THE

APPEAL REPORTS

FOR 1873,

BEING

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF CEYLON

SITTING IN APPEAL.

EDITED BY

S. GRENIER, Esq.,

ADVOCATE.

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PART II.—COURTS OF REQUESTS.
PART III.—DISTRICT COURTS.

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PART II.—COURTS OF REQUESTS.

January 14.

Present CREASY, C. J.

Claim to crown land, without parol evidence of possession.

C. R. Panadure, 14635. The plaintiff claimed a land called Dewawatunewatte, by right of purchase from the Crown, as against the first and second defendants, who pleaded that it was their ancestral property which they had possessed for more than 50 years. The 3rd defendant (the Queen's Advocate) was made a party to the suit, to warrant and defend plaintiff's title or cause the purchase amount to be refunded. No parol evidence was adduced on behalf of the 1st and 2nd defendants, who relied on a thombo extract, a government grant, a planting voucher and a certain deed of agreement, which they contended estopped both the plaintiff and the Crown from questioning their title. The Commissioner, however, gave judgment for plaintiff for the land, absolving the 3rd defendant from the instance with costs. *In appeal*, per CREASY, C. J.—"Affirmed. The burden of proof, as to the land not being crown land, was thrown by Ordinance on the plaintiff. He has not sufficiently proved it to be private property. Some of the documentary evidence put in by him is entitled to consideration, and has received it. But none of that evidence amounts to an estoppel; and as it is left wholly unsupported by the parol evidence of possession and occupation, which is naturally expected in such cases, the verdict against the plaintiff must stand."

Action for wages not contracted for.

C. R. Trincomalie, 28305. Plaintiff sought to recover a sum of Rs. 36, being wages, for nine months, as defendant's cook. The defendant denied the contract, and alleged that his uncle had engaged the plaintiff to cook for him while he was at school in India; and that he himself had been no party to any agreement to pay wages. The Commissioner (*Green*) held that defendant, having benefited by plaintiff's services, without the latter receiving any compensation therefor, was liable to pay the amount claimed, and

JAN. 21. } accordingly gave judgment as prayed for in the libel. *In appeal*, (*Dias* for appellant) per CREASY, C. J.—"Set aside, and judgment of non-suit to be entered with costs. It is quite clear that the defendant was never a party to the contract with plaintiff, either expressly or by implication."

January 21.

Present CREASY, C. J.

Promissory Note: nonsuit without costs.

C. R. Kandy, 47883. The plaintiff sued, on a promissory note, to recover from the defendant, who was the maker thereof, a sum of £8. The defendant, admitting the document, pleaded want of consideration, in that it had been granted for a balance due by him in respect of a land which he had purchased from the plaintiff, under a deed bearing the same date as the note, but which land the plaintiff had failed to put him entirely in possession of, in consequence of a judgment of the District Court interfering with his right to do so. The note was a promise to pay £8, "being balance due for the purchase of a certain land, to be paid without any interest soon after the land is clearly freed from dispute and plaintiff puts me (defendant) in possession thereof." The plaintiff, in his examination, stated that he had received the £8, "to carry on the case which was then pending about the land." The defendant's proctor having called no evidence, but merely put in the case above referred to, the Commissioner gave judgment for plaintiff with costs. *In appeal*, the judgment was set aside and a judgment of non-suit entered; and per CREASY, C. J.—"The document on which alone the plaintiff sues, taken with the admitted fact of the dispute as to the title, puts the plaintiff out of Court. The defendant has not contradicted the plaintiff's statements; and, if they are taken as true, they show very discreditable conduct on the part of the defendant. The non-suit will therefore be without costs."

Irregular trial.

C. R. Galle, 20. Plaintiff claimed five kurunies of a certain field on a bill of sale dated 28th December, 1867, as against the 1st and 2nd defendants; the 3rd defendant, (the vendor, who was an administrator,) being joined to warrant and defend plaintiff's title. The 1st defendant pleaded he was entitled to 5-24ths of the field in question, which portion he had leased to 2nd defendant. The 3rd defendant supported plaintiff's title, justifying the sale on the ground that the property belonged to his intestate. On the day of trial, the 3rd defendant alone being present, the proceedings as recorded by the Commissioner (*Lee*) were as follows: "3rd defendant examined. This land belonged to the estate. I sold it to plaintiff. The 1st and 2nd defendants have no right to what I thus sold. 3rd defendant has no witnesses present.

Judgment as prayed against 3rd defendant. Costs to be paid by him personally, not out of the estate. Deed to be cancelled." *In appeal*, the judgment was set aside, and case sent back for further hearing; and per CREASY, C. J.—"For all that has hitherto been proved, the plaintiff may still be in possession of the land. The 1st and 2nd defendants only claim title to 5-24ths of the land in question."

C. R. Colombo, 86215. The facts of the case are sufficiently set forth in the judgment of the Commissioner: "The plaintiffs in this case sue for one half of Kuttombagahakumbere, which they claim by virtue of a decree in their favor, pronounced in District Court, Colombo, 23556, and by prescriptive possession. The defendants claim it under a Crown grant, dated 29th July, 1870. The judgment in case 23556 would be a bar to the claim of the defendants, were it not that they now produce a grant in their favor, dated subsequent to the judgment in case 23556. The question in the present action is, whether the Crown had any right to sell this land. By the Ordinance 12 of 1840, sec. 6, "all forest, waste, unoccupied or uncultivated lands, shall be presumed to be the property of the Crown, until the contrary thereof be proved." The evidence adduced in this case, taken in connection with that given in case 23556, does not rebut this presumption. The 1st plaintiff's husband died in 1850 or 1851, and from that time up to the decision of the District Court case in 1859, the plaintiffs had nothing to do with this field. (See 1st plaintiff's examination in District Court case.) In 1863, when Mr. Leitch surveyed this property, it was waste land. The witnesses who now swear that the plaintiffs have been cultivating the field for the last 30 years, cannot therefore be believed, and the Crown grant in 1st defendant's favor must necessarily be upheld."

Crown grant. Res judicata.

In appeal, *Dias*, for the appellant, contended that the District Court judgment of 1859 *inter partes* was *res judicata*, and that the present plaintiffs having then based their title on a deed, the maker of which had himself obtained a Government grant in 1829, it was for the defendants to show that the Crown, having once parted with its title, had recovered it, so as to be able to sell a second time in 1870.

Morgan, for the respondent, relied on the evidence of the Government Surveyor and its legal effect under the provisions of Ordinance 12 of 1840.

Per CREASY, C. J.—"Set aside and judgment entered for appellants as prayed, except as to damages. It appears that the old judgment in 1859, between these parties, decided that these plaintiffs were owners of the land. This is *res judicata*. It outweighs, as against these defendants, the presumption created by the Ordinance 12 of 1840, that this land was Crown land. In the absence of proof that the plaintiffs had parted with the land after the judgment in 1859, that judgment is still conclusive as against these defendants."

Notarial mortgage.

C. R. Matale, 27994. Plaintiff sued for the recovery of Rs. 49, being value of the produce of a garden, which said produce defendant had, by a notarial deed, specially mortgaged to plaintiff in lieu of interest due on a debt. Defendant denied the execution of the document, and pleaded minority. The deed was duly proved, but the Commissioner *(Temple)* non-suited the plaintiff with costs, holding "that the evidence as to damage was too weak to place any reliance upon, and the deeds were, at least, suspicious."

In appeal, Morgan, for the appellant, urged that no reason having been assigned by the judge for considering the deed suspicious, the evidence of the notary and witnesses, who were examined at the trial, should be deemed conclusive. If such solemn documents could be so arbitrarily rejected, of what use were notarial attestations?

Dias, for the respondent, was not heard.

Per CREASY, C. J.—Affirmed.

February 14.

Present CREASY, C. J.

Award under an arbitration.

C. R. Avishawella, 8481. This was an action to recover the value of 2 hal trees, alleged to have been unlawfully cut by defendant on plaintiff's land. The defendant pleaded that the trees had stood on his own land, and that he had a perfect right to cut them. By consent of parties, the case was referred to arbitration; and, on the delivery of the award into Court, the Commisioner made the following order: "The award of the arbitrators is filed. Mr. Marshall raises the objection that the wording of the award, 'I consider that the defendant should pay Rs. 35, being value of 2 hal trees, etc,' is not a final award. This sentence when read in connection with the one immediately preceding, proves the meaning and intent of the award. I therefore hold the award final, and make the same an order of Court." *In appeal*, the defendant, in his petition, urged that the award was void, inasmuch as neither the original document not its translation was stamped; and that, as the question of title involved in the case had not been settled, the circumstance of the plaintiff's and defendant's lands being contiguous to each other, with the boundaries undefined, would give rise to further litigation. The order was, however, affirmed; and per CREASY, C. J.—"Appeal dismissed. If the appellant had any valid objection to make to the award, he should have done so by application to the Commissioner of the Court of Requests, either to refer back the award under the 26th section,

or to set it aside under the 27th section, of the Ordinance. Neither of these courses was taken. An objection raised, though informally, was properly considered by the Commissioner to be invalid. A new string of objections cannot be brought before the Supreme Court, as now attempted."

C. R. Galagedere, 30091. The plaintiff in this case sued for the recovery of certain articles, of the value of Rs. 97. 50, which he alleged to have delivered over to defendant for safe custody. The evidence disclosed that the deposit had been made with defendant's father-in-law, one Menikralle, some years previously. He having died, and the defendant having succeeded to his property, plaintiff now sought to enforce his claim against her. The Commissioner held that the delivery of the articles by plaintiff to the father-in-law had been satisfactorily proved; but that, as the present action had been instituted after the death of Menikralle, from whom no receipt was produced and who might have lost the goods or returned them to the plaintiff, the present defendant could not be held liable. *In appeal*, the judgment was affirmed; and per CREASY, C. J.—"Non-suit affirmed; not for the reasons given in the Commissioner's judgment, but because the plaintiff has failed on the real and sole issue raised in the case, namely, as to the delivery of the goods to the defendant. Plaintiff has proved a delivery not to her but to one Menikralle, her father-in-law; and it does not even appear that she is Menikralle's legal representative. As to the loss by "dolus" or "culpa lata," for which alone a depositary, who did not ask for the deposit, is responsible, see Thompson's Institutes, vol. 2, page 350; Herbert's Grotius, page 316, Voet ad Pandectas, XVI, 3, 7, and Poste's Gaius, page 396." Depositum.

February 21.

Present CREASY, C. J.

C. R. Galle, $\frac{44059}{44895}$. Plaintiff sued to recover Rs. 50, as damages consequent on the cloth of his billiard table having been cut by defendant. Judgment in the first instance went by default, but it was subsequently opened up on affidavits. Plaintiff in his evidence stated.—"I produce table of rules which was on the wall. The first cut is Rs. 50. At the Oriental Hotel, it is Rs. 100. I said I would take Rs. 20, if paid Abatement of damages.

at the end of the month. Defendant was a customer, and this was the first cut. I asked for the Rs. 20, but my servant always brought back an impertinent answer. After judgment by default, defendant wrote and offered me Rs. 35." The Commissioner gave judgment as follows:—"Plaintiff having offered to abate a part of the charge, it would be equitable to decree defendant to pay plaintiff Rs. 35 with costs. *In appeal*, affirmed.

February 28.

Present CREASY, C. J.

Registration. Priority of deeds.

C. R. Galle, 151. The law and the facts of the case are fully set forth in the following judgment of the Chief Justice.—"Set aside, and plaintiff's claim dismissed with costs. This is a dispute as to priority between conflicting mortgages. The plaintiff's deed is dated 29th December, 1866, but it was not registered until 18th July, 1871. The defendant's deed is dated May 1871, and was registered on the 7th of June 1871, that is, while the plaintiff's deed was yet unregistered. The plaintiff appears to have issued a writ and to have pointed out this property for seizure, and the defendant claimed it on April 15th, 1872. The defendant now contends, that his priority of registration entitles him to pre-payment. The plaintiff contended, and the Commissioner has ruled, that, inasmuch as the plaintiff's deed was registered prior to the making of the defendant's adverse claim before the Fiscal, the requirements of the Registration Ordinance have been satisfied, so far as this deed is concerned, and that the plaintiff is entitled to avail himself of his deed's priority in point of date. The 39th clause of the Ordinance is as follows: 'Every deed, judgment, order, or other 'instrument as aforesaid, unless so registered, shall be deemed 'void as against all parties claiming an adverse interest thereto 'on valuable consideration, by virtue of any subsequent deed, 'judgment, order or other instrument, which shall have been 'duly registered as aforesaid. Provided, however, that fraud 'or collusion in obtaining such last mentioned deed, judgment, 'order, or other instrument, or in securing such prior registra-'tion, shall defeat the priority of the person claiming there-'under; and that nothing herein contained shall be deemed to 'give any greater effect or different construction to any deed, 'judgment, order, or other instrument registered in pursuance 'hereof, save the priority hereby conferred on it.' It appears to me that, according to this Ordinance, when the defendant registered his deed on the 7th of June, 1871, the plaintiff's deed, being

then unregistered, was a nullity, as against the defendant's registered deed. I think also, that no subsequent registration by the plaintiff could give plaintiff's deed validity, except subject to the priority which the defendant had already obtained. Such appears to me to be the most natural meaning of this somewhat confused and ill-worded clause; and this opinion is much strengthened by a consideration of the purpose of the Legislature in this matter, and by considering which interpretation will effectuate that purpose, and which would thwart it. The clear object of the Legislature was to protect honest purchasers and creditors. A man, when asked to advance money to another, looks naturally to ascertain what are the borrower's means of payment. If he finds that the borrower is the ostensible owner of any landed property, he naturally searches the register to see what, if any, encumbrances there are on it. If the register shows no encumbrances, he advances his money on a deed which he carefully registers, and thinks himself safe, as he ought to be, and as he will be, according to the construction which I put on the Ordinance. But if some other man has got a stale old deed of encumbrance in his pocket, which the register does not reveal, and this stale old incumbrance is only suddenly registered when the debtor is about to be sold up, and if this stale deed were then to be allowed to over-ride the deed registered before it, the whole system of Registration would be turned from a security into a mockery and a snare; and encouragement would be given to frauds which the law specially desired to prevent."

Account stated.

C. R. Jaffna, 736. Plaintiff sued to recover Rs. 22, being balance due on an account stated. Defendant denied the debt. Plaintiff, in his examination, stated "my account is headed N. M. Oader Saibo, which is defendant's brother's name. Some of the things included in his brother's account were given to defendant. He came and purchased himself on some occasions." The Commissioner held that the evidence in the case was "strong against the defendant," and gave judgment for plaintiff. *In appeal*, the judgment was set aside, and a non-suit entered with costs. And per CREASY, C. J.—"The fact that the plaintiff in his books entered the defendant's brother and not the defendant as his debtor, is so very strong that it requires much more to get over it than the plaintiff's assertion that he entered the defendant's accounts in his brother's account. He gives no reason whatever for such an unbusiness-like proceeding. The payment spoken to by the witnesses may well have been made by the defendant on his brother's behalf."

Loan. *C. R. Jaffna*, 727. Plaintiff sued to recover Rs. 35, being money lent to defendant, who denied having borrowed. The Commissioner non-suited the plaintiff, holding that "so large a sum of money as Rs. 35 being lent without a written acknowledgement from defendant, is more than the Court can believe." *In appeal*, the judgment was set aside, and case sent back for further hearing; and per CREASY, C. J.—"There is no law requiring a writing in the case of a loan of Rs. 35; nor does it seem reasonable to reject respectable parol evidence of such a loan. But as the Commissioner reports that the evidence has not left a favorable impression on his mind, the case is merely sent back for further hearing. Let the plaintiff be called upon to produce his memorandum of the loan and the list of his dealings, spoken of in his examination. Plaintiff could not put such documents in evidence on his own behalf, but the Judge may very properly examine them, and see if they corroborate or contradict what he has stated."

March 7.

Present CREASY, C. J.

Money lent. *C. R. Jaffna*, 764. The plaintiffs, alleging that they had, on the 15th of June last, paid and satisfied the amount of a debt bond which they had previously executed in favor of the defendant for Rs. 80, brought the present action to compel them to grant a valid receipt or refund the money with interest thereon at the rate of 9 per cent per annum from the alleged date of payment. The defendant denied the payment, but the Commissioner held the same duly proved, and gave judgment for plaintiff as prayed for. *In appeal*, per CREASY, C. J.—"Set aside and judgment of non-suit to be entered. There is no authority for maintaining such an action. The plaintiff ought to tender a stamped receipt, and if the defendant refuses to sign it, he should proceed as directed by the Stamp Ordinance, section 22, Ordinance 23 of 1871."

Damages. *C. R. Kegalla*, 13162. This was an action to recover Rs. 55, being value of a bullock unlawfully shot and killed by defendant. In addition to the evidence of the witness who was disbelieved at the trial, the plaintiff called the Ratamahatmeya's peon, who stated that he saw complainant's bullock lying shot in a ditch below defendant's garden, where he found blood marks indicating that the animal had been dragged across the ground. The

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Commissioner gave judgment as follows: "I do not consider the case is satisfactorily proved. The evidence of the last witness amounts to nothing. The evidence of complainant as to the shooting is only supported by his first witness, a gentleman whose evidence can scarcely be thought worth much. There remains the peon's evidence, which only proves an animal was killed in defendant's garden. I dare say plaintiff's animal may have been shot by defendant, but I don't believe any one saw him do it. *In appeal*, (*Grenier* for appellant) per GREASY, C. J.—"Set aside, and judgment entered for plaintiff for Rs. 45 and costs. It is not safe to take an owner's valuation of his own property to the full amount. The Commissioner, in the conclusion of his judgment, states, 'I dare say plaintiff's animal may have been shot by defendant, but I don't believe any one saw him do it.' But not even in criminal cases is it necessary to produce a witness who actually saw the accused person do the deed which is complained of. There is evidence here that the plaintiff's bullock was shot; that almost immediately after the report of the shot, the animal was seen lying in defendant's garden; and that the defendant was seen walking away towards his house holding a gun. On the other side, there is no evidence at all, not even that of the defendant. I cannot see enough in the Commissioner's remarks about the plaintiff and his first witness, or in any part of the case, to make me think their evidence untrustworthy."

C. R. Colombo, 86788. The plaintiff in this case claimed a certain land under a bill of sale from Government, dated 17th February, 1866. The defendants supported their title by documentary evidence, supplemented by proof of long possession which apparently was not disbelieved by the Commissioner, who however gave judgment for plaintiff as follows: "This land was surveyed in 1860, by the Government Surveyor, as Crown property. No steps were then taken by any one claiming the land, to put forward his claim. In February 1861, it appears to have been surveyed by a private surveyor as the property of Hendadrigey Bastian Perera. In 1866 this land was sold by Government and purchased by plaintiff, and there can be no doubt he possessed what he purchased. As no claim was made by any one to this land when it was sold by Government, it is hard to suppose that at that time it belonged to any one but Government." It was urged in the petition of appeal (1) that the circumstance of the defendants having preferred no claim was satisfactorily explained by the 1st defendant in his examination, Crown land.

in the course of which he said "this land was surveyed by Government about 10 or 12 years ago. I was not present at the survey, but after the survey I produced my deed to the surveyor." The land sales usually took place at the Cutcherry in Colombo, and the defendants were not bound to attend, nor was there any evidence to show that they knew that any portion of their own land had been advertised for sale; (2) that the land claimed by plaintiff and sold to him by Government appeared to have been an old Portugese military trench, lying between the properties of the 1st and 2nd defendants; and the evidence of the Surveyor who was appointed by the Court, with the consent of both parties, went to show that "the two strips of land on either side of the ditch now claimed by plaintiff, were alike in cultivation and on one flat with the defendants' properties." (Vide Surveyor's Report of November 21.) *In appeal*, (*Grenier* for appellant, *Ferdinands* for respondent,) per CREASY, C. J.—"Affirmed. The fact that this land consists of the bed of an old Portuguese military trench and of the strips of ground running along the sides of the ditch, is very strong proof that it was Government property."

Goods sold. *C. R. Kegalla*, 13049. The plaintiff sought to recover Rs. 47. 25, as balance due on account of goods supplied. The claim was fully proved, by parol evidence and by the production of an account book; but the Commissioner (*Mainwaring*) held as follows: "This is an action for balance found to be due for goods sold to defendant by plaintiff in 1871 and 1872. In a case of this sort, it is extremely difficult for a Court to do otherwise than give for a plaintiff, as the witnesses are always well coached in their parts, and it is extremely difficult for a defendant or his counsel to break them down. In this case, the usual evidence has been produced, and the witnesses have on the whole stood the cross-examination well. I am nevertheless not satisfied that the case is a true one, and fancy that defendant gave in his examination the true reason for the case being brought, viz, a quarrel between himself and plaintiff's brother-in-law. Plaintiff's case is dismissed with costs" *In appeal*, (*Grenier* for appellant) per CREASY, C. J.—"Set aside and judgment entered for the plaintiff with costs, as prayed. This is a claim for goods sold, which has been clearly proved. The Commissioner states that the plaintiff's witnesses were not shaken on cross-examination, and nothing appears against their respectability. On the other side, there is no evidence at all, not even the defendant's own testimony. To refuse a judgment to a tradesman under

such circumstances would be a denial of justice, and a strong encouragement to dishonest debtors. The imaginary quarrel to which the Commissioner alludes, was denied by the plaintiff when giving evidence, and was merely alleged by the defendant in his examination as a party."

Rival claims to proceeds of Fiscal's sale.

C. R. Jaffna, 39413. This was an appeal affecting rival claims to certain proceeds of a land, which had originally belonged to one of three dowried sisters named Muttopulle, and which had been mortgaged by her to plaintiff and judgment creditor in D. C. Jaffna, No. 3912. Muttopulle having died without issue, her sister Sinnapulle (1st claimant) and the son and only child of the second sister Teywanepulle (who had predeceased Muttopulle,) each inherited one half of the land. The plaintiff in this case, having obtained judgment against the son, caused *his* one-half to be sold in execution; and the amount of the writ having been satisfied, there remained in deposit a balance which was seized by a subsequent creditor of the son (2nd claimant) under C. R. writ 712. Sometime after the sale under 39413, the plaintiff in 3912, who had previously sold several other lands mortgaged to him by Muttopulle, caused to be sold the remaining one-half of the property in question, as belonging to the estate of his late debtor, and received the proceeds in satisfaction of the balance due to him. The 1st claimant, having thus lost her right to that half, now moved to be allowed to draw the money in deposit, claiming preference over the 2nd claimant. The Commissioner (*Livera*) having allowed the 1st claimant's motion, the 2nd appealed on the ground that the portion of land in question having been sold as Teywanepulle's son's share, the 1st claimant could have no right to any part of the proceeds, without having the Fiscal's sale first set aside. *In appeal, (Grenier* for appellant, *Ferdinands* for respondent) per CREASY, C. J.—"Set aside, and motion refused. The claimant ought first to get, (if she can,) the Fiscal's sale set aside."

March 7.

Present CREASY, C. J.

Locatio conductio.

C. R. Galle, 44570. The law and facts of the case are fully set forth in the following judgment of the Chief Justice:

"Set aside and judgment to be entered for plaintiff for Rs. 20 and costs. This is a case curious in its facts, and in which a point of law of some interest has arisen. The parties are Mahomedans residing at Galle; the defendant appears to be a teacher of children.

In July 1871, the defendant, in consideration of Rs. 20 paid down by plaintiff, undertook to teach the plaintiff's grand-daughter to read 30 chapters of the Koran in six months, or in default to refund the twenty rupees. The parties had a formal notarial agreement drawn up and signed. Its text is as follows: 'Know all men by these presents, on this 5th day of July, 1871, before me Ossen Lebbe Abdul Kader, Notary Public, of Galle district, personally came and appeared Sinne Kakier Tamby of Kumbalwelle of one part, and Pakier Tamby Mahomado Sahib of Kumbalwelle of the other part, and declared that the said appearer of the 2nd part do hereby declare to have duly received, in advance for his trouble, the sum of £2 from the appearer of the 1st part, undertaking to teach Marian Manuel, grand-daughter of the appearer of the 1st part, 30 chapters of Koran, and according to the said agreement, after being taught the 30 chapters of Koran within six months, and after her reading the said 30 chapters in the presence of the said appearer of the 1st part, to be discharged: in default then of so doing, the appearer of the 2nd part to forego all his trouble and to return the said £2 to the said appearer of the 1st part. Thus agreeing, this agreement is caused to be written, signed, sealed and perfected, on the above date, in the presence of the two subscribing witnesses, Sego Ismail Lebbe Mohandiran Ally and Wappuchie Markar Mohamado Raya, both of Gallapiadde in Galle.' It is to be observed, that the agreement does not say a word about the child being a clever child, or a child of average ability, or a stupid child; nor does it appear, that any representations were made by the plaintiff about the child's ability, or that the defendant made any enquiry about it. The child attended the defendant regularly, for the purpose of being taught; no difficulty was placed in his way by the plaintiff, or by any one else. As to the pains taken by defendant in teaching, there is some evidence that he neglected the child after a little time; but the Commissioner does not seem to have regarded this evidence as a foundation for a judgment, nor shall we do so. We shall take the case as one in which the teacher is certainly not proved to have taken more than average pains with his pupil, but as one in which he is not proved to have made default in taking average pains. At the end of the specified time, the child could not read more than ten chapters. As to the facility or difficulty of learning to read the whole 30 chapters in the time, one witness says—'There are cases in which children can, and 'in which children cannot, read 30 chapters in six months. If 'the child is very intelligent she might do so.' Another witness says—'She is not clever. If she had been, she would have 'known the 30 chapters before now.' Acting, as it seems, on this last evidence, the Commissioner has non-suited the plaintiff.

He says that 'the performance of this contract was subject to 'an implied condition, that the pupil herself possessed the ne- 'cessary amount of natural ability, and the plaintiff on his part 'gave an implied warranty to that effect.' The Commissioner has referred to the English cases of Robinson v. Davison, 24 L. T. N. S. page 755; and Taylor v. Caldwell, 8 L. T. Rep. N. S. page 350. In one case, a professional player on the piano was disabled by illness from performing at a concert according to contract. The manager of the concert, who had contracted for her performance, brought an action for the breach of contract; but it was held by the Court of Exchequer, that she was excused from performance by reason of the illness which had incapacitated her. This would have been an authority in the present case, if the teaching of the child had been prevented by the illness of either teacher or pupil; though, even then, the defendant would probably have been bound to return part at least of the consideration money. But it does not touch this case at all. The other English authority cited, Taylor v. Caldwell, was a judgment of the Court of Queen's Bench delivered by Mr. Justice Blackburn. In that case, there had been an agreement to let a music-hall for a series of concerts; and before the day arrived, the music-hall was burned down. In that judgment, Mr. Justice Blackburn says, 'There seems no doubt that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it, or pay damages for not doing it; although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible.' He then goes on to say, 'But this rule is only applicable, when the contract is positive and absolute, and not subject to any condition, either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

"But this case of Taylor v. Caldwell does not touch our present case, any more than did Robinson v. Davison. If the teacher's capacity to teach, or the pupil's capacity to learn,

which existed at the date of the contract, had perished without fault of the parties, before the time fixed for the completion of the contract, there might, according to Taylor v. Caldwell, have been a good answer to a complaint for non-performance of the contract. But nothing of the kind happened here. The child does not appear to have lost any of her wits during the six months; and the attempted analogy between her and the burnt music-hall, fails as completely as the other attempted analogy between her and the sick musician. We by no means say, that in contracts like the present there can be no implied warranty as to the pupil's aptitude for learning. Supposing that the child in this case had been in a very great degree below the average, and greatly deficient in power of apprehension, or of memory, or of both, so as to make it extremely difficult, if not impossible, to teach her, we think the instructor ought to have been made aware of such defects in the child before he made the bargain; and we think that the child's grand-father, who hired the defendant's services to teach the child, may be considered to have given an implied warranty of the child's freedom from such defects, but not a warranty of intelligence to any greater extent.

"It is well known, that by Roman Law the vendor, in a contract of purchase and sale, is held to give an implied warranty of the article being free from serious defects, of which the purchaser had no notice at the time of the purchase. It is enough to cite for this Grotius' Introduction, Book iii, ch. xv, sec. vii. Now, the present contract is a contract *locationis conductionis*; the thing hired being the teacher's labor and skill. The Institutes and the Digest pronounce that 'the contract 'of letting to hire approaches very nearly to that of sale, and is 'governed by the same rules of law;' 3 Inst. xxiv, 1. The Digest says the same; and there is a dictum in it as to the contract of letting and hiring being a contract founded on the law of nature, which is not immaterial with reference to an authority which I shall cite presently. The Digest xix, title 2, par 1 and 2, says, 'Locatio et conductio, cum naturalis sit et omnium 'gentium, non verbis sed consensu contrahitur: sicut emptio et 'venditio. Locatio et conductio proxima est emptioni et 'venditioni: iisdem que juris regulis consistit.'

"There is a remarkable passage in the third book, 17th section of Cicero de Officiis, (and this work is a high authority on questions of principle,) which shows distinctly that the best jurists of old Rome regarded this contract of *locatio conductio* as being one of the classes of contracts in which the most full and frank good faith should be observed between the parties, and in which neither party should be allowed to gain an advantage

by reason of the other party's ignorance of any material fact. Cicero quotes a dictum of the ancient Roman Jurist, Quintus Scævola, that there was very great importance in all those 'judicial proceedings, in which the formula directed the judge 'to decide according to the requirements of good faith, *ex fide 'bonâ*. And he used to think that this expression, *ex fide bona*, 'was of most extensive operation, and that it was practically 'applicable in cases of Guardian and Ward, of Partnership, of 'Trusts, of Commissions, of Purchase and Sale, of Hiring and 'Letting, which make up the ordinary system of social life.' 'Quintus Scævola summam vim esse dicebat in omnibus iis 'arbitriis in quibus adderetur, ex fide bona; fideique bonæ 'nomen existimabat manare latissime, idque versari in tutelis, 'societatibus, fiduciis, mandatis, rebus emptis venditis, con-'ductis locatis, quibus vitæ societas contineretur.' A little further on Cicero pronounces that 'since the law of nature is the 'fountain of law and justice, it is a rule, in accordance with the 'law of nature, that no one shall act in such a manner as to filch 'benefit out of another man's ignorance.' 'Quoniam juris 'natura fons sit, hoc secundum naturam esse, neminem id agere, 'ut ex alterius præ letur inscitia.'

"Considering, therefore, the contract *locationis conductionis* to be under the same rules, as to warranty and implied condition of fitness, which govern contracts *emptionis venditionis*, let us see how far such warranty extends,—merely to a warranty against latent defects, such as make the subject-matter of the contract unfit to a serious degree for the purpose for which it is intended. The warranty goes no further. The vendor of a house, when nothing is expressed in the contract about the quality of the house, is not taken to warrant that it is superior in structure, salubrity or convenience to average houses of the class: he is merely held to warrant that there is no defect in it, which makes it impossible to occupy it without serious detriment to health and comfort. The seller of a machine is not taken to give a warranty that it is superior to the common run of such machines; he merely warrants that it is free from such defects as would decidedly deprive it of average utility. So in a contract for the hire of work to be done on an article belonging to the hirer, where nothing is said about the quality of the article which is to be worked on, the owner of the article cannot be held to warrant that it is of special aptitude for the operation. He cannot be considered to warrant more than that the article is free from such defects, as would render it especially difficult to be worked on.

"Applying these principles to the present case, we can find no warranty or condition on the part of the plaintiff, about this child's intellect, which has been broken. As we stated at the

beginning of this judgment, the utmost that has been proved against the child's capacity, is that she is not a clever child. But in common language, when we call children clever, we mean that they are decidedly above the average; as we call children stupid, who are decidedly below the average as to aptitude for receiving instruction. The great majority of children are of average, or of nearly average, aptitude. They are neither stupid nor clever. The young student of the Koran in this case appears to have been a child of this average standard. Certainly she is not proved to be below it. The result is that the defendant has failed to prove the breach of any condition or warranty on the part of the plaintiff, and the plaintiff is entitled to have his money back according to the stipulation in the contract."

March 14.

Present CREASY, C. J.

Use and occupation.

C. R. Batticaloa, 3318. This was an action to recover 12 amonams of paddy, as the muttatu share of the produce of a certain paddy field sub-rented by plaintiff to defendant, who however denied having ever rented, occupied or cultivated the land in question. On the day of trial, the defendant's Proctor having taken the objection that the contract, if any, not being in writing, was void under the Statute of Frauds, the Commissioner dismissed the case. *In appeal*, the judgment was set aside and case sent back for further proceedings and for trial; and per CREASY, C. J.—"The Supreme Court has repeatedly pointed out that in cases relating to land, where the plaintiff cannot enforce his original contract because not in writing and notarially executed, still, if the defendant has had beneficial use and occupation, he is bound to compensate the plaintiff for the same, by the contract which, in such cases, arises *ex re*."*

Damages on a Lease.

C. R. Kegalla, 13,185. The plaintiff sought to recover Rs. 98, as damages consequent on not having been placed in possession of three out of seven lands, which defendant had rented to him, for nine years, on a notarial lease dated 12th October, 1865. The defendant denied the alleged non-posssion by plaintiff, and pleaded prescription. The Commissioner held as follows: "The evidence is very conflicting, and I have been considerably puzzled in ar-

* The law on this subject is fully explained in the Supreme Court judgment in C. R. Kalutara, 17112. See Civ. Min., Jan. 12, 1864.

riving at a decision, but have come to the conclusion that, taking all the circumstances of the case into consideration, the probability is that plaintiffs have been in possession of the lands. It is impossible that, had they not been, they could have allowed seven years to elapse before coming to Court. Plaintiff's case is dismissed with costs." *In appeal, Dias,* for appellant. [Your claim is clearly prescribed.—C. J.] Only perhaps to a limited extent. The lease should be taken as a continuing contract, and we are entitled to recover damages for, at least, within two years of the date of action. Such has been the rule as to mesne profits. *Grenier,* for respondent, was not called upon. Per CREASY, C.J, "Affirmed. The claim is prescribed." Damages on a Lease.

C. R. Mullaittivu, 9815. The plaintiff, as guardian of two minors, claimed a certain land on a deed, more than 30 years old, which had been executed in favor of their grandfather, by the father of 1st defendant. The 1st defendant, without traversing the alleged sale, disputed the boundaries given in the plaint as incorrect, and pleaded that "the garden in dispute was the hereditary property of his late father and mother, and after their death he possessed the same." The Commissioner (*Withers*) gave judgment for defendants, holding that they had proved long possession, which had not been interrupted by such payment of rent or contribution of produce as would affect their prescriptive title. *In appeal,* per CREASY, C. J.—"Set aside and plaintiff, on behalf of the minors, to be placed in possession of the garden mentioned in the plaint, on the plaintiff (as such guardian) making compensation to the 1st defendant for the materials and building of two of the houses in the said garden, which are proved to have been built by 1st defendant's father: the amount of such compensation (unless the parties can agree to the same) to be settled by the Commissioner of the Court of Requests, either on his own view, or after hearing such evidence as the parties may adduce on this point. The old law of Prescription by a quarter of a Prescription.*

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* Held that the whole of the Common Law with respect to prescription and the limitation of actions and suits has been abrogated and that Ord. 8 of 1834 contains all that is in force on these subjects. D. C. Kurunegala, 21698. Civ. Min., June 20, 1871.

Held that possession of ¼ of a century will confer a prescriptive title against the Crown. D. C. Colombo, 1245. Civ. Min., September 13, 1870.

Held that an adverse possession of 10 years is sufficient to prescribe against a co-parcener or co-tenant. C. R. Batticaloa, 9653. Civ. Min., April 21, 1870.

Prescription.

century's possession was abolished in this Island by Regulation 13 of 1822, the effect of which in this respect was continued by Ordinance 8 of 1834,—(See the end of clause 1.), and by Ordinance No. 22 of 1871, and Ordinance No. 1 of 1852, clause 3. The only rules of prescription that apply to land cases in Ceylon are those that are laid down by Ordinance No. 22 of 1871, clauses 3, 14, 15, and 16. It may be taken as a fact, that in this case the 1st defendant and his father have had *natural* possession (I use the epithet advisedly) of this garden, or of part of it, for much more than ten years before 1865, when the rights of the minors accrued, in behalf of whom this action is brought. But it also seems to me clear as a fact, that the 1st defendant within those ten years had paid rent for this garden, and that he had done so for as many as at least ten years between 1850 and 1870. This affects the period of thirty years mentioned at the end of the 14th clause of the Ordinance, as well as the period of ten years mentioned in the 3rd clause. I consider the fact of these payments sufficiently proved by the plaintiff's general evidence and the more specific evidence of his witness Sinne Velen. It is the defendant's case, not the plaintiff's, which deserves to be regarded with suspicion, inasmuch as the defendants endeavoured to set up what the Commissioner has rightly termed a tricky defence by alleging false boundaries. Indeed, the defence of prescription is hardly raised in the answer at all. The Commissioner has treated the evidence of payment of rent as null and void, because the rent was not paid on a notarial lease. But the Prescription Ordinance nowhere requires that the payment of rent, which will bar the effect of possession, shall be payment of rent under such a lease as might be enforced in a Court of law. Indeed, the plaintiff's father might have enforced payment of rent, not under the lease, but by an action for use and occupation, after the tenant had used and occupied the garden. It becomes unnecessary for me to go into the more general and important question, whether a mere tenant on sufferance can ever acquire a right under our Ordinance of Prescription against the owner who has permitted him to occupy. Certainly under Roman law he who thus obtained and held *possessionem precario*, had no *possessionem civilem* sufficient to enable him to acquire a title by *Usucapio* against the *Dominus* from whom he had begged permission to occupy. But I believe that some difference of opinion exists as to the effect of our Ordinances on this subject; and therefore sitting alone I will not adjudicate on it, unless the nature of the issue compels me."

March 19.

Present CREASY, C. J.

C. R. Balapitimodera, 21902. A judgment of non-suit by the Commissioner *(Halliley)* was set aside, and judgment entered for plaintiff, in respect of a house claimed by him, in the following terms: "The plaintiff has brought forward a body of evidence, the general effect of which is to satisfy the Supreme Court that he is by prescriptive title the lawful owner of the house in question. This evidence is not counteracted by any brought forward on the other side. The Commissioner states that the plaintiff's evidence 'is very unsatisfactory' and non-suits him. This summary way of disposing of cases is very unsatisfactory; no reasons are given for it, and the Supreme Court cannot discover the grounds for any." (*Ferdinands* for appellant.) Evidence.

April 22.

Present CREASY, C. J.

C. R. Galle, 45817. A Police Officer, who was a witness in this case, was found guilty of Contempt and sentenced to seven days' imprisonment for not having appeared on the day of trial, as required by a subpœna which had been duly served on him. The defendant justified his absence on the ground that there was severe sickness in his family and that one of his relatives had small pox. The Commissioner (*Lee*) did not appear to discredit this story, but held that "that was no excuse for not sending in a report." *In appeal*, per CREASY, C. J.—"Order amended by directing the appellant to pay a fine of Rs. 5 and by striking out the sentence of imprisonment. The Commissioner states his belief in the appellant's statement about the sickness in his (the appellant's) family. Under such circumstances, a neglect to attend Court ought not to be severely punished. It is a great stigma on a person in this appellant's condition of life to be sent to jail; and it would be absolute cruelty to imprison a man who has committed no actual crime, at a time when his near relatives are dangerously ill and require his personal attendance." Contempt.

June 3.

Present CREASY, C. J. and STEWART, J.

C. R. Batticaloa, 3178. Plaintiff sued to recover Rs.55, which he alleged the defendants had received from his son for the purpose of retaining Counsel to defend the plaintiff, who at the time was in jail as accused in a J. P. case, but which sum, it was stated, the defendants had misappropriated to themselves. The Contract.

Contract.

defendants pleaded "not indebted." At the trial, the 2nd defendant was absolved from the instance, while judgment was entered against 1st defendant with costs. *In appeal*, (*Grenier* for appellant,) per CREASY, C. J.—"Set aside and judgment of non-suit entered. There is no evidence of any contract between plaintiff and appellant; and there is no legal evidence of failure of consideration. No costs. The 1st defendant's conduct is very discreditable. If he had employed Counsel, he would have been eager to prove it in defence of his character. If the son was really acting as the father's agent in employing the defendant, and the father in any way directed or ratified the son's acts, a fresh action may be brought in the present plaintiff's name and further evidence may be supplied. If the boy acted independently in employing the defendant, he (the boy) can sue by guardian. In either case, some proof should be given that no Counsel appeared for the father."

June 11.

Present CREASY, C. J. and STEWART, J.

Damages.

C. R. Kegalla, 13282. This was an action to recover the value of a cow which plaintiff alleged had been strangled to death by means of a noose set by the defendants, who however denied having set any noose at all. The Commissioner, having believed plaintiff's story, gave judgment for him for Rs. 35 and costs. *In appeal*, per CREASY, C. J.—"Affirmed. It is very difficult to make out from the evidence at what place the noose was actually set, but it does not appear to have been within the defendant's own land; indeed, the defendant in his petition of appeal asserts that it was not. The case, therefore, does not come within the principle of the law as laid down by Gibbs, C. J. in *Deane* v. *Clayton*, 7 Taunt., 489, a judgment which was ratified by the Court of Exchequer in *Jardin* v. *Crump*, 8 M. and W., 782."

June 20.

Present CREASY, C. J. and STEWART, J.

Moorish Custom.

C. R. Colombo, 89417. The judgment of the Commissioner (*J. H. de Saram*) explains the facts of the case. "The plaintiff seeks to recover the sum of Rupees 8, being his share of the fee paid to the defendant, a priest of the Marandahn Mosque, on the occasion of a certain wedding. The usual fee on such occasions is Rupees 8. 75, and it is admitted by defendant that in such cases the fee is divided in the

following proportion, 2-5ths to the priest, 2-5ths to the barber and 1-5th to the sexton, but he adds that this division is adopted only when the fee is Rupees 3. 75 or any sum below that, and that when it exceeds that sum the excess is taken entirely by the priest and only Rupees 3. 75 divided as already mentioned. The plaintiff, on the other hand, contends that the fee, whether over or under Rupees 3. 75, is divided between the priest, barber and sexton in the proportion stated, and that he is therefore entitled to Rupees 8. 0 being 2-5ths of the Rupees 20 paid on the occasion in question. The defendant denied having received any portion of the fee and adduced evidence to prove that the whole sum was handed to the senior priest who paid him his share. From the plaintiff's evidence it appears only a part of the fee was paid to defendant, Rupees 10. The witness Sekadie Markar Idros Lebbe Markar swears he handed the money to defendant. He can have no object, as far as the Court can see, in stating this, if he did not hand him the money, for if it was handed to the senior priest the plaintiff would have sued him. As only Rupees 10 were paid to defendant, the question is whether the plaintiff is to get 2-5ths of that or of only Rs. 3. 75. The plaintiff is entitled to 2-5ths of the ordinary fee, and unless there is something to show that he is restricted to that and nothing more, he is clearly entitled to 2-5ths of any sum that is paid. According to the defendant's statement (but which is not borne out by the senior priest or Assen Lebbe Markar—and I lay stress on it as being a statement made by the defendant) the plaintiff has to accept a smaller amount as his share when the fee is below Rupees 3. 75. If this be so, it is surely nothing but fair that he should receive a higher amount when the fee is above Rupees 3. 75. The fee is paid with one object, and that is to be divided between the priests, barber and sexton. The Head Moorman has stated how the fee is divided, and he bears out the plaintiff's contention. The defendant and his witnesses each give a different account as to the manner in which the fee when below Rupees 3. 75 is divided. I do not therefore feel disposed to place any reliance on their statements. Judgment for plaintiff for Rupees 4, being 2-5ths of Rupees 10, and costs." Moorish Custom.

In appeal, Brito for appellant.—Even accepting the evidence for plaintiff, the custom pleaded was not proved to be one which had existed from time immemorial. On a question like this, the testimony of the Turkish Consul, who was called for the defence, might well outweigh that of the Head Moorman. *Grenier*, for respondent, was not called upon. Per STEWART, J.—" Affirmed. The Supreme Court sees no reason to discredit the evidence of

Sekadie Markar, (the uncle of the bridegroom,) who distinctly affirms that he paid Rs. 10 to the defendant, and who was believed by the Commissioner. On a question of custom, such as the present, the evidence of the Headman is entitled to great weight."

June 25.

Present CREASY, C. J. and STEWART, J.

Action ex delicto.

C. R. Panwila, 3597. The judgment of the Commissioner *(Smart)* sets forth the issues adjudicated upon. "In this case the plaintiff sues for value of buffaloes delivered to defendant, and for consideration due for their hire. A receipt or writing setting forth the conditions of the transaction is filed in the case. The defendant's Proctor objects that the writing is invalid, inasmuch as it is not on a stamp, and therefore is not receivable in evidence, even though the penalty, as proposed by plaintiff's Proctor, should be paid on it. I consider the objection good and valid and therefore reject the document in evidence. At the same time, it is perfectly allowable for plaintiff to prove by parol evidence the delivery of the animals, even were there no writing whatever; and it just amounts to a question of whether the Court believes the animals were actually delivered to defendant or not; if they *were* delivered, it is for defendant to shew that they were returned or to prove that there was some set-off against them. The Court is satisfied that the animals *were actually delivered*, the evidence of the fact being good and satisfactory. Plaintiff calls, besides other witnesses, the Aratchy, who affirms to having written the *pass*—permit, and having given it to defendant, and also a man of defendant's own village, who affirms to having seen defendant using the same buffaloes; and this evidence the Court *considers very conclusive*. There seems no reason to doubt the animals were worth £9, and therefore judgment is entered for plaintiff to the extent of Rs. 90 and costs of suit."

In appeal, (*Dias* for respondent) per CREASY, C. J.—"Affirmed. The substantial part of the plaintiff's claim is for the value of his buffaloes, which defendant has illegally converted and appropriated. This is a cause of action ex delicto, and is unaffected by the writing about the hire to which the stamp objection has been raised. Even if the Stamp Ordinance applied, the document might have been admitted under the provisions of the 46th clause of the Stamp Ordinance No. 11 of 1861, as to allowing unstamped or insufficiently stamped documents in evidence on taking the proper precaution of payment of the duty and penalty.

Moreover, we greatly question the propriety of our reversing proceedings on objections about stamps, when substantial justice has manifestly been done by the Court below: see the 20th clause of the Administration of Justice Ordinance, No. 11 of 1868."

June 27.

Present CREASY, C. J.

C. R. Colombo, 87694. The plaintiff, as landlord, had given notice, on the 10th July, 1872, to the defendant, who was a monthly tenant, requiring him to quit on the 10th of the following month. The issue in the case was, whether such notice was sufficient in law. The Commissioner (*de Saram*) held as follows: "I consider the notice to quit within one month from the 10th July bad, as the defendant was a tenant paying rent from the 1st to the end of every month, and the notice should have been to quit at the end of one month, such time to expire at the end of any given month." Notice to quit.

In appeal, the case had been argued, on the 21st February, by *Grenier*, for the appellant.—All that a tenant, equally with a landlord, was entitled to was reasonable notice, and such notice had been given in this case. *Huffel* v. *Armistead*, 7 C. and P., 57. The Commissioner's ruling was clearly wrong, as by the Ordinance 7 of 1840 no lease for any period exceeding one month could be valid except it were in writing. To require therefore one month's notice to expire at the end of a current month, was to enable either landlord or tenant to enforce a tenancy of more than a month, in contravention of our Ordinance of Frauds. The English Statute of Frauds was different in this respect, as it sanctioned a parol lease for any period within three years. [I should like to hear you Mr. Dias on this point.—C. J.] *Dias*, for respondent.—The word "month" in the 2nd clause of the Ordinance could only mean a month commencing from the 1st and ending on the last day of the month. The contention on the other side, that the month was to be made up of fractions of two consecutive months, was clearly opposed to the monthly tenancy contemplated in the Ordinance, and would practically have the effect of throwing a property on the hands of the landlord in the middle of a month and depriving him of a fortnight's rent. The established local custom in the matter was in accordance with the Commissioner's view.

The Chief Justice, having directed this day that the case be called, delivered the following judgment which His Lordship said should be accepted as only that of a single Judge. "We must read the Nisi Prius case of *Huffel* v. *Armistead*, in

Notice to quit.

connection with the subsequent case of *Jones* v. *Mills*, which came before the Court of Common Pleas in Banc, and which is reported in 31 L. J., (C. P.) 66. I should have been glad of more express authority on the subject, but as at present advised I think with Mr. Justice Williams, that the notice must be one commensurate with the term for which the letting was, that is a month for a month; and I also think that it must be a notice expiring at the expiration of a current month after the date of the notice. Evidence of custom might be given in these cases, and might have the effect of varying the presumption arising from the mere nature of the tenancy."

July 8.

Present CREASY, C. J. and STEWART, J.

Agency.

C. R. Kandy, 52092. The plaintiff (*D'Esterre*) sued defendant (*Wait*) to recover Rs.41·5, "being amount due as per annexed particulars,"—which were cost of repairs of a gold watch Rs. 31·50, postage Rs. 4·67, London Agent's charges Rs.1·50, plaintiff's commission Rs. 3·38. The defendant, in his answer, alleged that he had been always ready and willing to pay items 2, 3 and 4, and disputed the correctness of item 1. Plaintiff in his evidence said that he had regarded himself as defendant's agent, having been requested to have the watch repaired by Messrs. Sarl and Sons, from whom he produced a bill with that part of it, however, containing the amount of the charges cut off. He explained that he had cut off the amount himself, as he wished no one to know what the repairs had actually cost him in London. The Commissioner (*Stewart*) held as follows: "There is no evidence of the cost of the repairs, nor is there any thing to shew that the plaintiff was to charge for them irrespective of what the cost really was. He could not have been expected nor was he asked to do more than to get the watch repaired, seeing that he is not a watchmaker, and therefore also not competent to make the charge. He has, however, it must be inferred, charged more than the watchmakers in England whom defendant requested him to employ, and hence apparently this cutting away or destroying by him of that part of their bill shewing their charges, on the alleged ground that he was not bound to disclose the contents of his invoice, &c. He has charged besides commission, which clearly shews that he was employed only to get the work done and nothing more. Judgment therefore for plaintiff for only the items admitted with costs in that class." *In appeal*, (*Ferdinands* for appellant, *Grenier* for respondent) per STEWART, J.—Affirmed.

C

August 12.

Present CAYLEY, J.

C. R. Panadure, 15312. One Thomis Pieris, being the owner of a land called Delgahawatte, mortgaged the same, in February 1865, to Harmanis Dias. In May 1870, Pieris' brothers and sisters (his sole heirs) sold the property to the Plaintiff. In January 1872, another creditor of Pieris, who however held no special mortgage, having obtained judgment on a bond dated November 1865, issued writs and caused this land to be sold, when the 6th defendant became the purchaser. The Commissioner *(Morgan)* having given judgment for plaintiff, the 6th defendant appealed. Mortgage paid off by heirs, without administration.

In appeal, Dias, for appellant.—The heirs could not sell their ancestor's property without paying his debts, whether secured or unsecured. It was alleged by the heirs, that they sold the land to pay off a debt secured by a mortgage on it. But they had to prove this. It was true a mortgage bond was filed in the case, but it did not follow that the proceeds of the sale had gone to pay off the mortgage debt. To allow private sales by heirs would be to allow them to defeat the creditors of the deceased, by conveying his property to third parties.

Ferdinands, for respondent.—The payment of the mortgage debt was not denied by the contesting defendant, and the bond itself was produced to prove that the debt existed. Even the petition of appeal did not question the existence and payment of the debt. In *Namasevayam's* case, the Supreme Court held that a sale by the heirs to pay off a special mortgage would be valid, although administration had not been taken out.

Per CAYLEY, J.—"Set aside and case sent back for further hearing. If the first five defendants sold the $\frac{3}{8}$ belonging to Thomis Pieris, for the purpose of paying off the special mortgage held by Harmanis Dias, and did with the proceeds of the sale satisfy that mortgage, their sale should be upheld and the plaintiff declared entitled to judgment. Evidence of this payment should be adduced."

C. R. Gampola, 28531. The plaintiff, by purchase from the Crown, was the owner of a land, in the district of Udapalata, in the Central Province, bounded on all sides by the Mahavila Ganga, and as such owner claimed the right "to take and appropriate the firewood and other things thrown on the said land by the action of the water of the said Mahavila Ganga." The grievance now complained of was "that the defendant, on or about the 12th October, 1872, Jurisdiction.

unlawfully took and deprived the plaintiff of a quantity of firewood which was then on the said land, so thrown thereon by the water as aforesaid, to the plaintiff's damage of rupees 100." The defendant, who was the Ratamahatmeya, denied the plaintiff's right to appropriate the firewood in question, which he admitted having sold, as the property of the Crown, under instructions from the Government Agent. The answer further raised the plea of jurisdiction, on the ground "that the rights involved were of greater value than rupees 100." On the 17th of March, the Commissioner (*Neville*) made the following order: "plea of jurisdiction being taken as to the value of the rights involved, plaintiff's Proctor contends that the Court cannot entertain the question of the value of the rights involved which are future, but can only try the actual trespass. Laid over for ten days, for plaintiff to institute an action to have his title to the disputed right of jetsam established." On the 28th of March, the plaintiff was non-suited in the following terms. "The right to alluvion, accretion or jetsam being in dispute, and plaintiff claiming only special damages and not having, as ordered, instituted action to establish his right to the said alluvion, accretion or jetsam—which may be regarded as *usucapio* and as immoveable property,—the right being alleged as attached to the land and part and parcel thereof (equally with trees growing on it, etc.)—this Court is not competent to award damages, the title being in dispute and being beyond the jurisdiction of this Court, as is clear from one act of trespass alone causing damages rupees 100."

In appeal, *Dias*, for appellant.—The question of jurisdiction should be determined by the value of the thing actually in dispute, and not with reference to any collateral matter which might incidentally be drawn into the discussion. The property in dispute in the case was valued at £10 and came within the jurisdiction of the Court below, but the enquiry into the right in respect of which the £10 was claimed, was merely a collateral enquiry, and no decision thereon could operate as *res judicata*. Per CAYLEY, J.—"Affirmed. The right to take the wood washed up by the river is claimed as appurtenant to the plaintiff's land, and this right is put in issue by the defendant's answer, and is the real question in dispute between the parties. The value of this right is far more than rupees 100; and the Supreme Court thinks that the learned Commissioner has properly held the case to be beyond the jurisdiction of the Court of Requests."

Damages. Horse-breaking.

C. R. Colombo, 90032. Plaintiff (*Walles*) sued for the recovery of rupees 13·16, being charges for repairing harness and shoeing a

horse belonging to defendant, (*Weinman*) who, admitting the debt, claimed rupees 100 in reconvention, as part damage caused to a mare belonging to him, which, by plaintiff's careless and unskilful treatment in training, had depreciated in value. It appeared from the evidence that the animal in question had originally been trained by *Pate*; that afterwards she had foaled and had not been used for 2½ or 3 months. At the end of that period the mare was sent to plaintiff, who, after lunging her regularly for some days on the Galle Face, drove her in his brake. Subsequently, however, he attempted to harness her opposite his house in the Pettah, and what then occurred was deposed to by the horsekeeper as follows: "I told him not to, but to take the animal to Galle Face. He however put her in after strapping her leg first. He then wanted to get into the trap. The mare plunged and fell. Its leg was then strapped. Its knees were injured as well as its side and hind leg. Plaintiff undid the strap, and took the mare opposite the Gas Works, and lunged it and whipped it very much. The mare got timid after that, and did not go as usual. It stopped now and then." *Pate* stated to the Court that, having heard the horsekeeper's story, he was of opinion that "the mare was very likely to get very stubborn after such treatment;" that the mare was, when he knew her, good tempered and free from vice in harness; and that after the accident he had sold her, at the request of plaintiff, for rupees 300, whereas she had previously been worth rupees 500 or rupees 600. The Commissioner (*de Saram*) dismissed plaintiff's case, and entered judgment for defendant for rupees 100, holding that "in restricting his claim to rupees 100, the defendant had given up a good portion of the loss sustained by him."

In appeal, (*Ferdinands* for appellant, *Grenier* for respondent) per CAYLEY, J.—"Affirmed. The damages reduced to eighty six rupees and eighty four cents, (Rs. 86·84) as the defendant admits the plaintiff's claim for Rs. 13·16."

C. R. Colombo, 89922. At the first trial of this case, it was agreed that Mr. Schwallie should make a survey, plaintiff paying for it in the first instance, but the expense to be ultimately made costs in the suit; and a postponement was thereupon allowed. At the adjourned trial, the plaintiff was non-suited in the following terms: "when the case was instituted, the plaintiff should have taken care to file a survey, if he required one, with the plaint. He was however allowed a postponement on the last occasion the case came on, to get a survey made; and now the Surveyor reports that, in consequence

Irregular non-suit.

of some neglect on the part of the plaintiff, he was not able to survey the land. The Surveyor also reports that the plaintiff did not produce the former survey of the land—not filed in the case." *In appeal*, (*Grenier* for appellant) per Cayley, J.—"Set aside and case sent back for hearing. No sworn report of the Surveyor is filed, and there is nothing in the record to shew that the delay in making the survey was due to plaintiff."

Costs.

C. R. Mallakam, 201. This was an appeal against an order refusing to recall writs for costs against plaintiff, who had voluntarily withdrawn his case. A string of objections had been taken in the Court below, all of which however had been overruled. *In appeal*, *Grenier*, for appellant, submitted that the requirements of the 35th section of the Rules and Orders had not been properly complied with. There was no note of the taxation of costs on the record by the Clerk of the Court, and the writs had therefore been irregularly issued. The objection, he observed, had not been taken in the petition of appeal, but it was desirable that the minor Courts, which were inclined to be lax in their practice, should be required to strictly carry out the law. [The costs allowed were reasonable, and the omission you refer to may easily be supplied by the case being sent back.—Cayley, J.] The objection, however, not being pressed by Counsel, the order was affirmed.

Re-opening judgment.

C. R. Colombo, 90285. The plaintiff claimed rupees 97, as damages caused by the defendant having his canoe maliciously seized under a J. P. warrant. The defendant justified the seizure, on the ground that he acted under "sufficient and probable cause." On the day of trial, (31st March) the defendant being absent and his Counsel stating that he had received no instructions, judgment was entered for plaintiff with costs. Subsequently the defendant moved to have the judgment re-opened on an affidavit which, *inter alia*, recited that he had been obliged to go to Galle on the 22nd March on private business as dubash to supply ships; that he had intended to return in time for the trial, but had been delayed by reason of his accounts not having been settled by some ship masters; and that he had a good and honest defence on the merits. The Court below, however, declined to entertain the motion in the following order: "Re-opening of judgment disallowed, as the defendant left no instructions with his Counsel and might have telegraphed from Galle if he really could not attend."

In appeal, Kelly, for appellant.—The discretion vested in the Commissioner under the 18th section of the Rules and Orders (Ordinance 9 of 1859) was not to be exercised arbitrarily; and there was sufficient reason assigned in the affidavit to open up the judgment. Sed per CAYLEY, J.—"Affirmed. The affidavit does not show that the defendant was prevented from appearing by accident or misfortune, or by not having received sufficient information."

C. R. Colombo, 90011. The plaintiff sought to recover the sum of rupees 12·50, as damages consequent on having had to attend at an investigation, held by the Modliar of the Corle, by command of His Excellency the Governor, into a charge preferred by defendants and several others in a petition complaining that the plaintiff, who was a division officer, had blocked up a certain road. The Commissioner (*Livera*) non-suited the plaintiff in the following terms: "I hardly think the defendants are responsible for the expense undergone by the plaintiff. The Modliar was requested to report on the petition, and if in deference to him the plaintiff took the trouble to obey the orders sent, he must bear the consequence himself." Damages. Privileged communication.

In appeal, (*Ferdinands* for appellant, *Grenier* for respondent) per CAYLEY, J.—"Affirmed, but not for the reasons given by the learned Commissioner. If the plaintiff had proved that the defendants joined in maliciously signing and presenting to the Governor a petition which they knew to be false and which contained criminatory matters against the plaintiff, the plaintiff would have been entitled to damages, and the amount claimed would have been by no means excessive. The petition, however, is not proved, nor is secondary evidence of its contents given, as could have been done if its non-production had been sufficiently accounted for. It is impossible, therefore, to determine how far the statements contained in it were actionable. The petition moreover, being one to the Governor against a public officer in a matter in which the petitioners had an interest, is in its nature privileged; and before the plaintiff could recover damages for any defamatory statements contained in it, he would have to give some evidence of express malice."

August 19.

Present CAYLEY, J.

C. R. Ratnapura, 7618. Plaintiff, as widow of Don Simon, sued defendants for the recovery of an undivided one half share of the Construction of a will.

land mentioned in the libel as part of her late husband's estate. The first three defendants disclaimed title, while the 4th alleged that, as daughter of Don Simon, she held the property in question for the maintenance of herself and the minor daughter of her full sister Sovitchi Hamy, in terms of her father's last will, the 5th clause of which was verbatim as follows:

"All the remainder of the moveable and immoveable property, etc. after the deduction of the above bequests, was assigned to my wife Punchy Manike and my own children Appoohamy, Sobitchyhamy and Muttoo Manike, to be divided and given equally between them, provided however that the property to the worth of £30 or that amount in money be given credit to the estate of her the aforesaid Sobitchyhamy's share on account of the expenses incurred for the hand and neck jewels and ornaments, etc. furnished her at the time of her marriage: nevertheless these provisions are to take their course in this manner having referrence to the assistance rendered or caused to be rendered to my wife Punchy Manike during her natural life by my aforesaid children Appoohamy, Sobitchyhamy and Muttoo Manike, and unless the said Punchy Manike made over as to her own pleasure while she was as yet alive or after her demise the said shares or anything else agreeable to her pleasure, the children whose names appear in this clause cannot use any violence or force by laying to their shares or right of inheritance save and accept the means of livelihood."

In appeal, (*Ferdinands* for appellant, *Dias* for respondent) per Cayley, J.—"Set aside and judgment entered for plaintiff for the land claimed in the plaint but without damages. The 5th clause of Don Simon's will is not very intelligibly worded, but the Supreme Court thinks that the intention of the testator, as gathered from the entire clause, was that the enjoyment by the children of their shares should be postponed until the determination of the widow's life-interest. The 4th defendant is entitled to means of livelihood out of the estate, but this will not give her any right to a specific share of the estate, much less to any particular land."

Effect of recitals in a deed.

C. R. Point Pedro, 784. Plaintiff claimed ¼ of certain lands by right of inheritance from his mother, and complained that defendant (his brother) had unlawfully removed his paddy crop. The defendant denied plaintiff's right, and set up title in himself by purchase from plaintiff's mother and co-proprietor. The Commissioner (*Drieberg*) after plaintiff's examination dismissed the case, holding that the defendant's deed was expressly recited in a partition deed affecting the parent's estate, to which both plaintiff and defendant were parties. *In appeal*, per Cayley, J.—"Set aside and case sent back for new trial. The present action not being founded on the partition deed, the recitals of that deed, though evidence against the

plaintiff, do not operate as an estoppel, and the plaintiff should have an opportunity of proving his case."

Loan.

C. R. Balapitimodera, 22129. The plaintiff sought to recover rupees 10·32, which he alleged had been borrowed and received by defendant, who however denied the debt. The plaintiff called two witnesses and the defendant none. The Commissioner (*Halliley*) held as follows: "In transactions of these kinds, there should always be a promissory note or a receipt passed. Nothing is easier. Now among the witnesses that generally come before me, I always find that plaintiff's witnesses are for plaintiff, and the plaintiff could not state the case better than they, and defendant's ditto. So that I can hardly ever believe witnesses who come before me. Plaintiff, having failed to get a promissory note or receipt from defendant, is non-suited with costs. *In appeal*, (*Ferdinands* for appellant) per Cayley, J.—"Set aside and judgment for plaintiff for rupees 10·32, with interest thereon at 9 per cent. from date of action brought, and costs of suit. Neither a promissory note nor a receipt was necessary to enable the plaintiff to recover the amount advanced by him. He has proved his case, and the defendant has called no evidence to rebut it."

Burden of proof.

C. R. Balapitimodera, 22063. This was an action on a bond against the heirs and representatives of a deceased debtor. The defendants pleaded that the debt had been paid and the bond obtained by the debtor during his life time, but called no evidence at the trial. The Commissioner (*Halliley*) non-suited the plaintiff with costs. *In appeal*, per Cayley, J.—"Set aside and judgment for plaintiff as prayed with costs. The Commissioner has not given any reasons for non-suiting the plaintiff. The burden of proof is thrown on the defendants, and they have called no witnesses."

Non-suit.

C. R. Negombo, 21634. Plaintiff sought to recover the amount of a mortgage bond from defendants as being in possession of the debtor's estate, but having failed to prove such possession, the Commissioner (*Dawson*) entered a judgment of non-suit. *In appeal* per Cayley, J.—"Affirmed.

Effect of judgment for land.

C. R. Mullaittivu, 9930. This was an action for damages against the defendant, who was charged with having unlawfully reaped, threshed and appropriated a portion of the paddy crop which had been cultivated by plaintiff. Defendant justified himself on the ground that he had previously obtained judgment in the District Court for an undivided ¼ of the field in question. It appeared that when defendant, as holder of a writ of possession, proceeded to have his right enforced, a crop of paddy which had been cultivated at plaintiff's sole expense and labor was standing on the field, though not ripe for cutting. The Commissioner (*Withers*) gave judgment for plaintiff in a lengthy judgment, in the course of which he held as follows: "Now it was and is the Court's opinion, that with a judgment for land passed any plantation growing on the land, and by that is meant all the produce of the land which has not resulted from the labor of man—trees and natural grasses for instance as distinguished from corn." *In appeal*, per CAYLEY, J.—"Set aside and plaintiff's claim dismissed with costs. The judgment in the case No. 115, being a judgment for an undivided ¼ of the land without any reservation, carried with it a right to ¼ of the crop growing at the time on the land. It is not clear hat the appellant has appropriated more than ¼ of the crop, and to this he was entitled."

Crown claim to royalty on Plumbago.

C. R. Kurunegala, 28350. The following judgment of the Commissioner (*J. H. de Saram*) explains the case: "The facts of this case are as follows. The land referred to in the plaint was purchased by the plaintiff from a third party, who alleged he had a right to it. The plaintiff commenced digging for plumbago when a claim was put in on behalf of the Crown to the land, and it was put up for sale by the Government Agent of this Province on the 4th August, 1871. The plaintiff relinquished all right he had to the land under his first transfer, and purchased it from the Crown. The copy of the conditions of sale put in evidence by the plaintiff, is admitted to be a copy of those on which plaintiff purchased the land. There is no mention made in those conditions that the purchaser would have to pay royalty on plumbago dug on the land; and as the Government Agent has demanded payment of royalty, this action has been instituted to have the question of the plaintiff's liability or non-liability settled. For the plaintiff it was contended, (1) that the land was sold on the understanding that plaintiff would not have to pay royalty; (2) that plaintiff is not bound by any clause in the transfer which is not consistent with the conditions of sale; (3) that the rights of the Crown which were reserved by the 4th clause of the

conditions are those referred to in the Minute of 1st August, 1861, and by which no right is reserved on minerals, but only on precious metals; (4) that it is not proved that there is any regulation or proclamation in existence, authorizing the demand of royalty. On behalf of the Crown, it was urged that, inasmuch as the plaintiff accepted a Grant from the Crown, he is bound by that Grant, and as there is a special clause in it, by which the right to all the minerals in the land is reserved, the demand for payment of royalty is valid. This contention appears to me to be well founded. The present action is not one to set aside the Grant given by the Crown, and to compel it to hand plaintiff one in terms of the conditions of sale, but it is one requiring the Court to hold that plaintiff is not liable to pay royalty. It is beyond the power of the Court to do this, as the very deed on which the plaintiff rests his title contains a clause reserving the right of the Crown to all minerals in the land. Had the action been one to set aside the present transfer, the Court would have been in a position to take notice of any difference that exists between the conditions of sale and the wording of the transfer. For these reasons, it is decreed that the plaintiff's case be, and the same is hereby, dismissed with costs."

In appeal, (Ferdinands for appellant) per Cayley, J.—"Affirmed. Plaintiff has admitted the original right of the Crown to the land by purchasing it from the Crown, and the transfer under which he now holds it expressly reserves the minerals. He complains that the transfer is not drawn in accordance with the conditions of sale under which the property was sold to him, no reservation of the minerals having been mentioned in these conditions. How far this might be a good ground for instituting a suit for specific performance of the original contract of sale, or for procuring a new or amended transfer, it is not necessary to determine; but so long as the plaintiff holds the land under his present conveyance, which expressly reserves the right of the Crown to the minerals, it is not competent for him to dispute that right."

C. R. Panwila, 4120. This was an action to recover Rs. 100 on a bond, the original of which had been lost but a certified copy of which was filed with the plaint. The defendants, admitting the document, pleaded part payment, and strangely enough concluded their answer with a prayer that each party might be condemned to pay his own costs. The Commissioner (*Smart*) held as follows: "The original deed being lost, plaintiff to hold up his claim at all should have called the notary and witnesses to give evidence as to the genuineness of the copy. But even with this there is a strong pre-

Action on a Bond.

sumption that part of it has been satisfied, by the evidence for defendants. Defendants admitted their liability to plaintiff for Rs 15 ; therefore judgment is given for plaintiff for Rs 15, but plaintiff will bear all costs." *In appeal*, (*Grenier* for appellant) per CAYLEY, J.— "Set aside and case sent back for further hearing. The Commissioner in effect holds that the original bond having been lost, plaintiff cannot maintain his claim without calling the notary and witnesses. The defendants, however, admit the bond in their answer ; and consequently no proof at all is required of the instrument on the part of the plaintiff. The onus of proof is entirely thrown upon the defendants ; and, unless they have proved the payment to the satisfaction of the Commissioner (which from his judgment is not quite clear) plaintiff is entitled to judgment. Even if the defendants prove the payment of part of the money due, the balance not having been paid into Court, plaintiff should not be condemned to pay defendants' costs."

Contract affecting land.

C. R. Panwila, 3713. Plaintiff sought to recover Rs 20 alleged to have been advanced as part value of a land which he had agreed to purchase from defendant, who however denied the transaction. Evidence was adduced to prove the advance, but the Commissioner (*Smart*) nonsuited the plaintiff, on the ground that the agreement pleaded was not in writing as required by the Ordinance 7 of 1840. *In appeal*, per CAYLEY, J.—"Set aside and judgment entered for plaintiff as prayed. It was decided in 1871, D. C. Walligame (Morgan's Digest, p. 82) and again in 34472, D. C. Colombo, Civ. Minutes, November 10, 1863, that money paid in pursuance of a contract which is void under the Ordinance of Frauds and which is not performed is recoverable."

Effect of settling and withdrawing a case.

C. R. Chavakacheri, 17273. The plaintiff had deposited the sum of Rs 75 with defendant in December 1871, as security for the performance of certain work the former had undertaken to perform. The money was to be returned to plaintiff in December 1872, if no loss or damage were caused by him to defendant in the interval. In August 1872, the defendant dispensed with plaintiff's services, without however returning the deposit, to recover which the present action was brought. Three previous suits in respect of this very claim had been instituted and subsequently withdrawn. Plaintiff admitted at the trial, that he had signed the settlement filed in the last case, No. 17215, but insisted that defendant had failed to carry out the terms thereof. The Commissioner (*Drieberg*) dismissed the claim with

costs, holding that plaintiff's remedy under the circumstances was by an action to enforce the settlement.

In appeal, (*Ferdinands* for appellant) the judgment was set aside and case sent back for hearing; and per Cayley, J.—"The mere fact that the plaintiff withdrew the former case will not prevent him from reinstituting it. If, however, the Commissioner is satisfied, after hearing evidence, that the previous withdrawal was part of a final settlement which was duly carried out, the plaintiff's claim should be dismissed, as having been reinstituted in fraud of such settlement."

C. R. Mallakam, 210. This was a case of encroachment. The Commissioner, (*Murray*) after hearing evidence of both parties, gave judgment for defendant for the land in dispute, and nonsuited the plaintiff. *In appeal*, *Grenier*, for the appellant, pressing only for a nonsuit, the judgment was modified accordingly. Inconsistent judgment.

C. R. Kurunegala, 28566. Plaintiff claimed Rs 96 as value of 12 amunams of paddy, being the share of a certain field which had been cultivated by defendant. In defence, it was pleaded that the paddy had been given by plaintiff in part payment of interest due by her late husband on a bond granted by him to defendant's brother, of whom defendant was the sole heir. The bond itself was not produced, but evidence was led to prove acknowledgment by plaintiff of the alleged debt and her delivery of the paddy in part satisfaction thereof. The Commissioner, (*de Saram*) having believed defendant's witnesses, dismissed plaintiff's claim with costs. *In appeal*, (*Grenier* for appellant, *Ferdinands* for respondent) per Cayley, J.—"Set aside and case sent back for further hearing. The bond alleged to have been given by plaintiff's deceased husband to Kirihami should have been produced, and proved in corroboration of the evidence given by the defendant, or the non-production of this instrument should have been properly accounted for." Bond.

August 26.

Present Cayley, J.

C. R. Nuwera Eliya, 3168. The plaintiffs in this case had been nonsuited in respect of their claim to a certain land. Having subsequently plucked coffee from the property in dispute, the Commissioner (*Hartshorne*) proceeded to try them for Contempt of Court and fined each Rs 10, holding that "a nonsuit in an action for ejectment operated as a dismissal." *In appeal*,—(*Ferdinands* for appellant Contempt.

was not heard)—per CAYLEY, J.—"Order set aside. The plaintiffs were not bound to give up possession of the land to the defendants, who have no judgment in their favor, because they, the plaintiffs, had been nonsuited in an action brought by them to try their title; nor can the plaintiffs be punished for Contempt of Court for retaining possession."

Jurisdiction. Damages.

C. R. Puttalam, 6888. Plaintiff alleged that he had manufactured 5000 bricks from clay dug out of a portion of land belonging to 1st and 2nd defendants; that thereafter the other defendants had maliciously destroyed the bricks, falsely laying claim to the said land, to his damage of Rs 30. The 1st and 2nd defendants admitted they were the owners of the land; that the other defendants were their lessees; and that with the full knowledge and consent of such lessees they had licensed plaintiff to make bricks. The 3rd, 4th, 5th, and 6th defendants pleaded they were not lessees, but proprietors of the land, and denied the grievance complained of and the right of the plaintiff to sue in the absence of any notarial authority from the 1st and 2nd defendants to occupy the land in question. The Commissioner (*Pole*) gave judgment for plaintiff for Rs 12½, holding that "this is a simple case of damage, although by the pleadings it is attempted to magnify the case into one of title to land."

In appeal, *Dias* for appellant.—The question of title was undoubtedly raised on the pleadings, and the right of the plaintiff's lessors to the land was in issue.

Per CAYLEY, J.—"Affirmed. The plaintiff has proved that the 3rd 4th, 5th and 6th defendants destroyed the bricks which he had made; and these defendants have failed to prove any justification for this act. No evidence as to the title to the land was called by either side; and the issues upon which the case was tried and decided are within the jurisdiction of the Court of Requests."

Action on Bond. Husband and wife.

C. R. Kandy, 52126. The plaintiff sought to recover Rs. 65 and interest on a bond, which defendant admitted having executed but the consideration of which she denied having received. The plaintiff, being affirmed, stated "the defendant, I admit, did not receive the consideration, but the husband received it. She (defendant) gave me the bond." The Commissioner (*Stewart*) held as follows: "Plaintiff admitting that defendant did not receive the consideration, case is dismissed with costs." *In appeal*, per CAYLEY, J.—"Set aside and judgment entered for plaintiff as prayed. The action is one on a bond, and the only defence is want of consideration. The burden of

proof is upon the defendant, and she has called no evidence. The Commissioner has non-suited the plaintiff, in consequence of his admission that the defendant's husband, who appears to have since died, and not the defendant, received the consideration. But the fact that the plaintiff gave good consideration for the instrument, whether to the defendant or to her husband, is sufficient to entitle him to maintain an action against the party who signed the bond in his favor. The plea of coverture has not been taken."

C. R. Colombo, 90445. Plaintiff was nonsuited, on the ground that his present claim had been adjudicated upon in a previous suit, in which he had endeavoured to set off the same amount against the defendant. *In appeal*, per CAYLEY, J.—"Affirmed. The Commissioner is right in holding that the plaintiff, having pleaded the amount now claimed by him as a set-off in a previous action brought against him by the present defendant, and the issue thereon having been found against him, is estopped from suing the former plaintiff for the demand specified in the plea of set-off. See Eastmure v. Laws, 5 Bingham, 444." Non-suit. Set-off.

September 5.

Present CAYLEY, J.

C. R. Panadure, 14980. The Government had taken up in 1871, under the provisions of Ordinance 2 of 1863, a certain land for the purpose of enlarging the Panadure burial ground, and had fenced in a road that the defendant (who lived to the south) was using. The defendant (Proctor *Jayesinghe*) having broken down a portion of the fence over the road on the day it was put up, the Modliar, as representative of the Government Agent, instituted this action for trespass and damages. The defendant pleaded that the road in question was a way of necessity, and deposited in Court Rs 50, being the value of the encroachment as assessed in the libel. It appeared from the evidence that, when defendant purchased his property in 1870, there was a foot-path (which he subsequently enlarged into a cart-road) running across what was now the burial ground on to the high-road; that thereafter, certain excavations in the burial ground having interfered with that cart-road, Soyza Modliar, acting under the Government, opened the road now in question for the defendant's use; and that about a fortnight after the defendant had gravelled it, on the plaintiff fencing in the whole of the Government property, the defendant removed the obstruction to his right of way. The Commissioner (*Morgan*) held as follows. "The defendant came to his Way of necessity. Effect of Ordinance 2 of 1863.

present residence in 1870, so that he could have gained no prescriptive right to the road, nor has any been shown as on the part of those under whom he claims. In fact, his application is one, as the plaintiff's Proctor described it, *ad misericordiam*. He admits that he converted a foot road into a cart road, and he asks the Court to compel the plaintiff to receive Rs 50, which he tenders, and allow him the use of the cart road. But this the Court has no right to do. The defendant's proper course is to apply to the Government under the Ordinance 2 of 1863. He has further means of securing access to his residence, if he has none at present. Defendant was wrong in breaking the fence, and he is decreed to pay one Rupee as damages. As the case seems a hard one for him, I will not cast him in further damages. Judgment for plaintiff with costs."

Ferdinands, for appellant.—This was a way of necessity, and the defendant was entitled to it. Holmes v. Goring, 2 Bing., 76. [But there the owner had originally held the land himself in parcels—CAYLEY, J.] The principle was the same in both cases, that where there was no other way which a party could use, it was no trespass to make a way of necessity. The Crown having itself allowed the road in lieu of the one destroyed, defendant could not be charged with trespass. [It is de...ed that there was an easement. Defendant's purchase was only in 1870.— CAYLEY, J.] He did not claim by prescription, but on the ground that there was no road by which he could have access to his land without trespassing on the lands of other persons. [The evidence on this subject is not sufficiently full.—CAYLEY, J.]

The Queen's Advocate, for respondent.—The defendant had other means of access and could not complain. [It appears across 10 or 15 lands—CAYLEY, J.] But the area was very small, and from his own personal knowledge of the place, he could say that defendant would suffer no inconvenience whatever. Besides, the plea of necessity could not avail, as there was a statutory remedy prescribed by Ordinance 2 of 1863, cl. 9, and that was the only remedy now available to an aggrieved party. The land in question had been taken possession of by Government for the purposes of a burial ground under the Ordinance, and the defendant's right, if any, was extinguished by the enactment in the 4th clause, which vested the land in the Crown free of all mortgages and incumbrances and to the exclusion of "all persons whomsoever, whatever right or title they may have or claim to have in the property."

Ferdinands, in reply.—The Ordinance did not destroy the common law right of the defendant to a way of necessity, nor could it affect the rights of third parties who had neither sold the land nor shared in the compensation paid by the Crown.

Per CAYLEY, J.—"Affirmed. This is, in effect, an action by the Crown to set aside a claim made by the defendant of a right of way over a piece of land taken by the Government for the purpose of a public burial ground. It was admitted, at the hearing before this Court, that the land was regularly taken under the provisions of the Ordinance 2 of 1863. The right of way is claimed by necessity only. Now even though such a plea were tenable, (and, in view of the certificate of possession issued under the 4th clause of the Ordinance, I think it would not be,) the defendant has failed to prove this necessity; and this issue has been expressly found against him by the learned Commissioner. It appears, from the rough sketch filed with the proceedings as well as from the defendant's evidence, that although the burial ground supplies the nearest and most convenient means of access to the minor road from the defendant's property, there are other means of access easily available. If the defendant cannot otherwise obtain free and sufficient access to his property, he should, as suggested by the Commissioner, apply to the Government for a road under the provisions of the 9th clause of the above mentioned Ordinance."

C. R. Balapitimodara, 22135. Plaintiff, who was a special mortgagee, was prevented by defendant from selling the mortgaged property, the latter claiming it by right of purchase at a Fiscal's sale held six months previously. The Commissioner (*Hallilej*) held as follows: "There is no bill of sale as mentioned in the mortgage bond in evidence. I can't therefore say the extent of the land. Plaintiff is nonsuited with costs." *In appeal*, per CAYLEY J.—"Set aside and judgment entered for plaintiff as prayed with costs of suit. By a deed of mortgage dated 29th September, 1868, Kaluvahakuru Siman mortgaged with plaintiff all his right in the land in question. The defendant claims the property by purchase at a Fiscal's sale held in 1872, under a writ against this Siman issued for costs. Plaintiff's mortgage must have priority over defendant's purchase; and, as all Siman's right in the land was mortgaged, the precise extent of property is quite immaterial." Mortgage.

C. R. Galle, 46118. This was an appeal against costs which plaintiff was condemned to pay in an action brought by him to redeem a mortgage bond, which defendant admitted having refused to deliver over. When the case was called, the Commissioner (*Lee*) made the following order: "the mortgage bond is handed to plaintiff. The defendant to take the money deposited and to have costs." Per CAYLEY, J.—"Set aside, so far as relates to that part of the judgment Costs.

which condemns plaintiff to pay defendant's costs, and amended by ordering defendant to pay plaintiff's costs. Defendant admits in his answer that he refused to allow plaintiff to redeem the mortgage, and has called no evidence to justify such refusal. Plaintiff has been unnecessarily put to the expense of bringing this action to redeem the bond, and he ought to have his costs. Moreover, it does not appear that any notice was given to the defendant before the trial, that plaintiff had deposited in Court the Rs. 20 on the 15th of May, 1873."

Arbitration.

C. R. Gampola, 28234. The dispute in this case, which affected title to land, was, on the joint motion of the parties and their Proctors, referred to the sole arbitration of Abraham Mohandiram, whose award was as follows: "I having received the letter in case No. 28234 which was addressed to my name, the plaintiff, defendant and several other respected people proceeded to the disputed land and enquired, but for the following reasons it is difficult to make out to whom the disputed land belongs. On our enquiring we did not find a deed to the said land, nor was the Koralle of the said district, who separated the said land formerly, present. But having enquired from the neighbouring headman, it is given to understand that the said disputed land is the property of the defendant but not of the plaintiff." On this award being filed, the Commissioner (*Neville*) dismissed plaintiff's claim and decreed the land in question to defendant.

In appeal, (*Kelly* for appellant) per CAYLEY, J.—"Set aside and case sent back for a new trial. Appellant to have his costs in appeal, but the costs in the Court below to abide the final adjudication. The reference to arbitration having been voluntary, no appeal would lie from any judgment which had been given according to the award; but it appears to the Supreme Court, that in the present case the judgment has not been given according to the award. In the award, the arbitrator states that it is difficult to make out to whom the disputed land belongs, but that, having made enquiry from neighbouring headman, he is given to understand that it is the property of the defendant. There is no express finding that the land belongs to the defendant, and nothing more than the statement of the opinion of certain headmen. Such an award will not entitle the defendant to judgment in his favor, nor indeed could any definite judgment be based upon it."

Indefinite judgment. Prescription.

C. R. Galagedera, 30393. This was an appeal against a judgment of the Commissioner, (*Capt. Williams*) decreeing, under the Kandyan law, one half of a certain land to plaintiff, as one of two sisters, by right of inheritance from her father. *In appeal*, per CAYLEY, J.—

"Set aside and case sent back for further hearing and consideration. Plaintiff claims by inheritance from her father Kiri Banda an undivided ¼ share of a certain garden called Naranghamulle Cattuwa. The learned Commissioner has given judgment for the plaintiff for half share of the portion of land inherited by Kiri Banda, but he proceeds to observe that it is not clear from the evidence what this portion of land is, but that it must be ⅛th share of that which descended to his children excluding the portion of land given to the widow. Now the principal issue in the case is not whether the plaintiff is entitled to a share of Kiri Banda's land (for the fact of her being his daughter is not seriously contested), but whether the land claimed in the plaint was inherited or possessed by Kiri Banda. On this issue there is no finding, and it is impossible to ascertain from the judgment what precise share of what precise land is decreed to the plaintiff. No effectual writ of possession could issue upon a judgment thus framed. The learned Commissioner has observed that prescription cannot avail in the case, because the plaintiff is apparently about twenty two years of age only. The age of the plaintiff is, however, by no means conclusive on the question of prescription. It is possible that a prescriptive title may have been acquired by the defendant as against Kiri Banda before the plaintiff's right of action accrued, or prescription may have commenced to run against Kiri Banda before his death, in which case the disability of the plaintiff could not prevent such prescription from being completed by the adverse possession of the defendant for the term of ten years."

Jurisdiction. Test of value of land.

C. R. Gampola, 28680. The title to a certain land of about two seers' sowing extent was in dispute between the parties. The Commissioner (*Penney*) nonsuited the plaintiff on the following ground:—"the land is worth 12 or 15 rupees a year, and at 10 years' valuation is worth more than Rs. 100." *In appeal*, per CAYLEY, J.—"Set aside and remanded for further hearing and consideration. The case has been dismissed by the learned Commissioner on the ground that, as the value of the yearly produce of the land in dispute is 12 or 15 rupees and on the assumption that the value of the land is equivalent to the value of 10 years' produce, the case is beyond his jurisdiction. There is however no evidence for this assumption, and it is also to be observed that, in estimating the value of the annual produce as a criterion of the value of the land, the expenses of cultivation should be taken into account. When land is cultivated in *ande*, half share of the produce usually goes to the andekariya. The amount for which the land would rent, or the amount for which it would be given out in *ande*, would be a more accurate measure of its value."

Damages on contract affecting land.

C. R. Kandy, 52134. This was an appeal against a judgment of the Commissioner (*Stewart*) awarding Rs. 5 to plaintiff as damages consequent on the breach of an alleged agreement, by which defendant had bound himself to lease a certain land to plaintiff who in good faith had improved the property. *In appeal*, per CAYLEY, J.—"Set aside and plaintiff non-suited with costs. This is an action to recover Rs. 40 damages for breach of an alleged contract, by which plaintiff agreed to improve and cultivate a piece of land in consideration of an alleged promise by defendant to give him a lease of the land for five years. Plaintiff also claims the Rs. 40 under the common counts for work and labor done and money paid on account of defendant at his request. Plaintiff has called witnesses to prove that he carried out certain work on the land, but there is no evidence of the contract declared upon in the first count of the plaint, the terms of which are disputed and which would have required notarial execution. Nor is there any evidence that the alleged work was done and money expended at the defendant's request, express or implied. See 32746, C. R. Kandy, Solomons' Reports, part 1, page 23."

Stamp objection.

C. R. Colombo, 91967. Plaintiff sued upon a document, which he described in his libel as a promissory note, for the recovery of Rs. 47, being amount of principal and interest due thereon. The defendant pleaded payment. On the day of trial, the defendant's Proctor relied on the legal objection that the alleged promissory note was a bond and therefore insufficiently stamped, and declined to call evidence in support of the plea in the answer. The Commissioner (*Livera*) entered judgment for plaintiff as prayed for.

In appeal, *Grenier*, for appellant, pressed for a rehearing to prove payment. Per CAYLEY, J.— "Set aside and case sent back under the conditions hereinafter stated. In this case, the instrument having been expressly admitted in the answer, and a plea of payment being the only defence, it was not competent for the defendant to raise an objection at the trial as to whether or not the document was properly stamped. (See Israel v. Benjamin, 3. Camp., 40.) The defendant is allowed, as an indulgence, an opportunity of proving his plea of payment; but he must pay all the costs of the day in the Court below and of this appeal, within seven days after a taxed bill has been presented, and must deposit in Court, within seven days of the case being sent back to the Court of Requests, the amount claimed in the plaint, to abide the final adjudication. Upon his failure to comply with any of the above conditions, the judgement appealed against is to be treated as affirmed."

Contract.

C. R. Colombo, 90405. This was an action to recover half the value of fish caught by defendant with the aid of plaintiff, who led evidence to show that the defendant, having cast his net into the sea to the south, called upon the plaintiff, whose boat was to the north, to enclose the fish and drive it into his (the defendant's) net, promising to reward him with half the fish that might be caught. The defendant denied the alleged agreement in his answer, but the Commissioner (*Livera*) having believed the plaintiff's evidence gave judgment for him to the full amount claimed, Rs. 61.

In appeal (Ferdinands for appellant, *Grenier* for respondent) per CAYLEY, J.— "Affirmed."

September 9.

Present CAYLEY, J.

Burden of proof.

C. R. Galle, 46376. This was an action for goods sold and delivered and for money lost in consequence of an alleged assault by defendant, who pleaded not indebted and not guilty. On the day of trial, both parties being present, the Commissioner (*Lee*) made order as follows. "Plaintiff ready, defendant not ready. Judgment for plaintiff with costs." *In appeal*, per CAYLEY, J.— "Set aside and case sent back for hearing. The defendant appeared on the day of trial, so that the case is not one of default. The onus of proof being on the plaintiff, he was bound to prove his case before judgment could be given in his favour."

Execution against person.

C. R. Galle, 46474. The plaintiff, who had been fireman on board the steamer *Leith*, sued the defendant (the Captain) for the recovery of Rs 9, being wages for overtime. The Commissioner (*Lee*) having heard plaintiff's evidence gave judgment for him on the 5th July. On the 8th July, plaintiff's bill of costs was taxed at Rs. 1. 70 cents, and writ against person was allowed and issued. *In appeal*, per CAYLEY, J.—"The judgment of the 5th July, 1873, is affirmed, but the order of the 8th July, so far as relates to the writ against person, is set aside. Each party is to bear his own costs of appeal, if any. It appears from the proceedings and the letter of the learned Commissioner, that the only issue raised at the trial was, whether the plaintiff performed the work for which he has claimed extra wages; and the plaintiff's evidence on this point being uncontradicted, judgment was properly entered in his favor. With regard to the writ against the person of the defendant, the Supreme Court thinks that it was not competent for the Court of Requests to issue such writ. By the 47th clause of the Ordinance 7 of 1863, a seaman is empow-

ered to sue for wages in a Court of Requests, notwithstanding that the amount claimed exceeds £ 10; and it is enacted that the order of the Court may be enforced by writ against person as well as against property, notwithstanding any former law or Ordinance to the contrary. The question must here, however, be governed by the Ordinance 11 of 1868, by the 87th clause of which it is enacted that a judgment pronounced by the Commissioner of any Court of Requests, shall, in all cases, be enforced by execution against the property or (under the provisions of the 165th section of the Ordinance 7 of 1853) against the property and person of the party condemned therein. So that, since the passing of this Ordinance, execution against person in all Courts of Requests cases, is subject to the provisions of the 165th clause of Ordinance 7 of 1853, by which imprisonment for debt not exceeding £10 is expressly confined to cases of fraud only."

Landlord and tenant.

C. R. Colombo, 91943. Plaintiff sued the defendant as his tenant for rent alleged to be due for the months of March and April, 1873. The defendant in his answer pleaded payment to one Teagappah, under a judgment of this Court in No. 91575, and disputed plaintiff's right as landlord. It appeared that Teagappah had entered into an agreement in 1861 to convey the premises in question to plaintiff, but had failed to do so. A District Court suit, No. 59,203, had subsequently been instituted by plaintiff for specific performance, but he had been nonsuited on a technical objection raised against the libel. In that suit, Teagappah in his answer had admitted that he had let the plaintiff into possession and had expressed his willingness to grant a conveyance. Defendant in the present case had paid rent to plaintiff from 1861, till the date of the nonsuit which was in 1873, but it was contended that such payment of rent had been made at the request of Teagappah. The Commissioner (*Livera*) having given judgment for plaintiff, the defendant appealed.

Grenier, for respondent, on being called upon, submitted that the admissions contained in the answer in the District Court case disclosed an equitable title in plaintiff, which defendant had acknowledged for more than 10 years by payment of rent. Besides, plaintiff having admittedly been placed in possession of the house had acquired a bona fide right by prescription as against Teagappah, in whose favor the defendant had collusively allowed judgment to go by default in 91575 for the amount now claimed by plaintiff.

Kelly, for appellant, in reply.—Plaintiff had clearly no legal title to shew, for if he had he would not have instituted the District Court case referred to. Defendant had not entered under plaintiff, but

under the original owner under whom Teagappah claimed, and the payment of rent to plaintiff had been at the instance of Teagappah.

Per CAYLEY, J.— "Set aside and plaintiff nonsuited with costs. It appears to the Supreme Court that the plaintiff has failed to prove her right to recover from the defendant the rent claimed. The defendant entered into possession of the house as tenant of one Segapatchy. Upon Segapatchy's death, defendant paid rent for some time to her grandson Teagappah; who, as appears from the present plaintiff's libel in case No. 59,203, D. C. Colombo, inherited the premises from Segapatchy. Subsequently, at the request of Teagappah, defendant paid rent to the plaintiff. After the decision of the District Court case which plaintiff brought against Teagappah for specific performance of an agreement to convey this property, and in which plaintiff was nonsuited, Teagappah withdrew his request by suing the defendant for the rent then due. Defendant allowed judgment to go by default. Plaintiff now sues for the rent which defendant has paid to Teagappah. Plaintiff has, however, failed to prove her title to the house; and, whatever equitable rights she may have to a conveyance of the property under the deed of the 28th September, 1861, upon which the District Court case was brought, she cannot, until she has enforced these rights, sue the defendant, who did not enter as her tenant and only paid her rent at the request of the admitted legal owner which request was subsequently withdrawn."

C. R. Urugalla, 1802. The defendant had executed a bond, in June 1870, in favor of Kalu Banda, the father of the minor child on whose behalf plaintiff sought to recover the amount due theron. Defendant having pleaded payment to Kalu Banda's mother, Rang Menika, the Commissioner (*Power*) nonsuited the plaintiff in the following terms: "It does not appear that defendant was aware of the existence of the child, or that any demand on its behalf by plaintiff was made to defendant on Kalu Banda's death. He is not supposed to know there was a child, and therefore has paid the money to deceased's mother against whom I think plaintiff should proceed." *In appeal*, (*Ferdinands*, for appellant, *Dias* for respondent) per CAYLEY, J.—"Set aside and judgment entered for the minor plaintiff for Rs. 100 and costs of suit. Kalu Banda's mother, not having taken out letters of Administration to her son's estate, was not authorized to receive a debt due to her son, the latter having left a child, who under the Kandyan law would be entitled to inherit his personal property. The Rs100 must be paid into Court and deposited in the Loan Board for the benefit of the minor." Unauthorised payment of a Bond

Landlord and tenant.

C. R. Trincomalie, 28758. The facts of the case are set forth in the following judgment of the Commissioner (*Templer*)—"The defendant occupied the plaintiff's house, paying a rent of Rs 12·50 per mensem. On the 7th October, the plaintiff (*Buttery*) wrote to defendant (*Hunter*) the letter marked A, stating that he wanted a rent of Rs 22.50 per mensem, and telling defendant that, in case he should refuse to take the house at that rent, he must leave it on the 1st November. Defendant sent the reply marked B, dated 16th October, asking the plaintiff to allow him the occupation of the house until the 1st December at the then rate Rs 12.50 and taxes, and saying that he could not pay the higher rent. To this the defendant replies, by letter C on 11th November, telling the defendant to vacate his house on 1st December or pay rent at Rs. 30.50. I take this last letter to be a fresh lease granted by the plaintiff at the old rate, but stipulating for the vacation of the house on the 1st December. There is no other explanation of the letter. The defendant made a request to be allowed to occupy the house at the old rate until the 1st December, and the plaintiff tells him he may occupy it until then ; says nothing, it is true, about the terms ; but this avoidance of any reference to terms was, I consider, a tacit admission or acceptance of those proposed by Hunter. I hold that the plaintiff is not entitled to any increased rent, but is only entitled to what was tendered to him by defendant and refused. Judgment for plaintiff for the sum of Rs. 26·50, but the plaintiff to pay all the costs of this case." *In appeal*, (*Grenier* for respondent) per CAYLEY, J.—"Affirmed. The Supreme Court thinks that the construction put upon the letters B and C by the Commissioner is correct."

Mesne profits. Prescription.

C. R. Pasyala, 1886. The following judgment of the Commissioner (*Byrde*) explains the facts of the case: "the plaintiff in this case sues for the recovery of £9 18s., being alleged mesne profits of the land called Kebellegaha Cumbura during the years 1868 and 1869. It appears from the evidence adduced in the Colombo District Court case No. 53866, that Andris' father, the owner of the lands in dispute in that case, apportioned his property between Andris and his elder sister, the mother of the defendants, i. e., between Andris and Punchy Hamy, the 1st defendant in this present case. The decision of the District Judge in case No. 53866 places the land Kebellegaha Cumbura definitely in the possession of the plaintiff, Loko Ettena ; and from the evidence of the defendants themselves they possessed and enjoyed the fruits of Kebellegaha Cumbura for 2 years, i. e., during the pendency of the District Court case. From 1st July, 1868, to 5th December, 1870, there appear to have been only two harvests, that

is, the harvest prior to 4th June, 1869, and that prior to 5th December, 1870. The witness Baronchy states that the crop of the year in which the District Court case was instituted was 40 bushels, and that of the year previous 50 bushels. This is of material value to establish the average crop of the Kebellegaha Cumbura, of which the plaintiff claims the mesne profits. Baronchy states, in District Court case No. 53866, that the ground share is about 25 bushels a year at 3s. per bushel, and I do not think this evidence, adduced to prove the value of the land in dispute, can in any way bar the plaintiff from instituting this case for mesne profits for the two years during which she was ousted from her lawful possession by the defendants, who, after the plaintiff had commenced the cultivation, took the continuation out of her hands, forcibly retaining possession, and enjoyed the fruits of the land which are adjudged to be hers, and which she inherited, but which the defendants cultivated and claimed as theirs by right. I am therefore of opinion that the crop of the Kebellegaha Cumbura was about an average of 35 bushels, and that the Government share was about 9 bushels. Of the balance 26 bushels, I consider the cultivator is entitled, by virtue of risk and labor, to one-half or 13 bushels per annum. I therefore find the defendants liable to the plaintiff for the average value of the ground share for 2 years at 13 bushels per annum or 26 bushels at 3s. per bushel or Rs. 39. Costs of suit to be divided."

In appeal, per CAYLEY, J.—" Affirmed but amended as herein after stated. In this case, the plaintiff has recovered mesne profits in consequence of defendants having held possession from the 1st of July, 1868, to the 5th of December, 1870, of certain land decreed to the plaintiff in case No. 53866, D. C. Colombo. During this time there were only two harvests, one ending the 4th of June, 1869, and the other the 5th of December, 1870. The plaintiff brought her action for the land in question with several other lands, on the 4th of June, 1869, and claimed mesne profits accruing both before action brought and *pendente lite*. She obtained judgment for the land in question, but, as to the rest of her claim, was expressly nonsuited. Having been nonsuited as to her claim for mesne profits in the previous action, there is nothing to prevent her from instituting a new action to recover them; but the question arises how far her claim is prescribed, the present action having been brought on the 20th of July, 1871. It was decided in the case No. 1108, D. C. Kurunegala, (Supreme Court Minutes, 7th July, 1871) under the Ordinance 8 of 1834, (by which Ordinance the present case must be determined) that mesne profits are in the nature of damages, and are prescribed in two years; but that, if an action has been brought to try title to the land, without a claim for mesne profits being made, and, after the decision of that

action, a new action is instituted for their recovery, the two years will be counted, not from the commencement of the action to recover mesne profits, but from the commencement of the former action, which was brought to try the title. The ground upon which this decision is based is that the delay, arising during the pendency of the former suit, is the delay of the Court and that *actus curiæ nemini facit injuriam*. In the present case, however, the mesne profits having been claimed in the first action, the delay is not due to the Court; but to the default of the plaintiff, who failed to establish her claim to the satisfaction of the Judge; so that the principle laid down in the case 13080, D. C. Caltura (Supreme Court Minutes, 18th August, 1 855) would seem to be applicable. In that case it was decided that where an action had been brought upon a bond within 10 years from its date and had been subsequently struck off for want of prosecution, and a second action had been afterwards brought upon the same instrument, after 10 years had elapsed from the date of the bond, but within ten years from the date of the previous action having been struck off, the second action is prescribed. And referring to the language of the Ord inance 8 of 1834 no distinction can be drawn, so far as relates to this question, between actions on bonds and actions for mesne profits. The claim for the produce taken up to the 4th June, 1869, will accordingly be prescribed; and the amount of the judgment will be reduced by one half. In other respects, the judgment will be affirmed. Each party will have to bear his own costs of appeal."

September 12.

Present CAYLEY, J.

Paddy tax. *C. R. Panadure*, 15395. Plaintiff, who was a Government paddy renter, claimed Rs. 40, being the value of 40 bushels of paddy which he alleged were due to him as half share. The defendants pleaded that the field in question was subject to only one-fourth and not one-half duty. The plaintiff, after leading evidence to prove cultivation by defendant, filed an assessment wattoo for 1872 and closed his case. For the defence, it was contended that the action could not be maintained until it was decided what share of the produce the Government was entitled to. The Commissioner (*Morgan*) held that the onus was on the defendant (who called no evidence) and entered judgment for plaintiff as prayed for. *In appeal*, per CAYLEY, J.—"Set aside and case sent back for further hearing. It is incumbent upon the plaintiff to prove his claim, and for this purpose it is necessary that he should prove to what share he is, as Government paddy renter, entitled, and should also give some evidence as to the amount and value of the crop taken by the defendant."

September 19.

Present STEWART, J.

C. R. Kurunegala, 29285. The plaintiff sued for the recovery of Rs. 30, "being value of a bullock, belonging to plaintiff, gored and killed by a bullock belonging to defendant, on the 17th day of June, 1873." On the plaintiff closing his case, the Commissioner (*de Saram*) held as follows: "It is not proved that the defendant's bullock is of such a fierce nature as to render it unsafe to let it graze about without being secured. The plaintiff is non-suited with costs." *In appeal*, (*Ferdinands* for appellant) per STEWART, J.—"Set aside and judgment to be entered for plaintiff for Rs. 30 and costs. There was no occasion to prove that the defendant's bullock was of a fierce nature. According to the general rule of the Roman Dutch law, the owner of a brute animal is liable for the injury it has caused. See judgment of Supreme Court, October 29th, 1860, in Jaffna, C. R. 25869, Beven and Mills, part 10, page 53. See also as to Kandyan law, Austin, page 51." Owner of an animal liable for injury caused by it.

C. R. Galle, 43083. This was an action by a landlord on a lease to recover rent due thereon. The defendants pleaded that they had not been let into possession, by the interference of third parties who claimed title to the land in question. On the day of trial, the Commissioner, (*Lee*) without entering into evidence, entered judgment for plaintiff as prayed for in the following terms: "The defendants admit the entry into possession, and the fact of the defendants having been interrupted, if they were so, is no defence, though it entitles them to an action against the interrupters." *In appeal*, per STEWART, J.—"Set aside and case remanded for hearing. The defendants should have been allowed an opportunity of adducing their evidence and proving that the plaintiffs promised to make an amicable settlement of the District Court case, the issue in which would seem, according to the defendants, to comprise the dispute in the present case." Lease.

September 23.

Present STEWART, J.

C. R. Colombo, 92553. The plaintiff sued on the 25th June, 1873, to recover Rs. 59, as balance due on shop bills. The defendant brought that sum into Court, denying his liability to pay costs on the ground that there had been no previous demand. The defendant stated on his oath that he had made a part payment in March, that when the bill was subsequently presented in June he had asked Costs.

plaintiff to wait till the end of that month; and that the plaintiff thereupon went away perfectly satisfied. In cross examination the defendant admitted that the bill had been presented in January and March. The Commissioner (*Livera*) gave judgment for plaintiff, but cast him in the entire costs of the suit. *In appeal*, (*Ondaatjie* for appellant, *Grenier* for respondent) per STEWART, J.—" Affirmed. According to the evidence of the defendant, not only was there no demand for immediate payment, but he was led by the plaintiff to believe that plaintiff would wait till the end of June. Under these circumstances, the suit having been instituted on the 25th June, before the expiration of the time agreed upon, the plaintiff was properly cast in costs."

Proctor and client.

C. R. Urugala, 1,940. The facts of the case are fully set forth in the following judgment of the Commissioner (*Power*).—" The plaintiffs in this case seek to recover the sum of fifty rupees (Rs 50) being money paid to the defendant, their proctor (*Bartholomeusz*) in case No. 1499, C. R. Urugala, for the purpose of employing an Advocate in appeal. Three witnesses have sworn to having seen this money paid to the defendant,—that this was on the 9th November, and that the defendant told his clients to come on the 13th to sign—what they do not seem to know. But it appears, however, that both of them did come to the Court on the 13th November, and on that day signed the security bond in appeal, which is in the defendant's hand writing and witnessed by him. This constitutes the case for the plaintiffs. The defendant in the first part of his examination states he cannot say if an Advocate appeared in appeal, as he has lost his books and has not them to refer to. He afterwards admits having received in all from the plaintiffs £3 3s., being £1 1s. his fee for conducting the case, and which was paid him at the time his services were engaged, and £2 2s. paid him at the time he wrote the petition of appeal. That of this money £1 1s. was his fee for writing the appeal petition, and £1 1s. the Advocate's fee. That he further paid a pleading drawer 5s. for making a copy of the case to be sent to the Advocate, and that the balance being insufficient for the Advocate's fee, he directed his client to bring him 6s. more and he would engage the services of an Advocate. That this money not having been paid him, he engaged no Advocate. The Court considers that the charge of £1 1s. for writing the petition of appeal is exorbitant. The £1 1s., first paid and accepted, was for conducting the case to its final issue. I cannot believe that £5 was paid as plaintiffs say, for they must have known that it was very much more than was necessary. But at the same

time, I consider that the defendant has retained money which he should have paid to an Advocate, and which was paid him for the purpose of engaging one. I allow the five shillings paid to the pleading drawer, though I think it is high, and enter judgment for plaintiffs for the balance of £2 2s., paid at the time of drawing the appeal petition. Judgment is entered for plaintiffs for £1 17s., or Rs. 18·50 and costs of suit." *In appeal*, per STEWART, J.—Affirmed.

September 26.

Present STEWART, J.

C. R. Matara, 27836. This was an action instituted in June, 1873, to recover liquidated damages for breach of a notarial agreement entered into by defendant in 1864 to marry plaintiff's sister. Judgment by default having been entered, the defendant subsequently moved to re-open judgment on an affidavit which set forth that he had been unable to attend at the trial on account of ill-health, and that he had a true and honest defence on the merits. The Commissioner (*Jumeaux*) having rejected the motion, the defendant appealed. *Grenier*, for appellant.—The agreement was on the face of it of an immoral character, and could not be legally enforced, it having been stipulated that plaintiff's sister should live with defendant for six months, and that thereafter banns were to be published and the marriage was to be consummated. [That is the usual practice amongst natives of that class—STEWART, J.] But no custom could make that moral which the law distinctly declared to be immoral. Apart from this, the laches of the plaintiff, in delaying the action for nine years, should be viewed with suspicion, and it was open to the Supreme Court to afford equitable relief under the 18th clause of the Rules and Orders by allowing the defendant to enter into his defence. [I should have been inclined to do this, if defendant had explained in his affidavit the reason why he had failed to carry out his agreement. —STEWART, J.] Affirmed.

Damages on an agreement to marry.

C. R. Colombo, 92153. The plaintiff claimed Rs. 75, as value of a boundary wall which he alleged defendant had destroyed. The defendant denied the plaintiff's right to the wall, but admitted having pulled down the same and rebuilt a more substantial one. The Surveyor who had examined the premises with reference to the deeds of both parties, stated that the wall in question stood entirely within plaintiff's land. The Commissioner (*de Livera*) held as follows: "The plaintiff claims the value of his wall which was broken down by

Damages.

the defendant. It appears that the wall raised in its stead is a more durable and substantial one. I therefore think it would be better for both parties to allow the wall to remain as it now stands. The case is dismissed, each party bearing his own costs." *In appeal*, (*Grenier* for appellant, *Browne* for respondent) per STEWART, J.—" Set aside and judgment entered for plaintiff for the land on which the wall stands and one rupee damages and costs. It will be seen from the answer that the defendant claimed the old wall as his property. According to the evidence of the Surveyor, the ground on which the new wall stands (the locality is the same) is the property of the plaintiff. The defendant had no right to remove the old wall, which did not stand on his property, or to build a new wall in its place without the consent of the plaintiff, the owner."

September 30.

Present STEWART, J.

Tort, Damages.

C. R. Negombo, 21958. Plaintiff sued for the recovery of certain Timber, alleged to have been illegally seized and detained by the defendant, and for damages consequent thereon. The answer justified the detention, on the ground that the plaintiff had had a jack tree cut down in so careless and negligent a manner that its fall had damaged two cocoanut trees and a large number of coffee plants on a land of which defendant was the lessee, whereby defendant had suffered a loss of Rs 48, which he claimed in reconvention. On these pleadings the case went to trial, when the Commissioner (*Dawson*) held as follows. "It is not proved that plaintiff sustained damages such as the Court can estimate, nor is it proved that plaintiff is the person liable for damage caused by the fall of the tree ; nor is it proved that defendant is the person entitled to recover such damages. The claims then for damages on both sides disappear. The defendant contends that he was justified in detaining the timber, and that he had a lien on it until his damages were paid. In the first place, he has not shown that he is the person who should hold such lien, supposing such lien existed in law. I invited defendant's Proctor to find me an authority. He has not done so. Judgment is entered for the jackwood timber described in the plaint, (its value is not proved) and costs of suit."

In appeal, Grenier, for appellant. Plaintiff, in his examination, admitted that he had purchased the tree in question *before* it was felled, and as such owner he was liable to the damage caused by the person engaged by him to fell the same, whether such person was the original owner of the tree, or any other party so employed. As to the question of law involved, the defendant, as lessee, was fully entitled to

claim in reconvention any damage suffered by him, the rule being that the actual occupier of land was the proper party to maintain an action for wrongful acts interfering with the beneficial use and enjoyment of the property, and diminishing the value of the possessory interest; owners or reversioners suing only where the injury to the property was of a permanent character, which however was not the case here. The detention of the timber was bona fide, and one of the witnesses swore that in his presence, "the defendants called on plaintiff to pay damages and remove the tree." But even assuming that the detention was improper, the Commissioner rightly held that plaintiff had proved no damage as resulting from such detention. The following cases were cited by Counsel in the course of the argument: Dobson *v.* Blackman, 9 Q. B. 991; Hosking *v.* Philips, 3 Exch: 168; Bedingfield *v.* Onslow, 3 Lev. 209; Addison, 10, 158.

Per STEWART, J.—"Set aside. The evidence already shows that considerable damage was occasioned by the falling of the tree claimed by the plaintiff upon the trees standing in the land leased by defendant. For this loss the defendant, although only a lessee, is entitled to recover. (See Addison on Wrongs, page 10.) "The actual occupier of the land is in general the proper party to maintain an action for wrongful acts of a temporary character, interfering with the beneficial use and enjoyment of the property, and diminishing the value of his possessory interest." See also 3 Lorenz, p. 209. The tree in dispute having caused damage to the property of defendant, it appears to the Supreme Court that defendant is warranted in detaining the tree, on the same principle that the proprietor of land is justified in detaining trespassing cattle until the damage they have committed has been paid. Considering the general evidence of damage, as well as the fact that only one year of defendant's lease for eight years has expired, it is decreed that judgment be entered for the plaintiff for the timber in question on the defendant being paid Rs. 35. Plaintiff to pay the costs of the defendant."

Contempt.

C. R. Point Pedro, 6370. This was an appeal against a conviction for Contempt. The defendant appeared to have been impertinent and to have questioned the justice of a decision which the Commissioner (*Drieberg*) had pronounced against him. Per STEWART, J. —"Set aside. The appellant should not have been punished forthwith. See provisions of the 107th section, Ordinance 11 of 1868, which expressly requires that a party charged with contempt shall be bailed (or in default of bail committed) until the following day."

October 21.

Present STEWART, J.

Malicious prosecution. Damages.

C. R. Colombo, 92757. The plaintiff claimed Rs. 95·75 as damages consequent on a malicious prosecution of him by the defendant on a charge of theft, which said charge after a J. P. investigation had been dismissed under instructions from the Queen's Advocate. The defendant disclaimed malice, and denied his liability to pay the amount sued for, which included sums alleged to have been paid as Proctor's fees and for refreshments for witnesses. On the day of trial, the plaintiff besides giving evidence himself called Messrs. Swan and Heyzer to prove that they had received four guineas for professional services rendered by them, and had on different occasions been provided with a carriage to attend the investigation which took place at the Customs premises before Captain Donnan. The Commissioner (*Livera*) held as follows: "In the opinion of the Court the plaintiff is not entitled to any portion of the money claimed by him. He is non-suited with costs." *In appeal*, per STEWART, J.—"Affirmed. There is no evidence at all of want of probable cause. The plaintiff in his evidence does not even distinctly state the charge against him was false."

House rent Prescription.

C. R. Jaffna, 1280. Plaintiff, as widow, sued for the recovery of Rs. 47·25, being one-half of the rent due by defendant for nine years' use and occupation of a certain land which had belonged to her late husband. The Commissioner (*Murray*) having given judgment as prayed for in the libel, the defendant appealed. Per STEWART, J.—"Altered by the amount of judgment being reduced to Rs. 18. The plaintiff cannot recover for more than three years' use and occupation before action brought. See 8th and 11th sections of Ordinance 22 of 1871. According to the evidence, the sum agreed upon as the annual value of the produce was Rs. 7. The defendant did not possess after January 1873. Plaintiff can therefore only recover for a period of about 2 years and seven months. Parties to bear their own costs."

October 28.

Present STEWART, J.

Toll.

C. R. Matale, 29775. The judgment of the Commissioner (*Temple*) in favor of plaintiff, explains the facts of the case. "This is a case brought by the Natande Toll-keeper against the defendant, (*Fuller*) as Road-officer of Matale District, for toll claimed on transport of Government bricks, rice &c., for the road department. The question is, are these carts free from toll on the passes filed, as the goods were transported over 10 miles, i. e., 14 to Dimbulla, from the Natande

toll-station. The 19th clause of Ordinance 14 of 1867 limits the distance to 10 miles from a toll station." The defendant, in his examination, had stated as follows: "I am Road-officer of Matale district. In course of business I have had to send road materials, such as bricks, lime, tools and rice, for the support of my coolies to Dimbulla. For these carts passes were given for Natande toll, a distance of 14 miles. The papers are signed by my clerk. They are correct. The amount claimed in them is Rs. 8·42. I used formerly to pay the tolls on vouchers drawn or made out from these orders. But about 2 years ago, I was ordered to issue passes within 10 miles of my district and not to pay them at all." *In appeal*, per STEWART, J.—"Affirmed. There is no exemption in the Toll Ordinance of the nature contended for by the appellant. Vehicles employed in the construction of roads, are only exempted from toll within 10 miles of the toll station, upon production of a certificate from the Superintending officer."

C. R. Colombo, 90194. The plaintiff, as owner and occupier of a house in Washers' quarters, complained that the defendant, who was residing in the adjoining premises, had three months ago, in the absence of the plaintiff at Kandy, cut a portion of plaintiff's roof and had placed a new roof on the boundary wall which separated the two houses. The prayer was that defendant be ordered to remove the said roof and pay Rs. 30 as damages with costs. The defendant answered that his roof had been supported by plaintiff's wall for 10 years and upwards, and denied that he had caused any damage as alleged. The evidence, however, went to show that defendant's roof had rested for nearly 20 years, and until the committing of the grievance complained of, on posts erected a few inches from the foundation of the wall in question over which the plaintiff's roof had overlapped. Judgment was given for plaintiff by the Commissioner (*Livera*) as follows: "there can be no doubt that defendant's roof never rested on the wall which separates the plaintiff's house from the defendant's premises, but on posts erected near its foundation. I am satisfied that defendant took advantage of plaintiff's absence and committed the damage alleged. Judgment is hereby entered up in favor of the plaintiff with costs, and the grievance complained of to be removed." Subsequently, it having been represented to the Court that the defendant had not fully carried out its decree, although he had replaced his roof on posts, the Commissioner after a personal inspection of the place made order as follows: "Defendant should lower his roof a foot and a half: if the plaintiff's rafters had not been cut by defendant, the roof could never rest so high as it does now."

Damages. Boundary wall and adjacent roofs.

In appeal, Browne, for appellant.—The judgment of the Court below had been satisfied by the payment of damages on account of the plaintiff's roof which had been cut, and by the removal of defendant's roof from plaintiff's wall. Defendant could do as he pleased on his own land, and the Commissioner was not justified in conceding more than had been asked for in the libel, which contained no prayer for general relief.

Grenier, for respondent.—The effect of the judgment was to place the parties in statu quo, and the defendant by raising his roof was preventing the plaintiff from replacing the cut ratters.

Per STEWART, J.—"Affirmed. The appellant is evidently seeking to take advantage of his own wrong."

Loan to wife: liability of husband.

C. R. Colombo, 93220. This was an action to recover Rs. 35·50, being value of a silk cloth and certain jewelry alleged to have been lent by plaintiff's wife to defendant's wife. The loan was denied altogether in the answer, but the Commissioner (*Livera*) held the same proved, and gave judgment for plaintiff as prayed for.

In appeal, Brito, for appellant. The action was not maintainable, as the articles sued for were not necessaries supplied to defendant's wife.

Grenier, for respondent. But the evidence disclosed a promise by defendant to return the goods and he was therefore liable.

Per STEWART, J.—"Affirmed. There is evidence that the defendant promised to return the articles."

December 9.

Present STEWART and CAYLEY, J. J.

Action for money paid. Proctor discouraging a good appeal.

C. R. Newera Eliya, 3852. The plaintiff sued the defendant for the recovery of Rs. 21, "being money paid on defendant's account and at his request on the 15th March, 1873." The case came on for trial on the 13th May, (plaintiff being represented by Mr. Proctor *E. de Waas*) when defendant, on being examined, admitted that the plaintiff had paid Mr. Proctor Bartholomeusz Rs. 21 on his (the defendant's) account in C. R. case 3646. The latter record not being forthcoming, the hearing was adjoined till the following day, when the case book was produced, and Mr. Bartholomeusz deposed as follows: "I received from plaintiff two gunieas on account of defendant with reference to a case in which I had appeared for defendant. I cannot remember the date upon which I received it." The Commissioner (*Hartshorne*) however non-suited the plaintiff, on the ground that it had not been proved that defendant had authorised or requested the plaintiff to make any payment on his account. *In appeal*, per CAYLEY, J.

Action for money paid. Proctor discouraging a good appeal.

—"Set aside and judgment given for plaintiff as prayed. Defendant admits that plaintiff paid Mr. Bartholomeusz twenty-one rupees (Rs. 21) on his, defendant's, account, but states that he repaid the money to plaintiff. This the defendant has failed to prove. The Supreme Court has read with surprise a letter filed in the case and written by the plaintiff's own Proctor to the Commissioner, in which the writer states that to the best of his knowledge and belief his client has no grounds for appeal. This letter (which the Proctor has been requested to explain but of which he has offered no explanation) was apparently written with the object of prejudicing the writer's own client. The Commissioner has written across the letter the remark.—"If he wishes to appeal let him do so." It should, however, be clearly understood that, if an appeal is filed in time, it requires no consent on the part of the Court below, or any recommendation on the part of the appellant's Proctor or any one else. It is filed as a matter of right, and becomes a proceeding before the Supreme Court with which the Court below has nothing further to do except to forward it in due course. The Supreme Court can only suppose that the object of the appellant's Proctor in endeavouring to stop the appeal for which his client had such good grounds, was to prevent the Supreme Court from reading the very proper remarks of the Commissioner about the removal of the connected record, for which one or other of the two parties engaged in the case appears to have been responsible."