision really only went the length of holding that this fact by itself was sufficient to save the transaction; so that it was of no moment, from the English view of preference in bankruptcy, whether other creditors were pressing him or not; and beyond that the Judge merely maintained the correctness of the ordinary form of direction to a jury, namely that concurrenceof voluntary payment and contemplation of bankruptcy (as the law then stood) was necessary to constitute such fraudulent preference. But not only are these weighty dicta against that decision, as far as it can be said or supposed to be an authority on the question of simultaneous pressure by the preferred creditor *and other creditors*, but it should not weigh with my decision under the Civil Law, which altogether discards the question of pressure in the general sense and only deals with it in this sense, that though generally neither pressure by a creditor nor spontaneity of payment affects the position of preferred creditor, yet, if several creditors are equally pressing, it is a fraud for an insolvent person to prefer one to another, and this I think is common sense and natural equity.

Apart altogether from any question of whether 2nd and 3rd defendants are liable, as the assignees, not of the estate of the first defendants, but only of the firm of which he was a partner: and apart from all consideration of the fact that he has not personally been adjudicated insolvent: and apart from any question of what is necessary to constitute a fraud on the Bankrupt law, I think that the evidence shews this mortgage to be a fraud on the other creditors in accordance with the principles of the Civil Law and therefore void. And the plaintiff's claim will be dismissed with costs.

The plaintiff appealed against this judgment.

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Crenier, for appellant:—The law to govern the case is the English and not the Civil or Roman Dutch Law. See section 58 of Ordinance 7 of 1853. The mortgage in question was valid under the provisions of the Bankruptcy Act of 1869, section 92, nor was it affected by the Statute of Elizabeth. The law of fraudulent preference as to Bankrupts was clearly laid down and lucidly explained by Lord Cairns in *Butcher v. Stead*, 33 L. T. n.s. 541, which had been cited in the Court below. Here the bond had been executed *four* months prior to insolvency and under *pressure* from the creditor who was acting bonâ fide ; and it was not competent for the assignee to question the mortgage. In the words of the Lord Chancellor, in the case cited, "it was the intention of the Legislature, in defining for the first time the law as to fraudulent preference and changing the old rules as to contemplation of Bankruptcy into a rule which exposed the payment to be impeached for a period so long as *three* months, to accompany and temper this enactment by a provision of great convenience in mercantile dealings." On the other hand, the mere preference which one creditor secures over another would not vitiate a deed under the Statute of Elizabeth. *Wood v. Dixie*, 7 Q. B. 892, *Holbird v. Anderson*, 5 T. R. 235. But even assuming that the Roman Dutch Law applied, it was not established that there was a *concursus* of creditors pressing Brodie at the same time, *Voet*, 42, 18, 17. The appellant was a creditor in respect of the private, and not the partnership, estate of the insolvent, and the proceedings did not disclose the existence of a single other private creditor.

Ferdinands, D. Q. A. (*Layard* with him) for respondent:—

Even if the English Law was to govern the case, the facts shew that the pressure relied upon was only a colorable pressure. The threat was applied only after the composition was agreed to, and it is evident that the insolvent and the favored creditor were acting in collusion, and this brought the case within the statute of Elizabeth, which is not affected by the English Bankruptcy Act, and so rendered the bond void. The case of *Roche Victoria*, D. C. Colombo, 61400, affirmed in appeal after long argument, decided the question that a mortgage by an insolvent debtor was void as against present and future creditors intended to be defrauded, and this was in accordance with the Roman Dutch Law, *Voet*. 42. 8. 14, and there is nothing in our law which protected such deeds, when the fraudulent debtor afterwards took refuge under the Insolvent Act. The clause as to fraudulent preference in England must be construed as applying here to cases other than those covered by the Dutch Law. To rule otherwise would be to legalize fraud under shelter of the Insolvent Ordinance, which never could have

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been the object of grafting the English Law of fraudulent preference into our Insolvency Ordinance. There is no evidence to shew that this was a private debt of the Insolvent. This was not an issue in the court below and could not be entertained without fresh evidence being entered into.

Grenier, in reply:—The threat by Gordon to declare Brodie a bankrupt in London and which Brodie admits influenced him in executing the mortgage, was sufficient to indicate pressure and to negative that the security given was voluntary. This pressure saved the validity of the bond. The question of fraud or no fraud under the Statute of Elizabeth depended on the motive of the party granting a deed. *Nume v. Willsmore*, 8 T. R. 521. Unless therefore it could be shewn that the debtor's *sole* motive was to give preference to one creditor, the deed could not be impeached; and it was held by Vice Chancellor Bacon in *Blackburn v. Cheesebrough*, 12 L. R. Equity, 364, that "if the act of "the debtor can be properly referred to some other motive or "reason than that of giving the creditor paid in preference "over other creditors, then neither the Bankruptcy statute nor "*any principle of law or policy* will justify a Court of law in "holding that the payment is fraudulent or void." Here Brodie had admitted that it was not till after the bond had been granted and he returned to Ceylon that he knew he was hopelessly insolvent, and that it was to prevent Gordon taking extreme measures against him in London that he had given the mortgage. *Roche Victoria's* case was quite different. There the conveyance was purely *voluntary and without consideration*. The fact of the debt to Gordon being a private and not a partnership debt was specially pleaded in the appellants replication and there was no traverse of it by the respondents. The report of the assignees further shewed that the mortgaged property did not belong to the insolvent firm but to Brodie personally.

Cur. adv. vult.

The Supreme Court this day held as follows:—

Set aside and judgment entered for the plaintiff against the first defendant as prayed for in the libel, except as to costs, which shall be paid by the 1st defendant personally, and by the 2nd and third defendants, as assignees; the claim of the 2nd and 3rd defendants is dismissed.

This is an action on a mortgage bond, bearing date the 1st August 1874, and executed by the first defendant, to secure the payment of Rs. 20,000, with interest. On the 16th December 1874, the first defendant was adjudged insolvent, and the act of insolvency relied on by the petitioning creditor was a declaration of insolvency by the insolvent, under the 10th clause of the Ordinance No. 7 of 1853, and bearing the same date as the petition for

adjudication. The 2nd and 3rd defendants, who are the assignees of the Insolvent estate of the 1st, filed an answer, by which they impeached the bond in question on the ground of fraudulent preference. The first defendant filed no answer, but he was examined as witness in the case, and his evidence taken in the case 70216, as well as the evidence taken in the special case *D. C. Colombo Lr. A.* was by consent received in evidence in the case. On the 22nd November last, the learned District Judge of the District Court set aside the bond, holding that, according to the Civil Law, it was void, being a fraud on creditors; at the same time expressing his opinion that, according to the local Ordinance No 7 of 1853, which by clause 58 introduced the Law of England, on matters of fraudulent preference, the bond would be good. It is unnecessary to express any opinion on the question whether the bond is good or bad according to the Civil Law or the Roman Dutch Law, because we think that neither of these two systems of jurisprudence is applicable to the case. We think that the 58th clause of the Ordinance No. 7 of 1853 having introduced the English Law on a special subject, it must be taken to have excluded all other laws with respect to that subject, and we think the law applicable to the case is the English Law, and that the judgment of the District Court should be set aside.

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April, 17.

April 17th.

Present :—DIAS, J.

D. C. Kandy, 6,562.

The Police Magistrate convicted the accused, a saddler, on a charge of "having quitted the service of the complainant without notice or reasonable cause, in breach of cl. 11 of Ord. No. 11 of 1865."

A saddler is a *servant*, under the Labour Ordinance.

On appeal, it was contended that "a saddler was a scientific or skilled labourer, and was not amenable under the Ordinance, unless bound by a written contract as provided by cl. 7."

The Supreme Court, however, affirmed the judgment, without calling upon *Van Langenberg* for respondent.

May 1st.

Present :—DIAS, J.

P. C. Point Pedro, 18,844.

This and another case (No. 18,828), as connected cases, were heard and decided on the same day. No. 18,828 was a plaint against defendant for riotous and disorderly behaviour in a public street,

Irregularity of proceedings.

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in breach of cl. 2 of Ord. No. 4 of 1840 ; and in No. 18844, the defendant in the former case charged his accuser with assault and with resisting him against his duties as process server.

The Police Magistrate delivered one judgment in both these cases. But on appeal, the proceedings were quashed as being grossly irregular, and per DIAS, J :—The two plaints being essentiallydifferent, should have been tried in two different cases.

P. C. Kalutara, 57,343

Arrack Ordinance.

The charge was laid under cl. 37 of Ord. No. 10 of 1844 for removing 2½ gallons of arrack without a permit. The Police Magistrate in measuring out the arrack, found it to be a little more than two quarts, and sentenced the defendant to pay a fine of Rs. 50.

On appeal, this was set aside, and case remitted for further evidence, and per DIAS, J :—The quantity of arrack removed by the defendant has been found to exceed two quarts, which would make the removal, without a permit, illegal ; but by cl. 37 of the Ordinance, the penalty is to be determined according to the quantity removed. This the Magistrate failed to find, and the case is sent back to ascertain the actual quantity removed, and to impose such a fine as is pointed out by cl. 37. *(Ondaatjie* for appellant.*)*

P. C. Kurunegala, 30,067.

Toll Ordinance.

Plaint :—That defendant did, at the toll bar of the bridge, there not being the toll-keeper thereof, personate and represent himself to be the toll-keeper, and did demand and take illegal toll from complainant, in breach of cl. 16 of Ord. No 14 of 1867.

The licensed toll-keeper stated that he desired the accused to recover the toll from the complainant, and had authorised him to issue a receipt for that amount ; and that he himself was lying in a room at the toll bar, suffering from fever, at the time the receipt was granted.

The Police Magistrate thought that the accused, even though acting under the authority of the licensed toll-keeper, had violated cl. 11 of Ord. 4 of 1867, and accordingly sentenced him to a fine of Rs. 5.

On appeal, set aside and defendant acquitted. Per *Curiam:*— The evidence abundantly shews that the defendant acted as the agent of the toll-keeper, and in his presence ; the payment of the

toll must be therefore looked upon as a payment to the toll-keeper himself, and not as a payment improperly exacted by the defendant. (*Van Langenberg* for respondent.)

1877 May, 4.

P. C. Point Pedro, 18,855.

Grenier for appellant. *Browne* for respondent.

Toll Ordinance.

PER Supreme Court: This is a charge under the 4th and 17 clauses of the Ordinance No. 14 of 1867. It appears that on the 11th February last, the defendant caused his palanquin carriage to be drawn by four men over the bridge, of which complainant is the renter. The defendant was in the carriage at the time, and refused to pay toll on the plea that a vehicle drawn by men was not liable to pay toll. The Magistrate acquitted the defendant, on the ground that the Ordinance only contemplated carriages drawn by horses or other beasts of burden. The Supreme Court, however, differs from the Police Magistrate, and thinks that the vehicle in question comes under the description given in the 4th clause of the Ordinance: "every vehicle not enumerated above," and as such, liable to pay one shilling.

The acquittal is, therefore, set aside, and the defendant adjudged guilty, and sentenced to pay a fine of ten rupees.

May 4th.

Present:—DIAS, J.

P. C. Galle, 98075.

Abusing, so as to provoke assault, is not an offence.

Plaint: that defendant did, on *etc.*, abuse complainant so as to provoke assault. One of the witnesses proved that the terms "blackguard and whore's son" were used.

On appeal against a conviction (*Dornhorst* for appellant), the proceedings were quashed as the plaint did not disclose an offence punishable by law.

P. C. Matara, 77768.

1. Whether or not striking out of the plaint one of

The plaint was "that the 2nd defendant did on the 7th day of February, at Vihara Hena, assault and beat the complainant: and the 1st defendant forcibly removed the complainant to Narregalla Estate and unlawfully detained him there."

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the defendants, in order that he may be called as a witness by the rest, is regular?

2. Competency of a defendant in criminal proceedings to give evidence for or against his co-defendants.

On the day of trial, the 2nd defendant (Mr. Fowke), who was a J. P., presented an affidavit praying that the 1st defendant (Mr. Milne) might be excluded from the charge, in order that he might be called as a witness for the defence. This was objected to by the complainant, but the Magistrate ruled that the case should proceed as against the 2nd defendant only, with leave to the complainant to separately prosecute the 1st defendant for false imprisonment.

The case then proceeded, the complainant calling several witnesses to prove that he had been slapped on the face by the 2nd defendant and that he had been taken into custody and detained by a Police Constable at the instance of both defendants.

For the defence Mr. Milne was called, and he deposed that he did not see complainant assaulted. Another witness was offered for cross-examination, but the complainant's Proctor declined to question him.

Mr. Arunachalam, the Magistrate, acquitted the defendant in the following terms:

"I have no doubt that complainant was forcibly removed and unlawfully detained by the Police Constable, but defendant cannot be held responsible for this, as even supposing that he directed the police constable to do so, the constable was not justified in acting on that order. As to the slap on the face, to which the charge of assault is reduced, it is impossible that Mr. Milne should not have seen it, if the assault was committed."

On appeal, *Grenier*, for appellant.—The proceedings have been very irregular* in the 1st defendant having been excluded from the plaint and the charge confined only to the 2nd. There was nothing to prevent the 1st (without being discharged) from giving evidence for the 2nd accused. All that the law required was that an accused party should not give evidence for or against himself. See *Reg.* v. *Deeley*, 23 L. T. n. s.168, which was a

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* But see *P. C. Matara 71410* (Grenier's Rep. 1870 P. C. p. 31), in which CREASY, C. J. observed as follows:—

"It is stated in the first volume of Thomson's *Institutes*, when speaking of Police Courts, 'if an improper number of persons are made defendants, in order to exclude them as witnesses, the Magistrate should exclude [that is, strike out of the plaint] those so made, and allow them to be called as witnesses.' A reference is given to Beling and Vanderstraaten's *Police Court Cases*, p. 126. In the present case, the petition of appeal urges that the defendants lost the advantage of each others evidence. But no distinct application to strike out names from the plaint, so that specified parties might give evidence for specified other accused, was made at the trial. Such application ought to be distinctly made and ought to be supported by affidavit."—ED.

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case under the 14 and 15 Vict. c. 99 which had been adopted in Ceylon by Ordinance 9 of 1852.† On the evidence, the case against the defendants had been fully established. Assuming Mr. Milne's evidence to be all true, it was not inconsistent with the defendants' guilt.

Per DIAS, J.—Set aside, and defendant adjudged guilty, and sentenced to pay a fine of Rs. 50. The Supreme Court does not generally interfere with the decisions of the lower courts on mere questions of fact, but the evidence in this case is such that this Court is compelled to over-rule the decision of the Police Magistrate, and hold that the assault has been proved. The complainant in this case is the clerk of a shopkeeper called Absolom, and it appears that on the 7th February last the two defendants entered Absolom's shop and asked the complainant to produce a letter which had been sent to him in the hands of the 2nd defendant's servant. On complainant denying the receipt of the letter, the defendants, without any legal authority, began to search the shop by opening the drawers, and examining the books ; and in the midst of this unlawful proceeding, the complainant says the 2nd defendant slapped him in the face. The first defendant was improperly left out of the case at the instance of the 2nd, who called him (the 1st defendant) as his witness for the purpose of contradicting the complainant's statement that the 2nd had slapped him. In view of what was going on in the shop at the time of the assault, it is quite possible that the witness failed to notice the slap, and this item of evidence loses all weight when opposed to the direct evidence of complainant and his witnesses ; supported as that evidence is by the police officer, who says that the complainant complained to him of the assault, and shewed him a slight swelling of the face. The Supreme Court believes that the complainant was not only beaten by the defendant, but that he was improperly handed over by him to the police constable, and removed by the latter to the bungalow of the Justice of the Peace, who appears to be the 1st defendant.

P. C. Badulla, 19,736.

Grenier for appellants.

The Supreme Court held as follows :—

Escape from custody (c. 70 of the Police Ordinance), and evidence thereof.

This is a charge against three Police officers, under the 70th clause of the Ordinance No. 16 of 1865 for allowing one Marsal Perera, who was in their charge, to escape from custody. The 1st and 3rd defendants were convicted, and the 2nd acquitted. The present appeal is by the 1st. It appears that Marsal Perera was

† See Taylor *on Evid.* § 1223, and all the cases cited thereunder (including *R. v. Deeley*), shewing the exact limits of *sec.* 3 of Lord Brougham's Act of 1851. See also Archbold's *Crim. Pl.* p. 273 (17 Edn.)—ED.

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arrested as being concerned in a robbery, and was detained in the custody of the Police, but it does not clearly appear from the evidence, whether, at the time of the escape, he was in the custody of the Police under a warrant of commitment, or whether he was merely put under police surveillance. In a case like this, the first step in the proof is that the person, who has escaped, was in lawful custody at the time of the escape. The best proof of this is the warrant of commitment itself. It should have been produced, or secondary evidence of its contents given after due notice to the defendant to produce the original. This has not been done and the evidence of the Police Inspector does not clearly shew under what circumstances Marsal Perera was in the Police station at the time of the escape.

May 15th.

Present : CLARENCE, J. and DIAS, J.

C. R. Anuradjhapura, 6801 / 6908

Grenier for appellant.

A claim in execution cannot be tried by substituting the defendant for the original defendant.

Set aside and proceedings quashed for irregularity. This is a claim in execution which has been tried by substituting the claimant for the original defendant. The claim should have been tried in another case.

May 17th.

Present :—CLARENCE, J. and DIAS, J.

The Court is adjourned till Tuesday next, the 22nd instant, in consequence of the demise of the late Hon'ble Sir William Hackett, Kt., Chief Justice.

May 22nd.

Present :—CLARENCE, J. and DIAS, J.

C. R. Kalutara, 88,767.

The owner of land who seizes cattle on it damages.

Set aside and judgment ordered to be entered for plaintiff and the case remitted to the Commissioner to determine the amount of damages.

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The remedy given by the Ordinance No. 2 of 1835 is cumulative, as this Court had occasion to observe in *C. R. Kandy, 30,619*, June 10th, 1863, reported in Creasy's Report p. 117, and in addition to such remedies as the aggrieved party already had at common law. The plaintiff is suing in the Court of Requests, has proved the trespass, and has also adduced evidence as to the damages the adjudication on which latter evidence, we leave to the Commissioner.

feasant, may avail himself of the common-law right of distress. The remedy under Ord. No. 2 of 1835 is cumulative.

C. R. Matale, 35,405.

Liability of landlord for grant of lease, without quiet possession.

The following is the judgment of the Supreme Court :—On the 7th September, 1876, the defendant leased to plaintiff a coffee garden for twelve years. It appears that at the date of the lease, the garden was subject to another lease by the defendant, in favour of some Tamils, who disputed the plaintiff's right to the crop of 1876, and this action was brought by the plaintiff for the value of that crop. The Commissioner nonsuited the plaintiff on the ground that his lease was illegal and inoperative, owing to the previous lease ; and that his only remedy was to have back the money he paid on his lease. This view of the case is erroneous. On his lease, the plaintiff was entitled to quiet possession, and his right of possession having been disputed by a party claiming under the defendant, the defendant is liable to the plaintiff in damages. Judgment will therefore be entered for plaintiff for Rs. 95 and costs.

set aside.

C. R. Kalutara, 38,986.

The effect of *Wattooroos*.

Per Supreme Court :—This is an action by a paddy renter who bought the Government share of the defendant's field, which was as half. Defendant admits his liability to pay 1-10th, and the evidence in the case fully supports his statement ; but the Commissioner gave plaintiff judgment on the ground that he was bound by the Government assessment as set forth in the Wattooroo, under which the rent was sold. This view of the case is erroneous, and it is quite competent to defendant to prove (as he did in this case), that the Wattooroo was wrong.

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May 25th.

Present :—CLARENCE, J. and DIAS, J.

Irregularity of proceeding.

P. C. Kalutara, 57,628.

On a charge, under clause 90 of Ordinance No. 16 of 1865, the Police Magistrate fined the 3rd defendant, in whose house the tom-toming and other disturbances were going on, and ordered the 1st, 2nd, 4th, 5th and 6th defendants to give bail to appear for judgment, when called upon.

On appeal, affirmed as respects the 3rd defendant, but set aside as regards the 1st, 2nd, 4th, 5th and 6th defendants.

With respect to the other defendants, the Police Magistrate had no power to call on them to enter into recognisance to appear, when called on, to receive judgment ; that sentence is set aside and those defendants fined one cent each.—(*Grenier* for appellant.)

P. C. Hambantota, 6,851.

1. A license to possess opium in a certain quantity in a specific place, does not warrant its holders to possess it in any other place, much less a quantity beyond that covered by the license.

2. Custody of opium by a *carrier*, when justifiable without a license.

Plaint : that defendants did possess opium, namely 34 lbs. more or less, beyond the quantity prescribed by law, without having a license, in breach of clause 6 of Ordinance No. 19 of 1867.

It appeared that 2nd defendant who was a licensed dealer of opium at Galle was requested by one Abdulla, a dealer in Hambantota, to forward through his messenger Rahim Rs. 500 worth of opium at Rs. 15 per lb, but that instead of entrusting Rahim with the supply, the 2nd defendant himself brought it to Hambantota, and while going into the house of the 1st defendant, to allay, it was said, his thirst, was seized with the opium in his possession.

The Police Magistrate acquitted the first defendant for want of evidence, but found the 2nd guilty in these terms :—

"He is a licensed vendor, but his license limits his possession, and his authority to sell, to his shop No. 260 at Dangedara in Galle. He justifies his possession in the present instance, upon the plea of his being the *carrier* of opium, the sale of which had been, at least in part, accomplished to the licensed dealer of Hambantota. *P. C. Tangalla, 39,308* confirmed in appeal, was quoted to shew that custody by a bearer was held to be justifiable without a license, but here the 2nd defendant is more than a carrier, for at the time of the seizure, he still retained part of the proprietorship in the opium, and that part he had no right to represent in Hambantota." The Police Magistrate therefore sentenced the 2nd defendant to pay a fine of Rs. 50, and ordered all the opium to be seized except Rs. 250 worth, which the licensed dealer Abdulla appeared to have bought previous to seizure, at the rate of 1 lb. for Rs. 15.

On appeal, *Grenier* appeared for appellants.

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The Supreme Court affirmed the judgment in these terms :—

In this case, the second defendant appeals against the Police Magistrate's decision convicting him, under the 6th clause of the Opium Ordinance of 1867, of illegally possessing opium, and sentencing him to pay a fine of Rs. 50, and confiscating, of 34 lbs. of opium seized by the Police, the balance over and above Rs. 250 worth @ Rs. 15 per lb. We think it clear that this balance of opium, which would be 17⅓ lbs., was seized in 2nd defendant's possession. He had bought it to sell, but had not yet sold it, to the extent of parting with the possession. It is also clear that the license, which 2nd defendant holds, being a license to possess opium in quantity not exceeding 20 lbs. in a specific house in Galle, did not warrant his possession of opium at Hambantota. It was, however, contended in appeal that 2nd defendant's possession was in fact that of a mere carrier, and consequently that he was entitled to an acquittal, upon the principle of a Tangalla case, decided by this Court on February 4th, 1876. The facts as to this are, that 2nd defendant, being a licensed opium dealer in Galle, received an order from Hambantota for a large quantity of opium, proceeded to execute the order, and instead of entrusting the opium to the hands of any third person or carrier, brought it himself to Hambantota. He was a carrier in the mere sense that he conveyed the opium, and only in that sense ; he had the opium in his possession as its owner, and was, therefore, open to conviction under the Ordinance.

With regard to the sentence, if the case had merely been that the 2nd defendant, in the execution of an order for opium, had technically trasgressed the requirements of the Ordinance by becoming his own messenger, we should have considered the case not one for the infliction of the extreme penalty of fine and confiscation. But the evidence discloses that the defendant came into Hambantota in possession of 34 lbs. of opium, which is considerably more than his license allowed him to possess even in Galle. We do not therefore feel disposed to interfere in mitigation of the sentence which the Police Magistrate has considered it proper to pass.

D. C. Galle, 39,051.

Libel :—

The incumbent priest of a mosque has a right to the

I. That the plaintiffs, who always were and still are Mohamedans, are the children of Neyna Markar Mohamadoe Anifa, who was likewise a Mohamedan and died at Galupidde on the 23rd October, last.

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exclusive performance of religious rites and ceremonies over the corpse of those who had been members of that mosque.

Qu. Whether the proceedings ought not to have been ordered to abate, as being a matter purely ecclesiastical?

II. That the said deceased was before and at the time of his death a member of the Mosque, known as Cotwa Palli at Talapitia, and the plaintiffs are likewise members thereof, and as such the plaintiffs had the right to have the corpse of their father taken to the said Mosque, and, after the performance thereat of the usual and customary religious rights and ceremonies, to bury same in the burial ground attached to the said Mosque.

III. That the plaintiffs relying on this right on the day and year aforesaid removed the corpse of their said father, intending to take the same to the said mosque for the performance of the customary religious rights and ceremonies and thereafter to bury it in the burial ground attached to the aforesaid mosque. Yet the defendants, who are two of the priests officiating in the said mosque, maliciously intending to injure the deceased's family, viz., the plaintiffs, and to expose them to contempt and disgrace, did not nor would permit the corpse to be taken to the mosque aforesaid or to have any religious rites and ceremonies performed over the dead body, but with force and arms prevented the same being done, and thus the plaintiffs were obliged to bury the corpse without the customary religious rights and ceremonies being performed.

That by reason of the aforesaid conduct of the defendants, the plaintiffs have been exposed to contempt and disgrace and have suffered in mind and body, to plaintiffs' damage of Rs. 1,400.

Pray for judgment in their favour, and costs.

Answer :—

I. Not guilty.

II. That the defendants, who are the priests of the mosque in question and who have the exclusive right to perform the customary religious rites and ceremonies over the body of the deceased, were not asked or requested to perform the same. That the plaintiffs and others, with force and arms and with intent to commit a breach of the peace, entered the mosque premises when the Police interfered and prevented the plaintiffs and others from committing a breach of the peace, which is the alleged trespass complained of in the libel.

III. That the defendants, denying to be true or relevant the other matters and things in the libel alleged, say that the parties who resisted the Police were convicted before this Court and punished for the said offence.

Pray that plaintiffs libel may be dismissed with costs.

It appeared that the defendants did not object to the burial in the premises of the mosque, but only to the religious services being performed *in* the the mosque by the *stranger* priest who was asked to officiate by the plaintiffs. Plaintiffs attempted to prove that the

priest whom he wanted to officiate at the burial, was a priest elected by the congregation, and had on more occasions than one, read prayers in the mosque. 1877 May, 25.

The District Judge relied mainly on the evidence of the plaintiff's second witness, which is as follows :—

Jerahim Saibo Alim Mah Usubo Lebbe—affirmed.

I am priest of Kaluvella. I have been so 12 years, the priest before me was 1st defendant. I know this mosque, I officiate at the burials there. I used to say prayers in the mosque and then bury the dead, and say the prayers at the grave, I have very often done so, both for Moormen and Malays—I did so with the permission of the Matichans of Kaluvella. I could not go to another mosque without their permission. I do not know if the Matichans of my mosque had asked permission of the 1st defendant to use his mosque. I bury Malays there too. I am priest of the Malays. I bury them in this ground without the permission of the matichans.

Cross-examined.—The permission of the Matichans of my mosque would be required before a stranger priest could perform service in my mosque. The Matichans would then ask me. My permission would therefore be requisite before a stranger priest could perform service in my mosque. That rule would apply to all services, including the burial service. I perform the Friday service at Kaluvella—that is the sign that I am the priest of that mosque. 1st defendant performs the Friday services at Palapitiya. A stranger priest cannot perform any services in a mosque without the consent of the regular priest of that mosque.

The learned District Judge *(Lee)* held as follows :—

I rely upon the evidence of the Kaluvella priest (2nd witness for plaintiff.) It is clear that the incumbent priest has a right to the exclusive performance of the services of his religion in the mosque, and that he obtained by such performance certain fees It is equally clear that he cannot be deprived of these fees by the intrusion of any stranger, and that it is only with his permission that such strangers can use any such mosque. I am of opinion therefore that defendant did not commit any wrong in claiming their exclusive right, and I adjudicate accordingly, dismissing the suit of the plaintiffs, and casting them in costs.

On appeal (*Grenier* and *Browne* for appellants, *Ferdinands* D. Q. A. for respondent,) their lordships affirmed the Judgment.*

* *Qu?* Whether the proceedings ought not to have been *set aside* and ordered to abate, as the subject matter of the case was purely ecclesiastical. See collective decision of the Supreme Court in *D. C. Galle*, 23,466, July 2nd, 1867 ; also *King vs. Coleridge*, 2 B. and A. 806, where HOLROYD, J. said : " It seems to me that the mode of burial is as much a matter of ecclesiastical cognizance, as the prayers that are to be read, or the ceremonies that are to be used at the funeral."—ED.

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Nuwara Eliya, No. 5,261.

Reducing into possession *feræ naturæ*, and liability of the occupant.

The plaintiff, *Downall*, claimed Rs. 50, as the value of an elk unlawfully killed and appropriated by the defendants, the said elk being at the time the property of the plaintiff.

The defendants pleaded not guilty of the alleged trespass ; and the 2nd and 3rd defendants admitted having killed an elk on the grounds attached to the Round Bungalow, then tenanted by Mr. d'Esterre, but said they were not aware that the animal was the property of the plaintiff.

The evidence disclosed that Mr. Cotton had taken out the plaintiff's dogs on the morning of the day in question ; that he had started two elks, one of which was killed on the barrack plains ; and that six dogs out of the pack gave tongue in another direction after the other elk. As to whether, however, the dogs or any of them had come up to the latter elk before it was shot, the evidence was conflicting ; while the 1st defendant (d'Esterre) deposed as follows :—"I did not know that the elk was being hunted when I killed it. It was about ten o'clock when I first knew the elk was near my bungalow. It was about half an hour afterwards. I did not hear any dogs barking or horns being blown. About a quarter after 2 o'clock, Mr. Cotton came up and said the elk had been killed by plaintiff's dogs." The bungalow keeper, (the 3rd defendant) swore that the elk was standing three-quarters of an hour before it was fired at.

The Commissioner *(Murray)* gave judgment for plaintiff for Rs. 40, holding that "the elk was still in the power of the dogs when killed by the defendants."

On appeal, *Grenier*, for the defendants and appellants, argued on the facts, and cited the Roman-Dutch and English authorities relied on by Sir Edward Creasy in District Court Tangalla, 2,961. Vanderstraaten's Reports, page 247. He also cited *Churchwood vs. Studdy*, 14 East, 240.

Ferdinands, D. Q. A. for respondent, replied on the facts and cited Justinian, 2, 1, 12.

Per CLARENCE, J.—Set aside and judgment entered for the defendants with costs. The question simply is whether, when appellants killed the elk, plaintiff had fairly reduced it into his own possession. The evidence amounts to no more than this. Two elks were started by the hunting party. Mr. Cotton followed up and killed one, some of the dogs went away after the other, and were in pursuit of it at the time when defendants killed it. The evidence of the plaintiff's witness, Rangan, is not quite intelligible.

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Per CLARENCE, J.—"Set aside and judgment entered for the defendants with costs. The question simply is whether, when appellants killed the elk, plaintiff had fairly reduced it into his own possession. The evidence amounts to no more than this. Two elks were started by the hunting party. Mr. Cotton followed up and killed one, some of the dogs went away after the other and were in pursuit of it at the time when the defendants killed it. The evidence of the plaintiff's witness, Rangan, is not quite intelligible. He says that the dogs did not come up until after the elk was killed and the carcase removed, and also says that the dogs came up before the second shot was fired."

May 29th.

Present :—CLARENCE, J. and DIAS, J.

P. C. Galle, 38,788.

Action on a bond by a Proctor.

The plaintiff *(Samarawickrama)*, a Proctor of the District Court of Galle, sued the 1st defendant, as principal, and 2nd and 3rd defendants, as sureties, on a Bond dated 15th August, 1871, for the recovery of Rs. 750, together with interest at 18 per cent per annum. The defendants pleaded that the bond had been granted in satisfaction of a judgment debt due by the 1st and 2nd defendants in case 30,020, the plaintiff, who was the Proctor of the judgment creditor in that case, having undertaken to pay his client and secure the said debtor a discharge. They also pleaded that the said judgment debt had been subsequently paid by themselves, (a portion having been levied in execution), and that the plaintiff (having paid no consideration whatever on the bond) was not entitled to recover in the present suit. The plaintiff replied by a general denial. At the trial, the defendants produced two receipts, one dated 14th May, 1872, acknowledging Rs. 150 in part payment under writ No. 30,020, and another dated 11th October, 1872, acknowledging receipt of "the whole principal and interest due in that case (30,020)." Both receipts were signed by plaintiff. It also transpired in evidence that plaintiff had re-issued or extended the writ in 30,020 against the defendents on several occasions subsequent to the date of his bond.

The District Judge *(Lee)* gave judgment for plaintiff as prayed for.

On appeal, *Grenier* for appellants argued at length on the facts, *Van Langenberg* appearing for respondent in support of the judgment.

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The Supreme Court held as follows :—

Set aside and plaintiff's claim dismissed with costs. Plaintiff, who was the Proctor of the plaintiff in District Court Galle, 30,020, sued on a bond granted to him by the three present defendants, two of whom were defendants in District Court Galle, 30,020, for £75 and 18 per cent interest. The bond is said to have been granted in order to secure plaintiff in the event of his accommodating 1st and 2nd defendants by paying off the judgment in which they had been cast in 30,020. The bond is dated 3rd August, 1871, and on 11th October, 1872, plaintiff gave 1st and 2nd defendants a receipt signifying discharge of the principal, interests and costs due in 30,020. Defendants allege that the intention of plaintiffs furnishing the money for discharge of the judgment in 30,020 was given up, and that they, little by little, supplied the plaintiff with the money in discharge of the judgment.

Even if the plaintiff's evidence is to be credited, plaintiff could not retain the judgment which the District Judge has given him,—for the District Judge has given him judgment as prayed, viz., for the sum named in the bond, with interest from the date of the bond, whereas he could only be entitled to interest from the date on which he advanced the money, which in his evidence he states to have been March, 1872.

But after considering the pleadings and the evidence, we are unable to accord credit to the plaintiff's case. He has claimed in his pleadings more than, on his own shewing of accounts, he could be entitled to, suppressing mention of sums admittedly found by defendants. The accounts as stated by plaintiff, and his witness, the chief clerk, are vague and obscure, and it is noteworthy that, although according to plaintiff he satisfied the judgment from which he was to protect defendants, he continued re-issuing the writ in April and August following, a circumstance which favours defendant's view of the case, but not plaintiff's.

P. C. Batticaloa, 11,279.

Licensing Ordinance.

Plaint :—That the defendant, being the licensed Tavern keeper of No. 4, did, on the 8th of July, 1877, at Palliaddikuda, within the jurisdiction of this Court open, and allow to be kept open, Tavern No. 4 after the hour of 8 at night and before the hour of five in the morning of the 9th February, in breach of clause 4 of Ord. No. 22 of 1873, and clause 37 of No. 7 of 1873.

Grenier for appellant.

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Per CURIAM :—The proceedings quashed, as the plaint does not disclose an offence.

In the former case [11,016, P. C. Batticaloa], referred to in the petition of appeal, the defendant was charged under Ordinance No. 7 of 1873, clause 37, and No. 22 of 1873, clause 4, with exposing intoxicating liquor for sale in his tavern after 8 P. M., and the prosecution failed, because the complainant only proved the sale of arrack, which the legislature in the former Ordinance has defined as *not* intoxicating liquor. In the present case, the complainant has charged defendant under the same two clauses, with keeping his tavern open after 8 P. M., there being no allegation that it was kept open for the sale of intoxicating liquor. In effect the complainant has now admitted the allegation, which in the former case he failed to prove.

P. C. Pusselawa, 15,297.

Mana grass not exempt from toll.

The question in this case was whether *mana* grass ("bed" grass) was exempt from toll. The Police Magistrate finding it not exempted by proclamation, held that toll should have been paid.

On appeal against a conviction (*Van Langenberg* for appellant), the judgment was affirmed in these terms : The carts were loaded with mana grass intended for use as cattle bedding. Very possibly after the grass has been so used, it may have been applied to land as manure, but it was not carried as manure, when it passed the toll gate in question.

C. R. Colombo, 2,673.

Where in a bill of lading of goods carried by the defendant in his ship for the plaintiff, the defendant stipulated for certain exceptions, *held* that such exceptions would exempt the

The defendants who were common carriers, received from a shipper in Melbourne, and contracted to deliver to the plaintiffs at Colombo, certain goods, but did not deliver a certain portion thereof, for the value of which deficiency this action was brought.

The defendants admitted receipt of the goods and the short delivery, but pleaded that they exercised all due and reasonable care, and were not liable by reason of certain exceptions and conditions in the bill of lading which covered the goods. The exceptions and conditions referred to were (1) weight, measure, contents and value unknown ; (2) all accidents, loss, damage, delay or detention from transhipment or warehousing &c. excepted ; (3) goods to be landed or transhipped at the Company's expense, but at the merchant's risk ; and (4) Company's liability to cease as soon as the goods are free from the ship's tackles.

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defendant's liability for loss, only on proof by him that it was caused by some of the excepted causes, [and that it could not have been avoided by reasonable care &c.]

On the trial day, it was contended for the plaintiffs that the burden of proof was on the defendants to shew that the loss arose from any of the exceptions pleaded.

But the Commissioner *(Boake)* ruled that it was not a question of burden of proof at all, but only one of interpretation to be put on certain words; and on the learned counsel for the plaintiffs declining to lead evidence, the Commissioner entered a nonsuit, being "distinctly of opinion that before the plaintiffs could recover in this case, it would be necessary for him to prove that the goods short delivered were in the boxes."

On appeal, *Browne* for the plaintiffs cited Kay *On Ship Owners*, i. p. 258: The exceptions only exempt the owner or master from liability for loss *which has been caused by* some of the excepted causes, and which could not have been avoided by reasonable care, skill and diligence.

Their lordships called upon the respondent to support the judgment.

Grenier for him contended that the nonsuit was correct, though not for the reason given by the Commissioner. The bill of lading was wide enough to cover the loss. [CLARENCE, J.—but you have not shewn that the loss came under any of the exemptions mentioned in the bill.] On that point I will refer your lordship to *Phillip v. Clark*, 26 L. J. C. P. (n. s.) 168, 270, and *Czech vs. General Steam Navigation Company*, 3 L. R. C.P. p. 14. * Plaintiffs said that they delivered the goods "in good order," but did not receive the same in the like good order. It ought to be proved that the goods were received in bad order. Then only would the onus lie on us to prove the causes of the loss. *Haddon v. Perry*, 3 Taunt. 305. Until damage to the goods were proved, the onus would not be shifted to the defendants.

Cur. adv. vult.

Per CURIAM :—Set aside and case sent back for trial. Plaintiff's claim in respect of the alleged short delivery of certain

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* *Philips vs. Clark.* Where in a bill of lading of goods carried by the defendant in his ship for the plaintiffs, the defendant stipulated that he should not be accountable for leakage and breakage.—*Held*, that the defendant was liable for loss arising from leakage and breakage caused by the negligence of the defendant and his servants in throwing the goods.

Czech vs the General S. N. Co.—Goods were shipped on board a steamer under a bill of lading which contained an exception from liability for "breakage, leakage, or damage." The goods were found at the end of the voyage to be injured by oil. It was found that there was no oil in the cargo, but that there were two donkey engines in deck near the place where the goods were stowed, in lubricating which oil was used; there was no direct evidence of how the injury to the goods occurred. In an action against the ship owner, *Held* that the exception did not protect the ship owners from liability for damage accruing thro' the negligence of their servants.

bottles of wine alleged to have been carried in defendant's ship under certain bills of lading. Defendant's answer can only be read as admitting the receipt, and the loss, of the goods, and consequently the Commissioner was wrong in summarily nonsuiting the plaintiffs, because they declined to adduce evidence to prove the shipment. All costs to be costs in the cause. 1877 May, 31.

P. C. Colombo, 5746.

Plaint, that defendants being licensed retailers of arrack had their licensed premises of their canteen, No. 11 Dam Street open after 8 P. M., in breach of Ordinance No. 7. of 1873 clause 37 and Ordinance No. 22. of 1873 clause 4. Licensing Ordinance.

On appeal against a conviction, the proceedings were quashed, as the information disclosed no offence. (*Grenier* for appellants.)

P. C. Kandy 7137.

On a charge of disorderly behaviour, under Ordinance No. 4 of 1841 clause 2, the Magistrate found the accused guilty in these terms : "By the evidence of the police constable, the offence took place, near the public street, in a lane going up to some stables. It was also between 1st and 2nd defendants' houses. It follows therefore that the lane leads to their houses, and is, I think, a public street, within the meaning of the Ordinance. "Public street" under cl. 2 of the Vagrants' Ordinance.

On appeal, the Supreme Court affirmed the judgment of the Court below.

May 31st.

Present :—CLARENCE, J. and DIAS, J.

P. C. Panedura 27,266.

The P. M. adjudged the defendants, guilty, who were charged under c. 5 of Ordinance No. 24 of 1848 and clause 2 of Ordinance No. 4. of 1864, and sentenced them severally to a fine of Rs. 30, besides confiscating the timber seized. Timber Ordinance.

On appeal, per DIAS J. affirmed, except as to the fine imposed, which is set aside, and the defendants are fined Rs. 30, as one fine for the offence. It was urged for them in appeal that they were not liable to be criminally prosecuted as they had a bona fide title to the land. All the evidence which the defendants have adduced on this alleged title is a case No. 20,357 *C. R. Panedura*, which seems to be a case between these parties for a land called

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Kirepellegahawatte. In the appeal petition in this case, the defendants claim the land, on which the trees were cut, as Megahawatte, so that the case No. 20,357 C. R. is inappliable. Even if it did apply, its mere production is not evidence of such a title in the defendants as to oust the jurisdiction of the Police Courts. (*Grenier* for appellant.)

Bench of Mag., Colombo, 14,977.

1. A lessee, who had access to the land which was in a filthy state, is an "owner or occupier," under cl. 1 of Ord. 15 of 1862.

2. But an owner of the land who had not in law such access, is not liable, as not being an "occupier."

The defendant, a lessee, was charged, under sec. 1 and 2, c. 1 of Ordinance No. 15 of 1862, with keeping the premises in question in a very filthy state &c.

The Bench of Magistrates (Messrs. P. Coomara Swamy and J. N. Keith) held as follows:—

It seems to us that the case cited by Mr. Advocate Ondaatjie for defendant, (B. of M. Colombo 12,292 June, 2, 1876) is not in point. There the defendant was the *owner* of the land, and had leased it to one Pieris, and nothing appeared on record to shew that he, the owner, had access to the land. The Supreme Court on reversing our judgment, held that, to punish the defendant would be "to hold that an owner, who may be precluded from access to the premises in the occupation of his tenant, is nevertheless open to criminal prosecution, notwithstanding that he has no more right to enter upon these premises or exercise any control therein than a stranger." But in the present case, it is proved that defendant is the *lessee* of the premises, which consist of a large garden and a few houses. It is true that the houses are sub-let, but there is nothing to shew that the garden itself in respect of which this case is brought, is also sub-let. To this garden, the defendant is proved to have had daily access. He is found guilty and sentenced to pay a fine of Rs. 10.

On appeal, affirmed and *per* CURIAM :—Without discussing the charge under the 2nd sub-section, this charge was clearly prosecutable under the 1st section, and the case is distinguishable from the case cited. (*Ondaatje* for appellant.)

P. C. Kandy 6684.

Grenier for appellant

False information.

Affirmed. The defendant was charged with giving false information to a Police Inspector, and was convicted. It was urged for the defendant in appeal that his statement was not voluntary in as much as it was made in answer to a question put by the

complainant. We think otherwise, as the defendant was under no obligation to make the statement, though it was made in answer to a question.

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P. C. Kurunegala 30,278.

Ferdinands, D. Q. A. for respondent.

Affirmed. The Defendant was charged with having in his possession a stolen cow without a note in writing, as required by clause 21 of Ordinance No. 14 of 1859, and was convicted, The only question for decision is whether, under the 24th clause of the Ordinance, the prosecution is barred. The Police Magistrate has decided in the negative, on the ground that the offence is a continuing offence. We think this decision right. The offence, as laid in the plaint, is within the three months.

P. C. Matara 78,361.

Defendant was charged with "quitting complainant's service without leave or previous warning, as required by law, and being guilty of wilful disobedience of orders and gross neglect of duty, contrary to cc. 3 and 11 of Ordinance 11 of 1865.

A severe assault on a servant is a "reasonable cause" under c. 11 of the Labor Ordinance, for his quitting the master's service, without notice.

The learned P. M. *(Arunachalam)* acquitted the defendant in these terms :—

"In connected case No. 77,851, complainant has pleaded guilty to a severe assault on defendant, and as I consider this was a *reasonable cause* under the 11th clause, and justified defendant in leaving conplainant's service, this case is struck off."

On appeal, *VanLangenberg* for complainant contended that the case should have been fully heard and investigated, as the reason given by the P. M. was not supported by the Ordinance or by any decision of the Supreme Court.

But the Supreme Court affirmed the judgment as follows :—

Complainant having committed a severe assault on defendant of which complainant has pleaded guilty, the defendant was justified in leaving complainant's service without notice.

P. C. Nuwara Eliya, 10,154.

The plaint charged the defendant *(a minor)* with having left the complainant's service without notice, in breach of the 11th clause of Ordinance No. 11 of 1865 ; and the complainant, affirm-

Whether a *minor* is liable, under

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the 11th clause of the Labor Ordinance, for quitting his master's service, without notice.

ing that the attendance of the accused could not be secured by means of a summons, obtained from the Magistrate a warrant for service at Panadure. On the representation, however, of the Fiscal of the Western Province that the defendant was a very young boy and in ill-health, the Queen's Advocate ordered the Magistrate to examine the complainant before further proceedings were taken for the arrest of the accused, intimating at the same time, that if the defendant was a child of ten years only, he could not, in his (the Q. A.'s) opinion, enter into any binding agreement of service.

The complainant was accordingly examined, and, on the papers being returned to the Queen's Advocate, he directed the Magistrate to withdraw the warrant, in the following letter :—

Queen's Advocate's office,
Colombo, 8th May, 1877.

No. 152.

The Police Magistrate, Nuwara Eliya.

SIR,—In reply to your letter, No. 96 of the 1st instant, I have the honor to state that when the boy left his master's service, he could not, even on Mr. Gunewardene's own showing, have been more than 11 years old. At this age, he could not, in my opinion, have sufficient capacity to enter into a binding contract of service. I think that the warrant should be withdrawn, and the complainant left to his remedy by appeal to the Supreme Court.

I am, Sir,

Yours obedient servant,

RICHARD CAYLEY, Q. A.

The Magistrate accordingly made order as follows :—

"In compliance with the Hon'ble the Queen's Advocate's instructions, contained in his letter No. 152 of the 8th instant, the warrant in this case is withdrawn."

The complainant thereupon appealed.

Grenier for appellant : The question as to whether a minor could be prosecuted or not under the Labour Ordinance had already been decided by this Court, Police Court, Matara, 72,024 (2 *Grenier*, p. 52,) in which Sir Edward Creasy (Stewart, J. concurring) explained that the Supreme would not admit the objection founded on the defendant's minority. The English authorities were also in keeping with this ruling. See *Wood* v. *Fenwick*, 10 M, and W. 195, decided under the Act 4 Geo. 4, c. 34 from which our local Masters and Servants' Ordinance had in a great measure been copied. Also *R.* v. *Chillesford*, 4 B. and C. 94, in which Bayley J., held as follows :—"An infant may make a contract for his own benefit : he may therefore make a contract for hiring and service, for that will be beneficial to him. It will give him a right to

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sue for wages. If he does not perform his contract, although no action may be against him, he will be liable to the statutable regulations applicable to masters and servants." The legal view hitherto recognised in this country of such contracts as the one in question was correctly laid down by Justice Thomson, in his *Institutes* (vol. 2, p. 315) :—"Contracts," he says, "which are necessary, as for his (the minor's) food (which is to his profit), and which are to his benefit, as a contract for wages, are valid." It was doubtless to compensate in a manner for this liability that a minor was expressly empowered by statute to personally sue for his wages in the Court of Requests, without the intervention of a guardian or a *curator ad litem*. See clause 83 of Ordinance No. 11 of 1868.

The Court took time to consider, and this day CLARENCE, J. delivered the judgment of the Supreme Court as follows :—

Undoubtedly a minor may enter into a contract of service, so as to render him liable to statutory punishment for desertion. He may bind himself by contracts which are for his own benefit, and a contract of service may be one of these. But this assumes that the minor is old enough fairly to comprehend the situation and its consequences. In the present case, it appears from the Fiscal's report that the minor in question is a sickly boy of not more than ten years of age, and we are certainly not prepared to say that he was of capacity to bind himself by a contract of service. The plaint against him should not be entertained. The Police Magistrate's order cancelling the warrant is therefore affirmed.

Affirmed.

C. R. Ratnapura, 284.

The *paravem* tenants of *dewalagama* lands are each liable only for so much of the services as are due in respect of his holding.

The Basnayeke Nilema of the Maha Saman Dewali of Sabaragamuwa sued the defendants (12 in number) for failing, as tenants of a *pangua*, belonging to the said dewala, to render certain dues and perform certain services enumerated in the libel, and claimed Rs. 18.50 as the assessed value of the said dues.

Only three of the defendants appeared. They pleaded that they were the holders of three lands of the pangua in question, and were always ready and willing to commute or perform services *proportionate to the lands they held*, and that plaintiff never demanded payment nor informed the defendants what *rajakaria* they had to perform.

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The D. J. *(de Livera)* held as follows :—

The question before me is whether the services of the tenants, or the value at which such services were assessed by the Commissioners, admit of division. I am of opinion that the plaintiff is entitled to what he claims, and that each of the defendants is responsible for the performance of all the services, or the value of those services. The Commissioner's decision as regards the money value of those services is final, and as it dealt with the *pangua* as a whole, and not with each land belonging to it, each shareholder is responsible for the payment of the whole amount.

It was unnecessary in this instance for the plaintiff to inform the defendants of the nature of the *rajakaria* they had to perform, as they admit they were willing to commute in proportion only to the extent of the lands they hold.

Judgment for plaintiff as claimed, with costs.

On appeal, *Layard* for the defendants : The Court below was wrong in holding that the liability of the tenants was indivisible. The Service Tenures' Commissioner's decision, upon which the judgment now in appeal proceeds, need not bind the Court. If solidity was meant, it should be so expressly stated. Domat's *Civil Law*, i. p. 319. Vanderlinden, p. 203. Where several debtors are bound for the same thing, the obligation does not bind every one of them for the whole, unless it is specially expressed. The *pangua* here must be looked upon as a divisible whole, for may not each *pangukaraya* assign away his interest ? We have been always willing to perform our own services, or to commute proportionately. Besides, we were not called upon by the landlord to perform the services, and this he was bound to do, according to the decision of the Supreme Court in *C. R. Ratnapura, 9,353.*

Browne for respondent : it is not the individual shareholders who are responsible to the proprietor, but the *pangua*. The division of the services is a matter left to the tenants themselves. [Reads a portion of the Reports of the Service Tenures' Commissioners of 1871, and objected to by *Layard.*] The pangua, and not its shareholders, is liable. The question of divided liability, therefore, does not arise in the present case. [Dias, J : Supposing a *pangua* covered about a hundred acres, and was divided between 20 or 30 people, and one of them held one rood. Would this man be held liable for the services of the whole *pangua*, that is, of all the remaining tenants ?] The Ordinance No. 4 of 1870 deals with the whole *pangua*, and the Commissioners, in p. 170 of their Reports, say the same thing.

Cur. adv. vult.

And this day, the Supreme Court, after reciting the facts of the case, held as follows :—

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The *pangua* seems to have been registered under the Ordinance No. 4 of 1870, and the names of the first five defendants appear in that register as paraveni nilakarayas, and the services due in respect of the whole *pangua* are valued by the Commissioners at Rs. 18.50. The nilakareyas do not appear to have exercised the right of commutation given under the 14th and subsequent clauses of the Ordinances. There seem to be several nilakareyas to the *pangua*, each holding a separate parcel of land of unequal extent, and the question that has been raised in the case is, whether each nilakareya is liable for the whole of the services of the *pangua*, or only for so much of it as is due in respect of his holding.

The Commissioner has decided, as this Court thinks erroneously, that each is liable for the whole. We are not aware of any law or custom by which one of several nilakareyas of a *pangua* is liable to render services for the whole *pangua*, that is to say, for himself as well as his co-tenants. The mere fact of the Commissioner having valued the services of the whole *pangua*, instead of valuing the services of each nilakareya, cannot create a liability which did not exist before. In this case, it is quite competent to the defendants to render services in respect of their several holdings, and the plaintiff has no right, before demanding such services, to proceed against them for their value. A demand does not appear to have been made in this case.

Set aside and plaintiff nonsuited with costs.

June 1st.

Present :—CLARENCE, J. and DIAS, J.

D. C. Galle, 37,705.

A non-suit in 1869 in an action raised by plaintiff in 1860, *held* to interrupt prescriptive possession pleaded by defendant to a subsequent action brought against him 1875.

Plaintiff instituted this action in February 1875 to recover a portion of a garden. He had been nonsuited in a previous action which he had brought for the same land in 1860, and which was terminated in 1869.

The District Judge nonsuited the plaintiff on the ground that defendant had acquired a title by prescription, having been in possession from 1860. *(C. R. Galle* 9750, i Lorenz 91*)*.

On appeal *Van Langenberg* for appellant : the former suit was clearly an interruption of prescription. The case referred to by the District Judge is inapplicable, as that was an action upon a money claim. Prescriptive title can only be acquired by an uninterrupted and undisturbed possession. In 2 Thomson 187, claim

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before a *Gunsabawe* was held sufficient to interrupt prescription, also *D. C. Kandy*, 9,601 and *D. C. Kurnegala* 12,911,

Grenier for respondent. The pendency of case No. 19,707, followed by a nonsuit, was no interruption of defendant's prescription. Defendant had admittedly been in possession since 1860 and all that the Ordinance required to constitute a prescriptive title was that "such possession should be unaccompanied by payment "of rent or produce or performance of service or duty or by any other "act *by the possessor* from which an acknowledgement of a right in "another would fairly and naturally be inferred". Defendant had done nothing to justify any such inference, and the words cited have been construed as containing a definition of possession by adverse title. See Vanderstraaten, p. 46.

The Supreme Court thought the judgment of the Court below to be erroneous. "By the 2nd clause of the Ordinance No. 8 of 1834, the possession necessary to constitute a title by prescription is not only an adverse possession, as defined by the Ordinance, but an undisturbed and uninterrupted possession, and this Court has repeatedly held that the institution of a suit is an interruption (No. 12,911 D. C. Kurunegala, 29 July 1854). The case relied on by the District Judge is inapplicable.."*

Set aside.

D. C. Matara, 28,289.

Action on a mortgage bond, granted without authority. Misjoinder of defendants.

The libel stated that one Allis de Silva (whose heirs were first four defendants) was indebted to the fifth defendant (who was then the wife of one Louis), on a bond, dated 23 July 1865, mortgaging certain lands; that the said Louis, since deceased, borrowed from the plaintiff Rs. 500, "and for the security of the said sum of money, mortgaged the said lands and subjected the said documents"; and the libel prayed "that the estate of Louis, represented by the 5th defendant, may be condemned to pay to plaintiff the said sum of Rs. 500.....and that the said first four defendants may be cited to shew cause why the aforesaid lands should not be held executable for the debt &c."

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* See *D. C. Jaffna 9601*, 27th November 1862, in which *Sterling*, and *Temple, J. J.* upheld the authority of D. C. Kurunegala 12,911, *dissentiente* CREASY, C. J, who held that "without positively differing from the opinion expressed by the majority of the Court in this case, and from the judgment of our predecessors in the Kurunegala case, I must state that the question is one in which I entertain great doubt." But see *D. C. Kurunegala* 12,185, 21st June 1866, pending suits, though they may become dormant, stop prescription, per CREASY, C. J. and TEMPLE and STEWART, J. J.—ED.

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The first four defendants disputed Allis de Silva's right to the whole of the lands, claimed one-half share in them, alleged fraud in the transaction, and pleaded misjoinder of action.

The fifth defendant pleaded that her husband had no right to excute the bond for reasons stated, and alleged want of consideration &c.

The District Judge disbelieved payment by plaintiff to Louis, and dismissed the case on the ground that the execution of the mortgage by Louis to plaintiff was intended to defeat one of his creditors.

On appeal, *(Grenier* for appellants, *Layard* for respondent*)*, the Supreme Court held as follows :—

In this case, the plaintiff sues on a mortgage bond, dated 26th September 1869, said to have been granted by the husband of the 5th defendant. Under this bond, there are several lands mortgaged, and the only right which the mortgagor had to mortgage these lands appears to be a mortgage bond of the 23 July 1865, granted by one Allis de Silva to the 5th defendant. The first four defendants are joined in this case as the heirs of Don Allis de Silva, and they have, among other matters, disputed the plaintiff's right to join them in this suit. The plaintiff's mortgage bond is a personal bond by the 5th defendant's husband, and does not pretend to be an assignment of the previous mortgage in favour of the 5th defendant, though the lands mortgaged are the same as those mortgaged under the bond in favour of the 5th defendant. The 5th defendant's husband seems to have dealt with the bonds, as if they were his own property, as there is a clause in the bond in favour of the 5th defendant, whereby it is provided that if the debt is not paid within a given time, the lands mortgaged should become the property of the mortgagees. The debt does not appear to have been paid.

We think that the first four defendants were improperly joined in that case, as the heirs of the mortgagor of the bond of 28th September 1869. The bond sued on in this case is a bond of 26 September 1869, granted by a party who is in no way connected with the ancestor of the first four defendants. It is true that he has mortgaged lands, which were the property of the defendants' ancestor, but he had no right to do so. He cannot reach the lands, except through the bond of 23rd July 1865, which he has not assigned to plaintiff.

Judgment to be entered for plaintiff for the amount claimed with interest against the estate of the deceased Hewa Giddeneye Louis or Andris, represented by the 5th defendant, and that the plaintiffs claim to have the land mortgaged sold in satisfaction of his claim, be disallowed. The 1st, 2nd, 3rd, and 4th defendants

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are absolved from the instance with costs as against the plaintiff. The 5th to pay plaintiff's costs.

Set aside.

5th June.

Present:—CLARENCE, AND DIAS. J. J.

P. C. Mallakam, 6,951.

1. Where the P. M. "struck off" a case, referring the parties to a civil suit, and afterwards, on the motion of the complainant, re-opened the case, on failure of the accused to raise the civil suit, *held* that the order to re-open was not appealable.

This was a case under the Malicious Injuries Ordinance, which the P. M. struck off, referring the parties to a civil action, "as this seems to be a matter for civil remedy." Sometime afterwards, however, the complainant petitioned, and the Magistrate made the following order:—

"Notice accused to institute a civil suit, as they claim the land. They must do so on or before the 30th, or this case will be re-opened."

Then followed this order:—"Accused has taken no steps. Notice him to appear to proceed with the case. Trial for the 11th instant."

It was contended that the P. M. could not compel the defendants or the complainant to raise the civil action, nor that he could re-open the case which had been struck off. But the magistrate held that, as the case was "struck off," not dismissed or finally decided, he had the power to order a re-opening of the case. As however the defendants wished to appeal on this point, he would let the case lie over.

2. It is irregular for a party to present an appeal to the Supreme Court by forwarding it direct to the Supreme Court, and not through the court below.

On appeal *Grenier*. for appellant cited *P. C. Matara* 72852, Grenier's Report 1874, p 16, to shew that the words "struck off" in such cases were equivalent to "dismissed." The 5th cl. of Ordinance No. 18 of 1871 applied to a case like the present, and the P. M. had no power after dismissing a plaint to order its resumption in the same case or its re-institution in another, *P. C. Galle 8534*, Ramanathan's Reports 1877, p. 3 [CLARENCE, J.—but I don't think the order in the present case is an appealable one.] It is an order having the effect of a final judgment.

Browne contra, contended that the order was not appealable.

The court rejected the appeal in these terms :—

This appeal appears to have been presented irregularly, being forwarded to the Supreme Court, instead of being lodged in the Police Court in due course. But were that otherwise, the appeal would not lie, the order appealed against being a mere interlocutory order.

P. C. Kandy, 6,631

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Plaint under proclamation of 5th Aug. 1819.

Plaint:—That the accused did on 28 February last forcibly enter into complainant's leased field Galamamwella, on pretence of a right thereto, and whilst in the occupation of the complainant did remove the paddy crop standing thereon, in breach of Proclamation of the 5th August 1819, and did assult and beat the complainant.

On appeal against a conviction, the proceedings were quashed and per CLARENCE J.—the plaint does not allege that the defendants acted without the authority of a competent court.

Quashed.

D. C. Kurnegala, 19,394.

Action for quiet possession of crown land, and circumstances under which the crown, as intervenient, was allowed to have the deeds it granted to the parties, to be called in and cancelled, with the object of issuing new grants.

The plaintiff in this action sought to be declared the owner, and to be quieted in possession of the land, Millegahamulle hena, described in title plan No. 84513. The defendants denied plaintiff's right to the land in question, which they stated was Rakattanegahamulle hena. Each party claimed the land on a crown grant, and the Queen's Advocate intervened in the case on behalf of the crown.

Their lordships affirmed the judgment of the Court below in the following terms:—

Plaintiff and third defendant both lay claim to a piece of land called Rakattenegahamulle hena, in extent a little less than four acres. This and an adjoining land called Millegahamulle hena in extent a little less than five acres, were put up to auction by the crown, but by a mistake, which seems to have begun at the time when the plots were surveyed, the names of these lots got transposed on the plans and papers. It was in evidence that the plan, and descriptions, of the lands put up at these crown sales, were open to inspection before hand at the Kachcheri ; that the Kachcheri Mudalyar read out the name, number of lot, acreage of each ; that the peon called out the name of the land only, and that this course was followed on the present occasion. When the peon called out "Rakatanagahamulle hena," the third defendant bid, and the lot was knocked down to him, and in the same way plaintiff bid when "Millegahamulle-hena" was called, and had that lot knocked down to him. The 3rd defendant then went into the possession of the real Rakatenegahamulle-hena, but the title deed which he obtained in due time, though it purported to convey Rakatenegahamulle-hena so far as the name of the subject matter

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was concerned, described in extent and boundaries the five acre lot. Conversely, the plaintiff got a conveyance describing the extent and boundaries of the four acre lot, and styling it "Millegahamulle-hena." The evidence further satisfies us beyond doubt that these defendants intended to buy Rakatanegahamulle-hena, the four acre lot; he had been in occupation of it already, and had made one unsuccessful application to be allowed to buy it at the upset price. We believe further that plaintiff was a speculative bidder, and that he had no definite intention of buying any particular lot: indeed, he admits that he had never seen either piece of land before the sale. Eventually, four months after the sale, he found his way to the four acre lot and found defendant in possession. He now claims to be put in possession of that plot. The Queen's Advocate has intervened, has very fairly explained the mistake which there has been, and prays that both deeds may be called in and cancelled, proposing to issue new grants of Rakattenegahamullehena to 3rd defendant, and of Millegihamullo-hena to plaintiff. Under these circumstances, we consider that the District Judge has made a proper and equitable decree in ordering both grants to be cancelled, a new grant properly describing Rakatenegahamulle-hena to be given to 3rd defendant, and plaintiff to have the option of taking a new grant, properly describing Millegahamulle-hena.

Plaintiff's appeal will, therefore, be dismissed with costs.

P. C. Galagedara, 23,281.

Set aside and proceedings quashed.

Arrack Ordinance.

The information charges defendant under cl. 26 of the Ordinance No. 10 of 1844 with selling by retail 26 gills of arrack, without having obtained a license from the Government Agent. But the information does not aver that the defendant was not acting on behalf of the licensed retail dealer, as mentioned in the same clause; and we cannot hold that defendant has not been prejudiced by this omission, since the evidence suggests, to say the least, that defendant was so acting.

June 7th.

Present:—CLARENCE, J. and DIAS, J.

P. C. Chilaw, 11,681.

Grenier for appellant.

Sed aside and proceedings quashed. This information charges appellant under the 10th, and the 12th, clauses of Ordinance.

No. 7 of 1873, with retailing arrack without a license, "in the boutique occupied by Baba Appoo." The charge is not maintainable under the 10th clause, since that clause only penalises the sale of intoxicating liquor, which by the interpretation charge, arrack is not.

The charge under the 12th clause is also defective, since the information does not charge him as the occupier of unlicensed premises, but on the contrary lays the occupation in another.

J. P. Matale, 6,852.

The following is the Chief Justice's statement of the case, reserved by him under ss. 40 and 44 of Ordinance No. 11 of 1868, for the decision of the Supreme Court collectively:—

"At the Criminal Sessions held at Kandy in the month of March last, Rayappen, Muttu Carpen, Rangasamy Asari, Wewery Chettiar, Miguel Cornelius Appu Baas, and Allaga, were tried and found guilty of Murder.

"In the course of the trial, the Deputy Queen's Advocate offered in evidence the statements made by the accused on the preliminary hearing by the Justice of the Peace.

"It was objected, for the prisoners, that the statements had been made prior to the examination of the witnesses in support of the charge, and could not therefore be put in as part of the statutory examination of the prisoners.

"On examination of the original depositions it was found that the statements in question were annexed to, as if forming part of, the depositions, in the ordinary way, and as if they had been made subsequently to the examination of the witnesses in support of the charge. The caution prescribed by section 183 of Ordinance No. 11 of 1868 was stated to have been administered to the accused, and the statements purported to be signed by the accused, by the Justice, and by the Interpreter. But while the depositions of the witnesses were dated the 26th April, the statements of the accused bore date the day preceding, the 25th April.

"The Justice was then called as a witness. He admitted that the accused had made the statements in question previously to the examination of the witnesses, but he said that the statements had been made voluntarily and after the caution prescribed by Ordinance No. 11 of 1868 had been administered. He said further, that with one exception, that of the sixth prisoner, the accused were Tamils, and that as he, the Justice, did not understand the Tamil language, what they said was translated to him by the Interpreter, who subsequently read over and explained to each of the accused what had been taken down by the Justice as his statement. The Justice also stated that each statement was signed by the person whose statement it purported to be, by the Justice himself, and

1. Under c. 183 of Ordinance No. 11 of 1868, the statement of a person charged with any crime or offence, may be taken by Justices before or after the examination of the witnesses in the case.

2. Such a statement becomes admissible in evidence, without further proof thereof, if it purports to have been made after the person making the same had been cautioned, and also purports to be subscribed by the Justice and by the Interpreter (if any

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by the Interpreter. The sixth prisoner is a Sinhalese, and spoke in the Singhalese language, which the Justice stated he understood.

"It was than objected, for the prisoners, that without the evidence of the Interpreter, there was no proof that the statements in question were the statements of the accused.

shall have been employed) who interpreted the same.

"The Interpreter was not called, and the Deputy Queen's Advocate referred to section 12 of Ordinance No. 9 of 1852 which renders the statement of an accused person taken down in writing by any Justice, if the said statement purports to be made after the person making the same has been cautioned in the manner required by law, and also purports to be subscribed by the Justice and by the Interpreter (if any shall have been employed) who interpreted the same, admissible in evidence without further proof, and contended that this provision of the Ordinance made it unnecessary to adduce any further proof of the statement of the accused than the written statement itself taken and signed in the manner required by the Ordinance.

"I allowed the statements to be read, but as upon further consideration, I doubted whether the section referred to bore the construction contended for by the Deputy Queen's Advocate, I considered that the questions involved should be reserved for the decision of the Supreme Court.

"The questions I have reserved are as follows:—

First. Whether the statements in question were taken by the justice in accordance with the provisions of section 183 of Ordinance No. 11 of 1868.

Secondly. Whether, assuming the foregoing question to be answered in the negative, the said statements were made admissible by section 12 of Ordinance No. 9 of 1852.

Thirdly. Whether the said statements or any of them were admissible in evidence independently of the Ordinance aforesaid.

W. HACKETT."

Creasy (assigned by Court): The two first points reserved by the Chief Justice must be answered in the negative, and the third in the affirmative. The statements were not taken in accordance with cl. 183 of Ordinance No. 11 of 1868, inasmuch as that clause prescribes a certain order for the J. P. to follow, when prisoners are brought up before him, and this order was not observed in the present case: the prisoner's statements had been taken first. This is not a mere informality in an unimportant point of practice, but a substantial objection to the evidence being received. It is no more a mere matter of practice than is the rule that evidence of character cannot be given unless an accused himself has opened the topic. Admitting that the order of the wording of this clause did not vitiate a statement by its being taken out of that order, it would then simply be a case in which no express provision had been made by the local legislature. The English Law is in force by virtue of Ordinance No. 3 of 1840. Under sec. 18 of 11 and 12 Vict. c. 42,

statements of prisoners can only be taken after the examination of witnesses. As already shewn, this is not a mere point of practice, to which the English statute would not apply. *With regard to the second question.* If the statement is not taken in consonance with Ordinance No. 11 of 1868, cl. 183, it cannot possibly be admitted by virtue of sec. 12 of Ordinance No. 9 of 1862. The words "any statements"——[DIAS, J :—We are with you on that point. The clauses of the two Ordinances must be taken together.] By this very clause, the fact of the statements being taken before the examination of witnesses renders them illegal, for that clause provides for the admission without proof of a certain class of writings, viz, statutory confessions. But it is added by way of a proviso that nothing herein contained shall prevent statements *made at any time* from being proved in the ordinary way : thereby clearly shewing that the privileged confessions, such as those now in question, must be taken at some particular time. Therefore they ought to be taken at the time indicated by cl. 183 of Ordinance No. 11 of 1868, and the time which is expressly pointed out by the English statute already referred to. *With regard to the third point.*—(It was admitted on all hands that the statement might be put in evidence, but that it must be properly proved, which it was not).

Ferdinands, D. Q. A. for the crown : The provisions of cl. 183 of Ordinance No. 11 of 1868 differ materially from those of the English Act 11 and 12 Vict. c. 42. The latter enactment, s. 18 expressly requires the statement to be taken *after* the examination of all the witnesses, and the J. P. then addressing the accused is required to use these words, "having heard the evidence, do you wish &c." There is nothing of this kind in our Ordinance No. 11 of 1868, and the departure from the English procedure had been advisedly made to meet the different system in operation here. Public prosecutors are unknown to the English Justice, and he is therefore required before committing the accused to take his statement last, but the Ceylon Justice has to send his cases to the Queen's Advocate's department, which often directs fresh evidence to be taken, and itself directs the commitment. What would be the effect of an intermediate statement, and how inconvenient it would be to have cases going backwards and forwards after each statement? The Ordinance No. 9 of 1852, cl. 12 gave no order of proceeding, and referred to statements taken at any stage of a case, and consequently Ordinance No. 11 of 1868 was so worded as not to be in conflict with the prior provision, which should have full operation, and under it, the statement is admissible. The question is not one of evidence but of procedure. The English Act is one "to regulate the proceedings of Justices of the Peace," and can have no operation here as part of the law of evidence : but

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even the English law of evidence is only in operation here in so far as it is not controlled by local Ordinances.

Cur. adv. vult.

And this day, the Supreme Court delivered judgment as follows :—

In this case the statements of the Tamil prisoners were uttered by them in the Tamil language, and interpreted to the Justice of the Peace, who did not understand Tamil, consequently, the Interpreter not having been called at the trial, the statements of these Tamil prisoners could only be admissible if let in by effect of the 12th clause of Ordinance No. 9 of 1852, which provides for summary mode of admission without proofs which would be necessary at common law.

The statement of the Sinhalese prisoner was made in a language which the Justice of the Peace understood, so that it was admissible under the Ordinance of 1852, unless the circumstance of its having been taken *before* the depositions took it out of the operation of that enactment, as a statement not admissible at all.

In the view which we take of the two enactments referred to in the questions reserved for our consideration, we must to some extent consider these enactments together.

An objection indeed was raised, *in limine*, that, as the statements in question would not have been admissible in England under 11 and 12 Vic. c 42, § 18, they were not admissible here by virtue of clause 2 of the Ordinance 3 of 1846. This latter point is not among the points reserved at the trial, and very properly so, because, apart from any question whether on other grounds 11 and 12 Vic. c. 42, § 18 is applicable to criminal trials in this country, our legislature has expressly enacted the contrary, so far as concerns this case. For the 3rd clause of Ordinance No. 3 of 1816 expressly provides that, where by legislation of this colony special provision is made for regulation of matters of evidence, the colonial enactment, and not the law of England, shall prevail ; and the legislature of this Colony *has* made provision in the matter now in question, by the enactment of 1852 referred to in the case. We need not, perhaps, have noticed this point raised by the prisoners' counsel, but we do so, lest by passing over it, we might be supposed to imply any doubt as to the sufficiency of the case reserved by the late lamented Chief Justice.

The 183rd clause of Ordinance 11 of 1868 is a re-enactment of the 24th clause of Ordinance 15 of 1843. (We may note here that the punctuation of this clause in the authorized edition is not quite accurate ; there should be a full stop, and not a semicolon, after the word " witness" in the 1st line of p. 977.)

After an attentive consideration of this clause we read it as a

direction to the J. P. to do certain things, each in a certain manner, two of those things being the recording of depositions, and the taking of the accused's statement ; but we do not find a direction that he is to take accused's statement *after* recording the depositions. The utmost which, we think, can be said of clause 183, in respect of the *time* of taking accused's statement, is that in enumerating and describing the two acts of taking depositions and taking accused's statement, it enumerates them in an order and in a manner consistent with the supposition that the depositions would generally be taken before the statement. But we cannot extend this to imply a direction, as a *sine qua non*, that the statement should be taken *after* the depositions. If that had been the intention of the Legislature, we should have expected to find that intention expressed in unmistakable language. And we are the more disposed to consider that this was not the intention of the Legislature, after a consideration of our own Ordinances of 1852 and 1868, and the English Act of 1852. The 18th section of the English Act is unmistakable in its provisions. It provides for the prisoner's statement being taken *after* the depositions, and then goes on to provide for the summary proof of whatever the prisoner shall "*then*" say, *i. e.* after the depositions have been taken. We can hardly suppose our Legislature in 1852 to have been unaware of the English Act of 11 and 12 Vic. (1848) ; in fact, the concluding lines of clause 12 of Ordinance 9 of 1852 are borrowed from § 18 of the English Act. Yet, clause 12 of Ordinance 9 of 1852, while providing for summary proof of accused's statement, names only two requisitions as to be complied with in order that the statement may be summarily admissible, viz, (1) that the statement purport to have been made after due caution ; and (2) that it purport to be duly signed, and such signature be not disproved. If the intention had been that this power of admitting statements without further proof should apply only to the statements taken *after* the depositions, we should have expected to find that distinctly enacted ; and we think that the circumstance of the clause containing no reference to anything of the kind indicates that the Legislature, when the Ordinance of 1852 was passed, did not contemplate such a restriction ; and we think further that it indicates that the Legislature did not understand clause 24 of the Ordinance of 1843 as requiring the statement to be taken after the depositions. Then when we find, in our Ordinance of 1868, the 24th clause of the Ordinance of 1843 re-enacted *totidem verbis*, we can only conclude that our Legislature has not thought it proper to prescribe anything as to the time at which previous statements are to be taken.

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This being our view on the 1st question reserved by the late Chief Justice, it is answered in the affirmative ; and it is, therefore unnecessary to consider the remaining questions.

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We have not lost sight of the circumstance that in England, before the passing of the Act of 1846, it was considered proper, and was the custom, to take prisoners' statements after the depositions. All that we need say is, that we think that the Legislature of this Colony, no doubt after due consideration of the requirements of the matter, when dealing with the admission of prisoners' statements in evidence, and prescribing the circumstance under which such statements shall be summarily admissible, has not thought fit to require that such statements be taken *after* the depositions.

The result is, that the statements in question in this case were, in our opinion, properly admitted, and the conviction is, therefore, sustained.

Eodem die.

The D. Q. A. *(Ferdinands)* moved for a writ of *habeas corpus* directed to the Fiscal of Kandy to bring up the prisoners convicted in the above case for sentence.

On the prisoners being brought up (14th June), sentence of death was passed on them all.

D. C. Kandy, 65,786.

In an action for damages for the infringement of a right, the circumstance of the defendant's belief that they had reasonable grounds for acting as they did, may affect the question of costs, but does not warrant the dismissal of the case, if the right is established.

This was an action for damages, raised by the plaintiff as owner of a field, for having been prevented by the defendants from using a certain watercourse. The learned District Judge dismissed the claim in these terms :—

In April 1866, the plaintiff complained that the defendant had prevented him from taking water from the *ella :* a Village Council was summoned under the Ordinance No. 21 of 1861, the matter was investigated by the Goverment Agent and the council, and the defendant was acquitted. In December 1866, there was a complaint against the plaintiff for taking water from the *ella*, and a council was assembled and the plaintiff was fined. In 1870, the plaintiff again complained that the defendant had unlawfully prevented him from taking water : a council was convened, and after proof it was held that the complainant had failed to prove he had a right as alleged. In 1874, the plaintiff again complained, and this time the council and the Assistant Agent found that the plaintiff was entitled to the water, and the defendants were fined, and on the 5th of June 1874 the Ratamahatmeya of Matale South was ordered to have the *ella* opened at once.

I presume that since then, the plaintiff has been in the enjoyment of the water. His claim now is for damages for having been

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deprived of the water for the two previous years, 1873 and 1874. I am of opinion that he is not entitled to damages. In resisting his claim to get water, the defendants were acting in accordance with the decisions of the Village Councils assembled in 1866 and 1870. It seems to me that they were perfectly justified in relying on these decisions as settling the rights of the parties, for the reason that the decisions of a Village Council on such a matter are, by the Ordinance No. 21 of 1861, sec. 20 and 21, and Ordinance No. 21 of 1867, sec. 24, declared *final*. It is declared to be their duty to do substantial justice in all questions coming before them, and "no appeal shall lie to any court against the decision or award of any village tribunal on any plea whatever." I am of opinion that the proceedings before Mr. Sharpe in 1866 were final and that the subsequent proceedings in 1870 and 1874 were irregular, as in contravention of the fundamental principle *nemo debet bis vexari pro una et eadem causa*. The defendants were subjected to no less than three quasi-criminal trials for refusing to allow the plaintiff to take water. The question of his right was fully tried in 1866 and they were acquitted. It seems to me monstrous that they were again and again tried for the same offence. But whether these trials were regular or not, I have no doubt that until the December in 1874, the defendants were justified in acting as they did, and that they are not liable in damages. The action is dismissed with costs.

On appeal, *Van Langenberg* appeared for plaintiff, and *Grenier* for defendants and respondents.

The Supreme Court set aside the judgment of the Court below and sent back the case for further evidence. They held as follows :—

The question in this case is whether the plaintiff is entitled to the use of the watercourse in question. This question has not been decided by the learned judge, who non-suited the plaintiff on the ground that the defendants (under the circumstances of the case), were justified in doing what they did. These circumstances appear to be the various conflicting decisions of the Village Council, before which the disputed right was tried. The Supreme Court thinks that, if plaintiff had a right to the use of the watercourse in question, and the defendant had prevented the plaintiff from the exercise of that right, the plaintiff would be entitled to recover damages ; and though the circumstance relied on by the learned Judge may be taken into consideration in considering the question of costs, they are not such as to justify the dismissal of the plaintiff's case altogether.

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D. C. Tangalla, 3,394.

Grenier for appellant.

Sufficiency of libel declaring on a tort.

Set aside and case sent back for trial, each party to have the option of adducing further evidence.

Plaintiffs in their libel allege that defendants wrongfully prevented them from fishing where they lawfully might. The District Judge has summarily non-suited the plaintiffs on the ground that this action "ought not to have been brought against them as pri-"vate individuals, but in their official capacity, when they might "have called on the Queen's Advocate to defend them." The only question is, has the libel sufficiently ascertained the persons of the alleged tort-feasors, clearly it has.

D. C. Badulla, 19,244.

Whether the heirs to an estate, in Kandyan law, could maintain an action for their shares, before the decease of of their mother?

Plaintiff sued in ejectment averring that defendant had ousted him from certain lands belonging to him by paternal inheritance. Upon stating in his examination, that his mother (who was alive) had a life interest in the lands, the proctor for defendant moved that plaintiff be nonsuited, on the authority of cases Nos. 14,823. 14,587 and 19,880 decided in appeal, in which the Supreme Court was stated to have held that the heirs could not maintain an action in support of their shares till after the decease of the mother.

The learned District Judge upheld the objection and nonsuited the plaintiff, though the plaintiff was prepared to shew that her mother was aware of the action instituted by him, and had been given 5 pelas for her maintenance.

On appeal, *Van Langenberg* for plaintiff cited *D. C. Ratnapura 662½*, June 15, 1866, and *D. C. Kandy, 56,750*, Grenier, 1873, pt. 3, p. 25.

Grenier for respondent relied mainly on the cases cited in the court below.

The Supreme Court thought the District Judge was wrong in construing the words of plaintiff as an admission that he, plaintiff, had no present estate in any of the lands he claimed, particularly as plaintiff's proctor asked to be allowed to lead evidence to prove that the mother had a piece of land of 5 pelas in extent apportioned to her for her maintenance. Set aside and case sent back for trial.

D. C. Manaar, 7,062.

Preference under a

This action was raised to set aside the claim to preference made by the 1st defendant, over certain lands which had been

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seized under plaintiff's writ No. 6,997. Defendant based his claim upon a special mortgage bond, the effect of which plaintiff contended was nullified by a deed of renunciation which the defendant executed two years subsequent to the mortgage bond.

mortgage bond and the effect of a deed of renunciation.

The learned District Judge *(Massie)* nonsuited plaintiff on the ground that the deed of renunciation did not affect the lands seized.

On appeal *(Grenier* for appellant, *Browne* for respondent*)*, the Supreme Court held as follows :—

Affirmed. In this case, plaintiff got judgment against 2nd and 3rd defendants and seized two lands which were claimed by the 1st defendant under a mortgage bond of 2nd June 1866, granted by the husband of the 2nd and father of 3rd defendant. The plaintiff now seeks to set aside the first defendant's claim. In answer to 1st defendant's bond of 1866, the plaintiff says that by a notarial deed of 23rd September 1868 the 1st defendant has renounced all right under his mortgage. The learned Judge, however, held that by the deed of 1868, the 1st defendant had not so renounced his right. On referring to that deed, we find the 1st defendant, after renouncing his rights under several deeds recited therein, using the following words,—"I from this day renounce all my claims to and in every land, *held and possessed* by me previous to this date either by virtue of the aforesaid deeds, or any other deeds." The mortgage of 1866 does not give the 1st defendant a right of possession and the renunciation as regards lands held and possessed by the 1st defendant can only apply to lands other than the one in dispute, which never was in the possession of the 1st defendant.

D. C. Matara, 26,549.

VanLangenberg for appellant.

The Supreme Court held as follows:—

Purchase by parties of lands under a partition, and procedure there under.

This is a partition case in which an order was made for a sale of the lands, and at such sale some of the parties seem to have purchased for amounts exceeding the value of the shares. An order was then made by the District Court calling upon such parties to pay into court the difference. The ascertainment of this difference was entrusted to commissioners, who have filed several schedules, which were brought to the notice of the court on the 9th August 1874, on which day counsel were heard and judgment postponed till the 24th. On the 24th, counsel again appeared and offered to re-argue the case, but the learned Judge very properly rejected the application. The order made on the 24th, seems to be

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the same as that made on the 19th which is not sufficiently explicit. The proper course to follow, under the circumstances, is to ascertain the share due to each of the parties, and to require those who have made purchases beyond the value of such shares to bring the difference into court to be paid over to those who have bought below the value of their shares, or who have not bought at all.

After hearing all the parties interested, the court will make a fresh order in the case. Set aside and case sent back for judgment *de novo*.

June, 12th.

Present: CLARENCE, J. and DIAS, J.

P. C. Colombo, 6,006.

False information.

This was a charge, under clause 166 of Ordinance No. 11 of 1868, of having wilfully and maliciously given false information to the J. P. with intent to support a false accusation against the complainant, by &c.

Complainant, *sworn:* Defendant filed an information before the J. P. charging me with arson. I was acquitted.

Sansoni, *sworn :* I am a J. P. clerk. I produce J. P. case No. 277 in which the defendant charged the complainant and others with setting fire to his house. On that information, summons were issued. The J. P. discharged the accused (present complainant), holding that the information was false. *Cross-examined,* from a subsequent deposition made by the complainant (present defendant), it appeared that he based his charge on the information of others.

On this and some other evidence which was not material, the P. M. held that there was no evidence that the information was false within the knowledge of the defendant, and acquitted him.

On appeal, *Grenier (* with him *Dornhorst)* for appellant, *Layard* for respondent, the Supreme Court held as follows :—

Set aside the case sent back for further investigation. The evidence recorded is insufficient to support this charge, since there is nothing to shew that defendant knew the charge of arson to be false. But after reading the connected case in which defendant's charge of arson was investigated by the J. P., we consider that the present charge should be further investigated. In the first case, present defendant charged three men with arson, and he is now charged with giving false information, with intent &c, against each of those three men. It will be enough to support a conviction if defendant be proved to have given false information with intent &c, against

either of those three. This case is sent back to afford present complainants an opportunity of adducing evidence of the statements made by the defendant to the Police Officers on the morning after the fire. Defendant to be also entitled to adduce counter evidence in defence. 1877 June, 12

P. C. Puttalam, 8,248.

The following judgment of the Supreme Court explains the facts of the case :— Nuisances Ordinance.

Set aside and defendant acquitted. He is charged under the Ordinance No. 15 of 1862, with keeping for more than twenty four hours offal of a buffaloe in a filthy and noxious state in a certain garden, and with neglecting to remove the filth and cleanse the place. The charge appears to have been first laid under the 3rd sub-section of cl. 1, under which it would have been bad for want of averring defendant to be the owner or occupier of the garden. The plaint seems afterwards to have been amended by substituting cl. 9. for sub-section 3 of cl. 1, which is merely a saving clause.

The Police Magistrate seems to have convicted defendant under cl. 9. as for a nuisance at common law. We do not think, however, that the evidence proves defendant to have committed any offence in the nature of a public nuisance punishable at Common Law. All that is proved is that a bullock of defendant's came and died in another man's garden, and stank there, and that defendant was asked to remove the carcase, and did not remove it.

P. C. Colombo, 6,187.

Plaint :—That the defendant did, between the 1st of March & 11th of May 1877 and on divers other times and seasons between that and this day, in Colpetty in the town of Colombo, have and occupy and keep and maintain a common ill-governed and disorderly house and in the said house for the lucre and gain of him the said defendant, and did cause and procure certain persons, male and female of ill fame and dishonest conversation there to meet, frequent and come together and the said persons in the said house at unlawful times as well as at night as in day to remain tippling, whoring and misbehaving themselves and did permit to the great damage and common nuisance of all liege subjects of our Lady the Queen there inhabiting and against the peace of our Lady the Queen, her crown and dignity. On a plaint for keeping a bawdy-house, the Police Court has no power to order it to be demolished &c.

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The P. M. found the defendant guilty in these terms :—

Sentenced to three months hard labor and pay a fine of fifty rupees.

Police are ordered to demolish the brothel, by turning out of the house all the whores and preventing their return.

On appeal against this finding (*Grenier* for appellant, *Ferdinands D. Q. A.* for respondent), the Supreme Court affirmed the judgment except, as regards that part of the judgment which orders the police to demolish the brothel, which is set aside. The Roman-Dutch law seems to authorise the proceeding, though we do not think that a criminal court of such limited jurisdiction as the Police Court has the power to make such an order.

B. of M. Colombo 14584,

Storing fish manure.

The Magistrates (Messrs. P. Coomara Swamy and Keith) held as follows :—

We hold it proved that the defendant kept in deposit at St. John's Warehouse, a quantity of fish manure from which noxious or offensive smells did arise, injurious to the health of the public We hold it proved also that the defendant, as manager of the Wharf and Warehouse Company, had no license or authority from the Council to store such manure, as required by the Council's bye-law. We find the defendant guilty and he is fined ten Rupees. He is further ordered to desist and abstain from storing such manure in the said Warehouse.

On appeal, (*Browne* for appellant, *Layard* for respondent), the Supreme Court affirmed the judgment in these terms :—

This is a charge against the defendant for depositing a quantity of offensive fish manure in St. John's Warehouse without a license, in breach of Rule 1. Chap. 20 of the Municipal Bye-Laws. The defendant was convicted, and from this conviction he has appealed. It was proved in evidence that a large quantity of this offensive manure, (about two or three thousand bags at a time) was collected in the St. John's Warehouse, which is in the occupation of the Wharf and Warehouse Company, of which the defendant is the manager, and it was also proved that the smell arising out of this manure was very offensive and injurious to public health. Under these circumstances, we think the defendant has clearly brought himself within the operation of the Municipal bye-law.

B. of M. Colombo 14869.

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Meaning of "keeping and depositing" under rule 1, ch. 20 of the bye-law of the Colombo Municipality.

The parties in this case were the same as in the case immediately preceding this. Defendant, on being fined (as above reported), for having stored fish manure in St. John's Warehouse, obtained the sanction of the Executive Government to run up a shed in the Railway premises and remove manure thereto, until the Railway should be able to carry off to Kandy the supply already imported. But the Municipality entered a plaint against the defendant, who was adjudged guilty by the Bench and fined.

On appeal, *Browne* for appellant contended that the manager of the Wharf and Warehouse Company had no intention of breaking the law. When fined in a previous case, he did his best to have the goods removed and carried out of town, but the Railway was unequal to effecting this as expeditiously as he would have. He was allowed to erect a file of cadgan sheds, in the Railway premises, in order that the manure may be left there, till the Railway could remove it. The bye-law did not contemplate a case of this kind. The bench was wrong in treating the words of the bye-law "depositing," even for five minutes, as illegal. The defendant never meant to *store* the manure there.

Layard for respondent: The intention of the defendant has nothing to do with the case. Defendant stored the manure on the Railway premises. [DIAS, J: did he store it with the view of keeping it there?] If he stored it, he meant to keep it. It is true he meant to keep it only so long as the Railway could carry it away; but that is what all forwarding agents mean to do. They keep the articles stored, till the opportunity for despatch arrives. The language of the bye-law covers a case of this kind.

Cur. adv. vult.

The Supreme Court this day affirmed the judgment in the following terms:—

The defendant, who is the Manager of the Wharf and Warehouse Company is charged under rule 1 cl. 20 of the Municipal bye-law, with keeping and depositing a quantity of offensive manure in the Railway premises at Maradana. It appears that defendant had already been fined for keeping a large quantity of the manure in question, or manure of a similar description, in the Wharf and Warehouse Company's premises at another part of the town; and he now brought this manure, which undoubtedly smells very offensively, to the Railway Station for transport up-country. But the Railway not having trucks enough to carry away so large a quantity at once, defendant deposited the manure at his own risk at a place within the Railway premises, where he was allowed to do so, and covered it in with cadjans; and there it remained for

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several days, until the Railway was able from time to time to take it away. We think this was a *storage* in terms of the Municipal bye-law. The defendant, in fact *stored* the manure at the Railway station, because the Railway could not carry it off quickly enough. No doubt, he was only endeavouring to get the manure away from Colombo, where, as the action of the Municipality had already warned him, its storage was punishable ; and it was not his fault that the Railway was unable to take it away as quickly as he desired. These, however, are considerations, which, if the offence has been committed, cannot avail to prevent a conviction. Nor, is there any power to impose a less fine than that inflicted, as there is as to the fine for continuing the offence after notice to desist.

C. R. Kalutara, 37,772.

Whether the *lex anastasiana* prevails in Ceylon.

This was an action on a promissory note for Rs. 30 which plaintiff had bought at a fiscal's sale under the following circumstances.

The trustees of St. John's Church, then in course of construction, had raised a loan from plaintiff on a promissory note, on the understanding that the subscribers to the church fund were in some measure to protect the liability of the trustees by granting promissory notes to one of them. The present defendant made the note (sued upon in this case) for the amount of his subscription, payable to Dr. VanCuylenberg, one of the trustees, as aforesaid. The trustees in the meanwhile being unable to take up the promissory note they had granted to plaintiff, allowed judgment to pass in his favour in case No. 29087 of the *District* Court of Kalutara, whereupon the Fiscal seized in Dr. VanCuylenberg's possession the promissory note made by the present defendant, and sold and assigned it over to the plaintiff, for a consideration of Rs. 5.

There were several pleas raised by the defendant one of which was that he was liable to pay only Rs. 5, the consideration which plaintiff actually paid at the Fiscal's sale, but the Commissioner over-ruled all of them and entered up judgment for the full amount of the note, viz. Rs. 30.

On appeal, *Grenier* for defendant, argued on the facts and cited 8 Burge 549, 550, *Bentinck v. Willinck*, 2 Hare 1, Sande *de actionum cessione*, cap. 11 and 13, 3 Grenier *D. C. Galle 32,460* p. 82, Cod. 4, 35 and 8, 32. Groenew. *Tract Inst.* lib. 4.

Ferdinands D. Q. A. *contra.* The *lex anastasiana* formed no part of the law of Holland. Neither Vanderlinden nor Van-Leeuwen makes any mention of it. Besides, defendants' liability is based on a promissory note, and the case must therefore be govern-

ed by the English law. The negotiability of promissory notes would be seriously affected if the *lex anastasiana* were introduced into this colony.

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Cur. adv. vult.

The Supreme Court held as follows :—

Plaintiff sues on a promissory note for Rs. 30 made by defendant in favour of VanCuylenberg. Plaintiff having a judgment against VanCuylenberg sued out execution, and the Fiscal seized and sold this note, which plaintiff bought at the Fiscal's sale for Rs. 5.

It is contended for defendant in appeal, that plaintiff cannot recover in this action more than Rs. 5, which he actually paid for the note.

Whether or not the *lex anastasiana*, in respect of sales of rights of action, forms a part of the law of this colony, is a question which we need not consider until a case arises which would clearly fall within that law. The Plaintiff's claim in the present case does not fall within it, for this law had unquestionably been very much narrowed in its operation in later times. Not only had its effect been restricted, as observed by this court in *D. C. Galle, 32,460*, Grenier 1874, p, 31, to what has been called litigious claims, but it is plain that at the time when Voet and VanLeeuwen wrote, the right of the debtor to compound for the actual sum paid by the party who had purchased the claim was excluded, where the sale was made after a previous offer to the debtor at the same price, or where, as in the present case, the sale was by public auction. In this respect, it appears to us that it makes no difference whether the question arises on a suit by the purchaser against the original debtor, or by the debtor taking the initiative and asserting his *jus tantundem offerendi* or *retractus*. See Voet xvii. 4.18 et seqq. VanLeeuwen, *Censura Forensis*, iv. 20.17.

It is true that VanLeeuwen, at the passage cited, is speaking only of the traffic in inheritance *de hereditate vendita*, and not directly *de actione vendita*, but the principle is the same in either case, and Voet seems to contemplate both.

Affirmed. *

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* See Tomkins and Jencken's *Modern Roman Law*, p. 341 as to what obligations are *not* assignable. See also *Macrae v. Goodman*, Moore's P. C. Reports, Vol. 5, p. 315. That was an appeal from a decision of the Supreme Court of *British Guiana*, which held *inter alia* that the *lex anastasiana*, as a constitution of the Emperor *Anastasius*, confirmed by another of *Justinian*, formed part of the Roman Dutch law, and as such was in force in the colony of British Guiana. But the Lords of the Privy Council, reversing the judgment of the court below, held as follows, on that point :—

"The *Anastasian law*, or any rule analogous to it, cannot be applied to cases free from any taint of unfairness, consistent with the ordinary principles which regulate the administration of justice, and ought, if contended to be so applicable in any system of jurisprudence, to be clearly shewn to be so by the person thus contending. Their Lordships are of opinion that

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D. C. Kandy, 68,001.

Where plaintiff sued his joint heir for his share of movables, *held* that administration was unnecessary, as the distribution may be effected by simply finding what property of the deceased was in his house at the time of his death.

Plaintiff alleged himself joint heir with the defendants of the moveable property of Helen Banda, deceased, and complaining that they refused to give him, the plaintiff, the share he was entitled to, prayed that they may be condemned to pay to him the value of such share.

In answer the 2nd and 3rd defendants disclaimed title to any share, but the first defendant claimed all the moveables as hers by gift from deceased.

The learned D. J. held that the deceased died intestate *quoad* his movables, and that he intended to gift them (though he was not able to execute any deed) to his widow, the first defendant; but the D. J. without entering judgment for plaintiff, absolved the 2nd and 3rd defendants with costs, and adjourned the further consideration of the case for a month, to give the parties an opportunity either of coming to a settlement or of applying for letters of administration. The personal property of the deceased being of some value, it is desirable that it should be properly inventorized and appraised, and that either his widow or his son should take out letters of administration, under which the estate may be duly distributed according to law.

On appeal (*Cayley*, Q.A. and *Ferdinands*, *D.Q.A.* for plaintiff, *Van Langenberg* for respondent) the Supreme held as follows:—

Affirmed so far as the decree declares that the late Basnaike Nelime died intestate *quoad* his moveable property. In all other respects, the decree of the District Court is set aside, and the case sent back for decision on the other issues raised in the pleadings. Both parties to be at liberty to adduce further evidence.

No doubt it is desirable in general that large intestate estates should be distributed by administrators appointed by the District Court, but under the peculiar circumstances of the present case, we do not think that the parties should be forced to the alternative of compromising the case, or taking out letters of administration. The principal question which has to be decided in order to the distribution of this intestate estate is, what property of the deceased's was in his house at his death, and that question can very well be decided in this action. The 2nd defendant was rightly made a party in our opinion, not so the 3rd, who is consequently absolved from the action, and whose costs will be paid by plaintiff. All other costs are reserved in the cause, but the 1st and 2nd defendants must pay plaintiff the costs of this appeal.

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the respondent has not done this in the present instance. He has failed to satisfy them; nor do they believe that in British Guiana, the *anastasian law*, or any principle or rule analogous to it, or derived from it, whether capable or not capable of being applied in some cases, can be applied in such a case as the present."—ED.

D. C. Kandy, 65566.

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Action for goods sold and delivered, and for money found to be due upon an account stated. Plea, never indebted.

A debt, even though it has formed an item in an account stated and admitted, is yet not recoverable, if originally it was void by the effect of a statute.

Though defendant denied it, it was satisfactorily proved that the accounts were looked into and signed by the defendant on two different occasions.

The learned District Judge entered up judgment for plaintiff in these terms :—" Some delay has taken place in getting the lengthy accounts of the plaintiff translated. On considering the evidence he has led, with the account book, aided as I have been by the careful scrutiny of the Interpreter Modliar, I come to the conclusion that plaintiff has proved his case."

On appeal, *Cayley*, Q. A. (*VanLangenberg* with him) appeared for the defendant : he would not press the appeal upon other points, save only as regards the last item mentioned in the plaintiff's accounts, which ran as follows : "*March 20. Don Siman Baas (defendant) undertook to pay on account of A. K. Pereira, who owed me Rs. 336. 6*" Clearly this amount could not be recovered. Under the Ordinance No. 7 of 1840, cl. 21, a promise to make good the debt, default or miscarriage of another, should be in writing and signed by the party making the same.

Ferdinands, D. Q. A (with him *Grenier*) *contra* :—The defendant has admitted the correctness of the accounts of the plaintiff, inasmuch as they are proved to bear the signature of the defendant. In *Cocking v. Ward*, 1 C. B. Rep. 868, which was also a case under the statute of frauds, TINDAL, C. J. held that the defendant's admission that he owed a certain sum of money to the plaintiff, was sufficient to enable the plaintiff to recover on the account stated.

Cayley, Q. A. replied that the evidence of admission was insufficient.

The Supreme Court held as follows :—

Affirmed, except as to the one item of Rs. 336 and odd cents, "on account of Pereira Mohandiram." This item is described by plaintiff in his account as follows: "Don Siman Baas undertook to pay on account of Pereira, Mohandiram, balance due, after looking into accounts." This falls within the scope of the 1st sub-sec. of the 21st clause of the Ordinance No. 7 of 1840, and plaintiff not having proved any promise or agreement in writing cannot recover this item.* Parties will bear their own costs in appeal.

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* It is well to give the reasoning of Lord Chief Justice Tindal:
"The objection was, that the admission of a debt will only enable a

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D. C. Batticaloa, 18,614.

Grenier for appellant, *Ramanathan* for respondent (being called upon) cited Hamilton's *Hedaya*, 100,102.

Cur. adv. vult.

1. One is not entitled to damages for the seduction of his wife, after having deserted her and allowed her for years to live as an unmarried woman.

2. Under the Mohamedan law,

The Supreme Court delivered judgment as follows :—

Set aside and plaintiff nonsuited with costs.

The plaintiff seeks to recover damages for the seduction of his wife by defendant. It appears that when the woman was a child of four years of age, the plaintiff had gone through the usual marriage ceremony, but some years after this ceremonial, he left the woman, who remained with the parents till she grew up, and then married the defendant.

The learned judge of the court below gave judgment for the full amount of his claim. From this, the defendant has appealed.

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plaintiff to recover as upon an account stated, where the debt itself does not appear to be incapable of being recovered as a debt; and that, here the plaintiff could not recover upon the original contract [which related to an interest in land], inasmuch as it was not evidenced by a writing signed.

"But, in the first place, such an exception is contrary to the authority of several decided cases. In *Knowles v Mitchell*, 13 East, 249, the ground of the original debt was a sale to the defendant of standing trees, which the defendant afterwards procured to be felled and taken away; and the objection was, that the plaintiff could not recover on the original contract for standing trees, which formed part of the realty: but it was held, nevertheless, that the acknowledgment of the price to be paid for the trees, after they were felled and applied to the use of the defendant, was sufficient to sustain the count on the account stated; Lord *Ellenborough* saying that if there were an acknowledgment by the defendant of a debt due to the plaintiff upon any account, it was sufficient to enable him to recover on an account stated."

And Tindal, C. J. after reviewing *Highmore v. Primrose*, 5 M. & Sel. 65, *Pinchon v Chilcott*, 3 C & P 236, *Seago v Deane*, 4 Bingh 459, 1 M. & P. 227, continues as follows:—

"And we think it sustainable also on principle; for after the debt has formed an item in an account stated between the debtor and his creditor, it must be taken that the debtor has satisfied himself of the justice of the demand, that it is a debt which he is morally, if not legally, bound to pay and which therefore forms a good consideration for a new promise: and the creditor, on the other hand, may reasonably be excused for not preserving the evidence which would have been necessary to prove the original debt before such admission. The principle may not, perhaps, be applicable to cases where it can be shewn the original debt is absolutely void from any illegal or immoral consideration, or where it is made void by any statute, as by those against usury or gaming: but we think it applies to cases where the only objection is that the original debt might not have been recoverable from the deficiency of legal evidence to support it." (*Cocking v Ward*, 1 C. B. Rep. 862—870).—ED.

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It was argued for the plaintiff that his marriage was good, as, according to the Mohamedan Law, infants of tender age were allowed to enter into contracts of marriage, and in support of this proposition our attention was called to a book of authority on general Mohamedan Law, (I Hamilton's *Hedaya*, p. 100,102.), This authority simply says that a marriage of a boy or girl under age is lawful. Now the age of majority, according to the Mohamedan Law, is 16 years, and between that and the birth of a child, there are many periods at which a child may be competent to do acts which require intelligence and understanding, but a child of such tender age of four years has not naturally his understanding so far matured as to enable him to understand his position in such a serious contract as the contract of marriage; and as the authority above referred to does not fix the exact age at which a boy or girl can enter into a contract of marriage, it is of little value. Besides, the Mohamedan Law, as laid down in the *Hedaya*, is the law which prevails in the continent of India. This law we have not adopted in its integrity, but only so far as it is sanctioned by local usage, and we are not aware of any local law or custom which legalises marriage contracts entered into between parties of such tender age.

as obtaining in Ceylon, the marriage of a boy or girl of about four years of age is illegal, in the absence of any local custom.

Even if a valid marriage had been proved, plaintiff, having left his wife and allowed her for years to live as an unmarried woman, is not entitled to damages.

D. C. Badulla, 20,137.

Grenier for appellant, *Van Langenberg* for respondent.

One's right to compensation for improvement of land, possessed under a parol agreement to sell, does not entitle him to retain such possession as against another who holds a valid lease from the admitted proprietor.

The following judgment of the Supreme Court explains the case :—

Set aside and judgment entered for plaintiff for the land in dispute, without prejudice to the defendant's right to compensation, if any, and the case is sent back to ascertain the amount of damages which the plaintiff will be entitled to, and to give judgment thereon.

The plaintiff in this case is the lessee of a coffee garden under a lease of 27 November 1873 from one Tikiri Banda, and he complains that the defendant has, without any right, kept him out of possession. The defendant admits Tikiri Banda's right to the garden, and says that in 1870 Tikiri Banda put him in possession on a parol agreement to sell, that since 1870, he has cultivated and improved the land which he insists on retaining till such expenses

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are paid. The learned Judge upheld the defendant's claim and dismissed the plaintiff's libel with costs.

We think this judgment erroneous. The defendant's right to compensation does not entitle him to retain possession as against the plaintiff, who holds a valid lease from the admitted proprietor. The plaintiff will be entitled to the land, and as the District Judge has not assessed the damages which the plaintiff would be entitled to, the case is remitted for that purpose.

D. C. Kandy, 66,637.

Grenier for appellant, *VanLangenberg* for respondent.

The Supreme Court held as follows:—

A non-suit under an award, is no bar to an other action between the same parties, though such award may be entirely against the plaintiff on the merits.

Set aside and case sent back for re-hearing and judgment *de novo*, as the judgment relied on by the learned Judge is not a bar to the present claim.

This is a case of encroachment. In a previous case for the same land between the same parties, the matter in dispute was referred to arbitration, and the arbitrator made an award against the present plaintiff. That award was made a rule of court, and the defendant in this case pleaded that judgment in bar. The learned Judge upheld the plea and dismissed the plaintiff's case with costs. The plaintiff has appealed, and it was contended for him in appeal that the previous decision being only a nonsuit was no bar to this action. On referring to the award filed in the case, *No. 183 C. R. Kandy*, we find the arbitrator, after stating his reasons for the award (which are entirely against the plaintiff on the merits), adding the following words: "the plaintiff should therefore be nonsuited with costs": and this award was made a rule of court.

Whatever may be the reasons given by the arbitrator for his award, we think we can only look at the operative part of the judgment, which is only a nonsuit, and as such, is not a bar to this action.

June, 14th.

Present: CLARENCE, J. and DIAS, J.

D. C. Batticaloa, 18,598.

Where a resulting

In this case, the second plaintiff jointly with her husband, the first plaintiff, prayed that defendants be ejected from, and the plaintiffs

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trust in real property, purporting to be in the name of A, was sought to be established in favour of B, by parol evidence that the purchase money of such property was found by B's deceased father, while trading in partnership with A, *held* that in the absence of any allegations of fraud, such evidence was inadmissible, as it had the effect of varying the terms of the deed of purchase.

be quieted in possession of, an undivided $\frac{1}{8}$ of $\frac{1}{3}$ share of certain lands, alleging "that heretofore, to wit from 1841 to 1858, the defendants and their deceased brother, Ahamado Lebbe, the father of the 2nd plaintiff, jointly traded together and acquired the lands set out and described in the schedule A, as well as movable property; that after the death of the said Ahamado Lebbe, his heirs and the defendants continued jointly and acquired the lands described in schedule B, as well as certain movable property; that the second plaintiff is justly entitled to an undivided $\frac{1}{8}$ of $\frac{1}{3}$ of the lands in the schedules A and B &c."

The first defendant in answer denied that Ahamado Lebbe and 2nd defendant jointly traded with him from 1841 to 1858; nor that, after the death of Ahamado Lebbe, his heirs and the first and second defendants jointly traded; but stated that the "first defendant had carried on trade, himself, and that, during the life-time of the said Ahamado Lebbe, the second defendant and his brother Ahamado Lebbe, and after the death of the latter, Ahamado Lebbe Pitchetamby, the first plaintiff and the second defendant were employed by him as his agents for the purchase and sale of goods." And for a further answer, he stated that some of the lands referred to in the libel were his own by purchase, that some now belonged to third persons, that of some $\frac{2}{3}$ belonged to second defendant and Ahamado Lebbe's estate &c. And the first defendanf pleaded prescriptive possession and claimed the improved value of certain lands &c.

The second defendant admitted the plaintiffs' right to the shares claimed and denied the ouster complained of.

In the replication, which was inartistically drawn, the plaintiffs admitting that the conveyances of the lands which the first defendant claimed by purchase, were conveyances made in favour of the first defendant only, attempted to avoid their effect by averring that the purchases of these lands were made in behalf of the partnership.

On the trial day, the following were the proceedings recorded:—

"Sir Coomara Swamy for first defendant contends that it is not open to plaintiff to put in parol evidence to alter, vary &c. written documents, citing 2 Taylor on *Evidence*, 962 and 981(4th ed) and that the right sought to be acquired under deeds, wherein plaintiffs' name does not appear, is contrary to Ordinance No. 7 of 1840.

"Mr. Advocate Hay for plaintiff denies that he seeks to vary, alter &c a written document, but that he purposes to shew that the consideration was found by him.

"Sir Coomara Swamy points out that the replication runs not thus.

"Mr. Advocate Hay next claims to come in under his prayer for further relief.

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"He is on all points over-ruled, the court conceiving that he is estopped by his pleadings from his money claim, and that it would be unreasonably widening the general scope of that prayer to make it embrace such a case.

"He is therefore nonsuited with costs, being referred to a separate action for his money claim."

On appeal *Cayley, Q. A. (Langenberg* with him) appeared for the plaintiffs and appellants and contended that the judgment of non-suit was premature and that the case ought to have been proceeded with.

Ferdinands, D. Q. A. (with *Grenier*) contra: The case was argued on the question of law by consent in the court below. If the law was good, it was unnecessary to have gone into evidence. The present case involved another attempt to introduce into this colony the law of resulting trusts. The Supreme Court has systematically avoided this, *D. C. Jaffna* 3451.* Without any allegations of fraud, parol evidence was inadmissible.

Cayley Q. A., (in reply). The objection about resulting trusts does not apply to partnership. The present suit arose out of a partnership transaction. Ordinance No. 22 of 1866 introduced the law of England as to partnership, and the evidence attempted to be led was therefore admissible.

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* In this case, the libel averred that 2nd plaintiff's late husband Sego Mohamado, two days before his death, executed a deed on the 9th July 1874 in favour of defendant, conveying certain lands; that the said deed was granted nominally to defendant, who paid no consideration for the same, it being intended that the said defendant should hold the lands in question in trust for the use of the 2nd plaintiff and that, after the death of the 2nd plaintiff's late husband, the said defendant should re-convey the property to her; that the defendant, though often requested, had refused to make the conveyance &c. Wherefore 2nd plaintiff and her present husband, the 1st plaintiff, prayed the court to compel the defendant to re-convey the property to the 2nd plaintiff, on her paying the expenses necessary for the execution of the deed &c.

The deed dated 9th July 1874 purported to be an out-and-out sale by Sego Mohamado and his wife (the present 2nd plaintiff) to the defendant, for a consideration of Rs. 400.

The defendant demurred to the libel, as declaring upon a contract which ought to be in writing notarially attested, in terms of cl. 2 of Ordinance No. 7 of 1840.

The District Judge upheld the demurrer in these terms: –

"There is not a word of the alleged understanding embodied in the deed, and I question whether parol evidence can be given to vary or qualify this transfer deed. Moreover the agreement set up in the libel, and which the plaintiff seeks to enforce was a parol one affecting land, and the action therefore is not maintainable. The 2nd plaintiff too was herself a party to the deed, and, in my opinion, cannot be allowed to dispute her own solemn act. She is clearly estopped from doing so."

On appeal, the Supreme Court *affirmed* the order, seeing no reason to the contrary.—ED.

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The Supreme Court held as follows :—

The record of the proceedings at the trial is far from clear, but it appears that the District Judge simply nonsuited plaintiffs upon their whole case, upon a short ground which could have reference only to those items of land which 1st defendant claims to have acquired by purchase, viz, that plaintiffs could not be allowed to call evidence to vary first defendant's conveyances. The meaning of this seems to be that the District Judge refused to allow plaintiffs to avoid the effect of the conveyances to first defendant by evievidence in proof of the price having been found by plaintiffs. As to this, we certainly do not say that under no circumstances could parol evidence be admissible to avoid the effect of such conveyances to one only of a firm of partners ; but we do not find in plaintiff's replication any averment of circumstances which would render such evidence admissible. There is no allegation of fraud. We think the District Judge was right in refusing to allow plaintifls to call evidence in proof of their having found the price. The District Judge however was quite wrong in nonsuiting plaintiffs on their whole case, because this point only concerns a part of it. With the above expression of our opinion on that one point, the order which we shall make is that the non-suit be set aside, and the case sent back for trial.

The costs in the Court below are to be costs in the cause. We cannot give any costs of this appeal.

June, 19th.

Present :—CLARENCE, J. and DIAS, J.

P. C. Galle, 98,239.

Plaint :—That the defendant (Baba Appu) did on the 22 instant at Kumbulwelle sell by retail a quantity of spirits distilled from cocoanut palm, to wit, one bottle of arrack, without a license, in breach of the 26th, clause of the Ordinance No. 10 of 1844.

1. A license which is not as near as is material to the form C' is no license under cl. 26 of the Arrack Ordinance.

In defence, the following license was produced :—

"This is to certify that Charles de Silva and Baba Appu are licensed to retail arrack and toddy on account of Silvestry Fernando and Bastian Cooray, renters of the arrack farm of the Galle District for 1876 and 1877, and for their benefit, in the tavern No. 12, situated at Godellewatte in Menuangodde within the four gravets, during such period as the said arrack farm shall be actually held by the present renters thereof.

2. The words 'liable to a fine,' under cl. 26, leave no discretion in the Magistrate.

"This licence is liable to be cancelled on the application of the said renters.

Galle, $\frac{19}{21}$ May, 1877.

E. T. Noyes,
for Govt. Agent.

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The Police Magistrate held as follows :—

The license produced is not as near as is material to the form C. It leaves out the price and quantity entirely. Previous to this institution, the arrack renters were warned by this court in P. C. No. 95,982 that they should hold licenses materially in the form C, as their tavern-keepers sold at over-rates, claiming exemption from form C, provisions of which they pleaded ignorance of. Therefore I shall not regard the case at all as one for a nominal penalty, even if the 26th clause leaves a discretion.

Defendant is found guilty of selling arrack without a license as near as is material to form C, and fined Rs. 50, half to informer.

On appeal, *Grenier* for appellant urged the objections referred to in the following judgment of the Supreme Court :—

Affirmed. This is a charge under the 26th clause of the Ordinance No. 10 of 1844 for retailing spirits without a license. The 26th clause require a license as near as is material according to a form given in the clause. On the day of trial, the defendant produced a licence, which is different from the form given, in one material respect, that is, it does not state the price at which the arrack is to be sold. The Magistrate held the license insufficient and fined the defendants Rs. 50. From this decision the defendant has appealed and it was contended for him that he was a person acting for the licensed retail dealer (as provided for in the 26th clause), and was not responsible for any defects in the license as long as he acted in conformity with it. On referring to the license, we find it to be in favour of the defendant and another, on account of the renter of the farm.

We think under this license, the defendant is the immediate licensee, and he does not therefore fall under the description, in the 26th clause of persons acting in conformity with the license granted to another. It was also contended that the Magistrate had a discretion as to the fine, and our attention was called to a case reported in 3 Grenier p. 63. On referring to that case, we find that the opinion of the Supreme Court there was based upon on inference drawn from the order in which the 1st and 2nd subsections of the 11th clause of the Ordinance No. 6 of 1872 appear in that enactment but not upon any general ru le of construction applicable to the words "liable to be fined". These words were held not to give any discretion to the Judge. *Whitehead v Regina*, 14 L. J. Mag. C. p. 165), and we do not think that the case referred to from *Grenier* is an authority against this construction.

Affirmed.

P. C. Matara, 77.852.

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Under cl. 14 of the Labor Ordinance, the P. M. has no power to award payment of the wages due.

Plaint:—That defendant did on the 19th instant turn the complainant out of his service without previous notice or reasonable cause, and did refuse to pay him the wages due for the month ending February, 18th, viz. Rs. 25, contrary to cl. 14 of Ordinance No. 11 of 1865.

The learned Magistrate (*Arunachalam*), considering it proved that defendant not merely assaulted complainant and ordered him to leave his premises, but was threatened to be whipped if he did not go away at once, found defendant guilty of refusing without reasonable cause payment of wages when due fined him 50 cents and ordered him to pay the months wages due.

On appeal (*VanLangenberg* for appellant), the Supreme Court affirmed the judgment, except as to that part of it which awarded payment of the wages due, which was set aside. The Police Magistrate had no power to make such an order.

D. C. Kandy, 65,424.

Where defendant, a headman under suspension, reported to the Government Agent that the land cultivated by plaintiff was crown land, and threatened defendant, so that he desisted from cultivation for a year, and it was afterwards proved to the Agent that the land did not belong to the crown, *held* that an action for

Grenier for respondent, *VanLangenberg* for appellant.

The Supreme Court affirmed the judgment of the court below in these terms:—

Plaintiff sues defendant claiming certain damages, for that defendant maliciously and unlawfully sequestered and prevented plaintiff from cultivating a certain garden of which plaintiff was lessee in possession.

Plaintiff was in possession under a lease from one Kiriya. Defendant was a local headman temporarily under suspension, and Kiriya was acting in his place. Defendant reported to the Government Agent that this land was crown land, and he further went to the land and claimed it as crown land, and warned plaintiff to desist from cultivation, telling him he would be imprisoned at hard labour, if he continued cultivating. Defendant is not proved to have done any thing more than this: he is not proved to have used any force. Plaintiff, on being thus threatened by defendant, left off working the land. The Government Agent subsequently made an enquiry about the land, but all that is proved on this point is that no crown land was proved, and plaintiff, after about a year's cessation of cultivation, resumed work on the land.

Before we can find a verdict for the plaintiff, we must be satisfied that plaintiff's leaving off cultivation was the natural consequence of defendant's act. But before that question can arise, we

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damages would not lie against the headman, unless it were proved that the defendant acted maliciously and without reasonable cause, and that the plaintiff's leaving off cultivation was the natural consequence of the defendant's act.

must be satisfied that defendant acted maliciously and without reasonable cause. We think that malice might fairly have been inferred from the circumstances, if the absence of reasonable cause had been proved.

But if defendant acted from mere spite, he would still not be liable to plaintiff in the present action, if his crown claim was a bona fide claim, and not a mere baseless pretence. There is no evidence in this case upon which we can find or presume, as against the defendant, that his crown claim was a mere pretence and invention of his own. All we know is that the plain.iff went to the Kachcheri and was told there would be on enquiry, and that afterwards the Ratamahatmeya told him something which had the effect of inducing him to resume his cultivation.

For these reasons, the decision of the D. J. dismissing plaintiff's libel, will be affirmed.

D. C. Negombo, 7,894.

Browne for appellant, *Ferdinands D. Q. A.* for respondent.

The Supreme Court held as follows :—

Lease goes before sale.

Set aside. Plaintiff took in lease from defendant the garden Wannia-watte for four years from 6th February 1874, at £ 30 rent for the whole term. It is admitted that he had paid three years rent in advance in January 1876, when the northern half of the land was sold under a writ obtained against defendants by a certain creditor of defendants. Two months after the sale, the purchaser got into possession. Plaintiff now sues defendant claiming Rs. 460 damages, and the D. J. has awarded him the full amount claimed.

Clearly the purchaser at the Fiscal's sale could only take subject to the plaintiff's lease, and had no right whatever to oust plaintiff. If plaintiff was foolish enough to allow himself to be turned out, that was not defendant's fault. If defendant had demurred to the libel, he would have been entitled to succeed. Defendant however did not demur, but on the contrary, disputed only the amount claimed, and pleaded a tender of what he alleged to be due. The only question therefore which we have to consider is the question of damages.

The D. J. has clearly awarded too much. He has given plaintiff compensation in respect of the whole land, whereas the return to the writ on which the sale was made clearly shews that only half was sold. After considering the evidence as to the land, the number

of cocoanut trees and its cultivation, we give plaintiff Rs. 20 for the profits of the half of land after he was put out of possession, to which must be added a years rent for the half, Rs. 37.50, making in all Rs. 57-50.

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D. C. Trincomalee 21,412.

What sort of an acknowledgement will entitle one to recover a debt upon a count on an account stated.

Libel: That the defendant is truly and justly indebted to the plaintiff, as administrator of the estate of Sego Kando, deceased, in the sum of Rs. 225, for copperah purchased by the defendant from the said Sago Cando, and for money found to be due and owing from the defendant to the said Sego Cando on account stated between them on or about the month of July 1874, as per account current herewith filed marked A, and being so indebted, the defendant often promised the plaintiff to pay, but so to do wholly failed and neglected. Wherefore &c.

The "account current", marked A, ran as follows :—

"17 April, 1874. To 25 cwt. of copperah at Rs. 45 per candy, amount for 5 candies, Rs. 225."

Answer: (1) general issue, (2) prescription, under cl. 9 of Ordinance No. 22 of 1871.

The learned D. J. (Moir) over-ruled the plea that the "account current", dated 16 April 1874, was prescribed under cl. 9. He held that the case fell under cl. 8, as an account stated, and gave judgment for plaintiff on the merits.

On appeal, *Cayley Q.A.* for defendant and appellant: There was no accounting at all between the parties. The promise to pay was not in writing, nor does the evidence reveal an unqualified acknowledgement of the debt. A qualified acknowledgement of the debt will not entitle plaintiff to recover upon a count on an account stated, *Evans v Verity*, R. & M. 339.

Ferdinands, D. Q, A. for respondent: Oral admissions are sufficient to support a count upon an account stated. *Newhall v. Holt*, 6 M. & W. 662. [Mr. Cayley said he did not dispute that.] That being admitted, there is evidence in the case to shew the sufficiency of the admissions. "Defendant said he would pay me (plaintiff), when I got letters of administration"— "Plaintiff pressed defendant for money. Defendant said he would try and settle the next day".—"Plaintiff asked his nephew to shew the account and he did so. But defendant did not want to see it, saying he knew what was due. The nephew however shewed the account, when defendant said 'Don't I know the amount? It was seen and settled.

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I shall bring the money tomorrow."—" Deceased said to defendant 'I am very well, give me the £ 22.10 due for copperah sold to you.' Defendant replied he had no money then, but would pay the money or give some jewels the following day."

Cur. adv. vult.

The Supreme Court this day held as follows :—

Affirmed. This is an action for goods sold. Amongst other money counts, the libel contained a count on an account stated. The goods were sold in July 1874, and this action was brought in May 1876. The defendant, among other pleas, pleaded the 9th clause of the Ordinance No. 22 of 1871 in bar of the plaintiff's claim. Though the sale was denied by the defendant, it was satisfactorily proved. The claim for goods sold being barred by the Ordinance, the plaintiff's claim could only be sustained on the count for an account stated. We have carefully looked over the the evidence and think that the evidence of an account stated is sufficient to sustain the judgment.

D. C. Kalutara, 28,686.

Payment by a land of $\frac{1}{10}$th of its produce to Government is evidence of its being a private land.

Van Langenberg for appellant, *Ferdinands D. Q. A.* for the respondent (the crown).

The following is the judgment of the Supreme Court :—

This is a claim for land under the crown. The plaintiff's long possession is admitted, but on the question whether such possession exceeded 30 years the evidence is conflicting. In support of his title, the plaintiff produces four Thombo extracts marked A, B, C, and D. In A and C the land is described as private property, and in B and D as Company's ground ; but there is no evidence in the case as to which portions of the land in dispute these Thombo extracts severally apply, and perhaps it will be difficult after this lapse of time to shew their applicability. But there is evidence in the case that the land always paid one-tenth of the produce to Government which is the usual payment extracted for private lands, and this furnishes strong evidence of recognition on the part of the crown of the plaintiff's right, and in view of the plaintiff's long and undisturbed possession, we think the evidence sufficient to establish his right by prescription. Judgment for plaintiff with costs.

Set aside.

D. C. Galle, 39,040.

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This action, which was raised to cancel a Fiscal's sale, arose in the following way.

The effect and worth of an *obiter dictum* expressed on the bench.

One Abeyewickreme, being entited among other property to a divided ½ part of the land called "Padillegewatte", made a joint will with his wife, disposing of his property, and it was contended that there was a prohibition in the will against the wife or any of the testators children alienating such property during the life time of the said wife. The testatrix, who survived her husband, and one of their six children, became judgment debtors, on a promissory note, in case No. 30,985. Writs issued and ½ of ½ of the land above named was sold by the Fiscal to one Cornelis, whereupon the plaintiff (the first of them being a son of the testator, and the second his son-in-law), laying claim to two-sixths of ½ of the land in dispute, sued 1st the judgment creditor at whose instance the land was sold, 2nd the testatrix, 3rd her son (brother of the first plaintiff), and 4th the purchaser of the land, and prayed for quiet possession of the said share and the cancellation of the Fiscal's sale.

In answer, the 2nd and 3rd defendants denied the existence in the will of any prohibition against alienation, and pleaded that case No. 33,017 determined the matters set forth in the libel. The 4th defendant also filed answer to the same effect.

The learned D. J. (*Lee*) dismissed the plaintiff's case on the ground that the case referred to in the defendants' answer was conclusive against the plaintiff.

On appeal (*Cayley Q. A.* for plaintiff, *Ferdinands D. Q. A.* for respondent), the Supreme Court held as follows :—

On looking into the case No. 33,017, we find it to be a case instituted by one of the six children against a purchaser in execution under a writ against the widow and another of the 6 children. The principal defence in that case was that plaintiff having acquiesced in the mortgage bond granted by his mother and brother, would not dispute its validity. The learned Judge dismissed the plaintiff's case, and the Supreme Court affirmed that judgment, mainly on the ground of fraud on the part of the plaintiff, but expressed an opinion (evidently in reply to an argument advanced by counsel), that the clause of prohibition against alienation is ineffectual to create a valid entail, as the said will does not state on whose behalf the prohibition is made.

We have carefully examined this will, and we find a life interest is given to the survivor, after whose death, the property is devised to the seven children of the testators. Under these circumstances, we think the second ground given in the judgment of the Supreme Court to be a mere *obiter dictum*, as the first was quite sufficient to

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support the judgment. We therefore think that we are at liberty to put our own construction on the will: and that is, that the survivor only took a life-interest, subject to a prohibition against alienation in favour of the seven children, and that the absolute sale in favour of the 4th defendant cannot be sustained to that extent. But we hold the said sale to be good to the extent of the widow's life-interest, and the reversionary right of the 3rd defendant her son, and for that reason we affirm this judgment.

D. C. Galle, 37,924.

Where A and his wife in their last will appointed "C their daughter and her husband D, and their child now existing, viz E, and also the other children which may hereafter be procreated by their daughter to be the sole heirs of the estate," *held*

1. That C, D and E took the estate in fee, subject to open and let in the other children, as soon as they came into esse;

2. That C and D, as husband and wife, under the Roman Dutch Law,

This case turned upon the construction of a clause in a last will, which plaintiff interpreted differently from the defendant. The facts are these:—

Don Adrian de Silva Gunatileka Amarasiriwardene Mudeliar married Cornelia Gertrude Anthonisz in community of property, and had by her a daughter Merciana Dorothea, who married Henry Thomas Dias Abeyesinha also in community of property. On the 17th December, 1848, Don Adrian de Silva and his wife Cornelia made a mutual last will, in which occurred the following disposition:—

Secondly. These appearers declared to nominate institute and appoint their beloved daughter Merciana Dorothea and her husband Henry Thomas Dias Abeysinhe Mohandiram of Galle and their child *now existing and also the other children which may hereafter be procreated by their daughter to be the sole heirs of all the estate,* goods effects chattels and things whatsoever and wheresoever the same may be, which shall be left at the death of the first deceased of the said appearers, whether moveable or immoveable and of what kind or nature soever, which they the said appearers are now jointly in possession of as their common estate, that is to say, all the property which the first named appearer was possessed of jointly with his first wife Johanna Dias Lamaettenay who died about the year 1838, an inventory whereof is filed in the late District Court of Amblangoda in the matter No. 42 and all the property both moveable and inmoveable which the said first named appearer has since acquired *to be divided according to law amongst their said daughter and son-in-law and their child as aforesaid, as also by the children which may hereafter be procreated by them.*

The testator died on the 6th May, 1849. Probate of his will was first granted to his son-in-law, Dias, and, on his death in 1858 without the estate being closed, it was granted to the survivor Cornelia, who filed final accounts and delivered over the property of the estate to Merciana, who at that time had a minor daughter, Angeltina. Angeltina married plaintiff in 1874, but before Angeltina's marriage with plaintiff, her mother, Merciana, had married

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defendant (in 1865), and had died intestate in 1873. Defendant claimed a certain portion of the estate of Don Adrian de Silva and Cornelia.

Plaintiff brought this action to have that claim set aside, so far as it affected his own. He contended that by the true construction of the will, and the intention of the testator and testatrix, his wife Angeltina succeeded to $\frac{1}{2}$ of their property left at the date of the death of the predeceased testator; while according to the defendant, not merely were Dias and Merciana instituted heirs under the will, but also every child born of Merciana, who, by her first bed, had Angeltina, and by her second bed, four other children; that the estates would thus be divided into seven equal shares; that plaintiff would be entitled to only $\frac{1}{7} \bowtie \frac{1}{14} \bowtie \frac{7}{84}$ or $\frac{2}{84}$ shares; and that defendant and Merciana (at the time of the death) "were entitled in community to $\frac{7}{14}$ shares, viz. $\frac{1}{7}$ in Merciana's own right, $\frac{1}{14}$ by right of the community with her deceased husband Dias, and $\frac{2}{7}$ through her two deceased children (by defendant), and this defendant says he is entitled to $\frac{1}{2}$ of the said $\frac{7}{14}$, equal to $\frac{7}{28}$ or $\frac{21}{84}$, and each of the three surviving children to $\frac{1}{3}$ of the other moiety, namely to $\frac{7}{84}$ each."

were entitled to a share each.

The learned District Judge *(Lee)* held that by the devise (1) the husband and wife (Dias and Merciana) took one-half as one person, and (2) that the plaintiff's wife, as their only child existing at the testator's death, took the other half.

The following was the judgment of the learned District Judge :—

Two questions arise on the construction of Adrian's will, *first* whether the husband and wife took one share or two shares, and *secondly* whether the children of Merciana born subsequent to the death of Adrian are included in the class designated the "other children which may hereafter be procreated by the daughter."

On the first point I have been referred to the case of *Gordon Whieldon* (12 Jurist 988). There the bequest was to Captain Gordon, his wife, and children. There Turner for plaintiffs *arguendo* cited Littleton, 291 : "If a joint estate be made of land to a husband and wife, and to a third person, in this case the husband and wife have in law, in their right, but the moiety, and the cause is for that the husband and wife are but one person in law." Amphlett for the defendant argued that if the bequest had been intended to be to Captain Gordon and his wife as one person, the natural expression would have been to Captain Gordon and his wife and his children.

Lord Langdale held that the rule laid down in Littleton was correct, and held that the husband and wife took as one person, there being nothing in the will to show a contrary intention.

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I cannot see that there are any words in this will significant of any such intention. The inclination of the testator was to benefit his daughter and her children ; he does not say their children but her children. It is true that in the latter part of the will, he speaks of his daughter and son in law, but I do not look upon these words as imparting any intention to consider Henry Thomas Dias as distinct from his wife.

Then as to the second point, the defendants' counsel referred me to several cases, but in all of these there appears to have been a bequest for life to the parents with remainders to the children. In *Right vs Creber* (5 Barnewell & Creswell 866), there was a bequest for life with reversion, and it was held that the words " heirs of the body" comprehended *all* children, and not only those living at the death of the tenant for life, and that a remainder vested in every child, divested *pro tanto* on the birth of another child : this is a decision of 1826. In *Defflis vs Goldschmidt* (1 Merivale 417) a fund was created for the payment of legacies, payable on the legatees attaining 21 years of age, the interest of the fund being devoted to the mother, until the children attained that age : it was contended that the only legatees comprehended in the phrase "hereafter to be born", were those born between the making of the will and the death of the testator, and that children not *in esse* during the testator's life time did not share. This contention was not approved by the Court ; the difficulty attending the contrary construction, even though it amounted to positive impracticability, could not control the express words of the testator's declaration. In *Barrington vs Tristram (* 6 Vesey 348) and *Critchett vs Taynton* (1 Rus. & Myl., 541), the rule of the court was declared to be to let in all children until they must have a distributive share given to each.

These authorities are all of considerable antiquity. In *Viner v. Francis* (Tudor's Leading Cases, page 642), the general rule was laid down as being " to exclude all children, who although living at the date of the will, yet die before the testator, and to include all those who are living at the time of distribution, although born after the will on the death of the testator. The contention in *Viner v. Frances* was that the heirs of a child dying in the life time of the testator took a share of the bequest, but the ruling of the Court excluded that child. The case is therefore not exactly on all points with this. In *Scott* v *Parwood,* in the absence of any express intention, it was held that only children born at the death of the testator took, and not those born thereafter. When there is no reference by the testator himself to any particular time at which the class is to be ascertained, and the gift is immediate to the children of the testator or any other person, that is a gift not subject to any prior life interest on the attainment of any particular age or any other contingency, such children or other member of that

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class and such only, as are living at the testator's death will be entitled (2 Watson's Equity 1284) as I have already remarked, in the cases cited by defendant's Counsel there was bequest for life with remainder over to children and in that event all children born after a will as before the testator take shares.

When a legacy is given to each child that may be born to either the children of either of the testator's brothers, a child born after the testators death is not included, for the words "may be born" may be considered to provide for the birth of children between the making of the will and the death of the testator, and a different consideration would impute to the testator the inconvenient and impossible intention that his residuary personal estate should not be distributed until after the death of all the children of either of his brothers, Smith's *Real and Personal Property* 788. The more recent authorities appear, therefore to support the plaintiff's contention (vide xxiv W. R. 84.),

It is declared, therefore, that on the true meaning of the will of the 19th December, 1848 filed of record, the plaintiff, as husband of Angeltina Dias, is entitled to a moiety of the estate bequeathed in the will of the 14th August 1848 and also filed of record.

It is decreed that defendant do pay the costs of this suit.

On appeal, *Cayley* Q. A. (and *Ferdinands* D. Q. A.) appeared for defendant and appellant: The D. J was wrong in importing into the will a limitation which is not there. The after born children should not have been excluded. Dias, Merciana and Angeltina took the estate in fee, subject to open and let in the other children, as soon as they came into esse. *Dejflis v. Goldschmidt*, 1 Merivale 417, *Right v Creber*, 5 Bar & Cres 866, *Williams on Executors*, 983. The will involves a fidei commissum, and the case must accordingly be decided by the Roman Dutch Law. The fact that the Roman Dutch Law recognises an *oneratus* excludes the necessity for a present estate to protect the remainder-over, Vanderlinden's *Institutes*, 135, Tomkins and Jencken's *Modern Roman Law*, 273. [CLARENCE, J:—We should like to hear you on the other part of the case.] Under the English Law, the husband and wife are one person, the legal existence of the woman being suspended during the marriage, Kerr's *Blackstone*, 1. p. 468, and accordingly, if a joint estate be made of land to a husband and wife and to a third person, the husband and wife can take but a moiety *Littleton* 291, whereas under the Roman Dutch Law, such a bequest would have a different effect, for there, the husband and wife are two different persons, one being the guardian of the other, Grotius' *Introd.* 26, Van der Keessel, par 91.

Grenier, contra: The widow had not the life-interest of the bequest. The very words of the will contemplated a division and

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distribution immediately after the death of the first spouse, so that the after-born children will not be let in. The presumption of law is also in favour of such a construction. *Defflis v. Goldschmidt* is commented upon in 2 *Jarman on Wills*, 167, where the true effect of that case is indicated. And the passage cited from *Williams on Executors*, 983, does not apply, because the author goes on to say (in p. 1089 of the 7th edition, ch. 2. pt. 3, bk 3), that "the leading principle is that where a bequest is immediate to children in a class, children in existence at the death of the testator, and these alone, are entitled." The present case falls under the first of the class of cases referred to by the editor of *Brown's Chancery Reports* in p. 404, note under *Andrews v. Partington*, a general devise to children or other persons, as a class, comprehends those persons only who answer that description at the time of the testator's death. *Heath v. Heath* , 2 Atkyns, 122. So also in *Parker v. Tootal*, 11 H. of L. 143, words in a will indicative of a class must be taken to denote the class as it was constituted at the date of the will or at the death of the testator. *Olivan v. Wright*, 24 W. R. 84 is quite parrellel to the present case. That the widow rightly apprehended the true effect of the will is shewn by the fact appearing in the libel, not traversed in the answer, that she handed over the property of the estate to her daughter Merciana. *Secondly.* The distinction between English and Roman Dutch Law as to the relationship of husband and wife, does not enter into the case. The question is, how do the devisees take, not as between husband and wife, but as regards third persons. If the law were laid down so far, the distribution of the estate in its minor details could be easily agreed upon.

Cayley Q. A. (in reply) did not dispute the authorities cited, but said that all of them would yield to the express words of the will. The intention of the testator was clear. The case was precisely similar to that mentioned in *Williams*, p. 983.

Cur. adv. vult.

And this day, CLARENCE, J delivered the judgment of the Supreme Court as follows :—

That the decree of the District Court of Galle of the 10th day of April 1876 be set aside, and the case sent back with directions as hereinafter mentioned. Parties to bear their own costs in both Courts.

Don Adrian Gunatilike Mudeliyar, and Cornelia his wife, made their joint will on the 17th December 1848. By this joint will, which was never revoked, and is the instrument which we have now to interpret, the testator and testatrix, after a gift to the poor, appointed " their beloved daughter Merciana Dorothea, and her

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" husband Henry Thomas Dias Abeysinhe Mohandram, of Galle, " and their child now existing, and also the other children which " may hereafter be procreated by their daughter," sole heirs of all the property, subject to the marriage community " which shall be " left at the death of the first deceased of the said testator and " testatrix." The will then proceeded to enumerate the property aforesaid, which was all property brought into the marriage community by the husband, and continued—" to be divided according " to law amongst their said daughter and son-in-law, and their " child as aforesaid, as also by the children which may hereafter " be procreated by their daughter." The will then appointed the surviving spouse Merciana and Dias " to be the executors of the " will of the [first dying spouse] and administrators of his or her estate and effects." The will also reserved to the makers a joint power of revocation, which was never exercised. No question arises as to the effect of any revocation by the surviving spouse, with respect to the share of the common property, since no such revocation appears to have been made.

In construing this joint will, we may apply *mutatis mutandis* those canons which have been laid down by the English Courts in construing English Wills.

It was not contended by either of the parties that Merciana and her husband took life estates with remainder to the children of Merciana ; and we think it evident that the intention of the will was that Merciana and Dias should take shares, and not a life estate. The words " to be divided · · · amongst their said daughter and son-in-law and &c" sufficiently indicate this.

This being so, we have first to consider whether, as the plaintiff contends, the only child of Merciana's who takes under the gift is Engeltina, the child who was in existence at the date of the will, or whether, as the defendant contends, afterborn children also take shares.

It is admitted that Engeltina, plaintiff's wife, is the only child of Merciana's who was *in esse* at the date of the will. It is also admitted that she was the only child who was *in esse* when Don Adrian died. It is further admitted that after Don Adrian's death Merciana had four other children by a second husband.

We think that this joint will must be considered as " speaking" from the death of Don Adrian, the spouse who first died. It dealt with all the common property. So far as concerned Don Adrian's share it became irrevocable, and must " speak" from his death ; and so far as concerns the wife's share, without going into the question whether she could have revoked it after his death, it is sufficient to observe that she never did attempt to revoke it after his death, but allowed it to remain what the joint testators intended

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it to be when they made it, a will final as from the spouse first dying.

It is contended by the plaintiff that the case falls under the English rule that, where there is a gift to a class, to be divided at a specified time, only those members of the class can take who were born before the specified period of distribution. We do not think the case does fall within that rule. In the first place we do not think that the testators have specified any period of distribution. The will bequeathed "all the estate · · · which shall be left at the death of the first dying spouse · · · to be divided as thereinafter mentioned." Here the reference to the death of the first dying spouse is merely for the purpose of ascertaining the property which is to pass by the gift. There is nothing to show an intention that the distribution should take place then. In the second place, we observe that the gift is to Merciana, and her then husband, and her child already born, and to a class, (the future children of Merciana,) of which class not a single individual was in existence at the time from which, as we hold, the will speaks. This brings the case within the principle of another rule mentioned at p. 85 of Mr. Jarman's book, viz., that where there is an immediate gift to children, if there is no child *in esse* at the testator's death, all subsequently born children will take. If under these circumstances the sharing was restricted to Engeltina, the mention of "the other children would be rendered merely insensible. We are of opinion that the gift must be shared by all the children Merciana had by both husbands.

We next have to consider whether, as the District Judge has held, Merciana and her husband Dias take only one share between them or two. The District Judge has decided, on the authority of Lord Langdale's judgment in *Gordon v. Whieldon*, 11 Beav. p. 170, that they take only one share. In that case Lord Langdale, in the absence of any discoverable indication as to what shares the testator meant the legatees to take, held that they, husband and wife, as one person in law, would take only one share between them. We think that there, as in *Gordon v. Whieldon*, the testators have not vouchsafed any expression of an intention one way or the other; but here the husband and wife are a husband and wife under the Roman Dutch, and not under the English Common, law.

At English Common Law, as Littleton lays it down, because husband and wife are one person only, if a joint estate in land be conveyed to husband and wife and a third person, the husband and wife shall take one moiety, and the third person, the other; and that, although at English Common Law the wife's freeholds are not the husband's absolute property. Are the husband and wife under the Roman Dutch Law to be similarly considered one person for the purposes of this gift? The wife's position as regards property is very different under the two systems. It may perhaps be argued that

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this difference as to property should not prevent the husband and wife under Roman Dutch Law from being regarded as one person, inasmuch as the English husband can have no more than a life estate at most in his wife's freeholds, and yet that does not prevent their being one person in law for the purposes of sharing a gift even of a freehold. The fact is that at English Common Law, although the wife has distinguishable rights as to her "realty," her person is merged in that of her husband, her "personal property" that which attends the person, becomes her husband's property absolutely, even her choses in action become his, if he reduces these into possession while she lives. The English distinction between real and personal property is unknown to the Roman Dutch Law, but none of the wife's property becomes the absolute property of the husband ; on the contrary, the joint properties of both are thrown into a common stock, administered by the husband during the marriage, and divisible afterwards in moieties. The personality of the wife cannot be said to be merged in that of the husband under the Roman Dutch Law. She is regarded as capable of contracting with her husband, as Voet points out, in his title *de ritu nuptiaram* (xxii. 2. 63.), in the course of explaining some points in which the power of a husband over his wife is dissimilar to that to which minors, madmen &c., are subject. This incident is of itself enough to prevent husband and wife from being regarded as one person only, and to this has to be added, that under the Roman Dutch Law, the husband and wife cannot be each other's heirs.

Voet indeed in his title *de testibus* (xxii. 5. 5.) lets fall an expression which, on a superficial view, might perhaps be supposed to imply that he regarded this matter in the opposite light. He is discussing the reasons why a wife should not be compellable to give evidence for or against her husband, and says, "cum enim ex arctissimo vinculo conjuges quasi in unum coaluerint." Here all that Voet means is, to argue, from the closeness of the marriage relation, against the impolicy of compelling either spouse to what would be calculated to produce estrangement ; we certainly do not regard him as intending to imply that the wife's personality is merged in her husband's ; and a mere chance expression like this, even when employed by so eminent an authority as Voet, cannot avail against the undoubted characteristics of the married state under the Roman Dutch Law. Under the English Law, the personality of the wife is merged in that of the husband. Under the Roman Dutch Law the case is not one of merger, but of mere subjection.

For these reasons we think that we cannot restrict the participation of Merciana and her husband Dias in this gift to one share between them. We hold that each took one share.

The result is that the whole property passing under the gift is divisible into sevenths. Merciana's representatives take one

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share ; Dias' representatives one share ; Engeltina one share ; and Merciana's other four children, or the respective representatives of each, (for two are dead) one share each. Having thus laid down the principles according to which, in our judgment, the division is to be made, it is unnecessary for us in this Court to work out the arithmetical computation of the subdivision of these seven shares.

There being no dispute as to the subject matter of the gift, the decree of the District Judge is set aside, and the case sent back with directions to the District Judge to carry out the apportionment of the property upon the principles which we have laid down.

The case has been very fairly presented to the Court by the parties, and had it been practicable to do so, we should have dealt with the costs by ordering them to come out of the testator's estate. Under the circumstances the nearest approach which we can make to this is to direct that plaintiffs and defendant do each bear their own costs in both courts.

June, 21st.

Present :—CLARENCE, J. and DIAS, J.

P. C. Colombo, 6591.

Grenier for appellant (and complainant.)

The following is the judgment of the Supreme Court :—

"Rude behaviour" under cl. 15 of Ordinance No. 17 of 1873.

Appellant charged respondent, a hired carriage driver, under cl. 15 of Ordinance No. 17 of 1873, with "rude behaviour," and refusing to drive appellant in the carriage which appellant had hired.

The evidence does not prove more than that the driver declined to drive appellant to Maradana, alleging that his (the driver's) master had ordered him to be at the Gas Works at 4 P. M. We cannot hold this to have been "rude behaviour" within the meaning of the Ordinance. Refusing to drive is not punishable under cl. 15.

We do not see any reason to interfere with the Police Magistrate's order awarding defendant one Rupee expenses.

Affirmed.

June, 22nd.

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June, 22.

Present:—CLARENCE, J. and DIAS, J.

D. C. Kandy, 66,343.

Where A. made two assignments of movable property, the first on the 29th and the second on the 31st of July, and the assignees registered them on the same day, the second being registered earlier in the day than the first, *held* that priority of registration did not give preference to the second assignment, as the first was registered within the period fixed by the Ordinance 21 of 1871.

Against a judgment decreed in favour of plaintiff for the sum of Rs. 1000 with interest and costs, the Fiscal reported the sale of defendant's property for the sum of Rs. 3250, whereupon the execution debtor, in anticipation of the deposit, granted on 29th July 1876, an assignment (No. 11,330) to Velleyan Chetty, of his rights to the sum overlevied, and on the 31st July he granted a second assignment (No. 37) to the same fund to Hadji Marikar. Both assignments were registered on the same day (31st July), the one last in date being however first registered.

Vellayan Chetty, issued a rule on Hadji Marikar, to shew cause why the amount over-levied, as already mentioned, should not be paid to him. It was admitted by Hadji Marikar that the execution debtor told him that he had given a bond to Vellayan Chetty on the preceding Saturday.

The learned District Judge, *Lawrie* made the rule absolute in the following order :—

The question for determination is, which of the assignees has a right to the fund? he whose assignment was first registered? or he whose assignment was first granted? or are both entitled to rank *pro rata* on the fund.

Had the question arisen under the Ordinances regulating the registration of titles to land (8 of 1863 and 3 of 1865), I think I should have sustained the assignee whose deed was first registered, provided of course that there had been no fraud on his part, either in obtaining it, or in securing priority of registration. I should have done so, on the ground that the Ordinances expressly attach importance to priority of registration, and confer preference on deeds according to the date when recorded. Under these Land Ordinances, unregistered deeds are valid and may be registered at any time. It is only in competition with other deeds that registration is of importance.

But the present case arises under the Ordinances 8 of 1871 and 21 of 1871. By these, bills of sale of moveable property, which (by the 6th clause of 8 of 1871) include assignments, must be registered within 14 days. If so registered, they shall be deemed good and vaid ; if not registered they are ineffectual and invalid. The first of the Ordinances required registration within seven days ; the 2nd of them extended the time to 14 days. I find nothing in these which confers preference on deeds according to the dates of registration, and I do not feel justified in construing them as if

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they contain such words. I read them as giving to every assignee 14 days to register ; if he does so in time, his deed is good and valid; if he does not it is not worth the paper on which it is written. It may be that the Legislature intended to give priority to deeds according to the dates of registration, and that without such a provision the object of registration is defeated in a great measure, but as that has not been stated as I said, I do not feel justified in assuming that there has been an omission much less in attempting to rectify it. The assignee here, who got the assignment on the 29th of July, registered it within 14 days, and so made it a valid assignment, which in my opinion could only be defeated by one of prior date, also registered in due time. The assignment of 31st July is secondary to that of the 29th. The claim of the holder of the latter is preferred and he is found entitled to costs.

On apeal, (*Grenier* for appellant, *Ferdinands, D. Q. A.* for respondent) the Supreme Court affirmed the judgment.

D. C. Matara, 747.

An official administrator, even though he has no available funds in the estate, cannot appeal to the Supreme Court without affixing the necessary stamps to his petition.

In this case, certain movable property which had been inventorised by order of court, as belonging to the deceased, Cornelia, were claimed by her father-in-law as his, whereupon the Secretary of the Court, to whom the administration of the estate had been entrusted under the peculiar circumstances of this case, moved, with the view of winding up the estate, for an order on the claimant to institute proceedings to have his claim to the property established, and in failure thereof, that he, the administrator, may be authorised to sell them. The District Judge however ruled (23 February) that the administrator ought himself to raise the action, inasmuch as the articles inventorised were found in the claimant's house and were therefore presumably his.

The administrator, being desirous of appealing against this order, moved that he might be allowed to prosecute the appeal without stamps in the first instance, there being no funds available in the estate. The learned District Judge allowed the motion in these terms, on the 27th February last :—

" The counsel for the claimant contends that the proceedings are irregular as no notice was given of the motion, and quotes 1 Thoms. *Instit*, p. 360, Matara D. C. case No. 24,086, and Beven and Mills *Misc.* p. 339. I hardly think this is analogous to the the cases quoted as they refer to amended answers or libels, and not to motions to appeal in blank : the former would ofcourse materially affect the case, but not so a mere motion to appeal, more especially as the amendment stands " in the first instance."

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"With regard to the contention that the administrator is acting in contravention of the order of the court, I do not see how he can well help if he consider that it is for the benefit of the minors, for he is appointed by the court, and not at his own seeking, to guard the welfare of the minors, and should be allowed every privilege as any other individual in such a position.

The cases quoted by counsel for the official administrator (cases Nos. 705,707 and 192) go to shew that in former instances, affidavits &c were in the first instance allowed in blank, and I see no reason why this application should not be granted.

On appeal, *Ferdinands D. Q. A.* for the respondent contended that the appeal was irregular and could not be maintained. The objection of the respondent, though not pressed through the usual form of an appeal, would be taken notice of by the court as a question affecting the revenue. The exemptions under the Stamp Ordinance No. 23 of 1871, schedule part ii were only in favour of the Q. A. and one admitted a pauper. The official administrator was entitled to his commission and his appeal should therefore be rejected.

Grenier for appellant relied mainly on the arguments urged in the Court below.

The Supreme Court rejected the appeal, "as the appeal petition which is written on an unstamped paper cannot be entertained. The order of Court of the 27th February last is irregular."

June, 26th.

Present: CLARENCE, J. and DIAS, J.

P. C. Pasyala, 6163.

Apprehension of offenders, under cl. 144 of Ordinance 11 of 1868.

This was a charge under the 144th and 163rd clauses of the Ordinance No. 11 of 1868 against a Peace Officer for wilfully neglecting to produce before some competent Magistrate one Singo, accused of cutting and wounding and of theft, and handed to the defendant by the complainant.

On appeal against a conviction, *Grenier* for appellant: Before a conviction could be obtained, it was necessary to establish (1) that the defendant had been empowered to act within the limits of the village in which the offence was committed or the offender was found, and (2) that the defendant had reasonable grounds to suspect that any person had committed any of the serious offences enumerated in the 144th clause of the Ordinance. As regards the first point, it is in evidence that there was a Peace Officer for the village in which the alleged offence was committed and the alleged offender

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was found, and there is no legal evidence on record of the fact that the defendant had been, in the language of the Ordinance, 'authorised and required to arrest persons'. The evidence of Pieris, who was the proper peace officer of the village in which the alleged offender was found, conclusively shews that he was present when the defendant was asked to take the said offender into custody. The person specially authorised and empowered to act within the limits of his own village was Pieris and not the defendant. As regards the second point, there is an utter absence of proof that any of the serious offences contemplated in the 144th clause had been committed.

The Supreme Court acquitted the defendant in these terms :—

It appeared at the trial that the matter complained of took place at a village called Ratembete. The defendant is the headman of the adjoining village, and some evidence was called to prove that he was authorised by the Mudalyar of the korle to act as Peace Officer of Ratambete. The Mudalyar himself was not called, and there is no evidence as to the authority of the Mudalyar to appoint the defendant, and upon the evidence before us, we are not prepared to say whether the Mudalyar's appointment was good or bad. But the evidence shews that whilst the accused person was still in the custody of the complainant, the duly appointed Peace Officer of the village came up to the spot, and the complainant could have delivered over his man to that officer, who being the admitted Peace Officer of the village, is the proper party to take charge of him, but complainant, however, does not seem to have done so.

P. C. Kegalla, 11,116.

Per Supreme Court :—

Timber Ordinance.

Set aside and defendants acquitted. The charge is laid under cl. 8 of the Ordinance No. 24 of 1848, and to sustain the conviction, it must be proved that the timber was removed from defendants, or some other private land, on which it had been felled. The evidence is very contradicting as to where this timber was felled, and as to which of it was fresh and which old.

P. C. Colombo, 6754.

Ramanathan for appellant

Plaints on printed forms &c.

Per Supreme Court :—Affirmed. The evidence for the prosecution, taken with the evidence for the defence, is sufficient to sustain the conviction of appellant on the count for stealing.

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The Supreme Court notices that the information in this case, presented by an Inspector of Police, is written on a printed form, intended for charges under the Ordinance No. 10 of 1865, and adopted to its present purpose by erasures. This practice of altering printed forms into information of charges totally different from those to which the forms were designed, is becoming very common, and occasionally results in much confusion. The Police Magistrates would be only doing their duty, if they refused to entertain such informations.

D. C. Kandy, 60,088.

VanLangenberg for appellant, *Grenier* for respondent.

The Supreme Court held as follows :—

In pari delicto, potior est conditio defendentis.

Burden of proof.

Plaintiff sues on a mortgage bond for £200, granted by her husband's brother, Rasdeen Ahamat, to her husband Lahari Ahamat. Rasdeen Ahamat is dead. The bond was assigned by the obligor to Joreida, the original plaintiff, and during the pendency of this case after the plaintiff's replication had been filed, her interest in the bond was sold by the Fiscal, and bought by the present appellant, who thereupon got himself substituted for the original plaintiff on the record,

The defence is that there never was any consideration for the bond, which is expressed to be made in consideration of £200, paid by the mortgage to the mortgagor ; and that the making of the bond was a mere colorable and fraudulent transaction, intended to defeat Rasdeen Ahamat's creditors.

No question arises as to the appellants being a purchaser for value, without notice of the fraud or deficiency of consideration, if such there be. The simple issue raised by the pleadings is that raised by the original plaintiff's replication to the defendant's answer, in which the original plaintiff Joreida traversed the defendant's allegation of want of consideration and fraud ; and the present appellant, as substituted plaintiff, simply stands in the original plaintiff's shoes.

Here want of consideration would not necessarily invalidate the mortgage as between the mortgagor and mortgagee. According to circumstances, the mortgage might be invalid as between grantor and grantee for a failure of consideration, or valid as a voluntary benefit conferred by the former on the latter. But if the mortgage was a mere colorable one for no real consideration, made in order to defeat Rasdeen Ahamat's creditors, it was a fraudulent transaction of which neither party can be assisted by this court to any

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advantage. If such be the character of the transaction, *in pari delicto melior est conditio defendentis.*

In forming our conclusion as to the facts, we lay out of consideration the evidence of the original plaintiff, Joreida, except as to the one circumstance of Rasdeen Ahamat having been her husband's brother, with respect to which it is scarcely likely that she would have ventured to commit perjury. As to other facts, we think that this woman's evidence is wholly unworthy of credit. After by her replication distinctly denying the averments in defence made in defendant's answer, she comes forward at the trial and unblushingly swears that there was no consideration for the mortgage, and that it was made simply "to save Rasdeen Ahamat's property."

What we do find is this. Rasdeen Ahamat was, at the time when he gave the mortgage, an accused and held to bail in a coffee stealing case then in course of investigation before a justice of the peace. This indeed has not been regularly proved, but it appears to have been admitted upon production of the Deputy Queen's Advocate's copy of the depositions in the coffee stealing case. And Rasdeen Ahamat, when so held to bail, executed the deed in question, whereby he purported, in consideration of £ 200, to mortgage to his brother, an ex-Sergeant of the Ceylon Rifles, as security for that sum, the seven specified pieces of land. The interest was to be paid half-yearly, but it appears that none had been paid when Rasdeen Ahamat died two years afterwards.

Looking at the circumstances of the parties, and the amount of the property mortgaged by the deed, we think that the proof of the foregoing facts throws on the plaintiff the onus of proving that the consideration expressed in the deed did pass; and as the plaintiff has not done this, we are of opinion that the District Judge's decision dismissing the plaintiff's libel with costs was right.

D. C. Kandy, 67,849.

Grenier for appellant, *VanLangenberg* for respondent.

The Supreme Court held as follows :—

Bhuddist law of succession.

The plaintiff sues as the pupil of a deceased priest on a bond and promissory note granted by the defendant in favour of the deceased priest. Two parties intervene in the case, one calling himself a pupil of the deceased priest, and the other his brother and heir-at-law, and there is no doubt if the bond and promissory note are not temple property, the brother would be the party entitled

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to them. The two documents on the face of them are a bond and a promissory note in favour of the deceased priest. There is nothing in them to shew they were trust property, which would go to his sacerdotal heirs, and we think the D. J. right in holding that they were the private property of the deceased priest.

D. C. Jaffna 3,262.

A security, who has renounced the beneficium ordinis et discussionis, is not entitled to a notice of the principal debtor's default; nor may such security avoid his liability by attributing laches to the obligee in not enforcing payment from the principal debtor for a period insufficient to bar the claim by prescription.

The plaintiff who was the arrack and toddy renter under Government for the District of Jaffna for the year 1869-70, sold, by deed dated 14th August 1869, in sub-rent to the 1st and 2nd defendants the farm of two parishes for a certain consideration, and the 3rd 4th and 5th defendants bound themselves jointly and severally (renouncing the beneficium ordinis et discussionis) to pay a certain balance then standing due by the first two defendants to plaintiff.

The case was pressed as against the 3rd defendant alone and the learned District Judge held as follows :—

I think it very hard that the 3rd defendant should be called upon at this distance of time to answer for the default of his principals. The 1st and 2nd defendants made default in the payment of the third instalment, and the lease expired in June 1870, and the plaintiff does not seem to have taken the least trouble about the matter till he instituted this suit in March 1875, although it was in his power to re-sell the rent-farm as soon as the default was made by 1st and 3nd defendants in the payment of the instalments. The plaintiff has been guilty of such gross negligence in this matter that I consider the 3rd defendant entitled in equity to a discharge of his suretyship. The plaintiff does not seem ever to have given notice of the principal's default to 3rd defendant. The 3rd defendant pleads this expressly and there is no denial of it in the replication. I think it unfair and unjust that the 3rd defendant should now, after the lapse of very nearly *five* years, be called upon to answer for the default of his principals.

On appeal *Ferdinands D. Q. A.* for appellant. The 3rd defendant, by renouncing his privileges and binding himself jointly and severally obliged himself as principal. If so, he cannot avail himself of the plea of laches on the part of the plaintiff. Where the benefit of discussion has been renounced, the creditor may pass over the principal debtor and sue the security, 1 Pothier on *Obligations*, 263. (Evans' Edition.)

The Supreme Court held as follows:—

Set aside and judgment entered for plaintiff against 3rd

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defendant for the balance sum declared in plaintiff's libel to be due upon the bond, with interest as therein prayed, and costs of suit.

The D. J. has nonsuited plaintiff as against 3rd defendant against whom only the case was brought to trial, on the ground that plaintiff has not proved that he gave 3rd defendant notice of that principal debtor's default: and that it appeared unfair and unjust that 3rd defendant should, after the lapse of five years be called upon to answer for the default of his principals.

As to the *first* ground, it was not necessary for plaintiff to prove notice, for 3rd defendant was not entitled to claim any. The *second* ground is clearly untenable. A Court of Equity has no right to refuse a plaintiff remedy on a contract, merely on the ground of a lapse of time insufficient to bar the remedy by prescription.

D. C. Trincomalee, 30389.

The District Judge should have an ample discretion to provide for the protection of the minor's interest, but where the testator has chosen to repose confidence in the curator, she ought not to be called upon to give security for the property entrusted to her, unless it were proved that such property was in danger in her hands.

The following judgment of the learned District Judge explains the facts of the case :—

This is a motion by one of the legatees under the will of the testator (Canagaratne Modliar) for a rule to call on the grandmother of the minor to deposit in Court the money and jewellery she received from the executors, or give security therefor. It is opposed on the ground that the grandmother is entitled to the possession of the property in terms of the 7th clause of the will.

I do not think the legatee is the proper person to raise the question, but as he has brought the matter to the notice of the Court, it is open to me to make such order as the circumstances require.

The grandmother is not a guardian, as described in the motion. Seven guardians are distinctly named in the will, and they, or such of them as may have undertaken the duties imposed on them by it, will be responsible to the minor, when she comes of age, for all the property to which she is entitled under the will. The grandmother and aunt of the minor are made by the testator as the persons with whom he wished the minor to be allowed by the guardians to remain, so long as she was brought up by them in the Christian faith, and during such time also, he wished the income and jewels belonging to the minor "to be left in their charge." This concluding request, for it is merely a request which the guardians could comply with or not in the exercise of a just discretion, does not release the guardian from the responsibility touching the minor's property, and I consider they would be justified in seeking

security from the grandmother for the movables given to her. But since they do not seem at any time to have demanded such security, and as moreover great confusion has arisen in the management of the estate, I think the Court is bound, in the interest of the minor, to require the grandmother, who has by admission obtained possession of the jewels and certain moneys of the minor, either to give security for them or to deposit them in court. There is nothing in the evidence, or in the proceedings, in this or in the connected case No. 20920, to shew whether or not the condition attached to the custody of the child by her grandmother is being observed or not, but I may observe that departure from that condition would warrant the Court to demand the absolute surrender of the property from her, without the alternative of security. It is still open to the guardian or any of them to require such absolute surrender as well as of the person of the minor if the condition has been infringed.

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It is ordered that the custodian of the minor, her grandmother Sinnepulle, do within 8 days give security for the full value of the jewels and money belonging to the minor which have been given to her. The secretary of the Court to ascertain from the proceedings and record here below the value of such property, or that she do lodge the same in Court within that time.

On appeal *Ferdinands D. Q. A.* for the custodian of the minor and appellant, *Ramanathan* for the legatee and respondent), the Supreme Court held as follows :—

No doubt the District Judge should have an ample discretion to take steps for the protection of the minor's interest, but in the face of the confidence which the testator has chosen to repose in the grandmother, the appellant, she should not be called upon to give security for the value of these jewels, unless there be some matter before the Court from which the Court could infer that the jewels were in danger in her hands. We do not find any circumstances of that kind. The District Judge states that there has been great confusion in the management of the estate, but it is not shewn that the respondent is liable for this. She is not the executor.

Order of 4th May last will therefore be set aside with costs.

June 29th.

Present:—CLARENCE, J. and DIAS, J.

P. C. Colombo, 6,696.

Set aside and defendant acquitted. The information consists of two counts, the first, a count of theft, and the second, a count

*Requisites for a charge of guilty re-

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charging defendants with "receiving and having in their possession one fowl belonging to the complainant."

Receipt of stolen goods.

The second count alleges no offence, and should not have been entertained. In order that a charge of reception of stolen goods may be good, it must allege that the goods were received, defendant knowing them to be stolen property, and not only so, but the information must also allege that the goods were unlawfully received.

The Police Magistrate states that he convicted the first defendant on the charge of theft. This conviction cannot stand. The only evidence against the first defendant is that which points to his having been in possession of the fowl, and having accounted for his possession by saying that he got it from the 2nd defendant. There is no evidence to shew that this account was false, and no evidence that 1st defendant's possession was recently after a theft. For anything that is proved, complainant may have lost the fowl a year or two ago. *Per* CLARENCE, J.

P. C. Colombo, 6,818.

Vagrants' Ordinance.

Plaint:—That defendant was on the night of the 12th instant found in the premises of this complainant for some unlawful purpose, in breach of cl. 3 of ordinance No. 4 of 1841 sec. 4.

On appeal against a conviction (*VanLangenberg* for appellant), the proceedings were quashed, as the plaint was "substantially bad, in that it does not disclose an offence under cl. 3 of the Ordinance No. 4 of 1841.

P. C. Dimbulla, 1,573.

Labor Ordinance, No. 11 of 1865.

VanLangenberg for defendant and appellant, *Grenier* for complainant and respondent.

The following judgment of the Supreme Court is sufficiently explicit as to the facts of the case:—

The defendant, a sub-Kangany on the coffee estate of which complainant has charge, appeals against a conviction on an information under cl. 11 of ordinance No. 11 of 1865, for leaving complainant's service without notice or reasonable cause. His defence was that more than a month's wages were due and remained unpaid after 48 hours' notice to complainant, so that he was justified in leaving, under the 21st. clause of the Ordinance. It is admitted that four months' wages were due, and that 48 hours' notice was

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given by the appellant, but the complainant claims to set off against the wages, under the 21st clause, a sum of Rs. 170, alleged to be due from the appellant on an advance. Rs. 170 is more than the four months' wages, so that if this Rs. 170 is a debt due from the appellant to the estate, the conviction must be set aside.

Complainant's contention is that Rs. 170 is the balance remaining unpaid of a larger sum advanced by the estate to the appellant, through one Veeran, the head cangany of the estate, to enable the appellant to bring coolies to the estate. It is proved that Veeran had some Rs. 1,100 given him on the estate, and Rs. 500 handed to him afterwards by Messrs. Sabonadiere & Co. in Colombo. For the purposes of this case, we must lay Messrs. Sabonadiere & Co's advance out of consideration, because there is no evidence on which we can decide this advance to have constituted a debt to the estate rather than to Sabonadiere & Co.

With regard to the Rs. 1,100, there is no doubt whatever, on the evidence that it was given to Veeran with the intention that he should distribute it, or some of it, amongst the sub-kanganies, of whom appellant was one. It is also admitted by Veeran who was called for the defence that he did distribute the advance to the sub-kanganies, and that he gave Rs. 450 of it to the appellant. And complainant contends that this was in effect an advance by the estate to the appellant, Veeran being a mere conduit-pipe to pass the money, constituting a debt due from appellant to the estate. Appellant on the other hand contends that whatever he received from Veeran constituted a debt due by himself to Veeran, but not to the estate.

There is no doubt that a debt may be contracted between an employer and a sub-kangany in the manner contended for by complainant. If it is arranged between A, B & C that A shall advance money to C by handing it to B, who is to pass it on to C, and that C shall be responsible to A, and if that arrangement is carried out, this will constitute a debt due from C to A, just as much as if A had handed the money direct to C. But before we can find that a transaction of the kind now in question constitutes a debt due from a sub-kangany to the employer, we must be satisfied, either by direct evidence or fair inference, that those parties were at one in the arrangement; and we ought not to convict this appellant, on the ground of his being indebted to complainant for the advance in question, unless we are reasonably satisfied that he understood and assented to an arrangement that he was to be responsible, as a debtor, to the estate.

After considering the evidence in the case, we are not satisfied that this was so. Not one of the complainant's witnesses is able to state that there was any arrangement, how much of the advance the appellant was to receive. Even the conductor who interpreted,

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when the advance was given, is not able to say how much appellant was to receive or did receive, and it is not until Veeran is called for the defence that it appears that appellant received Rs. 450 from him. This renders it improbable that there can have been any understanding between appellant and the manager, that appellant was to be definitely considered a debtor to the estate. A further improbability arises from the circumstance that the appellant gave Veeran a promissory note for what Veeran gave him. Much stress was laid for the prosecution, in the circumstance that appellant had submitted to deductions being made from his pay on account of this money ; but as the other evidence in the case establishes, and, in our opinion, no more than that appellant received money from Veeran, who in turn was indebted to the estate, we cannot regard this circumstance either as amounting to an acknowledgment that he was an original debtor to the estate, or as evidencing a novation transferring to the estate a debt originally contracted in favour of Veeran. It is a circumstance not incompatible with the appellant being a debtor only to Veeran, for if appellant by this means made payments to Veeran's creditor on Veeran's account, his own liability to Veeran would be *pro tanto* reduced. The evidence does not satisfy us that the appellant undertook to become debtor to the estate, and that being so, the conviction will be set aside and the appellant acquited.

It is as well that we should add that our conclusion in the above question is not to be regarded as casting any reflection upon the veracity of those gentleman who gave evidence for the prosecution. We have no doubt that they deposed honestly to their belief as to the intention of the arrangement in question, and probably their view may have been correct as to the intention on the side of the estate. But it takes two parties to make a contract, and we are not satisfied as to the agreement on the part of the appellant.

Set aside.

D. C. Kalutara, 30,900.

The Supreme Court reversed the judgment of the court below in these terms:—

Prevarication.

Plaintiff when affirmed made a statement, and when re-called, after another witness had deposed to the contrary, admitted that his statement was false. This may have been perjury, but was not prevarication. The sentence passed by the District Judge upon plaintiff is therefore set aside.

D. C. Jaffna, 5,148.

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Demurrer.

The plaintiff sues for a land of which the defendant is the planter. He complains that the defendant is in forcible possession of the whole granden. He claims damages in respect of such forcible possession and for a sale of the defendant's interest under the Partition Ordinance. To this libel, the defendant demurs on the ground that an action for damages and partition cannot be blended together. This demurrer the District Judge has very properly over-ruled, and his judgment is therefore affirmed.

July, 3rd.

Present:—CLARENCE A. C. J., DIAS, J. and LAWRIE, J.

Mr. Clarence sworn as acting Chief Justice.

The Hon'ble Lovell Burchett Clarence produces in court a warrant under the hand and Colonial Seal of H. E. the Hon'ble Arthur N. Birch. Companion of the most distinguished order of Saint Michael and Saint George, Lieutenant Governor and Commander-in-chief in and over the Island of Ceylon, with the dependencies thereof, dated at Kandy, the 30th day of June, 1877, appointing him the said Lovell Burchett Clarence to be Acting Chief Justice of the Supreme Court of the Island of Ceylon.

The said warrant is read and filed.

The said Lovell Burchett Clarence thereupon takes the Oaths of Office and Allegiance in such manner and form as the same are by law appointed to be taken or made, which Oaths were administered by the Hon'ble the Acting Senior Puisne Justice.

Mr. Lawrie sworn in as acting Junior Puisne Justice.

The Hon'ble Archibald Campbell Lawrie produces in court a warrant under the hand and Colonial Seal of H. E. the Hon'ble Arthur N. Birch, Companion of the most Distinguished order of Saint Michael &c.

The said warrant is read and filed

The said Archibald Campbell Lawrie thereupon takes the Oaths of Office and Allegiance in such manner and form as the same are by law appointed to be taken or made, which Oaths were administered by the Hon'ble the Acting Chief Justice.

P. C. Point Pedro, 19,207.

A coach carrying Her Majesty's mails and

The learned Police Magistrate *(Drieberg)* held as follows:—

The question submitted to me by counsel for decision in this case is, whether a coach carrying Her Majesty's mails, and *passen-*

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passengers for hire is exempt from toll, under cl. 7 of Ordinance No. 14 of 1867.

gers for hire, is exempt from toll, under cl. 7, Ordinance 14 of 1867 ? It was contended for the complainant, that the fact of the coach carrying passengers for hire also, made it liable to pay toll. This contention does not appear to me to be tenable, for the toll is not leviable on the *passengers*, but on the *vehicle* and horses. I do not think that cl. 5, Ordinance 14 of 1865, cited by complainant's counsel, has any bearing on the question at issue. In the case of *Andree vs. Silva (2 Lorenz*, 60,) it was assumed throughout the argument in appeal, that the Galle Mail Coach—(which, it is well known daily carries passengers) was not liable to pay toll. Although that case was under the repealed Ordinance No. 9 of 1845, still, as respects the exemption in question, the wording in that and the Ordinance now in force, is the same. The defendant is acquitted.

On appeal the judgment was affirmed for the reasons given by the Magistrate.

P. C. Colombo, 6,202.

Malicious Injuries' Ordinance.

Plaint: The defendant did on the 10th May forcibly enter into complainant's dwelling house, remove the tiles and commit damage to his crockery, and the victuals he was preparing, in breach of Ordinance No. 6 of 1846, cl. 19.

On the complainant being sworn as follows—"Defendant is my landlord, on the 10th he and his men removed all tiles from the house. That is all my charge, the house is his own,"—the Police Magistrate dismissed the plaint.

On appeal (*Grenier* for appellant), the Supreme Court held as follows:—

Set aside and instead of the charge being dismissed, the information is quashed.

The charge is laid under the Malicious Injuries Ordinance, but malice is not alleged. But for this defect, we should have sent the case back for trial.

P. C. Kandy, 42,433.

In a charge for theft, ownership of property ought to be laid.

Van Langenberg for appellant.

The Supreme Court quashed the proceedings in these terms:—

The plaint in this case is insufficient, as it does not state to whom the coffee plants in question belonged, which is essential in a charge of theft. *Ramanathan's Rep.* p. 4 D. C. Negombo, 331.

D. C. Colombo, 1,541.

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VanLangenberg for appellant.

Ferdinands, D. Q. A. for respondent.

Under the Land Acquisition Ordinance of 1876, no appeal will lie from a decision of the assessors, where they have agreed together as to the amount of compensation, not even if the compensation so awarded is less than the amount tendered by the Government Agent.

The Supreme Court held as follows :—

Appeal dismissed with costs. This is an appeal from an award made in the District Court under the Land Acquisition Ordinance of 1876. The case was referred to the District Court by the Government Agent for the Western Province, under the 11th. section of the Ordinance.

By the 23rd sec., when the person interested in the land has made a claim to compensation pursuant to any notice mentioned in sec. 7, or in sec. 14, the amount to be awarded to him is not to exceed the amount claimed or be less than the amount tendered by the Government Agent under sec. 8, or the amount which the Government Agent shall have offered to give under sec 13.

And by the 27th section, in case both of the assessors agree together as to the amount of compensation, their decision thereon shall prevail, " without right of appeal".

The notice mentioned in sec. 14, requiring the person interested to state the sum claimed for compensation, is not filed in the case, but we presume that there was such notice, since the person interested, who is the appellant in the case, filed a statement laying his claim at Rs. 3,250. The Government Agent under sec. 13 had offered Rs. 1,370. Consequently under sec. 23, the amount awarded should not have exceeded Rs. 3,250, or fallen short of Rs. 1,370. At the trial, however, the assessors and the District Judge, all three, agreed in awarding only Rs. 1,050, the 23rd sec. of the Ordinance having been wholly lost sight of. At the hearing of the appeal, counsel for the Government Agent offered the appellant the amount of the Goverment Agent's tender, but this offer being declined, we have to adjudicate upon the appeal as in ordinary course.

It is clear that the award, awarding less than the Government Agent's previous offer, was quite wrong, being made flatly in the face of the 23rd section of the Ordinance, but we are of opinion that the 27th sec. forbids our entertaining this appeal against the award.

It is alleged in the petition of appeal, that the evidence disclosed that a previous assessment had been made under the old Ordinance of 1863. The allegation appears to have been put forward with the view of founding the prayer that the whole proceedings ought to be quashed on the score of no jurisdiction. All that we need say upon this part of the case is that this objection was not recorded as taken in the Court below, and further that the allegation is untrue, as appears by the record of the evidence.

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D. C. Colombo, 71,900.

Practice as to filing documents referred to in the document on which the action is based.

The libel declared upon a lease, and the defendant, prior to answering, moved "for a notice on the plaintiff to file in court the powers of attorney, dated 7th November, 1876 and 1st July, 1876, referred to in the lease dated 27th December, 1876 and filed with the libel, and by virtue of which the parties became lessors to the plaintiff, and for 8 days' time after notice thereof to file answer."

The District Judge disallowed the motion.

On appeal, *Grenier* appeared for appellant. [DIAS, J.—if plaintiff sues on a power of attorney, you have a right to call upon him to file it, but here he sues upon a lease] True, but the lease recites the power of attorney. [CLARENCE, A. C. J.—The power of attorney is not directly mentioned in the libel, but incidentally referred to in the case. Plaintiff is not bound to shew you all the evidence he has, but only a sufficient cause of action.] The defendant cannot plead without the power of attorney. The libel recites that one Tambyar and others appointed defendant as their agent and put him in possession of the land in respect of which this action for ejectment is brought; and that the said Tambyar and others aforesaid revoked (after notice) the power of attorney granted to the defendant, and thereafter leased the premises to the plaintiff. That lease, commences with these words: "Know all "men by these presents that Tambyar, A B, D C and E F heir and "and attorney as per the power of attorney executed by F. notary "Public of Manipay on the 7th November 1876, and G H heir "aud attorney as per the power of attorney executed by P notary "Public of Batticotte on 1st July 1856, came and appeared on the "one part, and Benjamin Sellappa [the plaintiff in the present "case] on the other, and requested to write and execute this lease "&c." If these powers of attorney were filed, defendant would go to the root of the matter and be able to understand his position better, and to plead more effectually.

VanLangenberg for respondent contended that there was no necessity whatever to file the power of attorney. There was a sufficient cause of action declared upon, and the duty that remained for defendant was to plead without further delay.

Grenier (in reply) submitted that if their lordships were not with him, the case ought to go back for the admission of the answer.

Cur. adv. vult.

The Supreme Court held as follows:—

Set aside. Defendant has no right, under the 8th section of he Rules and Orders of 4th July 1842, to require plaintiff to

produce the powers of attorney in question. But the Supreme Court thinks that, under the circumstances, defendant may be allowed to file answer within 8 days from this date, upon payment of all plaintiff's costs to this date, including appeal costs, excepting the costs of the libel.

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D. C. Kandy, 70,477.

Injunction against removal of gravel, under cl. 72 of the Road Ordinance.

This suit was instituted to restrain the defendant (a Government Road Contractor), by injunction, from removing gravel from the Nilambe estate, of which the plaintiff was superintendent. The application was founded on affidavits of the plaintiff and of a third party that the plaintiff was sustaining damage through the act of the defendant, and that sufficient gravel of suitable quality could be obtained at a convenient distance from the spot where the defendant was carrying on operations.

The writ was granted on 29th November last, and on the 8th January, defendant moved to have the injunction recalled. By affidavit, defendant admitted that, for the purpose of repairing the road, he did dig and remove gravel from the Nilambe estate; but that no substantial or irreparable damage was caused by the defendant or his workmen or labourers by the digging and removal of such gravel. He further denied that sufficient gravel or any gravel at all fit for the use of repairs of roads could be obtained from neighbouring waste lands or could be conveniently obtained from the other portions of the estate for the repairs of road adjacent to the pit in question. He further said that, previous to the defendant taking the road contract from Government, the pit was used by the Government officers in charge of the roads, and gravel cut and removed without any objection on the part of the proprietors, or of the then managers of the said estate, and the defendant subsequent to his taking the contract continued to use the same pit, and cut and removed gravel therefrom for the repairs of the said road; that the plaintiff or the proprietors have not suffered damage to the amount claimed; but if any damage at all was caused by the digging and removal of gravel, such damage could not and would not exceed ten rupees. The defendant produced also the contract entered into with Government and the special power from the Director of Public Works to exercise as regards the Deltota road and Pupuressa road, and the road from Peradeniya to the junction with Pupuressa, the several powers and authorities conferred by Ordinance No. 10 of 1861, on officers in charge of works to which the the Ordinance is applicable.

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The learned District Judge disallowed the motion.

On appeal, *VanLangenberg* appeared for appellant, *Ferdinands, D. Q. A.* for respondent.

The Supreme Court set aside the order of the court below and dissolved the injunction in the following judgment:—

From the affidavits and the evidence in the case, it appears that the defendant is a contractor under Government for the upkeep of certain roads and that he cut and removed the gravel in question for the purpose of repairing a road which he has contracted to keep up. By the contract entered into between the defendant and the Government, the latter guaranted to the contractors the same rights and privileges as to procuring the necessary materials for the upkeep of the roads as are now enjoyed by officers of the Public Works Department. The defendant also holds a letter of the 12th October, 1876, from the Director of Public Works, authorising him to exercise the several powers and authorities conferred by the Ordinance No. 10 of 1861, on officers in charge of work. By the 81st clause of the Ordinance No. 10 of 1861, the Commissioner of Roads (who is now represented by the Director of Public Works) is authorised to give such power, and the Supreme Court thinks that under the contract and the letter of the Director of Public Works the defendant is entitled to exercise such powers as are contemplated by the 72nd clause, and all that is complained of against him in this case is that he cut and removed gravel from the Estate, without the owner's consent, though the same can be conveniently obtained from the neighbouring waste lands.

The evidence in this case satisfies us that the defendant could not conveniently obtain gravel from neighbouring waste lands, or from common or abandoned grounds. Such being the state of the facts, he was justified under the Ordinance in doing what he did, and the Injunction should not have issued.

D. C. Kandy, 62,577.

Grenier for appellant.

VanLangenberg for respondent.

The Supreme Court held as follows :—

Fraud in claim in execution.

Plaintiff got judgment and issued writs of execution, and seized a land which is claimed by defendant, who is the son of the execution debtor on a bill of sale of 13th July 1872. This action is brought to set aside the sale, and the defendant appeals.

There is little or no evidence as to the circumstances of the execution debtor, at the time of the sale to the defendant, and the

mere fact of his being in debt at the time of the sale is not of itself sufficient to avoid a sale on the ground of its being a fraud on the creditors. It must further appear that he was in insolvent circumstances at the time he was dealing with the property. Set aside and case sent back for further evidence.

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D. C. Ratnapura, 10,690.

Kandyan deed of gift.

Plaintiff, by right of inheritance from his father and by prescription, claimed certain lands which the defendants were alleged to hold forcible possession of.

Defendants denied that plaintiff was Situwa's son, or that he ever held his shares, and further stated that the said Situwa left no issue by his wife Ukku, to whom he gifted by deed all his shares to the land in question, and that she adopted the defendants, and they pleated prescriptive possession.

Plaintiff joined issue on the question of paternity and adoption, and avoided the deed of gift referred to in the answer of the defendants, by contending that, as there was no special clause in it disinheriting him, nothing therein should affect his right.

On evidence, it appeared that defendants were Ukku's nieces, whom she adopted, with no ceremony whatever, but simply took charge of them and brought them up. Plaintiff clearly proved that he was Situwa's son by his first wife Dingiri. The deed of gifts recited "neither I, nor any heirs, executors &c or any other person whomsoever shall in future dispute the validity of this gift."

The District Judge (*de Livera*) dismissed plaintiff's claim, holding that the deed in question was valid as against the plaintiff, although he was not expressly declared to be disinherited, and cited Perera's *Armour*, ch. 6 sec. 12 and 7.

On appeal *Grenier* appeared for appellant, *Layard* for respondent.

Cur. adv. vult.

The Supreme Court held as follows :—

Affirmed. Plaintiff claims the land in question as of inheritance from his father Situa, who in his libel he alleges to have died about twenty years before suit. Defendants have traversed the paternity. On this point the District Judge's judgment proceeds on an assumption that plaintiff is the son of Situa, but in the view we take of the case, it is unnecessary that we should proceed upon that issue.

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After plaintiff's birth, Situa married Ukku and executed a deed in her favour, the execution of which was admitted, and which, if valid at all, took effect as a deed disinheriting Situa's heirs. By this deed Situa gifted to Ukku, "with the view of receiving from her future aid and assistance until my death," his lands of paternal inheritance, adding "all these aforesaid lands &c have been hereby gifted to the said Ukku, consequently neither I nor my heirs, executors, administrators or assigns or any other person whomsoever shall in future dispute the validity of this gift."

Ukku died about six or eight years ago; and defendants, who appear to have been in possession since her death, allege that they were adopted by her. The adoption is traversed by plaintiff, but in the view we take of the case, it will not be necessary for us to decide that issue.

From the clause last cited in the deed in question, it is evident that the deed was intended to disinherit the heirs of the donor, and the consideration of the disinheriting gift away from them is expressed to be the executory condition of receiving future aid from the donee till death.

We think, upon the balance of authorities cited by Sir Charles Marshall, that a deed in these terms is valid, subject, as in the *Kurunegala case* cited at p. 316 of Sir C. Marshall's book, to an onus on the donee of proving fulfilment of the condition. And if this action had been brought by plaintiff upon Situa's death, we should have been prepared to hold that upon plaintiff's antagonist lay the burden of proving that the condition had been fulfilled down to Situa's death. But plaintiff's conduct in lying by all these years since Situa's death materially alters the position of the matter. Plaintiff admits that he has been out of possession since Situa's death. For some 14 years during Ukkua's widowhood, and for some six or eight years since, plaintiff has lain by and allowed others to enjoy these lands under the deed, the validity of which he now contests. And he only comes forward 6 or 8 years after Ukkua's death, when it would be very probably difficult for those claiming under her to prove affirmatively by direct evidence that Ukku had rendered Situa the necessary assistance stipulated for until his death. We consider this as raising a strong presumption that Ukku did render that assistance and that she could have been able to prove it, had plaintiff brought his action at Situa's death, when, if the deed passed nothing to Ukku, plaintiff's right became assertible.

For these reasons the D. J's decision is affirmed with costs.

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Present:—CLARENCE, A. C. J, DIAS, J. and LAWRIE, J.

P. C. Matara, 78,486.

The defendants in this case, who were charged under cl. 11 of Ordinance No. 11 of 1865, were acquitted by the Police Magistrate, *Arunachalam*, who held as follows:—

Under the Labor Ordinance, a servant is not liable to, punishment, if his wages are unpaid for any period longer than a month, and in computing the wages due, coolies (servants) will not be responsible for monies advanced by the master to the Kankani, but only for such sums as have been advanced directly to them by the master.

The defendants say that wages are due to them from February 20 to May 6th, viz the balance of pay remaining at the end of each month, after deducting the value of rice issued in the month. Complainant admits this, and that, at least from a week or fortnight before they left the estate, (the coolies say it was much earlier), they demanded their wages and that he promised to pay them on May 20th., when their three months on the estate would be out, on his return from Galle. Defendants were not bound by law to wait for their wages till 3 months had expired. If it is usual for coolies in other estates to wait that time, it is because they choose to wait. Complainant then says he must deduct from what is due to the defendants each man's share of the advances made to the kangany to bring them from the coast and for their road expenses, and for the expenses after they reached the estate &c, and that if these advances were deducted, the coolies would be in his debt. But Pechimuttu kankani distinctly states that he alone is responsible to complainant for these advances, that when the coolies are paid their wages, he will receive from each what he has lent to each and repay the money to complainant. These advances, most of which probably never reached the coolies' hands, are therefore matters purely for civil action as between superintendent and kankani, and kankani and cooly, and no portion of the advances can be deducted by the superintendent from the wages due to the cooly. As I understand the 21st clause of the Labor Ordinance, in computing the wages due at any time, the servant is to be debited with advances made *to him*, that is, to him directly, whether in money, food or clothes. The clause says nothing of advances made to the Kankani.

On appeal *Van Langenberg* appeared for the complainant and appellant, but the Supreme Court affirmed the judgment in these terms:—

The evidence shews that defendants' wages had been unpaid for more than a month and that more than 48 hours before leaving the estate they had unsuccessfully demanded payment. Complainant has not proved any counter-debt due from the several defendants to himself which extinguished his liability to them so as to disentitle them to the benefit of the 21st clause of the Ordinance.

Affirmed.

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D. C. Kandy, 67,295.

Under the Land Registration Ordinance of 1863, a secondary mortgage, though taken with notice of the primary mortgage, gains priority over such primary mortgage, if registered earlier in point of time.

A claimant in this case contended for preference over the plaintiff in respect of the proceeds sale in execution of the defendant's lands which had been mortgaged to both parties. The mortgages had been executed on the same day, 24th August, 1875, the one in favor of the claimant being a primary mortgage and that of the plaintiff a secondary one, as expressly recited in his bond. The plaintiff registered his mortgage on the 27th September 1875, but the claimant did not register his until after that date. It was admitted by the plaintiff that the notary who had attested both the bonds had told him of the primary mortgage in favor of the claimant.

The claimant having issued a rule on the plaintiff to shew cause why he should not be declared entitled to preference by virtue of his primary mortgage, the learned District Judge held as follows:—

"Mortgages by the Ordinance have priority according to the "date of registration, and I am of opinion that the imperfect "notice given to the plaintiff that there was an older mortgage does "not bar his right to insist on priority being to his later mortgage "because it was first registered. The rule is discharged with costs."

On appeal, *Van Langenberg*, for appellant: (1) The plaintiff having registered his bond with notice of the primary mortgage was guilty of constructive, if not positive, fraud, and was therefore not entitled to priority, under the proviso of clause 39 of Ordinance 8 of 1863. Under the Middlesex Registry Act, 7 Anne, cap. 20, such notice had been held to vitiate registration. *Chivel v. Nicholls*, 1 Str. 664; *Sheldon v Cox*, 2 Amb. 624; *Le Neve, v. Le Neve*, 2 Amb. 436. (2). The plaintiff's mortgage being expressly a secondary one, his right thereon could not be enlarged so as to prejudice the claimant.

Grenier, for respondent. The Ordinance made no such equitable exception as was contended for, and the plain words of clause 39 were in favor of priority by registration. There was no fraud in plaintiff availing himself of what the law provided. The recent case of *Edwards v. Edwards*, Law Reports, 2 Ch. div. 291, decided under the Bills of Sale Act, 17 and 18 Vict., cap. 36, was quite to the point. In the words of Lord Justice James, "both parties stood on their legal rights—neither of them was misleading the other." *Le Neve v. Le Neve* was cited in *Edwards v. Edwards* and practically overruled. The real scope and object of the local Registration Ordinance was explained by Sir Edward Creasy, in *C. R. Galle 151*, 2 Grenier, p. 6. The fact of plaintiff's mortgage being a secondary one was of no consequence. The Ordinance recognised the distinction, but at the same time

provided in clause 39 that nothing therein contained "shall give any greater effect or different construction to a deed, save the priority conferred on it." 1877 July, 6.

Van Langenberg replied.

Cur. adv. vult.

And this day, the judgment of the Supreme Court was delivered by CLARENCE A. C. J., as follows:—

Appellant and respondent are contending for priority of claim to the proceeds of sale of certain immovable property seized under respondent's writ against one Jayeganader. Appellant and respondent are both mortgagees. Appellant's mortgage is prior in date, but was registered after respondent's.

Respondent's mortgage is expressed to be a "secondary mortgage," though the deed does not mention who the first mortgagee was. Respondent admits that the notary, who attested his mortgage and who had also attested the first mortgage, told him of the existence of the first mortgage.

The learned District Judge held that the respondent's mortgage, being the first registered, ranked over the appellant's earlier mortgage subsequently registered.

It was argued in appeal, for appellant, that by analogy to the *ratio decidendi* of *Le Neve v. Le Neve*, 2 Amb, 336, decided upon the Middlesex Register Act, 7 Anne, c. 20, and that class of cases, we ought to hold that in equity the second mortgagee, having taken his mortgage with express notice of the first mortgage, must be postponed to the first mortgagee.

The Middlesex Registry Act was enacted, as the preamble says, to prevent frauds being committed against honest purchasers by means of prior and secret conveyances: and the enacting part of the 1st clause declares that a deed "shall be adjudged fraudulent and void" as against a subsequent purchase for valuable consideration, unless the memorial was registered before that of the subsequent deed. The Ceylon Ordinance No. 8 of 1863, after reciting in its preamble that the want of a proper system of registration is injurious to land-owners, enacts, by its 39th clause, that a deed not registered "shall be deemed void" as against subsequent claimants for valuable consideration on registered documents of title, and its 39th clause contains a proviso that fraud or collusion in obtaining the subsequent title or securing the registration shall defeat the priority of the party. So that there is a very close analogy between the too enactments. It is true that the preamble of the Ceylon Ordinance does not mention expressly the mischief of "secret conveyances," but both enactments seem to have been aimed at the same object. Nor is there in our opinion any difference

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made by proviso to the 39th clause of our Ordinance, since that proviso merely gives expression to what under the English Act has been held to pass *sans dire*. In the English Courts of Equity, it has been held in a large number of cases, from *Le Neve v Le Neve* upwards, that a subsequent mortgage with notice of a prior mortgage does not gain priority by prior registration. The cases on this point were reviewed by Lord Hatherley when Lord Chancellor, in *Rolland v. Hart*, L. R., 6 Ch. app., 678, when Lord Hatherley, reversing a decision of the Master of the Rolls, affirmed the principle gathered from previous cases. He held that it is fraud if the person who has actual notice attempts through the medium of the Registration Act to get priority, and in other words, that if actual notice be proved, the party cannot take advantage of his registration to invalidate a previous unregistered security.

Rolland v. Hart was decided in 1871. In 1876, there came before the Court of Appeal in Chancery the case of *Edwards v. Edwards*, L. R. 2 Ch., div. 291. This was a case under the Bills of Sale Act, 17 and 18 Vict., c. 36, section 1. For the purposes of the point which we are considering, that Act is closely analogous to the Middlesex Registry Act. It is expressly directed against frauds committed by means of secret bills of sale, and enacts that when the requirements of the Act are complied with, the bill of sale shall be "null and void to all intents and purposes whatsoever," so far as regards the property in the goods comprised therein. It is true that in this Act the bill of sale is made null and void, not merely as against a subsequent incumbrance perfected in compliance with the statutory requirements, but as against everybody; but this distinction is not imported into the *ratio decidendi* of the Court in deciding the case. In this case Lord Justices James and Mellish concurred in holding that notice did not take the case out of the Act: they thought it undesirable to engraft such construction upon the plain words of the Legislature. Lord Justice Mellish said—"The Courts of Equity have given relief on equitable grounds for "provisions of old Acts of Parliament, but this has not been done "in the case of modern Acts which are framed with a view to "equitable as well as legal doctrines." And Lord Justice James disposed of the argument that the unregistered bill of sale holder was being defrauded by the execution creditor, in the following observations: "The mortgagee says to the execution creditor, You "are not prejudiced, for you knew of my security." The execution creditor replies: "I knew you had a security, but you knew "the law as well as I. You knew that, if I issued execution, "your security would be of no avail, as to chattels of which "you had not taken possession. I knew that my remedy "against those chattels was liable to be defeated by your "taking possession before I seized them in execution. You knew

" that your security was liable to be defeated by my taking them in execution before you took possession." Both parties stood upon their legal rights. Neither of them was misleading the other. 1877 July, 6.

In considering the question under our own Ordinance as between a second mortgage taken with notice of a first mortgage, but registered before it, we think it inexpedient to govern our decision by the analogy of the rule which undoubtedly has become an acknowledged one in the English Courts of Equity with regard to the corresponding case under the Middlesex Registry Act. We adopt the argument of Sir George Mellish quoted just now, and are not prepared to trench upon the plain enactment of this recent Ordinance, framed, to borrow Sir George Mellish's phrase, with a view to equitable doctrines. The Ordinance was designed to produce certainty: we should be letting in a great flood of uncertainty if we admitted such cases of notice to be an exception to its operation, and especially so in a country like this, where parol evidence is too often so extremely untrustworthy.

If it be argued that the second mortgagee has been guilty of fraud which brings him under the force of the proviso in clause 39 of the Ordinance, no doubt the similar claim has been designated fraud in the English cases under the Middlesex Registry Act. But we prefer to apply to the present case the observations of Sir William James in *Edwards v. Edwards*. Each party is standing on his legal right, and we find no grounds on which we can say that either has been trying to mislead the other. The first mortgagee must be taken to have known that if he did not register his incumbrance, a second morgagee might step in before him. All that is proved respecting the second mortgagee is that, knowing of the first mortgage, he took the legal steps to secure himself: he is not shewn to have done anything underhand or to have made any pretence.

There remains one other argument which was advanced on behalf of the appellant, viz. that the respondent's mortgage is expressed on its own face to be a secondary mortgage and that consequently we ought not, by upholding his claim to priority founded on prior registration, to enlarge it into primary mortgage. It is quite true that the mortgage is expressly stated to be a " secondary mortgage," although the deed does not say secondary to what private mortgage. All that we need say in reply to this argument is, that every secondary mortgage is capable of being enlarged into a primary mortgage by the primary mortgage being got out of its way; and we hold that the operation of the Ordinance has put appellant's primary mortgage out of the way of respondent's secondary one.

For the foregoing reasons we hold that the decree of the District Court was right, and it is therefore affirmed.

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D. C. Galle, 10,612.

The Supreme Court held as follows :—

1. Objections founded on the Stamp Laws should be taken by demurrer, only where the instrument is not capable of being stamped before trial.

Set aside and demurrer over-ruled. Under the Stamp Ordinance of 1871, the defect of stamping can be rectified by paying a penalty (*No. 65,822, D. C. Colombo*, 13th July 1875). * And as this court has held in *8,993 D. C. Jaffna*, 2 Lorenz, 97, objections founded on the stamp laws are to be taken by demurrer only, when the instrument in question is incapable of being made good by being stamped before trial.

D. C. Galle, 2,563.

2. Defect of stamping can be rectified by paying a penalty.

Registration of marriage contracted in 1861, in the District of Galle.

This was a contest for letters of administration. Applicant alleged herself to be the widow of the deceased. The opponents denied she was the widow and claimed administration as brothers and sisters.

It transpired in evidence that the applicant married the intestate in 1861, and had a child by him on the 2nd April 1868, which was duly registered, but the marriage itself was not, though the intestate appeared to have lived till 1871.

The learned District Judge dismissed the opposition with costs, being of opinion that the marriage was lawfully contracted according to the customs of the Sinhalese.

On appeal, *VanLangenberg* appeared for the opponents and appellants, and *Grenier* for the applicant and respondent.

The Supreme Court held as follows :—

The Supreme Court sees no reason to be dissatisfied with the D. J's decision upon the evidence, that the respondent was married to the intestate, according to the Sinhalese custom. The sole question we have for decision is, whether that marriage was invalid for want of registration in pursuance of the Ordinance No. 6 of 1847. The marriage in question is found to have taken place about 1861. Now, the 4th clause of the Ordinance No. 13 of 1863 cures any defect arising from want of registration under the old Regulation No. 9 of 1822, but there is no similar cure for a want of registration under the Ordinance No. 6 of 1847, if the marriage needed registration under that Ordinance. The 6th clause of the Ordinance of 1847, which is the clause under which this marriage falls, so far as regards registration, was (under the 5th clause) to

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* See *D. C. Colombo 63,498*, the original case in which the point in question was decided, and on the authority of which *D. C. Colombo 65,822* was decided,—ED.

come into operation only where and when the Ordinance was proclaimed, and it appears that the Ordinance has never been proclaimed for the Galle District. 1877 July. 10.

The result therefore is that the marriage in question is not defective for any want of registration. It is consequently a valid marriage.

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Present:—DIAS, J. and LAWRIE, J.

P. C. Colombo, 5,686.

Resisting Fiscal's officer in the execution of his duty.

This was a charge of resisting and obstructing the complainant, a fiscal's officer, in the execution of his duty while executing writ No. 62,582, of the District Court of Colombo, in breach of cl. 23 of Ordinance No. 4 of 1867.

The following letter of the defendant to the Fiscal explains the facts of the case:

The Fiscal, W. P. Colombo.

11th April, 1877.

Sir,

With reference to writ No. 62,582 D. C. Colombo, I beg again to inform you that the same has been discharged by the arrangement referred to in my note on the copy offered to me by the Peon Bastian Appo on the 4th April and returned to your office.

I must here enter into the history of this arrangement to shew how far the plaintiff and his Proctor are, whilst trying to annoy and harass me for private motives, attempting to avail themselves of the convenience offered by your department.

To proceed to facts. This writ was issued on the 2nd February, scarcely a week after I had settled in Colombo and my furniture was pointed out by plaintiff. To obviate the unpleasantness of a formal seizure and inventory, I handed to your officer a list surrendering certain part of my furniture and asked your permission to remain in possession to save the necessity of watchers, but I was refused and the things were under seizure till the 3rd March. On the Saturday preceding, in view of the great annoyance and inconvenience that might possibly result to my family by being disturbed in their home, I arranged with Mr. Heyzer to assign him over the goods mentioned in that list, and a good deal more, on condition that he stops the writ, then under execution, *and does not re-issue it.* This I looked upon, as I still do, as a settlement of the writ, though it might be said that the property did not pass into his possession and that therefore I must give them up to *him.* To him, Mr. Heyzer, as the legal owner of the property, I am bound to answer for them, holding after the deed in his favor, as a loan only, but I maintain that they are not still liable for seizure under a writ which was

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already partially executed and the rest stayed by plaintiff's Proctor. *I have asked frequently* for the original writ and the returns of this execution but without success, and find on reference to the record that it was not *returned* to the court nor *re-issued* by it, as it should. Since then the same Peon has called on me to pay the amount or surrender property, and threatens to take immediate possession or remove my furniture in your name, and as he says by your order. To this I must certainly object, and, whilst I do not wish to go to law with any body or take advantage of any body's faults, I must inform you that I shall hold all parties concerned as responsible to the consequences of carrying out the intention of the plaintiff to annoy myself and my family again and again, particularly when sickness has added to their other sufferings. I do not wish here to disclose my other objections, but in case you desire me to do so *for your satisfaction* I shall be prepared to.

I shall therefore feel obliged by your instructing your officers not to molest my family, as I shall be prepared, if obliged, to surrrender other property to satisfy the writ.

I have &c. A. Bawa.

The obstruction complained of took place on the day following the date of the above letter.

The learned Police Magistrate (*Mason*) acquitted the defendant in these terms :—

On 22nd. February, the defendant's property was seized on the writ in question and advertised for sale. The sale was stayed at the request of the plaintiff's Proctor, who accepted from the defendant a notarial deed transferring to him furniture to the value of the amount claimed in the writ.

The Fiscal should have made his return to the District Court to this effect. After the sale was once stayed, the re-issue of the writ without the authority of that court was illegal (cl. 30 sec. vi of Ordinance No. 4 of 1867).

On appeal by the complainant (*Browne* for him, *Grenier* for defendant), the Supreme Court affirmed the judgment of the court below. " The original writ having been executed, the Fiscal had no power to re-issue it, without an order of court".

P. C. Puttalam, 8,088.

Practice.

The Supreme Court held as follows :—

Set aside, and defendants acquitted. Eight defendants were charged in the plaint with gambling. On thé 19th December 1876, the charge against the 1st, 2nd and 3rd defendants was withdrawn, but on the day of trial the 1st, 3rd, 4th and 8th defendants appeared and pleaded. Evidence was heard, and the Police Magistrate convicted the 1st 4th and 8th defendants. The charge having been withdrawn against the 1st and 3rd defendants, they should not

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have been tried at all, and the proceedings as regards them are quite irregular.

As regards the 4th and 8th defendants, the evidence as recorded does not bring the charge home to them. The witnesses speak so loosely, and in such a general way, that it is impossible to say whether they speak of one or more or all the defendants.

P. C. Panedure. 28,076.

Cruelty to animals.

On a criminal charge, one is liable only for his own acts.

The defendant, a proprietor of a coach, was charged, and found guilty, under Ordinance No. 7 of 1862, cl. 1, with causing to be ill-treated &c. a horse, by allowing it to be driven while suffering from galls.

On appeal, *Browne* appeared for appellant.

The Supreme Court reversed the judgment of the court below as follows :—

The defendant is not proved to have caused the ill-treatment complained of. He was not present when the horse was put into the coach, nor did he drive. It is not established that he knew the horse was galled, nor that he had given directions that it should be used when unfit for work.

This being a criminal charge, the defendant is liable only for his own acts, and not for the cruetly of his servants.

P. C. Puttalam, 8,466.

Practice as to amendment of plaint.

The original plaint in this case was as follows :—

That defendant did on or about the 27th May last fell and remove from the crown forest Alayadichola in the Puttalam District 69 Tammana logs without previously obtaining any license to do so, in breach of cl. 8 of Ordinance No. 24 of 1848.

The Police Magistrate, on the day of hearing, recorded as follows :—

" Parties present. Defendant pleads not guilty and produces a license dated 7th May from the Acting Government Agent, authorising him to remove timber within 12 days. The license is marked A. The plaint is amended and filed, &c."

The amended plaint stood as follows :—

That defendant did on or about the 27th. May last remove from a private land in the Puttalam District 69 Tammana logs, after the time mentioned in his license had expired, in breach of &c.

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The Magistrate proceeded to hear the evidence, and found the defendant guilty.

On appeal, *Grenier* appeared for appellant

The Supreme Court reversed the judgment of the Court below in these terms :—

The plaint originally set forth that the defendant felled and removed timber from a crown forest without a license.

The defendant pleaded not guilty and produced a license which admittedly referred to the timber in question. The production of that license entirely disproved the allegations in the plaint, for it proved that the timber had been removed not from a crown forest, but from private land, and that a license had been obtained.

The accused should have been acquitted.

But the Magistrate altered the plaint, and substituted a new charge of removing timber after the license had expired. As this went beyond mere amendment, and amounted to framing a new plaint for a different offence, it was beyond the Magistrate's power.

P. C. Matara, 78,394,

Gambling.

The Supreme Court held as follows :—

Set aside. It is not proved that the games of which complainant speaks were games of chance. One at least, viz. *Vala Salli*, we understand, is a game played with marbles requiring some skill, ofcourse there may be betting on it, but there is no proof that there was any on this occasion. The Ordinance was not intended to interfere with the innocent amusements of the people.

D. C. Negombo, 125.

The two appeals in this case arose in the following way.

Taxation of costs, and fees of appraisers in testamentary case.

The widow of the deceased, Kurera, applied for and obtained letters of administration, the opposition of the opponents being set aside with costs. On writs issuing for costs as taxed, the opponents objected (11 January 1876) to certain items in the taxed bill, on the ground that the R. and O. of 1st October 1833 did not contemplate the very many charges under the head of "attendance," by which the applicant's bill was alleged to be swelled up ; that where two Advocates were engaged, only half fee was allowable to Proctors for brief to the junior Advocate, whereas in the present case brief

for both Advocates were charged in full; that the case was neither difficult nor intricate, and that therefore the table of fees made out by the opponents should be substituted for that passed by the secretary, &c. 1877 July, 10.

The learned District Judge ordered the objections to be submitted to the applicant's Proctor, Mr. Ball, for his answer, which however was never filed, but on the 30th March 1876, the D. J. after argument ordered a day to be fixed for hearing the objections to the items, and, pending such investigation, stayed the sale of the land seized. On the 1st May following, Mr. Ball renewed his motion for writs, and was allowed them on the 10th May, as the parties who objected to the taxation took no steps to maintain their objections.

The opponents appealed against this order.

The second appeal was against an order allowing certain commission to the appraisers who appraised the estate. The opponents attempted to reduce these charges by alleging that in the appraisement there was excess of acreage, as also lands wrongly included which were never owned by deceased, bonds prescribed, double entries &c. The District Judge, on the 17th February 1877, held as follows:—

The amount claimed by the appraisers in this case cannot be allowed, as I do not consider they were justified in charging commission on Rs. 331,980 odd. This large sum represents the full value not only of the estate of the deceased but also of that of his father Domingu and also of the property brought into the community by the applicant. I hold that they were entitled to charge only on the full value of the estate of the deceased and his wife. Now the deceased had only $\frac{1}{6}$ share in his father's property, and commission should have been charged on this $\frac{1}{6}$ only; this $\frac{1}{6}$ represents the share of the estate of the deceased, whereas the entire property does not represent the estate but something outside and distinct from the estate. No doubt the appraisers had to write down the value of the entire property in order to ascertain the value of the $\frac{1}{6}$ share, that was a matter of simple calculation; the summary or abstract prefixed to the detailed reports of the appraisers shews the real value of the property, both moveable and immoveable; the sum total is Rs. 69,928-64 or in round numbers Rs. 70,000, on this sum only and not on Rs. 331,930 the appraisers are entitled to charge. I do not uphold the opponents' objections regarding the excess of acreage and regarding the erroneous insertion of bond, as the opponents should have objected at the time the appraisement was made and pointed out what they considered to be errors of omission or commission on the part of the appraisers but they did not do so; the appraisers were quite right in making an inventory of all the bonds, even those

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which seemed prescribed, because the plea of prescription may never be raised, besides these bonds may not be really prescribed. The appraisers argue that the opponents should not be allowed at this stage to object to the amount claimed as commission. I do not agree with this view ; the opponents have been guilty of great delay, but they should not be debarred even now from showing that the principle on which the appraisers base their calculations is erroneous and illegal. The correct amount due to the appraisers is

Commission at 1 per cent, on movable property Rs.	75
On immoveables at ½ per cent	310
Travelling allowance.	90
Total Rs...	475

Of this sum, the appraisers have already received Rs. 200 leaving a balance of Rs. 275 still due, this sum of Rs. 275 the appraisers are entitled to recover. And as already decided by my predecessor, the estate and not the applicant must pay, the opponents will pay the costs of these proceedings.

On appeal, *Cayley Q. A.* and *Browne* appeared for the appellant's, and *Grenier* for respondents.

The Supreme Court held as follows :—

Affirmed with the exception hereinafter mentioned. In this case, there are two appeals, the first against the order of the 10th May 1876, allowing the Secretary's taxation of the respondent's bill of costs, the other against the order of the 17th February 1877, allowing certain commission to appraisers.

With respect to the first order, the bill of costs of the District Court was taxed after due notice so far back as 23rd December 1875, and the bill of costs in the Supreme Court was taxed on 12th March 1875. No objection appears to have been taken to the Secretary's taxation, which was the proper course to have been adopted if the appellant was dissatisfied with such taxation. Bills having been duly taxed, writ of execution was issued, when the appellant's Proctor, on the 8th January 1876, filed a paper of objections to the bills, and by an order of court of 11th January, the District Judge ordered the respondent's Proctor to answer the objections. This, however, does not appear to have been done, and on the 30th March 1876, the sale of the property seized under the writ was stayed. In May 1876, the respondent's Proctor moved that the writ might be extended and re-issued, and the District Judge allowed the application on the ground that the appellant had taken no steps to set aside the Secretary's taxation.

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We think the District Judge right. After such gross laches on the part of the respondents, they have no right to call upon the Court to open up a taxation which was made nearly twelve months previously. The course they have adopted in filing written objections, and calling upon their opponents to answer them in writing, is also grossly irregular, as no written pleadings should be admitted on a question of taxation.

For the above reasons, the order of the 10th May last is affirmed with costs. With regard to the second order it is affirmed, except as to that part which relates to costs, which is set aside and all parties are declared entitled to their costs out of the estate.

The appellant having succeeded in reducing the respondent's claim from Rs. 1949·36½ to Rs. 475., they should not have been cast in the costs of these proceedings.

We also think that as the appraisement was one of unusual difficulty, the appraisers were properly allowed commission on the whole common estate.

D. C. Kandy, 65,107.

On the proceeds of a sale in execution, the secondary mortgagee who has given notice at the sale of his mortgage, is entitled to preference over a simple contract creditor at whose instance the writ issued.

Qu. whether without actual notice, but with registration, of such mortgage, he is

The plaintiffs, Sinnaya Chetty and another, recovered judgment on the 25th May 1875 against the defendant, Mr. Shave, for Rs. 8506 and interest. In the November of that year, Shave's half share of the Trafalgar and Agrawatte estates were sold, but being heavily burdened with mortgages, no benefit was realised by the execution creditors under the said sale. Writs were re-issued and Shave's half share of the St. Helier's estate was sold and purchased by the execution creditors for Rs. 20,000, whereupon Messrs. Alston Scott & Co. claimed a portion of the proceeds by virtue of a primary mortgage, dated 20th. August 1874, in their favour over that property. There were also other creditors who claimed concurrence. In the meanwhile, Sinnaya Chetty and his co-plaintiff assigned their rights in the judgment to Raman Chetty and Annamalai Chetty, who deposited in Court so much of the purchase money as was sufficient to meet all preferent and concurrent claims then before the court, including the amount of the primary mortgage of Messrs. Alston Scott & Co., and obtained from the court credit for the balance sum of the purchase money, by its orders dated the 8th. and 28th. February 1876.

Some time after the Fiscal's transfer was executed and delivered to the assignees, Alston Scott & Co. on the 19th May 1876, moved the court to set aside the orders of the 8th and 28th February on the following grounds :—

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entitled to preference?

That Theyna Pana Raman Chetty of Colombo, under an alleged assignment from the plaintiffs of the judgment in this case, on the 8th February 1876, unlawfully moved for credit for the sum of Rs. 10,407 part of the purchase amount of the said half of St. Helier's Estate, due and payable as aforesaid by the said P. L. R. M. Sinnaya Chetty and fraudulently obtained an order of credit for the second amount and for a conveyance from the Fiscal of the said half of the said estate without any notice to the mortgagee (Messrs. Alston Scott & Co.) or to the several persons who had preferred claims for concurrence.

That the said Thayna Pana Raman Chetty and Tana Pana Annamalai Chetty of Colombo (one of the claimants to the proceeds) on the 28th February, 1876 unlawfully moved for an order of payment on the Government Agent for the sum of Rs. 485 and fraudulently obtained an order of payment for the said amount, without any notice to the mortgagees (Messrs. Alston Scott & Co.) or to the other persons who had preferred claim for concurrence.

And they (Alston Scott & Co.) further moved the court to order the assignees to bring into court the balance of the purchase money for which credit had already been given, in order to meet a further claim of theirs on a secondary mortgage, dated 23rd October 1874, over the said half share of the St. Helier's estate.

The District Judge exonerated the assignees and the original execution creditors from the charge of fraud, and declined to cancel the orders of the 8th and 25th February, against which ruling, the claimants, Alston Scott & Co. appealed, and the Supreme Court ordered as follows :—

"The orders of the 8th and 28th February may have been quite right on the state of facts then before the court and may still be sustained, but it must be borne in mind that they were made exparte, and as the appellants now contend that they are in a position to bring before the court other facts which give a different complexion to the case and which, if they had been before the court when the orders of February were made, might have led to a different result, and as such contention has been supported by appellants, it appears to the Supreme Court to be right that a further enquiry where all parties may be represented, should take place.

"It is therefore decreed that the orders of the District Court of Kandy of the 8th and 28th February 1876 as also the judgment or order of the 31st of August following be set aside and the matter be referred back to the District Conrt for further hearing and adjudication."

In compliance with the direction of the Supreme Court, the matter came on for hearing before the District Judge on the 24th February last. On this occasion, Mr. Leechman, who was called as a witness, swore that at the sale he informed the Chetty, in the presence of the Fiscal, of the secondary mortgage in favour of Alston Scott & Co.

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Where a purchaser at a Fiscal's sale claimed credit as execution creditor and, after settlement of all claims then before the court, was allowed credit for the balance sum of the purchase money, and subsequently thereto a secondary mortgagee preferred his claim, *held* that the Court below was right in ordering the purchaser to bring into Court, pending further inquiry, the balance for which he had obtained credit.

The learned District Judge held as follows :—

While I maintain my opinion that the Chetties committed no fraud, I hold that the mortgagees have done nothing which bars their rights to have the mortgages fully satisfied. The secondary mortgage was registered and thus its holders have a preferential right to the price of the property, superior to this debt due to the execution creditor, and to all the other debts due by the debtor, except the ordinary preferential claim of servants &c. I hold (1) that the purchaser must *ante omnia* bring the money into Court, and (2) that the secondary mortgage held by Alston Scott & Co. is a subsisting burden.....I therefore order the balance of purchase price to be deposited in court by the purchasers, and Alston Scott & Co. are allowed to file within 10 days a formal claim stating what sum it is they claim, and for what debt, in order that the plaintiffs or the other claimants may have an opportunity of admitting or disputing that claim. Costs reserved.

The assignees appealed against this judgment.

Ferdinands D. Q. A. (*Grenier* with him) appeared for appellants :—Mere registration was no notice to the execution creditor. He was a purchaser for valuable consideration, and actual notice must have been expressly proved. Even if registration was notice to the world, the effect of it was lost in this case, inasmuch as Messrs. Alston Scott & Co., by preferring this primary mortgage alone and being silent as to the secondary mortgage, led the purchaser to believe that no debt existed on the latter against the proceeds of the sale. The laches of the mortgagee ought to prejudice himself, and not a bona fide purchaser. If Alston Scott & Co. informed the Fiscal of the secondary mortgage and the Fiscal did not report it to the court, their remedy is against the Fiscal. It is too late now and highly irregular to call upon the purchaser, without any fraud whatever on his part, to bring into court money once credited to him. As matters stand now, the Fiscal is protected at the expence of the execution creditor. In equity, it is right that the assignee, who is held to be a bona fide purchaser for valuable consideration, should not be disturbed. He is under the circumstances entitled to the protection of the Court.

The following authorities were cited in the course of the above argument, *Wyatt v. Barwell*, 19 Vesey 435, *Jolland v. Stainbridge*, 3 Vesey 485 ; *D. C. Batticaloa 16673* and *D. C. Kandy 52284*, Vanderstr. pp 261 and 243, Story's *Equity Jur.* § 401, 3 Burge 239, Marshall's *Judgments*, 167,169.

Cayley Q. A. contra (with *VanLangenberg*) : The order appealed against is provisional and not conclusive, for where, as in the present case, there is a dispute between two claimants, the usual practice is to order the whole of the purchase amount to

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be brought into court, *D. C. Ratnapura 6901* and *D. C. Colombo 24,768*, 3 Lorenz, 213, and 311. This is all the District Judge has required the assignee to do. It may yet be competent for him to draw the money again, after a fuller investigation into the matter. On the merits, there is no necessity to enter into questions of registration or notice, as the contest is one between a simple contract creditor and a secondary mortgagee. The right of the latter can be discharged only by payment or by express waiver on his part. But in point of fact, the purchaser had ample notice, both from Messrs. Alston Scott & Co's letter to the Fiscal and from Mr. Leechman, of the existence of the mortgages. The authority cited from 3 Burge certainly bears out the proposition that a creditor, who is in the country but stands by without interposing at the public sale, loses his security, but the answer to it is we did not stand by without interposing, and even if we did, that authority is hardly applicable to Ceylon, where our procedure differs widely in the sales of property by the Fiscal from that prevailing in Holland. At any rate, the Fiscal's sale does not wipe off previous existing encumbrances, *D. C. Colombo 61,113*, 16th December 1875.* Alston Scott & Co. cannot be said to be guilty of fraud, actual or constructive. They did nothing to induce the assignee to believe that the secondary mortgage did not exist. It was easily ascertainable at the Registrar's Office. In Ceylon, as in America, registration must be held to be notice to the world of existing encumbrances. The cases cited from *Vesey* proceed under the Acts of Anne, which are very different from our own Ordinances on the subject. The order of the District Judge ought therefore to be affirmed.

Ferdinands D. Q. A. in reply: The District Judge's order is not provisional, but final, as he has definitely decided upon the substantial point in issue. There is no necessity for the assignee to pay money into court by one hand, and then, as suggested, draw it out by another. The conveyance has been passed in favour of the assignee, and it is now too late to disturb existing circumstances. They must in equity be left *in statu quo*.

Cur. adv. vult.

And this day the Supreme Court held as follows :—

The plaintiffs obtained a writ of execution and caused the Fiscal to seize and sell one half of a Coffee Estate. At the sale, the plaintiffs themselves became the purchasers, and subsequently

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* See *Appendix*, where this case is reported in full.—ED.

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assigned their interest to the present appellant, who may be treated as representing the plaintiffs. Messrs. Alston Scott & Co., who held a first and second mortgage of the estate, preferred their claim on the first mortgage, and the Fiscal sold the estate, subject to this claim. There were several other claims made to the proceeds of the sale, and all the claims then before the Court having been satisfied, the plaintiff obtained credit for the balance purchase money, on the 8th and 28th February. About a month afterwards viz., on the 31st of March, Messrs. Alston Scott & Co. made their claim on their second mortgage, but there was then no money in Court to meet it. They afterwards, viz., on the 22nd May, filed an affidavit and moved to set aside the orders of the 8th and 28th February. This application, however, was disallowed by the District Judge on the 31st August, but on appeal that order as well as the previous orders of the 8th and 28th February were set aside, and the case sent back for re-hearing. At the second trial, which took place on the 24th February last, after hearing evidence and argument of counsel, the learned Judge ordered the balance purchase money for which the plaintiff obtained credit to be brought into court. Against this order the plaintiff's appealed and it was contended for them that Messrs. Alston Scott & Co., having concealed their second mortgage, were not entitled to set it up now against the plaintiffs, who were innocent purchasers without notice, and who were misled by such concealment. On carefully considering the evidence, we think the plaintiffs had actual notice of the second mortgage at the time they bid for the estate.

As to the question raised by the respondent's counsel, whether registration is not constructive notice, we think it unnecessary to express any opinion, as we think the plaintiffs had actual notice of the mortgage.

As to the orders of 8th and 28th February, the Supreme Court thinks they were rightly made according to the materials then before the court ; and they also think there is no foundation for the charge of fraud brought against the plaintiffs with respect to those two orders. This litigation would not have taken place if Messrs. Alston Scott & Co. had promptly made their claim on their second mortgage, but they do not seem to have done so for some months after the money was paid into court, and a month after the plaintiffs obtained credit.

Under these circumstances we do not think they are entitled to their costs.

The order of the District Court is affirmed, each party paying his own costs in both courts.

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D. C. Batticaloa No. 1.

1. The Supreme Court has jurisdiction to entertain appeals from orders made by District Judges, on references made to them by the Registrar of marriages (under cl. 13 of Ordinance No. 13 of 1863), in respect of caveats entered against issue of marriage certificate.

2. Circumstances under which a testamentary guardian was allowed to give his ward in marriage to his son, even though the estate accounts had not been closed at the time of such marriage.

The facts material to the appeal taken in this caseare as follows :—

One Pattinian died in 1861, appointing his brother Vaikaly as the executor of his last will and the guardian of his three children. The eldest, who was a daughter, married Sambunatha Udeyar, one of the parties in this case, between whom and the executor there appeared to have been much animosity. One of the questions they disputed about was the custody of the third child of the testator. The District Judge *(Worthington)*, in settlement of it, entered of record in the Testamentary Case, the following order :—

" 22 July 1875 : It is today agreed upon that she [the third child of the testator] shall be handed over to the executor in terms of the will, on the understanding that she is not to be married out by him until the consent of the Court shall have been first obtained. In witness whereof, parties and counsel affix their signature hereto. * * *

" The executor present acknowledges receipt of the girl into his custody, and promises to do what be can with her education, and not to marry her out without the consent of the court."

On the 14th December 1876, the grand father and the uncle of the minor girl petitioned the D. J. " to call upon the executor to settle the said girl in life" upon which, the then D. J. *(Atherton)*, made the following order :—

" 30th April 1877 : The petitioner is informed that the court has no objection, and consents to the girl being given in marriage by the executor, in terms of the testator's will."

On the 3rd May following, the executor invited a few of his friends and effected a marriage between his own son Kanapathy, and the girl in question, according to the customary rites of the community to which they belonged.

After the consummation of the marriage, when the guardian attempted to register it, Sambunatha Udeyar and his wife (who was the eldest sister of the ward)and three other of the closest relatives, entered a *caveat*, but the Registrar saw no reason to refuse the certificate of marriage ; pending however an application to the District Judge, under cl. 13 of the Ordinance No. 13 of 1863, he suspended the issue of the certificate. When the matter came up before the D. J., the minor girl (being about 12 years of age) expressed her entire willingness and consent to marry " her cousin Kanapathy", whereupon the D. J. directed the grant of the certificate.

The petitioners who opposed the certificate appealed.

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Ramanathan appeared for the appellants.

Cayley, Q. A. (*Ferdinands, D. Q. A.* and *Grenier* with him) appeared for respondents, and would object to the jurisdiction of the Supreme Court. This was a case in which the District Judge is given an appellate jurisdiction in respect of the proceedings had before the Registrar of Marriages. In cl. 13 of Ordinance No. 13 of 1863, "Government Agent" might have stood for "the District Judge", in which case no appeal would lie to the Supreme Court. In cl. 19 of Ordinance No. 11 of 1868, the appellate jurisdiction of the Supreme Court extends to the correction of errors committed by District *Courts*, and cl. 19 of that Ordinance should be read subject to cl. 19. Throughout the Ordinance No. 11 of 1868, a distinction runs between District *Courts* and District *Judges*. Under these circumstances, the Supreme Court could not entertain the present appeal.

Ramanathan contra: In cl. 79 of Ordinance No. 11 of 1868, "District Judge" is used indiscriminately with "District Court". There is a special clause in the Ordinance No. 13 of 1863, clause 28, which sanctions an appeal "from all decisions and orders of any court made under the authority of this Ordinance." The distinction drawn between "District Judge" and "District Court" does not exist.

Cayley Q. A. (in reply): cl. 28 of the Ordinance 13 of 1863 favours my contention, because according to that clause, the appeal is from "orders of any *Court* &c," not *Judge*. [CLARENCE, J. referred to cl. 12 of the Marriage Ordinance in which "Court" was used indiscriminately with "Judge".]

Their lordships reserved their judgment on the question of jurisdiction, and to enable counsel to argue on the merits of the case, some connected papers and cases were ordered to be sent for from the Court below.

And on a subsequent day the Judges wished to hear counsel on the merits.—

Ramanathan for appellants: The point for decision, viewed superficially, appears to be simple. A young woman expresses her willingness to marry a young man, and her testamentary guardian consents to the marriage. What opposition, it may be asked, can there be to this? The answer is (1) The guardian, situated as he was, is incapacitated from giving his consent. The executor had been guilty of gross fraud and negligence in the management of the estate [the circumstances of which were all detailed]. The he legal relations which ought to exist between guardian and ward nust be *uberrima fide*, 1 Story's Eq. Jur. 318. Suspected as he was by the District Judge, he ought, to have in so important a matter s marriage, taken the advice of the closest relatives of the bride.

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Grotius, Van der Keessel, Domat, Vanderlinden and other jurists are very clear upon the peculiar obligation which rests with guardians to solicit the opinion of the relatives of the ward in all matters of importance and to act accordingly. Instead of doing this, the present guardian, who is shewn to have behaved very fraudulently, consults his own desires, in order to carry out his schemes. The girl herself is too young to determine what is good for her. She is certified by a competent doctor to be of weak intellect. Though the guardian is a testamentary guardian, the fraud and *mala fides* of which he has been guilty incapacitates him from giving his consent. (2) It ought to be remembered that the closest relatives of the bride are averse to the marriage and do not consent to it, and (3) an insuperable objection to the marriage is the fact that the bridegroom is the son of the guardian, and as such, can never be allowed to marry the ward of his parent. *Bynkersh* Q. J. Priv. ii. 3. p 218, *Voet*, 26.7.6, *Vanderlinden* p 80, *3 Burge* 962.

Cayley Q. A. contra: The Roman Dutch authorities cited are of no avail in Ceylon. The local Ordinance prescribes certain disabilities as to want of consent, want of age and prohibited degrees of consanguinity, in none of which the present case falls. We have nothing so do with the frauds or mal-administration alleged to be committed by the guardian. The simple question is whether the parties may or may not marry. There is nothing in our Ordinance to prevent them from doing so. Besides, the testamentery guardian had the express authority of the District Judge to give the ward in marriage.

Ramanathan (in reply): The Roman Dutch Law authorities are not superseded by the Ordinance. The District Judge had been misled into making the order of the 30th April last. Even if he made the order advisedly, that was no reason why the guardian should marry his own son to his ward.

Cur. adv. vult.

The Supreme Court held as follows:

This is an appeal from a decision of the District Court of Batticoloa upon a *caveat*, under the 13th clause of the Ordinance No. 13 of 1863, referred to him by the Registrar.

We are satisfied that the appeal lies. It is indeed contendcd for the respondent that the 13th clause entrusts these matters to the District Judge personally, as a named individual, so that his decision should not be regarded as the appealable decision of a Court. We do not take this view. In the 12th clause, the expression used is "District Court," in the 13th, "District Judge". There is no reason that we can see for supposing that any distinction was intended between decisions under cl. 12, and decisions

under cl. 13. The words "Court" and "Judge" seem to us to be employed as convertible terms, and the 18th clause of the Ordinance expressly renders appealable all decisions and orders of any Courts made under the authority of this Ordinance.

The next question is whether, under the circumstances of the present case, we ought to interfere with the conclusions arrived at by the District Judge. We think we ought not. The girl, Sinnapillai, is the daughter of the testator in Batticoloa Testamentary Case No. 10. Her father by his will entrusted the disposal of her hand in marriage to his executor. Afterwards an order was made by the District Court, by consent of the executor and some other parties who had been contending with him in the Testamentary Case, that the girl should not be given away in marriage without the consent of the Court; subsequently upon a petition by the executor, the District Judge made an order that the executor should be at liberty to provide a marriage for the girl. He has brought about a marriage which has been perfected so far as concerns all the native solemnities between her and his own son; and the appellants, who appear to belong to the party which has been long contending with the executor in the Testamentary Case, lodged their caveat against the registration. With regard to the circumstances, upon which stress was laid by both parties to the appeal, of the marriage having been consummated before the application for registration, the bride and bridegroom have taken the risk of that, and we cannot found on that any consideration forbidding us to refuse registration, even if on other grounds we felt that we ought to refuse it. The suggestion made by the appellants who oppose the registration is, that the executor is bringing about this marriage in order to facilitate his defrauding the infant bride's estate under her father's will; and much stress was laid upon the circumstance that the executor has been ordered by the District Court to give certain security and has not yet given it. All this was laid before the District Judge, and after enquiry, after examining witnesses, after examining the bride and bridegroom and learning from them that they desire to marry each other, and after satisfying himself by medical evidence that the girl is perfectly able to know her own mind, the District Judge in his discretion came to the conclusion that he ought not to forbid this marriage.

It is very desirable that such matters as these should be concluded summarily by the discretion of the District Judge, and we should be very slow to interfere with the discretion of the District Judge, when it has been exercised upon the materials laid before him.

In the present instance, we decline to interfere with the District Judge's decision. The appeal is consequently dismissed. *

* It will be perceived that the Judges have not decided upon the question whether a guardian may marry his son to a ward of his, before the

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Present :—DIAS, J. and LAWRIE, J.

P. C. Matara, 78,493.

Under cl. 11 of the Labor Ordinance, the non-supplying of rice in advance by the superintendent of an estate to his cooly, is not a reasonable cause for the cooly's leaving the service of the superintendent.

The defendant was charged with leaving the service of complainant without notice, leave, or reasonable cause, contrary to cl. 11 of Ordinance No. 11 of 1865.

The Police Magistrate acquitted the defendant in these terms:—

"It appears from complainant's evidence that he expected her to weed 180 trees, which he considered a reasonable task for a man or woman to do per day, that she did not do that amount of work and therefore at the end of the first week, he reduced her allowance of $\frac{1}{4}$ bushel of rice to $\frac{1}{8}$ bushel, and that she left the estate on the fourth day after this issue of rice. It does not appear what was the exact amount of work she did. The conductor from whom complainant derived his information is not able to enlighten the Court on that point: but complainant produces a pocket check-roll from which it appears that this defendant and four other coolies worked together on one patch and that on an average they weeded $36\frac{1}{3}$ trees per day. Taking this as approximately correct, it becomes necessary to consider what is the fair and reasonable amount of work that might be expected from a woman in her condition. Complainant says she could easily have weeded 180 trees, but the conductor does not support him. When questioned particularly with referencc to the nature of the soil that was weeded by her, the conductor said an active and able bodied woman could at most have weeded 35 or 40 trees and an able bodied man about 70 trees. Afterwards however he seemed anxious to add to the number of trees a woman could have weeded, and after much prevarication and shuffling, he distinctly stated a woman like this defendant could at most have weeded 45 trees. This number is not very much above the number which on a calculation of average complaninant assigns to her. But it is clear that no number short of 150 could have satisfied complainant and I consider that this was an exorbitant amount of work to expect from her. Because this standard was not reached, complainant reduced the supply of rice from $\frac{1}{4}$ to $\frac{1}{8}$—and considering that not having received any wages she had no money to buy herself the usual curry stuffs, vegetables &c eaten with rice, and that the great majority of her fellow-coolies were in as lamentable a state as herself and unable to help her, and that the $\frac{1}{8}$ bushel could under the usual circumstances have lasted only to the 9th instant — and that

accounts with the estate have been closed. Did the court tacitly uphold the argument of the learned Queen's Advocate, viz. that the local Ordinance had superseded the Roman Dutch Law on the subject?— ED.

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complainant shewed no signs of being less exacting in his demands when the next issue-day came, (in fact from his evidence today it is clear he considered himself to be acting very fairly and justly and would not have yielded,) and that before her, there was the certain prospect of much suffering, perhaps of death by starvation, if she had remained, I think it was natural and justifiable for her to have left the estate on the 10th instant."

On appeal, the Supreme Court set aside the judgment and convicted the defendant, and sentenced her to be imprisoned for twenty four hours. It held as follows :—

It was urged for defendant that she was obliged to leave as the complainant would not advance to her such a quantity of rice as was necessary for her maintenance. The complainant's answer is that, she having only weeded 36 trees when she could weed 150, she was entitled to no more rice than she had received. The Supreme Court must notice the well known fact that owners of estates are in the habit of advancing rice to their coolies before the monthly wages fall due. In most instances if this were not done, the coolies would be without food, since they are not usually possessed of ready money before hand and might not have credit at the bazaars, if any are near. But there is no law which obliges the estate-owner to give this advance, and consequently we are not prepared to regard the non-supplying of advance rice as a reasonable cause for leaving within the meaning of the 11th clause. If the rice were withheld, as complainant says that he withheld it, on account of laziness on the part of the cooly, we should hold the coolie's defence insufficient and that he is not only liable to be convicted but to receive an appreciable amount of punishment. But having in mind that coolies are almost, if not quite universally, dependent for subsistence on this advance supply of rice, if we found that a cooly who did a fair day's work was refused advance-rice and deserted simply because he must otherwise be without food, though we should hold him liable to conviction, we should impose upon him a mere nominal punishment.

In the present case, the complainant says he only advanced to the defendant ¼ bushel of rice on April 30—manifestly insufficient to last her until 10th May when she is charged with leaving. Complainant justifies this on the ground that she only weeded 36 trees per day when she could have weeded 150. The evidence called by complainant however does not support his statement. His conductor says that an able bodied man could only do 75 trees and a woman 35 trees. In this state of the evidence we cannot adopt the complainant's charge of laziness against the defendant and say that it was her own fault that she did not get rice advanced to her.

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Under there circumstances we think that a mere nominal punishment will meet the justice of the case.

D. C. Kalutara, $\frac{8126}{10856}$.

The information was as follows:—

The 7th clause of the Arrack Ordinance of 1844 is inoperative within the districts specified in cl. 15, so far as it creates the offence of keeping distilled spirits elsewhere than in the registered store-house.

Pemiano Chavy, arrack renter of the District of Kalutara complains that (1) Prolis Silva being a distiller of spirit (2) Halnetty Marsel Perera (3) Kalinge Philippoo Perera and (4) Warnecule Arachchige Pemiano Appoo, all of Calemulle in the District of Kalutara, did on the 23rd day of January, 1877, at Calemulle, in the District of Kalutara within the jurisdiction of this Court have and possess 198 gallons of arrack or distilled spirits in a place not being a registered house or store for the purpose situate at Callemulle, in breach of the Ordinance in such case made and provided.

2. And the said complainant further complains that (1) Prolis Silva (2) Halnetty Marsel Perera and (3) Kalinge Philippoo Perera did at Callemulle on the 23rd day of January, 1877 unlawfully possess 198 gallons of spirits distilled from the produce of the cocoanut palm, in breach of the Ordinance in such case made and provided.

The evidence for the prosecution proved that the arrack renter of the District and others went to the distillery of the 1st accused and found in an open shed, about 4 or 5 fathoms off the store-house (which was licensed), 198 gallons of arrack in 3 jars.

In defence, the removal of arrack from the licensed premises to the unlicensed premises, was sought to be explained by the allegation that an offer had been made to the 1st accused to buy the arrack in his store, but that, as the intending purchaser doubted that three of the "leaguers" were of the usual strength or marketable, those three "leaguers" were removed from the store to the distillery for the purpose of being re-distilled and mixed up with the balance of the quantity remaining in the store, in order to bring the whole to the proper degree of strength. It was however elicited in cross-examination that the distillery was not in working order.

The learned District Judge found the 1st accused guilty in these terms (acquitting the rest for want of evidence):—

The evidence puts it beyond all doubt that the 198 gallons of arrack were at the time of seizure upon the premises of the distiller (1st accused) in a place other than the houses and stores referred to in the first part of cl. 7 of the Ordinance. It is not conclusively proved that the arrack was placed in the place where it was found for the purpose of re-distillation. There was no possibility of such re-distillation at the time of seizure for the apparatus was

not in working order. It was competent to the 1st accused, had he thought it fit, to call the 2nd, 3rd and 4th accuseds as witnesses; there would then have been affirmative and definite evidence of the purpose of the removal of the arrack to the shed from the godown. That this direct evidence has been kept back weighs against the defence. The learned counsel for the prisoners drew my attention to the case (reported in B. and V. p. 160) *Kegalle P. C.* 16,940. That case is by no means on all fours with this. There the prisoner appears not to have known what were the contents of the basket left in his house by a cartman. The cases cited in the Supreme Court judgment are, as to facts, different from this. In the first case (*Simpson vs. Norwin*), the statute was held to have in view the question of the killing of game between the 1st February and 1st September ; the possession between these periods of game killed prior to the 1st February was held no offence. In the second case (*Warneford vs. Kendall*), a servant picked up game which he found lying dead, and was apprehended when carrying to his master: this was held no offence. In the case in which I am now dealing, the prisoner sets up as a defence that he knowingly broke the law for a purpose which does not constitute an exception under cl. 32.

I cannot put my own views of what should be into the Ordinance: all I can do is to construe the Ordinance by the ordinary rules. So construing this Ordinance, I find the 1st accused guilty of a breach of cl. 7 of Ordinance 10 of 1844.

On appeal *Van Langenberg* appeared for appellant, *Ferdinands D. Q. A.* and *Grenier* for respondent.

The Supreme Court held as follows:—

Set aside, and the indictment quashed. The Supreme Court agrees with the conclusion which the District Judge has arrived at upon the evidence. But having regard to the 15th clause of the Ordinance No. 10 of 1844, this court is of opinion that the indictment does not disclose an offence. The charge can only be under the 7th clause of the Ordinance, and by the 15th clause it is enacted that, in order to obviate hardship, the 6th 7th 8th and 10th clauses of the Ordinance shall not come into operation, nor be of any force or effect, so far as they relate to the distillation of spirits from the produce of the cocoanut or other description of palm, within certain named Districts. One of the named Districts is " the Caltura Division within the Western Province," which includes the place at which defendant is charged, with having committed the offence. The offence with which defendant is charged is that created by the 7th clause, of keeping arrack in a place other than a registered storehouse, and it may be argued that the 15th clause, rendering clause 7 inoperative only so far as it

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relates to distillation, does not affect it as regards this offence. After consideration we are unable to adopt that view. The meaning of the 15th clause is certainly not made so clear as it might have been, but if we were to hold that the words "so far as they relate to distillation," restrained the excepting force of the clause to the mere act of distillation, we should be depriving the clause of all meaning, and rendering it merely insensible, for not one of the four clauses named directly enacts anything about the act of distillation. The 6th clause enacts that no distillation license shall be granted unless the distilling premises are in a certain state. The 7th forbids the storing of the spirit in any place other than the approved storehouse. The 8th requires the distillery to be kept clear of trees: and the 10th forbids the Government Agent to license any still below a certain capacity. Unless we are to consider the exception as referring to collateral matters connected with distillation, it will have no force at all.

We therefore feel bound to hold that the 7th clause is inoperative within the specified districts, so far as it creates the offence of keeping distilled spirits elsewhere than in the registered storehouse.

D. C. Trincomalie, 21,468.

A creditor who has not recovered judgment, may claim concurrence in the proceeds of a sale in execution taken out by a judgment creditor.

The learned District Judge (*Moir*) discharged the rule (on which the present appeal arose), with costs, as follows:—

This is an application on behalf of Messrs. Cargill & Co. and other persons, alleged to be unsecured creditors of the defendant in this case, for concurrence with plaintiff in the proceeds sale of the property sold under the writ issued by him. Plaintiff objects to the allowance of concurrence to these claimants, on the ground that they have not obtained judgment against defendant.

In support of the application, it is contended that defendant having filed an affidavit admitting the claim, it is unnecessary for each to bring a separate action, as such proceeding will merely entail needless costs—counsel also stated that the defendant had called a meeting of the creditors when they agreed to his property being sold and distributed amongst them.

The position taken up by the unsecured creditors, who have not obtained judgment, is altogether untenable. I fail to see what title they have to meddle in this case; they are neither parties, nor intervenients, nor mortgagees of the property sold. They profess to come in as claimants to the proceeds sale of defendant's assets by virtue of the affidavit, signed by him, which they file. But this gives them no title to interfere in this case; it is only an admis-

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sion of their claim and, filed in this case, only affects the parties thereto.—Then again as to the allegation that all the creditors agreed to divide the proceeds—where is the agreement? If there be anything in writing, claimants may have good grounds for intervening in the case, and in preventing the plaintiff from depriving them of a share of the proceeds, but there does not seem to be any formal agreement, or anything binding on plaintiff.

In this case I can take no notice of claims against the defendant that are not formally before the Court, the claims now advanced are put forward in a most informal and irregular way. The judgment creditors are entitled to concurrence with plaintiff, but not any of the others.

On appeal, (*Grenier* for appellants, *Ferdinands D. Q. A.* for respondent), the Supreme Court held as follows:—

Set aside, and case sent back to the District Court, as hereinafter directed. This is an appeal against a decision of the District Judge of Trincomalee on a claim of Messrs. Cargill & Co. to concurrence with plaintiff in the proceeds sale of the property of defendant, seized and sold under plaintiff's writ. Defendant has made an affidavit admitting the debt claimed by Cargill & Co., which is for shop goods upon an account commencing with "account rendered to 31st March 1875, Rs. 376.56." The District Judge has rejected the claim to concurrence on the ground that the claimants have not obtained a judgment.

In appeal it was contended for the appellants, Cargill & Co. that the defendant's admission of the debt was enough to establish their claim. We do not assent to that argument. To adopt it would be to open a wide door to fraud in many cases, though we see no reason to suspect any in this case, nor on the other hand can we adopt the District Judge's conclusion that appellants have no right to concurrence, because they have not got judgment. No doubt this is an instance in which an adjustment of the claim to concurrence is attended with difficulty and inconvenience. As Voet points out in the 4th title of book xx, the adjustment is to be made expeditiously and as summarily as possible; and the judgments of this Court of 1843 and 1860 cited in p. 456 of Mr. Justice Thomson's book, rule no more than this.

The order of the District Court will be set aside, and the case sent back to the District Court in order that the District Judge may investigate the appellants claim, and find how much is due from the debtor to them. They will then be entitled to concurrence for the debt so found with the plaintiff and other creditors who are in the same position as the plaintiff, for we do not find that there are any hypothecary creditors. If at inquiry the plaintiff or any other creditor with whom the appellant dealt, so far as it may be found by the Court, will be brought into competition, thinks it proper to

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contend that appellant's claim or any part of it is barred by prescription, we think that it is competent to raise that contention.

Each party will bear his own costs in appeal.

D. C. Galle, 39,996.

The maker of a promissory note, which is joint and several, cannot recover from his co-makers, without a cession of action from the payee, more than their proportionate share.

The plaintiff and defendants in this case made a joint and several promissory note in favour of the plaintiff in case No. 35,003, who recovered judgment on the said note and levied by writ the full amount of the note including costs, from the present plaintiff alone. The latter now sued his co-makers for their shares.

The 3rd and 4th defendants did not appear, though the rule *nisi* on them for default of answering was reported as served. But the 1st and 2nd defendants appeared and consented to judgment for their respective shares, viz. $\frac{2}{3}$th, but the learned District Judge (*Roosmalecocq*), upholding plaintiff's contention, decreed as follows:—

"The promissory note being joint and several, the writ must issue for the full amount, and not merely for the proportion due from 1st and 2nd defendants."

On appeal, *Grenier* appeared for respondent.

The Supreme Court reversed the order of the court below in these terms :—

The order appealed against is wrong. The note is joint and several, as between the makers and the payee ; but as between the makers, one maker who has had to satisfy the judgment on the note cannot recover from any of his co-debtors more than such co-debtor's proportional share, unless he has got a cession of action from the original creditor, which plaintiff in this case has not got.

The judgment appealed against is set aside, and in lieu thereof it is decreed that plaintiff do recover from each of 1st and 2nd defendants respectively $\frac{1}{4}$th of the sum claimed in his libel. First and second defendants will pay plaintiffs costs of suit, excepting any costs, such as service of process, which may have been incurred in respect of 3rd and 4th defendants alone, and will have, as against plaintiff, their costs in appeal.

D. C. Colombo, 3.

Payment on a bond executed in Ceylon, of

In the matter of the insolvency of W. C. and J. Brodie, the following *special case* was stated —

"By a mortgage bond executed in Ceylon and dated the 5th January, 1870 and herewith filed, William Church Brodie bound

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himself to pay John Gordon of New Bond Street, London, the sum of £ 2, 500 sterling for money borrowed and received—partly in London and partly in Ceylon by remittance from London—interest at the rate of seven per cent being payable half yearly to the said John Gordon at London.

monies borrowed and received partly in London, and partly in Ceylon by remittance from London.

"The right was reserved to the said John Gordon to apply in London the balance value, if any, of certain coffee referred to in the fourth clause of the bond towards payment and liquidation of the debt.

"By a subsequent bond dated 1st August 1878, filed in case No. 70,419 D. C. Colombo, the said William Church Brodie granted to the said John Gordon further security for portion of the amount due on the said bond of the 5th January 1870.

"The said William Church Brodie was declared an Insolvent Ceylon on the day of

His assignees admit the bonds and are willing to pay the amount due thereon, not in British pounds sterling, but in Ceylon currency at and after the rate of 10 Rs. to the £ (or Rs. 25,000 and interest to date).

"It is submitted, for and on behalf of the said John Gordon, that the amount due on the said bonds is payable in British pounds sterling, as the contract was one to pay in London and is not affected by the currency Proclamation.

"It is submitted, on behalf of the assignees, that there is no such special provision in the bonds in terms of the 9 sec. of the proclamation and that consequently the bond is payable at and after the rate of 10 Rs. to the £.

It is submitted also for the assignees that there is no clause in the bonds making the amount payable in London.

The following was the bond in question :—

Know all men that I William Church Brodie of Colombo am held and bound unto John Gordon of New Bond Street, London, in the sum of two thousand five hundred pounds (£ 2,500) sterling for money borrowed and received and which said sum of money I do engage to pay unto the said John Gordon or to his attorneys, executors, administrators of assignees, on six months previous notice in writing being served on me demanding the repayment thereof, the like notice to be given by me before repaying the money.

And until re-payment of the said sum of two thousand five hundred pounds (£ 2,500), I do engage to pay interest thereon to the said John Gordon at London on the 30th day of June and the 31st day of December of each and every year, at the rate of seven per cent per annum and if any two of the said instalments of interest be unpaid and in arrear, then I engage and bind myself to pay the said sum of £ 2,500 (two thousand five hundred pounds) and interest or demand.

And as security for such payment I do hereby mortgage with the said John Gordon, as a first or primary mortgage, the following property, to wit : All that forest land called Doollogaha Mookalane now con-

1877 July, 12.

verted into a coffee estate called Doolagalla Estate, situated in lower Boolatgame near the village Narangalle and Doomlessale in Three Corles bounded on the North and North-East by the rock called Kaberegalla, on the South and South-East by private lands and on the West by the other part of the same forest, containing in extent one hundred and eighty eight acres, three roods and fourteen square perches, according to the title deed thereof No. 1208 dated the 19th day of June 1861 and attested by P. J. L. VanderStraaten Notary Public, which I have deposited with the said John Gordon, together with all the buildings, machinery tools and live and dead stock upon the said estate or belonging thereto.

And I do promise and agree to keep up and maintain the cultivation of the said estate and to consign to the said John Gordon for sale all the coffee of the said estate on the usual mercantile terms of commission, drawing bills of exchange on the said John Gordon, for the customary advance through the Banks on shipment of the said coffee (at the rate not exceeding fifty five shillings per hundred weight), and the said John Gordon, after deducting from the net proceeds of the said coffee all advances made by him against the same as aforesaid and all charges consequent thereon, shall be at liberty, if he so desires it, to apply the balance, if any, towards payment and by liquidation of the bond.—

And I do further engage or bind myself, my heirs, executors and administrators and all my property whatsoever for the due performance of the forgoing obligation.

In witness whereof I do set my hand and seal to three of the same tenor as these presents at Colombo aforesaid on this fifth day of January in the year one thousand eight hundred and seventy.—

W. C. Brodie.

The learned District Judge *(Berwick)* held as follows :—

I have carefully considered the special case submitted. The first point to be decided is the question where the debt was meant to be payable, whether in Ceylon or in England? I think I ought to confine myself to the intention of the parties in this respect at the date of the bond of 5th January 1870 filed with the special case. As to the interest, it is quite clear that it was to be paid in England to the creditor who lives in England. As to the principal, there is greater room for doubt and the very fact that the deed expressly provides for the *interest* being paid in London and is silent as to the place of payment of the principal, might at first sight seem to indicate that a distinction was intended (expressio unius exclusio alterius est), but I think that the fair conclusion to be drawn from the whole deed and the right of payment in London specially reserved to the creditor, indicate that when that bond was executed the parties contemplated that the creditor should have the right of demanding and enforcing payment in London.

The preliminary point being settled, the rest is clear. Her Majesty's order in Council has no reference to any debt not pay-

able in Ceylon all which remains governed by the antecedent law. This Bond being expressed in terms of British money and payable in England is therefore payable in gold, and not in silver rupees at the rate of 2 shillings (i e $\frac{1}{10}$ of a gold Sovereign) to a rupee. If the debtor pays it here, he must pay the local amount value of £ 2,500 sterling (gold) or whatever else the amount figures of the debt may be. The debtor must pay the costs of the special case.

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July, 12.

On appeal, *Ferdinands D. Q. A.* appeared for appellants (with *Layard*) and *Grenier* for respondent. The following authorities were cited in the argument : 3 Burge 774, 1 Pothier *on Oblig*, 356) *Johnson v. Bland*, 2 Burr. 1084, *Melan v. The Duke de Fitzjames*, 1 Bos. and Pul. 141, D. C. Colombo 63,444 (*Dobree v. Hayley*, Story's *Conflict of Laws*, 280, 299, 2 Burge 860,863.

Cur. adv. vult.

The Supreme Court held as follows :—

Set aside, and it is decreed that the principal amount, or so much of it as is still due and unpaid on the plaintiff's bond of 5th January 1870 be paid in Ceylon currency of Rupees Ten for the pound sterling ; and the interest, or so much of it as is still due, be paid in British currency or its equivalent in local money. Parties will bear their own costs in both Courts.

The plaintiff is the holder of a mortgage bond of 5th January 1870, executed at Colombo for £ 2,500, with interest at 7 per cent per annum payable in London. The debtor Mr. William Brodie became insolvent, and the appellants in this case are his assignees. The questions for consideration is whether the principal and interest due on the bond are payable in British or Ceylon currency. On a special case submitted by the parties, the learned Judge has decided in favour of the creditor. From this judgment the assignees have appealed.

In the absence of any other evidence in the case, we are confined to the bond itself as to the intention of the parties. As to the interest, the bond expressly provides that it should be paid in London. With regard to the principal, the bond is not very clear ; but in view of the fact that the bond was executed in Ceylon, and that a distinction was drawn in the deed between principal and interest as to the place of payment, we think that the place of payment must be taken to be Ceylon, and the principal should therefore be paid in Ceylon currency.

Set aside.

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July, 17.

July, 17th.

Present:—DIAS, J.

D. C. Galle, 39276.

The Supreme Court held as follows :—

Prescription. Set aside, and the plaintiff is nonsuited with costs.

It appears that the plaintiff, the defendant, and one **Thomis** owed money on a bond of 12th January, 1866. The plaintiff, having paid the whole amount on the 9th October 1869, now sues the defendant for his one-third of the debt. The defendant has pleaded prescription, and the District Judge over-ruled the plea and gave judgment for plaintiff, and hence this appeal.

The libel was filed on the 4th February 1876, and the payment was made by the plaintiff on the 9th October 1869, (when the cause of action had accrued,) so that at the date of the action more than three years had elapsed, and under the 5th clause of the Ordinance No. 8 of 1834, the plaintiff's claim is barred. 1 Lorenz p. 254, and 3 Lorenz p. 65.

D. C. Kalutara, 30,167.

VanLangenberg for appellant.

The Supreme Court held as follows :—

Divorce for malicious desertion. This is an action by a husband against a wife, for divorce a vinculo, on the ground of malicious desertion and adultery. The marriage is admitted, but defendant, in her answer, traversed the desertion and the adultery.

The adultery is not proved but the husband's evidence, if believed, proves the malicious desertion, and it is uncontradicted by any evidence for the defendant.

The judgment of the District Judge, decreeing a divorce with costs against defendant is affirmed.

Costs of Proctor in appeal. Defendant's Proctor should have known better than to sign a Petition of Appeal containing allegations which might have been proved in the Court below, but which are supported by no evidence whatever, and is he disallowed all appeal costs in consequence.

D. C. Batticaloa, 15,238.

The case of the plaintiff, who has a Mohamedan widow at the time of the institution of the suit, was dismissed with costs on the

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22nd June 1868. Six years afterwards, defendant moved for writs against the person of the plaintiff, who was now married and under coverture, for costs.

A Mohamedan wife is not liable to arrest for civil debt.

The learned District Judge allowed writs to issue.

On appeal (*Grenier* for appellant, *Ferdinands D. Q. A.* for respondent), *D. C. Batticaloa 4086*, 29th April 1839, was cited.

The Supreme Court held as follows :—

Set aside. The plaintiff is a married Mohamedan woman who appeals against an order of the learned District Judge, allowing writs against her person to issue.

There is nothing in the Mohamedan Code of laws opposed to the rule of Roman Dutch law, that a woman under coverture is not liable to arrest for civil debt : and following that rule of the common law of the colony, the order of the 7th November 1876 is set aside, and the plaintiff is declared free from arrest for civil debt, so long as she remains under coverture.

July, 24th.

Present :—DIAS, J.

P. C. Jaffna, 13,313.

Finding unowned goods, under Reg. No. 15 of 1823.

Defendant was charged with a breach of cc. 2 and 3 of the Regulation No. 15 of 1823, in that she did find and take a jewel, called *sarattu ottial* belonging to the complainant, and failed to bring the same forthwith to the Police Vidahn of the place or to the nearest Magistrate.

The Police Magistrate found the accused guilty and sentenced her to one month's imprisonment at hard labour.

On appeal, *Grenier* for appellant cited P. C. Kandy 5107, * November 28, 1876, and *Ferdinands D. Q. A.* admitted that the sentence was severe.

Dias, J. set aside the sentence of imprisonment and fined the defendant five cents.

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* The following is the judgment referred to :—

Appellant has been convicted on a charge under the Proclamation of 25th October 1823 which required the finder of property to bring the same to the Headman of the village or division on pain of being punished "by fine or imprisonment either with or without being employed at hard labor, at the discretion, and according to the powers, of the Agent before whom such conviction shall take place."

This Proclamation is not in the revised Edition of the Legislative Enactments of Ceylon, although it has never been expressly repealed.

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P. C. Colombo, 6,914.

Procedure as to a joinder of several offences in different counts in the same plaint.

Plaint :—That the 1, 2, 3, 4, 5, 6 and 7th defendants were on the 7th day of June 1877 found gaming, playing or betting with cards at a game of chance at Cheku Street, in a house kept or used for the purpose of common or promiscuous gaming, in breach of sec. 4, cl. 4 of Ordinance No. 4 of 1841. Also that the 7th, defendant did keep, hold or use or occupy the said house for the purpose of common or promiscuous gaming, playing or betting in breach of cl. 19 of Ordinance No. 4 of 1841.

Against a conviction under both counts, the defendants appealed.

Ramanathan for appellants : The proceedings ought to be quashed. The plaint contains two counts, under the first of which the maximum punishment is a fine of two pounds, while under the second the maximum punishment is imprisonment at hard labour for six months and a fine of £ 5. The punishments being different, the offences themselves are different. Under the English Law, a joinder of several offences in different counts in the same indictment is not allowable, for the reason that it would puzzle, and prejudice the defence of, the accused. If such an indictment

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The reason probably is that it was omitted by mistake from its proper place in the Edition of 1853.

It appears inserted in the fly-leaf of the 2nd volume of that Edition. If the 4th clause of the Ordinance 6 of 1867 were still in operation, there could be no question but that no conviction can stand under the Proclamation, for that clause provides that the copies of Revised Edition should in all Courts and upon all occasions be taken to be (i e, we presume to include) the only lawful enactments in force of the period included ; but this clause was repealed by the Ordinance 7 of 1872, which enacts that the copies of the revised edition are to be taken as *prima facie* "evidence that they contain the only Proclamations, Regulations Ordinances and Charters in force."

What are we to understand by the copies of the Revised Edition being *prima facie* evidence of the state of the Law of this country ? And how are we to apply such a provision to a criminal charge under a Proclamation not in the Revised Edition ? We must deal with this expression in the Ordinance 1872 as best we can. We find that the Proclamation has not been repealed, and therefore is still Law, but we cannot in justice impose more than a nominal penalty for a conviction under it, considering that the Revised Edition issued under the authority of Government is to be regarded as having encouraged the public to suppose that the Proclamation in question was repealed.

There remains the question, whether the Police Court had jurisdiction to try the charge. We are clearly of opinion that it had. The Ordinance of 1833 in effect *quoad hoc* substituted the District Judge for the Agent. It is true that the Ordinance 11 of 1834, which created the Police Courts, did not bestow on the Police Courts jurisdiction to try cases under the Proclamation, because the amount of punishment awardable being punishment according to the powers of the District Judge, took such cases out of the Police Court jurisdiction, but the 99 clause of Ordinance 11 of 1868 gives the Police Court jurisdiction in the case.

The conviction is affirmed, but the fine is reduced to a fine of one cent.

were presented to the Court, the proper course would be to call upon the prosecutor to elect, in failure of which the proceedings would be liable to be quashed. *Young v R.* 3 T. R. 106, *R. v Kingston*, 8 East 41. In the present case, the defendants have been much prejudiced. They were taken up by the Police on the evening of the 17th June and released on bail late at night on the same day, and on the following morning the plaint was filed and the case heard then and there, ending in a conviction. The unseemly haste with which the prosecution has been conducted is an additional prejudice which the defendants have suffered in their defence. The Court should not therefore hesitate, under the cases cited, to exercise its discretion and quash the proceedings. The local decisions on the subject are at one with the English Law, *P. C. Balapitimodera 43,072*, Grenier, 1872, p. 16, and *P. C. Negombo 5,830*, 2 Beling p. 79. Moreover, with regard to the first count, under which each of the six defendants is fined Rs. 10, the offence being *single*, the punishment is also single, *Rex v. Clark*, 2 Cowp. 612. Gambling is a single offence. Can one man gamble by himself? Two or more persons must join together in committing a single act of gambling. The punishment for gambling must also be single. *Vanderstraaten* 1870, p. 40.

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Cur. adv. vult.

The judgment of the Supreme Court was this day delivered as follows :—

It was urged for the first six defendants that the offence being single, the fine should also be single. We differ from this view, and think the Magistrate was right in fining the defendants Rs. 10 each. As regards the 7th defendant, it was urged that the plaint was bad, in that it contained two distinct charges under two distinct clauses of the Ordinance. We think this objection equally untenable. There is nothing in our law or practice which requires that the plaint should only contain one charge. There may be cases in which it will be inconvenient to charge two distinct offences in one plaint, but this is not one of those cases. The evidence in this case is more or less applicable to both charges, and the defendants could not have been in any way prejudiced by the two charges being included in the same plaint.

P. C. Tangalla, 41,838.

The burial of a corpse in the vici-

Plaint :—That defendant has committed a breach of the Ordinance No. 15 of 1862, cl. 1 sec. 7, inasmuch as much as by burying, on the 29th May 1877, a corpse close to the borders of Ennapitiya

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tank, the defendant caused to drain into the said tank noisome and offensive matter, and otherwise did a thing whereby the water of the said tank is fouled or corrupted, or likely to be fouled or corrupted.

nity of a tank, so that the tank was actually or likely to be corrupted, is a nuisance, under Ordinance No. 15 of 1862.

It appeared in evidence that the defendant had been requested by his father, just before he died, to bury his body in a certain part of the defendant's private land ; that the grave was accordingly dug and, notwithstanding the protest of the complainant, a Police Sergeant, the corpse was buried in the place indicated, about 12 yards from the edge of the water, at a depth of about 5 feet, so that the corpse lay under the level of the water ; and it appeared also that the defendant had built a wall, 5¾ feet in length, in front of the grave, i. e. between the grave and the tank. The complainant was not aware of the existence of any public burial ground at Tangalla, nor was he able to say that the water of the tank had been actually polluted. The 2nd witness, Bastian, had seen other corpses buried along the northern bund of the tank, and stated that the people of Tangalla did not use for drinking purposes the water of the tank, but of the wells sunk in that tank. The 3rd witness, the Aracci of the town, among other things deposed as follows : "The water of the Ennapitya tank is largely used for drinking and cooking purposes.....In former years, the water of the tank used to extend beyond the grave. I remember the burial of some bodies on the bund of the tank. Though bodies were so buried, the water was used to be drunk as now. I do not know of any harm that can be ascribed to the use of that water. As the tank is filled from the high ground around, there is always a chance of dirt &c. being carried into it. People sometimes wash mats and dirty things in the tank &c."

The 4th and the last witness was Mr. Spittel, a sub-assistant colonial surgeon, who swore as follows :—

Cholera has been bad lately at Tangalla, and therefore it has been necessary to be more than ordinarily particular about the sanitation of the place. About the time of the burial in question, cholera was at its height. I have inspected the grave. It is on the bund of the Ennapitiya tank, about 12 yards from it. I should think the natural surface of the ground will be about three feet above the surface of the water, so that if the grave be 5 feet deep, it must be below the surface of the water. The body cannot under any circumstances be much above the level of the surface of the water. I think that, considering the nature of the ground between the grave and the tank, there is great danger of the water of the tank being corrupted by the decomposing body. I can say with confidence that, considering the laws of the capillary attraction of earth, the ground between the grave and the

tank must be permeated with the water of the tank. This water coming in contact with the noxious liquids exuding from the body under decomposition must, by the laws of the mixing of liquids, first become impregnated thereby, and so conduct the corrupt matter into the tank, for it is a well known fact that when one liquid comes in direct contact with another the two liquids become mingled throughout every where in equal degree—provided they be of unequal density. The juices from a decomposing body would necessarily be of a different density from water. 1877 July, 24.

The learned Police Magistrate (*King*) held that the wall between the corpse and the tank afforded no protection against the permeability of obnoxious gases and fluids, and "that the water of the tank is most probably already, but must at all events sooner or later, become fouled or corrupted. It is not necessary I think to prove that the water is, or must be already, corrupted, or that all the various steps from the act to the accomplished nuisance are, or have been, revealable to the senses. The doing of anything which shall at any future time produce, or be fairly argued to produce, the corruption of the water, however many and unseen the various steps (so long as an offensive result may be fairly apprehended), may be, is necessarily to my mind, on offence, in the intention of the clause of the Ordinance under consideration". The Magistrate accordingly found the defendant guilty, and besides sentencing him to a fine of Rs. 50, required him (under cl. 11 of Ordinance No. 15 of 1862) to abate the nuisance within 3 days from this day of judgment.

Grenier for appellant (with him *Layard*): Until the water of the tank was actually corrupted, no nuisance would lie. The words of the Ordinance must be strictly construed. As regards the order of the Magistrate, directing an abatement of the nuisance, that could not be done in this case, as the plaint did not state the nuisance to be a "continuing" one, *Rex v Stead*, 8 T. R. 142, 1 Russel *on Crimes* p 454.

Ferdinands D. Q. A. contra: The court will supply the omission in a case of this kind. It involved a remedial measure, and the words of such statutes may be enlarged and extended, *Dwarris* p. 693, 718. The 7th section of the Ordinance 15, of 1862 contains the words "causing or suffering to run any unwholesome or offensive liquid, or doing any thing whereby any such water shall be in any degree fouled or corrupted," which words amply cover the finding of the Magistrate.

Grenier replied.

The Supreme Court affirmed the judgment of the Court below.

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D. C. Kurunegala, 3,704.

Grenier for appellant, *VanLangenberg* for respondent.

The following judgment of the Supreme Court sufficiently explains the facts of the case :—

A mortgagee, put in possession in lieu of interest, cannot be ejected on the ground of the mortgager having tendered the amount due on the mortgage, without his tendering at the same time the value of the crop then growing on the land.

Affirmed. The question involved in this case is one of some importance, and the Supreme Court thinks that the conclusion arrived at by the learned Judge is a correct one. On the 22nd November 1867, the plaintiff granted a mortgage bond to defendant for Rs. 82, with right of possession of the mortgaged field in lieu of interest. The plaintiff alleging that the defendant had refused to receive the money when duly tendered, brings it into Court, and prays for ejectment and possession.

The defendant denies the tender, and pleads that he is entitled to the crop which was then growing on the land.

The question upon which the parties went to trial were, first, whether there was any tender at all ; and secondly, if there was any, whether it was made before or after the defendant had cultivated the field. On both issues the learned Judge found for the defendant.

We think that on a bond like the one in question, the debtor has no right to tender the principal and demand restoration of the field, after it has been cultivated by the creditor, without at the same time tendering so much as would be equivalent to the fair net value of the then growing crop. To hold otherwise would be to enable the debtor to deprive the creditor of his honest labour and expense incurred at a time when he had a right to do so.

Affirmed.

D. C. Kurunegala, 20,186.

A seizure and sale by the Government Agent of a land for water rate, under the Paddy Cultivation Ordinanceof 1867, confers an absolute title on the purchaser though be-

One Abdul Cadir, being indebted on his bond dated 28th June 1875, signed judgment in case No. 3,335 in favour of plaintiff on the 25th November 1875. Writs of execution issued, and the land mortgaged under the bond was seized by the Fiscal on the 21st January 1876, but previous to this seizure, the land in question had been seized (6th December 1875) by the Government Agent, under clause 35 of the Paddy Cultivation Ordinance (21 of 1867,) and sold (30th December 1875) to the defendant in the present case. The certificate of such sale, however, was granted to him by the Government Agent only on the 16th June 1876.

The learned District Judge dismissed plaintiff's case, finding a superior title in defendant.

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On appeal (*Ferdinands D. Q. A.* for plaintiff and appellant, *Grenier* for respondent), the Supreme Court held as follows :—

It was contended for the plaintiff that the defendant's right to hold the land "free from all incumbrance" occured only from the date of the certificate, which being after the date of seizure under the plaintiff's writ, could not operate against his right by his seizure. We cannot agree to this view of the case. We think the certificate is merely evidence of the sale, and when granted has reference back to the date of the sale. Even supposing the certificate to operate from its date, we think it will have the effect of over-riding the previous seizure by the defendant.

fore the grant of the certificate of such sale, the land in question has been sequestered by the Fiscal under a valid judgment.

D. C. Kegalle, 3274.

Grenier for appellant *VanLangenberg* for respondent.

The following judgment of the Supreme Court sets out the facts of the case:—

A deed of gift *inter vivos*, granted voluntarily and without pressure, cannot be set aside for want of consideration.

Irregular proceedings.

In this case the plaintiff seeks to set aside a deed granted by him to his son, the defendant, on the ground of want of consideration. He alleges that the deed was granted to the defendant to enable him to deposit it in the Kachcheri as security. The deed which is set out in the libel appears to be not the deed which the plaintiff seeks to set aside, and the learned Judge has forwarded to us a deed bearing an entirely different date. It does not seem to have been put in evidence, or produced at the trial, and when the District Judge set aside the deed by plaintiff in favour of the defendant, the deed which he has forwarded to us does not appear to have been before him. Under these circumstances, we should have set aside the proceedings on the ground of irregularity, but assuming the District Judge had set aside the right deed, we think him to be wrong, as it is not competent to plaintiff to pray that his own deed (granted voluntarily and without any pressure) should be set aside on the ground of want of consideration. The learned Judge was also wrong in setting aside the deed of the intervenient, who is a bona fide purchaser for value from the defendant, who sold to him on the strength of his bill of sale from the plaintiff.

Set aside, and the plaintiff non-suited with costs, including the costs of the intervenient.

1877
July. 27.

July 27th.

Present :—CLARENCE, J.

P. C. Colombo, 7,043.

Timber Ordinance. Defective plaint.

Plaint:—That defendant did, on the night of the 24th. June 1877 at Sarawatta, remove a cart load of sawn timber containing 440 pieces, without obtaining a proper permit for the same, in breach of cl. 8 of the Ordinance No. 24 of 1848.

On appeal against a conviction, *Grenier* appeared for appellant.

The Supreme Court quashed the proceedings in these terms:—

The information is laid under the 8th clause of the Ordinance No. 24 of 1848, by virtue of which clause it is an offence if any person, without such a permit as therein mentioned, shall remove from his own land, or from the land of any other private party, any timber felled thereon. The information in this case is defective, in that it simply charges defendant with removing timber, without specifying that it was felled on the land from which it was removed, or from what land it was removed ; and this defect is not in any wise cured by the evidence.

P. C. Colombo, 7,216.

The Supreme Court held as follows:—

Charges in the alternative not allowable.

Weights and measures Ordinance of 1876.

The information in this case was improperly framed, the informant having by an error (which is of almost universal occurrence in informations laid under enactments couched in an alternative form) charged defendant with using a measure representing a gallon not being in conformity with the standard, *or* not stamped as required by the Ordinance. This in effect is a charge that defendant either committed one offence or that he committed another. Defendant might have been charged with either of these offences, or with both, but the informant was not entitled to lay his information in an alternative form. No objection, however, on this point was taken before plea, and the substantial rights of the defendant have clearly not been prejudiced by the error.

The evidence is sufficient to sustain the conviction on the first half of the information, on which the Police Magistrate has convicted the defendant, except that there is nothing to show that the Ordinance has been proclaimed as mentioned in clause 16.

The conviction is, therefore, set aside, and the case remanded for inquiry upon that point, the onus being upon informant of showing that the Ordinance has been brought into operation by proclamation.

July 31st.

Present:—DIAS, J.

1877
July, 31.

P. C. Jaffna, 3,042.

Plaint: That the defendant, being a servant in the employ of the Government rest house keeper, Jaffna, was on the 4th day of July 1877 guilty of gross neglect of duty in failing to take proper care of the property of Capt. Berdun, then residing in the said rest house, in breach of cl. 11 of Ordinance No. 11 of 1865.

One who is employed at irregular intervals for daily wages, cannot be convicted as a "servant", under cl. 11 of the Labor Ordinance.

The Captain proved that he expressly asked the accused to take care of the box, "as there was much money (over Rs. 6,000) in it." The box in question was found to have been attempted to be forced open. And the rest-house keeper swore, among other things, as follows:—

"Accused is engaged in the rest-house as a cook. He is paid daily. He is sent for and cooks when any visitors come to the rest-house. He is permanently employed. He has been employed as cook from time to time during the last three months. On this occasion he was sent for yesterday afternoon. He is paid at so much a day. When I am out and travellers are staying in the rest-house, the man engaged as cook must look after the place. It was the accused's duty to look after the rest-house yesterday, when I was out".

The learned P. M. found the accused guilty in these terms:—

I think accused is undoubtedly a "servant" under the meaning of the Ordinance, although only engaged at irregular periods and for daily wages. The interpretation clause, while mentioning "menials, domestic servants, and other like servants", does not make any exception in favour of persons engaged daily or at irregular periods. It seems to me that accused must be considered under an engagement, until he gives notice to his employer that the engagement has terminated. Accused did not do so. He even explicitly accepted the charge given him by Captain Berdun.

On appeal against this finding, there was no appearance of counsel, and his lordship acquitted the defendant, on the ground that the 11th cl. of the Ordinance in question was inapplicable to the case.

August 7th.

Present:—DIAS, J.

P. C. Colombo, 7804.

Plaint:—That defendant did on the 29th June 1877 at Colombo, wilfully and maliciously give false information to W.

A false accusation, ad-

1877 August, 7.

Penny Esq., J. P. Colombo, with intent to support a false charge of theft, to the effect "that the defendant [the present complainment] did on the 26th June 1877 at Kochchikadde, during his "[the present defendants'] absence from home, go up to his wife "Rakai and falsely ask and obtain with complainants' (meaning "present defendant's) compliments, the articles enumerated in "the annexed schedule and had absconded herself," in breach of cl. 166 of Ordinance, No. 11 of 1868.

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mitted to be on information, is not punishable under cl. 166 of Ordinance No. 11 of 1868.

In the J. P. case, the present defendant, as complainant, stated that he knew nothing personally of the theft in question, but that his affidavit (as quoted above in part) was affirmed to, on the information of his wife.

The Police Magistrate, found the accused guilty and sentenced him to 3 months' imprisonment and Rs. 50 fine. But the Supreme Court set aside the judgment and acquitted the defendant in these terms :—

It appears from the connected J. P. case No. 434 in which the present defendant was examined, that he charged the complainant in this case on information received from his wife, who supports that statement. Under these circumstances, the defendant is not liable under the 166th clause of Ordinance No. 11 of 1868.

P. C. Puttalam, 8313.

Timber Ordinance.

On a charge of felling timber on crown land, without license, in breach of cl. 5 of Ordinance No. 24 of 1848, the defendants laid claim to the land and led some evidence ; but when it transpired in the case for the complainant, that the trees were fifty years old, the learned Police Magistrate held the land to be crown land, but acquitted the defendants, as they appeared to have acted bona fide in the matter.

On appeal, the Supreme Court set aside the judgment and sent the case back for further hearing. "The fact of the defendants having acted bona fide is not of itself sufficient to exonerate them from liability. They are bound to shew a prima facie title in themselves or those through whom they claim, and the case is sent back to enable them to do so if they can.

P. C. Matara, 78621.

Gambling and prescription.

The offence of gambling laid in this case, under sec. 4 of cl. 4 of Ordinance No. 4 of 1841, was alleged to have occurred on the 6th of April. The plaint bore date the 26th June.

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The learned Police Magistrate over-ruled the objection that the offence was prescribed under sec. 22 of the Vagrants' Ordinance, and found the accused guilty, stating the following circumstances as the reason why he thought the case was not prescribed.

It appeared the defendants were charged with 38 others on the day following the day of the offence (April, 6th), in case No. 78207, which came on for trial on the 26th June last. It being objected on that day that so many defendants could not be tried together, the Police Magistrate ordered the complainant to prosecute only nine persons on the original plaint, with leave to institute fresh plaints against the remaining defendants. The plaint in the present case was one of these, and it was instituted, as above stated, on the 26th of June.

On appeal the Supreme Court acquitted the defendants, observing (without more) that the charge was prescribed.

P. C. Panwila, 16058.

The Supreme Court held as follows :—

Liability of carts conveying rape-seed poonac to pay toll.

Defendant's cart was conveying a substance which falls under the description of rape-seed poonac. Defendant contends that this stuff is exempt from toll because it was used exclusively for manure. The 4th clause of the Ordinance No. 14 of 1867 exempts from toll carts carrying manure only, but the clause goes further and excepts from that exemption poonac and some other substances. The Ordinance No. 7 of 1875 was passed to enable the Government to take out of this exception substances used for manure, and there is no doubt but that if this rape-seed poonac is, as it seems to be, a substance used for manure, the Government ought, by a Proclamation under the Ordinance of 1875, exempt it from toll. But, as the Government do not appear to have done so, it is now liable to toll, and consequently this conviction was right.

Affirmed.

P. C. Kandy, 7636.

Carriage Ordinance of 1873, and Municipal bye-law.

Plaint :—"That the above mentioned defendant, being a proprietor of a carriage, or having the charge or care thereof, did, on the 3rd day of June 1877, demand for the hire of such carriage more than the proper sum allowed by regulations made in conformity with the section 14 of Ordinance No. 17 of 1873."

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The facts of the case appear in the following judgment of the Supreme Court :—

The defendant is charged with demanding for carriage hire more than the proper sum allowed by a regulation made under the 5th subsection of the 14th clause of the Ordinance No. 17 of 1873. The regulation referred to in the plaint is a bye-law of the Municipality of Kandy, which provides for the management of licensed carriages within its limits, and the only clause of the regulation which is applicable to the case is the 15th clause, which provides that the bye-laws shall not be applicable to carriages let to hire on special agreement, or engaged at the residence of its owner for a day or a longer or shorter period. The facts proved in this case are that the complainant, being in want of a carriage to go to the levee and the ball at the Pavilion, applied to the defendant (who is a carriage hirer) who claimed the sum of Rs. 15 for the use of his carriage in the manner required by complainant. This being a proposal for a special agreement, is not within the operation of the bye-law referred to, and the conviction of the defendant was wrong.

Claims for concurrence on money in deposit in court.

D. C. Matara, 28,789.

This was a partition suit, in which a sale was decreed by consent.

To the 2nd. defendant's share of the proceeds of such sale, several claimants advanced claims. The District Judge marshalled them as follows :—

1. That of the 3rd. claimant, who claimed upon a judgment duly revived, and obtained against the 2nd defendant, for making the grave of some person whose name was not in evidence.

2. That of the 4th claimant, who claimed upon a judgment duly revived, and obtained against the 3rd. defendant on a promissory note given *inter alia* for the funeral expenses of one Jane Abraham.

3. That of the 1st. defendant, who claimed on a debt bond on which no judgment had been obtained.

4. That of the 2nd. claimant who claimed on a judgment, duly in force, obtained on a money claim.

The 5th. and 6th. claimants were disallowed their claims, as the judgments in their favour were superannuated without being revived.

The 1st. defendant, who was also a claimant, and at whose instance the respective merits for preference of the several claimants were dismissed, appealed.

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Grenier appeared for appellant, *Ferdinands D. Q. A.* and *Van-Langenberg* for the respondents.

The Supreme Court reversed the order as follows :—

The 1st. defendant claims upon a judgment duly in force, obtained on the security bond entered into by the 2nd. defendant as executor of the will of one Peter Lambertus Perera Wickremeratne Ekenaike.

The 2nd. defendant was executor of the will and guardian of the infant wards under the will, and he having been convicted of fraudulently misappropriating certain of the property to which these infant wards were entitled, the present 1st. defendant was appointed guardian, and the security bond transferred to him by order of the District Court. The judgment obtained upon the bond was for Rs. 2896·50 which appears to have been the ascertained amount of 2nd defendant's defalcations.

The 1st. defendant's claim is entitled to rank first, under those circumstances, as a lien on 2nd. defendant's property, and as the amount (Rs. 2896·50·) is larger than the amount of the assets in Court in this case, nothing is left for the other creditors. Had there been any surplus, the 2nd. 3rd. and 4th. claimants, as judgment creditors would have been entitled to participate in such surplus rateably, subject to the right of the 1st. claimant (who claims on a promissory note, but has no judgment) also to participate rateably, if he could satisfy the District Judge that he had a subsisting debt The 3rd and 4th claimants can derive no priority whatever from the circumstance of their debts having been contracted for funeral expenses of strangers to this matter for which second defendant has become responsible to them.

The order of the District Judge will therefore be set aside, and 1st defendent declared entitled to the money in deposit in this case to the credit of 2nd. defendant, 1st. defendant to get his costs in both courts from the other claimants.

D. C. Colombo, 66,920.

The facts of this case are reported in pp. 62-65 of these Reports.

On the record being forwarded to the court below, Mr. Morgan on behalf of the purchaser of the printing press, moved for an order for the refund of the purchase money of the printing press, as the Supreme Court had cancelled the Fiscal's sale. Mr. Loos opposed on behalf of the judgment creditor who was special mortgagee and at whose instance the property was sold in execution.

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The learned District Judge (*Berwick*) ruled as follows:—

Mr. Loos contends that he is not bound by the judgment of the Supreme Court, he having been no party to the motion and proceedings on which the appeal was founded, and no party in the appeal itself. On referring to the record I find that this statement is correct. The order, appealed against and affirmed but to which the Supreme Court added a rider directing the cancellation of the sale, was an order of the 21st December 1876 on a motion originally made on the 29th November 1876. The motion was argued on the 20th December, and the parties to that motion as appears by the record, were Mr. Browne and Mr. VanCuylenburg for the *purchaser* and Mr. Grenier instructed by Mr. Ohlmus for the *landlord*. It was a contest between the landlord and the purchaser in which the judgment creditor had no interest whatever, and of which he had no notice. It is therefore quite correct to say that he was no party either to the proceedings or to the appeal; but matters followed which may have led to an erroneous cancellation on the point. As I have said, the matter was argued on the 20th December. Judgment was given on the next day, and on the same day and immediately after the judgment, another motion was taken up, made my Mr. Loos for the judgment creditor to draw the money, which upon his motion on the 22nd of November the Court had directed the Fiscal to pay into the Kachcheri to abide its further orders. That motion the Court allowed, but upon terms of giving security, and there was no appeal upon that order. Mr. Loos' client, the judgment creditor, is clearly therefore not bound by the proceedings in the appeal court and I think the sale is still good as concerns him.

One way or the other there are three parties in the case besides the judgment debtor. There is the judgment creditor, who has a mortgage of the press and who caused it to be sold on his writ; there is the purchaser, who has got his purchase cancelled by the Supreme Court without the knowledge of his vendor; and there is the landlord, who claims a lien, and which lien both this Court and the appellate Court have sustained.

The purchaser, having got the sale cancelled, now claims the money in deposit; the special mortgagee in opposition claims the money as the proceeds of the sale, urging fairly that he would rather have his debt paid than merely have the security for it. The landlord today makes no claim to the printing press and thus embarasses the mortgagee's security. The confusion is very great. I think I would do strict law by upholding the sale as far as concerns the mortgage creditor, but I think it will be more becoming to the Supreme Court and also save expense to parties in further proceedings if I make a provisonal order disallowing the motions of both parties, so that the case may again come properly before

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Where A. bought at a Fiscal's sale a printing press, with notice of the lien which the landlord of the execution debtor had for rent, and paid the purchase price to the Fiscal and demanded delivery of the press, and the Supreme Court on appeal, upholding the lien of the landlord, ordered the sale of the press to be cancelled and the purchase money to be refunded by the Fiscal, and where the purchaser, in pursuance of such order moved in the court below for the refund of the purchase money, but was opposed by the execution creditor on the ground of

the Supreme Court, and this time at least all parties will be before the Supreme Court who will then make such an order as they may think just to all, and so will bind all parties without possibility of further mis-carriage. It is directed that the present order shall have no effect until the judgment debtor has had notice of the Queen's Advocate's motion and had an opportunity of being heard upon it.

On appeal, *Ferdinands, D. Q. A.* and *Morgan, D. Q. A.* appeared for claimant and appellant, *Layard* for respondent.

Cur. adv. vult.

The Supreme Court held as follows, (Dias, J. dissenting) :—

Set aside, and it is ordered that the judgment of this court of the 15th March last, in so far as it declared that the sale of the printing press should be cancelled, be recalled, and the execution-creditor declared entitled to the purchase money. Parties will pay their own costs in appeal.

Opinion of the Chief Justice and Junior Puisne Justice.

Under the execution creditor's writ in this case, the Fiscal seized and put to auction a printing press, the execution debtor's property. The press was standing in a house rented by the debtor, and the landlord of the house, as found in the former judgment of this Court, upon an appeal to which he and the purchaser were parties, saved his lien. The purchaser of the press acquired the debtor's interest in the press, that is, he acquired it subject to the landlords' lien.

In March last, this case came in appeal before this court upon an appeal to which only the purchaser and the landlord were parties, and (as between those parties) this court held that the landlord had saved his lien. There appears, however, to have been some misapprehension upon the decision of this appeal, and the learned Judges who were then sitting in appeal were evidently under the impression that the execution creditor was a party to the appeal: under those circumstances an order was made that the sale should be cancelled.

The case now comes before the court upon an application to the District Court for his purchase money, which the execution creditor had in his hands, subject to security to refund, if required so to do : and upon this occasion, not only the purchaser and the landlord, but also the execution debtor appear. The execution creditor now contends that the order of this court cancelling the sale does not bind him, having been made behind his back, and insists, that he has a legal right to the purchase money. There has been some intricacy in the proceedings concerning this sale, and the

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his being no party to the proceedings in appeal, *held* (Dias, J. dissenting) that the opposition was good on the ground put forward, and that accordingly so much of the former decree of the Supreme Court as cancelled the sale should be recalled, and the execution creditor held entitled to the purchase money.

several motions made, to some of which some only of the persons concerned were made parties ; and the learned Judges, who decided the appeal in March last, evidently supposed that, upon the motion then before them, the execution creditor was represented, since the appeal judgment directs that the execution creditor should bear his own costs.

It now appears that the execution creditor was not before the Court when that appeal order was made, and consequently he is entitled to object to its being enforced against him ; we cannot accede to the purchaser's argument, that the creditor is to be considered as having notice because of his Proctor being in Court when the motion (from which the original appeal arose) was being argued, and especially as the order of the Supreme Court went beyond the motion on which the appeal was taken. The question now comes before us in the presence of all parties, and the execution creditor takes his stand upon the sale. We think he is entitled to have it upheld. The purchaser could take no more than his debtor's interest, and the evidence shews him to have bought in the face of the landlord's claim. Under these circumstances we think that the order of the Supreme court of the 15th March last, in so far as it declared that the sale of the press should be cancelled, should be recalled, and the execution creditor be declared entitled to the purchase money ; parties paying their own costs in appeal.

Opinion of the Senior Puisne Justice.

I am sorry to be obliged to differ from my brother Judges in this matter. I think the order of this court of the 15th March last was a strictly legal and, under the circumstances, a very equitable order. By that order this court has set aside the sale of the printing press and declared the purchaser entitled to be refunded the purchase money which was then in the Fiscal's hands. If the order now appealed from were to be upheld, we should be allowing the District Judge to set aside an order of this court upon the application or objection of a party to the record. Such a proceeding, I think, is open to much practical inconvenience, as it will create a great deal of uncertainty as to the authority of the order of this court. According to the procedure of our courts, a variety of persons independently of the plaintiff and defendant become parties to a suit in the course of its progress, such as interveniens (very often of different sets) co-defendants, claimants in execution, and so forth, and if any one of these parties were allowed to repudiate the orders of this court on the ground of want of notice or other excuse, they effectually prevent any one of such orders being carried out. The objecting party in this case is the plaintiff on the record and I think we should not uphold his objection of want of notice, at least of the last appeal, and, if he did not appear before

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this court when that appeal was argued, it was his own fault, and he ought not to be allowed to go to the District Court and object to the order of this court being carried out. If he were prevented from appearing before this court either from want of notice or other sufficient cause, he should have applied to us to give him an opportunity of being heard with a view to a re-consideration of our order, but to allow him to go to the District Court and object to our order being carried out would be subversive of all authority in our proceedings. It is urged that the plaintiff had no notice of the proceedings of the District Court of the 13th February last from which the last appeal was taken, but it appears that, though he had no formal notice, his Proctor was present in court when the matter was argued, and that a motion of his to draw the money which was submitted to the Judge on the same day was only allowed conditionally, evidently with a view to give the purchaser an opportunity to appeal from the order of the court of the previous day disallowing his application for the printing press. Under these circumstances I think it cannot be fairly urged for the plaintiff that he had no notice in fact of the proceedings on the purchaser's application, the order thereon, and the appeal therefrom; and to allow him now to avail himself of the mere technical objection of want of formal notice would be quite inequitable. In view of the forgoing, the last order of the Supreme Court appears to me to be the fairest and most equitable to all parties. That order has set aside the sale, and restored the purchase-money to the purchaser, but to order now that the purchase-money should be paid to the plaintiff, is to deprive the purchaser of his money without giving him its equivalent ; for all that appears, the printing press may not be worth more than the amount of the landlord's claim. These are my views of the case, but as the majority of the court is of a different opinion, the order as above recorded is made.

D. C. Kalutara, No. $\frac{1828}{10868}$.

Under cl. 26 of Ordinance 2 of 1877, no higher fine than Rs. 200 can be imposed.

Information :—Jayewardene Wickremeratne Mahavidhanelagey Anthony Simon of Paiyagala in the District of Kalutara complains that Abraham Fernando of Beruwala, being a Notary Public, did unlawfully and in breach of the rules and regulations, contained in the sub-sections *7, 9, 10, and 13* of clause 26 of Ordinance 2 of 1877, fail and neglect to insert the day, month and year, and place of execution, and place of acknowledgment, and names and residences, of the attesting witnesses in the following deeds and documents executed by him, and that he failed and neglected to duly attest the following deeds and documents by him to wit :

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1. A debt bond for Rs. 1,000 by Francisku Silva Tanapathy in favor of Euseppu Siman.

2. A deed of agreement between Euseppu Siman and Mahamarakkelegey Isohamy and two others for Rs. 4,000.

3. A bill of sale by Mahamarakkelegey Moses Perera and another to Euseppu Siman for Rs. 1,000.

4. A debt bond for Rs. 500 by Mahamarakkelegey Moses Perera to Euseppu Siman;

And that he also permitted and suffered certain party or parties and witnesses to sign their names and make their marks in certain blank sheets of paper intended to be afterwards used as deeds and instruments before the whole of such deeds and instruments had been written or engrossed thereon, and that he also failed and neglected, in breach of the 12th sub-section, clause 26 of Ordinance 2 of 1877, to preserve in his protocal drafts of certain deeds executed before him, and to attach his signature and those of the parties and witnesses to the original deeds.

The accused pleaded guilty and the District Judge sentenced him to pay to Her Majesty a fine of fifty Rupees for the breach of each of the sections 7, 9, 10, 13, (making a sum of Two hundred Rupees) and further fine of Two hundred Rupees for breach of the 12th Section of the clause 26 of Ordinance 2 of 1877.

On appeal (*Layard* for appellant), the Supreme Court held as follows :—

Affirmed, except as to the sentence of Rs. 400 which is reduced to Rs. 40.

Under cl. 26, the District Judge has no power to impose a higher fine than Rs. 200 ; but in view of the fact that as fraud was intended and that the defendant is a notary of long standing, the Supreme Court thinks that a small fine will meet the justice of the case.

August, 14th.

Present:—Dias, J. and Lawrie, J.

P. C. Galle, 1087.

1. The meaning of the word "communicate", under Port Rule No. 21, framed in terms of cl. 6 of Ordinance No. 6 of 1865.

Plaint :—That defendant did on the 18th instant, communicate with the ship "Arabia" outside the Port of Galle, in breach of the 21st. Port Rule, framed under the 6th clause of the Ordinance No. 6 of 1865.

The Port Rule in question was as follows :—

"No boat whatever shall communicate with vessels until after the visit of the Government Port Boat. The Tindal or person in charge of any boat offending against this rule shall be liable to the

penalty imposed by the Ordinance, in addition to the suspension of his license and that of the boat."

The P. M. *(Blyth)* found the defendant guilty and sentenced him to pay a fine of Rs. 200.

On appeal, *Grenier* appeared for appellant, *Ferdinands, D. Q. A.* for respondent (the pilot).

The Supreme Court held as follows :—

It appeared in evidence that when the ship "Arabia" was just outside the port, the defendant was seen pulling his boat towards her ; the complainant then got into his boat and followed the defendant's boat, and he states that when the defendant's boat was close to the ship, the ship stopped for about ten minutes and turned round, and that when she was going away, he noticed the defendant's boat leaving the ship from the port side. This evidence is corroborated by several witnesses who were called. It was contended for the appellant that there was not sufficient evidence in the case to bring it under the legal meaning of the word "communicate" in the Port Rules, as there was neither proof that he boarded the ship, nor in any way came in contact with it. The Supreme Court, however, thinks that the evidence is sufficient to warrant the conclusion that the defendant had communicated with the ship in contemplation of the Port Rules. The very fact of the defendant pulling his boat towards a ship out side the port, shews his intention to communicate with her, and the evidence that the ship had stopped when the defendant's boat was alongside raises a strong presumption that it did so for the purpose of communication. In a case like this, from the distance of the vessel communicated with, the complainant cannot be expressed to give more direct evidence. The evidence he had given satisfies the Supreme Court that there was communication between the defendant's boat and the ship.

The Supreme Court cannot pass without notice the highly improper tone of the appeal petition, and the false statement in the third paragraph. The appeal petition appears to have been filed by Mr. Keegel, and it is not creditable to him to have written a document of such an objectionable character, containing statements, which, if he were the Proctor who appeared for the defendant at the trial, he must have known to be false. Mr. Keegel however does not sign the petition and the court has repeatedly remarked on the impropriety of Proctors filing pleadings without attaching their signatures to them and taking upon themselves the responsibility.

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2. Statements in appeal petitions, and by whom such petitions are to be signed.

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P. C. Jaffna, 13,398.

The cutting down of a tree on a land under seizure by the Fiscal, is not 'resistance' to Fiscal under the cl. 23 of Fiscal's Ordinance, but is punishable by the court whence the writ issued.

The defendants were charged with having unlawfully obstructed the complainant, as headman and Fiscal's officer, in the lawful discharge of his duty, by felling a mango tree which stood on the land called Manival-thotam, whilst under seizure by him under writ No. 21,000 of the District Court of Jaffna, in breach of cl. 23 of the Fiscal's Ordinance of 1867.

It appeared in evidence that accused were no parties to the writ, that the 2nd accused was in the possession of the land on which the tree stood, that the complainant proceeded to the land and announced its seizure to the accused, affixing the notice itself to one of the trees, that second accused sold the tree in question to a third party, that the complainant warned him against the sale but that the accused allowed the purchaser to have the tree cut down.

The Police Magistrate (*Hopkins*) thought the complainant had effected a legal seizure, and that the second defendant was not justified in destroying a part of the immoveable property so seized, and accordingly fined him Rs. 25.

On appeal, *Grenier* appeared for appellant.

Per DIAS, J: Set aside and defendant acquitted. The evidence does not disclose a breach of cl.23. of the Fiscal's Ordinance. If the tree was cut down by the defendant after the property had been seized in execution, he would be amenable to the Court whence the writ issued.

P. C. Matara, 78024.

1. An irrigation officer cannot claim exemption from toll under cl. 7 of Ordinance 14 of 1867.

2. A certificate from such officer is no defence to one acting under it.

Plaint for evading toll, in breach of cl. 7 of Ordinance No. 14 of 1867.

The defendant was a servant of the officer in charge of the Irrigation Works, within ten miles of the toll station of which the complainant was the renter. The defendant refused to pay toll for the cart in which he was conveying provisions to his master, on the strength of a pass furnished him by the Irrigation officer.

The Police Magistrate (*Templer*), while holding that the Irrigation officer who had to do with irrigation channels, had no power to grant a certificate of exemption from toll, under the 7th clause of the Ordinance, as not being employed on any "road, bridge, canal or ferry" within the meaning of that clause, acquitted the defendant, "because he was proved to have been acting under the orders of his master. In such a case, the person liable under the 17th clause is the master, and not the servant."

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On appeal, the Supreme Court set aside the judgment of the court below and sentenced the defendant to pay a fine of 50 cents. "The P. M. was right in holding that an Irrigation officer was not a person contemplated by the 7th clause of the Ordinance No. 14 of 1867, and that the pass produced by the defendant was insufficient to free him from toll, but he is wrongin holding that the person granting the pass, and not the person who attempted to use it, is the party liable under the 17th clause of the Ordinance. The defendant having passed the toll without paying, and without being able to produce a lawful authority to do so, is liable to punishment under the Ordinance. Giving a certificate without authority to do so is an independent offence."

B. M. Galle, 5278.

The question in this case was whether the defendant, an overseer of roads, was liable to pay toll for "light hand-carts."

Hand-carts are not liable to pay toll.

On appeal against the decision of the Police Magistrate, the Supreme Court set it aside and acquitted the defendant, as the hand-cart were not liable to toll, citing *P. C. Point Pedro* 12553, 6th June, 1873, *P. C. Chilaw* 7788, Vanders. p. 139, and *P. C. Colombo*, 329, 1 Grenier p. 4.

P. C. Matara, 76607.

Vagrants' Ordinance. Gambling.

The D. Q. A. consenting, the Police Magistrate tried a charge of keeping a gambling house, and sentenced the defendant, under cl. 19 of Ordinance No. 4 of 1841, to six months' imprisonment and a fine of Rs. 50.

On appeal, *Grenier* for appellant cited 2 Grenier, p. 52 and p. 23, 25. Per DIAS, J. Affirmed, except as to the term of imprisonment, which is reduced to 3 months, under cl. 99 of Ordinance No. 11 of 1868. The Police Court has no power to impose a punishment beyond its ordinary jurisdiction.*

P. C. Point Pedro, 19680.

The following is the judgment of the learned Police Magistrate (*Drieberg*) in this case:—

This is a prosecution under the Toll Ordinance, in that the defendant did illegally demand toll for a bandy drawn by men, and

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* But see B. & V. Rep. p. 142.—Ed.

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which according to the evidence adduced, has never been drawn by a beast of burden, and to which, in its present state, no beast of burden can be attached. The defence is that the toll was legally demanded under the ruling of the Supreme Court in *P. C. Point Pedro* 18855, (1st May 1877). In this case the Police Magistrate held that a palanquin carriage drawn by men was not liable to toll. It was in evidence, however, that this palanquin was sometimes used with horses. The Supreme Court set aside the finding of the Magistrate in the judgment reported in p. 113 of *Ramanathan's* Reports. No reference appears to have been made either in the Appeal Court or in the Court below to *P. C. Point Pedro*, 12553, decided on appeal on 6th June 1873. My judgment in that case sets out the facts, and is as follows :—

"This is a prosecution, under cl. 15, of ordinance No. 14 of 1867, in that the defendant did demand and take toll in a case in which toll was not payable under the provisions of this Ordinance. The defendant admits having levied and received a toll of 50 cents, on a vehicle of the complainant's (the complainant calls it a hand cart), which is so constructed as to be pushed only by coolies, and was so pushed at the time the toll was levied, the complainant being seated in it as a passenger. The vehicle in question (which the Court has inspected) resembles in shape and construction a large double perambulator, and is commonly known in the Jaffna district as a "push-push." It appears to the Court to be clear, having regard to the judgment of the Supreme Court in *P. C. Chilaw* 178, Civil Minutes, 1871, and *P. C. Colombo* 329, 1 Grenier, p. 4, that the toll in question was legally levied.

"In the *Chilaw case*, the Supreme Court held that the word "vehicles," in the sentence "vehicles not emunerated above" in the Ordinance No. 14 of 1867, must be construed with reference to the use of the words in the former part of the Ordinance, and taken to apply only to vehicles drawn by horses, oxen, elephants or other beasts of burden. It therefore follows, in the opinion of the Court, that no vehicle of any description is liable to toll, except, when drawn by beasts of burden.

"The attention of Government was drawn to the decision of the Supreme Court in this case by the learned Magistrate *(Jayatilleka)* whose judgment was therein upheld, in his Administration Report for 1871, as District Judge of Chilaw (see Administration Report 1871 p. 329), on the ground that "it may probably necessitate an amendment of the Ordinance."

"This being a novel point in the Jaffna District, the defendant is fined 5 cents.—*J. S. Drieberg.*"

In appeal, this judgment was affirmed for the reasons given by the Police Magistrate.

As regards the facts of the present case, it is on 'all-fours' with *P. C. Point Pedro 12,553*, but is distinguishable from *P. C. Point Pedro 18,855*. In the former case, the construction of the bandy is such that it cannot be used with horses. In the latter case, the bandy was one ordinarily drawn by a horse, and apparently constructed for that purpose, although on the occasion in ques-

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tion, it was drawn by men. But the principle of law involved in both cases appears to be the same. It will thus be seen that the restrictions placed by the Supreme Court on the 4th clause of the Ordinance in P. C. 18855 is in conflict with the ruling of that Court on the same point in *P. C. Chilaw* 1788, *P. C. Colombo* 339 and *P. C. Point Pedro* 12553. As this prosecution was avowedly instituted to clear up the question of law involved, I deemed it expedient to set out the various decisions bearing on it. Assuming that I am bound to follow the latest ruling of the Appellate Court on the point, I hold on the authority of *P. C. Point Pedro* 18855, that the defendant is not guilty, and he is accordingly acquitted and discharged.

On appeal by the complainant, (*Grenier* for appellant) the Supreme Court held as follows :—

Set aside and the defendant is adjudged guilty, and sentenced to pay a fine of 50 cents. There is no inconsistency between the case No. 18855, *P. C. Point Pedro* and the previous decisions on the subject. The vehicle in question is neither intended to, nor could, be drawn by a beast of burden. This case is therefore distinguishable from the case No. 18855, in that the vehicle in the latter case was a palanquin carriage, which is usually drawn by a beast of burden, though at the time it passed the toll it was drawn by men.

August, 21st.

Present:—DIAS, J.

D. C. Kandy, 64536.

Requirements of the Kandyan Law as to adoption.

The plaintiffs, as nephew and grand-nephew of one Dingery Appoo, who had died intestate in or about the year 1870, claimed to be heirs at law by adoption of the deceased. The defendant, who was administrator of the intestate, denied the alleged adoption, and set up title by inheritance in himself and his sister Punchy Menika, as the children of the deceased by an associated marriage. On the issues thus raised, the parties proceeded to trial, and the learned District Judge (*Lawrie*) upheld the plaintiffs right in the following judgment, which explains the facts of the case :—

" The defendant is the administrator of the estate of Dingery Appoo, and by a decision of the Supreme Court, 2nd February, 1875, it has been expressly determined that by a grant of administration to him, the question of who are the heirs is left open, because that grant was come to summarily for the purposes of the administration and cannot prevent the parties from proving by a

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separate suit the adoption or associated marriage upon which they rely. Accordingly the two relations of the deceased who claim as his adopted sons raised this action in March 1875 against the administrator, calling on him to transfer to them the estate in his hands. The administrator in his answer admits that the plaintiffs were related to the deceased, but denied that they were adopted by him, and also denied that they were entitled to any share of the estate because they were descended from the deceased's sister, who had been married out in deega.

"The defendant further averred that he and his sister are the children of the deceased, the issue of a marriage in which he was one of the associated husbands. During the pendency of the suit two or three petitions to intervene have been presented. The rights of those intervenients may be reserved. The defendant did not call any evidence either to rebut the proof led by the plaintiffs, or to substantiate his own averments. He satisfied himself with maintaining that the plaintiffs had not made out their case, and that their action should be dismissed. From time to time hopes were entertained that the parties might settle and consent to a division of the estate. I may say that I personally was anxious that they should do so and so end the strife, because I am well acquainted with the second plaintiff and also with the son-in-law of Punchi Menika, the defendant's sister. Both of them were often at my house, and make silver things for me, and I feel that it will be difficult for either of them to understand that my decision has nothing to do with my preference for the one over the other. Besides, I think that this is a case of some difficulty and novelty which is likely to be taken to the higher Court, and I should be sorry to see the estate much diminished by a protracted law-suit. For these reasons I had hoped that I would be spared what I feel to be the rather disagreeable duty of deciding this case, and the estate spared further loss by an amicable arrangement. But this has not been found practicable. The evidence, particularly that of the second plaintiff, was given so moderately, and was so free from exaggeration, that I believe it to be true. Not only did the evidence strike me as true, but as the defendant did not impugn or attempt to contradict it, I am bound to accept it and to give it judgment for the plaintiffs unless it is insufficient in law. Of course it is only the facts which I must accept, not the conclusions which the plaintiffs and the witnesses draw from these facts. I think, to begin with, that it is proved that Dingery Appoo was childless. In the Testamentary case, I held that the defendant was not his son, and I have no evidence before me now that he was. It is proved that the first plaintiff is his nephew, that his mother died in Dingery Appoo's house, when the first plaintiff was very young, and that from that time he was brought up by his uncle: that he was

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fed and taught by him, and that his uncle got him a wife whom he conducted to the house, and that he lived with his uncle until his death. It is also proved that the second plaintiff was a grand nephew of Dingery Appoo's and was born in his house; that when his parents went to Hewaheta he was left behind and was brought up and sent to a Pansala and taught silversmith's work by the deceased Dingery Appoo, and that he lived with him until his death. It is further proved that Dingery Appoo's widow regarded the second plaintiff as her adopted son and granted a deed to him in which she so styles him. A witness drew from these facts a conclusion that the plaintiffs were adopted by Dingery Appoo. But the defendant says these are not sufficient, because it has not been proved that Dingery Appoo ever publicly declared the plaintiffs to be his adopted sons. Now it is necessary to determine whether a public ceremony or declaration is necessary to constitute adoption or whether it is only proof of it. If the tie of adoption like that of marriage can only be formed by a formal declaration, it must be conceded that the plaintiffs have not proved they were adopted; but if, on the other hand, a public declaration is only proof of adoption, then it becomes a question whether that is the only proof or whether other evidence may not be received. It is, I think, quite certain that the public declaration does not constitute adoption. There have been several cases in which the declaration which has been held sufficient was made for some other purposes. For instance, in the case 53309, the declaration that the girl had been adopted was made as a reason why she should not contract a certain marriage. It was not said that that statement created a tie which did not exist before. The girl had been adopted long before, but no circumstances had occurred which made it suitable or necessary that the fact should be publicly announced beyond the family circle. There have been cases in which the statement in a deed that the grantee is the adopted son of the grantor had been held sufficient to prove adoption, though I imagine it could not be contended that it created a relationship. In *Armour* (Perera's edition, page 32) it is laid down that there are no prescribed forms and ceremonies of affiliation, and therefore it is not practicable to ascertain in every instance whether an orphan child or a child who was removed from the parent's care in its infancy, and who was educated by another person, was merely a foster child or protege of that person or whether the said child was adopted and affiliated by that person. From the cases I have spoken of, and from this and other passages, I think it is quite certain that adoption can be constituted not only without a ceremony but also without any words addressed by the adopter to the adopted child. If it is sufficient that the adopter make the declaration to others, and that he need not make it in presence of or to the child, then, I think, it follows that the declara-

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tion is merely proof and not the constitution of the adoption. *Armour* (Perera's edition, page 38) goes on to say, however this much is certain, that unless the child and the person who had brought up and educated that child were of the same caste, and unless that person had publicly declared that he adopted that child and resolved that the said child should be an heir of his estate, the child will not be recognized as adopted and affiliated. I think this law is somewhat antiquated, for though the first of these conditions, sameness of caste, is presented in this case (as I had occasion to say in another case 63038), it is a condition to which no effect can be given in our courts. If there be proof that a person intended to adopt, and did adopt, a child of a different caste than his own, no courts would now step in to insist on a distinction of caste which the adopter had himself ignored. Then as to the publicity of the declaration, can it be maintained that a public declaration is necessary, after the decision of the Supreme Court in the cases 53309 and 55778 In the one case, the declaration was only a conversation between the adopter and another chief who had come to solicit the child as wife for his son. In the other case, the declaration was made when giving instructions to draw up a deed of gift. I think these cases warrant the conclusion that a public declaration is not necessary. But is it the Kandyan Law that there must be even a private declaration by the adopter? I shall assume for a moment that it is, and I find in this case the uncontradicted evidence of the second plaintiff, that the deceased called him son and that he told him to take care of the lands, and that there is no one else who will get them. I am entitled to hold it proved, because as I said there is no contradiction of this, that the conduct of the deceased to the plaintiffs was a continual declaration by acts, though not by words, that they were his adopted sons and heirs. It is consistent with Kandyan law to infer adoption from facts and circumstances, apart from declarations by the adopter. The authority for that is the 12th section of *Armour* (Perera's edition, page 39), where it is said that certain given facts will warrant a conclusion that the deceased had decidedly adopted his daughter-in-law. These facts did not include a declaration by the adopter, but describe as nearly as may be the position of the first plaintiff's, for he was married and settled in the deceased's house and rendered him assistance till he died. The deceased Dingery Appu was held a childless man, and if he was childless, there is no presumption against the adoption averred by the plaintiffs. On the contrary, it is highly unlikely that he intended his lands and goods to be divided and scattered among a numerous clan of relations there is in the Kandyan Districts. I think a presumption in favor of adoption is, when a childless man or woman has reared and maintained one or more of their relations in his house. Many

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people have a dread of speaking about their death and what shall be done with their property after it. Dingiry Appu may have been such a man, but I have little doubt that he felt satisfied that his property would go to the two plaintiffs who had lived from infancy under his care and who owed every thing to him. I admit that this decision goes further than any other case I know, in admitting general proof of adoption, but I think it is founded on what may be fairly inferred from the recent authorities that it is not inconsistent with Kandyan law or feeling, and that it is in accordance with the justice of the case. I mean by that that by it the estate of the deceased goes to those whom he intended should get it. Judgment for the plaintiffs for the estate of the deceased with costs."

On appeal *Grenier*, for defendant and appellant, argued on the facts and cited Austin, 52, 64, 74, Solomons, 6, Marshall, 354, Sawyer, 46, *D. C. Kandy, 28,190*, Appendix to Sawyer's Digest, 61, *D. C. Kegalla, 2,665*, Civ. Min. March 6, 1877.

Ferdinands D. Q. A. (*Van Langenberg* with him) for plaintiffs and respondents, replied on the facts and cited Marshall, 347, Armour, 135, 3 Grenier D. C. p. 117.

Cur. adv. vult.

And this day *Dias, J.* delivered the judgment of the Supreme Court, as follows :—

Set aside and plaintiffs non-suited with costs. The question in this case is whether the plaintiffs are the adopted children of one Dingiri Appu. The evidence is very meagre and does not establish the requirements of the Kandyan Law as to adoption.

August, 24th.

Present :—LAWRIE, J.

P. C. Mannar, 4,723.

Common and promiscuous gaming.

The Supreme Court quashed the proceedings in these terms :—

The Police Court has no jurisdiction to try, charges under the 14th clause of the Ordinance 4 of 1841.

See *Avisawelle, 6,087* reported in Ramanathan Rep. p. 11 and *P. C. Colombo, 5,400* reported in Grenier Rep. 1873 p. 23.

D. C. Anuradhapura, 203.

Grenier for appellant, *Ferdinands, D. Q. A.* for respondent.

Malicious injury to trees on crown forest.

Quashed. The accused was charged under the 19th section of the Ordinance 6 of 1846 with committing wilful or malicious injury in cutting down trees standing in a crown forest ; the Dis-

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trict Judge found him guilty and sentenced him to six months imprisonment and Rs. 100 fine. But the Ordinance authorizes the infliction of no greater punishment than £5 fine or three months imprisonment, unless the Queen's Advocate shall consider the offence deserving of greater punishment ; in such cases, the penalty may be as high as the Court can inflict. In this case, the prosecution was at the instance of a private prosecutor, and is signed by the Secretary of the Court, under Ordinance 16 of 1871. Without the concurrence or sanction of the Queen's Advocate, the District Judge had no power to pronounce the sentence he did. Assuming the evidence of the witnesses to be true, the charge should have been laid under the Timber Ordinance.

August 28th.

Present :—DIAS, J. and LAWRIE, J.

P. C. Matara, 76,202.

A plaint which does not state under what section of the Ordinance the offence is laid, is bad.

Plaint :—That the defendant did on the 14th day of July 1876 at Wattegederemulle unlawfully and cruelly ill-treat, beat, and cause or procure to be ill-treated, abused, tortured and killed a dog chained and a heifer tied up, duly secured in complainant's house or premises, contrary to the provisions of the Ordinance No. 7 of 1862.

On appeal by the 1st defendant against a conviction, *Layard* for appellant cited 1 Lorenz 2.

The Supreme Court quashed the proceedings in these terms :—

The plaint in this case is substantially bad, in that it does not state under what section of the Ordinance No. 7 of 1862, the defendants are charged, see Lorenz. p. 2.

P. C. Galle, 98,593.

Maintenance.

Plaint, 1st May 1877 :—That the defendant did on the 4th day of April last leave his child without maintenance, so that it requires to be supported by others at Walpitia, in breach of the 3rd clause of the Ordinance No, 4 of 1841.

On appeal against a conviction (*Layard* for appellant), the Supreme Court held as follows :—

Set aside, and case sent back for re-hearing, with liberty to complainant to amend the plaint. The plaint is dated 4th May 1877, and the offence is charged to have been committed on the 4th

April preceding. The charge as laid would thus be one day too late, and the complainant should have an opportunity to amend it. 1877 Aug. 28.

C. R. Kalutara, 38,574.

Plaintiff claimed Rs, 45 as damages sustained by him during a year "by friuts and branches of a cocoanut tree, which belongs to the defendant and overhangs plaintiff's house, falling on the roof of the plaintiff's house and destroying the tiles and otherwise damaging the said roof". And the plaintiff also prayed "that the said cocoanut tree may be ordered to be cut down to prevent further damage." Damage by over hanging trees.

Plea : not guilty, and no damage caused.

On the trial day, the learned commissioner (*Lee*), without going into evidence of any sort, recorded as follows :—

"The plaintiff is not entitled to damages, as he might have caused the tree to be lopped, plaintiff will be, and is hereby, nonsuited, but the court orders that the defendant shall now, and from time to time, and whenever required, lop the branches of such trees as overhang the house. No costs. See *Galle 35,508*.

"The counsel for plaintiff, being asked if he presses for damages, says no."

On appeal by the plaintiff, *Grenier* for him contended that the effect of the commisioner's order was to advise defendant to take the law into his own hands, and cited *Leg. Mis.* 1867, p. 53 and 2. Grenier, C. R. 53.

But the Supreme Court affirmed the judgment.

C. R. Colombo, 3,942.

The plaintiff, as Fiscal of Colombo, sued the defendant for the recovery of Rs. 59, alleging that, under writ of execution issued from the District Court of Colombo in case No. 67,527, he seized certain property, the sale of which defendant (who was defendant in the District Court case) stayed by settling the amount due on the writ, without however settling the charges due in respect of the seizure and advertisement of the property. Plaintiff admitted that as defendant did not surrender any property, the seizure he made was at the instance of the plaintiff. Fiscal and suitor.

The defendant pleaded that the writ sued out in case No. 67,527 was based upon a special mortgage bond and that if the execution creditor in that case did not point out the property so

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specially mortgaged for seizure, the Fiscal should look to him for the payment of of the charges arising from the seizure of any other property belonging to the defendant.

The learned Commissioner dismissed the plaintiff's claim with costs, holding that his remedy was against plaintiff in case No. 67,527.

On appeal, *Layard* appeared for appellant, *Dornhorst* for respondent.

The Supreme Court affimed the judgment of the court below.

August 31st.

Present :—DIAS, J. and LAWRIE, J.

P. C. Colombo, 8029.

Resistance to police, under cl. 75 of the Police Force Ordinance.

Complainants, who were Police officers, charged defendants with resisting and obstructing them, whilst in the legitimate discharge of their duties, in breach of cl. 75 of Ordinance No. 16 of 1865.

It appeared in evidence that the complainants, suspecting an illicit sale of arrack, went to the house of the accused and attempted to search for arrack, when they, the complainants, were assaulted and turned out, as they did not produce their warrant. They admitted they were in plain clothes, with only their Police belt "apparent."

The learned Police Magistrate fined the defendants Rs. 20 each, being of opinion that "the complainant and his witnesses were clearly acting as required by cl. 51 of the Ordinance 'to detect and bring offenders to justice,' and I find that they were obstructed in the execution of their duty by the accused."

On appeal, *Grenier* for appellants : The 51st clause of the Ordinance No. 16 of 1865, on which the Magistrate relies, should be read together with the 52nd clause, which distinctly specifies the class of offences in respect of which a Police Officer may arrest without a warrant, and your lordships have held that if authority to arrest be wanting, there is no authority to search, *Beling* part 2. p. 138.

The Supreme Court held as follows :—

Set aside and defendants acquitted. Under the circumstances of this case, the Police had no authority to enter the defendant's house, and the resistance offered by the defendants is not therefore illegal.

September, 6th.

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Present :—DIAS, J. and LAWRIE, J.

C. R. Badulla, 12,524.

The Supreme Court held as follows :—

Promissory note.

Set aside. The note was originally completed without a stamp and bore only the mark of Menika and a stamp was afterwards affixed on which the name of Menika has been written. The stamp is dated three days latter than the note and has obviously been affixed after the rest was written. All the witnesses speak to its having been affixed at the time the note was written. They certainly have not spoken the truth and cannot be relied on. The note seems to us to be a forgery and the action on it is dismissed.

September, 7th.

Present :—DIAS, J. and LAWRIE, J.

C. R. Dickoya, 540.

The Supreme Court held as follows :—

Physician's fees.

Set aside and the case sent back as hereinafter stated. The rule that physicians could not sue for their fees in England was abolished by the Medical Act 21 and 22 Vict. c. 90. sect. 31. and it never at any time applied to surgeons.

It is a rule which was never applicable to native practitioners in Ceylon, who have always been held entitled to sue for their fees.

The case is sent back in order that the commissioner may decide the amount due to the plaintiff.

P. C. Colombo, 7,679.

False personation.

Plaint :—That the defendant did on the 7th day of April 1877, at Colombo Police Court, wilfully and knowingly procure a certain man, whose name is unknown to the complainant, to personate one Jeronies Peries, to whom a sum of Rs. 20 was to be repaid by order of the Supreme Court, with intent to defraud the complainant of that sum, and did aid and abet the said person in personating the said Jeronis Peries.

On appeal against a conviction, *Grenier* appeared for appellant.

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The Supreme Court held as follows :—

The Supreme Court is of opinion that personating with intent to defraud is an indictable offence, and consequently that aiding and abetting another to personate with the same intent to defraud is also an offence.

The sum of which the accused intended to defraud the complainant was a small one, and the offence was one within the jurisdiction of the Police Court.

C. R. Matala, 3,069.

Kandyan Law.

The land in dispute in this case originally belonged to one Sabeya, and after him his daughter Ukku possessed it. Ukku was the wife of plaintiff, and had by him a son, Suddana, who survived his mother and died childless. Plaintiff claimed the land by right of his son Suddana and by prescriptive possession.

Defendant led no evidence in support of his title.

The commissioner (*Sinclair*) held as follows :—

According to Kandyan law plaintiff is the heir of his son, and at his death the land reverts to the next heirs of the mother's family, and there is sufficient evidence to show that Suddana survived his mother.

Judgment is accordingly entered for plaintiff for possession of the land during his life time, the land at his death reverting to the nearest heirs of Ukku's family. Plaintiff cannot transfer more than his life-interest in the land ; and a transfer of the land by him is therefore null and void.

On appeal, *VanLangenberg* appeared for plaintiff and appellant, *Grenier* and *Browne* for respondent.

The Supreme Court set aside the judgment of the Court below and entered judgment for plaintiff in these terms :—

The plaintiff is proved to have been in possession of the land in question for many years, and to have been but recently dispossed by the defendant.

The learned commissioner has found that the plaintiff is entitled to possession during his life time, but that the land shall then revert to the nearest heirs of Ukku's family. The defendants and intervenients have not proved that they are those heirs or that they have any right to the land.

The question of the extent of the plaintiff's rights in competition with those of the next heirs of Ukku, cannot be determined in this action, to which these heirs are not parties.

September, 11th.

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Present:—DIAS, J.

P. C. Colombo, 7,585,

Dornhorst for appellant.

The Supreme Court set aside, and quashed the proceedings in these terms :— Licensing Ordinance of 1873.

The Ordinance No. 7 of 1873 does not apply to taverns where arrack is sold. The plaint is defective as it makes no reference to the Ordinance No. 22 of 1873.

P. C. Colombo, 7,516.

Dornhorst for appellant.

The Supreme Court held as follows :—

Set aside, and defendant acquitted. This is a charge under the 38th clause of Ordinance No. 7 of 1873, for being found in the premises of tavern No. 14. According to the evidence, the defendants were found in the back yard of the tavern and not within the building used as the tavern. The word "premises" in the Ordinance contemplates a building, as is evident from the use of the words "to be closed." Meaning of the word "premises" in cl. 38 of of the Licensing Ordinance of 1873.

P. C. Balapitiya, 48676.

Plaint:—That the defendant did on the 6th day of March 1877, at Borekanda Estate in Karendenia, receive money under false pretences, in that he the defendant did on the said day and place, obtain of and receive from Endris de Silva, superintendent of the complainant's said estate a sum of Rs. 1.50, falsely representing, that he the defendant was authorized by the Government Agent, Southern Province, and the Modliar Wellaboda Pattoo, to receive the said sum of money as a fee for stamping a quantity of timber belonging to the complainant. Receipt of money under false pretences by a stamper of timber.

It appeared in evidence that before timber could be removed from private property, it had to be stamped, and the allowance made by the Government Agent to the stamper was only cents 50, per diem, whereas the defendant charged Rs. 1.50. He justified the charge by proving that as the estate was about 15 miles away from Panangoda, the place where he lived, he had to incur expences, which when deducted would leave him only 50 cents.

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But the Police Magistrate found "that the defendant fraudulently demanded and received from the superintendent of complainant's estate a sum of Rs. 1.50, under the alleged authority of the Kachcheri Mudalyar. The Government Agent's circular allows 50 cents, *per diem*, and makes no provision for hackery or cooly hire. There is nothing to shew that the defendant's demand was made to cover such expenses, nor anything in the nature of a private agreement. The defendant is therefore adjudged guilty."

On appeal, (*Grenier* for appellant), the Supreme Court set aside the sentence and acquitted the defendant in these terms :—

The defendant is charged with obtaining money under false pretences. The amount received by the defendant is Rs. 1.50, which does not appear to be an unreasonable amount, considering the distance he had to walk to complainant's garden, besides employing others to carry the stamping apparatus and stamp the timber. The defendant does not seem to have been aware of the Government Agent's circular which authorizes the stamper to receive 50 cents, per day. This circular does not say how much is to be paid to coolies and others who are necessarily employed in the work, and it cannot be supposed that the circular intended that they should be paid out of the stamper's pocket.

C. R. Chavagacheri, 2662.

The Supreme Court held as follows :—

Set aside and the case sent back to be proceeded with.

Jurisdiction of Courts of Requests to ascertain the competency of a plaintiff to sue as manager of a temple.

The subject matter in dispute in this case is a piece of land said to be worth Rs. 63. The defendant has not pleaded to the jurisdiction of the Court, as in fact he could not do. The Commissioner, however, non-suited the plaintiff, on the ground that he should establish his right in a competent court as Manager of the Temple, in respect of which the land is held. It is quite competent for the plaintiff to establish in this case his right to the parcel of land in dispute as Manager of a Temple or otherwise. All costs to abide the result.

P. C. Balapitiya, 48823.

VanLangenberg with *Dornhorst* for appellant.

The Supreme held as follows :—Set aside and the 5th and 12th defendants are acquitted. There is no legal evidence in this

case that the house where the gambling took place is a place kept for common or promiscuous gaming. The objection of the defendant's Proctor that the Magistrate should not try the case was properly over-ruled, but the Supreme Court thinks it undesirable that the Magistrate should take any active part in the apprehension of offenders who are to be tried by him as judge.

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Magistrates who are to try offenders ought not to take an active part in the apprehension of offenders.

September, 18th.

Present:—LAWRIE, J.

P. C. Matara, 78789.

This was a charge of gambling. On the day of trial, the defendant objected to the jurisdiction of the Police Court, as the offence alleged to be committed, fell within the jurisdiction of the *Gansabhawa* of Wellabadapattu, under cl. 53 of the rules made in terms of the Village Communities' Ordinance (26 of 1871).

An order to renew bail is not an appealable order.

The Police Magistrate (*Arunachalam*) recommended that the case should in the first instance be instituted before the Gansabhawa, and thence transferred to the Police Court by the Government Agent, if he thought fit, according to the powers vested in him by the 3rd proviso of cl. 21 of Ordinance No. 26 of 1871. The Government Agent being also of this view, the Police Magistrate ordered the defendants to appear on a future day.

On appeal against this order (*Grenier* for appellants), the Supreme Court dismissed the appeal in these terms :—

The order of the 16th August was merely one requiring the accused to renew bail to appear before the Magistrate on the 18th August, two days afterwards. That is not an appealable order.

September, 20th.

Present:—LAWRIE, J.

P. C. Matara, 78711.

Plaint:—That the defendant did on the 11th July 1877, unlawfully pass over the road toll at Bandattara, and evade the payment of toll, and forcibly pass and take his vehicle consisting of rice, paddy and other sundries, contrary to cl. 17 of Ordinance No. 14 of 1867.

1. A Superintendent of minor roads, appointed by the District

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The learned Police Magistrate (*Arunachalam*) held as follows :—

Road committee, is exempt from paying toll, and may grant passes to vehicles, which are bona fide employed in the construction or repair of roads, but not to vehicles containing his private luggage and provisions.

Defendant, a servant of Mr. F. Bird, Superintendent of Minor Roads, Matara, drove a cart through a toll station kept by complainant on a minor road within Mr. Bird's district and, refusing to pay toll, produced as his authority a pass granted by Mr. Bird.

I consider that Mr. Bird is under the 7th cl. of Ordinance No. 14 of 1867, exempted from paying toll within his district, and has the power to grant passes to vehicles &c., provided they be *bona fide* employed in the construction or repair of his roads. The cart in question contained his private luggage and provisions, and cannot be considered to have been so employed.

Defendant is convicted and fined 50 cents.

Both parties appealed.

Complainant's appeal was against the portion of the judgment which declared that Mr. Bird was exempted from toll and could grant passes. Complainant contended that the 7th cl. contemplated only officers in the Public Works Department and who held their appointments from Government, and not superintendents of minor roads, who are appointed by the Chairman of the District Road Committee, who is himself not exempted.

Defendant contended that as he produced a pass from Mr. Bird, he was entitled to the acquittal ; and if Mr. Bird acted illegally in granting the pass, he was liable to punishment under 7th cl., and further that the evidence showed that the cart followed Mr. Bird with the luggage and provisions in the course of his journey, and that it was a cart allowed by Government for the purpose of carrying his boxes whenever he moved about, and therefore it must be considered to have been *bona fide* employed in the construction or repair of the roads.

Per Curiam :—Affirmed, the Supreme Court seeing no reason to the contrary.

C. R. Panedura, 21,131.

Where a fisherman claimed damages against another for frightening away a

The plaintiff, by occupation a fisherman, went out in a boat commonly known as *Hadi Oruwe*. After the usual manner of fishing in these boats, the plaintiff having secured a quantity of bait-fish, called *hingaro*, threw hands-full of them into the sea as the boat was moving on, and enticed a shoal of large fish. His boat was being paddled very gently, in order to enable his party of men to angle the fish, when defendant came up in a boat and wish-

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ed to have the loan of some bait-fish, which the plaintiff would not accommodate him with, whereupon the defendant moved his boat over the shoal of fish, and frightened them away by splashing the water with his oars. The plaintiff now sued defendant for the recovery of Rs. 30, being value of the fish which he might have caught but for the defendant's act.

shoal of fish which he had allured in the open sea, and was on the point of angling, *held* he was not entitled to recover, as he had not reduced the shoal of fish into his possession.

The learned Commissioner after considering the authorities cited before him (for plaintiff, *C. R. Galle, 14538*, 2 Lorenz, 115, *C. R. Galle, 16,645*, 3 Lorenz, 161 and *C. R. Panedura, 13,368*, 17 May, 1871*; for defendant *C. R. Panedura, 8014**), dismissed plaintiff's action in these terms:—

However malicious the conduct of the defendant appears to be, I feel unable to give judgment for plaintiff. The shoal of fishes in question was certainly not reduced into actual possession. And I can scarcely consider that although they were near plaintiff's boat enticed by the bait thrown from it, they were under his coercion, as they were in the open sea, free to move about and not encompassed by a net. Although it was stated by plaintiff that the fishes would have remained near the boat as long as their appetite was served, it is hard to say what other instincts or causes may not have dispersed them and deprived the plaintiff of the chance of capturing them.

Plaintiff is non-suited. Each party bearing his costs.

On appeal *VanLangenberg* appeared for appellant, *Browne* for respondent.

The Supreme Court affirmed the judgment, seeing no reason to the contrary.

C. R. Balapitiya, 25,600.

An agreement between A. and B. to divide in certain proportions the fish to be caught by them, though legal, is yet not enforcible, because as there was no period of its endurance

VanLangenberg for appellant, and *Grenier* for respondent.

The Supreme Court set aside the judgment of the court below and dismissed the action in these terms :—

The plaintiffs claim to enforce an agreement between them and the defendant to divide in certain proportions the fish to be caught by them.

Assuming that it has been proved to have been entered into, the agreement, though legal, cannot be enforced, because as there was no period of its endurance fixed, its duration depended on the mere will of the parties, and any one of them could retire from it

* See Appendix for a report of these cases.—Ed.

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fixed, its duration depended on the mere will of the parties, and any one of them could retire from it at pleasure.

at pleasure. We give no opinion as to whether the plaintiffs might not have a claim for damages in respect of the defendant's withdrawal from the agreement at a time when they had reaped advantage from it and had conferred none in return.

September, 28th.

Present:—CLARENCE, C. J.

C. R. Panedura, 21,318.

1. A parent is not liable for the tort of his minor son.

2. An agreement made by defendant in consideration of plaintiff's agreeing to forego taking criminal proceedings against defendant's child is illegal.

Plaint:—Plaintiff complains of the defendant, for that the plaintiff lost a watch about two months ago, and on search being made for the same, the defendant brought to the plaintiff the pieces of the said watch, stating that it had been removed from the plaintiff's premises by the defendant's minor child and had been broken by him, but the plaintiff refused to accept the same and demanded the value thereof, viz. Rs. 50, whereupon the defendant paid a sum of Rs. 15 to the plaintiff, and promised to pay the balance sum of Rs. 35 but has failed to pay the said sum &c.

Defendant denied the claim.

The commissioner *(P. de M. Ondaatjie)* nonsuited the plaintiff in these terms :—

The defendant's son is a sickly looking child of 8 years of age. The defendant is clearly not liable for the torts of his son. As to the alleged promise of the defendant, it is not valid, not being in writing as required by the Statute of Frauds. There is no evidence of part payment besides the statement of the plaintiff. But part payment will not take a case out of the statute, even if satisfactorily proved.

On appeal, *Dornhorst* for appellant, the Supreme Court held as follows :—

Affirmed. Defendant was not originally liable for the tort of the child in taking and damaging plaintiff's watch, and the alleged agreement by defendant to pay Rs. 50 was evidently, according to the evidence, an agreement made by defendant in consideration of plaintiff's agreeing to forego taking criminal proceedings against the child. Such an agreement would be void at English Law for illegality, and the law of this Island, which was in some respects borrowed from the policy of English Law in criminal matters, agrees, in my opinion, with the English Law in this respect.

October, 2nd.

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Present:—CLARENCE, A. C. J. and LAWRIE, J.

P. C. Kandy, 6808.

Plaint :—That the defendants did on the 19th instant at Kalugala assault and beat the complainant, and rob from his person the following property viz., 1 silver waist chain, 1 silver box with chain, 1 small velvet bag silver mounted, 8 gold rings, 2 silver rings, 1 silk umbrella, 1 silk sarong cloth, 1 chintz cloth, 1 silk handkerchief, 1 comb, 1 penknife and Rs. 30 in money.

A charge of highway robbery is beyond the jurisdiction of the Police Court.

It transpired in evidence that the assault and robbery was on the highway at night. At the close of the case, objection was taken to the jurisdiction, but the Police Magistrate (*Moysey*) overruled the objection and convicted the defendants.

On appeal, *Grenier* and *VanLangenberg* appeared for appellants and cited 2 Grenier, p. 66.

The Supreme Court quashed the proceedings in these terms :—

As a charge of highway robbery, this was beyond the jurisdiction of the Police Court, and the objection appears to have been taken in the court below.

D. C. Colombo, 37583.

Practice as to substitution of parties.

This action was raised in June 1864, by J. C. Nicholas (the father of appellants), as trustee under a certain deed (under which the appellants were the beneficiaries), against James Campbell, as executor of the last will and testament of Mrs. Helen Foulstone, the donor in the said deed. The defendant, although he entered appearance, and moved on the 2nd July 1864 for time to answer, failed to answer, and the plaintiff issued a rule on him for default of answering returnable on the 21st July 1864, but on that day the plaintiff died suddenly, intestate and without appointing another trustee. The appellants, who were minors and orphans, evidently through ignorance of their rights, allowed the suit to lie dormant till the 4th October 1875, when one of them, T. E. Nicholas, moved for a rule on J. C. Ebert, one of the heirs of the late Helen Foulstone, and on Charlotte Foulstone, widow of the late James Campbell, also an heir of Helena Foulstone, to shew cause (1) why this case should not be resumed, (2) why the cestui que trust, T. E. Nicholas, should not be made plaintiff therein, and (3) why the said J. C. Ebert and Charlotte Foulstone should not be made defendants therein. The learned District Judge (*Berwick*) disallowed

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the motion for substitution, holding that "the parties to take the place of a deceased executor, as defendant, are his own executor, or administrator." The appellants thereupon filed an affidavit deposing that Campbell, the defendant and deceased executor, died intestate and without leaving any property and therefore left no executor, and upon this affidavit the appellants again moved, on the 6th July 1877, for a rule on the said J. C. Ebert and Charlotte Foulstone to shew cause why they, as heirs of Mrs. Foulstone, should not be made defendants. The rule was allowed by the then acting District Judge (*Liesching*), and when the appellants moved the rule to be made absolute, the District Judge for the time being (*Morgan*) discharged the rule on the 2nd August, in these terms :—

"A similar motion was made in 1875, and disallowed. No appeal was taken. Motion disallowed."

Against this order, the appellants appealed. *Grenier* appeared for them, and *VanLangenberg* for respondents.

The Supreme Court dismissed the appeal in the following judgment :—

It would be most inconvenient and would lead to much confusion, if such substitution as appellants ask for were allowed in a suit eleven years old, in which no steps were taken for ten years after the whole of the original parties are dead. The original libel was filed against an alleged executor. The action which appellants desire to prosecute is against certain persons as the heirs of the original deceased. The libel contains claims and allegations against the executor which cannot be made as against the heirs of the original deceased by a mere substitution of names If appellants have any right of action against the persons named, they can bring a fresh action against them and file their libel containing the allegation on which their claim is based.

October, 4th.

Present :—CLARENCE, A. C. J. and LAWRIE, J.

P. C. Matara, 78847.

Arrack Ordinance.

Plaint :—That the defendants did on 6 August 1877, at the arrack godown in Hakmana, sell or dispose of, or cause or permit to be sold or disposed of, on their account by retail, arrack without a license, contrary to Ordinance 10 of 1844, sec. 26, and to Ordinance 8 of 1869, sec. 1.

The defendants were arrack renters and were proved to have

sold arrack in retail at their godowns, and convicted and fined fifty rupees. 1877 October. 4.

On appeal, it was contended that arrack renters were licensed retail dealers, but the conviction was affirmed. —

D. C. Tangalla, 622.

Information :—That A. B. C. and D. did on or about the month of January 1877, steal and drive away from Udayala a yoke of black cattle [described], property in charge of the said Kirimadenege Lebseriye (complainant). In a charge of theft ownership should be laid.

On appeal against a conviction, *VanLangenberg* for appellants cited *Ramanathan*, 1877, p. 4. [CLARENCE, A. C. J : was this objection taken in the court below?] The case cited is one in which the objection was taken in the Appeal Court in the first instance.

The court quashed the proceedings in these terms :

The property in the cattle is not laid in any one. The case reported in p. 4 of Mr. Ramanathan's Reports is an authority that the objection is not now too late.

C R. Tangalla, 19323.

This was a claim by a surveyor for his fees, which defendant denied. Practice.

The Commissioner, on the trial day, finding from the examination of the plaintiff that the work was done about 18 months previous to action, dismissed his claim as prescribed.

On appeal, *Grenier* for appellant (plaintiff) contended that prescription was not pleaded and the case ought to go back for trial.

It was decreed accordingly.

October, 9th.

Present :—CLARENCE, A. C. J. and LAWRIE, J.

P. C. Galle, $\frac{22314}{24496}$

The defendant was charged with leaving his carriage on the public road, in the middle of the street, Fort, so as to cause incon- Leaving conveyance

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venience and danger to the public, in breach of sec. 3 of cl. 53 of Ordinance No. 16 of 1865.

On public road.

On appeal against a conviction, (*Grenier* for appellant), the Supreme Court held as follows :—

The 3rd section of the 53rd clause of Ordinance No. 16 of 1865, provides for the punishment of two offences, (1) leaving a conveyance in a street longer than is required for taking up or setting down passengers ; (2) leaving a conveyance in such a manner as to cause inconvenience or danger to the public. The carriage in question had been taken to the street and left there empty, without a horse, until the horse was brought from the stall. The delay does not seem to have been long : one witness says 8 or 10 minutes, another says 3 minutes. We do not think that merely leaving a carriage for 10 minutes in a street is an offence under the Ordinance.

The defendant would have been rightly convicted, had it been proved that by so leaving the carriage he caused danger or inconvenience to the public. So far as appears, this took place during day-light, and though it is said by the police constable Louis, that danger and inconvenience were caused, his evidence is negatived, or at least not supported by the other witnesses.

Conviction set aside and defendant acquitted.

C. R. Matara, 30693.

The Supreme Court held as follows :—

Mortgagee in possession in lieu of interest.

The mortgage was specially granted with possession in lieu of interest, and there was evidence which justified the Commissioner in finding that the land had been possessed in accordance with that proviso. This disposes of the plea of prescription. But plaintiff having had possession, cannot have interest too.

D. C. Kandy, 66318.

The judgment creditor of a public officer should first endeavour to realize the amount of his writ from

The plaintiffs (D'Esterre & Co), who obtained judgment for Rs. 645. 15, with interest at 15 per cent. sued out writs of execution against the person and property of the defendant (the Rev. J. Bamforth), and directed the Fiscal in terms of clause 32 of the Ordinance No. 4, of 1867, to enforce the writ against the person of the defendant, if he failed to pay the amount due by him or to surrender unclaimed property sufficient to satisfy the amount due on the writ.

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The defendant filed an affidavit and moved the court for the reasons therein stated to order, in terms of cl. 34 of the Fiscal's Ordinance, that a sum of Rs. 20 be seized in execution under the writ, until the plaintiff's claim be satisfied, and further moved that writ against the person be recalled.

The affidavit was as follows :

Edward Elliott maketh oath and saith that from information received he believes that the abovenamed defendant is indebted to the plaintiff upon the judgment in this case in the balance sum of Rs. 350 and that he is unable immediately to meet the claim in full.

That inclusive of this sum of Rs. 350, this deponent saith that the defendant is also indebted to the plaintiff in the balance sum of about Rs. 1,800 (the original debt having been Rs. 300) upon a bond granted by defendant and this deponent believes that this claim is now being settled by monthly payment of Rs. 50 which defendant pays out of his salary.

That in addition to the above sums due to the plaintiff this deponent has been informed, and he verily believes it to be true, that the defendant is indebted to several other shop keepers in the balance sum of Rs. 5,600—and has entered into an agreement with them by which he is obliged to pay a sum of Rs. 200 out of his salary monthly for distribution among his creditors in liquidation of the said debt.

This deponent further saith that the defendant is in the receipt of a monthly salary of Rs. 500, and that from information received he believes that the defendant has for some time past paid and still pays a sum of Rs. 300 to his creditors in manner aforesaid, and that the balance salary is barely sufficient for the support of himself and his large family. This deponent further saith that if the Court would make order in terms of the 34 clause of the Ordinance No. 4 of 1867 that a sum of Rs. 20. (which the defendant is willing to allow) be seized in execution monthly out of defendant's salary under the writ issued in this case till the debt is liquidated, he believes that such order would be fair and reasonable regard being had to the circumstances above stated, the defendant being possessed of no other property.

The learned District Judge *(Lawrie)* allowed the motion and recalled the writ.

On appeal, *Grenier* appeared for appellant, and *Layard* for respondent.

The following authorities were referred to in the argument : *Voet*, 42.1.43 and 2.4.82, *Van Leeuwen's Cens. For.* pt. 2.1.15.29, *Matthaeus de Auct.* 1.6.20, *Bell's Commentaries*, 127, 128, *Wells v. Foster* 8 M. and W.

Cur. adv. vult.

And this day, CLARENCE. A. C. J., delivered the judgment of the court as follows :—

The policy of the Fiscal's Ordinance is that the salary of a public officer should not be seized, until the court has been satis-

his debtor's property, exclusive of the official salary ; failing that, the creditor might apply to attach the salary and in the last resort only might proceed against the debtor's person.

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fied that no other property of the debtor is available to satisfy the writ against property ; and that process against the person of the debtor should not be enforced, until there has been a failure on the part of the debtor to satisfy the writ against property. So that the sequence, where a public officer fails utterly to satisfy his creditor's judgment in the hands of the Fiscal, should be that the creditor should first endeavour to realize the amount of his writ from his debtor's property, exclusive of the official salary ; failing that, the creditor might apply to attach the salary, and in the last resort only, might proceed against the debtor's person.

In the present case, the matter stands now in this position : a writ against person has been recalled, and the District Judge, upon the application, not of the creditor, but of the debtor, has ordered a sum of Rs. 20 out of the debtor's salary to be seized monthly until plaintiff's writ is satisfied. We see no reason to interfere with the order sequestering the debtor's salary to the extent of Rs. 20 monthly, which has been made at the debtor's instance, and which will not prevent the creditor from enforcing his writ as against any other property which the debtor may possess, or, should that remedy fail, to satisfy the writ, from applying for such further sequestration of the debtor's salary (if any) as the District Court may, in its discretion, think fit to award. With regard to plaintiff's remedy against defendant's person, it will be time enough for him to seek to enforce that, when he has exhausted his remedy against defendant's property, as well the official salary as other property, without his writ being satisfied. No costs in appeal.

Affirmed.

D. C. Kalutara, 1.

Ferdinands, D. Q. A. and *Morgan, D. Q. A.* for plaintiff and appellant (the Government Agent) ; *Grenier* and *VanLangenberg* for defendant and respondent.

Every Court has an inherent right to inspect land in litigation before it.

The Supreme Court affirmed the judgment of the court below, as follows :—

We are of opinion that the valuation of the learned District Judge is in conformity with the evidence adduced, and represents the market value of the land.

The District Judge was in error when he held that the words of the Ordinance prevented him and the assessors from inspecting the land. Every court has an inherent right to inspect land in litigation before it. Cases may arise where it would be necessary for the District Judge (after due notice of his intention to do so)

to adjourn from the ordinary court house, and to hold the court for the examination of witnesses, and decision of the cause, on the land itself or its vicinity. 1877 October, 9.

C. R. Kurunegala, 2216.

Browne and *Layard* for plaintiff and appellant, *Ferdinands, D. Q. A.* for defendant and respondent. Village tribunal.

The Supreme Court affirmed the judgment of the court below. in these terms :—

We are of opinion that the Village Tribunal in question had jurisdiction, under the 21 st. section of the Ordinance No. 26 of 1871 to determine and fix the correct boundary between the gardens belonging to the plaintiff and defendant. The parties agreed to a reference of the matter to arbitration, and the judgment of the Village Tribunal, approving of the award of the arbitrators, is unambiguous ; it was laid before the Government Agent under the 32nd section and was affirmed.

The Ordinance does not give appellate jurisdiction to the Supreme Court to review the proceedings of Village Tribunals, and it is therefore impossible for us to review the proceedings of the Tribunal in question. But as the judgment is unambiguous, and decided a matter of fact on a queston within the jurisdiction of the tribunal to try, and as the parties to the case in which the judgment was given are the same as those in the present case, we hold that the judgment of the 14th May was right.

J. P. Matara, 25,624.

P. C. 78,939, 78,940, 78,947, 78,948.

Grenier for appellants.

The following is the judgment of the Supreme Court in the above cases :— Toll Ordinance.

Of these five cases, No. 79,939 and No. 78,947 are counter charges between the same parties under the Toll Ordinance : the toll-keeper of Polwatte gate charging Mr. Bird with evading payment of toll, and Mr. Bird charging the toll-keeper with improperly demanding toll.

In No. 78939 in which Mr. Bird is charged with evading the toll, it is proved that defendant is an officer entrusted with the superintendence of minor roads. The 7th clause of the Ordinance

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exempts from toll all persons employed in the maintenance of any road within ten miles of the toll station at which toll is to be levied, upon production of a certificate from the officer superintending the work. If Mr. Bird, though a superintendent of minor roads, was on the occasion in question driving past the toll station on other than the business of his office, he would be liable to pay toll ; but there is in this case evidence, admissible as part of *res gestæ*, which quite warranted the Police Magistrate holding that Mr. Bird was passing the toll station on road business, on his way, in fact, to inspect a road under his charge. It does not appear that he produced to the toll-keeper any certificate, and counsel for the toll-keeper laid much stress on this incident ; but there was no necessity for him to produce any certificate, since he was himself the officer in charge of the work, and it would be absurd to suppose that he need grant a certificate to himself. It was indeed argued that he ought and should have provided himself with a certificate from the District Chairman or committee. That argument, however, is very simply disposed of by this observation, that the 7th clause of the Toll Ordinance requires, and for very obvious reasons, no other certificate than that of the person actually superintending the work. For these reasons, the order of the Police Court in cases Nos. 78939 and 78947 are both affirmed.

The other three cases are counter charges of assault between the same parties. With regard to these, the Supreme Court is by no means satisfied upon the evidence that either party committed anything in the nature of an assault of which a court of justice need take notice. The decision in these three cases are therefore set aside and the defendant acquitted.

October, 12th.

Present :—CLARENCE, A. C. J. and DIAS, J.

P. C. Colombo, 7983.

The Supreme Court set aside the order of the court below in these terms :—

Plea of *autre fois acquit.*

A man who has been tried and acquitted of a charge brought under the 166th section of the Ordinance No. 11 of 1868, cannot be again tried for the same offence under the 54th section of the Ordinance No. 16 of 1865. The plea of *autre fois acquit* should have been upheld.

D. C. Galle, $\frac{19333}{17184}$

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1. Irregularity in proving previous conviction before verdict.

2. The mode of proving previous conviction.

On a charge of burglary, after the case for the prosecution had been closed, and the prisoner's counsel had addressed the court, *Nell, D. Q. A.*, "put in evidence case No. 14155 in which prisoner "was convicted of stealing a bullock and hackery, in case the "court intended to convict."

The learned District Judge convicted the accused in these terms :—

In the absence of any evidence on the part of the prisoner to show that he went with any other motive, the court must hold according to the evidence that it was with the intention of theft, and the case put in shows the prisoner to have been formerly convicted of stealing. He is sentenced to 12 months' imprisonment with hard labor and to receive 20 lashes.

On appeal, *Grenier* for appellant contended that the putting in of the previous conviction before sentence, was altogether informal and the proceedings ought therefore to be quashed. The District Judge had apparently been influenced by the previous conviction in arriving at the conclusion he did.

Ferdinands, D. Q. A., would not gloss over the irregularity, but the District Judge was far too able a man to allow the previous conviction to weigh in his mind as to the guilt of the prisoner on the charge then before him. Indeed the District Judge recorded that the case put in evidence was available only in case he intended to convict. But under any circumstance, it was competent to the Supreme Court to reject that part of the evidence and see whether, independently of it, the conviction might stand. He submitted it would.

Cur. adv. vult.

And now the Supreme Court affirmed the judgment as follows :—

We notice with great surprise that at the trial of this case the Deputy to the Queen's Advocate adduced, before the District Judge had pronounced his verdict on the information, to prove a previous conviction against the prisoner. We have considered whether, under these circumstances, we should not quash the proceedings, if not acquit the prisoner. We have however decided to affirm the conviction, because we can find no ground for supposing that the District Judge's mind was influenced to a conviction by this improper suggestion of previous conviction. The evidence proved beyond doubt the prisoner's forcible entry into the complainant's house by night, and there was no explanation whatever for the defence.

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We have also to point out that even had the evidence to prove a previous conviction been tendered after the Judge's verdict on the indictment, it was singularly deficient. A previous conviction cannot be proved by merely putting in a District Court record, without any evidence to prove the identity of the prisoner.

D. C. Kalutara, 29927.

Whether entering the witness-box with one's slippers on, is a contempt of court.

On appeal against a conviction for contempt of court, *Ferdigands*, *D. Q. A.* appeared for appellant, *Braeue* for respondent. The Supreme Court held as follows :—

Conviction set aside. If the appellant entered the witness box with his slippers on from intentional bravado, such a proceeding would be a contempt of court which the District Judge might punish, but the Supreme Court thinks that the District Judge was over hasty in jumping to the conclusion that a contempt was intended. It is hardly likely that the appellant, himself a suitor in the case, can have deliberately intended to affront the Judge, and the Supreme Court considers that the District Judge would have acted more discreetly, had he, in the first instance at any rate, contented himself with calling the witness's attention to the circumstance and directing him to remove his slippers.

October, 16th.

Present :—CLARENCE, A. C. J. and DIAS, *J.*

P. C. Colombo, 8466.

Maintenance.

This was a charge of maintenance, which the Police Magistrate, after evidence heard, dismissed. On appeal, the Supreme Court called upon the Magistrate to state his reasons for the dismissal of the case. He wrote as follows :—

The Registrar, Supreme Court.

SIR,

In reply to your letter of the 11th instant, I have the honor to state that the complainant admitted that the defendant had been supporting the eldest child which was with him. Defendant did not admit the paternity of the other two children, and I considered that complainant had not adduced such evidence as would justify a finding

that they were defendant's children. He was accordingly not called on for his defence, and defendant acquitted on complainant closing her case. 1877. October, 16.

Yours &c,

W. PENNEY.

Dornhorst appeared for appellant, *Grenier* for respondent.

The Supreme Court held as follows :—

After reading the Police Magistrate's letter, explaining his reasons for the order made and appealed from, it is directed that the order be affirmed.

Having regard to the Police Magistrate's letter, we may add that, following the English decisions, his order is not to be considered as a dismissal on the merits, barring future application in respect of the two young children, (*re* Harrington, 12 W. R. 420.)

P. C. Matara, 78927 and 78928,

In accordance with the Police Magistrate's directions referred to in case No. 78,789, reported in page 263 of these reports, cases were instituted against the gamblers and keeper of the gambling house before the Gansabhawa of Wellabada-pattu and thence transferred to the Police Court. In case No. 78928 defendants were charged with gambling with cards and dice at a house in Dondra, kept for the purpose of common or promiscuous gaming, in breach of Ordinance 4 of 1841, sec. 4, subsec. 4; and in case No. 78927 a Notary was charged with keeping the house, in breach of Ordinance 4 of 1844 sec 19.

In both cases various legal objections were taken which were over-ruled by the Police Magistrate *(Arunachalam)*, who convicted the defendants, holding the following facts proved in 78927 (the same facts were proved in 78928). "1.—That on the 28th of July, two Policemen went with witness Bastian to the President of Wellabadapattu, the chief resident official at Dondra, and after obtaining his permission went with two others, five in all, to defendant's house (which is not far from the President's), saw a large crowd of people gambling with dice and cards for money, and as the gamblers rose and ran, seized seven of them, (the defendants convicted in 78928) and at once took them before the President, and then before this court,—and that they found in the gambling room, the cards and dice &c., produced before this court. 2.—That on the three days immediately preceding the 28th of July, *i. e.*, I believe, from the beginning of the Dondra Perahéra—the two

1. A plea of *autre fois acquit* will not avail without proof of acquittal.

2. Construction of cl. 53 of the Village Council rules of the Wellabadapattu, Matara.

3. The jurisdiction of the Police Court to try gambling offences under the Vagrants' Ordinance is not ousted by the jurisdiction of the Gansabawe

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Policemen, owing to rumours in the village that gambling was going on at defendant's house, went to the house, and saw people running through the jungle behind the house; and that on the 27th of July and early on the 28th of July, witness Bastian went to the house and saw crowds of people actually engaged in gambling for money with cards and dice.

to try them as breaches of the Village Council's rules, [and per *Lawrie, J.*, it is not merely not ousted by, but ousts the jurisdiction of the Gansabawe.]

"These facts are quite enough to maintain the charge in the plaint, that the house was kept for the purpose of common or promiscuous gaming. Defendant is the owner and occupier of the house, and has lived in it with his family for at least ten years, and was living in it during the Perehera week. It does not appear that on the occasions on which the witnesses visited the house, he was seen in it, but I do not think with defendant's counsel that it was necessary to shew that he actually superintended the gambling and received the profits. Such evidence is very rarely procurable, especially where the keeper holds a fairly respectable position in society, such as the defendant (a Notary) appears to hold. But it is not for a moment to be supposed that large crowds of people can assemble in a house and gamble for days, unless the actual occupier of it sanctions and approves of the gambling and receives some compensation in return for the risk he runs."

4. The jurisdiction of the Gansabawe, as described by cl. 25 of Ordinance No. 22 of 1871, is exclusive only in those civil and criminal cases expressly scheduled as such in cl. 21.

On appeal, *VanLangenberg* and *Grenier* appeared for the appellants in each of the cases, and *Ferdinands, D. Q. A.* for respondent.

The Supreme Court affirmed the conviction in both cases for reasons given in the following elaborate judgments :—

Opinion of the Acting Chief Justice.

5. The simple fact of a European being complainant, irrespective of the circumstances under which he came to be such, ousts the jurisdiction of the Gansabawe.

These two cases come before us on appeal by defendants against convictions in No. 78,928, of gambling in a place kept for common gaming, and in No. 78,927 of keeping a place for common gaming, the former charge being laid under sub-section 4 of clause 4 of the Vagrant Ordinance 1841, and the latter under clause 19 of the same Ordinance.

6. What evidence is sufficient to convict a keeper of a

The first plea raised in each case was a plea of *autre fois acquit*. That plea was clearly not maintained, because there was no proof of any acquittal. It appears that originally charges were preferred against defendants in the Police Court, and on a contention being raised for the defence, that the Police Court had no jurisdiction, the Police Magistrate, though holding an opinion that the Police Court had jurisdiction, thought it well that the charges should be disposed of by the Gansabhawa, and so struck off the case. The charges were then preferred in the Gansabhawa, and thence, under the interference of the Government Agent, re-transferred to the Police Court, by institution of the cases now in appeal. Doubtless,

if the Police Magistrate was of opinion that his court had jurisdiction to try the original charges preferred, his proper course was to over-rule any plea raised as to jurisdiction, and proceed to trial of the charges: however, in the events which happened, defendants cannot maintain this plea of *autre fois acquit*, since there has not been any acquittal.

After disposing of this short point, we come to the question of jurisdiction itself, and it is contended for the defendants that by virtue of the 25th clause of the Village Communities' Ordinance, the Police Court jurisdiction to try these charges was ousted, and that this alleged gambling, and this alleged keeping of a common gaming-place were cognizable only on prosecution before the Gansabawa. The 53rd clause of the Village Council rules for the district in question declares that

> "any person found gambling, cock-fighting, or hackery-
> "racing on public thoroughfares, shall be liable to a fine
> "of Rs. 10, and any person keeping a house or place of
> "gambling or cock-fighting, shall be liable to a like fine,
> "and a further fine not exceeding Rs. 5 per day if such is
> "continued after notice to abstain from a breach of the
> "rule."

I think it reasonable to refer the words "on public thoroughfares" to hackery-racing only.

The contention then is, that since gambling and keeping a gambling place are punishable in the Gansabawa under this rule, the Police Court jurisdiction is ousted by the 25th clause of the Village Council Ordinance which provides that

> "the jurisdiction, civil and criminal, conferred on the
> "tribunals hereby created, shall as respects the natives of
> "sub-divisions in which they are established, and subject
> "to the proviso in clause 21 * *, be exclusive, and
> "shall not be exercised by any other tribunal, on any
> "plea or pretext whatsoever."

This contention at once fails, for the purpose of the present cases, because the complainant in both cases, an Inspector of Police, is an Englishman, and not a native, clause 21 requires "both parties" to a "criminal case" to be natives; except in consent cases, in order to found the Gansabawa jurisdiction. In the cases before us, we have no concern to enquire how Mr. Holland came to be the complainant, it is sufficient for us to know that he is the complainant.

But the general question of jurisdiction which has been argued before us is one of importance, and we do not think we should do right in deciding these appeals upon the short ground that the complainant is not a native; we shall therefore consider the contention raised apart from that circumstance.

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In limine we do not view the question as one of a repeal of the provisions of the Vagrant Ordinance in hâc re by the Village Council Ordinance. There are no doubt instances, to some of which we have been referred in argument, in which a statute creating an offence, and affixing a particular penalty, has been held to be constructively repealed by a subsequent statute which described the same offence and affixed a different penalty. Such questions are questions of the Legislative intention. We do not think the question arises, whether, by virtue of this Village Council rule as incorporated in the Village Council Ordinance, there be such a thing as a partial local repeal of certain portions of the Vagrant Ordinance. But the question still remains, whether, having regard to the 25th clause of the Village Council Ordinance, the Police Court can any longer exercise its jurisdiction over these charges.

Under the Vagrant Ordinance, the Police Court may punish gambling in certain places with £ 2 fine or one month imprisonment at hard labour. Under the Village Council Ordinance, the Gansabawe may punish gambling in any place with Rs. 10 fine only. Under the Vagrant Ordinance, the Police Court may punish keeping a gaming place with as much fine or imprisonment as the Court has jurisdicton to award, so that if the Police Court jurisdiction is ousted by the Gansabawe jurisdiction, no gambling or keeping of a gambling place can ever be punished in this District with more than the limited punishment which the Gansabawe can award. The exclusive jurisdiction spoken of in cl. 25 of the Village Council Ordinance is "the jurisdiction civil and criminal hereby created." The clause of the Ordinance which professedly creates civil and criminal jurisdiction is cl. 21, which declares that the Gansabawas are "to try breaches of Village councils' rules, and to exercise civil and criminal jurisdiction" in the civil and criminal cases thereinafter described. Probably the truth is that when the Village Communities Ordinance was enacted, the contingency of a Village Council rule overlapping the criminal jurisdiction of any existing court was not thought of. The Legislature seems to have regarded the Gansabawe jurisdiction of trying breaches of Village Council rules, and the Gansabawe criminal jurisdiction of trying to a limited extent offences already constituted by existing law, as distinct matters, and the reason why clause 25 contains no express reference to breaches of Village Council rules probably is, that it was never conceived as possible that any other court could have or claim jurisdiction to try a breach of a Village Council rule. This latter consideration supplies, I think, the answer to the question now mooted. When a man is indicted under a statute or Ordinance, the offence is a breach of the statute or Ordinance, the act alleged is but the mode in which the enact-

ment is said to have been infringed. So in the present instance, a man can only be charged before the Gansabawe with a gambling offence as a breach of the Village Council's rule in that behalf, and the breach of the Village Council's rule could never be cognizable by the Police Court. I have no doubt that the provision as to the exclusive jurisdiction contained in clause 25 was intended to be restricted to those civil and criminal cases expressly scheduled as such in cl. 21. If gambling had been named in the criminal schedule, as another class of charge also to be found in the Vagrant Ordinance is named, viz. maintenance cases, then undoubtedly the Police Court jurisdiction would have been ousted; but gambling is not named in the criminal schedule. I regard the Legislature as having provided for exclusive Gansabawe jurisdiction only in those matters scheduled in clause 21, and as having done so with the mind that criminal matters, included in Village Council rules, could not give rise to any conflicting jurisdiction, owing to the very circumstance that, in such cases, the cognizable offence would be the breach of the rule, which of course could only be dealt with by the Village tribunal. A breach of the 53 cl: of these Gansabawe rules is an offence triable by the Gansabawe only. A breach of the Vagrant Ordinance enactment against gambling, is an offence triable by the Police Court, and not by the Gansabawe.

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For these reasons, I think that the jurisdiction of the Police Court to try gambling offences is not ousted by the jurisdiction of the Gansabawe to try in breaches of the Village Council's rule against gambling.

I am further of opinion that the convictions in these cases are sustainable upon the merits. In No. 78,928 the evidence is quite sufficient, and in No. 78,927, in which the defendant is charged with keeping a place for common gambling, the evidence is also sufficient. Although there was no evidence of the defendant in the latter case being in the house at the time when the Police made their descent, there was evidence that the house was his family residence, that it was being then used for common gambling, that it had been used for the same purpose before; and, moreover, there was evidence that defendant, though not seen when the Police descended upon his house, was not absent from his village.

It appears from the judgment of the Police Magistrate in one of these cases, that the Police Magistrate, before deciding the case, went to view the spot, and also examined on the spot two of the witnesses for the prosecution. It was quite proper for the Police Magistrate to inspect the place, but with regard to his examining witnesses there, it does not appear from the record that the defendants or any one on their behalf were present when such examination took place. However, we need take no further notice of this point, since it has not been adverted to in the appeal.

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The opinion of the Acting Junior Puisne Justice (Lawrie), delivered by Mr. Justice Dias:—

I am of the same opinion. Village Tribunals were established "to diminish the expense of litigation in petty cases, and to promote the speedy adjustment of such cases."

Their jurisdiction in criminal matters is limited to petty assaults, thefts, &c., and the test of whether an offence is within or beyond it, is whether the appropriate punishment is greater than a Rs. 20 fine.

The 2nd and 3rd provisos of the 21st clause and the 31st clause regulate what shall be done, if charges for more serious offences have by mistake been entertained. Not only is power given to the President of the Tribunal and to the Queen's Advocate and Government Agent to direct the cause of action to be tried by the Police Court, but by clause 31st, as soon as the President discovers that the case is one in which the appropriate punishment is more than Rs. 20, he must stop the trial, and order the cause to be transferred to the proper court. A counterpart of these provisions is found in the 25th clause, for it is there enacted that it shall be the duty of every court, whenever it shall appear to it that the case before it is one properly cognizable by a Village Tribunal, to stop the further progress of the case, and refer it to the Village Tribunal of the district.

It is maintained by the appellants in these cases that the offences of which the accused were charged, were offences properly cognizable by the Village Tribunal, and that the Police Magistrate ought to have refused to entertain the charge, and to have referred the case to the said Tribunal.

The offences in question are gambling, and keeping a house for gambling, both laid under the Ordinance No. 4 of 1841. The Village Tribunal had no jurisdiction to try the offences under the Ordinance No. 4 of 1841, and neither offence is included in the list of those expressly assigned by clause 21. That is not surprising, for so far from gambling being regarded as a petty offence, it has long been looked on as a serious one, because it so often leads to crimes of violence. But it is urged that because one of the rules of the village community, which this Village Tribunal has authority to enforce, provides a punishment for gambling, the Village Tribunal has exclusive jurisdiction.

> The rule is this, "any person found gambling * * shall be "liable to a fine of Rs. 10, and any person keeping a "house or place of gambling * * shall be liable to a "like fine, and a further fine not exceeding Rs. 5 a day, (if) "such is continued after notice to abstain from a breach "of this rule."

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The body of the rules in which this occurs applies to almost every subject which can affect a rural population. All such rules are intended to supplement the common or statute law, to render it more easily applicable and more readily enforced in the special circumstances of the village or district, and are not intended to repeal or alter the law applicable to the whole Island.

The words of the rule as to gambling are more comprehensive than the words of the Ordinance No. 4 of 1841. By the rule, gambling even in a private house among friends is punishable. The rule thus supplements the Ordinance, and is intended to prevent gambling, that is, gambling in the statutory sense of checking the taste for it being contracted in places where the Legislature did not venture to intrude.

I am therefore of opinion that there is a kind of gambling which the Village tribunal has exclusive jurisdiction to punish, but that it has no power to punish the gambling struck at by the Ordinance; so that, if a prosecution were commenced against gamblers or keepers of gaming houses as for a breach of this rule before a Village Tribunal, and it appeared in the course of trial that the offence was one which fell under the Ordinance, and consequently that the appropriate punishment was higher than the tribunal could impose for a breach of the rule, it would be the duty of the president at once stop the trial under the 31st section, and to refer the case to the Police Court.

For these reasons I have no difficulty in sustaining the jurisdiction of the Police Court and in concurring with the opinion of the Chief Justice on this as well on the other questions raised in these appeals.

C. R. Puttalam, 10,312.

A party summoning a witness to a criminal trial is not bound to remunerate him.

The judgment of the Court below was set aside in these terms—

Plaintiff claims to recover from defendant, the complainant of a criminal case in the Puttalam Police Court, Rs. 8.50 for coming 17 miles to Puttalam to attend Court. It has already been shewn in an able judgment by Sir Edward Creasy (*No. 5,159 C. R. Negombo*, 3rd December, 1863), that in this matter, the English rule has been adopted as the law of this Colony, the Civil Law being on this point over-ridden by the English rule, under which the party summoning a witness to a criminal trial is not bound to remunerate him.

It does not clearly appear whether plaintiff lives in Puttalam,

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or at the place whence he came to attend Court. If the former, he could not have charged these travelling expenses even in a civil case.

Plaintiff's action will therefore be dismissed with costs.

D. C. Colombo, 317.

Informal proceedings in contempt of court.

In this testamentary suit, the guardian was found guilty of contempt of court.

On appeal, *Grenier* appeared for appellant, *Layard* for respondent.

The Supreme Court set aside the order complained of, in these terms:—

The Supreme Court is unable to discover the previous order referred to by the District Judge in his order of 5th October. In the latter order, the learned judge refers to certain deeds, and judging from the appeal petition, the appellant seems to have been committed for the non-production of these deeds. There is no definite order in the case calling upon the appellant to produce any deeds. All that appears on the record is a report of the testamentary clerk of the 22nd January 1875, in which he says that the appellant should be required to produce the transfers as ordered on the 30th August 1866, which statement is not borne out by the order of that date. The District Judge should make a definite order on the appellant to produce the deeds in question within a given time, and if they are not produced, or their non-production sufficiently accounted for, deal with the appellant as for a contempt.

October, 18th.

Present :—LAWRIE, J.

The Queen v. *Meera Saibo.*

Indictment for a false defamatory libel will lie according to the law of this colony, it being held that the

[Though this case was not before the Supreme Court in its *appellate* jurisdiction, it has been thought desirable to insert a report of it here from the fact of its being a novel case.]

At the Sessions of the Supreme Court in its original jurisdiction, holden at Colombo during October, the indictment presented to the court was as follows :—

The Honorable Richard Cayley, Esquire, Advocate of Our Sovereign Lady Queen Victoria, informs the said Court that Mutu Mirasaibo, un-

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Roman Dutch law should be considered obsolete on this point.

lawfully wickedly and maliciously contriving and intending to injure vilify and prejudice one George Adolphus Hole holding the offices of salt superintendent and Deputy Fiscal Puttalam and to deprive him of his good name fame credit and reputation and to bring him into public contempt, scandal, injury and disgrace on the first day of March in the year of our Lord one thousand eight hundred and seventy seven, unlawfully wickedly and maliciously did write and publish, and cause and procure to be written and published a false, scandalous, malicious and defamatory libel in a petition addressed to the Government Agent for the North Western Province, containing divers false scandalous malicious and defamatory matters and things of and concerning the said George Adolphus Hole and charging and accusing the said George Adolphus Hole with and of various corrupt practices, to wit, of bribery and extortion in the discharge of his official duties as salt superintendent and Deputy Fiscal. In a certain part of which said petition, there were and are contained certain false malicious and libellous matters of and concerning the said George Adolphus Hole according to the tenor and effect following, that is to say (1) "Heads of salt "department of former days give in contract to build salt stores to "receive the salt of the inhabitants to people of consequence and with "good security, but at present Mr. Hole gives in contracts to his barber "Madasami and doby Mari Muttu", meaning thereby that the said George Adolphus Hole corruptly and in dereliction of his duty as salt Superintendent gives out public contracts to persons unfit to carry them out and being in his private employ: whereas in truth and in fact the parties indicated were and are fit persons to undertake such work and never were in the service of the said George Adolphus Hole as barber and doby as falsely alleged as aforesaid.

And the said Advocate further informs this Court that in a certain other part of the said petition there were and are contained certain other false malicious and libellous matters of and concerning the said George Adolphus Hole according to the tenor and effect following, that is to say, (2) "Although orders were issued to the effect that salt will "be issued from first January from Kalpitiya and Nachchikalli stores, "yet if a sum of five Rupees is offered, he directs them to Kalpitiye "which can be ascertained from the records of the Kachcheri"—meaning thereby that the said George Adolphus Hole upon receipt of a bribe of five rupees disregards orders previously made as to issue of salt.

And the said Advocate further informs this Court that in a certain other part of the said petition there were and are contained certain other false malicious and libellous matters of and concerning the said George Adolphus Hole according to the tenor and effect following, that is to say (3) "When the manufacturers have collected their salt and "heaped them according to their respective number, he, having received 'fowls jaggery and money, permits the owners of numbers 15 or 20 "to remove their salt soon after number one is over; when questioned "as to why it was, he brings out frivolous excuses to the effect that "kuttus are leaking &c &c, for all these things the storekeeper also "has a hand. The salt store superintendent is ignorant of the bribes "that the storekeeper receives and the storekeeper is ignorant of the "bribes that the salt superintendent receives". Meaning thereby that

1877 October, 18. — the said George Adolphus Hole is in the habit of corruptly receiving bribes in money fowls and jaggery in the discharge of his public duties as sait superintendent.

And the said Advocate further informs this Court that in a certain other part of the said petition there were and are contained certain other false malicious and libellous matter of and concerning the said George Adolphus Hole, and to the tenor and effect following, that is to say, (4) "in the absence of the Assistant Government Agent, having "received handsome bribes, he issues orders to sell properties sequester- "ed under writs without taking any security at the time, when title "deeds are produced he takes no notice of them". Meaning thereby that the said George Adolphus Hole in the discharge of his official duties as Deputy Fiscal as aforesaid, is in the practice of corruptly receiving bribes and extorting moneys from parties whom he unfairly benefits to the prejudice of others.

And the said Advocate further informs this Court that in a certain other part of the said petition there were and are contained certain other false malicious and libellous matters of and concerning the said George Adolphus Hole according to the tenor and effect following, that is to say, (5) "On the twelfth of July one thousand eight hundred "and seventy six he has received from me also twenty five Rupees "in cash and three fowls." Meaning thereby that the said George Adolphus Hole corruptly received the said twenty five Rupees and three fowls as a bribe in the discharge of his public duties: he the said Mutu Mirasaibo then well knowing the said several defamatory statements to be false, to the great damage scandal and disgrace of the said George Adolphus Hole, to the evil example of all others in the like case offending and against the peace of our Lady the Queen Her crown and dignity.

Ferdinands, D. Q. A. for the crown.

Templer for the prisoner raised the following question of law, whether, the colony of Ceylon being under the Roman Dutch Law in all criminal cases not especially provided for by the Ordinance for the time being in force, a criminal suit could be brought under the Roman Dutch Law for a libel?

He cited *Van der Linden's* Institutes (Henry's edition), p. 340 commencing "simple defamation" to end of p. 341, and argued that the prosecutor, though employed by government, was not a member of the government within the meaning of this section. He further cited *Van Leeuwen* ch. xxxvii § i. "the sheriff or the "public has no peculiar right to an action of injury or slander, or "to institute a criminal suit on that account, unless it be an un- "common calumny, in which the public is interested on account of "the consequences" also § 3 of the same ch. p. 481; and Voet *ad Pandectas* lib. xlvii. tit. x. sec. 17, commencing "*quia tamen pœna* to "*si alieno delicto læsi sint*", also sec. 18 of the same lib. and tit. commencing with the beginning of the sec. to "*convenient r legi*": from which he argued that no criminal prosecution lay under the circumstances against the prisoner.

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Ferdinands D. Q. A. was not heard in reply.

LAWRIE, J., held *first* that the prosecutor was not a member of the government, as defined by *Vander Linden* ; but that a criminal prosecution for libel on a private individual, can be sustained by the English Law, and by that of all civilized nations of the present day ; and consequently the Roman Dutch Law, in the present case, presuming it to be conclusive in favor of the prisoner's contention, must be considered obsolete.

After the jury had found the prisoner guilty, *Templer* moved in arrest of judgment, that the Judge's ruling was such an error in matter of law as would fall within sec. 20 of Ordinance No. 28 of 1865, and that the question should be re-argued before the collective court. Section 23 was read.

Ferdinands, D. Q. A. in reply was stopped by the Judge.

Held by LAWRIE, J., that inasmuch as he had previously taken the opinion of one of the other Judges of the Supreme Court on this very point, and as both were agreed on their law, that a re-hearing of the arguments would only create a delay, and could not have any effect on the eventual punishment of the prisoner, and the motion was accordingly refused.

October, 19th.

Present:—CLARENCE, A. C. J. and DIAS, J.

P. C. Colombo, 8,579.

Dornhorst for appellant.

The following judgment of CLARENCE, A. C. J. sets out the facts of the case :—

Under cl. 26 of Ordinance No. 10 of 1844, imprisonment may be inflicted, even though the plaint is not entitled under the amending Ordinance No. 8 of 1869.

This case was argued before me when I was sitting alone, and I was about to affirm the sentence, entertaining no doubt but that it was within the power of the Police Magistrate to inflict it, when counsel for the appellant drew my attention to the case *P. C. Colombo, No. 3,430* reported at p. 41 of Mr. Ramanathan's Reports. I certainly am of opinion that, since the Ordinance No. 8 of 1869 which alters the extent of punishment which may be inflicted for breaches of clauses 26 and 29 of the Ordinance No. 10 of 1844 is, by virtue of its 2nd clause, to be read and construed as if it and the Ordinance of 1844 were one Ordinance, the Police Magistrate can inflict the larger measure of punishment meted out by the Ordinance of 1869, without it being a condition precedent to his

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power to do so, that the complainant should have entitled his plaint under the Ordinance of 1869 as well as under that of 1844. I should not, however, sitting alone have ventured to assert my own opinion counter to what appears to have been a decision of the collective court. But holding very strongly the opinion which I have mentioned, I have consulted my brother Dias and my brother Lawrie, and as they agree in my view, I shall give expression to it by affirming the sentence appealed from.

P. C. Ratnapura, 2,249.

A charge of forcible entry, under the proclamation of 1819, cannot be met by impeaching, though *bona fide*, the title of the complainant.

Per curiam: This is a charge under the Proclamation of 5th August 1819, consequently if complainants establish that they were in the actual occupation of the land, the criminal charge cannot be met merely by defendants impeaching, although *bona fide*, the lease under which complainants were in.

If this were a proceeding under the Malicious Injuries Ordinance, the existence of a bona fide claim on the part of the defendant would be a proper reason for referring the complainants to a civil action; but under the Proclamation, the offence is the forcible assertion by a breach of the peace of claim real or colorable only, without the authority of a proper court. See *P. C. Kandy, 87,359* Vanderstraaten's Rep. p. 261.

Set aside and case sent back for trial.

P. C. Kalutara, 58,104.

A constable acting under the orders of his Serjeant, cannot be charged with frivolous arrest, under cl. 169 of Ordinance 11 of 1868.

Per curiam:—This is a prosecution under cl. 167 of Ordinance No. 11 of 1868, and the issues is whether the Police Constable frivolously and vexatiously arrested complainant. It cannot be said that he acted frivolously or vexatiously, when, according to the evidence, he acted merely upon the orders of his Serjeant. Whether the arrest was legal or illegal is not the issue.

Affirmed.

P. C. Lindulla, 1,815.

VanLangenberg for defendant and appellant.

Per Curiam:—Whether or not complainant has an action for

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false imprisonment against defendant for detaining her in his own premises after her arrest on his own writ against her person, is a question which we have not now to decide. She cannot maintain her present charge under clause 167 of Ordinance No. 11 of 1868, which has reference to arrest and detention on criminal charges.

Clause 167 of Ordinance No. 11 of 1868 has reference to detention on criminal charges only.

Judgment set aside and defendant acquitted.

J. P. Jaffna, 12,110.

The appeal lodged against the order of the Justice were rejected as "no appeal lies by way of appeal to the Supreme Court against an order of the Justice of the peace declining to entertain a charge and discharging the accused."

No appeal lies to the Supreme Court against an order of J. P

P. C. Jaffna, 14504.

The Supreme Court held as follows :—

This court has already pointed out in *P. C. Colombo 1770*, December, 12th 1876, that it is not necessarily incumbent on a complainant to attend and point out his defendant for the execution of process, though he may be required to do so if his aid is really necessary for the identification of the defendant. In the present case, we certainly cannot take upon ourselves to say that the description given of defendant's name and residence is insufficient without the aid of complainant. If the Fiscal's officers are unable to serve the process without complainant's aid, complainant may be noticed to attend and point out his defendant.

P. C. Mallakam, 6623.

This was a case of assault, and of unlawfully and maliciously destroying a boundary fence. After evidence was heard for the complainant, the Police Magistrate recorded as follows :—

1. The statements made on oath of a witness, legally taken, are admissible evidence against him, if he is sub-

"Complainant's Proctor moves to put in evidence case No. "6621, P. C. which is a counter case to this, to prove that accused "did destroy the limit fence, according to his own admission. Ac- "cused's Proctor objects that as a criminal case, it cannot be put in evidence against the accused. The case is received in evidence

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to prove the statements spontaneously made by this accused just now to the court, I think this is quite admissible, although it is a criminal case. That case was called and disposed off immediately before this, and is a counter case to this, referring to the same transaction at the same time and place."

On appeal against a conviction, (*Ramanathan* for appellant), the court affirmed the finding as follows :—

2. Mode of proving depositions.

It was quite competent to the prosecution to prove as against accused in this case the statements made by him, when giving evidence in case No. 6621 as a witness. It must be taken as settled by the decision of the Privy Council in *R.* v. *Coote*, L. R. 4 P. C. 599, that the statements, made on oath of a witness, legally taken, are admissible evidence against him, if he is subsequently tried on a criminal charge, excepting always answers to questions which he was improperly compelled to answer, in spite of objections raised by him, that the answers would criminate him. We must however point out to the Police Magistrate that the proper way of proving the evidence given by the present defendant, in his case No. 6621 would have been by calling some person who heard the evidence, for instance, the Interpreter of the Court who signed the deposition, and in whose hands the deposition might have been placed. The mere "putting of case No. 6621 in evidence" proves strictly nothing more than that such a case exists. We need say no more on the point, because no objection on the head was taken by defendant's Proctor.

D. C. Colombo, No. 1.

The following was the *special case* stated to the court:—

Lex loci solutionis and the currency in which such payment is to be made on a contract of life assurance entered into in Ceylon in 1852.

"A policy of assurance was effected over the life of Sir Richard Francis Morgan on the 18th day of February 1852 No. 1105 with the Standard Life Assurance Company for the sum of £ 4999-19 sterling which is herewith filed.

"The premiums due and payable on the aforesaid policy of assurance were paid half yearly by Sir Richard Morgan in Colombo and a receipt in the following form was given by the agents of the said Assurance Company in Colombo in acknowledgement of the above mentioned payments.

" 'Received the sum of forty seven pounds four shillings and ten pence sterling being the premium for one ½ year's assurance of £ 4999-19 on the life of Richard Francis Morgan under the above mentioned Policy, from 18th November 1875 to 18th February 1876."

Signed JAMES HAWIE CLASON.
p. p. Manager.
Signed DAVID SCOTT.
p. Secretary.'

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"The payment of the premium before the change in local currency was made in pounds, but after the 1st January 1872 the payment was made in present currency, each pound being considered equivalent to ten Rupees.

"Sir Richard Francis Morgan departed this life on the 27th day of January 1876, having by his last will and testament dated the 22nd day of June 1875 appointed his wife (the present plaintiff) sole executrix.

"The said will was duly proved by the said executor, and probate granted on the 3rd day of July 1876 by the District Court of Colombo.

"By the death of the said Sir Richard Francis Morgan recited above, the sum of £4,999 19 has become due and payable by the said Assurance Company to his Executrix.

"The question submitted to this court for decision is whether the said Assurance Company is bound to pay the amount of the policy in pounds sterling, or in the legal currency of the Island at and after the rate of two shillings to the rupee."

Extract from the Policy.

Whereas Mrs. Classina Joselina Morgan, wife of Richard Francis Morgan Advocate of the Supreme Court of Ceylon, residing in Colombo, being desirous to effect an Assurance on the life of the said Richard Francis Morgan her husband to the extent of four thousand nine hundred and ninety nine pounds nineteen shillings sterling, with the Colonial Life Assurance Company, under class C, in accordance with the "Regulations and conditions of Assurance" printed on the back of this Policy, and having subscribed, or caused to be subscribed, and deposited at the office of the said company in Colombo, Ceylon, a declaration, bearing date the fifteenth day of January 1852, which is also signed by the Directors subscribing as relative hereto, and which is hereby declared to be the basis of this Assurance, and having paid to the Directors the sum of two hundred and twelve pounds five shillings and ten pence sterling as the premium for such Assurance for one year from the eighteenth day of February 1852.

Now be it known by these presents that if the said Richard Francis Morgan shall die at any time within the term of one year, as above set forth, the capital stock and funds of the said company, shall be subject and liable to pay, and are hereby charged with the payment, to the said Mrs. Classina Joselina Morgan her executors, administrators or assigns of the said sum of four thousand nine hundred and ninety nine pounds and nineteen shillings sterling at the end of three calendar months after the death of the said Richard Francis Morgan shall have been certified and proved to the Directors of the said company, the said sum of four thousand nine hundred and ninety nine pounds nineteen shillings sterling to be paid at the office at the said company in Colombo Ceylon from which this Policy has been issued, or at the office of the said company in London, at the option of the Directors of the said Company.

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The learned District Judge (*Berwick*) held as follows :—

As in the case already decided to-day between *Gordon and the Assignees of Brodie* [see pp. 224-227 of these reports,] the preliminary question in the present case is the place where the debt is payable. I have carefully studied the Policy of Assurance and find that it contains an express provision as to the place of payment, but no provision as to the currency in which payment is to be made, which latter is what the words "special provision" in the Queen's Order in Council refer to.

The Policy contains an express provision that the debt shall be payable either in Colombo or in London at the option of the debtor, and until that option is exercised and declared no judgment can be given on the present point. But although no formal declaration is evidenced by the special case, it would be idle for the Court to wait for such a mere formality because the very submission of the special case implies the Insurance Company's desire and intention to pay at the place most favorable to themselves viz., Colombo, and it is agreed by counsel at the bar that the option has already been declared.

The debtor having declared his option to pay in Colombo, the debt is payable in Colombo, and as the Policy contains no special provision as to the currency in which the debt is to be paid (construing the word pound sterling as I have done in the case of *Dobree vs. Hayley*) it follows that the Policy of Insurance is within the purview of the Order in Council, and that it is competent to the debtor to pay the sum assured in silver rupees at the rate of one-tenth of a gold sovereign to a rupee instead of in gold or British currency.

On appeal, *Grenier* appeared for the executrix and appellant, and *VanLangenberg* for respondent.

The Supreme Court held as follows :—

This is a contract of Life Assurance created in 1852. It was indeed contended for the appellant that the contract must be reckoned as dating from the time of payment of the last premium, which of course would be subsequent to the date of the currency proclamation (1st January, 1872); but that contention cannot be maintained for a moment. The payment of the premiums simply prevented the existing contract from determining, and did not create a new contract of assurance. The sum assured is payable in Colombo, or in London, at the option of the assurers. They have elected to pay in Colombo, and consequently the money is payable, under the Proclamation, in rupees, at the rate of one rupee for every two shillings. The contention of the appellant completely fails ; and the appeal is therefore dismissed with costs.

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Present :—CLARENCE, A. C. J., DIAS, J. and LAWRIE, J.

D. C. Kandy, 1148.

The following application of Clans Budde, in the matter of the last will and testament annexed of the late A. C. T. Meyer, explains the facts of the case :—

"That by the will executed by the testator on the 11th April 1873, he appointed Christian Ernst Mirus his executor.

"That the said C. E. Mirus having pre-deceased the testator, the testator did on the 2nd May last, instruct Frederick John de Saram, his notary, to prepare a codicil to his said will, substituting applicant as executor in the stead of the said C. E. Mirus.

"That the said F. J. de Saram did accordingly prepare a codicil in terms of the aforesaid instructions and such codicil was according to an appointment made with the said testator to have been executed on the day following.

"That the said testator having died suddenly on the night of the 2nd May, the codicil was not executed by him, (vide affidavit the said F. J. de Saram).

"That Louise Sophia Meyer, the widow of the said testator, has by the annexed document for herself and as guardian of her children consented and agreed to letters of administration with the will annexed being granted to your applicant without his entering into the security bond usual in such cases.

"That your applicant finds it impracticable to furnish the usual security, and therefore prays that letters of administration be granted to him on his entering into his personal bond."

Louise Meyer for herself and as guardian of her children consented to the application being granted, without the application entering into the security bond usual in such cases.

The estate consisted of two coffee estates valued at Rs. 310,000 and of some movable property valued at Rs. 2,440, aggregating in the sum of Rs. 312,440.

The learned District Judge called upon the Secretary of his court to report on the matter. His report was as follows :—

"The 4th clause of the R. and O. requires that the administrator with will annexed should give two *good* and *sufficient* securities for the due execution of the will, and further the court is required to examine diligently and strictly the sureties as to their sufficiency, and they shall make oath that they are severally worth, and even the form of the bond is given.

The court has a discretion to relax the stringency of the requirements contained in Rule 4 of the Testamentary R. and O. (p. 77), and to dispense with collateral securities, if hypothecation of property be offered in their stead.

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"The widow is not the *sole* heir. The deceased left children, by the will they are the *constituted heirs*. The widow has only a life interest so long as she remains *unmarried*.

"No consent will allow this. The R. and O. are imperative.

"See also 72nd clause of Ordinance 11 of 1868."

The Judge ruled as follows :—

In this application for administration with will annexed, it is sought to obtain letters of administration without furnishing the usual security, but on giving only a personal bond, on the ground that the applicant finds it impracticable to give the security required by the rules of court. The rules allow me no discretion whatsoever and though the consent of the widow has been secured I do not think that such consent could empower me to deviate from the prescribed rules particularly as the widow has only a life interest, and the interest of minors are concerned. The rules are very stringent and imperative, and even where a widow seeks for administration such administration can only be granted on her giving a bond with two good and sufficient sureties for the due execution of the will. Reference being had (in requiring such security) to the amount of the property returned by the appraisers, not only is this compulsory but the court is directed to act with great care and caution, for all such sureties shall be diligently and strictly examined by the court as to their sufficiency and shall be required to make oath that they are severally worth the sum for which they are about to enter into security. Where even the officer of the court is appointed, he can only get such administration on giving the security as directed. I am therefore of opinion that I have no power to grant this application and that I am bound by the rules and cannot deviate from them. The motion is therefore disallowed.

On appeal *Ferdinands, D. Q. A.*, for applicant, contended that the court had a discretion to dispense with securities from executors, as might be inferred from cl. 72 of Ordinance No. 11 of 1868. The object of demanding securities was to carry out the trusts of the will, but under the present will the applicant had no such duty thrown on him. He prayed for letters of administration only with view of seeing that the affairs connected with the coffee estates which required immediate attention were not neglected. The widow consented to dispense with the usual securities. This is one of those cases in which the Supreme Court could relax the stringency of the rule No. 4 of the Testamentary Rules and Orders. Marshall's *Judgments*, p. 6. The court may order the least amount of security, or under the common law may grant a limited administration for one or two years. That would be sufficient for the purposes of this case, as after that period other arrangements might be made.

Cur. adv. vult.

And now CLARENCE, A. C. J. delivered the following judgment :— 1877 October, 23.

The appellant and the notary employed by the testator have made affidavits, from which it appears that the executor named in the will having predeceased testator on the 2nd May, the testator instructed the notary to prepare a codicil appointing as executor appellant, the present applicant for administration *testamento annexo*, and on the 3rd May the testator died before it was possible for him to execute the codicil which the notary prepared, and I see no reason to doubt that such was the case. If appellant had, as but for the sudden death of the testator we believe he would have, been actually nominated testator's executor by codicil, he would in all probability, under the usual practice, have obtained probate without furnishing security, upon the principle recorded at p. 5 of Sir Charles Marshall's book, that it is in general unnecessary to demand security from an executor, whose selection by the testator for that office is a proof of the testator's confidence in his integrity. And in view of the circumstances, already referred to, of the present case, I think that we have a discretion, and that we might reasonably exercise that discretion in appellant's favour, to relax somewhat the stringency of the requirements contained in Rule 4 of the Testamentary Rules and Orders as to administrator's security.

I will not say whether or not, under such circumstances, we should consider it right, or ourselves at liberty under any circumstances, to dispense with collateral security altogether. All that we now say is that we have not been satisfied as to the urgency of appellant's application to be allowed to take administration on personal security only. He has made affidavit as to the extent of his property, and we shall do no more upon the present appeal than affirm the order of the District Judge refusing, under the present circumstances, to grant administration upon applicant's personal security alone, and I may point out that the District Judge has a discretion, as recorded in Sir Charles Marshall, p. 6, to accept hypothecation of property in place of sureties.

Per LAWRIE, J: I concur in affirming the judgment appealed against. The amount of the security which the applicant should be ordered to find is a matter within the discretion of the court, and in the peculiar circumstances of the present case, it might be fixed at a small sum,—sufficient however to cover the amount of the income or revenue which the administrator is likely to have in his hands at any time. I am unable to say that the District Judge can dispense with sureties for the sum which is so fixed. I think our rules are imperative and require two sureties. From my experience of the working of testamentary cases in this colony, I feel the necessity of there being sureties. In the events which may

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happen to the most solvent and honest administrator, such as leaving the Island, or dying, the sureties are the only persons to whom the court can look, or on whom it has any hold even if we had power to dispense with sureties, I think it would be wrong to do so.

D. C. Colombo, 3,826.

In the matter of the Estate of the late Capt. Henry Helsham.

1. The domicile of origin is presumed to be retained, unless an abandonment of it be proved, and the burthen is cast on the party who alleges such abandonment.

2. Circumstances insufficient to prove establishment of a new domicile in the case of one who had been an officer in H. M's. army and had served in the police force.

3. The law of domicile governs title to movables.

In this testamentary case, the widow of the intestate moved to draw out of Court half of the monies belonging to the estate. It appeared that the intestate, who was born in England, purchased on the 14th March, 1851 his ensigncy in the 53rd Regiment, and also purchased his Lieutenancy in the same Regiment on the 12th October, 1852. He served in the Indian Mutiny, and was for his services appointed Captain in the 25th Regiment, on the 15th December, 1859. In 1858 he went with his Regiment to England, and in 1863 came with his Regiment to Ceylon. In February 1864 he married his first wife, an English woman, and a son was born in October, of the same year. Mrs. Helsham died in June, 1866, and in December, 1866 he sold out of the army, obtaining £2,000 for his commission, which was lent out on mortgage in Ceylon, and formed the bulk of the estate property now in dispute. When he retired from the army he joined the Police force in Ceylon. He visited England from June, 1871 to November, 1872, taking home his son by his first wife whom he placed with his relatives. In January 1873 he married for the second time the applicant, another Englishwoman, her 3 children by him having been born previously. In May, 1873 he was superannuated from the Police and lived thereafter in Colombo till he died in March, 1874.

Layard for the widow contended that the domicile of the intestate was Ceylon, and that accordingly the applicant was under Roman Dutch Law entitled to one half of the estate.

Browne, for the guardian of the infant son by the first marriage, maintained that the original English domicile had never been changed for a domicile in Ceylon, and that the applicant as a widow under English law was entitled to only one-third of the monies.

The learned Acting District Judge (*L. Liesching*) held as follows :—

Captain Helsham was an officer in Her Majesty's army until 1866, when he sold his commission about six months after the death of his first wife who left one child, the present opponent.

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It is unquestionable that until the date of such sale, his domicile was England, where the "head quarters" of his regiment was. Officers of the Queen's Regiments do not lose their domicile when ordered abroad.

On selling out he entered the Colonial Service as an Officer of Police, and after serving in it from 1866 to 1873 he was superannuated. He then continued to live in Colombo for a year, and died. It is contended that his domicile was Ceylon at the time of his death.

Previous to his decease he had children by the applicant whom he subsequently married in Ceylon.

The present motion is to allow her to draw one-half of the proceeds of the intestate's commission under the Roman Dutch law.

This motion is opposed by the guardian of the infant son of the deceased by his first wife, on the ground that England and not Ceylon must be regarded the domicile of deceased, and that the applicant can only claim one-third of the estate under the law of England.

It will be observed that the children of the deceased by the applicant are not parties—their rights are held in reserve ; but necessarily the decision in this case will affect them hereafter.

Besides the question of domicile, the applicant's counsel raised another issue. He maintains that since deceased did not sell his commission during the life time of the first wife, the child of that wife cannot claim any part of the proceeds,—and as the deceased left nothing else to speak of, that child cannot according to his contention inherit anything through his mother.

A commission it is contended cannot be inventorised. It is argued that community consists of only such property as is the subject of uncontrolled and absolute alienation which a commission is not—since its sale is subject to various restrictions and it can be forfeited or lost in various ways.

On the other hand, Mr. Browne for opponent contends that Captain Helsham neglected to administer the estate after his wife's death—that he sold his commission only six months after her death and five years before he married applicant—and that had he taken out administration, the price of that commission would have been treated as part of the estate; in fact that "the community between "his client and the intestate continued as one partnership"—and quotes among other authorities VanLeeuwen p. 113 to the effect that half of all accessories to the estate belongs to the children, and he argues that the laches of the father are not to operate to the damage of the child.

It seems to me that if the principle maintained by Mr. Layard

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for applicant were to be upheld, it would follow that whereas an officer might in the purchase of his successive steps impoverish the common estate by several thousands of pounds, yet if his wife died before he reconverted the last commission he held into money, the heirs of the wife would lose every thing accruing from such sale, though the commission was purchased with their money of the common estate.

It will not, however, be necessary for me to give any judgment on this point, for it only arises if the domicile of the intestate is held to be Ceylon ; if it be England, then it is admitted on all hands that applicant can have only one third of the estate.

Now I believe after enquiry and careful consideration that *England*, not Ceylon, must be regarded as his domicile. Before he sold his commission in 1866, unquestionably he could have only one domicile, as a British officer, liable to service in any part of the world, whether in a colony, or (during war) in an enemy's country ; and England was till then his domicile.

Since then, what acts did he perform, or what did he say, to justify the belief that he intended to change his domicile and make it Ceylon instead of his native country.

Burge has clearly laid it down that not even the purchase of a house, or vesting part of a man's capital there, or residence alone, will afford evidence of a change of domicile, but there must be residence with the intention that it should be permanent, p. 54.

Now in the present case a copy or draft or original of a letter in the handwriting of the deceased is produced, written in Kandy after he had joined the Police, and dated 1867, wherein he applies for a grant of land as a retired officer " with the view of settling in this colony." The question is whether these words are to be taken as expressing a deliberate intention on his part to live and die in this colony. I do not think that this follows : every public servant may be said to have " settled in this colony," but it is well known that almost every one who comes from England looks forwards to a time when he wlll enjoy a pension afer the age of fifty-five as the reward of good service, and retire to his native home. There are other military officers, in the Police Force, some of whom have acquired land here : is it to be assumed that Ceylon had become their domicile *ipso facto* ? All merchants and planters come out to settle in Ceylon, but do they intend to make it their permanent residence, or rather to retire with a fortune if one can be made ?

As to his taking a colonial appointment, the acceptance of an appointment which even though it may involve permanent residence, yet if held only during pleasure and not for life, so that a person may be removed from it, as the deceased virtually was, does not constitute change of domicile. See, Burge p. 48.

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But, it is argued, here is a copy of a letter he wrote in which he says it is his intention to settle in Ceylon. But where is the evidence that it is a copy? It is signed by deceased as any letter would be, and in point of fact it may be the original letter itself which on fuller consideration he may have resolved not to send. It is also a well known fact that several military officers have asked and obtained grants of land in Ceylon and eventually left the Island for good. It does not appear to whom the letter was to be addressed, whether to the Ceylon Government or to whom. This intention to settle here may have been contingent on receiving the grant of the land and it is certain he never did receive it. When he wrote it he had a career before him; when he died he had neither land nor appointment nor any other tie to the Island to uphold the presumption of its being his domicile.

But applicant says that after he had left the Police, she asked him if he would go home, and he replied "No," as he suffered from sciatica in England. Now without at all impeaching the veracity of the applicant who has come forward, this statement must be received with caution as evidence of intention to change domicile, for very much must depend on the precise words used, and the time and circumstances when they were used, and the mental and physical condition of the speaker. Did the deceased mean that he did not want to go to England then or at that very time; or did he mean that he had abandoned all intention of residing in England again? Did he mean, in other words, that he regarded Ceylon as the place where he meant to live and die, though he had a child in England and he and his present wife were both English?

Mr. Layard has quoted *Bruce v. Bruce*, 2 B. and P. 229, and I made a note of the date of that judgment because I thought there were later decisions on the point, and such is the case. (See Story p. 47). At the time when *Bruce v. Bruce* was tried, communication with England was by the Cape in sailing vessels. European functionaries in India went on sick leave to the Cape, not to England; and the position of officers in the East India Company's Service was different from the Queen's Service. Their "head quarters" was India, and they were expected to serve in India, and they had no military rank beyond a certain defined latitude. India now is practically nearer Ceylon than Gibralter then was, and people think much less of running to and fro. It would, it seems to me, create much uneasiness among Europeans were the principle accepted that any casual remarks either to a relative or another as to one's intentions, which may at any moment be altered by the inexorable laws of health, by a change of circumstance, the inheritance of property which would enable a person to live comfortably at home, &c. &c., and which after all may be not the expression of a fixed intention, but of a floating idea, depending too (when such intention is re-

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peated) on the omission or introduction of one or two modifying words, is sufficient to afford proof of a deliberate intention of changing one's domicile.

In the present case then, seeing that the deceased's domicile was till 1866 England, that his taking an appointment in the Police did not in itself involve change of domicile,—that there is no evidence that the letter or copy of a letter (which ever it may be) which is produced was ever sent,—that if it were, his saying he intended to settle in Ceylon does not necessarily mean that he intended to remain there after he received a pension,—that it would be natural for a man asking for a grant of land to make out as strong a case as he could in obtaining it,—and seeing also that his wife saying he told her he meant to remain here does not sufficiently shew that he meant to remain, not only at present, but always, I am of opinion that the native land of the deceased must be regarded as his domicile and that applicant can only claim one-third of the estate as her own share.

There is a case which bears to a certain extent upon the points at issue, which has not been quoted by counsel on either side, but which I have before me. It is *Smedley v. Straube*, No. 28,841, February 18, 1860,* and in that case the question of domicile of the late Mr. Curgenven who married a lady of Ceylon is fully considered, and judgment given by the late Sir R. F. Morgan, who was then District Judge, in favour of an English domicile.

I will only add that it seems to me that the later authorities become more and more in favour of the theory that a man intends to return to his own land unless strong evidence to the contrary is given, and this is only natural. In bygone times the journey from one township to another was attended with danger, and people took formal leave of each other when travelling from Edinburgh to London. It was assumed that, after a man had escaped the perils of the deep and the attacks of enemies and reached his destination, he would think twice before those dangers were encountered again, but with our present rapid and comparatively safe mode of travel so many people are abroad who intend to return that the evidence of deliberate intention to change the domicile must be very clear indeed.

The motion of the applicant is therefore disallowed, and it is ordered that one-third of the money deposited in the Kachchery be paid to her ; costs to be paid out of the estate.

On appeal, *Layard* appeared for appellant, *Browne* for respondent.

Cur. adv. vult.

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* See appendix for a report of this case.—ED.

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The Supreme Court affirmed the judgment of the court below in these terms :—

The first question for decision upon this appeal is whether Captain Helsham when he died was to be considered as domiciled in England or Ceylon. There is no difficulty in determining the law applicable to the facts in this case. Captain Helsham's domicile of origin was England, and the onus is on appellant, (Captain Helsham's widow), who maintains that, at the time of Captain Helsham's death, this domicile of origin was superseded by Ceylon as a domicile of choice, by shewing facts from which we are to infer such an adoption on Captain Helsham's part.

The facts in evidence are these. Captain Helsham was gazetted in 1857 to H. M's 53rd Regiment, and after serving in India and England, came with the Regiment to Ceylon in 1863. In 1864 he married at Colombo his first wife by whom he had children. In 1866, his first wife died. In December 1866 he sold his commission and obtained employment in the Ceylon Police. In 1868 he married his second wife, now his widow, by whom he had children previously. In June 1871 he took his second wife, and his two children by her and also his son, the only surviving child of his first marriage, to England, and returned in November 1872, leaving however the son in England. The son still remains in England, the second wife and her children remain in Ceylon. In May 1873 Captain Helsham was superannuated from the Police, and he died in Colombo in March 1874.

In addition to the above circumstances, there is put in evidence, on appellant's behalf, the draft of a letter which appears to have been found among Captain Helsham's papers at his death. The letter is without address, but it purports to be a draft of a letter written by Captain Helsham to some high authority in England or Ceylon, asking that in consideration of his sixteen years' service in the army, the writer may be allowed to purchase crown land in Ceylon upon certain favourable terms which used formerly to be extended to officers in the army, and the writer states that the application is made "with a view of settling in the colony". We think that this draft has no bearing on the question now in issue, and that for two reasons. In the first place, though the draft bears Captain Helsham's signature, there is no evidence that the latter was ever sent to the party addressed. This is a very important consideration indeed, for if the letter was not sent, the draft is at once deprived of all significance as an indication of an intention on the part of the writer to settle in Ceylon. In the second place, even supposing that the letter had been sent, there is no evidence that the request it contained was ever acceded to, or in fact that Captain Helsham ever obtained any land in this Island, and so, even assuming that Captain Helsham expressed an intention of settling in Ceylon, as an explanation of his motive for writing the

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letter, *non constat* that that intention was adhered to if the application was unsuccessful and the land was not obtained.

There is further the evidence of the appellant as follows :— "After my husband was superannuated, I asked him if he would "go to England. He said no, because England did not agree with him." And upon further examination, the witness stated that Captain Helsham had suffered from *sciatica* while in England and got better after returning to Ceylon, though some of the complaint still clung about him.

This piece of evidence of the widow's, and the circumstance that after super-annuation Captain Helsham remained in Ceylon till he died, are the only circumstances which in our opinion can be considered as pointing in the direction of an intention to remain permanently in Ceylon.

We do not think that these two circumstances are sufficient to warrant our inferring from them, that Captain Helsham at the time of his death had the intention of not returning to his native country but of remaining permanently in Ceylon. We need not say what our decision might have been if Captain Helsham had lived in Ceylon some years instead of only a few months after his superannuation. We do not think that the interval of ten months which elapsed between Captain Helsham's super-annuation, and his death was long enough to create any strong inference that he meant to stay in Ceylon permanently. There is however the evidence as to his reply to his wife's question, which is put forward as raising an inference that he meant to stay here altogether and not return at all to England. Holding as we do the other evidence in the case insufficient to raise the inference that Captain Helsham had adopted Ceylon as his domicile, we do not think that this evidence of an isolated remark by him is sufficient to turn the scale. So much depends on knowing all that passed when the remark was made. It might indeed be that Captain Helsham made the remark with the mind, as he uttered it, to remain here permanently, or it might be that his remark had reference simply to the consideration whether he would go to England at that particular moment, or it might have been a remark made in a moment of illness which did not fairly represent the utterer's general disposition of mind. It is an item of evidence in appellant's favour, but by itself it is in our opinion too slight to turn the scale.

For these reasons, the decision of the District Judge will be affirmed. The costs of court below to come out of the estate, but appeal costs to be paid by appellant.

Affirmed.

D. C. Colombo, 65,137.

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Procedure under the Arbitration Ordinance of 1866.

From the recitals of the deed of submission to arbitration filed in this case, it appeared that Susey Fernando Bastian Appu and Moona Koona Caruppan Chetty had an extensive dispute concerning some timber, which dispute formed the subject of litigation in the actions No. 20,307 D. C. Chilaw and No. 65,137 and 62,437 D. C. Colombo. It appeared that decisions were rendered in these cases and cross appeals against those decisions lodged in the Supreme Court. After those appeals had been so lodged, the parties agreed to submit their differences to arbitration, and the appeals having been withdrawn by the permission of the Supreme Court, a submission was made to arbitration by a written instrument dated the 22nd November 1876. A fresh written submission was made on the 20th February last, in consequence of the time for award under the last submission having elapsed. The arbitrators having made their award, the plaintiff obtained a rule nisi in the present case (65,137) to make their award a rule of court.

The learned Acting District Judge (*Moryan*) discharged the rule in these terms :—

It appears that the deed in question was signed subsequently to the withdrawal of the appeals from the Supreme Court, which was made with the intention, and on the understanding, that proceedings in both courts should be terminated for the very purpose of the matters being decided by arbitration. It is impossible therefore to say that the matters in difference were then the "subject of an action in court". The 13th clause of the Ordinance is therefore the one that applies, and the course prescribed by that clause has not been followed as it ought to have been by the party who is desirous of benefiting by it. The court is bound by its judgment in 70,075 D. C. Colombo (*Bone v. Home*).

On appeal, *Cayley, Q. A.* (*VanLangenberg* with him) appeared for plaintiff and appellant, and contended that the cases did not come under cl. 13 of the arbitration ordinance, because that clause related to differences *not* in action. In the present case, there were actions brought, but the appeals were withdrawn, as the parties agreed to refer the matters in dispute to arbitration. The withdrawal of the appeals was a necessary part of such agreement since the appeals could not be pending and the arbitration going on. The case properly fell within cl. 14, which contemplated a reference whether a case was pending or not before the court. Even if the case came under cl. 13, it was not imperative that an application should be made to the court to have the agreement filed. The words "may be made" are permissive. [LAWRIE, J. The withdrawal of the appeals makes the District Judge's judgment final. How can the court admit the award, for then there would

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be two judgments in the same case, one by a court duly constituted, the other by an informal court? Besides, can the motion in the present case affect, so as to set aside, the judgments in the Chilaw cases?] Was there anything void or illegal in this reference, that was the simple question? Whatever the effect of the reference might be as regards third parties, the award would be a valid judgment *inter partes*.

Grenier for respondent, took objection to the irregularity of the proceedings and relied on *Bone v. Home*, Ramanathan's Report, 1877, p. 45.

Cayley, Q. A. in reply stated that the judgment pronounced in *Bone v. Home* gave no reasons. It was a simple affirmation. He read, and explained the object of, clauses 13 and 14.

Cur. adv. vult.

The court now held as follows ;—

If this arbitration is to be regarded as an arbitration in a suit, it ought to have been made in accordance with the provisions of the 12th clause of the Arbitration Ordinance, and in each of the three suits the application mentioned in that clause ought to have been made to the court. Nothing of that kind however appears to have been done, and consequently, so far as the arbitration is to be regarded as an arbitration in a suit, the award cannot be made a rule of Court.

That the appellant so regards the arbitration is patent from the circumstance of his moving in this suit to have the award a rule of court in this case. And besides this, there is further difficulty. How could matters in litigation in the two other cases be settled by a rule of court in this case?

For these reasons we are of opinion that the award in question cannot be made a rule of court in this case, and consequently (though not for the reasons given by the learned District Judge) that the order of the District Court, refusing to make the award a rule of court, must be affirmed.

D. C. Colombo, 69,169.

Property which is subject to a *fidei commissum* cannot be sold or partitioned un-

The subject matter in dispute in this case was half of a garden and seven houses, all of them subject to a valid fidei commissum. The plaintiff claiming 4-12th of these premises applied for a partition or sale thereof. This application was resisted by the defendant on the ground that the property, being subject to a fidei commissum, the court could order neither a partition nor a sale.

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The learned District Judge (*Berwick*) upheld this contention and recommended the plaintiff to apply to the Legislative Council for a private act to set aside the entail.

der the Ordinance No. 10 of 1863.

On appeal, *Grenier* for plaintiff and appellant contended that the words of clauses 13 and 14 of Ordinance No. 10 of 1863, were extensive in their application. The prayer in the libel was for partition or sale. There was nothing in the Ordinance inconsistent with the prayer, and he cited *Misso's case.* If sale may not be decreed, partition may be granted [DIAS, J.—It is very difficult to decree partition, but you can break the entail under the new Ordinance, which is retrospective.]

Dornhorst for respondent was not called upon.

The court held as follows :—

The application for a sale is clearly inadmissable, as it is against the very nature of the trust created, which is a prohibition against alienation. With regard to the application for a division, we think it equally inadmissible, as it will interfere with the nature of the devise, which is a devise in common to certain parties and their descendants. The Ordinance No. 10 of 1863 is silent as to property held under a fiduciary trust such as the present, though it expressly mentions, in clause 12 and 13, the cases of mortgages and leases. We do not think that that Ordinance ever contemplated the case of a fidei-commissum, which will be effectually defeated if the Ordinance is held applicable to such cases, and we cannot by implication set aside the Common Law, which denies the remedy of partition to a person instituted heir under a condition, *2 Burge, 678.*

October, 25th.

Present :—LAWRIE, J.

C. R. Colombo, 6322.

A girl of 17 years of age has a right to elect with whom she would live, and her father will not be liable for her maintenance if she chooses to live apart from him.

Per Curiam : The Supreme Court decided (on application on a writ of *habeas corpus*) that the child, a girl of 16 or 17 years of age, was old enough to have right to elect with whom she should live. She has chosen to remain apart from her father.

I am of opinion that the plaintiff in whose house she is staying has no claim against the father for maintenance. Except in special cases of proved unfitness for the custody of his children, a father is not obliged to maintain, in the houses of others, children whom he desires to maintain in his own house, but who voluntarily live apart from him.

Set aside and plaintiff's claim dismissed with costs.

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C. R. Balapitiya, 25,739.

Practice as to postponement.

Per LAWRIE, J : The Supreme Court will not readily interfere with an order of a Commissioner refusing a postponement of a trial, and the judgment of the Supreme Court in No. 24973, forwarded by the Commissioner, approved of such an order. But there the party applied for the postponement, on the ground he had no witnesses though he had six weeks notice of trial ; besides he gave a false excuse for his failure to subpœna. But the present case is different. The summons was returnable on the 6th September, on that day defendant filed answer, both parties filed list of witnesses, and the case was fixed for trial next day. The defendant had no time to subpœna witnesses, even if he had supplied stamps on the day he filed his list. He could not have had his witnesses ready, and he was thus entitled to a postponement. Every effort for the prompt despatch of business is to be commended, but it is more than prompt despatch to compel a defendant to go to trial on the day after the returnable day of the summons.

October, 30th.

Present:—CLARENCE, A. C. J. DIAS, J. and LAWRIE, J.

P. C. Kalutara, 11132.

Where a Bhudhist priest was preaching against Christianity, and in the course of his harangues made use of violent and intemperate language so as to inflame and highly excite the Christians, *held* that the J. P. was right in binding over the priest to keep the peace.

This was an appeal against an order of the J. P. binding over the defendant, a Budhist priiest, to keep the peace.

Browne appeared for appellant.

The following judgment of the Supreme Court sufficiently sets out the facts of the case :—

The evidence shews that defendant has been on more than one occasion preaching or haranguing in the streets of Kalutara against christianity. Were that all, the Justice of the Peace would have been wrong in binding him over to keep the peace. Under the law administered in this colony, it is perfectly lawful to address an audience with any arguments against Christianity, and any one who interferes with him must take the consequences. But the evidence goes further than this and shews that defendant in the course of his harangues made use of violent and intemperate language unnecessary to any religious controversy, which we do not desire to reproduce, but which appears to have been eminently calculated to inflame the audience and provoke a breach of the peace. According to the evidence, a large crowd was present, and the Christians became highly excited at defendant's language, and but for the interference of the Police, a serious breach of the peace would in all

probability have taken place. The Justice of the Peace, exercising the discretion vested in him under the 221st clause of the Ordinance No. 11 of 1868 has bound over defendant to keep the peace as a person likely to do an act which may probably occasion a breach of the peace. We see no reason why we should interfere with the exercise of the Justice of the Peace's discretion.

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Affirmed.

D. C. Kalutara No. $\frac{1142}{11038}$.

Indictment:—Tudugalamunasinhege Don Odaris Appoo of Berowela complains that Petebendige Harmanis of Berowela on the 6th day of June in the year of our Lord 1877 at Berowela within the jurisdiction of this court did unlawfully steal take and carry away a bull bearing brand marks.....and some other marks which were cancelled, of the property of him the said Tudugalamunasinhege Don Odaris Appu.

And the said Tudugalamunasinhege Don Odaris Appu further complains that the said Patebendige Harmanis at the time and place aforesaid did receive and have in his possession knowing the same to be stolen a bull bearing brand-marks.....and some other marks which were cancelled, of the property of the said Tudugalamunasinhege Don Odaris Appu.

And the said complainant further complains that the said Patebendige Harmanis on or about the 8th day of July 1877 at Berowela aforesaid did have in his possession, beef without being able satisfactorily to account for the same, in breach of the Ordinance No. 14 1859 cl. 23.

On appeal against a conviction, *Browne* for appellant contended *inter alia* that there was a fatal variance between the charge as laid and the evidence led, in respect of the time of the offence. In the indictment the offence under Ordinance of 1859 was said to be committed on the 8th July, but the evidence of theft referred to an act on the 8th of June.

The Supreme Court held as follows :—

Conviction set aside, and defendant acquitted on the 1st and 3rd counts. The 2nd count, which discloses no offence, is quashed.

Defendant is charged with stealing the bull on the 6th of June and with the possession of the beef on the 8th of July. Following the English authorities we are prepared to hold that time is not necessarily to be proved as laid, but in the present case the variance between the dates on which the defendant is charged with the stealing and the possession of the beef renders it unjust to-

1. Insufficient indictment for guilty receipt.

2. In a charge of theft, it is not material that an averment of time should be proved as laid, but where there is a variance between the dates on which the defendant is charged with stealing the bull and the possession of beef, the evidence of possession ought not to be used as evidence on the charge of theft.

3. Before inflicting pecuniary mulcts upon native

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wards the defendant to use the evidence of possession as evidence on the charge of stealing.

villagers, the greatest caution ought to be exercised, as their lands are likely to be sold in payment of the fines imposed.

Had we affirmed the conviction, we should have reduced the sentence by omitting the fine of Rs. 100. The Supreme Court thinks that the greatest caution should be exercised before inflicting heavy pecuniary mulcts upon native villagers, whose lands must in all probability be sold to pay large fines.

D. C. Colombo, 1,542.

1. An Ordinance which is repealed must be considered, except as to trrasactions past and closed, as if it had never existed.

2. But where a reference to the District Court was made by the Government Agent in terms of sec. 11 of the Land Acquisition Ordinance of 1876, and it was found that the compensation for the land in question had been assessed on a previous occasion under the repealed Ordinance No. 2 of 1863, *held* that it was not compe-

The following was the reference to the District Court by the Government Agent, under sec. 11 of Ordinance No. 3 of 1876 :—

Whereas by powers in me vested under sec. 6 of "The Land Acquisition Ordinance, 1876", I the undersigned Sir Charles Peter Layard &c, upon due notice given, having proceeded on the 20th November 1876 to make inquiry under sec. 8 of the said Ordinance, in order to determine the amount of compensation which should be allowed for the undermentioned land, to wit, two allotments &c [specified], and the following circumstances have arisen, namely that I the said Government Agent was unable to agree with the persons interested in the said allotments of land, as to the amount of compensation to be allowed for the same, I do hereby, in conformity with sec. 11 of the said Ordinance, refer the matter to the determination of the District Court of Colombo, and I do further state for the information of the District Court.

(a) that the said land is situated at Tanque Salgado in the Kotahena Ward of the Municipality of Colombo, and is of the extent of 3 roods and 28¼ sq. perches or thereabout ;

(b) the undermentioned persons or claimants are persons interested in the said land, Mr. Gerrit William Stork and Mr. Felix Stork ;

(c) That I have tendered for compensation under sec. 8 of the said Ordinance, the sum of Rs. 5,350 ;

(d) That I am willing to give as compensation to the persons interested the sum of Rs. 5,350.

Before entering into the merits, the claimant objected (21st March) to the jurisdiction of the Court and contended that it was not competent for it to proceed, under the new Ordinance No. 3 of 1876, to the assessment of compensation, the compensation due for this land having been already assessed by jurymen under the provisions of the Ordinance No. 2 of 1863. It was admitted that proceedings were completed under the Ordinance No. 2 of 1863 up to the steps referred to in section 4 of that Ordinance, and that government refused to take the land upon the assessment made under that Ordinance.

The question having been argued on both sides, the court thought it necessary to reserve the point for consideration and di-

rected the case to proceed subject to its decision upon the objection

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The learned District Judge (*Berwick*) after going into the merits, delivered (11th May) the following judgment :—

tent for the crown to proceed *de novo* under the new Ordinance, as in it there was a reservation in the clause repealing the Ordinance of 1863.

Having carefully considered the preliminary objection taken by Mr Van Langenberg and compared the existing with the repealed Ordinance, I am of opinion that it is competent for this Court to proceed to the assessment of compensation under the new Ordinance and that the whole proceedings are rightly, and could only be rightly, taken for the acquirement of the land in question under the new Ordinance. It is admitted that although certain steps were taken for the acquisition of the land under the old Ordinance, and that the amount which would be payable for compensation if Government should determine to take possession under that Ordinance was assessed, yet that in fact government did not take possession but preferred that the previous steps should be abortive, and I think it clear that there is no power either to compel it to take possession or to compel it to pay the compensation determined by the jury contingently on its doing so. The whole proceedings under the old Ordinance are therefore now simply an abortive chapter of the past; and Goverument, if at any future time (whether a year or a century later, does not matter) again desires to have this land, is obliged I think to proceed *de novo* under the new Ordinance; and clearly, if so, *all* (and not merely a part) of the proceedings must be under the latter, including the mode of assessment of compensation. I say Government is *obliged*, (and not merely *entitled*) to proceed under the new Ordinance *de novo*, because the repealing clause of the latter, having repealed the Ordinance of 1863 except so far as relates to proceedings which *have taken place* under it, it has become impossible for Government now to proceed to take possession and grant a certificate under that Ordinance, that being a proceeding which has *not taken place* before the Ordinance was repealed. It is impossible to amalgamate the two ordinances and complete under the one what had been left uncompleted or rather wholly and lawfully abandoned under the other, and which cannot now be enforced in any way, wherefore, as already said, the *whole* of any proceedings for the acquisitiion of land must now be under the new Ordinance solely.

The objection to the competency of the Court to assess the compensation is therefore over-ruled and effect will be given to the judgment pronounced on the 21st March which was subject to the decision on this point.

Fees to assessors Rs. 31.50.

It is decreed that the defendant do recover from the plaintiff as compensation the sum of rupees five thousand three hundred and fifty and that the defendants do pay the costs of this suit.

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On appeal, (*VanLangenberg* for appellant, and *Ferdinands*, *D. Q. A.* for respondent), the Supreme Court held as follows :—

This is an appeal by a land owner against a valuation of his land made under the Land Acquisition Ordinance, 1876. Upon the day of trial, before the assessors were sworn, a preliminary objection was taken by the present appellants that it was not competent to the crown to have this land valued under the Ordinance of 1876, because it had already been valued under the repealed Ordinance of 1863. That objection was over-ruled by the learned D. J. and hence the present appeal.

The Land Acquisition Ordinance 1876 received the assent of His Excellency the Governor on the 23rd June 1876. In 1876, before that Ordinance came into operation, this land was valued by a jury under the Ordinance of 1863 at a very much larger price than that arrived at under the proceeding now in question. The Government Agent reported the result of that valuation to the Governor, but the government did not elect to purchase the land at the price, and the proceedings referred to in clause 4 of the Ordinance of 1863 never took place.

Apart from any special provision in the repealing clause, the effect of the repeal of the ordinance of 1863 by the ordinance of 1876, would be, that transactions past and completed under the old ordinance would remain valid, but that nothing could thenceforth be done under the old ordinance: the old ordinance could no longer be acted upon. It is, perhaps, scarcely necessary to cite authorities for principles so well established as these; they may however, be found in the cases of *Surtees v. Ellison* 9 B. & C, 750 and *R. v. Mawgan* 8 A & E, 496. The particular effect of such a repeal would, I think, have been, as regards the cases in hand, that all purchases completed under the ordinance of 1863 would have remained valid, but that so far as any transactions under the ordinance of 1863 may have been inchoate at the time of the repeal and needing for its completion the doing of some of the things which that ordinance created the power to do, such inchoate transaction would become incapable of completion. For instance, suppose proceedings to have been in progress under the ordinance of 1863 in respect of a piece of land, and a jury to have been summoned under that ordinance and a day fixed for the valuation, then if the ordinance of 1876 came into force in the interim, the proceeding under the ordinance of 1863 would thereby have become incapable of completion.

But the repealing clause of the ordinance of 1876 contains this reservation, it repeals the old ordinance, "except so far as related to any proceedings or matters which shall have taken place thereunder, before this ordinance shall come into operation." If the operation of this reservation be simply to save, or rather to assert

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the saving of the effect of all transactions completed under the old ordinance, it might be struck out of the repealing clause without altering the force of that clause. But we see no sufficient reason why we should not allow these words to import their plain and natural meaning. That meaning, applying it to the case in hand, is this :—Here is a proceeding which has taken place under the old ordinance, a valuation of this land at a certain price. So far as relates to that proceeding, the old ordinance is not repealed by the new, and consequently the new ordinance has reserved to the Government the power of completing by the procedure of the old ordinance the transaction of purchase to which the proceeding in question was directed. We do not mean to say that in order to the completion of such purchase all the procedure mentioned in clause 4 is necessary, the certificate mentioned is merely a short cut to the transfer of ownerships and land which might be obtained otherwise, but in our view the repealing clause in the ordinance of 1876 has reserved to the crown the power of proceeding to a completion of the transaction by the procedure mentioned in clause 4 of the ordinance of 1863.

Under these circumstances, it appears to us to be *ex debito justitiæ* that the crown should not be allowed to abandon the old valuation because it may be in the opinion of the advisers of the Crown inconviently high, and begin anew under the new ordinance. Suppose the new ordinance had not been passed. Could the crown, after obtaining the jury's valuation, have abandened it as too high and begun again *de novo* under the same ordinance? we do not think that such a contention could be maintained for a moment, and if, as we hold, the new ordinance has reserved to the crown the power of proceeding to completion on the old valuation, the same considerations apply.

Lest it should be asked by way of *reductio ad absurdum*, can the crown in this view never proceed under the new ordinance if there happen to be an old valuation made perhaps ten years ago under the old ordinance? we would point out that in such a case there would be a very fair objection to acting upon valuation which might from the lapse of time be very fairly assumed no longer to represent the true value of the land. It is not necessary now to discuss *what* lapse of time might entitle the crown to abandon an old valuation and proceed *de novo* for another. It is sufficient to say that the crown ought not to be allowed to proceed *de novo* when, as in the present case, there is an existing valuation only a few weeks or months old.

This moreover is an objection which, if it is worth anything, might be raised in favor of a claim to proceed *de novo* if there had been no new ordinance, a claim which, we apprehend, no one could seriously support.

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A couple only of questions remain. We were referred in argument to the ordinance of 1877, amending the ordinance of 1876 ; but that ordinance does not affect this case if it did not come into operation until after the proceedings now in question had been begun under the ordinance of 1876. The trial had taken place, assessors' verdicts given, and the decision of the learned D. J. had been reserved upon the point now in issue. A question was also raised of acquiescence to disentitle appellants. I do not see that there has been anything in the nature of acquiescence to disentitle appellants to press their present contention, they having taken the objection in the District Court when it it was proposed to name assessors.

In this view, it follows that in our opinion the contention now raised by appellants is entitled to succeed, and that the proceedings in this matter taken under the ordinance of 1876 should be quashed, with costs against the respondent. It may perhaps be thought that this is a mere dilatory termination of the question, since it will be now competent for the crown to begin again *de novo* by virtue of the amending ordinance of 1877. That, however, is no concern of ours. We have simply to determine on this appeal whether it was competent to the crown to take the proceedings which they took under the ordinance of 1876, and that question must of course be unaffected by a subsequent statute to which we cannot assign a retrospective operation.

November, 1st.

Present :—LAWRIE, J.

P. C. Matale, 15135.

VanLangenberg for appellant.

The following judgment explains the facts of the case :—

Irregularity of proceedings in calling upon a defendant, immediately after his acquittal on one charge, to plead to a fresh one.

The defendant was accused of stealing or receiving with guilty knowledge some coffee. At the trial, the Police Magistrate held that there was no evidence of actual theft, nor could he on the evidence have found the accused guilty of receiving coffee knowing it to have been stolen.

The accused was entitled to an acquittal. It was irregular then and there to call on him to account for the possession of green coffee under the 5th clause of Ordinance No. 8 of 1874. That forms the subject of another complaint. The accused could not

have been expected to have witnesses in attendance to meet a charge not made against him. 1878. November, 1.

The accused is acquitted of the crime charged.

November, 2nd.

Present :—CLARENCE, A. C. J., DIAS, J. and LAWRIE, J.

D. C. Tangalla, 3447.

VanLangenberg for appellant.

Browne for respondents.

* * * The Supreme Court cannot pass without censure the conduct of the plaintiff's Proctor who abandoned his client in the middle of his trial without assigning reasons therefor. His costs are disallowed. Proctor's costs.

D. C. Kandy, 66960.

Grenier for appellant.

VanLangenberg for respondent.

The following judgment explaining the facts of the case :—

Compensation for improvements made on another's land.

Affirmed, but the case is sent back for a decision of a point omitted to be decided by the District Judge.

The accuracy of the judgment, in so far as it finds that the plaintiff is entitled to the land, is not disputed ; but the defendant maintains that he is entitled to the value of the houses which he built *in bona fide*.

The belief under which the defendant avers that he and his father made these improvements is that they were paraveny nilakarayas. It is admitted that he has failed to prove that. But if he and his father *in bona fide* believed that they were, if they built in consequence of that belief, and if the Dewala authorities acted towards them as if they held in parveny, and knowing that the defendant and his father thought they did, looked on while they voluntarily erected buildings at their own expense, we are of opinion that the defendant is entitled to some compensation on eviction.

But none of these things have been proved. It had not been proved under what circumstances the houses were built, whether by the defendants voluntarily, or under an agreement with the Dewala. It is not even established by whom they were built. The

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proof is meagre, and before the question of compensation can be decided, the case must be more fully investigated.

The judgment of the District Judge is affirmed, but in respect it does not deal with the defendants claim of compensation, the case is sent back for a judgment on that point.

No costs in appeal.

D. C. Kalutara, 30479.

Revocability of donations.

The facts of this case sufficiently appear in the argument :—

Dornhorst for appellant submitted that the deed of gift was *mortis causa*, and not *inter vivos*, and therefore revocable. The words of the deed clearly bore out this contention : "I Guneratne Terunanse &c., being very old and infirm &c.", words which shewed that, at the date of the execution, death was contemplated. If however it be held that these words were in themselves insufficient to make the deed a *donatio mortis causa*, the words following in the body of the deed, "I the said &c., shall possess the same until my death, and after my death the said pupil shall possess the same &c.," made it a testamentary disposition, and as such it was revocable. Viewed therefore as a *donatio mortis causa* or as a *last will*, the plaintiff was entitled to the prayer of his libel. But even assuming that the deed in question was a gift *inter vivos*, the plaintiff was entitled to revoke it, in that it had been proved that the donee did not comply with some of the conditions imposed on and accepted by him, but that he had on one occasion used violence towards the donor. Voet (32.5.22) enumerates the exceptions to the general rule of law that donations *inter vivos* are irrevocable ; causæ vero sunt si donatarius donatori manus impias intulerit, aut atrocem injuriam aut ingentem jacturæ molem aut vitæ ejus insidias struxerit aut denique non paruerit conditionibus donatori adjectis. The evidence in the case further shewed that the donor had no right to gift, he being a mere trustee and having no absolute right of property. The gift on that ground too was bad and should be set aside.

Browne for respondent argued *contra.*

Cur. adv. vult.

The court affirmed the judgment of the court below as follows :—

We agree with the District Judge that this is not a *donatio mortis causa.* It is true that a donatio mortis causa may be given

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quum quis nulla præsentis periculi metu conterritus sed sola cogitatione mortalitatis donat (Dig. xxxix. 6. 2), provided there be actual expression of the donor's mood—"expressa scilicet non in mente retenta" (ibidem); but that of itself is not enough, nor as pointed out in the judgment of this court in D. C. Matara, No. 26320 (2 Grenier 142) is it enough that in addition the donee's possession is to be postponed till after the donor's death. It is further required "*ut et redhibendi conditio adjiciatur operte aut certe ex formulae conceptione insit donatione*" (Voet xxxix. 5. 4). This deed recites that the donor was very old and infirm, and it postpones the defendant's possession till after plaintiff's death; but we do not find in it any direct or plainly implied reservation of a right to resume the gift. The gift therefore, in our opinion, is not revocable, as a *donatio mortis causa*.

It may however still be revocable as a simple donation inter vivos, for some of the causes described in Cod. viii, 55. 10. 22. One of these causes is the breach by the donee of a condition of the donor's quiet enjoyment during his life; and the case reported in Vanderstraaten p. 145 is an authority that the aid of the courts may be invoked for a revocation. We cannot say that the evidence in this case satisfies us that the defendant has taken possession of the property in question. Nor does the evidence satisfy us that defendant has done any of the other things which would entitle plaintiff to a revocation of the gift, although it does satisfy us of one thing, viz., that the plaintiff desires to avoid the deed, because, as he says, the Dayakas complained of it as *ultra vires*.

November, 6th.

Present :—CLARENCE, A. C. J., DIAS, J. and LAWRIE, J.

D. C. Kalutara, 30371.

Grenier for appellant.

Contempt for prevarication.

The Supreme Court reduced the sentence of hard labour inflicted by the court below, to one of twenty days simple imprisonment in these terms :—

The Supreme Court has often pointed out that mere falsehood uttered by a witness is not of itself punishable as prevarication. The witness who commits perjury renders himself liable to be indicted and punished with the pains and penalties of perjury. But after carefully considering what the District Judge has recorded in this case, we see no reason to doubt that the witness has been guilty of prevarication, by giving in the witness box shuffling and evasive

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answers. He denied repeatedly all knowledge of what he and his brother claimed in a C. R. case, and afterwards confessed to remembering. It would be unreasonable to expect a District Judge to take down every single word uttered by a shuffling witness. We must trust something to the discretion of the District Judge, in the absence of indication that his discretion has been, so to speak, indiscreet. There is quite enough recorded in the present case to induce us to believe that the District Judge, who had the witness before him, and could observe his demeanour, has rightly held that the witness prevaricated. But the District Judge was quite wrong in inflicting hard labour.

D. C. Kandy, 62,711.

1. A mortgage debt does not become extinguished by the mortgagor acquiring the mortgagor's interest in the mortgaged property.

2. Where the mortgagee so buys up the interest of the mortgagor, he will not be prevented *cæteris paribus* from recovering the debt from the general estate of the mortgagor.

Slema Lebbe executed a bond in 1866 in favour of Ponnappa Chetty, mortgaging a certain land. In 1873 the mortgagor gifted to his wife the land so mortgaged. In September 1874, the mortgagee recovered judgment on the bond against the administrator of the debtor, subsequently to which, in the November of the same year, Mr. Holloway purchased the land in question from the widow of Slema Lebbe, and while the property was under seizure by virtue of the judgment aforesaid, he obtained an assignment of it in his favour, and now, as substituted plaintiff, sought to revive judgment.

The defendant resisted the rule served on him, on the ground that the claim was extinguished by way of merger arising from the fact of Mr. Holloway becoming purchaser of both the judgment and the mortgage.

The learned District Judge upheld this contention and discharged the rule.

On appeal, *Van Langenberg* for appellant (Holloway), contended that there was nothing to prevent appellant from recovering the amount of the judgment debt from the general estate of the mortgagor, if there were sufficient assets in the hands of the administrator. The creditor need not in the first instance discuss the specially mortgaged property, Voet *ad Pandectas*, 20, 1, 15.

Ferdinands, D. Q. A., contra, cited, Pothier on *Obligations*, 425 and 426 to shew that the debt was extinguished by confusion of two opposite characters, as creditor and debtor, in Mr. Holloway.

The Supreme Court set aside the order of the court below, and made the rule absolute with costs, in these terms :—

There is no suggestion of the existence of any unsecured creditor of Slema Lebbe's, for whose payment the assets of Slema Lebbe's estate will be insufficient if this mortgage debt is paid out

of Siema Lebbe's general estate. Nor can we see that under the Roman Dutch Law, the debt has become extinguished by the mortgagee's acquisition of the mortgagor's interest in the mortgaged property. 1877 Nov. 6.

For these reasons, the order appealed against will be set aside, and rule to revive judgment made absolute with costs.

D. C. Kalutara, 29975.

The following judgment of the learned District Judge (*Lee*) sets out the facts of the case :— The crown is not bound by law to warrant and defend its sales.

"The petitioner became the purchaser from the crown, under the conditions of sale filed in evidence, of the right to the crown's share of the crop due from the land mentioned in the libel. The cultivators (defendants) having refused to pay the share which the crown sold (i. e. half the crop), the plaintiff comes into court against them to recover that share, and against the crown to warrant the sale, and in failure to pay to the plaintiff the difference between half and one-tenth of the crop.

"As against the cultivators, the plaintiff has failed entirely. It was incumbent on him to prove as against them that the share of crop due is half, and that, he has failed to prove.

"As against the crown, the case is different. The two judgments of the Supreme Court (*C. R. Kalutara 29900* and *D. C. Galle 26570*) do not touch the question at issue. Both those cases arise out of the sale of crown lands, and as to those sales, it was held on the authority of the English law that there was no warranty implied, as between the crown and the purchaser. The law in the present circumstances is to be found in Voet, tit. 39, lib. 4, sec. 7. In answer to the question "*An publicani possint petere remissionem vectigalium ob insolitam sterilitatem et unde illo provenire possit? an et id quod interest si ipsis non præstentur conditiones promissæ?* Voet says *Illud locationi vectigalium cum locationibus privatis commune est quod ob insolitam sterilitatem.....natam, jure publicani desiderare possint pensiones promissæ remissionem.....Longeque magis remittenda ex parte pensio si..... non præstentur publicano, conditiones illæ quæ locatione adjectæ sunt et ob id minus ex conductione redactam sit.....Quin imo si non præstentur conditiones nominatim insertæ ac promissæ conductoribus tempore conductionis, publicanos in id quanti sua interest, agere posse, secundum jus commune in omnibus illis receptum qui conventa non implent, extra dubium est..*'

"Clearly therefore if the "*conditiones nominatim insertæ ac promissæ*" have not been observed, the crown is liable in damages.

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"On reference to the conditions of sale, it will be seen that by the first article 'the renter is entitled to collect the share of the party, amounting to one-tenth, one-twelfth, one quarter, or one-half to which the government is by law or custom entitled, of the above-mentioned harvest of the fields specified in list herewith annexed.' The list hereto annexed is the *wattoorvo* of which copy has been produced and in which these lands are entered as liable to give a tax to the crown of one-half of the crop.

"It was incumbent on the crown to defend the right which is sold, and as the crown has not thought fit to do so after notice, I must declare the crown liable to pay to the plaintiff the damages sustained.

"There is no evidence before me upon which I can assess damages and the case must come before me again on that point if the parties cannot agree upon the amount.

"As regards the 1, 2, 3, 4, 5 and 6th defendants, the plaintiffs will be declared non-suited with costs. As regards 7th defendant, I decree that having failed to warrant and defend to the plaintiffs the sale of half the crop, the 7th defendant is liable to pay to the plaintiffs the difference between one-tenth and one-half of the crop, and any profit which the plaintiffs may prove that they had legitimate reason to expect. The 7th defendant must pay plaintiff's cost."

On appeal, *Cayley, Q. A.* for the crown (7th defendant): The crown is not liable to warrant and defend, *D. C. Galle 23119*, 2nd July 1868, Vanderstraaten's Rep. p. 16, which is the leading case on the subject. In the court below, the case was not presented, as held erroneously by the District Judge, as a matter of *rectigal*. The suit was not for a remission of *rectigal*. So far as the crown is concerned, the plaintiff's case ought to be dismissed.

Grenier, contra: the crown is liable in damages *Voet*, 39, 4, 7. The prayer in the libel is virtually a prayer for damages, as the prayer is in the alternative to warrant or to pay damages. The answer of the crown was insufficient as it merely denied its liability to warrant.

Cayley, Q. A. (in reply) contended that the passage cited from Voet was no authority on the point before the court. The *conductores*, farmers, were very different from the *publicani*, who were a class of sub-renters. As he understood the passage, it referred to quite a different state of things [the section was read and commented upon.]

Browne appeared for the first six defendants and respondents.

Cur. adv. vult.

The Supreme Court set aside the decree of the court below and dismissed the plaintiff's case in these terms:—

The crown is not bound by law to warrant and defend its sales, and the authority cited by the learned Judge refers entirely to a different state of things.

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D. C. Galle, 91.

The appellant who was the defendant in case No. 39734, D. C. Galle, was taken up in execution and committed to prison on the 18th June last. On the 11th July, he filed a declaration of insolvency, and a petition praying that he might be adjudged an insolvent under the Ordinance. Accordingly on the 18th July he was adjudged an insolvent, and discharged from custody. No protection however appeared to have been granted. On the 27th July, the detaining creditor moved for a notice on the insolvent to show cause why the order discharging him from custody should not be rescinded, and the defendant re-committed on the ground that the debt for which he was in jail was contracted by breach of trust. This motion was discussed on the 28th August, and the learned Judge rescinded the order of the 13th July and re-committed the insolvent.

An interlocutory order may be rescinded by the District Judge who made it, if such order issued by mistake or on insufficient or false evidence.

Semble that one who is committed to prison on a writ of execution and afterwards is adjudged an insolvent at his own instance, cannot be discharged without notice to his creditor, if the debt involves a fraud or breach of trust.

On appeal by the insolvent, *Grenier* contended that the District Judge had no power to rescind his own order, and even if he had, he had no right to do so in the present case, as there was no breach of trust on the part of the insolvent. He was the defendant in case No. 39,734 and was never charged with fraud or breach of trust; only that while he was a servant of the plaintiff in that suit, the plaintiff had sustained some damages. That did not bring the defendant under any one of the exceptions contemplated by the 30th clause of the Insolvency Ordinance.

Layard for respondent: The District Judge had power to rescind his own order. In practice interlocutory orders, such as orders for sequestration, grant of an injunction &c. issued by mistake or on insufficient evidence, are frequently cancelled by the District Judges themselves. In the present instance, the order was clearly made by mistake. The creditor in District Court Galle 39,734, under whose writ the insolvent had been committed, had no notice of the motion made by the insolvent's proctor that the insolvent might be discharged. The creditor was entitled to such notice, and to be heard, before the order of discharge was made. *Re Pellatt*, 5 L. T. n. s. 853, *Ex parte* Preston, 5 L. T. n. s. 389, Griffiths and Holmes on Bankruptcy, 914, 915.

Grenier replied

Cur. adv. vult.

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And now the court held as follows :—

It is contended that the District Judge had no power to rescind his own order.

The Supreme Court however is of opinion that in the circumstances of this case the District Judge had the power to do what he did. We have consulted all the authorities bearing on the subject, and we find that according to Roman Dutch Law and according to the practice that prevails in the District Courts since their creation, the District Judges had the power to rescind their own orders where such orders have been issued by mistake or on insufficient or false evidence. This of course did not apply to final judgments on the merits, which can only be set right by appeal to the Supreme Court. This seems to be a power inherent in all courts. In the progress of a suit it becomes necessary to make a variety of orders both interlocutory and final, and if the District Judge has not the power to set aside or correct them when they are found to the wrong, the aggrieved party will necessarily be driven to the expensive and dilatory process of appeal. The rule therefore is not only founded in law, but in great practical convenience.

Sir Charles Marshall, who wrote before 1839, refers to this very question in several parts of his book. He discusses fully the Roman Dutch Law on the subject and his opinion is in favour of the power (Marshall p. 187and 179). This power appears to have been exercised by District Judges from the time of the charter of 1833, and we are not aware that it had ever been questioned. Orders for sequestration and injunctions ae frequently cancelled by District Courts and we are not prepared to set aside such a salutary practice, especially when it is in conformity with the law. When the insolvent was discharged on the 13th July, the petitioning creditor was not before the court, and the learned Judge's attention does not seem to have been called to the nature of the debt for which the insolvent was in custody.

D. C. Matara, 28,331.

Contempt of court for spitting in court.

On appeal against a conviction for contempt of court, arising from plaintiff spitting in court, while being examined in the witness box, *Grenier* appeared for appellant.

The court set aside the conviction in these terms :—

It is very unlikely that the plaintiff meant any disrespect to the court, and his spitting was probably due to nervousness. It is beneath the dignity of a court to take notice of such trifles.

D. C. Galle, 39,132.

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Libel :—"That upon a writ of execution issued by this court in case No. 36,789 at the instance of the 1st defendant against the 2nd defendant he the 1st defendant, caused to be seized and pointed out for sale among other properties specially mortgaged to him one half part of the land called Wellegoda Watta situated at Ahangama.

"That at the sale which took place on the 25th September last, the plaintiff then fully believing and being given to understand that the said ½ part of the said land belonged exclusively to the 2nd defendant, purchased the same for a sum of Rs. 225.

"That subsequently the plaintiff received information and became aware of the fact that the 2nd defendant is not entitled to any part of the said ½ part (his half having been previously sold under a writ) but that the said ½ part aforesaid is the maternal share of the 3rd and 4th defendants and two others who are minors and under the protection of the 2nd defendant.

"That the plaintiff with a view to complete the purchase, without prejudice to his right either to the land or purchase money in the event of a dispute and eviction by the rightful owner, as lawfully he may do, paid the purchase amount under protest.

"And the plaintiff avers that the writ aforesaid was wrongfully issued by the 1st defendant, who had no right to point out any thing out of the said one half part, and 2nd defendant being present at the sale with intent to defraud the plaintiff purposely and wrongfully suppressed the right of his children, who now assert a right to their shares of the land sold as aforesaid, to the plaintiff's great loss and damage.

"Wherefore plaintiff prays that the defendants be cited to shew cause why the sale, in so far as it effects the rights of the 3rd and 4th defendants and the minors who are still under the protection of the 2nd defendant, should not be cancelled, and why the plaintiff should not be allowed to receive and take back the sum of Rs. 225, out of the sum of money paid by the plaintiff, or that in the event of the sale being declared good and valid against all parties, that the same may be confirmed and the plaintiff put in peaceable and undisturbed possession of the premises aforesaid, with costs and for such other relief &c."

The 2nd 3rd and 4th defendants, though served with process, did not appear, but the 1st defendant did and pleaded that the land was specially mortgaged to him by the 2nd defendant and that plaintiff could not maintain this action as he purchased nothing more than the interest of judgment debtor, whatever it was.

The learned District Judge held as follows :—

1. If a purchaser at a Fiscal's sale completes the contract by paying in the purchase money and thereafter finds out that the judgment debtor had no title to the subject of the sale, such purchaser will not be entitled to relief, but *semble* would be, if payment be made under protest.

2. It is a good plea that a fresh suit cannot be instituted to shew irregularity or error of fact or law in a prior suit (*Gavin v. Hadden*), but in order to succeed such plea should be taken at the proper time.

3. Service under subsection 5 of cl. 30 of the Fiscal's Ordinance.

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"It is perfectly clear that at the time of the sale, the plaintiff (an innocent purchaser) was unaware that half of the land had been previously sold, and the evidence shews that such half had been previously sold for a debt due to the crown, and hence the other half belongs to the minor children of the 2nd defendant (the execution debtor), and to the 3rd and 4th defendants ¼ each. The 3rd and 4th defendants being in default and rule made absolute, their ¼ can be now held as a valid sale, but in regard to the other ¼ of the minor children the sale in execution must be held bad and the said sale under writ No. 36,789 so far as affects the said ¼ is hereby set aside and cancelled and the plaintiff entitled to the proceeds of said ¼.

"In case 36,789 when the question of proceeds was discussed on the 21st July last, the record is 1st and 2nd claimants not served, the 1st claimant being present plaintiff, and it would appear that some time after 22/25 February Mr. Weerasuria for 1st defendant moved to re-issue rule against 1st and 2nd claimants to be left at their last place of abode without any reason, the previous record of the 16th February shewing "that 1st and 2nd claimants are reported not now in the village" and the report of the Fiscal is that it was left at the last place of abode : this is wholly insufficient to bar the present plaintiff of his first right.

"It is decreed that the 1st defendant (who draws the whole of the proceeds) do pay plaintiff out of it half of what plaintiff paid for half of the land, and that plaintiff be quieted in the possession of one fourth of the land (more fully described in the libel) in common, as it is not shewn that 1st defendant knew of half having been previously sold just as much as plaintiff himself. Parties to pay their own costs."

On appeal *Layard* for 1st defendant and appellant (*Morgan* with him) : The respondent having purchased at a Fiscal's sale, he did so at his own risk and clearly had no right to claim a refund of the purchase money, *D. C. Colombo, 48,472*, Vanderstraaten's Rep. 24, and *D. C. Kandy, 58,857*, Civ. Min. 10th July 1875. Further, the respondent claimed in the original case No. 36,789 D. C. Galle to have the purchase money refunded, and appellant on that occasion obtained a rule on the respondent (who was 1st claimant in that case), "to shew cause why his claim should not be set aside." That rule having been made absolute against the respondent, he cannot maintain the present action. The proper course which the respondent should have adopted was to make the application, which he now makes in this suit, in the original case No. 36,789. *Gavin v. Hadden*, 3 L. R., P.C. 726. And lastly, the substituted service ordered by the District Judge was regular and in accordance with the provisions of the sub-section 5 of clause 30 of the Fiscal's Ordinance No. 4 of 1867, and the respondent

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has failed to shew any reason or cause why the rule made absolute against him in D. C. Galle 36,789 should be re-opened, and consequently the learned District Judge was wrong in decreeing the appellant to refund ¼th of the purchase money.

Van Langenberg for respondent was heard *contra*.

Cur. adv. vult.

And now the court held as follows :—

The averments in plaintiff's pleadings have been established. The charge of fraud against 2nd defendant indeed is not proved, but as between him and plaintiff, it is as good as proved, since he has not traversed it.

The District Judge has confirmed the sale so far as concerns the ¼th belonging to 3rd and 4th defendants, who are in default. This was clearly wrong, since the pleadings disclose no ground whatever for a decree against them ; but on the contrary, the plaintiff himself alleges that their title is good. They however have not appealed, and that part of the decree will therefore be undisturbed.

As regards the ¼th belonging to the minors, the District Judge has cancelled the sale, ordering 1st defendant, who appears to have drawn the whole proceeds of sale, to repay its price to plaintiff.

If plaintiff had purchased at the Fiscal's sale, and the purchase and sale had been completed before he found out the judgment debtor's want of title, he would clearly have had no title to relief, according to the rule laid down by this court in *D. C. Colombo No. 58,472* Vanderstraaten 26, and the case recorded in the Civil Minutes, 13th July 1875. However he found it out soon after the sale, and paid his purchase money under protest.

Before considering whether the circumstances of this protest makes a difference in plaintiff's favour, entitling him to succeed, we must dispose of two objections urged in appeal on behalf of the appellant, 1st defendant.

It appears that in the original suit No. 36,789, after plaintiff had put in a formal claim to have his purchase money refunded, and been noted in the record as "1st defendant" in that case, the present 1st defendant, who as plaintiff, obtained on 3rd December 1875 a rule *nisi* on 1st claimant, to show cause why his claim should not be set aside. On 16th February 1876, 1st claimant was reported "not now in the village", and thereupon the other plaintiff's Proctor obtained leave to re-issue the rule "to be left at his last place of abode". This having been done and 1st claimant not appearing, the rule was made absolute against him, so

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that, unless " 1st claimant" who is present plaintiff can upset that rule, it shuts him out of court. It was argued in appeal for present 1st defendant, that present plaintiff should have made the application which he makes in this suit, and *Garin v. Hadden*, L. R. 3 P. C. 726 was cited. This would have been a good objection, if taken by way of plea in 1st defendant's answer, but it does not lie in 1st defendant's mouth to raise it now for the first time in appeal.

The 1st defendant's next objection is that the service ordered by leaving notice at 1st claimant's last place of abode was not, as the District Judge has held it was, irregular and improper. It appears to us that this objection is good. The 5th sub-section of cl. 30 of the Fiscal's Ordinance empowers the court, if after reasonable exertion personal service cannot be effected, to prescribe any other mode of service as an equivalent. Now it certainly lay on the present plaintiff who seeks to upset a rule made absolute against him, to show some defect in that service, which he contends to have been so improper that the rule should be re-opened. But plaintiff has shown nothing of the kind. On the contrary, the Supreme Court sees no irregularity in the matter. Plaintiff, when 1st claimant in the original suit, had made his claim by a Proctor and must be taken to know that the question would probably come shortly to a decision. If he chose to absent himself from his accustomed address without making arrangements for his interests being duly represented, it was not unreasonable in the then District Judge to order service of the rule by leaving it at his last place of abode.

Holding this view, it becomes unnecessary for us to decide on the effect of plaintiff's protest, because his protest has come to an end in the other suit.

For these reasons, the decree of the court below will be set aside so far it decrees the 1st defendant to refund the price of ¼th of the land Wellegodde-Watte.

Respondent will pay plaintiff's costs in appeal.

November, 8th.

Present :—CLARENCE, A. C. J., DIAS, J. and LAWRIE, J.

C. R. Galle, 53,733.

One who is unlawfully deprived of his property, has a right to

Layard for plaintiff and respondent, being called upon, cited *D. C. Kandy, 63,034*, November 16, 1876, and *Northmore's Case*, 1864, VanLeeuwen p. 124 and Voet vi. 1. sec. 7 and 8, and contended that compensation may be claimed. He also cited *Domat's* Civil Law, sec. 3, tit 6, bk i, art. 7, and Ordinance No. 22 of 1871.

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The Supreme Court affirmed the judgment of the learned commissioner for the reasons given by him. It held as follows :—

If we had been satisfied that this buffaloe had been stolen from the defendant, we should have set aside the judgment, because an owner who has been unlawfully deprived of his property has a right to recover it, not only from the thief but even from a bona fide purchaser. But here there is no evidence that the buffaloe was stolen from the defendant. The evidence that it ever belonged to him is open to suspicion, and without stronger proof of ownership than he has adduced, he has no right to retain it and refuse to give up possession to the plaintiff, who has *ex facie* a perfect title to it.

recover it not only from the thief, but even from a *bona fide* purchaser.

D. C. Kandy, 67167.

Grenier for appellant, *Van Langenberg* for respondent.

The Supreme Court affirmed the finding of the court below as follows :—

The only point pressed upon us upon this appeal is that plaintiff cannot maintain this action of ejectment by reason that the foundation of his own title is a twenty five years lease, which it was said, was *ultra vires* and bad *ab initio*. But the lease is good as against the incumbent who granted it, and as against all the world, as long as his incumbency endures. In the case cited for appellant (D. C. Kandy No. 59,767 Civil Minutes 2nd July 1875) the incumbency of the party who granted the lease had already determined.

A lease granted by the incumbent of a *vihare* is good so against himself and all the world, so long as his incumbency endures.

D. C. Kandy, 66541.

Van Langenberg for respondent.

The following judgment of the Supreme Court explains the facts of the case :—

Plaintiff claims to be quieted in possession of a garden and prays for damages for the loss of a coffee crop which he avers that he was prevented from gathering by reason of defendant wrongfully causing the garden to be seized and sold by the Fiscal as the property of one Karuppan.

Defendant pleads that plaintiff had previously leased the land on a planting lease to Karuppan, that defendant seized Karuppan's interest on a judgment against him, and purchased it at the Fiscal's

1. A re-entry under a lease cannot be made without a suit *in invitum*, even under an express condition.

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2. Circumstances of a surrender of a lease in fraud of creditors.

3. Where a lease was not made expressly to A. and his assigns, *held* that A.'s interest was nevertheless transferable under writ against him.

sale. Defendant further avers that plaintiff has been in possession since defendant's purchase, and claims to be put in possession, and for damages for being kept out of possession.

Plaintiff in his replication admits the lease to Karuppan, but pleads that Karuppan had abandoned his interest and plaintiff had resumed the land. Plaintiff does not traverse defendant's allegation that plaintiff has been in possession since defendant's purchase, though he re-asserts his own claim to damages for loss of crop. That reservation however is not inconsistent with defendant's averment, since plaintiff's claim refers to what took place before defendant's purchase, and defendant's assertion is of plaintiff's possession *after* defendant's purchase. So far as this is concerned, we must take it that plaintiff has not disputed having been in possession since defendant's purchase.

As to the merits of the case, the learned District Judge finds that Karuppan's surrender of this lease was in fraud of creditors: There is no doubt that he made the surrender a day or two only after service of the rule on which judgment went against him by default. Now in this respect the case somewhat differs from the ordinary case of a person indebted making away with his property just before suffering judgment. For Karruppan's interest in this case was burdened with the necessity of keeping up the cultivation, and it is very probable that a man who was insolvent would not be able to keep up the cultivation. The lessor and lessee under such circumstances might both desire a surrender, without any fraud being involved. But plaintiff, the lessor, has not proved that the condition under which he was entitled to re-enter had happened. Had that condition happened, a surrender might have been made *by agreement*, without going to court, although under our law a re-entry cannot be made in invitum even under an express condition without a suit. Plaintiff has not proved that the condition for re-entry in the lease had happened, and consequently, under the circumstances, he must show that he gave full value for Karuppan's interest in the lease. This he certainly has not shown and the fact appears to be the contrary It was argued that the lease not being expressly made to Karuppan and his assigns, was not transferable under writ against him. But we do not follow here, the strictness of English conveyancing law on such points. An interest is transferable here and by consequence can be sold under a writ, unless it already appear that the privilege is a personal one granted to the grantee.

The plaintiff's case consequently fails, and his libel must be dismissed with costs. Moreover, plaintiff having been admittedly in possession since the sale to defendant, which sale we uphold, plaintiff must be ejected and is further liable to defendant in damages. According to plaintiff's evidence, the year's coffee would

be worth £35 to £40, and of that one-half under the lease would be the lessee's share. Considering, therefore, that defendant has no possession since his purchase, the Rs. 400 claimed does not appear too much. 1877. Nov. 13.

For these reasons, the learned District Judge's order is affirmed.

November, 13th.

PRESENT.

The Honorable Sir JOHN BUDD PHEAR, KT.

The Honorable LOVELL BURCHETT CLARENCE, *Acting S. P. J.*

The Honorable HENRY DIAS, *Acting J. P. J.*

Sir John Phear, sworn in as Chief Justice.

The Honorable Sir John Budd Phear, Knight, Barrister-at-Law, produces in court a warrant under the hand and colonial seal of His Excellency Sir James Robert Longden, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Governor and Commander-in-chief in and over the Island of Ceylon with the dependencies thereof, dated at Colombo the twelfth day of November, One thousand eight hundred and seventy seven, appointing him the said Sir John Budd Phear, Kt. Barrister-at-law, to be Chief Justice of the Island of Ceylon.

The said warrant is read and filed.

The said Sir John Budd Phear takes the oaths of Office and Allegiance in such manner and form as the same are by law appointed to be taken or made,—which oaths were administered by the Honorable the Acting Senior Puisne Justice.

November, 16th.

Present :—PHEAR, C. J., CLARENCE, J. and DIAS, J.

Mr. Philip de Melho Jurgen Ondaatje, Advocate, appears and takes the oaths of Office and Allegiance on his appointment as Deputy Queen's Advocate for the North Western Province.

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J. P. Kandy, 15824.

An indictment on Ordinance No. 5 of 1857, cl. 15 for the offence of "having in his custody and possession moulds or instruments which were then intended to make or impress the apparent resemblance of both or either side &c., of of a rupee," will be amply supported if proof be offered of the prisoner having in his possession an iron instrument consisting of two halves of a particular kind, a pair of bellows, a crucible and three counterfeit rupees.

The following was the case reserved by the Hon'ble L. B. Clarence, while Acting Chief Justice, for the opinion of the Collective Court :—

Kandardeniyagedara Dingery was tried before me at the Kandy Criminal Sessions of the Supreme Court, on the 9th August 1877, on an indictment charging that "knowingly and without lawful excuse he did have in his custody and possession two moulds or instruments which were then intended to make or impress the apparent resemblance of both or either side or a part of both or either side of a piece of Queen's silver coin lawfully current in this colony called a rupee."

At the trial the prosecution proved that the prisoner had in his possession at the time in question, a pair of bellows, a crucible, 3 counterfeit rupees and an iron instrument consisting of two separate halves. The last mentioned instrument was obviously the outer metal shell of a mould adopted for casting some dice of metal of about the circumference of a rupee but the actual matrix whether of sand, loam or whatever other substance may have been employed, was wanting. The instrument in question appeared in fact to be the empty shell designed to enclose a fragile matrix for casting. It had an aperture for the admission of molten metal, but there was no vestige of any matrix.

If the instrument in question were held to be a mould or instrument intended to make or impress the apparent resemblance of both or either of the sides of any of the Queen's current silver coin or any part or parts of both or either of such sides within the meaning of the 14th clause of the Ordinance No. 5 of 1857, the evidence supported the inference that the prisoner had it in his possession knowingly and without lawful excuse.

I left the question to the jury, whether the prisoner was proved to have had in his custody or possession knowingly and without lawful excuse a mould or instrument intended to make or impress the apparent resemblance of both or either sides of a rupee, directing them that if they found in the affirmative they should convict.

I also directed the jury that in determining whether or no the instrument abovementioned was a mould or instrument intended to make or impress the apparent resemblance of both or either sides or a part of both or either sides of a rupee, they might take into consideration the circumstance of its being accompanied in the prisoner's possession of 3 counterfeit rupees.

The jury convicted the prisoner but entertaining some doubt as to the correct interpretation of the 14th clause of the Ordinance No. 5 of 1857, I did not pass sentence and I reserved for the consideration of the Collective Court the question, whether under the circumstances above detailed there was any evidence to go to the jury of the prisoner having in his possession a mould or instrument intended to make or impress the apparent resemblance of both or either sides or a part of both or either sides of a rupee, within the meaning of the 14th clause of the Ordinance No. 5 of 1857.

Van Langenberg for the accused; clause 14 of the Ordinance No. 5 of 1857 is a transcript of 2 Will. c. 84. In order to bring

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the case under the ordinance, an "impression" should exist on the mould. ["The mould" as described in the case reserved was produced in court]. *Rex. v. Foster*, 7 C. & P. 494 &c. *Reg. v. McMillan*, 1 Russell on Crimes, 117. Was the mould produced, a "mould" within the ordinance? Penal Ordinances are to be construed in favor of liberty. The indictment declares that the "mould" was "intended" for coining.

[CLARENCE, J.—I left to the jury to decide whether the prisoner's possession of three counterfeit rupees, a crucible, and a pair of bellows, coupled with his possession of these moulds, was sufficient evidence of the prisoner having in his possession a mould intended to make the apparent resemblance of a rupee, under the ordinance.]

The judgment of the court was delivered as follows, by PHEAR, C. J :—

We are of opinion in this case reserved that the jury had before them ample evidence to justify their coming to the conclusion of fact that the accused had in his possession a mould or instrument intended to make or impress the figure or apparent resemblance of a Queen's coin.

The words of *Patteson, J.* reported in the record of the two cases of *Rex. v. Foster*, 7 C. & P. 495, to which the learned Advocate who appears for the accused has referred us, seem to tell against his argument. We are in effect asked to hold that if a coiner succeeds in secreting any part of a complex instrument of coining, or if he endeavours to carry on his trade with an incomplete or imperfect tool, the words of clause 14 of the Ordinance No. 5 of 1857 fail to reach him.

The conviction is upheld, and the sentence will be passed by the Judge on circuit at the next criminal sessions to be held in Kandy.

P. C. Matale, 15311.

VanLangenberg for appellant.

P. C. Matale, 15341.

VanLangenberg for appellant.

Browne for respondents.

P. C. Matale, 15345

Grenier for appellant.

Browne for respondent.

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P. C. Matale, 15350.

Dornhorst for appellan'.

Browne for respondent.

1. An information for theft, with ownership laid in an alternative form, in a particular named proprietor *or* of some person unknown, is bad (if objected to) on the score of duplicity.

The following judgment of the Supreme Court in the above four cases sufficiently sets out the facts :—

In each of these cases,, the appellants are charged with stealing green gathered coffee, and in each information, the ownership is laid in an alternative form, in a particular named proprietor *or* of some person or persons unknown. In neither case however, did defendant's Proctor object to the information on the score of duplicity. We consider that we may assume the Police Magistrate to have convicted in each case upon the count charging the theft of coffee, the property of the named proprietor ; and for that reason, considering the convictions substantiable on all other grounds, we send the cases back for further evidence as abovementioned.

2. Clause 5 of Ordinance No. 8 of 1874 as to possession of green coffee, does not create a substantive offence, but merely alters the law of evidence.

We consider it fairly established in each case that the coffee in question was green gathered coffee, and consequently the 5th clause of the Ordinance No. 8 of 1874, comes into play, and throws on the defendants the onus of satisfactorily accounting for possession. And upon the evidence (excepting always the point as to estate ownership abovementioned) we think that the conviction was right.

In Nos. 811 and 812, statements of the defendants were certainly most irregularly taken and recorded upon the forms made in J. P. cases after the defendant had pleaded in the present cases. The Police Magistrate may perhaps have been misled by the decision in P. C. Matale, No. 15135 on November 1st last of a learned Judge who probably had not at the time his attention directed to the decision of this court in P. C. case No. 12959, November 21, 1876, where we pointed out that the 5th clause of this ordinance does not create a substantive offence, but merely alters the law of evidence. In the cases now before us we think that this irregularity falls within the category of irregularities referred to in clause 20 of the Administration of Justice Ordinance, which have "not prejudiced the substantial rights" of the party. We do not think that these defendants have had their substantial rights in the least prejudiced by this irregularity. This would have been otherwise, had their statements been inconsistent with the evidence for the defence.

The conviction in each of these cases is set aside and they are sent back for evidence on the question whether or no the estate in question is owned by the individual proprietor named in the plaint. If the complainant succeeds in establishing that point, the conviction will be sustainable.

C. R. Tangalle, 19015.

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Grenier for the plaintiff and appellant.

Browne for the intervenients and appellants.

Practice.

The Supreme Court remanded the case for re-hearing in these terms :—

The plaintiff had a perfect right to call witnesses on his new list, as it had been accepted by the court long before trial, even though that list was filed with a view to the intervention. The interventions should not have been summarily dismissed as the Commissioner has done. The interventions having been received, the intervenients are entitled to call upon the court to hear and determine that rights.

The defendants will pay the costs of this appeal.

D. C. Negombo, 7875.

Grenier for appellant.

Dornhorst for respondent.

The following judgment delivered by CLARENCE, J., and agreed to by DIAS, J., sets out the facts of the case :—

Whether a wife living separate from her husband without having obtained a decree of divorce or judicial separation, can claim from her husband either expenses incurred by others in her maintenance, or permanent future alimony.

Plaintiff avers in her libel that she is defendant's lawful wife, that defendant had abandoned her, whereby plaintiff "with the assistance of others was obliged to be maintained at a great expense, to wit the sum of Rupees 150," and the plaintiff prays for judgment for the said sum of Rupees 150, and an allowance for the future for her support at the rate of Rupees 10 per month. Defendant by his answer traverses the desertion and avers that it is plaintiff who refuses to live with him, because he has discontinued residing in the house of her parents. The District Judge has given judgment for the plaintiff according to the prayer of her libel, dispensing with some of the witnesses whom plaintiff was prepared to call.

The evidence recorded by no means produces upon us the impression which it appears to have produced on the District Judge. On the contrary it inclines us to the belief that defendant's version of the matter is at any rate as near the truth as plaintiff's. If this were all however, we should have to send back the case for plaintiff's additional evidence, which was dispensed with at the trial. We shall not do that for the simple reason that plaintiff's libel discloses no ground of action whatever.

There is no averment (indeed it does not appear to be the fact) that plaintiff herself has incurred the expense of Rs. 150 by reason of the alleged abandonment. Had that been otherwise, the

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question would have arisen—whether a wife living separate from her husband and not suing for a divorce or judicial separation, can sue her husband and claim damages in respect of her past subsistence. Nor can plaintiff be awarded the Rs. 10 per mensem which she claims for her future subsistence. Any such order would be in direct contravention of the policy of our law, since the plaintiff does not ask for a decree of divorce or judicial separation, but for permanent future alimony for living separate without any such decree. The libel was clearly in our opinion demurrable. Defendant however, by his proctor, did not demur but traversed, thus putting the District Judge to the trouble of investigating an issue on which, as we hold, plaintiff could have no judgment even if she succeeded.

We think that the order appealed from should be set aside and plaintiff non-suited. All costs divided.

This being the opinion of the majority of the court, the order in appeal will follow accordingly.

The Registrar read the following opinion of LAWRIE, J., before whom the case was argued on the 8th November last, while he sat with CLARENCE, A. C. J. and DIAS, J.—

I agree with the Chief Justice in thinking that the judgment appealed against should be set aside, but as I do so on different grounds, and as I dissent from some of the views he has expressed, I feel bound to give a separate opinion.

I understand the law to be that a husband is bound to maintain his wife, and that if he fail to do so, she has a right of action against him.

In this case, the plaintiff sets forth in her libel that she is the defendant's wife, that he unlawfully deserted her without maintenance, that she has incurred debt in maintaining herself to the extent of Rs. 150, that the has no means to maintain herself in the future. She prays that he be decreed to pay her Rs. 150, and that, unless he can show good and sufficient cause to the contrary, he be decreed to pay her Rs. 10 a month for the future.

I do not say that the language of the libel is happy, but it may disarm criticism when it is observed that it is signed by the plaintiff herself and that it was not prepared by a professional pleader. I think it would be unfair to read it otherwise than as I have done.

I am unable to concur in the opinion of the Chief Justice that the libel discloses no ground of action entitling the plaintiff to the relief prayed for, and it follows that I cannot agree that, if the defendant had demurred to the libel, he would have been entitled to his costs. For I am strongly of opinion that if the libel can be read as containing the various averments I have stated it does contain, it is a relevant libel, which if proved, could entitle the plain-

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tiff to the very relief she claims, subject only to this, that the judgment for future and continuing maintenance should expressly bear that it should be paid only so long as the desertion of the husband lasted.

But while I think the libel is relevant and discloses a good ground of action, I of course hold that, before getting judgment, the plaintiff was bound to prove her averments.

If she failed to prove her leading averment that she had been deserted, or her other averments that she had contracted debts and need Rs. 10 a month to live on, she shall certainly not be entitled to judgment.

It is because I am of opinion that she has failed to prove that her husband deserted her, that I concur in thinking that her action should be dismissed.

It is plain from the proof that she refuses to live with her husband in his house. That being so, he is not bound to maintain her elsewhere. A husband is bound either to maintain his wife in his own house, or if he refuses to do so, to supply her with the means of living. But if he is willing to receive her, she is bound to live with her husband wherever he chooses to reside. If she refuses to stay there, and prefers to live elsewhere, she forfeits her right to maintenance.

It is not very clear that the defendant is willing to receive the plaintiff, but it is not necessary now to ask whether he is or not. That would be a pertinent enquiry were the plaintiff willing and ready to return to him. But as she has distinctly stated, when examined in this case, that she is not willing to live with defendant in his present house, I think she cannot receive maintenance.

No doubt she gives as her reason for refusing to live with him that he would murder her. If it had been proved that either her life or health were in danger by him, the case would be different, but that has not been proved. It is therefore not necessary to discuss what her rights or remedy would have been, had she proved that she could not safely live in his house.

D. C. Badulla, 20541.

The following judgment of the learned District Judge *(Gibson)* explains the facts of the case :—

Compensation for improvements made by a tenant under a lease, and the limits

"The plaintiff, the incumbent of the Bogodde Passera and Malitta vihares and guardian of the minor Olegame Dammapalle Samenaroo Unanse, brings this action to have defendant ejected from the land Pansalawatte and the buildings standing thereon appertaining to Passara and Bogodde vihares. The defendant while admitting that the land belongs to Bogodde Vihare contends

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that he is in lawful possession of the said garden, it having been leased to him on the 7th August 1865 for 25 years by Galanda Sobitha Nayake Unanse, then incumbent of the said vihares and guardian of Mupana Sonatera Samenaroo Unanse and nephew and pupil of Muppene Dhammarakitta Unanse in accordance with his last will and testament executed on the 31st March 1852 filed in the Testamentary Case No. 216. The said Samaneroo relinquished the robes in 1872, on which Dhammarkitte Unanse instituted a case in the D. C. No. 19465 for the incumbency of the Bogodde Malitta and Beddegame vihares and got judgment, and sues that the plaintiff may be ordered to pay him the sum of Rs. 2000 for the cost of improvements he has effected on the tenements.

"The plaintiff's counsel contends that defendant is not entitled to any compensation, as when he leased the premises he was fully aware that they were in dispute as far back as the 23rd May 1862. Beddigame Gamegedere Dhammarakitte Unanse had instituted an action D. C. No. 15,805 against Gallanda Sobitta Unanse for the incumbency of the Passera vihare and its appurtenances, and Passera, Bogodde, Malitta and Beddegame vihares are all held by one and the same incumbent, and that defendant being well aware of this fact leased the premises on his own risk.

"From a perusal of the previous cases No. 15,805 and 19,465 and Test Case No. 216, it is quite clear that Gallanda Sobitha Unanse held the incumbency of the vihares in question, having been appointed guardian of Mupane Sonatera Samenaroo Unanse by Dhammarakitta Unanse, as before noticed; he disrobed in 1872 and subsequently went mad, but till then defendant's lessor was clearly in lawful possession of the vihare. The first case brought No. 15,305 was for the lands attached solely to Passera vihare and Pansalawatte is not mentioned in the list of appraisement filed in that case. I dont see that defendant could know that all the vihares were under one and the same incumbent when he had the land on the 7th August 1865, for at that time the land in question was not in dispute, it was not till the 1st October 1872 that Dhammarakitte Unanse instituted his action for Bogodde Malitta and Beddegame vihares and their appurtenances, and consequently I hold that defendant's lessor had a bona fide right to lease the said premises and defendant to take them, and I think the law is clear that when a person takes a land on lease under a bona fide belief of his lessor's right to lease, he is entitled to compensation for the improvements effected during his occupancy; of course had he taken it knowing the lessor's right was disputed, he would have done so at his own risk, but the court holds that when he took it there was no dispute.

"The only question now to be decided is the amount of compensation to which defendant is entitled. It is proved that he

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erected a tiled house in lieu of a building that had been standing at least 40 years, and defendant proves that the erection of this building cost him originally about £ 140 and that additions subsequently made cost another £ 60 which makes up the amount he claims, and it is further shown that the house can be leased out at the rate of Rs. 25 per mensem. The court thinks that that fact proves his claim is not excessive, but it must be remembered that the materials used in the old house were employed in constructing the new one and consideration must be taken for that. I should think Rs. 1700 would be a fair and just estimate of the value of the premises.

"It is adjudged and decreed that plaintiff be condemned to pay to defendant Rs. 1700 for the improvements he has effected and that *on payment* of such sum defendant shall quit the premises, plaintiff paying costs."

On appeal *Ferdinands, D. Q. A.*, and *Van Langenberg* appeared for plaintiff and appellant, and contended that defendant was not entitled to compensation, Perera's *Armour*, p. 118; even if he was entitled to receive any compensation, he could not retain possession of the property as against the rightful owner, *D. C. Badulla 20,137* Ramanathan's Reports, 1877, p. 157. The rents received ought to be set off against the value of improvements, *Touissant's Case*.

Cayley Q. A. (with him *Grenier*) for defendant and respondent :—

The present suit is in the nature, of a *rei vindicatio* in which *impensæ utiles* might be recovered, and recovered not from the lessor, but from the ejector, *D. C. Kandy, 66959*, 3rd July 1877. The Dutch Law on the subject is very clear. By retention of property alone, can one's right to compensation be made effective, Voet *ad Pandectas*, vi. 1. 36, *retentione sola* &c. Defendant is entitled to recover, even though expenses are greater than the value of property, since no man ought to enrich himself at the expense of another. [LAWRIE, J.*—does not clause 2 of Ordinance No. 7 of 1840 affect your position?] No. That clause relates to the acts of parties, but tacit hypothecs arise by operation of law. The Ordinance of Frauds has never hitherto been supposed to have swept away the law of tacit hypothecs. The word "mortgage" in clause 2, relates only to conventional mortgages. On the question of damages, the District Judge's finding is correct.

Ferdinands, D. Q. A., (in reply) cited D. C. Kandy, 66599,

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* This case was argued on the 5th October last before CLARENCE, A. C. J., and LAWRIE, J.—ED.

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D. C. Badulla, 20137, *Toussant's Case* and D. C. Kandy, 52439, Grenier, 1873, p. 58.

Cur. adv. vult.

And now CLARENCE, J. delivered the judgment of the court, as follows :—

The lease appears to have been made in contemplation that improvements would be made by the lessee. The first ten years' rent (£50) was paid in advance. If the lessee chose to go out at the end of those ten years, he was to receive the value of his improvements. If he choose to go out at any time between the end of the first ten years and the end of the term, he was to get half valuation for his improvements. And we infer that if he continued on till the expiry of the term, he would have got nothing for his improvements, which is the view upon which the defendant bases the claim in his answer.

The lease ofcourse is not binding upon the present incumbent, and the question is what claim has defendant for improvements?

The District Judge finds upon the evidence that defendant has erected a tiled house in place of an old building. Deducting the value of the materials of the old building (which seems to have been a tumble down affair), the District Judge finds that defendant has expended Rs. 1700 net upon the new house, and the District Judge, having regard to the evidence as to the obtainable rental, finds that Rs. 1700 fairly represents the value of the house.

Defendant is very much in the position of the man described by Celsus (Dig. xi. 1. 38) *qui in fundo alieno quem imprudens emerat ædificavit.* He came in bona fide, but he acted imprudently, since he must be taken to have known that his tenancy might determine at any time with the incumbency of his lessor. The building of this house clearly falls under the category *impensæ utiles*, and consequently defendant is entitled to a right of *retentio* in respect of the money spent, but not necessarily to the whole amount of his expenditure. The limits of the right of *retentio* for *impensæ utiles* in the case of an out-going possessor, such as this defendant is, are very plainly laid down by Voet (vi 1. 36), and also in the original passage in the Digest (vi 1. 38), on which Voet's commentary is based.

First of all, the amount which the out-going possessor can claim is doubly limited : in no case can he claim more than the amount expended, and in no case can he claim more than the difference between the original and improved value of the property. If the rise in the value exceeds the sum expended, he can only claim the sum expended ; if the rise in value falls short of the sum expended, then he can claim the amount of the rise in

value. Further than this, there is an equitable discretion left to the Judge *qui varie ex personis causisque constituit*, who is not to allow a man, as Lord Langdale put it in *Saunders* v. *Hooper*, 6 Beav. 246, "improved out of his property" where the *impensæ utiles* "*nimis graves sint, nec eas ipse dominus fuisset facturus*". It would be manifestly inequitable to shut a man out of his own property merely because he cannot pay for expensive improvements which have undoubtedly raised the value of the property, but which he never would have undertaken on his own account. In such a case as that, the Roman law, and the Roman Dutch law also, empowered the Judge to award that the outgoing possessor should sever and take away (*tollat*) such of his improvements as could be taken away without reducing the property to a state worse than the original one, provided that the real owner might have the option of keeping the improvements as they stood, by paying the outgoing possessor a sum representing what would be the value to him of the materials if severed.

In the case before us, we see no reason to disapprove of the Judge's finding that the amount laid out by defendant in these *impensæ utiles* has been Rs. 1700. What is the exact increase in the value of the property, the District Judge has not expressly found. He puts the value of the premises, which apparently means the value of the house, at Rs. 1700, from which it would seem that the District Judge has somewhat confused the value of the new house, site and all with the rise in the value of the property. There is no direct evidence as to whether the new incumbent would have been likely to erect such a building as this new house, but upon this question, whether the *dominus eas impensas facturus fuisset*, it is material to note that the original incumbent, whose lease actually subsisted for several years contempleted improvements to be made by defendant. The original ground rent reserved in the lease was £ 5 per annum, and defendant has built a house on the land at an expense of £170, which must have increased the value of the property by very nearly that sum, if the District Judge's finding is right, which we do not think it is. If defendant had gone out voluntarily two years ago about the time when the action was brought, he would, if his original lessor had been continuing incumbent, have been entitled to the full value of his improvements under the lease. He is now being turned out, or rather is liable to be turned out, owing to the results of his imprudence in taking a lease which his lessor had no power to grant at 12 years. Going out at 12 years under the lease, he would have half value for his improvements, and would have to pay two years rent at £ 5 a year.

We think under these circumstances that we shall be making an equitable adjudication between plaintiff and defendant, if we give him the half of Rs. 1700.

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The decree, therefore, will be that the order appealed from be set aside, and in lieu thereof it is decreed that defendant do quit possession of the property in question on being paid Rs. 850; and that defendant be entitled to retain possession of the property until he be paid the said sum of Rs. 850 or on the expiration of the original term of 25 years, whichever event soonest happens.

We may as well add that since defendant cannot, and indeed does not, claim to be placed in a better position than he would have had under the lease, he will lose his claim to Rs. 850, if he remains in possession till the expiry of the original term.

With regard to costs, the District Judge gave defendant his costs, and defendant has been more in the right than plaintiff, for plaintiff sued in ejectment without tendering anything for improvements, and in fact traversed in his replication defendant's averment of having made improvements. Defendant on the other hand has not denied plaintiff's title, and has established the fact of improvements, though we do not award him their whole value. We shall give defendant his costs in the court below. In appeal, each party will bear his own costs.

D. C. Colombo, 69938.

1. In order to maintain a civil action against a public officer, it is not enough to shew that he has in the course of his business, as a public officer, been guilty of misfeasance or non-feasance, but the plaintiff must go further and allege that a particular right of his has been injured in consequence.

Plaintiff (*Alla Pitche*) sued the defendant (*Adams*) in his capacity of Fiscal of the W. P., for the recovery of Rs. 2,500 as damages, averring that defendant seized and advertised for sale under the D. C. Colombo writ No. 54348 a house and ground bearing assessment No. 9, having received previous thereto notice that the premises were specially mortgaged to one Sinnaya Chetty; that at the sale, the plaintiff in ignorance of the said mortgage became the innocent purchaser of the said premises for the price of Rs. 2100 being the then full value of the said property; that after he was put in possession of the said property, the mortgagee issued writs against it and had the property seized and sold, ejecting the plaintiff therefrom; that the defendant was guilty of negligence and irregularity in failing to inform the plaintiff of the said mortgage, and to report to the court the claim so preferred, and in allowing the proceeds of the sale to be paid over to the execution creditor; that by reason of these premises, the defendant became liable in damages to refund the amount of the purchase money, viz: Rs. 2,100 and an additional sum of Rs. 400 expended on the property by the plaintiff for necessary repairs.

The defendant denied the gross negligence and irregularity imputed to him, and pleaded that the plaintiff had notice of the mortgage, inasmuch as it was duly registered by the holder thereof,

and that he did not incur damages by any act of the defendant, and the defendant claimed the benefit of clause 10 of Ordinance No. 22 of 1871 and of clause 21 of Ordinance No. 4 of 1867.

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The learned District Judge (*Berwick*) held as follows :—

"Counsel heard on the question of whether registration of the mortgage was notice of the mortgage to the defendant and all others.

"I am fully of opinion, as at present advised, that the mere registration of a mortgage, without more, is not notice to all the world, although it affords the means of knowledge to all the world, and that this is the correct view whether regard be had to the English decisions or to the Roman Dutch Law as to the law of notice in respect to registered documents. I am not concerned to say what ought to be the law, and whether the English or the American view is the more reasonable, and it would be very presumptuous in me to speak dogmatically on a subject on which so many and such abler judges than myself have differed in opinion. I may however say that to me the sounder reasoning seems to point to the propriety of the law as it is both in English and under the Roman Dutch Jurisprudence.

"There is one point which ought to be carefully noticed as having a very important bearing on the question viz., by our ordinance, although deeds and incumbrances may be registered, they are not bound to be registered: persons are left at liberty to take certain risks if they choose not to register them. Further our ordinance does not profess to be an authority on the question whether registration is *per se* notice or not to all the world, and neither does it profess to be an authority on the effects of registration (which is not to be confounded with notice), but it simply professes to enact certain effects (not of registration) but of non-registration.

"Counsel further heard on the plea of prescription

"Mr. *Layard* for defendant cites *Roberts v. Read*, 16 East 217, *Gillon v. Boddington*, Ryan and Moody 161, *Bonomi v. Backhouse*, 28 L. J. Q. B. p 378, *Whitehouse v. Fellowes*, 30 L. Q. J. C. P. 306.

"Mr. *Grenier* for plaintiff cites *Mayne* on Damages p. 360, *Howell v. Young*, 5 B. & C, 259, *Smith v. Fox*, 17 L. J. Ch. 170, *Vaughan v. Weldon*, 31 L. J. 683, *Jackson v. Spittel*, L. R. 5 C. P. 543, *Backhouse v. Bonomi*, 9 H. of L. 503.

"On the plea of prescription the question for determination is whether the cause of action arose on and by an act of committing the negligence alleged (supposing negligence proved), or on and by the sustaining of the damages claimed: in the first case the action will be prescribed, in the other case it will not.

2. Where A., a Fiscal, sold in January 1870 to B. a land in execution, without informing him or the court of the mortgage which subsisted thereon, though he (the Fiscal) had received previous notice of it, so that A. who bought in ignorance of the encumbrance and paid the then full value of the property, was evicted by the mortgagee in April 1877, and where A raised an action in June 1877 claiming special damages, *held* that the 21st clause of the Ordinance No. 4 of 1867 was no bar to the action, as the cause of action accrued to the plaintiff, not from the mere suppression at the sale of the

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existence of the mortgage, but from the date of the eviction which caused the special damage.

"There is no doubt that on certain grounds it would seem very hard and unprincipled if the first view were to be sustained in all cases, and that an innocent sufferer should be debarred from remedy in a case where a person had done an act of negligence which did not and could not come to the knowledge of the plaintiff till after the time limited by the statute, and which did not, and from circumstances could not earlier, occasion him damage and thus lead to the discovery of negligence.

"But this is a consideration of policy and expediency by which courts have no right to be guided, and I have therefore only to ascertain what the law is, according to the intention of the legislature, and the construction put by decisions on the meaning of the words used.

"From the decisions in the English courts on the same words "cause of action" occurring in statutes analogous to our ordinance, and from which statutes the words have manifestly been copied by us, it seems to me that these words do not have the same meaning in all cases, and that there are certain tests by which the meaning is to be ascertained in different classes of cases. These tests (or some of them) seem to be as follows in cases not of "breach of express contract", which class is *dehors* to the present suit :—

"1. When an act is not actionable of itself, but becomes so by reason of consequential damage, then the damage and not the act is the "cause of action" and the term of prescription begins to run only from the date of the damage. Such is the case in the English action of slander where special damage has to be shewn. This illustration is taken from Mr. Justice Bayley's judgment in *Howell v. Young*, 5 B. & C. 265.

"2. On the other hand, where the defendant has been guilty of misconduct (as alleged in this case) and the special damage results from the misconduct, such damage is only a part of the injury sustained by the defendant, and not of itself a cause or the whole or only cause of action. Such is the case when the English action for slander is for words which are actionable in themselves, although special damage may be and frequently is alleged in the declaration. There the allegation of the special damage is a mere explanation of the manner in which the conduct of the defendant became injurious to the plaintiff, and the defendant may recover without proving the special damage. There the misconduct is itself a cause and the cause of action, and "the statute of limitation is a bar to the action, unless the special damage alleged in the declaration constitutes a new cause of action," and the extent of the injury is a mere measure of the damages (Holroyd J., in *Howell v. Young*. In such a case a plaintiff is allowed to recover as "consequential" damages not only the loss he has suffered but all he "is likely to suffer from the act." (Mayne's treatise on Damages, p. 360, citing *Howell v. Young*).

"3. If, however, there is a continuing misconduct, as in the case of a nuisance, then every moment of continuance is a new cause of action, for which a plaintiff may recover on account of a fresh damage, (which he could not do in another case). To this class of cases belongs *Whitehouse v. Fellowes*, 30 L. J C. P. 305. Nov. 16.

"4. So also where the act of the defendant is not unlawful in itself, and gives the plaintiff no legal ground of complaint by its results at the immediate time, but the cause of the grievance only accrues subsequently, as when his right to the ordinary enjoyment of his land is for the first time interfered with, some time after the lawful act of the defendant on his own land, unknown to the plaintiff, the cause there of action accrues from the date of such interference with the ordinary enjoyment of plaintiff's land, and not from the date of the defendant's act done without his knowledge. In such cases the consequential damage is the true cause of action, *Backhouse v. Bonomi*, 9 H. of L. Rep. 503, and *Robert v. Read*, 16 East, 215, *Gillon v. Boddington*, 1 Ryan and Moody, 161.

"Now the case before me clearly falls within neither of the last two tests, for the Fiscal's act in negligently concealing the fact of a mortgagee's claim at the time of the sale in execution is not a continuing act, and it was misconduct, and of such a nature as interfered with the purchaser's ordinary enjoyment of his rights from that date, and gave an immediate cause of action; neither does it fall within the first test, for the defendant's negligence was immediately actionable, but it does fall I think within the 2nd of these tests, and this view seems to me expressly and authoritatively confirmed in respect to actions against Sheriffs and Attorneys by the decisions in *Howell v. Young*, 5. B. & C. 265, and *Smith v. Cox*, 17, L. J. n. s. Ch. 170. This view of the law might certainly prove very hard in particular cases: but the law does not profess to administer distributive justice, but to be governed in the case of all individuals by the same general and identical rules.

"I must hold the plea of prescription good. The plaintiff must therefore be non-suited with costs."

On appeal, *Cayley, Q. A.*, appeared for plaintiff and appellant:

The District Judge's decision is found mainly on *Howell v. Young*, which however is not on all fours with the present case. Prescription in the present case runs from the result of the act complained of, and not from the act itself. *Backhouse v. Bonomi*, 28 L. J. Q. B. 378, considerably modifies *Howell v. Young*, and that was a case in which the defendant, as owner of certain mines, withdrew in 1849 the pillars of coal which had been left as supports to the roofs in some of the old workings. The consequence was that the roof of the mine fell, the adjacent strata one after another subsided in slow succession, and at last in 1854 the

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support of the intermediate strata having given way, the plaintiff Bonomi's land which was 280 yards off from the defendant's mines sunk, and his house which stood thereon was injured. The plaintiff brought his action for the injury in 1856. It was held, reversing the judgment of the Queen's Bench in this case, that the Statute of Limitations was no bar to the action, as no cause of action arose to the plaintiff by the mere excavation by the defendant of the pillars of coal on his own land, so long as it caused no damage to the plaintiff, and that the cause of action first accrued when the plaintiff received actual damage. This decision was affirmed by the House of Lords, *Backhouse v. Bonomi*, 9 H. of L. Rep. 503. But English cases are not conclusive on the point before the court, as cl. 84 of the Fiscal's Ordinance introduces the Roman Dutch Law in all matters which formed the subject of that exactment, and which were not expressly provided for by it. Now under the Roman Dutch Law, the very foundation of prescription is implied consent or implied abandonment of one's right, and this can only be implied, when the party can be aware of his right. Leyser's *Meditations on the Pandects*, vol. 7 ch. 7 p.148. The plaintiff in this case could not know that he had any right of redress until the injury complained of was actually sustained.

Grenier (with him *VanLangenberg*) for respondent, submitted that the simple point in issue was whether cl. 21 of the Fiscal's Ordinance barred the present suit. The term 'cause of action' occurred in that clause, and was manifestly borrowed from the Common Law Procedure Acts. Roman or Roman Dutch authorities were therefore of no avail on the point before the court. See *Jackson v. Spittle*, 22 L. T. n. s. The case of *Backhouse v. Bonomi* was distinguishable from the present case. See *Nicklin v. Williams*, 23 L. J. Exch 335. But before the validity of the plea of prescription was considered, it ought to be ascertained whether plaintiff had disclosed a cause of action at all in his libel. The defendant's conduct of itself did not constitute a cause of action. *Howell v. Young*, 4 M. and W. 259.

Cayley Q. A. (in reply): The case turned in the court below on prescription. It is too late now to say that plaintiff's libel discloses no cause of action, for if it were really so, defendant ought to have demurred to the libel.

Cur. adv. vult.

And now the judgment of the court was delivered by CLARENCE, J., as follows :—

One question only is contested upon this appeal, viz., whether

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this action is barred by the 21st clause of the Fiscal's Ordinance. The plaintiff's pleadings aver that defendant, being Fiscal in January 1870, seized and advertized for sale a certain land, under writ in Colombo District Court case, defendant having previous notice that the land was mortgaged to one Sinnayah Chetty. And the pleadings charge defendant with "gross negligence and irregularity," in that he proceeded to put up for sale, keeping plaintiff in ignorance of the mortgage, whereby plaintiff became the purchaser of the land at its full value, was put into possession by defendant, and was subsequently ejected by the mortgagee in April 1876, a few weeks only before action was brought. Plaintiff claims to recover from defendant Rs. 2,500 as damages incurred by plaintiff by reason of defendant's gross negligence and irregularity in selling this land to plaintiff, without telling plaintiff of the mortgage, whereby plaintiff was afterwards ejected by the mortgagee's superior right.

Defendant has pleaded the 21st clause of the Fiscal's Ordinance, and therefore we have to enquire when did plaintiff's cause of action accrue. If plaintiff's cause of action was the alleged negligence and irregularity of the Fiscal at the time of the sale, his action is barred by the ordinance, being long out of time, but if the cause of action be the consequential damage of his eviction by the mortgagee, his action is in time. The way to test questions of this kind is to enquire—whether plaintiff's pleadings disclose a cause of action apart from the special damage alleged. *Howell v. Young*, 4 M. & W. 259, was cited for defendant. That was an action against an attorney, the plaintiff claiming the damages sustained in consequence of the attorney's breach of duty in not using proper diligence in the investigation of a certain security. There, applying the same test, the Judges held that the cause of action was the breach of duty itself, and that the consequential damage which occurred a year after was no new cause of action. The result was that the plaintiff's action was found to be barred by the statute of limitations, whereas had he been complaining of the results of a simple physical tort, (if the expression be permissible), as in *Nicklin v. Williams*, 10 Exch 259, and *Bonomi v. Backhouse*, 9. H. of L. 503, his cause of action would have been the consequential damage, although the defendant's act or omission might have occurred years previously.

The present case may seem at first sight to fall within the category of *Howell v. Young*. We do not, however, think that it is governed by that class of cases. It is not, as *Howell v. Young* was, the case of two parties who have specially contracted themselves into a position involving certain duties; but the action is against a public officer, a Fiscal, for damages sustained by reason of an alleged wrongful act or rather omission, a breach of duty

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committed in the exercise of his office. Now, in the English case against the Sheriff, who *pro hac vice* is in exactly the position of our Fiscal, it is very clearly laid down from *Williams v. Mostyn*, 4 M. & W. 145. upwards, that in an action against a Sheriff, it is not enough to show a wrongful thing done by the Sheriff, but to maintain your action, you must go further back and show some damages, not necessarily pecuniary damages, but a breach of some definite right of plaintiff's. So in *Williams v. Mostyn* which was an action against the Sheriff for permitting an escape, it was held that if the debtor had been prisoner under an execution, the action would have lain, because the escape would have infringed the creditor's right to have his debtor's body continuing in jail until satisfaction of the debt. But it appearing in *Williams v. Mostyn*, that the debtor was only a prisoner under arrest on mesne process, the Judges held that the Sheriff's act in permitting the escape, though wrongful, was not actionable unless damage were shown to have followed it, as for instance if by reason of the debtor not being in custody, the creditors had been unable to get him up on *habeas corpus*, or to serve some declaration upon him.

Similarly in *Stimson v. Farnham*, L. R. 7. Q. B. 178, and that class of cases, in which the Sheriff is sued for a false return, it is ruled that it is not enough to show that the Sheriff has done the wrongful act of making the false return, but you must show damage resulting from the false return. The principle which, we conceive, as underlying these English cases against Sheriffs, applies we think to the case here against a Fiscal, and the English action against a Sheriff for a false return has very much in common with this case. We think this principle underlies these English Sheriff cases,—that to maintain a civil action against any one, it is not enough to show that he has done a wrongful act, or made a representation, or omitted to do something which he should have done, unless you also show that by reason of such misconduct on his part some private right of yours has been infringed: and so where the party sued is a public officer, it is not enough to show that he has contravened his official duty, but you must show that some private right has been infringed thereby, for the law will not recognize that objective interest which all persons have in the good conduct of public officers as the ground of a civil action against an officer. To maintain his action the plaintiff must show that the officer's misfeasance has infringed a particular right of plaintiff's own. We think it perfectly reasonable to apply this to actions against a Fiscal, and to say, in order to maintain a civil action against the Fiscal, it is not enough to show that he has in course of his business as a Fiscal made a misrepresentation, or done something else which as Fiscal he ought not to have done, unless you also show that some private right of yours has been infringed in consequence.

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Then applying this to the case in hand, it works thus:—putting aside the special damage averred as having occurred when plaintiff was ejected by the mortgagee, plaintiff's case is, that in consequence of the Fiscal's suppressing at the sale the existence of this mortgage, plaintiff bought a mortgaged estate at the price of its full value. Does that disclose a cause of action? The suppression of the mortgage by itself clearly did not, according to the principle just discussed. Did the plaintiff's purchase constitute a cause of action at the time when it was made, irrespective of the subsequent eviction? We think not, for although plaintiff paid the full value, he was in the position of enjoying the full benefit of the property until the mortgagee came to subtract from it the amount of his mortgage debt; and there was no necessary *constat* that the estate in his hands would ever be come down upon for the mortgage debt. The mortgagor, whose debt to the mortgagee was not extinguished by the sale of the land, might have paid the debt, or the mortgagee might have sued him and recovered the amount from his general estate.

We thus arrive at the conclusion that, irrespective of the special damage averred as occurring when plaintiff was evicted in 1870, plaintiff's pleadings do not disclose a cause of action. Then if plaintiff's cause of action be special damage which accrued when he was evicted, it follows that plaintiff's action is not barred by the 21st clause of the Fiscal's Ordinance. We say, *if* plaintiff's cause of action be special damage which occurred when he was evicted, because the question whether plaintiff's pleadings disclose any cause of action at all has not been raised by the defendant at present. He has not demurred to plaintiff's pleadings, but has simply traversed certain of plaintiff's averments.

It was suggested in the argument of this appeal on defendant's part that plaintiff has disclosed no cause of action at all, but that issue has not been raised on the pleadings. We think that we should not now discuss it, if we can otherwise decide the question whether defendant's plea of prescription is good, which is the sole question which the parties raised before the court below at the stage of the cause when this appeal was taken. Undoubtedly the question, whether there is any cause of action at all is a question which ought to be decided before any question of limitation of action. There is a manifest anomaly and inconvenience in applying under the converse order of procedure the test we have been applying, viz., whether the defendant's conduct of itself constituted a cause of action. For should it hereafter prove that what the plaintiff has averred is not a cause of action, the result will be that the plaintiff will have brought his case to a trial on the merits, and avoided the effect of a statutory bar, by the sheer demerit of his case. This we cannot help. When the case comes to trial the

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District Judge will have to decide that question. In the meantime for the purposes of his appeal, we shall take it that plaintiff *has* averred a cause of action, because defendant has presented to the court his present plea of the ordinance upon that footing. He has not demurred, but has simply traversed and pleaded the ordinance. We may assume for the purposes of this appeal that defendant when he pleaded the ordinance supposed that plaintiff's pleadings did disclose a cause of action in other respects. On that footing we decide the case, without entering upon an issue which is not raised as yet, but which will have to be decided if the case comes to trial.

For the above reasons we are of opinion that the order in appeal must be that the order appealed from be set aside, and the case remitted to the court below. Plaintiff will have his costs in appeal, and his costs in the court below of defendant's plea of the 21st clause of the ordinance. All other costs will be reserved as costs in the cause.

D. C. Kandy, 69433.

Where plaintiff declared on a contract entered into by means of a correspondence, and it appeared that the letter setting out the terms proposed by him, though duly posted, never reached defendant, *held* that that letter constituted no acceptance of defendant's offer binding on him.

This action was brought to recover damages in that defendant did not accept delivery of 200 bushels of rice bargained and sold to him by plaintiff, and in that defendant refused to employ certain carts of plaintiff after engaging to hire them &c.

Defendant pleaded never indebted, and "that on the 31st July, the defendant offered to purchase 200 bushels of rice from the plaintiff, provided the same were sent in 8 or 10 carts, and provided further the carts would bring down coffee therein from defendant's estate Amblawette. The plaintiffs did not write accepting the offer, but on the 12th August two carts reached the estate of the defendant's with rice, the drivers whereof refused to take down the defendant's coffee &c."

On appeal against a dismissal of the case, *Van Langenberg* appeared for appellant, and *Grenier* for respondent.

The court held as follows :

On the 26th July defendant began a correspondence with plaintiff which resulted in defendant sending to plaintiff on the 31st July a letter in which defendant offered to take 200 bushels of rice at Rs. 4.75 a bushel, brought up in 8 or 10 carts, bound to take back to Gampola defendant's coffee.

On the 3rd August plaintiff wrote to defendant that he was sending 264 bushels at plaintiff's price in 9 carts, and that the carters agreed to bring down coffee, but that plaintiff would not be responsible for that. Upon the evidence it is found that this letter

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was duly posted, but that it never reached defendant, and consequently, upon the authority of *The British and American Telegraph Company v. Colson*, L. R. 6 Exch. 108, that letter constituted no acceptance of defendant's offer binding on him. We may note here that the letter spoke of 264 bushels, whereas defendant had only offered to take 200.

On the 12th August defendant received by post a cart note from plaintiff specifying 5 carts as sent with 232 bushels of rice. Defendant's offer was up to that time unretracted, but we do not think plaintiff entitled to treat this communication of his received by defendant on the 12th August as an acceptance of defendant's offer binding on defendant, for plaintiff has not proved that it corresponded to the terms which defendant had tendered. There is no proof of the despatch or receipt of any letter with the cart note, and by itself, the cart note mentions 5 carts only, whereas defendant asked for not less than 8 ; and, what is most important, nothing was said about the down loads of coffee, for which defendant had stipulated as a matter of importance to him.

Some further correspondence ensued between the parties, and defendant made plaintiff another offer which was not accepted. Plaintiff sues defendant for damages for not accepting the rice sent and for not employing the carts. We quite agree with the learned District Judge that plaintiff has failed to prove the contract on which he sues.

D. C. Kandy, 41349.

Where A brought his action on a promissory note against B and C as "Pieris & Co." in 1864, and moved in 1874, to join D E & F as co-defendants, on the ground that they were sleeping partners with B & C, *held* that the plea of prescrip-

The following judgment of the learned District Judge (*Lawrie*) sets out the facts of the case :—

"This action on two promissory notes was instituted by the Chartered Mercantile Bank of India, London and China, so long ago as October 1864, against Jusey Pieris and Don Domingo, trading as Pieris & Co. No answer was filed, and no steps taken by the plaintiffs for several years, until in 1869 the case was struck off the roll of pending cases, to which it was restored in 1873.

"The original defendants, Jusey Pieris and Don Domingo, on 4th July 1876 filed an answer in which they admit the making of the notes, and plead (1) that they received no notice of dishonor, (2) that since the making they became insolvent.

"The first plea has been withdrawn, it was admitted at the bar that due notice of dishonor had been given. I do not understand the relevancy of the second plea. It is true that the defendants were adjudicated insolvents, but that does not render them incapable of being sued, and as they have not got a certificate, their insol-

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veney in my opinion presents no obstacle to judgment being entered against them.

"In November 1874 the plaintiffs moved that three others be added as co-defendants, on the ground that they were partners, with the original defendants in the firm of J. Pieris & Co.

"They were made co-defendants in June 1875. Reserving all pleas and rights competent to them, they have now filed answer stating several pleas, the only one of which now persisted in is the plea of prescription. It was decided by the Supreme Court in the case 43159 that these new co-defendants were partners of the firm. That is no longer disputed, and it must therefore be held as settled that at the date when the promissory notes sued on were made or endorsed to the plaintiffs, the defendants were liable as partners. But they now maintain that inasmuch as no notice of this claim was made to them within the years of prescription relative to promissory notes, no judgment can now be pronounced against them.

"I do not concur in this view. In my opinion the present action was instituted against the firm of J. Pieris & Co., and that service of the summons against the two ostensible partners was a sufficient notice of a claim on the firm, including all its members, the firm was capable of suing and being sued by its descriptive name of J. Pieris & Co. A judgment against the firm would in my opinion have been a judgment operative against all the partners, whenever and wherever they could be found.

"I am of opinion then that the plea of prescription is barred, because the action (on notes endorsed by Pieris & Co.,) was instituted in time against the firm and its only known partners, and that the plaintiffs thereby barred prescription and secured the right of proceeding against all the partners whenever he found them out.

"Judgment for the plaintiffs with costs."

On appeal, *Cayley Q. A.*, (with him *Van Langenberg*), appeared for the co-defendants and appellants: The promissory notes in question became due in 1864, and the appellants were made parties in this case in 1875. Mere notice to them of the claim of plaintiff will not take the case out of prescription. There should be raised an *action*, sec. 4 of Ordinance No. 8 of 1834. Till 1875 no legal proceedings of any kind were taken against the appellants. If they were sought to be made individually liable, they ought to have been individually sued conjointly with the original defendants in 1864, and Lindley on *Partnership* vol. i. p. 519 (edition of 1860) was cited.

Browne for respondent: The present case ought to be read with case No. 43159, D. C. Kandy, which shews the connection of the present appellants with the original defendants, and the manner

tion put forward by D E & F was entitled to succeed, as the suing of B & C as "Pieris & Co." could not be reckoned (under the Ordinance No. 8, of 1834) as the suing of their sleeping partners.

2. Whether fraud interrupts prescription.

in which they, the appellants, have all along been trying to fraudulently repudiate their liability. Fraud avoids everything, even prescription, which is available only where there is *bona fides*.

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Cayley, Q. A., (in reply): The case referred to is between third parties. No fraud was alleged, and none proved. The decision went merely upon prescription, and in that the District Judge has erred.

Cur. adv. vult.

And this day CLARENCE, J., delivered the judgment of the Court, setting aside the judgment of the court below and non-suiting plaintiff, as follows:—

In this case three co-defendants, Pedro, Silvestry and Anthony, appeal from a judgment pronounced against them on two promissory notes purporting to be made by "Pieris & Co." The co-defendant Silvestry has not filed any answer, and consequently as to him there is no reason for disturbing the judgment. As to the other two the sole question arising on this appeal is, whether the appellant's plea of prescription was entitled to succeed.

The notes sued on were made in 1864, and the two original defendants were sued in that year as "Jusey Peris and Don Domingo, both of Kandy trading as Peris & Co." The action appears to have lain dormant until 1875 in consequence of their insolvency, and it was not until 1875 that the appellant and one Hendrick were made co-defendants, reserving to them all pleas and defences. We do not see how the suing of Jusey Pieris and Domingo under the above style can be reckoned as the suing of their sleeping partners, the co-defendants. The plea of prescription therefore succeeds, unless, as it was contented in appeal, the plaintiff can evade it on the ground of fraud. We are not aware of any decision in which fraud has been held to prevent the prescription bar, but we do not consider it necessary to pronounce a decision upon that point, because assuming that fraud would avail at all, we do not find that plaintiff has established it, or even sufficiently averred it. If fraud could avail the plaintiff at all, it could only be on the ground of its preventing plaintiff from attaining the power to take steps (*potestas experiundi* or *facultas agendi*). Plaintiff's only averment about fraud is that co-defendants "fraudulently avoided their liability hitherto," which is vague, and the only evidence adduced by plaintiff on this head is that plaintiff has produced the record in another case in which Pedro and Anthony were sued in 1865 by another plaintiff on a promissory note of "Pieris & Co.," and in which they unsuccessfully pleaded that they were not partners.

For these reasons the decree appealed from is affirmed with

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costs as to the appellant Silvestry, while with respect to appellants Pedro and Anthony it is set aside, and plaintiff non-suited with costs in both courts.

November, 20th.

Present :—PHEAR, C. J., and DIAS, J.

C. R. Colombo, 4931.

A Proctor admitted and entitled to practice in the District Court of Colombo, and for that reason entitled to practice in all the local courts of that district, is liable to pay, on the certificate granted to him, a stamp duty of £3, even though he states his intention to practise only in some specified one or more of those local courts.

Plaint :—That the plaintiff, as proctor practising in a minor court other than in Colombo, Kandy, Galle, Jaffna or Trincomalie was liable to pay to the defendant only the sum of Rs. 20, for the annual certificate. That though the plaintiff declined to pay more than the said Rs. 20 for stamps for his certificate for the year ending 24th March 1878, the defendant, in his capacity of the Secretary of the District Court of Colombo, insisted on the payment of Rs. 30, and the plaintiff did on the 24th March 1877 pay Rs. 30 under protest, which was Rs. 10 in excess of what was due from plaintiff in terms of Ordinance No. 12 of 1848.

Wherefore plaintiff prays for judgment against the defendant for the said sum af Rs. 10 and costs of suit.

The learned commissioner (*Boake*) held as follows :—

It is clear that the plaintiff was entitled to a certificate for Rs. 20 as he practices only at Pasyala, but instead of paying Rs. 30 he should have made application to the Supreme Court as directed by the 6th clause of the Ordinance No. 12 of 1848 ; as he did not do so, his payment "under protest" is of no use and he is non-suited with costs.

On appeal, *Layard* appeared for appellant, and *Grenier* for respondent.

PHEAR, C. J., held as follows :—

The question which now comes before us for decision arises on the words of the proviso in clause 2 of Ordinance No. 12 of 1848. which runs thus ;—

> Provided that if any Proctor shall be entitled, and shall intend to practice in courts situated at different places, he shall only be required to obtain one such stamped certificate yearly from the proper officer of any court in which he shall intend to practice, provided, however, that if different rates of stamp duty are chargeable on certificates issued to proctors practising at such places, the certificate so to be obtained shall be taken out in some court of the place where the highest amount of duty is chargeable.

Table B in the schedule to the ordinance specifies the rates

of stamp duty chargeable on the annual certificate, and it prescribes of fee of £ 3 if the proctor shall practise in Colombo, Kandy, Galle, Jaffna, or Trincomalee, but only a lesser fee if he shall practise elsewhere in the Island.

It is contended on behalf of the appellant that a Proctor admitted and entitled to practise in the District Court of Colombo, and for that reason entitled to practise in all the local courts of that District, if he states that he intends to practise only in some specified one or more of those local courts, and not in Colombo, is entitled under the provise of clause 2, to obtain a correspondingly limited certificate at the lower rate of stamp duty in table B, instead of at the Colombo rate.

We think that this view of the effect of the ordinance is incorrect. It appears to us that the "places" both of the provise and of table B, are at least co-extensive with the ground covered by the Proctor's title to practice.

By clause 1 it is enacted that

When any order shall have been duly made for the admission of any person to act as an advocate or a proctor in any court of this Island, the Registrar of the Supreme Court of the said Island shall and is hereby required at the time of such admission to issue and deliver to the person so admitted a writing under the hand of such Registrar and seal of the said court, certifying the admission of such person as an advocate or a proctor as aforesaid, and specifying the court in which he has been admitted to act.

The Supreme Court only admits to practice in the Supreme Court, or in a District Court, and the plaintiff's certificate under this section is doubtless a certificate to practise in the Colombo District Court. The annual certificate of clause 2 of the ordinance is a certificate that the applicant is a Proctor of the Court giving the certificate, that is, the court in which he is entitled by his admission to act, and that he is duly authorized to practise therein. This cannot be less than a District Court. The proviso to cl. 2 relieves the Proctor from the obligation to take out more than one such certificate, or, in other words, from the obligation to take out the certificate of more than one District Court, in the event of his being entitled to practise in more than one such Court, subject however to the condition prescribed as to the amount of the fee. If he conforms to this condition, he will obtain his certificate from the proper officer of any court in which he "intends to practise" and inasmuch as no lesser than the District Court can give the certificate, the Court to which the intention to practise is referable must be a District Court, and not merely a local court hold at some place within the territorial limits of the district.

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P. C. Jaffna, 14162.

1. Publication of close season, under Ordinance No. 6 of 1872.

2. Penalties under the Ordinance 6 of 1872.

Plaint :—That Poother Kanther, and Kanther Kanavethy on the 20th day of May last unlawfully did kill game, a doe deer, within the district of Kachchai, in respect of which the close season had been declared and during the period so declared close, in breach of the 1st section of the 11th clause of Ordinance No. 6 of 1872.

That the said Poother Kanther and Kanther Kanavethy on the 21st day of May last had in their possession during the period declared close in the said district of Kachchai some meat of a deer, for which they were not able to account satisfactorily, in breach of the 6th section of the clause 11th of the Ordinance No. 6 of 1872.

It was contended for the accused.

1. That there was no evidence of a proper publication of the close season.

2. That the plaint was defective, in that the words "as declared in the Government Gazette" were not inserted, *P. C. Ratnapura 14293, Grenier's* Report 1, page 10.

The learned Police Magistrate *(Hopkins)* held as follows :—

I think the publication of a close season has been sufficiently proved. Complainant (the *Udeyar* of Kachchai) proves that he gave the order to the tom-tom beater, and each of his 1st and 2nd witnesses was perfectly aware of it, and while giving their evidence even mentioned the months (though this has not been recorded, as, at the time I took down their evidence, I did not think it material). I do not think the Ratnapura judgment cited means anything more than that the conviction in question was set aside, because no publication had been proved to have been made or had actually been made.

I think the plaint as it stands is perfectly good in law.

The date is not at all proved by the evidence for the defence and therefore if that story is true, it affords a good reason for complainant's witnesses turning informers if that transaction preceded the act with which the accused are charged in this case.

I have not the slightest doubt in my mind as to the guilt of these accuseds. They are both found guilty and fined Rs. 50 each.

On appeal, *Grenier* took the objections referred to in the following judgment of the Supreme Court, and cited *Grenier*, 1874, p. 14.

PHEAR, C. J, affirmed the judgment of the court below in these terms :—

Two points were pressed upon us in this appeal. First that the 3rd clause of the ordinance empowers the creation at one time only of the "close season" for one single year, and that if it be desired to create a similar "close season" for succeeding years,

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fresh notifications and proclamations are necessary. Second that the fine inflicted upon this conviction (if the conviction be good) should have been a single fine on both defendants jointly, and not a personal fine on each defendant.

With regard to the first point, we think that the effect of the words of clause 3rd is to enact that there shall be every year in any province &c., a "close season", to be specified both as regards the date of commencement and duration in a prescribed manner by the Government Agent of the Province, subject only to the condition that the duration is not to exceed five months.

It is easy to understand from the nature of the case that the purpose of the ordinance would not have been every where fulfilled by the establishment of the one and the same "close season" for all parts of the Island, and it is very intelligible that the Legislature should consider that the varying circumstances of locality would be better met by entrusting the task of determining upon the actual season to be adopted for the different districts to local authority than by taking it on itself. On the other hand, there is nothing to indicate that the Legislature contemplated periodical re-determination of such season by the Government Agent or republication thereof and the notification in the Government Gazette is as formal and permanent a record of the time selected as mentioned in the body of the ordinance had it been made would have been.

Upon the second point it was contended that the 6th sub-section of clause 11th does not warrant a personal fine on each defendant.

But in truth the words in sub-section 6th—"any person" must in that sub-section, as in sub-section 1, be taken to authorize the infliction of an individual fine on each person who commits a breach of the enactment whether he does so alone or jointly with others. The decision to which we were referred appears to have turned on some peculiarity in the wording of the information.

P. C. Galagedara, 2334.

1, Retail of arrack.
2. When two men stand as fellow prisoners, having pleaded to the same information, neither of them, so long as he

The 2nd accused (Siman Appu) in this case was the arrack renter of Tampane and Harrispattu and had a garden at Attadeniya. He held no license to retail liquor at that godown, but the persons in charge of the godown held a certificate from the Government Agent which ran thus :

This is to certify that Abraham Silva, Marthalis Perera, Andree Perera and Bastian Perera have been authorised by me to issue permits for the removal of arrack and rum from the arrack store at Attadeniya to any place within the arrack rent division of Tampane and Harrispattu from 1st July 1876 to 30th June 1877, or during such period as the arrack rent division shall be actually held by Simon Appu.

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remains a prisoner under trial, can be examined as a witness for or against the other.

On the 21st of March, one Kiri Banda went to the godown and paid Rs. 3.50 for a gallon of arrack, and along with the arrack he received from the man in charge (1st defendant) a permit in these terms :

Permit is hereby granted to remove one gallon of arrack in charge of Kiri Banda on account of the Hedeniya tavern No. 8, from Madeniya to be consumed within 48 hours.

The charge was laid under clause 26 of Ordinance No. 10 of 1844.

On appeal against a conviction, (*Grenier* for appellant, *Van Langenberg* for respondent.) DIAS, J. held as follows :—

The appellant is charged under the 26th clause of the Ordinance No. 10 of 1844, with selling arrack by retail, to wit, a quantity of about 26 gills, without having obtained the Government Agent's license mentioned in that clause, and not being at the time acting for, and by the authority of and for the benefit of a licensed retail dealer.

It is beyond dispute that appellant did sell the quantity of arrack in question to the witness Kiri Banda, but the defence set up is that appellant as keeper of the Hedeniya godown supplied the arrack in question to Kiri Banda on account of a tavern kept at Hedeniya by one Carolis Perera.

The evidence does not fully inform us as to localities, this probably is in consequence of the localities being so well known to the Police Magistrate and the parties in the case, that formal proof was overlooked, and this is a matter which, if it were necessary, could be set right by further evidence. But we understand the defence to be substantially this, that appellant is in charge of a District arrack renter's "godown" at Hedeniya (the place were the offence is averred to have been committed), such godown being an arrack renter's central depôt from which he issues supplies to the taverns in the District, and that the sale to Kiri Banda was a sale on account of the Hedeniya tavern keeper. In short, the defendant's contention appears to be that the Hedeniya tavern keeper, instead of himself taking Kiri Banda's money and giving him the arrack in return, let him go to the head renter's godown and pay his money and get the arrack there, on condition that the transaction was reckoned in his accounts with the head renter.

Assuming this to be the true version of the transaction, it completely fails, in our opinion, as a defence to the charge. Whether the head arrack renter can, without infringing this clause of the ordinance, sell a less quantity than thirty five gallons even to his sub-renter by a simple sale over the counter of the godown, is a question which it is not now necessary to determine. The sale now in question was a sale to one of the public, and none the less so although defendants might credit the Hedeniya tavern keeper with

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the profit which the tavern keeper would have made of Kiri Banda had he bought the same arrack at the tavern. To hold otherwise would be to give judicial sanction to a mere colourable pretence which would defeat the main objects of the clause.

This being our view, and holding that the defence if fully proved would be of no avail in law, we are of opinion that the conviction should be affirmed.

It is perhaps as well to point out that proof of the evidence given by the 2nd defendant when a witness in a previous justice of the peace case, though admissible against himself, was not admissible against his fellow prisoner, in as much as he himself could not have been examined as a witness either for his fellow prisoner or against him.

When two men stand as fellow prisoners having pleaded to the same indictment or information, neither of them, so long as he remains a prisoner under trial, can be witness against the other. We were referred indeed to *Rex v. Deely*, 11 Cox C. C. 607, but that case is no authority since the decision in *Rex v. Payne*, L. R. 1 C. C. R. 349, in which the point was deliberately decided upon a case reserved by the sixteen Judges, upon the great principle which is a distinguishing characteristic of English criminal law, that a prisoner on his trial cannot be examined.

In the present case, there is nothing in the record to show that the Police Magistrate treated this piece of evidence as evidence against appellant, as well as against his co-defendant.

If this evidence were evidence against appellant, and we had doubt whether the Police Magistrate had weighed it as against appellant, we might feel bound to make a different disposal of this appeal. It is clear however that even if the Police Magistrate committed the irregularity of using this as evidence against appellant, (and we are certainly not justified in assuming anything of the kind), appellant has not been prejudiced thereby, since the evidence in question merely went to corroborate the evidence adduced by appellant in his own defence.

We should perhaps not omit to state that this objection was not urged by the learned counsel who appeared for the defence.

P. C. Matara, No. 78836.

Irregularity.

The Supreme Court set aside the conviction and sent the case back for re-hearing in these terms :—

The Police Magistrate tried this case on the 11th September, and after witnesses were examined, he seems *ex proprio motu* to

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have sent one of the bottles to Mr. Vanderstraaten for analysis, and on receiving a report from him he accepted it as conclusive proof and acquitted the accused.

It is hardly necessary to say that the report by Mr. Vanderstraaten was not admissible as evidence. There is no proof that the liquid analysed by him was part of that seized in the possession of the defendant, nor was evidence of the result of the analysis given in court on oath in the presence of the accused.

We find stitched up in the case a certified copy of a letter written by Dr. Koch to the District Judge of Negombo, in February 1876, which (if possible) is even more inadmissible as evidence in this case than the report of Mr. Vanderstraaten.

C. R. Trincomalie, No. 32454.

A wife who is a *publica mercatrix* may sue alone.

The Supreme Court set aside the judgment and sent the case back "in order that plaintiff may have an opportunity of proving the allegation that she is a public trader. If she proves that she is *publica mercatrix*, she will be entitled to sue alone. Defendant may adduce counter evidence."

All costs to abide the event.

C. R. Kurunegala. No. 2256.

Claim of the crown for paddy field adjoining a tank in a *gabadagama*.

Per DIAS, J:—Plaintiff claims a paddy field which is admittedly a part of the bed of a tank. The 1st defendant, who is the Queen's Advocate, denies plaintiff's right, and claims the land as crown property. Evidence was called on both sides, and it appears that the tank in question was always treated as crown property. The village is admittedly a *gabadagame* and the cultivators hold their lands on a service tenure. It is not necessary for the purposes of this case to determine the rights of the crown with respect to tanks generally. It is enough to say that the evidence before us abundantly proves the tank in question to be the property of the crown, and the field which plaintiff claims being part of the tank, must be presumed to be the property of the crown, unless plaintiff can produce a grant or such a title by prescription as would bar the crown. In both these respects plaintiffs have failed and the judgment of the commissioner should be affirmed.

D. C. Colombo, 69371.

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A non-suit does not bar the plaintiff from suing a second time on the same cause of action.

The plaintiff complained that defendant disputed his title to three boutiques and a cattle shed standing on a certain land which he alleged was decreed to belong to him (the plaintiff) under judgment of the District Court in suit No. 65,677.

The defendant claimed the premises in question as tenant under one Henerat Appuhami and pleaded in bar the judgment of the Supreme Court, dated 10th September 1875 in C. R. Colombo 105141, which was a suit brought by the present plaintiff against the present defendant for ground rent of one of the boutiques in respect of which the present action was raised. The Supreme Court in that case nonsuited plaintiff as his title was founded on a Fiscal's sale which expressly excluded the boutique for the rent whereof he sued.

The learned District Judge upheld the plea of *res judicata* in these terms :—

I certainly would not have taken the same view as the Supreme Court has done in the C. R. case, and to my mind it seems clear that only the materials were meant to be excluded from the Fiscal's sale, but the question is not what I think on that point, but whether the judgment is conclusive in the present case, and I think it is so. It is true that it was only a non-suit, and that a non-suit is not generally conclusive, but it is a rule that where a court of competent jurisdiction has found a particular fact material to the decision, or has put a particular construction upon a document material to its decision, such finding of fact or such construction is *res judicata* against all who were parties to that cause.

On appeal, *Grenier* and *Ramanathan* appeared for the appellant, *Browne* for the respondent.

The judgment of the court was delivered by PHEAR, C. J. :—

It seems plain that the effect of the former judgment of non-suit does not bar the plaintiff from suing a second time on the same cause of action. Whether or not the construction which the Supreme Court is supposed to have put upon the condition of sale in the former case is binding on the District Court in the present case, it is not necessary for us now to consider. The plaintiff appears entitled to have all his evidence placed before the court, and to have the merits of his case determined thereon independently of the former non-suit.

Set aside and the case to go back for trial.

The appellant to get his costs of appeal.

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Present :—PHEAR, C. J., and DIAS, *J.*

P. C. Galle, 99291.

The following is the judgment of PHEAR, C. J :—

Dilatory proceedings.

In this wretched case a woman complains that her brother, her sister, and her sister's husband committed a gross assault upon her in a street or public place at Galle.

She laid her information on the 6th August last, and the 31st August was fixed for the hearing. On the 31st all parties were present, but the defendants said they were not ready, and the case was postponed. Either at the time or subsequently (for the Magistrate's notes are not clear on this point), the 24th Sept. is fixed for the hearing, and eventually all three defendants are bound over in recognizances of Rupees thirty each to attend on that day.

On the 24th September the parties were present and ready, but the Magistrate had no time to proceed with the case, so it was postponed again this time to the 22nd October when it was actually tried.

Thus a matter, which by its nature ought to have been dealt with and determined with the least possible delay, was kept rankling in the minds of parties, and its duration, without reason, prolonged over a period of two months and a half. It was not surprising that after this lapse of time the witnesses to the transaction, one of whom appears to have been a casual passer by, and another a policeman differed a good deal as to the hour of the day when the occurrence took place, as to what blows were struck, and by whom, and so on. The Magistrate's judgment is very concise : "evidence grossly contradictory, and cannot be reconciled. No "doubt unreliable, defendant acquitted."

For my own part, however, I should not hesitate to find on the evidence that was given that the complainant was assaulted very much as she describes. It is perhaps doubtful whether the the 2nd defendant, the complainant's brother, did actually take part in the assault and he is entitled to the benefit of that doubt. I would, therefore, only convict the 1st and 3rd defendants, that is, the sister and her husband.

What the cause of the quarrel was has not been made clear, but plainly it was a family matter. Had trial followed close on the occurrence, the proper order would I think have been to bind over the convicted party to keep the peace towards the complainant for two months in addition to fine ; but it is too late for such an order now.

The sentence must be a fine of rupees ten each.

P. C. Kurunegala, 30760.

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—
Timber Ordinance, and its operation.

This was a charge of felling timber on crown forest, without license, in breach of cl. 2 and 5 of Ordinance No. 24 of 1848, and cl. 2 of Ordinance No. 4 of 1864.

The learned Police Magistrate, on the authority of *P. C. Kegalle 41512*, Ramanathan, 1877, p. 69, dismissed the case.

On appeal, *Ferdinands, D. Q. A.*, appeared for appellant: The case relied upon by the magistrate (*Ramanathan*, 1877, p. 69) goes a greater length than others yet decided. It is also in conflict with other decisions, *Grenier*, 1873, p. 60, *Ramanathan*, 1877, p 23, *Grenier*, 1872, p. 13. Neither is it analagous to the present case, as in that case the land appeared to be periodically cultivated. The burden of proof was on the defendant to shew that the lands were not the property of the crown, cl. 6 of Ordinance No. 12 of 1840.

VanLangenberg contra, submitted that the case in *Ramanathan*, 1877, p. 69 was precisely similar to the present, and cited *P. C. Colombo 49586*, 3 Lorenz 190, and *P. C. Matara 14044*, 24 July 1877.

Ferdinands, D. Q. A. replied.

The judgment of the court was delivered by PHEAR, C. J., as follows:—

It appears to me in the evidence of the witnesses adduced by the crown in this case that the acts of the defendants which are complained of substantially amounted to taking possession of, and preparing for cultivation, certain more or less forest land. Any felling or removing of timber trees which he effected was only an incident in this operation, and not a principal act of itself. I think, therefore, it cannot rightly be disjoined from the rest of the case, and made separately the subject of prosecution under the Timber Ordinance No. 24 of 1848. In other words, the case which the prosecution made against the accused was something very much worse than a mere felling and removal of timber, to which alone the Timber Ordinance applies, and which was laid in the information. It bore a substantially different character and might have formed the subject of entirely different criminal proceedings. I therefore, think the acquittal was right, This accords with a decision lately given in this court, and relied upon by the Magistrate.

P. C. Kalutara, 58200.

On a charge of assault on a police constable, it appeared in Assault and

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evidence that a vaccinator went into a Government School in order to speak to the teacher thereof to allow the boys to be vaccinated, leaving at the gate the constable in question to see that none of the boys found their way out of the gate. The defendant who was the monitor of the school wished to go out, but was prevented from so doing by the constable, whereupon the defendant thrust him aside, opened the gate and let himself out.

The Magistrate found the defendant guilty of assault.

On appeal, (*Browne* for appellant), the court acquitted the defendant in these terms :—

The evidence shows the constable was the wrong-doer. The defendant was justified in placing his hands upon him and pushing him on one side, to such an extent as was necessary to enable him, the defendant, to obtain egress from the compound, and it does not appear that he did more than was in reason required for this purpose.

P. C. Kegalla, 42,718.

Maintenance.

Grenier for appellant, *VanLangenberg* for respondent.

The following authorities were cited in the argument :—

P. C. Galle, 52235, April 19 1865. *Beling* pt ii p 87, *ib.* p. 7, *Beling and Vanderstraaten*, p. 60, *P. C. Galle 98,593*, 28th August 1877, *P. C. Colombo 50*, September 12, 1846.

The judgment of PHEAR, C. J., explains the facts of the case:—

The plaint in this case runs as follows :—

On this 14th day of May 1877.

The defendant did about three months ago leave the complainant, his wife, and the child born to him without giving any kind of support, in breach 2nd clause of Ordinance No. 4 of 1841.

On behalf of the defendant it is objected that this plaint is bad on two grounds, 1st that the offence is insufficiently described ; 2nd, that the clauses of the ordinance of which the alleged offence is a breach is erroneously given as the 2nd clause, whereas it ought to have been the 3rd clause.

Now the enactment which must govern the Court in regard to this matter is the 3rd rule of schedule A to Ordinance No. 18 of 1861.

" Every such plaint shall bear date of the day and year in which it is entered and shall state the names and residence of the parties complainant and defendant, the crime or 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 it is within the juris-

diction of the Court, and every such plaint shall be, as near as is material, in the form and according to the precedents contained in the schedule of terms hereunto annexed (B). Provided that no complaint shall be held to be insufficient by reason of a departure from the strict letter of the said forms, or by reason of any defect or imperfection which does not prejudice the substantial rights of the defendants upon the merits."

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The form in schedule B, which would have applied to this case is:

(7) Desertion of child. Leave his child without maintenance, so that it requires to be supported by others, in breach of the 3rd clause of the Ordinance No. 4 of 1841.

And no doubt the plaint does exhibit a departure from the strict letter of this form. But I am satisfied that the departure, such as it is in either particular, did not prejudice the substantial rights of the defendant on the merits. He could have had no doubt whatever of the precise nature of the charge made against him, or of the enactment under which the proceedings were taken.

It is further objected that on the face of the plaint it appears that the offence charged was committed at least three months before the plaint was filed, and that consequently the prosecution is barred by operation of clause 22 of the Ordinance.

In my opinion, however, this is not so. The offence charged is in its nature a continuing offence, as has been so often held by this court. The mention in the plaint of the date "about three months ago", merely serves to satisfy the commencement of his continuing offence; and it seems to me that the common sense inference from the words of the plaint is that the offence was still continuing when the complaint was made on the 14th May 1877.

The evidence given at the trial shew clearly enough that it was so. The defendant who was present never pretended that it was otherwise. Indeed the case was altogether an undefended one. The defendant had a fair trial, was never under any misapprehension at all as to the nature of the charge preferred against him. It would be a miscarriage of justice now, after conviction, to set aside the whole proceedings on the fictitious ground that the accused had in law been tried for the offence which was at an end and complete three months before the date of plaint, and would indeed be a magnification of the law's delays and misdeeds which are already so startling in this case.

The conviction is therefore affirmed.

C. R. Nawalapitiya, 10072.

Lien for repairs made.

The Supreme Court set aside the judgment of the court below and sent the case back for trial, in these terms:—

The table being the admitted property of the plaintiff, the

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commissioner should have determined the question in respect of the defendant's claim for repairs. If the table had been repaired, and the plaintiff was bound to pay Rs. 2.50 for such repairs, the defendant had right to retain it till that was paid. As regards the defendant's claim to Rs. 4.50 as an old balance, that claim does not give him a right of lien. The judgment of the commissioner leaves open and undecided the very questions which he is called upon to decide in this case.

All costs to abide the result.

D. C. Colombo, 68034.

Breach of promise of marriage, and claim for liquidated damages.

The plaintiff (*Namasivayam*) "for and on behalf of his daughter Tangamma, a minor," averred in his libel that under a deed of agreement No. 7308, dated 12th March 1873, (filed and pleaded) it was agreed by and between the plaintiff jointly with his daughter Tangamma of the first part, and the first defendant (*Supramanian*) of the second part, and the second defendant (*Tambyah*) of the 3rd part *inter alia* as follows :—that at any time six months after the said Tangamma should arrive at the age of puberty and become marriageable, the first defendant should marry her, and in case of the first defendant failing or declining to do so, he should pay the sum of Rs. 50,000 as liquidated damages (and not as penalty) to the plaintiff for the benefit of the said Tangamma, and by the said agreement the second defendant, renouncing the *beneficium ordinis seu et excussionis*, did also engage and bind himself as a surety for the first defendant for the true performance of all the conditions and agreements on his part and for the payment of the said damage. The libel further set forth that the said Tangamma attained the age of puberty and became marriageable on or about the 5th July 1874, and that the said plaintiff and Tangamma were always ready and willing on their part to fulfil the said agreement by Tangamma marrying the first defendant, and that all conditions were fulfilled, all things happened, and all times elapsed necessary to entitle the plaintiff and his daughter to the performance by the defendants as principal and surety, of the agreement on their part, yet that the first defendant had wholly failed and refused to fulfil the agreement ; whereby an action had accrued to the plaintiff to recover, for and on behalf of his daughter Tangamma, from the defendants the sum stated of Rs. 50,000 as liquidated damages for the breach of agreement : The prayer of the libel was that the defendants be decreed to pay that sum and costs to the plaintiff, for and on behalf of his daughter.

The defendants in their answer admitted the agreement, but denied that the plaintiff and his daughter were ready and willing

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to fulfil their part, or that the first defendant wholly failed and refused to fulfil the agreement, or that the plaintiff's daughter sustained any damage whatever by reason of the first defendant's alleged refusal, or that the defendants were liable in the damages claimed. The first defendant further said in answer that the plaintiff's daughter arrived at the age of puberty and became marriageable in the month of July 1874, but the fact was deceitfully concealed from the said defendant by the plaintiff, and upon the defendant discovering it, he was ready and willing to carry out his engagement within the stipulated time, and did on the 27th day of November 1874, and within the six months provided by the said agreement, request the plaintiff to appoint a day for the marriage without further loss of time. That the plaintiff failed to comply with the said request, when the said defendant caused a demand to the same effect to be made by his proctor on the 24th of December, and thereafter deputed a priest, according to custom, to wait on the plaintiff to have a day fixed for the marriage and the nature of the dowry promised by the plaintiff ascertained, but the plaintiff evaded seeing the said priest. The first defendant then appointed a day in January and again in February for the marriage, but the plaintiff and his daughter upon various false pretexts refused to agree to the said days, and so delayed and harassed the first defendant, that the said defendant on the 24th of February last intimated to the plaintiff by letter, his reasons at length for declining to keep on the engagement or marry the plaintiff's daughter ; and the first defendant said that firstly by reason of the plaintiff's neglect and refusal to fulfil the agreement within the six months, and next by reason of the deceit and evasions practised on the first defendant as detailed in the said letter, the defendant was not bound to carry out the said agreement nor liable in damages as claimed.

The defendants further averred in answer that the marriage was conditional on the plaintiff giving and bestowing on his daughter and the first defendant, a dowry in money, lands or jewels, of the value of ten thousand rupees ; but the plaintiff although requested to specify the nature of the dowry and to make a settlement thereof preparatory to marriage, neglected and refused so to do, and the defendant was not bound to contract the said carriage without the said settlement ; and the defendant prayed that the plaintiff's case be dismissed with costs.

The replication of the plaintiff, replying to the first paragraph of the defendants' answer denied the truth of the statements therein contained save as to the admissions therein contained, and joined issue with the defendants thereupon. In reply to second paragraph of the answer, plaintiff admitting that his daughter arrived at puberty in the month of July 1874 denied that the fact was

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deceitfully concealed from the knowledge of the first defendant, and said that at the said time the defendant was in treaty to marry Miss Nanny Tamby; that first defendant married Miss Nanny Tamby a month before action and legalised the said marriage subsequently; admitting that the first defendant on the 27th November 1874, wrote to the plaintiff the letter alleged in the answer, professing his willingness to enter into the said marriage and requesting a day to be appointed for the celebration thereof, plaintiff, said that the said letter was not received by him till the month of January 1875, being subsequent to the receipt by the plaintiff of the letter from the proctor of the first defendant, which plaintiff also admitted having received. Plaintiff denied that he ever failed or refused to comply with the several requests made by the first defendant in the letters mentioned or that he ever evaded seeing the priest whom the first defendant alleged he sent to the plaintiff to ascertain the amount of dowry, or that the plaintiff ever refused on false pretext to agree to the days selected by the first defendant in January and February 1875, for the celebration of the marriage; or that he ever delayed and harassed the first defendant, as alleged. Plaintiff, admitting receipt of the first defendant's letter of February 24 1874, denied the sufficiency and truth of the reasons or pretext therein given and made by the first defendant for refusing to fulfil his engagement, and denied that he deceived the first defendant or evaded his request, and save as to mutual admissions, plaintiff joined issue with defendant in respect of all matters and things set forth in the second paragraph. In reply to the third paragraph, plaintiff said that in pursuance of the agreement in the libel pleaded he was always ready and willing to give and bestow to his said daughter and the first defendant on the occasion of their marriage a dowry or marriage portion of the value of Rs. 10,000 and make a settlement thereof; and plaintiff denied that under the said agreement he was bound to specify to the defendant previous to the occasion of the marriage the precise condition of such dowry or that he ever refused so to specify the same, or that by any reason of any act on the part of the plaintiff the defendant was relieved from the obligations he had undertaken. Joining issue with defendant, plaintiff prayed for judgment as already prayed in the libel.

In the rejoinder of the defendants, they denied that at the time the plaintiff's daughter arrived at puberty, or at any time during the negociations for fixing a day for the marriage, that the first defendant was in treaty to marry Miss Nanny Tamby; on the contrary, plaintiff was in treaty, his daughter concurring, to marry her to others and with that view delayed and harassed the first defendant until he was compelled to throw up his engagement with the plaintiff as alleged in the answer.

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The agreement was as follows :—

Agreement entered into and concluded between Sevagooronatha Modliar Namasivaya Modliar of Cheekoo Street in Colombo, jointly with his minor daughter Tangamma of the first part, and Tambaya Modeliar Superamanean Modeliar of the second part, and Sanmogam Modeliar Tambaya Modeliar of Marandahn, Esquire, of the third part witnesseth.

That the said Sevagooroonatha Modeliar, in consideration of the marriage proposed and agreed to take place between his said daughter Tangamma, and Tambaya Moodeliar Superamanean Modeliar at any time six months after the said Tangamma arrives at the age of puberty and becomes marriageable, promises and agrees to give and bestow as dowry or marriage portion to the said Tangamma and Tambaya Modeliar Supramanean Modeliar on the occasion of their marriage, either in lands, money or jewels to the value of ten thousand Rupees, and such landed property to be within the gravets of Colombo.

And the said Tambaya Modeliar Supramanean Modeliar agrees to marry the said Tangamma as aforesaid, and in case he fails or declines to do so, he agrees to pay the sum of fifty thousand Rupees as liquidated damages (not as penalty) to the said Sevagooroonath Modeliar Namasevaya Modeliar for the benefit of the said Tangamma; likewise if the said Tangamma fails or declines to marry the said Tambaya Modeliar Soopramanean Modeliar, the said Sevagooroonatha Modeliar Namasevaya Modeliar hereby agrees to pay the sum of fifty thousand Rupees to the said Tambaya Modeliar Soopramanean Modeliar as damages agreed between them (and not as penalty).

And the said Sanmogam Modeliar Tambaya Modeliar doth hereby engage and bind himself as a surety for the said Tambaya Modeliar Soopramanean Modeliar and for the true performance of all the conditions and agreements on his part and for the payment of the damages above referred to, hereby renouncing the *beneficium ordinis seu et excussionis* to which a surety is otherwise by law entitled.

In witness whereof the said Sevagoronatha Modeliar, Tangamma, Tambaya Supramanean and S. Tambaya Modeliar have set their hands and seals to three of the same tenor as these presents, at Colombo on the 19th day March, 1873.

On the trial day, it was agreed that the girl attained her age of puberty on the 12th July, and that the 1st defendant married Mr. Nannytamby's daughter one month after the present action was raised.

Plaintiff's counsel put in evidence the following correspondence and closed his case, reserving his right to lead evidence of of damages sustained.

S. NAMASIVAYAM ESQ., Colombo, 27th Nov. 1874.

Dear Uncle.—As it is now about 5 months since your daughter whom you agreed to give me in marriage by certain agreement became marriageable, I am ready and willing to carry out my part of same to have the marrige solemnized in terms of the agreement, and I therefore beg you to appoint a day without further loss of time.

I am, dear uncle.

T. SUPPRAMANIAN.

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S. NAMASIVAYAM ESQ. Colombo, 24th Dec. 1874.

Dear Sir,—I am instructed by Mr. Tambyah Modliar Suppramanian Modliar of Colombo to request you would without any more delay send him a reply to his letter of the 27th ultimo, in which he asked you without further loss of time to fix a day for his marriage with your daughter Tangamma. My client wants the marriage to take place in the month of January next.

Yours truly, F. C. LOOS.

F. C LOOS ESQ. Colombo, 26th Dec. 1874.

Proctor.

Sir,—With reference to your letter of the 24th instant I am instructed by S. Namasivayam Modliar to inform you that he never received the letter of the 27th ultimo referred to in your letter.

I am further instructed to inform you that my client is willing to fix a day for the marriage of his daughter with your client and requests your client to meet him according to Hindoo custom for the purpose of making the preliminary arrangements to fix the day for the marriage.

Yours truly, W. P. RANESINGHE, Proctor.

S. NAMASIVAYAM ESQ., Colombo, 7th Jan. 1875.

My Dear Uncle.—In accordance with your request per your letter to my Proctor Loos, dated 26th December last, I did on the 5th instant send our priest Coomarasawmy Koorkel and Natchiappa Chetty, desiring them to call upon you and to have fixed a day for the marriage and see the dowry you promised to give, but to my surprise they returned and informed me that you were away from Colombo, and so they were unable to see you ; I have now to inform you that I have fixed a day viz., the fourteenth (14th) January instant for the solemnization of the marriage with your daughter, and request that you will prepare for the carrying out of same. Yours &c., T. SUPPRAMANIAN.

T. SUPPRAMANIAM ESQ., Colombo, 12th Jan. 1875.

My Dear Nephew,—Your letter of the 7th January instant, reached my hands at Katukande Estate in Negombo only on the 10th instant, and I hasten to reply to same.

It is impossible to make all the necessary preparations for the marriage against the 14th instant, for which day you have fixed the marriage to take place. I must also inform you that the day should be auspicious and agreeable to the horoscope of both myself and my daughter, and that notice of marriage should be given to the Registrar, and the marriage registered according to law. All this cannot be done n such a short time. I shall therefore thank you to fix an auspicious day that may be convenient for both parties. I insist again that due notice be given to the Registrar and the marriage registered according to law before the marriage ceremonies are gone through. I am also anxious that these matters which concern love and future prosperity should be amicably arranged.

I regret your having in the first place written to me though your proctor, and in the 2nd place to have fixed the 14th instant for the marriage when you yourself know that it impossible to have a marriage duly registered and to make other preparations for the marriage according to our custom within such a short time as 3 days. 1877 Nov. 23.

Yours &c., S. NAMASIVAYAM.

T. SUPPRAMANIAM ESQ. Colombo, 28th Jan. 1875.

My Dear Nephew.—I shall feel obliged by your replying to my letter of the 12th instant, that I may in time make the necessary preparations for the marriage. Yours affectionately,

S. NAMASIVAYAM.

S. NAMASIVAYAM ESQ. Colombo, 4th Feb. 1875.

My Dear Uncle,—With reference to your letter of the 28th ultimo, I beg to inform you that I shall be most happy to have the marriage registered and shall be glad to know from you within thirty days the auspicious day you name that the notice should be sent in to the Registrar at same time. I shall be obliged by your informing me about the proposed dowry. Yours &c, T. SUPPRAMANIAM.

T. SUPPRAMANIAM ESQ. Kattukande Estate, 12th Feb. 1875.

My Dear Nephew,—Your letter of the 4th instant, came to my hand yesterday. In accordance with your wishes contained therein, I consulted the priests to appoint an auspicious day within the 30 days you mention for the sending of the notice to the Registrar. They (the priests) say that although the month of February is objectionable for such acts, still as you are anxious to have it done in that month, they appoint two days suitable for the sending of the notice to the Registrar viz, Monday the 15th instant, and Thursday the 18th instant, I shall thank you therefore to sign and send me the usual marriage notice on one of the above dates that I may get my daughter also to sign it, and have it sent to the Registrar for publication.

With regard to the last paragraph of your letter I beg to inform you that the dowry will be given to you as stipulated in the original marriage contract. Yours &c., S. NAMASIVAYAM.

S. NAMASIVAYAM ESQ. Colombo, 24th Feb. 1875.

My Dear Uncle,—I was much surprised at receiving on the 17th, your letter of 12th, in answer to mine of the 4th, and your conduct in this transaction seemed to me so strange and unaccountable that I took time to deliberate upon it.

It seems to me that you and your daughter seem disinclined to carry out your engagement, and as this involves a matter affecting our future happiness, I do not wish to press the engagement and will relieve you and her from it. It is due to you to state how I have arrived at this conclusion and why I consider your letters hitherto unsatisfactory and evasive.

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In the first place it was your duty, both according to custom and in view of the relation existing between us, to keep me informed when your daughter became marriageable. This you altogether suppressed from our family and left me to find it out myself. I then sent you a letter on the 27th November. Asking you to fix a day for the marriage, to which you sent no reply, and I was forced to address you on the 24th December through my proctor, when you wrote back that you did not get my letter of the 27th November, although I have the best evidence to prove that you did receive it.

I next sent our priest and Natchiappa Chetty to you at your own request when you were reported as out of Colombo.

I then named the 14th of January in a letter of the 7th and you delayed answering this till 12th, and then wanted auspicious days and other excuses for delay, and as a last resource I wrote to you on the 4th instant asking you to name the day and wanting to know what the proposed dowry was to consist of, and to this letter you posted an answer on the 15th as the envelope shews antedated 12th February (which reached me only on the 17th) in which you fix the 15th (a past date) or the 18th, which does not admit of a mariage within the 30 days. All this taken in connection with the fact that you and my aunt were insisting on knowing beforehand what settlement my father proposed to make on me before you consented to the marriage, have satisfied my mind that your object and that of your family is to tire me out and make me to give up the marriage. You might have effected this by being a little more candid with me, and you need not have apprehended that I would go to law to recover damage from you. These evasive proceedings of yours have diminished the respect and confidence I had in you and your family, and as a marriage under these circumstances cannot be conducive to our happiness, I regret that it cannot now take place.—Yours &c., T. SUPPRAMANIAM.

My dear Nephew, Colombo, 2nd. March 1875.

Your letter of the 14th ultimo came duly to my hands and I much regret and am really surprised at receiving such a reply to my letter of the 12th ultimo. With regard to the receiving of your letter of the 27th November last, I beg to inform you that the letter was delivered to me by the Post Office authorities long after your letter of demand, and along with your letter of the 7th January ; and under the circumstances, it is the Post Office that should be blamed and not I.

I never introduced any unreasonable excuse in my letter of the 12th of January. It is true that I insisted on your registering the marriage before the religious ceremonies were gone through, as I am in duty bound to adhere to the laws of the land. I never delayed in replying to your letter of the 4th ultimo, nor did I ante-date my letter. Your letter was delivered to me at Katukande only on the 11th ultimo, and I at once replied to it on the following day, and enclosed it in a letter to my son to post it at Colombo, which was done accordingly ; hence the difference between the date of the letter and the post mark on the envelope which you have so uncharitably construed. This I hope is sufficiently convincing and I need not dwell on the subject. You have never asked in your letter as to what the dowry was to consist of, but

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wanted merely to know about the proposed dowry, which fully appeared in the marriage agreement.

Neither I nor my wife at any time insisted in knowing as to what settlement your father proposed to make on you, although we were strongly urged by your own step-mother to do so. In fact we did not care to ascertain that, had we any such intention we should have ascertained about it in our letter to you.

In the same manner I can refute and explain each and all the excuses you bring forward in the letter under reply. For instance, in your letter of the 4th instant you ask me to name within thirty days from that date an auspicious day to enable you to send the notice to the Registrar. I named two days viz : the 15th or the 18th. You say that the 15th was past when my letter reached your hands, but you could have very well sent the notice to the Registrar on the 18th ; and this you have not done, and try to find fault with me when I had done every thing in my power to facilitate your views.

I had not the least intention of tiring you to give up the marriage, although you assume that that was my intention and that of my family. It is entirely a mystery to me to find how my conduct has been represented as strange and unaccountable. I must assure you that I am perfectly willing and ready to give my daughter in marriage to you. My daughter is likewise attached towards you.

With this explanation I trust that you will be convinced that we in no way intended nor do intend to evade the contract.

No sooner you have the marriage registered, I shall be ready at any time to give my daughter in marriage to you.

I shall therefore thank you to send me a reply to this without loss of time.—Yours &c., S. NAMASIVAYAM.

T. SUPPRAMANIAM, Esq., Colombo, 6th March 1875.

My dear Uncle,—In reply to your letter of the 2nd instant, I beg to say that I have well considered the whole matter and that I am still of the same opinion that I do not think the marriage will be conducive to the happiness of your daughter and myself. I regret very much that the marriage cannot now take place.—Yours &c.,

T. SUPPRAMANIAM.

T. SUPPRAMANIAM, Esq., Colombo, 24th March 1875.

My dear Nephew,—I have duly received your letter of the 6th instant, and cannot help expressing my surprise and regret at the disingenuous reply you have afforded to my letter of the 2nd instant. The question for decision is simply this :—are you prepared or not to abide by the engagement solemnly entered into by you ? I have plainly and without any equivocation told you in my letters that for my part the contract will be faithfully fulfilled, and I shall feel obliged to you for a definite reply to the question embodied in my communication and before indicated.

Neither I nor my daughter see any reason whatever for the marriage resulting in unhappiness to yourself and her.

It would be advisible I think now that you should shew this letter to your father.

Awaiting your reply.—I am, yours affectionately,

S. NAMASIVAYAM.

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T. SUPPRAMANIAM, Esq., Katukande, 8th May, 1875.

My dear Nephew,—Referring to my letter of the 24th March last, duplicate of which please find enclosed, I have now to request of you to kindly favor me with an answer to it.

As a definite reply to the enclosed letter is a matter of vital importance I shall feel extremely obliged by you answering it as early as possible.

Awaiting your reply.—I remain, yours sincerely,

S. NAMASIVAYAM.

On plaintiff closing his case with the reservation above mentioned, defendant objected that plaintiff had no right to sue, and moved that the proceedings be quashed on the ground that the plaintiff had not been appointed curator *ad litem* over his minor daughter.

It was contended for the defendant that a curatorship was not necessary, as the plaintiff in this case was not a minor ; on the contrary, it was with him personally the contract was entered into, though as a trustee for a beneficiary.

The learned District Judge (*Berwick*) ruled as follows :

"The Court desires to consider carefully the wording of the deed and also the heading of the libel before applying the law to the particular case, merely noticing that it is not disposed to attach over great weight to the heading of the libel, if this can be amended at once so as to meet justice and law without inconvenience to the parties.

"This point will be reserved, and on the application of defendant's counsel, the further hearing will be adjourned until the decision of this point."

On a subsequent day, the learned Judge held as follows :—

"I have purposely delayed till now giving judgment in this case, in the hope that the parties would act upon the advice I gave at the hearing and come to a friendly settlement of their family quarrel, each party having now fully availed themselves of the opportunity of vindicating their own conduct before their friends and the public of their community. As however I understand that no arrangement has been come to, I see no advantage in delaying my decision longer.

"As the whole evidence has been put before the court, on which the plaintiff founds his *right* to damages on behalf of his daughter for breach of the first defendant's promise to marry her, (only the assessment of the *amount* due having been reserved by arrangement for further evidence if necessary), and as I am pre-

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pared without hearing the defendant in reply to give judgment against the plaintiff's *right* to damages, and that on the merits and apart from any legal question of his competency to sue in the present form of action, I proceed to state the grounds on which my decision on the merits proceeds.

"By a deed of agreement dated 19th March 1873 executed by the plaintiff, by his daughter, then a child sixteen months under the age of puberty, that is to say (probably not more than ten and a half years old)—by the first defendant, and by his father as surety for him, it was agreed that the first defendant should marry the girl "*at any time six months after she arrived at the age of puberty.*" The expression quoted appears to me to mean not within six months after she arrived at puberty, but at any time within a convenient and reasonable period after the expiry of six months subsequent to her having arrived at the age of puberty. The plaintiff on his part promised to bestow a dowry on the couple "either in land, money, or jewels, to the value of Rupees ten thou- "sand, and such landed property to be within the gravets of Colombo." In construing this last clause, I conceive that the defendant was entitled to insist on his being informed at a reasonable time before the marriage of the specific *corpora* of the dowry intended to be settled, and to have fair opportunity of investigating the titles and value of any landed property which might be proposed. The parties mutually bound themselves for fulfilment of the contract in the sum of Rs. 50,000 as liquidated damages and not as penalty.

"With respect to this last provision, whatever conflict of opinion or doubts may exist under the English law as to the effect of these words, our law on the subject is clear and simple. It will be found in the 12th and subsequent sections of lib. 45, tit. i of Voet's Commentaries, and it is there stated at the end of sec. 13, that under the Roman Dutch law "where an excessive amount has been fixed by the contract by way of fixed penalty, the whole sum is not to be adjudged, but the court is to mitigate it, so that it may be reduced and restricted to, as nearly as may be, the probable damages sustained by the plaintiff." It might indeed be supposed (though I think erroneously) that this is simply on all fours with the English law as to "penalty", and does not apply to what the latter law calls "liquidated damages." I do not stop here to enlarge on the application of the well-known English rule that courts of equity (and alsoi ndeed of common law, *Kemble v. Farren, 6 Bing. 141*) will not suffer their jurisdiction to be evaded merely by the fact that the parties have called some thing damages which is in fact a penalty. For penalty, *poena* in the technical language of the civil law, is not the same as it is in the technical language of the English law. The latter speaks of three things: "damages"

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(to be assessed by a jury), "liquidated damages", (fixed by the parties themselves); and "penalty" or a penal sum which equity reduces to the real damage sustained. But in the language of the civil law, we have only two things, viz., "*id quod interest*" which corresponds broadly with the English word damages, and *poena* a "penalty" which is exactly equivalent to the English term 'liquidated damages', or rather it includes both that and the English idea of a penalty. This will be sufficiently apparent on referring to the beginning of sec. 12 of Voet's Commentaries, lib. 45, tit. 1, and Pothier's treatise on Obligations, sec. 342, where he says, "elle est par conséquent compensatoire des dommages et intérêts qu'il, souffre de l'inéxecution de l'obligation principale." There is this further difference between English and civil law, that in the latter (as stated by *Story* in his Commentaries on Equity, sec. 1317) "penalties "were treated altogether, as in reason and justice they ought to "be, as a mere security for the performance of the principal obli-"gations." The result is, (again to quote the words of *Pothier* in sec. 345) that "La peine stipulée en cas d'inéxecution d'une ob-"ligation, peut, lorsqu'elle est excessive, être réduite et modérée "par le juge." I have gone thus particularly into this last question as it was raised in the argument on the case and might become very material.

"So much for the three principal conditions in the deed, so far as it may become necessary to decide upon these. I will not however have to apply the law laid down on the last point if I have arrived at a just conclusion on the facts."

And on the facts, the learned Judge found in favour of the defendant, and entertaining that view of the case, he considered it unnecessary to decide upon the legal objection taken *in limine* as to plaintiff's authority to sue.

Plaintiff was non-suited with costs. He appealed.

Cayley, Q. A., (with him *Browne* and *Layard*) for plaintiff and appellant: The action is based on an agreement in writing. It is admitted that 1st defendant broke off the engagement, but he pleads certain excuses. As regards the preliminary objection taken in the court below, plaintiff is a party to the agreement and is a trustee for his daughter. It is therefore competent for plaintiff to himself sue. The money if recovered would be payable to him as trustee and he would have to account for it to his daughter. On this point however the District Judge has not decided. The date for the execution of the contract was "at any time six months after the said Tangamma arrives at the age of puberty and becomes marriageable." She arrived at the age of puberty in July and it was not incumbent on the plaintiff to give her in marriage till after the end of the December of that year. The 1st defendant's let-

ter of 27th November 1874 was therefore premature in calling for the fulfilment of the marriage. The next letter dated 24th December was also premature. It was a lawyer's letter, evidently intended to treat the father-in-law with scant courtesy. [The other letters were read and commented upon.] There was no unfair or unnecessary delay, much less evasive delay, on the part of the plaintiff as complained of by defendant. It was defendant who was in the wrong, actuated as he was with a desire to marry into a different family. As regards the question of damages, the words of the agreement are, the defendant "agrees to pay the sum of Rs. 50,000 as liquidated damages" to plaintiff. The entire sum stipulated is recoverable as liquidated damages, *Lowe v. Peers*, 4 Burr. 2225. Under the Dutch law, courts have power, as rightly held by the District Judge, to mitigate a penalty, on extenuating circumstances being shewn by the defendant to exist, but such mitigation ought to be allowed only in extreme cases. Voet uses the word *ingente*, Bynkershoek *immane*, Pothier *immense*. In the present case there is no such immense discrepancy between the actual result of the contract and the damages claimed, considering the social position of the parties and the circumstances under which the breach was committed. The District Judge is in error in holding that he may reduce a sum expressly mentioned. *Pothier* (on Obligations, pt. 2, c. 5. sec. 341) says "where the parties who stipulate that a certain sum shall be paid "upon the non-performance of an anterior obligation *intend* that in "case of default nothing shall be paid but the sum so agreed upon, "this is not a penal obligation. The obligation which results from "it is not a penal obligation but as much a principal obligation as "the first of which the parties intended to make a novation". The sum expressly stated cannot therefore be reduced under the Roman Dutch law. But English authorities would be of great value in this case, as involving a question of the *intention* of the parties and therefore a question of construction of a deed. [PHEAR, C. J., under the English law, this is a case in which the parties must be deemed entitled to fix their own measure of damages. But for the present we do not want to hear you any further on the question of damages.]

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Ferdinands, D. Q. A., (with him *Grenier*) contra: where the amount of damages claimed is out of proportion to those actually sustained, Equity ought to interfere, Evan's *Pothier on Oblig.* p. 210, Story's *Eq. Jur*, sec. 1318, Morgan's Dig. p. 220,229. But an objection *in limine* was taken in the court below as to the plaintiff's right to sue. The learned District Judge, who reserved his judgment on that point, has gone into the merits of the case, and given his decision thereon without allowing the defendant to put forward such defences as he had. The District Judge has not decided upon

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the question raised *in limine*. It would be unnecessary at the present stage of the case to go into the question whether the damages stipulated may be recovered in toto or in part, as the case both for the plaintiff and the defendants remained incomplete. The case ought therefore to go back for evidence.

Cayley, Q. A., had no objection to the case going back for evidence.

PHEAR, C. J. held as follows :—

It appears that to us that there has been to a certain extent a miscarriage of the trial in the District Court. When the plaintiff's case was closed, the learned advocate who appeared for the defendants took an objection *in limine* to the plaintiff's right to sue on the cause of action laid on the libel, and the Judge reserved the point. Also on the motion of the defendant's advocate, the further hearing of the case was then adjourned until the decision of this point. The plaintiff's advocate thereupon stated that he had prematurely closed his case, and that he desired to call some evidence of actual damage, caused by the breach of contract. This took place on the 2nd March, and it does not appear that any order was made fixing any precise period for the adjournment. The Judge took time to consider the point thus reserved, and it does not seem that the case came before the court again for the prosecution of the trial until the 12th July, on which day the judge said :—

" I have purposely delayed till now giving judgment in this " case in the hope that parties would act upon the advice I gave at " the hearing, and come to a friendly settlement of this family quar- " rel, each party having now fully availed themselves of the " opportunity of vindicating their conduct before their friends and " the public of their community. As, however, I understand that " no arrangement has been come to, I see no advantage in delaying " my decision longer.

" As the whole evidence has been put before the court, on " which the plaintiff founds the *right* to damages on behalf of his " daughter for breach of the first defendants promise to marry her, " only the assessment of the *amount* due having been reserved by " arrangement for further evidence if necessary ; and as I am " prepared without hearing the defendant in reply to give judg- " ment against the defendant's right to damages, and on the merits " and apart from any legal question of his competency to sue in " the present form of action, I proceed to state the grounds."

And finally, after discussing the evidence to some length, he pronounces his decision, as follows :—

" Entertaining this view of the facts on the merits of the case, " and that the plaintiff has not established any right to damages, " it seems quite unnecessary to trouble ourselves with the legal ob-

"jection taken by defendant's counsel preliminary to entering on "this case. The plaintiff will be non-suited with costs." 1877 Nov. 23.

Now we think that there was unquestionably, on the evidence adduced by the plaintiff, a case made, which called for judicial determination as between the parties,—a case to go to the jury, so to speak. The plaintiff did not ask for a non-suit, and if the matter was to be determined upon its merits, with the possibility of further proceedings being carried on to the court of appeal, it is plain that each side ought to have been allowed, if he desired it, to make the material of his case complete. The plaintiff ought to have had the opportunity afforded him for adducing his evidence as to actual damage, because he had asked for it before the defendant had entered upon this case; and the defendant ought also to have been asked whether he desired to leave the case as it then stood.

The learned advocate who appears before us for the defendant urges that he has very material evidence which he wishes to adduce. We think it clear that in the interest of both parties, the case must go back to the District Court for completion of the trial; and under all the circumstances which have occurred, we think that it should be tried de novo.

The judgment below is therefore set aside, and the case sent back for new trial. The costs of appeal to abide the event.

November, 27th.

Present:—PHEAR, C. J., and DIAS, J.

P. C. Kandy, 48.

Proceedings under the Cattle Trespass Ordinance No. 9 of 1876.

The following judgment of PHEAR, C. J., sets out all the facts of the case:—

The appellant in this case is the owner of certain cattle, which were seized (while trespassing on a coffee estate) by the owner thereof and sent by him to the Police office with this letter:—

The Police Sergeant, Gattambe. Peredeniya, Oct. 20th 1877.

Dear Sir,—The cow and calf have been trampling my coffee estate from a month since. I caught them on the night of the 18th instant. The damage was assessed by the village *arachchi* and Duraya of Peradeniya at the following rates, viz.,

42 jack plants @ 50 cents each	...	Rs, 21
25 coffee plants @ Rs. 1 each	...	25
Grass fields		5
Total	...	Rs. 50

Yours truly, D. J. D. WANAGESEKARA.

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On the 22nd October, the Superintendent of Police of Kandy wrote the following letter to the Police Magistrate of Kandy :—

Police Office, Kandy, 22nd Oct. 1877.

Sir,—I have the honor to send a stray cow and calf pounded at the Gattambe Police Station on the 20th instant, for trespassing on the garden of Mr. D. J. D. Wanagesekera on the 18th instant, together with a report from the local headman who assessed the damages. The owner, Kader Saibo of Gattambe, having declined to pay the damages which have been assessed at Rs. 51, I beg that the cow and calf may be sold to recover the amount of damages, and the cost of feeding for 3 days at 37½ cents, amounting to Rs. 1.12, as provided for in cl. 7 of the Cattle Trespass Ordinance No. 9 of 1876.

I am Sir, your obedient servant,
E. F. TRANCHELL,
Supdt. of Police, C. P.

Upon this letter, the Magistrate appears to have endorsed the following order :—

Owner here to contest damages. Fix for an enquiry on Saturday. Defendant to remove the animals on giving bail to produce them. Brand marks to be examined by some court officer.—H. L. M.

The record does not contain any notice of any sort to the owner of the cattle in reference to the report or order. But under a heading No. 48, 27th October 1877, "Enquiry on a letter from Superintendent of Police, 22nd October 1877, No. 6555", there follow copies of depositions of the coffee estate owner and his witnesses relative to the facts of the cattle trespass. One of these witnesses appear to have been the local headman of the Superintent's letter. His deposition commences thus :—

"*Punchi Kiri Dureya*—affirmed : I am Urapol Dureya. I gave the report (filed in the letter from Police). It is true."

A vernacular document purporting to be o report is appended at the end of the record, but it is not referred to by the witnesses or marked by the court. It does not appear whether the owner of the cattle was present during these proceedings. The decision ot the Magistrate is given in the following words :—

"No more evidence adduced. The previous damage is not "proved to have been committed by these animals. Complainant "may recover Rs. 25 damages which sum together with the charge "for keep, viz., Rs. 1.12 will be recovered by sale of the animals, "if not paid within 48 hours. Defendant is also condemned to "pay a fine of Rs. 25, the damage having been committed in the "night,—to be recovered in the same manner, and by distress of "defendant's property."

Against this decision the owner of the cattle appeals on the ground (amongst others) that the proceedings of the Magistrate were altogether irregular, and were not a proper exercise of the summary jurisdiction conferred by cl. 7 of Ordinance No. 9 of

1876, and I think this contention is sound.

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It appears to me under the word of the enactment, the report of the police constable or local headman (as to the result of his investigation on the spot, undertaken if possible with the aid of three or more respectable persons of the neighbourhood in regard to the particulars of the trespass, assessment of damages &c.) after being sworn to or verified by him in open court, is the foundation of the Magistrate's authority to take action. It is only upon receiving this evidence that he becomes empowered to hold a summary enquiry subject to reasonable notice thereof being given to the owner of the cattle when possible. The report so verified takes the place of an ordinary complaint or information, and also forms evidence in this case.

Instead of following this course, the Magistrate did in effect institute proceedings on the mere statement of the school-master conveyed in his letter to the Police, together with the paper appearing included therein, and not given under any sanction or responsibility. The Superintendent's letter, I need hardly remark, only carried on to the Magistrate what had been received from the estate owner.

Had it appeared from the record that the owner of the cattle was present during the enquiry of the 27th October, and had full opportunity to meet the case made against him, probably this court would not have considered the irregularity of the Magistrate's proceedings sufficient alone to vitiate the order made thereon. But as the record stands, the inquiry seems to have been not only bad *ab initio*, but *ex parte*, and not cured by acquiescence on the part of the defendant, and the order must be quashed.

November, 29th.

Present :—PHEAR, C. J.

P. C. Colombo, 9706.

Plaint :—That defendants, being reputed thieves, did on the 7th day of November 1877 at Kayman's gate loiter about in the public street with intent to commit some unlawful act, in breach of Ordinance No. 4 of 1841 cl. 4 sec. 7 and cl. 5. Vagrants' Ordinance, No. 4 of 1841.

All the evidence led in support of the charge was this :—

"*P. C. Sinnasamy, affd.* I know accused, they are reputed thieves. Yesterday the 1st accused dropped this ring near a cooly, then 2nd accused picked it up and the 3rd accused then came up saying he was a goldsmith. The ring was shewn him and he said it was gold. The 2nd accused then offered it to the cooly

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for Rs. 25. He went away and I seized the accused. They live by practising this deception. This occurred at Kayman's Gate, near the sea. *Cross Examined.* The cooly told me what the accused had tried to do"

There was also evidence of a prior conviction of the 1st accused under the Vagrants' Ordinance.

The Magistrate (*Penney*) after finding that the unlawful act laid in the plaint as intended to be committed was fraud by attempting to pass off a brass ring for a gold one, held as follows :—

" Under cl. 5, 1st accused is sentenced as an 'incorrigible rogue' to 4 months imprisonment at hard labour. The 2nd and 3rd accused are sentenced to one months imprisonment at hard labour."

On appeal, per PHEAR, C. J.—

This case seems to have been very imperfectly tried in the Police Court. The plaint is laid as for a breach of Ordinance No. 4 of 1841, cl. 4, sec. 7 and also cl. 5. The plaint however omits to state the unlawful act which it is alleged that the prisoners intended to commit within the first mentioned portion of the enactment, or any facts at all within clause 5. Moreover there is no evidence against them upon the principal offence, *i. e.* the offence charged under cl. 4, sec. 7, except the statement which the police constable retails as having been made to him by a coolie with regard to their behaviour towards the cooly himself, who is not made a witness. And finally it does not appear that the prisoners were called upon for any defence at all to the unspecified charge relating to former convictions, though two witnesses were called to establish it. On the state of the record, it is impossible to sustain the conviction in this appeal.

P. C. Ratnapura, 2479.

Grenier for appellant.

Labor Ordinance.

Per CURIAM :—The offence charged against the defendant in the plaint is " that he did on the 16th April 1877, leave the complainant's service" &c. And the evidence certainly shews that if that charge is made out, this offence was committed at Colombo.

It is possible on the facts that a charge might have been framed against the defendant, such that the offence would have fallen under the cognizance of the Ratnapura Police Court. As the case however stands, I think that court had no jurisdiction to entertain the matter of the charge actually made, and therefore the same must be quashed.

D. C. Galle, 31906.

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Ferdinands, D. Q. A., for respondent.

Practice as to putting cases in evidence.

In this case of ejectment, PHEAR, C. J., commented as follows on the practice of putting cases in evidence :—

"In the trial of this suit below the unfortunately common practice has been pursued of the parties being allowed to put in before the court the records of other cases to be thereby treated as evidence each as a whole, without any particularization of the document or process therein which it is desired to use as evidence, or any steps taken to make such document proper evidence between the parties if necessary, such as by proof or admission &. The District Judge even goes so far as to refer to a former judgment delivered by himself in one of the cases so put in, though there was no identity of parties, and requests that it may be read as part and parcel of his judgment in the present case.

"Under these circumstances it is now extremely difficult to ascertain with precision what were the materials which were actually dealt with as evidence between the parties to this suit at the trial in the District Court, and to estimate the different portions of them at the right value." * * *

And his lordship proceeded to deal with the merits of the case, so far as they were based on proper evidence.

December, 1st.

Present :—PHEAR, C. J., CLARENCE, J., and DIAS, J.

D. C. Colombo, 965.

No appeal lies to the Privy council from an order in insolvency proceedings.

In the matter of the insolvency of Keppel Jones & Co., Messrs. Finch Woods & Co. moved for a rule upon the assignee to shew cause why in pursuance of the provisions of Ordinance No. 7 of 1853 he should not be ordered to deliver over to them certain goods found in the possession of the insolvent or to pay to them their value.

The learned District Judge ordered that a half of the goods in question be delivered to the claimants and declared the other half to belong to the insolvent. The Supreme Court affirmed this finding.

And now the claimants (Finch, Woods & Co.) prayed for leave to appeal to H. M. the Queen in council.

VanLangenberg and *Browne* appeared for appellants.

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Layard for respondent.

The court refused the application for leave to appeal in these terms :—

We think that Mr. Layard's preliminary objection to our entering upon this review is good. In 3 Lorenz, page 234, is the report of *Ledward's case*, in which this court after argument decided that the 52nd section of the Charter gave no appeal to the Privy Council as a matter of right, and we are unable to distinguish that case from the case which is now before us.

We see no sufficient reason for not accepting the authority of that decision, which was a decision of the collective court.

The application for leave to appeal to the Privy Council is therefore refused with costs.

December, 4th.

Present :—PHEAR, C. J., and DIAS, J.

Disenrollment of a Proctor of the Supreme Court for unprofessional conduct in misappropriating to his own use the monies of his client.

In the matter of the complaint of D. C. De Silva of Gampola, against Mr. Edgar Edema, Proctor of the Supreme Court.

The following judgment was delivered by PHEAR, C. J :—

This is the matter of a rule of this court dated the 6th November, which runs as follows :—

With reference to the petition presented to the Supreme Court by Don Carolis de Silva Jayewardene of Navalapitiya on the 22nd July last, and the deposition of the said Don Carolis de Silva Jayewardene made on oath before the acting Chief Justice and Mr. Justice Dias on the 27 October last, it is ordered that a Rule do issue on Mr. Edgar Edema, a proctor of the Supreme Court at Hulfsdorf, on Friday the 16th day of November at 11 o'clock in the morning, to show cause why he should not be struck off the Rolls for unprofessional conduct in misappropriating to his own use the monies of his client Don Carolis De Silva Jayewardene, plaintiff in C. R. Navalapitiya, No. 12443.

This rule was served on Mr. Edema on the 12th November, and the matter came on to be heard before the Collective Court on Saturday 1st December, when Mr. VanLangenberg and Mr. Layard appeared on behalf of the respondent and filed the affidavits of the respondent himself and of one John Joseph Plunket, and the Court, after hearing Mr. VanLangenberg against the rule and the Queen's Advocate in support of it, took time till to-day to consider its judgment.

The leading and material facts of the case are fortunately placed beyond dispute, although as regards some of the occurrences there is much conflict of testimony between the petitioner and the respondent.

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On the 16th of August 1875, the petitioner, Carolis De Silva, instituted a suit in the Court of Requests of Nawalapitiya against one Luke Perera to recover an alleged debt, and employed Mr. Edema as his proctor to conduct it. The suit was tried and judgment given in favor of De Silva on the 26th October of the same year. Execution proceedings followed, which, with the interpolation of an intervention of third parties, covered a period of eight months, and finally on the 8th July, as nearly as may be eleven months after the first institution of the suit in the Court of Requests, the amount claimed and decreed was paid out of the Kandy Kachcheri to Mr. Edema, as proctor for De Silva.

Notwithstanding, however, that Mr. Edema thus received the money on behalf of the petitioner so long ago as 8th July 1876, he had not paid it over to the petitioner up to the time that this matter came before the court on Saturday last, although he then by the mouth of his Advocate expressed himself ready to pay it into court for him, and has in fact since done so, and it is in respect of this money that the rule in effect requires to account.

His answer given in his affidavit is as follows :—

After the money was drawn, and for nearly three months thereafter, I never saw the petitioner nor had I any conversation such as he deposes to. I was informed that during that time he was absent at Galle, and the first intimation that I had of his having gone there was by a telegram which he sent to me from Galle asking me to get a postponement in a certain Court of Request case in Gampola in which he was interested.

The telegram is filed of record in that case. When he returned he did not come to my office at Gampola, but whenever he casually met me at Navalapitiya, when I happened to go there with the Court, I asked him to come over to Gampola to receive the amount due to him. But this he never did, and requested me to bring the money with me to Navalapitiya. One day, when I was at Navalapitiya on my way to Dimbulla, he asked me for payment. I told him again to come to my office as I never carried money with me, or to wait till my return from Dimbula, as I could not make it convenient to return to Gampola immediately. He said he was then going to Gampola and wished me to give him an order on my office, which I could not do, as I had no responsible clerk who could have made the payment in my absence.

He then wanted me to give him an order on Mr Plunket, who he knew had monetary transactions with me, and I gave him an order accordingly. On my return from Dimbulla, I was informed of the dishonor of the order. I met the petitioner and told him that I would pay him myself whenever he brought the order to my office at Gampola. Subsequently, he met me and told me that he had arranged to get timber from Plunket for the money. I have since had no request from him to pay the amount, nor was I aware that he was dissatisfied with the arrangement which had been made with Plunket, until I received information of the petition.

It cannot be said that this answer, even so far as it extends,

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and if treated as unimpeached, is of a satisfactory character. But it is moreover important to remark that it does not even pretend to carry the explanation beyond the date when Mr. Edema became informed of the charge made against him by de Silva's petition to this court, which was certainly communicated to him by the Commissioner of the Court of Requests in the month of May last. The petition of the 22nd July, referred to in the present rule, was the record of two substantially identical petitions of complainant against Mr. Edema in the matter presented to the Supreme Court by de Silva. The first was dated the 16th May 1877, and was referred by the Supreme Court to the Commissioner of the Court of Requests at Gampola for enquiry and report. Mr. Edema was then accordingly called upon by the Commissioner to answer the complaint and did so in the following letter dated 2nd June, 1877:—

"Sir,—In reply to yours of the 31st ultimo, I have the honor to inform you that I did recover monies in Navalapitia, C. R. case *No.* 12443. At the time the monies came to my hands, the petitioner, *my* client I believe was at Galle. A few months ago as I was on my way to Dimbula, the petitioner met me at the Rest House at Navalapitia and asked for his money. I told him, I had none with me at the time save my expenses up and offered him an order on Mr. Plunket which he accepted, after deducting what was due me; since then I heard nothing till you showed me the petition the other day. If the order was dishonored, it was the duty of my client to have brought it back to me and taken his money, which he has not done, whereby I concluded that the order must have been honored or some arrangement entered into between him and Mr. Plunket, for Mr. Plunket told me on my asking him about the order it was all right.

The petitioner never called at my office for his money, and I am always ready to let him have what is justly due.

I don't want any of my client's monies, as I have, thank goodness, sufficient of my own to keep me agoing. The order was given to suit the petitioner's own convenience, and it was his duty to have called over at once in case the same was not paid.

If Mr. Plunket has not paid him the money, let him bring me my order and I am ready for him. Trusting this explanation is sufficient for you to make a favourable report on my behalf, yours &c.

If it is possible to suppose that Mr. Edema, at the time when he wrote this letter, honestly believed that De Silva had obtained from Plunket the money which was due from him, Edema, or had entered into some arrangement with Plunket for the payment of it, he was at any rate put by De Silva's charge on the enquiry whether this was so or not, and had he chosen to enquire he would have ascertained at once that, as it is now admitted, nothing of the kind had taken place.

The offensive and vulgar passage in his answer: "If Mr. Plunket has not paid him the money, let him bring me my order and I am ready for him"—was the prelude to no action on his own

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part, and what must we infer, when we find on 1st December, six months afterwards, that this money is still unpaid and Mr. Edema in substance repeating the same reason for not paying it? He knew as he himself says, when he returned from Dimbulla, that Plunket in the first instance dishonored the order, and he does not any where venture to assert that Plunket held funds of his, or was for any reason bound to meet his draft. Can we resist the conclusion that the Plunket transaction is essentially false, and if it was originally perhaps initiated by Mr. Edema as a mere expedient for evading payment of the debt as long as possible, yet was finally put forward deliberately—on two separate occasions—for the purpose of therewith defeating, if he could in the court, that which he must have known was a just claim of the petitioner?

The petitioner De Silva's narrative, given viva voce on oath, of the continuous and unavailing efforts which, he says, he made from the very outset to procure payment of the money from Mr. Edema, is entirely at variance with the latter's statement that for nearly three months after drawing the money, he never saw the petitioner or had any conversation with him. But of the two stories, that of De Silva certainly seems to us to wear the more truthful aspect and to consist the better with the probabilities of the case. We do not think it likely that a suitor, who had been so long harassed and kept out of his money, as had happened with De Silva by the reason of the Court of Requests proceedings, should have been so entirely careless of reaping the fruits of his ultimative success, as Mr. Edema repr sents him. And the letter (exhibit A.) bearing no date, which De Silva swears he received from Mr. Edema in December or January, and which Mr. Edema does not in any way notice in his affidavit, discloses that something had previously taken place between De Silva and himself in reference to the non-payment of the money and to a promise on the part of Edema to pay it, very different indeed from that which is described on the affidavit as the preface to the giving of the order upon Plunket. The letter runs :—

"My dear Silva,—On Saturday last I could not get the record and had no time. Kindly send me the number of your case, and I will send you an order as promised for what is due you in the course of this week. Yours truly,

E. EDEMA.

I should come to-day but must be in Kandy, if all's well. E. E.

We see here the non-fulfilment of previously made promise to pay, and an excuse for the default which is in its nature unreal and evasive.

It is not necessary for us to dwell longer on the facts. We think it is plain beyond reasonable doubt that the petitioner's com-

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plaint against the respondent is true in all its material particulars. Mr. Edema first yielded to the temptation to appropriate to his own purposes the money of his client which he had in his hands, and then upon its being required of him, he evaded payment to the last under cover of a series of fictitious stories and even fraudulent excuses. The pretence that De Silva's complaint to the Supreme Court was ill-founded, because he (De Silva) had been paid his money or had the opportunity of being paid it by Plunket, was an imputation of dishonesty against his client, which was not only false but under the circumstances fraudulent, and it was made and persisted in with a deliberation which aggravates the seriousness of its complaint. It appears to us that Mr. Edema has not merely committed an act of dishonesty against De Silva, but has shown himself entirely unmindful of the high position of trust in which he as proctor stood towards his client, and of the principles of integrity and honor, to which by reason of that position, he was bound to conform himself in his relation with him. He has, in short, proved himself unfit to be a member of the honorable profession in which he now has a place. We can no longer hold him out to suitors as a person qualified to advise them, and to undertake their affairs, or in whom they may with safety place their confidence. and we feel that we are bound by our duty to the public to direct that his name be removed from the roll of proctors of this court.

We took time to consider our judgment, not so much on account of any doubt upon the facts at issue between the parties, as for the purpose of endeavouring to find some ground upon which we could offer the respondent a *locus penitentiæ*, and a hope, however slight, of being allowed upon condition at some future time to apply for admission to his lost post. We regret, however, that reflexion does not enable us to do so, and therefore the rule will be made absolute unconditionally.

It is ordered that Mr. Edgar Edema, Proctor of the Supreme Court of the Island of Ceylon, be, and he is hereby, dismissed and his name struck off from all and every roll in which the same is entered as proctor.

P. C. Colombo, 8566.

1. Whether under the Timber Ordinance, a plaint should specify the names of

Plaint :—That the defendants abovenamed did cut and fell timber from crown land called Nahratta handa, situated at Malabe in Palle Pattu of Hewagam Korle, without any authority, on or about the month of March last, and cultivated with Kurukkan, and that they did moreover cut down valuable timber, in breach of Ordinance No. 24 of 1848, clause 5.

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The following was the evidence led :—

Complainant, affirmed. I saw accused fell the timber on this crown land. They cut down several trees. I seized them. They owned no land adjoining it. *Cross-examined.* No questions.

trees felled.

Julius Pieris, sworn. I am Mudalyar of Hewagam Korle. I sent for accused. They admitted having cleared the land. I went to the spot and inspected the place. It is a thick jungle and has not been cleared for 20 years. It is surrounded by crown jungle. One large and several ordinary trees had been felled. Accused urged no claim to it. The 2nd accused is son of 1st accused. This was for chena cultivation. I got authority from the Agent to prosecute and authorised complainant to do so.

2. Nature of the penalty under cl. 5 of the Ordinance.

In defence it was contended (1) that the plaint was defective, as the trees were not specified in the plaint (*Ramanathan's Rep.* 1877, pp. 23 and 69), and (2) that this was a clearing for chena cultivation and therefore should not have been brought under the Ordinance.

The learned Police Magistrate (*Penney*) held as follows :—

"As the Police Court is said to be one of summary jurisdiction, and technical objections are therefore only upheld when the accused are prejudiced, I am not disposed to attach weight to the objections urged. The plaint alleges that "valuable timber" was felled and the evidence has amended any defect in the plaint. Accused have not been prejudiced by the Mudalyar substituting his subordinate's name for his own as prosecutor. Accused are convicted and fined Rs. 50 each. Half to complainant."

On appeal *Dornhorst* for defendants urged the objections taken in the court below (*Ramanathan's* Rep. 1877, pp. 23 and 69), and further contended that the offence being single, the punishment also must be single (*Ramanathan* p. 84). [C. J. I do not quite understand you]. There are a number of decisions in this court, in which certain offences have been held to be *single*, *Bel.* and *Vanderst.* p. 189, and the case there cited *Rex v. Clarke*, Cowp. 612, where an offence, created or made penal by statute, is in its nature single, one single penalty only can be recovered, though several join in committing it. [C. J. That must be in respect of *qui tam* actions. (Cowper, 612, was read.) *Rex v. Clarke* appears to be such a case and is not applicable to the one like the present. It is remarkable that Lord Mansfield commences his judgment (in *Rex v. Clarke*) with the words "there is no cause of greater ambiguity than arguing from cases without distinguishing accurately the grounds upon which they were determined." These *qui tam* actions involving forfeitures, are in the nature of civil actions, and decisions thereon are of no avail in a case like the one before us. I shall however take time to consider my judgment].

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And this day, his lordship held as follows :—

I think I may infer on this plaint and evidence that the three appellants have been each convicted severally of a single felling and not altogether of one joint felling. In this view the sentence is unimpeachable.

Affirmed.

D. C. Kandy, 68848.

Where A and B, widows of C deceased, granted, as mothers and natural guardians of their minor children by C, a lease to the defendants, for a consideration mentioned in the deed, and the children of C subsequently disputed the validity of the lease, *held* that, in the absence of proof that the lessors had absolute power to aliene or encumber the minors' property, or that the transaction was on the whole such that the minors could not in fairness and

Plaintiffs sued in ejectment, averring, "that one Natchiappa Chetty died in the year 1864 possessed of considerable property (among others the "Padurawatte" Estate, of about 200 acres situated at Teldenia) and leaving him surviving Kadirai and Sandanam his widows, and issue by them Valliamma, Ramen Chetty and the plaintiffs; that by a certain writing disposition or last will (filed of record in Testamentary case No. 615), made and executed by the said Natchiappa Chetty on the 12th day of December 1863, it was provided that all the property he died possessed of should be equally divided among his children share and share alike, and the said Natchiappa Chetty appointed his eldest son Ramen Chetty to carry out the provisions in the said deed; that in August 1864, the said Ramen Chetty obtained letters of administration with the will annexed; that the said Ramen Chetty, in his capacity as administrator, and acting under and by virtue of the provisions contained in the said deed or will, in June 1869, executed a deed of distribution in favor of the said children; that the defendants, well knowing the premises and taking advantage of the minority of the said plaintiffs, have been since the year 1870 in the unlawful possession of the said "Padurawatte" Estate, and have taken and appropriated to themselves the produce and profits thereof, and the plaintiffs as far as they are able to ascertain, estimate the nett profits of the said estate from the year 1870 to 31st December 1875 at Rs. 75,000; that the defendants have during the last two years neglected the up-keep and cultivation of the estate so that the same has deteriorated in value to the damage of Rs. 10,000.

And the plaintiffs prayed that the defendants might be cited to shew cause why the plaintiffs should not be declared entitled each to an undivided one-eleventh share of the said estate (worth Rs. 100,000), the defendants ejected therefrom and the plaintiffs put and placed in possession thereof, and further why they should not file a true and just account of the produce received of the said estate and of the expenditure thereof during the said period, or pay to the plaintiff the said sum of Rs. 75,000, and a further sum

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of Rs. 15,000 as and for mesne profits *pendente lite*, and also the said sum of Rs. 10,000 and costs of suit.

The defendants in answer pleaded that "after Ramen Chetty had obtained probate of last will, he, by his deed of 12th December 1863, put and placed Kadirai and Sandanam (widows of the deceased and guardians of the said minor children) in possession of the said estate; that upon a writ sued out against the said Ramen Chetty his undivided one-eleventh share of and in the said estate was sold, and the said Kadirai and Sandanam became the purchasers thereof; that the said Kadirai and Sandanam for themselves and as the natural guardians respectively of the said minors, did on the 18th June 1869, for the purpose of carrying on the cultivation of the said estate, and for the maintenance of the said minors, as they lawfully might, enter into an indenture, bearing the said date, and borrowed the sum of Rs. 12,650 from the defendants, the same to be repaid in manner mentioned in the said indenture; that thereafter, on the 13th day of May 1870, the said Kadirai and Sandanam being then indebted unto the defendants and to Odeappa Chetty (whose claim the defendants discharged) in the sum of Rs. 12,650 for advances made upon the said indenture, and being unable to pay the same and to carry on the cultivation of the said estate, and having no funds or income sufficient for the maintenance of the said minors, the said Kadirai and Sandanam and Walliamma for themselves and guardians aforesaid did, by an indenture bearing date the day and year last aforesaid, lease the said estate to the defendants for a term of ten years subject to the terms covenants and conditions in said indenture fully described; that the defendants under and by virtue of the said indenture have been in possession of the said estate, and have taken the produce thereof, but they denied that the produce of the said estate from the year 1870 to 31st December 1875 amounted to Rs. 75,000; that since they entered into possession of the land they have expended considerable sums in the up-keep and cultivation of the said estates as per account filed shewing the sums expended by them and the income derived from the said estate during the said period; that if the said lease be determined by the court, the plaintiff ought to be decreed to pay to the defendants their share of the loss which the defendants have sustained in the upkeep; that the defendants did not neglect the said estate or that by reason of the alleged neglect the said estate has deteriorated in value;" and the defendants prayed that the plaintiff's libel be dismissed, or if the said lease be declared determined, that the plaintiff be decreed to pay to the defendant the said sum of Rs. 13,018.

equity be permitted to repudiate it, the lease was bad and inoperative as against the minors.

The plaintiffs in reply admitted the execution by the said Kadirai and Sandanam of the deed of the 18th June 1869, but denied that they, the said Kadirai and Sandanam, borrowed or had any right to borrow the said sum of Rs. 12650 so as to charge

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the property of the plaintiffs therewith or that the said deed is good and operative in law as against the plaintiffs or their estate, and the plaintiffs also admitted the execution by the said Kadirai and Sandanam of the deed of the 13th May 1870, but stated that the said Kadirai and Sandanam had no power or authority to execute said deed and that the same was executed in breach of trust and to the prejudice of the plaintiffs' estate as the defendants were well aware, and is not binding on the plaintiffs as their estate.

The learned District Judge (*Lawrie*) upheld the validity of the lease and dismissed plaintiffs' action with costs.

Plaintiffs appealed.

The following two deeds were material to the case and were referred to in the argument in appeal. Besides these deeds, there was another deed No. 6703 (executed on the same day as deed No. 9401) which however was not put in evidence.

The deed No. 6401 ran as follows :—

Know all men by these presents that at Kandy on this the 18th day of June 1869 before Alia Marikar Audoo Lebbe Marikar of Kandy Notary Public, I, Raman Chetty son of the late Pa La Nachchyappa Chetty deceased of Katukella street, within the four gravets of Kandy, having come and appeared, have written and granted this mortgage bond in favor of both Verasami Mestriar's daughter Katerahi, my mother, and Verasami Mestriars' daughter Chantanama, my step mother of Katukelle aforesaid in the following manner, to wit :—

That whereas I the said Ramen Chetty and my brothers and sisters Walliamma, Annamalai, Arunasalam, Narayanan, Meenadchi, Muttaiya Venkadasalam, Ledchumanan, Punkavanam and Nachchiyammai being heirs to the properties hereinafter mentioned and belonging to the estate of the late Pa La Nachchyappa Chetty deceased, who was my father, I the said Ramen Chetty of my own accord and on account of my own necessity and without the consent of the other heirs aforesaid, had mortgaged out of the properties belonging to the said estate, the property bearing No. 19 situated at Trincomalie street Kandy, and the property bearing No. 917 occupied by me, my mother, my step mother and my brothers and sisters situated on the Peradenia Road at Katukella in Kandy, with the deeds and documents relating thereto, to and with Ra Ma Cha Raman Chetty of Colombo, borrowed and received £500 sterling thereon and had for my wants spent the same, and now the other heirs aforesaid have asked me to redeem the said properties and give to them, and whereas I have money at present with me to redeem the said lands by paying off the said principal sum of £ 500 sterling and the interest due thereon, I the said Raman Chetty have borrowed and received in cash £ 600 sterling of Ceylon currency of and from the aforesaid Kadiria and Shandanam for the purpose of discharging the aforesaid debt. That since I have received the said £ 600 fully in cash I have made the following agreement, that until the payment of the said £ 600 sterling and settlement of the account thereof, I shall continue to pay interest on this principal monthly without failure at the rate of £1 per one hundred pounds per month commencing from the date hereof. That the said principal sum of £ 600 sterling shal

on demand be payable to both or either of the said Katerahi and Shandanam, their heirs authorised or assigns by me, my heirs authorised or assigns—and that as mortgage for the said principal and for interest that may be accumulating thereon after the aforesaid rate, the following is given. That of the lands, estates, houses, buildings and plantations hereinafter described, not registered, to which I and the aforesaid ten persons, my brothers and sisters on the proper heirs, I do hereby mortgage my undivided one-eleventh share, exclusive of the undivided ten shares to which the ten children are entitled as well as the produce and profits thereon, and my right and title thereon as security for this debt. The lands are recited in the deed of inheritance bearing No. 6394 dated 12 day of June 1869 and attested by Alia Marikar Audoo Lebbe Marikar Notary Public aforesaid in favour of me the said Raman Chetty and in favor of the said ten persons, my brothers and sisters and they are as follows, &c. . . .

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The lease ran as follows :—

This indenture made this thirtieth day of May 1870, between Walliamma to and with the consent of her husband Supermanian pulle, testified by his being a party to these presents of the first part, Kaderai of the second part, and Kaderai as the mother and natural guardian of Annamala, Arunasalem, Nareynen, Meenatchy, Muttaya of the third part and Shandanam of the fourth part, and Shandanam as the mother and natural guardian of Vengadesalem, Letchymen, Poongavenam and Natcheamma of the fifth part, and Thaina Pana Lana Savana Veerappa Chetty and Thaina Pana Lana Payna Keena Vellayen Chetty of the sixth part.

Whereas Walliamma, Anamala, Arunasalem, Naraynen, Meenatchy, Muttaya, Vengedasalem, Letchymen, Poongavanam, Natchiamma are seized of and absolutely entitled to an undivided one-eleventh each under and by virtue of a certain deed hereunto annexed, and the said Kaderai and Shandanam jointly to the remaining one-eleventh of a certain coffee estate or plantation called and known as Pahurugalle watte, situate in the Pallanapattu of lower Dumbera, as purchaser at a Fiscal's sale held thereof under Kandy District Court writ No. 61130, with the plantations, buildings, fixtures, machinery, live and dead stock and other things thereon and therein, and intended to be hereby demised.

And whereas the cultivation of the said estate was carried on during the season 1869-70, by advances made by the said Thaina Pana Lana Sawanna Verappa Chetty and Thaina Payna Lana Payna Reena Vellayen Chetty under a certain indenture bearing No. 6403 dated the eighteenth day of June 1869, and attested by Amawadu Lebbe Notary, and whereas there is now due to the said Veerappa Chetty and Vellayen Chetty upon the said indenture for the advances made, the balance sum of (£1265) one thousand two hundred and sixty five pounds, and the said Walliamma, Kaderai and Shandanam as aforesaid are unable to pay the said amount, and whereas the said Walliamma, Kaderai and Shandanam as aforesaid have not the means of carrying on the cultivation and upkeep of the said estate, and there being no funds or income sufficient for the support of the said minors who are under the protection and care of the said Kaderai and Shandanam are desirous by reason of the premises in the interest of the said minors that the said

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coffee estate should be leased as otherwise the same will be deteriorated and entirely lost to the said Walliamma, Kaderai and Shandanam and to the said minors.

And whereas the said Thaina Pana Lana Sawana Verappa Chetty and Thaina Pana Lana Pana Reena Velleyen Chetty have agreed to take over the said estate on lease for a term of ten years, and to carry on the cultivation of the same upon these terms, covenants and stipulations hereinafter mentioned.

And whereas the said Walliamma and the said Shandanam in their own right and as the mother and natural guardians of the said minors have agreed and consented to the said terms.

Now this indenture witnesseth that in consideration of the sum of (£1265) one thousand two hundred and sixty five pounds due as aforesaid and the rent hereinafter received and the covenants hereinafter contained on the part of the said Verappa Chetty and Velleyen Chetty their executors, administrators and assigns to be observed and performed, the said Walliamma, Kaderai and Shandanam, and the said Kaderai as the mother and natural guardian of Annamala, Arunasalem, Nareynen, Meenatchy and Muttaya, and the said Shandanam as the mother and natural guardian of Vengedesalem, Latchymen, Poongavanam and Natchiamma do and each of them doth hereby grant and demise unto the said Verappa Chetty and Velleyen Chetty their executors, administrators and assigns all that estate or coffee plantation called the Paharugallewatte, and comprising the following allotments of land to wit :— ° ° °

To have and to hold the said estate and premises hereby demised or intended so to be and every part thereof with their or every of their appurtenances unto the said Thaina Pana Lana Sawanna Veerappa Chetty and Thaina Payna Reena Vellayen Chetty their heirs, executors, administrators and assigns from the thirteenth day of May, A. D. 1870, for and during the term of ten years thence next ensuing and paying yearly and every year during the said term unto the said Walliamma, Kaderai and Shandanam, and their heirs, executors, administrators and assigns the yearly rent of (£72) seventy two pounds by monthly instalments of (£6) six pounds commencing from the thirteenth day of June next, and payable on the thirteenth day of each and every month in each and every year during the continuance of these presents, &c.

On appeal, *Cayley, Q. A.*, (with him *Ferdinands, D. Q A.*, and *Browne* and *Morgan*) appeared for plaintiffs and appellants, and dwelling upon the circumstances which he thought tainted the lease with suspicion, contended that the court ought in equity to cancel the lease and place the parties, as far as possible, *in statu quo*. He also submitted that the widows had no authority to grant the lease, being neither testamentary guardians nor guardians appointed by court. Under the Roman Dutch law, every guardian was a creature of the court. The three kinds of *tutela* in the civil law, *testamentaria, legitima* and *dativa* were all merged in the Roman Dutch law in the *tutela dativa*, required the confirmation of the court, Grotius' *Introduction*, p. 33 (Herbert's edition,) *Groenewegen L. Ab.* p. 11, *non ipso jure &c*, ib. p. 617, Vander Keessel's *Select Theses*, sec.

117, Burge, 935. R. & O. p. 80 sec. 19. If it be contended that the Kandyan law was applicable to the case, the lease was equally bad. A Kandyan widow had no right of her own accord to dispose of any part of her deceased husband's landed property, to the prejudice of their children, Perera's *Armour*, p. 19. This power of alienation was still further restricted by *Sawers*, Dig. p. 31 § 5, to widows appointed to administer, and even then her power to encumber was founded on absolute necessity, "clearly to satisfy the most necessary and urgent wants of the family." In the present case, there was no such urgent necessity for the grant of the lease. Assuming that the widows had the power to lease, they had still not the sanction of the court, as guardians, to alienate the property, for the lease was an alienation *pro tanto* of property, *D. C. Galle, 27719*, Vanderstraaten p. 67. Plaintiffs were entitled to damages. If the lease be held valid, the plaintiffs ought to be treated as lessors, and as such entitled to re-enter for breach of covenant.

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VanLangenberg and *Grenier* for the respondents contended that plaintiffs were not entitled to re-enter, because they repudiated the lease. The present form of action in ejectment did not permit of the re-entry. The property was in the Kandyan Provinces, parties were domiciled there, and chose the Kandy District Court for the adjudication of their case. The case accordingly ought to be governed by the Kandyan law. If the grandfather or grandmother of a child could be natural guardian without intervention of court (Marshall's *Judgment* p. 352), *a fortiori* could a father or mother be so. *Austin* p. 29. The lease was therefore good. Even under the Roman Dutch law, the act of the widow, if beneficial to the estate, was valid, *1 Lorenz*, 19. The plaintiffs were certainly benefited by the lease [and counsel commented on the fairness of the transaction.]

Cayley, Q. A., in reply: Irrespective of legal questions, was the lease fair? Dr. Shipton, a planter of 26 years' experience, swears to the fact that if the estate were well kept, the yearly crop would be from 4 to 5000 bushels parchment, representing a yearly income of £4,000 to £5,000. Surely a rental of £72 a year was not a fair equivalent to so large a crop, even taking it to be true that the defendants lent the widows £1265 on interest. It would be a dangerous precedent, if natural guardians could deal with the property of minors, without being appointed by court. The authories cited for respondent go the length of shewing that in Kandyan law natural guardianship over the *person* of the minor and enjoyment of the usufruct were allowable. Under any circumstance, Sawers lays at rest all doubt in this case, inasmuch as the widow can alienate only in case of urgent necessity.

Cur. adv. vult.

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And now the judgment of the court was delivered by PHEAR, C. J., as follows :—

The two defendants, Veerappa Chetty and Vellayan Chetty are in possession of a certain coffee estate named Padurawatte under a lease for ten years commencing on the 13th May 1870, which will be presently more particularly described.

The nine plaintiffs, of whom the five last named by reason of being minors appear in the suit by a curator appointed by the court for that purpose, together with another sister named Valliamma, and a brother named Raman, are the eleven children of one Natchiappa Chetty who died in the year 1864.

Natchiappa Chetty by will gave the whole of his property, of which the Padurawatte estate formed part, to these eleven children, share and share alike, and it has been a question in the trial below whether or not Raman has not since sold his one-eleventh to his brothers and sisters. However this fact may be, the plaintiffs in this suit alleging that they are entitled to ten-eleventh shares of (amongst other property this Padurawatte estate, by their libel and replication taken together, complain that the just mentioned lease, under which the defendants claim to hold, is in effect an encumbrance on the estate, and was granted without due authority by persons pretending to act as managers of the estate, at a time when they, the plaintiffs, were all minors, and that the defendants under cover of it are committing great waste &c. On these grounds, the plaintiffs ask that the lease may be declared invalid, the defendants ejected, and an account taken of mesne profits &c., for the period of the defendants possession.

The lessors according to the terms of the lease were these three persons, viz., Valliamma, (*i. e.* one of the sisters who is not a party to the present suit, she being at the time of the making of the lease married to one Superamanian pulle, and he consenting to her executing the lease), Kaderai one of the two widows of Natchiappa, who executes as mother and natural guardian of the next five sisters, then minors, and Shandanam the remaining widow of Natchiappa, who executes as the mother and natural guardian of the remaining four children, exclusive of Ramen.

There has been much discussion both in this court and before the District Judge as to the precise character which Kaderai and Shandanam bore in relation to the minor's property, that is whether or not they were under any law the appointed or natural guardians of the respective minor's property, and if so whether or not they had the power of granting such a lease of the coffee estate as that which is in question. The learned District Judge was of opinion that the lease under the circumstances of the estate might be considered an ordinary cultivating lease, that the two ladies were by Kandyan law natural guardians or curator of their respective chil-

dren's property, and that in that capacity they had at least the power to grant such a lease as this.

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But we find ourselves unable to view the lease of the 13th May 1870, as an ordinary cultivation lease. The nature of the transaction embodied in the lease is thus described in the lease itself :—

"Whereas the cultivation of the said estate was carried on during the season 1869-70 by advances made by &c." [See lease given above.]

It seems plain from this that the lease was granted to the lessees mainly to enable them by the usufruct of the estate to repay themselves a former debt, *i. e.* money which they had before the making of the lease advanced upon the terms of another and previous contract. The lease was in fact a usufructuary mortgage for ten years to secure repayment of a past debt, without any proviso for redemption.

It is clearly incumbent upon those who rely upon the strength of a transaction of this kind against the claims of the minors either to establish that the alleged guardians had absolute power to alien or encumber their minors property to the extent of the lease, or at least that the transaction was on the whole such that the minors could not in fairness and equity be permitted to repudiate it. We find, however, no grounds for holding that Kaderai and Shandanam, even if they be taken to have been the natural guardians under the Kandyan law of their respective children, had legal power to alien or encumber the property of those children, and almost no evidence whatever appears on the record which can tend to raise an equity in favor of the defendants. The account of the matter which they themselves give in their answer is nothing more than a bare repetition of the recital in the lease quoted above, they say :—

"That the said Kaderai and Sandaman for themselves and as the "natural guardians, respectively, of the said minors did on the 18th "June 1869 for the purpose of carrying on the cultivation of the said "estate and for the maintenance of the said minors, as they lawfully "might enter into an indenture bearing the said date, and borrowed "the sum of twelve thousand six hundred and fifty rupees from the "defendant the same to be repaid in manner mentioned in the said "indenture.

"That thereafter, on the 13th day of May 1870 the said Kaderai "and Sandanam being then indebted unto the defendants, and to "Odeappa Chetty (whose claims the defendant discharged) in the sum of "twelve thousand six hundred and fifty rupees for advance made upon "the said indenture and being unable to pay the same, and to carry "on the cultivation of the said estate, and having no funds or income "sufficient for the maintenance of the said minors, the said Kaderai "and Shandanam and Valliamma for themselves and guardians afore-"said did by an indenture bearing date the day and year last aforesaid "lease the said estate to the defendant for a term of ten years, subject

1877 Dec. 4. — "to the terms and covenants and conditions in the said indenture "fully described."

The indenture of 18th June 1869 here referred to does not appear to have been produced at the trial, and is not on the record. What it was we do not know. But it seems plains that money advanced on the security of that indenture could not, without more, be substantial consideration for the beneficial lease of 1870. For the recovery of the alleged balance of twelve thousand six hundred and fifty rupees the defendants must be content to rest on the foundation of the indenture of June 1869, whatever that is worth, unless they can shew that the lease upon which they now rely was substituted for it in such a manner, and under such circumstances as could serve to bind the plaintiffs. This they do not attempt to do.

The allegation that the guardians were unable to carry on the cultivation of the estate does not disclose any valuable consideration for the lease, but only affords a reason why they, the guardians, should let the estate instead of keeping it in hand. Neither does the bare fact, if true, of their having no funds or income sufficient for the maintenance of the minors help the defence, because the lessees do not undertake to advance money for this purpose ; and it is only from the rent received that the maintenance is to be derived.

The District Judge in his judgment says "he is inclined to "think that the proceedings in the testamentary case show that "there was an urgent necessity for an advance of money, the pro- "ceedings taken for sequestration by Pallaneappa Chetty prove "that if the widows had not entered into some such arrangement "as they did, the estate would have been torn in pieces by "creditors, and lost to the children altogether." We do not know to what extent, if at all, the facts disclosed and the evidence given on the former proceedings referred to, were taken to be admitted as between the parties to the present suit. The record is silent on this point. But the defendants do not themselves pretend that there were any other advances made by them as consideration for the making of this lease than those represented by the outstanding balance of twelve thousand six hundred and fifty rupees secured on the footing of the indenture of 1869, and they do not make any suggestion that the lease granted to them was for the purpose of saving the estate from the hands of the creditors. Indeed it is extremely difficult to see how it could have been a means to that end. By granting the lease, the lessors did not become better able than they were before to pay off existing liabilities on the estate except to the extent of the rent received, which was not, as appears by the recitals of the lease itself a full cultivating rent. And we find nowhere any hint of any arrangement by which cre-

ditors, third parties, were barred of right of recourse to the property. 1877 Dec. 4.

On the whole of the case we are of opinion that the lease which the plaintiffs impeach was such a dealing with the plaintiffs' (who were all the time minors) interests in the subject of the lease, as the lessors had no legal power to effect, and that the defendants have established no ground upon which they can be allowed to hold the lease as security for the payment of the twelve thousand five hundred and sixty rupees, balance of alleged advances, or of any other sum.

The judgment of the District Court must, therefore, be set aside, the lease declared invalid and inoperative as against the plaintiffs. The plaintiffs must recover possession of their shares of the estate from the defendants, with costs up to date, and the following account must be taken :—

First, of monies received by way of rent to the use of the plaintiffs with simple interest at 9 per cent on each payment.

Second, of annual profits made by defendants from the usufruct of the estate after allowing all reasonable and necessary expenditure actually incurred, with interest on each annual amount at 9 per cent simple interest. Decree to be given for the balance of these two accounts according to the side on which it appears to stand.

December, 5th.

Present :—Dias, J.

C. R. Kandy, 4533.

Van Langenberg for appellant.

The court held as follows :—

Liability of tenants of *dewalagama* lands.

Plaintiff claims Rs. 41.69 being the estimated value of services due from defendant in assisting at the repairs of the wall of the dewale. The commissioner non-suited plaintiff on the ground that defendant is only jointly liable with the other holders of land under the dewale. The Supreme Court however is of opinion that defendant is liable to be sued alone in respect of his services the value of which will have to be established in evidence.

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December, 6th.

Present :—PHEAR, C. J.

No court of justice ought to allow itself to be put in motion by any other person than the parties themselves or their qualified agents in open court; and every attempt to influence or to call to account a judge of any degree for his judicial acts by private or official correspondence, is in a high degree reprehensible, and may amount to contempt of court.

In the matter of Inspector A. Sourjah of Galle against Deonis of Matara.

The following order of PHEAR, C. J., explains the facts of the case :—

This matter presents some peculiar features, and calls for, I think, some comment from the court.

On the 6th August 1877, Inspector A. Sourjah as complainant presented two plaints in the Police Court at Galle namely a plaint,

(a) charging one Deonis with the theft of 1 dessert knife, 1 small pair of scissors and two lead pencils, the property of the Oriental Hotel at Galle, value Rs. 2.50.

(b) charging one Carolis Appu with theft of a jet sleeve link, the property of Mr. A. Mitchell value 50 cents.

The Police Magistrate refused to issue summons on these plaints for a reason which he endorsed upon them :

8th August, summons refused.

(a) A J. P. enquiry is pending, No. 17285 for the theft of the property.

(b) 8th August 1877.

Summons refused.

A J. P. enquiry is pending No. 17288 for the theft of the property.

Upon this apparently an irregular correspondence took place between the Superintendent of Police, Galle, and the Police Magistrate. The Superintendent of Police then communicated with the Inspector General of Police at Colombo and through him with the Queen's Advocate, who rightly advised (in a letter addressed to the Inspector General of Police on the 23rd August) "that the "proper course for a complainant to pursue when a Police Magistrate "refuses to entertain his plaint is to appeal to the Supreme Court."

With a view probably to obtaining an opportunity of taking the course thus advised with reference to the Magistrate's order of the 8th August, notwithstanding that the time for appeal as against it has elapsed, Inspector Sourjah as complainant on the 28th August, again presented a repetition of plaint (a) bearing even the old date 6th August.

Upon this on the same day the Magistrate endorsed the following order : "28 August. Referred to original decision on "8th August, as I think this is a repetition of the plaint "formerly rejected on the 8th August to which order was made "and on record."

"If complainant is dissatisfied with the order of court on

"that plaint, he had his right of appeal. The second application "while the J. P. case is still pending is most improper and a most "wrongful waste of the Magistrate's time."

Two days latter, i. e. on the 30th August, the Superintendent of Police sent the Police Magistrate the following letter.

No. 1731. The Police Magistrate Galle.

Sir,—I have the honor to forward the accompanying Petition of appeal and to request that it may be transmitted to the Hon'ble the Supreme Court.

I am &c, S. D. Graham
S. P. S. P.

And a lengthy petition of appeal, purporting to be the petition of Inspector Sourjah to the Supreme Court and complaining of the Magistrate's refusal to issue summons on the plaint, presented by him on the 28th, seems to have acccompanied, or been enclosed in, the letter.

It is plain that it was improper on the part of the Superintendent to interfere in the matter by letter as he did, or even otherwise personally.

The petitioner Inspector Sourjah ought to have made his application to the Police Court in regular course.

The Magistrate would have been justified in declining to treat judicially an application thus irregularly made and ought to have done so. However the Magistrate unfortunately did not do so, but following the bad example set to him, himself wrote back to the Superintendent of Police a formal letter declining to receive the petition and giving reasons founded on the merits of the case for not receiving it.

Thereupon on the 1st September, the Superintendent of Police sent a letter to the Registrar of the Supreme Court, of which the following is the first passage.

I have the honor to solicit the favor of your kindly submitting the accompanying petition of appeal to the Hon'ble the Judges of the Supreme Court, and trust that I may be permitted further to submit the annexed copies of correspondence which will I hope explain the case. The remainder of the correspondence is with the Inspector General of Police at Colombo. However if you consider it necessary for reference, I will apply for it to be sent to you.

And the petition of Inspector Sourjah which the Magistrate declined to receive acccompanied this letter. If it was merely intended to procure that the matter of this appeal, notwithstanding the Magistrate's refusal to forward it, should be brought before the Supreme Court for judicial determination, then plainly the Superintendent of Police thus repeated in respect to the Supreme Court the impropriety of which he had previously been guilty towards the Police Court with considerable aggravation. The

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judges of the Supreme Court, however, at first misled by the Superintendent of Police's letter and his reference to a mass of correspondence, understood him to desire to submit to them for advice or for a formal adjustment a matter of difference between himself and the Police Magistrate, and as a step towards effecting a settlement they thought it right to send to the Police Magistrate the papers which the Registrar had received from the Superintendent of Police and to request him to be good enough to report thereon.

This the Magistrate did very fully in a letter to the Registrar dated the 10th September.

Various circumstances after this time concurred, to prevent the judges from giving immediate attention to this matter, lying as it appeared to do outside the regular judicial business of the Court, and it was only quite recently that it was discovered how entirely the action taken by the Superintendent of Police had disguised its true character.

On this state of facts, it has been thought best that Sourjah's petition of appeal should be treated as if it were now come before the Court in due course on an application for leave to present the appeal directly, instead of through the Police Court, and this day has been fixed for the hearing of the application, of which notice has been given to the petitioner.

Meanwhile however, viz., on the 7th September, the charge of theft against Deonis was repeated by Inspector Sourjah and a conviction obtained.

There remains then now no action to be taken on the appeal, even if admitted, and therefore no necessity for our determining the question raised in the petition of appeal in regard to the exercise of the Magistrate's judicial discretion in refusing to issue process. I therefore say nothing as to whether he was justified in law or not. But plainly the steps which have led up to this application have been from beginning to end irregular.

Neither the police court nor any other court of justice ought to allow itself to be put in motion by or to listen to any other person than the parties themselves, or their qualified agents in open court. Courts of justices are to be put in motion by a regular prescribed method of proceeding in public, and every attempt to influence or to call to account a judge of any degree for his judicial acts by private or official correspondence is in a high degree reprehensible and may indeed amount to contempt of court. Disregard of this rule, as this case abundantly exemplifies, may give rise to much unseemliness, and besides opens the door to very great mischief. In favor of the poor and weak against the wealthy and strong, this court will sometimes, though even then with caution, treat a petition made directly by the petitioner himself, through the post, as if

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it were made by him personally in open court. But there was not even any such saving ingredient as this in the present case. And Inspector Sourjah, if he was not well enough advised to proceed regularly and in due course, must be content to lose his remedy.

The application for leave to present the petition of appeal to this court directly, instead of in the ordinary course through the Police Court, is refused.

December, 7th.

Present:—PHEAR, C. J., and DIAS, J.

C. R. Kandy, 5275.

Where A shot B's cattle, acting *bona fide* under a license which, however was void, *held* that B was not entitled to recover damages from A.

Plaintiff sued defendants "for the recovery of Rs. 100 being damages sustained by plaintiff by reason of defendant's having, on the 30th November last, shot two head of plaintiff's cattle, killing one and seriously injuring the other."

Defendants admitted having shot two head of cattle, but justified the act by pleading that the animals were trespassing on 1st defendant's land, and that they, the defendants, had the license of the Police Magistrate to shoot such cattle.

The license in question was issued under the Ordinance No. 2 of 1835 and was dated 22nd November 1876. It was contended for plaintiff that as the Ordinance No. 2 of 1835 was repealed by Ordinance No. 6 of 1876, which received the assent of the Governor on the 20th November 1876, two days before the date of the license, the license was void.

The learned commissioner, however, dismissed the plaintiff's case in these terms:—

In regard to the defendant's liability for shooting the animals, on the authority of the license produced, I hold that the license was strictly void, but the defendants acted *bona fide* under it, and the Magistrate may also be presumed to have acted *bona fide* in issuing it from the date of the license being so close to the date on which the new ordinance was sanctioned.

On appeal, *VanLangenberg* for respondent, DIAS, J. affirmed the judgment.

P. C. Matale 15382.

Proclamation of 5th August 1819.

The charge was laid under the proclamation of 5th August 1819.

VanLangenberg for appellant, *Dornhorst* for respondent.

The following judgment of PHEAR, C. J. explains the facts of the case:—

It appears to me that the plaint in the case which is limited

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to a charge of unlawfully taking possession of moveable property, is bad for not stating one of the two alternatives mentioned in the 2nd branch of the proclamation, as the charge under which the facts of the case bring in the accused. The plaint ought to specify some conduct on the part of the accused which can be seen on the face of the plaint to be an offence within the terms of the proclamation. But the plaint merely charges that the defendants did forcibly and unlawfully take possession of certain specified goods while they were in possession of the complainant without the authority of a competent Magistrate. It omits to charge that they were so taken by the accused either "to avenge themselves for any injury &c" or in liquidation of any demand &c. And this defect is so far from being cured by the evidence that it appears, on the case put forward by the complainant herself, that both these alternatives were distinctly negatived, and that the question between the parties was a question of right. But it is plain that while the first branch of the proclamation is directed to the case of entering forcibly in possesion of land under pretence of legal claim, the second which applies to the taking of moveable property is confined to the two alternatives just referred to. But in view of the effect of the evidence, I think it right towards the accused that they should be acquitted on the plaint as it stands, instead of the plaint being quashed.

The order of conviction is therefore set aside and the accused acquitted.

D. C. Matara, 23087.

The power to punish for contempt of Court should be exercised sparingly and only with the most careful discretion, and every conviction for contempt made by a court which is not a superior court, and is subject to ap-

The following judgment of PHEAR, C. J., sets out the facts of the case :—

The power to punish for contempt of court should be exercised sparingly and only with the most careful discretion, and every conviction for contempt made by a court which is not a superior court and is subject to appeal or review ought to shew on the face of it that a contempt of court was committed. This in the present instance, the District Judge's judgment in the matter, even if read together with the proceedings of the several days from the 4th to the 12th September as recorded by the judge, in my opinion fails to shew. One Wattuhamy, not a party to the suit which was being tried in the District Court, was at the close of the defence ordered by the judge to produce on the following day the 4th September at noon a document which he admitted was in his possession at his house some miles distant from the Court house, and under the threat of being attached if he did not do so, he

promised to obey the order. He did not in fact appear in Court to the judge's knowledge on the 4th or 5th, but he appeared there and produced the document on the 6th, after attachment had been ordered to issue but seemingly before it had issued. He gave an excuse for his delay which the judge held to be frivolous. When the order was made on the 3rd, the trial seems to have been adjourned until the next day for the plaintiff's reply to the defence and for the judgment. It does not appear that the document which Wattuhamy was required to bring was wanted by either of the parties to complete his case or indeed that it was capable of being made evidence between them. On the 4th, reply of the plaintiff was made without, so far as the record discloses, any reference to the missing document, and the judgment of the Court was reserved. The judgment was eventually delivered on the 22nd October and even in that I can find no trace of the document having been in any degree capable of furnishing material evidence relevant to the issues tried and determined. If it be taken on the finding of the judge that Wattuhamy was without sufficient cause guilty of considerable delay in obeying the order of the Court, it is not found, and there are no facts disclosed from which I can infer, that he intended thereby to challenge the authority of the Court, or to disturb or hinder the orderly course of the business of the Court, or that in fact any sort of obstruction or hinderance to the proper and effective trial of the case before the Court was caused by his conduct

Conviction set aside and fine to be refunded.

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peal, ought to shew on the face of it that a contempt of court was committed.

D. C. Galle, 39543.

Per PHEAR, C. J.—This is also a case of contempt of Court. The District Judge has fined the petitioner Rs. 25 for not having obeyed an order to deliver up possession of land, made upon him under Ordinance No. 12 of 1840.

Where one is accused of contempt of court for not obeying an order to deliver up possession of land, made upon him under Ordinance No. 12 of 1840, it is necessary to establish that the order was make against, and was serv-

Now it is quite as essential in a case like the present, as in such a case as that which has just been disposed of, that the adjudication of the contempt, i. e. of all the material facts serving and necessary to constitute the contempt should be complete and specific. In the present case, in order to make out a contempt it was necessary to establish that the order in question was made against, and was served on, the person accused of the contempt, that 14 days had elapsed from the date of that service and that the accused refused to deliver up possession of the land. Now in the first place no formal order ever seems to have been made by the District Court in this case, other than a brief note on the record. No factum of service on any order or copy order is even attempted

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ed on, the accused, that 14 days had elapsed from the date of that service, and that the accused refused to deliver up possession of the land.

to be proved directly and the judge gets over this difficulty by saying that the accused in an affidavit which he had filed on 24th July last, admitted that the order was at some previous time served upon him.

No date of service is mentioned any where or alluded to, and it is in fact not possible to say when in the view of the prosecution the 14 days commenced or when they expired. As however the conviction was made on the 26th October, and the affidavit referred to of the accused was filed in July, the judge thinks he is justified in asssuming that at the time of the hearing very much more than the 14 days must have expired since the date of the service of the summons whenever that may have been.

But the judge seems in error in supposing that the petitioner in this affidavit admitted the fact of the service of any order upon him. The passage bearing on the point is: "That in the case "summarily decided a writ has been issued against the petitioner "to eject him from the premises where in he resided and a house "of 11 cubits. And to the Fiscal's Arachchi of Kahawe who went "to execute the said writ, Petitioner delivered a copy of the "statements he had to say and begged that a report be made "accordingly." The petition here only admits that an order had been made against him and that some endeavour had been made to execute it. The petition does not appear to contain any thing from which it could be inferred as a fact that the order, or even a notice of the making of the order, had ever been formally served upon the petitioner either before the attempt at executing the order or at any time.

But the accused was assuredly entitled, notwithstanding that he knew of the issuing of the order, to all the time which delay in serving it would give him in addition to the 14 days from service to which he was entitled under the Ordinance.

It is not only possible, but moreover seems probable on the materials of this record, that the order never has been in fact served upon the accused, and that the 14 days allowed him by the Ordinance have never began to run. At any rate in the complete absence of any proof of service the adjudication of contempt cannot be sustained.

The conviction is quashed, and the fine, if paid, must be refunded.

D. C. Galle, 34643.

VanLangenberg for the 2nd defendant and appellant, *Morgan* for the 3rd defendant and appellant.

Browne and *Layard* for plaintiff and respondent.

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PHEAR, C. J., held as follows :—

Practice of "putting in" cases in evidence.

The argument which has been addressed to us on behalf of one of the appellants, has brought out very prominently the great mischief which arises from a loose practice, seemingly very prevalent in courts of first instance in regard to the taking or reception of evidence at the trial of suits. I mean the practice of referring to the cases of suits previously determined between litigant parties, either in the same or other courts, and "putting in," as it is termed, those cases, that is, putting in the record book of the proceedings in these former suits respectively as a whole, to be used in some unspecified way as evidence between the parties in the pending trial. In the present instance this practice has been indulged into a very large extent, and the 3rd defendant seems to have relied mainly for the establishment of the title, which he sets up to the land in suit, upon the probative materials of some kind or other supposed to be embodied in several other cases which were so "put in" and were received by the court at the trial. Now the record or a portion of the record of a former suit may be of use as evidence between parties in a pending trial for the purpose of proving *res judicata* or any fact of formal process or procedure which may be relevant to the matter in issue between these parties. In such case, either the record or the portion of it which is required should itself, if necessary, be produced before the court at the proper time in the trial, or a properly authenticated copy should be used instead, and in either alternative only the copy should be filed or a document received in evidence in the case. Pleadings and statements of parties in former suits and depositions of witnesses may be dealt with in like manner, each should be adduced as a separate item of evidence, the person, whatever party or witnesses to be affected by it being offered the opportunity of explaining it, and when received as evidence a properly authenticated copy should be taken and filed in the place of the original. Similarly with regard to documents filed of record as part of the evidence or otherwise in a former case, only that these must generally be proved or admitted as between the parties to the pending case before they can be used therein and should themselves be removed to the new record, the copy being substituted for them in the old.

Even if, in the place of proceeding thus regularly, the Court receives the record book of the former trial in its entirety, it should take care that the particular pleading, process, deposition or document which is used as evidence between the parties be specifically referred to at the proper and convenient time in the course of the trial by the party using it, and in the event of its not being of such a nature as to assure itself that it be sufficiently proved or admitted.

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the court should further make note of the fact on the record of the pending trial.

With such a method of proceedings, it will be rendered quite clear on the face of the record of trial what are the documents and evidential materials of the former case imported into the new one, and what their value is, and there could be no occasion for us or for learned counsel on appeal to search into a mass of papers, such as the several record books of former cases now before us, in the hope of finding therein some morsel of undefined material which may have been in the minds of the parties concerned when at the trial these former cases were referred to and "put in" and may then have been intended to be used as evidence between the parties.....

D. C. Galle, 39,861.

Agreement to return commission.

Plaintiff *(Jansz)* was engaged as auctioneer by the defendants *(Delmege & Co)*., who acted as agents for the under-writers, to sell the cargo saved from the wreck of the *Orestes*, and plaintiff instituted this action to recover his commission at the rate of 2½ per cent.

Defendants resisted the full charge, on the ground that the plaintiff agreed to return them 1¼ per cent of this commission.

The plaintiff denied the agreement to return any part of this commission.

The case on the facts depended mainly on the evidence of the parties themselves, with the additional fact on the defendants' side that the plaintiff on previous occasions had agreed to "*return commission.*"

The District Judge found for the defendants that the plaintiff agreed to return 1¼ per cent of the commission.

The plaintiff appealed.

Ferdinands, D. Q. A., for the appellant, urged that as the evidence on either side depended on the word of the respective parties, the court should incline to the side that repudiated a contract that was fraudulent and illegal on the face of it. Defendants, as agents of the under writers, were bound to do the best they could for their absent principal and should not be allowed to benefit by a conspiracy with the auctioneer at the expense of their principals. It was in evidence that the auctioneer rendered account sales charging 2½ per cent., which were transmitted by the defendants to their principals. These account sales were false,

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inasmuch as the commission paid by the agents to the auctioneer was really only 1¼ per cent., the agents appropriating the other 1¼ to themselves.

Browne, for the respondents, urged that the ruling on the facts was correct. The plaintiff had admitted that it was usual for him to return half commission in his previous dealings with the defendants, and the correspondence pointed to the same agreement in this instance. This was the only question before the District Judge, and it was only in the petition of appeal that the question of its legality was raised. If it had been properly raised, it might have been urged in defence that the custom of European merchants here and elsewhere had legalised the practice.

The Supreme Court, *per* PHEAR, C. J., held as follows :—

We think on the evidence that there is not sufficient reason for disturbing the finding of fact at which the District Judge arrived, viz., that the auctioneer contracted, in this case, to sell on a commission of 1¼ per cent, though he further agreed to represent in accounts which he might render that his real commission was 2½ per cent. On the finding the plaintiff can only recover the 1¼ per cent, and we are not concerned to enquire what was the purpose which the two parties to this intended the misrepresentation to serve, though it is not easy to suppose that it was altogether an honest one. The purpose itself, whatever it may be, does not seem to affect the merits of the plaintiff's present claim. The judgment will, therefore, be affirmed.

December, 13th.

Present :—PHEAR, C. J.

P. C. Colombo, 9527.

The power conferred on the Magistrate by cl. 54 of Ordinance No. 16 of 1865 is to be exercised only when the person charged falsely or frivolously

Plaint :—That defendant did on the 14th October 1877 at Dehiwella falsely charge the complainants before Police Serjeant Caderevalu with obstructing the public throughfare at Dehiwelle, and did keep the complainants in custody of the police for four hours, and did not further prosecute the said charge, in breach of cl. 54 of Ordinance, No. 16 of 1865.

It transpired in evidence that defendant obtained the release of the complainants at their own request.

The Police Magistrate *(Penney)* held that cl. 54 gave him the option of inflicting a fine or awarding such amends as should seem fit ; that the accused was guilty of the act complained of, but that "as he wronged no one by so doing, the fitting amends to be made

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amounted to nothing." The accused was accordingly discharged.

On appeal, *Dornhorst* appeared for complainant and appellant, *VanLangenberg* and *Browne* for respondent.

is brought, or appears, before him, to be dealt with according to law.

PHEAR, C. J. held as follows :—

It appears to me that a somewhat incorrect view has been taken both by the magistrate and the complainant in regard to the scope of the enactment in clause 54 of the Police Court Ordinance (No. 16 of 1865). As I read clause 54, the power there conferred on the Magistrate is to be exercised when the person charged falsely or frivolously is brought before him, or appears before him, as the case may be, in order to be dealt with according to law. In this case the present complainant, rightly or wrongly, never was taken before the Magistrate, nor did he appear before him to ask for the adjudication of the original charge, and the occasion did not occur for the exercise of the power in question. The magistrate was therefore right in dismissing the complaint.

D. C. Matara, 8162.

Contempt of court for disregarding an order of court to keep silence.

The following was the record of the proceedings in the matter of the alleged contempt of court :—

"Don Johanis Weekremesinghe Gunesekera Vidana Arachchi of Akuresse and Don Lewis are called upon by the court, after ordering silence in the court and getting it proclaimed by the peons, to shew cause why they should not be fined for disobedience and contempt.

"No. 1 states,—I was only talking in a low tone.

"No 2 says,—I did not speak loud and begs to be pardoned.

"These two men tell a lie in saying they did not speak loud for I was so disturbed in listening to Mr. Boultzens addressing the court that I had to order silence, and then again was I disturbed, and on looking to see who was talking, I saw both of them were talking quite loud in front of the bench, and considering that it is a contempt in the face of the court and disobedience of order, I fine them at once.

"They are each fined ten rupees."

On appeal, *Layard* for appellant.

The conviction was set aside in these terms by PHEAR, C. J.—

This is a very imperfect adjudication of contempt and fails altogether to set out and to find expressly the facts, whatever they are, which constituted the contempt of which the appellants have been convicted. It is no doubt possible to infer, from the hasty

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and imperfect note which the District Judge has put upon record of that which occurred in Court before him, that the two petitioners may have been guilty of contemptuous disregard of an order of Court duly made to them to keep silence, and that by their conduct in wilful disobedience of that order, the seemly and regular prosecution of the business of the court may have been interrupted. But there is certainly not foundation enough on the record to support a judicial conclusion of fact to that effect, and, as I have already said, the adjudication falls short of even stating the requisite conclusion of fact.

The power of punishing for contempt of court should always be most cautiously exercised with very careful discretion and regularity of procedure. And this does not appear to have been the case in this instance.

December, 18th.

Present:—PHEAR, C. J., CLARENCE, J., and DYAS, J.

C. R. Kalutara, 19454.

Where A obtained judgment in 1866 against B, decreeing B to convey a certain land to A, on receipt of Rs. 18.75, and this sum was not paid by A to B for 9¾ years, *held* that the judgment had executed itself in favour of B.

Plaintiff, claiming title to a land, prayed for quiet possession of it, and that its seizure made by the 1st defendant as execution creditor of the 2nd defendant may be set aside.

The action was instituted on the 26th January 1865, and plaintiff obtained judgment on 13th December 1866, conditional on his paying into court the sum of Rs. 18.75.

On the 13th November 1876, plaintiff moved for a notice on the heirs of the 2nd defendant, to shew cause why they should not be made parties defendant and why judgment should not be recovered. Notice issued on the 23rd February 1877, and on the 21st April following, the plaintiff moved to resume motion of 13th November 1876, and for a notice on 1st defendant and heirs of 2nd defendant to shew cause why they should not receive from plaintiff Rs. 18.75 and convey to him one-quarter of the land in question as per judgment.

The 1st defendant consented to the terms of the motion, but the heirs of the 2nd defendant objected on the ground that the action was prescribed.

The commissioner upheld the plea.

On appeal, PHEAR, C. J., affirmed the judgment in these terms:—

We think the judgment of the Court of Requests is substantially right, though the ground on which it is placed is not altogether accurate and sound. The judgment which the plaintiff

1877 Dec. 18. — and appellant seeks to have received in his favour was in truth a conditional judgment. It was adjudged that on plaintiff paying into court £ 1.17.6, he be placed and quieted in possession of the subject matter of the suit, and the condition there implied is that he pay the money into court within a reasonable time. It is altogether beyond reason that plaintiff should take 9¾ years to pay £ 1.17.6. The judgment has in fact by lapse of time executed itself in favour of defendant.

C. R. Kandy, 4807.

Dornhorst for appellant, *Layard* for respondent.

The Supreme Court held as follows :—

Payment to Fiscal. We think on the evidence that there has been a practice in the Fiscal's office for the three-quarter purchase money, as it is called, to be paid to the head clerk, and to Ambrose, amongst others, representing the head clerk. We further think that in the testimony of Mr. de Livera, the Deputy Fiscal, and the statement made by the Fiscal himself in a former suit No. 69629, D. C. Kandy, that the Fiscal was aware of this practice, or at any rate must be taken to have been so as against the plaintiff who *bona fide* paid the money into the office, according to the practice which he found obtaining there. And while allowing the practice to subsist, the Fiscal cannot shelter himself under section 1, clause 66 of the Fiscal's Ordinance.

In this view, we think, that as against the defendant we must treat the receipt of the money from the plaintiff by Ambrose as equivalent to a receipt of it by the defendant himself. The plaintiff, in other words, paid the money twice over to the Fiscal, and as he did so the second time under constraint and protest, he is entitled in this action to recover it back.

December, 20th.

Present :—PHEAR, C. J.

D. C. Tangalla, 3337.

Contempt of court. The proceedings on which the defendant was convicted of contempt of court were based on the following affidavit :—

"Don Bastian Weeraratne of Tangalla solemnly affirms and declares that by virtue of the judgment recorded in case No. 3337 of this court, the affirmant was quieted in the possession of the portion (D) adjudged in his favour, but notwithstanding the said

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judgment, the 2nd defendant in the said case, called Mirisse Achchege Nades of Tangalle, prevents the affirmant from peaceably possessing the said portion lot D. That on the 25th instant, when the affirmant wanted to get a cocoanut tree belonging to him under the said judgment cut down, the said Mirisse Achchegey Nades came to the spot in a violent manner using threats and foul language and cut and damaged the coir rope which the affirmant had brought there and forcibly took away the affirmant's axe.

"Wherefore the affirmant prays that the said Mirasse Achchegey Nades of Tangalle may be brought up and dealt with for contempt of court. D. D. WEERARATNE.

"Affirmed to in court, on this 26th day of November 1877.

"Before me, W. J. S. BOAKE."

The learned District Judge read the above affidavit of plaintiff to the 2nd defendant, and called upon him to shew cause why he should not be punished for contempt of court."

After some evidence was heard, the learned Judge (*Boake*) held as follows :—

"This is the second time that this defendant has opposed the execution of the decree in this case. Let him be committed for 6 months for contempt of court.

On appeal, (*Grenier* for appellant) the conviction was set aside in these terms by PHEAR, C. J:—

There is no evidence on the record of the order of the court which is supposed to have been disobeyed, nor can I find out that in fact any direct order of court has been made upon the appellant and infringed by him. The record of the suit is not so clear as it might be, but it appears that on the 11th July 1876 there was a decision passed by the court as between plaintiff and 2nd defendant and others declaring their respective shares in the property which is the subject of suit. Afterwards a commission issued to one Mr. Kemps directing him to survey and divide the property according to this declaration. Mr. Kemps seems to have acted under this commission and on 22nd December 1876, the partition effected by him was made a rule of court. In January 1877, a writ of possession issued in favor of the plaintiff entitling him to obtain exclusive possession of the share allotted to him under Mr. Kemps' partition. He is said to have obtained possession under that writ on 5th November 1876, after some opposition from the present appellant. And it would appear that the act of the appellant which is now complained as a contempt of some order of court was of the nature of a trespass committed on the 25th November upon the land of which the plaintiff obtained possession on the 5th November as the result of Mr. Kemps partition. If this be the right view of the facts, the plaintiff seems to have mistaken

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his remedy. But however, this may be in the absence of any evidence of the order alleged to have been infringed, the conviction must be quashed.

P. C. Colombo, 9374.

Evidence of gambling.

Per PHEAR, C. J :—The conviction cannot be supported upon the materials on the record.

In the first place the depositions of the two witnesses who appeared in behalf of the prosecution are materially defective inasmuch as they do not disclose the names of the deponents. Also there is no evidence to support the finding necessary to be arrived at, that the place where gambling was going was a public or open place within the meaning of the ordinance. It almost appears from the evidence of the policeman that it was open in the sense of being capable of being seen into from the outside of the garden, not that it was open to the entrance of any one who desired to go in.

The first Policeman said the garden was fenced round, and the second, while he said it was an open public garden, coupled this statement with apparently his reason for thinking so, namely, that he and his companions could see into it from the rail-road ; further there is no evidence of any specific act of gaming, there is only the opinion expressed by the 2nd of the Policeman witnesses for the prosecution that the accused and three others were gambling with dice in a garden under a bamboo bush—and as the witnesses doubtless knew that they would share in the profit of a conviction, it need hardly be said that their opinion on this part (whatever even that may amount to) was not altogether of unimpeachable value. There is again no evidence of any instrument for gaming being found or used, otherwise than just mentioned for these two Policeman witnesses only say that a 3rd person (who is not called) picked up dice and the dice are not in fact produced by anybody.

On the whole the case is not merely imperfect, it is altogether wanting in the essential materials necessary to support a conviction. And this deficiency of the evidence appears not to be very creditable to the parties concerned in promoting and carrying out the prosecution.

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Present :—PHEAR, C. J.

D. C. Jaffna, 6085.

VanLangenberg for appellant.

Ferdinands D. Q. A., for respondent.

The Supreme Court held as follows :—

A libel is either demurrable altogether or not demurrable at all, and cannot be demurrable as against one defendant and not as against the other.

The District Judge has upheld the demurrer as against the 1st defendant but left the action to proceed as against the 2nd defendant. This was wrong, the libel is either demurrable altogether or not demurrable, and cannot be demurrable as against one defendant, and not as against the other. The libel clearly is demurrable, since it avers that plaintiff in a former suit sued the 1st defendant alone on this very bond now sued on, and got a judgment, which plaintiff now prays to have cancelled in order that he may sue both defendants *de novo*, on the same bond. The demurrer must be upheld and the plaintiff's suit dismissed with costs.

APPENDIX.

I

[See *ante*, p. 212.]

D. C. Colombo, 61113.

The following judgment of the Supreme Court (delivered on 16th December 1875) explains the facts of the case :—

The plaintiff bases his title to the share of the garden in dispute on a Fiscal's conveyance, dated January 9th 1871, upon a sale in execution in case 5384, in which suit the same plaintiff had obtained judgment against one Istaven Mendis, upon a bond bearing date July 15th 1863, whereby the share of land in question has been specially mortgaged to the plaintiff. That action was instituted in June 3rd, 1869, and judgment obtained on the 19th July following.

It is unnecessary to refer to the claim set up by the present defendant, the judgment of the District Court appealed from, and now under consideration, being confined to the contention between the plaintiff and the intervenient who claims ¾ of the whole land, which, it is admitted by both parties, originally belonged to Anthony Mendis, who left four children, of whom Istaven Mendis, the execution debtor in 53844 was one.

The plaintiff at the hearing in the District Court restricted his demand to Istaven's ¼ share with which therefore we have only now to do.

This ¼ (included in the ¾) the intervenient claims by purchase as per Fiscal's conveyance of July 21st 1870, on a sale upon a writ issued in case 52734 against L. Bastian Silva, who was the then owner by ½ virtue of a conveyance from the Fiscal dated June 11th 1866 upon a prior sale in execution in case 30404, wherein Bastian Silva had obtained judgment against Istaven Mendis on a general mortgage bond of May 8th 1858.

It was contended on behalf of the plaintiff that though his conveyance was later in date (January 9th 1871), still that by virtue of prior special mortgage of July 15th 1863 on which the sale and purchase proceeded and his title depended, the land vested in him notwithstanding all the intermediate sales.

The learned District Judge (held the sales under which the intervenient claimed being judicial,) that by operation of law the conveyance of the Fiscal cleared off the plaintiffs prior special mortgage, and consequently that the intervenient was entitled to judgment. The learned District Judge was also further of opinion that the intervenient ought to have judgment inasmuch as the land at the time of the special mort-

gage to the plaintiff was under judicial sequestration by the Fiscal in case 30404 under Bastian Silva's writ against Istaven Mendis.

We agree with the learned District Judge on the latter point which we shall first briefly consider.

The case 30404 against Istaven was, we find, instituted on June 6th 1861, judgment duly obtained and writ of execution issued on June 10th 1863. To this writ the Fiscal made his return on the 21st July following, certifying that he had caused the share of land now in question to be seized, which seizure according to the report of the officer who effected the same was made on the 22nd June preceeding the land being then under seizure on another writ. It will thus be seen that the land was actually in the custody of the law at the time of the special mortgage to the plaintiff on the 15th June 1863.

The officer who made the seizure was examined de bene esse and certainly he does not appear to have given a very lucid account of the process adopted in effecting the sequestration. But it should be remembered that this witness (as stated at the bar) is an infirm old man who was speaking of a transaction that took place 12 years ago. Moreover the fact that the plaintiff was a resident of the village, and that the sale took place by public auction on the spot after due publication, goes far to establish that the plaintiff could not have been ignorant of the proceedings then going on.

Holding then, that the land was under judicial seizure from June 22nd, how does this sequestration affect the plaintiff's subsequent special mortgage of July 15th 1863 ? The arrest in execution by the Fiscal must in our opinion be taken (see Lorenz's *Civil Practice* p. 47 and the authorities therein cited) to have passed the property " out of the estate of the defendant into the hands of the state giving the plaintiff a pignus prætorium thereon", and accordingly rendering the plaintiff's subsequent special mortgage of no validity against the sale in execution on which the title of the intervenient is founded.

As respects the other point we entirely differ from the conclusion of the learned District Judge that a Fiscal's sale wipes off all previous mortgages, and we unanimously adhere to the judgment of this court in Kalutara D. C. 24512 (Grenier's Report 1873 page 22,) in which we consider the law to be correctly stated as it has hitherto been understood and practised in this Island. The present Judges of this court, whose experience on the bench and at the bar has extended in the case of two of them to 30, and in the case of the other to 12 years, have no hesitation in declaring that a Fiscal's sale has always been deemed by them to confer (in the absence of fraud, actual or constructive) no more or less right on the purchase, than the title, whatever it may have been, of the execution debtor, subject to all its encumbrances.

Further, dealing with the question merely as one of expediency, which however we desire to keep quite distinct from that of law, we entertain a strong conviction of the danger to commercial as well as other interests of this colony, if the view of the court below were upheld, and lands specially mortgaged rendered liable to be brought to sale (whether the mortgagee assents or no, or is apprised or not of the sale) by any judgment creditor of the mortgagor (even supposing there be no collusion) at possibly a time when, owing to temporary causes, the property would not fetch its proper value of the sum secured by

the special mortgage, notwithstanding that the mortgagee may be content to wait in well grounded hope of a more favorable period for recovering his money. To quote the words of Sir R. F. Morgan, then Acting Chief Justice, in D. C. Kandy 58135, (July 8th 1875) "no more dangerous doctrine to the best interest of the country can be inculcated than that a mortgagee, say an English capitalist, can be deprived of his right by a quiet Fiscal's sale of the premises mortgaged, held at Badulla or any other place.

In this very case, we have a forcible illustration of how easily a Fiscal's sale may be brought about, no less than four such judicial sales taking place within as many years.

But to revert to the legal aspect of the case. It should be remembered, that the Roman Dutch law does not obtain in Ceylon in its integrity and in all its details, much less in its modes of procedure, see 60664, D. C. Colombo, Grenier's reports 1873, 129. We have therefore to consider, even supposing the strict Roman Dutch law to be as stated by the learned District Judge, whether this portion of that law, which depends to a great extent on the mode of procedure adopted with reference to the execution of judgments, prevails in Ceylon.

Now, the mode of procedure is regulated by the Fiscal's Ordinance and long usage, as declared by the judgments of this court. By that ordinance, no provision whatever is made for creditors giving security for the restitution of the proceeds of property sold on a writ of execution. Nor is there any mode prescribed how the fact of a land about to be sold being especially mortgaged is to be discovered by the Fiscal. This essential precaution of taking security, forming the very foundation of the modern Dutch practice, failing, the system carried on it cannot subsist.

Judging from the practice and decisions of our courts, we are of opinion that the law adopted in Ceylon is, as we find in Voet lib. 20 tit. 1, sec. 13, summarized by Burge vol. 3, p. 200. And in accordance with this state of the law, the conveyance by the Fiscal prescribed by the Fiscal's Ordinance 4 of 1867, recites that the purchaser becomes entitled to all the rights, title and interest of the debtor in the property, and the assignment is in the same terms.

The extent of the title conferred by a Fiscal's conveyance was determined so long ago as 1833, see Morgan's digest, p. 12, Negombo D. C. 7997 where it was held that "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. See also other cases cited by Mr. Justice Thompson in his Institutes, vol. 1, p. 355 and especially Galle, D. C. 15547 (November 3rd 1853), and it was similarly determined by the collective court that a Fiscal's sale is not of necessity binding, so as to give an irresponsible title to the purchaser, against all claimants. It should seem that the Fiscal only sells the debtor's interests in the land, and that the purchaser should make himself aware of the extent of such interest according to the rule caveat emptor.

These authorities abundantly support the decision of this court in D. C. Caltura 24582, Grenier's Rep. 1870 p. 23 (the correctness of which has been questioned) between the Galle case 15547 and the Calutara case 24582 on the ground that the parties in the former claimed totally

irrespective of any derivative right from the mortgagor. But this difference does not affect the principle of the decisions, the ground on which they proceeded being the same in all, viz., as to the extent of the interests transferred. The old case in Morgan's Digest p. 12, which does not seem to have been before the learned District Judge is conclusive on this point.

It only remains for us to declare that we are clearly of opinion that by the law of Ceylon, a subsequent sale in execution by the Fiscal does not per se, deprive a prior special mortgagee of recourse to the property specially mortgaged to him.

The judgment of the District Court will however be affirmed, on the ground that the land was under judicial sequestration at the time of the mortgage to the plaintiff.

II

[See *ante* p. 265.]

C. R. Panedura, 13386.

Plaintiff prayed for damages stating that "at great expense and labour, he caused a large Madella net to be cast and thrown near the sea at Egodeneyana Velle for the purpose of taking and catching fish, as he might have done, according to law and in accordance with the immemorial custom and usage relating to fisheries in this district. And the net having been cast as aforesaid, a large number of fish was enclosed within the net, but the defendants unjustly and forcibly, and after the plaintiff had cast the net and enclosed a quantity of fish entered in boats the space of water bounded by the net, and by casting Nooldells within the said space of water, disabled plaintiff from drawing in his net ashore and from appropriating to himself the fish enclosed and secured by his net; and further the defendants by this malicious act of theirs caused the fish thus secured to escape: whereby and by reason of the grievances committed by defendants, the plaintiff lost the fish which he would otherwise have haulded up, and is in other respects damnified to the extent of £10.

Answer: not guilty and a claim in reconvention for the sum of £6, being damage done to the defendants' Nool Della net.

The learned commissioner *(Lee)* held as follows (13 March 1871):—

"This is an action *ex delicto*. The court finds the following facts. In the afternoon of the 6th ultimo, the plaintiff's boat put out to sea, leaving as usual one end of the net on shore, and after proceeding some distance turned northwards and to the west of a shoal of fish. Having proceeded sufficiently in this direction, the northern arm of plaintiff's net was in course of being brought ashore by a man swimming, in accordance with the usual practice, and was within 50 fathoms of the shore, when the defendants, owners of a *nul del*, a recently invented discription of a net, rowed into the water saw as to the fifty fathoms by plaintiff's net, and put the extremities and arms of their net within such enclosed space, thereby preventing the plaintiff from securing the fish, as he would in all probability have done. The

plaintiff perceived north of him another *madel* party, which seeing that plaintiff had reached and was in the act of surrounding the shoal, drew off. I think that the fact of plaintiffs' net being overlapped by the defendants's net is strongly corroborative of plaintiff's contention. It appears to me that the insertion of plaintiff's net, as described by defendants' witnesses is utterly incredible. According to one of the defendant's witnesses, plaintiff's boat lay alongside the defendants net, and the net was then raised over the plaintiff's boat. The raising of a net so heavy as the *nul del* from four fathoms of water along the whole length of a *pada* boat, and its carriage over the length and breadth of that boat by seven or ten men, seem to me to be allegations *prima facie* incredible, and requiring stronger evidence than that I have before me.

"The plaintiff having by this entry of the defendant's lost his fish, claims £10 as damages from the defendants, basing his claim upon the common law as well as immemorial custom.

"The court will first regard the claim at common law, for if it be found that plaintiff was exercising a common law right, the onus of proving their acts of aggression to be sanctioned by custom lies on the defendants. After a very careful consideration of the case *No. 14538 C. R. Galle* (reported at page 115 of Lorenz, pt. 2) with connected case *No. 16645 C. R. Galle*, and upon perceiving the evidence of both these cases, I am of opinion that this case is governed by the principles laid down in those cases, and that the right of recovery in these cases is based on the fact of a prior occupancy, and the maxim *sic utere tuo ut alienum non laedas.*

"The sea being open to all men, both these parties had a right to fishing therein ; but this is not saying that one party had a right of so fishing as to destroy the privileges of the other. That would be, according to one party, an exclusive right which cannot exist.

"The plaintiff had undoubtedly the prior occupancy, and had done all things needful to ensure success. To use the words of the collective court of appeal (C. R. Galle 14538), "the plaintiff had the fish under his coercion, and but for the acts of the defendants, he would have reduced them under his actual possession.

"Now if a man has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it, (vide *Ashby v. White*, 1 Sm. L. C. 237, per Holt C. J.)

"The plaintiff had extended his net and enclosed a space of water, as he legally might have done, in the exercise and enjoyment of his right of fishing in the open sea, and the defendants having injured him in the exercise thereof, have now to show that immemorial custom sanctions their aggression.

"The evidence adduced by the defendant does not by any means justify their acts. It does not establish any custom whatever as immemorial. My attention was drawn by Mr. Proctor Daniel to two previous judgments pronounced by me, and I therefore think it necessary to say that those judgments, being in opposition to the ruling of the Supreme Court in the Galle cases, have not been by me considered as at all binding me.

"For these reasons, I am of opinion that plaintiff has a right of action against the defendants, and that he is entitled to the damages

he claims, which I assess at £10, in accordance with the maxim *omnia præsumuntur contra spoliatorem.*

"It is not proved that the damages set up by the claim in reconvention was effected at the plaintiff's instance, nor do I think that the evidence supports the allegations. It is very remarkable that complaint was not made to the Peace Officer at once.

"On the grounds, therefore, that plaintiff's right of pre-occupancy was interfered with by the defendants, I pronounce judgment for plaintiff against the defendants jointly and severally for £10 and costs of suit."

On appeal, the Supreme Court (16 May 1871) affirmed the judgment seeing no reason to the contrary.

III

[See *ante* p. 300.]

D. C. Colombo, 28841.

Judgment.—Mr. Samuel Stewart Curgenven, an Englishman by birth arrived at Trincomalie in 1819 in the staff of Vice Admiral Sir Richard King and as his private Secretary; on the 28th December 1819 he was appointed agent of His Majesty's Naval Hospital and for the victualling of His Majesty's ship at Trincomalie, and subsequently when the establishment was reduced, he was appointed Naval Storekeeper. In 1822 he married Charlotte Eugenie Lavalliere, a lady born in this country and of Dutch and French descent; on the 26th February 1834, he made a last will by which he directed that the proceeds of his estate should be invested in England or, if the executors deemed it more advisable, put out to interest on "the most solid and most unobjectionable security," and the interest paid to his widow during her life (provided she continued a widow) for the use and benefit of herself and her children. At her death, "the principal" was to be divided amongst his children, Charlotte Winifred (now Mrs. Straube), Eugenie Elizabeth (now Mrs. Power) Clara (now Mrs. Smedly), Charles Richard, and Evelina Theodora (now Mrs. Mytton.) On the 21st Sept. 1834 (7 months after the making of the will), another son was born, Samuel Lavalliere. Mr. Curgenven did not however alter or revoke his will. In 1837 he intended to go to England on leave of absence, taking his family with him, and for that purpose he came round to Colombo where the vessel was in which he had engaged his passage, but he suddenly died here on the 7th March of that year.

The executors named in the will, the widow Mrs. Lavalliere and Mr. Craven produced the will and obtained probate thereof on the 5th May 1837. Mrs. Curgenven did not marry again, but enjoyed the proceeds of the estate until her death, which took place on the 5th January 1860. She left a will however in which she set out her right as widow to a half of the husband's estate and bequeathed £1000 from such half to her son Samuel, minus £450 previously advanced for the purchase

of his commission, and the remainder thereof to all her children equally. She made other provisions, as to her own estate, (for she inherited largely from the estate of her brother Theodore Lavalliere who died on the 17th April, 1859) which are irrelevant to the present issue and need not therefore be more particularly noticed.

The plaintiff, as the husband of Clara Curgenven now complains that Mrs. Curgenven received £3324. 7.7. as the assets of her husband's estate, exclusive of plate, jewellery and furniture worth £600, and of property in England in the hands of Mr. Peter Curgenven, from which his, the plaintiff's, wife as one of the 5 children, named in the will, is entitled to one fifth. He claims judgment for this one fifth and also for an account of the accumulations made by Mrs. Curgenven from this interest allowed her, and which he says must be considerable, Mrs. Curgenven having invested the principal sum at "large interest."

The defendants who are the executors under Mrs. Curgenven's will, and who as such represent also the estate of her husband, plead that £3324.7.7. formed the whole of the common estate of Mr. and Mrs. Curgenven, and that she, as wife, was under the Roman Dutch law, entitled to one half, so that the estate of Mr. Curgenven had only £1655.11.9 ½, that they "tendered the share which Mrs. Smedly was "entitled to and of any interest which may have accrued thereon since "Mr. C's death," but that plaintiff refused to receive the same; as to the accumulations, the defendants plead that there are none, and that plaintiff on the 7th March, 1857 executed a deed releasing Mrs. C. from all claims in respect of such accumulations.

The plaintiff in reply, denies the right of Mrs. Curgenven to claim a half from the common estate and admits a tender of ⅛th. conditioned upon the plaintiff executing a release by which he would be barred from claiming any accumulations there might be found to exist, to which he, the plaintiff, objected. As to the release of the 7th March, 1857, the plaintiff pleads that it is invalid in law without consideration, and that his signature thereto was obtained by means of fraud and misrepresentation. Such are briefly the facts and such the state of pleading in this case. The first question they raise for consideration is, which is the law by which the case ought to be governed? By the English law, Mrs. Curgenven would have had a right to dispose of the whole estate; by the Roman Dutch law to dispose of only a half for (unless where the rights of married parties are governed by an anti-nuptial contract) that law regards man and wife as partners, each entitled at the dissolution of the partnership, by the death of either partner, to a half of the partinership stock or common estate. Again by the English law, the subsequent birth of a child does not invalidate a will previously made, i *Williams*, 145. By the Roman Dutch law, the will becomes void by agnation, since the father is presumed not to have thought of him. Lorenz's *Vander Kessel*, *Thes*, 306.

The decision of this question will (as the assets were all moveable) depend upon what the domicil was of Mr. Curgenven, for the wife follows the domicile of the husband. It is asserted by the plaintiff that he was domiciled here.

That is the domicile of a person where he has fixed his permanent home and principal establishment, to which whenever he is absent he has the intention of returning, *Story*, sec. 42. It has been defined as the place in which the person "larem rerumque ac fortunarum suarum

summam constituit, unde rursus non sit discessurus si nihil avocet ; unde cum profectus est, peregrinari videtur ; quod si rediit, peregrinari jam destitit." *Cod.* x. 29.7. To contitute domicil there must be the factum (excepting the case of a person in iteneri) and the animus. The animus, which must exist in all cases, may be gathered from a variety of circumstances. As a general rule, the place of man's birth, domicilium originis, is presumed to be his domicil, unless there is reason to believe that he has abandoned it and acquired another; the mere act of abandonment of one domicile being insufficient, unless another domicile has been actually acquired. On the other hand, if a person actually left his domicilium originis and removed to another place, with an intention of remaining there for an indefinite time and has a place of fixed present domicile, it is to be deemed his domicile, notwithstanding he may entertain a floating intention to return at some future period. Story's *Conflict*, 51. If the removal however be only for some particular purpose, which is expected to be only of a temporary nature, or in the exercise of some particular profession, office, or calling which does not contemplate an absence from the former domicil for an indefinite and uncertain period, it is not a change of the former domicile ; *Burge*, 42 ; *Resp. Jurisc. Holl.*, par 5, consil 85, et par. 3, vol. 2 consil 138 in 24 et seq. Officers in Her Majesty's army have accordingly been held not to lose their domicile when ordered abroad on service ; officers of the old East India Company's service on the other hand, whose profession renders a residence in India necessary, have been held to lose their English, and to gain an Indian, domicile. *Bruce v. Bruce*, and *Munroe v. Douglas*.

If the office be such as not to require permanent residence, or, although it may require permanent residence, yet if it be held only during pleasure, and not for life, so that the person might at any time be removed from it, a residence in the place in which the duties of the employment or office are to be discharged does not of itself alone afford a presumption that the former domicile is abandoned. To raise such presumption in the case just put, there must be circumstances indicating an intention to remain in the place, even if he were removed from the office or if his employment ceases. There are several cases in the Dutch reports establishing this principle which are very well put together and examined in the appendix to Mr. Henry's report of the case of *Odwin v. Forbes* p. 181—209, and in 1st Burge's Commentaries p. 48, 54.

Let me now endeavour to apply these rules to the case before us. The 18 years residence of Mr. Curgenven in Ceylon, his marriage with a lady born here, his going to England merely on leave and his intention to return to Ceylon, if he would get no employment elsewhere, weigh in favor of the domicilium habitationis. But as opposed to these, it must be considered that he came out here in the naval service, and that there is nothing to shew that when he came, or since, he entertained the intention of making Ceylon his fixed and permanent abode during life, the " propositum illic perpetuo morandi", " neque solâ habitatione" which Voet (v. i. 98)points out, must exist to constitute domicile. Mr. Astley Cooper and Mr. Isaac Crabb, who were both examined at Trincomalie, swear that the office of storekeeper which Mr. Cooper now holds, is one held during pleasure and that the person is liable to be removed from it at any time, and that it always was, and still is, paid for

by the Imperial Government. Mrs. Power swears that her father gave up his house, (he occupied a government house by the way), sold his furniture, that he spoke of his intention of getting an appointment at Malta, if he could ; that he bought no house property, as he intended to leave Ceylon and there was a chance of his not returning. It appears further that he kept accounts with his banker in England all the time he was here, remitting money to him from time to time. These, coupled with the direction in his will as to the investment of the monies belonging to him, rebut the presumption (for the question according to the authorities already referred to becomes narrowed) "of an intention to remain in the place, even if he were removed from the office or if his employment ceased." An intention which, as already seen must be shewn to create the domicilium habitationis in the case of a person who resides in a place holding an office there during pleasure and, without which intention, residence is only viewed as mansio temporaria.

For the above reasons, I hold that Mr. Curgenven did not abandon his domicilium originis and did not acquire a domicilium habitationis as the wife has no choice of her own but follow the "dignity of the domicile and the forum of the husband." Mrs. Curgenven's domicile was English too. It follows that as regards moveables, and Mr. Curgenven had nought else, he had the power of disposing thereof, and that his widow cannot claim the Dutch Law right to a half.

I am unwilling to leave this question without referring to another view of it which struck me forcibly when I came to study the case. Assuming that Mr. Curgenven had lost his English domicile and that his wife could claim a half, can she be held to have retained such right under the particular circumstances of this case? It is clear that Mr. Curgenven meant to have disposed of the whole of the estate, whether he had a right to do so or not. It is equally clear that Mrs. Curgenven for a long space of time acquiesced in such disposition and took benefit thereunder. Probate was taken of Mr. Curgenven's will on the 5th January 1837. On the 11th January 1838 was filed an "Inventory of the goods &c., of Samuel Stuart Curgenven and an account of the estate of the deceased." All the property and money in Ceylon, not half only, were brought to account and a balance of £1841. 16. 8½ shewn in favor of the estate. Both Inventory and account are signed and sworn to by Mrs. Curgenven and the other executors. On the 5th February 1849, a further account of the estate of the Samuel Stuart Curgenven was filed, bringing into account other monies received from India, and shewing a total balance of £3324. 7. 7¾, in favor of the estate, signed and sworn to by Mrs. Curgenven and Mr. Lavelliere. On the 28th November 1851, another "further account of the estate of Samuel Stuart Curgenven" was filed, shewing two sums of £5 and £8. 4. paid to the Notary for drawing out the marriage settlements of Mrs. Power and Mrs. Straube, and reducing the balance—a balance still "in favor of the estate" to £3311. 3. 1¾, also signed and sworn to by Mrs. Curgenven and Mr. Lavalliere. No further monies were received or paid, and there was no necessity for any further account, but on the 17th February 1855, another account is filed which is headed "a true and perfect amended account, comprising the receipts and payments of these accounts heretofore filed, and shewing the share which the survivor is entitled to." Then for the first time a division is made of the

total thus: "To survivor's share £1655. 11. 9¾. To balance in favor of estate £1655. 11. 9¾." This new account completely altered the position of the case; and it was filed, as was seen, 18 years after the death of the deceased, during which 18 years, be it remembered, Mrs. Curgenven remained in possession of the whole estate, and during which time too other rights had supervened, for three of the daughters were in the interval given away in marriage. Both Mr. Smedley and Mrs. Power swear that the first intimation they had of Mrs. Curgenven's claiming a right to a half was after her death, when they were apprised of her will, they having all along been led to believe that they would participate in a share from the entire estate.

It is a principle in equity, a principle which, as shewn by Mr. Swanstone in his learned notes on the case of *Dillon v. Parker*, and by *Story* in his Equity Jurisprudence, is borrowed from the Civil Law, and therefore of force with us,—that he who accepts a benefit under a deed or will is bound to confirm and adopt the whole instrument, conforming to all its provisions, and renouncing every right inconsistent with them; that no one is allowed to frustrate an instrument under which he claims. Spence's *Equitable Juris.* c. 7, s. 11. On this principal it has been held that where a testator gives to his wife and children all his estate whatsoever real and personal to be equally divided amongst them, the wife ought to be put to her election, on the ground that her claim of dower would disturb the equality of division which is contemplated by the will. It is true that Mrs. Curgenven (regarding her as a Dutch law widow) took what was her own only, and not what her husband gave her, but it appears to me very questionable whether her acquiescence for 18 years, her repeated solemn acknowledgments in court that the whole estate was her husband's, would not be held to amount to an election on her part to give up her right as widow, and to possess the whole estate, and thus stop her, claiming her widow's right after a great lapse of time and after the supervention of other rights, (to wit, the marriage of some of the children on the faith of the former arrangement), which render it inequitable to disturb such former arrangements. (Notes on *Mayès v. Mordaunt*, in White and Tudor *Leading Eq. cases*, i. 281; *Dickson v. Robinson*, Jac. 503; *Roberts v Smith*, 1 S. and St. 513.

We come next to the claim for the accumulations of interest, which, as alleged by plaintiff in his libel were considerable, Mrs. Curgenven having invested her money from time to time, at large interest in the first place. Plaintiff has not proved the existence of any accumulations. Mrs. Straube swears that she was acquainted with her mother's affairs when living, and that she has looked fully into the estate with the view of winding it up; that to the best of her knowledge there were no accumulations made by her mother from the interest received by her, excepting of course the small sums of interest due at her death and received afterwards; that the interest of the money in England went all towards the education of her children. She adds, if any mother received "accumulations, she had also large mands upon her; she lent Mr. Power large sums of money amounting to £800 and he caused to pay interest since 1856. She purchased a commission for my brother Samuel for £ 450 soe lent my elder brother who was then dependent upon her, several sums of money amounting

to £312, but these were out of the principal but, of course she lost the interest upon those sums as soon as they were paid away. If there were any accumulations, they must have dissolved when her principal sum was so much reduced.

One cannot but see the force of this observation assuming that Mrs. Curgenven received all the time full 12 per cent upon the principal without any loss or stoppage, that would give her £398, say £400 a year. Place against this the outfit of the children sent to England, her own expenses of living and those of her children here, the calls which a lady in her position must have had to meet, and lastly the loans that she had to make of £1562 (for the principle is all safe) and it is difficult to conceive how any "accumulations can still exist."

But secondly, supposing there were accumulations it appears to me that they all belonged to her under her husband's will, "she shall continue" says that instrument to "receive the interest of my estate until death for the use of herself and my dear children, when the principal thereof is to be divided amongst my children under the stipulations herein set forth."

This view of the case renders it unnecessary that I should consider the force of the release given by the plaintiff, and her other children to Mrs. Curgenven on the 7th March 1858 releasing and discharging her and the other executors of and from all manner of claims, demands and actions whatsoever for or in respect of the interest which was directed to be paid to the widow for the use of herself and her said children or any part thereof, or for or in respect of any cause, matter or thing whatsoever relating thereto, further than to state that the plaintiff has failed to prove, as pleaded by him that that release was obtained from him by "fraud and misrepresentation." Mr. Power swears "that it was signed in order that it might be sent to England, to enable Mr. Lavalliere to make arrangements with Mr. Peter Curgenven, solely for that purpose. Mrs. Straube said it would be waste paper otherwise, a correspondence took place between Mrs. Straube and Mrs. Power and myself. The letter D. was written by Mrs. Straube to my wife—it was in consequence of this letter that I signed. I was asked by Mr. Straube to get Mr. Smedly to sign, a correspondence took place between him and Mr. Smedly and I stated to him the reason why the document was wanted. I stated this in order to induce Mr. Smedly to sign, as he would not sign otherwise &c".....It is accordingly decreed that the plaintiff do recover from the defendants, as executors aforesaid, the sum of £664.17.6 with such interest as has accrued thereon since the 6th January 1860. Costs on both sides to be paid by the estate of Mr. Curgenven.

Richard F. Morgan, D. J.

18th February, 1861.