THE

APPEAL REPORTS:

BEING

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF CEYLON

SITTING IN APPEAL.

C. A. LORENZ, Esq.,

ADVOCATE.

PART I.

CONTAINING

THE REPORTS OF 1856.

COLOMBO:
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1860.

ADVERTISEMENT.

By the kind permission of the Government of Ceylon, I am enabled to publish the First Part of a series of Reports, which, when completed, will comprise the Decisions of the Supreme Court during the years 1856—1858. The greater number of them were prepared by me, from notes taken during the argument. Some of the cases decided between the Months of June and September, 1856, were reported by my learned friend, Mr. Owen Morgan, to whom I beg to tender my acknowledgments. The entire series has also undergone subsequent revision, and been carefully compared with the Minutes of the Supreme Court, wherever the latter were found to be of any assistance.

I trust to be able to publish the remainder of the series in a few months more; and it is hoped, that the Government will continue to afford the same facilities to future reporters, which they have so liberally extended to me, and for which I am mainly indebted to Sir Henry Ward. The very limited profits derivable from the sale of legal works in Ceylon, (however useful they may be to Judges and Practitioners, and thus, ultimately, to the Public,) must always prevent publications of this kind being undertaken at the private expense of individuals. But the information which they convey to gentlemen in the Judicial Service, who are not in the immediate vicinity of the Supreme Court, will, it is believed, be considered a sufficient reason for allowing the publication of such works at the Public expense.

I have to thank Mr. *Skeen*, and Mr. *Herbert*, of the Government Printing Office, for the great assistance they have rendered me, in carrying the book through the Press, and for the excellent manner in which it has been printed.

C. A. L.

Colombo, 8*th July*, 1860.

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2. A husband may sue in his own name for lands belonging to his wife. - 176

3. Where it appears that there are other parties entitled in common with the plaintiff, the Court will permit them to join in the suit. - - *Page.* 177
4. It is no objection to an action by the lessee for quiet enjoyment, that the parties who have disturbed him have not been joined. - - 191
5. The assignee of a bond, if empowered to recover by all legal means, may sue in the assignor's name. - - - - - 142
6. The owner and master of a vessel cannot be joined in an action for the non-delivery of cargo. - - - - - - 200

See *Crown.*

PARTITION.

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PAUPER.

1. A party may be dispaupered at any stage of the case; and if dispaupered after evidence heard, the Supreme Court will not interfere. - - 15

PIGS.

1. Under Ordinance No. 2 of 1835, § 10, a party may shoot a pig trespassing on his cultivated land, without a license from the Headman. - - 14

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1. A party having planted land on a contract made with the widow of the deceased owner, was held entitled, as against the heirs, to a house thereby reserved to him. - - - - - - 19
2. A planter is by custom entitled to reside on the land planted by him. - 201
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1. A Magistrate cannot alter the charge, after the case has been disposed of. - 2
2. In prosecutions for the breach of an Ordinance, the section and number of the Ordinance should be stated. - - - - - 2
3. Where the title to property is in dispute, the proceedings should be stayed till the title is decided by a civil action. - - - 2
4. Where a charge is criminal only under an Ordinance, such Ordinance must be referred to in the plaint. - - - - 13
5. A defendant accused of larceny is not entitled to an acquittal, on the ground that the act proved constituted a robbery. - - - 13
6. Where a defendant has been tried and acquitted, the complainant is not entitled to ask for a new trial. - - - - 14
7. It is no objection in appeal, that a defendant was brought upon a warrant without a previous summons. - - - - - 24, 122
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10. A Magistrate cannot carry out a sentence of corporal punishment pending the period allowed for appeal. - - - - - 101
11. The defendant, on a charge of having stolen property in his possession, admitted the possession, but added that he had taken the property for wages due to him. A conviction based on such admission was set aside. 133
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14. A conviction, where the defendants had not been allowed time to secure the attendance of witnesses, set aside. - - - - 187
15. Where the summons did not contain the name of the complainant, nor state the offence with sufficient certainty, the Supreme Court quashed the proceedings. - - - - - 192
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4. Under an allegation of possession by the plaintiff, it is competent for him to prove possession by his mortgagee. - - - - 115
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7. Possession from the early part of 1841, up to May 1851, held insufficient to confer a prescriptive title. - - - - - 164
8. Prescription against a rightful owner, when admitted. - - - 174
9. *Qu.* Whether 35 years' possession would confer a title by prescription, where such possession is alleged to have been as mortgagee? - - 221
10. Possession for more than 10 years under a gift from the son of A., held not to have been interrupted by the appraisement of the property in the estate-case of A., and a seizure of it under a writ against the donor. - 243
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2. A Proctor cannot, in the absence of a special agreement, charge more than 10*s.* for conducting a case in the Police Court. - - - 22
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1. A Seaman's wages are not forfeited by his refusal to proceed on a voyage not designated in his Articles. - - - - - 2
2. Such articles cannot be varied by parole evidence. - - - 2
3. The owner and master of a vessel cannot be joined in an action for non-delivery of cargo. - - - - - - 200
4. A Justice of the Peace cannot try an offender under § 243 of the Merchant Shipping Act. - - - - - - 260

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1. On a complaint under Ordinance No. 10 of 1852, § 5, the defendant must be proved to have failed to report the disease without the least possible delay. - - - - - - - 14

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1. Annexing a stamp to a security-bond originally written on insufficient stamp, does not render the bond valid. - - - - 134
2. A notice of judgment under § 7 of the Rules of 1842, need not be on stamp. - 153
3. A contract relating to the sale of goods does not require a stamp. - 165
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2. A conveyance based on a previous agreement, and which conveys the premises "according to the intent and meaning of" such agreement, incorporates a reservation contained in it, although the *habendum* in the conveyance professes to convey the premises absolutely. - - - 195

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2. The widow's liability must be restricted to the amount of assets received by her. - - - - - - - 92
3. A widow is, under ordinary circumstances, entitled to administration of her husband's estate in preference to the heirs. - - - 144
4. The widow and heirs of an intestate may sell his property without obtaining administration. - - - - - - 233
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THE APPEAL REPORTS.

1856.

January 8.

Present CARR C. J., STERLING J., and TEMPLE J.

1856.
Jan. 8.

[On this day, the Hon'ble PAUL IVY STERLING, Esq., was sworn in as *Senior Puisne Justice*.]

No. 1,776,
D. C. Tangalle. } *Aratchigey* v. *Halaperoemegey.*

Non-joinder of minors interested in a suit, no ground for dismissal.

It appeared that certain minors were interested in this suit, which the Court below had dismissed on the ground of their non-joinder. The Supreme Court, on appeal, remanded the case back to the District Court for re-hearing and decision *de novo*, with liberty to the plaintiff to apply to the Court to be appointed guardian of the minors *ad litem*, and to amend his libel accordingly. The hearing of the case to stand over, if necessary, for that purpose; and the costs to abide the result.

No. 5,690,
D. C. Jaffna. } *Amblaven* v. *Modely Tamby.*

Where an Intervention has been set aside, the Court cannot afterwards pronounce a judgment against the Intervenient.

The judgment of the Court below was set aside, and the case remanded for re-hearing and decision *de novo*, on the following grounds:—"The intervention having been set aside on the intervenient's and her proctor's absence, on the 13th July, when she was also adjudged to pay her own and the other parties' costs consequent on the intervention, that judgment must be considered as a non-suit, and final in respect of the intervenient's claim or interest in the suit. The Court below could not, therefore, proceed to give a subsequent judgment on the 24th July, against her, to the effect that the plaintiff should be put in possession of the land, (which was held by *her*, and was in dispute between them on the intervention,) and that she should pay also all costs in the suit."

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Jan. 8.

No. 4,995,
C. R. Batticaloa. } *Canayenagem* v. *Dixon.*

A Lessee may, after notice, repair, and deduct the expenses from the rent.

The general law on the subject of Repairs is, that a lessee can compel his landlord to keep the property leased in good order, so that it may be applied to its common purposes; and should the landlord neglect to do so, after due notice, the lessee may deduct the cost of necessary repairs from the amount of the rent. Grotius' *Introd.* iii. 29, § 12; Vander Linden, *Instit.* 238; 1 Domat, *Civ. Law*, 101; 3 Burge, *Comm.* 346.

No. 8,281,
P. C. Matella. } *Dorecumboore* v. *Sinne Lebbe.*

A Magistrate cannot alter the charge after the case has been disposed of.

The conviction in this case was set aside on the ground of irregularity,—it appearing that the charge had been altered after the Police Magistrate had disposed of the case. The charge, as originally drawn, was defective, in omitting to state the complaint by such description thereof as would shew it was punishable in law; and the Schedule of Forms annexed to the Ordinance No. 7 of 1854 shews that on prosecutions for breach of any Ordinance, both the *section* and the *number* of the Ordinance should be stated.

In prosecutions for breach of an Ordinance, the section and number of the Ordinance should be stated.

No. 35,105,
P. C. Colombo. } *Seyedoe* v. *Silva.*

On a charge under cl. 14 of the Ord. No. 14 of 1840, if the title to the field be disputed, the proceedings should be stayed till the title is decided by a civil action.

On a charge for cutting, thrashing, and removing the paddy crop of a certain field, without giving notice, or paying the renter's share, in breach of clause 14 of the Ordinance No. 14 of 1840; *Held*—That as the title to the field was disputed, further proceedings should be stayed, until it be decided, in a civil suit, whether the land in question be liable to any, and what tax.*

January 12.

Present Carr C. J., and Temple J.

Jan. 12.

No. 16,683,
D. C. Galle. } *Hook* v. *Steadly.*

Where a Seaman had signed

This was an action brought by the plaintiff as a Seaman on board the *Bothnia* to recover from defendant who was Master

* See also No. 7,773, P. C. *Avishavelle.*

1856.
Jan. 12.

thereof, the sum of £10. 4*s*. 6*d*. being balance of wages due to the plaintiff as Seaman, and for work and labour done as such on board the *Bothnia*, at the instance and request of the defendant; and further, to recover certain clothes left in charge of the defendant, belonging to plaintiff, and of the value of £3. 5*s*. 6*d*.

Articles to the effect that he was "Shipped at *Cardiff* on a voyage to *Galle*," Held that no parol evidence was admissible to alter or explain the meaning of these words.

A Seaman's wages are not forfeited by his refusing to proceed on a voyage not designated in his Articles.

Defendant pleaded, 1. *nunquam indebitatus;* 2. *non detinet;* 3. that according to the terms of the Agreement, the plaintiff was not entitled to claim wages till the vessel had completed her discharge, and arrived at a final port of discharge in Europe; 4. that the plaintiff did not leave the vessel with the consent of the defendant, nor was the plaintiff discharged; but that the plaintiff left the vessel refusing to work; 5. that the vessel was undergoing repairs, and that she had earned no freight.

Replication to 1st and 2nd pleas, *similiter;* and as to the 3rd plea,—that the Agreement was to work from *Cardiff* to *Galle*.

The Shipping Articles produced in evidence showed that the plaintiff had agreed to perform a voyage from *Cardiff* to *Galle;* but parol evidence was given to shew that although the Shipping Articles mentioned the voyage as from *Cardiff* to *Galle*, yet that the port of discharge was to be somewhere in *Europe*.

The evidence of Mr. *Black*, the Consular Agent, was to the effect that in a conversation had with the plaintiff and other Seamen, they said they had no complaint to make, but that they would work no more and wanted their discharge; that they "doggedly and sulkily said, they wanted their discharge and would work no more."

And hereupon the District Judge pronounced the following judgment:—

"The Court is not prepared to accept the construction placed on the Shipping Articles by the plaintiff's proctor, but does not deem it necessary to consider at length the question of what that construction ought to be, there being evidence before it as to matters of fact upon which a satisfactory conclusion may be attained. The plaintiff and his witnesses have stated that they were assured by the Shipping Master at *Cardiff* and by the defendant during the passage out, that their voyage was to terminate at *Galle*, but these statements are met by what the Court considers to be evidence on the other side quite as satisfactory, if not more so. There is proof of parties, who shipped at *Cardiff* at the same time with the plaintiff, and who signed the same articles as he did, being still on board, and the Court considers the evidence of the American Consular Agent conclusive against the present claim. The plaintiff's claim is dismissed with costs."

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On Appeal, (*R. Morgan* appearing for the Appellant,) the Supreme Court reversed the foregoing judgment, and pronounced judgment as follows:—

"The defendant is decreed to pay to the plaintiff the sum of £10. 4*s*. 6*d*. claimed in the Libel for his wages, and to restore also the clothes of the plaintiff, or to pay him a further sum of £3. 5*s*. 6*d*. as the value thereof.

"The Supreme Court is of opinion, that the defendant is bound by the insertion in the Articles of Agreement,—'shipped at *Cardiff* on a voyage to *Point de Galle;*' and that the plain and simple construction and legal effect of that alteration in the Articles is that the plaintiff and other Sailors signing the same so altered, were shipped at *Cardiff* on a voyage to *Point de Galle* only, and were not bound to proceed further in the vessel; and this plain meaning of the written agreement cannot be explained away by parol evidence to show that the Clerk had inserted these words in ignorance of his duty and without authority, and that the Sailors had understood, that they were to proceed the whole voyage to some port of discharge in *Europe*. The Shipping Master is bound to attest the signature of each Seaman to every agreement after having caused it to be read over and explained to him, and the Master is bound thereby, and has only to blame his own neglect and carelessness if his story be true.

"A Seaman's wages are not forfeited by his quitting the Ship and refusing to proceed on a voyage not designated in his Articles of Agreement. The *Countess of Harcourt*, 1. Hag. 248. The *Cambridge*, 2. Hag. 243. Abbott *on Shipping*, 143, 529.

No. 18,631,
D. C. Trincomalie. } *Tranchel* v. *Shand.*

The plaintiff brought an action in *Trincomalie*, against the defendant, his factor in *Colombo*, to recover the proceeds of timber sent from *Trincomalie* to *Colombo*, where it was received and sold by defendant. On a

On a question respecting a Plea to the Jurisdiction filed by the defendant, the Supreme Court pronounced the following judgment:—

"The Libel seeks to recover the balance of an amount realized by sale of certain timber, which had been shipped from *Trincomalie*, as requested by the defendant (as per letter therewith filed), and landed at *Colombo* and delivered to the defendant, who took charge of the same and realized by sale thereof the amount stated in the accounts set forth in the Libel, and paid the larger portion of such amount, but neglected to pay the balance of it. According

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to the Libel therefore, the cause of action is on a contract made at *Colombo*, with the defendant, as factor or agent there, for the sale of timber shipped by the plaintiff; and it refers to letters filed therewith as evidence in support of such contract, some of which letters would tend to shew that the contract was not made at *Colombo;* but as it is admitted that the whole correspondence is not before the Court, the Judges can express no opinion as to the legal effect of the letters, excepting that some of those filed do not support the present Libel,—the cause of action appearing in the Libel to be at *Colombo*, where the defendant also resides." The Plea was therefore held good upon the Libel filed, which was accordingly dismissed with costs.

Plea to the Jurisdiction, *Held* that the cause of action arose at *Colombo*.

No. 13,026, *D. C. Caltura.* } *Silva* v. *Silva.*

In this case it was *Held* that the plaintiff as a prior Mortgagee was entitled to preference over a subsequent Mortgagee, although the latter had no notice of the prior mortgage. The Mortgage-deed of the plaintiff (the prior Mortgagee) was not impeached on the ground of fraud; and if the duplicate thereof was filed in the District Court, such registry would be a strong circumstance to rebut the fraud; and the broad principle of the Dutch Law should prevail, that special mortgages take preference amongst each other according to their respective dates.

A prior Mortgage is entitled to preference over a subsequent Mortgage, although the latter had no notice of the previous Mortgage.

January 15.

Present STERLING J. and TEMPLE J.

Jan. 15.

No. 28,190, *D. C. Kandy.* } *Gallegodde* v. *Atteregamme.*

This was an action for the recovery of certain lands; and the plaintiff had filed an affirmation of her own and two other parties, to the effect that the defendant was not possessed of any property which would enable him to satisfy a judgment for the rents and profits, if the plaintiff should obtain such judgment: and that the defendant was committing waste and damage to the property of which the plaintiff was the rightful owner. And

A Sequestration granted on affirmations, that defendant was not possessed of sufficient property to satisfy a judgment for rents and profits, and that he was committing waste,—set aside.

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hereupon the District Court granted a Sequestration; against which order the defendant appealed on the following grounds: 1. that it did not appear upon oath that any amount was due to the plaintiff by way of rents and profits: 2. that the affirmation of the plaintiff was contradicted in all material points by the defendant.

The Supreme Court set aside the Sequestration, without prejudice to the plaintiff applying for an injunction.

No. 19,957, *D. C. Colombo.* } *Aina Egappa* v. *K. Mahamadoe.*

A Rule for Judgment ought to be personally served on the defendant.

In this case the plaintiff had filed an affirmation to the effect that the defendant was concealing himself to avoid service of the Rule for judgment. But the District Court refused to allow other than personal service. The Supreme Court, in appeal, held that personal service of notice of judgment was necessary. (See Rules and Orders, 17th June 1844, § 2.)

January 19.

Present STERLING J. and TEMPLE J.

Jan. 19.

No. 5,490, *P. C. Ratnapoora.* } *Van Hagt* v. *Telenis.*

Exposing a small quantity of unwholesome fish for sale, is not a nuisance.

A conviction on a prosecution for a Nuisance in exposing a small quantity of unwholesome fish for sale in public, was set aside; the act complained of not being a *nuisance*, either by common law or the local Ordinance, No. 17 of 1844, (cl. 41, 42.) The prosecution was not laid upon any Ordinance, nor did there appear to have been any *sale* of the fish.

No. 2,728, *C. R. Ratnapoora.* } *Kiribatgelle* v. *Mapenana.*

A plaintiff who holds a Mortgage Bond for an amount above £10, may

Where the plaintiff, who held a mortgage from the defendant for an amount above £10., and sued, not to recover the mortgage debt, but merely the value of the produce (below £10.)

which he alleged he was entitled to in lieu of interest, it was *Held*, that the Court of Requests had jurisdiction to entertain the case, which was accordingly remanded for a New Trial.

sue on it for the value of the produce, in lieu of interest, (if below £10) in the Court of Requests.

No. 16,138, *C. R. Jaffna.* } *Caderegamer* v. *Leembruggen.*

The defendant had accidentally shot a bullock, and the plaintiff as owner thereof claimed £4. 10*s.* as its value. The defendant admitted the accident, but denied the value set upon the animal. The Court below gave judgment for £1. 10*s.* and costs; but on appeal the Supreme Court held that each party should pay his own costs. If the plaintiff had only claimed £1. 10*s.*, *non constat* that the defendant would not have admitted the claim.

Where the plt. claimed £4 10*s.* as the value of his bullock, accidentally injured by the deft., and at the trial recovered only £1. 10*s.*, *held* that each party should bear his own costs.

No. 266, *C. R. Newere Ellia.* } *Kiri Menica* v. *Podia.*

The Rule for the *District Courts* (of the 23d June 1843), which directs, that if at the trial of any cause involving the right to immoveable property, evidence be given suggesting a title by Prescription, the Court should stay further proceedings, and allow amendment of pleadings and the filing of fresh lists,—was held to apply to proceedings in *Courts of Requests* also.

The D. C. Rule of the 23rd June 1843, respecting the Plea of Prescription, is equally applicable to proceedings in Courts of Requests.

No. 16,257, *C. R. Jaffna.* } *Moettoepulle* v. *Moeroegen.*

In this case the Court below entertained doubts as to the credibility of the witnesses on both sides, but gave judgment for the plaintiff. The Supreme Court, on appeal by the defendant, set aside the judgment, and remanded the case for a New Trial; costs standing over.

Where the Court below doubted the credibility of the witnesses on both sides, but gave judgment for the plt., the S. C. directed a New Trial.

1856. *Jan.* 19.

No. 5,093, *C. R. Bentotte.* } *Dinnis* v. *Silty.*

Several part-owners of land possessing it in separate shares, may join in one action for a disturbance of their possession.

In this case the plaintiffs sued the defendant for having disputed their title and disturbed them in the possession of certain lands. The defendant (after examination of the plaintiff) took the objection that the shares claimed by the plaintiffs were divided and *separately possessed;* but the Supreme Court, in appeal, held that there was no improper joinder:—and per STERLING J., "Wherever the interest is several, yet the plaintiffs ought to join, if the cause of action be one entire joint damage."

No. 119, *C. R. Matura.* } *Silva* v. *Goenesekere.*

A Fiscal's sale, held at the Fiscal's Office, without an order to that effect, or an application in writing from the parties, is void.

The plaintiff brought his action to eject the defendant from, and to be declared owner of certain lands. It appeared that the plaintiff had purchased the property at a Fiscal's sale, on an execution issued against the present defendant. But the sale had been held at the Fiscal's Office; and the Fiscal's officer proved that no order had been given by the Court, directing that the sale should be conducted at that Office, nor any application received from the parties consenting to the sale being held there. *(General Rules,* 11th July, 1840, cl. 34.) On these grounds the Supreme Court held the sale void.

No. 25,644, *C. R. Colombo.* } *Worms* v. *Parker.*

It is no objection to a Witness that he has not been subpœnaed. Proxies in Courts of Requests require no stamp. A Proctor, if authorised by the proxy, may sign security-bond in appeal.

In this case the Supreme Court *Held,* 1. that it is no objection to the examination of a Witness that he has not been served with a subpœna; 2. that Proxies in *Courts of Requests* need not bear a stamp; such not being required by the Schedule of the Stamp Ordinance, No. 19 of 1852; and the head "Power of Attorney" not being meant to include such proxies; 3. that the Appellant's Proctor, if authorized by the proxy, may sign the Security bond required from the Appellants.

January 23.

1856.
Jan. 23.

Present STERLING J. and TEMPLE J.

No. 16,499, *P. C. Negombo.* } *R. Cocq* v. *Silva.*

Coolies engaged to work during the Cinnamon-season, (which extends beyond a month,) are not liable, in the absence of a written contract, to the penalties of the Ord. No. 5 of 1841.

In this case the defendants had been sentenced to a month's imprisonment for desisting at their work in the Cinnamon Gardens, under cl. 7 of the Ordinance No. 5 of 1841; and an appeal was taken against this sentence, on the ground that they were not labourers, but merely performers of job-work. It appeared that they had been engaged for more than a month, viz: for the Cinnamon-season. *Held*, that no written contract having been given in evidence, under cl. 5 of the Ordinance, the defendants were exempt from the penalties of that Ordinance.

No. 5,558, *P. C. Ratnapoora.* } *Tissekutty* v. *Nona Baba.*

Using indecent expressions in public is not an offence.

Held that using indecent and unbecoming expressions in the public streets, did not constitute an offence at common law. It might have been entertained under cl. 2 of the Vagrant Ordinance, No. 4 of 1841.

No. 36,396, *D. C. Colombo.* } *Nugera* v. *Silva.*

A reference to Arbitration signed by a Proctor is ratified by the Client and becomes binding on him, by his taking part in the proceedings in Arbitration.

A reference to Arbitration had been made by order of Court on a motion signed, on the part of the 2nd defendant, only by his Proctor; but it was shewn in evidence, that the 2nd defendant had attended some of the meetings of the Arbitrators, and had taken part in the proceedings. The Court below hereupon pronounced judgment as follows:—

"This is a rule issued at the instance of the plaintiff against the defendant to shew cause why the Award filed by the Arbitrators in this case, and dated the 3d June 1852, should not be made a rule of Court. The defendants oppose it. It appears that in the present case the matter in dispute was on the 3rd February 1852 referred to arbitration, on a motion made and signed by the

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plaintiff, his proctor, and by the 1st and 3rd defendants and their proctor.* There is no regular bond of submission nor any record whatever of the terms of reference; nor is there any thing to shew that the 2nd defendant either concurred in, or was a party to, such reference. At Common Law any party to the submission might at any time before the award is made, revoke the authority of the arbitrator, and even render the submission void as to all. And it seems that it is equally so in Equity, that where defendants have different interests, the revocation of one defendant may annul the submission. The English practice on the Statute Law, 3 and 4 Will. IV. c. 42. § 39, referred to by plaintiff's counsel, wherein revocation is prohibited without leave of Court, can scarcely apply to this Colony. Here we have our own rules and practice for our guidance. In the present case it is sworn to by the 1st and 3rd defendants, (whose affidavit is, as regards some of the matters therein stated, supported by that of a third party or witness examined before the arbitrators,) that for reasons therein stated, they withdrew themselves from the submission after the examination of four of their witnesses and *before* the decision of the arbitrators, which in substance is *not denied* by the arbitrators in their counter-affidavit, as they state that although they had *declared* to the parties what their decision *would be*, the matter was still, at the request of the defendants, *postponed* to another day for *further evidence;* while in the interval the deponents were served with a notice by defendants not to proceed on with the arbitration which they abandoned. Under all these circumstances, and looking moreover to the recent decision of the Supreme Court in the case No. 7,071 of this Court, wherein it was held that the powers of a Proctor must be *narrowed* and *confined* to the *strict* and *literal meaning* of the words of a proxy, this Court is of opinion that the proxy filed by *Mr. Vanderstraaten* for the defendants in the present case, did not allow of his referring the matter in dispute to arbitration, without the express consent of all his clients; and there being nothing on record to shew that the 2nd defendant either consented or submitted to such reference, the Court is of opinion that it is not binding on him, and that there was moreover, a revocation of the authority by the 1st and 3rd defendants before the award was made or filed. The rule is therefore discharged with costs."

On appeal by the plaintiff, *Rust* for the plaintiff and appellant, after stating the facts from which it appeared, *inter alia*, that the defendants had twice withdrawn the case from the trial-roll with

* The Proctor for the 1st and 3rd defendants held a proxy from the 2nd defendant also, and represented all the defendants throughout the proceedings.

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a view to arbitration, contended that the order of the District Court was clearly wrong and must be set aside. 1st.—As to the reference itself. The motion upon which the District Judge made the order to refer, was signed by the Proctor for the defendants, and also by two out of the three defendants. In England an attorney had a general power to refer to arbitration, (2 *Chitty's Practice* 1,471; *Russell* 32,) and there was no distinction at Law or in Equity. *Furnival* v. *Boyle*, 4 Russell, 142. Here however the Supreme Court had decided, that a proctor must be kept strictly within the authority given him by the proxy. Any defect in the motion was however rectified by the conduct of the parties, who had *all* attended before the arbitrators and taken part in the proceedings until the close. They had thus ratified the act of their proctor and could not question its propriety. (Story *on Agency*, pp. 202 and 239; *Maclean* v. *Dunn*, 4. Bing. 727. *Voet*, iii. 3. §§ 10 and 12.) Ordinarily it is not necessary that a reference should be in writing, (*Russell*, p. 49.) All that is required is the intention of the parties to be bound by the decision, which is clearly evidenced in this case by their attendance. 2ndly.—The revocation by the parties of the arbitrator's authority is simply a nullity,—as they could not revoke the order of the District Court under which the arbitrators acted. That could only be set aside by the Court itself or upon appeal. (See *Misc. Rep.* p. 88.) In England, prior to the 3 and 4 Will. IV. c. 42, the right of revocation, before the award was made, existed, if the submission had not been made a rule of Court; but even then it was a contempt, and an attachment would lie. (*Russell*, pp. 101, 149, 150.) It is submitted that the order of the District Court here is equivalent to a rule of court in England; and further, that any party aggrieved thereby must avail himself of the regular method of getting the same set aside, and cannot take it upon himself to do so. Even before the 3 and 4 Will. IV. c. 42, parties could not revoke the submission after it had been made a rule of Court. (*Chitty*, 1,466. See also *Haggett* v. *Welsh*, 1. Sim. 134.)

W. Morgan, for the defendants and respondents.] The 2nd defendant not having joined in the motion to refer the cause for arbitration, he was not bound by the award. It was true that Mr. *P. Vanderstraaten's* signature appeared in the application; but he was the proctor for the other defendants also: his signature in addition to those of the other defendants could not be said to be *as representative of the 2nd Defendant*, as Mr. *De Saram*, the proctor for the plaintiff, added his signature to *that of the plaintiff himself* in the submission. Watson *on Arbitration*, p. 186. 2ndly.—The 2nd

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defendant gave no power to Mr. *Vanderstraaten* in his proxy to submit his case to arbitration. It would not be denied that a special authority was required in that respect. And Mr. *Vanderstraaten* was only authorised to appear and defend the 2nd defendant *in the District Court of Colombo*; and not before arbitrators. 3rdly.—The defendants, who had submitted to the arbitration, having revoked their authority before award, and the award in question being subsequent to the revocation, was null and void. Watson *on Arbitration*, p. 21. *Milne and others*, v. *Gratrix*, 7 East, p. 608. The facts of the revocation and notice thereof to the arbitrators, before the award, was clearly established to the full satisfaction of the Court below; and the statute of 3 and 4 Wm. IV. c. 42, § 39, had no manner of application to the Courts here. 4thly.—The ratification, relied upon by the appellant's counsel, being of a void act, was wholly inoperative. Story *on Agency*, § 240.

Sed per Curiam.] The Interlocutory order of the Court below is set aside with costs, and it is decreed, that the rule to make the award a rule of Court be made absolute. The reference was under an order of the Court which named the arbitrators thereby appointed, and the Supreme Court considers that the 2nd defendant ratified this reference made by his proctor, inasmuch as he, the 2nd defendant, attended before the arbitrators so appointed, and took part in the proceedings. The arbitrators have by their own affidavit, in the opinion of the Supreme Court, cleared themselves from the alleged charge of misconduct, and on reference to the award itself, it appears free from objection."

No. 16,588, *D. C. Galle.* } *Manegey* v. *Forbes.*

Where a plt. by his act on seeks only to affect the rights of the Crown, he should p: o-ceed agains t the Queen's Advocate.

This action was brought against a Government Agent, by a party who claimed ownership (as male heir of the original owner,) of certain lands of the tenure of *Parveny-Dewal*, and which the Government Agent had caused to be registered as having reverted to Government, on the ground that the original owner had left no male issue. *Held*, that the plaintiff by his action seeks only to affect the rights of the Crown, and the action should therefore be brought

against the Queen's Advocate, who is pointed out by Ordinance No. 12 of 1843, § 4, as the proper officer to represent the Crown.

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No. 15,869, *D. C. Caltura.* } *Senewiratne* v. *Fernando.*

In an action for money in the D. C. which might have been brought before the C. R., the plaintiff though successful is not entitled to his costs.

This was an action for money under £10, brought before the District Court; and the Court had given judgment for the plaintiff with costs. On appeal, the Supreme Court directed that although the plaintiff had succeeded at the trial, each party should bear his own costs; for as it was an action which might have been brought in the Court of Requests, the plaintiff could not under clause 5 of the Ordinance No. 12 of 1843, recover his costs.

January 26.

Present STERLING J., and TEMPLE J.

No. 28,826, *P. C. Kandy.* } *Muttusamy* v. *Bartholomeusz.*

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Where a charge is criminal only under an Ord., such Ord. must be referred to.

This was a charge against the defendant for non-payment of wages; but as such a charge is a criminal charge only under an Ordinance, and no Ordinance or clause of an Ordinance was referred to in the information, the dismissal of it by the Court below was affirmed in appeal.

No. 12,136, *P. C. Jaffna.* } *Parpadem* v. *Sambo.*

A deft. accused of Larceny is not entitled to an acquittal on the ground that the act proved constituted a robbery.

The defendants were accused of Larceny, and after the complainant's evidence had been heard, it was objected that the act proved did not constitute larceny, but robbery. They were however convicted, and the conviction was affirmed on appeal.

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No. 9,929, *P. C. Pt. Pedro.* } *Welyder* v. *Cannavadiar.*

Where a deft. has been tried and acquitted, the complt. is not entitled to ask for a new trial.

The defendants were accused of robbery, but were acquitted. The complainant in his petition of appeal prayed for a new trial. But the acquittal was affirmed on the ground that a man cannot be tried twice on the same charge, and also because the Supreme Court has no jurisdiction in a matter which has been properly investigated by the *Police Court*, and where no legal ground appears against its finding.

No. 17,450, *P. C. Mallagam.* } *Erasenayegam* v. *Modely.*

Under cl. 5 of Ord. No. 10 of 1852, a deft. must be proved to have failed to report the disease without the least possible delay.

The defendant had been fined under clause 5 of the Ordinance No. 10 of 1852, for not having reported a case of Small Pox in his house without the least possible delay. It was in evidence that the patient was *removed* within five days after he had been taken ill. On appeal, the conviction was set aside, as there was no evidence recorded on which to found any decision in the case; and, although the patient may have been removed within five days, as stated by the Magistrate, the defendant may nevertheless not have failed to report the disease with the "least possible delay."

No. 12,151, *P. C. Jaffna.* } *Keegel* v. *Gabriel.*

Under Ord. No. 2 of 1835, cl. 10, a party is justified in shooting pigs, if found trespassing.

This was a charge for shooting a pig under clause 10 of the Ord. No. 2 of 1835. The defendant admitted the shooting, but stated that the pig was trespassing in his field. The Court below having found him guilty, the Supreme Court on appeal, set aside the conviction, because the defendant was justified under the 10th clause in shooting the pig, if trespassing on cultivated or enclosed land. The preceding clause which requires a permission from the Headmen, does not apply to pigs.

No. 318,
D. C. Jaffna. } *Regina* v. *Welyder.*

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Offering a bribe to the Record-keeper of the Court to alter a document, and afterwards to a Clerk to abstract a deed from the record, was held to be a contempt of Court; the offence having some analogy to the case of tampering with a juror.

Offering a bribe to a Clerk or Record-keeper of a Court to alter or abstract a deed from the case, is a Contempt of Court.

No. 1,307,
D. C. Batticaloa. } *Selby Q. A.* v. *Chinnepulle.*

This was a case of Assault and cutting off the complainant's ear with a knife. It appeared that one of the defendants aimed a blow at the complainant with a knife which cut off the tip of his ear. The Court below having convicted the defendants, the Supreme Court, on appeal, affirmed the conviction, and *per* TEMPLE, J.— "Ear-cutting is an offence within the jurisdiction of the Supreme Court; but it is only such when done with the view of stealing the ear-ornaments."

Ear-cutting is an offence within the jurisdiction of the S. C., and is only such when done with the view of stealing the ear-ornaments.

No. 13,795,
D. C. Chilaw. } *Fernando* v. *Fernando.*

Plaintiff had been admitted in August 1850, to sue as a pauper. In 1855 the defendant without any previous affidavit obtained a rule on the plaintiff to shew cause why he should not be dispaupered. The plaintiff, on examination, admitted that he was possessed of property, but stated that it was incumbered or in litigation; and the Court, after hearing evidence, discharged the rule. *Held*, that evidence having been fully heard by the *District Court*, which thereupon decided that the plaintiff had no available property, the Supreme Court could not interfere. The question must be left to the discretion of the District Judge. No informality appeared on the proceedings. Though the defendant is not precluded from taking the objection at any time, yet the tardiness raises a suspicion against him.

Where the D. C. after hearing evidence, has refused to dispauper a party, the S. C. will not, in the absence of any informality, interfere with the finding.

A party may be dispaupered at any stage of the case.

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No. 3,053,
D. C. Galle. } *Issa Naide* v. *Silva.*

Revival of a superannuated judgment. On affidavit that the deft. though present in Court, did not hear his name called, and therefore could not shew cause against the rule, which he was ready to do upon notarial documents, the S. C. set aside the order reviving the judgment, and remanded the case.

The original libel in this case was filed in the late *District Court* of *Amblangodde*, on the 8th November 1839. The action was on a bond. The original Court having ceased to exercise its former jurisdiction, the case was transferred to the District Court of *Galle*; and on the 30th November 1852, the latter Court after issuing a rule to the defendant, who, it was stated, was not present in Court, revived the judgment passed in the case. The defendant appealed against this order, on the ground 1. that the defendant was present when the rule to revive judgment was made absolute, but did not hear his name called, (as verified by an affidavit filed with the petition,) and therefore could not shew cause against the rule; and 2. that he was ready to prove payment by a notarial receipt, which was annexed to the Petition for the satisfaction of the Supreme Court.

The order of the Court below was set aside, and the proceedings remanded to the Court below in order to enable the defendant to produce the alleged receipt.

No. 16,500,
D. C. Galle. } *Ahamadoe* v. *Alima Umma.*

Service of notice to examine *viva voce* should be personal. Examination of a Moorish woman.

This was an appeal against an order of the Court below refusing to allow the examination of a Moorish woman, a party to the case. It appeared that the notice had not been personally served on her, but only affixed to her door,—no reason being previously shewn for affixing it, which is allowed only by a special order when the Court is satisfied that a party is concealing himself to avoid service. *Held*, that the service by affixing, was bad, having been made without an order of the Court; and *per* TEMPLE J.—"Moorish women are very averse to appearing in public, and the District Court should exercise its discretion whether it is necessary that the examination should be conducted in open Court or in chambers."

No. 17,036,
D. C. Colombo. } *Catachicancanemegey* v. *Waniachigey.*

An administrator is entitled to the proceeds of property belonging to his

Upon the sale in execution of one-seventh part of a garden, (which one-seventh belonged to the defendant as one of the heirs of *Andris Silva*,) *Don Abraham*, the administrator of *Andris Silva's*

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estate, opposed the sale on the ground that the whole of the property belonged to his intestate. Fourteen days were allowed him to establish his claim, which however he failed to do. He afterwards brought his action in the *Court of Requests*, but on the day of trial withdrew it. The execution was then levied; and a surplus being left, the defendant claimed it. *Don Abraham* opposed, on the ground that the surplus should be paid to him as administrator, the defendant having admitted that the property belonged to the estate. *Held*, that unless the defendant could shew a settlement of the estate, and that he is entitled to the share, as having passed out of the hands of the administrator by a division of the estate, the money must go to the administrator. If the latter fails to pay the share of the defendant as heir, he is liable in an action. There is however no necessity for the defendant to bring an action, as directed by the District Court, to establish his claim to the money, as he can force a settlement from the administrator in the testamentary case.

intestate, unless the heir can prove a settlement of the estate, and a division of the property.

January 30.

Present STERLING J. and TEMPLE J.

No. 3,282, *P. C. Badulla.* } *Karendegedere* v. *Udewalawese.*

Jan. 30.

This was an information on which several defendants were convicted of *riotous conduct tending to a breach of the peace.*

Morgan, R., for the defendant and appellant.] What is the meaning of this expression? It is not a *riot*, because here the object *had not been carried out*, and at most it was only a *rout*. [TEMPLE J., I take it to be a riot,—the doing of a lawful thing in an unlawful manner. Look at 4 Blackstone. I think I could bring the case under one of the definitions there.] A riot is beyond the jurisdiction of a *Police Court*, (No. 7077, 7078, *P. C. Pt. Pedro, Civ. Min.*, 4th April 1853.) Then look at the amount of illegal evidence received,—as to the defendants being quarrelsome and litigious people, and having been convicted of previous offences. [TEMPLE J.—Is there sufficient legal evidence to support the charge? Cl. 14 of No. 11 of 1843, has been repealed. It does not signify

"Riotous conduct tending to a breach of the peace," is an offence, cognizable by a Police Court. A conviction will be affirmed, if there be sufficient legal evidence to support it, though illegal evidence may have been admitted at the trial.

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what amount of illegal evidence has been received, provided there be sufficient legal evidence.] The illegal evidence creates an impression on the mind of the Magistrate to the prejudice of the defendants. [TEMPLE J.—This is a very common offence in the Kandian provinces, and ought to be put down. The Calendar at Kandy is very heavy, and this is the way it is swelled.]

Judgment *affirmed.*

No. 19,661, *C. R. Colombo.* } *Paterenehelegey* v. *Tyntrigey.*

C. having taken the pltff's. cart on hire, had conveyed rice therein for the deft. There being a short delivery, the deft. detained the cart. Held in an action by the plt. to recover the cart, that the deft. had no right to detain it.

The plaintiff claimed a cart belonging to him which the defendant refused to give up, on the ground that a quantity of rice which had been delivered to one *Carolis Appoo* to be conveyed to *Kotmalie* in this cart, had been short-delivered; and also on the ground that by custom he (the defendant) might detain the cart until the deficiency were made up. It appeared that *Carolis Appoo* had contracted with defendant to convey the rice, and had engaged the plaintiff's cart for that purpose. The rice having been delivered short, the defendant was obliged to pay his employer £12. 14*s.* 9*d.*, on account of the deficiency; and thereupon on the return of the cart to *Colombo*, the defendant insisted on detaining it, until plaintiff should make good the deficiency. *Carolis Appoo* was not forthcoming.

De Saram (*C. H.*) Acting Commissioner, held that the cart of the plaintiff, a third party, could not be seized and detained on account of the fraudulent conduct of the contractor; and thereupon gave judgment for the plaintiff.

On appeal against this decision *Morgan* (*R.*) appeared for the appellant.

The judgment of the Court below was *affirmed.*

No. 8,929, *C. R. Matura.* } *Iddegodegey* v. *Liyenegey.*

An agreement to plant a garden, the owner

The plaintiff claimed £10 for work and labour in planting defendant's garden. In his examination he stated, "I claim £10 for

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agreeing to pay £10 to the planter, need not be in writing to enable the planter to sue for the money.

planting share. I kept no account of the expenditure. The defendant said he would give me a writing after I had cleared the garden. I agreed to plant if he would give me £10." On objection taken by the defendant that the action was not maintainable under § 2 of the Ordinance of *Frauds*, No. 7 of 1840, the Commissioner over-ruled the objection and gave judgment for plaintiff.

On appeal against this judgment,

Rust for the defendant and appellant, contended that the action was not maintainable. He quoted No. 5,670, C. R. *Negombo*, (*Civ. Min.* 16th August 1853, and see *Misc. Rep.* p. 84.)

Held, that the case did not fall within the Ordinance, and that the decision quoted did not apply.

Judgment *affirmed*.

No. 5,906,
C. R. Caltura. } *Scharenguivel* v. *Medumegey*.

The defendant having planted certain land on an agreement with the widow of the deceased owner, he was held entitled as against the heirs, to a house thereby reserved to him.

The original owner of certain lands, died leaving a widow and children. The widow entered into an agreement with the defendant, whereby it was agreed that he should plant 75 trees on the land, and should thereupon be entitled to live on the land; and that if he should plant more, he should be entitled to remuneration for such excess at 1*s.* 6*d.* a tree. Subsequently the heirs sold the land to the plaintiff, who brought this action to eject the defendant from it.

Morgan (*R.*) for defendant and appellant.] Although a widow may not alienate, she may make an arrangement beneficial to the heirs: and here the arrangement was beneficial, because otherwise the planter would have been entitled to his regular planter's share, viz., a third of the trees, which is in fact a third of the fee-simple of the land; whilst under the agreement, the defendant gave up a positive advantage (the planter's share,) for the permission to reside in a house occupying a small spot 2 by 2½ fathoms in extent.

TEMPLE J., however, thought it quite clear that the widow did not transfer the soil. Does the Agreement give the defendant a vested right?

On a subsequent day (8th March, *present* CARR C. J. and STERLING J.) the decision of the Court below was set aside, and the planter declared entitled to the house, with costs.

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February 9.

Present CARR C. J. and TEMPLE J.

No. 90,
C. R. Jaffna. } *Amblevaner* v. *Armogem.*

Interlocutory judgment, in Court of Request, where no evidence had been heard, held irregular.

In this case the Interlocutory judgment was not entered according to the 17th section of the *Rules and Orders for Courts of Requests*, no evidence having been heard; nor did the proceedings shew whether, when judgment was made final, the defendant was allowed or not to call evidence. The judgment of the Court below was therefore set aside, and the case remanded for a new trial.

No. 8,737,
C. R. Matura. } *Don Andries* v. *Ramanaikegey.*

A defendant not allowed to call evidence after he had once declined to do so.

In this case the plaintiff's evidence had been heard; but the defendant declined to call any evidence. The judgment was postponed; but on a subsequent day, before judgment was pronounced, the defendant wished to call evidence, but was not allowed to do so, and the Commissioner gave judgment for plaintiff. On appeal the judgment was *affirmed.*

No. 7,
C. R. Badulla. } *Helandegedere* v. *Helandegedere.*

Plt. entitled to judgment agnst. a deft. in possession, only on proof of his title.

This was a land-case, and after evidence had been heard on both sides, the Commissioner gave judgment for the plaintiff, remarking that "the plaintiff's evidence was not satisfactory, but the best that could be got; and the defendant had adduced no evidence whatever to the point."

The Supreme Court set aside the judgment, and remanded the case for a new trial, on the ground that the plaintiff could obtain judgment against the defendant (who was in possession,) only upon proof of his own title.

No. 24,
C. R. Matelle. } *Selby, Q. A.* v. *Williamson.* 1856. *Feb.* 9.

The defendant had in his answer pleaded that the land in dispute was worth more than £10; but on his examination stated, that the land was waste at the time the action was brought, and that it was now worth £10, because he had since cultivated it. The Commissioner rejected the plea to the jurisdiction, and proceeded to hear and decide the case for the plaintiff. On appeal the Supreme Court affirmed the decision.

On a plea to the jurisdiction, the value of the land is taken at the time of action brought.

No. 5,616,
C. R. Batticaloa. } *Mohedien Bawa* v. *Perera.*

The defendant was absent on the day of trial; but the Commissioner proceeded to hear a witness for the plaintiff, and gave final judgment for him. The Supreme Court, on appeal, set aside the final judgment and made it Interlocutory, the 18th and 19th clauses of the *Rules for Courts of Requests* not having been complied with.

A C. R. cannot enter, *final* judgment without notice to the deft.

No. 8,018,
C. R. Matura. } *Kudacallegey* v. *Mapallegamegey.*

The plaintiff had called two witnesses, and desired to call others. But the Commissioner said he presumed the plaintiff had called his best witnesses, and, refusing to hear others, gave judgment against him. On appeal the judgment was set aside, and the case remanded for a new trial. "The plaintiff ought to have been allowed to call further evidence, two only of his witnesses having been examined."

A C. R. cannot prevent a party calling further evidence.

No. 4,415,
C. R. Avishavelle. } *Isboe Pulle* v. *Packier Tamby.*

In this case "it was decreed that the land did not belong to the plaintiff, and therefore he was non-suited."

Where a plt. was non-suited,

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the S. C. struck out other words in the decree inconsistent with a non-suit.

R. Morgan, for the Appellant, wished it to be altered into a simple non-suit. [CARR C. J.—How can we make it plainer?] Here is a decree declaring the land not to belong to the plaintiff.

The judgment was amended by the plaintiff being non-suited with costs.

No. 101,
C. R. Chavagacherry. } *Weleyden* v. *Caderegamer.*

Qu.? Whether a fresh schedule shld be annexed to every new Transfer.

The plaintiff claimed under a deed of purchase of 1850, which did not however contain a Schedule or publication made apparently for it; though the previous deed in his vendor's favour contained a schedule made at the date of the sale to him in 1843. The Notary, who drew both the deeds, stated that in view of the previous schedule, he did not require a fresh schedule to enable him to draw the plaintiff's deed; but the Supreme Court, on appeal, required evidence on the point to shew that by the customary law a fresh schedule and publication could be dispensed with under such circumstances, and the deed be still valid.

No. 5,080,
C. R. Chavagacherry. } *Toussaint* v. *Armogem.*

A Proctor cannot, in the absence of a special agreement, charge more than 10*s.* for conducting a case in a P. C.

This was an action to recover £1 for services rendered as a Proctor at the Police Court. The plaintiff was not examined on oath as a witness; but the Commissioner after questioning him, gave judgment against the defendant. On appeal the Supreme Court set aside the judgment. "The plaintiff should prove by his own or other evidence that he had attended the whole day to conduct the case for the defendant, and that defendant had agreed to pay that amount for his services." [CARR C. J.—Is a Proctor entitled to £1, for conducting a case in the Police Court? I think 10*s.* is the amount charged in *Colombo*, in the Police Courts, and Courts of Requests.]

No. 4,680,
C. R. Kaigalle. } *Oenanse* v. *Amenamelagey.*

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Where title to land above the value of £10, is in issue, the C. R. has no jurisdiction.

This was an action to recover a certain quantity of Paddy (or its value) as ground-share of a field worth £22. 10*s*. The plt's title to the field was disputed by the defendant. The Court below having tried the case, gave judgment for the plt. On appeal, the judgment was set aside, on the ground that the parties having put the title to the field in issue, the case was beyond the jurisdiction of the Courts of Requests.

No. 5,730,
C. R. Caltura. } *Sedo Hamy* v *Fernando.*

The plt. cannot appeal, where his Proctor has submitted to a non-suit.

The plaintiff's Proctor declined to proceed, and claimed a postponement on the ground that a survey which had been ordered was against him. The plaintiff was thereupon non-suited. On appeal "the judgment was affirmed, the plaintiff's Proctor having submitted to a non-suit."

No. 141,
D. C. Badulla. } *Rodrigo* v. *Rodrigo.*
In rê Gamegey Johannes Rodrigo.

The S. C. declined to interfere between two administrators of the same estate, deriving their authority from different Courts, unless upon an application supported by affidavits.

In June 1854 the plaintiff applied to the District Court of *Colombo* for administration of the estate of the late *G. J. Rodrigo*, and, on the ground that the deceased had left property within the jurisdiction of the District Court of *Badulla*, as well as of *Colombo*, obtained an order from the Supreme Court giving sole and exclusive jurisdiction to the District Court of *Colombo*, in respect of the property of the deceased.

It appeared that another party had previously, in October 1853, produced a document in the District Court of *Badulla*, purporting to be the will of the said deceased; and had applied for administration of his estate there.

Held, on a letter from the District Judge of *Badulla*, that the Supreme Court could not interfere in the matter. The parties feeling aggrieved by its order granting exclusive jurisdiction to the District Court of *Colombo*, should apply in due form upon affidavits, and after notice to their opponents, to set the same aside.

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No. 1,870, *D. C. Ratnapoora.* } *Eknellegodde* v. *Mestrigey.*

Guilty knowledge rebutted by lapse of time and explanation corroborated by evidence.

This was an information against the defendants for having stolen cattle in their possession, knowing it to be stolen. The Supreme Court, on appeal against the conviction, set it aside, and acquitted the defendants. "From the lapse of time between the loss of the animal and its apprehension in the possession of the defendants, and from the fact that they at once mentioned the name of the man from whom they got it, who on being examined corroborated their statement in a great measure, the Supreme Court considers that guilty knowledge has not been conclusively established against the defendants."

February 13.

Present CARR C. J., and TEMPLE J.

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No. 15,169, *P. C. Caltura.* } *Pieris* v. *Mohamadoe Tamby.*

It is no offence to pull down a Fiscal's Notice of Sale.

A charge for pulling down a Fiscal's Notice of Sale fixed against a tree, had been dismissed by the Court below. On appeal the dismissal was affirmed, the matter charged not being an offence.

No. 37,316, *P. C. Colombo.* } *Hopman* v. *Sinne Marcar.*

A carriage-owner is not liable under the Carriage Ordinance for a refusal to hire by his wife.

This was a case under the Carriage Ordinance for refusing to let a conveyance, on the proper fare being tendered. It appeared that the proprietor was not at home, and the wife refused to let. The Court below dismissed the charge.

TEMPLE J.] The dismissal is affirmed. A man is not criminally responsible for the acts of his wife.

No. 12,092, *P. C. Jaffna.* } *Walley* v. *Irogenader.*

It is no objection in appeal,

R. Morgan, for the defendant and appellant, submitted that no summons appeared to have been issued previous to the warrant.

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A warrant under clause 6, of the *Police Court Rules*, can issue only in case of non-appearance: and according to clause 4, the party accused, if not present or in custody, should be *summoned*, before a warrant can issue.

that the deft. in a Police Court case was brought up on a warrant, without being previously summoned.

CARR C. J.] Does this appear to have affected the substantial rights of the accused?

Morgan.] It would; for the accused states that his witnesses were not present, which was probably in consequence of his having been in gaol on the warrant, and being thereby prevented from getting up his witnesses. At this rate every rule of the Police Court will be disregarded.

TEMPLE J.] He ought to have taken the objection in the Court below.

CARR C. J.] There is a great deal said about the Supreme Court favouring technical objections. We must try to act up to the spirit of the Ordinance.

The conviction was *affirmed.*

No. 20,876, *P. C. Galle.* } *Kellar* v. *Keegel.*

An unlawful detention of the person, is an offence cognizable by the P. C.

This was a charge against a Police Inspector for detaining the complainant half an hour at the Station House. The Court below held it no offence, and referred the complainant to his civil remedy. On appeal by him, the Supreme Court, after hearing *Morgan* (*R.*) for the appellant, set aside the judgment of the Court below, and the case was remanded for further hearing. "An unlawful detaining of the person being in the nature, and within the legal signification, of a false imprisonment, which includes an Assault, is an offence cognizable before the *Police Court.*" (1 Hawkins, P. C. c. 60, § 7.—4 Bl. *Comm.* 218.—1. Burn's Just. 278, *tit. Assault.*)

No. 302, *D. C. Jaffna.* } *Selby, Q. A.* v. *Vesovenaden.*

Statements made to a witness by the deft. on promise of

The conviction of the Court below was set aside, on the ground that statements made to a witness in the course of an attempt to

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settle the case, are not admissible in evidence against an accused, being made on promise of favour held out to him.

favour, are not admissible in evidence.

No. 3,740,
D. C. Trincomatie. } *Paleni Chetty* v. *Verapaterem.*

A superannuated judgment against a deceased deft. must be revived against his representative, before execution can issue.

A judgment had been entered in 1836 against a party, who had since died, before execution had issued. In 1855 the plaintiff applied for a rule on the defendant's Administrator to shew cause why execution should not be issued against him, which was granted; but *held* on appeal that judgment should have been revived against the administrator, before execution could issue against him.

No. 16,575,
D. C. Caltura. } *Mariano Siman* v. *Juan Siman.*

The Heirs of a deceased parent cannot claim, as agnst. third parties, their share out of any particular property.

A husband had, after the death of his wife, brought an action to recover certain monies advanced by him to the defendant; and having died pending the action, his heirs obtained judgment and execution, which was duly levied.

The plaintiff, a judgment-creditor of the husband, shortly after applied to the Court for an order of payment to draw the amount so recovered by the heirs.

Rust, for the children of the deceased wife, maintained that there having been no division of the estate after the wife's death, the money advanced by the surviving husband, and now recovered by his children, belonged to the common estate, and the children were therefore entitled to their share out of it. Grotius, p. 117; V. d. Linden, 104; Van Leeuwen, *Comm.* 413, 416; *Censura Forensis*, lib. iv. tit. 23 § 25; Voet, xxiv. 3 § 29, 30, 31; 1 Burge, 305, 306.

R. Morgan, for the plaintiff, (the judgment-creditor.)] The children cannot claim any particular portion of the common property. The mother died 30 years ago; and the claim of the children was long prescribed,—(See a judgment of Sir *H. Giffard*, of the Supreme Court of Judicature, No. 2,364, 6th July, 1822.)

Rust, in reply.] This is a question of partnership, the plaintiffs recover a certain sum of money, and we state we are entitled to a half.

The claim was set aside, on the ground that children could not claim the half of *any particular* property.

No. 336, *D. C. Matura.* } *Sarieboe* v. *Saiboedoray.* *In re Meera Lebbe Marcan.*

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A party died, leaving a wife and minor child, and a will appointing his brother and minor child executors. The Court granted probate to the brother, with reservation of right to grant like probate to the son, when he should become of age. The son afterwards applied for probate, stating that he had become of age; but the brother opposed on the ground that he was not of age. Evidence having been heard, the Court below found the son of age, and granted like probate to him, decreeing the costs to be paid out of the estate. *Held*, on appeal by the son, that the brother should pay the costs personally, his opposition having been vexatious.

Where an executor vexatiously opposed probate to his co-executor, and his opposition was set aside, he was condemned personally in costs.

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Present CARR C. J., and TEMPLE J.

No. 12,622, *P. C. Jaffna.* } *Augustinoe* v. *Pedroe.*

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This was a charge of assault upon a soldier in uniform. The complainant had gone up to two people who were quarrelling in the street, and advised them to "give each other freely," on which one of them knocked off his forage-cap with a stick, and on seizing hold of the stick, the other gave him a blow on the back. The Police Magistrate acquitted the latter, and sentenced the former to 20 lashes and imprisonment at hard labour for 3 months. On appeal by the defendants, it was ordered, that the appeal should stand over to allow them to apply to the Governor for so much of the sentence as inflicted corporal punishment; the Supreme Court considering that the case did not call for such punishment, and that it has not itself the power under the Ordinance to remit the same.

A common assault on a soldier in uniform is not an offence which calls for corporal punishment.

The Sup. Court has not the power of remitting a sentence.

No. 3,456½, *P. C. Badulla.* } *Amat* v. *Louis Hamy.*

This was an appeal against a conviction "for permitting or suffering to be used a cart belonging to the defendant, for which no license had been obtained; in breach of cl. 6 of the Ordinance No. 23 of 1848." *Per* CARR C. J.] The conviction is *set aside*. It is

To constitute a breach of the 6th cl. of the Carriage-Ordinance, the cart should

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be proved to have been used for hire.

not alleged in the charge, nor does it appear in the evidence that the cart was permitted or suffered to be used for the conveyance, for hire, of goods or passengers, which circumstance of hire is necessary to infringe the clause of the Ordinance. The owner may use his cart or lend it to his friends to carry goods for sale, without license, if it be not lent for hire.

No. 2,127,
C. R. Point Pedro. } *Cadergamer* v. *Peroemayner.*

A deed which is 30 years old need not be proved.

This case was remanded for a new trial. It appeared that a certain deed had been rejected in evidence on the ground that the attesting witnesses were dead. *Per* STERLING J.] By the English Law of Evidence that fact relative to a recent deed would be provided for by proving the hand-writing of the deceased witnesses. But the deed in this case being 30 years old, proves itself; and no evidence of execution is necessary: account being given of its custody, or it being that possession accompanied it.

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Present CARR C. J., and STERLING J.

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No. 15,249,
D. C. Colombo. } *Pintoe* v. *Pieris* and others.

Parol Evidence inadmissible to limit the liability of a debtor, when sued for contribution by his surety.

In this case the plaintiff sued the defendants for the recovery of a sum of money, paid by him as one of the sureties on a bond granted to Government by the defendants and another, as principals. At the trial it was proposed on the part of the defendants to prove, by parol evidence, that the plaintiff had become surety for the other debtor alone, and at his request, and not for the present defendants.

The arguments urged in the Court below are stated in the judgment. *(Lavalliere D. J.)*

"The defendant's counsel addresses the Court, and contends that it is competent for his client to enter into evidence that the plt. was only surety for one of the debtors of the late *Tamba Pulle*, who was therefore alone liable to the plaintiff, and not to the other debtors, the present defendants; and refers to the following authorities in support of his position.

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"*Hall* v. *Wilcox*, 1 Chitty *on Bills of Exchange*, 607, (M. and Rob. 58.) No. 14,502, *D. C. Galle*, 18th June 1851. *Perfect* v. *Musgrave*, 3 Chitty *on Bills of Exchange*, 1044, (6 Price, 111.) *Raggett* v. *Axmore*, ibid. 881, (4 Taunt. 730.) *Collott* v. *Haigh*, 1 Selwyn's *Nisi Prius*, 877, (3 Camp. 281, *Hill* v. *Reed*, D. & R., N. P. C. 26.) *Pike* v. *Street*, ibid. 1410, (1 M. & M. 226.) ibid. 387. 2 Phillips *on Evidence* 757, note 2, (3 Camp. 362.) *Turner* v. *Davies*, 2 Esp. 478. *Thomas* v. *Cook*, 8 B. & C. 728. *Bollson* v. *Cox*, 5 Harrison 218. 1 Pothier, 165—283.

"Mr. Advocate *Rust*, heard *contra*, contends that parol evidence cannot be adduced to vary or contradict a written instrument.

"1 Taylor, § 745. 2 Phillipps, 357. (9 Ed.) Chitty *on Contracts*, 99. Smith's *Mercantile Law*, 259. *Fentum* v. *Pocock*, 5 Taunt. 192; (1 Marsh. 14.) *Abbott* v. *Hendricks*, 10 L. J. C. P. 51, (4 Jur. 1113.) 1 Pothier, 165. 2ndly, That this contract being under the Ordinance No. 7 of 1840, for the prevention of Frauds and Perjuries, requires to be *in writing*, and cannot therefore be altered or varied by parol evidence. 2 Taylor 753 § 822. 2 Phillips, 359. 3rdly, That any agreement to vary the present one, must be therefore also *entered into by all*, as under the bonds they are all liable *in solido*. *Webb* v. *Salmon*, 19. Law J. Q. B. 34.

"Mr. Advocate *R. Morgan* in reply, contends that the rule has exceptions as regards evidence to alter or vary a written instrument. It does not apply as between debtors themselves, although it does as regards the creditor; 2, that he is not going to shew a guarantee or indemnity, but only that plaintiff was not a surety for the other defendant: the Ordinance therefore does not apply; 3, that he will prove that all agreed to the plaintiff standing surety for *Tamba Pulle* alone; the objection is therefore premature, and the authority referred to does not apply.

Judgment.] "The Court on a careful consideration of the arguments and authorities adduced by the counsel for the parties is of opinion, that it is not competent for the defendants, by parol evidence, to vary or contradict the agreement as appearing on the face of the instruments which are admitted by them, and upon which it appears the parties were sued by the Crown in the case No. 31. The authorities referred to by the defendant's counsel do not seem to the Court to be strictly applicable to the present case. The instruments in question are under seal, and in which the parties are bound jointly and severally. The plaintiff therein became security for all the defendants, including the late *Tamba Pulle*, and for the whole, each of the principal debtors being likewise debtors of the whole of the debt in favour of the Crown.

"The motion, to be allowed to call parol evidence to shew that plaintiff was only a surety for the late *Tamba Pulle*, and not for the present defendants is therefore, disallowed."

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On appeal against this judgment.

R. Morgan, appeared for the 1st and 3rd defts. and appellants.]

Rust for the plaintiff and respondents (*W. Morgan* and *Dias* with him), after distinguishing the cases cited on the other side, and shewing that they consisted, first, of those where proof of accommodation in actions on bills and notes had been gone into; and secondly, of a class of cases in equity when the liabilities of sureties *inter se* were discussed, contended that the evidence tendered in this case was clearly inadmissible: 1st, because parol evidence is inadmissible to vary a written contract. 1 Taylor §§ 813, 14, and 19. 2 Phillips, p. 357. *Abbott* v. *Hendricks*, 1 M. and G. 795. *Besant* v. *Cross*, 20 L. J. C. P. 173. *Foster* v. *Jolly*, 4 L. J. Ex. 65. *Adams* v. *Wordley*, 1 M. & W. 374. *Hoare* v. *Graham*, 3 Camp. 57. *Woollam* v. *Hearn*, 7 Ves. 212. 1 Story's *Eq. Jur.* 1531. Chitty *on Contracts* p. 99. Smith's M. L. 257. 2ndly, because the bond in question being required by the Statute of Frauds and Perjuries to be in writing, cannot be varied by parol evidence. 2 Taylor § 820—830. 2 Phillips, p. 359. *Goss* v. *Lord Nugent*, 2 L. J. Q. B. 127, *Marshall* v. *Lynn*, 6 M. and W. 109. *Stead* v. *Dawber*, 10 A. and El. 57. 3rdly, because any agreement between the parties to vary the bond must be in writing and signed by all of them. All are liable on the bond, each surety for the whole debt, and therefore any agreement to alter its terms would fall within the Statute of Frauds and must be in writing. *Webb* v. *Salmon*, 19 L. J. Q. B. 34. *affirmed* in the House of Lords. The collective case, *Galle* 14,502, 18th June 1851, relied upon by the other side, only decided that it was competent for a defendant to plead want of consideration to a suit on a simple money-bond. The *Kandy* case, 24,882, is an authority in favour of the plaintiff, as it decided that each principal is liable *in solido*, and that a surety who had paid a part of the debt could sue also the principal debtors or any one of them for the amount. It had been decided by the Collective Court on the 3rd January 1851, *Galle* No. 13,525, that if a surety, bound only for a moiety of the debt, paid the whole, he could recover the whole from the principal; and *a fortiori* here, where each debtor was liable, *in solido*, and each surety liable for the default of any other.

The judgment of the Court (TEMPLE *dissentiente*) was as follows:

"This order was made on a motion of the appellant to be allowed to adduce parol evidence to shew that the plaintiff in the suit was surety for one *F. R. Tamba Pulle* only, and not for the present defendants and appellants;—whereas, on reference to the bond, the plaintiff and others have bound themselves as sureties for the defendants and others as principals. The Supreme Court is therefore of opinion, that to have granted the motion would have been

to permit parol evidence to vary and contradict the bond, and to alter its legal construction, in contravention of the rules of evidence, mainly framed to provide against Perjury;—a provision which if found of necessity in England, should evidently be strictly maintained here, where false evidence is so easily obtained."

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TEMPLE J.] I dissent from the judgment given, and consider that parol evidence is admissible. No contract as between the principals and sureties appears on the face of the bond,—the only contract between them arising from the bond is an implied one, founded upon a principle of equity, that if one man pays another's debt he may compel repayment. The admission of evidence would not impeach the bond (which, as between the principal contracting parties, would remain undisturbed;) but would only rebut the implied equitable contract, by shewing a different contract to have been entered into between the principals and sureties.

April 5.

The order of the Court below was *affirmed*.

No. 26,656, } *Lindsay* and another v. The *Oriental Bank Corpo-*
D. C. Kandy. } *ration* and others.

The facts of this case are fully stated in the judgment and the arguments of Counsel. The judgment of the Court below, against which the present appeal was taken, was as follows:

The *Rajawelle* case.

"This is an action brought by *Elsy Lindsay* and *James Farquhar Hadden*, Executrix and Executor of the last Will of the late *Martin Lindsay*, and two of the surviving devisees in trust under the said Will, against the *Oriental Bank Corporation Colombo*, *George Smyttan Duff*, *James Ingleton*, *George Smyttan Duff* as Executor of the Will of the late Colonel *Brown*, and *David Baird Lindsay*, by which they seek to eject the defendants from the Estate known by the name of the *Rajawelle* Estate. *Prayer*, that they be restored to their original rights in, and be put and placed in the possession of, the said Estate; that defendants be decreed to pay to them the sum of £10,000, as mesne profits; and that defendants do pay costs of suit. The circumstances that have given rise to this case appear to be as follows:

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"Colonel *Martin Lindsay* and Mr. *George Turnour* were the proprietors of the entire *Rajawelle* Estate, and so continued until the death of the latter. Subsequent to that event (in the year 1846) Colonel *Lindsay* proceeded from *Scotland*, where he had been residing for some years, to *Ceylon*, for the purpose of selling the Estate.

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In 1846 it was accordingly put up to public auction in lots:—two portions, viz. lots No. 2 and No. 4, were purchased by Mr. *Tytler* and another; and Nos. 1, 3, and 5, being the premises now in dispute, were purchased by Colonel *Lindsay*. Shortly after this purchase, Colonel *Lindsay* died in *Kandy*, leaving a Will executed in *Scotland* in the year 1844, by which, after providing for the payment of all his just debts and funeral and other expenses, he devised to his widow *Elsy Lindsay*, *James Farquhar Hadden*, *Henry Lindsay*, *David Baird Lindsay*, and *James Hadden*, on certain trusts in his Will expressed, his portion of the *Rajawelle* Estate—being the premises in dispute. Of these parties *Henry Lindsay* renounced and refused to act, and *James Hadden* having acted died in *Scotland* in the year 1848, and *David Baird Lindsay* left *Ceylon* in the year 1850 and has never since acted,—though in the first instance he took probate of the Will in *Ceylon*,—the present plaintiffs taking probate likewise (being resident in *Scotland*) in the Sheriff's Court of *Aberdeen*. At the time of Colonel *Lindsay's* death, there was a Mortgage on his Estate, on which a sum of about £4,000 was due in favour of Mr. *Turnour's* Executor, Captain *Atchison*. In the year 1847 arrangements were made by the executors and devisees in *England*, with the firm of *Shaw* and *Caffary* in *London*; and a deed (exhibit F.) subsequently executed, and in February 1848 signed by all the executors and devisees (with the exception of *Henry Lindsay* who never acted), by which *Caffary* agreed to advance the sum of £6,000 on the security of the Estate,—the proceeds to be applied to the payment of the Mortgage and the upkeep and cultivation of the Estate. In accordance with the terms of this deed, and on the strength of a letter of credit granted by *Shaw* and *Caffary*, *David Baird Lindsay* did, on the 15th February 1848, draw Bills on *Shaw* and *Caffary* at six months' sight for the sum of £4,000,—which bills were discounted by the Oriental Bank. In the month of May 1848 *Shaw* and *Caffary* failed, and some months subsequent thereto, in July 1848, *David Baird Lindsay*, in consideration of this and of other bills drawn by him, cashed by the Oriental Bank and dishonoured, granted to *George Smyttan Duff*, as Manager of the *Oriental Bank Company*, a Bond mortgaging the *Rajawelle* Estate for a sum not to exceed £7,000; accompanying such bond with a Warrant of Attorney to confess judgment: and immediately after left for *England* in order, if possible, to make fresh arrangements similar to those he had previously made with *Shaw* and *Caffary*. Before leaving Ceylon, however, *David Baird Lindsay* applied for, and obtained from *Duff*, as Manager of the *Oriental Bank Company*, a letter in which the latter pledges himself not to proceed on this Bond against *Lindsay* during his absence

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from *Ceylon*, or up to 1st January 1849, provided the cultivation of the *Rajawelle* was properly maintained, (exhibit A); but in the month of November 1848, during *David Baird Lindsay's* absence from *Ceylon*, and without any previous notice to him, *Duff* did take proceedings and obtained a judgment in the District Court of *Colombo*, by virtue of the Warrant of Attorney to confess judgment, for a sum of £7,838. The Estate was subsequently sold by the Fiscal of the Central Province in satisfaction of the Writ issued, and purchased by the Oriental Bank for £2,225,—who, after the lapse of some 18 months, sold it to the late Colonel *Brown*, *James Ingleton*, and Doctor *Smyttan*, for the sum of £10,000.

"Before proceeding to consider this case on the merits, it appears the most convenient course for this Court to consider certain technical objections that have been taken by the defendant's Counsel. These objections are:—

"1. That *Henry Lindsay*, one of the executors named in the Will of *Martin Lindsay*, should have been joined as a plaintiff. 2.—That plaintiffs sue as Executors and Trustees, and it is not shewn that they are entitled to sue in either capacity. 3.—That no case as against the *Oriental Bank Corporation* has been made out, and that therefore the whole case for plaintiffs falls to the ground. 4.—That the *Oriental Bank Company* have not been made defendants.

"As regards the first objection, it is in evidence that *Henry Lindsay* renounced and wholly refused to act; and unless one accept the trust, he is not a trustee. *Willis*, p. 32, 38. As regards the second objection, the Court holds it has been shewn that the plaintiffs have the necessary power to sue,—for they had a constructive possession of the Estate in dispute, and mere possession is sufficient as against an immediate wrong-doer. *Armory* v. *Delamirie*, 1 Strange 505. Roscoe *on Ev.* p. 541. The objection taken moreover, would properly only apply to property from which the testator had been ousted. That plaintiffs had a constructive possession in the Estate, and that they were devisees in trust, and had so acted, is manifested from the Mortgage Deed granted by them to *Shaw* and *Caffary*—a surely sufficient positive act. As regards the third and fourth objections, the Court neither considers (looking at the nature of the present action,) the failure of plaintiffs' claim as against the *Oriental Bank Corporation* fatal, nor the non-joinder of the *Oriental Bank Company* material. The *Oriental Bank Corporation* may not be, from the absence of some specific provision in their Charter, legally responsible for the acts or debts of the

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Oriental Bank Company; but that *Company* has long ceased to exist, and it is not disputed that the *Oriental Bank Corporation* took over and succeeded to all its business.

"Having thus disposed of these technical objections, the Court proceeds to the consideration of this case upon the merits. It has been urged for plaintiffs, that the proceedings taken by the *Oriental Bank Company's* Manager in *Colombo* against *David Baird Lindsay* on the Mortgage Bond and Warrant of Attorney granted by the latter, are invalid, as regards plaintiffs, on four grounds. 1.—That they were in violation of good faith. *Coote on Mortgage*, p. 604. 2.—That the Warrant of Attorney was granted by only one of the executors, and that it is not sufficient to enter judgment against the others. *Elwell* v. *Quash*, Str. p. 19. 3.—That no demand was made previous to the institution of the suit. *Abbott* v. *Greenwood*, 2 Jur. p. 989.—*Capper* v. *Dando*, 2 Ad. and Ellis, cited in 2 Archbold p. 867. 4.—That judgment was obtained for more than the amount £7,000, mentioned in the Warrant; and 5. —That proceedings were taken and judgment obtained against *David Baird Lindsay*, personally, and not as one of the executors of *Martin Lindsay's* Estate. It has also been submitted, that the Mortgage Bond itself is invalid, for, though an executor may have power to mortgage the testator's Estate, it must be for the purposes of the whole Estate: and in this instance the Mortgage was only granted to the Oriental Bank as a further security for a debt already contracted by *David Baird Lindsay* personally, and that consequently there was no consideration.

"The Court considers, that in strictness the 2nd 3rd 4th and 5th objections thus taken must be held good; and as respects the 5th objection it is clear that the action was brought against *David Baird Lindsay* personally,—that the judgment of the Court is against *David Baird Lindsay* personally, and that the transfer to *George Smyttan Duff* by the Fiscal of the Central Province, transferred *only* the right and title of *David Baird Lindsay* in the *Rajawelle* Estate.

"It has, however, been urged by the counsel for defendants, that, though there are some irregularities in the proceedings, still that they are all founded on the Mortgage Bond granted by *David Baird Lindsay* to the Bank, which does hypothecate the *Rajawelle* Estate,—though the Bond itself binds *David Baird Lindsay*, his executors, administrators, and assigns solely; and that *in Equity* the Court should hold and consider the judgment of the District Court of *Colombo* as against *David Baird Lindsay*, as executor of *Colonel Lindsay*, and not as against him individually. And this

brings the Court to the consideration of one of the most important and most painful points of the whole case, viz. whether the proceedings taken by Mr. *Duff*, the Oriental Bank Manager in *Colombo*, against *David Baird Lindsay*, during his absence from *Ceylon*, were in breach of good faith. The Court has examined and weighed with extreme care and impartiality all the circumstances connected with this point that are before it, and it is constrained to pronounce its opinion, that such proceedings were *not* in good faith; and that the reasons assigned for breaking the solemn formal promise contained in the letter addressed by *Duff* to *Lindsay*, are entirely insufficient. There was (so far as the Court can perceive) but one circumstance that would have authorized *Duff*, after having written the letter to *Lindsay*, to proceed against him, before the date mentioned therein,—and that was, any neglect in the cultivation of the *Rajawelle* Estate. No evidence whatever, that such neglect did take place has been afforded, and Mr. *Duff* has himself stated, that such was not his reason for instituting proceedings. The Court must here refer to a circumstance which strengthens this charge of breach of faith. After proceedings had been taken by Mr. *Duff*, he was made aware that Mr. *Lindsay* had been able to effect other and more favourable arrangements with the Directors of the Oriental Bank in *London*, and a Deed was actually drawn up and signed by Mr. *Lindsay*, and the Bank's Secretary, Mr. *Lancaster;* but this knowledge had not the effect of causing Mr. *Duff* to stay the proceedings that he had commenced. But it has been urged, that *David Baird Lindsay* had concealed the real state of his affairs from the Directors of the Oriental Bank in *London*. This charge, however, has been only asserted,—not in any satisfactory manner proved. In truth, it would seem that the Bank Directors were kept fully informed of the dealings *Lindsay* had with their Ceylon branch by their local manager. Another point which should be considered here, and is of material importance, is as to Mrs. *Elsy Lindsay's* concurrence in the Mortgage Bond and Warrant of Attorney granted by *David Baird Lindsay*. This, the Court holds, has not been established, and indeed the letters of Mrs. Lindsay, put in by defendants, lead to an opposite conclusion.

"The Court, in consideration of all the circumstances of this case, is of opinion, that the judgment of the District Court of *Colombo* No. 8,997, is against *David Baird Lindsay* individually, and not as executor of Colonel *Martin Lindsay's* Estate, and that such judgment can in no way affect the rights of the other co-devisees, who were no parties to it.

"It is therefore decreed, that the defendants be ejected from the

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premises in dispute; that plaintiffs, as devisees in trust of the estate of *Martin Lindsay*, be restored to and quieted in possession thereof; that they do recover from the defendants mesne profits to the amount of £6,467 3*s*. 1*d*., in the following proportions: from the defendant *George Smyttan Duff* from 1st February 1849 to 30th April 1850, and from defendants *George Smyttan Duff*, as executor of the Estate of Colonel *Brown*, and from *James Ingleton* from 1st May 1850 to 21st May 1853, at the rate of £1,500 per annum, and that the above defendants do pay costs of suit, save and except the costs of the Oriental Bank Corporation, as against whom the libel is dismissed with costs, and the costs of the 5th defendant, which will be borne by himself."

In appeal against this judgment:

Feb. 23.

Mr. *Selby's* Argument.

Selby Q. A. for the defendants, (*R. Morgan*, *Rust*, *Lawson*, and *Lorenz* with him.)] This action was brought by *Elsy Lindsay* and *James Farquhar Hadden*, styling themselves Executrix and Executor of the Will of the late Colonel *Martin Lindsay* and two of the devisees in trust under such Will, against the *Oriental Bank Corporation*, and Messrs. *Duff*, *Ingleton* and *Brown*, and Mr. *David Baird Lindsay*, for the recovery of the *Rajawelle* Estate, and the mesne profits thereof.

Duff is sued in two capacities—individually, and as executor of *Brown*. *Brown* and the defendant *Ingleton*, in May 1850, purchased the property in question from the *Oriental Bank Company* in partnership with a Dr. *Smyttan* of Bombay, for the sum of £10,000. At the time of this purchase, the *Oriental Bank* was in quiet possession of the property, and had been so for about 15 months, under a conveyance from the Fiscal of the Central Province, made by an order of Court in execution. From that time (1850) the purchasers (*Brown* and *Ingleton*) together with *Smyttan*, (who is no party to this suit and has not been cited), continued in quiet possession, cultivating and improving the estate, and spending large sums of money upon it, up to the time when this action was brought,—21st May 1853. They were therefore 3 years in possession after the sale to them from the Bank, and the Bank had been 15 months after the sale to them by the Fiscal. *Duff* is also sued individually: and to this we have no objection; as it affords him the opportunity of defending his conduct, which has been most absurdly impeached. The first defendant is the *Oriental Bank Corporation:* who are, however, no longer parties to the suit, as the suit has been dismissed against them, and there has been no appeal by the plaintiffs against this dismissal. The *Corporation* were made parties under the supposition that they were identical with the *Oriental Bank*

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Company, and liable for their acts and debts. This the plaintiffs had failed to prove, and the suit was accordingly dismissed as against them. The consequence of which is, that not only is *Smyttan*, one of the proprietors of the property decreed to be given over, no party to the suit, but also the execution-creditor and purchaser is not before the Court, although fraud and collusion are expressly alleged between the *Oriental Bank Company* and *D. B. Lindsay*, as the foundation of this suit. *D. B. Lindsay* was the sole executor in *Ceylon* of the estate of his late father, Colonel *Lindsay;* and the resident proprietor and manager of the estate. He was so under the terms of his father's will, and with the concurrence and consent of his co-devisees, who had specially authorized him to manage and cultivate the estate, and especially to draw bills in respect of the necessary funds. He drew a number of bills, and he also gave the mortgage-bond, on which the estate was finally sold; and he is charged by the plaintiffs with fraud and collusion, in having given that mortgage. But although he is made defendant in the suit for obvious reasons—viz., in order that the plaintiffs might charge him with a fraud upon them, and thus get his acts and proceedings declared void,—yet his interests are identical with those of the plaintiffs; for he is not only a co-devisee under the will, but also one of the *cestuis que trust:* and he, accordingly, benefits by the present judgment as much as the plaintiffs do: for they get the estate back for his *benefit;* and of course he, though condemned in costs, has not appealed.

The plaintiffs in this case are the 4th defendant's mother and his brother-in-law. The action is to declare the mortgage fraudulent, as being not for any debt due by the estate, but for a debt due by *D. B. Lindsay* individually; he having colluded with the Bank (who had advanced the money) to defraud the owners of the property which he held only as a Trustee; and to declare the proceedings on that mortgage-bond void, as far as they affect the estate of the testator, because taken against *D. B. Lindsay* individually; It prays therefore, that the defendants be ejected from the land, and the plaintiffs restored to their original rights; and that the defendants be decreed to pay £10,000 for mesne profits.

We do not deny, that if the allegations in the libel had been proved, the plaintiffs might be entitled to relief—viz. that all parties be restored to their original position; and the plaintiffs put into possession; and of course, all the other parties restored to the same rights which they held or possessed previous to the sale. But, as it will appear by and bye, not only is their libel altogether disproved as regards the first defendant (*the Oriental Bank Corporation*), so

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that in point of fact the party who has committed the alleged fraud and collusion has not only been absolved and is not before the Court, but also all the allegations in the libel as to all fraud have been expressly abandoned. The whole proceeding is grounded on fraud: it is in the nature of a Bill in Equity by two devisees against their co-devisee and another for defrauding them. The parties to this Bill are the mother and brother-in-law of the party charged with the fraud. This most conclusively shews, that they felt nothing short of fraud could affect the validity of the proceedings. If they could have treated the proceedings as null—if they could have shewn that the estate was sold under some mistake—all that they would have done would have been to join *D. B. Lindsay* as a co-plaintiff with themselves to eject the present proprietors as mere trespassers. But they felt that they could not eject a *bona fide* purchaser of the estate upon a sale for an estate debt, unless they could impeach him with fraud and collusion. For otherwise it is impossible to suppose that a mother would have charged her son with fraud, and the son have consented to the mother bringing the charge. But though the whole case of the plaintiffs rests on allegations of fraud, there is a concealment of one fact, on which the whole case may turn,—and which completely destroys the charge of fraud—viz. that the plaintiffs, together with *D. B. Lindsay*, were parties to a deed in favour of *Shaw* and *Caffary*, by which they undertook to mortgage this very estate, in consideration of their advancing a sum of £4,000 to pay off a mortgage in favour of one Capt. *Atchison*, and £2,000 to carry on the cultivation of the property; that under that deed the Bank was the party who advanced the money: and that this was the very money for which, together with other advances, the mortgage bond for £7,000 was subsequently granted to the Bank by *D. B. Lindsay*. The facts of this case are, that Colonel *Lindsay* was originally the owner of the estate, in partnership with Mr. *George Turnour*; that after *Turnour's* death, a sale of the estate took place, at which *Martin Lindsay* became purchaser of his share; and having no money to pay for the purchase (and this is an important fact,) he granted a primary mortgage of the estate to Captain *Atchison* for £5,739, and was thus enabled to complete the purchase. At the time of Colonel *Lindsay's* death, there was also another charge upon the estate of £4,000, being a mortgage granted by him to Messrs. *Hudson Chandler* and Co., (the agents of the estate) to cover their advances on the estate: and which mortgage had subsequently been assigned for value to the *Oriental Bank* in September 1847,—of which assignment the Bank had given due notice to *D. B. Lindsay*, the resident owner

and executor, by a letter dated the 22nd September 1847. At the time of the sale in execution for the other mortgage, the Bank were still holders of this mortgage granted by Colonel *Lindsay* himself; and it was in consideration of the sale and payment of the debt on the mortgage of July, that they consented to give back this bond for £4,000 and to release their securities. This circumstance is borne out by the evidence of *Duff* before the commission in *England*. It is important to bear in mind, that at the time of Colonel *Lindsay's* death, the estate was deeply and irretrievably involved. There were the two debts—the one to *Atchison* of £4,000 with £800 interest, and the other to *Hudson* and *Chandler* of £4,000. The estate was not only thus encumbered, but there were no funds for carrying on the cultivation of it, and it was necessary to borrow. It should be borne in mind, that the estate was a coffee estate, the sole value of which depended on the cultivation of it being regularly and properly maintained. For this purpose *D. B. Lindsay*, who was in Ceylon and was a manager jointly with his father at the time of the father's death, proceeded to England in 1847; and in order to get funds for paying off the mortgage to *Atchison*, who pressed for his money, and also to some extent to provide funds for the upkeep of the estate, he, together with the plaintiffs on record, entered into an agreement with *Shaw* and *Caffary*. *To this deed the plaintiffs are parties.* It is dated the 15th of February 1848, and is made between all the trustees of Colonel *Lindsay's* estate of the one part, and *Patrick John Caffary* of the other part. It therefore includes *James Hadden* and *James Farquhar Hadden*. This deed, after reciting the will of *Martin Lindsay*, goes on to say, "that the testator, thinking it probable that one or more of his sons might feel disposed to devote himself or themselves to the management of the said premises, and for that purpose to reside in *Ceylon*, declared that he or they should be at liberty to undertake the management of the same accordingly, if his said trustees or trustee should consider it advantageous, &c." Then follows the agreement, which consists of several clauses. The second clause is to the effect that *Caffary* should forthwith give to *D. B. Lindsay*, a letter of credit authorising him to draw Bills of Exchange at six months' sight upon *Caffary*, under his said firm of *Shaw* and *Caffary*, and that all the monies so obtained by *D. B. Lindsay* should be applied in or towards paying the aforesaid mortgage-debt or the interest thereof;" and the fourth, to the effect that "the trustees or trustee for the time being of the said will, should within a reasonable time after a request from *Caffary*, make and execute to him a legal and effectual mortgage of all that

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part of the said *Rajawelle* Estate belonging to the said testator, and of the fixtures, &c." Then there are other conditions as to advances for cultivation, and as to the mode of payment by consignment of produce, which it is not necessary to read.

When this agreement was concluded, *Shaw* and *Caffary* agreed to accept bills for the money to be advanced in pursuance of it, and as it was necessary to get a party to cash them in *Ceylon*, the *Oriental Bank Company* agreed to do so. The parties to this deed thereupon wrote to the Bank a letter of guarantee, to which it is necessary to call your Lordships' attention. The letter is dated *Aberdeen*, 20th January 1848. [CARR, C. J.—Why, when they had this letter, did they take security?] The guarantee was a limited guarantee. It was limited to £4,000. *Shaw* and *Caffary* had failed. The *Haddens* had also failed. And it was only a reasonable precaution on the part of the Bank to require a mortgage of the property.

This was an arrangement with *Shaw* and *Caffary*, while *D. B. Lindsay* was in *England*. He returned to *Ceylon* to go on with the management of the estate; and on his return the agreement was executed here, by attorney, to give it validity. On this agreement *D. B. Lindsay* drew bills on *Shaw* and *Caffary* for £4,000 to pay off *Atchison's* mortgage, which was actually paid off by that money. He also drew bills for £2,000 under the agreement, which sum was required to pay interest on the £4,000 mortgage, and for the upkeep of the estate. Almost immediately after his return to *Ceylon*, as early as the 28th of February 1848, he made an application to the District Court of *Kandy*, in the testamentary case in which probate had been granted to him as sole executor in *Ceylon*, for power to mortgage the estate. The application stated, amongst other things, that the debts of the estate amounted to £12,500, of which £8,500 were secured upon the mortgage of certain of Colonel *Lindsay's* landed property in *Ceylon*, which had already become due and payable, and had consequently been called in by the holders of the mortgage. Upon this application, the District Court of *Kandy* made an order, authorising him to mortgage. This order has not hitherto been set aside or in any manner affected. [CARR, C. J.—Is that order not supported by some authority,—some affidavit by the party?] No affidavit was necessary. The order was made before *Shaw* and *Caffary's* failure, immediately on *D. B. Lindsay's* return from *England*. He had authority to draw bills under the agreement for £6,000, but the plaintiff had only given a guarantee for £4,000—and that was

not sufficient to pay off *Atchison's* mortgage. Besides he was still under this difficulty, a difficulty of which the plaintiffs were aware, that there was no use paying off this debt of £4,000, if the cultivation of the estate could not be kept up, and for which funds were absolutely necessary. He therefore mortgaged the estate to the Bank for £2,000, for which there was another security;—and this mortgage they still hold and it was proved in this case. Matters thus went on for a few months until the great commercial panic took effect in 1848, and notice arrived in *Ceylon* of *Shaw* and *Caffary's* failure. In the meanwhile the bills for £6,000 had been drawn on *Shaw* and *Caffary*, other bills had also been drawn for the purposes of the estate, and a large sum was due to the Bank, for which they held no security; and under these circumstances the Bank called upon *D. B. Lindsay* for a further mortgage, and he agreed as sole executor and under that authority from the District Court, to give such further mortgage, —these two amounts of £2,000 and £7,000 being considerably under the mark sanctioned by that authority. He accordingly granted the Mortgage of the 11th of July 1848 on which this case mainly has proceeded, and together with that mortgage, a Warrant of Attorney to confess judgment. It is important to look both at the mortgage and at the warrant of attorney, from both of which it will clearly appear, that he was acting under the authority of the District Court of *Kandy* as sole executor in *Ceylon* of his father's estate. The mortgage was drawn up by the late Mr. *Giffening*, at that time the senior Conveyancer in *Ceylon*, a person intimately acquainted with the practice here. It begins thus, "Know all men by these presents that I, *David Baird Lindsay*, sole executor in *Ceylon*, of the estate of *Martin Lindsay*, &c." Then come the recitals—a recital of *Shaw* and *Caffary's* deed—of the bill for £4,000 drawn on them—of their failure—of the bill for £420 drawn by *Hudson Chandler* and Co., and cashed by the Bank —of the advance of £230 on a bill drawn on Mrs. *Lindsay*—and also of other bills passed to the Bank with shipping documents for coffee,—and the condition is as follows: "That if the said *D. B. Lindsay*, his heirs, &c., should well and truly pay or cause to be paid unto the said *G. S. Duff*, or his successors, Managers, &c., the said sum of the several bills, and other sums of money aforesaid, with all interest, costs, re-exchange, postage and charges, (provided always, that the sum of money to be *ultimately recovered* shall not exceed £7,000), then this obligation to be void, &c." With this bond was also granted a warrant of attorney to confess judgment. It begins with "I, *David Baird Lindsay*, sole executor in *Ceylon*

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of the estate of *Martin Lindsay*," and after reciting the bond, authorises the attorney "to confess one or more judgment or judgments, and consent to the issuing of one or more execution or executions founded on the said bond, and in all respects to do and act for him in the premises as if he were personally present, and did confess and consent as aforesaid: Hereby releasing all and *all manner of error and irregularity* in such and in all such proceedings and all right of appeal; and ratifying and confirming, &c." I need not say, that, however it may affect the plaintiffs on record, it is binding on the grantor; and that *as sole executor;*—and further, that if he represented the plaintiffs, or they concurred in it, it is binding on them also; for the Principal and Agent are in law the same person. It was said below, that the mortgage was not for the interests or purposes of the estate. That it *was* clearly for the benefit of the estate—that, but for this arrangement, there was no chance of preserving the estate, and the whole concern must have been immediately brought to the hammer,—has been, I think, my Lords, most conclusively established in evidence. It was necessary for *D. B. Lindsay* to go to *England* to make further arrangements. Money he had not. Money his co-devisees did not give. And the estate would have been irretrievably ruined, if the cultivation had been stopped. Accordingly he determines to go to *England;* and having given the Mortgage for £7,000, obtains a letter from *Duff*, to which I must refer, because much has been said of that document, which is justified neither by the letter of it, nor by the spirit of the arrangement in respect of which it was given. Your Lordships will find this statement in the judgment of the Court below—"Before leaving Ceylon however, *D. B. Lindsay* applied for and obtained from *Duff* as Manager of the *Oriental Bank Company*, a letter in which the latter pledges himself *not to proceed on this bond* against *Lindsay* during his absence or up to the 1st January 1849, provided the cultivation of the *Rajawella* estate was *properly maintained;*" after which the Judge states that "the Court has examined and weighed with extreme care and impartiality all the circumstances connected with this point that are before it, &c." Your Lordships will find from the proceedings, that the charge of fraud and collusion on which the plaintiffs rest their case in the libel, was wholly given up: but the District Judge seems to have thought that his judgment against the defendants would be justified, if there was, as he says, a breach of faith on the part of *Duff* in taking proceedings against *D. B. Lindsay*. He says, he has taken great care and exercised great impartiality in examining the proceedings

on this point: and thereupon he finds a breach of faith on the part of *Duff*. Now, I shall read the letter itself,—and Your Lordships will see at once that proceeding on the bond was not the thing in the minds of the parties at the time, and that the letter has no reference whatever to the bond, or to any other matter but one. The letter is as follows:

"Dear Sir,—With reference to the £4,000 *bills* drawn by you on *Shaw* and *Caffary* of *London* on the 15th February 1848, at 6 months' sight, to the failure of these parties, and to the visit you now propose paying *London*, to endeavour to form a new connection, I hereby agree on the part of the Bank that, provided the cultivation of *Rajawelle* is *properly kept up*, *you* shall not be proceeded against *on the said bills* in the event of their dishonour, until your return to *Ceylon*, or say previous to the 1st January, 1849. I remain, &c., *G. S. Duff*." *If*, in spirit, there had been a departure from the agreement, I would not call attention to the fact, that the letter refers exclusively to the bills for £4,000, but I shall shew reasons why that letter only applies *to the bills for* £4,000; why it is especially limited to those bills; and why it could have no reference whatever in the mind of *Duff* or *Lindsay*, *to the Bond*, *or to any other matter but to the* £4,000 *bills*.

[Carr, C. J.—There is no evidence, either in *Duff's* examination, or any where in the mass of proceedings before me, in support of your statement, that the letter did not relate to the Bond.] The letter confines the promise to the *Bills* for £4,000. Proceedings on the bills, and proceedings on the Bond are not the same thing. They may have been the same as to *D. B. Lindsay;* but not to the other devisees who had given a separate guarantee for the £4,000 bills. It was to prevent proceedings on those Bills that the letter was given. It would not have affected *D. B. Lindsay's* credit in *England*, to have been sued on the Bond here; but it would have affected his credit and have prevented him entering into new arrangements, if proceedings had been taken against him and the plaintiffs in *England* on the guaranteed bills for £4,000. It was to prevent the parties being called upon in *England*, that that engagement was entered into. There was, however, probably, another reason for this engagement. It was obtained by *D. B. Lindsay*, not only to secure his relatives and himself from proceedings on these guaranteed bills; but it would seem, that *Lindsay* had led the parties to the guarantee to believe that the £4000 for which they had been liable had been paid, and he naturally would not wish to have them called upon to pay it whilst he was in *England*. "But," it may be said, "if this be so—

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and we admit that, according to the wording of the letter it applies only to the £4,000 bills—why did not Mr. *Duff* say so, when called upon to explain the supposed breach of promise." Because, I reply, Mr. *Duff* at once gave the true reason which influenced *him* in taking proceedings on the Mortgage Bond during *Lindsay's* absence. He did not refer to the letter to see whether the promise was as stated in the question put to him; but gave at once, as an honest man, the true reason for proceeding on the bond.—"Because" said he, "I was informed by parties on the spot that they were about to take steps to seize the crops." Now the crops were mortgaged to the Bank. It was *Lindsay's* intention therefore that the Bank should get them. It was the Bank's intention that the crops should come to them, for they would not have taken a Mortgage which did not include the crops. He could only prevent a fraud being committed on *Lindsay* and on the Bank, by getting into possession of the estate and preventing the crops passing into the hands of other creditors. It was the picking season. It has been alleged in the Court below that no sooner was *Lindsay's* back turned, than the Bond was put in suit. That is not the fact, and is not borne out by the evidence. Proceedings were not taken on the Bond until November. "I did proceed on the Bond; and I did so to uphold the Bond, and to uphold your agreement that the Bank should get the crops." That was Mr. *Duff's* answer to *Lindsay*. [CARR, C. J.—The Bond was given as security for the Bill. If Mr. *Duff* meant the Bill, and the Bond was security for the Bill, where is the difference?] The Bond was a security not only for the Bills for £4,000, but for other Bills amounting to nearly £3,000, for which no guarantee had been given; and the reason why Mr. *Duff* proceeded on the Bond in spite of the letter, was because he had been told that he would lose the crops mortgaged to him if he did not. It was therefore necessary, in order to uphold the Mortgage, that the Estate should be seized at once. But although he had got judgment on the Bond and taken possession, in order to prevent other parties depriving him of his just rights, yet he himself stayed the sale until after *Lindsay's* return in January 1849. There was therefore ample time, if there had been any breach of faith or any irregularity, for *Lindsay* to have applied to the Court for the redress which he would have been entitled to. *Duff* acted on the advice of those who were well qualified and competent to give him advice. Suppose the letter did refer to the Bond. Still I say that inasmuch as circumstances had arisen which neither party could foresee, Mr. *Duff* was absolved, because he was only acting

with a view to uphold the Bond, and to secure the crops which would otherwise have gone to other creditors, from whom it was his intention, and *Lindsay's* intention, to keep them. If the Estate had been sold, so that on his return he could have no relief, there might have been an excuse for the accusation. But he was in the Island, and was standing by when the property was sold; and after he has thus allowed the Estate to be sold, he has no right to apply for *restitutio in integrum*, on the ground that there was a breach of faith in putting the Bond in suit against him. On his return to *Ceylon* on the 29th of January 1849, he writes a letter to Ingleton from *Galle*. "I was very glad," he says, "to get your letter yesterday, and although the news is not pleasant, I hope that matters will take a turn. I go to *Colombo* to-morrow and shall let you know the result. Your attention and thought in laying aside some money for my use I do assure you I take most kindly. The steps you took with the Bank were perfectly correct. *It was no use attempting to resist.* I am, &c., *D. B. Lindsay.*" He was aware then of the proceedings against him, and yet he alleges no breach of faith, he takes no proceedings to stop the sale; but stands by and sees the sale take place and completed. And up to this hour he has taken no proceedings to impeach the sale.

So *Lindsay*, having given this Mortgage, and obtained the letter from *Duff*, proceeded to *England* in order to make arrangements for money to pay the debts and for further advances to keep up the Estate. In the meanwhile, Mrs. *Lindsay* had herself entered into negociations with the Bank as to the upkeep of the Estate. And here I shall refer to her letter of the 21st June 1848, to the Bank in *England*. "Under the circumstances in which I am placed," she says, "I trust the Directors will agree to hold over their claims against the *Rajawelle* Estate for a period of three years. For their security the *Bank will hold a first Mortgage on the Estate*, but which, though perfectly secure ultimately, it would be impossible for them to realize at the present time. The Estate is in very fine condition, and in a situation to yield a crop of about 5,000 cwts. of Coffee per annum; and it is under the management of my son, who resides in the Island and exclusively devotes his time to the property. If the Bank shall agree to this request, I would further propose that my son should for the future hand over the Bills of Lading to the *Oriental Bank* in *Ceylon*, drawing against the shipments to the extent of 30*s.* per cwt. &c." No person can read this letter without perceiving that Mrs. *Lindsay* fully admitted the debt to the Bank, and that the money received by her son was for the Estate, and that he was the Manager for the

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parties in *England*, and that, whether there was or was not a conveyance to the Bank, they had a right to the Estate or to payment of their money. Shortly after, *Lindsay* arrived in England; and in November 1848, the parties came to an agreement, which was shortly after signed by *Lancaster* the Secretary of the Bank, and by *D. B. Lindsay*. That agreement was intended to carry into effect the idea previously sketched out in the letter of Mrs. *Lindsay*:—the Executors were to have further time to pay, the crops were to come to the Bank, and the Bank was to find the funds for the upkeep and cultivation of the Estate, and to pay £40 a month by way of maintenance to Mrs. *Lindsay*. [CARR, C. J.—Why was this Agreement signed by *D. B. Lindsay* alone and by *Lancaster*? It is made between the Executors and Mr. *Duff* of *Ceylon*.] If *D. B. Lindsay* believed, as he did, probably as he was advised, and as was really the case, that he was sole Executor in *Ceylon*, it is not strange that he should have signed it alone, for the Estate vested in him alone. But whether Mrs. *Lindsay* signed it or not, the agreement carries out her intention and her own suggestions. She was to get £40 a month, and she did get £40 a month, and subsequently £25 a month up to August 1850. Now, this is an important document, for this reason. It recites the two Mortgages granted in Ceylon:—"Provided nothing herein contained shall extend or be deemed to extend, to prejudice, affect or diminish in any way the prior right, title, and claim, to and over the said parts, shares, estates, plantations, and premises, given and secured to the said *Oriental Bank*, or to the said *G. S. Duff*, as Manager as aforesaid, under and by virtue of the said two several hereinbefore recited Bonds, or instruments of hypothecation, or either of them, &c." Although, therefore, this agreement was arranged in *England*, it made particular provision for preserving the rights of the Bank upon the two Mortgages executed in *Ceylon*. [TEMPLE, J.—It suspended the Bank's rights under those Mortgages.] That might or might not be: but it did not deprive the Bank of them. It was a confirmation of them. But, the Plaintiffs say, "Why did not *Duff* complete that deed?"—Because, said he, I saw that the arrangement was altogether fallacious; and because you, *David Baird Lindsay*, kept back from the Bank,—not the fact of the Mortgage,—but the fact of your having given the Bank the right of immediate possession and sale under the Warrant of Attorney." It is in evidence, that, had the Bank in *England* known *that*, they would not have entered into that new arrangement, and it was *because* this power was represented to be wanting, or not disclosed, that the arrangement of November was thought necessary, and

the agreement entered into. It was not executed. [CARR, C. J. —It was.] Not in *Ceylon*, where alone it could be validly executed. It was left perfectly discretionary to Mr. *Duff* to execute it or not. [STERLING, J.—Was there any arrangement as to the period for which the agreement should exist?] For two years. *Lancaster's* name was affixed as Secretary, to shew the Bank's approval. It was a mere draft. [CARR, C. J.—The parties to it are *Duff* and *D. B. Lindsay*. It is then signed by *Lancaster*. Why is it signed by *Lancaster?*]

Mr. *Lancaster* was their Secretary. The Bank wishes to make certain arrangements in *Ceylon*. The deed is prepared in *England*, and Mr. *Lancaster* signs it to shew the Bank's approval. They send it to *Duff* to be executed here both by him and by *D. B. Lindsay* (though *Lindsay* had already signed it there,) because execution here was indispensable to its validity; with a letter of instructions to *Duff* and a power of Attorney to *Moir* to execute it on the part of *D. B. Lindsay*. It *could not* be executed in *England*. The Ordinance of Frauds and Perjuries requires all Deeds relating to lands here to be executed by a Notary, licensed to practice in *Ceylon*, and two witnesses. In the same month of November, proceedings were being taken to enforce the Mortgage bond by Mr. *Duff*. Now, whatever may be said with regard to these proceedings, although they may shew great irregularity on the part of the persons employed by the Bank, one thing is certain —there was no Fraud. *Lindsay* returns to *Ceylon*—he finds indeed a judgment against him on the Bond—he finds the Estate seized and advertised to be sold in execution: but he remains silent, takes no step to stop the sale, does not pay the debt and redeem the property, does not go to the Court and say that the proceedings had been fraudulently taken in his absence, and that the Judgment should be set aside. So far therefore as *Lindsay* is concerned, it is quite clear that these proceedings are conclusive and binding. Whether personally or as executor, I shall afterwards discuss. He is bound, and he cannot now come forward and object to them.

The Estate was sold by the Fiscal to the Bank in March 1849, for the sum of £2,500. This is called in the Libel a nominal sum. At that time it was not a nominal sum. Nobody then would give more, or so much for it; and this, not only because of the locality of the Estate, which was liable to suffer very much from drought in dry seasons, but because there had been a great fall in the market in regard to the value of Coffee. That allegation therefore in the Libel conveys an erroneous idea of the fact. The estate was

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sold to the Bank for that amount, because the Bank took it for so much as it could get out of the Estate for the payment of its debts. [CARR, C. J.—It is a fact in evidence that the property was worth £5,000 at the time.] If it had been considered worth £5,000, it would have fetched £5,000 at the sale. The evidence of Mr. *Gavin* which is alluded to, scarcely goes that length. He says "At that time speculation in Coffee land in Lower *Dumbere* was very hazardous, and I still consider it to be so. I considered the property then put up, to be worth barely £5,000, and I doubt if I would have given that myself." And again: "At that time the portion in dispute looked very *shuck* indeed, and was much burnt up and looked bad. The Coffee in that district suffers much from drought." Coffee Estates at that time, as every body knows, were a drug in the Market. And although the Bank got it at the sale for £2,500, in reality it cost them a great deal more. Even supposing the Bank ought to have paid £5,000 for it, had it fetched its real value, that was still far below the amount of their debt. The Estate, in point of fact, as regards the Bank, realized the sum of £13,000: for that was the amount of their Mortgage debts, and they recovered nothing more except the price of some shipments of Coffee, which certainly did not reduce their claim below £10,000 or £11,000. The Bank accordingly bought the Estate and kept it for 15 months. But the Bank offered the parties to let them have it back for the amount of the debt—say, even for £2,000 or £3,000 less than their debt. Not only did they offer it to the *Lindsays;* but *Gordon*, the Chairman of the Bank, spoke to severa respectable Merchants in *London*, and asked them to take up the Estate on behalf of the *Lindsays*, and relieve them of it. "Pay us the charges, and take the Estate." We are told, indeed, that the motive of the Bank in wishing to give up the Estate to the *Lindsays* was to get rid of *awkward questions*. What these awkward questions are we know not; and no one has told them to us. But it is quite clear that the Bank acted fairly and honorably throughout the matter; they offered the Estate back on payment of their debt. "Yes," but it has been said, "you have made up an account of £13,000 against us, which you would have us pay you without questioning." This is incorrect. There were the Mortgages, there were the Bills, there was the cash credit, and the advances for the crops; and the accounts were rendered long ago, and *they have not been, up to this day, questioned.*

The Estate was sold in March 1849, and the Bank held it till May 1850. During that time the Bank also made the allowances

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to Mrs. *Lindsay*, and continued them up to the month of August 1850,—three months after they had sold it to the appellants. As long, therefore, as the Estate remained in their possession, they made the allowance and were ready to re-convey it to the *Lindsays* on payment of their charges; and this is important to us, as the purchasers from the Bank, for we have surely a right as purchasers from the Bank to avail ourselves of their equities. On the 25th of April 1849, *after* the news of the sale had reached *England*, Mrs. *Lindsay* writes as follows to Mr. *Lancaster*.—"The very distressing position in which I now find myself placed, in consequence of circumstances that have occurred in *Ceylon*, which you are no doubt aware of, obliges me to solicit your friendly assistance in my behalf, and to beg that you will use your influence with the Directors of the *Oriental Bank* to continue the allowance of £10 a month, while the Bank holds the Estate of *Rajawelle*, &c." The allowance was continued, under the modification as to the £25, until August 1850. In May 1850 the Bank sold the Estate to *Brown*, *Ingleton*, and *Smyttan*. There had indeed been a previous offer by Mr. *Robertson* on the part of *Baring Brothers* for £8,000: but the offer was subject to the approval of the *Barings*, and they would not take it at that sum. By that time a re-action took place, the market for Coffee was still improving. The crisis was over—prices rose—money was more plentiful: and in addition, during all that time, up to the sale to *Brown*, *Ingleton*, and *Smyttan*, it was in the Bank's possession, and the Bank had ample funds at command for its proper cultivation, and had brought it into a perfect state of cultivation, so that its actual value was greatly enhanced. [STERLING, J.—Have you proved what amounts the Bank had spent?] The fact was proved that the funds necessary for proper cultivation were supplied, but the particular items are not in evidence. Whatever was necessary or advisable in order to bring the Estate into good order was proved to have been supplied. In fact, in 15 months, they spent £7,000 on the Estate.

This is a correct statement of the facts of the case; and from these I think a few important conclusions may be drawn:

1. That *Brown*, *Ingleton*, and *Smyttan*, are *bonâ fide* possessors of the Estate, which they bought for £10,000 from parties who had themselves been in quiet possession for 15 months under a judicial sale, which has not been set aside. 2. That Mr. *Duff* has not been in individual possession of the Estate; and that he has received no part of the profits. 3. That the Mortgage debt of £7,000 was a *bonâ fide* debt of Colonel *Lindsay's* Estate, and not of *D. B. Lindsay* individually; and that he committed no fraud on his

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co-devisees in granting a Mortgage. 4. That there was no collusion between *Duff* and *D. B. Lindsay*. 5. and *lastly*, That the proceedings by the Bank against *D. B. Lindsay* on the bond were not in breach of good faith; and that, even if they had been, that could not in any way affect the validity of the previous transactions, to wit: the mortgage which had been given in July 1848. [STERLING, J.—You have said that the letter related only to the £4,000 bill.] But even granting that the letter related to the bond, (and this we deny,) it could only affect the *proceedings on the bond*, and by no means the validity of *the bond itself;* and, again, granting that it related to the bond, the condition guaranteed on the part of *D. B. Lindsay*, was not performed, the Estate was not properly *kept up*. [CARR, C. J.—The judgment says *maintained*. The Estate was in a bad state at the time.] Although it was in a bad state, the undertaking was that it should be *properly kept up*. It is not to be supposed that if the Estate was covered with weeds, the weeds should be allowed to remain and increase; for that would have ruined the Estate. The Estate required to be weeded; and the Coolies were £840 in arrear at the time. The condition was therefore not fulfilled, and the Bank was not bound by the letter, even if it were a promise, applicable to the bond.

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Now as regards the judgment pronounced in this case; it is immediately obvious upon reading it, that the Court below has not proceeded to declare or decree any of the various matters prayed for in the Libel; but it has simply granted that part of the prayer, which prays, as a consequence of the alleged fraudulent acts complained of, that the defendants might be ejected. It has not even decided, in accordance with the application of the plaintiffs themselves, that they should be restored to their original rights: for, whilst it has ejected the defendants and given back the Estate to the plaintiffs, it has made no decree for securing to the other parties their rights. It has given back the Estate, as if no charge or incumbrance ever existed on it; and has made no provision whatever as to the restoration to *Brown*, *Ingleton*, and *Smyttan* of the money they have paid for it. The reason of such a judgment is obvious. The Court felt that the plaintiffs had wholly failed in proving the material allegation of fraud and collusion, which would have justified their prayer,—had failed in proving that the *Oriental Bank Corporation* had anything to do in the matter, or that there had been any fraud in the transaction,—or any collusion between the 4th defendant and Mr. *Duff*. [CARR, C. J.—It made no provision as to the defendant's right,

because the *Oriental Bank* was not considered to be before the Court.] On that very ground I maintain that the action, having failed as to the *Oriental Bank*, it should fail as to all the defendants. The relief sought for by the plaintiffs is the relief which the law of this Colony and the Equity Courts in *England*, grant; viz. *Restitutio in Integrum*,—restoring the parties to their original rights, where a fraudulent act has been committed, by which parties have been deprived of the property to which they were entitled. (*Marshall's Judgments*, p. 175.) According to the authorities laid down in Voet, (iv. 1 § 21, 26,) and in 2 Burge, where a party comes to Court, and prays for restoration to original rights, all the parties who have been affected by the proceedings should be before the Court; and the proceedings for *restitutio* should be in that Court by which the erroneous judgment was passed. To such a suit therefore, the mortgagee, whose mortgage is to be affected, to wit, the *Oriental Bank*, and the vendee, whose title is to be cancelled, to wit, the *Oriental Bank*, was a necessary party. This is indeed admitted by the plaintiffs themselves; for they make the *Oriental Bank Corporation* the first defendant in the case, and insist that they are identical with the *Oriental Bank Company*. The object of the suit was to declare that no title passed under the Fiscal's Conveyance, which Conveyance was made under an order of the District Court of *Colombo*, in execution of a judgment in which the *Oriental Bank* was the party most immediately concerned. And this very party is not now before the Court. Mr. Justice STORY in his book on *Equity Pleading* has collected all the English and American authorities on this point, and draws the general conclusion from them. (p. 97 notes.) [CARR, C. J.—There is no doubt of that. But is that the practice here?] [STERLING, J.—In the case of a sale by a Sheriff, it is the Sheriff who conveys: he is the vendor.] I shall not go the length of saying that the Fiscal himself was a necessary party, because he made the conveyance simply as a ministerial officer of the Court. But the mortgage-creditor and the execution-purchaser was a necessary party in any suit, the object of which was to impeach the Mortgage and the title under the Fiscal's Conveyance. The Bank must have the opportunity of being heard, to defend its right to sell, and to maintain the validity of its title under the Fiscal's Conveyance. [CARR, C. J.—Can you not bring an action against the vendee; and should not the vendee call upon his vendor to warrant and defend his title?] In a simple action of ejectment that may be done: but the object of this action is to set aside, for fraud on the part of the *Oriental Bank*,

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a judgment and a conveyance obtained by the Bank. I submit that the Courts of this country will not grant a partial relief, or do iniquity to one party in doing equity to another: that it will not investigate or question the title of the Bank, without calling in the Bank; or turn out the innocent purchasers from the Estate, without restoring to them the money actually and *bonâ fide* paid by them for it; or give back the Estate to the plaintiffs, without at the same time decreeing them to give back a sum equivalent to the amount for which the Estate was incumbered. This is quite in accordance with the English law. *Gore* v. *Stackpole*, 1 Dow 18. By the Roman Dutch Law, the effect of the Fiscal's Conveyance is to pass the legal title *ipso facto*, to divest the former owners of the Estate, and to vest it in the purchasers: and until that conveyance has been set aside, the legal title remains in the purchasers. Burge (ii. 577,) takes almost all his law on this point from Matthæus *de Auctionibus;* who again is so full and so particular in his treatment of the subject, that Voet in his title on the same subject says that *Matthæus* has left nothing to be added. [CARR, C. J.—How does this apply to *Kandy*?] I am not aware that there is any express law on the subject in *Kandy*. [CARR, C. J.—The Ordinance No. 5 of 1852, was not in force then.] That Ordinance did not introduce a new law, but declared what the Law was. If there was no Kandian Law on the subject, the Law of the Maritime Province should apply. The case of *Parsons* v. *Selby* held that distinctly—viz., that the Law of the Maritime Province applied to *Kandy*, as to Slander. [CARR, C. J.—That was not upon the Roman Dutch Law alone, but upon principles of Natural Equity. *R. Morgan.* It was argued that that was the Roman Dutch Law, and also that it was consistent with Natural Equity. *Sterling J.*—A conquered country retains its law, until the conquering nation shall alter it.] If it be a new point, untouched by former decisions, I am quite prepared to maintain that the Roman Dutch Law applies in this case to *Kandy* as much as to the Maritime Province. [TEMPLE, J.—The 5th cl. of the Ordinance *declares* the law of *Kandy* to be that of the Maritime Provinces.] But, after all, if it be a question between the English Law and the Roman Dutch Law, there is no difference in this respect: for a sale under a decree in England passed the legal title. But I am quite prepared to say that the Dutch Law alone should apply; because no other Law but the Dutch Law will be consistent with the Fiscal's Ordinance and the *Rules of Practice.* Indeed the very term "Fiscal" is borrowed from the Dutch Law. The practice of the Courts as to the

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Fiscal's rights and duties is to be the same throughout the Island; and one law cannot apply at one place, whilst another applies at another place, to one and the same system of Rules. The principle of the Civil Law is moreover a principle consistent with Natural Equity; and if there is no express Law, that principle must be followed, if only because it is consistent with Natural Equity, whether adopted by the Roman Dutch Law or not. It would indeed be unjust if the Fiscal's Conveyance were an absolute bar in all cases. But there are many exceptions; and some of these exceptions are enumerated in 2 Burge, 578. These are the only exceptions, and none of them apply to the present case. They are exceptions such as operate every day in our practice: for our practice, whether designedly or not, is precisely the same as that under the Roman Dutch Law in this respect. [CARR, C. J.—But a man may stand by, and see the sale go on, having a good title, and then bring his action against the purchaser.] There are such cases: but we are now discussing general principles. If the property was seized in the possession of a party, and sold for his debt, then absent parties claiming the property could come forward, and have the sale set aside; unless they had been represented by attorney. What I mean is, that where there has been an order by a competent Court to convey, that order is conclusive as to the title, until it be set aside. By a valid order, therefore, which has not hitherto been impeached, which was made by a competent Court, the Fiscal was directed to convey this estate to the Bank; the Fiscal did convey, not only by a deed, but by actually putting the Bank into possession, after receipt of the purchase money. Now until some person comes forward and shews to the Court that that order was fraudulently obtained, and gets it set aside, it is conclusive as to the legal title. It is a proceeding *in rem*, not *in personam*. True, if obtained by Fraud or Collusion, it may be set aside. But you must *set it aside*. You cannot eject the party, and leave the order untouched. And if this be not so, I should like to know who would purchase any lands at a Fiscal's sale or under a title from the Fiscal. [CARR, C. J.—But in ordinary cases, it is not the practice to allege the Fiscal's sale, and to have it set aside.] This is not the ordinary case of a proceeding against a wrong-doer, the purchaser; but against third parties: and hence it makes it the more necessary to bring the purchaser before the Court,—for if the sale is set aside there ought to be a decree for repayment of the purchase money. The District Court saw this difficulty, and tries to escape it in a curious way. It does not set aside the order or the Fiscal's Conveyance, but only holds

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that the decree of the District Court did not affect the plaintiffs or the estate. True, it does not affect any rights of the plaintiffs individually, but it affects the *property*, if words can make it plain; for the property is ordered to be conveyed—that is the property actually conveyed—and thus the persons having an interest in it are affected, and therefore, if you wish to claim back the property, you must have that order set aside, as may be done if fraudulent. And to do this, not only is the Bank a necessary party, but it was also necessary and indispensable that Dr. *Smyttan* should be a party. For the effect of this judgment is to destroy the validity of his title from the Bank. He is one of the persons to whom the Estate was conveyed by the Bank, and how can the Court declare that the Estate did not pass from the Fiscal to the Bank and *Brown*, *Ingleton* and *Smyttan*, without having *Brown*, *Ingleton*, and *Smyttan*, before the Court? Is not the object of the suit to set aside their title, and to declare that the Estate never passed to them? True, *Smyttan* was not in the Island, but, for the same reason, you need not have made *Brown* a party, for *Ingleton* alone is in actual possession. See *Fallowes* v. *Williamson*, 11 and 17 Vesey. *Jackson* v. *Rolins*, 2 Vernon; and the note of this case in Daniel's *Chancery Pr.* 361. They say *Smyttan* is in *Bombay*. But you might issue Edictal citation against him. They say he has no property in *Ceylon*. Now that is a *Petitio Principii*,—it is assuming the very point in dispute. And to get over all these difficulties, it is said, "Of course, we do not want a judgment for mesne profits against *him!*" No!—but you ask a great deal more: you ask the Court to declare that the title from the Fiscal never passed to the Bank, and therefore never passed from the Bank to him.

The next point to which I shall direct your Lordships' attention, is that the estate of *Rajawelle* vested in the Executor *D. B. Lindsay* alone; or in other words, that the mortgage-bond on which the judgment was granted was a valid and binding obligation. And here I may mention that by the established Law of this Colony the whole estate of a deceased testator vests in the executor; that there is no distinction whatsoever between real and personal property, with one exception which does not apply to this case; and the cases decided on this point have established the right of the Executor to deal with real property as assets for the payment of debts. No. 4,416, *Chilaw* (Civ. Min. 24th Oct., 1838)—2,496 *Col.* These cases, establish not only what is in accordance with the Roman Dutch Law, viz., that the whole estate vests in the executor; but they go a great deal further, they recognize a private sale made by the executor, which they could not do by the Roman Dutch

Law, but which having been the established practice in *Ceylon*, the Courts were unwilling to interfere with or unsettle. And even as to property in *Kandy*, there is a decree of your Lordship the Chief Justice in a case from *Kandy*, No. 19,125, which shews that the same rule is applicable to the whole Colony. The Charter gives the right of granting probate and administration to all the District Courts of the Colony, and the same rules are applicable to all the Courts. That case is as strong a case as can be desired: for there the defendant mortgaged as administratrix; and the mortgage was held good and the property of the estate liable. [CARR, C. J.—Is not leave required from the Court?] Of late years: but even now it is only an Administrator who requires the leave; but not an Executor, who, as the person appointed by the Testator himself, requires no leave from the Court to sell or mortgage. Who conveys the estate here? The Executor. Suppose a party dies, leaving two heirs, whom he appoints also as Executors. They may take the estate and possess it in common, hold the deeds in common, and sue as joint-tenants. But supposing there is a division. Both are Executors under one probate. In that case they as executors convey the separate shares to each other: for no estate will pass which is not evidenced by a writing. For the estate had already vested in the Executors. Herbert's *Dutch Exrs*, p. 90. And indeed there is no substantial difference in any important respect between our law and the English rule of Executors: for Equity holds that real property is assets in the hands of the Testator for the payment of debts, which is precisely the same principle.

But, say the plaintiffs, the estate did not vest in the Executors but in the Devisees in trust under the will. I deny that position altogether. But if it did vest in the devisees, then it vested in *Henry Lindsay* with the others; and *Henry Lindsay*, in order to divest himself, must have done so in writing, because our Ordinance requires a writing. For taking the case I have just put: if the Estate vested in the two sons by the will, supposing one refused to accept the inheritance—how can that be evidenced? How could the creditors be otherwise secured? If they call upon one to pay the debts, he might say "there has been a division: I have given over to my brother his share in the Estate." *Query*, Where is the writing? For you can only part with your title, already vested as it is, by writing. Are we now-a-days to be driven to parole testimony to find out whether there has been a division? Is it not the practice to evidence such a division by a notarial writing? The practice is for the executor to give the conveyance. I will

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not say that such a division may not be effected by a deed of partition among the heirs. But some deed or writing is, in the first place, essential—either a conveyance from the executor, or a deed from the heir renouncing his right. And this I conceive is in accordance with the practice in *England*. [TEMPLE, J.—But *H. Lindsay* never accepted.] That shews that the bequest never vested. If the bequest vested at all, it vested by the will, at the death of the Testator. Their argument is *that*. Treat it as a legacy: for we know nothing of devisees here. A legacy does not vest until the debts have been paid: that is a condition over-riding all legacies. The executor should first pay all the debts, and then transfer the property left to the legatees. But, say the plaintiffs, by the deed of *Shaw* and *Caffary*, the Bank, by becoming a party to it, assented to the Estate being taken by the devisees. No,—that deed by you, must be considered as entered into by you in your character as executors. And it is, in point of fact, by them as executors for the payment of the debts. If you hold that that was giving the Estate over to the devisees, that was making *D. B. Lindsay* guilty of a fraud on the creditors: for then *D. B. Lindsay* would be divesting himself of the whole funds available for the payment of the debts. And this view is borne out by the deed, for it was entered into for the very purpose of paying the debts. So far from the Bank assenting to the devise, the deed shews that they only assented to their taking the Estate for the payment of debts. In *Sneesby* v. *Thorne*, although certain persons had been appointed as devisee and Executors, yet, having sold the property as Executors, because of some pressing necessity, even in *England*, where the duties and rights of Executors and devisees are so different, the sale was upheld by the Court of Chancery. 3. *Eq. Rep.* 662, 849.

We stand then, as representatives of the Bank, in the place of *Shaw* and *Caffary*. They agreed to advance the money on a mortgage. The Bank advanced it for them. The money was borrowed on the mortgage and applied actually to pay the purchase money to *Atchion*. The other Executors who were abroad, never having proved the will in *England*, *D. B. Lindsay* granted a mortgage. Had he not a right to do so? Even granting that we had assented to the others as Executors, still this act of one was the act of all, the act of one Executor on the spot, the sole Executor who had proved the will here; and if his probate enures for their benefit, so his acts as Executor are binding on them. 5 Jarman and Bythewood, 182; *McCleod* v. *Drummond*, 17 Vesey; *Scott* v. *Tyrrell*, 2 Dickens. What becomes of the money is no concern of the

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purchaser; though if that could be a question here, we have proved that the price went in actual payment of the Estate-debts. Nor is the Civil Law different in this respect: for the same rule is laid down by Voet, in his title on Guardians. See also *Miles* v. *Durnford*, 21 L. J. Ch. 667.—*Ewer* v. *Corbet*, 2 P. Wms. 148. *Eland* v. *Eland*, 4 M. and C. 420. and *Johnson* v. *Kennett*, 3 M. and K. 624.

Lindsay's right to mortgage cannot be questioned until the order of the District Court of *Kandy*, of the 28th Feb. 1848, has been revoked: and the parties who pretend to be aggrieved thereby have taken no steps to do so. That was an order authorizing *Lindsay* to mortgage the estate—an order by a competent Court possessing jurisdiction. If they had come and impeached it for fraud, the Court would have cited *D. B. Lindsay*, and the mortgagee; and Lindsay would probably have produced the authority from them to which he refers in his application. It is in evidence that Lindsay was authorized by them to take out Probate as sole Executor in Ceylon. He says in his application, that he applies by their authority. And I submit that his power to mortgage cannot be questioned without setting aside that order. *Malony* v. *Gibbons*, 2 Campb. 504. *Cowan* v. *Braidwood*, 2 Scott, N. R. 138. The Power of Attorney from the Executors in *England* to *D. B. Lindsay*, is indeed not forthcoming; it is not in the proceedings: but *non constat* that it was not then produced, and shewn to the Court, and that the Court was not satisfied that he had authority under it to mortgage: for we must presume on the face of the proceedings, that every thing was properly and regularly done. Not that any authority from his Co-executors was necessary, for it was not. But if, as we may conclude, it existed, then they could not even raise the question of *D. B. Lindsay's* power to mortgage. [Carr, C. J.—The order of the Ecclesiastical Court is conclusive.] Not only conclusive, but it must have operation until set aside. *Cowan* v. *Braidwood*, 2 Scott, N. R. 157. And on the face of this order, the inference is, that if the plaintiffs had complained against their Co-executor, it was in his power to shew that he acted with their knowledge and concurrence. Not only had he power to mortgage, but there is sufficient and abundant evidence to shew that the other executors had ratified his act. For under the subsequent deed of November prepared in England, the rights of the Bank under the mortgage were expressly reserved. Why, it has been asked, was not this deed executed by the other parties in England? Because it had already become known there, that *D. B. Lindsay* as sole Executor in Ceylon, was alone entitled to alienate

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or mortgage the Estate. But, there is other evidence that they were aware of and concurred in this mortgage. They have not shewn that they supplied *D. B. Lindsay* with money to conduct the Estate. Frith's evidence supports this. But further, not only as Executor, but as resident Proprietor and Manager, he had a right to mortgage the Estate for funds to conduct it. *Sayers* v. *Whitfield*, 1 Knapp, P. C. Rep. 133. And therefore, funds not having been provided by the Executor in *England*,—and this is expressly proved in the evidence,—what was *D. B. Lindsay* here to do, but to get money from the Bank for the upkeep of the Estate? 3 Burge, 353.—*Miles* v. *Atherton*, P. C. Rep. of 1821. Was he not driven by necessity to raise money, not only to pay past debts, but also to provide for the future cultivation. If so, were not the advances to him a sufficient consideration for the mortgage? But the plaintiffs contend that although—and they seem to be driven to admit this,—although the mortgage was a good and valid one; yet the proceedings taken upon it, are irregular and invalid. True, that proves the badness of our title; does it prove the goodness of your's? The plaintiffs should shew a good legal title before they can turn the appellants out of possession. If I have been successful in my previous argument, I have shewn that the title vested in *D. B. Lindsay*, as sole Executor: and if our title is bad, the Estate should revert—not to the plaintiffs,—but to the 5th defendant, *D. B. Lindsay*, to whom it has been committed by the Court for payment of the debts. [CARR, C. J.—But the Probate to one inures to all. *Webster* v. *Spencer*, 3 B. and Ald. 360. See 1 Man, & Ryl. 183. 2 B. & C. 153. 2 Bingh, 177.] Not by our Rules: for by our rules there is always a reservation of the right of the Court to grant Probate to the others, if they come in, and submit to the jurisdiction of the Court. And the others must come forward, and prove the will, and take the oath, before they can be recognized as Executors. And the present Probate to *D. B. Lindsay*, expressly reserves the right of granting like Probate to the other Executors. [STERLING, J.—This Probate is granted to *D. B. Lindsay* solely.—That is your answer.] There are 5 objections taken by the Court below, to the validity of the proceedings of the District Court of *Colombo*: and I shall take them up, and answer them separately.

The first is *Breach of Faith*, on the part of Duff, in suing *Lindsay* during his absence. I have already shewn the groundlessness of this objection. But supposing the proceedings against him were in breach of faith, that is only an objection in *his* mouth, and not in that of any other person, who was not a party to the suit.

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And it is no objection, even in *his* mouth, because, notwithstanding the pretended breach of faith, he, being on the spot, and aware of the proceedings, subsequently allowed the sale to take place. If a party has an objection to the sale, and notwithstanding allows the sale to take place, he is concluded. Again, the alleged breach of faith is not complained of by the plaintiff: it is only pleaded by *D. B. Lindsay*, in his answer. *They* do not plead it as an injury done to *them*, nor shew that they have been injured by it. Those proceedings did not affect the plaintiff, except in so far as the property of the Estate was sold: whether the action was commenced before, or after *Lindsay's* return, makes no difference to them.

The *second* objection is, that the Warrant of Attorney is only granted by one Executor. *Elwell* v. *Quash*, 1 Str. 19. But that was a case where one of three executors granted a warrant of attorney to confess judgment, and judgment was entered on it against *all three*. Here the warrant of attorney was granted only by *D. B. Lindsay*, the proceedings were against him alone, and the judgment,—not against the other executors,—but solely against *him*. That he had such power, as executor, to grant a warrant of Attorney appears clear from *Russell* v. *Plaice*, 23 L. J. Ch. 441.—And indeed if it be admitted that he had a power to mortgage, the power to grant a warrant of Attorney is incidental to it. It is the Dutch procedure, analogous to the English procedure of Foreclosure. His power was therefore not only as executor, but as incidental to the authority given by the District Court of *Kandy*, and ratified by his co-executors in *England*, and to the authority possessed by him, as resident manager and sole executor, to borrow money for the preservation of the estate entrusted to him. Coote *on Mortgages*, 202.

The *third* objection is, that there had been no previous demand in the proceedings against *D. B. Lindsay*. That again would have been an objection in the mouth of *D. B. Lindsay;* but how can it be in the mouth of others. He might have said—and this is all he could have said—"You have made no previous demand, and *I am not liable to costs*." See V. d. Linden, p. 395. But here, on the contrary, the defendant by his attorney has admitted the demand. The Libel alleges a previous demand, and the answer of the defendant admits the libel; and even if contrary to fact, the defendant cannot afterwards deny it. Upon the record therefore, the fact of a previous demand is established.

The *fourth* objection is, that judgment was obtained for more than £7,000, the amount covered by the warrant of Attorney.

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Now this was a great blunder; but it is no more than a blunder; for on the face of the Libel, the condition of the bond that only £7,000, should be recovered, is stated. I only mention this, to shew that it was nothing more than a blunder, and that the proceedings were strictly *bonâ fide*: and that no fraud was intended. But the Bond makes the amount to be *ultimately* recovered £7,000: and there was nothing to prevent the plaintiffs from suing for £14,000, the amount of the bond. Though we sued for more than £7,000, the judgment could give us no more than £7,000, and if the judgment gave us more than £7,000, we could not recover more. But what *did* we recover? We only recovered £2,500. And even if we have recovered more by the judgment, that could not affect the judgment for what was due; it would be bad only for the excess. 1 Archb. Q. B. Pr. 543.—*Stopford* v. *Fitzgerald*, 11. Jur. 351. [CARR, C. J.—The judgment was good, except for the excess. Why should not *D. B. Lindsay* have appealed? The Rules of Appeal do not apply to Absentees.]

The *fifth* objection is, that the proceedings were against *Lindsay* personally, and not as executor. And before answering the objection, I shall, for argument's sake, admit it. What then? If it was an estate-debt, what difference does it make? For although the judgment was against him individually, yet he had a right, if it was an estate-debt, to take the assets to pay the debt. He held the Estate as assets for the payment of the debt; and he had a right to appropriate the funds arising from the sale, to payment of the debts. *Miles* v. *Durnford*, 21 L. J. Ch. 667. In order to get judgment on the bond, it was not necessary to set out the mortgage as granted by him as Executor—or to pray for judgment against him as Executor. But the proceedings and the judgment are, in point of fact, against him as Executor. The Libel sets out the bond which is granted by him as Executor. It refers also to the warrant of Attorney, which is granted by him as executor; and with these are filed the bond and the warrant so granted by him. Then the judgment is: "That the defendant do pay [a certain sum of money] *due on a bond dated the 11th of July* 1848." Can your Lordships understand the judgment, without looking into the record to see in what character the defendant is condemned, nay even to find out who this "defendant" is. Look at the judgment in this very case before us:—"That the defendants—" (*who* are the defendants?) "be ejected from the premises in question," (what premises? where are they? what are its boundaries and its extent?) Look at the judgments of the Supreme Court—"That such and such a decree be affirmed," or "be reversed." If you do not look into

the record,—if you do not go back to the District Court for that decree,—then back to the Libel and subsequent proceedings for explanation of the District Court's judgment, you can know nothing of the parties, of their character, or the claim,—in a word, nothing certain as to the meaning of the decree. All our proceedings for a long time have been to this effect; and I can produce numbers of cases wherein the judgment against executors are precisely to the same effect as that of the District Court of *Colombo* in the case in question. In No. 18,415 of the District Court of *Colombo*, although judgment had been decreed against A. and B., one of whom paid only half, on the ground that it was only a joint judgment, the District Court, on his application for a discharge, referred back to the bond in the case, and after looking at it, declared the defendants to be liable jointly and severally. A judgment must be construed with reference to the whole record, and if there be any uncertainty as to its precise effect, reference ought to be made to the documents on which it was decreed. Voet, xlii. 1, § 20. [STERLING J.—It is reason and common sense, that if there be any obscurity in the language of the Court, it should be explained by the whole of the proceedings.] The manner of construing our judgments is very clearly stated in *Henly* v. *Soper*, 8 B and C. 20. "In considering," said the judges, "the proceedings of Colonial Courts, we must look at the substance and not at the form, according to the rule adopted by the Privy Council. If we, sitting in *England*, were to require in the proceedings of foreign Courts, all the accuracy for which we look in our own, hardly any of their judgments could stand." We admit, that there were several irregularities. But we maintain, that there has been strict *bona fides* throughout, and no fraud whatever. And if there has been no fraud, no such irregularity can affect the judgment or the judicial sale. *Manaton* v. *Molesworth*, 1 Eden, 18.

There remains only one point, viz. the Mesne profits. [CARR C. J.—As to that, there is only Mr. *Tytler's* evidence, that it would lease for £1,500 a year.] And what does Mr. *Tytler's* evidence amount to, after all?—That if the Estate were properly cultivated, and if there were a proper expenditure of money upon it, it would be worth £1,500 a year. When he comes to be cross-examined, however, he admits that there must be deductions made for the interest of the capital embarked, and for judicious management. [CARR C. J.—There must then have been an order for an Account. But then, here we have no Master to refer to, and are we not obliged to look into it ourselves?] In an action of ejectment in *England*, no mesne profits are recoverable except by Statute.

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In the case of Landlord and Tenant, and in a suit in equity to recover an inheritance, mesne profits are not recoverable. There must be an account. 1 Story *on Eq. Jur.* § 510. Then what are the mesne profits decreed in the case? A sum upon such loose and vague evidence as Mr. *Tytler's*, is concluded to be the probable amount annually received, and thereupon judgment is entered for that amount. But further, the possession of the present defendants, is a *bonâ fide* possession, a possession acquired by purchase from a party who had been a year and a day in actual, quiet possession, and who could not therefore himself be ejected except in a suit with him to try title. Even supposing they were not there by a good title, they could not be made liable for mesne profits, except from the time of litis-contestation. V. d. Keessel, *Thes.* 205. Domat, § 2180,—Voet xli. 1. 33. And in regard to this principle, there is no difference between the Civil Law and the rule in Equity in *England*. *Hercy* v. *Ballard*, 4 Brown, Ch. Rep. 469.

We have shewn not only that we have had the possession, and are entitled to remain until a better title is proved against us; but we have also shewn that we have the legal Estate in the property. The mortgage bond granted by *D. B. Lindsay*, was one which he was fully competent to grant, not only as sole executor in *Ceylon*, but as the attorney of the other executors in *England*, and as resident manager of the Estate; that upon that bond we were entitled to proceed to judgment and execution; that judgment was duly granted, defendant being present by attorney and consenting to the judgment; and that by the order of the Court to convey, and by the Conveyance by the Fiscal, which Conveyance is of the *Rajawelle* Estate, the *Oriental Bank* became the legal owner thereof: that, as we claim under the *Oriental Bank*, and no proceedings have been taken to bring the *Oriental Bank* before the Court, or to set aside either the Order of the District Court of *Kandy* to mortgage, or the judgment and order of the District Court of *Colombo*, or the Conveyance made by virtue of the order, we have established not only an equitable title, but we have shewn in ourselves a perfectly valid legal title to that Estate.

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W. Morgan's Argument.

W. Morgan for the Respondents, (*O. Morgan* with him.)

One of the main questions raised in this case is *the plaintiff's title to sue*. It is said, that it is not shewn that the plaintiffs had a title to sue as executors or devisees. In *Webster* v. *Spence*, 3 B. and Ald. 363, Bailey and Holroyd, J.J. lay down the rule that although only one executor may have proved, the probate enures to the benefit of all. [Sterling, J.—That rule is much too ge-

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neral to bear on this case, where there is a colonial probate.] The Will itself is a sufficient title, and the validity of the will is not questioned. When the will is proved, the trust is immediately created, and the trustees take under it, if they have accepted the trust. [CARR, C. J.—You may take a sale from the other executors; but you cannot prove your title without producing probate.] One executor proves the will, and that enures to the benefit of all. In this case the executors are also devisees in trust. They take under the will, and immediately the will has been proved by one executor, the title vests in the trustees, provided they accept the trust. An executor shews his title by mere acceptance. 1. *Williams on Executors*, 241. *Dyer's Reports*, 367. *R.* v. *Inhab. of Stone*, 6 *T. R.* Mere possession is sufficient to vest the title in an executor or devisee; for taking possession is an acceptance of the trust; and *D. B. Lindsay* took possession. The possession then of one trustee is the possession of others; and here, as soon as the will was proved, the title vested in the devisees; and the executors could not interfere. 4 *Burge*, 737. It is said, that in the probate obtained by *D. B. Lindsay* in *Ceylon*, there is a clause reserving the right of *Elsy Lindsay* and others to take out probate thereafter. No inference can be raised from this circumstance,—for it is the usual form here and every where else. The *Queen's Advocate* has drawn a distinction between executors and devisees in trust. But in the present case the devisees in trust were the executors. The devisees derive authority from the will; so do executors. In this country if an executor is allowed to take possession of lands, to the exclusion of the devisees, what is to become of entails? The right of executors to alienate has been carried far enough, for the sake of expediency; and it would be highly dangerous to extend it further.

The next question is *the non-joinder of H. Lindsay*. This objection is also raised in the 3rd clause of the Petition of Appeal. It would appear to have been assumed there, that the trust-estate *vested* in the trustees by the will, and therefore, it is contended, he should have divested himself of it by deed. But it must be shewn that *H. Lindsay* accepted the trust; for until he had done so, the estate did not vest in him. See *Townson* v. *Tickell*, 3. *B. and Ald.* 38, per HOLROYD, J.—*Bonifaut* v. *Greenfield*, *Cro. Eliz.* 80. —*Hill on Trustees*, 204. 1 *Powell on Mortgages*, 249. True, that conveyancers are advised to have disclaimers in such cases; but they are merely evidence of non-acceptance for the purpose of shewing a good title; for when the muniments of title are exhibited, it would appear there was another trustee, and the law

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presuming that he had accepted, it would be necessary to shew by another deed that he had not. I refer to the Libel which alleges that *H. Lindsay* never did act as executor or trustee, and never took probate, and the Answer, in which it is admitted *that he did not act.* And if you will look to the deed of *Caffary*, you will find his non-acceptance recited, and that *H. Lindsay* did not join in it,—a deed executed by *Duff* himself as agent of *Caffary*, and to which all the other devisees in trust were parties. The Bank received a copy of that deed, acted under it, and now claim to stand in the shoes of *Shaw* and *Caffary.*

The other objection is, that *the estate was assets in the hands of the executor* for the payment of debts. I admit that the property of estates are assets in the hands of executors, but with some qualification. This point has been ably put by the Queen's Advocate; but I must say, much too generally. If it be stated as a general rule, that an executor holds all the property of his testator as assets, and that he may sell and alienate them, the only remedy of the heirs being to sue his securities,—I deny the proposition. Suppose the testator has left land under the bond of *Fidei-Commissum.* Will this be assets in the hands of the executor? Will you let him sell it? He cannot do it,—except in one case, and that is where either the trust-property is expressly charged with a debt, or where there are no other assets to pay it. And on reference to the Will of Colonel *Lindsay*, it will be found that the *Rajawelle* was not charged with the debts of Colonel *Lindsay*, but the estate generally. Have they shewn that there were no assets? The will itself negatives this, for it leaves considerable personal property to the widow. But assuming that there were no assets, I maintain that the debt of the estate was discharged, by the Bank taking the personal and individual credit of *D. B. Lindsay.* It is nowhere denied that the advances made by the Bank were for the purposes of the *Rajawelle* estate; but they having taken the personal credit and responsibility of *D. B. Lindsay* and of *Caffary*, the claims on Col. *Lindsay's* estate were thereby discharged. Again it is urged, that the vendor should have been joined, or in other words, that all the share-holders of the late Oriental Bank Company should have been made parties to the suit. True, the Oriental Bank Corporation were sued as a defendant, and sued because we supposed that all the liabilities of the Oriental Bank Company had been transferred to the new Bank. Your Lordships well know that in this action, and in every other action of tort, (for there ought to be no difference,) the vendor need not be joined. Suppose you sue three defendants, and you fail as against one, you take judgment

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against the other two. [*The Q. A.*—The two trustees who signed the deed are *Kennedy* and *Adam Duff*. They were the vendors.] It was not a Chartered Company and all the shareholders should have been joined. But the vendors are *not necessary parties*. Assuming that our Libel is a bill in equity to set aside the mortgage, judgment and sale, which I however deny, yet I find that the Courts of Equity have held that where all the persons interested cannot be made parties, the judgment will not be held to bind them, and they do not require persons who cannot be reached by the process of the Court to be made parties. But in cases here, we must refer to the practice of our Courts. Is not the practice here different? Does it not happen every day that actions are brought without joining the vendor or the mortgagor, and judgment entered? This is a case to get possession of the trust-property. In every case of trust, the first thing that a trustee has to do, is to get possession of the trust-estate.

When I answer this objection—I answer also the objection as to *Dr. Smyttan, who, it is said, must have been made a defendant.* He is not within the jurisdiction of the Court and has no property. In our Courts we always proceed against the parties in possession; and if judgment be given against them, they have their remedy against those from whom they derived their rights. Our judgment cannot take away the rights of *Dr. Smyttan*, whatever they may be. This objection was not taken in the answer, and the rules of practice do not permit them to take it now. Of course, as he is not before the Court, nothing can be recovered from him. He is out of the jurisdiction of this Court, and if he does not choose to come and defend his rights, it is his own fault. If your Lordships will decide that these parties should have been joined, it will be the very first instance in which such a rule is adopted. [Temple, J.—You always reserve the rights of third parties.] Rather, nothing is said of their rights, because the law reserves them. These are the objections raised by the learned Queen's Advocate to the plaintiff's title to sue. But before I enter into the defence set up, I must, however reluctantly, refer to the *breach of faith*, on the part of Mr. *Duff*. I maintain, that there has been a breach of faith. I refer you to the bond of the 11th of July 1848, to the letter from *Duff*, bearing even date with the bond, and to the proceedings had upon that bond. Your Lordships will perceive from the evidence tendered in this case, and from the examination of Mr. *Duff*, that immediately after granting the bond, and receiving the letter from *Duff*, *Lindsay* left the

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Island to proceed to *England*, for the purpose of making arrangements regarding the estate, and that even the passage money for *Lindsay's* voyage was furnished by the Bank. So that it will appear, that *Lindsay* gave the bond and warrant of attorney, and took the letter in exchange. Now, on the faith of that letter, *Lindsay* went to *England* and made arrangements with the Bank there, and actually got two years further time to pay the debt. This pledge, was not a mere naked promise from one gentleman to another, but one which in point of fact operated as an agreement between the Bank and *Lindsay*, and, on which the latter acted. [CARR, C. J.—*Duff* denies that he sent *Lindsay* to *England*.] He went away on the faith of that letter; and notwithstanding the engagement, and notwithstanding that *Lindsay* had acted on it, the Bank took proceedings in November following. And the excuse given by the Bank for this step is, that they were obliged to take the proceedings for certain reasons. Let us examine these reasons. Mr. *Duff*, when examined under the commission, stated that his inducement for so acting was, that *Reid, Kirk and Co.* and the Ceylon Bank had threatened proceedings against the *Rajawelle* estate;—in his examination before the trial, he reiterated this; and after the plaintiffs had closed their case, he was called as a witness for the defendants, and he then repeated that that was his inducement; *but added*, that the estate was not in good order. I do not say that he here stated any thing different from what he had stated previously: but I say that this is quite a new statement, made after the plaintiffs had closed their case and after the counsel for the plaintiffs had commented on the breach of faith. The Queen's Advocate stated, that the estate not having been properly kept up, was a good reason for a lawyer to give. The Queen's Advocate's explanation is, that *Duff's* object in taking the proceeding was to get the crops secured and to protect *D. B. Lindsay* himself, and to uphold the mortgage: and that *Duff* feared that the creditors would get into possession, which would have been detrimental to *Lindsay*. Now, it is for your Lordships to say whether the excuse of the threats was a good one. What had *Duff* to fear,—holding as he did the mortgage in his hands? If the mortgaged property is seized by other creditors, the mortgage-creditor has merely to produce his bond to the Fiscal, and to make his preferent claim to that officer; whereupon the Fiscal sells the property subject to such claim. Mr. *Duff* could have therefore no possible apprehension, in consequence of Messrs. *Reid, Kirk and Co.*, and the Ceylon Bank's threats. If indeed his claim was to be contested, he might have been forced to put his bond in suit, and

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try his superior right in a proceeding between him and other creditors. It is to be presumed that no objection was taken to his mortgage. But, says the Queen's Advocate, they might have taken the crops. I submit that the question whether the crops were to be considered mortgaged, cannot arise. It appears by the bond that the crops also were specially mortgaged; and if the other creditors seized the crops, *Duff* had only to produce his bond, and his right would have been secure. [CARR, C. J.—But if the crops were severed, where is your mortgage?] If the property was to be seized at all, it should have been by the Fiscal; and while the crops were thus in the Fiscal's hands, *Duff* could have produced his mortgage. All that the other creditors threatened were *legal proceedings*. This is the explanation given by *Duff*; but if he was acting under legal advice, his legal adviser must have known what I have already stated. The pledge was broken during *Lindsay's* absence, and I take this ground merely to shew that proceedings were taken against that pledge, and that therefore the estate was improperly sold. Another excuse given by the Queen's Advocate for proceeding during *Lindsay's* absence, is that the letter related not to the bond, but to the bills. Your Lordships will observe that in the £7,000 for which the bond was given is included the amount of the bills—£4,000. Mr. *Lindsay* returns with a deed granted by the Bank in *England* giving 2 years further time—(deed of Nov. 1848.). But, says Mr. *Duff*, I did not sign that deed, though sent to me for signature by the Directors, because *Lindsay* had deceived the Directors; because he had stated to them that the mortgage given in Ceylon was without a power of sale. Every lawyer knows what was meant by that. But it is said, that *Lindsay* ought to have told them of the warrant of attorney he had given. He however had a pledge from *Duff* not to proceed in his absence, which completely neutralized the warrant to confess judgment. Fortified with this, he was quite certain that the Bank and Mr. *Duff* had no power to sell. *Lindsay* returns to Ceylon and becomes aware of the seizure;—and here I come to the question of collusion between *Duff* and *Lindsay*. *Lindsay* finds, that in spite of the pledge, proceedings had been taken against him, judgment had been entered, the estate had been seized; and further, *Duff* refusing to act on the deed brought out from *England*, and having, as he says, two other bonds against the estate. *Lindsay* was completely at the mercy of *Duff*, and being so situated, unmindful of his duty as co-trustee—of his duty to the family,—he did not do what he was bound to do, to prevent the alienation of the family property. This is the collusion we complain of. [STERLING, J.—

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What collusion—when the parties were at arm's length from each other?] Whatever a man's situation might be, he cannot be justified for being unmindful of his higher obligations. And of Mr. *Duff*, we say, he took advantage of the helpless state in which *Lindsay* then was. Time was everything in the case, and time was all that was wanted: "Don't sell the estate—take the crops—hold on for a time; and it will do well." But, further, if a creditor takes a mortgage from a co-trustee with full knowledge that there are other trustees who had acted, the mortgagee and mortgagor are guilty legally of collusion. In this case however, we are not bound to shew collusion; we have nothing else to do but to shew that the property was the property of Colonel *Lindsay;* and that the defendants were in wrongful possession. The right of Colonel *Lindsay* is admitted. He was in possession at the time of his death. He made a Will which is admitted to be a perfectly valid Will; and having shewn this, we have shewn all that we ought to shew. Your Lordships have never been particular as to the pleadings in cases: but you are now called upon to consider this libel as a bill in equity. We know not such a thing here. It will be unfair to us and to the Judges in this Island, to insist upon rules which never existed here. It was stated in the Court below, that the libel was drawn by the late Sir *Thomas Turton.* He was an able lawyer, but he knew nothing of our rules of pleading and our practice here. Could not your Lordships imagine—if Sir *Thomas Turton* enquired of the practitioners in our Courts, what sort of pleading was necessary in such a case, where Trustees claimed possession of trust-property —that the answer would have been, the best way is to give a narrative of all the facts? I maintain that when we shew our title to sue, Colonel *Lindsay's* right to the estate, and the defendants wrongful possession, we have established our case.

The defendants urge, that advances were made by the Oriental Bank for the purposes of the Estate, and that therefore the Bank had a lien or tacit hypothec on *Rajawelle*,—which formed the consideration of the bond of 11th July 1848. And the Queen's Advocate laboured to shew that the advances were for those purposes. Now, I say that we nowhere denied that those advances had been for the purposes of the *Rajawelle* Estate. We assert in our replication that the "bills were drawn and cashed upon the personal and individual credit and responsibility of the said *P. J. Caffary* and *D. B. Lindsay* respectively, and that the proceeds thereof were applied to, and fully paid off, satisfied and discharged the said lien, if any there existed, which is denied, upon the said Estate." Assuming then that the advances were made for the purposes of the

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Rajawelle Estate, still according to the Dutch Law there was no lien or tacit hypothec on the same. [CARR, C. J.—I do not think that the Queen's Advocate contended that the Bank had a lien.] [*Queen's Advocate.*—What I said was, that the advances formed a charge upon the Estate, which was a good consideration for the bond.] Was this charge equal to a lien or not? Had these advances given the Bank a lien or not? If it be contended that on account of these advances the Bank had a lien on the *Rajawelle* Estate, then I say that according to the Dutch Law the Bank had no lien on this Estate. The £4,000 included in the £7,000, the amount of the bond, is the balance of the purchase money due by Colonel *Lindsay's* Estate to *Atchison.* Whatever the doctrine of the English Law may be, according to the Dutch Law the vendor has no tacit hypothec or lien on the land for the purchase money thereof. 2 *Burge* 720, 3 *Burge* 343. The residue of the amount of the Bond, viz., £3,000, is said to be for the upkeep of the Estate. There is no express law or usage in this country giving the Bank a lien on the *Rajawelle* Estate even for that amount. 3 *Burge,* 349. [CARR, C. J.—But there was a mortgage of £2,000 in favour of the Bank. Was not that sum part of the consideration of the Bond?] That bond of £2,000, as also the Assignment of *Hudson's* Mortgage of £4,000, were certainly mentioned in evidence; but they were not the subject of enquiry in this case. The amount of the bonds or of either of them, is not included in the £7,000, for which the bond of the 11th July 1848 was granted. That was the mortgage-bond on which judgment was taken, under which the Estate was sold. All the enquiry, and all the evidence taken, were concerning the bond of the 11th July 1848; and the Queen's Advocate has admitted that neither of the amounts for which the other deeds were taken were included in the £7,000, for which the bond of the 11th July 1848 was granted. And on reference to our Ordinance of Frauds and Perjuries, No. 7 of 1840, you will see that there can be no lien or equitable mortgage, otherwise than by writing. The Queen's Advocate has said, that the Bank stood in the shoes of *Caffary;* but there had been no assignment of their deed to the Bank. Assuming, however, that the Bank had a lien on *Rajawelle* on account of these advances, I say, according to the replication, that this lien was discharged by the bills drawn by *D. B. Lindsay* on *Caffary.*

This brings me to the other point, viz., *that the advances made by the Bank were upon the personal credit and responsibility of D. B. Lindsay and Caffary.* Mr. *Gordon,* in his evidence under the commission, stated that he would not sanction the advances unless

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some respectable firm in *England* would bind themselves to accept the bills of *D. B. Lindsay*. That occasioned the execution of the deed by the devisees in trust and *Caffary*, of the 15th February, 1848. It seems that a letter of credit was then given by *Caffary*. Mr. *Duff* as the agent of *Caffary* signed that deed, a copy of which was given to the Bank; and the advances were made under that deed. *D. B. Lindsay*, according to that deed, drew on *Caffary;* and the Bank cashed his bills, clearly shewing that they trusted entirely to the personal credit and responsibility of *D. B. Lindsay* and of *Caffary*. Whatever right the Bank might have acquired was clearly waived by making those advances. In the deed of *Caffary* the devisees agreed to give a mortgage of the Estate to *Caffary*, and the Bank, being a party to that transaction, gave up all rights on the Estate. *Fawell* v. *Heelis*, *Ambler*, 726; *Cowell* v. *Simpson*, 16 *Vesey*, 280; *Story on Eq. Jur.* § 1226 *and notes*. True, that *Caffary* failed, but the Bank having, according to the authorities, "carved out its own security," could not have a lien on the Estate. The very fact of the Bank taking the bond of 11th July 1848, shews this.

I proceed to shew *that the mortgage bond of the 11th July* 1848 *was invalid*, for the following reasons:

1st. *Because it was granted by only one of the co-trustees.* The Deed of *Caffary* of the 15th February 1848, was executed by all the devisees excepting *Henry Lindsay*. In that deed is further fully recited the Will by which the trust was created, and the trustees appointed; copy of which will was also in the possession of *Duff*. With full knowledge and cognizance then, that there were other trustees who must all act jointly, this bond is taken from *D. B. Lindsay* alone. The authorities cited by the Queen's Advocate only shew that a Mortgagee or seller *without notice* will be protected by Courts of Justice, but they can have no manner of application in this case. True, there are decisions that Executors may sell and encumber, but here there is only one executor, and one of several Trustees mortgaging. 4 *Burge*, 737. If I can shew that there was no consideration for the mortgage bond, and that it was an irrational, iniquitous, and improvident mortgage, it would be of no avail even if all the Executors and Trustees had joined; the bond would have been voidable; but having been granted by only one of the Trustees, it is absolutely void. Your Lordships need not be told that it is only necessary to proceed to set aside a voidable transaction, not one that was void. We say that the mortgage was a perfect nullity.

2nd. *That the consideration was a debt due by the Executor on his*

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personal security. The lien, if any there was, having been waived by funds raised on the personal responsibility of *D. B. Lindsay* and of *Caffary*, the consideration was no debt of the Estate; there was therefore no consideration for mortgaging the estate-property, i. e. the *Rajawelle*. If the amount for which the bond was granted was advanced contemporaneously with or subsequent to the bond, then it might be presumed it was for the benefit of the Estate. But in this case, the advances had been made long before, and there is nothing left for presumption, for by the advances raised on personal credit the debt of the Estate had been fully paid and satisfied. It was therefore for the debt of *D. B. Lindsay*, that the security was given by this mortgage. It was not for the benefit of Colonel *Lindsay's* Estate—but for the benefit of *D. B. Lindsay* or *Caffary* and the Bank. Although our Courts have allowed alienation of estate-property generally, they will not allow it in such a case, viz., to pay a debt of one of several Executors. And at the time of the mortgage, the bills of *Caffary* were not even due.

3rd. *The irrational and iniquitous character of the Mortgage.*—This Bond was given for £7,000 to be paid *on demand;* and was fortified with such a dangerous instrument as a Warrant of Attorney to confess Judgment. Where was this amount to come from at a moment's notice? And where was it to come from in 1848? If a man binds himself, he may do so as improvidently as he likes. But when he binds another's property—when an Executor does an act to bind the property of his Testator,—will any Court of Justice allow him to do so in this way? It was said forbearance was the consideration.—Pretty forbearance! Take a Bond on the 11th July 1848, get Judgment in November 1848, and sue out Writ. I shall refer to an analogous case cited in the Court below. It is the case of *The Wave*, reported in 15 *Jurist*, 518. In that case, the Master of a vessel borrowed money for the purpose of repairing it; but at the time of the mortgage no bottomry-bond was contemplated. A bottomry-bond however was subsequently taken; and this was considered an invalid instrument, because the money had been raised on the personal credit of the Master. Here, an Executor borrows money, for the purposes of the Estate; no mortgage is contemplated at the time—not thought of, as *Duff* said; but the money is raised on the personal credit of this Executor; he then grants a mortgage of the property of his Testator. Can the mortgage be held good? [STERLING, J.—But in the case of a bottomry-bond, you proceed on different principles.] The same principles will apply in the case of an Executor. *Miles* v. *Durnford*, 21 *L. J. Ch.* 666, was referred to by the

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Counsel for the defendants, for the purpose of shewing that in the case of a mortgage by an Executor it is necessary to shew, not that the money raised was for the purposes of the Estate —but that it was not for such purposes; and I find the principles I have just contended for were applied to the case of an Executor mortgaging his Testator's property. It is said, that when the borrower goes to the lender, he must bind himself as the latter requires; but the case is different; for here the loan had already been made. The lender went to the borrower and asked for security for the money that had been lent; and taking advantage of the helpless state of one of the Trustees, made him bind the trust-property. Were not the acts of the Bank and those of *D. B. Lindsay* under such circumstances, fraudulent in law? Were not the plaintiffs and others, *the cestuis que trust*, thus fraudulently deprived of the Trust-estate? The security is not given for the benefit of the Estate, but for the sole benefit of *D. B. Lindsay*. But I say even "unfair conduct" will be a ground in such a case to open up a decree. *See Coote on Mortgages*, 604. The rule in all such cases, where Masters borrow for the repairs of the vessel, or where Executors borrow for the upkeep of the Estate, is *ex necessitate*. The money had been raised by the bills on *Caffary*, but it was carried further, which could not have been done;—there was no necessity to bind the Estate for raising any money. When the reason of the law ceases, the law ceases.

4th. We now come to the *Order to Mortgage* obtained by *D. B. Lindsay* from the District Court. This order was obtained on the 28th February 1848, and it is said that it was obtained not for the purpose of making the mortgage of 11th July 1848, but the mortgage of £2,000 spoken of. Yet by the bond of 11th July 1848, it would appear as if the order was obtained for that occasion. Mr. *Duff* has stated that when this order was obtained, the mortgage of 11th July 1848, was not thought of. See how they went to work. To make a mortgage of £2,000, an order for £12,000, was applied for! What are the terms of that order? To raise a sum of money towards payment of the late Colonel *Lindsay's* debts and for the upkeep of the Estate. And in pursuance of that order a mortgage is made to pay a debt contracted by *D. B. Lindsay* on his own personal credit and responsibility. It was bad enough to grant such an order on an *ex-parte* application, but surely your Lordships will see that the terms of such an order, if granted at all, should be strictly pursued.

5th. *The Warrant of Attorney granted by D. B. Lindsay was wholly insufficient.* The case of *Elwell* v. *Quash*, 1 Strange 20,

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was cited in the Court below, in order to shew that a warrant from one of several Executors cannot be made use of to bind an Estate. It is true that in that case, other Executors being parties, Judgment was not given against them in consequence of their not having joined in the warrant. But if the warrant could not bind the Estate in a case where the Executors were parties to the suit, *a fortiori* the warrant granted by *D. B. Lindsay* could not bind the *Rajawelle*, the other Trustees and Executors not having even been made parties to the suit. The Appellants in their petition of Appeal say the authority is simply inapplicable, as there was no Judgment against the plaintiffs; aye, there *was* no Judgment against the plaintiffs or binding the *Rajawelle*, and therefore it should not have been sold. It is also contended, that *no demand was necessary* before the action was brought. In *Abbott* v. *Greenwood*, 2 *Jurist* 989, the argument of Counsel was precisely the argument now urged—that the proceedings in Court were a demand, and yet it was there held that an actual demand was necessary. See *Capper* v. *Dando*, 2 *A. and E.*, 458. The Queen's Advocate has argued that, according to the Dutch law, if no demand was made before action, the plaintiff would only lose his right to costs. But what has that law to do with this case, where the proceeding being under a warrant to confess Judgment, an actual demand is considered necessary? But, says the Queen's Advocate, it is stated in the Libel, that the money was not paid although demanded, and that the defendant by filing an admission, admitted that a demand was made. Surely the same can be said of all the English cases where it was held that a demand was necessary. [CARR, C. J.—There is nothing said about a demand.] The warrants here are not drawn out according to the warrants in England; but the warrant refers to the Bond, which makes the debt payable on demand. The Judgment was entered for a sum exceeding the maximum amount of £7,000, for about £383 more. This could not have been done, for surely when Judgment is entered upon a warrant to confess, you cannot go beyond the amount fixed by the party who granted the instrument. [STERLING, J.—But the bond is for £14,000. I suppose that is intended to cover the interest.] That is the penal sum; no Court will allow the penal sum to be recovered. The Queen's Advocate urges, that these were objections in the mouth of *D. B. Lindsay*. Our action is simply for the recovery of the Trust-estate, which went into the hands of strangers in consequence of his wrongful acts. And we can take advantage of all illegal and wrongful acts by which the alienation was caused.

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I shall next refer to the *nature of the proceedings* adopted to enforce the bond of 11th July 1848. It will be seen from the Libel, that the action was brought against *D. B. Lindsay* personally; he is not sued as Executor; and according to the Judgment, *D. B. Lindsay* individually is decreed to pay the amount claimed. Execution was issued to seize and sell the property of *D. B. Lindsay;* and the *Rojawelle* was sold as the property of *D. B. Lindsay* individually, as is shewn by the very title deed under which the Bank held and the defendants now hold. [STERLING, J.—But there is a reference to his capacity as Executor.] None whatever. In the Judgment, after stating the amount claimed, the words *as per bond* are added. The Queen's Advocate says, on the authority of Voet, that if there is any uncertainty in the Judgment, you may refer to the record to make it certain. Now there is no uncertainty in the Judgment. It is as certain as can be, that the decree is against *D. B. Lindsay* individually, and if we refer to the Bond, *D. B. Lindsay* simply designates himself Executor, and in the condition it is stated that "if *D. B. Lindsay*, [individually,] his Heirs, &c., pay, &c." We shall therefore refer to an uncertainty, and quite reverse the authority; we shall explain a certain Judgment, (which does not require explanation) by reference to an uncertain document. If your Lordships will hold this to be a Judgment against Colonel *Lindsay's* Estate—a Judgment *de bonis testatoris*, it will be in defiance of all rules; and in every Judgment given by the District Court, an attempt will be made to construe it as each party pleases.

Then it is stated, that the Estate, after the Bank had purchased it, *was kept open for the Lindsay family for* 18 *months*. Your Lordships will observe, that Mrs. *Lindsay* was to pass the accounts, the balance against her being some £14,000. It is said that they were willing to give up a few thousand pounds,—say four. Where was she, a poor widow, to get £10,000 at a time when the Mercantile crisis was at its height? It is said, that Mr. *Gordon* went about trying to raise money for her,—true, Mr. *Gordon* would rather have the £10,000 *then*. The Queen's Advocate has urged, there is no decree for the purchase-money which the defendants paid the Bank. They have got their remedy against the Bank, and no decree was necessary. All that we sought was, the possession of the Trust-estate, and the decree was given accordingly. Then it has been urged *that this being a Fiscal's sale—a judicial sale,—the legal title was conveyed ipso facto*, and a chapter from 2 *Burge*, has been cited in respect of Fiscal's sales. These are merely directory rules. The very passage cited commences with "when

the sentence has been passed," &c., clearly referring to a class of actions alluded to in *Vanderlinden*, p. 180, cited in the Court below. In the case of a pledge or mortgage, on producing an act of "willing condemnation," the plaintiff obtains a decree that the mortgaged property is "bound and executable," and the Fiscal then proceeds to sell, according to the rules laid down for his guidance, which are collected in *Burge*. Here we have no such Judgment to begin with, and the whole chapter is therefore clearly inapplicable. It is further contended, 2 *Burge* 581, that absent parties are not prejudiced by this mode of sale only in cases when they are unrepresented by "attornies." I contend that the sales alluded to are in reference to cases where the *defendant's* property is sold, and "by the parties not prejudiced" are meant only such claimants as mortgagees, &c. In this case, by a Judgment against A. you proceed to sell the property of B. Will the owner of the land be barred from claiming, because his joint-tenant, either by gross neglect or collusion, allows the land to be sold; and can a colluding party benefit by such sale? But really, what have we to do with the rules laid down by *Burge*, when we have our own directory laws on that subject—viz. the Ordinance No. 1 of 1839 and the Fiscal's Rules of 11th July 1840? In the 15th clause of that Ordinance reference is made to claims of this kind under a Fiscal's sale, and it is there stated, that the "person in possession shall be considered *prima facie* the proprietor thereof, until the contrary be shewn." So that we had not, by our Fiscal's laws, to shew our title, but the defendants; for the possession of the Bank commenced under the sale. What is a Fiscal's deed worth? No practitioner in Ceylon will hold that it gives a good title. The Fiscal merely sells property pointed out to him by the plaintiff, and his deed is nothing more than a certificate of sale; he does not even contract to warrant and defend title.

The Queen's Advocate has next referred to an *order to convey*. This is a simple subsidiary order under the Writ of Execution. By the 17th clause of the Fiscal's Rules, the Fiscal cannot give his deed, his certificate, to the plaintiff in a case when the latter buys the land himself, for he then does not pay the purchase money; he therefore must get an order of the Court directing the Fiscal to give the plaintiff credit for the purchase money and to deliver over to him a bill of sale. And in pursuance of this clause of the Fiscal's rules, this order was made as a matter of course. The Queen's Advocate has argued as if this was an independent, unconnected order, barring the plaintiffs from claiming the *Rajawelle*. Surely your Lordships cannot think of giving to this order such an effect. A great many cases have also been cited to shew that mortgagees

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or purchasers from Executors are not bound to see to the appropriation of the amount paid. I do not deny this proposition. But in this case the mortgagee and purchaser were affected with notice. It will not do to speak of purchases for valuable consideration; they must go a step further, and shew that they were purchasers without notice, and there are abundant proofs that the Bank had notice; and those who claim under it are affected with such notice.

But, says the Queen's Advocate, suppose all that is in favor of the defendants is wiped away,—have you, the plaintiffs, shewn a title? Our title is very simple,—our right and title to sue, and that Colonel *Lindsay* was the owner of the *Rajawelle* of which he died possessed. To require us to prove more than that will be unjust both in law and practice, whatever may be the practice in the Courts of Equity in England, presided over by the ablest Lawyers and having machinery to work with, which is wholly unknown to this country, whose Courts are presided over mostly by unprofessional men.

As regards the *Mesne Profits*, we have the evidence of Mr. *Tytler*. It will not do for Mr. *Duff* to say he was a mere Agent. The question of Agency cannot enter into your Lordship's consideration in an action of trust. He has his remedy against his Principal. We have to proceed against the parties in possession, whether they be Agents or otherwise.

It is said that Mrs. *Lindsay* and the others ratified the mortgage and the sale complained of. There was *no ratification*. In considering the question of ratification, nothing less than actual notice will answer. In all the letters of Mrs. *Lindsay*, she complains of her destitute state, and therefore when she applies for an allowance from the Bank, she could not be said to have ratified the acts of her son. Mr. *Frith's* evidence was of the conversation had with Mrs. *Lindsay* in 1850, after the estate had been sold, and what does she then say? That "her son had been obliged during the adverse times in Ceylon to mortgage it and make away with it—but she hoped now to be able to reclaim it"—and poor lady! she wanted the assistance of Mr. *Frith* to do so. The letter of Mrs. *Lindsay* of April 25th 1849, was put in to shew acquiescence, but in the concluding part of that letter she says, she makes the application to Mr. *Lancaster* without prejudice to her rights. The conversation between her and Mr. *Adam Duff*, deposed to by that gentleman under the Commission, and referred to in the Court below by defendants' counsel, was relative to the debt due to the Bank, and also how the Bank would go on with her allowance. "And" says Mr. *Adam Duff*, "at that interview, Mr. *Gordon* and

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myself pointed out to Mrs. *Lindsay* the probability, when the property in Ceylon rose to a sufficient value to permit of the Bank recouping themselves, in the event of the Estate being sold by the Agent in Ceylon. She was very much overcome at hearing that, and with tears in her eyes entreated of Mr. *Gordon* and appealed to me that we should hold the Estate over, as she was under great hope that property would rise sufficiently in Ceylon to admit of a reversion to herself and family. It was a most painful scene, for there she was crying, poor woman, and entreating us to do what we could for her."

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R. Morgan in reply.] The Queen's Advocate has so carefully touched upon every topic bearing upon the case, and so thoroughly exhausted every topic upon which he did touch, that nothing is left, save to point out how the arguments adduced by the learned counsel for the plaintiffs had already been anticipated and refuted by the learned Queen's Advocate.

It would be convenient to consider the objections, firstly, as they relate to matters of form; and secondly, to matters of substance.

The objections to form, as respects the plaintiffs, are three: their title to sue as Executors; their title to sue as Devisees; and the non-joinder of *Henry Lindsay* as a plaintiff. To qualify them to sue as executors, it is necessary that they should have sued out probate in the Courts of this Colony; for it is well established that probates have no force beyond the country in which they are granted. Hence, the probate taken by the plaintiffs at the Sheriff's Court at Aberdeen can give them no title to sue here. *Story on Conflict of Laws*, §§ 512—514, and it is necessary also that upon exemplification thereof, the plaintiffs should have sued out fresh probate here. 3 *Burge* 1,011, *Burn* v. *Cole*, Ambler, 416. It was said in answer to this, that the probate of one executor enured to the benefit of all. This, though true as a general proposition, cannot apply here for three reasons: 1st, because, the probate taken by *D. B. Lindsay*, was a probate taken in a Colonial Court, and could not enure to the benefit of foreigners, who were not subject to its jurisdiction; else this great inconvenience would ensue,—and inconvenience was a sound argument,—that parties would act as executors who were not subject to the control of the Court. If Mrs. *Lindsay* could sue, she could also dispose of estate-property, and the whole might be alienated by executors whom the Court could not reach, and the creditors would thus be left without remedy. We rather follow the practice of the Spiritual Court, which requires double probate, where all the executors do not at first join in proving the will. 2ndly, Though there are cases in the books, where an

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executor who had not proved, joined another who had taken out probate, there was no case where two or more executors sued, none of whom had taken out probate;—nay more, not only is this the case in the present instance, but executors who have not proved, are here suing one who has proved. The act of one may enure to the benefit of another joined with him, but certainly cannot to the benefit of one opposed to him; else, we should have executors sharing in the rights of their co-executors, without being bound by their acts, which would be opposed to every principle of law or justice. 3rdly, the English rule does not apply here, owing to the form of our probates. The present probate confers on *D. B. Lindsay the whole estate*, rights and credits of the deceased; the Court reserving to itself the right of granting probate to the other co-executors *in case they should appear before the Court and sue out the same.* This they have not yet done. It would thus appear, that the plaintiffs are not entitled to sue as Executors.

The next question is, whether they are entitled to sue as Devisees. It is submitted that they are not, for two reasons:—1st, the whole estate vested by our laws, as shewn by the Queen's Advocate, in the executor, and the rights of heirs and devisees do not accrue until the debts have been paid, the estate settled, and the legacies and devises made over. The right of inheritance does not exist *ipso jure* or under the will, but must be taken or conveyed by a positive act; if the estate vested in the executors, they could only divest themselves of it, and convey a right to others, devisees or strangers, in the way prescribed by the Statute of Frauds, and that is by a notarial act. *Van der Linden*, 123; *Col. D. C.* 35,223. It was said in reply to this, that *Shaw* and *Caffary's* deed was the act which the law required to vest the estate in the devisees: but the Queen's Advocate has already shewn, that that deed need not be necessarily viewed as made with the plaintiffs as devisees, because they are spoken of in that instrument as trustees, a term which would include executors as well; but even if so viewed, it certainly is not a notarial act whereby *D. B. Lindsay* conveyed the estate to the devisees.—2ndly, even if a conveyance by the executors were not necessary, yet, as there is no distinction here between moveable and immoveable property, and all were alike assets,—devisees, to acquire a right, must sue out probate.—*Story on Conflicts*, § 509. It follows therefore, that the plaintiffs are entitled to sue neither as executors nor as devisees. Assuming, however, for the sake of argument, as the plaintiffs contend, that the estate vested in the devisees by virtue of the will, then it follows that it vested in *Henry Lindsay* as well. And this was the third objection

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of form, as applicable to the plaintiffs. If the estate vested by the will, it vested in *Henry Lindsay* with the others, and he could only divest himself of it by a notarial act. 1 *Cruise's Dig: p.* 510. [CARR, C. J.—These are at best technical objections. I would rather go on the merits.] And so would the defendants: they courted the fullest investigation on the merits; but at the same time, it is submitted that if ever there was a case in which the defendants had a right to take technical objections, it is the one before the Court. What is the plaintiffs' case, but a tissue of technical objections? It is altogether founded on technicalities. Now that all the merits are before the Court, who will deny that the case would never have seen the light of day, were it not for the blunders alleged to exist in the case upon the mortgage-bond under which the land was sold. [CARR, C. J.—Rather, the case would never have seen the light of day, but for the Estate being very much improved and risen in value.] Doubtless that first gave the idea, and then arose the endeavour to ferret out documents to see whether holes could not be picked in them. Because the proceedings did not carefully set out *D. B. Lindsay's* liability *as executor*, although there could not exist a shadow of a doubt that it was against him in that capacity, the plaintiffs wish the Court to believe that *D. B. Lindsay* individually, and not the estate, was bound. Because the money was paid before the execution of the bond, though there was not a reasonable shade of doubt that it was paid to *Lindsay* for the preservation and upkeep of the estate, the plaintiffs wish the Court to believe that it was paid on *Lindsay's* individual credit, and not on the credit of the estate. The plaintiffs contend, that by the will, the estate vested in all the devisees, and all should have joined in the mortgage;—admitted, say the defendants, following this line of argument, but then your action is bad as all the devisees had not joined in it. Oh! but that's a technical objection, is the reply. The plaintiffs contend that the proceedings in the mortgage-suit were invalid, because they affected the rights of the co-devisees who were not joined in that suit. Admit it, say the defendants, following this line of argument, but then your proceedings in this suit, are invalid because they set aside a purchase, and thus affect the rights of a purchaser who is not a party to the suit. Oh! but that's a technical objection, is the reply. Technicality forsooth!—the defendants are driven to it by the conduct of the plaintiffs. Nothing can please them better than to throw all technical objections, on both sides, overboard, and view the case on its substantial merits; but this will not evidently suit the plaintiffs. The defendants have a right, therefore, to take technical

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objections, and it is submitted, the case is such as should induce the Judges, if necessary, to uphold technical objections, to prevent a failure of substantial justice.

The objections as concerning the defendants—are *first, the non-joinder of the Oriental Bank Company.* The action is brought to set aside the purchase; this is evident from a mere perusal of the Libel; and in such a case, the purchaser is an indispensable party. It is contended in reply, that the action should be regarded as one of ejectment merely, and that if the purchaser was a necessary party, he should have intervened. But it will be seen that the prayer for ejectment is only consequential upon the setting aside of the purchase;—the burden of the Libel is to charge that fraud, which, if proved, would invalidate the purchase; and it was not till the trial, when the plaintiffs found that they were utterly unable to substantiate the charge of fraud, and that there was no ground whatever for imputing collusion, that it suited their purpose to argue that the case was after all one of ejectment only,—adding quaintly, that all they wanted was the land. Our Courts, with all their anxiety to disregard mere matters of form, have always held parties bound to their rights in the way they were set forth. I do not want to multiply instances, but one, No. 23,067, *Kandy*, is very much in point. The learned counsel for the plaintiffs gave us an interesting narrative as to the preparation of the Libel; how Sir *Thomas Turton* had come here, consulted Ceylon practitioners and prepared the same; but all this only evidenced the care and deliberation with which the pleadings were prepared; the necessity for a charge of fraud was seen and inserted, as also a prayer to set aside the purchase. If native suitors are held bound by their pleadings, *a fortiori* should the rule obtain in a suit like the present, the pleadings in which were, if not prepared, at least approved of in England. But why, it is asked, did the Bank not intervene? There might have been a show of reason for this question, but for the fact that the plaintiffs brought parties before the Court whom they describe as the sellers, to wit, the *Oriental Bank Corporation;* the defendants denied this, and set forth who the sellers were; but the plaintiffs insisted upon their story, and it was not till the morning of the trial, after all the witnesses to prove this point were summoned from Colombo, that it was admitted that the Corporation were not the sellers, and they were given up. The question, Who were the sellers? was then put in issue by the plaintiffs, and this was not a case in which the defendants could call upon the sellers to intervene. Nor was there any analogy between this case and the ordinary cases of simple ejectment brought against parties in

possession, for the defendants here had purchased of parties who were *bonâ fide* in possession for more than a year and a day, and who derived title from one in whom the estate had vested.

The second objection, as respects the plaintiffs, is the *non-joinder of Dr. Smyttan.* The answer to this objection was two-fold;—1st, that the objection was not taken in the Answer; and 2ndly, that no mesne profits were asked against Dr. *Smyttan.* Now it will be seen from the record, that not only was the objection taken in the answer, but that the plaintiffs' attorney swore an affidavit, that "he was advised by counsel and verily believed that it was necessary to afford the Court an explanation on the face of the pleadings, why *George Smyttan in the answer mentioned, had not been made a party defendant in the usual manner*," and thereupon got leave to amend. Again, though no mesne profits were asked of *Smyttan*, yet the whole of the mesne profits accruing during the time, were asked for and obtained against the other defendants. If mesne profits have not been taken from Dr. *Smyttan*, his land has been taken from him, and it is immaterial to the plaintiffs whether they got the mesne profits from *Smyttan* or from *Duff*, so long as they get the mesne profits of the whole term. There was some difficulty as to the division of mesne profits, and the Supreme Court may not be aware that the judgment in respect of mesne profits was twice altered after it was pronounced, the prevailing anxiety throughout however, having been how to make *Duff* liable in most. And at length, ingeniously enough, they were so divided, that Colonel *Brown*, *Ingleton* and *Duff*, were made to pay for what *Brown*, *Ingleton* and *Smyttan* had received!

These are the objections to the *form:* the first question as respects the *merits* relates to the Mortgage bond of July 1848. That instrument is impeached on the ground of its *not having been signed by all the trustees; of want of consideration; and of its irrational character.*

With respect to the first, two questions arise for consideration: 1st, was the concurrence of the other trustees necessary; 2nd, if necessary, has it been shewn? The Queen's Advocate has demonstrated that the estate vested in executors until its final settlement, and that executors alone could represent it until the debts were paid and the residue conveyed over to the devisees. Even had all the executors duly proved, it was quite competent for one to act in mortgaging the estate. *Coote on Mortgages*, 202; *Scott* v. *Tyler*, 2 *Dickens.* But here *D. B. Lindsay* had alone proved and was described by the other executors in *Shaw* and *Caffary's* Deed as

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the "*sole executor.*" The concurrence of the others was therefore legally unnecessary; but notwithstanding this, such concurrence was fully shewn; and this was the second answer to this objection. In Colonel *Lindsay's* Will it is provided, that any of his sons who should assume the management of the estate should be considered the Agent of the other executors and trustees. In *Shaw* and *Caffary's* Deed it is set out by the other trustees that *D. B. Lindsay* had also proved the Will under a power of attorney from the other executors. In the application to mortgage, which has not een impeached or set aside, it is set out that *D. B. Lindsay* held the authority of the other executors to mortgage. Again the deed of November 1848, though executed in England and clearly with the concurrence of the other trustees, was executed by *D. B. Lindsay* alone: all which clearly establish the fact of *D. B. Lindsay* having been the Agent of the others, who are thus bound by his deeds. As he is now in collusion with the plaintiffs to upset his own acts, it is impossible for the defendants to get at the powers; but the plaintiffs are estopped by the admissions in their deeds from questioning the existence at the time of those powers. Apart from this however, their active concurrence is abundantly evident. Mr. *Frith* swears that Mrs. *Lindsay* told him "that the property was in the possession of the *Oriental Bank;* that her son was obliged during the adverse times in Ceylon to mortgage it and make away with it, but she hoped now to be able to reclaim it, if she got assistance from them or from any other party." In the letter of the 25th April 1849, she refers to the mortgage and sale, and prays for a monthly allowance in consequence of her destitute condition, so long as the Bank held possession of the property. The Deed of November expressly saves the rights of the Bank on the Bonds for £2,000 and £7,000, and Mrs. *Lindsay* subsequently draws her allowances under this deed, and upon receipts clearly referring to it. It is said that in the letter of the 25th April she expressly reserved her rights, but it will be seen that all she says is "without prejudice to the right of either of the parties to *enforce or rescind the Deed of Arrangement which was executed by you (the Bank) and my son in November last.*" She does not reserve to herself the right to question the previous mortgages. *D. B. Lindsay* was together with her and the *Haddens* at Aberdeen when this arrangement was made. All this shows active concurrence, of which very slight evidence was necessary, seeing that the Trustees had clearly delivered over to *D. B. Lindsay* the whole management of the trust, had not provided funds themselves, and knew that he must have raised them from others for the purposes of the Estate.

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A distinction has been attempted to be drawn on the ground of this being a Trust-estate, but it was one not justified by law or equity. Where a man dies in debt, his property must go to pay it, though burdened with a trust, so that the debts are deemed a charge on the land. *Ball* v. *Harris*, 3 Jurist; *Shaw* v. *Borrer*, 1 Kee. The cases on the subject are well put together in 5 Bythewood and Jarman, 137 *et seq.* It is unnecessary to notice the argument that there was considerable property left to *E. Lindsay*, which by the way, was strangely inconsistent with the allegation of her extreme destitution, for the evidence shewed that there were no assets of any value save the *Rajawelle* Estate.

The second objection to the Bond is the want of consideration; in support of which it is urged that the Bank had no lien on the Estate, and that as the money was advanced on the bills before the bond was signed, therefore there was no consideration. It is hardly necessary to enter into the general question whether a lien for unpaid purchase-money and for the upkeep of an Estate existed under our Law, though the authorities were clear that it did exist both under the Dutch and English Law. 2 *Story's Eq. Jur.* § 1,220; 2 *Domat, b.* iii. § 5, *art* 4; *Vinnius* ii. 1. 41. *Voet* vi. 1 § 14; *Cens. For. part* i. *lib.* 4. *cap.* 19. *n.* 20. The question here is, not whether the lien could be enforced, but whether it was a good consideration for the Bond subsequently granted; and of this there can be no doubt. This argument is moreover based on a fallacy; for the mere delivery of bills or notes as security, is not payment, unless those bills or notes have been discharged; nor is the circumstance of bills or notes or even a bond being taken for the purchase-money, evidence that the vendor agreed to give up his lien. Nothing less than an agreement to take a distinct and independent security, as for instance a mortgage on another Estate, has been held to afford evidence of intention to waive the lien; and it lies on the purchaser to shew it. The bills of *D. B. Lindsay* were given for Estate purposes; the bulk of the amount went to pay the very purchase-money for which the property was mortgaged. When the acceptor failed, the holder of the bill was entitled to demand security, and hence the bond. The Bank was at that time in a position to enforce payment; they also held the £7,000 bond, supported by a warrant of attorney to confess judgment. Instead of enforcing those securities, and compelling a sale of the property at once, (a course which, had it been taken, would have saved the Bank all the annoyance and expense to which it was subsequently exposed), they agreed to accept *Lindsay's* Bond as security, advancing to him other monies, and finding him funds to enable him

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to go to *England* and make arrangements with any other Mercantile House. Advantage is now attempted to be taken of this indulgence and liberality, and the Court is called upon to pronounce, that when the Bank took *Lindsay's* Bond, it discharged the Estate-debt. No equity can be urged in support of such a plea. If Estate-property was mortgaged for the private debt of the executor, doubtless the mortgage would be bad; but the real circumstances must be looked into, to ascertain whether the debt was an estate or a private debt, and the previous advance of the money did not conclusively shew that the debt was a private one. The case cited by the Counsel for the defendant in support of his position, was that of *the Wave* in 15 Jurist; but there is no analogy between the two cases. Bottomry Bonds are instruments *sui generis*, and subject to particular rules. In dealing with executors, purchasers are not bound to see to the application of the purchase money; whereas Bottomry Bonds cannot be sustained unless the money is proved to have been lent for the purpose of repairing and preserving the ship.

The third objection to the Bond was, its so-called *irrational character;*—irrational, because it was payable on demand—an objection which if good, will invalidate half the Bonds in the country. If indeed the bond was irrational, the plaintiffs should have sought to set it aside and cannot treat it as a nullity. But it is not. The objection, it is said, applies because the debtor did not go to the creditor to apply for money (in which case the creditor could make his own terms,) but the creditor came to the debtor for security. I cannot see how the fact of the creditor trusting the debtor beforehand, altered their relative situations or affected their respective rights and liabilities. Besides, had the bond not been given, the other securities could have been enforced, and what would have become of the Estate then? But, it is said, the Bank should not have made the bond payable on demand, since *Shaw* and *Caffary's* agreement was made payable in five years. No analogy surely can exist between the case of merchants engaging in a speculation and insisting upon a term of years during which they were to get the Estate business, and a Bank drawn into this transaction by the unexpected failure of the parties after the negotiation of the bills, and thus forced to take non-banking securities. Had *Shaw* and *Caffary* paid the bills, they would have been entitled to the Mortgage. Equity will give the same rights to the party who advanced the money. It would certainly be a new way of paying old debts to allow the Trustees now to say,—"True the Estate was indebted, true you advanced the money on a guarantee and

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at our instance, true you saved the property; but because you took bills when the money was advanced, though we instructed you to do so, you must lose all claim on the Estate now; its debts have been extinguished." The learned counsel for the plaintiffs has stated that the Court had nothing to do with the other Bonds held by the Bank of £2,000 and £4,000 respectively. They were not proceeded upon, simply because it was unnecessary to do so, as the Estate was insufficient to pay the debt upon one Bond; but they were given in evidence in the Court below.

The next objection was that of *breach of faith.* Strictly speaking there can be no doubt that the guarantee referred to the bills and not to the Bond, although the District Court, professing to view the question "*with extreme care and impartiality,*" never once adverted to the circumstance. But assuming that the pledge was general, the circumstances that afterwards transpired, not only justified, but actually compelled Mr. *Duff* to proceed against Mr. *Lindsay.* The evidence shews conclusively that the Estate was not properly kept up; witness the testimony of Mr. *Ingleton* and Mr. *Gordon.* Mr. *Ingleton* states, that when the Estate was sequestered, it was "*in bad order,*" "*upwards of* £800 *was owing to coolies;*" "*the Agents only supplied him with* £15 *or* £20 *at a time and he could not get rice with such small sums for the coolies.*" Mr. *Gordon* swore that the Estate "*was very weedy, the cultivation could not have been carried on properly.*" And yet the Court, having viewed the case with "*extreme care and impartiality,*" held that "*no evidence whatever* that such neglect did take place had been afforded." It was contended also by the plaintiff's counsel, that the explanation of the Estate not having been kept in a proper state of cultivation, was not afforded till the trial, after the plaintiff's case had been closed. But the defendants had never before an opportunity for making any explanation; for, the charge not having been brought in the libel, could not have been answered. But that such was our explanation was known to the opposite side; for it was referred to and commented upon by the counsel for the plaintiffs in his opening in the Court below. It mattered little that that was not the reason which operated in Mr. *Duff's* mind when he took the proceedings, except in so far as it shews that in spite of the breach of the condition Mr. *Duff* was unwilling to proceed. When he found, however, that others were going to proceed, he felt that he could delay no longer, and his lawyers advised him to put the Bond in suit. But it is said that, Mr. *Duff* having a mortgage of the growing crop, could not be prejudiced by the proceedings of other creditors. It is rather a nice question whether such a

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security continued after the severance of the crop; but none could doubt that to prevent such severance, was a wise precaution. Indeed the necessity for Mr. *Duff's* proceeding is evident, from the circumstance that *Smith & Co.* did actually refuse to give up a portion of the crop which had been picked and was in their possession, and that portion had to be put up for sale under the Writ and purchased by the Bank. It was already seen, that no possible prejudice could have resulted to Mr. *Lindsay* from the Bank having obtained Judgment, as the Estate had not been put up for sale for some six weeks after Mr. *Lindsay's* arrival. The sale was first fixed for January, but the Bank had it postponed till the 5th of March. The Bank gained nothing therefore, by the judgment having been obtained in November, excepting that it was enabled to seize the property and put it in the possession of the Fiscal, through whom the Bank could, as it did, spend money for its upkeep. With a view to the sale in March 1849, it was quite as easy for the Bank to have taken its Judgment any time after the 1st of January, the period fixed by the so-called pledge. This shews therefore, that no object prejudicial to Mr. *Lindsay* was contemplated by the Judgment. The Bank did only that which, had Mr. *Lindsay* been here, he would, as an honest man, have been bound to do himself, in order to preserve to the Bank the security given by the Bond. Immediately the Bank got possession of the Estate, it paid the immense amount of arrears then existing, some £800 and upwards. The crop in the possession of *Smith & Co.* was sold under execution and purchased by the Bank for £1,070; this was all they were bound to give *Lindsay* credit for, but they sent the crop to *England*, and sold it there, and the whole amount it realized, viz. £1,800, was carried to his credit. The Court has also seen how the Bank kept the Estate for some 15 months after the purchase, to enable the *Lindsay's* family to take it up,—Mr. *Gordon* going himself, from firm to firm, to induce his mercantile friends to assist Mrs. *Lindsay*. It was after all these efforts had proved unavailing, that the Bank parted with the Estate to its present proprietors. Whilst the Bank held it, and after it had parted with the property, large sums of money were spent, which made the Estate the valuable one it now is. Up to the sale by the Bank, and for three months after it, they made monthly allowances to Mrs. *Lindsay* of £40 and then of £25; after the sale, they parted with the security they had for a portion of the debt, £4,000; they never proceeded against *D. B. Lindsay*, which they might legally have done, for the balance; and it is in the face of these circumstances,—shewing not only the absence of bad

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faith, but the utmost liberality and generosity,—that the defendants are charged with bad faith. This charge of bad faith was never brought against the defendants in the plaintiff's libel. They had brought against the Bank and against Mr. *Duff* every charge of fraud and collusion they could think of, but this was never referred to. When Mr. *Duff* was examined in *England*, he there referred to the letter and spoke of it. After some time, sufficient to allow of communication between parties in *England* and Mr. *D. B. Lindsay* at *Calcutta*, the latter filed an answer, to the reception of which, notwithstanding the lapse of time, *the plaintiffs consented;* in which this letter is set forth, and bad faith in reference thereto charged. This shews (in addition to the circumstances of *D. B. Lindsay* not having taken steps to set aside the proceedings after he came here, but rather assenting to them and writing to Mr. *Ingleton* that there was no use attempting to resist,) how much Mr. *Lindsay* felt himself at the time aggrieved by the proceedings.

The Queen's Advocate has shewn that, as sole executor, as the Agent of the other Trustees, as the manager in possession, *D. B. Lindsay* was entitled to mortgage the Estate;—the application of every farthing for the purposes of the Estate, the payment of the purchase money, the funds for its upkeep, and for enabling the manager to proceed to *England* to find funds to carry on the Estate, were clearly and conclusively shewn. The parties not being able to pay the debt, the mortgage was duly foreclosed and the Bank became the purchasers under the judicial sale. Even after that sale, it gave every opportunity for the family to get back their own, and after every possible means was exhausted, the property was resold. Into the question of the judicial sale, so fully treated by the learned Queen's Advocate, it is unnecessary to enter, further than to notice an observation of the learned counsel for the plaintiffs, who said, that a Fiscal's title is the worst in the country, —a statement which would be perfectly true, if the Queen's Advocate's position with respect to the conclusiveness of a judicial sale was not upheld. The Fiscal gives no warranty, and if the law did not make sales by them conclusive, and binding upon all who do not assert their claims in due form, there would be no safety in purchases from the Fiscal. *Cur. adv. vult.*

The judgment of the Court was delivered by CARR, C. J.]

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Judgment.

It is ordered, that the decree of the District Court of Kandy be set aside, and the plaintiffs' libel dismissed with costs; it appearing to the Supreme Court that, on the merits of the case, which have been fully entered into, and well argued by the counsel on both sides, the plaintiffs cannot maintain their claim in this suit. This

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view will relieve the Court from considering in detail the several technical objections urged in the proceedings, and on any of which alleged errors, defects, or irregularities, the Supreme Court could not, by the Ordinance No. 6 of 1855, proceed to reverse or remand the judgment of the District Court on appeal, unless they were productive of injury to either party.

The plaintiffs have entirely failed to prove their case on the ground of fraud or collusion between *David Baird Lindsay* and the *Oriental Bank*, or Mr. *George Smyttan Duff*, or the *Oriental Bank Corporation;* whilst the mortgage of the 11th July, 1848, and the warrant of attorney thereon, were also clearly given for the payment of debts incurred by the testator, Colonel *Lindsay*, and for the management of his coffee estate at *Rajawelle;* and were not granted, as set forth in the libel, for any private debt of Mr. *David Baird Lindsay*. It is proved, that Mr. *David Baird Lindsay* was, under the terms or directions of his father's will, and with the knowledge and concurrence of the plaintiffs, employed to manage and cultivate the testator's coffee estate at *Rajawella*, and to draw bills on account thereof: that he also alone obtained probate of the will of Colonel *Lindsay* in this Colony, as the sole executor resident therein, and was specially authorised by the Court of Probate in this Colony possessing exclusive testamentary jurisdiction in respect to the estate and effects of the said testator in Ceylon, subject to appeal to this Court, to mortgage so much of the landed property in Ceylon of the said testator as should be sufficient to raise £12,000, to be appropriated towards the payment of the debt of the said testator, and the management and cultivation of the plantation belonging to his estate. It therefore appears to the Supreme Court, that Mr. *David Baird Lindsay* had full power and authority to grant the said mortgage of the 11th July, 1848, it being strictly for the above purposes.

With regard to the proceedings in the case No. 8,997, they are admitted to be irregular in form; but as, upon the whole matter, the plaintiff has declared against the defendant therein as executor, (see *Williams* on *Executors*, p. 1,520), and the judgment is also against the defendant on the bond given by him as executor; the Supreme Court would, on appeal, have only considered the judgment to have been obtained against the defendant in his representative character, having reference to the whole record, and directed execution accordingly "*de bonis testatoris*." Another objection urged against the proceedings in this suit is, that the letter of Mr. *George Smyttan Duff* of the 11th July, 1848, which was given to Mr. *David Baird Lindsay*, when the mortgage and

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warrant of attorney aforesaid were granted, must operate as a promise to forbear or suspend the proceedings in the said securities, provided that the *Rajawelle* Estate were properly kept up, until Mr. *David Baird Lindsay's* return, or previous to the first of January, 1849. On this point, the Supreme Court considers that there is sufficient evidence to shew that the estate was not "*properly kept up.*" Mr. *James Ingleton* deposes that he was manager of the estate for some years, and at the time it was sequestered by the Bank. "It was in bad order then; after Mr. *D. B. Lindsay* left for England, I did not receive sufficient funds for the cultivation. At the time the estate was sequestered, upwards of £800 was owing to coolies. The agents only supplied me with £15 or £20 at a time. I could not get rice with such small sums for the coolies. I repeatedly wrote on this subject to the agents, *J. and G. Smith & Co.* They were also engaged in cultivating coffee. Their reply was, that they could not give me more until Mr. *Lindsay* came out. I only applied, during the term of Mr. *Lindsay's* absence from Ceylon, £170 to the upkeep of the estate; the rest of the money was for picking coffee." Now, this small sum of £170 was clearly inadequate "*to properly keep up*" such a large estate for nearly five months, during which Mr. *David Baird Lindsay* was absent, namely, from July to December, 1848. Mr. *Gordon* also deposes that he has been a planter 10 years, and adds, "I know the estate in dispute for the last 9 years: I knew it in 1848; I was then living on Sir *Herbert Maldock's* estate. Then, the *Rajawelle* was *very weedy*, —the cultivation could not have been carried on properly." Assuming, therefore, that the estate was not "*properly kept up*" at the time, which the Court fully believes to have been the case, it forms no just ground of complaint against Mr. *George Smyttan Duff*, that he was induced to act promptly on another more urgent reason, as it seemed to him,—namely, to secure the crops, which, he had reason to apprehend, were in danger of being taken by other creditors, and which were mortgaged to the Bank; and Mr. *David Baird Lindsay* intended to be possessed by it. As mortgagee not in possession, the Bank was forced to institute the suit to sequester the crop, and Mr. *George Smyttan Duff* appears to have thus acted upon legal advice, and with no other spirit than to protect the Bank's interests, which it was his duty to do. The sale, moreover, was stayed until the 5th March 1849,—more than two months after Mr. *David Baird Lindsay's* return, and the time limited by the letter referred to, namely, 1st January, 1849.

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Yet Mr. *David Baird Lindsay* does not take any steps to oppose the sale, or raise any objections to the proceedings during his absence. On the contrary, in his letter from *Galle* to Mr. *Ingleton*, dated 29th January, 1849, he writes, "The steps you took with the Bank were perfectly correct, it was no use attempting to resist." The *Bank*, moreover, continued, after the sale, in possession for 15 months, during which time the Directors evinced every wish to afford Colonel *Lindsay's* family an opportunity to redeem and get back possession of the estate, on payment of the debt due to the *Bank*, on which it was willing to incur a loss. It must be borne in mind, also, that although the estate sold only for £2,500, it was at the time heavily incumbered, and the Bank had outstanding claims on it to the amount of above £10,000. Coffee estates at that time, also, were not considered a safe or good investment for such large advances, being in a very depressed state. Finding that Colonel *Lindsay's* family took no steps to redeem the estate, the *Bank* subsequently sold the property to Colonel *Brown*, Mr. *Ingleton*, and Dr. *Smyttan*, who became *bonâ fide* purchasers of the same for £10,000, and remained in quiet possession thereof for about three years, until the institution of this suit.

Under these circumstances, the Supreme Court considers that the plaintiffs are not entitled to any of the reliefs claimed by them.

Judgment reversed.

No. 8,074,
C. R. Galle } *Garstin* v. *Barton.*

A party may make an opening in a wall standing on his own ground, unless the adjoining owner has acquired a prescriptive right against such opening.

The plaintiff had called upon the defendant to build, at their joint expense, a party-wall between their premises, which adjoined each other. On the refusal of the defendant, the plaintiff had built the whole wall at his own expense, and on his own ground. Subsequently the plaintiff made an opening in the wall, which it was said enabled him to look into the defendant's yard. The defendant having blocked up the opening, the plaintiff in this action sought to have the same re-opened; and the Court below gave judgment for the plaintiff.

On appeal by the defendant,

W. Morgan appeared for the defendant and appellant.] You cannot make a window in your wall to look into another man's property. Grotius, *Introd.* 209, 210. [CARR, C. J.—You mean a party-wall.] I mean any wall separating the two premises. Gale

on *Easements*, 191; *Moore* v. *Rawson*, 3 B and C, 340. [CARR, C. J.—We must uphold the decision of the Court below. Surely *Garstin* can break down the wall, as it stands on his own ground? Do you contend then, that though *Garstin* can make a very large opening by wholly removing the wall, he cannot make a small opening in the wall whilst standing? STERLING, J.—Until you have acquired a prescriptive title, you have no right to stop up the wall.]

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Rust for the plaintiff, was not called upon. *Affirmed.*

No. 9,750, *C. R. Galle.* } *Sevette Oemma* v. *Gabriel.*

This was a question on cl. 3 of the Prescription Ordinance, No. 8 of 1834. The defendant had pleaded prescription against the Bond on which the plaintiff founded his action; and the Court below held that the plea did not apply, as it appeared that the plaintiff had within the ten years brought a former case on this very bond.

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Where a plt. has commenced an action on a Bond, and has been non-suited, this is no interruption of Prescription against a subsequent action.

Dias, for the defendant and appellant, maintained this was no interruption of prescription, the plaintiff having been non-suited in the former case; and that there was no act on the part of the defendant in that case whereby the existence of any debt could be inferred. He quoted a case in point. No. 13,080, *D. C. Caltura*, (*Civ. Min.* 18. August, 1850.)

Morgan (*R.*), for the respondent, quoted a case the other way, —No. 8,382, *D. C. Galle*, (*Civ. Min.* 10 January 1842,) in which it appeared that the plaintiff had put his bond in suit in a previous case, within ten years from its date; and though non-suited in that case, had been held to have thereby interrupted prescription.

The Judges were about to hold that prescription had not been interrupted by the institution of the former case. But *Morgan* obtained time to send for the case, in order to see whether the defendant had therein done any act under § 7 of the Ordinance.

Cur. adv. vult.

On a subsequent day, the case was re-argued.

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Morgan, (*R.*) for the Respondent.] The former case shews an act whereby the Court may be satisfied that the debt has not been paid. The defendant was informed of the suit being then pending, and filed his answer. [CARR, C. J.—And pleaded payment,—and offers to prove the very thing which, by the subsequent lapse of

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time, we are now entitled to presume without proof.] The former case was struck off for default of proceeding. Will your Lordship allow us to reinstate that case, which was commenced within the time limited for prescription? [CARR, C. J.—Can I deprive the defendant of a legal right which he has since acquired?]

The plea of prescription was *held good.*

No. 11,294, *C. R. Galle.* } *D. Hakkoeroegey* v. *O. Hakkoeroegey.*

Where the plt. erroneously claimed less than he was entitled to, the balance was presumed to have been liquidated.

The plaintiff appealed against the judgment of the Court below on the ground that his plaint had been incorrectly entered in the record, viz., as a claim for £1. 2*s.* 6*d.*, whereas his claim, as supported by the bond produced in the case, was for £1. 17*s.* 6*d.* *Held*, that the plaintiff having limited his claim to £1. 2*s.* 6*d.*, and got judgment thereon, it was now too late to alter the claim; and the balance must be presumed to have been liquidated.

No administration is necessary in small estates; but the widow's liability must be restricted to the amount of assets received by her.

[This was an action against the widow of the original debtor. Being a small estate no administration was held to be necessary; but the Supreme Court directed, that the widow's liability should be restricted to so far as she may have received assets of her deceased husband]

No. 10,805, *C. R. Galle.* } *Perera* v. *Silva.*

Where a deft. had two days to subpœna witnesses, he was held not entitled to a postponement on the ground of their absence.

The plaintiff claimed £6 for work and labour as native clerk of the defendant, from 1st January to 31st December 1854, at 10*s.* per month. On the 27th September 1855, the day fixed for appearance, the defendant appeared and pleaded payment, except as to one month; but not having his witnesses ready, judgment was entered for the plaintiff for the whole amount of his claim and costs. The defendant appealed, on the ground that the Court had not allowed him a postponement to enable him to prove his defence; —he having been unable to subpœna his witnesses, on account of stamps not being procurable during a whole week commencing from the 17th September.

The judgment of the Court below was *affirmed.*

No. 5,064,
C. R. Kaigalle. } *Horetella* v. *Kaloewa.*

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This was a case regarding the ownership of certain cattle. There had been a previous case between the defendant and the plaintiff's brother. *Held* that the plaintiff, not having been a party to the former suit, was not concluded by the judgment or evidence therein.

A plt. who was no party to a former case, is not concluded by the judgment therein.

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Present CARR, C. J., and STERLING, J.

No. 15,711,
P. C. Matura. } *District Committee* v. *Mailappoegey.*

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In this case, the Court below was of opinion, that although the defendant had on the 14th January committed an offence in not having performed labour, according to his election, under the Ordinance No. 14 of 1848; yet the Chairman of the District Committee having afterwards, on the 11th February, allowed the defendant to commute, and having granted him a receipt, had released him from all liability to punishment under the 5th clause, and could not afterwards bring a charge against him. And thereupon the charge was dismissed. The Supreme Court, on appeal, *affirmed* this judgment.

Where the Chairman of a District Committee had received the commutation tax from the deft., the latter was held not liable to punishment for a previous refusal to work.

No. 3,410,
P. C. Badulla. } *Wahogalle* v. *Wewogedere.*

The sentence of the Court below was set aside on the following grounds:

A charge of Burglary is not within the jurisdiction of a Pol. Court.

1.—That the case was beyond the jurisdiction of the Police Court, as it appeared by the evidence that it was a case of Burglary,—the house having been broken into and the property stolen from it at night.

2.—That one of the prisoners had not been identified by the witnesses.

3.—That the other prisoner was convicted of no legal offence, viz., "of having stolen property in his possession." If this meant of receiving the stolen property *knowing it to be stolen*, no such offence was stated in the charge.

Having stolen property in possession, is not an offence.

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No. 14,036,
P. C. Kornegalle. } *Gonagaldeniye* v. *Gonagaldeniye.*

Proceedings of a Police Court, in order to be valid, must be entered in the Record Book.

In this case the Supreme Court having discovered that the proceedings in the Court below had not been entered in the Record Book, referred for an explanation to the Magistrate, who wrote in answer,—"that the system of keeping Record Books had for some time been discontinued, and that there was no record of the present case."

The appeal taken by the complainant against the sentence of the Court below was therefore rejected: the whole proceeding being null and void, not having been entered in the Record-book.

No. 29,045,
P. C. Kandy. } *Mapolegedere* v. *Mapolegedere.*

Where defts. in a Police Court have been discharged, without evidence being heard; the complainant may, by leave of Court, reinstate the case.

The complainant had on the 5th September 1855, in a previous case No. 27,056, charged the defendants with taking forcible and unlawful possession of a field while in the possession of the complainant, in breach of the proclamation of the 5th August 1819. On the 17th September, the defendants appeared and pleaded not guilty; and the Magistrate made the following order:

"Complainant has only *joint* possession of the field.—*Discharged.*"

Another and subsequent order appeared on the margin, to the effect that the complaint "may be reinstated."

On the 29th November 1855, a fresh charge was brought in respect of the same offence; and when the case came on for hearing, the defendant's counsel objected that the decision in the former case was a bar to the subsequent charge,—the two charges being precisely the same; and that the defendants could have been legally convicted on the previous charge, and it was immaterial whether any evidence had been adduced at the first trial, or not. The Magistrate over-ruled the objection, on the ground that the complainant had obtained leave to reinstate his case.

On appeal, the judgment of the Court below was *affirmed.*

No. 16,914,
D. C. Galle. } *Armogem* v. *Welligem.*

A Demurrer on the ground that one of the defts.

In an action against two defendants (husband and wife,) for goods sold, the defendant demurred, on the ground that, according

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to the plaintiff's own shewing in the libel, the 2nd defendant was a married woman, and could not therefore be made liable on a mere personal contract, or be joined with her husband in an action of *assumpsit*. (No. 3,939, *Galle, Civ. Min.* May 17th, 1837.) The demurrer was over-ruled by the Court below; but *Held*, on appeal, that the demurrer was good, there being no grounds set forth in the pleadings for joining the wife in the suit; and *per* CARR, C. J.—"Such demurrers for mis-joinder of the wife are usual in the District Court of *Colombo*."

appeared by the libel to be a married woman, held good.

No. 7,529, *D. C. Jaffna.* } *Velloe Pulle* v. *Modeli Natchy.* In ré *Caderigamer Varitamby.*

On an application for administration, it appeared that the estate had been in the possession of the opponent since the death of the deceased in 1832; that some of the property had been sold by the opponent; some given in dowry, and some still in his possession. It also appeared that the applicant (the son of the deceased) was thirty or thirty-two years of age. And under these circumstances the Court below considered it unnecessary to interfere by giving administration to either party.

The Court always discourages stale applications for Administration.

On appeal, the Supreme Court *affirmed* the judgment: and *per* CARR, C. J.—"The Court always discourages stale applications, and sees no ground for issuing administration in the case."

No. 16,937, *D. C. Galle.* } *Silva* v. *Silva.*

The defendant had moved for a rule on the plaintiff to shew cause why the proceedings in this case should not be stayed, until the plaintiff should have paid the costs incurred by the defendant in two previous cases instituted by the plaintiff against the defendant for the same land, in both of which cases he had been dispaupered.

Rule on the plt. to shew cause why the proceedings should not be stayed, until he shall have paid the costs in two previous cases for the same cause of action, refused.

The Court below refused to be guided by the judgment of the Supreme Court in case No. 13,329, *D. C. Galle;* as it did not set out the law upon which it was based, and as there might have been facts and reasons connected with it, which might have made that judgment a good one in that particular case; and held as follows: "The defendant who now seeks to estop the plaintiff till the costs

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of dispaupering him in the former case have been paid, has, it appears, sued out writs to recover such costs. That is his remedy. He has proved the plaintiff not to be a pauper; if so, let him levy on the goods or lands he has proved the plaintiff to possess. In this case especially, the Court should be careful in exerting its power, as the previous cases came to an end, not on the merits, but on an issue utterly irrelevant thereto, *pauperes* or *non-pauperes*. The tests are—1, has the action been tried? and 2, has it been proved to be vexatious? Neither has been done. See *Doe* v. *Standish*, 2 Dowling, N. S. 26.—*Doe* v. *Winch*, 3 B. and Ald. 602. *Bowyear* v. *Bowyear*, 2 Dowl. 207; and 3 M. and Scott, 65.

On appeal (*Rust* for the respondent), the Judgment of the Supreme Court was *affirmed*.

No. 9,142, *D. C. Galle.* } *Bandery Kadoe* v. *Deemony*.

The D. C., on a criminal prosecution, having declared the charge vexatious, &c., awarded £3, as costs to the deft.; and the order was affirmed in appeal.

In a criminal case (of cattle stealing) the Court below pronounced the charge unfounded and vexatious, and "by virtue of the 10th clause of the Rules and Orders of the 21st October 1844, awarded to the accused, payable by the complainant, the sum of £3, as his reasonable costs."

The complainant appealed, on the ground that, even granting the complaint to have been unfounded and vexatious, the rule quoted by the Court below did not give the discretionary power to award any fixed sum of money as costs, but costs generally; and £3 was a very enormous sum to be paid to the accused, unless and until he should satisfy the Court or the Secretary that that amount of costs had been *bonâ fide* incurred.

The judgment of the Court below was, however, *affirmed*.

March 19.

Present CARR, C. J., and STERLING, J.

March 12.

No. 20,979, *P. C. Galle.* } *Sonnenkalb* v. *Black*.

The facts of this case are fully stated in the argument.

R. Morgan, (*Rust* with him for the defendant.] The defendant *Black* was, after evidence heard on both sides, found guilty of an

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Assault on *Sonnenkalb*, the complainant, and sentenced to pay a fine of £10, and to be imprisoned for two days. [CARR, C. J.—Was there not rather a plea of guilty, the evidence being with the view of mitigating the punishment?] If it were so, the objection of irregularity would still apply, for the Magistrate had no right to hear evidence on both sides upon such a plea, calling upon the complainant to commence first, then hearing the defendant's witnesses, and after that the complainant in reply. If it was a plea of guilty, the circumstances should have been shown by affidavits, or if evidence was adduced, the defendant should have commenced. The course taken by the Magistrate could only be explained by the supposition that he looked upon the plea as one of "not guilty" and called for evidence on both sides. It was clear however, that the punishment inflicted was in view of the evidence adduced; and under the circumstances the judgment and the sentence could not well be separated. It will be observed from the Record that at the close of the evidence the Magistrate formally found the prisoner "Guilty." After the defence, and after Mrs. *Black* and Mr. *Ronayne* had been examined, the Magistrate very improperly volunteered his own evidence, alleging that he was the person alluded to by Mr. *Ronayne*, though his name was never mentioned, and he denied having made certain statements which Mr. *Ronayne* had previously sworn to. It was bad enough that the Magistrate had forgotten what was due to his position as a person called upon to decide fairly and impartially between the contending parties; but he went much further: for, after having given his evidence contradicting Mr. *Ronayne* and impeaching his veracity, when the latter rose to explain, the Magistrate took improper advantage of his position, and would not allow him to do so. There might possibly be some excuse for the Magistrate offering himself as a witness, but there could be none for his conduct in denying to the party, whose veracity he had attempted to question, the common justice of being heard in defence. Furthermore, the evidence of the Magistrate was as immaterial as it was illegal. The evidence of Mr. *Ronayne* tended to show that he had told Mr. *Black*, an hour before the assault was committed, that Mr. *Sonnenkalb* had insulted his wife the day before. Assuming for the sake of argument that Mr. *Ronayne's* information was not correct,—it was strictly so in point of fact,—yet the question for consideration was, not whether the information was true or false, but did the party give such information to the husband as induced him, on the impulse of the moment, to raise his hands against the person who he believed

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had insulted his wife? Doubtless, as it turned out, it would have been better had Mr. *Ronayne* not given Mr. *Black* the information he did. But allowance should be made for the circumstances under which he acted. It would seem that society in *Galle* was in a divided state, and that Mr. *Ronayne* was under the impression that Mr. *Sonnenkalb* was systematically insulting Mrs. *Black* whenever he had an opportunity to do so. Such being the case when he heard of the occurrence the day before, and that she had again been insulted in the presence of several persons, he felt that as a friend of the family it was right to inform the husband of it. This was perhaps the strongest circumstance in favour of Mr. *Ronayne's* story, for had he not believed at the time that Mrs. *Black* had really been insulted, he would not have acted upon it, or given the information he did. Without imputing perjury to any party, it was possible to believe that the two mistook each other; but it was quite clear, even from the Magistrate's own evidence, that he had used language in conversing with Mr. *Ronayne*, which led the latter to believe that his friend's wife had been insulted. Mr. *Ronayne* was positive that Dr. *Clarke* had given the information he swore to, and would have entered into details had the Court given him an opportunity to do so.

The proceedings teem with irregularities: the evidence was not taken down by the Magistrate nor given before him as the Rules required; but the case rested mainly on the great objection as respects the illegality of the Magistrate's evidence. It was illegal for a person, who was sole judge in the cause, to give evidence before himself. Taylor *on Evidence*, 1071. It was impossible for him to weigh his evidence as against that of another; and he might commit the mistake, as in this case, of attaching more credit to his own evidence than to that of another. In this country where the Magistrate was often the sole official in a place,—where it is desirable, above all things, to inspire the natives with a sense of respect towards our judicial institutions,—a greater injury could not be done to the administration of justice, than to allow the idea to go abroad that a Magistrate could with impunity act as the Magistrate in this case has done. The Court will, it is hoped, by quashing the whole proceedings, refuse its sanction to so dangerous a precedent. [CARR, C. J.—I cannot approve of the punishment of imprisonment inflicted in this case, as it did not call for it. But I shall take time to consider whether I am bound to look at the plea as one of Guilty, in which case I cannot interfere with the punishment, but will suspend it until the party has had time to apply to the Governor. If however the plea was not taken as one

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of Guilty, the Supreme Court will then consider the objections urged by the Counsel.]

On the 19th March, CARR, C. J., delivered judgment as follows:

A Judge cannot give evidence in a case tried before himself.

Where a prisoner has pleaded *guilty*, but the Magistrate viewing it as a plea of *not guilty*, has entered into evidence on both sides, the S. C. will examine into the regularity of the proceedings.

It is no objection in appeal that the wife of the prisoner has been examined as a witness, where she has been called for the defence.

The judgment of the Court below is *set aside* for irregularity of proceedings. The plea of "Guilty," subject to the consideration of the Court of the circumstances in extenuation of the offence, has been viewed as a plea of "Not Guilty;" and the Court has proceeded to hear the evidence on both sides, and pronounced judgment of "Guilty" thereon. The evidence of the wife of the accused has been improperly received; but the appellant could not avail himself of that objection, as she was examined for the defence. But the Police Magistrate's evidence is open to grave objections. In Taylor *on Evidence*, vol. ii. p. 1071, it is stated, "So a Judge before whom the cause is tried must conceal any fact within his own knowledge, unless he be first sworn; and consequently, if he be the sole Judge, it seems that he cannot depose as a witness; though, if he be sitting with others, he may then be sworn and give evidence. In this last case, the proper course appears to be, that the Judge who has become a witness should leave the Bench and take no further judicial part in the trial, because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another." And see the authorities cited. In this case, the Police Magistrate voluntarily gave his evidence, although it was objected to by the Proctor appearing for the defendant; and the Supreme Court cannot say how far the evidence of the Magistrate may have weighed in his judgment on the merits of the whole case, and in the sentence on the defendant. *Set aside.*

No. 1,373, *P. C. Navellepittia.* } *Abraham* v. *Thompson.*

A party is not liable to pay toll, unless he has passed the toll bar or station fixed by the Governor.

The defendant in this case was charged with a breach of the Ordinance No. 4 of 1849, in having passed the toll-place at *Ginnegetenne Pass* without paying toll.

It appeared that the defendant had only passed a portion of the Pass, and had turned off a road before he came to the toll-bar. The Magistrate held that as the station (or toll-bar) fixed by the Governor was situate beyond the turn, the defendant had not committed a breach of the Ordinance; though it would have been

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otherwise, if the accused had first to pass the toll bar before he got to the turn branching off from the Pass.

On appeal by the plaintiff against this judgment:

R. Morgan appeared for the appellant.] Though, for the sake of convenience, the toll-bar is not placed at the middle of the Pass, but at one end of it, the defendant is still liable; for the Ordinance is intended to protect the *whole* of the Pass. The road, I am told, branches off only at a distance of three feet from the bar.

CARR, C. J.] The judgment is *affirmed*. But there seems to be no objection to the appellant applying to the Governor to authorise him, under the 2nd clause of the Ordinance, to collect toll at more than one place, so as to allow of another toll-bar being erected on the *Ambegamoa* side of the branch-road.

No. 6,955, *P. C. Tangalle.* } *Regina* v. *Singarekare.*

A deft. in the Police Court, who, according to the Record Book, had pleaded guilty, denied the plea in his Petition of Appeal. But the sentence was affirmed.

The defendant was charged with a breach of the 5th clause of the Road Ordinance, No. 14 of 1848; to which charge, according to the Record Book, he pleaded Guilty, and was sentenced to three months' imprisonment at hard labour. But in his petition of appeal he denied having pleaded guilty, and stated that he was ready at the trial to call witnesses to prove that he had not been noticed to attend to perform work.

The Supreme Court has no power to mitigate a sentence.

Held, that the defendant having pleaded guilty, the Court below could not hear evidence in the case; and the Supreme Court had no power to mitigate the sentence, which it would otherwise do, as being too severe.

No. 10,018. *P. C. Pt. Pedro.* } *Cannawadiar* v. *Alwar.*

"Forcibly taking away property from the complainant," is not an offence.

This was a charge for "forcibly taking away from the complainants 6 palmira rafters, the property of the complainants, on the afternoon of the 24th January, 1856, at *Paly*."

Held, on appeal, that there was not in the charge or evidence a sufficient ground for a criminal prosecution.

March 22

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Present, CARR, C. J., and STERLING, J.

No. 5,659, *C. R. Galle.* } *Maharimbegey* v. *Nillekandy.*

In this case, the Supreme Court held that the Court below should be very strict in enquiring into any apparent fraud practised on it by suitors, in respect to money lodged in Court, or paid by the Government Agent under its directions; and as the plaintiff did not appear, on the proceedings, to have been entitled to a certain amount drawn out by him, he should, unless he could satisfy the Court thereon, be ordered to refund the amount overdrawn by him, to abide the further order of the Court in regard to the claims of others, who might afterwards establish a right to the same.

Where a party in the Court of Requests cannot satisfy the Court of his right to monies drawn out by him, he should be ordered refund the same.

No. 4,531, *C. R. Avishawelle.* } *Soerewire-aratchigey* v. *Lekangey.*

The defendant, against whom the Court below had given judgment, appealed on the ground, 1st, that the only evidence received in the case was the affirmation of the plaintiff, whilst the Rules require other evidence beside the statement of the plaintiff; and 2nd, that the case having been postponed for a period of five months after defendant's appearance, he had forgotten the day. And an affidavit to this effect, and as to the merits of his case, accompanied the petition.

The Supreme Court thereupon *set aside* the decree of the Court below, and remanded the case for a new trial, as it did not appear to have been investigated. Costs to abide the event.

On appeal by a deft., on the ground that the only evidence adduced by the plt. was his own affirmation, and that the case had not been properly investigated, the Supreme Court set aside the judgment.

March 29.

Present, CARR, C. J., and STERLING, J.

No. 17,464, *P. C. Negombo.* } *Liyenegey* v. *Algampittegey*

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In this case, the defendant had been brought up on a Warrant instead of a Summons, as required by the Rules, and was at once committed to gaol. He was brought up for trial on the third day; when he wanted a witness, who had been subpœnaed, but was not

A Magistrate cannot carry out a sentence of corporal punishment pending

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the period allowed for appeal.

in attendance. A warrant was thereupon issued to bring up the witness; but before the witness arrived, the Police Magistrate proceeded to hear the case, and without waiting for the defendant's evidence, sentenced him to three month's hard labour and twenty lashes. The sentence was immediately after carried out, although the defendant's Proctor had previously given notice of appeal against the judgment.

On appeal, *Morgan* (*R.*), for the defendant and appellant, contended that the whole proceedings were irregular. [CARR, C. J., —I do not think we can enter into the question of irregularity; and as to the punishment, I think the assault was one that called for punishment.] I cannot question the punishment, and that is the reason why I insist upon the irregularity of the proceedings. There has been no summons, and the Rules require a summons. [CARR, C. J.—Has that omission been attended with injustice to the defendant?] Then look at the proceedings after sentence. The Proctor for the defendant intimates his intention to appeal. He is requested to give his notice in writing. He does so; and in his written motion expressly states that he has been called upon by the Court to make a written notice. The notice is given in, according to the Magistrate's endorsement on it, at three o'clock. The petition of appeal is handed to the gaoler at eleven next morning; and then, for the first time, the Proctor learns that the defendant has already received the twenty lashes three hours before. Do your Lordships think the Magistrate was justified in carrying out the sentence in such haste? [CARR, C. J.—Most certainly not; and I shall express the strongest disapprobation of it. But the Proctor is also to be blamed. The Proctor gives notice of appeal by a written motion. The Magistrate holds that mere notice of appeal is not sufficient to stay execution. Why did he not put in his petition then? Still I condemn the course taken by the Magistrate.]

CARR, C. J., then delivered judgment as follows:

The Supreme Court finds no fault in the sentence, but considers that the Magistrate ought to have stayed the execution of the corporal punishment upon the motion of the Proctor of the defendant. The 10th clause of the Ordinance No. 7 of 1854 provides, that where a defendant is sentenced to receive corporal punishment, the execution thereof shall be stayed "pending appeal;" and the 9th clause allows any party wishing to appeal from any sentence, ten day's time to lodge the petition of appeal. In the Magistrate's opinion, he can debar the party of the entire benefit of appeal from any sentence of corporal punishment, unless

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the petition of appeal be filed within what he considers due time, notwithstanding the express provision in the Ordinance, that the party may have ten day's time to prepare and lodge the same. The whole spirit and intention of the legislature, however, is to stay execution of every corporal sentence, whilst it is open to review or liable to correction on appeal. Any proceeding, therefore, tending to defeat or evade such a merciful provision, must be regarded as irregular and illegal.

No. 20,994, *P. C. Galle.* } *Silva* v. *Cancangerigey.**

The Supreme Court declined to entertain an objection to proceedings in a Police Court, which had not been urged in the Court below.

R. Morgan, for the plaintiff and appellant, objected to the gross irregularity of the proceedings.

There were two cases, one of *Nicholas* v. *Matthes*, and the other of *Matthes* v. *Nicholas* and five others. These two cases were treated of as one, and both charges were enquired into in one and the same proceeding, the evidence being taken down as "evidence for the complainant in No. 20,994, and for the defence in No. 21,053." The parties were not the same; for, though the complainant in one case was a defendant in the other, yet there were six defendants in the former, of whom one only was the complainant in the latter. Then again, the complainant in one of the cases was never examined, and we were thereby deprived of our right of cross-examining him; whilst the *party accused* has been examined as a *witness* in his own case. [CARR, C. J.—But surely you ought to have objected to all this in the Court below.] Will your Lordship believe that the Proctors did not object? I never heard any instance of a case being decided without the complainant having been examined. And here, the complainant in No. 20,994 is fined £1, for a false, frivolous, and vexatious charge. How can you ascertain whether the complaint is false, if the complainant himself has never been examined? [CARR, C. J.—Have we any right to alter a sentence for want of form?] If the objection was one of mere want of form, I would not have maintained it; but here is the power exercised of fining a man for bringing a false case, and the man himself has never been examined. [STERLING, J.—The point in the case is, have you taken the objection in the Court below?]

The sentence was *affirmed*.

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* See also *Silva* v. *Martinus*, No. 21,053, *P. C. Galle*.

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April 2.

Present, CARR, C. J., STERLING, J., and TEMPLE, J.

No. 235,
D. C. Kandy. } Estate of *T. C. Morton.*

A Secretary of the District Court is not always an eligible person to be appointed the appraiser of an estate.

In this case the District Judge had struck out the name of one of the appraisers named by the applicant for administration, and had substituted the name of the Secretary of his Court. And on an appeal against this proceeding;

R. Morgan, appeared for the administrator and appellant.

CARR, C. J, said he recollected several decisions on the subject, disapproving of the appointment of a Secretary as an appraiser, and enquired what had been the practice in the District Court of *Colombo*.

Cramer, Secretary of the District Court of *Colombo*, stated that the Secretary was appointed only in cases where there was a dispute between the heirs. The commission allowed was ½ per cent on immoveable property, and 1 per cent on moveables.

Morgan.] The Secretary being the Officer of the Court, was not a proper person to be appointed appraiser, and the Supreme Court has frequently so decided; (No. 23,720, D. C. *Kandy*, *Civ. Minutes*, 5th November 1850, was in point.) The parties interested have a right to nominate their own men; and may, as in the present case, to protect the interests of the heirs, agree upon a stated sum. Half per cent on Mr. *Morton's* Coffee Estate will be a very large sum to pay, and the interests of those concerned in the estate were more worthy of consideration than those of the Secretary of the Court. [CARR, C. J.—How can a Secretary be supposed to know anything of the value of a Coffee Estate? And how can he go about appraising without neglecting his proper work.]

The judgment of the Supreme Court was as follows:

It is clearly not the duty of the Secretary of the District Court to appraise property. And the Supreme Court has in previous cases expressed its strong disapproval of that officer being employed upon these commissions, because the business is liable to take him away from his office, and to interfere with the due discharge of the duties of his department. It is also objectionable from its making the Secretary liable to be called as a witness in the suit; and the Secretary having moreover the Records of the Court under his charge, he ought not to have a private interest and source of profit in suits derivable from the appointment to these Commissions, wherein he may be favoured, or opposed by the

parties litigant. Apart from these public grounds of objection to the Secretary being appointed to this Commission, it is not to be presumed, from his usual avocations, that he would be an eligible person to act as an appraiser of the Testator's Coffee-Estate, and the valuable machinery thereon. The order of the Court below is therefore *reversed*.

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No. 62. *D. C. Colombo.* } In rê *H. M. Packier Bawa* and others, Insolvents.

This was an appeal against an order of the Court below refusing protection to the insolvents.

Where an insolvent had commenced business with £100, and closed in 18 months with a loss of £200, and was unable to account for such loss; and had a few days before his failure given secondary mortgages to certain native creditors, though he had at a meeting previous to his insolvency represented that he had no native creditors; and it appearing also that no proper accounts had been kept, the Court refused Protection.

If an Insolvent being examined, offers any explanation of facts admitted by him, and refers to the Assignee in support thereof, the Assignee may be examined.

Rust, (*W. Morgan* with him) for the appellants, submitted that the order of the District Court, removing the insolvent's protection must be rescinded; because,

1.—The examination of the assignees should have been allowed; as it was necessary in order to explain facts elicited from the insolvents. It was one of the first principles of justice that no man should be condemned unheard; and Bentham, p. 102, has laid it down, that an examination was never refused, except when it was intended to commit an injustice. It had been contended that the withdrawal of protection was no punishment, but simply allowing the creditors to enforce the right they possessed at common law of taking their debtors in execution; but that was not so, for the Ordinance protected an honest but unfortunate trader from arrest; and it was only when he was proved to be a fraudulent one, that he could be taken in execution. It had also been urged, and the District Judge had laid great stress upon the point, that the Ordinance did not speak of any examination *by* the insolvents. It was not necessary that it should do so, as this principle pervaded the whole of the law. It was easy enough for an advocate so to shape his examination as to elicit particular facts only; but was it just to deprive a party of the right of explaining them?

2.—The District Court found that the insolvents had withheld entries within sec 2 of cl. 151 of the Insolvency Ordinance; but there was nothing to bring them within the operation of that section. It had not been shewn that a single entry had been held "with intent to conceal the state of the insolvent's affairs or to defeat the objects of the law of insolvency." The entries consisted, for the

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most part, of temporary loans. No one had come forward to found a claim upon them. Who then could be damnified? With regard to a note for £85, it had not been entered, for reasons given by the insolvents, who had endorsed it (they said) to the assignee, their principal creditor, and he was actually suing upon it.

3.—As to undue preference, none was proved. The insolvents had, under pressure, given mortgages to some of their creditors; and the question of an undue preference must be decided in accordance with the English cases,—which held that a payment under legal compulsion or threats of legal proceedings, did not constitute an undue preference. But the District Judge also found, that the conduct of the insolvents brought them within sec. 9 of cl. 151: and that they had kept their accounts imperfectly, &c. Assuming this for the sake of argument, it must be shewn that it was with "intent to conceal the true state of their affairs." No such intent appeared; on the contrary, considering they were Moormen, their ledger was wonderfully well kept. It was said that the accounts were mixed, and that some of prior date were to be found after others of subsequent dates; but there were many blank pages in the book; and what more natural than that they should be filled up as the length of various dealings required?

As to the balance-sheet, which must be furnished in English, the bankrupts could not be held responsible, as they did not understand that language. In England such matters were always left to the accountant, and it would be an extraordinary proceeding, to punish a man for not doing what it was utterly out of his power to do. It had not been shewn that the insolvents had thrown any obstacles in the way of its preparation.

R. Morgan, contra.] It was material to notice, that the body of European creditors, and the assignee, joined in opposing the insolvents,—a circumstance which shewed that all thought this a flagrant case, and one in which an example should be made. It was not correct to state that the District Court, in granting or withholding protection, was limited to the consideration of the acts specified in the 151st clause, and was bound to grant or refuse it as the insolvent had or had not committed any of those acts. The District Court must look to the general conduct of the insolvent, and grant or refuse him the benefits of the Ordinance, protection being one of them, just as such general conduct was or was not satisfactory; though if the insolvent committed any of the acts in the 151st clause, the District Court had no discretion, but was bound to refuse protection. Such was the construction given to the

256th clause of the English Act, corresponding with the 151st clause of our Ordinance. *Stainton* v. *Stainton*, 21 Law J. *Bankr.* 7. Another fallacy in the argument on the opposite side lay in representing that the Court was punishing the insolvents in denying protection, and that therefore the onus was on the opposing creditors to prove a strong case against them; whereas the correct view to take of the case was, that the insolvents were seeking a benefit and should prove themselves fully entitled to it. "I do not agree," said the Lord Chancellor in *Ex parte Rufford*, 21 Law J. *Bankr.* 35, "that we have to inflict a punishment: the case is, whether the conduct of the parties as traders is such as entitles them to a benefit in the shape of a certificate, giving them protection from their creditors: it is rather withholding a benefit from them which good conduct might have entitled them to, than awarding to them a punishment." Not only was the general conduct of the insolvents unsatisfactory and fraudulent, but they had clearly committed several of the acts mentioned in the 151st clause. They commenced business with about £100, and closed in about 18 months with some £200 loss, and no account whatever was given how that loss arose. They had landed properties, but in the names of their wives, and a few days before the failure they executed secondary mortgages of the title they had in favor of their brothers-in-law, and the properties, when sold, were purchased by their mothers-in-law,—herein realizing the general features which existed in all Moorish failures, and which ought at once to be checked. Some £600 which were received from Kandy were altogether unaccounted for, and was doubtless put by, to enable the men to commence a neat little business again, after the white-washing which their certificate would give them. Their accounts were in a most discreditable state;—the Court would not expect any skilful mode of book-keeping in such cases, would not require the different books which English Merchants kept, but must expect to see entries made in an honest, straightforward manner. Here whole sheets were left blank, and in a most suspicious manner. Every item against Moorish creditors was carefully withheld, and the insolvents could not explain this, although allowed the fullest opportunities for doing so. At a meeting held before the insolvency, they admitted having represented that they had no native creditors, indeed that they offered as security for an intended compromise, the very men whose names seemed afterwards to be entered as secondary mortgagees.

CARR, C. J.] We will not trouble Mr. *Morgan* any further, as the Judges concur in thinking that several acts have been shewn

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against the insolvents, which disentitle them to any benefit, and we cannot interfere with the discretion exercised by the District Court in refusing protection. And as to the examination of the insolvent, if the insolvent, during his examination admits any facts, and states any thing in explanation of such facts, and refers to the assignee in support of such explanation, then I think the assignee may be examined.

No. 26,656. *D. C. Kandy.* } *Elsy Lindsay* and another v. The *Oriental Bank Corporation* and others.

Where two persons were appointed "Attornies and Attorney" to "prosecute an action to its final determination," the Supreme Court rejected a Petition of Appeal to the Queen in Privy Council, signed by only one of them.

The plaintiffs had filed a Petition of Appeal to the Queen in Privy Council against the judgment in this case reported *ante* p. 31. On the 22nd March, CARR C. J. said, that the Power of Attorney filed by *Van Houten*, one of the plaintiffs' agents, and by virtue of which he alone had signed the Petition, seemed to be a joint power in favour of *Van Houten* and another, and did not empower the former to sign it alone.

The Power of Attorney was in the following form: "*Elsy Lindsay* and *James Furquhar Hadden* do hereby nominate and appoint *Thomas Charles Morton* of Calcutta, and *Frederick Philip Van Houten* of Ceylon, the true and lawful Attorney and Attornies of them the said *Elsy Lindsay* and *James Farquhar Hadden*, to recover possession of the said Coffee Estates hereinbefore described, and for that purpose, and any claim to mesne profits and damages, if necessary, to commence and prosecute any action or actions, suit or suits, or other proceedings at law or equity, against the said Oriental Bank Corporation, or any person or persons in charge or possession, or claiming right of possession, setting up title to the said Estate, or any part thereof, or any Coffee, produce, or stores, or personal chattels, or property, of or belonging to the said Estate of *Rajawelle*, or any land, goods, chattels, property or effects in the Island of Ceylon, which were of the said *Martin Lindsay* deceased, or which appertained to his estate, as the said *Thomas Charles Morton* and *Frederick Philip Van Houten* may think right; to prosecute such proceedings to judgment, or other final determination, or to suspend, discontinue or put an end thereto, at any stage; and to appear, to answer, and defend any action or actions, suit or suits, respecting the said estate and lands, or claim to mesne profits and damages. And the said *Elsy Lindsay* and *James Far-*

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quhar Hadden do give and grant to the said *Thomas Charles Morton* and *Frederick Philip Van Houten*, full power and authority to nominate and appoint one or more substitute or substitutes, Attorney or Attornies, Agent or Agents, under them for all or any of the purposes aforesaid; and the same to revoke, and again re-appoint another or others in their and in his stead to depute; which nomination, substitution or appointment, shall be and continue notwithstanding the said *Thomas Charles Morton* and *Frederick Philip Van Houten*, or any or either of them, shall die or leave the Island of Ceylon. And the said *Elsy Lindsay* and *James Farquhar Hadden* do hereby give and grant to the said *Thomas Charles Morton* and *Frederick Philip Van Houten*, and their substitute or substitutes, full power and authority in the premises, and in case of need to leave any dispute to arbitration, and to subscribe, sign, seal or execute any agreement of reference or arbitration bond, to appoint an arbitrator or arbitrators, and to obey any award in the premises, and generally to do perform and execute all other acts and things which shall be requisite in, and about the premises, as fully and effectually to all intents and purposes as they the said *Elsy Lindsay* and *James Farquhar Hadden* might or could do if personally present, they the said *Elsy Lindsay* and *James Farquhar Hadden* hereby ratifying and confirming, and agreeing to ratify, and confirm all and whatever the said *Thomas Charles Morton* and *Frederick Philip Van Houten*, or their substitute or substitutes shall lawfully do or cause to be done in and about the premises by virtue of these presents."

W. Morgan for the plaintiffs and appellants.] The objection which your Lordship the Chief Justice felt to the Power, and upon which the Court wished to hear me, was that it was joint and not several. I submit that the power is a joint and several power, and that therefore *Van Houten* alone may appeal. I need not observe, that in construing all documents we should adhere to certain rules which have been laid down for our guidance. The very first rule of construction in respect of contracts, refers to the *intention of the parties*, and I shall endeavour to shew, that the intention of the parties here was to give a joint and several power. The words of the power are that *Elsy Lindsay* and *James Farquhar Hadden* have appointed *Thomas Charles Morton* and *Frederick Philip Van Houten* their "Attornies and Attorney." The word Attorney is used after the names of two persons, and the power should therefore be understood as given to them *or each of them*, authority to appear for the plaintiff. [CARR, C. J. What are you authorised to do as Attorney?] "To recover the

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property and to prosecute any action, suit &c., in respect thereof, as they think proper, to judgment. [CARR, C. J. As *they!* Two persons are appointed Attornies and Attorney to do what *they* think proper.] If the clause is conceived in the plural and the parties' intention is to give separate powers, then the intention is to be taken, although the construction may be ungrammatical. 1 Pothier, p. 62. But further, the power goes on to authorize them to appoint substitutes who may act even if the Attornies or either of them should die, or be absent from the Island. The rule regarding substitution is, that if the Attorney dies, the substitute's power is at an end; but here that rule is met by a particular provision. So that if both the Attornies appointed a substitute, and if one died, the substitute should under this power still continue to act. This proves the intention of the parties to appoint severally, and intention is all that we have to look to; 2 Pothier 35; Dwarris *on Stat.* 698. This argument will meet the difficulty suggested by his Lordship the Chief Justice: for if you can give two constructions to an instrument, of which one will prevent its operation, and the other render it operative, you are bound to adopt the latter, in spite of the apparent want of grammatical correctness. Here, therefore, if you refuse to take the use of the word *attorney*, as implying the intention to give a several power, merely because the plural is afterwards adopted, you will wholly prevent the operation of the instrument. 1 Pothier 57. [STERLING, J.—There is a case in Story *on Agency* 39, where fifteen were appointed jointly and severally, and an act done by four, was held to be valid.] That case if at all is in my favour. [STERLING, J.—No; because the appointment was expressly a joint and several appointment, and yet the matter was thought open to argument.] Your Lordship is of course aware, that Lawyers in England can argue on any case put to them. I am arguing as to the intention of the parties who have signed the power. But, further, the opposite party has not taken the objection hitherto. The proxy in the District Court was signed by *Van Houten* alone, and the fact of no objection having been taken in the District Court in this respect, proves that the defendants did think the power sufficient. And so far from finding fault with it, they even acknowledged *Van Houten's* right to act alone by serving a notice on him in June 1855, to advance this case on the Trial Roll. If the objection does arise from the other side, can they now maintain it, after they have acted as they have done?

If the power should be held to be insufficient, the whole proceedings in appeal fall to the ground and are null; for if *Van Houten*

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had no power to act alone, the plaintiffs have been unrepresented in this Court. [CARR, C. J.—The appeal was before *Morton's* death.] But the proxy was signed by *Van Houten* alone. [CARR, C. J.—That may shew that the Proctor had no sufficient power to appear, but how does that affect the case? The appeal came from the other side; and here in this Court we only look to the appellant.] In Story § 491, there is a case where the power had been executed in part by the Agent at the time of his death; and it is laid down that the remainder of the power may be executed by his heirs;—*a fortiori*, if there be two Agents and one dies, the power remains with the survivor; that is, assuming this to have been a joint power: but I have endeavoured to shew that it is not a joint but a several power. In the present case *Van Houten* alone authorised the proceedings in the District and Supreme Courts, and in fact executed the best part of the power.

The other objection, suggested by the *Senior Puisne Justice*, is as to the sufficiency of the power to carry the case to the Privy Council. The attorney is authorized to recover the Estate, and to do every act to recover, and to institute all suits, and to carry the case to a *final termination*. Now this is carrying the case to a final termination; for a case which will admit of an appeal to the Privy Council, is not finally terminated as long as it is open to it.

R. Morgan, for the defendants.] The Privy Council expects that the Court below should look into the case and see that the appeal has been formally and properly taken, and should examine the power which either of the parties may hold. McQueen, 709.—The power in this case is a joint power; but it is argued that the word *attorney* in the singular, occurring after the two names, makes it a several power. But powers must be strictly construed. Can it be argued that that word makes it several? It is quite clear that the principals, in giving the power, intended that both attornies should act jointly, and the use of the word *attorney* in the singular means that each of course should be an attorney, but at the same time that they should act jointly. Then as to the clause authorizing a substitution; it shewed that the intention was to make the power a joint one. Had the power been several, it would have been quite unnecessary, for the substitution would not have been affected by the death of one of the attornies. It was only on the assumption that the power was joint, that the clause became necessary. The power must be understood to be joint until the contrary is shewn. Paley *on Agency* 177. Story is to the same effect; and one of two joint Attornies cannot act, though after the death of the other. Domat goes further and says (§ 1163,) that

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the principal would not be bound by the act of one of two joint Attornies. The principals may have confided in *Morton* and *Van Houten*, and it would be wrong to hold them bound by the acts of *Van Houten* alone. The power is therefore clearly insufficient, because it is a joint and not a several power.

Secondly. It is insufficient, because it gives no power to carry an appeal to the Privy Council. A power to conduct a case dies with the judgment of the Court before which the Agent is authorized to appear. Voet iii. 3. 18. The term *final determination* in the power, may refer to the further steps in the case after judgment, to execution, to a writ of possession, or to reference to arbitration; but certainly not to an appeal to the Privy Council.

Then as to allowing the opposite party to appear in this Court, will your Lordships suppose that we would have objected to their appearance? Would it have been graceful or proper on our part to do so? There was a constant reference to a poor widow on the one side, and a rich corporation on the other; and any attempt to prevent the opposite Counsel being heard would of course have brought upon us the additional insinuation of preventing fair play. We have, of course, not taken the objection hitherto for the reason I have stated; and also because by allowing them to appear in appeal, we should not be held to have waived our objection to their power. We might have asked for security for costs in the first instance, but we were very anxious to do nothing, which would have had the appearance of shrinking from enquiry. Now however, that the Highest Court in the Island (the Judges unanimously concurring,) have pronounced judgment in our favour, it is time that we should protect ourselves. Immense costs have been already incurred, not a farthing of which have we yet received nor will we be secured for. [Sterling J.—Have you considered that class of cases treated of in Story, where two joint attornies having acted, on the death of one the survivor is bound to continue?—for here, the period for appeal being limited, there would not be sufficient time to enable the parties to procure the necessary power.] Those cases do not apply to this; for the plaintiffs had ample time, since the death of Mr. *Morton*, to send for another power. [Carr, C. J.—The plaintiffs in their power agree to ratify what *Morton* and *Van Houten* or their substitutes might do.]

W. Morgan in reply.] As to the word *attorney* in the singular, the rule I have stated as to the intention of the parties, fully applies to this case. If, as the Counsel on the opposite side has admitted, the parties by using the word *attorney* in the singular,

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intended that each should be the attorney, then my construction of the power is correct, and each or either of the attorneys could act singly. The want of grammatical correctness is no objection. Then as to the clause of substitution, you cannot argue from that, that the power to the substitute to act in case of the death or absence of either of the two agents, must be taken to exclude the agents from acting separately; because this rule applies only where there exists a doubt, and here, from the use of the word *attorney*, no doubt can exist as to the intention that the power should be several. The authority in Voet applies only to Proctors; and *non constat* that an agent when authorized to recover land and to sue, cannot appeal. We are expressly authorized to go to the Courts in the Island for the purpose of recovering the land. As to the clause of Ratification, that is in the general form. The grammatical construction, when you come to compare the two clauses, may not be consistent; but the ratification depends on the power, and if we construe the power as several, the ratification will of course apply to a several act. [CARR, C. J.—But look at Story on Agency, § 42. So strictly is a power construed, that even if the power be given jointly and severally, an act by two will not be within the power: it must be by *all three* or *by one*.] The same section in Story shews, that if the intention of the party can be gathered, it may be considered to be a several power, although the terms used may not convey a several authority.

CARR, C. J. delivered judgment.] We feel ourselves bound to allow the objection taken to the Power, not as to the extent, but as to the exercise of it by *Van Houten* alone. We are sorry that in a case so important as this, our decision should deprive you of your appeal: but the Charter reserves to the Queen her right to grant you an appeal notwithstanding; and you can make your application to Her.

April 9.

Present CARR, C. J.

No. 30,029. *P. C. Kandy.* } *Helangodde* v. *Davit.*

April 9.

A party who removes arrack without a per-

This was a charge under the 32nd, 33rd, and 37th Clause of the Ordinance No. 10 of 1844, for "possessing and removing one

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gallon of Arrack, without a permit from the Government Agent of the Province, or from the licensed retail-dealer of the district."

mit, though proved to have purchased it from a licensed retail-dealer, and not to have been removed beyond his division, is liable to a fine under cl: 37, of the Arrack Ordinance.

It was proved in the Court below, that the defendant had purchased the Arrack at a Tavern at *Lewelle*, and had paid for it, but had removed it without waiting for a permit. It was also proved, that the Renter at *Lewelle* could not write, but had told the defendant, if he wanted a permit, he might wait for it. It appeared also, that the arrack had not been removed beyond his division.

The Magistrate below, on the ground that the Ordinance was imperative, fined the defendant £5.

The defendant appealed, on the ground that the Renter had been in the habit of selling arrack without granting permits, as required by the 28th Clause; and that the object of the Ordinance was for the protection of the Renter; and that inasmuch as the arrack in question had been proved to have been duly purchased from the licensed Renter, and not removed beyond the limits of his division, the defendant was fairly entitled to the benefit of the 4th paragraph of the 32nd clause. The Supreme Court amended the judgment, "by reducing the fine to *thirty shillings*, for being concerned in the removal of one gallon of arrack without a permit, contrary to the 37th Clause. The further offence of not giving up the name and place of abode of the owner, which subjects the offender to a fine of £5, was not proved. The Renter, under the clause, is liable to a fine of £5 for neglecting, refusing, or wilfully delaying to grant a certificate upon receipt of the value of the spirits sold."

May 14.

May 14. Present STERLING J., and TEMPLE J.

[The Hon'ble CHRISTOPHER TEMPLE Esquire was sworn in as *Second Puisne Justice*.]

May 17.

May 17. Present STERLING J., and TEMPLE J.

[The Hon'ble PAUL IVY STERLING Esq. was sworn in as *Acting Chief Justice*, until the arrival of Sir WILLIAM CARPENTER ROWE.]

No. 15,747. } *Sela* v. *Matthes.*
D. C. Galle. }

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In this case, which was an action of ejectment,—the judgment of the Court below *(E. H. Smedley, D. J.)* proceeded on the following grounds:

Under an allegation of possession by the plaintiff, it is competent for him to prove possession by a mortgagee under him.

"The plaintiff states, that the share he claims was mortgaged more than thirty years ago by *Woutersz*, his great-grandfather's child; that he never possessed, and that he is not aware whether his father did. This, I have no doubt, is the actual state of the case. The plaintiff now claims through the alleged mortgagee, and it has been proved in evidence, that he has redeemed the mortgage in question. Now, first, the claim as set up in the libel is stated to be by the personal possession of the plaintiff and his father before him, in common with the other heirs, to the eastern half of the garden. The examination of the plaintiff, and his evidence adduced, clearly prove, that the plaintiff or his father never possessed personally. Upon this variance alone therefore, the plaintiff must be nonsuited. But going further, and supposing that the issue to be tried by the Court this day was,—which it is not,—whether the plaintiff had a right through the mortgagee, the plaintiff has by his own act put himself out of Court; for in a case, No. 6027, the present plaintiff, who was then 3rd intervenient, distinctly declares, that the identical mortgage-deed, on which he now builds his right, is a spurious document. The plaintiff cannot thus blow hot and cold: his right, if it ever existed, has been for very many years dormant, and has ceased by lapse of time: he can have no right by personal possession, because he this day states, he never possessed; neither can he have any right by the alleged possession of the mortgagee, as he has declared the mortgage-deed to be spurious. The plaintiff is nonsuited with costs."

On appeal by the plaintiff, the above decree was set aside and the case remanded for a new trial, the Supreme Court being of opinion, that as the possession of the mortgagee was in point of law the possession of the mortgagor, there was no variance between the proof and the allegation in the Libel; and that it was competent for the plaintiff to avail himself to shew his right as well under the mortgage-bond as by inheritance and possession.

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No. 146. } In rê *K. Mudianselagey Banda.*
D. C. Budulla. (*Test.*) } *Korewatoore* v. *Kewlegedere.*

It is expedient that *all* the witnesses to an impeached Will should be examined, before Probate is granted.

The Will produced by the Applicant in this case, was attested by a Notary, and signed by eight witnesses. The opponent denied the execution of the Will. On the day of trial the Notary and two of the witnesses were called, and this proof was held sufficient by the District Court. On appeal by the opponent—

R. Morgan, for the appellant, contended that where a Will is to be proved in solemn form, *all* and *every* one of the witnesses ought to be called. Such is the practice of the Ecclesiastical Courts in England, and it is followed by the Courts in this Colony. 1 Williams *on Executors*, p. 281.

W. Morgan, for respondent.] What is meant by *all* the witnesses, is all those required by *Law* for the due execution of the Will; and according to law, proof by one attesting witness is sufficient. But in this case the Notary, as well as two of the attesting witnesses, were examined, and proved the execution of the will. [Temple J.—It is expedient that all the witnesses to an impeached Will should be examined. The decree should be set aside, and the case remanded for a new trial. As the Will is impeached, it is necessary that *all* the witnesses thereto should be called and examined.] *Set aside.*

No. 13,764.
D. C. Kornegalle. } *Sinne Tamby*, v. *Samsy Lebbe*, and another.

An affidavit "that the defendants had declared that they would not allow the plaintiff to recover anything," *held* insufficient to support a sequestration.

In this case a sequestration granted by the Court below was, on appeal, dissolved with costs, on the ground that the affidavits were not sufficient to entitle the plaintiff to a sequestration, since it was not averred that the defendants were alienating their property; the plaintiff having only averred that he had reason to believe they would conceal their property, and the third party merely swearing that the defendants had declared that they would not allow the plaintiff to recover any thing from them. And *per* Temple J.—"In all such affidavits, the terms of the Rules of Court, which are both simple and explicit, should be followed as nearly as possible."

May 22.

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Present STERLING C. J., and TEMPLE J.

No. 16,051.
D. C. Galle. } *Rajepackse* v. *Karoeneratne.*

Where the Plaintiff sued on a Bond granted to him individually, but for a debt due to his late father, and the Court below dismissed the suit; the Supreme Court, on appeal, allowed the plaintiff to amend his libel by suing as executor.

The plaintiff sued on a bond granted to him by the defendant, renewing a debt previously contracted by the defendant with plaintiff's father. It appeared that the debt due to the plaintiff's father had been also upon a bond, which bond was delivered to defendant when the debt was renewed. The Court below held that no consideration had passed, and that the plaintiff ought not to have sued in his own person as if the debt had been due to him personally, but ought to have sued as the executor of his father's will.

On appeal, the Supreme Court modified the decree of the District Court, and allowed the plaintiff to amend his libel by suing as executor; each party paying his own costs. "The bond apearing to be assets, ought to be recovered as such by the plaintiff, as executor, in the District Court. Where an executor delivered up a bond, and took a new bond with surety to himself for the debt, this, though a conversion in Law, is none in equity. *Armitage* v. *Metcalfe*, 1 Ch. Cases, 74. And in case of a *devastavit* at Law, it has been doubted whether the personal representative need sue to recover back in his own name, as a *devastavit* is a wrong, and the Law will not compel an executor to persevere in a wrong. *Clark* v. *Hougham*, 2 B. & C. 155. If the bond should be proved to belong to the plaintiff as heir, it would be no objection that the cause of action was in his own right, and that he had named himself as executor would then be surplusage. Williams *on Executors* 1470."

No. 6,106.
C. R. Caltura. } *Rodrigo* v. *Kitto.*

The plaintiff had in 1846 given the deft's. husband some gold to be made into a chain, and in 1854, the chain being still incomplete, he

This was an action to recover from a widow, as heir and next of kin to her deceased husband, the sum of £7 16*s*. The plaintiff in 1846 or 1847, supplied the deceased, who was a jeweller, with gold to be made into a chain. Within a few months, a further advance was made; and in 1854, the chain being still incomplete, two sovereigns more were advanced. The defendant pleaded the

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gave a further quantity of gold viz: 2 Sovrgns. In an action to recover £7 16*s.* the value of the gold; *Held* that the receipt of the 2 Sovrgns. in 1854, was an act under the 7th clause of the Ordinance No. 8 of 1834, taking the case out of 5th clause.

5th section of the Ordinance No. 8 of 1834, and contended that the sums advanced previous to 1854 were prescribed. The Court below *held* that the plea did not apply, and that the claim being only for money advanced was not prescribed: for the money was not money *lent*, but advanced for a work, which prescription does not affect.

STERLING C. J. The judgment is affirmed, but not on the ground given by the Court below. The receiving two sovereigns in 1854, was an act done according to the 7th section of the Prescription Ordinance No. 8 of 1834, which act was sufficient to take it out of the 5th section. The strict course would however have been to sue the widow as executor *de son tort*.

No. 27,176.
C. R. Colombo. } *Findlay* v. *Alwis*.

The plaintiff sued for the value of *goods supplied*; but on the day of trial, was allowed to amend his plaint by adding the words "*and goods ordered but not removed.*" On appeal against this order, the Supreme Court refused to interfere.

The plaintiff in this case claimed £7 5*s.*, being value of goods enumerated in his bill of particulars. It appeared in evidence, that in January, the defendant had ordered the plaintiff to make a coat "for a particular purpose," and the coat was not sent to him till after the expiration of six months. On the day of trial, the plaintiff's Proctor moved to amend the plaint, by inserting the words "and goods ordered but not removed." The Court allowed the amendment, though objected to by defendant.

On appeal by the defendant against this order, *Dias* appeared for the appellant, and *R. Morgan* for the respondent.

Dias.] The proceedings are irregular. There was an amendment on the day of trial, by adding the words "goods ordered but not removed," and the defendant had no time to frame his defence. The summons was issued on the 16th, served on the 17th, and the case was called up on the 18th. The defendant is clearly entitled to 48 hours' notice; he applied for a postponement as he was taken by surprise. [TEMPLE J.—That was not the reason; you moved for a postponement on the ground of the amendment.] The Bill of particulars of the plaintiff's demand was only produced on the day of trial. The defendant was surely entitled to a postponement, as there was not sufficient notice according to the Rules and Orders, p. 145, r. 4. [TEMPLE J. Are you prepared

to say that you had witnesses to produce? Can your client swear an affidavit to that effect? True the coat was required in January, but the defendant never went to try it, never took notice of the plaintiff's letter, and refused to take the coat.]

R. Morgan.] The defendant nowhere says he has witnesses.

STERLING C. J.] It is not alleged that they had material witnesses. These objections ought to have been taken in the Court below, for the Ordinance No. 6 of 1854 precludes our entertaining in appeal such objections as are now taken. *Affirmed.*

No. 8,390.
C. R. Negombo. } *Wittesinhegey* v. *Wittesinhegey.*

This was an action to recover the half part of a garden, which half part was valued at £5. The defendant pleaded to the merits of the case, but on the day of trial put in a plea to the jurisdiction, inasmuch as the land was worth more than £10. The Court disallowed the plea at so late a stage of the proceedings.

On appeal, *Dias*, for the appellant, contended that the want of jurisdiction appeared on the very face of the plaint.

TEMPLE, J.] It ought to have been given in evidence under the general issue. 1 Chitty on *Pleading*, p. 440, (note c.) *Affirmed.*

The defendant having pleaded to the merits, put in a plea to the jurisdiction on the day of trial. The Court below having disallowed the plea at that stage of the case, the Supreme Court affirmed the order.
The want of jurisdiction ought to be given in evidence under the general issue.

No. 2,357.
C. R. Manaar. } *Ramelingen* v. *Marantha* and others.

This was an action to recover auctioneer's fees due and payable by defendants. The defendants had requested the plaintiff in his capacity of auctioneer to sell a piece of land. The notice of sale was accordingly published; but the sale having been interdicted, the land was not put up on the day fixed. The plaintiff claimed five per cent. on the amount subsequently realized. The Court below *held* that there was no claim against defendant for auctioneer's fees as sued for.

An Auctioneer is entitled to fair remuneration, though in consequence of the claim of a third party, the sale did not take place.

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On appeal the judgment was set aside, and the case remanded for a new trial, and *per* TEMPLE, J.—The plaintiff is entitled to a fair remuneration for his trouble, and the expense he has been put to in publishing the sale, though the claim of a third party prevented it from taking place.

No. 2,871.
C. R. Ratnapoora. } *Mudelihamy* v. *Adanhamy.*

In an action on a Bond, the defendant denied his signature to the Bond. The Court below after evidence, held the Bond to have been proved, but dismissed the plaintiff's suit,on the ground of want of consideration. On appeal, the Supreme Court reversed the decision, and gave judgment for the plaintiff.

This was a claim on a bond. The defendant denied his signature; and the Court below did not disbelieve the evidence as to the execution of the bond; still it thought that no consideration had passed, and dismissed the case.

On appeal, *W. Morgan* appeared for the appellant.] If the bond was executed, the presumption is, that consideration did pass. Besides, the defendant admitted to the Notary that he had received the money. The Commissioner speaks of certain reports about the parties, which are altogether irrelevant. Unprofessional judges are sure to go wrong if they listen to reports.

STERLING, C. J.] There was great irregularity in the Commissioner giving weight to suspicions arising from matters not in evidence. The decree is reversed, and judgment entered for plaintiff.

No. 27,792.
D. C. Kandy. } In rê *Henry O' Conner*, an Insolvent.

In this case Mr. *Ferdinands*, Proctor for the Insolvent in the Court below, moved that the composition tendered by the Insolvent be taken into consideration by the Creditors present.

Seventeen Creditors of the Insolvent appeared, by their Proctors, and agreed to accept the composition.

Lawson, for Messrs. *Bell, Miller and Co.*, submitted that only those creditors whose debts had been proved, or whose claims were admitted by the Insolvent during his examination, could be permitted to vote: there were only seven such creditors, and one dissented. 6-7ths were not 9-10ths, which the Ordinance required.

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Mr. *Ferdinands* contended that inasmuch as the Insolvent had but seven creditors competent to vote (that is, with proved claims above £20,) six of whom agreed to accept the composition; under the circumstances, 6-7ths must be considered equivalent to 9-10ths, to render this provision of the Ordinance operative, inasmuch as it was *imposible* to procure the 3-10th of a man which was wanting to make up the 9-10th of 7, viz: 6 and 3-10th.

The Judgment of the Court below *(T. C. Power, D. J.)* was as follows: "The 140th clause of the Insolvency Ordinance enacts, that 9-10ths in number and value of the creditors then present and competent to vote must agree to accept the composition, before the District Court can annul the adjudication of Insolvency. The number of Creditors whose claims are above £20, and who agree to accept the offer of composition tendered, is *six*. With one opposing creditor, it is clear there are but 6-7ths and not 9-10ths of the creditors consentient. The offer of composition on this ground must therefore be considered as rejected."

On appeal, this order was set aside by the Supreme Court, the adjudication of Insolvency annulled, and the Petition for sequestration dismissed; and it was decreed, that every creditor do accept the composition offered by the Insolvent, and agreed to by the majority of his creditors. The Supreme Court considered that, under the circumstances of the case, the consent of the 6-7ths of the creditors must be deemed to satisfy the requirements of the 140th clause of the Ordinance, and to come within its tenor and meaning.

No. 27,752.
D. C. Kandy. { *Sotiana* v. *Keera.*

A plaintiff is not entitled to a writ of execution against the defendant's person for costs under £10.

The facts of this case are stated in the judgment of the Supreme Court, which is as follows:

"By the final decree in this case, of the 13th April 1855, it was decided that the plaintiff should be put in possession of the land, and the defendant should pay costs,—the plaintiff waiving all claim to damages. Subsequently the plaintiff's costs were taxed at £9, and he moves for a writ against the defendant's person for that amount; which motion is disallowed by the District Judge, relying on the Ordinance No. 7 of 1853, § 164: which order of disallowance is the subject of the present appeal. Now it appears to the Su-

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preme Court that by the decree below, the costs were distinctly separated from the damages; moreover that the plaintiff was enjoined thereby to waive all damages. It is of opinion, that having reference to the above Ordinance, the order should be affirmed."

May 28.

Present STERLING, C. J., and TEMPLE, J.

May 28.

No. 3,340.
P. C. Badulla. } *Amoonekandoore* v. *Dimbooleene* & others.

Riotous conduct tending to a breach of the peace, is a misdemeanour cognizable by the Police Court.

This was an information against several defendants for *riotous conduct tending to a breach of the peace;* on which the defendants were convicted.

R. Morgan for the defendants and appellants.] This is not a criminal offence. It is not a breach of the peace. If it is a *riot*, it is out of the jurisdiction of the Court.

TEMPLE, J.] I do not look upon it as a riot in the strict sense of the word, but as a misdemeanour. *Affirmed.*

No. 17,740.
P. C. Negombo. } *Kroos* v. *Kroos* and others.

A sentence of corporal punishment in a case of assault on unprotected females in their own dwelling, upheld.

It is no objection in appeal that the defendants were brought up upon a warrant, before summons.

This was an appeal in a case of Assault committed at night on unprotected females, within their own house. It appeared that the defendants had not been summoned to appear and answer the charge as required by the Rules, but were brought up on a warrant on the 2nd May, and kept in custody till the 5th,—the day on which the case was heard. The Magistrate having found them guilty, sentenced them to corporal punishment. On appeal:—

R. Morgan, for defendants and appellants.] The punishment is very severe: the defendants are charged with a simple assault. Corporal punishment is never inflicted in cases of assault, except where a knife or other weapon is used. In Police Court cases, a summons ought to issue to bring witnesses; but here the defendants were in jail till the case was heard, and it was impossible for them to produce witnesses. This is opposed to the Rules.

STERLING, C. J.] The evidence appears very strong. I am no advocate of corporal punishment, but in the case of an assault committed on women living unprotected, I think the punishment quite deserved. *Affirmed.*

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No. 16,614. *C. R. Jaffna.* } *Canegeraya* v. *Veylen.*

This was an action to recover 3*s.* being money lent to the defendant. The witness for the plaintiff stated on the day of trial, "that the plaintiff had a criminal case for assault against the defendant, and that the defendant promised 3*s.* for an amicable settlement." The Court below held that the consideration was illegal, and dismissed the claim.

On appeal, the Supreme Court ordered that the decision be set aside, and the case remanded for a new trial, as it appeared from the record that on the day of hearing, the defendant was absent and *final* judgment given on the evidence; whereas by the 17th and 19th clauses of the Rules for *Courts of Requests*, such judgment should have only been *interlocutory*. It is illegal to compound a felony, but not an assault, which is a mere misdemeanor.

A Court of Requests cannot, in the absence of the defendant, enter up final judgment after evidence.

Withdrawing a complaint for assault, is not an illegal consideration for a promise to pay money.

No. 4,022. *C. R. Bentotte.* } *Silva* v. *Silva.*

In this case a third party had intervened in support of the defendant. The Court below having nonsuited the plaintiff *with costs*, the intervenient issued a writ of execution for his costs; but when the matter was brought to the notice of the Court, the Commissioner stated that the judgment did not include the *intervenient's costs*, and recalled the writ.

From this interlocutory order the intervenient appealed. The Supreme Court affirmed the order of the Court below, but modified the final judgment by decreeing "that the plaintiff do pay the costs of the intervenient as well as those of the defendant."

The Court having nonsuited the plaintiff *with costs*, an Intervenient, who had come in support of the defendant issued a writ for his costs. The Commissioner recalled the writ, on the ground that the judgment did not include such costs. The Supreme Court affirming the order, amended the previous judgment by decreeing costs to the intervenient.

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No. 20,427.
C. R. Kandy. } *Uddegeddere* v. *Thegome.*

A plt. having sued for and recovered the principal amount on a bond, brought a second action for the interest. The Court below having dismissed the case, the Supreme Court affirmed the dismissal.

The plaintiff claimed £4, being interest for one year on a sum of £6, borrowed by the defendant on a bond. It appeared that the plaintiff had already brought an action for the principal of the bond, and had recovered that amount. The Court below having referred to that case dismissed this claim, as it there appeared that the claim had been fully liquidated.

TEMPLE, J.] The splitting of the action is suspicious. Besides, the presumption is against the interest being due. *Affirmed.*

No. 9,102.
C. R. Ca'pentyn. } *Caderewel* v. *Murguretta.*

In ejectment, the plaintiff must recover on the strength of his own title.

The plaintiff as executor sued the defendant for the recovery of certain lands as belonging to his Testator. The Court below held that "as the defendant is unable to point out any other property belonging to the deceased, which would answer the description given in the deceased's Last-will, it therefore would appear that the property so described in deceased's will is that in dispute." The defendant was accordingly adjudged to pay the damages claimed, and to be ejected from the premises.

On appeal the Supreme Court ordered that the decree be set aside, and the case sent back for a new trial. "The Plaintiff sues as executor, to recover lands in the possession of the defendant. The plaintiff has judgment below, on the ground that the defendant cannot point out any land to satisfy the devise; conflicting with the leading principle of the law of ejectment, that the plaintiff must recover on the strength of his own title."

No. 17,155.
D. C. Galle. } In rê *S. L. M. Ibrahim Saiboe.*

An insolvent in custody is entitled to his discharge, immediately upon the adjudication (and without

This was a question respecting protection from Arrest under the Insolvency Ordinance.

The Petitioner had been in jail since November 1855 for a debt. In April 1856, he was declared an Insolvent, and a motion made by his Proctor that he be, under § 36 of the Ordinance No.

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7 of 1853, protected from arrest and discharged from custody, was disallowed as premature. The Court below held, that notice of adjudication of insolvency should have been given in the Gazette; that two public sittings should be appointed for the insolvent to surrender and conform, for which purpose the insolvent was not yet before the Court; and that a party imprisoned for debt could not be discharged without notice to creditors.

notice to his creditors) unless the case falls under any of the exceptions in § 36 of the Insolvency Ordinance.

On appeal against this judgment, *R. Morgan* appeared for the appellant.

The Supreme Court ordered, that the prisoner should be discharged under the provision of the 36th section of the Ordinance No. 7 of 1853; it not appearing that the case came within any of the exceptions in that clause.

No. 201.
D. C. Galle. } *Sela Umma* v. *Bawadoe Marcan.*

Where Commissioners, acting under an order of the Supreme Court in a case for Partition, made their Report, which after notice to the opponent (his proctor being present and having no cause to shew) was made a rule of Court, the Supreme Court, on appeal by the opponent, refused to set it aside.

This was an action under the 10th section of the Partition Ordinance No. 21 of 1844. After several appeals, the parties had finally come to a settlement, and agreed to effect a just and equitable partition. The Supreme Court then ordered that the Commissioners appointed should be directed to mark out the boundaries between the two parties, and to state the extent of each portion. The Commissioners having made their return; on a motion by the applicant to shew cause why the Commissioners' return should not be made a rule of Court, the Proctor for the opponent stated that he had no cause to shew, and it was ordered "that the Commissioners' return be made a rule of Court, and be and stand as the judgment in this case." Afterwards, on the same day, the opponent appeared *in person* and objected to the order; and the Court having over-ruled the objection, an appeal was taken thereon.

Rust, for the opponent and appellant.] The Proctor had no right to consent to any motion unless special power was given in the proxy. A party has a whole day to shew cause. And assuming the Proctor had the power, it has constantly been the practice of the Courts to open up judgments. [Temple, J. This is no case of *consent*. The Proctor says he has no cause to shew, and leaves it to the Court. Where a party is represented by a Proctor, the Court only recognizes the Proctor.] The Proctor says he has no cause to shew. We appeal against the order because

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we have cause to shew. I thought it was left to a party to question any judgment, if it was erroneous. Further, we appeal on the merits. The Commissioners went beyond their duty: they had a defined object to carry out, a defined duty to perform, and I only wish the order of the Supreme Court carried out in its integrity.

Dias, for the applicant and respondent, contended there was no *consent*. The Proctor was called upon to shew cause, and he said he had no cause to shew. Consent to a judgment was quite a different thing, and in no way analogous to the present case. Besides, a party is bound by the acts of the Proctor. Marshall's *Digest*, 545. Again, according to the rules, the petition of appeal ought to have been signed by a Proctor or drawn out by the Secretary. It is signed by one *Jansz*, but what authority has *Jansz* to sign the petition? If drawn by the party, the appellants are at once out of Court. I consider this objection so strong, that I will not enter into the merits, though I am prepared to do so.

TEMPLE, J.] The Commission is in the nature of an arbitration, and we are very reluctant to find fault with the arbitrators chosen by the parties themselves. The Court need not enter into the question as to the authority of the Proctor. *Affirmed.*

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Present STERLING, C. J., and TEMPLE, J.

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No. 6,500.
D. C. Ratnapoora. } *Mutto Menicka* v. *Punchy Menicka.*

Qu. Whether a *deega*-married wife is entitled to a life interest in her husband's estate.

In this case, the original owner of the lands in dispute had a son and a *beena*-married daughter. The plaintiff was the daughter of the latter; and the defendant the widow of the son, who had died without issue. The widow, who had contracted a second marriage, asserted in her answer her right to the whole of the lands, upon a transfer in her favour from her husband, who had obtained the same under a deed from her father; but neither of these documents having been proved, the Court below gave judgment for plaintiff. From this finding the defendant appealed; and her counsel, in appeal for the first time, raised the question whether the widow was not entitled to a life-interest in the husband's landed property, although she had contracted a second marriage.

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W. Morgan, for the defendant and appellant.] The widow was entitled to a life-interest in the husband's property, which by inheritance was an exact half of his father's property, unless the second marriage had been contracted against the wish of the first husband's relatives, or unless she had been guilty of misconduct. Marshall's *Digest*, p. 326, § 51. There was no evidence to shew either the one or the other; and if the decree in the Court below were affirmed, she would be deprived of her right altogether.

R. Morgan, contra.] This point was not raised either in the pleadings or in the petition of appeal, and no doubt for a very good reason. The defendant set up deeds which were never proved, and the District Court said that the documents were suspicious. The rule referred to applied only to cases of *beena*-marriages, as the authority shewed.

W. Morgan, in reply.] The rule of Law is, that a *deega*-married daughter forfeits her right to her *parent's* estate. There is no authority in support of the argument on the other side. A *beena*-married woman has no right to her husband's property, nor has he any right to hers.

TEMPLE, J.] My impression was that the rule only applied to *beena*-marriages, but I have no objection to save the point. The judgment of the Court below is affirmed, without prejudice to any right which the appellant may have as widow.

No. 13,450. *D. C. Caltura.* } *Fernando* v. *Coorey.*

Effect of a Joint will, considered.

A husband and wife made a joint will, giving part of certain lands to the defendant. After the death of the wife the husband sold a part of the same land (as alleged) to the plaintiff who claimed it under the sale. The District Judge before whom the case first came on, did not find the fact whether the lands claimed by the parties were the same, but held that the husband could sell, notwithstanding the last will. The case being referred back by the Supreme Court, the Court below held that the husband could not sell. The Collective Court sent it back again, to find the fact definitively, whether the lands were the same or different. The Court below held that they were different. On appeal against this decree:

Rust for the defendant and appellant, was heard on the facts, and contended that the land bequeathed was the same as the land sold; and such being the case, he submitted that after the joint will, the

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survivor could not sell. 4 Burge, 405 : Van Leeuwen, iii. 2. 16 ; V. D. Keessel, th. 283 ; 1 Williams *on Executors*, 104; *Dufour* v. *Pereira*, 1 Dick. 419.

R. Morgan contra, was heard on the facts, that the lands were not the same. Even if they were, the survivor could alienate. Voet, *de Pactis Dotalibus*, n. 63, in med. Van Leeuwen, *Cens. For.* part. 1. lib. iii. c. 2. n. 16. Loenius, *Decisien*, cas. 137.

Per Curiam.] The Supreme Court agrees in opinion with the District Court, that the portion in dispute was not bequeathed to the defendant.

Judgment for the Plaintiff.

No. 14,008. } *Peria Carpen* v. *Hutoegederegey.*
D. C. Galle. }

A party who had paid off a mortgage-debt due by the defendant, by giving his own bond for the amount, was allowed priority over other creditors, on the proceeds of the mortgage-property.

The defendant in this case shortly before judgment, sold to A a garden (which was bound in special mortgage to B,) and the plaintiff having seized it on his writ, A made his claim in execution and proved that he had given his own bond to B, to the extent of B's mortgage-debt, in part payment of the purchase-money, and that he had paid the balance in cash to the defendant, and that at the same time, an agreement was entered into between A and the defendant, whereby the defendant agreed to pay the interest on A's Bond to B, and reserved to himself the right of taking back the property within ten years on payment of the amount for which he professed to sell it. The District Court being of opinion that the transaction was fraudulent, set aside the deed of transfer.

On appeal against this decision, *Dias* appeared for the appellant, and *R. Morgan* for the respondent.

Dias.] The case against the claimants is only one of suspicion, and suspicion is not fraud. The transfer did not include the whole of the defendant's property. 3 Burge, 107, 623, 624. Assuming that the transaction was fraudulent, and that the whole of the purchase-money was not paid by A, the claimant, he is still entitled to preference to the extent of £95, with interest, paid to B, the mortgagee. A purchaser who employs the purchase-money in payment of creditors to whom the land is mortgaged, succeeds to their rights, to the extent of what he pays them. 1 Domat, b. iii. tit. 1. § 7. art. 6. p. 361.

Morgan.] Fraud can only be shewn from the circumstances

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of the case. All the badges of fraud existed here. The transfer was made pending the suit; the defendant continued in possession of the property sold; and there is an agreement to get back the property ten years after date, for the very sum paid ten years before. Even the interest on the bond for £95, is to be paid by defendant. The price paid was about half of the admitted value. I admit the justice of the claim to the extent of £95, paid to *Anthonisz*, and will consent to its being paid.

Per Curiam.] The judgment of the Court below is affirmed, except as to the £95, which the claimant was entitled to in preference. Claimant to pay all costs.

June 4.

Present STERLING, C. J., and TEMPLE, J.

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No. 30,909. *P. C. Kandy.* } *Van der Wall* v. *Middleton* and others.

The law regarding forcible entry obtains in Kandy, independently of the Proclamation of August 1819. The right of the owner to take forcible possession of his property whilst in possession of another, — considered.

The plaint in this case charged the 1st and 2nd defendants with having forcibly entered the dwelling-house of the complainant, and taken forcible possession thereof, with some moveable property and papers, without the authority of a competent Magistrate, in breach of the Proclamation of 5th August 1819, and with Assault; and the 3rd, 4th, 5th, 6th, and 7th defendants, with having aided and abetted the 1st and 2nd defendants; and the 3rd, 4th, and 5th defendants also with having, without any cause, imprisoned and detained the complainant. The Court below found the 1st defendant guilty of taking forcible possession, and of Assault; and the 4th and 5th of having illegally detained the complainant.

On appeal against the conviction,

R. Morgan, for the appellant.] The Proclamation does not apply. It was enacted to meet an evil then prevalent, of parties, who owned land in common taking the law into their own hands and trying to eject each other, without resorting to a Court of Justice for the settlement of their differences. Secondly, the possession contemplated therein is clearly an independent possession, which could not be said of the possession of a servant for his master, or a tenant for his landlord. [STERLING, C. J.—Take it for granted that the Proclamation did not apply.] Then there was no assault; as the alleged assault was quite dependent on the forcible possession.

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No blows were given; but when the complainant refused to quit, he was pushed to the outer-verandah, and there was only the *molliter manus imposuit*, which the law clearly allowed in such cases. [STERLING, C. J.—The complainant was then given in charge of the Police and marched into Court.] *Middleton* was not charged with false imprisonment, and the Police only interfered when they apprehended a breach of the peace. [STERLING, C. J.—It appeared that the Police had been acting as the private agents of *Middleton*. Apart from the Proclamation, the general Law does not justify forcible entry.] There is no law here making forcible entry penal, excepting the Proclamation, and at common law (both English and Dutch) a landlord may forcibly dispossess a tenant. He is not liable therefore civilly, and *a fortiori* cannot be criminally. See No. 4,591, D. C. *Jaffna*, decided collectively. (Civ. Min. 30th June, 1852). [TEMPLE, J. Could *Middleton* turn out his own tenant forcibly, and thereby commit a breach of the peace?] He was not tried for a breach of the peace; so that the question does not arise.

W. Morgan, for the respondent.] The Proclamation does apply. Cases of this nature are continually being tried in *Kandy* under the Proclamation. It is still in full force, and to say that this case did not come under it, would be to render it entirely nugatory. Assuming that *Middleton* had a right to the premises, he could not, under the Proclamation, get possession without the "sanction of a competent Magistrate." This Proclamation was the law against forcible entry in the Kandian Provinces. It is an outrageous thing to drag a man out of his dwelling-house. Here he was dragged out and given in charge of the Police and marched away to the Police Court. Mr. *Colepepper* in his evidence stated, that he had sent the Police there to prevent a breach of the peace;—then clearly the Police exceeded their authority, for instead of taking *Middleton*, who committed the breach of the peace, into custody, they took *Van der Wall*, and he was dragged away from the house, and removed to the Police Court. What did the poor man do? It was not *he* that committed the breach. *Middleton* was clearly guilty of an assault; and the giving the complainant in charge of the Police, was a continuation of that assault. Besides which, there was no evidence to shew that *Middleton* had a right to the house. It was *Gerard* who had taken it on lease, which lease had not then expired. *Van der Wall* entered under *Gerard*, and he in his examination admitted only that he had received instructions to deliver some things in the house, (which was also used as a store,) and that *Brown*, having engaged him (*Van der Wall*) to sell these things

"he kept the articles for that purpose." There was an admission that some articles in the store belonged to *Brown*, (whose Agent *Middleton* was,) but not the house itself. It is not correct to state that *Van der Wall* permanently settled himself in the house after he had received the notice to quit, for there was evidence to shew that this was his dwelling-house always, and that he only removed to an opposite house when it was filled with coffee during crop-time.

R. Morgan, in reply.] *Middleton's* right to the house was undoubted. It had been leased to *Gerard*, who transferred it to *Brown*, for whom *Middleton* was acting. The complainant had corresponded with *Middleton* as *Brown's* agent, and received supplies from him,—and every letter and cart-note of his was headed, "*Alexander Brown's* Store." The plea that *Middleton* had no right, was clearly a subterfuge. His entry was rendered positively necessary in view of *Brown's* interest, and to have allowed the complainant to continue in possession of the property and accounts, until a regular law-suit was brought and decided, would have been ruinous to those interests. A landlord has a right forcibly to turn out his tenant. The case of *Newton* v. *Harland*, has been repeatedly over-ruled. In *Harvey* v. *Bridges*, 14 *M. & W.* 442, Baron *Parke* said, "I cannot see how it is possible to doubt, that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though, in so doing, a breach of the peace was committed."

The Proclamation, under which *Middleton* was tried, not applying, he was not guilty of forcible entry under it. Further, there being no other law here making forcible entry penal (the English Statutes not applying here) he could not be convicted *and was not*, for a breach of the general law. The assault depended quite upon the dispossession, no other force being used than was necessary to that end. The Police were clearly not guilty, for the head and front of their offending was, to march complainant to the Police Court when they thought a disturbance was likely to ensue. No master would be safe, if he could not summarily turn out his servant, when he felt it necessary to do so. If he had to bring an action in the meanwhile, and contend with the thousand and one pleas that would be put in before he could get back his own, it would be ruinous to Estate-agents and others who had stores in charge of persons employed by them.

Sterling, C. J., delivered judgment.] It has been argued at the bar that there is no law against forcible entries in the Colony,

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and that the operation of the Proclamation of the 5th August 1819, was an evidence that no such law existed in Kandy prior to its date. Now it is the nature of a Proclamation generally, only to be declaratory of what the law is; and although the Proclamation merely *expressly* points at one case of forcible entry, namely on land, and taking away crops as a prevalent practice to be particularly noticed; yet, as it uses the emphatic language "to the disturbance of the public peace and in *contempt* of the *laws of our Lord the King*," it clearly assumes that some law on the subject of forcible entry pre-existed.

Then see what is the English law, as laid down by all the text writers, particularly from *Grainger's Roscoe* of 1846, p. 483.

As to the case of *Harvey* v. *Brydges*, cited for the defence, the dictum of Baron *Parke* as to the free-holder's right to justify an assault is met by the counter-*dictum* of Baron *Alderson*, at the same time relying on *Newton* v. *Harland* and Lord *Kenyon's* decision; and here the case is a breaking into a house and committing an assault—not a mere entry on the land; and at all events Baron *Parke* recognizes the free-holder as amenable to the criminal law. And the case now before this Court is strictly a criminal one, the fines going to the Crown.

It has also been alleged at the bar, that the Dutch law makes no provision against cases of forcible entry; but this is quite opposed to the following authorities: *V. d. Linden* b. II, section 6, p. 319. Brown's *Civil Law*, 405. Wood's *Civil Law*, 257. (It is to be observed that the *Jaffna* case No. 4,591 cited, was a civil one for the recovery of damages.) The reason assigned by *Wood*, and which is the basis of all law on the subject, applies with particular force in this Island, where so many of the natives are immersed in disputes relative to small parcels of land or claims to fruit, and from which arise so many breaches of the peace. And if the law of forcible entry did not apply here, it could not be too speedily ordained. It is at all events clear, that the 1st defendant was guilty of the assault; and the judgment of the Supreme Court is that the decision below be *affirmed*.

No. 9,172. } *Ackmeemena* v. *Medume-arachigey*.
D. C. Galle. }

In this case the prisoner was charged with the possession of stolen property, viz., a box belonging to the complainant. He

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The defendant on a charge of having stolen property in his possession, admitted the possession, but added that he had taken the property for wages due to him. The Court below having convicted him on such admission, the conviction was set aside.

pleaded "not guilty," and added that he took the box, "because the complainant owed him wages for work done." Hereupon the Court below gave the following judgment:—"After the statement voluntarily made by the defendant in open Court, it is needless to call upon the complainant to establish his case by evidence. The accused could not take the law into his own hands to remedy his grievances. If every man act in the same manner, there would be no need of Courts of Justice." The prisoner was found guilty, and sentenced to four months imprisonment at hard labour.

On appeal against the conviction;

Dias, for the defendant and appellant.] The District Judge quite misapprehended the legal effect of the prisoner's statement. It was true that he had taken the box, but does such taking under the circumstances amount to theft? There was a plea of "not guilty" recorded, and the prisoner's voluntary statement amounts to the same thing. If instead of the first plea, the prisoner had simply made the statement, the judge should have directed a plea of "not guilty" to be entered. Then it comes to this,—the prisoner pleads not guilty, and the prosecutor calls no witness. [STERLING, C. J. I think so too. But have we the power to remand the case for a new trial?] The 10th clause of the Ordinance No. 9 of 1843, gives the power to the Judges on Circuit, and that power is extended by the 16th clause to the Judge at *Colombo*. By the 7th clause of the Ordinance No. 20 of 1852, the same power is saved to the Supreme Court as at present constituted. The present case should not be remanded, but the prisoner acquitted. There is not a single instance of a case like this having been remanded. So far as the prisoner is concerned, it can make no difference whether the decision is affirmed, or the case sent down for a new trial. He has already suffered about two months' imprisonment. By the time the case comes on for a new trial, the full time of the imprisonment will have expired; but, nevertheless, the District Judge may proceed on with the case, and convict and sentence him for a further term of four months. If the order of this Court be for a new trial, the prisoner's success in appeal would place him in a worse position than before. [TEMPLE, J. When the order is set aside, the prisoner is entitled to be liberated.]

The Supreme Court ordered the case to be sent back for a new trial, and thought it probable that in the event of the defendant being found guilty, the Court below would take into consideration any previous imprisonment undergone by him.

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No. 28,075.
D. C. Kandy. } *Meddoome* v. *Sekamelagey.*

The Rule of the 2nd July 1842, § 8, does not require a party to file copies of documents, where the originals are in the possession of the opposite party.

This was an appeal against an order of the Court below, refusing to admit in evidence a copy of a deed, which copy was not filed with the Libel in accordance with § 8 of the Rules and Orders of the 2nd July 1842, the original being with the defendants.

R. Morgan, for the plaintiff and appellant.] All that the Rules require is that the documents referred to in the pleading should be filed. But the original of this deed is alleged to be in the possession of the defendants, who being *a party to the suit*, cannot fairly complain of the want of notice. [TEMPLE, J.—If the plaintiff could not file the original, was he not bound to file a copy?] The Court, under the Rules, has a discretion to allow proof of documents not filed. [TEMPLE, J.—The rule only requires filing when the party has it in his power. Third parties mean those who are no parties to the suit. From the nature of this action the defendant was charged with the possession of the original deed, and he cannot now object to the want of notice.]

Per Curiam.] The rule referred to requires a plaintiff, at the time of filing his Libel, to produce and deposit in Court any vouchers or written documents, to which such pleading refers,—or copies of such of them as may be in the possession of third parties. The plaintiff could not do the former, since, as he alleges, the mortgage-bond referred to in his Libel is in the possession of the defendant, and the rule does not require the latter, except when the document is in the possession of third parties, i. e. of persons not parties to the suit.

Set aside.

The power possessed by District Judges of carrying out a sentence of corporal punishment, notwithstanding an appeal, is one to be very rarely exercised.

No. 1,322.
D. C. Batticaloa. } *Cattapody* v. *Oemoor-Catta.*

In this case a sentence of corporal punishment was carried into effect, notwithstanding an appeal. The Supreme Court, without questioning the power or the discretion the District Judge had exercised, remarked in its judgment, that it was a discretion which should be very rarely exercised, as it so far nullified the appeal.

Held that annexing a stamp to a Security-Bond originally on an insufficient stamp, did not render the bond valid: and the appeal was rejected.

No. 10,074.
C. R. Calpentyn. } *Kader Saiboe* v. *Oedoema Lebbe.*

The appeal in this case was rejected, the Security-Bond being written on insufficient stamp, and the annexing of a stamp to make up the deficiency being contrary to the 12th clause of the Ordinance No. 19 of 1852.

No. 10,370.
C. R. Calpentyn. } *Cader Saiboe* v. *Oedoema Lebbe.*

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A judgment based on an amicable settlement, set aside, where the Court manifestly mistook the intention of the parties.

In this case the plaintiff claimed £9. 10*s*. It appeared that the plaintiff, in the month of February 1852, took a garden in lease from A, for nine years commencing from April 1854, for the sum of £28. In June 1852, A sold the land to the defendant, who was ignorant of the lease. On the day of trial the defendant stated in his examination, that as the land was sold to him, he had a right to the produce; but as the plaintiff held the title-deed of the land, he wished to settle the matter in dispute, and pay off the amount, having received from A the necessary funds for that purpose. No answer appeared on record; but on this examination of the defendant, the Court below gave judgment for the plaintiff. The defendant having appealed against this judgment;

R. Morgan, (*Dias* with him) for the appellant.] The Commissioner entirely misunderstood the nature of the proposed settlement. The rent reserved by the plaintiff's lease, which was to take effect twenty-seven months after the date of its execution, amounted to some £3, and the amount of the present claim was £9. 10*s*; and therefore it cannot be supposed that the defendant agreed to pay three times as much as the plaintiff would be entitled to under the lease. The proposed settlement, as appears from all the circumstances in the case, was with a view to get rid of the plaintiff's lease. The defendant having discovered the existence of this document, insisted on his seller settling with the plaintiff, and she seems to have authorized him to do so, and to have furnished him with the necessary funds. That this was the nature of the proposed settlement is further evident from what the defendant says in his petition, "that by reason of the present judgment, he would be obliged to pay a larger sum in settling with plaintiff, than he had paid for the purchase of the land itself." The examination of the defendant is recorded in the third person. Evidently the Commissioner has only recorded the effect of the defendant's examination in his own mind. Again, it seems from a note of the Commissioner, made after the appeal petition was filed, that when the judgment was entered up, the settlement had not been finally concluded. The Commissioner says "he (defendant) further promised to pay the above sum at once to plaintiff, and left the Court with the plaintiff ostensibly to effect the settlement of the matter."

Rust, (*W. Morgan* with him) for respondent.] This is a judgment by consent, and the plaintiff cannot be heard against it. On the day of trial the defendant came into Court, admitted the

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cause of action, and said he was ready and willing to settle the case, by paying the plaintiff the amount of his claim. It would be a dangerous practice to send back such a case for a new trial. It appears that the parties agreed to a judgment, and the Commissioner acted in pursuance of their agreement. There was nothing on the record to warrant the argument on the other side, that the proposed settlement went beyond the mere payment of the sum in dispute. The cancellation of the plaintiff's lease was an after-thought, and to allow such an argument, would be to allow the appellant to contradict the record. This Court has always encouraged amicable settlements, and never interfered except upon strong grounds. According to the English cases, no appeal lies from a judgment by consent. Consent debars the appellant from his right to appeal. *Toder* v. *Sansam*, Parl. Cases, p. 468. [STERLING, C. J.—Mr. *Morgan* wants to draw a distinction; the judge has made a mistake.] But you cannot contradict the record. The Commisioner says that the defendant agreed to give £9. 10*s*. In the plaint £9. 10*s*. was claimed, and this was the actual amount of damages awarded. [TEMPLE, J.—The intention was a settlement to cancel the case.]

Per Curiam.] The decision of the Court below is set aside, and the case remanded for a new trial; the appellants paying costs.

No. 39.
C. R. Badulla. } *Ballegalle* v. *Ballegalle.*

Where the plaintiff's own evidence shewed that the defd. was entitled to a share in the land in dispute, which was not, however, reserved to her in the judgment, the case was sent back for a new trial.

In this case the plaintiff claimed a field called *Hangomoowe Coombere*; and after evidence heard, the Court below gave judgment for the plaintiff for the entire field. On appeal by the defendant, as the plaintiff's own evidence shewed that the defendant had a share in the land, which was not, however, reserved to her in the judgment, the Supreme Court set aside the decree, and sent the case back for a new trial.

June 7.

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Present, STERLING, C. J., and TEMPLE, J.

No. 16,175. *D. C. Caltura.* } *Don Abram* v. *Don David.*

A Thombo-Extract is not conclusive evidence of the nature of the title to land.

The question in this case was as to whether the land was service parveny or not. The Court below had held that it was not, and given judgment for the plaintiff. In the Thombo-Extract produced in the case, the following entry occurred:—"Grandfather's service parveny, subject to perform Lascoreen duties. No proof being tendered, these gardens are considered Company's land; their Honor's share not yet paid."

Dias, for the appellant, contended that such entry was evidence that the land was service parveny, and claimed a reversal of the judgment pronounced by the Court below.

But *per Curiam.*] The judgment is *affirmed.*

June 11.

Present, STERLING, C. J., and TEMPLE, J.

No. 82. *D. C. Colombo.* } In rê *Jusey Silva.*

June 11.

The breach of an agreement by which the deft. was bound to pay to the plt. all monies received by him for goods sold on joint account, is not a breach of trust, under § 36 of the Ordinance No. 7 of 1853.

This was an appeal against an order of the Court below refusing protection to an Insolvent in custody, under clause 20 and 36 of the Ordinance No. 7 of 1853.

W. Morgan, (*Dias* with him,) for the insolvent and appellant.] This is the first decision on the question of protection under the new Ordinance. The grounds of the decision of the District Court are as follows: "On reference to the pleadings and proceedings had in the civil case No. 36,396, it appears that the claim was founded upon a notarial Agreement dated the 19th November 1841, under which the plaintiff (the detaining creditor) made certain advances to the prisoner, for the specific purpose of enabling him to supply Government with beef for the space of one year, commencing from the 1st December then next ensuing, the plaintiff receiving 2-6th shares of the profits arising from the transaction; the plaintiff, moreover, to possess the monies that should be realized by the extra sale of meat, and all other monies proceeding from the transaction;—and that, although the defendant received £2,183. 9*s.* 0¾*d.* for beef supplied to the troops, as

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also for the value of beef sold to divers other person, yet he only allowed the plaintiff £1,553. 15*s*. 3*d*., leaving a residue of £629. 13*s*. 9$\frac{3}{8}$*d*., which the defendant failed to pay to the plaintiff, contrary to the agreement entered into between them. By the amended answer put in by the defendants, the prisoner denied the fulfilment of the contract and agreement on the part of the plaintiff (the detaining creditor,) or that he ever advanced to the prisoner any sum or sums of money. The case was, upon the motion of both parties, referred to arbitration; and by the award filed by the arbitrators, and since affirmed by the Supreme Court, the prisoner, jointly with the co-defendants, was adjudged to pay to the plaintiff £621. 7*s*. 6*d*. The Court, under these circumstances, is of opinion, that the prisoner is in custody at present for a debt contracted by a very gross breach of trust, and that he is not entitled to the indulgence contemplated by the 36th clause of the Ordinance. The prayer for discharge is accordingly disallowed with costs." It is difficult to see how the grounds set forth constituted a breach of trust. Trusts and breaches of trust are words, the meaning of which is well known to lawyers, and it cannot be contended that the Legislature intended to give them a different signification. They should be construed in the same way as they always were. *Smith v. Harmon*, 6 Mod. 143. There must be a trust created by the agreement or some fiduciary character given to the defendants, from which a trust might be implied. But on reference to the instrument, it simply appears that the plaintiff was to make certain advances to enable the defendant to supply beef to the Commissariat, and the defendant was to pay to the plaintiff all monies received by him from the Commissariat, and the plaintiff was to hold these monies till the supplies were completed and the accounts examined. Before the termination of the contract, the defendant was sued for a breach of that part of the agreement whereby he had bound himself to pay over to the plaintiff the monies received from the Commissariat; so that if any fiduciary character was given to either of the parties, it was to the plaintiff and not the defendant. Hill *on Trustees*, p. 21. If there was no trust, there could then be no breach of trust, for a breach of agreement is not a breach of trust. If the defendant in this is held to be guilty of a breach of trust, the District Court would have to refuse protection in every case of simple debt on a bond, where the debtor failed to liquidate the debt, for it may be argued that the creditor trusted the debtor in making the loan and that the latter was guilty of a breach of trust in not accepting it! [STERLING, C. J. Did not the District

Judge say that the defendant was guilty of fraud?] The District Judge said that the debt had been contracted by a very gross breach of trust. But supposing that he said that the debt had been contracted by fraud, it is difficult to understand how he could have come to that conclusion. He appeared not to have had a clear conception of the objections raised. He gave as one of the grounds of the decision that the defendant in his answer made certain denials. You cannot make the defendant responsible for any defence set up by his counsel; and the defendant cannot therefore be said to have contracted the debt by fraud. Had the defendant made any false representation which induced the plaintiff to enter into the contract, the case might perhaps be different. The words of the 36th clause of the Ordinance were, "provided that the Court shall not order such release, where it shall appear by any judgment, order, commitment, or sentence under which the insolvent is in prison, that he is in prison *for any debt contracted by fraud or breach of trust*, or by reason of any prosecution against him whereby he had been convicted of any offence." There is nothing in the judgment, or order, or pleadings, or the proceedings, to shew that the debt contracted by the defendant, for which he was sued, had been contracted by fraud or breach of trust.

Rust, for the Respondent.] The judgment of the District Court must be affirmed. The District Judge after a very careful consideration of the *whole of the proceedings* in the case No. 36,396, came to the conclusion that the insolvent had been guilty of a "very gross breach of trust," and if such a breach of trust was not disclosed therein, it would be impossible to bring any defendant within the meaning of the proviso, by which it was evident that fraud and breach of trust were used as convertible terms. [TEMPLE, J. The District Judge looked to the whole of the proceedings, and decided that the insolvent was guilty of fraud.] Not fraud only, but also breach of trust. The proceedings shewed this conclusively. The award found all the plaintiff's allegations proved. But, it is argued, the fiduciary character did not exist between the parties. It existed in two points of view: 1st. as partners; for the receipt by the defendant of a large amount of money from the Commissariat, and the appropriation of the same to his own use instead of paying it over to the plaintiff as he was bound to do, was surely gross breach of trust as well as a fraud upon the plaintiff. 2nd.—As between principal and agent. The defendant, as agent, receives the money of his principal, the plaintiff, and appropriates it to his own use. It is impossible to conceive a grosser breach of

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trust. If the relationship of master and servant existed between the parties, the case would have been one of embezzlement. The evidence would conclusively establish it. 1 Russell *on Crimes*, 184. But in the absence of such relationship, it was a case of a breach of trust. 1 Russell *on Crimes*, 57; 2 East, 695, 696, where the distinction is clearly pointed out, and what constitutes a breach of trust as distinguished from felony is plainly laid down. The money was paid to the defendant for a specific purpose, and its mis-appropriation by him was both a fraud and a breach of trust. [STERLING, C. J.—Is there not a provision in the 151st clause, relating to vexatious defences?] Yes, but it is submitted that that question cannot be gone into now. The defendant may at his last examination be brought within the provisions of that clause. No clearer cause of fraud and breach of trust can be established against a party; and the judgment of the District Court given after much deliberation is a sound and well-reasoned one, and must be affirmed.

W. Morgan, in reply.] The proceedings do not shew that the debt for which the defendant was sued had been contracted by breach of trust or fraud. The defendant's plea, if it were fraudulent, which it was not, could not shew that the *debt* had been so contracted; nor did the judgment shew it. And the amount for which judgment was given, consisted of the payments made to the defendant by the Commissariat, and not the advances made by the plaintiff. The action is not for any profits due on the contract, but to recover the monies which the appellant had received from the Commissariat. At the time the action was brought the contract was still subsisting, and he was sued on a part of it. The parties were not partners, nor did they stand in the relationship of principal and agent. The authorities cited on the other side did not apply to the case, as it was purely one of breach of agreement. If this should be held to be a debt contracted by breach of trust or fraud, where are we to stop? The Ordinance aimed at two objects, one certainly to prevent fraudulent conduct: but the other to shorten the period of imprisonment; and *both* these objects ought to be kept in view.

STERLING, C. J.] If the defendant had by fraudulent representations procured credit, the view taken by the Court below, would under the terms of the Ordinance have been more sustainable. Looking to the whole of the dealings, I cannot view the transaction in any other light than a case of common money-dealing. Under these circumstances, I disagree with the finding below. Nothing specific is laid down respecting fraud, and a great Equity Judge, Lord

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Eldon, I think, said that the Courts were reluctant to say what was fraud. The Court may wisely, properly, and safely come to the conclusion that the prisoner be liberated.

TEMPLE, J.] I agree with the Chief Justice. The Insolvency Ordinance is intended for the benefit of innocent traders, who have got into debt from misfortune and not wilfully. To see if this be a debt contracted by fraud, it is necessary to see what the defence is. The defendant admits having received the money from the Commissariat, and that he did not pay the plaintiff. It does not necessarily follow that because he did not pay it, this was a fraudulent debt. The defendant and plaintiff might have had other transactions between them; and unless some circumstances of fraud appear, I do not know why the defendant should be deprived of the protection.

Set aside.

No. 8,224.
D. C. Jaffna. } *Areapatteren* v. *Morgappen.*

Where a claimant in Execution has once withdrawn his claim, he cannot insist upon a second notice. *Qu?* Whether the service of the notice to establish a claim in execution, should be personal.

In this case a claimant in execution, appealed against an order of the Court below setting aside his claim, on the ground "that he had not been called upon to appear and establish his claim, but only to shew cause why his claim should not be rejected," and "2. that the notice had not been served upon him personally, as required by the Rules."

Muttukistna, for the plaintiff and respondent.] There was no necessity for a notice in the form insisted on in the petition of appeal; the one issued was quite sufficient, and is the usual notice issued in such cases. As to the service of notice, it was not served upon him personally, but the Fiscal had reported that he was concealing himself, and that the notice was affixed at his place of abode. [TEMPLE, J.—Leaving at the place of abode, and affixing it there, are different things. Is affixing at the dwelling-place sufficient? What is the practice in Colombo?—*W. Morgan* said, it was usual under such circumstances to put in an affidavit, and to obtain a special order from the Court substituting such service for a personal one.] The Rules do not require any personal service. But no notice was necessary, as the claimant had once withdrawn his claim, and failed a second time to establish it; and if he was allowed to go on, there would have been no end to his claim.

Affirmed.

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June 14.

June 14.

Present, ROWE, C. J., STERLING, J., and TEMPLE, J.

[The Hon'ble Sir WILLIAM CARPENTER ROWE was sworn in as *Chief Justice.*]

No. 12,766.
P. C. Batticaloa. } *Cartigeser* v. *Murogappen.*

On a complaint under § 14 of the Toll Ord., both the starting and landing places must be proved to be within a mile of the ferry.

On a complaint for a breach of the 14th clause of the Ordinance No. 9 of 1845,

Held by the Supreme Court, that in order to bring the case within the clause, both the starting and the landing places must be within a mile of the ferry; and there being no evidence to shew how far the former was from the ferry, the case was remanded for further evidence.

June 18.

Present, ROWE, C. J., STERLING, J., and TEMPLE, J.

June 18.

No. 8,512.
D. C. Jaffna. } *Pandiar* v. *Sinne Tamby.*

The Assignee of a Bond, if authorized to recover *by all legal means,* may sue in the Assignor's name.
It is not a ground of demurrer that the Proxy given by a party is insufficient.

This was an action brought in the name of the creditor upon a Bond, which appeared to have been assigned over to a party who in the libel designated himself as the plaintiff's Attorney, and had signed the proxy in the case. The defendant demurred to the Libel on the following grounds:—1. That the assignment did not authorize the assignee to sue in the assignor's name; 2. That the Proxy did not authorize the Proctor to sue in the assignor's name; 3. That the Libel in other respects was informal and insufficient. The Court below overruled the demurrer. And on appeal against this order,

Muttukistna for the defendant and appellant.] The Assignment being an absolute conveyance of all rights and privileges, the assignee can no more sue in the name of the Assignor than the purchaser in the name of a seller. The principle is the same. Here the assignor, who, by his own act, had divested himself of the right, is, throughout the libel, treated as the plaintiff; and yet we cannot look to him for costs, for he may at any time repudiate the proceedings to which he is no party; nor can we recover costs from the assignee, who is only suing as his attorney. [STERLING, J.—But provision has been made in the Court below for your costs.] The

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assignee has undertaken to be answerable for costs: but his conduct is in that respect an argument in support of the demurrer. It is an admission that the libel was defective, and the action not properly brought. It was easy for him to attempt to remedy the defect, which had induced the demurrer, by such offers. [TEMPLE, J.—But why may not the assignor sue?] Because he has no further interest, and the assignee alone is the party entitled. 3 Burge, 347. Besides, if the assignor can sue, he can also recover, so that payment to him and discharge by him would be valid. But after notice of assignment, would we be justified in paying to the assignor, and would such payment discharge our liability? If not, then the action is clearly brought by the wrong person. [TEMPLE, J.—What is the practice in *Colombo?—R. Morgan.* An action may be maintained either in the assignor or assignee's name.—ROWE, C. J.—Who is the plaintiff on the record, and whom do you treat as the plaintiff?] I confess we call the assignee the plaintiff; but we simply mean the person who brought us into Court. The real plaintiff in the libel is the assignor. [ROWE, C. J.—Assuming the assignee to be the plaintiff, can he not sue in the assignor's name?] I submit not,—for there is no reservation in the assignment. To sue in his name, there must be an express provision to that effect. Bacon's *Abridgment*, 330. [STERLING, J.—Does not the assignment authorize the assignee to sue by *all legal means*, under which the assignor gains his authority?] That is the usual clause, but it is too vague and general. Has the plaintiff chosen a legal way? If your Lordships hold that it includes the power to sue in the name of the assignor, I have nothing further to urge. [ROWE, C. J.—The Court is unanimously of opinion that *all legal ways* covers the authority of the assignor. What have you to say on the second ground?] The Proxy does not authorize the Proctor to sue in the assignor's name, but expressly empowers him to sue in the assignee's name. [STERLING, J.—But how is that a ground of demurrer? Must you not look to the four corners of your libel, and not travel out of it?] The proxy raises the question of the plaintiff's title to sue. The word demurrer is not used in this country with that technical precision: it ought to receive a more liberal construction.

STERLING, J.] It may do well to make it the subject of a motion or some other step, but it cannot constitute a subject of demurrer. The demurrer was well argued. As to the first ground, the Court has already held that the three words meet your objection; the second ground was as regards the nature of the authority to the Proctor, which may be dismissed in a very summary manner, as

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Demurrer over-ruled.

June 21.

Present, ROWE, C. J., STERLING, J., and TEMPLE, J.

June 21. *No.* 972. } In rê *Ackmeemene atcharigey Janis.*
D. C. Galle. } *Ackmeemene* v. *Ackmeemene.*

A widow is, under ordinary circumstances, entitled to Administration, in perference to the heirs.

On the 6th February 1855, the District Court granted administration of this estate to the applicant, a son by the second marriage of the intestate. On the 27th, he moved the Court that the widow of the deceased might be associated with him in the administration.

The Court granted the motion, provided the widow agreed to accept it. On the 12th March, a son by the first marriage (the present opponent) prayed that administration might be granted to him, to the exclusion of the widow and the first applicant. The Court then granted administration to him jointly with the widow; but nothing further was said about the first applicant.

On appeal by the widow,

Dias, for the appellant, contended that the widow had the preferent right to administration. This was recognized by the Rules of Practice sec. 4, cl. 6. The practice in the English Courts was the same; 1 Williams *on Executors*, 342; and has been invariably followed in this country; Marshall's *Digest*, p. 3. It is true the Court has sometimes a right to set aside a widow, but a strong case must be made out to justify such a course. In this case it was not attempted to show that the widow was unfit to administer. [STERLING, J.—It appears in your petition of appeal that the son by the first marriage is entitled to a larger portion.] Where the application is by the widow, it is not competent for the Court to enter into the question who had the greater interest. If such a doctrine were once admitted, what was there to prevent the creditors of the deceased contesting administration with the widow? Another objection to the present order of the Court was, that it was a joint administration; 1 Williams *on Executors*, 342; and it is quite clear, from all the circumstances, that the widow and the son by the first marriage will never agree.

R. Morgan, contra.] Both by the English Law and by our practice, and under the circumstances of this case, the amount of

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interest ought to be considered. By the Dutch Law, where a person marries a second time without effecting a division of the common estate, the children of the first marriage are entitled to call for a division including all the subsequent profits. Now our interest is greater than the widow's; and interest ought to be and is an important ingredient in considering questions of administration. *Walker* v. *Carless*, 2 Cases *temp.* Lee, 560; 1 Williams *on Executors*, 321; Marshall's *Digest*, p. 3. [TEMPLE J.—Joint administrations are very unsatisfactory.] That difficulty may be remedied by granting sole administration to the opponent.

TEMPLE, J.] The general principle gives priority to the widow.

Affirmed.

No. 16,489.
D. C. Caltura. } *Francina* v. *Rodrigo.*

Where a case might have been decided on the pleadings, but the plaintiff and his proctor being absent, the District Court dismissed it, and it appeared that the Proctor had been prevented from attending by ill health, the case was sent back for a new trial.

This case was instituted in September 1854, and came on for trial on the 22nd May following. On the day of trial the plaintiff and his proctor were absent, and the case was dismissed. The reason stated by the District Judge on the record for the dismissal was, that the plaintiff had filed no list of witnesses. On appeal by the plaintiff against the dismissal,—

Dias, for the appellant.] The only reason given by the Court below for the dismissal was capable of explanation. No evidence was required, as the case could have been disposed of upon the pleadings. The plaintiff claimed the proceeds-sale of certain premises, by virtue of a bond dated May 1842, under which the land was specially mortgaged to him. The defendant opposed the plaintiff's claim, upon a bond dated the 24th January 1843, specially mortgaging the land to *him*; which bond he said was a renewal of a previous bond dated January 1842, under which, however, the land did not appear to have been specially mortgaged. The defendant now sought, under his second bond dated January 1843, to set up a claim of preference over the plaintiff's bond of 1842. This the defendant could not do, as the land was not specially mortgaged under his first bond, and at the date of the second the plaintiff had already acquired a right over the property. The appellant also urged his proctor's illness on the day of trial, as a ground for a postponement, and this the Supreme Court always considered a valid ground.

The decree was set aside, and the case remanded for a new trial.

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June 25.

Present, ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 26,971.
C. R. Colombo. } *Hettigey* v. *Sinne Marcan.*

An agreement for the sale of a share in the Government Paddy-rent, is not within cl. 2 of the Ord. of Frauds, the rent being virtually payable in kind, after severance.

The plaintiff stated in his plaint that the first defendant having purchased from Government the paddy-rent of certain fields for the year 1855, did on the same day sub-rent a quarter share thereof to him for 10*s.* 6*d.* then received: that the plaintiff and defendant during the season collected the rent in paddy as well as money, whereof the plaintiff's share amounted to 24 parahs of of paddy, and 6*s.* 10*d.* in money, which the defendant refused to deliver.

The defendant denied having sub-rented any share of the paddy-rent to the plaintiff.

On the day of trial, the defendant took the objection, that the action was not maintainable, the contract being one affecting land, which should have been in writing under clause 2nd of the Ordinance No. 7 of 1840; and quoted the case No. 5,676. And the Commissioner having, on this objection, dismissed the plaintiff's suit:

Held, in appeal, that the cause of action related to the purchase of a Government-tax virtually payable in kind *after severance* of the paddy-crop; and that neither the Ordinance nor the case relied on below were applicable to the case.

No. 9,039.
C. R. Negombo. } *Pieris* v. *Don Mathes.*

In an action relating to land, the plt. admitted that the property once belonged to Government. *Held*, that neither the Commissioner nor the defendant had a right to set up a title for the Crown, and the nonsuit entered against the plt. was set aside.

The plaintiff claimed £2 5*s.*, being the value of 1-10th of the tobacco planted by the defendant, on his, the plaintiff's land. The defendant denied the plaintiff's right and set up a claim to 1-4th of the land. On the day of trial the Commissioner examined the plaintiff, and upon his admission that the land once belonged to Government, dismissed his claim. On appeal by the plaintiff,—

Dias, for the appellant.] The Commissioner entirely lost sight of the issue in the case. The Government is no party, and the Commissioner's examination of the plaintiff was quite irrelevant. The Commissioner was quite mistaken as to the law applicable to Crown lands. The plaintiff said that he possessed the land for forty years, and this will give him a prescriptive right even against

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the Crown. Under clause 8 of the Ordinance No. 12 of 1843, ten years possession will give plaintiff a qualified right, which the defendant cannot dispute.

The Supreme Court sent the case back for a new trial, and *held* that neither the defendant nor the Commissioner had, under the circumstances, any right to set up a title for the Crown.

No. 15,140.
C. R. Jaffna. } *Cadergamer* v. *Velyder.*

Where the case had been struck off for default of proceeding, but it appeared that the plt. had been misled as to the day of hearing, the Sup. Court directed the case to be reinstated.

This case had been struck off for default of proceeding; but it appeared from the record, that the plaintiff had been misled by the Clerk of the Court, as to the day of final hearing; and the Supreme Court set aside the decision on this ground, and directed the case to be reinstated.

June 30.

Present, ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 18,709.
D. C. Colombo. } *Ritchie* v. *Bernard.*

June 30.

Where a part of the cause of action accrued in Colombo. *Held*, that the District Court of Colombo had jurisdiction to entertain the case.

This was an action for a breach of contract, alleged to have been entered into at *Colombo* within the jurisdiction of that Court, and in which plaintiffs sought to recover certain sums of money advanced to defendant for the purpose of purchasing Coffee at *Kandy*, and which had not been accounted for by the defendant. The defendant pleaded to the jurisdiction, on the grounds, 1st, that the action or cause of action did not accrue within the District of *Colombo;* and 2nd, that he was a resident within the jurisdiction of the District Court of *Kandy*. The Court below held that the *whole cause of action* ought to be shewn to have accrued in *Colombo* to give the Court jurisdiction, and as it appeared from the evidence that certain of the advances only had been made in *Colombo*, and this being only a part of the cause of action, the plaintiff was not entitled to bring his suit in that Court. On appeal by the plaintiff;

R. Morgan, (*W. Morgan*, with him) for the appellant.] The 24th clause of the Charter does not warrant the opinion of the

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Court below, that the *whole cause of action* must accrue within its jurisdiction. A material part of the cause of action did accrue within the jurisdiction of the Court. The District Judge founded his judgment upon the authority of cases decided in England upon the County Courts Act, (9 and 10 *Vic.* c. 95 § 60.) Those decisions however turn on the wording of the 60th section; and it has been held that it is the *whole cause* of action which gives jurisdiction to a County Court. There is another section (128,) relating to the concurrent jurisdiction of the Courts of Westminster, and that section draws a distinction between a cause of action accruing wholly or in some material point within the jurisdiction of a Court. *Barnes* v. *Marshall*, 21 L. J., Q. B. 388. There is no analogy between the English County Courts and the District Courts here. The County Courts are inferior Courts, which the District Courts are not, their jurisdiction being equal to that of the Superior Courts in England. Besides, the wording of the section alluded to, is different from the 24th clause of the Charter. The English act speaks of the *cause of action*, whereas our Charter says "the act, matter or thing in respect of which any such suit or action shall be brought." The construction now contended for was upheld in a collective case reported in Marshall's *Digest*, 257. Collective decisions have the authority of Law, and are binding upon the Supreme Court, 1 Kent's *Comm.* 495. The 47th and 48th clauses of the Charter recognise their authority, and it is too late now to question the authority or the collective decision already cited. The District Courts here have concurrent jurisdiction, except where the defendant has pleaded to the jurisdiction. Ordinance No. 12 of 1843, clause 7. The cause of action set forth in the libel is the non-accounting of the money received by the defendant in Colombo. Debts have no *situs* but follow the creditor, and the accounting by defendant ought to be taken to have been in Colombo.

Lawson, (*Dias* and *Rust* with him) for the respondent.] Under the Charter the whole cause of action must be within the jurisdiction. What is the whole cause of action as set forth in the Libel? 1st. The agreement between the parties; 2nd. the advance of the money to the defendant; and 3rd, the breach of the agreement. The plaintiffs called evidence to prove the first, but entirely failed. The case cited from *Marshall* is inapplicable. It only goes to prove that questions of jurisidiction and the merits can be tried together. This was unquestionably the law before the Ordinance No. 12 of 1843, the 7th clause of which requires that the question of jurisdiction should be tried separately. The question turns entirely upon the construction of the 24th clause of the

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Charter, and Sir *Charles Marshall*, who brought the Charter into operation, says, that the words "act, matter or thing, &c.," in that clause are tantamount to the words "cause of action." This is undoubtedly the correct construction; but the construction contended for on the other side would make the Charter read thus "acts, matters or things, &c." If Sir *Charles Marshall's* construction is the correct one, the English cases on the County Court Acts are clearly applicable. *Borthwick* v. *Walton*, 24 Law J. Rep. C. P. 83; *Buckley* v. *Hann*, 5 Exch. 151. The jurisdiction of the District Courts is territorial, and in that respect quite analogous to that of the County Courts. They are not like the superior Courts of Westminster, which have jurisdiction all over the country. The defendant is resident in *Kandy* and his witnesses are there.

R. Morgan, in reply.] If the view contended for on the other side is to be upheld, it would lead to serious inconvenience. Ship Captains, and other coasting traders, who have no permanent abode, could not be sued at all.

Per Curiam.] The decree of the Court below is set aside. The Supreme Court is of opinion that the act, matter or thing in respect of which the action was brought, was done or performed within the jurisdiction of *Colombo*. Costs are to abide the result.

July 5.

Present, ROWE, C. J., STERLING, J., and TEMPLE, J.

July 5.

No. 7,929. *D. C. Jaffna.* } *Toussaint* v. *Visentipulley.*

By the rule of the *Thesawalamy*, the property of the wife is liable for the debts of the husband.

The plaintiff, who held a writ of execution against the property of the defendant, ponited out to the Fiscal for seizure certain monies left by will as a legacy to the defendant's wife, for her long and faithful services to the testatrix. Upon seizure by the Fiscal, and on motion to draw the money, the defendant's wife filed an opposition. The Court below having allowed the opposition, the plaintiff now appealed against the order.

Muttukistna, for the plaintiff and appellant.] The community of property between husband and wife extends to property howsoever acquired, by inheritance, or donation, or legacy. 1 Burge, 277. V. d. Linden, 87. The 3rd clause of sec. 4 of the *Thesawalamy* did not contemplate only the case where both parties (husband and wife) were willing, as erroneously maintained by the District

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Judge in his order on the motion; but every clause distinctly recognizes the doctrine of community, for it lays down that no compensation is claimable for "any portion that may have been sold or alienated."

Rowe, C. J.] If it can be alienated, it can also be seized by a creditor. The legacy is clearly liable to be seized for the debt, and the money may be lawfully drawn by the appellant.

Set aside.

July 9.

Present, ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 19,063. *P. C. Negombo.* } *Ahmat* v. *Gabriel.*

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A Police Constable need not, whilst acting as such, be in uniform, or carry a staff.

This was a charge against the defendants under the 60th clause of the Ordinance No. 7 of 1844, for having assaulted and obstructed the plaintiff in the lawful discharge of his duty as a Police Constable, while taking into custody a person whom he suspected had stolen property in his possession. The Magistrate having ascertained that the Complainant was not in uniform at the time and did not carry his staff, was of opinion that he was not in the legal discharge of his duty, when he was, as alleged by him, resisted by the defendants; and thereupon the defendants were acquitted. He further found the complainant guilty of having instituted a false, frivolous, and vexatious charge, and under § 12 of the Ord. No. 11 of 1843, fined him £1, which fine if not paid within 24 hours was to be recovered by distress.

On appeal by the complainant,—

Selby, *Q. A.*, for the appellant.] The Ordinance does not require Police Constables to have either staff or uniform; but, on the contrary, they are bound to do their duty under any circumstances. The Magistrate has fallen into the vulgar error that the staff makes the constable. In England the Statute under which special constables are appointed, enacted that each constable should be provided with a staff, which is to be returned when the office ceases; and in a case where a special constable was found acting nine years after the occasion for which he was appointed, it was held that he could have acted as such constable although he carried no staff. *Reg.* v. *Porter*, 9 C. P. 778. Fiscal's Officers were required by the Ordinance No. 1 of 1839 to carry a staff, and to shew it, if required, in the execution of processes;

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but this Ordinance expressly exempted Native Headmen and Police Vidahns, and it may fairly be presumed that the Legislature did not intend that the Police should necessarily have a staff. The question is, whether the appellant was in the execution of his duty. The Police had been informed of a theft, and the complainant seeing an individual with the stolen property in his possession, arrested him. The 20th clause of the Police Ordinance justified his conduct, and if he had not acted as he had done, he would be, under this very Ordinance, liable to fine and imprisonment, and dismissal from office. There is a marginal note inserted by the Police Magistrate in these proceedings, as follows: "The case No. 19,062, the complainant allowed to withdraw; as it appeared to the Magistrate that it was a trumpery charge, got up merely for the sake of bolstering up this charge of resisting the Police Constable, who had been buying a wall-plate, and wanted a Malabar cooly to carry it to his house." There is no evidence however to support this, and it was unbecoming in a Magistrate to make such an unfounded charge against any one; but further, the case referred to shewed the contrary. In that case the complainant said in his evidence "picking up anything found on the ground in public places cannot be called theft; I therefore withdraw the charge." This may be good Magistrate's law, but it is most unlikely that a complainant who had preferred a deliberate charge of theft against the defendant would have said so: the probability was, that it was put into the complainant's mouth by the Magistrate, who recorded it as evidence. Before a complainant can be fined for preferring a false charge, it must appear that he acted maliciously; all that can be said in the present case is, that he had not his Police uniform.

Rowe, C. J., remarked, that the Police Magistrate was altogether wrong in his view of the case, and that the complainant's conduct was meritorious. The Judges of the Supreme Court, as well as all other Judges and Magistrates, must feel it their duty to protect the Police in the execution of their duty.

No. 6,517.
C. R. Batticaloa } *Meera Saib Maricar* v. *O' Grady.*

The facts of this case may be gathered from the judgment of the Supreme Court, in appeal.

Where a vessel cannot

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go up to the Custom-house, the master is entitled to charge boat-hire for conveying the goods ashore.

Muttukistna appeared for the plaintiff and appellant.

Per Curiam.] It appears that vessels of the tonnage of the plaintiff's cannot pass the bar and go up to the Custom-house: consequently, the road-stead, in which the plaintiff was obliged to anchor, is the place to which he undertook to carry the defendant's goods; and he can charge the hire of the boat to take them to the Custom-house: such also is the custom of the port of Colombo.

Judgment for the Plt.

July 12.

Present, ROWE, C. J., STERLING, J., and TEMPLE, J.

June 27.

No. 16,362.
D. C. Galle. } *Casim* v. *Ludovici.*

By the Mahomedan Law, the children of a pre-deceased brother, (where the intestate has left only a widow and a sister as his nearest of kin), are entitled to one-fourth of the intestate's property.

The plaintiff in this case claimed a certain share out of A's estate, as one of the sons of A's brother. The defendant who was the administrator of A's estate, pleaded that as the plaintiff's father had pre-deceased A, he did not inherit to A's property. The Court below held that under these circumstances, the plaintiff had no share in A's estate, and gave judgment for the defendant.

On appeal by the plaintiff,—

R. Morgan, for the appellant.] Although the law of the District Judge would be correct in the case of a man leaving issue, it does not apply to cases where the deceased has left no issue. The present Intestate left only a widow, a sister, and a nephew. The Court below relied on case 57 in MacNaughten's *Mahom. Law*, p. 128, where a grandson was excluded from sharing in his grandfather's estate, on the ground that his father had died before the grandfather. But in case 129, the sons of a deceased brother were allowed to inherit. See Regulations, vol. i, p. 93. cl. 63.

The Judges now intimated their wish to receive evidence on this point, and three witnesses were examined regarding the Mahomedan Law of Inheritance;

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And *Per Curiam.*] The Supreme Court having examined witnesses as to the Laws of Inheritance among the Moors, considers, that as the intestate died leaving no brothers, but only a widow and a sister as the nearest of kin, the children of his pre-deceased brother are entitled to one-fourth of his estate. Therefore the plaintiff, having a brother, is entitled to one-fourth.

Judgment for the Plt.

No. 21,167.
D. C. Colombo. } *Clark* v. *Perera.*

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A notice of judgment under §. 7 of the Rules of July 1842, need not be on stamp.

Upon amendment of the Libel, no fresh summons need be issued to the defendant, provided he has had notice of the amendment.

This was an action to recover £50. 11*s*. for coffee sold by the defendant, which he had failed to deliver.. On the 3rd April the defendant appeared and called for particulars, but did not issue any notice to the plaintiff calling on him to file the same. On the 9th of April the plaintiff filed Account particulars. On the 14th April before the defendant filed any Answer, the plaintiff moved to be allowed to amend his libel. Leave being granted, the amendment was made, and notice thereof was issued and served on the defendant on the 21st April, in which notice the amendment was set out at length. From the 21st April to the 13th May, the defendant took no step either to set aside the amendment, or to answer, and on the 13th May, the plaintiff served a notice on him that he would move for judgment against him on the 16th, for default of answering. On the 16th the defendant appeared and shewed cause,—1. That the notice did not bear a stamp; and 2. That no fresh summons had issued after amendment. On the 19th May, the Court below upheld both the objections, and refused the motion for judgment, with costs. On appeal by the plaintiff:

R. Morgan for the appellant.] The plaintiff adopted the course laid down in sec. 7 of the Rules of 2nd July 1842. The defendant being in default of answering, the plaintiff moved for judgment against him, having given him two days' previous notice of the intended motion. In the shedule of the Ordinance No. 19 of 1852, no mention is made of a notice for judgment by default, and it is clear that the Legislature never meant that it should bear a stamp, for while it is omitted from this Ordinance, it is expressly provided for by the Ordinance No. 2 of 1848. It was because the latter enactment was found to weigh heavily on suitors, that the Legislature enacted the one of 1852; and the omissions must have been made advisedly. It cannot be contended that the revenue would suffer; for in the case of a rule *nisi*, that instrument bears a stamp, and the affidavit of service does not, whilst in the case of a notice the stamp is on the affidavit. [Temple J. A great deal turns on the § 33 of the old *Rules and Orders*, by which a party is entitled to two days notice of any motion, and if no cause is shewn in the first instance, a rule issues to shew cause within 4 days, and if then no cause is shewn, the rule is made absolute.] The plaintiff acted under the Rules of July 1842. [Rowe, C. J. By the subsequent rule, relied on by the appellants, the District Court is required "forthwith to give judgment,"—which is at variance

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with the 33rd clause of the Rules of 1833, which requires two notices, or a notice and an order. The presumption would be that the rule of 1842 over-rides that of 1833.] Judgment by default was unknown to the system introduced in 1833, which required evidence in all cases; but since July 1842, the rule of 1833 has never been acted upon in cases of judgment by default. On the contrary, parties always proceed under the 7th clause of July 1842. When defendants are residents in Town, it is a matter of convenience to serve notices on them, and rules are seldom or never issued, as they always involve great delay and require to be served by the Fiscal's Officers. The latter course is only adopted where defendants reside in the country, and cannot be reached by private notices. It has been held by the Supreme Court, that the 7th clause of the Rules of July 1842, "does away with the necessity of a rule *nisi*;" Nos. 21,233 and 21,275, *D. C. Colombo;* and the notice given in the present case is the same as the one given in those cases, and that did not bear a stamp. It is absurd to talk of Practice requiring processes to bear stamp. The Ordinance must expressly require processes to be stamped, otherwise the Courts cannot require it. As to the 2nd point, viz. that a fresh summons should issue on amendment, this is an objection equally unfounded. The defendant received a notice which set out the amendment at length. There are indeed some cases in which a summons was issued, but this practice is highly objectionable and so far from being the invariable practice, there are cases in which this very Judge held that a verbal intimation of an intended amendment was sufficient. No. 20,000, *D. C. Colombo.* What is the use of a summons, but to bring the defendant before the Court; and once there, all that he is entitled to is information of what takes place. To issue therefore a fresh summons is opposed to the Rules and Practice of the Court, and most unreasonable and objectionable.

Rust contra.] The default insisted upon by the plaintiff was simply owing to our having treated the notice of amendment as a simple nullity, because we were entitled to a fresh summons. If a fresh summons was necessary, the notice was a nullity. The District Judge finds correctly that a fresh summons was necessary on an amendment. The case quoted in no way militates against this principle. There the amendment was only the omission of one of the defendant's names, whilst in the present case there was a material amendment of the libel. By rule 1. (p. 60) of the *Rules and Orders*, a summons is necessary "to intimate the cause of action." Where therefore a fresh cause of action has been intro-

duced by an amendment, as here, a fresh summons is necessary, for the previous summons did not intimate the "amended cause of action." The summons issued in this case does not state the cause of action. We received a summons stating a particular cause of action, and before we pleaded, and after the examination of a witness *de bene esse*, and in consequence of such examination, the plaintiff amended his libel, and there was an entirely different cause of action;—quite a new element was introduced into the libel; and further, the amendment was granted behind our back. That was how we were damnified. *After* the amendment had been allowed, we received notice of such amendment. [*Rowe.* C. J. Amendment is allowed as a matter of course before Answer.] Not in this particular case, where an examination *de bene esse* had taken place, which materially altered the case. The issuing of a fresh summons upon amendment is the undoubted practice of the Courts, and has been so for the last 20 years, and is followed by a District Judge who from his long occupation of the Bench is conversant with the practice. The practice is in accordance with the Rules laid down for the guidance of inferior Courts. Another consideration, apart from the Rules and Orders, is that every summons must be on a Stamp; and here they wanted to evade the stamp for a fresh summons. As to the other point, it has been contended that this is a proceeding under the 9th cl. of July 1842; but it is not so, because to enable a party to proceed thereunder, the opposite party must have been duly summoned, which cannot be predicated of this case. If the 9th cl. is excluded, it comes within the old Rules, which require a Rule Nisi. The notice is in fact a Rule; the words are synonymous. Our rules speak of Notices, but that they are identical with Rules Nisi is evident from the last part of the 33rd rule of Sec. 1, which after providing for a notice and the subsequent procedure, authorized the Courts in certain events to make the *rule* absolute,—that is, the notice. [Rowe, C. J.—How do you meet the difficulty suggested by the omission of the words "notice for judgment by default" in the Stamp Ordinance of 1852?] Possibly, because the draftsman understood his work better, and held that such notices were included in the term "rule nisi," as unquestionably they are. The last Ordinance used the same expression as Ordinance 7 of 1841, by which stamps in judicial proceedings were introduced; and under that Ordinance these notices were required to be stamped. In none of the cases cited on the other side was the objection taken.

R. Morgan in reply.] The amendment is immaterial, as it only stated the same cause of action in other words referring to the

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contract already declared on. In No. 20,000, *D. C. Colombo*, the amendment was important; for the names of one or two of the defendants were struck out in an action for slander, which if not done, the plaintiff would have been nonsuited.

Per Curiam.] The order of the Court below is set aside with costs. The object of the summons required by clause 1 of section 1 of the Rules, is to bring the defendant before the Court; and having been once brought there, no further summons is necessary. Nor does the Stamp Ordinance require a stamp upon the notice which was served upon the defendant.

July 16.

Present ROWE, C. J., STERLING, J., and TEMPLE, J.

July 16.

No. 31,401.
P. C. Kandy. } *Appoohamy* v. *Amaris.*

On a charge in the Police Court, where no defence has been entered into, the defendant cannot raise one in his appeal.

This was an appeal against a conviction of the Police Court of Kandy. The defendant had pleaded not guilty to the charge; but no defence was entered into at the trial.

Per Curiam.] By the Record it appears that no defence was entered into in the Court below. The defendant now raises one in his appeal; but not having done so at the proper time, he must be left to his petition to the Governor for the remission of the penalty.

No. 12,918.
P. C. Batticaloa. } *O'Grady* v. *Baba.*

A sentence of a Police Court inflicting Corporal Punishment cannot be carried into effect before the lapse of the ten days allowed for appeal.

The defendant in this case had been found guilty, and sentenced to receive twenty lashes, and to be imprisoned for three months at hard labour. He appealed against the conviction and sentence, and stated in his petition that the sentence had been carried into force before the lapse of the ten days allowed for appeal, and notwithstanding that he had given notice of his intention to appeal.

ROWE, C. J.] The allegation in the Petition of Appeal of the defendant's having given notice of appeal, is denied; but it is clear

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from the notes of the Magistrate that the defendant was flogged within the ten days allowed for appeal. This was a grievous miscarriage of the law, and the Judge was guilty of an excess of jurisdiction.

Per Curiam.] The Supreme Court affirms the judgment of the Court below, thinking that judgment justified by the evidence. At the same time it animadverts strongly on the precipitancy of the Police Magistrate in causing corporal punishment to be inflicted before the expiration of the ten days allowed by cl. 9 of the Ordinance for lodging the petition of appeal. In an appeal from a conviction in the Police Court of Negombo (No. 17,464) when a somewhat similar proceeding was brought under the notice of the Supreme Court, the late Chief Justice, in giving the judgment of this Court, thus expressed himself:—"The whole spirit of the Ordinance and intention of the Legislature, is to stay execution of every corporal sentence whilst it is open to review or liable to correction on appeal: any proceedings therefore to defeat or evade such merciful provision, must be regarded as irregular and illegal."

In that observation the Court now fully concurs, and wishes strongly to impress upon Police Magistrates, who may be called upon to act under similar circumstances, that whether the prisoner gives notice of appeal or not, at the time of conviction, a fact which seems to be controverted in the present instance, it is decidedly beyond the power of a Police Magistrate to carry a sentence of corporal punishment into effect, until after the lapse of the ten days' grace provided for by the Ordinance.

July 19.

Present ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 18,802.
D. C. Colombo. } *Segappa* and others v. *Brito.* *July* 19.

This was an appeal against a judgment of the Court below non-suiting the plaintiffs. The case was fixed for trial on the 5th March 1855, on which day the parties on each side having been examined by the opposite counsel, the case was ordered to stand over till the next day. On the following day, *Rust* for the defendant (previous to any evidence having been called by the plaintiff,) moved for a non-suit on the grounds stated in the judgment. And the District Judge (*T. Lavalliere*) thereupon pronounced judgment as follows:

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"This is an action in which the plaintiffs, as *partners*, seek to recover from defendant a balance sum of £400, being the price and value of coffee sold by plaintiffs to the defendant, and upon an account stated, filed by them, shewing a sum of £1149 19*s.* 7*d.* the gross amount of the value of coffee supplied by them."

"The defendant in his answer admits that plaintiffs, from the 7th February up to the 30th April 1854, supplied him with coffee to the value of only £999 11*s.* 11*d.*; and that he, defendant, did from the 10th February to the 4th May 1854, pay plaintiffs divers sums of money amounting in all to £889 5*s.*, leaving only a balance sum of £110 6*s.* 11*d.* in favour of plaintiffs: thus much only he admits having dealt with them as partners. From the facts elicited by the examination of the 4th and 5th plaintiffs and the defendant, it appears that the amount disputed by defendant is as regards the *two items* of 74¼ cwts. 26lbs. and 10½ cwts. 10lbs. of coffee, in value £145 7*s* 5*d.*, entered in the account rendered by plaintiffs under date 20th March 1854. The defendant, who only admits the receipt of the former item, states that it was entirely upon a *separate and distinct transaction* with the *4th plaintiff only;* and that it had no reference whatever to the partnership transaction with the plaintiffs jointly. This fact appears to be fully established by the admission of the 4th and 5th plaintiffs themselves, in their examination. These two items are admitted by them to have been taken from a separate and distinct account kept between *4th plaintiff and defendant*, and that they were, without the knowledge or sanction of the defendant, transferred over to the *partnership account* for the purpose of liquidating a debt *due by the 4th plaintiff alone*,—which could not have been done, had these two items also formed part of the *partnership* transaction, as now contended for by plaintiffs' counsel. Even the examination of the two accounts between the 4th and 5th plaintiffs and defendant, took place, it appears, on separate occasions, and on different days; it is therefore quite clear that the plaintiffs, to serve their own purpose, have coupled in their present claim items of two distinct and separate transactions. Supposing the defendant had, in an action against the present plaintiffs, included these two items as forming part of the partnership transaction, he would have been out of Court by the production of his own accounts, which shews that they are part of a separate transaction between himself and 4th plaintiff alone. The same principle must, therefore, hold good in the present case as regards the plaintiffs, who, under the circumstances, must, in the opinion of the Court, be non-suited, reserving the right of the 4th plaintiff to recover the two items in question by a separate action. *Plaintiffs non-suited acccordingly.*

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The plaintiffs having appealed against this judgment,

R. Morgan, (*Dias & Stewart* with him) appeared for the appellants.

Rust (*W. Morgan* with him) for the respondent.

The Supreme Court was of opinion, that it was not competent for the District Court to non-suit a plaintiff present in person or by counsel, without hearing his evidence, except with his consent. And the decree of the Court below was thereupon set aside, and the case remanded to be proceeded with.

July 26.

Present ROWE, C. J., STERLING, J., and TEMPLE, J.

July 26.

No. 1,326.
D. C. Batticaloa. } *Caderewelle* v. *Swaminader.*

A Judge cannot refuse the process of his Court to a party duly applying for the same.

Other irregularities of proceeding commented upon.

This was a charge against the defendant for unlawfully taking one shilling by way of Commutation under the Road Ordinance No. 8 of 1848, from the plaintiff, who was not liable to pay the same. The defendant was convicted by the Court below; and now on appeal,—

R. Morgan, (*Muttukisna* with him) for the appellant.] The defendant was not charged under the Road Ordinance, but under the common law for extortion. The defendant, against whom information had been taken by the same Judge then acting as Justice of the Peace, submitted a list of witnesses to be subpœnaed before the District Court for the defence, but the Judge refused to issue subpœnas to three of them, as their names were not on the list previously given in to the Justice of the Peace, and as they were out of the district. The applicaton for subpœnas was repeated on the day of trial, and again refused on the ground that the application was made merely with a view to concoct evidence for the defence. This is highly irregular. It is true there are certain formalities prescribed in reference to citing witnesses before the Supreme Court in criminal causes, such as a certificate of their materiality; but there is no such rule in reference to the District Courts. The rest of the proceedings are also full of irregularities. The District Judge as J. P. took proceedings and issued search-warrants and got possession of all the papers of the Defendant, without entering into any evidence; sent him to gaol and kept him there for ten days, and then took bail for £200, an amount not required even by the Supreme Court. Again, the

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defendant was examined as to what his witnesses were to prove. [Rowe, C. J.—The refusing the process of the Court was a most monstrous thing, and the proceedings ought to be quashed. There is absolutely no evidence beyond the vague statement of *Mr. Morphew*, that he thought the defendant ought to pay commutation, and that on close inspection he seemed to be of age.] The defendant appeared immediately after his conviction and produced his petition of appeal; and the Magistrate disallowed it, because it appeared to have been drawn up before the judgment was pronounced! [Rowe, C. J.—It is a pity that Magistrates should permit their zeal to carry them beyond the plain path of duty. In this case the Magistrate was very much wanting in his duty and the exigencies of his office; and the charge was not proved against the defendant.]

Per Curiam.] The Supreme Court in this case reverses the decision of the Judge below, being of opinion that the specific offence charged against the appellant was not brought home by the evidence. The Court at the same time sees so much that is irregular and questionable in the whole transaction, that it strongly recommends further enquiry; and if the facts elicited should warrant it, further proceedings on the part of those who have the superintendence, in that District, of the local department. Further, the attention of the Court having been pointedly called to the refusal of the District Judge on the 25th June to issue the necessary process to compel the attendance of the witnesses required by the accused, the Judge is hereby reminded, that whatever may be his private opinion of the object which an accused party may propose to himself in making such application, no Judge has a right to refuse to the subject the process of his Court, if that process be duly applied for. Should he, on the day of hearing, be of opinion that no sufficient case has been made out for a postponement, he is perfectly at liberty to exercise a sound discretion on that point: but to refuse process in the nature of a subpœna is contrary to the first principles of justice.

No. 27,853.
D. C. Kandy. } *Calinga Rawter* v. *Soyza* and others.

A defendant, on a rule *nisi*, is entitled to the whole day to shew cause; &

In this case a rule was obtained on the 19th January 1855, calling on the defendants to shew cause why judgment should not be entered against them for default of appearance; which rule was made returnable on the 29th January. On that day the rule

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the rule ought not to be made absolute till the next day. If a rule be made absolute in such a manner that either party may be said to have been taken by surprise, the Court will order the Rule to be opened.

having been returned duly served, it was, on the motion of the plaintiff, made absolute, no cause being shewn. It appeared however, that the defendant had on that day appeared by his Advocate, at 12 in the noon, but found that the Court had already risen. The Judge having subsequently, on application by the defendant, refused to open the rule, the question was now brought in appeal before the Supreme Court.

R. Morgan appeared for the plaintiff and respondent.

Per Curiam.] According to the practice in the Superior Courts in England, a rule is not generally so made absolute until two or three days after it is returnable. And if after a rule has been made absolute in this manner, it appear that Counsel was instructed in time, it is usual and proper courtesy in most cases to open the rule without compelling the opposite Counsel to move the Court; and if this be refused, the Court will order the rule to be opened. Further, if a rule be made absolute in such manner that either party may be said to be taken by surprise, the Court will order the rule to be opened. *Archbold's* Practice, p. 1490-93. It seems to us exceedingly undesirable, that rule 33 of sec. i. (*Civil Jurisdiction*), should receive so strict a construction as was put upon it by the District Judge in the present instance, the defendant having been foreclosed by his decision before the expiration of more than half the day on which the rule was actually made returnable, although rule 33 calls on him to shew cause at any time within four days. And as there would obviously be much difficulty in fixing the precise hour at which that fourth day might be said to be terminable for the purposes of this rule, the rising of the District Judge being in different Courts, or even in the same Court, occasionally at different hours, we think a more reasonable and convenient construction would be, to hold that it should not be competent in any case to make such a *rule nisi* absolute, until the day after the day for which the rule is returnable, thereby giving the party on whom the rule has been served, grace until the sitting of the Court on the fifth day. But in this particular instance, the rule which it was sought to make absolute, operates, when so made absolute, in fact as a final judgment; and it being clear that both the Law of England and of this country concedes to a defendant the grace of being let in to defend, on an affidavit accounting for non-appearance and swearing to merits; this, we apprehend, is an additional reason why the judgment should be in this case for the defendant. Again, judgment for want of a plea is constantly set aside in practice by the Queen's Bench, on similar affidavits.

Set aside.

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Present ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 14,593.
P. C. Jaffna. } *Martensz* v. *Ossen Saibo.*

A charge for using abusive language in the street, not laid under a local Ordinance, is not maintainable.

Calling another a "*Pariah*" is not a Criminal offence.

This was an appeal against a conviction of the Police Court of *Jaffna*, upon a charge "that the defendant used abusive language towards the prosecutor, in the public street of Jaffna." It was in evidence, that the defendant had called the prosecutor a "*Pariah*."

On appeal by the defendant, the conviction was set aside: and *per Curiam:* "This charge is not laid under any local Ordinance, and the only specific evidence in support of the charge is that of the Prosecutor, who says the appellant called him a '*Pariah*.' As this cannot be considered an uncommon calumny and which the public is interested in, there is no ground for the institution of a criminal proceeding. *Van Leeuwen*, 486."

No. 10,390.
C. R. Galle. } *Supermanien* v. *Casy Lebbe.*

Under cl. 6 of the Ordinance No. 8 of 1834, a part-payment made within a year before the commencement of the action, interrupts prescription; though at the time of such part-payment more than a year may have elapsed since the cause of action had accrued.

The plaintiff, on the 24th January 1855, sued the defendant for £4 10*s.* 10½*d.*, being balance due for goods sold and delivered from 8th November 1852 to 6th May 1854. The defendant pleaded Prescription. It appeared that the balance was struck on the 6th March 1853; a payment made on the 10th March 1853; and another on the 6th May 1854. The Court having given judgment for the plaintiff, the defendant took the present appeal.

Muttukistna for defendant and appellant.] On the face of the account filed, this is a partnership transaction; and the other partners not having been joined in the action, the plaintiff should be nonsuited. Chitty on *Pleading*, p. 10; Collyer on *Partnership*, 461, 420. Secondly, inasmuch as the last payment was not made within the prescribed period, it did not take the case out of the statute, for the Ordinance requires an act of admission *within* the prescribed period. See No. 2,672, *D. C. Jaffna*, Coll. *Civ. Min.* 11th October 1848. [TEMPLE J.—That is contrary to the English decisions, and to the doctrine laid down by Lord Ellenborough.] The English Statute of Limitations differs from our own in this respect, that it only bars the remedy; whereas the local Ordinance, following the principle of the Dutch Law, extinguishes the debt. So that any payment made after the prescriptive period, was made without prejudice and did not revive the liability.

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Per Curiam.] This was an action for goods sold and delivered. Defence, that the debt was prescribed by Ordinance No. 8 of 1834. On the 7th of March 1853, the debt became due; and on the 23rd of January 1855, the action was brought. By the Ordinance No. 8 of 1834, clause 6, therefore, which requires that in the case of goods sold and delivered the action must be brought within twelve months, the action would be barred unless something had intervened to take the case out of the Ordinance. On the 6th May 1854, the defendant made a payment on account. The question for the decision of the Court is, whether that payment takes the case out of the Ordinance.

It will be observed, that the words of the Ordinance, which limit the period for bringing the action, are in effect similar to those of the English Statute, 21 James 1, c. 16, barring the action simply, and not extinguishing the debt. *Higgins* v. *Scott*, 2 B. and Ad. 413. Now, according to the Law of England it is quite clear, that any payment made at any time before action brought will revive the power of bringing the action, being in truth evidence of a continuing or new promise; from the date of which payment another six years begins to run, and must expire, before the action would be again barred by the Statute of James. But some diversity of opinion and practice has, it seems, heretofore prevailed in these Courts, upon the construction of the Ordinance No. 8 of 1834, it being contended that the peculiar words "within the term hereby prescribed for bringing the action," which occur in the 7th clause of that Ordinance, make the principle which applies in England inapplicable in our Courts; and that, in order to revive the promise, the payment must have been made, in this case for instance, within twelve months after the debt shall have been due, so that the payment actually made on the 6th May 1854 would not take the case out of the Ordinance. We are of opinion, that this is not the true construction of the 7th clause of the Ordinance. It will be observed, that this clause expressly recites, that the terms of limitation prescribed by clauses 3, 4, 5, and 6, are founded simply on the presumption of payment arising from the time which the creditor has allowed to elapse without exacting payment; and then goes on to provide, that certain acts may be considered so sufficiently to rebut that presumption, as to enable the creditor still to sue. Now the nearer to the date of the action brought we find the payment made by the debtor, the stronger undoubtedly is the rebuttal of any presumption that the debt was satisfied. In the words of the Civil Law, *habemus confitentem reum*, up to the very commencement of the action.

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To assume therefore, that the Ordinance would consider a payment made in May less cogent evidence of the continuance of the debt, than a more stale payment in the March preceding, would be to stultify the whole tenor of the enactment. It seems to us then, that the far more reasonable construction is, to hold that the words "within the term hereby prescribed for bringing the action," denote simply a measure of time, varying as prescribed by the previous clauses, from ten, to six, to three, and to one year,—such measure of time to be reckoned backwards from the date of action brought; the object of the legislature, namely, the letting in evidence to rebut the presumption of payment, being thus effected in the most satisfactory manner, by admitting all more recent, and excluding all such stale proof, as may be in date anterior to the respective periods of limitation fixed in each case by the Ordinance. Applying that construction to the present case, the simple question will be, is there proof of an acknowledgment within one year before action brought, from which the Court might be convinced that the debt has not been satisfied. The answer is,—proof has been given of a payment on account, made on the 6th May 1854, the action having been commenced on the 23rd January 1855. Upon that evidence the Judge below gave judgment in favour of the creditor, in the words of the Ordinance, "as he might have done if the action had been brought within the time limited by the Ordinance," and we are of opinion that that judgment must be *affirmed*.

No. 14,273.
D. C. Badulla. } *Singapulle* v. *Heneya*.

Possession from the early part of 1841, (viz: two or three months after December 1840,) up to the 7th May 1851, *held* not sufficient to confer a title of prescription.

This was an appeal by the plaintiffs against a judgment of the Court below, decreeing certain lands to the defendant. The facts of the case are fully stated in the judgment.

Per Curiam.] The District Court, with special Assessors, has found that *Oenga* was the sister of *Avesiri*, the former owner of the land; and that the plaintiffs, as her heirs, are entitled to the land; but it also finds, that the defendant has obtained a title by prescription. The land in dispute was, on the 23rd December 1840, decreed to Avesiri, in a suit by her against the father of the plaintiffs; after which (as stated by the defendant in his examination at the first trial) she transferred it to the defendant: but there is no satisfactory evidence to shew when this transfer took

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place, except that it was between the decree of December 1840, and the death of Avesiri, which the plaintiffs say, took place two or three months after the decree. All, therefore, that appears is, that the defendant begun to possess some time early in 1841; but at what exact time it does not appear. The plaintiffs commenced litigation on the 7th May 1851, and in that suit they were non-suited, after which they continued litigation up to the present time. It is not therefore clearly shewn that the defendant had possessed for ten years prior to the 7th May 1851, and the plaintiff's legal title being established, the Supreme Court considers that it is for the defendant satisfactorily to prove an undisturbed and uninterrupted possession for ten full years prior to the commencement of litigation, which he has failed to do.

The judgment of the Court below is therefore set aside, and judgment entered for the plaintiffs.

No. 19,954.
D. C. Colombo. } *Alston, Scott & Co.* v. *Sinne Lebbe Markar.*

A contract relating to the sale of goods does not require a Stamp. The Ordinance No. 7 of 1840 requires only the signature of the party sought, to be rendered liable on such a contract.

Libel: That the plaintiffs, in consideration that the defendant would grant them a Promissory Note of £276, at four month's date, agreed to sell and deliver 16 tons of sheet iron; and although the plaintiffs were always willing to deliver the goods, yet the defendant would not sign or deliver the said note. (There was also the usual count for goods sold.) And the plaintiffs prayed that the defendant may be condemned in £276, &c.

Plea: The defendant, admitting the agreement, denied the plaintiffs' right to maintain the action, as the iron tendered to him was in a bad, unsound, and damaged condition, and therefore he refused to accept the same, and to give to the plaintiffs the said Promissory Note.

On the day of trial, *R. Morgan* for the plaintiffs, moved that a written contract which had been entered into between the parties, be read in evidence. This contract was in the following form:—"We, the undersigned, have hereby agreed to purchase from Messrs. *Alston, Scott & Co.* the following goods, viz:—16 tons sheet iron, per *Hope*, at £17 *5s.* per ton, the samples and description of which we have examined. The terms of the purchase are, that a Promissory Note for the amount shall be given by the undersigned, made payable to Messrs. *Alston, Scott & Co.* or order, in four

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instalments from the date of the tender of delivery of the goods. The goods to be removed at the expense and risk of the purchaser. Should any portion be damaged, the purchasers are only bound to take the sound part. If any dispute should arise as to the quality or condition of the goods, we agree to refer it to the arbitration of two Merchants, one to be named by each party; and in case of the neglect or refusal of either party to name an arbitrator, the other to appoint both."

This document was signed by the defendant only.

Rust, for the defendant, objected to its admission, 1. because it bore no stamp, according to Ordinance No. 19 of 1852; and 2. because it did not fulfil the requirements of the Ordinance No. 7 of 1840, cl. 21, as it did not bear the signatures of all the parties thereto.

On a subsequent day, the Court below (*Lavalliere*, D. J.) delivered the following judgment:—

"The Court is of opinion that the contract is admissible in evidence. It clearly comes under the exemption in part I, as a memorandum or agreement relating to the sale of goods, wares, or merchandize. It seems that the words of the exemption are very comprehensive, and include not only contracts for the sale of goods, but also such *as relate thereto*. Chitty *on Contracts*, p. 126. Here the primary object is the sale of the goods, the other stipulations being subordinate thereto. The Court is further of opinion that, independently of the 21st clause of the Ordinance No. 7 of 1840 not bearing the construction placed on it by the defendant's counsel, the defendant is not now in a position to question the validity of the contract, inasmuch as he has, both in his pleading and examination, already admitted it, and denied his liability under it, only on the ground of his having found the iron in a damaged state, of which he was not aware when he signed the contract; and that he was, consequently, not bound to remove it, or to grant the Promissory Note for the amount stipulated. The contract A is accordingly admitted and read in evidence: from which it appears, that the defendant agreed to purchase from the plaintiff 16 tons of sheet-iron at £17 5*s*. per ton weight,—the samples and description of which is in the contract admitted to have been examined. The contract does not specify any time for the removal of the goods. The plaintiffs state, that the first time the defendant made any objection as to the condition of the iron, was 14 or 15 days after the contract was signed, while the defendant says, that it was only 4 or 5 days after, when he, for the *first time*, saw the iron. It is perfectly immate-

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rial to the case, whether the defendant saw the iron before or after he completed the purchase, inasmuch as by the written contract the defendant was entitled to reject any portion of it that might be found damaged; and which, indeed, seems to be the prevailing custom amongst the merchants in *Colombo*, dealing in articles of this nature. Since an agreement to refer any matter of difference between two parties to arbitration is no bar to an action brought in respect thereof, (Chitty *on Contracts*, p. 687), the only question for consideration is, as to the condition of the iron at the time the defendant refused, after the contract, to receive it. The Court, on a careful consideration of the evidence adduced, is of opinion, that the condition of the iron did not justify the defendant refusing to accept it. The evidence of *Strachan*, who is a professional Engineer, and a person apparently fully capable of forming a correct judgment on a matter of this nature, is, in the opinion of the Court, quite conclusive, and far more deserving of weight than that of the two native blacksmiths, who it appears were called in by defendant to examine the iron only about six weeks ago, when it was probably in a worse condition than when first sold to defendant in February last. The Court is of opinion that the plaintiffs are entitled to judgment.

On appeal against this judgment,

Rust appeared for the appellant: *W. Morgan* for the respondent.

The Supreme Court affirmed the decision of the Court below, it seeing no reason to suppose that the District Court had not come to a correct conclusion on the facts, upon the determination of which this case depended.

August 2.

Present ROWE, C. J., STERLING, J., and TEMPLE, J.

August 2.

No. 16,769.
D. C. Colombo. } *Robertson* v. *Fulton.*

A surety on a Bond is not discharged from his liability by the circumstance of a party who had agreed with the debtor to pay off all his debts, subsequently taking an assign-

This was an action on a bond whereby one *Walker* engaged to pay *Shand* £3,000, after nine months notice in writing. Besides a mortgage of two Coffee Estates as security for the debt, *Fulton*, the defendant, bound himself as surety for *Walker* for the payment of the above sum. On the 20th May 1852, *Shand* assigned the bond to *Gerard, Brown and Co.*, and they, on the 20th and 22nd May 1852, assigned the bond to *Robertson and Co.*, the

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ment of the Bond from the creditor, and which he afterwards re-assigned for valuable consideration to the plaintiff.

present plaintiffs. *Robertson and Co.* now sued the defendant on the bond, alleging that by the sale of the mortgaged property they recovered only a part of the money due thereon, and that there was still due a balance sum of £482 16*s.* 1*d.* which they now claimed. To this libel the defendant filed an Answer in November 1852, in which he pleaded payment of £900 by *Walker* on the 31st April 1851, which, with the proceeds of the sale, discharged the bond. The plaintiffs replied, admitting the payment of £900, but that it was on another account. A year afterwards, the defendant amended his Answer, and in addition to the plea of payment of £900 by *Walker*, he also pleaded that, on the 19th November 1850, an agreement was entered into between *Walker*, *Heale and Co.* and *Gerard*, *Brown and Co.*, whereby *Gerard*, *Brown and Co.*, made themselves liable to pay to *Shand* the sum due by *Walker*, and that the mortgage-bond was assigned over by *Gerard*, *Brown and Co.* subsequently to such agreement.

On these pleadings the parties proceeded to trial; and two witnesses were examined, *Shand* for plaintiff, *Gerard* for defendant. The evidence related chiefly to the payment of £900. It appeared also that *Walker* had several estates, and having no funds for the cultivation thereof, *Heale and Co.* and *Gerard*, *Brown and Co.* supplied funds and agreed to pay *Walker's* debts between them; *Walker* remaining liable to them for whatever was paid on his account. The District Judge found that the £900 was not in satisfaction of this bond, but that the agreement, by which *Gerard* had to pay £3,000, operated as a novation of the debt and extinguished the original bond on which the plaintiff sued, and thereby discharged the defendant from his liability.

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R. Morgan, for the plaintiff and appellant, contended that this was no novation. [*Lawson*, for the defendant and respondent, admitted that the agreement of November 19 was not a novation of the debt.] That is the only point on which the District Judge relied. *Walker's* liability was not affected by the agreement; for this was not a case of debtor and creditor, and therefore there could be no confusion or merger. *Gerard* was not *Walker's* debtor, but only paid on his account. There is no other issue, except the question of a merger of the debt. *Gerard* paid on account of *Walker*, and *Walker* was liable. If *Gerard* had been the debtor of *Walker* and had then succeeded to the rights of the creditor, it would have been otherwise.

Lawson contra.] The defendant's Answer is founded on equity. *Gerard* assigned to plaintiff this mortgage-bond, but the mortgagor was no party to such assignment. Any defence that would be good against *Gerard* would be good against the present plaintiff,

as representing *Gerard*. Under the assignment of 19th November 1850, *Gerard* became liable to pay *Walker's* debts, and became as it were his debtor to that extent. Being under this obligation, he took an assignment of *Walker's* bond to *Shand*, and became *Walker's* creditor, and this double character induced by operation a merger or confusion of debts. This was no case of novation, but clearly of confusion. The principle of the doctrine, was that a man cannot pay himself. Whether *Gerard* paid *Walker's* debts or not, was of no consequence, upon the known principle of equity, "that which ought to be done is held to be done." 1 Story's *Eq. Jurisp.* 63, 61*a*. [ROWE, C. J.—How do you apply that principle in this particular case?] *Gerard* ought to have paid off the debt on account of *Walker*, and if he had done so, *Walker's* liability would have been extinguished. But *Gerard* took an assignment of the original bond, in breach of his agreement. If he had done what he ought to have done and paid it off, *Walker* could have pleaded satisfaction: but he took an assignment of the very debt intended to be paid off, and thereby profited by his own wrong and laches. [STERLING, J.—Is there any express clause in the agreement extinguishing the original debt?] No. But it was admitted that if *Gerard* had been a debtor of *Walker* and then succeeded to the rights of a creditor, it would have extinguished the debt. This is just the case. [ROWE, C. J.—The neglect to carry out the agreement is to make *Fulton* liable?] That is also the conclusion of the District Judge. That was the view taken by the District Judge, for which I have contended; though he afterwards enters into the question of novation, which, in my opinion, cannot be sustained.

Rust in reply.] In giving up the question of novation, the only ground on which the judgment of the Court below could be supported, has been abandoned. The equitable doctrine alluded to is in no way applicable. Of what laches have *Gerard, Brown & Co.* been guilty? They have paid the £3000 mentioned in the agreement, and as against *Walker* and the defendant, are entitled to all the securities *Shand* held. The agreement nowhere stipulated that such securities should be extinguished, and his Lordship the *Senior Puisne Justice* when he put this point, really disposed of all that could be said in defence to this action. The question of extinction and payment would be best evidenced by the acts of the parties, and the Executors of *Walker* have in the case No. 16,269 admitted the liability of their testator. Indeed this action was brought to recover the balance remaining unsatisfied under the judgment in that case. [TEMPLE, J.—Is *Fulton* one of the

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Executors?] No. But in that case, if *Walker* could have pleaded payment, his Executors would certainly have done so; and further in that case is filed the agreement between *Shand*, the original creditor, and *Gerard, Brown & Co.* who assigned to plaintiffs, by which it is specially provided that this bond should be kept alive. Here is abundant proof that *Walker* could not have pleaded payment; for although *Gerard* had paid the £3000, it was that he might be substituted to *Shand's* rights. There is no pretence for contending that this was a case of merger. The most essential ingredient was wanting. *Gerard* stood in the position of a creditor of *Walker* throughout, and was never his debtor. *Burge on Suretyship*, 253. [STERLING, J.—Does it not always arise by operation of Law?] I can find no cases in *Burge* to the contrary. Then as to payment of the £900, there was no evidence of it. All the evidence went to shew that the payment of £900 was not in discharge of the bond in question. The simple point is, whether the plaintiffs are not entitled to stand in the shoes of *Shand*, and I submit that only one conclusion can be arrived at. [ROWE, C. J. The whole case turns on the agreement.] *Cur. adv. vult.*

On a subsequent day the Supreme Court pronounced judgment reversing the decree of the Court below, and decreeing judgment for the plaintiffs in terms of the Libel: it being of opinion, that the defendant had not made out a sufficient case to discharge him from his liability as surety to *Walker* as against the plaintiffs, who had given valuable consideration for the Bond.

August 14.

Present ROWE, C. J., and STERLING, J.

August 14.

No. 18,103. *D. C. Matura.* } *Don David* v. *Don Andris.*

In an *ex-parte* trial, the deft. is entitled to cross-examine the plaintiff's witnesses.

The decree of the Court below in this case was set aside, and the case remanded for a new trial on the authority of a former decision of this Court, (No. 19,642, D. C. Kandy,*) wherein it was held that in an *ex-parte* trial, the counsel for the defendant should have been allowed to cross-examine the plaintiff's witnesses; and the practice of the District Court of Colombo being to allow such examination in similar trials.

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* See also *Hamilton* v. *Ross*, Tuesd. Min. Oct. 9th 1846, No.....

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Present ROWE, C. J., and STERLING, J.

No. 12,795.
P. C. Batticoloa. } *Assistant Government Agent* v. *Packier Lebbe.*

On an information for non-payment of the paddy-tax, the Police Court is bound to receive evidence tendered by the deft. in order to ascertain, with a view to the proper assessment of the fine, whether the land is Crown land or private property

In this case the judgment of the Court below was set aside, and the case sent back for further enquiry, the Supreme Court being of opinion that the Police Magistrate was in error in not examining the deeds tendered by defendants, and ascertaining whether there had been any acts of possession under them, and what receipts, if any, the defendants could produce for tax-payments in preceding years, it being essential, with a view to the proper assessment of the fine to be imposed, if any, that the Police Magistrate should decide *pro hac vice* whether the land be Crown land, and the parties thus liable to a tax of one-half, or private land paying a tax only of one-tenth.

No. 39,391.
D. C. Colombo. } *Silvestry* v. *Juanis Appoo.*

Where the deft., who had been fined 2*s.* on the evidence of the complainant, subsequently snatched a rupee from the complainant, stating that he took it on account of the fine; held not to be a theft.

The complainant in this case, and the defendant, were both employed at Mr. *Wilson's* Mills at New Bazaar. The defendant had been fined 2*s.* in a previous case, on the evidence of the present complainant.

On the following day, the defendant snatched 2*s.* from complainant in the presence of people, stating that he took it, as he had been fined 2*s.*, on account of the complainant. The Police Magistrate hereupon held the charge of theft to have been proved. The defendant was adjudged guilty, and sentenced to be imprisoned at hard labour for fourteen days.

On appeal,

Muttukistna for the defendant and appellant.] The facts proved, assuming them to be true, do not in law amount to theft. The defendant conceiving himself injured by the complainant, in having been fined, perhaps improperly, acted under the impression that he was entitled to that amount from the party, who had, or who he fancied had, injured him.

The Supreme Court set aside the judgment, it not appearing by

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the evidence or judgment, that the act complained of comes within the definition of theft as laid down in the authorities. *Van Leeuwen*, 488.—*Van der Linden*, 324.

August 19.

August 19.

Present ROWE, C. J., and STERLING, J.

No. 16,079. *D. C. Galle.* } *Ossen Saiboe* v. *Segoe Lebbe.*

Where the conditions of sale of real property, stipulated for the payment of the purchase-money on a given day, and the purchaser having made default, the parties by parol extended the period of payment, *Held* that evidence of such parole agreement was admissible.

This was an action to enforce specific performance of a contract to sell a Boutique. The defendants, as administrators of a certain estate, sold a boutique by public auction, and the plaintiff became the purchaser. According to the conditions of sale, which were notarial, the purchase-money was to have been fully paid on a given day, and in default the sellers were at liberty to resell the property. The conditions also contained a clause that, notwithstanding the default of the purchaser, the seller should be at liberty to enforce the contract. It was admitted that the purchase-money was not paid on the day fixed, but the plaintiffs alleged, that afterwards the parties entered into a parol agreement to the effect that the purchase-money should be paid into the hands of a third party to be held by him, till the defendants should have delivered undisturbed possession of the property, and a conveyance. At the trial in the Court below, the parol evidence was objected to under the Ordinance No. 7 of 1840. The District Court, however, admitted the evidence and gave judgment for the plaintiff. The present appeal was against that judgment.

Dias, for the defendants and appellants.] The evidence was inadmissible under the Ordinance No. 7 of 1840, as tending to establish a title to land by parol. The 2nd clause of the Ordinance is very stringent; much more so than the English Statute of Frauds. As far as the plaintiffs were concerned, the non-payment of the purchase-money on the day named amounted to a forfeiture of the conditions of sale, and the subsequent parol arrangement was entirely a new contract. [ROWE, C. J.—The vendors had the option to take advantage of the forfeiture, or to waive it; the evidence adduced went to shew the waiver.] That was just the objection. Such waiver could not be proved by parol. It was argued in the Court below that the parol arrangement was not a new contract but an enlargement of the time for the performance of the old

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contract. This was clearly objectionable under the Statute of Frauds. *Stowell* v. *Robinson*, 3 Bing. N. C. 928,937: 2 Taylor *on Evidence*, 818,902: and *a fortiori* under our Ordinance. It was also argued, that it was a mere substitution of one day for another. This is not correct in point of fact, because the parol arrangement went to import new and substantial conditions into the original agreement, such as giving undisturbed possession, and the purchase money being withheld till that was done. But admitting, for the sake of argument, that it was a mere substitution of one day for another, that was clearly objectionable under the Ordinance. 2 Taylor *on Evidence* 903, § 104; *Goss* v. *Lord Nugent*, 5 B. & Ad. 58. The authorities are quite clear upon this point. But it was urged also, that equity could give relief in a case like this, upon the ground of part performance. True, this is the doctrine of the English Equity Courts; but it rests entirely on the ground of part performance. With respect to the question of part performance, that was never upheld in this country, though repeatedly raised by Counsel. In England, the Judges have latterly condemned it as tending to repeal the Statute of Frauds. 2 Story, *Eq. Juris.* 77, § 765, 767. But even in England a distinction appears to have been drawn, in cases where the parol evidence goes to set aside the contract altogether, and to place the parties *in statu quo*, and where a written contract is attempted to be enforced with parol variations. 3 Story, *Eq. Juris.* 87. In the latter case Courts will not interfere. The present is an attempt to enforce the conditions of sale with a parol variation of a substantial character. Besides the objection under the Ordinance, there is another objection to the evidence adduced, as leading to alter a written contract.

R. Morgan, contra.] The case does not rest upon the ground of part performance. The original contract contained a clause empowering the vendors to take advantage of the forfeiture, or to enforce the contract. The parol evidence went to shew the election by the vendor. It neither varied the original contract nor imported new terms into it, but simply established the fact, that the vendor adopted one of two alternatives in the contract. If, indeed, this option was not given in the original contract, the objection on the other side would be of weight. It is not correct to say that the non-payment of the purchase money put an end to the contract. There must be another act on the part of the vendor to do so. The parol arrangement did not set up a new contract. The payment of the purchase-money and the delivery of possession were simultaneous acts, and the parol arrangement proved a waiver, on the part of the plaintiff, of the right of enforcing payment on

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the given day. It was, in fact, a substitution of one day for another, and could be proved by parol both at law and in equity. Sugden *on Vendors*, 169. Time was not of the essence of the contract, and could be waived by either party. It is not necessary to enter into the question of part performance. The question here is purely a question of fact, and the correctness of the evidence adduced is not impeached on the other side.

Dias in reply.] The parol arrangement was a substantial variation of the original contract. Could the plaintiff recover on the conditions only? Certainly not. Then the parol arrangement gave him a right which he did not possess under the conditions, clearly shewing that the plaintiff's claim rested entirely upon the parol arrangement.

Sed per Curiam.] The judgment is affirmed.

No. 12,170.
D. C. Kornegalle. } *Punchy Raale* v. *Modely Hamy.*

Prescription against a rightful owner, when admitted.

The plaintiffs claimed certain lands as the children of *Dingeralle;* and complained that the defendants were in forcible possession since 1831. They alleged also that they were minors, and that in 1836 their mother had brought a case for these very lands against the defendant's father, which, however, was abandoned three years after, owing to their mother's death. The defendants admitted the right of *Dingeralle*, but pleaded that he had conveyed the lands to their father upon a talpot deed of the year of Saca 1750. The answer also contained a clause denying all the facts stated in the libel. Upon these pleadings the Court below decided that two issues only were raised; 1st, Were the plaintiffs, the children of *Dingeralle?* 2nd, Did *Dingeralle* sell the lands to the defendant's father? and that the burthen of proving the first lay on the plaintiffs, the second on the defendants.

Evidence having been heard on both sides, the Court below pronounced judgment for the plaintiffs.

On appeal,—

Dias for the defendants and appellants.] All the blundering in the case on the part of the proctors and the parties, was owing to the act of the District Judge in determining the issues. No doubt the District Judge had the power to do so, but in so doing he was bound to state the issues *correctly*. It would have been much better if the proctors had been allowed to prove their respective cases,

without any interference on the part of the District Judge. The stating of issues, by the Judge, is a very unusual thing with other Courts. A glance at the pleadings will satisfy any person that the District Judge was wrong as to the issues raised. The plaintiffs were bound to prove first, that they were the children of *Dingeralle;* and secondly, having admitted the defendants' possession since 1831, they could not recover without either establishing their minority or the interruption of the possession by the case alluded to in the libel. According to the libel, the plaintiff's proctor seemed to have been fully aware of the evidence required to establish the plaintiffs' case, but the District Judge's settlement of the issues made him commit the mistake of confining himself to the 1st point, viz., whether the plaintiffs were *Dingeralle's* children. It may be urged that the defendants should have objected to the issues as settled by the District Judge, but that was no concern of the defendants. The plaintiffs were bound to make out a case, and if they failed to do so, the proceeding on the part of the Judge could not place them in a better position. On the question of minority, no evidence was gone into, but on the face of the proceedings it appeared that this plea could not avail the plaintiffs. On the day of trial (1855) the 2nd plaintiff admitted that she was 33 years of age, then taking 16 years as the age of minority, she was a major in 1838. The action was in 1850, two years after the full term of prescription had run against her. As to the case set up in the libel, it was not true, as stated by plaintiffs, that it was instituted by their mother. It was instituted in 1836 by themselves, and struck off in 1837, so that the defendants had prescribed against plaintiffs even after that case. The defendant's talpot is a genuine instrument, as will be seen on reference to the evidence of the plaintiff's own witnesses who supported it.

R. Morgan, contra.] The presumption is always in favour of the legal heirs. The defendants are mere usurpers, and are not entitled to any indulgence. The only issue upon the plaintiffs was whether they were *Dingeralle's* children. Then it was for the defendants to establish their deed or prescription. We admit the mere occupation since 1831, but that is not such a possession as would give them a prescriptive title. I am not prepared to admit that 16 years is the age of majority for the purpose of bringing an action. Twenty-five years is the proper period. [*Dias.*—Sixteen years is beyond all doubt the age of majority by the Kandyan Law.] There is sufficient on the face of the proceedings to shew that the plaintiffs were minors. The witnesses speak to 24, 25, and 26 years as the time when the plaintiff's father died. Taking 24 as the right time, the plaintiff's father then died in 1831. If, therefore, according

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to the libel, one of the plaintiffs was 5 years old in 1831, then he became a major in 1842, and no prescription would run against him till 1852, that is, two years after the present action. Then again, the former case was a clear interruption. The allegation that the case was struck off is not correct; on the contrary, the plea filed by the defendants in this very case states that the former case was then pending. The mere existence of a case which appears to have been given up for 10 or 15 years, is undoubtedly a disturbance. It is argued that this case was not put in evidence. It certainly was not in a formal way; but the case was a record of the same Court, and the District Judge had it before him.

The Supreme Court referred the case back for a new trial, on the question of prescription, but concurred with the District Court on its finding on the other issues.

August 21.

August 21.

Present ROWE, C. J., and STERLING, J.

No 16,391. *D. C. Galle.* } *Sitty* v. *Janis.*

A husband claiming lands belonging to him in right of his wife, may sue for them in his own name.

In this case the plaintiffs claimed certain lands as joint owners. On the day of trial it appeared from the examination of the plaintiffs, that the 2nd plaintiff derived his title through his wife, on which the defendant's counsel objected, 1st, that there was a variance in the title as set forth in the Libel and admitted in the examination: 2nd, that the wife of the 2nd plaintiff ought to have been joined as a plaintiff; and declining to call evidence, moved for a nonsuit on these objections. The Court below however pronounced judgment in favour of the plaintiff.

On appeal against this judgment—

R. Morgan, for the appellant.] The title as derived through the 2nd plaintiff's wife should have been disclosed in the pleadings, and the 2nd plaintiff should have sued "for and on behalf of his wife." This is the practice of the District Courts, wherever the husband claims through the wife; and the contrary practice would lead to much inconvenience whenever it becomes necessary to ascertain what are the separate properties of husband and wife, as in cases of divorce. There was a case in the District Court of Colombo where an application was made by the husband for letters of administration, and the Court rejected the application, as the wife did not

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join, the right to administer having accrued through the wife. I am not prepared to maintain both the objections; but it appears that though by the Dutch Law the wife cannot be joined as a party, yet it is necessary to mention that the party suing sues for and on behalf of his wife. *V. Leeuwen, Cens. For.* pars 2. lib 1. cap. x. § 10. page 31.

W. Morgan, (with him *Dias*,) for the respondent.] The objection taken below is purely technical, and the examination of the defendants themselves shewed they had no merits. If the objection was worth anything, it should have been taken by way of a plea in abatement. But there is nothing in the objection. By marriage the property of the husband and wife come into the community, and the husband has the sole control and management thereof. He can alienate or mortgage it, as he pleases. 1. *Burge* 419. And it follows that he can maintain an action in his own name and in his own right. In determining a question of parties to an action, the inquiry should be, what are their rights. If by marriage the wife becomes a minor and the husband has the exclusive administration of the community, it is contrary to law to join the wife; and if she were joined, the pleading would be demurrable. Such demurrers were always upheld in the District Court of Colombo. In Moorish cases the wife should be joined, and the reason of it is, that the Mahommedan law does not recognise community of property. The authority in the *Censura Forensis* does not apply; for that is the case of a wife having separate property. Again, the objections urged below were quite different from the objection now taken.

Per Curiam.] The judgment of the Court below must be set aside, and the case remanded for a new trial; the defendants paying costs of the day and of the appeal.

No. 13,250.
D. C. Kornegalle. } *Tickery Ettena* v. *Ping Hamy.*

A party, who sued for certain lands, having in her examination admitted, that there was ano ther Co-heir who was entitled to a half of the lands, the

The plaintiff claimed the whole of certain lands. The defendant denied the plaintiff's right and claimed the lands by prescription and inheritance. On the day of trial the plaintiff admitted that she had a sister who was entitled to half of the land. After hearing evidence, the District Judge found the fact of the plaintiff's possession and her right to a half of the land claimed, and pronoun-

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Supreme Court restricted the judgment in the case (which was for the whole) to a half of the lands; and allowed to the other Co-heir to join in the suit, to prove her right to the other half.

ceed judgment as follows: "The Court considers, decrees and adjudges that defendant be ejected from the garden. Defendant shall pay unto plaintiff damages £5, and costs of suit." The defendant appealed on the merits.

Dias, for the appellant.] Though the fact is found against the defendant, it is upon the most unsatisfactory evidence. The judgment as it stands is clearly bad; no judgment is given for the plaintiff for the land. All that is done is to eject the defendant from the *whole* of the land, though the District Judge admitted that the plaintiff was entitled to only one-half. The decree is inoperative. The plaintiff cannot get a writ of possession under it. The plaintiff must recover upon the strength of her title, and has no right to get a defendant ejected from lands to which she has no claim. If the present finding of the District Court were upheld, a District Judge might hold that neither plaintiff nor defendant has a title to the land, and yet proceed to eject the defendant in favor of others who are no parties to the suit. Here the defendant is in possession and the presumptions are in his favor, till the contrary is shewn by a party who may have a better title. Again, the District Judge awards full damages to the plaintiff. [STERLING, J.—The defendant would be liable to pay it over again to the party entitled to the other half of the land.] Just so. The judgment is quite irregular in this respect. The plaintiff can therefore only get judgment for one-half of the land and a half of the damages.

R. Morgan, for the respondent.] The defendant was properly ejected from the whole of the land, because the evidence shewed that he had no title. The Supreme Court has held that a tenant in common may maintain an action without joining his co-tenants; and in this country such a rule is absolutely necessary. C. M. 31st July 1854. It is difficult in this country to join all the parties entitled to any particular estate; and judgment is often given without prejudice to third parties. The defendant cannot complain; for the Court has held that he had no right to any portion of the land. It is urged that the decree was inoperative; but that is no concern of the defendant. If any one has a right to complain, it is the plaintiff; but she, on the contrary, is perfectly satisfied. If the District Judge was wrong in awarding full damages, there is no objection to the judgment being altered to that extent. The possession of a tenant in common is the possession of all, and the defendant cannot set up prescription against the rest. *Doe* v. *Philips*, 3 B. and Ad. 753.

Dias in reply.] The possession of a tenant in common is not the possession of the rest. It has been held by the Supreme Court

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that one brother may prescribe against another. A tenant in common may indeed maintain an action without joining the rest, and the case cited went only to that extent; but no authority or decided case can be produced to establish the rule that a person who is entitled to half can get judgment for the whole. *Chitty's Practice*, 278 *a*, 375.

The Supreme Court affirmed the decree of the Court below as to the plaintiff's right to an undivided moiety of the land in dispute; and ordered that the other sister should be allowed to join, to prove that she was a co-heir of the plaintiff.

No. 15,326.
D. C. Caltura. } *Solomon Pieris* v. *Siman Pieris.*

Where the plt. claims lands on a conveyance, which is not admitted by the defendant, the burthen of proof is on the plaintiff.

The plaintiff claimed the eastern half of certain lands on a conveyance from the administrator of the Estate of *Juan Pieris* and his wife. The defendant pleaded first, a general denial; and secondly, that the heirs of *Solomon* had sold the land to the intervenient, who sold it to defendant. He further pleaded Prescription. And issue being joined on these pleadings, the parties went to trial. The deed by the intervenient to the defendant was impeached by the plaintiff. It also appeared on the examination of the plaintiff that the intestates of plaintiff's vendor had died about 20 years ago, and that administration of their estate had only been lately taken out.

After the examination of the parties, the plaintiff submitted to the Court that the burthen of proof was upon the defendant, and hereupon the Court called on the defendant to begin. The defendant refusing to do so, judgment was entered up for the plaintiff.

On appeal against this judgment,

Dias appeared for the defendant and appellant.] Upon the pleadings and the examination of parties the plaintiff was bound to prove—first, his purchase deed; secondly, that it was the eastern half that he had purchased; thirdly, the right of his vendor's intestates. It is true that the District Judge had the right to determine the question of onus, but in so doing he must determine according to the facts before him. He cannot arbitrarily call upon any party he pleases, but must be guided by the rules of evidence. After the defendant had declined to call evidence, the District Judge called upon the plaintiff to prove his deed, an act quite inconsistent with his former ruling, and the best proof of the validity of the defend-

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ant's objection to begin. In the subsequent proceedings the defendant was not allowed to take part, the District Judge having ruled that the case should proceed as between the plaintiff and the intervenient.

R. Morgan, contra.] Under the Rules the District Judge had a wide discretion, and the Supreme Court never interfered upon light reasons. The intestates' right was admitted by the defendant, who claimed through the same party; and the plaintiff's vendor being the admitted representative of the original owner, the onus was clearly on the defendant to prove his deed which was impeached. The appearances of the case were against the defendant. The Notary who executed the deed had been convicted of forgery, and the defendant admitted in his examination that he was not prepared to prove his deed, not having summoned the Notary or the attesting witnesses. Under these circumstances the District Judge exercised a sound discretion in calling upon the defendant to begin. The defendant does not deny the transfer to plaintiff; all that he disputed was as to the portion sold. The plaintiff was not bound to prove the *locus in quo*, because the title of the intestates to the whole of the land was admitted. The plaintiff's deed conveyed the eastern half, and unless the defendant shewed that it was a fraudulent description, the plaintiff was entitled to recover.

Dias, in reply, denied that defendant had admitted the right of the original owner. All that he admitted was that the seller to the intervenients was a descendant of the original owner, who had died some 20 years ago. The plaintiff was not entitled to any indulgence. The objection was raised by his proctor, and if the case had been allowed to proceed in the usual way, nothing would have occurred.

The Supreme Court remanded the case for a new trial, for the plaintiff to prove his case.

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Present Rowe, C. J., and Temple, J.

No. 39,568. *P. C. Colombo.* } *Oedoema Lebbe* v. *Neina Marcan.*

A "disturbance of the public peace" is punishable by a Police Court.

The facts of this case are fully stated in the judgment of the Police Magistrate; which was as follows:—

"This is a charge against the defendants, of having disturbed

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the public peace, and the 3rd defendant having assaulted the complainant at the Mohammedan Mosque, at New Moor Street, on the 12th August instant. On that day a disturbance did take place there, and the complainant presented an Affidavit, charging thirty-three men, including the defendants, with 'having unlawfully, riotously and routously assembled and gathered together to disturb the peace of our Lady the Queen;' and with having 'then and there, unlawfully and riotously beaten and ill-treated the affirmant.'

But mere abusive words, unaccompanied by an actual challenge to fight, or by acts amounting to an assault, do not constitute a breach of the peace.

"The Complainant was examined, and stated that only one man had struck him one blow,—that there had been a great noise and disturbance, much talk and abuse, and that the defendant's party had ordered the complainant's party not to have prayers there, but at Marandahn. On the following day an Affidavit was presented by the 1st defendant, and five others, charging 19 of the complainants' party, and three Members of the Bar 'with assault, battery, riot and breach of the peace.' The accused on both sides attended of their own accord, and were held to bail for appearance, and to keep the peace, till the charges against them should be disposed of. Informations were taken on the 18th; the complainant and the leader of his party, *Slema Lebbe Naina Markar*, were examined, and gave their account of what had taken place in the Mosque; and Mr. *De La Harpe* stated what had taken place outside. On the perusal of these depositions, the Queen's Advocate directed that the three defendants should be proceeded against; which would be a sufficient vindication of the Law.

"As in this case, there has been exhibited much bad feeling, fierce party-spirit, and partisanship, it is deemed to be necessary, in delivering judgment, to go at some length into the differences amongst the Mohammedans, from which this squabble has arisen. These differences have now arisen to such a dangerous height, that unless some measures be taken by Government to regulate the affairs of the Moorish community, serious breaches of the Peace, with very unfortunate results, may be expected occasionally to take place, to the great annoyance of the other classes of the community, in the town and district of Colombo.

"During the last few years a very bad state of feeling has existed amongst the Moorish inhabitants of Colombo. Misunderstandings and quarrels have often small beginnings; and it was so amongst the Moors, not long subsequent to the appointment of the present Head Moorman. When such arise in a community, unless checked by timely explanations and concessions, they lead not only to the alienation of friendly feelings, but to the formation

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of parties strongly opposed to each other. The Head Moorman of Colombo holds an appointment, as such, from Government. In that document the Moorish inhabitants are enjoined to respect and obey him; but the party opposed to him pay no attention to that injunction; but, on the contrary, they fiercely oppose him, and say, they do not require a Head Moorman at all. The Head Moorman and his adherents are for carrying out the ancient customs and observances of their religion and the 'Code of Mohammedan Laws' enacted in 1806, by the Governor in Council, and re-enacted or given general effect to by the Ordinance No. 5 of 1852, clause 10.—Whatever may be the case as to the expediency or inexpediency of enforcing that Code, consisting of one hundred and two sections, and signed by twenty of the principal Moormen, Marcairs, Arbitrators, Priests and inhabitants of Colombo of that period, it seems that the Head Moorman has the sanction of Law for much that he does, or wishes to do, as appertaining to his Office. Whether he has acted with ability and energy, and in a conciliatory manner, is another question. The principal cause of contention, however, is the appointment of Priests. One party objects to the Priests appointed by the other party; and on this point there has been much bickering and many quarrels. Some time ago three gentlemen, *Dr. Elliott*, *Mr. R. Morgan*, and *Mr. Dalziel*, were requested to act as arbitrators, to which they consented, in the hope of thus preventing disputes, and preserving the Public Peace.—Twelve influential Moormen, six of each party, signed a declaration that they would abide by the award of the arbitrators. It is but justice to the Head Moorman's party to state, that they were willing to abide by the said award, and endeavoured in good faith, to carry it into effect, although some of its provisions were not quite acceptable to them. The opposite party, to which this complainant belongs, did not abide by the award of the arbitrators; they set it at nought; got up what they call a "club," and appointed Priests; entirely broke faith with the arbitrators, and the other subscribing party, and, what is highly discreditable to them, acted quite contrary to their own written pledge. Of course the award was only an effort, by consent of parties, to arrange their differences, and to prevent mischief; it had not the force of Law; and was only binding on those who can be guided in their conduct by the principles of honor and self-respect. Those opposed to the Head Moorman, are entirely to blame for the renewal of the disturbances respecting the appointment of Priests. But as to the case now under consideration. It is clear that there has been a disturbance of the Public Peace, which, but for the

arrival of the Assistant Superintendent of Police, Mr. *De la Harpe*, would probably have led to a serious riot. The judicious conduct of Mr. *De la Harpe*, aided in his efforts by the 1st accused, *Slema Lebbe Neyna Marikar*, and *Sego Meera Lebbe Sinne Lebbe*, had the effect of soon restoring tranquillity. Whether the complainant and others were right or wrong in going to have prayers at the New Moor Street Mosque on the 12th instant, or whether the Defendants and others, as it respects the rules and practices of their religious observances, were right or wrong in going to prevent them, to order them to go to the Marandahn Mosque, must be left out of consideration, in deciding this case, except in so far as the intention is apparent. For the disturbance that took place the defendants must be held responsible, as it cannot be held that they had a legal right to prevent other Mohammedans from going to prayers at New Moor Street Mosque, on the Festival of 'Hadjie Peronal,' or any other occasion. The defendants and others did prevent complainants and others from having prayers as was intended; and a great row, a great noise ensued, and there was a disturbance of the public peace. It need not be doubted that the defendants went to the Mosque with the intention, not to commit a breach of the peace, (as the 1st defendant is known as a respectable, peaceable man), but to prevent what they consider to be a great innovation in their religious worship, a great schism in their religious association. The complainant and others state, that the 1st defendant came with about 10 or 15 people. With so small a force, he surely could not be so foolish as to intend to fight with the '400 or 500' of the complainant's party already assembled at the Mosque. If the temper of the complainant's party be like that exhibited by the complainant in the witness box, the great commotion and hubbub that took place, may be easily accounted for. But still the defendants must be held responsible for the disturbance of the peace that occurred. Their zeal for the integrity of their religious system got the better of their discretion. Those whose duty it is to take steps for the preservation of the public peace, and to give effect to the Law, cannot in any way interfere in the appointment of Priests, or with the religious observances of the Mohammedans of Colombo; and those who actually disturb the public peace must be held responsible for their conduct, whatever may be the cause of quarrel respecting their own affairs.

"As to the assault charged against the 3rd defendant, the complainant states that the 3rd defendant struck him on the mouth. From the extraordinary bad conduct of the complainant in the

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witness box, little or no reliance can be placed upon any uncorroborated statement of his. *Ahamadoe Lebbe Uduma Lebbe Maricar* is the only witness who says he saw the 3rd defendant strike the complainant, and the value of his evidence may be estimated from this fact, that he positively avers that he 'did not hear from first to last anything said about going to Marandahn to pray,' and again 'he (2nd defendant) did not say *Po—Po—Marandaneque Po!*'—while at the same time he was close to the complainant, when the defendants were abusing him and the Priest. On the contrary, the complainant states—'I do not know why the defendants interrupted us; they did not explain, only said, '*go to Marandahn—go to Marandahn, go!*' Now, either the complainant or the said *Ahamadoe Lebbe* has stated that which is not true. This direct and material contradiction raises such a doubt respecting the blow said to have been struck by the 3rd defendant, that it is only fair to give him the full benefit of that very reasonable doubt.

"Amongst much shuffling and equivocation, there is sufficient evidence to shew, that the defendants did object to the reading of *Cotuba* at the Moor Street Mosque on that day the 12th instant, it being the Festival of '*Hadjie Peronal*;' and it comes out from both parties that *Cotuba* was formerly read only at Marandahn on that Festival. Had the defendants not have gone to the Mosque and made the objection to the service about to be performed, there would have been no tumult, and therefore the blame rests with them of having disturbed the peace. Viewing the matter as amongst themselves, and with reference to their religious customs, observances and prejudices, the defendants cannot be said to be in fault, in wishing to have their important Festivals conducted as they were before their quarrels commenced; but that view of the subject cannot for a moment be entertained or recognised in the decision of this case. Mention is made in the proceedings of the presence, near the Mosque, of three members of the Bar; that they went there to witness what might occur, and to endeavour to prevent a breach of the peace. It will be for these gentlemen to consider, whether it was quite consistent with their position as professional men, thus to identify themselves with a party in the quarrel amongst Moormen.

"Considering all the circumstances of this case, the nature and extent of the disturbance; that little or no violence was used; that the commotion lasted for so short a time, and was so easily put a stop to; that the complainant's party, having assembled in such a large number, and from an early hour, seemed prepared for tumult, should there be any interference with them; that the evident in-

tention of the defendants was not to commit a breach of the peace, but that they went, through an indiscreet zeal, in defence of the integrity of their religious system; a small fine will be sufficient to meet the ends of Justice, and to vindicate the Law. But if, after all that has been done in this case, breaches of the peace should occur amongst the Moorish inhabitants, those who may be found guilty of disturbing the public peace, no matter who they may be, or whatever party belonging to, may expect severe punishment.

"The said three defendants are adjudged to be guilty of disturbing the public peace, and are sentenced to pay each a fine of Ten shillings.

J. DALZIEL, P. M.

The defendants having appealed against this conviction, *J. Selby* appeared for the appellants;

Dias, (with him *Muttukistna*,) for the respondents.

The Supreme Court however, before pronouncing any judgment in the case, directed the following order to be communicated to the Police Magistrate.

"The proceedings in this case having been read, it is ordered that they be remanded to the Police Court. This charge not having been framed under any special Ordinance, and the words in which it is preferred failing to define in legal terms any offence known to the law of England or Holland, the Supreme Court has had some difficulty in arriving at the specific character of the offence meant to be imputed to the defendants. The Supreme Court cannot presume that the Police Magistrate has been entertaining a charge not within his jurisdiction, and being itself required by the Ordinance No. 7 of 1854, § 2, not to hold any charge to be insufficient by reason of any defect or imperfection in any matter or form, this Court has arrived at the conclusion that (to use the words of the Ordinance,) the offence intended to be charged in, and dealt with by the Police Court, was simply a breach of the peace.

"Whether the actual facts of the case would have warranted the Police Magistrate in coming to a conclusion that a breach of the peace had been committed by one or more of the defendants, it is impossible for this Court to say; from the unsatisfactory nature of his judgment, this Court has no means of ascertaining what act he, as the jury, has found to have been proved.

"This Court has no difficulty, as an exponent of the law, in declaring that mere abusive words, unless they contain an actual

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challenge to fight, or are accompanied by acts which amount to an absolute assault, or are calculated to strike terror into the peaceable bystanders, do not constitute a breach of the peace.

"From the words 'little or no violence' used by the Police Magistrate in his judgment, accompanied by the various alternations of opinion therein expressed, this Court is at a loss to know whether he has concluded that such a state of facts, as this Court has hereinbefore explained to be essential to a breach of the peace, did exist in the morning in question at the Mosque in Moor Street or not; and if they did exist, whether all or any of the defendants were actually, or constructively, agents in the offence. It is for him, as the jury, to find this fact, and this Court therefore remands this case to him for a specific answer upon that point."

Upon this order, the Police Magistrate forwarded the following letter to the Supreme Court:—

"*Police Court, Colombo,*
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"In compliance with the order of the Supreme Court, the Police Magistrate answers:—that on 12th August last, the complainant's party went to the New Moor Street Mosque to hold a religious service, which, before they quarrelled amongst themselves, was held only at the Marandahn Mosque, on the Festival of "Hadje Perunal;" that the defendants went to the Moor Street Mosque to prevent the holding of that service, and that they did prevent it accordingly.

"That such was their intention is proved by Mr. *De La Harpe*, who states that he was applied to by the 1st defendant's relative, on the morning of the 12th, to prevent 'an unusual thing,' the religious service, and reading of 'Cotuba,' at Moor Street Mosque. It is also proved by Mr. Prins, that the 1st defendant sent a message to him on that morning, that 'he feared there would be a disturbance at the Moor Street Mosque on that day.' A disturbance of the peace—a breach of the peace—did occur, which, clearly would not have happened had the defendants (and others) not have gone there and forcibly prevented the holding of the service that complainant and others intended to hold and were preparing to hold.

"The Police Magistrate has been for the last twelve years in his present Office, and is well informed respecting the contentions amongst the Moorish inhabitants of Colombo, and knows that very serious consequences are likely to ensue from quarrels such as that of 12th August last; and therefore, he deemed it advisable to

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explain at such length, in the judgment, the quarrels and proceedings of the two parties, which lengthy explanation he regrets to find has caused some obscurity. But no alternation of opinion was intended as to the fact that there was a breach of the peace, and that the defendants caused that breach of the peace, by forcibly preventing the religious service at the Mosque.

"The complainant states that the 3rd defendant struck him a blow on his mouth; in *that*, as to the actual blow, he was disbelieved for the reasons given; but it is held that the three defendants were present for a common purpose, acting in concert, in making a forcible invasion of the rights of the others—by angry words, gesticulations, raising of hands in a manner amounting to assault, in forcibly removing the mats spread for the intended service,—thus acting for a common purpose to prevent, and actually did forcibly prevent, the complainant and others from holding the religious service, causing a great uproar, pushing and shoving, and also striking; as Mr. *De La Harpe* saw one person with 'a very small mark on his face and the appearance of blood,' and heard a number of people crying out as if in terror, 'murder will be committed—come soon,' and he himself was squeezed in the crowd; and Mr. Advocate Muttukisna describes what occurred, then and there, as 'most decidedly a disturbance of the public peace.' By the words in the charge—'disturbing the public peace' is, in this case, meant a breach of the peace,—which it is held the defendants committed on the occasion in question.

J. DALZIEL, P. M.

On reading the foregoing letter, the Judges directed that the conviction of the Court below should stand *affirmed*.

September 16.

Sept. 16.

Present ROWE, C. J., and TEMPLE, J.

No. 2,787, *P. C. Mulletivoe.* } *Fernando* v. *Swamy*.

A conviction in a case, where the defendants had not been allowed time to obtain the attendance of their witnesses, set aside.

This was a complaint against three defendants for an assault. It appeared that a quarrel had arisen between the parties, owing to a misapprehension as to the right of fishing in the sea. The Court below found the defendants guilty of the assault, and fined them severally £2. An appeal being taken against this finding, it was

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alleged in the petition that the defendants were neither allowed time to bring their witnesses, nor to subpœna them. The Supreme Court referred back the petition to the Court below to ascertain the truth of the statement. On this, Mr. *Moir*, the successor of the Magistrate who had tried the case, reported that nothing appeared in the proceedings regarding the refusal of subpœnas; but that he understood from the clerk of the Court, that the defendants had not been allowed time to bring their witnesses, nor to subpœna them.

Rowe, C. J., thought that it was the very essence of injustice to refuse the process of the Courts to any party; that in the outstations particularly, where there was neither a press nor public opinion to control or guide them, the Magistrates should be all the more careful in their proceedings. He had no hesitation in saying that this was a miscarriage of justice, and that the *then* Judge was guilty of malversation.

The Supreme Court quashed the proceedings, and remanded the case for further evidence, that the Police Magistrate might have an opportunity of hearing both parties.

September 18.

Sept. 18.

Present Rowe, C. J., and Temple, J.

No. 18,089, *D. C. Colombo.* } *Candappa* v. *Ranewakegey.*

It is no objection to the admissibility of a Lease, that it has been executed by the Lessee only.

There was only one question of any importance in this case. A lease was put in evidence by the plaintiff, which appeared to have been executed by the lessee only. The present appeal was founded on the inadmissibility of the instrument.

Rust for the appellant.] The lease was improperly received. The Ordinance No. 7 of 1840, cl. 2., requires that such instruments should be signed by the party making the same. The party who signs the lease ought to be the lessor, and it cannot, with any propriety, be said that it may be signed by the lessee alone. The lessor made the lease in favor of the lessee. If it be true, as was suggested in the case, that in this country leases are sometimes signed by the lessee only, it must result in this, that the lessee, who is not the owner of the land, could establish an interest in it. There are, indeed, some decisions of the Supreme Court against this view, but there are others also of the same Court the other way. No. 1,235, C. R. Point Pedro, 13th June, 1853.

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The case No. 7,933, C. R. Galle (21st February 1854,) is certainly against the view now submitted; but in this conflict of decisions, it is quite open to the Court to reconsider the matter, particularly as it would seem that the latter decision is quite opposed to the clear and distinct words of the Ordinance.

The decision of the Court below, was *affirmed.*

No. 15,375, *D. C. Caltura.* } *Don Siman* v. *Don Andris.*

A party may call his proctor as a witness to contradict the evidence of his own witnesses.

In this case the District Court had received the evidence of the plaintiff's Proctor to contradict one of his own witnesses. On appeal,—

Dias for the defendant and appellant.] The Proctor's evidence was improperly received. True, that under the Common Law Procedure Act of 1854, a witness may be contradicted, but the Judges in England have strongly disapproved of the practice of Attorneys offering themselves to contradict their own witnesses. 2 *Taylor on Evidence*, 1,068.

R. Morgan contra.] The question is not whether the practice is good or bad, but what is the law on the subject. It is admitted that a party may adduce evidence, to contradict one of his own witnesses; if that be so, whether the evidence be that of the attorney in the case, or of any other person, it can make no difference.

Affirmed.

September 22.

Sept. 22.

Present Rowe, C. J., and Temple, J.

No. 23,067. *D. C. Kandy.* } *Silva*, Administrator of *Catherine Perera* v. *Carolina Hamy.*

By the Kandian Law, an illegitimate child is entitled to the acquired property of his Father.

The plaintiff claimed certain lands as the sister and heir of *H. Perera.* The defendant in her answer disputed the plaintiff's right, and claimed the property as the widow of *H. Perera*, for herself and on behalf of her child. At a previous trial of the case, the District Judge found that the defendant had not been married to *H. Perera*, but that his child, though illegitimate, was entitled to the property as the acquired property of the father; and gave judgment accordingly. On appeal against that judgment, the

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Supreme Court was of opinion that the Court below was wrong in departing from the pleadings, the answer having set up a marriage, which had not been proved; and thereupon remanded the case to allow the parties to proceed on amended pleadings. At the second trial, upon such amended pleadings, the Court below held the defendant entitled, on behalf of his child, to the property.

On appeal against this judgment,—

W. Morgan for the plaintiff and appellant.] The questions are—1st. Whether the Kandian law ought to govern the case. *H. Perera* was a low-country man, and both he and defendant were Christians. On reference to the Proclamation, it will be found that the Kandian law does not apply to low-country people. *Proc.* 2. March 1815, cl. 4. Again by sec. 8 and 9 a distinction is drawn between native Kandians and those who merely resort to Kandy. In the *Proc.* of 1818, p. 224. cl. 7, Kandians alone are mentioned; and in the same proclamation, p. 228, cl. 51, a provision is made in respect of low-countrymen and foreigners, who are to be subject to the Agent of Government alone, whereas the Kandians are to be under the Agent and Assessors. It seems therefore clear, that the *lex loci* was not to apply to low-country people. If the contrary were held, it will follow that polygamy and polyandry ought also to be countenanced among them.

2nd. Admitting that the *lex loci* would apply, can an illegitimate child inherit acquired property? The question of Marriage cannot be entered into now, for the Court has already held that there was no Marriage. *Armour*, p. 135, is the only authority in support of the view of the District Judge. The District Judge refers to a case in the late Judicial Commissioner's Court; but that is a case of marriage, as the record will shew. *Marshall* refers to this rule, in p. 338 cl. 78 of his *Digest;* but it would appear that, that was a case of a low-caste wife, and it has therefore no application whatever to this case. Now, if the Law was doubtful, the Court should at least have taken evidence on the point. The importance of the case demanded such a proceeding. Even if Armour's law was good and sound, it did not apply here, because the District Judge found that both were of equal caste. Again, the defendant said, that she had lived with Madooma Banda, and left him to live with the deceased. In such a case the parentage should have been proved conclusively. 1 *Taylor on Evidence*, 109.

R. Morgan contra.] As to the first point I need only say a few words. The laws of a conquered or ceded country are retained till changed by competent authority. *Clark's Colonial Laws*, 4, 5.

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The proclamation referred to applies only to the mode of administering justice. [Rowe, C. J. You need not labour that point.] As to the 2nd point, the Kandian law is as the District Judge has laid it down. Much of the difficulty has arisen from the order of the Supreme Court, in going upon a question of pleading, without deciding upon the merits. The Judge held no marriage *de facto*, but that, under the circumstances, the child was entitled. He seems to have held that illegitimate children are entitled to the acquired property. The facts of the case however, prove a clear marriage; and the Supreme Court, on the last occasion, had sufficient before it to decide on the merits; but it avoided that question by going on a question of pleading. The Kandian law being somewhat uncertain, we must look to general principles. [Rowe, C. J. Is there any case in which Armour's dictum has been upheld?] The case referred to by the Judge is set out in his judgment. [*W. Morgan.* That is a case of a marriage with a low-caste woman.] It is said that *Armour's* case does not apply in every respect, but if it applies to the children of an inferior woman, *a fortiori* to the children of a woman of a superior caste.

Affirmed.

No. 15,498.
D. C. Galle. } *Assen Saiboe* v. *Alima Oemma.*

It is no objection to an action by the Lessee against his Lessor for quiet possession or for damages, that the parties who have disturbed him have not been joined in the action.

In this case the plaintiff sued his lessor to compel him to give quiet possession of certain premises leased to him, or for damages. The Court below non-suited him on the ground that the parties who had disturbed him and actually kept him out of possession, had not been joined as defendants.

On appeal, the Judges having intimated that the nonsuit was improper, *R. Morgan*, for the respondent, agreed to allow judgment for 24*s.* as damages.

Dias for the appellant insisted upon full damages, and cited *V. d. Linden*, p. 198.

Sed per Curiam.] The decree of the Court below is set aside, and judgment entered for the plaintiff for the 12*s.* advanced by him, together with 12*s.* interest, and costs in the first class.

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October 8.

Present STERLING, J., and TEMPLE, J.

No. 9,534.
P. C. Matelle. } *Parenegamme* v. *Armogem Chitty.*

Where the summons in a Police Court did not contain the name of the complainant nor state the offence with sufficient certainty, the Supreme Court, on appeal against a conviction thereon, quashed the proceedings.

In this case the defendant appealed against a conviction of the Court below, and the proceedings were quashed, for the reasons stated in the judgment, which was as follows:—

"It is ordered that the proceedings be quashed. The summons served upon the accused is not in conformity with the Rules of the Police Court; it neither informs him of the name of the person complaining against him, nor what he is charged with taking forcible possession of; and it is, consequently, quite impossible for him to have been prepared to meet so utterly unintelligible a charge."

No. 14,253.
D. C. Badulla. } *Iddemegedere* v. *Tembe Coomboore Appoo.*

The Supreme Court will grant a new trial, where it is satisfied, either by the record, or by independent proof, that evidence has been improperly rejected.

The appellant in this case complained that certain evidence tendered by him had not been received. The decree of the Court below was set aside and the case remanded for a new trial, to let in evidence as to adoption and assistance; and *per Curiam*,—"It appears to the Supreme Court desirable, that in all cases when parties appeal, in part or in whole, on the ground that their witnesses have not been heard below, they should be in a position to prove (if omitted from the record where it should properly appear,) that they offered to produce those witnesses and that they were rejected."

No. 28,503.
D. C. Kandy. } *Ramen Chetty* v. *Paleniappa Chetty.*

This was a question of preference between two Mortgagees. *Abdul Mohidien Kandoe* by bond, mortgaged with the plaintiff a house with the muniments of title he then possessed relating to it, as collateral security. These documents, consisting of the Government Agent's receipt or certificate for the purchase-money, were afterwards lodged by the plaintiff's then partner, on behalf of

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Abdul, with the Government Agent, for the purpose of obtaining from him a grant in the name of the mortgagor. This grant being completed, the mortgagor received it from the Agent and deposited it by way of mortgage first with *Dunuwille*, then with *Stainton*, and then with the defendant, who afterwards obtained judgment and issued execution to sell the house. The plaintiff having likewise obtained judgment on his bond, brought the present action, claiming the proceeds of the sale and charging the mortgagor and the defendant with fraud and collusion. The answer denied all the allegations, excepting the mortgage to the defendant, and alleged that the money was raised by the mortgagor from the defendant to discharge a prior mortgage to *Stainton;* and charged the plaintiff and the mortgagor with fraud. The Court below, on the ground that defendant had sufficient notice of the existence of a prior mortgage to plaintiff, gave judgment for the plaintiff. Hence this appeal.

Rust for defendant and appellant.] The question of notice was not satisfactorily established. The evidence of the Notary, the only witness from whom that fact could be gathered, was very suspicious, and does not go to establish that the defendant had notice of the prior mortgage, the Notary himself being a perfect stranger to that transaction. The muniments of title were deposited by the plaintiff, on behalf of *Abdul*, with a view to the grant being made in *Abdul's* favor, who was thereby enabled to commit a fraud. It is a well known rule of law, that even an innocent party should be the sufferer, when he puts it in the power of another to commit a fraud,—but here, the plaintiff was no innocent party, for he delivered the muniments of title to the Government Agent, as agent of *Abdul*, by whom it was mortgaged first with *Dunuwille*, and then with *Stainton*, who successively instituted actions for the money. The English cases are very clear, as collected in 5 *Jar.* and *By.* on *Conveyancing*, 480. Whenever the holder of deeds, through any negligence, enables the owner to get possession of them, he is guilty of fraud. The latest case upon the subject is *Rice* v. *Rice*, 2 Drew 73, 20 Law Review, 180; where the whole subject is fully considered. [TEMPLE, J. Is not all that overthrown by your client having taken the mortgage with notice of the plaintiff's mortgage?] The defendant was not the first mortgagee after the grant had been obtained from Government, but the third. If the owner or holder of the deeds has been guilty of laches, he ought to be the sufferer. Where were the plaintiffs all this time? *Dunuwille* and *Stainton* were not affected with notice, and it must be admitted that we stand in their shoes *pro tanto;* no attempt

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even has been made to shew that *Stainton* was affected with notice. Strange that the plaintiff did not make his application to Government for the grant. Moreover, there are his own admissions in a solemn affidavit. It appears he was in Ceylon in 1853, and took no steps whatever against the subsequent mortgagees. True the plaintiff had been away on the Coast for some time; but the defendant's mortgage bond was in 1854, nearly three years after the plaintiff's return from the Coast; there is such *crassa negligentia* on the part of the plaintiff, in thus enabling *Abdul* to commit a gross fraud on innocent parties, as amounts to legal fraud on his part. The only evidence of notice was the Notary's; but when it came to be tested by cross-examination, he said, he knew nothing of his own knowledge, and had never seen the bond; but on the other hand, there was such gross fraud and monstrous negligence on the part of the plaintiff, as entitled him to no consideration or indulgence whatever. All the Equity in the case is on the side of the defendant, and the Law also; for *Burge*, after laying down the doctrine, that a mortgage effected by a party not having the *dominium*, was by the law of France and the Civil law, preferred to one effected after he had obtained the *dominium*, whereby he specially hypothecated the property, goes on to lay down, in vol. 3. p. 175, that this doctrine was not admitted in Holland, but that a special subsequent mortgage is preferred to one effected before the *dominium* was obtained,—that the former is equivalent to a general mortgage, the latter to a special mortgage. This very case is put in the passage quoted from *Voet* lib. xx. tit. 3. n. 6. *Abdul* had an inchoate title, and it was not complete till he obtained the grant from Government. This gives a legal title to the defendant, and I have already endeavoured to shew, that he had an equitable title also. When by the laches and gross negligence of the plaintiff and of *Abdul*, the perfected title got into the hands of the defendant, he was not only as an innocent party entitled to priority, but he became also entitled to priority by law. [TEMPLE, J.—Does not a certificate from Government confer a sufficient *dominium*, and is it not a kind of preliminary grant?] The Ordinance No. 12 of 1840, clause 8, shews that a party in possession under Government had no absolute right to a transfer.

R. Morgan, (*Lorenz* and *Coomaresamy* with him), for the respondent.] Our mortgage was undoubtedly prior to the defendant's. The Government called in the certificates to give a grant in perpetuity. If therefore the deeds were parted with on any colourbale pretence, it is no negligence. The Court below has held that the defendant was fully aware of the mortgage to the plaintiff,

believing the evidence before it. Whether *Stainton* or *Dunuwille* had notice is immaterial, so long as the defendant had notice; and that is fully shewn. The authority quoted is inapplicable, as our mortgage was not general but special. 3 *Burge*, 172.

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Rust in reply.] The plaintiff should have given notice to Government that the grant when prepared should have been returned to him, as he held a mortgage; but not having done this, he encouraged *Abdul* to commit this gross fraud on an innocent party. *Burge* says that the doctrine quoted on the other side was applicable only in France, and not admitted in Holland. 3 *Burge*, 175. The question is a very important one, and I beg to be allowed to argue it before the full Court.

TEMPLE, J. said, that the Judges found no difficulty in the matter. The question of notice being believed by the District Judge, that superseded any negligence that might be imputed to the plaintiff. The defendant lent the money to redeem the former mortgage with full notice of a prior special mortgage. The plaintiff had first an equitable title, which was afterwards strengthened by a legal title from Government. *Affirmed.*

October 11.

Present STERLING, J., and TEMPLE, J.

October 11.

No. 6,407. *D. C. Jaffna.* } *Peterson* v. *Anthony Pulle.*

This was an action to recover possession of a certain room, in a house belonging to the defendant, and was founded on two documents; an Agreement to sell, and a notarial deed of Transfer, both granted by the plaintiffs in favour of the defendants. In the agreement there was a clause to the following effect: "In a room called plaats-kamer, standing on the south of the verandah of the said house, we four persons, ourselves, our child Annapulle, and her husband Thomas McKeon, are to live and occupy the said plaats-kamer during our life-time; and they the purchasers or their heirs should not tell us to go out from the said room." The Bill of Sale was to the following effect,—"Know all men by these presents that we the undersigned Alvertina and Sophia Peterson of Jaffna, for and in consideration of the sum of £97 10*s.* sterling lawful money of Ceylon, the receipt whereof we do hereby acknowledge to have received, *have according to the intent and meaning*

A Conveyance founded on a previous Agreement, and which conveys the premises "according to the intent and meaning of" such previous agreement, incorporates the reservations contained in the agreement, although the *habendum* in the Conveyance professes to convey the premises *absolutely*.

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of our agreement dated the 18th day of February 1848, *granted, bargained, sold, assigned and transferred, and by these presents do grant, bargain, sell, assign and transfer,* unto Deogopulle Anthonipulle and Deogoe Fernando Anthonimottoo, both of Kaits, named in the said Agreement, our hereditary house, ground, well, and plantations, situated, &c. To have and to hold the said premises, with their and every other of their appurtenances, to them the said Deogoepulle Anthonipulle and Deogoe Fernando Anthonimottoo, their heirs, executors, administrators and assignees, as their own and lawful property *absolutely.* And we the said Alvertina and Sophia Peterson shall for ever warrant and defend thereto. In witness whereof, &c." The Court below dismissed the plaintiffs' libel with costs, on the ground that the defendants were not parties to the agreement, and that although it appeared that the transfer-deed was executed with reference to the said agreement, still the said transfer gave an absolute right to the property in question, without reserving a right to the Verandah room; and that the transfer deed having superseded the agreement, any reservation should have been recited in the said transfer.

Lorenz for plaintiff and appellant.] The *habendum* (which contains the words relied upon by the Court below) was unnecessary, and the granting portion may be put into effect without it. There was an agreement which was afterwards converted into a conveyance, and the agreement is incorporated in the deed, and must be taken as a part of it. Deeds like this, drawn up by native Notaries, cannot be fairly subjected to the strict rules of construction as laid down in the books. All that must be looked to is the real intention of the parties, and it cannot be urged that the agreement which is expressly referred to and made part of the subsequent deed was not intended to be carried out. Even according to the strict rules of conveyancing, the subsequent deed must be taken in connection with the previous agreement. 9 *Jarman on Conveyancing*, 86,311,457. *Carter* v. *Madgewick* 3 *Lev.* 339; *Easterby* v. *Sampson*, 1 Cr. and J. 118.

Morgan, (*R.*) for defendant and respondent.] The transfer is the later instrument, and it is quite unqualified. To construe it in connection with previous agreement would be to vary materially the operative part of the transfer. True, in the agreement there was a certain right reserved, but the parties by subsequently executing an absolute conveyance, would appear to have given up that reservation. The recital is only a reference to the agreement, and in the *habendum* it is an absolute transfer for the very word "absolutely" is used. In a case of this kind the *habendum* must

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rule. 9 *Jarman on Convey.* 87. Though inconsistent with the premises, the *habendum* should take effect. *Earl of Derby* v. *Taylor*, 1 East, 502. A deed will not be set aside on the ground of mistake, unless the mistake is undoubtedly apparent, which is not the case here. The *habendum* is perfectly inconsistent with the premises and ought to rule.

Sed per Curiam.] The decree of the 9th November 1855, was reversed; it appearing to the Supreme Court that the deed is to be considered with reference to the Agreement.

October 18.

October 18.

Present STERLING, J., and TEMPLE, J.

No. 3,705. *D. C. Galle.* } *Candappa* v. *Sinne Lebbe.*

An Injunction granted by a District Court, to restrain the heirs of a deft. from alienating property in fraud of a judgment, was upheld in appeal, although the judgment had been irregularly entered and had not been enforced for seventeen years;—it appearing that the heirs of the defendant had advertised the property for sale immediately after they had obtained time upon a rule issued by the plaintiff's heir, to shew cause why the judgment should not be revived.

This case was commenced against the defendant in 1836. In 1837 the defendant died. In 1838 the Secretary was appointed official administrator of the estate; and in 1839 he as such official administrator, admitted the plaintiff's claims, and a judgment was entered accordingly. About two years after, the plaintiff withdrew from the record the documents filed by him. From that time till 1856 (seventeen years) no further steps were taken by the plaintiff. In June 1856, certain parties, calling themselves the heirs of the plaintiff, moved for a rule to revive judgment against certain other parties, alleged to be the heirs of the deceased defendant. On the 23rd June the defendant's heirs appeared and took 8 days' time to shew cause. On the 24th, the plaintiff's heirs applied for an injunction to prevent one of the defendant's heirs from selling certain premises, which they alleged were liable to the judgment.

The injunction being granted, the defendant's heirs obtained a rule to shew cause why it should not be dissolved. This rule was upon argument discharged; and the present was an appeal by the defendant's heirs against the order discharging the rule.

Dias, for the appellant.] The whole proceedings were grossly irregular. The deceased defendant was sued as the administrator of a certain intestate estate, and not in his own right, and his administrator the Secretary was improperly made a party to the record. The proper course was to have taken administration *de bonis non* to the estate of the defendant's intestate. The Secretary therefore did not, according to law, represent the defend-

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ant's intestate, and the judgment obtained upon his admission was a mere nullity. The next irregularity, was the rule applied for and obtained against the defendant's heirs to make them parties to the record. If the defendant's representatives can be and are liable to be made parties, which, as already shewn, cannot be done, the Secretary, as official administrator, was the representative of the defendant, and he was already a party on record. Again, this rule was granted upon a mere motion, without any affidavit, which is contrary to the well known practice of the District Courts. If the heirs of a deceased party desire to become parties to the record, such an application must be supported by an affidavit. The injunction itself was improperly granted; 1st, because there is no libel filed, and a libel according to several decisions of the Supreme Court, is absolutely necessary; 2nd, there was no affidavit or any other legal evidence before the Court, as to the right of the party applying for the injunction. *V. D. Linden*, 440; and lastly, on face of the proceedings, the judgment appears to have been satisfied, and the District Judge himself seems to be of this opinion, for he says that two years after the judgment, the documents filed in the case were withdrawn by the plaintiff. Under these circumstances, the rule to dissolve the injunction should be made absolute.

W. Morgan contra.] The simple question before the Court was, whether or not the rule to dissolve the injunction was properly discharged, and the many irregularities referred to on the other side cannot now be looked at, as there is no appeal from them. It is urged, that the heirs of the defendant were improperly summoned upon the rule to make them parties to the record. This is not so. They were summoned merely as the heirs of *Jaynambo Natchia*, whose administrator the late defendant had been. In the affidavit filed by the respondents, it was alleged that the proposed sale was of a land the property of the said *Natchia*, and that that was the only property left for the satisfaction of the judgment. If that were so, the injunction was properly granted, else irreparable damage would accrue to the respondents. A Libel is not necessary in all cases to found an injunction upon. There may be cases of such emergency (and the present is one), which will not admit of any delay. All the parties were before the Court, and the Court had the authority to direct any one of them to abstain from an act which might interfere with the rights of the litigants. *Marshall*, 231. On the 23rd of June the defendant's heirs appeared to the rule to shew cause why they should not be made parties to the record, and obtained eight days'

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time. In the meanwhile, on the 24th, they advertised the property for sale, clearly with the view of defeating the respondent's rights to recover their judgment. The remedy is in their own hands, and if they can shew, as has been urged on the other side, that the judgment has been satisfied, the injunction will fall to the ground. The course adopted by the District Judge was absolutely necessary to prevent further litigation.

Dias in reply.] The irregularities in the case admit of no defence, and none has been offered; but it is said that the simple question was whether or not the rule to set aside the injunction had been properly discharged. In discussing that question the Court must necessarily look into the regularity of the application for the injunction; and it is unquestionably irregular, for want of a libel and an affidavit supporting the right of the applicant. The affidavit filed was not to the purpose. It merely stated that the land was advertised for sale, but did not contain any allegation as to the rights of the parties applying for the injunction. The right to grant injunctions should not be exercised except upon strong grounds. It is an *ex parte* proceeding, and liable to abuse.

Affirmed.

No. 21,768.
D. C. Colombo. } *Sammogam* v. *Sarewane Muttoe.*

On an application for provisional judgment upon two Promissory Notes, the mere fact of the plaintiff having after the Promissory notes became due, received another note and a cheque from the defendant, is not a sufficent answer to the application.

The question in this case arose upon an application for Provisional judgment. The plaintiff sued for the recovery of a certain balance due on two Promissory Notes, dated 12th September 1855, and 12th June 1856. The first had fallen due in December 1855, and the second in July 1856. The plaintiff in his examination admitted that in March 1856 the defendant granted him another Promissory Note for £200, which he had discounted at the Bank, and received part of the proceeds. He also admitted having shortly before the suit received a cheque from the defendant for £50. Upon his examination it was contended that provisional judgment should not pass; but the District Court over-ruled the objection and granted the application. The present was an appeal against the order.

Dias for the defendant and appellant.] This is not a case for provisional judgment. The mere admission of the defendant's signature to the Promissory note was not sufficient to entitle the plaintiff, in the face of his admissions, to provisional judgment.

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Here there was sufficient to raise a strong presumption against the plaintiff's claim. *Vander Linden*, 408. The receipt of another promissory note and of a cheque, after the two notes sued upon had became due, is a strong presumption of their having been satisfied; at all events it was a case in which an early day should have been fixed for the trial of the principal case.

W. Morgan, *contra*, was not called upon by the Court.

Affirmed.

No. 18,767.
D. C. Trincomalie. } *Buttery* v. *D. Rustomjee.*

In an action against the Owner and Master of a Vessel for negligently conveying certain goods from *Colombo* to *Trincomalie*, the first defendant, who was a resident of Colombo, pleaded to the jurisdiction; but his plea was over-ruled below and in appeal, on the ground that the cause of action, which was the non-delivery of the goods, had accrued to the plaintiff in *Trincomalie*.
2. The Supreme Court, observing however, that the Owner and the Master had been improperly joined in the same suit, non-suited the plaintiff.

In this case the plaintiff sued the defendants, the Owner and Tindal of a vessel, for damages in respect of certain goods conveyed by the defendant from Colombo to Trincomalie. One of the defendants, the first, pleaded to the jurisdiction. The District Court over-ruled the plea, and gave judgment against both the defendants. Against this judgment the present appeal was taken.

W. Morgan, for the appellants.] The first defendant resides at Colombo, he is therefore not within the jurisdiction of the District Court of Trincomalie. The "matter or thing" complained of in the libel was, that out of the casks consigned to the plaintiff by *Milne Cargill and Co.*, some part of the wine had been drawn by removing the bung, whereby the rest was damaged. [STERLING J. The cause of action was the non-delivery of the cask of wine in good order. The Court is against you on the question of jurisdiction. It appears however, that both the Owner and the Master have been joined in this suit, which we think cannot be done.] They cannot of course, be joined in this action. The law is quite clear on that point.

Rust, *contra*.] It is not competent for this Court to entertain any objection on the score of misjoinder. The only question is, whether the first defendant was liable to be sued in the District Court of Trincomalie, and there can be no doubt as to the correctness of the decision below, which should be affirmed. [STERLING J. The whole case comes up before this Court in Appeal.] No. Only the point raised by the first defendant, who had specially pleaded to the jurisdiction. [STERLING J. This Court cannot be called upon to make an idle order, as your client cannot succeed in the action.] The question of ultimate success cannot be

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gone into now. The objection is purely a technical one. [STERLING, J. It is a substantial objection.] At the present stage of the case, the Court can only consider the point raised by the first defendant, who alone has pleaded in the case. [STERLING, J.—You must convince the Court that the defendants are rightly joined.] It is not an uncommon thing to join the Owner and Master of a vessel, for if the latter only were sued and judgment obtained, execution could not go against the ship. [STERLING, J.—That is only as to the execution, and does not touch the point before the Court.] It would be perfectly competent to the plaintiff to waive one of the parties, if so disposed, and the Court might give judgment against the person actually liable. This Court has repeatedly held, that in case of misjoinder the judgment should be for or against the party who is found on the merits to have a good cause of action, or to be liable in damages. [STERLING, J. The question is, can you obtain a joint judgment?] I do not know that it is necessary. This is a case against carriers. [STERLING, J —The Court is against you.] I hope it will not nonsuit the plaintiff without giving its judgment on the question of jurisdiction. [STERLING, J.—There is no objection to that.] Then I must ask for the judgment of the Court on the point before it, and for leave to amend. [STERLING, J.—How can you amend?] By striking off one of the defendants, as the plaintiff might be advised. [STERLING, J.—That would be a fresh action.] The Courts have always allowed amendments liberally, and especially under the circumstances of this case. The objection as to misjoinder not having been taken in the Court below, of course the costs will be divided generally. We have succeeded on the plea put in by the first defendant, and on appeal also; but the plaintiff is nonsuited on quite a different point.

STERLING, J.—The order of the Court below is set aside. The Supreme Court is of opinion that the cause of action upon which the plaintiff has declared arose at *Trincomalie;* but as he has joined parties, whose liability is several and not joint, it is decreed that he be nonsuited. The objection not having been taken in the Court below, costs are divided.

No. 14,952. *D. C. Galle.* } *Goenesekere* v. *Sinne Lebbe Marcan.*

A Planter is by custom entitled to live on the land planted by him.

The judgment of the Court below, which decreed certain lands to the plaintiff, was amended on appeal, by the defendant (who had been proved to have planted the land and built a house upon

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it), being allowed, as planter, to live on the land, according to custom. It was held, however, that he could not, in repairing the existing house, encroach upon the soil, and would be bound, if required by the plaintiff, to pull down any encroachment already made.

Oct. 29.

October 29.

Present ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 14,456. *C. R. Jaffna.* } *Rengasamy* v. *Rengacutty.*

A Court of Requests cannot issue warrants in Mesne process.

In this case the appeal was on the merits, but it appeared from the proceedings that the defendant had absconded to the Coast, and on his return had been arrested by process of the Court.

TEMPLE, J. remarked, that the Court below had no right to arrest the defendant, as the Rules of Court did not allow it. The proper remedy would have been to enter up interlocutory judgment, and proceed under the Rules.

The judgment of the Court below was affirmed; but the Supreme Court called the attention of the Commissioner to the Rules for Courts of Requests, which give no power to arrest a defendant or to call on him to give security.

November 1.

November 1.

Present ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 1,086. *P. C. Caltura.* } *Fernando* v. *Sirikattogey.*

A person crossing a river across a sand-bank, does not "evade" toll under Ordinance No. 9 of 1845.

This was a charge for evading the payment of toll, by passing across from one bank of the river to the other, over the sea-shore near the toll station, not being a public highway, against § 13 of the Ordinance No. 9 of 1845. The facts were these. During some parts of the year the mouth of the Pantura river is closed up by the formation of a sand bank, over which people may cross over from one bank of the river to the other. This sand bank is between

the ferry and the sea. The defendant, who lives on the east of the high road leading to the Ferry, crossed the river over the sand-bank, which he could do without coming to the high road at all. Upon these facts the defendant was acquitted, the Magistrate holding that there was not a passing from a road over land not being a public highway. Hence the appeal.

The case was argued on the 18th October.

Dias for the complainant and appellant.] The construction put upon the words "from a road" was too narrow. To constitute a going from a road, it is not necessary that the party going should touch the road. The "going from" contemplated by the Ordinance, was equivalent to going *away from* a road. There are words in the 13th clause which would clearly cover this case, as "or shall fraudulently or forcibly pass by, over or through any place duly appointed for the collection of tolls;" again, "or if any person shall do any other act whatsoever in order to evade the payment of any tolls and which by the same would be evaded." The present was a case of passing *by* a place appointed for the collection of tolls. The facts of the case would warrant the conclusion, that the defendant did pass over or cross the ferry. Under the 3rd clause, the "crossing the ferry" was what makes a party liable to pay toll, and it may fairly be said, that passing a few yards below the usual place of crossing the river, or the ferry, was a "crossing the ferry" withing the meaning of the Ordinance. Again, the Ordinance does not attempt to lay down any particular acts as constituting an "evasion of tolls," and if it did, it would defeat its very object in leaving it open to parties to resort to other fraudulent practices in evading toll, taking care to avoid those expressly provided for in the Ordinance. This was very clear from that part of the 13th clause, which says, "or if any person shall do any other act whatsoever in order to evade the payment of any toll, and whereby the same shall be evaded."

Cur. adv. vult.

On this day Rowe, C. J., delivered the judgment of the Court.

Rowe, C. J.] The Judges did not concur with the reasoning of the Court below, but the conclusion arrived at was correct, as under the Ordinance, the defendant was not liable to toll. It appears from the 14th clause of the Ordinance, that a man may not hire his private boat to carry passengers; from which it is inferred that he may have his own boat to cross over; *a fortiori* he may cross over with his legs. It is in fact the common-law right in *England*, where tolls were not levied by Acts of Parliament, but by a kind of prescription by time out of mind.

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The Supreme Court considers that a fisherman, residing on the sea-shore, has a right to pass along the shore to his canoe, and that by so doing he does not evade the toll under the Ordinance.

No. 15,547. *D. C. Galle.* } *Silva* v. *Deondereliyenegey.*

Where a party, after the death of his wife (leaving children), sells a half of an estate, which belonged in common to himself and his deceased wife, his creditors cannot levy upon the other half.

The judgment in this case sets out the facts.

"That the decree of the Court below be set aside, and the case remanded for a new trial. Costs to abide the result.

"It would appear that the land belonged to *Fransiskoe* the judgment debtor, and that after the death of his wife *Sarah*, he sold half of the land to the plaintiffs; it would also seem, supposing this to have been his only property, that the other half devolved on his children, of whom the intervenient is one; and if so the judgment-debtor had no interest in the land when it was sold by the Fiscal in 1852, under the Writ against him. It therefore becomes essential for the District Court to find, 1.—Whether the sale to the plaintiffs was after the death of *Sarah*. 2.—When the other half devolved upon the intervenient and his co-heirs, if any; and whether the judgment-debtor had any interest in the land at the time the writ issued against him; because if he had, the whole land would seem to have been properly sold under the Ordinance No. 21 of 1844, which seems to have been in force at the time of sale."

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Present ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 29,219. *D. C. Kandy.* } *Barnes* v. *Calloo Appoohamy.*

It is a good cause of demurrer to a Libel founded on a Promissory note, that the note is insufficiently stamped. *Qu?* Whether, if the Plaintiff

This was an action for the recovery of money. The plaintiff declared upon two documents which were filed with his Libel. The former bore a stamp of two shillings, and was to the following effect:—"This is to certify that I Calloo Appoohamy of Matelle, have this 17th day of October 1855 purchased for the sum of £30 the ensuing crops of Arekanuts on the Gangaroowa Estate, the property of the heirs of the late Sir Edward Barnes.

proceeds on a Contract void under the Ordinance of Frauds, the Defendant may demur?

And furthermore that I have engaged to pay to Richard H. Barnes, superintendent of the said Estate of Gangaroowa, one half of the abovenamed sum of £30 on or before the 31st January 1856, and the remaining half on or before the 31st March 1856. *Calloo Appoohamy.* Witnesses. *M. S. Perry, Martin Perera.*

The second bore a stamp of one shilling. "This is to certify that I Calloo Appoohamy of Matelle, have this 21st day of January 1856, received from Richard H. Barnes of Gangaroowa £10, in which sum I hereby acknowledge myself indebted to the said Richard H. Barnes, and which I promise to repay to him within one month from the present date. In witness whereof I Calloo-Appoohamy have this 21st day of February 1856, at Gangaroowa signed my name to this. *Calloo Appoohamy.* Witnesses, *Thos. Davidson. G. M. S. Perry.*

The defendant demurred to the Libel; and the Demurrer being over-ruled by the Court below, the present appeal was taken against the ruling.

Morgan (W.) for the appellant, in support of the demurrer.] It is competent to demur to the libel, on the ground that the documents referred to and filed with it, do not entitle the plaintiff to recover. These documents form part and parcel of the libel. By the Rules of Practice all the documents alluded to in the pleadings should be deposited therewith. The case of *Clerihew* v. *Forbes*, No. 26,453. D. C. Kandy (C. M. 3. December 1853), shews that documents referred to are considered as incorporated with the libel. The first document in this case goes to establish an interest in land, and not being notarial, is invalid, under the Ordinance No. 7 of 1840. It was held by the Supreme Court in the Negombo case No. 5,670 (Miscellany, p. 84), that a contract relating to growing bunches of plantain should be notarial, and in the present case the contract is for a growing crop of Arekanuts. Chitty on Contracts, 272; *Emmerson* v. *Healis*, 2 *Taunt.* 38; where it was held, that a contract for a growing crop of turnips was within the Statute of Frauds. [STERLING, J. Are there no other decisions referred to in Chitty?] In page 273, a distinction is drawn between *fructus industriales* and the natural produce of the land. [TEMPLE, J. Are not Arekanuts *fructus industriales?*) So are Turnips. The second objection as to the documents being insufficiently stamped, is perhaps not so good as the first. But by § 5 of the Ordinance No. 19 of 1852, it is enacted that an insufficiently stamped document "cannot be *pleaded* or given in evidence in any Court or admitted to be good, *useful* or available, in law or equity." The documents in this case are clearly insuffieiently

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stamped, and they were *pleaded;* therefore the objection was properly taken by demurrer. It will be urged that if documents are insufficiently stamped, a remedy lies by payment of the penalty; but the objection must be held good, and if the defective documents can be remedied, the plaintiff may get that done and come into Court again.

Rust contra.] In considering this demurrer, your Lordships must look at the instruments. The first establishes no interest in landed property. [Rowe, C. J. But what do you say to the words of the Ordinance "shall not be pleaded or given in evidence if insufficiently stamped."] To that objection there are several answers. First, these documents are not pleaded, but simply filed with the libel in accordance with the 8th rule of July 1842. I was counsel in *Clerihew* v. *Forbes*, and contended that the documents upon which the libel was based must be held to be incorporated with it, quoting the rule in the English Courts of Chancery; but the best argument that they are not so incorporated is to be found in the very rule requiring them to be filed, for it does not make it compulsory, but only renders the party omitting to do so liable to certain consequences. It would be absurd to hold documents, if filed, to be incorporated with the pleadings, and if only referred to as they might be, not so: and yet an exception on the score that the deeds upon which the cause of action set out in the libel was grounded, were not filed of record, was over-ruled only the other day. And in *Clerihew* v. *Forbes*, the Supreme Court cautiously abstained from giving judgment for the defendant on that ground, although it was specially raised. If the judgment had proceeded upon this objection, it would have been an authority in the present case, but then the judgment was based on the fact that the libel disclosed no cause of action. Then again, if it be competent for a party to raise a preliminary objection, as in the present case, to the insufficiency of the stamps upon documents referred to in the libel, two trials would be necessary, the one to ascertain whether the objection was well founded, and the other upon the merits. [Sterling, J. A Court can always say whether an instrument is sufficiently stamped upon mere inspection.] The insufficiency of the stamp might depend upon a variety of circumstances. The document might be filed for a collateral purpose, and it might not be even necessary to produce it in evidence at the trial, and this really forms the main ground of objection to the present demurrer. The defendant might admit the document, or there might be evidence to support the libel without producing it at the trial. The demurrer is therefore premature. The words

"pleaded or given in evidence" must be read *in pari materiâ*, and can only refer to the trial. Then again, if the objection as to the stamp be upheld now, it will entirely defeat the provision in the following clause, whereby a party is enabled to get an instrument properly stamped at the trial. [ROWE, C. J. Surely these instruments are *pleaded*; the libel is founded on them. The words of the 5th clause are very strict, and would seem to make it incumbent upon the District Judge to see that a document filed with the libel is sufficiently stamped. TEMPLE, J. What right have you to go on with a case when the cause of action is founded upon instruments insufficiently stamped?] I say, the objection is premature, and can only be taken at the trial, and not even then, unless the instrument be given in evidence. The Court below, in overruling the demurrer, has held these instruments to be sufficiently stamped. [ROWE, C. J. No, the Court over-ruled the demurrer, holding that the defendant had no right to take it.] I maintain further, that the instruments were sufficiently stamped. [STERLING, J. What is the stamp required for a Promissory Note for £10?] One shilling and sixpence.

[The Court then held that the second document was insufficiently stamped.]

Rust.] Then the first document is a Promissory note, and sufficiently stamped. It bears a two-shilling stamp, which is quite sufficient for promissory notes not exceeding £30, the amount of this. [ROWE, C. J. It is surely a special agreement; it is not for value received, but to be received. STERLING, J. It has also a condition, the delivering of the arekanuts, which will prevent its operating as a promissory note.] It merely purports to be a certificate that a Sale has been effected, and then contains a promise to pay. It is precisely like one of the cases cited in *Story on Promissory Notes*, p. 15. This action has nothing to do with the crop, but is founded on the promise to pay. [ROWE, C. J. The Stamp Act is imperative on the Court. Both the documents are insufficiently stamped, and we are bound to protect the revenue. It was competent for the defendant to demur, and the demurrer must be upheld, and the decree of the Court below reversed.]

Judgment. That the order of the D. C. of Kandy of the 3rd September 1856, be reversed; the Supreme Court being of opinion that the two documents declared upon are insufficiently stamped, and that this objection was properly taken by demurrer; and that therefore it is not necessary to consider the other objection.

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No. 2,292.
D. C. Ratnapoora. } *Uddehawatte* v. *Naindelagey.*

Qu? Whether by the custom of *Ouderatte* and *Saffragam* a Husband has a life-interest in his deceased wife's Estate.

The question in this case was whether a Beena husband was entitled to a life-interest in the wife's property. The Commissioner held that he had a life-interest. It was stated at the bar that the Kandian law was the other way; but the Judges had doubts whether the *Ouderatte* and *Saffragam* rules were the same on the point, *Sir Charles Marshall* having held that the laws of the two places were not the same.

Morgan (*W.*) for the appellant, was not called upon.

The Case was remanded for a new trial, with the view that the Commissioner might call witnesses to certify as to the law or custom touching the right of a Beena husband to the lands of his deceased wife.

No. 3,042.
D. C. Ratnapoora. } *Don Bartholomeus* v. *Somitta.*

In land-cases before a Court of Requests, the value of the land ought to be stated in the Plaint.

TEMPLE, J. This is a claim for damages for default of services. The only difficulty I have is upon the ground of jurisdiction. It must appear that the value of the land in respect of which the services are claimed is within the jurisdiction of the Court.

Morgan (*W.*) for the plaintiff and respondent, urged that no objection had been taken on this score by the defendants. [TEMPLE, J. Consent, whether tacit or express, will not confer jurisdiction on Courts of Requests in land-cases above £10.]

Per Curiam.] The decree set aside, as the value of the land in respect of which the services were claimed is not stated in the Plaint, which is necessary to shew whether the Court has jurisdiction or not, which it will not have if the land exceeds £10 in value.

No. 2,757.
C. R. Ratnapoora. } *Mudelihamy* v. *Hattanchia Henea.*

The provision for opening up a judgment in a Court of Requests applies equally to an

The judgment of the Supreme Court in this case, fully explains the point involved in the appeal.

Judgment.—"The construction put upon the 17th and 19th clauses of the Rules by the Commissioner is incorrect. The Rules

contemplate the case being heard upon the day appointed for the appearance of the parties, and if on that day the defendant is absent upon summons served, the Court may hear the plaintiff's case *exparte* and give interlocutory judgment against the defendant. But under the 19th clause, the Court can re-open the judgment, if it is satisfied by the oath of the defendant, either that he did not receive the Summons in time to enable him to attend, and that he did not absent himself from home for the purpose of avoiding the service of the summons: or was prevented from attending by sickness or other reasonable cause; and this applies, although the defendant may have appeared on the Summons in the first instance, if he is absent on the day fixed for trial, which is only an extension of the day for appearance.

ex-parte judgment pronounced on the day of trial, after the defendant had appeared to the Summons. A written affidavit is not necessary for this purpose, the defendant being at liberty to shew cause verbally.

The Court is also wrong, in supposing an affidavit necessary. The defendant should be called upon to shew cause verbally, and ought not to be put to the unnecessary expense of putting in an affidavit."

No. 6,089.
C. R. Kornegalle. } *Welakatepatte* v. *Haterekorleraale.*

In this case the Commissioner imposed a fine on the defendant for contempt of Court, in putting forth a false defence to the action. *Held*, that making a false defence was not such a contempt as is contemplated by the 15th Clause of the Ordinance No. 10 of 1843.

Making a a false defence is not a contempt of Court, under sec. 15 of Ordinance No. 10 of 1843.

No. 28,503.
D. C. Kandy. } *Ramen Chetty* v. *Palleniappa Chetty.*

A petition having been presented to the Supreme Court praying that the decision in the Case No. 28,503, D. C. Kandy, pronounced by the Supreme Court (STERLING, and TEMPLE, J. J.) on the 8th October, 1856, might be brought collectively before the Judges sitting at a General Sessions;

The S. C. declined to entertain a Petition praying for Review of a judgment pronounced by two of the Judges.

ROWE, C. J., now called upon *Rust* for the Petitioner to begin, as it was an appeal from a decision of the Supreme Court, and the Judges wished to know if he had such right of appeal.

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Rust in support of the appeal.] The point upon which your Lordships wish to hear me is, whether the petition filed is in order; and whether an appeal lies from two Judges sitting in the Supreme Court to the full Court sitting in General Sessions. This is a petition to your Lordships, praying that a decision of the 8th October 1856, may be heard by the collective Court sitting at General Sessions, by way of Review. I am sure that, if I can shew that there is nothing in the constitution of this Court, or in the Legislative enactments, or in the Rules and Orders of your Lordships' Court, that militates against this prayer, your Lordships will be too glad to entertain such an appeal. I may state it as a general principle, that all Courts of Justice will aid a party feeling aggrieved by a decision of a lower tribunal, by giving him an opportunity of being heard before a higher tribunal. [TEMPLE, J. I certainly shall be glad to afford the appellant in this case the opportunity of a re-hearing, as the decision is my own—that is, I had read the case and had the principal management of it.] Bearing in mind this principle, I proceed to shew, not only that there is no law or rule preventing an appeal to the collective Court, but, on the contrary, a party feeling aggrieved by a decision of the Supreme Court, has an absolute right of appeal. I will not descend to verbal criticism; for appeal and review are convertible terms, and the Collective Court possesses the power of reversing the decree of the Supreme Court; but proceed to point out the power and constitution of the Supreme Court. To begin with the Charter of 1833, by which the Supreme Court was constituted, after providing for the power of a Judge on Circuit, it goes on, in cl. 47, to speak of General Sessions to be held before the three Judges "sitting collectively," and cl. 50 provides, that particular appeals may be heard at such General Sessions. The 51st clause provides for the time and place of holding such sessions. The 52nd clause (and it is to this clause that I beg your Lordships' particular attention) lays down the method of procedure in bringing any final decision of the Supreme Court, before the three Judges thereof sitting collectively at General Sessions, and the special manner in which appeals to the Queen in Council are to be brought before your Lordships, sitting collectively; and it provides, that *before* such appeal can be taken to the Queen in Council, "the judgment, &c.," intended to be appealed from, "shall be brought by way of review before the Judges of the said Supreme Court sitting collectively." It is therefore a condition precedent to an appeal to the Privy Council, that the judgment should be first reviewed by the Collective Court at

general sessions. This clause of the Charter has not been rescinded or in any way altered by a subsequent legislative enactment. [ROWE, C J. The whole of this machinery is apparently fitted to the state of things existing then.] I am endeavouring to shew, that in fact no alteration has been made. This Ordinance No. 11 of 1845, extended the right of appeal and allowed any party aggrieved by a decision of the Supreme Court, whether in Circuit or at Colombo, an opportunity of carrying (subject to certain limitations therein laid down) such decision to the Collective Court. That Ordinance has, however, been repealed by Ordinance No. 20 of 1852, § 14, and by the same clause certain provisions of the Charter with regard to the power of the Judge on Circuit are also repealed, inasmuch as this Ordinance substitutes the Supreme Court, sitting in Colombo without Assessors, for the Circuit and the Presiding Judge sitting with Assessors. The question now arises,—does Ordinance 20 of 1852, interfere with the right of a party aggrieved by any decision of the Supreme Court, to bring it by way of hearing before the Collective Court under the 52nd clause of the Charter? Is that clause abrogated? I submit not. The Ordinance after providing for the holding of Criminal Sessions lays down, in clauses 7 and 8, the method of hearing appeals from District Courts and Courts of Requests; and it is enacted by clause 7, that "the Supreme Court shall at Colombo hear and determine all appeals, &c., and exercise all such appellate powers, jurisdictions and authorities, as might heretofore have been exercised upon any Circuit by the Judge of such Circuit and Assessors, or by a Judge of such Court sitting at Colombo with three Assessors. In other words, the Supreme Court, consisting of three Judges, is substituted for the Circuit and Presiding Judge, and has precisely the same powers, and those only. By clause 8, such powers are to be exercised without assessors, and two of the Judges are constituted a quorum. This Court therefore, is neither more nor less than the Appellate Court, with the powers given by the Charter and a subsequent Ordinance to a single Judge, with only this difference, that it exercises such powers without assessors. The clauses of this Ordinance take the place of the provisions in the Charter for hearing and determining appeals from the District Courts of the Island. Having thus arrived at the powers your Lordships sitting here now exercise, we return to the 52nd clause of the Charter, and there find, as I have already stated, as a condition precedent to the right of appeal to the Privy Council, that the decision should be first brought by way of review before the Collective Court. The 5th clause of Ordinance 20 of 1852 speaks

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of a general sessions, shewing that such sessions still exist under the Charter. [ROWE, C. J. The 8th clause of that Ordinance gives to two Judges of this Court the powers conferred on the three by the preceding clause, providing thereby for the absence of the third from illness or any other cause. Put the case of the absence of one of the Judges from the Court of Queen's Bench sitting *in banc*, do you contend that the judgment of the others would not be the judgment of the Court of Queen's Bench?] It is not necessary for me to contend for any absurdity of the kind. I am arguing under the special provisions of an Ordinance. A writ of error lies from the decision of any of the English Courts *in banc* to the Exchequer Chamber. [ROWE, C. J. Just so; but is not the 52nd clause of the Charter the vestibule as it were, through which a party intending to appeal to the Privy Council must go?] No doubt it is, in those cases where a party can appeal to the Privy Council; but it goes further, and makes it "lawful for any person or persons being a party or parties to *any* civil suit or action depending in the said Supreme Court, to appeal to us, our heirs and successors in our or their Privy Council, against *any* final judgment, &c.," and then goes on to lay down the rules and limitations under which such appeal is allowed. The first, the only one with which I have anything to do, runs thus:—"*Before* any such appeal shall be so brought, such judgment, &c., shall be brought by way of review before the Judges of the said Supreme Court, collectively holding a general sessions at Colombo, at which *all* the Judges of the said Supreme Court shall be present, &c. &c." This review must precede the appeal to the Privy Council, and it may be, that the party may obtain the relief he seeks, and thus an appeal to the Privy Council become unnecessary. I have already shewn that "the said Supreme Court" spoken of in this clause, is the Supreme Court of the 7th and 8th clauses of Ordinance 20 of 1852; and it necessarily follows, that an appeal or review to the Collective Court is open to any party aggrieved by a decision of the Supreme Court, as my Client feels himself to be. [ROWE, C. J. But you say you do not intend to go to the Privy Council, and that indeed you cannot, as the amount for which judgment has been given is below £500.] That is the reason why the appeal does not mention the Privy Council, to which my Client intends to resort, if not precluded. [ROWE, C. J. I thought it was *ex concessis* that there was no intention to go further.] By no means. The appellant wished to bring the decision in appeal before the Privy Council, but I told him he could not do so under the 52nd clause of the Charter, for the reason stated by your Lordship, and

that therefore, if we proceeded at all, it must be under the 53rd clause, but that we must first exhaust all the means of appeal open to him in the Colony, for the appeal would certainly not be allowed unless he took this course. [ROWE, C. J. In that view no doubt your advice was sound; but I must say, I entertain a very strong opinion, that no appeal lies from two Judges to the Collective Court. The 52nd clause of the Charter, upon which you admit you are compelled to rely, seems to me to contemplate only those cases in which parties intend to appeal to the Privy Council.] It seems hard to say, that a party who is injured to within a few pounds of £500, should have no recourse to any Court beyond that under the 8th clause of Ordinance 20 of 1852,—that in fact he must depend upon the disposition of a Judge to reserve the case for the full Court. In England as your Lordship well knows when the power to reserve is given, it is freely exercised. In the present case the judgment is for £273 and costs; the latter are very heavy; and if your Lordships hold that this appeal does not lie, my client will be a great sufferer. I submit for the reasons urged that the appeal does lie.

Lorenz, contra.] Under the Charter one Judge constituted the Supreme Court (§ 31 in f.) and this one Judge might *reserve a question* for the decision of all the three Judges collectively (§ 47,) or an appeal might be heard at General Sessions at Colombo, by *consent of the litigant parties*, but not otherwise, (§ 50:) or lastly, an appeal might be taken from a decision of the Supreme Court (as then consisting of one Judge) to the Queen in Council, subject to a previous Review thereof before *all* the Judges. (§ 52.) If this Appeal be founded on the Charter, it can only be an application for a review; which however it does not profess to be. It is a Petition of Appeal, praying for a reversal of the previous judgment: and is, in fact, an Appeal to the General Sessions under the repealed Ordinance No. 11 of 1845; for it follows the form laid down by that Ordinance, and is supported by the certificates and endorsements required by § 3,—a fact which might lead one to conclude, that the gentlemen who drew the Petition were at the time ignorant that No. 11 of 1845 had been repealed, but having since discovered it, in stress of weather put in under the 52nd clause of the Charter. [TEMPLE, J. What then does the Petition present itself as?] It is hard to tell. If as a Petition to the Queen in Council, they are out of time, and their claim is below £500—not near £300; if as a Petition for a Review, they are equally out of time, and they have failed to give us the notice required by Rule 3 of the 16th December, 1852; if as a Petition

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to the General Sessions, their right of Petition has been abrogated by No. 20 of 1852. It was the obvious intention of the Legislature to abolish Appeals to the General Sessions, and to make the decision of the Supreme Court final, by requiring that all Appeals should be heard before two Judges at least, and if they disagreed, by all three: thus securing, in every decision, the opinion of a *majority of the Judges*, which would consequently render an Appeal to the General Sessions unnecessary. In other words, to allow an Appeal in the present case, would be to allow an Appeal from the two Puisne Judges, to the two Puisne Judges and the one Chief, with the satisfactory prospect, that even if the one Chief could be brought to dissent from his two Puisnes, the opinion of the latter would still prevail.

Rowe, C. J., now delivered the judgment of the Court.]

Mr. Advocate *Rust* moved, on Wednesday, October 29, 1856, that the petition in this case lodged in the Registrar's Office be accepted and entertained. The petition purported to be a petition from the defendant in this case to the Honorable the Judges of the Supreme Court sitting in General Session at Colombo, and stated *inter alia*, that the said petitioner felt aggrieved by the Judgment of the Supreme Court of the 8th October instant, and prayed that the said Judgment be reversed. The judgment in question was the judgment of the Supreme Court, on a petition of appeal lodged, argued by Council, and decided in due course by Sterling and Temple Justices, the Chief Justice being at that time absent on Circuit. The object of the present motion, was to get the case reheard before the full Court, and Mr. *Rust* in support of his motion, relied entirely on the 52nd clause of the Charter of 1833, admitting that there was no Ordinance, Rule, or authority, by virtue of which he could claim a rehearing, save that. Now the object of that clause, manifestly, was to grant to any parties to any civil suit or action, depending in the Supreme Court, an appeal to the Privy Council, subject to certain rules and limitations therein set forth, a compliance with which would be a condition precedent to such right to appeal. The second of these rules limits such right of Appeal to cases in which judgment shall have been pronounced in respect of a sum of £500. On reference to this petition, it appears that the judgment therein appealed against was for £273 only. It is clear therefore, that the case is not of that class in which an Appeal lies to the Privy Council, and it follows, that the Review before the Judges of the Supreme Court collectively in General Sessions at Colombo, provided by the 52nd clause as a preliminary to such Appeal, cannot

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be conceded to this petitioner. This objection the Court holds to be in itself conclusive; it may be observed however, that the tenor of this petition, and the absence of the notice required to be given within 14 days of the date of the judgment appealed against (see Rules, p. 132), manifestly shew that this proceeding never could have been taken originally under the 52d clause of the Charter, or with a view to an Appeal to the Privy Council under its provisions. I would rather appear, on the contrary, from the form of the document, that it must have been framed according to the course of proceeding which might have been open to a petitioner under Ordinance No. 11 of 1845, were that Ordinance still in force. At that time, Appeals were heard by a single Judge on Circuit and at Colombo, and that Ordinance, under these circumstances, gave an Appeal from such decisions to the Judges of the Supreme Court collectively in General Sessions. By the Ordinance No. 20 of 1852 however, the Ordinance of 1845 was repealed, and for the Appeal which theretofore existed to a single Judge on Circuit or at Colombo, was substituted an Appeal to the Judges of the Supreme Court at Colombo, two forming a quorum. This being, in effect, a decision of the Court *in Banc*,—the Appeal given by the Ordinance No. 11 of 1845, to the Judges in General Sessions, was no longer requisite, and accordingly, the provision of that Ordinance which gave that Appeal was not re-enacted in the Ordinance of 1852. From that period, all power to review cases in General Session of the Supreme Court has, in fact, ceased, save in that class provided for by the 52nd clause of the Charter; and as this present case does not, for the reasons already given, fall within that class, the Court, having no jurisdiction, declines to entertain this petition.

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November 8.

Present ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 29,048.
P. C. Kandy } *Mapolegedere* v. *Mapolegedere.*

This was a proceeding under the Proclamation of the 5th August 1859, against Forcible Entry. The Court below having found the defendant guilty, the present was an appeal against the finding.

An entry, under the Proclamation of 1819, should be forcible, and attended with cir-

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cumstances calculated to provoke breach of the Peace.

Per Curiam.] The entry, from the evidence, seems to have been made not only without violence, but with no attendant circumstances calculated to provoke a breach of the Peace. The question raised before the Police Magistrate, therefore, appears to have been merely a question of title; and the Supreme Court is of opinion, that in such cases, instead of entertaining the matter as a Criminal charge, the parties should be left to their remedies before the ordinary Civil tribunals. *Conviction quashed.*

November 10.

November 10.

Present ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 28,425. *D. C. Kandy.* } *Moosa Neina* v. *Ahamadoe Alim.*

A party claiming under a mortgage granted by a person in possession of Crown land, preferred to a party holding a subsequent mortgage, granted after the mortgagee had obtained a grant from the Crown,—the latter mortgagee having had notice of the previous mortgage.

In this case, the plaintiff declared upon a deed, dated the 3rd February, 1855, whereby one *Habiboe Mahamadoe* mortgaged with the plaintiff certain premises situated at *Gampola*, secured by the deposit of the title-deeds thereof, consisting of a Government Grant dated the 18th September 1854; and complained that the defendant, under colour of a writ of execution issued by him against one *Salle Pulle Saibo Tamby*, had caused the abovementioned premises to be seized by the Fiscal in satisfaction of the writ.

The defendant, admitting the seizure, justified it on the ground that the premises, though originally the property of the Crown, were held and possessed by *Habiboe Mahamadoe* by virtue of a deed of transfer from one Pitche Mahamadoe, dated the 14th June 1844; that while in such possession, the said *Habiboe Mahamadoe* on the 4th July 1844, mortgaged the premises to the said *Salle Pulle Saibo Tamby*, who afterwards, on the 23rd November 1844, transferred the mortgage to *Natchiappa Chetty* and *Vengedasalem Chetty*, who on the 7th July 1849, transferred the same to the defendant; and that the defendant, by virtue of a judgment obtained against *Salle Pulle*, on the 20th July 1854, did, as he lawfully might, cause the said premises to be seized; that this seizure was opposed by *Habiboe Mahamadoe*, and the sale stopped; whereupon the defendant brought an action against him to compel him to establish his opposition; in which case judgment went by default against him, and the premises were declared subject to be sold under the defendant's writ. That in the meantime

Habiboe Mahamadoe having applied to the Crown for a Grant of the said premises, the defendant was called upon by the Government Agent to deposit the original title-deeds thereof in the Cutcherry, which he accordingly did, receiving from such Agent a receipt for the same, and an assurance that the grant, when completed, would be handed to him. That Habiboe Mahamadoe afterwards clandestinely obtained the grant from the Government, and thereupon executed the deed declared upon by the plaintiff.

These facts, as stated in the pleadings, were established at the trial; and the Court below pronounced judgment as follows:

"The Court is of opinion, from the evidence, that the plaintiff at the date of the Indenture in his favour by *Habiboe*, must have been perfectly cognisant of the suit then pending between the defendant and *Habiboe* in respect of these very premises. The Court is also of opinion, that the grant from the Crown gave no new title to *Habiboe*, but merely strengthened his former title, and cannot be held to render invalid or worthless any former mortgage he had made of the premises on the title he then possessed. The Court considers that the mortgage by *Habiboe* to *Salle Saibo* is preferent to the Identure granted subsequently by *Habiboe* to the plaintiff; and it is decreed, that the plaintiff's claim be dismissed with costs."

On appeal by the plaintiff,

Rust (with him *Lorenz*) appeared for the plaintiff and appellant.

Dias for the respondent.

Lorenz contended, that assuming the plaintiff to have been affected with notice, (though the evidence on this point was very conflicting; yet the defendant's mortgage being imperfect, could not override a subsequent perfect mortgage, accompanied as it was by a deposit of the Grant from the Crown. At the date of *Habiboe's* mortgage to *Salle Saibo*, he had no right whatever to the premises; in fact it was admitted that then, and afterwards, the land was the property of the Crown; and the fact of *Habiboe* having afterwards, with the knowledge of the defendant and with his concurrence, applied for a Grant, shewed that but for the Grant, he had no title. The existence then of a suit between *Habiboe* and the defendant could not affect the plaintiff, for he could not but be satisfied from *Habiboe's* possession of the title-deeds, that he had then an unincumbered title. The authorities were quite clear on the point,—that a mortgage of *res aliena* is not confirmed by the mortgagor subsequently becoming owner of the property. *Voet ad Pand.* xx. 3. § 6; 3 Burge, 171; *Kerstemans Aanhangzel*, tit. *Hypothec*, p. 638.

Dias contra] *Habiboe* certainly had the dominium of the pre-

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mises, prior to the Grant from the Crown; for against all but the Crown, his possession of the premises was a sufficient title. 2 *Burge* 527; Grot. *Introd.* p. 74; and even against the Crown, he had a certain dominium, under the provisions of Ordinance No. 12 of 1848. The plaintiff was, further, estopped from questioning the defendant's right; for in the previous suit, the premises were declared liable to be sold under the defendant's writ; and this, as a judgment *in rem*, was binding on all parties, and certainly on the plaintiff, who claimed under *Habiboe*, a party to that suit. [He cited No. 28,503, D. C. Kandy; *ante*, p. 192.]

Rust in reply. *Affirmed.*

November 12.

November 12

Present ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 23,859. *D. C. Kandy.* } *Hennegedere* v. *Don Gabriel.*

A party is not estopped by a previous decision respecting the lands claimed by him, where he does not claim under either of the parties to the previous suit.

The plaintiff in this case sought to recover certain lands by virtue of a gift thereof made in his favour by his maternal Grandmother *Punchy Menika.*

Plea (amongst others,) that on the 14th May 1847, the plaintiff's mother *Dingiry Menika* instituted a suit, No. 20,366, against the present defendant, for the lands now in dispute, in which suit she claimed the same by right of inheritance from her father; that on the 6th day of February 1850, the said suit was decided against her, and judgment given in favour of the defendant; and that the plaintiff was privy to the said suit and the proceedings had therein.

On the day of trial in the Court below, the counsel for the plaintiff was about to call evidence, but was stopped by the Court, and requested to address himself to the question of *res judicata* raised by the defendant.

Lawson for the plaintiff having been heard on this point, the Court (*W. H. Clarke*, A. D. J.) proceeded to pronounce judgment, and in view of the previous judgment in the case No. 20,366, and of the doctrine laid down in *Sir Charles Marshall's* Digest, p. 246, 247; and of the close relationship between the present plaintiff and the plaintiff in No. 20,366, nonsuited the plaintiff.

On appeal against this decree, *Lorenz* for the appellant cited Broom's Maxims, tit. *Res inter alios acta*, &c.; and *per Curiam.*]

The case must be remanded, to be proceeded with. The plaintiff is not estopped, since he claims by a title independent of his mother.

November 14. *November* 14.

Present ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 16,975.
D. C. Galle. } *Baptist* v. *Baptist.*

An amendment of the Libel may be allowed, on the day of trial, subject to terms.

The examination of a party is at the discretion of the Judge; and where such discretion had been exercised against the examination, in a suit for separation, the Supreme Court declined to interfere.

This was an action for separation *a mensa et thoro* by the wife against the husband, on the ground of adultery and cruelty. Both these allegations were denied by the defendant. The case came on for trial on the 22nd September, and previous to calling evidence, the plaintiff's counsel moved to be allowed to examine the defendant. This motion was resisted on the grounds, 1. that the defendant had not been cited for examination; and 2. that the examination would tend to criminate him. These objections were upheld by the District Judge. The plaintiff was then examined by the defendant's counsel; and evidence was led by the plaintiff on both the allegations; but the District Judge declined to hear evidence of *adultery*, on the ground that the specific act of adultery tendered in evidence was not set out in the libel; and judgment was ultimately pronounced in the following terms:

"The Court having duly considered the evidence adduced in support of the allegations of adulterous intercourse and cruelty, is of opinion, that it is not sufficient to justify the Court in pronouncing sentence of divorce *a mensa et thoro;* and the plaintiff's suit is therefore dismissed."

The present was an appeal against this judgment.

Dias for the plaintiff and appellant.] The *viva voce* examination of the defendant was improperly disallowed. A party to a suit is liable to be examined under cl. 29 of the Rules and Orders, sec. I., and § 14 of the Ordinance No. 12 of 1843. A citation for this purpose was not necessary, as he happened to be in Court at the time. In practice it is usual to issue a notice calling upon a party to attend to be examined; but this is merely with a view to secure his attendance. The District Judge has evidently confounded the examination of a party *as a witness* under § 5 of the Ordinance No. 9 of 1852, with his examination *as a party* under

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the Rules and Orders. The second ground, viz: that the examination would tend to criminate the party, was equally untenable. No doubt a party is not bound to answer criminating questions, but this is a privilege personal to himself, and can only be asserted and insisted upon by him after the question has been put. *Boyle* v. *Wisenan*, 10 Ex. 647; *Abbot* v. *Boult*, 1 Jur. N. S. 93. Again, the District Judge was wrong in not allowing evidence of the adultery. It was quite competent for the plaintiff to adduce such evidence under the general allegation of adultery in the libel. Under any circumstances, an amendment ought to have been allowed. (He then contended that there was ample evidence of cruelty to justify a sentence of separation; and cited *V. d. Linden*, 89; 1 *Burge*, 648, 657.)

Berwick contra.] A party cannot examine his opponent without giving him notice. It is admitted on the other side, that without a notice the plaintiff's attendance could not have been enforced; his examination could not therefore have been insisted upon; and the mere circumstance of his voluntary presence in Court could not give the plaintiff a better right. Under § 29 of the Rules, no question can be put to a party, the answer to which might tend to criminate him. It is the *question* which is to decide the party's right to object to it, and not the probable answer which he may make to it. The cases cited on the other side are not applicable, for they relate to the examination of a party *as a witness*, in which case the provision of the Rules would not apply. Lastly, the proposed evidence of an act of adultery with one *Loko Hamy* was properly rejected. It was not alleged in the Libel, although several other distinct acts of adultery with other parties were charged. It would be unfair to the defendant to lead evidence which he was not prepared to rebut. Nor was any application made at the trial to amend the libel in this respect; and, if made, the Court would have properly rejected it, for it was still open to the objection of taking the defendant by surprise.

Dias in reply] The reason of the English rule of evidence in respect of criminating questions is equally applicable to the case of a party under examination; for he alone can know whether the answer is likely to criminate him or not.

Judgment.] That the decree of the Court below be set aside, and the case remitted for further enquiry; the Supreme Court being of opinion, that the District Judge should have amended the libel upon terms, giving, if necessary, time to the party against whom the amendment was made, and should then have received the evidence tendered, of adultery with *Loko*.

As to the refusal of the District Judge to examine the defendant, because such examination might tend to make him criminate himself, the Supreme Court deems that ground insufficient and untenable; but is of opinion, that as his examination at all in such a case was on other grounds a question for the discretion of the Judge, the discretion he has in this case exercised should not be over-ruled, inasmuch as every separation a *mensa et thoro* only, assumes the possible reconciliation of the parties.

November 19.

Present ROWE, C. J., STERLING, J., and TEMPLE, J.

No 27,199. *D. C. Kandy.* } *Menic Rahle* v. *Punchy Rahle.*

The Court is bound to hear the plaintiff's witnesses in a case of ejectment, although it may appear on the pleadings that he was out of possession for 35 years. Qu? Whether 35 years' possession would confer a title by prescription, where such possession is alleged to have been as mortgagee.

The Plaintiff in his Libel stated that his father *Kudaraale* was the proprietor of certain lands at *Menic-dewe*; and, being such proprietor, did about 35 years ago mortgage it with the defendant, as security for 260 riddies, with possession of the lands to the defendant in lieu of interest; that *Kudaraale* died about 15 years ago, leaving the plaintiff as his sole heir; that as such heir, the plaintiff tendered to the defendant the debt, on the 12th July 1853; but the defendant refused to give up the said lands.

The defendant pleaded that he purchased the lands from plaintiff's father and uncle in the year 1736, and 1739 of *Saka* (A. D. 1814, and 1817); and that from that time he had been in possession of them; which possession and the 2nd clause of Ordinance No. 8 of 1834, the defendant pleaded in the bar of the plaintiff's claim.

The Judge below, without entering into evidence, held, that the case was one to which the 2nd clause of the Ordinance was strictly applicable; and dismissed the plaintiff's claim.

W. Morgan, for the appellant.] When the case came on for trial, instead of the plaintiff being allowed to proceed to prove his case, the defendant's Advocate in the Court below prayed for judgment upon the pleadings, and the District Court decided that inasmuch as the plaintiff, in his libel, had admitted the defendant's possession for 35 years, the latter was entitled to judgment, quite forgetting the allegation in his libel that the lands were *mortgaged* to the defendant, and that he had possessed as *mortgagee*. Now a judgment upon the pleadings is always understood to be upon the *whole*, and not upon a *portion*, of the pleadings. The plaintiff should have been allowed to prove the

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mortgage and the possession of the defendant as mortgagee, in which case the Ordinance could have no manner of application. (He cited No. 19,129, D. C. *Colombo.*)

Lorenz for the respondent.] Admitting the correctness of the decision in No. 19,129, it is submitted, that it does not affect the present case: for the present is one in which the plaintiff has acquired a title by *Prescriptio longissimi temporis.* Sandar's Justinian, 228, 236, 237; 3 Burge, 26. The *Prescriptio longissimi temporis* has been adopted in Holland, with this difference, that in every case it was the third of a century. Loenius, *Decis.* 76, p. 502; 3 Burge, 35; Matthæus *de Auct.* ii. 7. § 84; H. Grot. *Introd.* p. 96; V. d. Kessel, *Thes.* 206. [STERLING, J. Does not No. 8 of 1834, abrogate all the prescriptions of the Dutch Law, and introduce those enacted by it in their place?] There is a distinction between Prescriptions of *Rights*, whereby property is lost or acquired, and Prescriptions of *Actions*—such as those introduced by the Ordinance No. 8 of 1834. This prescription of the third of a century requires neither *bona fides*, nor a *justus titulus.* Matthæus, *Paroem.* ix. § 2, 3. And the defendant in this case, even though destitute of *bona fides* and *justus titulus*, yet having been 35 years in possession, has acquired a title. 2. The plaintiff's *right to recover* the lands by the *actio pignoratitia* has been prescribed. Vinn. *Select. Quæst.* lib. ii. c. b. 3. *The object of prescription* is to terminate suits. 2 Colq. *Rom. Civil Law*, 145 § 1,118; 1. Taylor *Evid.* p. 85; Broom's *Max.* p. 694. And here we may fairly ask the question which Matthæus has put:—*Si in prescriptione longissimi temporis bonam fidem desideres, ecquis litium finis erit? (Paroem. p.* 224.)

Per Curiam.] Let the case go back for the plaintiff to proceed with his evidence. And on his closing his case, the defendant may, if he chooses, take his objection on the ground of prescription. The Court was premature in coming to the present decision, (which was accordingly *Set aside.*)

No. 15,926. } *In re Anthonan Perera.*
D. C. Colombo. } *Anthonan Perera* v. *Don Nicholas.*

The Ordinance No. 7 of 1835, does not apply to a case where the parties in actual possession, though stated

This was an application for Edictile Citation, under the Ordinance No. 7 of 1835, founded upon affidavits that the applicant was in the exclusive and *bona fide* possession of the land in question. Upon the citation issuing, two opponents appeared and claimed title, alleging that they were in possession, which the

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applicant in his answer admitted, but contended that they possessed only as his tenants. On these pleadings the parties went to trial, and on the day of hearing, after the examination of the parties, the applicant's Counsel contended that under § 4 of the Ordinance, the burthen of proof was on the opponents, for though they were admitted to have been in possession for 5 years, this possession was under the applicant, as his tenants. The opponents' counsel, on the other hand, contended, that the applicant not being in actual possession, it was necessary for him to prove by evidence that the opponents' possession was as tenants, his simple assertion to that effect being insufficient.

to be the tenants of the applicant, set up a title adverse to him.

The Court below was of opinion, that the applicant should begin, and that a contrary principle would be attended with injustice, inasmuch as a party might, in order to avoid an action of ejectment, adopt an application under the Ordinance, with a view to throwing the burthen of proof on the virtual defendant.

The applicant refusing to call evidence, the Court below dismissed his application, and the present was an appeal against the dismissal.

W. Morgan appeared for the appellant.

H. Dias for the opponent.

The Supreme Court pronounced judgment as follows.] The Court is of opinion, that the Ordinance is applicable only to cases where the applicant is in possession either "by himself or his tenant, or by any other person on his behalf," and who do not dispute the applicant's title, to enable him to force all persons who either pretend to have a claim, or who may have claim, to come forward and assert their rights; but that it does not apply to a case like the present, where the person in possession sets up a title in himself adverse to that of the party seeking Edictile Citation; nor does the Supreme Court consider that an applicant can make the required affidavit that he is in the "exclusive and *bona fide*" possession, when the party in possession disputes his title.

Affirmed.

November 26.

November 26.

Present Rowe, C. J., Sterling, J., and Temple, J.

No. 17,348.
D. C. Galle. } *Silva* v. *Mendis.*

Where a pleading is on insufficient stamp, the proper course

On the 18th August 1856, the plaintiff filed his libel claiming £75 damages. By a mistake of his Proctor, the Libel was written upon an insufficient stamp. On the 26th September, the defend-

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for the opposite party is to have it set aside by motion.

ant filed a plea signed by an Advocate and Proctor, objecting to the libel on the ground of its being insufficiently stamped. On the 20th October, the plaintiff's Proctor moved, "that the defend- "ant's exception might be set aside, the same having been irregu- "larly pleaded, and that the plaintiff might be allowed to amend "his libel by reducing the damages thereby claimed, on payment "of the costs consequent on such amendment, excepting the costs "enhanced by the irregular pleading put in by the defendant." On the 28th October, the matter was argued, and the District Judge made the following order: "It is ordered, that the plea "filed by the defendant be set aside with costs, and the plaintiff "be allowed to amend his libel, paying costs consequent on the "amendment."

From this order the defendant appealed.

Dias, for the plaintiff and respondent, was called upon by the Court. He submitted that the course adopted by the defendant was quite irregular and very expensive. The insufficiency of the stamp was a pure mistake of the plaintiff's Proctor, and the more correct course would have been to have informed him of it; but instead of that, the defendant filed a pleading signed by an Advocate and Proctor, simply with a view to costs. The insufficiency of the stamp did not make the libel bad; it was merely an irregularity, (2 Archb. Q. B. Pr. 846, 847; Burton v Kirby, 7 Taunt. 174; Clarke v. Jones, 3 Dowl. 277,) and the proper course was to apply to the Court by motion, or to obtain a rule to shew cause why the additional stamp should not be supplied within a given time. (Marshall, 507, 647, 2 Archb. Q. B. Pr. 1274; No. 378, Matura, 20th Aug. 1834.) It was true that the application to reduce the damages was after the defendant's plea was filed, but the proceeding adopted by the defendant was so improper, that the District Judge had exercised a correct discretion in condemning him in costs. *Affirmed.*

November 28.

November 28.

Present ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 2,861. *C. R. Point Pedro.* } *Ramen Velappen* v. *Patteniar.*

The judgment of the Supreme Court in this case sufficiently explains itself.

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By the *Thesawalame*, a son may exonerate himself from the debts of his deceased parent, by declining succession to the inheritance.

"The Commissioner in this case, relying on the authority of the *Thesawalame*, decided the local custom to be, that although the son has no assets from his deceased father, he is nevertheless liable to be sued for that parent's debt. However, this general position of the *Thesawalame* is qualified in Strange's *Hindoo Law*, p. 137, by the remark 'that to exonerate himself from payment of debt, the son must decline succession to the patrimony.' This correction of the general proposition is also established by the decree No. 2531, *Wademorachy*, 24th April, 1849." [The decree of the Court below, (which was in favour of the plaintiff,) was therefore *Set aside.*]

No. 26,342.
D. C. Kandy. } *Uduma Lebbe* v. *Halkewelle Mudianse.*

Deeds held to come from the proper custody, which were produced by the parties who claimed title thereunder.

The plaintiff claimed certain lands by virtue of a conveyance thereof, from *Dingiry Menicka* and *Kiry Menicka*, the widow and daughter of *Yattewattegedere Punchy-raale.*

The defendant denied *Punchy-raale's* title, and claimed the lands by right of inheritance from his own father *Halkewelle Korale*, who had purchased it from *Menick Raale* on a Talpot dated *Saka* 1737, (A. D. 1815.) He relied also on prescriptive possession.

Dingiry Menicka and *Kiry Menicka*, the vendors of the plaintiff, subsequently intervened in the case, traced their title from the same *Menick Raale*, who being the owner of the premises on a Talpot (*Saka* 1723,) conveyed them by a Talpot (*Saka* 1735) to *Punchy-Raale*, who possessed them up to his death. They alleged also, that *Punchy Raale* having died about 15 or 20 years since, his minor children (of whom *Kiry Menicka* was the survivor,) were left under the guardianship of their uncle *Halkewelle Korale*, under whom the defendant now claimed the property, and who had possessed it on their behalf till his death, which took place recently.

Upon these issues, the case went to trial, and evidence was called on the part of the plaintiffs. The deeds relied upon by the plaintiff and intervenients were also tendered in evidence. The Court below was however of opinion, that the evidence as to possession was contradictory, and that the deeds, although 30 years old, were inadmissible, inasmuch as there was no proof of their having

come from the proper custody, and that the intervenient *Kiry Menicka* being a minor at the date of her father's death, the deeds could not have been with her. (*Starkie*, 618; *Roscoe Civ. Evid.* 20.) And thereupon the plaintiff was nonsuited.

On appeal against their decree,

Lorenz appeared for the plaintiff and appellant.] The judgment is clearly wrong on the question of the admissibility of the deeds. [ROWE, C. J. From whose custody did they come, at the trial?] From the custody of the plaintiff, who held the old deeds attached to his conveyance. [ROWE, C. J. Then unquestionably they were where they ought to be.]

Per Curiam.] The decree of the Court below is set aside, and the case remanded for a new trial; the Supreme Court being of opinion, that the deeds tendered in evidence by the plaintiff are receivable in evidence, coming as they do out of the possession of the plaintiff and intervenients who claim title thereunder.

No. 15,819.
D. C. Galle. } *Ahamadoe Lebbe* v. *Ludovici.*

The boundaries given in a conveyance, held not to be conclusive, where there was a figure of survey attached thereto, which would enable the Court to ascertain by admeasurement the actual extent conveyed.

On the 4th December 1849, the plaintiff purchased from the defendant a house and premises within given boundaries. The old Title-deed, with a figure of survey, was attached to the plaintiff's conveyance. Shortly after this, the defendant attempted to sell a house and ground on the west of the premises sold to plaintiff, alleging that he had not sold to plaintiff all that the latter now laid claim to. Hence the present action. The western boundary as given in the plaintiff's deed, was "the house of one Meeralebbe presently occupied by Oeduma Lebbe Marcar." It appeared however in evidence, that at the sale to the plaintiff, the boundaries were pointed out, and that a fence stood between the premises sold to plaintiff and the house of Meeralebbe. On the day of trial the defendant moved for a survey, but the plaintiff declining to bear any part of the expense, it was not carried out. The District Judge thereupon gave judgment for the plaintiff; and from this the defendant appealed.

Dias, for the plaintiff and respondent, was called upon to support the judgment.] The contention of the defendant in the Court below was, that plaintiff was only entitled to the extent appearing in the old figure of survey attached to his deed, and that his present claim included a larger extent of ground than was con-

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tained in that survey. He was not prepared to admit that the portion in dispute was without that old survey; but admitting that it was so, he submitted that the plaintiff was entitled to the whole, whether more or less, within the boundaries pointed out at the sale (Sugden on V. and P. 372.) The defendant, by his conduct in pointing out the boundaries, led the plaintiff to believe that he was bidding for the whole included within such boundaries; and to allow a party like this defendant to receive the whole of the purchase-money, and to withhold a portion of the land sold, would be to allow him to take advantage of his own wrong. Even if the defendant had acted *bonâ fide*, and under a mistake, he was not entitled to relief, because the rule of law was, that as between two innocent parties, the person who has led the other into error must suffer for it.

Sed per Curiam.] The decree must be set aside, and the case remanded to the District Court for judgment *de novo*. The Supreme Court does not consider the judgment of the District Court will settle the point in dispute, which can only satisfactorily be done by a survey, to be made with reference to the old survey spoken of, and attached to the plaintiff's title-deed, and by ascertaining by evidence what was the line of boundary between the land occupied by the intestate and the property of Meera Lebbe.

November 29.

November 29.

Present ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 29,137.
C. R. Colombo. } *Layard* v. *Fernando.*

A Court of Requests may give judgment for "further interest."

This was an action brought by the plaintiff as Government Agent, for the recovery of £2 5*s*. 8*d*. due by the defendant as follows, viz. £1. 8*s*. being paddy-commutation tax of a certain field for the years 1847-1850, £0 17*s*. 8*d*. bring interest thereon at 9 per cent. per annum from 1st January 1847 to 30th June 1856; which said sums, the plaintiff prayed that the defendant might be condemned to pay him, *together with further interest at the above rate from* 1*st July* 1856 *till payment in full.*

The defendant, on the day of appearance, "admitted to be indebted to the plaintiff in the sum of £2 5*s*: 8*d*. as claimed": and the Commissioner entered judgment for the plaintiff in £2 5*s*. 8*d*. but refused to allow *further interest* as claimed by the plaintiff.

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On appeal against the decision,

Stewart, D. Q. A. for the plaintiff and appellant, contended that the Commissioner had no right to refuse further interest. He was supposed to have done so on the ground that such further interest might, in some cases, augment the amount of the plaintiff's claim beyond £10, the limit of his jurisdiction. But the answer to this was, that in the present case the principal and interest could, by no probability, exceed £10, for the principal being £2 5*s.* 8*d.* the interest could not exceed that sum, and the total sum recoverable would never be more than £4 11*s.* 4*d.* But even granting that the aggregate amount might in some cases exceed £10, the judgment would be good only for £10, or the Commissioner might limit the sum recoverable to that amount. [Rowe, C. J.—Would not a judgment for *further interest* be bad for uncertainty?] The amount is always ascertainable by calculation, and the Fiscal in levying always keeps within the amount which he has by previous calculation ascertained to be the amount actually due for principal, interest, and costs. It is the invariable practice in the District Courts to give further interest. The forms of Libels in *Vander Linden* invariably contain a prayer "for further interest till the day of full and effectual payment." (*Jud. Pract.* 185, seqq. [Rowe, C. J. In England all judgment debts carry interest, (1 & 2 Vict. chap. 110.)]

The decree of the Court below was thereupon "amended, by the plaintiff being allowed interest at 9 per cent. on the sum of £2 5*s.* 8*d.* from the institution of the suit until the recovery thereof."

No. 6,361.
D. C. Jaffna. } *Meigis* v. *Joseph.*

The District Court cannot issue a commission to examine witnesses, except on the application of parties.

This was an appeal against an order made by the Court below, directing the examination of witnesses on a commission. No application appeared to have been made by either party for such a commission.

Per Curiam.] The decree of the Court below is set aside, and the case remanded for decision on the merits. The District Judge has no power, under the Ordinance No. 3 of 1846, cl. 7., to issue a commission, except upon the application of one of the parties.

December 2.

1856.
December 2.

Present ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 16,436.
D. C. Galle. } *Silva* v. *Ally Cootty.*

Certain lands having been sold by an Executor, under an order of Court, and the Executor having absconded, an administrator *de bonis non* was appointed, who, under another order of Court, signed the conveyance. *Held*, in an action by the purchaser against the heirs of the owner, that any informality in the grant of administration, would not affect the validity of the purchaser's title.

This was an action for the recovery of certain land and buildings. The premises in dispute were originally the property of *Maula Cadija Umma*, by whom they were mortgaged to *Muhamadoe Sariboe Sinne Lebbe*. Subsequently, in April 1850, the said *Maula Cadija Umma* died, leaving a will constituting *Wallayatanil Amidoe* her executor. This executor obtained probate of the will in July 1850. The mortgagee then brought an action against the executor, and obtained judgment for the mortgage-debt in May 1852. The executor, after obtaining the permission of the Court, held a public sale of the premises in July 1852, in order to satisfy this debt and certain other claims on the estate: and at this sale the plaintiff became the purchaser. But before a conveyance could be made in his favour, the executor left the island, and was never after heard of. Administration *cum testamento annexo* was thereupon, in April 1854, committed to the Secretary. The sale having been further confirmed, by a decree of the Court below, affirmed in appeal, in the case No. 14,803, the Official Administrator was, in May 1854, ordered to convey the premises to the plaintiff; which he accordingly did in June 1854; and, in August 1854, this action was instituted to eject the defendants who held forcible possession.

The advocate for the defendants in the Court below, raised several legal objections, and alluding to the proceedings of the former District Judge, said that the "whole was one great blunder." The Acting District Judge adopting the same view, gave in February 1856, the following decision:—

"After a most careful and attentive consideration of this case, the Court is of opinion, that the validity of the act of the Secretary of this Court, in executing a transfer of the land and house in question to the plaintiff, is most questionable: and that therefore the plaintiff who sues under the questionable title which he has from the Secretary, cannot recover. The Court is of opinion, that the order of the 5th November in the Testamentary case No. 645, was made under such circumstances as to be fatal to the validity of any act the Secretary might thereunder perform as Official Administrator, that the Court had no power *in that case* to constitute the Secretary Official Administrator: but in default of the duly constituted Administrator (which should have been shewn

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by affidavit or on oath, and on the representation of other heirs,) citation as *ab initio* should have gone forth. And if thereafter no heirs should have appeared (and it seems probable that the very present defendants *would* have appeared,) then *and not till then*, could administration have been committed to the Secretary.

"The Court is of opinion, that this is the point whence all went wrong, and that the error just pointed out constitutes a grave defect in plaintiff's title.

"And when this view agrees with the equity of this case, the Court has little or no hesitation in declining to uphold plaintiff's title. The *evidence shews most distinctly*, the defendants to have occupied the house in question for a long series of years, and *shews the defendants to be the adopted children of the deceased*, and shews the deceased in her will to have spoken of this very house as *her* house, (i. e. the house of one of the defendants).

"The defendants are absolved from the instance with costs."

On appeal against this decree, *W. Morgan* appeared for appellant; and *Lorenz* for the respondent.

W. Morgan. The defendants' counsel in the Court below contended that the plaintiff's title was bad on the following grounds:—1. Because the Secretary's appointment as administrator was null, and all his acts therefore void; the Court having no jurisdiction to appoint him, and the heirs not having been previously cited; and 2. That the order to the Official Administrator to convey, was made irregularly,—the Court having no authority to do so,—and the will of the deceased not authorizing the sale. In respect of the first objection, it appears that the executor left the jurisdiction of the Court some years ago, and was not heard of since: the Court was therefore right in committing administration to the Secretary *durante absentia;* as there was no person in charge of the affairs of the estate. (1 Williams *on Exors.* p. 439.) The citing of the heirs was a mere formality,—the non-observance of which, even in a case where a party died intestate, and a creditor applied for administration, would not render the grant *void*, but only *voidable;* and the acts of the administrator, until the repeal of such administration, were good. (1 Williams, 520, 521.) It is difficult to understand the second objection, that the order to convey was irregular. If the Court authorized the sale, and had the power to commit administration during the absence of the executor, why should it not order the administrator to grant a conveyance? The authority of the Court to do so was never questioned. What if the will did not authorize the sale? Must not the mortgage-creditor be paid before the provisions of the

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will, to preserve the property, be attended to, when there were no assets wherewith to satisfy the creditor? The plaintiff could not be affected by any informality in granting the administration. He bought the land from the executor of the estate, who was specially authorized to sell it, and accepted a conveyance from a party appointed by the Court, and specially ordered to grant it. He is a *bonâ-fide* purchaser, and for a valuable consideration, and entitled not only to the protection, but to the favour of the Court. The finding of the Court below as regards the defendants' occupation, gave them no right, as they all along admitted that the property belonged to the deceased.

Lorenz for the respondent, quoted *Skeffington* v. *White*, 2 Hagg. 626.

The Supreme Court set aside the judgment of the Court below, and changed the non-suit into a decree for the Plaintiff.

No. 17,962.
D. C. Colombo. } *Pasqualgey* v. *Pasqualgey.*

The 5th Clause of the Ordinance No. 12 of 1843, respecting costs in cases under £10, does not apply to Land cases: and a District Court may amend costs in such cases, although the value of the land be below £10.

This was an action brought before the District Court of Colombo, involving a dispute respecting land. And the Court in giving judgment for the plaintiff, having found that the plaintiff in a previous suit before the Court of Requests of Negombo, respecting the same land, had stated its value at £4 1*s.*, refused to give him his costs.

The plaintiff appealed against this judgment, and amongst other grounds of appeal, urged "that the reason given in the said judgment for dividing costs, viz. that the plaintiff had previously instituted a case in the Court of Requests of Negombo, and in that case had valued the land at £4 1*s.*, was not a sufficient reason, beeause whenever parties are so situated that they have to travel only a short distance to go to the Court of Requests, they prefer going to the nearest Court, as the plaintiff had done in this instance, and institute their cases on a lower valuation of the land, rather than travel to a distance for the purpose of commencing proceedings in a District Court. That as the Court of Requests of Negombo was only six miles from the land in question the plaintiff had instituted the said case before that Court, and the case having been struck off on account of a defect in the plaint, he proceeded to Colombo and instituted his suit

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before the District Court there, setting forth the real value of the land, viz. £11 5*s*., which if not its real value, the defendant would have objected to in his pleadings or his examination, and that his not having done so was a proof that the land was of the value mentioned in the Libel."

W. Morgan was heard for the plaintiff and appellant.

Per Curiam.] The decree of the Court below is affirmed, except as to costs,—which are decreed to the plaintiff; the Supreme Court being of opinion, that the 5th clause of the Ordinance No. 12 of 1843, applies only to such cases as were cognizable by the Court of Requests at the time of the framing of that Ordinance,—namely, cases in which the title to or right to the possession of land was not in dispute. No such provision as to costs in land-cases, has been made since the passing of the Ordinance No. 22 of 1852, which first gave jurisdiction in land cases to the Courts of Requests; and that being so, and the election of suing in such cases in the District Court or in the Court of Requests, being left to the plaintiff without restriction, costs, as in the ordinary course, must follow the event."

No. 16,715.
P. C. Jaffna. } *Annamale Chetty* v. *Palen Valen.*

The disposition of witnesses examined at a preliminary enquiry before a Justice of the Peace, cannot be received as evidence at the hearing; and if so received, will render the conviction bad.

The defendants in this case were charged with having assaulted and beaten the complainant, and snatched 15 rupees from him. The evidence for the prosecution consisted of the depositions taken by the Justice of the Peace, which were tendered and received; and as "further evidence" the 3rd and 4th complainants were sworn and examined. The defendants were hereupon found guilty, and sentenced to a fine of £5, and imprisonment at hard labour for 3 months.

On appeal against this finding,

J. Selby for the appellant, contended—1. that the facts proved amounted to a highway robbery and assault, and the case was therefore beyond the jurisdiction of the Police Court;—2. that illegal evidence had been received, inasmuch as the proceedings had before the Justice of the Peace were put in and read without the accused having an opportunity to cross-examine some of the witnesses whose depositions were taken before the Justice of the Peace; and that this evidence weighed with the Judge there

could be no doubt, for that was put in first, and then "*further*" evidence was called.

Muttukistna, for respondent.] It is not stated why the depositions before the Justice of the Peace were put in; but it might have been merely to shew that such a complaint had been made immediately after the assault.

Per Curiam.] The conviction should be quashed. The Police Magistrate was bound to examine, as such, every witness *viva voce*, so as to give the defendants an opportunity of cross-examining them at the hearing. To substitute for such examination, the information taken on a preliminary enquiry by the Justice of the Peace, is an irregularity inconsistent with the rules of evidence and the due administration of justice.

December 3.

Present, ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 16,661.
D. C. Caltura. } *Isaak* v. *Silva.*

The widow and children of an intestate owner may sell the property of the deceased, without obtaining administration.

The plaintiff claimed certain lands by virtue of a conveyance dated 2nd November, 1854, granted by one *Petronella* and her children. The defendants disputed the plaintiff's title, and claimed the lands as purchasers at a Fiscal's sale, held on the 21st March, 1855.

It appeared that the lands originally belonged to one *Don Carolis* who died sometime previous to November, 1854; and after whose death, his widow (Petronella) and children had executed the conveyance in favour of the plaintiff, some portion of the purchase-money being devoted to the payment of certain debts due by *Don Carolis*. It appeared also that a writ of execution had issued in a case No. 13,856, against *Don Carolis*, and that by virtue of this writ the Fiscal seized the lands on the 1st December, 1854 (a month after the sale by *Petronella*), and subsequently sold them to the defendants, (one of the plaintiffs being present and protesting against sale.)

Hereupon the Court below gave judgment for the plaintiffs. And the present was an appeal against that judgment.

Dias, for the defendants and appellants.] There was a judgment binding against *Don Carolis* at the time the lands were sold by his widow and chidren; and the lands were seized for the recovery of this very judgment. The sale by *Petronella* took place shortly after *Don Carolis*' death, and probably in anticipation of the seizure

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which so soon after took place. A widow and heirs cannot sell property without previously obtaining administration.

Lorenz, for the respondents.] The existence of a judgment does not *ipso facto* invalidate a sale by the judgment-debtor. It can only affect it on the supposition of the lands being bound in judicial hypothec. But a judicial hypothec does not arise till seizure; 3 Burge, 378, 379; and here the seizure did not take place till a month after. 2. It is not incumbent on parties to take out administration of an estate before they proceed to alienate the property. No. 1,959, D. C. *Manaar*, (Civ. Min. 24th April, 1839.) On the death of *Don Carolis*, whether administration was takenor not, the widow remained the owner of a half of the common estate, and his children, as heirs, became the owners of the other half. By virtue of such ownership they might sell or mortgage the property without taking out administration or applying for any authority whatever. The object of administration is to protect the heirs,—to settle the claims against an estate, and to bring it to a liquid state,—not to divest the widow or heirs of rights which the law has given them. [STERLING, J., referred to *Mountford* v. *Gibson*, 4 East, 455.] The question has been fully considered in No. 1,531, D. C. *Wadimoratchy* (Civ. Min. 24th April, 1839,) where it is laid down that letters of administration are unnecessary where the heirs render themselves responsible for the intestate's liabilities.

The Supreme Court affirmed the decision of the Court below, on both the points. [STERLING, J., said it was quite clear that the widow and heirs of an intestate might sell lands, without taking out administration of his estate; especially where they do so for the purpose of paying off the debts due by the common estate.]

No. 16,701. *D. C. Galle.* } *Bartholomeus* v. *Anona.*

A survivor's right to alienate her share of the common estate, considered.

This was an action by two plaintiffs to recover 5-6ths of a garden, viz., 3-6ths upon two deeds of gift dated the 30th May, 1836, granted by their mother *Juana*, and 2-6ths in their own right, under their father *Don Siman*. It appeared in evidence that *Don Siman* was the original owner of the land. He died 40 years ago, leaving a widow, *Juana*, and three children, viz., the two plaintiffs and the first defendant's husband, *Adrian*. *Adrian* died 17 years ago, and the plaintiff's donor, *Juana*, some 22 years ago. The 1st defendant and her son the 2nd, claimed ½ of the

land, and alleged that the two deeds of gift were bad, as they did not exclude the legitimate portion of *Adrian*. Prescription was pleaded on both sides. On the day of trial the parties were examined, and no evidence was adduced, except the plaintiff's deeds of gift and some other deeds, which were all admitted by the defendants. *Ludovici*, for the defendants, cited 2 Burge, 690, 691. The District Judge gave the following judgment:—"Though the "Court has little or indeed no doubt that the mother did give her "one half of the joint estate to the plaintiffs, to the exclusion of "*Adrian*, and that the plaintiffs have so held for many years, yet the "law appears to be imperative that a son shall not be disinherited of "his legitimate portion without cause; and no cause is alleged. "Prescription in this case will not help the plaintiffs, who are "nonsuited with costs." From this the plaintiffs appealed.

Dias, for the plaintiffs and appellants.] The point of law raised in the Court below has entirely led away the Judge's mind from the points at issue. The plaintiffs being two of the three children of the admitted original proprietor, their right to 2-3rds of their father's half, or 2-6ths of the whole, was quite clear; and this did not appear to have been questioned by the defendants. Their right to 2-6ths being admitted, the next question was, were they entitled to another 3-6ths, to wit, *Juana's* half. In support of this the plaintiffs relied upon two deeds of gift, and prescriptive possession. The latter ground was almost entirely thrown out of consideration by the District Judge, with the simple remark, that prescription could not avail the plaintiffs in such a case. For this extraordinary proposition the District Judge assigned no reason, although it is quite clear that prescription did apply. With respect to the plaintiff's deeds of gift, before they can be treated as inofficious, it must be shewn that the residue of the estate was insufficient to make good the legitime, (2 Burge 148,) and it has been held in this Court in another class of cases, that an heir cannot proceed against every specific piece of property for his share, but was bound to bring the whole estate before the Court. The objection taken below did not apply to the donations in question, because they were irrevocable deeds for valuable consideration; and if the objection was good, it would equally apply to that class of deeds which were very common in this country, viz, gifts by parents on the marriage of their children. Admitting, however, that the objection did apply to the donations in question, it is submitted that it does not invalidate them altogether, and they can only be avoided to the extent to which any part of them might be required to make good the legitime; (Voet, xxxix. 5. 37.)

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In this case, however, the District Judge had set aside the donations altogether. Again, if the defendants had any right at all to their legitime portion, it is not a right *in rem*, but only *in personam*, and all that they can demand from the plaintiffs is a sum of money equivalent to their legitime portion; (Voet, xxxix. 5. 37;) and even such demand should be prosecuted within five years (*ib.* sec. 39.) Lastly, the District Judge having held that the plaintiffs had had possession from 1836, they were entitled to judgment upon the question of prescription.

W. Morgan, for the respondents.] The District Judge may have been premature in giving judgment in this case without going into evidence, particularly upon the question of prescription. But it is submitted, that the two deeds relied on by the plaintiffs should be treated as last wills, and as such they were rendered invalid by the non-reservation of the defendant's legitime portion. The original owner having left three children, their legitime portion amounted to ⅓rd, (Vanderlinden, 131); and that could not have been disposed of by plaintiff's donor as she has done in this case. All that the defendants claimed was their legitime portion, and it mattered not to them how the plaintiffs' deeds were dealt with by the Court, as long as the defendants' right was reserved. The deeds of gift are not, perhaps, altogether invalid; but the defendants' remedy is certainly not a merely personal action against the plaintiffs. The defendants were entitled to a share of their parents' property, and that, they could follow even in the hands of third parties. If the argument on the other side were good, it would apply to the case of an heir who proceeds for his inheritance. As to the question of 5 years' prescription, no such question was raised on the pleadings.

The case was remanded for re-hearing, the issues raised on the pleadings not having been tried.

December 5.

December 5.

Present, ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 8,316 *D. C. Jaffna.* } *Cander Simanpulle* v. *Eliatamby.*

A Mortgage Bond is invalid, if not signed in the presence of the subscribing witnesses.

This was an action for the recovery of £11 upon a Mortgage Bond, granted by the defendant and his late father. The defendant denied the Bond and his liability. The evidence shewed that the Bond was signed by the defendant's late father, in the

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presence of a Notary and two witnesses. The defendant himself signed it afterwards, but not in the presence of the two witnesses. The Court, however, entered up judgment for the plaintiff. And against this judgment, the defendant took the present appeal.

Muttukistna, for the appellant.] This action is founded upon a Bond which is clearly inadmissible in evidence, for it is an instrument affecting Real Property, and yet it was not proved to have been signed by the party in the presence of two witnesses, as required by 2nd clause of Ordinance No. 7 of 1840. [TEMPLE, J. The witnesses for the plaintiff proved that you signed the Bond.] Yes, assuming the witnesses to be telling the truth; but not in the presence of the subscribing witnesses. [TEMPLE, J. The witnesses for the plaintiff proved that you signed the Bond in the presence of the Notary and subscribing witnesses.] The only surviving witness to the attestation which was necessary to render the Bond valid, proves that the defendant did not sign it in his presence. [TEMPLE, J. The plaintiff did not call him; and is he to be believed?] Nor did the defendant call him. He was called by the Court, and I have no difficulty in dealing with the witness as far as his credit is concerned, for the District Judge has believed him, and expressly alludes to him in his judgment. [TEMPLE, J. It is proved that the consideration was paid.] It is scarcely fair to enter into that question, the action being founded upon the Bond, they must stand or fall by it. The defendant very properly relied upon that point, as it was fatal to the plaintiff's case, and therefore the judgment of the District Court ought to be reversed.

The Supreme Court reversed the judgment of the District Court, the District Judge having found the fact that the defendant did not execute the Bond in the presence of the witnesses, as required by Ordinance No. 7 of 1840.

December 8. *December* 8.

Present, ROWE, C. J., TEMPLE, J., and STERLING, J.

No. 13,240.
P. C. Batticaloa. } *Chinnetamby* v. *Kappoeraalle.*

The sentence of a criminal Court, if illegal in part, is illegal *in toto*, and the conviction will be altogether void.

The defendants in this case were charged with a breach of the 17th clause of the Ordinance No. 15 of 1843; and being found guilty, the first defendant was senteneed to a fine and imprisonment, and the second to corporal punishment.

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On appeal against this finding,

The Supreme Court affirmed it, as to the sentence against the first defendant, but as to the second defendant, they quashed the conviction,—on the ground that as the charge was under the 17th clause of the Ordinance, the Magistrate's power of punishment in case of conviction was also limited by that clause, on reference to which he had no power to inflict lashes; and the sentence of a criminal Court if illegal in part, is illegal *in toto;* and the conviction is therefore altogether void.

December 10.

December 10.

Present, ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 138.
D. C. Kornegalle. } *Estate of Wilgodde Ukkuraale*

After evidence heard on both sides, the Court will not hear further evidence on the mere affidavit of the proctor that such evidence is procurable.

Taking the opinion of the bystanders respecting the credibility of a witness, does not invalidate the judgment.

Administration was applied for by *Kiry Menica* as widow; and opposed by *Kiry Ettena* as sister, and on the ground that *Kiry Menica* was not the lawful widow of the deceased.

Both parties called evidence on the 14th October, 1856; and the opponent's proctors having closed her case, the District Judge postponed judgment for the 21st instant. On that day the opponent's proctors filed affidavits (sworn to by themselves) to the effect that one *Dingirale*, who was stated to have been a former husband of the applicant, was a necessary and material witness, and was keeping out of the way; that they the deponents had reason to believe that by the death-bed declaration of the deceased, he disposed of his personal property between his previous wife and his sister, the opponent, and that all the property, together with the papers, had been delivered to the latter, &c. And on this affidavit, they moved to be allowed to adduce further evidence. The District Judge refused the motion, except as to the evidence of *Dingirale*, which, on a subsequent day, (24th October,) he received; and after which he pronounced judgment as follows:

"A Korale and the assembled crowd in Court, being interrogated by the Judge, say—'We believe the story of the woman *Kiry Menica*, and do not believe that of Dingirale.' The Judge disbelieves the evidence of *Dingirale*. The decree of the Court must be, that administration be committed to the 1st applicant, as widow."

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On appeal against this order,

W. Morgan, for the opponent, said that this was a novel mode of deciding upon the evidence produced by parties. [ROWE, C. J. Indeed it is. It is a most extraordinary proceeding. The Judge says something to the assembled crowd: and the assembled crowd join in a kind of *chorus* in support of it. But does it affect the judgment on the merits?]

Morgan.] I submit it does. It is for the Judge to decide a case according to his own judgment, and not according to that of a Korale and an assembled crowd in Court. Besides, we asked for liberty to adduce fresh evidence on affidavits; which was refused.

Lorenz, for the respondent.] It would be a dangerous practice to allow a party to produce evidence after the case has been fully entered into, and is only laid over for judgment. And the affidavits are insufficient. They are only sworn by the Proctors in the case; and it does not appear that their client was ignorant of those new facts. In this manner Proctors may claim new trials in every case, on the ground that they were ignorant of (*i. e.*, that their clients concealed from them) certain material facts. [ROWE, C. J. What do you say to the opinion of the Korale and the assembled crowd?] Simply that the Judge found it very satisfactory to have the bystanders agree with him in his judgment. You cannot prevent judges conversing with their friends on the subject of the cases tried before them, and it is very satisfactory to a judge, to know that any opinion he may have formed in a case is considered correct by those who have had equal opportunities of coming to an opinion on the subject. This is not being guided by the opinion of others, but simply testing the soundness of his own opinion.

ROWE, C. J., thought the case ought to be sent back: but STERLING and TEMPLE, JJ., said there were no grounds for it. The affidavits were clearly insufficient. And the judgment was therefore *Affirmed.*

No. 26,361.
D. C. Kandy. } *Pandakkaregedere* v. *Pandakkaregedere.*

An heir-at-law is not precluded from proceeding for

The plaintiff claimed certain lands as the brother and sole heir of the deceased owner, *Ukkoo-rale;* and complained that the 1st defendant (the widow of the deceased,) who had only a life-

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the recovery of lands belonging to the estate of his intestate, by the fact of the administrator of such estate having sold the lands.

interest in the property of the deceased, had sold the lands now in dispute to the 2nd defendant, a near relative of hers.

The defendants admitted that the plaintiff was heir-at-law; but contended that the 1st defendant had a right to sell the lands as administratrix of her husband's estate.

On the day of trial, the court, without entering into evidence, upheld the sale in favour of the 2nd defendant, and dismissed the plaintiff's suit. The present was an appeal against that dismissal.

W. Morgan, for the plaintiff and appellant.] It is true that there are decisions of the Supreme Court to the effect stated by the Court below, but those decisions were based on the ground of expediency. The District Court of Colombo adds a very salutary provision to Letters of Administration issued from that Court, restricting the administrator from selling lands, without its special order, which may be obtained on shewing a necessity for it, and after citing the heirs. Such a proceeding is in perfect accordance with the Roman Dutch Law. V. d. Keessel, *Th.* 323.

Besides, the sales authorized by the Colombo Court, are Auction sales; but, in this case, the sale was a private one; and that is clearly irregular. Voet, xxviii. 8. § 21. Even in England an administrator's sale may be questioned. 2 Williams *on Executors*, pp. 480, 481; and from the appeal petition it appears that this transfer took place after the final account had been filed; and these lands reserved for the widow's life-interest. By the Kandyan Law, a widow having the administration of her husband's estate, cannot sell lands that belonged to her husband. Armour p. 23.

The Court here stopped the argument, and pronounced judgment, as follows:

That the decree of the Court below be set aside, and the case remanded for hearing; the Supreme Court being of opinion that, according to the authorities referred to, (Vanderkeessel, *Theses*, 323, Voet lib. 28. tit. 8. § 21,—Williams on Executors, vol. ii. pp. 480, 841, and Armour's Grammar of the Kandyan Laws, p. 23,) the plaintiff is not precluded from proceeding against the defendants, although the 1st defendant is the administratrix of Ukkoorale's estate.

December 13.

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December 13.

Present, ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 479. } *In the matter of the estate of Teruwanaide Marcar*
D. C. Galle. } *Sinne Lebbe Marcar.*

Where the District Court has, upon the consent of the administrator and the heirs, revoked the letters granted to him, and appointed another administrator, such subsequent appointment cannot be set aside on the mere application of the previous administrator, and without cause shewn fresh citations were held unnecessary on the occasion of the second grant.

This was an appeal from an order of the District Court, cancelling letters of administration granted to the appellant. It appeared that, in 1847, letters of administration to the estate of the deceased were granted to his brother *Packier Mohidin*, the present respondent. The heirs, not being satisfied with the conduct of the administrator, swore an affidavit against him, charging him with mal-administration; and, in 1855, the administrator and the other heirs agreed, that the appellant, who was the son of the deceased, should have administration. A joint application was accordingly made to the Court, which was allowed; and the new administrator gave and perfected the usual security. After this, several steps appeared to have been taken by the heirs, who never questioned the appellant's authority. In 1856, the respondent obtained a rule upon the appellant, to shew cause why the letters granted to him should not be revoked for irregularity and informality. No affidavit was filed in support of this rule, and no charge of mal-administration preferred. On the returnable day of the rule, the District Judge made the following order:—"The "grant of the administration made on the 21st November 1855, "being irregular, and therefore voidable, it is ordered that the "same be revoked, the party to whom it was granted paying costs "of this rule." From this the second administrator appealed.

Dias, for the administrator appellant:] The proceedings adopted by the respondent were grossly irregular. The respondent was estopped from questioning the grant of letters of administration to the appellant, because he, the respondent, and the other heirs were consenting parties to such grant. Informality and irregularity, the only two grounds taken, could not therefore be urged by them. The respondent may, of course, have the appellant removed from his trust; but that should be upon some substantial ground of objection, such as mal-administration: but the conduct of the appellant was not attempted to be impeached. The District Courts are armed with extensive power over executors and administrators (Charter of 1833, clause 27); and more particularly over administrators, who are the ministerial officers of the Court. The right to remove executors and administrators is clear, and the questions in this case are,—1, whether the occasion justified

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the removal of the respondent in 1855; and 2, whether there was anything in the second grant which made it void *ab initio*. With respect to the first point, the occasion clearly justified the removal of the respondent. There was an affidavit filed by the heirs, charging him with mal-administration, upon which, he, for reasons best known to himself, consented to withdraw. Such consent was equivalent to a confession of guilt, and the then District Judge, upon the application of all the heirs, acted upon such evidence, and removed him. As to the second point, there is some difficulty in ascertaining the line of argument adopted by the respondent in the Court below, and the reasons of the District Judge for his order. Want of citation seems to have been urged as an objection. Under the circumstances of the case, no citation was necessary, but even if it were, there was the consent of the heirs, which was equivalent to citation. (1 Wms. Ex. 363; *ib.* 367; In the Goods of Rodgerson, 2 Curt. 656.) According to the practice of the English Courts, which is generally followed in this country, no citation is at all necessary, except in cases where there are parties having a prior right to administer (1 Wms. Ex. 367). No such prior right existed in this case: on the contrary, the appellant, as the son of the intestate, had a greater interest in the estate, and a consequent right of preference to the administration. The next objection was, that administration properly granted could not be revoked, even on the application of the administrator. This is denied in the unqualified way in which it is put by the District Judge. The very authority relied on shews that the Judge has a discretion. Having such discretion, he exercised it in the removal of the respondent, and the substitution of the appellant for him, and something more than mere informality is required to remove him.

W. Morgan, for the administrator respondent:] The removal of the respondent in 1855, was a grossly irregular proceeding; and the appointment of the appellant was a nullity, such as could not be cured by any waiver on the part of the respondent and the other heirs. It is true that the District Judge may revoke an administration, but it should be upon good cause shewn. The mere consent of the administrator is not sufficient (1 Wms. Ex. 484). It is urged that an affidavit was sworn by the heirs against the respondent, charging him with mal-administration. That affidavit, however, does not appear to have been acted upon, for the removal of the first, and the appointment of the second administrator were long after the date of that affidavit. The revocation of letters of administration once granted is a serious matter. Rights of

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third parties may be most seriously interfered with. Before the grant of letters to the appellant, citation should have been issued, and that not having been done in this case, the second grant was void, and was properly set aside. (1 Wms. Ex. 393.) It is urged, that consent was equivalent to citation; but there is no evidence before the Court, to shew consent by all the heirs. Even if there was such consent, the citation required by the 6th clause of the Rules and Orders, sec. 4, should have issued. That is a general, and not a particular citation. It is intended not only for the benefit of the next of kin, but of creditors and others interested in the estate.

The Supreme Court was of opinion, upon the facts of the case, that no sufficient reason had been shewn to cancel the letters of administration. The respondent was condemned to pay the costs personally in the District Court as well as in appeal.

Reversed.

No. 16,783. } *Isboe Lebbe* v. *Seesma Lebbe.*
D. C. Caltura. }

The plaintiff claimed a garden upon a Bill of Sale, dated the 8th July, 1853, from the administrator (who since intervened) of one *Seradin*, the admitted original proprietor of the land. The defendant pleaded that the son of *Seradin* gave ⅓rd of the land to him, the defendant, on his marriage with his daughter. He had, however, no conveyance, but relied entirely on possession. His marriage, it appeared, took place in 1838, and his possession commenced three years after. The action was brought on the 9th October, 1855. Evidence was called, and the District Judge gave judgment for the defendant upon his prescriptive possession. From this the intervenient appealed.

Where a party claims property, of which he has been in possession for more than 10 years under a verbal gift from the son of A., the original proprietor; the appraisement of the property in the estate-case of A., and the seizure of it under a writ against the son of A., within the 10 years, are not *disturbances*, such as would deprive him of the benefit of the Prescription Ordinance.

Dias, for the intervenient and appellant.] The defendant must stand, or fall by his own possession, as the possession of his father-in-law could not avail him for want of a conveyance. Admitting, however, his possession of ⅓rd of the land, such possession was not an undisturbed and uninterrupted possession, as required by the Ordinance; for, in 1846, the intervenient applied for letters of administration to *Seradin's* estate, when the defendant's father-in-law appeared in opposition, and prayed that administration might be granted to him. Appraisers were nominated by him,

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and the land in dispute was appraised in 1850, as the property of *Seradin's* estate. The defendant's father-in-law, however, having failed to give security, administration was granted to the intervenient. This appraisement, it is submitted, was a disturbance of the defendant's possession in 1850, and that was before his title by prescription was completed. The appraisement was by a party acting for and on behalf of *Seradin's* estate; and is, therefore, equivalent to the act of the intervenient himself, who now represents that estate. It mattered not, however, by whom the defendant's possession was disturbed. Even the acts of strangers would take away his title by prescription. (Marshall, 525, section 9.) In this view of the case, there was another disturbance of the defendant's possession in 1848, namely, the seizure of the land under a Writ of Execution against the defendant's father-in-law. Under these circumstances, it is submitted, that the character of the defendant's possession was not such as would entitle him to recover.

Sed per Curiam.] The decision of the Court below is—*Affirmed.*

No. 14,436.
D. C. Badulla. } *Dawson* v. *Falconer.*

In this case the plaintiffs set out in their libel, that they being seised and possessed, as of their own property, of a certain Coffee Estate, called the *Mahavilla* Estate, at Badulla, had, on the 1st January 1850, employed the defendant as superintendent thereof, at £10 a month; that on the 19th May 1854, they had given him notice, that his services were no longer required, and asked him to give up possession to one *P. Ryan*, who, however, on proceeding to take possession, was expelled by the defendant, on the pretence of having a large claim for salary; that the Estate was of the value of £2,000; that the defendant had been paid his salary in full, and had no claim against the plaintiffs; and therefore, the plaintiffs prayed, that the defendant might be ejected from the Estate, and be condemned in £300 damages.

The defendant pleaded, 1st, that the plaintiffs were never seised of the said Estate; 2nd, that the defendant had been employed by the plaintiffs, as the agent of the proprietor of the Estate, to manage and superintend it, from January 1850 till October

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1854, during which time the defendant was allowed £10 a month, on condition that his salary would be increased in proportion to the increase of the crops; that for a long time, the plaintiffs failed to supply funds for the up-keep of the Estate; and the defendant was therefore obliged to expend money on it, viz., an amount of £1,138 19*s.* 3*d.*, which he claimed in reconvention.

The replication joined issue as to the salary, and stated that all necessary funds for the up-keep of the Estate, had been duly paid, and that if anything was still due, the plaintiffs were willing to pay the same; but that this did not justify the grievances committed by the defendant.

At the trial in the Court below, Mr. *Ryan*, and one of the plaintiffs, (Mr. *Dawson*), were examined as witnesses for the plaintiffs: the former proved, that when called upon to deliver possession of the Estate, the defendant had refused to do so, although he was offered an immediate settlement of all his claims, except that for salary, and had actually barricaded the Estate, and driven him out of it, with the assistance of the coolies; and the latter proved damages sustained by him to the amount of £350, by the detention of the crops.

The defendant called no evidence, but took the following points:

1.—That no weight could be attached to the evidence of the 1st plaintiff, unsupported, as it was, by accounts or other documentary evidence.

2.—That the plaintiffs had produced no authority from the proprietors of the Estate, who were in Bombay.

3.—That Mr. Miller, who was admitted to be the present agent of the proprietors, had not intervened.

4.—That no sufficient tender had been made to defendant, of an amount of £54, admitted by the 1st plaintiff in his examination to be still due to the defendant.

Hereupon the Court below pronounced the following judgment:

"After a most careful and attentive hearing of all the arguments and authorities produced by the able counsel on both sides in this case, and with a most anxious wish to arrive at its true merits, honestly and impartially, the Court is of opinion that the following admission of the defendant, in his answer dated 30th November 1855;—'and for a further answer in his behalf, the defendant says, that he was employed by the plaintiffs as agents of the proprietors of the said Coffee Estate in the libel described, to manage and superintend the same,'—together with the whole tenor of the defendant's letters to the plaintiffs filed in the case

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(on 31st August 1854,) and authenticated by him yesterday in Court, more especially the two dated respectively 5th and 22nd April 1854, sufficiently prove that his sole claim to the *Mahavilla* Coffee Estate, was derived from the plaintiffs, whose right thereto, the general maxim of law, that no servant has the power of disputing his master's title, clearly estops him from questioning." The defendant's detention therefore of the Estate, from the date of his receiving his employers, the plaintiffs', letter of the 19th May 1854, (by the hands of Mr. *Ryan*, who was employed, and offered twice, to settle all reasonable claims brought by defendant) until he ceded it to the receiver appointed by the Court on 29th September 1854, was unquestionably illegal, and has caused him to forfeit all claim upon the plaintiffs, either for any increased rate of salary up to the end of May 1854, or for the sum of £56 8*s*. 2*d*., once due to him by plaintiff, or for any further expenses unjustifiably incurred by him subsequent to the aforesaid date. In fact, the defendant having to-day totally refused to call any of his evidence, although he has no less than 18 witnesses down on his list, must infallibly cause the whole of his large claim in reconvention of £1,138 19*s*. 3*d*., entirely to fall to the ground.

"So far the case appears sufficiently clear; but the Court confesses, that no little difficulty exists in regard to the amount of damages, viz., £300, claimed by the plaintiffs. For, whilst there can be no doubt that the defendant has rendered himself liable to damages for his illegal retention of the Coffee Estate for three or four months, yet the means before the Court for estimating their extent seem to be hardly adequate. The only evidence adduced by the plaintiffs on this point is that of the said plaintiff himself, (for that of the plaintiffs' witness, Mr. *Ryan*, can scarcely be said to bear upon it,) and it becomes a grave question whether the statement of one of the parties interested, unsupported either by his office books, in which the sale of the coffee for 9*s*. 6*d*. for a bushel (subsequently sold for 8*s*. 6*d*.,) was entered, or by the contract for the same, or by the party to whom he made that sale in anticipation, can, although *morally* convincing, be held to be legally so. Under these circumstances, therefore, and taking also into consideration the statement in the plaintiffs' affidavit, 7th and 18th August 1854, that the defendant is not possessed of any property, the Court considers that the ends of justice will be sufficiently met by its giving judgment for the plaintiffs with *forty shillings*, *damages*,—and by ordering the defendant to pay all the costs of this heavy and protracted litigation. Judgment is therefore recorded for the plaintiffs, with forty shillings damages, and costs."

An appeal having been taken by the defendant against this judgment;

Rust, for the defendant (*Muttukistna* with him) made *three* points:] 1. That the plaintiffs are not and never were seised of the Estate as of their own property; 2. That the two plaintiffs held no authority whatever from the owners; 3. That the defendant was entitled to retain possession of the Estate, even as against the owners, u til repaid whatever sums had been expended by him for its up-keep and cultivation. Other points would arise, but these were the principal objections to the judgment below. *firstly*, This is an action of ejectment. The plaintiffs set up title in their libel, the defendant denies it, and they re-assert it in their replication; and it was therefore necessary for them to prove title, and this they entirely failed to do. [ROWE, C. J. You admit in your answer that you came in under them.] We say we came in under the plaintiffs as agents of the proprietors. In the oral examination of the defendant, he says, *Mr. Shand*, as agent of the proprietors, engaged him. We are not estopped from shewing they are no longer such agents. [ROWE, C. J. Is it not a case of master and servant?] Certainly not;—it is purely an action of ejectment; the prayer of the libel is, that he be ejected. The Court must look at the whole of the proceedings. It would be alike inequitable and unjust to condemn us by an unfortunate expression in the answer, and not to hold plaintiffs to their reiterated assertion of title. It is one of the first principles of the law of evidence that the *substance of the issue* must be proved. Here the substance of the issue is, clearly, title to the Estate. We were lawfully in possession, and could not be ejected by the plaintiffs. Our right is a much better one than theirs. They had no power to turn us out. [ROWE, C. J. By your own shewing you came in under them, and when you refused to give up possession, you became simply a wrong-doer.] I submit that the Court is looking at the pleadings from one point of view only: but *secondly*, it is clear from the 1st plaintiff's own shewing, that the 2nd plaintiff held no authority whatever from the owner of the Estate. [STERLING, J. That would only be a ground of non-suit at the trial.] Just so; but the District Judge would not non-suit as he should have done, when this objection was taken. Then, again, even the 1st plaintiff's authority is limited, and another gentleman not before the Court, not examined as a witness, holds a power of attorney from the proprietors. [ROWE, C. J. But your admission is, that you came in under the plaintiffs.]

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That admission, and it is a most unfortunate one, is opposed to the facts. Why were not all the powers of attorney produced? They would have conclusively shewn that the plaintiffs had no *locus standi*. Mr. Dawson was noticed to produce all papers connected with the Estate—indeed his right to sue was distinctly raised, and it was for him to establish such right;—he failed altogether, and the plaintiffs should have been non-suited. Then, as to the *third* ground, viz., that the defendant was entitled to retain possession of the Estate, until repaid the money advanced by him for its up-keep and cultivation, a sum of £56 is admitted by the defendant in his affidavit of August 1854, to be due to the defendant, and is also admitted by the first plaintiff at the trial. This amount was for Estate purposes, for, in the Answer, the defendant admits the receipt of his salary up to the end of May, and this is confirmed by the plaintiff's replication. The District Judge finds that this £56 was really due, and yet, strange to say, declares it forfeited, because the defendant had held over possession of the Estate. [TEMPLE, J. The District Judge considers this £56, in assessing the plaintiffs' damages at 40*s*.] That is neither the legal nor the grammatical construction of the judgment, which first treats of £56, and then goes on in quite a subsequent stage to assess plaintiffs' damages at 40*s*. They are assessed too high, for none was proved. Mr. *Ryan* proved none; and the 1st plaintiff was some thousand miles distant at the time, and had not even his books with him at the trial. The District Judge finds that his evidence is not legally sufficient, but says it is morally so; that was a consideration with which he had nothing to do. [ROWE, C. J. That comes of having laymen on the bench.] The District Judge, although no lawyer, is a man of ability; but his judgment in this case cannot stand, for it is uncertain and inconsistent. [ROWE, C. J. He clearly means that the defendant is not entitled to recover the £56, because the plaintiffs have been damaged to that extent and 40*s*. beyond. In other words, the plaintiffs have been damaged 40*s*. *plus* £56.] Allow me to apply a simple but effectual test. Would this judgment estop defendant from recovering £56 in another action from the plaintiffs, and would not the plaintiffs be estopped from recovering in another suit anything beyond the 40*s*.? The defendant clearly would not be estopped, and the plaintiffs equally clearly would be estopped. This judgment therefore cannot stand, and the case must go back for the defendant's evidence as to damages *ultra* the £56. [ROWE, C. J. But you say you were

entitled to hold possession until the £56 was paid. Do you seriously maintain that position?] The Law is clearly laid down in 3 Burge, 349 *and seq.*, and has been recognized repeatedly by the Privy Council. I refer to the case of *Sayers* v. *Whitfield*, 1 Knapp, 133, a case precisely similar to the present. There Lord *Wynford*, in giving judgment, stated that the principle in question was founded on the common law. [STERLING, J. Yes, the common law of England.] Here we have a common law much more liberal on this subject than the common law of England; for it acknowledges the right of lien in the very cases alleged by Lord *Wynford* to be excepted by the common law of England. [TEMPLE, J. In that case the advances were made by the agent. If you had been contending for Mr. Dawson's lien, it would have been applicable.] The law draws no distinction in such cases, as indeed it can draw none. The advances, whether made by Mr. Dawson or the defendant, were advances equally made by an agent, and equally give a right of lien. If you read the correspondence filed in this case, you will find that the plaintiffs stated once and again their inability to find funds, from various causes. The defendant, as the agent of the proprietors, found them himself, and by so doing possibly prevented this Estate from becoming utterly valueless. The principle recognized by the Roman-Dutch Law throughout, is, that whenever a party benefits the property of another *bonâ fide*, he is entitled to compensation. In a case of this kind the principle is extended, and the law gives the party expending his money for the preservation of the property, a lien upon it, and that, whether he be receiver, superintending agent, or trustee. [ROWE, C. J. That doctrine cannot apply in cases of this kind; but I think the case may go back to assess the damages of the defendant.]

Lorenz, for the respondent.] The Court has already expressed its opinion on the right of the plaintiff to recover *possession of the Estate* from the defendant. The defendant was the servant of the plaintiff, and whether or not the Estate belonged to the plaintiffs is immaterial; for the servant cannot question the title of the master under whom he holds possession. As to *damages*, it is clear that the Judge below was wrong in not giving the plaintiff damages; and if the defendant was worth a shilling, we should have appealed against this decision, and recovered our claim. It is equally clear that he intended to give them damages to the extent of £56, which he sets off against the like amount admitted to be due to the defendant. He has not expressed himself in a lawyer-like way; but the conclusion he has aimed at is supported

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by the evidence. It is true, he holds Dawson's evidence, though morally sufficient, yet legally insufficient; which is simply a distinction without a difference,—a likely mistake to be committed by a layman, who has been accustomed to consider a *party to a suit* incompetent as a *witness*, and who was therefore naturally taken aback at being called upon to receive his evidence. He has, however, virtually believed him to the extent of £56, for that is the effect of his refusing to give the defendant the £56, which is admitted to be due to him. But granting that the defendant is entitled to some compensation, he clearly could not hold the Estate against the plaintiffs, pending a settlement. [Rowe, C. J. No. He was the servant of the plaintiff, and should have gone when he was told to go. If my servant fail to please me, I dismiss him, and he must leave my house. If he holds out against me, and tells me he won't leave my house till he is paid, I shall *molliter manus imponere*, or get the next Policeman to do it for me. It is well the plaintiffs in this case were peaceable persons, or they may have sent the defendant out by force and arms, as they lawfully might; and the affair would have terminated in a Criminal Court. It would be a dangerous precedent to hold that a superintendent of an Estate cannot be dismissed by those who placed him there.] The plaintiffs went further, and actually sent *Ryan* with instructions to settle all claims; but the defendant would listen to no arrangement.

Rowe, C. J., delivered the judgment of the Court.

That the decree of the District Court of *Badulla*, of the 26th June, 1856, be affirmed as to so much of the judgment as decrees possession to the plaintiffs, it being clear that the defendant had never any possessory right as against his employers, and that in continuing upon the Estate, after regular notice determining his engagement as superintendent, he was altogether a wrong-doer.

The Supreme Court is further of opinion, that there being no proof of any contract between him and his employers, or of any established custom by which he—as such superintendent—was bound to advance monies, as an agent, for the cultivation of the Estate, he had no lien on that Estate, and no right to set off against the damages claimed by the plaintiffs any such payments as the defendant claims to be allowed for in the action.

Inasmuch nevertheless as the District Judge seems to have admitted such set off whilst assessing plaintiffs' damages at 40*s*. only, it is decreed, that plaintiffs be at liberty to take this case down again for trial on the single question of the assessment of their damages; and that the defendant, if he has in fact any claim on the plaintiffs

in respect of such alleged payments, be left to his remedy by cross action;—such cross action to be brought, and such new trial to be had, if at all, within six months, as assented to by the counsel on both sides, from the date of this judgment.

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December 15.

December 15.

Present, ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 21,395. *C. R. Kandy.* } *Gavin* v. *Davidson.*

Where a party contracts to pay a sum of money in Kandy, and gives a draft on Colombo for the amount, he is liable to pay the exchange charged by the Bank for cashing the draft.

The defendant had purchased an Estate from the plaintiff for £600, payable in Kandy; and the transfer being completed, the defendant sent the plaintiff a cheque or draft for the purchase-money on *Parlett, O'Halloran and Co.*, of Colombo. The plaintiff cashed the draft at the Branch Bank in Kandy, and received the amount of it, less £3 being half per cent. commission, being the amount of the exchange between Colombo and Kandy. He soon after wrote to the defendant, informing him that he had credited him with £600 in full, and debited his account with the amount of the commission "payable on the transmission of the money from Colombo to Kandy." The present was an action by the plaintiff to recover the amount paid by him as commission on the draft for £600.

The Commissioner below having given judgment for the plaintiff, the defendant appealed against it; and *Lorenz* for the appellant contended, that there was no evidence of any contract or agreement on his part to pay the amount claimed; and no law or custom entitling the plaintiff to recover commission on a draft or order which he had accepted, and for his own convenience had cashed at the Bank.

Rust, for the defendant, was not called upon.

Per Curiam.] The agreement between the parties was, that the defendant should pay the purchase-money in Kandy: and he gives a draft payable in Colombo; which puts the plaintiff to the expense of £3 in order to get the money. The plaintiff is clearly entitled to this amount, for it is so much less the purchase-money.

Affirmed.

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No. 6,631. *D. C. Ratnapoora.* } *Horetal Hamy* v. *Rang Appoo.*

By the Kandyan Law, a discarded wife has no claim against the parents of her husband for maintenance; and only against the husband, so long as she has the children in her charge.

The plaintiff claimed £21 12*s.* as maintenance for herself and her child. It appeared in evidence that the plaintiff was the deega wife of the 3rd and 4th defendants, and that the 1st and 2nd were the parents of the 3rd and 4th. There was no allegation whatever in the libel, shewing the liability of the 1st and 2nd, except the statement, that the plaintiff's marriage took place with the consent and agreeably to the wishes of the 1st and 2nd. The 4th defendant allowed judgment by default, but the 1st, 2nd and 3rd pleaded several pleas. First, that the plaintiff had left the 3rd defendant and gone with the 4th, who was in collusion with the plaintiff in this case. Second, that the child was not the joint child of the 3rd and 4th, but was the sole issue of the 4th; and third, that the said child was forcibly taken away by the plaintiff, though the 3rd defendant was ready and willing to support it. Upon these pleadings, the case came on for trial, and upon evidence on both sides, Mr. Mitford gave the following judgment:—"The defendants' evidence "is contradictory. It is admitted that the 3rd and 4th defendants "and plaintiff are married for fifteen years, and the defendants "have latterly taken her back to her parents: she has, therefore, a "claim for maintenance from the estate, and the children have "also a reversionary interest in their father's property. It is de- "creed that defendants do pay plaintiff maintenance at the rate "of 5 shillings per month, from the 5th September, 1855, and for "the future; and that the defendants do pay costs." From this the 1st, 2nd, and 3rd defendants appealed.

Dias, for the appellant.] The District Judge did not clearly understand the points raised by the pleadings. The case against the 1st and 2nd defendants was quite different from the case against the 3rd and 4th. There is no cause of action at all against the 1st and 2nd; and if they had demurred, instead of answering, they would have been entitled to absolution from the instance. The effect of the judgment below would be to make parents liable for the debts and defaults of the children,—a doctrine not warranted by any Kandyan Law; on the contrary, that law is directly the other way (Marshall, p. 351, § 119). With respect to the liability of the 3rd and 4th defendants, the District Judge has lost sight of the distinction between the plaintiff's personal rights, and those of her child. First, with respect to the plaintiff's personal rights:—A Kandyan divorce is the easiest thing in the world; it does not even require mutual consent. "The husband may, at any time, "with or without any just cause, discard his wife, and so may the

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" wife divorce herself from her husband, whether the marriage " was contracted in *deega* or *beena*." (Armour, 13.) According to the finding of the District Judge—that plaintiff was taken back to the parents by the defendants—she was a divorced wife; and even admitting that she was repudiated or divorced by the husband, without sufficient cause, she would only be entitled to retain possession of the wearing apparel which her husband had given her. (Armour, 15). This view is strengthened by the case put by Armour, of a wife with child at the time of the divorce by the husband without good cause, where she would only be entitled to maintenance until the child should be old enough to be delivered over to the father. (Armour, 15). This is the law applicable to the case as presented by the plaintiff herself; but if the defendants' story be true, the plaintiff is not entitled to any relief. Secondly, as regards the claims of the minor child:—There is no doubt that the father is bound to maintain his child by a divorced wife, till that child has attained the age of majority (Armour, 16); but the question here is, who is entitled to the custody of the child? The father was willing to accept it, but the plaintiff would not give it up. The Kandyan Law on this point appears to be, that the father is entitled to the custody of the children of his divorced *deega* wife. (Armour, 15).

The case was remanded for a new trial, the plaintiff having no claim against the 1st and 2nd defendants, and only against the 3rd and 4th, as long as she has the children in her charge.

December 17.

December 17.

Present, ROWE, C. J., STERLING, J., and TEMPLE, J.

No. 9,398.
C. R. Negombo. } *Mendis* v. *Fernando.*

This was an appeal by the plaintiff against an order of the Court below, requiring him to deposit the expenses of the witnesses previous to issuing his subpœnas.

Selby, Q. A., appeared for the appellant.

The Supreme Court directed the order appealed against to be " set aside; there being no Ordinance or Rule of Court which requires witnesses' expenses to be deposited prior to the issuing of subpœnas."

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No. 7,383. *C. R. Caltura.* } *Mohamadoe Lebbe* v. *Casey Lebbe.*

A claim for *money paid* is prescribed under § 5 of the Prescription Ordinance.

The judgment of the Supreme Court sets out the facts of this case. No counsel appeared on either side; but *Lorenz* (*amicus curiæ*) drew the attention of the Court to a previous decision of the 24th July, 1845, which is appended as a note.*

Per Curiam.] In this case the simple question for the consideration of this Court is, whether an action in respect of a money-payment made by the plaintiff for the use of the defendant, [the plaintiff having paid the purchase-money of certain property purchased by him for the defendant,] and adopted by such defendant more than three years before action brought, is barred by the Prescription Ordinance, No. 8 of 1834, § 5. It is contended

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**No.* 8,262. *D. C. Galle.* } *Don Andries* v. *Don Siman.*

That the decree of the District Court of Galle be set aside, and that the plaintiff and appellant do recover from the defendant and respondent the sum of £6 15*s.* 3¾*d.*, and interest thereon at 9 per cent. per annum, and each party do bear his own costs.

The parties in this case brought an action jointly against one *Don Theodoris de Silva Ameresinhe Aratchy*, in the District Court of Galle, case No. 3,879, and it was decreed therein "that the case be dismissed, the plaintiffs paying the costs." A writ of execution was issued upon that judgment against both the plaintiffs, and one of them paid the whole costs; and after a lapse of more than three years, brought the present action, to recover half the amount so paid by him from his co-plaintiff—the present defendant. The defendant pleaded the 5th and 6th clauses of the Ordinance No. 8 of 1834, in bar of the plaintiff's claim, and issue was joined on their applicability to the case.

The District Court held the plea of the defendant good, and the case having been brought before the Supreme Court on circuit, by appeal, it was reserved for the opinion of the Judges collectively, and argued before them, at the present General Sessions.

It has been argued before this Court on the part of the respondent, that the appellant was not in the former case liable to pay the whole of the costs, and that each of the co-plaintiffs in that case was, by that judgment, bound to pay only his share of those costs, and no more; (*Voet.* lib. xlii. tit. 1. § 24.)—that the payment upon which the present action is founded was voluntary, and that therefore the case comes under the 5th clause of the Ordinance, as either a "contract relating to moveable property," or "money lent without bond;"—that monies and debts of this kind class under the head of "moveable property," (*Van Leeuwen's Com.* p. 102, *Swinburne on Wills*, vol. 3. pp. 928, 936); but it might even fall under the head of "money lent," as the distinctions of "money paid, laid out and expended, had and received," are creatures of the English Law, and unknown to the Dutch Law, by which they would all class under the head of *Mutuum;* that the appellant as the *negotiorum gestor* of the respondent,

that the words "*money lent*" in that section, do not embrace such a case as this. The Supreme Court is however of opinion, that the expressions "money paid to the use of another," "money due on account stated," &c., are all no more than various forms of setting out a money debt due from one party to another; and that it was

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his co-plaintiff in the former case, paid money for him, and the transaction ought therefore to be looked upon as a *Mutuum;* (*Vinnius' Institutes*, lib. 3. tit. 17, p. 627)—that there is a case similar in some respects to the present, and in which such a transaction has been, even by the English Law, looked upon as a case of money lent, (*Wade* v. *Wilson*, 1. East 195.)—that the Ordinance, like the English Statutes of Limitation, which have been emphatically termed "Statutes of Repose," (2 Chitty on Statutes, p. 697 in notes), ought to be liberally and beneficially expounded, and therefore ought to be construed to include cases of "money paid," "laid out, and expended," &c., (Ib. p. 702, *Blanshard on Limitation*, p. 8".)—that the appellant had no cession of action, and has not therefore the same rights as the judgment-creditor; that without this cession he has *proprio nomine* an action *pro mandati* or *pro socio*, (*Vinnius*, lib. 3. tit. 17. p. 627; *Voet.* lib. 45. tit. 2. sec. 7; *Pothier on Obligations*, vol. 1. p. 166); and the judgment not being the basis of the present action, but only collateral evidence in support of it, the prescription of a judgment would not apply.

But this Court is of opinion, that although the Dutch Law may be as stated by the learned counsel for the respondent, yet this Court is bound by its decision of the 28th of December, 1837, in the Amblangodde case, No. 1,676, and by the practice having been invariably such as stated therein. It is now established, that when parties are condemned in costs generally, they are all liable *singuli in solidum;* and it follows, therefore, that this was not a voluntary, but a cumpulsory payment. The Court is further of opinion, that an argument cannot be maintained, as indeed none was offered, that the case comes under the 6th section; and the only question has been whether it comes under the 5th. As the payment is held to have been a *compulsory* one, this action cannot be said to be for the recovery of "money lent." Neither is it founded "upon any unwritten promise, contract, bargain, or agreement relating to moveable property;" and the only question which remains for consideration is, whether it is an action "for any moveable property." The words "moveable property" must be construed in the limited sense of corporeal property exclusive of choses in action. For otherwise, after the words "moveable property" should have been inserted the words "except as aforesaid," to shew that the 5th section was not repugnant to the two immediately preceding it, and which provide different terms of limitation for the moveables (taken in the wide sense of the word,) therein mentioned. Neither can "moveables" have been intended to comprehend money; for then there would have been no occasion to add the words "or to recover money lent." The Court has no reason to suppose that under the term moveable property, it was meant to include either actions to which a plaintiff had no right by cession, or which he was entitled to bring *eo nomine*.

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such money debt, when unsecured by bond, note, or other written security, which it was the purpose of the Ordinance to prescribe. Now it is clear, that in the present instance, the moment the defendant had adopted and ratified the payment so made to his use, a money debt existed, for the recovery of which the plaintiff might have at once sued, or required that it should be secured to him by bond, note, or other security, in the same manner, to all intents and purposes, as if the money had been originally advanced upon a present undertaking to pay.

The Court, therefore, being of opinion that this Ordinance, as one in favour of the quieting of suits and of sound credit in commercial transactions, should be construed liberally, decrees that in this case judgment should be entered for the defendant.

December 19.

December 19.

Present, ROWE, C. J., STERLING and TEMPLE, JJ.

No. 20,012.
D. C. Colombo. } *Francisco Pulle* v. *Wanniappa Pulle.*

A testator devised certain property to his adopted son *Matthes*, on condition that on *Matthes'* death it should devolve on his descendants, and that if he leaves no descendants, it should revert to the testator's heirs. Held that *Matthes* having died, leaving a child, who also shortly after died, the property reverted to the testator's heirs, and did not devolve on Matthes' mother as his sole heir.

In this case the plaintiff, who had obtained a writ of execution against one *Maria Rodrigo*, prayed that a certain house, which he had seized under the writ (and the sale of which the defendant had opposed,) might be declared the property of the said *Maria*, and be liable to be sold for her debt.

The defendant pleaded that the house was not the property of Maria, that it had formerly belonged to one *Philipo Silva Bernardo Pulle*, who by last will left the same to his adopted son *Matthes* (the husband of *Maria*,) under the condition "that he should not sell or alienate the same, but that, after his death, it should go to his descendants, subject to the same restrictions; and that in case he left no descendants, then it should revert to the heirs of the original owner (*Philipo.*)" That *Matthes* died without leaving any descendants, and thereupon the property reverted to the estate of *Philipo*, whose administrator leased the same to the defendant.

The Replication joined issue on the above facts.

And the Court below, after hearing evidence on both sides, held it to have been proved that *Matthes* had left no issue, and gave judgment for the defendant.

William Morgan for the plaintiff and appellant.] The question of evidence in the Court below, was whether *Matthes'* child, (for

it is admitted that he had a child,) was alive at his father's death or not. The plaintiff proved that the child was alive at the time, and only died some time after. With this evidence, I am instructed to say, that the District Judge was at first perfectly satisfied; and my learned friend, who conducted the defendant's case below, will not, I am convinced, deny it; although the Judge afterwards, most unaccountably, and to the astonishment of all the parties concerned, found the contrary to be the case. [During the rest of the argument, it was assumed that the child had survived the father.] Taking it for granted that the child survived the father, then, on the death of the father, the property devolved on the child, in terms of the will. And the will, though it makes provision for the succession to the property in case *Matthes* should die without issue, makes no provision for the case of the child himself dying without issue. We must therefore consider the entail at an end with the death of the child, and in the absence of express provision, the ordinary rule of succession comes into operation, and the mother of the child, to wit, *Maria*, as his sole heir, succeeds to the property. 2 Burge 113; Van Leeuw. *Comm.* 254; Voet *ad Pand.* xxxvi. 1. § 2.

Lorenz for the respondent, (*Rust* with him.)] Assuming the child to have survived the father, the entail does not cease with him, for the will provides that the property should go to *his* descendants under the same restrictions. Gail, *Observ.* ii. 132; V. d. Linden, *Inst.* p. 137; 2 Burge, 122. [Rowe, C. J. It must terminate one day or another. What is the rule in the Dutch Law?] It terminates with the fourth generation. [Rowe, C J. And who takes the property then?] The heirs of the last possessor. [Rowe, C. J. Is that not an argument against you? Why should not the property, in that case also, revert to the original testator, as you now contend?] The cases are different. In the present case the condition continues, but the descendants are wanting; in the other, the condition ceases, and therefore the law comes into operation and gives the property to those who are entitled to take it, as if no condition had ever existed. At most, it is a question of *intention*. And if the expressions in the will, as contended for by the opposite party, are doubtful, we must endeavour to gather from the context of the will, the real intention of the testator. What then can be clearer than that the testator intended that the property should *in no case* go to *Matthes'* widow? He leaves it to *Matthes*—an adopted son—out of the family: he disinherits his legitimate heirs for the pur-

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pose of providing for an adopted son;—and in case he dies, does the testator say that the widow should take the property? On the contrary, he directs that it should *revert to his own estate.* If the testator, then, ever intended that the widow of *Matthes* should take the property, here is the proper place to look for that intention; and if he here shews no desire to give it to the widow, how can we conclude it to be his intention in the event of *Matthes'* child dying without issue?

Rowe, C. J., delivered judgment:

We must go to the testator's intention; and his intention was, clearly, to benefit his adopted son *Matthes* and *his* descendants. We should be giving a very wrong interpretation to this will, if we say, that on the death of *Matthes'* child, the property was to go to his mother, who was not of the blood of *Matthes.* The testator has left blood relations, and the latter part of the clause in the will makes it quite evident, that he never intended that the property should go to the widow. The judgment of the Court below is therefore— *Affirmed.*

No. 30,016.
C. R., Colombo. } *Hadjie Markan* v. *Oedoema Lebbe.*

Insolvency is not a "disability" under § 10 of the Prescription Ordinance.

The plaintiff in this case (a shopkeeper) had been declared an Insolvent in September 1855, and an assignee having been appointed, disputes arose between them, which continued till June, 1856, during which time no steps had been taken to recover the debts due to the Insolvent. In June, 1856, the disputes were settled, by the assignee and other creditors consenting that the fiat should be cancelled. The plaintiff's bills were then returned to him; and on the 15th October, 1856, he brought the present action against the defendant, for the value of goods sold and delivered to him in August, 1855.

The defendant pleaded prescription; and the Commissioner below dismissed the suit. The plaintiff now appealed against this dismissal.

Lorenz, for the plaintiff and appellant:] Although the period of prescription has elapsed, the plaintiff has been under disability during the greater portion of it, and in consequence of the fiat pending against him, was prevented from suing on the Bills.

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[ROWE, C. J. Why did not the assignee sue for him?] The assignee was the party disputing throughout the insolvency, and all the plaintiff's bills are prescribed in consequence. [ROWE, C. J. But the Ordinance makes no provision for a case like the present.] It provides for other analogous cases,—that of a minor for instance, who has a guardian, just as an insolvent has an assignee, and who is obliged to look to the recovery of the debt. [TEMPLE, J., distinguished between an assignee and a guardian. The former was appointed for the express purpose of recovering debts with as little delay as possible, and to bring the estate to a close.] The Courts of Equity in *England*, in some cases, have allowed a departure from the strict letter of the Statute of Limitations. See *Ex parte Dewdney*, 15. Ves. 496; and *Ex parte Ross*, 2 Gl. and J. 47.

Per Curiam.] The Ordinance No. 8 of 1834 makes no provision for the case of a creditor disabled from suing by Insolvency, and the judgment of the Court below is therefore—

Affirmed.

December 24.

December 24.

Present, ROWE, C. J., and MORGAN, J.

[The Hon'ble RICHARD FRANCIS MORGAN, Esq., was sworn in as *Acting Puisne Justice*.]

APPENDIX, 1856.

No. 1.

[The following case, though not arising upon an Appeal from an inferior Court, is inserted, as involving an important discussion respecting the powers of a Justice of the Peace.]

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December 10.

Present, ROWE, C. J., STERLING, J., and TEMPLE, J.

In re *Brown* and others.

A Justice of the Peace has no power to try and convict offenders under § 243 of the Merchant Shipping Act.

A petition was presented to the Supreme Court, praying for a review of certain proceedings had before Mr. *Dalziel*, as a Justice of the Peace, against the petitioners; but the Judges expressed their opinion, that the Supreme Court could not review proceedings had before a Justice of the Peace, and that the only way the matter could be brought before them, was by a Writ of *Habeas Corpus*. On the 8th December, *Lorenz* moved for a Writ of Habeas Corpus, which was duly issued. On this day the Jailor produced the bodies of the Seamen.

Lorenz appeared for the parties brought up on the Writ:] On a day not stated in the proceedings, the Captain of the ship "*Henbury*" charged these men before Mr. Higgs, as Police Magistrate, with "breach of duty in *refusing to furl the maintop gallant sail*." The charge was then forwarded to Mr. Dalziel, Mr. Higgs being engaged with pearl oysters. Before Mr. Dalziel, no affidavit was filed or complaint made on oath against the men. They were, however, convicted of an offence, under the Seamen's Act, for *not returning to the ship*, and sentenced to 12 weeks' imprisonment at hard labour. Thus, the offence with which they were charged before Mr. Higgs, was different from the offence of which they were convicted by Mr. Dalziel. The proceeding on the face of it shows sufficient irregularity to justify the setting aside of the conviction; but there is one objection which is fatal to the whole case,—Mr. Dalziel, as Justice of the Peace, had no jurisdiction. [ROWE, C. J., suggested that the plaint did not shew *where* the offence was committed, except on board the vessel. Had

a Justice of the Peace any jurisdiction on the high seas?] A Justice of the Peace has no jurisdiction except as a ministerial officer; in short, no original jurisdiction. Even assuming the offence had been committed within the jurisdiction of any Court, he, as Justice of the Peace, has no judicial power to try it. The section on which Mr. Dalziel has thought himself authorised to hear and decide this matter, is the 17 & 18 *Vict.* c. 104. § 518, cl. 5., *Abbott on Shipping*, p. 163. *App.* [TEMPLE, J. Is not there some Ordinance allowing two Justices of the Peace to try cases of this nature?] There was a former Act of Parliament; but never any Ordinance. Mr. Higgs was purposely appointed to act as *Magistrate* at the Watergate, in order to try cases of this kind. We have no Ordinance,—no local Act, empowering two Justices of the Peace to act. The Justice of the Peace contemplated by the Shipping Act, is "one by whom offences of a like character are punishable," but Justices of the Peace here have no power to *punish* offences at all. [ROWE, C. J. The men have been convicted under the Merchant Shipping Act. Then, under that Act, only such a Justice of the Peace can act, who has those powers which such officers have in England.] The Ordinance No. 6 of 1843, is an Ordinance "for the creation of Justices of the Peace;" and the preamble of the Ordinance shews the nature of the office conferred on a Justice of the Peace:— "Whereas it is expedient to make more effectual provision for the preservation of the public peace, and for the apprehension, examination, and commitment to prison, of persons charged with the commission of crimes or offences, in order that such persons may be brought to trial before some Court of competent jurisdiction." The 2nd clause of that Ordinance lays down the manner in which a Justice of the Peace is to act,—"to preserve the public peace, &c.; to quell all riots, brawls, and other disturbances, &c.; to lodge all rioters, &c., in any prison for the district for which he is assigned to act, to be dealt with according to law, and to enquire of all crimes and offences, &c.; and for that purpose to summon and examine upon oath all witnesses, &c.; and to summon or apprehend &c., all criminals and offenders, and to deal with them according to law, &c." The Ordinance No. 15 of 1843 defines their duties and their rights. This Ordinance amplifies the words "to be dealt with according to law." It gives no criminal jurisdiction; if it does, a Justice of the Peace may try a case of murder. [ROWE, C. J. You contend, that under No. 6 of 1843, his powers are these,—he may proceed to lodge any brawlers, vagrants, &c.,

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in any prison he dealt with according to law, and then he has a direct power, if he sees fit, to cause to be summoned criminals, &c.; in short, to put the law in action; but the Court itself is not a competent Court.] Or, in short, in the words of the recital "to bring all offenders before a Court of competent jurisdiction;" clearly contemplating that he was a subordinate—merely a ministerial officer—to pave the way for the Queen's Advocate, before the latter takes steps to bring offenders to punishment. [ROWE, C. J. He is there *quasi*-judicially and *in transitu*.] We must distinguish between a commitment and a conviction; a commitment with a view to a trial, and a conviction after trial. The only case in which a Justice of the Peace may be considered as having original jurisdiction is under § 2 of No. 6 of 1843, re-enacted by No. 5 of 1855, where, viz., a breach of the peace is anticipated, he may *bind over* the parties to keep the peace. Beyond this, he cannot act judicially; for no man can exercise judicial functions, on whom they have not been expressly conferred by the Legislature. [STERLING, J., referred to the form of Warrant appointing Justices of the Peace.]

ROWE, C. J., now delivered the judgment of the Court.] It is to be understood that the Court now deals with the Writ of Habeas Corpus alone, and on the Return. It was abundantly clear that the commitment was as Justice of the Peace, for the functionary who has entertained the case has taken the trouble of striking out the words "Police Court" in the form of the Warrant used, and of inserting the words "Justice of the Peace" under his signature. The question then arises, whether, as Justice of the Peace, he had any jurisdiction to commit in execution. It is stated in the Warrant, that it is a committal under the 243rd clause of the Merchant Shipping Act. On reference to that Act, the offence contemplated by the 243rd clause of that Act is set out, and the penalty imposed. The Warrant does not mention the offence, but from the statement it can be gathered that it was wilful disobedience. We then come to see by whom such an offence is cognizable in this Colony. The words of the clause of the Act are "any Court or Justice of the Peace by whom offences of a like character are ordinarily punishable." It appears that this is a committal by a Justice of the Peace for the Midland Circuit. Offences of the like character are not punishable by a Justice of the Peace of this Island; for a Justice of the Peace has here, little, if any, power beyond the preliminary examinations

previous to trial, as clearly set forth in the argument of Counsel. A Justice of the Peace has the power of imprisonment for want of security, and this is limited to twelve months. The preamble is quite in accordance with the enactments that follow. He cannot commit in execution, but only in order to be brought before a competent Court. It would appear on the face of the commitment, that the Justice of the Peace has exceeded his jurisdiction; the whole proceedings were *coram non judice*, and the seamen who claim the right of British subjects have their liberty.

[*The Prisoners were discharged.*

No. 2.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Elsy Lindsay and James Farquhar Hadden, v. *the Oriental Bank and others, from the Supreme Court of Ceylon; delivered* 23*rd June*, 1860.

Present:

Lord Kingsdown.
Lord Justice Knight Bruce.
Lord Justice Turner.
Sir John Taylor Coleridge.

This appeal arises out of a suit instituted by the Appellants in the District Court of Kandy, in the Island of Ceylon, against the Oriental Bank Corporation, George Smyttan Duff, personally, and, as executor of Alexander Brown, deceased, James Ingleton, and David Baird Lindsay, for the purpose, according to the prayer of the libel in the suit, of having it declared and decreed that an instrument of the 11th July, 1848, and a warrant of attorney of that date mentioned in the libel, were and are, so far as regards the rights of the plaintiffs (the appellants) and the estate of Martin Lindsay, deceased, wholly null and void, and insufficient to convey or pass any interest in the said estate, or to create any charge or incumbrance thereon; and of having it also declared and decreed, that the rights of the plaintiffs (the appellants) and of the estate of the said Martin Lindsay, were not and are not in any way affected by any proceeding in a suit against the defendant David Baird Lindsay, No. 8,997, mentioned in the libel; and that by no proceeding had in the said suit in respect of the execution

against the effects of the said David Baird Lindsay, and the sale thereupon of the Rajawelle Estate, lands, and premises, could the said estate, lands, and premises be legally passed; and that the same did not by any such proceeding become the lawful property of the Oriental Bank mentioned in the libel, or of any of the defendants; and for the further purpose, according to the prayer of the libel, that the defendants might be ejected from the said estate, lands, and premises, and that the plaintiffs (the appellants) might be restored to their original rights, and put and placed in the possession of the said estate, lands, and premises, on behalf of themselves and those minors and others whose interests they represented, of which possession they had, as alleged, been illegally and fraudulently deprived; and that the defendants might be decreed to pay to the plaintiffs (the appellants), as and for mesne profits, the sum of £10,000, sterling, with costs of suit.

Upon the hearing of this suit, the District Court of Kandy, on the 16th April, 1855, made the following decree: That the defendants be ejected from the premises in dispute; that the plaintiffs (the appellants), as devisees in trust of the estate of Martin Lindsay, be restored to and quieted in possession thereof; that they recover from the defendants mesne profits to the amount of £6,457 3*s.* 1*d.* sterling, in the following proportions, that is to say, from the defendant George Smyttan Duff, from the 10th February, 1849, to the 30th April, 1850, and from the defendant George Smyttan Duff, as executor of the estate of Alexander Brown, and from the defendant James Ingleton, from the 1st May, 1850, to the 21st May, 1853, at the rate of £1,500 per annum; and that the above defendants do pay the costs of the suit, except the costs of the Oriental Bank Corporation, as against whom the libel was dismissed with costs, and except the costs of the defendant David Baird Lindsay, which were to be borne by himself.

From this decree of the District Court of Kandy the defendant George Smyttan Duff, in his own right, and as executor of Alexander Brown, and the defendant James Ingleton, appealed to the Supreme Court of the Island of Ceylon; and that Court, by its decree, dated the 8th March, 1856, reversed the judgment of the District Court, and dismissed the libel with costs.

The appeal before us is brought by the plaintiffs, the appellants, from this latter decree.

Martin Lindsay, the testator, to whom the estate in question belonged, and who appears to have been domiciled in Scotland, by his will dated the 21st of December, 1844, after directing

payment of his debts and funeral and testamentary expenses, gave, devised, and bequeathed his undivided share of the Rajawelle estate, in the Island of Ceylon, with the fixtures, implements, and utensils thereto belonging, which he held jointly with the heirs of the late George Turnour, and all other messuages, lands, tenements, and hereditaments, and other property, whether real, or personal, or mixed, belonging to him in the said Island of Ceylon, unto and to the use of his wife the appellant Elsy Lindsay, his son the respondent David Baird Lindsay, his brother the Rev. Henry Lindsay, his brother-in-law James Hadden, and his son-in-law the appellant, James Farquhar Hadden, their heirs, executors, and administrators, upon trust, to manage and cultivate the same as they should think most beneficial for the persons who should be entitled thereto under his will, with very full and extensive powers of management, and with a declaration of his most earnest desire that his trustees should continue to manage the same as long as might be practicable without bringing the same to a sale; and after declaring trusts of the net proceeds to be derived from the estate and premises for the benefit of his wife and children, he provided that any one or more of his sons who might feel disposed to take the management of the said estate and premises, and for that purpose to reside in Ceylon, should be at liberty to do so if his trustees should consider the same advantageous, but not otherwise; and he declared that the son or sons so for the time being acting in the management of the said estate and premises should be considered as the agent or agents, and be subject to the control and direction of his trustees in the management thereof and otherwise relating thereto. He then gave power to his trustees to sell the estate and premises, or any part thereof, and gave, devised, and bequeathed all his real and personal estates, property, and effects not before disposed of, and not being real or heritable property in Scotland, to which he should be entitled at the time of his decease, unto and to the use of the same trustees, upon trust to convert the same into money, and invest the proceeds thereof, and to stand possessed of the invested fund upon trusts for the benefit of his wife and children; and he appointed his wife and the said David Baird Lindsay, Henry Lindsay, James Hadden, and James Farquhar Hadden, to be his executors.

In the month of April, 1846, after the date of his will, the testator made some arrangements with the heirs of Turnour, under which he became solely entitled to the greater part of the Rajawelle estate, and he mortgaged the part of the estate to which he

had thus become entitled, and which seems to have retained the name of the Rajawelle estate, to Henry Alexander Atcheson, the executor of George Turnour.

In the month of January, 1847, the testator died, leaving several children; and at that time, the sum of £4,000 was due upon Atcheson's mortgage, and the estate, it appears, was also in mortgage to other persons.

In the month of April, 1847, the appellants and James Hadden, (who afterwards died in the year 1848,) proved the testator's will in Scotland, and in the month of July, 1847, it was proved in Ceylon by David Baird Lindsay. It is stated in one of the deeds, to which we shall have occasion to refer, that the will was thus proved by David Baird Lindsay under a power of attorney from the other executors and trustees; but this fact does not appear to have been proved in the cause as against the respondents. Henry Lindsay did not prove the will or accept any of the trusts created by it.

Soon after the death of the testator, the £4,000 secured by Atcheson's mortgage was required to be paid; and thereupon David Baird Lindsay, who was the eldest son of the testator and resided in Ceylon, and had the management of the estate there, came over to this country for the purpose of making arrangements to provide for the payment of the mortgage, and for securing the means of keeping up the cultivation of the estate. These purposes were effected by an agreement which was come to about the end of the year 1847 by all the trustees of the will, including David Baird Lindsay, with Mr. Caffary, a merchant carrying on business in London under the firm of Shaw and Caffary, and which agreement was embodied in a deed made between the appellants and David Baird Lindsay, and James Hadden of the one part, and Caffary of the other part.

By this deed, after reciting the testator's will, and that the trusts of the will had been accepted by the executors and executrix, except Henry Lindsay, and that the will had been proved by David Baird Lindsay under a power of attorney from the acting executors and trustees, and that David Baird Lindsay had, with the concurrence of the trustees, taken upon himself the management of the Rajawelle estate, it was agreed that Caffary should forthwith pay £2,000 to the trustees, and should forthwith give David Baird Lindsay a letter of credit authorizing him to draw bills at six months' sight to the extent of £4,000, to be applied towards paying the mortage-debt and interest; that upon payment of the mortage-debt and interest, the trustees should procure the securities for the same to be transferred to Caffary,

and should, on Caffary's request, execute to him a legal mortage for the full amount which should have been advanced by him, and for all further advances and supplies which should have been made and furnished by him, and should do all necessary acts for rendering the mortage effectual according to the laws of Ceylon, and for constituting it the first charge upon the estate, and for enabling Caffary to sell the estate in case the interest should be in arrear for three months, or the principal should not be paid within six months after payment should have been required. That the produce of the estate should be consigned to Caffary, he accepting David Baird Lindsay's bills against the produce, so as to provide the funds for cultivating the estate. That out of the moneys to arise from the sale of the produce, Caffary should reimburse himself the bills drawn against the produce, and keep down the interest on the mortgage, and should apply the surplus, if any, in reduction of the principal if he should think proper; and if not, then as the trustees should direct; and that if the consignments should be duly made, the principal should not be called in before the 31st December, 1852, and the trustees should not be at liberty to pay it off before that day unless Caffary should be willing to receive it.

It appears that, according to the laws of Ceylon, it is essential to the validity of deeds affecting immoveable property there, that they should be executed in the Island; and this deed, therefore, was not executed until the 15th February, 1848, when the several parties executed it in the Island by attorneys appointed for the purpose. The respondent, George Smyttan Duff, who was the Manager of the Ceylon Branch of the Oriental Bank, was the attorney by whom it was executed on the part of Caffary.

In order to effectuate the agreement with Caffary, it was necessary, of course, to provide for the negotiation of the bills for £4,000, to be drawn upon him by David Baird Lindsay, and accordingly, cotemporaneously with the agreement entered into with Caffary, an arrangement was come to by the trustees with the Oriental Bank for the Bank's discounting those bills. This they agreed to do, on being guaranteed by the other executors and trustees of the testator; and accordingly, on the 20th January, 1848, the appellants and James Hadden gave their joint and several guarantee to the Bank for the payment of the bills to the amount of £4,000.

Upon the occasion of the power of attorney being sent by Caffary to Duff, empowering him to execute the deed of the 15th

February, 1848, on his behalf, Caffary, on the 24th December, 1847, wrote to Duff to the effect that when the deed was executed by the attorneys of the executors, David Baird Lindsay was authorized to draw upon him (Caffary) for the £4,000 to discharge the existing mortgage, and that the title-deeds of the estate were then to be handed over to Duff, and he requested that Duff would hold them on his behalf; and in answer to this letter, Duff, on the 15th February, 1848, wrote to Caffary that the deed had been executed by the attorneys of the executors, and that David Baird Lindsay had negotiated through the Bank the bills to the amount of the £4,000, which was to be appropriated to the discharge of the mortgage, but that there had been time to pay over the amount and receive the title-deeds. On the 19th of February, 1848, however, he again wrote to Caffary that every thing requested in his letter of the 24th December had been complied with. In fact, immediately upon the execution of the deed of the 15th February, 1848, David Baird Lindsay drew upon Caffary for the £4,000, the bills were discounted by the Bank, and by means of the moneys thus raised, and of other moneys raised by bills drawn by David Baird Lindsay upon Caffary and discounted by the Bank, the mortgage was paid off, and the title-deeds of the estate were handed over to Duff.

It seems, that by the rules of the Ceylon Branch of the Oriental Bank, collateral security was required to be given with bills on England, and that in consequence of David Baird Lindsay's having negotiated through the Bank the bills beyond the amount of £4,000, an arrangement was come to by Duff with David Baird Lindsay, who had then returned to Ceylon, that he should give a temporary mortgage of the estate, to become void on payment of the bills, subject to the mortgage in favour of Caffary. In pursuance, as it would seem, of this arrangement, an application was made to the District Court of Kandy by David Baird Lindsay, on the 28th February, 1848, for the authority of that Court to mortgage the estate. This application proceeded upon allegations that the testator, at the time of his decease, was indebted to the amount of about £12,500, of which £8,500 was secured by mortgages which had become payable and had been called in, and that David Baird Lindsay held full authority from the other executors of the will to mortgage the estate, with a view to discharge the above claims, and to meet the necessary expenses attending the up-keep and cultivation of the plantations.

By an order of the District Court of Kandy, made upon this application, and dated the same 28th of February, 1848, it was ordered that David Baird Lindsay, as executor aforesaid, be authorized and empowered to mortgage so much of the testator's landed property in Ceylon as should be sufficient to raise £12,000, to be appropriated towards payment of the testator's debts, and the management and cultivation of the plantations; and on the 13th of March, 1848, David Baird Lindsay executed an instrument of bond and mortgage in favour of Duff, in which he, David Baird Lindsay, was described as sole executor in Ceylon of the estate of Martin Lindsay, and whereby he bound himself, his heirs, executors, and administrators, and all his property whatsoever to Duff, in the penal sum of £4,000, and after reciting that he had passed and intended to pass bills drawn on Caffary, and payable to the Bank, to the amount of £2,000, he, as executor as aforesaid duly authorized thereto by the District Court of Kandy, by the order of the 28th February, 1848, in order to secure the due payment of the said bills to the amount of £2,000, mortgaged the estate which was therein described as being the property of the estate of the late Martin Lindsay, deceased, to the said George Smyttan Duff, and deposited the title deeds of the estate with him, but subject to a mortgage for £6,000, thereafter to be made in favour of Caffary, in pursuance of the articles of agreement of the 15th February, 1848, and the bond was conditioned to be void if, upon non-payment of the bills, the £2,000, with interest and expenses, should be paid by David Baird Lindsay, his heirs, executors, or administrators, upon demand.

In the month of May, 1848, before the bills which had been drawn by David Baird Lindsay and negotiated through the Bank had become due, Caffary, on whom the bills were drawn, stopped payment, and there was at this time due to him, on his account with the testator's executors and trustees, a very large balance, a considerable portion of which, to the amount of upwards of £2,800 appears to be still remaining unpaid.

In consequence of Caffary's failure, it became necessary that new arrangements should be made with reference to the payment of the bills which had been drawn on Caffary, and to the carrying on the cultivation of the estate; and David Baird Lindsay accordingly again came over to this country: but before leaving Ceylon he was required by Duff to give further security to the Bank, and accordingly, on the 11th July, 1848, he executed another instrument of bond and mortgage in favour of Duff, in which he was

also described as sole executor in Ceylon of the estate of Martin Lindsay, and whereby he bound himself, his heirs, executors, and administrators, and all his property whatsoever, to Duff, in the penal sum of £14,000, and after reciting that he had, by virtue of an agreement made between him and the devisees and trustees of the late Martin Lindsay, with Caffary, dated the 15th of February, 1848, drawn the bills on Caffary for £4,000, and that Caffary had suspended payment, and that a bill which had been drawn upon him by Messrs. Hudson and Chandler, on account of the Rajawelle estate, and had become payable to the Bank, and which he had accepted, had been returned protested, and that the Bank had agreed to advance £230 on a bill drawn by him on his mother, to carry on the Rajawelle estate during his absence from Ceylon, and that other bills on Shaw and Caffary had been passed by him to the Bank, with shipping documents for Coffee shipped, and which coffee was supposed not sufficient to cover the amount of the bills, he, as executor, as aforesaid, duly authorized thereto by the District Court of Kandy, by order thereof dated the 28th February, 1848, mortgaged the estate, which in this instrument also was described as being the property of the estate of the late Martin Lindsay, to Duff, for securing the due payment of the bills of exchange and sums of money aforesaid, and the bond was conditioned for the payment on demand of the bills of exchange and other moneys aforesaid, with interest and expenses, but with a proviso that the sum to be recovered upon it should not exceed £7,000. David Baird Lindsay also, at the same time, executed a warrant of attorney to confess judgment, and consented to the issuing of execution upon the bond, and on these securities being executed, Duff, on the same 11th July, 1848, wrote and delivered to David Baird Lindsay the following letter:—

"Oriental Bank, Colombo,
"Dear Sir, 11th July, 1848.

"With reference to the £4,000 bill drawn by you on Shaw and Caffary, of London, on the 15th February, 1848, at six months' sight, to the failure of those parties, and to the visit you now propose paying London, to endeavour to form a new connection, I hereby agree, on the part of this Bank, that, provided the cultivation of Rajawelle is properly kept up, you shall not be proceeded against on the said bills in the event of their dishonour, until your return to Ceylon, or say previous to the 1st January, 1849."

The arrangements thus entered into by Duff with David Baird Lindsay were, it appears, immediately communicated to the Bank in London. We do not, however, find amongst these papers the

first letter by which this communication was made; but on the 15th August, 1848, we find a letter from Duff to the Secretary of the Bank, stating to the effect that these arrangements gave the Bank the first mortgage over the whole property to the full extent of their claim against David Baird Lindsay not otherwise covered, and in this letter, after referring to arrangements which had been proposed to the Bank by Mrs. Lindsay, Duff adds, "I suspect that Mr. Lindsay is not exactly in a position, at present, to carry out the arrangement proposed by his mother. The Bank of Ceylon have a claim of about £1,500 against him, a settlement of which is only delayed until his return to Ceylon, and he entered into an engagement with them not to mortgage the crops; and unless we make him a bankrupt at once, they may lay claim to their share of this year's produce."

It appears that the Oriental Bank, in the first instance, intended to leave the final settlement of the transaction to Duff, but they seem afterwards to have changed that intention; for early in November, 1848, they came to an arrangement with David Baird Lindsay, who had then arrived in this country, which was embodied in a deed dated the 4th November, 1848, and purporting to be made between David Baird Lindsay, described as one of the executors and devisees in trust of Martin Lindsay, of the one part, and G. S. Duff of the other part. By this deed, which was executed in this country by David Baird Lindsay and by the Secretary of the Bank here, and was intended to have been executed by Duff and by David Baird Lindsay by power of attorney in Ceylon, after reciting amongst other things, that there was then due from David Baird Lindsay, as such executor as aforesaid, to the Bank the sum of £7,000 or thereabouts, exclusive of interest, and that the Bank were also holders of bills to the amount of £2,000 or thereabouts, drawn by David Baird Lindsay on Shaw and Caffary, which were unpaid, but as collateral security for payment of which the Bank held bills of lading and shipping documents of coffee; it was agreed, in substance, as follows: that David Baird Lindsay, as such executor as aforesaid, should forthwith assign to Duff all crops of coffee then grown and being on Rajawelle, or which should be grown or produced thereon for the space of two years next ensuing, and should deliver over all such crops to Duff; and that in case David Baird Lindsay should omit to do so, Duff should have power to gather the crops, and to consign the same to the Bank in London for sale; that David Baird Lindsay should continue to manage the estate subject to the con-

trol of the Bank or of Duff; that David Baird Lindsay should not, during the said terms of two years, mortgage the estate or the crops without Duff's consent; that the Bank would, during the two years, or such part thereof as David Baird Lindsay should fulfil the agreement, advance, for the cultivation of the estate, such sums as should be necessary for the purpose, after applying the net proceeds of the crops of coffee, but so as not to exceed in any year a certain average sum for every hundredweight of coffee delivered to the Bank in that year; that the proceeds to arise from the sale of the coffee should be applied,—first, in payment of the expenses of cultivation; secondly, in payment of £40 monthly to the appellant, Elsy Lindsay; thirdly, in payment of the sums advanced by the Bank for cultivation, with interest; and fourthly, in reduction of the £7,000, and of so much of the £2,000 as the shipments of coffee appropriated to the payment thereof should be insufficient to satisfy; that at the expiration of the term of two years, the Bank should have power to sell the estate, and that the proceeds of the sale should be applied in payment of the £7,000 and £2,000, and of all other moneys advanced by the Bank, and as to any surplus upon the trusts of the will of Martin Lindsay, and that nothing therein contained should prejudice the rights of the Bank or of Duff over the estate under their two several bonds and mortgages, or over the title-deeds or any other property secured by the bonds.

This deed, it appears, was forwarded by the Bank to Duff on the 24th November, 1848, with a power of attorney from David Baird Lindsay to a Mr. Moir, authorizing him to execute the deed on his, David Baird Lindsay's, behalf; but the deed was never executed by Duff, nor, so far as appears, by Moir, for before it reached Ceylon, Duff, notwithstanding the undertaking contained in his letter of the 11th July, 1848, had taken the following proceedings in the Island.

On the 30th November, 1848, he commenced the suit No. 8,997, mentioned above, against David Baird Lindsay. By the libel in this suit, after setting forth the bond of the 11th July, 1848, it was alleged that the sums mentioned in the bond to be paid by the defendant had been demanded, and had not been paid, and that there was due and owing to the plantiff the sum of £7,838 13*s.* 3*d.*, with further interest on the sum of £7,805 7*s.*, part thereof, at the rate of 12 per cent. until payment, and it was prayed that the defendant might be adjudged to pay the said sum of £7,838 13*s.* 3*d.*, with further interest as aforesaid, and costs.

Immediately upon the libel being filed, an admission in full of the plaintiff's claim was also filed by virtue of the warrant of attorney, and thereupon and on the same day it was decreed that the plaintiff recover from the defendant the said sum of £7,837 13*s.* 3*d.*, upon the bond dated the 11th July, 1848, with interest on £7,805 7*s.*, at 12 per cent. from the 28th of November, 1848, till payment, and costs of suit; and it was ordered that execution issue against the property of the defendant for the principal and interest. A writ of execution was, thereupon, immediately issued to the Fiscal of the province, whereby he was directed to levy and make of the houses, lands, goods, debts, and credits of David Baird Lindsay, by seizure, and, if necessary, by sale thereof, the sum of £7,838 13*s.* 3*d.*, and under this writ the sheriff caused the Rajawelle estate to be seized and taken.

Notwithstanding the transmission to Duff of the deed of the 4th November, 1848, the execution was not withdrawn; the Bank alleging that in the negotiations which they had had with David Baird Lindsay he had misled them as to the power which Duff held over the estate and its produce. This was the state of matters when David Baird Lindsay again returned to Ceylon, about the month of December, 1848. He took no steps to impeach the proceedings which had been taken by Duff, and, on the contrary, in a letter which he wrote on the 29th January, 1849, to Ingleton, who had been in the management of the estate during his absence, and at the time when the property was seized under the execution, he expressed himself thus: "The steps which you took with the Bank were perfectly correct. It was no use attempting to resist."

Under these circumstances the estate was put up to sale by the Fiscal on the 5th March, 1849, and was purchased by Duff, on behalf of the Bank, for £2,500, and Duff thereupon entered into possession of the estate. By an order of the District Court, dated the 11th July, 1849, this sum of £2,500 was ordered to be set off against the debt due to the Bank, and by a deed, dated the 6th September, 1849, reciting that, by virtue of the writ of execution, the Fiscal had caused to be seized and taken the property thereinafter described, and, further, reciting the sale and the order for crediting Duff with the purchase-money against the debt, and that thereby Duff had become entitled to all the rights, title, and interest, of David Baird Lindsay in the said property, the Fiscal conveyed the estate to Duff in fee.

The £40 per month, by the deed of the 4th November, 1848,

agreed to be paid to Mrs. Lindsay, was paid to her by the Bank down to the month of April, 1849; but in April, 1849, the Bank discontinued the payment upon the same allegation that they had been misled by David Baird Lindsay in their negotiations with him. They afterwards agreed, however, to pay Mrs. Lindsay £25 per month, irrespective of the arrangement made by the deed of November, 1848, and without prejudice, and they continued to make this payment to Mrs. Lindsay down to the month of April, 1850, and, perhaps, longer; but the exact time when this payment was discontinued does not appear.

In the month of May, 1852, the Bank sold the estate to Colonel Brown, George Smyttan, and James Ingleton, for the sum of £10,000, and by a deed poll, dated the 4th of May, 1852, George Smyttan Duff, in consideration of £5,000 paid by Colonel Brown, £2,500 paid by George Smyttan, and £2,500 paid by James Ingleton, conveyed the estate to those parties in fee, that is to say, as to two fourth-parts to Colonel Brown, one fourth-part to George Smyttan, and one fourth-part to James Ingleton. James Ingleton had been, as has been stated, the manager of the estate; Colonel Brown was the father-in-law of the respondent George Smyttan Duff, and it appears that this respondent advanced to Colonel Brown part of the moneys which were required by him to enable him to complete the purchase on his part. The respondent, however, denies that he was interested in the purchase. It does not appear that there is anything to cast suspicion upon George Smyttan in reference to his connection with the purchase.

The libel in the suit out of which this appeal arises, was filed on the 21st of May, 1853, and answers having been put in, a great deal of evidence, both documentary and parol, has been entered into on both sides. Their Lordships, however, in the view which they have taken of the case, do not think it necessary to go at length into the evidence. It is sufficient to state, that in their opinion, it establishes the facts as above detailed, that it leaves no doubt in their Lordships' minds that the mesne profits have been fairly and justly estimated, and that the case attempted to be proved on the part of the defendants, that Duff's proceedings in Ceylon were occasioned by the cultivation of the estate not having been properly kept up, is by no means established to their Lordships' satisfaction. Their Lordships have entered thus at length into the details of this case, considering that although there are many points arising upon the facts which it is not necessary,

and would not, indeed, be right for them now to decide, it is upon the whole case, and not upon any detached portion of it, that part of their judgment depends.

A formal objection to the suit was raised on the part of the respondents, which it may be convenient first to dispose of. It was objected on their part, that George Smyttan and the Oriental Bank ought to have been made parties to the suit; but this is an objection of form and not of substance, and is one, therefore, to which their Lordships would be most unwilling to accede. They do not find that the objection was pointedly, if at all, insisted upon by the answers, nor do they find that either Smyttan or the Oriental Bank was within the immediate jurisdiction of the Court, and they readily adopt the view which seems to have been taken by the Supreme Court on this point, that the objection was not one to which weight ought to be given, unless the justice of the case required it. It does not appear to their Lordships that this was the case. They see no grounds on which it could be necessary to add these parties to the record, unless there was a right of contribution or of resort over against them; and if the respondents, the defendants to the suit, were wrong-doers as to the plaintiffs (the appellants), each liable *in solido* to them, their Lordships are by no means prepared to say that they were entitled to set up any such right to the prejudice of the plaintiffs' claims against them, even assuming the case to be wholly in equity. At all events, their Lordships are satisfied that any possible injustice will be obviated by the course which they are about to recommend for Her Majesty's approval, and they have no hesitation, therefore, in overruling this objection, and proceeding to dispose of the case upon the merits.

On considering the case upon the merits, the questions which arise appear to their Lordships to resolve themselves into two distinct classes; the one relating to the claim of the appellants to recover the estate, and the other to the claims of the respondents against the estate. The burthen is, of course, upon the appellants as to the one class, and upon the respondents as to the other. As to the first class of questions, the title of the respondents to this estate rests upon the purchase made by them from the Oriental Bank, who became the purchasers of the estate at a sale made under an execution upon a judgment obtained, in effect, by the Bank against David Baird Lindsay. The first point to be considered, therefore, seems to be, whether the estate was properly

taken in execution and sold under the judgment. We were not referred, in the course of the argument, to any peculiar law prevailing in the Province of Kandy which could affect this question, or indeed any other of the questions which arise in the case, nor have we been able to find that any such peculiar law exists. The case, indeed, was argued before us on both sides as depending upon the English law, and was so treated in the Courts of Ceylon, and it is sufficiently evident from the proceedings in the cause, that they were not taken under the Roman Dutch law, which prevails generally in Ceylon. We consider, therefore, that the question must be determined according to the principles of the English law. It is to be considered, then, whether, according to that law, this estate was properly seized and sold under the judgment. Now, the action on which this judgment was founded, was brought upon the bond of the 11th July, 1848, by which David Baird Lindsay was bound for the payment of the sum of £7,000. It was upon the obligation created by that bond the action proceeded. David Baird Lindsay is described in the bond as the sole executor in Ceylon of the testator, Martin Lindsay; but although he is thus described in the bond, the condition of the bond is for the payment by him, his heirs, executors, and administrators; and their Lordships do not think that the description in the bond can in any way alter the liability upon it, or convert the debt, which was by law his personal debt, into a debt due from the estate of the testator. David Baird Lindsay could not, as their Lordships think, have pleaded to the action that the debt was not due from him personally, but from him in his character of executor only. Again, the warrant of attorney on which this judgment was entered up is from David Baird Lindsay personally, and does not even purport to be given by him in his character of executor; but what seems to be even more decisive on this part of the case is, that the judgment is that the plaintiff do recover from the defendant; that the order for the execution is for execution against the property of the defendant, and that the writ of execution is to levy of the houses, lands, goods, debts, and credits of David Baird Lindsay. It is to be seen, then, whether this estate was the property of David Baird Lindsay. Their Lordships are of opinion that it was not. It is not disputed that the estate was well devised by the will of Martin Lindsay. It was thereby devised not to David Baird Lindsay alone, but to him and the other trustees. It is clear that all the trustees, except Henry Lindsay, accepted the

trust, and the estate therefore vested in them all. It was argued, on the part of the respondents, that David Baird Lindsay having been the sole executor in Ceylon, had full power over the estate, and several passages were cited from the Dutch Executors' Guide in support of that position; but these passages, as their Lordships understand them, relate to the powers of a Dutch executor over property governed by the Dutch law. They have no bearing upon the question of the power of one of several executors and trustees over property, the disposal of which is made under, and governed by, the English law. It was attempted, too, on the part of the respondents, to give effect to this judgment, and to the proceedings under it, against this estate, by reference to the power given by the order of the Ceylon Court to David Baird Lindsay to mortgage the estate to the amount of £12,000; but without reference to the question whether this power was well created,—and their Lordships are by no means satisfied that it was, having regard particularly to there having been no proof of the allegation on which the order proceeded that David Baird Lindsay had full authority from the other executors to make the mortgage,—their Lordships do not consider that David Baird Lindsay's power to mortgage the estate can be called in aid of this judgment and the proceedings upon it. The bond and mortgage, although comprised in the same instrument, are different securities, leading to different results, and capable of being enforced by different modes of proceeding; and the power to create the one cannot, in their Lordships' judgment, have any influence upon the question as to the validity or invalidity of the proceedings under the other. There are other considerations which may affect the validity of this judgment and of the proceedings under it:—the amount of the debt for which it was entered up; the times at which the several parts of the debt were payable; and the circumstances under which the judgment was obtained, and the execution issued: but these considerations, although they might affect the case as between the appellants and the Bank, might not, perhaps, be available to the appellants as against the respondents; and their Lordships, therefore, must not be understood to rely upon them. They rest their judgment upon the question as to the validity of the seizure and sale of the estate, upon the fact that the estate was not the property of the judgment debtor, and that so far as he had any interest in it which was liable to be taken under the judgment, that interest was vested in him as a trustee only.

It was argued, however, on the part of the respondents, that whatever might be the rights of the appellants against the Bank, they had no such rights against the respondents. That the respondents were purchasers for value without notice, but it is clear that the respondents are affected with notice. Their very purchase-deed refers to the conveyance by the Fiscal to the Bank. That conveyance refers to the judgment; the judgment refers to the bond and to the order of Court; and both the bond and the order of Court refer to the will by which the estate was devised to the trustees. It cannot be doubted, therefore, that the respondents must be taken to have had notice of the will, and of the devise to the trustees which it contains: but independently of the notice which is thus traced to the respondents, their title rests wholly on the judgment; and, as purchasers from those who purchased under that judgment, they were surely bound to see that the proper parties were before the Court to be bound by the judgment which was the root of their title. Moreover, if the Fiscal had not, as their Lordships think he had not, any authority to seize or sell the estate, it is difficult to see how his conveyance could pass any title to the Bank, or through them, to the respondents.

The respondents, therefore, as it seems to their Lordships, have failed to establish any title to the estate against the appellants by the direct operation of the conveyance under which they claim; and it follows, therefore, as their Lordships think, that the possession must be restored, unless the respondents are entitled to to maintain their title upon some other ground. It has been argued on their behalf that they are so entitled; that the Courts in Ceylon having both a legal and equitable jurisdiction, and the case presenting mixed questions of law and equity, the appellants can have no relief, without, as it is said, doing equity by giving effect to the equitable claims of the respondents; but the possession of the respondents was illegally taken, and is illegally held, and their Lordships do not think that persons holding an illegal possession are entitled to use that possession for the purpose of compelling submission to their equitable claims by those to whom the possession legally belongs. They think that, under such circumstances, the wrong-doers must restore the possession, and themselves initiate such proceedings as they may be advised to take for the assertion of their equitable claims.

They are of opinion, therefore, that the decree of the Supreme Court must be reversed, at all events to this extent:—that the

possession of the estate must be restored to the appellants. But it is one thing to refuse to allow an illegal possession to be continued for the purpose of giving effect to equitable claims; another, to compel the restitution of moneys which have been received by virtue of the legal possession, but are claimed to be held under an asserted equitable title; and their Lordships are not prepared to go so far as the District Court has gone, in decreeing payment to the appellants of the mesne profits of the estate. They think that there are some views of this case in which the respondents may be able to establish a title to those profits, and they are of opinion that the means of effectually asserting that title ought to be secured to them. For this purpose, they think that those profits, instead of being paid to the appellants, as directed by the District Court, ought to be paid into Court, and impounded, until the respondents shall have had the opportunity of asserting their claims. Whether they will assert their claims or not, and upon what particular grounds they will rest their claims if they think proper to assert them, it is for them, and not for their Lordships, to determine. Their Lordships desire only to be understood as giving no opinion as to the validity or invalidity of those claims. They do not think it would be right for them to enter at all into this part of the case. The case has been so complicated by the course which has been pursued, that it would be difficult, if not impossible, to unravel it in this suit, and their Lordships are not satisfied that they have before them all the parties who may be interested in the questions of equitable right.

It remains, then, only to consider the question of costs; and as to this point their Lordships are of opinion, that no costs ought to have been given against the plaintiffs, the appellants, in the Supreme Court, and that the costs of this appeal ought to be borne by the respondents, except the Oriental Bank Company, as to whom, their Lordships agree with the Courts in Ceylon that, there was no foundation for the suit.

Their Lordships will, accordingly, humbly recommend Her Majesty to reverse the decree complained of; to restore the decree of the District Court, so far as it relates to the defendants being ejected, and the plaintiffs restored to the possession; to vary the decree of the District Court, so far as it directs the mesne profits to be paid to the appellants, and order those mesne profits to be paid into Court; to direct an account of subsequent rents received by the respondents, and order the amount found due to be also

paid into Court. The moneys to be paid into Court not to be paid out without notice to the respondents until the expiration of six months from this time, with liberty to the respondents, in the meantime, to take such proceedings as they may be advised for asserting their claims to the said moneys, or any parts or part thereof, or to the said estate, otherwise than under or by virtue of the judgment, or any proceedings thereon. The order to be without prejudice to such claims.

Liberty to all parties to apply to the Court.

The respondents, Duff and Ingleton, to pay the appellants' costs of the appeal.