THE

APPEAL REPORTS;

BEING

REPORTS OF CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT OF CEYLON,

SITTING IN APPEAL:

EDITED BY

C. A. LORENZ, Esq.

ADVOCATE.

PART II.

CONTAINING

THE REPORTS OF 1857.

COLOMBO:

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1866.

ERRATA.

Page 39. Case No. 20,113; second line :—*for* claimed *read* disclaimed.

„ 71. „ No. 1,116; 23rd line :—*for* per Curiuns, *read* per Curiam.

„ 76. „ No. 8,502; 10th line :—*between* recovery *and* that, *insert* of.

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THE APPEAL REPORTS.

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Jan. 8.

January 8.

Present MORGAN, J.

No. 13,419, *P. C. Bentotte.* } *Liyeneachy* v. *Wanniachy* and others.

The fact of a Cultivator having cut the crop with the knowledge of the Renter, does not dispense with the Notice required by § 14 of the Paddy-tax Ordinance.

In this case it was held that the "due notice" required by the 14th Section of the Ordinance No. 14 of 1840, is the notice set out in the 3d section of that Ordinance, to wit: "a notice in writing specifying the name and extent of the land, the name and place of abode of the proprietor or cultivator, the day on which the crop is intended to be cut, and the date on which the said notice is given;" and that the fact found by the Court below, that the defendants had cut the crop with the knowledge of the Renter, did not dispense with the necessity for giving such notice. In the absence of such notice, the defendants were held to have been correctly sentenced to pay the fine imposed by the Court below.

No. 1,871, *P. C. Navelapitia.* } *Perera* v. *Menick Raalé* and another.

What constitutes guilty knowledge.

This was a charge against the defendants for having stolen coffee in their possession, knowing it to be stolen; and the Magistrate, having heard evidence, convicted the defendants. On appeal, the Supreme Court upheld the conviction on the following grounds:—

"The Police Magistrate having found the fact of guilty knowledge against the accused, the conviction must be upheld. The Supreme Court regrets to observe a statement in the Petition of Appeal, that not a tittle of evidence was produced to prove guilty

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knowledge on the part of the defendants. It is sworn to, that Coffee was stolen from the Estate, that that found in the house of the accused was Estate, and not Native Coffee, the quantity too large to be the produce of their own garden as stated by them,—that some five days before the search two men, (one living in the house of the accused, the other close by,) were found bringing Coffee from Poopallekally Estate, towards their house,—that one man whom the accused said was their brother, and living in the same house, has since fled,—that when the Police Officer and others were returning from the search, they observed a man coming towards the house of the accused with a bag of Cherry Coffee,—that upon seeing them he threw down the Coffee and ran away:—circumstances these, from which the Police Magistrate came to the conclusion, as the Supreme Court thinks correctly, that the accused knew that the Coffee found in their possession was stolen property."

No. 1,610,
P. C. Matura. } *District Committee* v. *Tetto Hamy.*

The section and number of the Ordinance, for breach of which a defendant is prosecuted, should be correctly set out in the Plaint.

A Plea should be duly entered of record, and evidence heard thereon, if adduced.

The conviction in this case was set aside on the following grounds :—

"The proceedings in this case are grossly irregular. In the first place the accused is charged with failing to perform labour though required by the Prosecutor, 'against the 5th and 76th clauses of the Ordinances Nos 14 and 8 of 1848.' The 5th clause of the Ordinance No. 8 of 1848, relates to the appointment of Provincial Committees ; the 76th clause to the informer's share of fines. The clauses making persons penally liable for failing to perform labour, are the 44th clause of the Ordinance No. 8 of 1848 and the 5th clause of the Ordinance No. 14 of 1848 ; and the clause and Ordinance, for breach of which the accused was charged, should have been correctly set out. If the accused admitted that he failed to perform labour, but pleaded that he was above 55, (which the Supreme Court is inclined to suppose was the case,) the same should have been duly set out on the Record, and evidence should have been allowed on both sides on this question."

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No. 18,917,
P. C. Matura. } *Senerat* v. *Hurumbure.*

In this case the complainant (appellant) had been fined by the Court below for bringing a false and frivolous charge against the defendant.

It having appeared to the satisfaction of the Police Court that the Prosecution had been instituted on frivolous grounds, the Supreme Court declined to interfere with its finding as regarded the Complainant, the more so as it did not dissent altogether from the view taken by the Magistrate. If it were true, however, as stated by the appellant, that he had acted under the directions of the Assistant Government Agent in instituting this case, his course was to apply to the Governor for a remission of the fine.

Where a party has brought a charge under the directions of the Government Agent, and been fined for frivolous prosecution, his proper course is to apply to the Governor for a remission of the fine.

No. 9,779,
P. C. Avishavelle. } *Don Gabriel* v. *Abraham Appoohamy* and others.

This was a charge for illegally removing timber; and although the defendants were acquitted, the timber itself the Magistrate held to have been legally seized and confiscated.

On appeal against this decision *Dias* appeared for the appellants.

Per Curiam:] The Judgment so far as it declares the timber to have been legally seized, is set aside. The Supreme Court fails to perceive on what grounds the Magistrate acquitted the defendants, seeing that they were found removing the timber without a permit. But the complainant not having appealed, the Court cannot interfere with the finding in that respect. The only question now before the Court, is whether the defendants having been acquitted of illegally removing timber, such timber can be seized and confiscated. The Supreme Court considers that it clearly cannot, and that the same should be forthwith returned to the defendants.

Where on a charge of illegally removing timber, the defendants were acquitted, but the timber was confiscated, the Supreme Court though satisfied with the guilt of the prisoners, declined to interfere in the absence of an appeal by the complainant: but set aside the confiscation.

January 12.

Present ROWE, C. J., and MORGAN, J.

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No. 90,
C. R. Jaffna. } *Veregetty* and others v. *Cander* and another.

This case, which had been pending since June 1855, was remanded for a new trial, on the ground that the judgment of the Court below decreeing the lands in dispute to the plaintiffs 'until defendants can shew a better title,' was "bad in law, wanting in certainty, and not putting an end to the contest between the parties."

A judgment decreeing certain lands to the plaintiffs "until the defendants can shew a better title," set aside as bad.

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No. 16,743, *D. C. Caltura.* } *Perera* v. *Perera* and *Silva.*

Where a party had intervened in a case, but his Petition had been set aside before the trial, the judgment pronounced in the case, is not *res judicata* against him in a subsequent proceeding between him and either of the other parties.

The facts of this case are sufficiently clear from the judgment of the Supreme Court, which is as follows:—

"That the order of the District Court be modified by the case being set down for trial on the present pleadings, or in case any of the parties amend *before the trial*, on the pleadings so amended, when the District Court will hear evidence and give judgment:—costs to stand over.

"The plea of *Res judicata* is inapplicable, because the Intervention by the present plaintiffs in No. 15,711, was set aside before the Court proceeded to hear the evidence of the co-defendant, who was plaintiff in that case, and to give judgment, so that the intervenients were no parties to the suit at the time the judgment was given and cannot be affected thereby. It appears to the Supreme Court, that when the Court below held the plea bad and suggested an amendment, it should have gone on with the trial, unless the co-defendant forthwith applied to amend, in which case it ought either to direct the amendment at once, or put off the trial for a limited time, as the justice of the case may require. By following such a course, much delay can be avoided."

January 14.

1857. *Jan.* 14.

Present Rowe, C. J., and Morgan, J.

No. 3,132, *C. R. Badulla.* } *Ahamadoe Lebbe* v. *Gallepittegedere.*

The mere fact of a party, who is able to write, having signed with a cross, is not sufficient to invalidate a document so signed.

This was an action on a bond, which the defendant had signed with a *cross*. The summons had been served, and interlocutory judgment entered against the defendant; but he having died before notice of final judgment, his widow and children were made parties. They appeared and denied the bond, and were allowed to call witnesses to prove that the deceased defendant was able to write. The Commissioner hereupon held the bond a forgery, and dismissed the plaintiff's suit, (and committed him and the two attesting witnesses for trial.)

W. Morgan, (*Lorenz* with him) for the plaintiff and appellant:] It is an ordinary practice among Natives to sign with a mark or a cross, although able to write. We offered moreover to prove an express admission by the defendant of the debt, shortly before his death.

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Per Curiam.] The judgment is set aside. The evidence adduced by the defendant does not warrant the conclusion: and the Supreme Court does not concur with the Commissioner in his finding on the evidence; but as evidence was not heard for the defence, and the existence of other evidence for the plaintiff is suggested in the Petition of Appeal, it remands the case for a new trial.

No. 13,284, *C. R. Galle.* } *Miskin* v. *Garstin.*

Action for recovery of a Reward offered for discovery of stolen property:—Form of Plaint.

The plaint in this case set out, "That the defendant is indebted to the plaintiff in £5 as a remuneration for giving information for the recovery of a gold watch, robbed of him in the month of December 1855; which the defendant refuses to pay."

Judgment was given for the plaintiff at the trial; and the defendant now appealed against it.

Rust for the appellant:] The plaint is clearly insufficient. [Rowe, C. J.—It discloses a sufficient cause of action, and is substantially sufficient. Perhaps it should have set out the case in the form of a contract?] [Morgan, J.—The defect, even granting it to be one, has been cured by pleading over. You have pleaded that the plaintiff's was not the information which led to the discovery.] *Rust* quoted *Lancaster* v. *Walsh*, 4 M. and W. 16. It is he who first gives the information (which information leads to the discovery,) who is entitled to the reward. But here Mr. Keegel, the Police Officer, receives information from the plaintiff's clerk (who tells him that he had heard of a Watch being offered for sale in the Bazar,) which induces him to go to the Bazar: and it is on his way to the Bazar that the plaintiff meets him and on *being questioned*, gives him the information. The information should be given *as* information and not in the course of conversation. *Lockhart* v. *Barnard*, 14 M. and W. 674.

Per Curiam:] Keegel swears that it was the plaintiff's information, which led to the discovery; and that but for that information, he should not have got the watch. The judgment is—*Affirmed.*

No. 7,569, *C. R. Caltura.* } *Silva* and others v. *Perera* and another.

Estoppel by *Res judicata.* Where an Instrument, the execution of it

In a previous case (No. 16,345,) between the same parties, the plaintiffs claimed certain lands. The defendants pleaded an Agreement, dated January 1838, by which the parties, under whom the plaintiffs claimed the lands, had agreed to transfer

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being denied, has been upheld in a suit, the party so denying cannot in a subsequent suit dispute the same instrument on the ground of want of consideration.

them to the defendants. The plaintiffs however, denied the Agreement; but at the trial, the District Judge held the Agreement to have been proved, and gave judgment for the defendants.

In the present case, the same plaintiffs, admitting the Agreement, contended that the consideration thereof had never been paid, and therefore prayed that the same be cancelled, as the plaintiffs had been condemned to give up possession of the lands. The defendants pleaded the former judgment, and prescription: and the plaintiffs' suit was thereupon dismissed.

On appeal by the plaintiffs, *H. Dias* appeared for the appellant; *Lorenz* for the respondent.

Held that the plaintiffs were clearly estopped by the judgment in No. 16,345, wherein they claimed the land by the same right that they now set up, and were opposed by defendants, who likewise pleaded the very defences now put forward by them. The difference in the mode in which plaintiffs prefer the claim in the two cases, is immaterial in an action *in rem.* (3 Burge, *Comm.* 1041.)

No. 29,864,
C. R. Colombo. } *Ramasamy* v. *Supermanian.*

On a plea of want of consideration, the burthen of proof lies on the party pleading it.

Where a party succeeded in appeal on a point not urged by him at the trial, all costs were divided.

This was an action on a Bond, for £7 10. The defendant admitted the Bond, but pleaded want of consideration. The Commissioner below held that it was for the plaintiff to prove consideration, as two years had not elapsed since its execution; and accordingly dismissed the suit.

On appeal *Muttukistna* appeared for the plaintiff and appellant.] There was no evidence necessary; the Commissioner was in error in supposing that the Dutch rule respecting the plea *non numeratae pecuniae* was still in force.

The judgment of the Court below was set aside, and the case remanded for a new Trial, and *per* MORGAN, J.] The defendant having in his bond admitted the receipt of the consideration, it is for him to establish his plea, and show that notwithstanding such admission, none was paid. The rule of the Roman Dutch Law requiring the plaintiff to prove payment of consideration within two years, is not in force here. See Ordinance No. 3 of 1846, § 1; and No. 7,071 District Court, Colombo.

The objection not having been taken by the plaintiff himself at the trial, the costs of the hearing, and the appeal, were divided.

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No. 8,215, *C. R. Caltura.* } *Stephen* v. *Rodrigo.*

In an action by a Proctor for his costs, the notice required by the Rule of *Jan.* 1846, should be proved to have been given.

This was an action by a Proctor to recover costs from his Client. The defendant pleaded payment, but failed in proving it; whereupon judgment was entered for the plaintiff.

Rust, for the defendant and appellant:] The plaintiff has not set out or proved that he had given the notice required by the Rules of 6th January 1846, by which it is ordered that no Proctor shall commence or maintain an action for the recovery of fees &c., until the expiration of a month after notice to his Client. [MORGAN, J. But you have pleaded payment. Should you not have taken the objection in the Court below?] The Defendant is a Native, and was not represented by counsel.

Per Curiam:] Let the case go back for evidence of the notice. In such cases the Commissioner should call upon the plaintiff to prove the notice. It would have been otherwise, if the defendant had been properly represented by counsel, and had advisedly put in a plea of payment, and might thereby be considered to have waived the plea as to notice. The plaintiff in the present case should prove the notice, or be nonsuited.

No. 4,982, *D. C. Jaffna.* } *Wyrewenaden* v. *Cander.*

Where the Court below gave judgment for the defendant on proof of possession, the Supreme Court refused to grant a new trial on the ground that certain deeds proving the Plaintiff's title had been improperly rejected.

In this case the plaintiff claimed certain lands by right of Inheritance; but the defendant denied plaintiff's right and pleaded Prescription. To support this right, the plaintiff offered a Dowry Deed in evidence: and the Court postponed the case for further evidence touching the Deed. At the second trial the defendant offered certain documents in evidence, which were rejected by the Court; and judgment was given for plaintiff on the plea of prescription.

On Appeal against this judgment, *Muttukistna* appeared for the appellant.] The Court below ought to have admitted the Deeds which were offered in evidence. [MORGAN, J. Assuming that the Court ought to have done so, how does it affect the case?] They go to shew that the plaintiff possessed no more than half the land claimed, which would have been presumptive evidence in support of defendant's claim. [MORGAN, J. It is only a presumption. We have positive evidence of prescription. How will you get over that?] I am not prepared to say what effect that deed might have had on the mind of the Judge; for aught I know, he might have disbelieved the parole evidence of possession, had that Deed been received.

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Sed per Curiam:] The Decree is *affirmed.* The Supreme Court is not prepared to support the rejection of the Deeds tendered in evidence by defendant; but it is unnecessary to remand the case on this ground; for, even assuming them proved, they will not affect the right of the plaintiff to judgment on the clear prescriptive title of his seller (the co-defendant,) nor will they go to impeach the Dowry Deed.

No. 16,308,
D. C. Caltura. } *Welwittegey* v. *Toopahigey* and others.

The question, upon whom the burden of proof lies, should be disposed of with reference to the pleadings and the examination of the parties.

A party, if satisfied with the admissions made by his opponent in his examination, should close his case, and call upon the opponent to proceed.

In this case the plaintiff having in examination elicited certain admissions from the defendants, contended that the burden of proof lay upon them; and the defendants refusing to call evidence, judgment was given for the plaintiff.

W. Morgan for appellant was heard; and the Court gave judgment as follows:

"It is ordered that the order of the Court below be set aside; and that plaintiff do lead his evidence at the trial or close his case, if so advised, upon the evidence elicited in his favor in the examination of the defendants; when the latter should enter into their defence, and the plaintiff be heard in reply; the plaintiff to pay the costs of hearing in the District Court and in Appeal.

"The Supreme Court considers that the question upon whom the burden of proof lies should be disposed of with reference to the pleadings of the parties, and any "declaration, admission, or denial," given in answer to the *viva voce* examination, and "entered in the proceedings as part of the pleadings of the party making it." If the answers of a defendant when examined at the trial establish the plaintiff's case, so as to render further evidence unnecessary, he should close his case, and call upon the defendant to enter into his defence. Such answers are evidence in favor of the plaintiff, and not statements in the pleadings which should affect the question as to the burden of proof.

"On the pleadings in this case the *onus* is clearly on the plaintiff, whose title is altogether denied. The admissions made by defendants (as to plaintiff's residence on the land in dispute,) raise a presumption in favor of the possession of the plaintiff, and he was at liberty to close his case upon it, if so advised, but not to call upon the defendant to begin. Further, the whole of a party's admission must be taken together, and not a part only of it. The defendants admit the plaintiff's right to a half of the third and fourth plantations, and this may perhaps account for and explain the residence of the plaintiff on the land."

No. 5,326, *D. C. Manaar.* } *Moottayen* v. *Sodele Muttoe.*

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A party can only appeal from a *sentence, decree* or *order*, but not against a mere opinion not followed by an order.

In this case, *W. Morgan* appeared for the defendant and appellant. The facts of the case are stated at length in the judgment, which is as follows: —

"That the Appeal be disallowed, and the case returned to the District Court to be proceeded with in due course. There is no appeal here such as the Supreme Court can entertain. An action is brought, to obtain a conveyance of land sold to, and possessed by, the plaintiff, or a return of the purchase-money and value of improvements made on the land. The defendant denies the claim in fact, and pleads that the contract to sell is void under the 2nd clause of the Ordinance No. 7 of 1840. On the day of trial, the Judge calls upon the defendant's Proctor, before proceeding further with the case, 'to point out in what way the Ordinance bears on the case;' the Proctor states his views, when the Court records, that it does not consider that the Ordinance applies, giving certain reasons for its opinion. The defendant's Proctor then moves for a postponement, in order that the 'opinion of the Supreme Court may be taken on the above,' which being allowed, leads to the present appeal.

"A party can only appeal from 'a sentence, judgment, decree, or order' of the District Court. Here there is no sentence, judgment, decree, or order; but only an opinion expressed by the District Court, on a part of the defendant's plea. The District Court should have gone on with the trial and distinctly overruled the plea, when an appeal would have been open.

"To save expense however to the parties, the Supreme Court intimates its opinion, that although a verbal contract for the sale of land cannot be upheld, yet there is nothing in the Ordinance to prevent a party, in the alleged situation of the plaintiff, recovering back his purchase-money, and the value of improvements laid out on the land.

No. 141, *D. C. Badulla.* } In the goods of Gamegey Johannes Rodrigo of Newera Ellia, deceased.

Rodrigo v. *Rodrigo.*

The facts of this case, (*Lorenz* for the appellant,) are stated at length in the judgment, which is as follows: —

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Where a party had been appointed administrator by the District Court of Colombo, (after an order of the Supreme Court conferring exclusive jurisdiction,) an Injunction issued against him by the District Court of Badulla, on the motion of an applicant for administration there, was set aside.

"It appears that *Gamegey Cornelis Rodrigo* applied for administration in the District Court of *Badulla*, of the estate of *Gamegey Johannes Rodrigo*, describing himself as his son. Owing to no return having been made to the Commission of Appraisement, sent from *Badulla* and directed to two persons at *Colombo*, for about a year, Letters of Administration were never issued to him, though the Court of *Badulla*, by its orders of the 13th March 1854, and 8th August 1854, declared him entitled thereto In the meanwhile another party, who described himself as married to a niece of the deceased, applied for and obtained Administration in the District Court of *Colombo;* and on the 3rd October 1854, applied for and obtained an order of this Court, conferring sole and exclusive jurisdiction as respects the estate of the deceased, on the District Court of *Colombo*. The Administrator thus appointed, then attempted to sell a land belonging to the deceased situated at *Newera Ellia*, when the District Court of *Badulla*, on the 15th December 1854, issued its injunction restraining such sale. The District Judge, shortly after ordering the injunction, represented the circumstances to this Court, when after hearing Mr. *Drieberg* (the Proctor for the Colombo Administrator,) an order was made on the 9th February 1856, to the following effect: 'The Supreme Court considers that it cannot interfere in the matter. The party feeling aggrieved by the order of the Supreme Court dated 3rd October 1854, granting exclusive jurisdiction to the District Court of *Colombo*, should apply in due form upon affidavits, and after notice to the opponent, to set the same aside.'

"An informal application was afterwards made, which was rejected by this Court on the 18th June 1856, on the ground that no notice thereof had been given to the opposite party.

"On the 22nd July 1856, an application was made on behalf of the Colombo Administrator, to set aside the injunction issued on the 15th December 1854; which application was disallowed by the District Court of *Badulla* on the 15th December 1856: and it is against this order of disallowance, that the present appeal is lodged.

"Considering that the Colombo Administrator is the person at present legally representing the estate of the deceased, and that the order of this Court of the 3rd October 1854, conferring exclusive jurisdiction on the District Court of *Colombo*, has not been set aside, but is still of force,—and this, though abundant opportunity was afforded to *Gamegey Cornelis Rodrigo*, to apply to have the same set aside,—the Supreme Court considers that the

injunction should be dissolved. It has less hesitation in pursuing this course, as the dissolution of the injunction cannot affect the substantial rights of the said *Gamegey Cornelis Rodrigo*. If he be the son of the deceased, he still has the opportunity of applying to revoke the administration granted to *Hettigey Philipo Rodrigo*, and that letters be granted to him, he being next of kin,—and also of applying (if there be any object now in doing so,) that the order of 30th October 1854 be set aside, and that exclusive jurisdiction be conferred on the District Judge of *Badulla*; or he may, as heir, institute his action, to establish his right to any particular property attempted to be sold, issuing a fresh injunction in that action, when the respective rights of the parties will be regularly enquired into and duly adjudicated upon."

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The order of the Court below of the 15th December 1856, was therefore set aside, and the injunction issued on the 15th December 1854, dissolved.

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No. 303, *D. C. Matura.* } *Bartholomeusz* v. *Teroonanse.*

In this case the Court below, on the report of the Commissioners appointed to appraise certain property, had attached a man for Contempt, in having detained property stated to belong to the estate under the administration of the plaintiff. The Supreme Court set aside the conviction; and pronounced judgment as follows:—

A person, who refuses to deliver up property to Commissioners, appointed by the Court to take charge of the goods belonging to an estate, cannot be summarily attached for Contempt.

"A party should not be proceeded against for Contempt, unless it is clear beyond all doubt, that, without any right whatever to do so, he disobeys the orders or defies the process of the Court. The Commission of Appraisement issued in this case, authorizes the Commissioners to take over property belonging to the deceased, and the Supreme Court by its order of the 3rd July 1855, further directed them to take possession only of property, 'which appears to have wholly belonged to the deceased, and was not possessed by the Priest as Temple property.' What belonged to the deceased exclusively, and what property, so belonging to him, the opponents unlawfully detain, are questions which ought first to be fairly tried in an action brought for that purpose, and

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not to be summarily disposed of, on a representation of the Commissioners in the Testamentary case. If, in such action, judgment went against the accused, and they still refused to deliver up the property, they may then be proceeded against as for Contempt; but it is premature to do so in the case as it stands at present."

No. 7,738, *D. C. Jaffna.* } *Peria Tamby* v. *Wairewy Mader.*

In an action on a Bond, a Memo. signed by the plaintiff and admitting the non-payment of the consideration, is admissible in evidence, to support the defendant's plea of want of consideration.

This was an action for £50 and interest, due on a Bond dated 17th June 1854. The defendant admitted the Bond, but stated that it had been granted to plaintiff on his promise to pay the consideration thereof in cash, as well as by supplying Tobacco, but which the plaintiff never did; and that, on the 2nd August 1854, when the defendant pressed him for the money, the plaintiff granted him a Memo. (Letter B,) promising him to pay the balance; which however he failed to do. The plaintiff in his replication joined issue on these facts, and alleged the document of the 2nd August 1854, to be a forged instrument.

The Document, Letter B, was in the following terms:—"The 2nd day of August 1854, to *Wairewy Mader*, I *Peria Cander*, have written and granted under-hand account, to wit, upon the interest-bond written and granted by the said *Wairewy Cander* in my favour on the 17th June 1853, deducting the amount paid to him, after looking over and settling the accounts, the balance still due is Rds. 353. 6. (£26. 10. 3.) I shall pay to him the sum of Rds. 353. 6., and shall obtain this under-hand account."

At the trial, the plaintiff's Proctor contended that the proof of the Memo. B., was inadmissible to contradict the Bond, because it was not stamped, and not attested by witneeses; and the Court pronounced the following judgment:—"The Court is of opinion, that B. cannot be admitted in evidence to vary A. The original document admits the borrowing and receiving the *full* consideration, on the day it was executed. The answer denies consideration. The Memo. B. is of date the 2nd August 1854, and purports to be signed by plaintiff, (which however he denies.) The Memo. varies and contradicts the Bond, by attempting to shew that the consideration was not paid, and that at the time of the making of the Memo. the plaintiff was still indebted to defendant in Rds. 353. 6. on the Bond. If such a document as B, could be admitted in evidence against a formally executed deed, such as A, then there would be no security to parties in

transactions of this kind, and would only encourage perjury, whereas in this Province, false evidence is easily obtainable. Judgment for the plaintiff for £50, interest and costs."

On appeal from this judgment, (*Lorenz* for the appellant, and *Muttukistna* for the respondent,)

Per Curiam :] The decree of the Court below is set aside, and the case remanded for a new trial. The document tendered by the defendant is admissible in evidence, and should have been received.

No. 16,088, *D. C. Galle.* } *Abeyesekere* v. *Siman* and others.

In an action to try the title to land, a previous judgment, wherein the plaintiff recovered damages against the defendant for trespass in respect of the same land,—though not conclusive,—raises a strong presumption in favour of the plaintiff's title.

This was an action, to recover possession of certain lands. On the 19th January 1841, the plaintiff had purchased the land from the 4th defendant; but the 1st, 2nd and 3rd defendants, having disturbed him in the possession and denied his title, the present action was commenced against them. The 4th defendant allowed judgment by default, the 2nd and 3rd disclaimed title, and the 1st pleaded on the merits, and claimed title to the land. On the day of trial, the plaintiff's Proctor put in evidence a previous case, No. 4,222, between plaintiff and 1st defendant, in which plaintiff had recovered damages in respect of this very land; and closed his case. The District Judge non-suited the plaintiff.

On appeal, *Dias*, for the plaintiff and appellant :] The 2nd, 3rd and 4th defendants having admitted our right, we had only to make out a case against the 1st. The case put in evidence, was conclusive against him. It is true that it was a case for damages, but it was a strong indirect admission of the plaintiff's title. It is true that it did not estop the 1st defendant from again going into evidence upon the question of title; but that did not preclude the plaintiff from making use of it as evidence, and it is pregnant evidence against the 1st defendant. The District Judge seemed to have lost sight of this view of the case, having been entirely led away by the argument of the 1st defendant's Proctor, that the former case did not operate as an estoppel.

Per Curiam :] The decree of the Court below is set aside, and the case remanded for a new trial, the plaintiff paying the costs of the hearing in the District Court and in appeal. The case, No. 4,222, raises a presumption in favour of plaintiff's title; for in it he claimed the land by the very purchase upon which he now grounds his right, and recovered damages against the

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1st defendant (who alone now claims the title,) for having drawn toddy from the trees standing on that land. But the decree in it is clearly not entitled to the force of *res judicata*, as the plaintiff's Proctor erroneously supposed ; as the action was not a proprietary one, and the judgment in it did not definitely find plaintiff owner of the land, nor is this suit founded on that judgment.

No. 8,585,
D. C. Jaffna. } *Valoepulle* v. *Winasitamby* and others.

An allegation, that a Document relied upon by the plaintiff, is "*not a genuine deed*", puts the execution thereof in issue.

The plaintiff, as executor of the last will of *Tyalmuttoo*, claimed lands under a Dowry Deed, dated 15th October 1837, granted by *Weregettiar Sinnetamby* (her father,) and *Sinnetamby Armogem* and *Sinnetamby Winasitamby* (her brothers) ; and by right of possession up to her death. The defendants (who were the brothers of *Tyalmuttoo*,) pleaded that *Tyalmuttoo* was not entitled to the lands in right of dower, *as falsely stated* by the plaintiff in his libel ; and that the Dowry Deed dated 15th December 1837, was not a genuine deed; and that the alleged grantors of the said Dowry Deed, were not entitled to the whole of the lands mentioned in the libel, so as to enable them to grant the same in dower to *Tyalmuttoo*. And they also claimed the land by right of prescriptive possession.

At the trial, the District Court held the Dowry Deed to have been admitted by the answer, (the terms " forgery," and " not genuine," not being synonymous ;) and therefore called upon the plaintiff to prove his possession on the Dowry Deed. And after hearing the evidence, (the defendants having called no witnesses,) the Court gave judgment as follows :—

" There are no doubt contradictions in the evidence called to support *Tyalmuttoo's* possession ; but not, under the circumstances of this case, in the Court's opinion, sufficient to justify the Court coming to any other opinion than that a strong *prima facie* case has been made out by the plaintiff. Let a party's case be ever so good, you will rarely meet with one, but some falsity *must* be adduced. I have no doubt, that there is falsity in this case to some extent. I do not believe that deceased *Tyalmuttoo* took the produce separately from her brothers (defendants,)— employing her own people and coolies to take the produce, repair the fences, and thatch the house. It appears by the evidence, that *Tyalmuttoo's* husband became insane eight or nine years since ; that after he became so, she continued to live in her Dowry-house on the land *Wadelytotam* and *Arikentidel*, together

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with defendants (her brothers,) up to about a year and a half ago, when she left the village. That was more likely, her husband being insane and *Tyalmuttoo* living in the same house with defendants, in which she had a share in Dower for so many years, than that defendants should have managed her lands for her; hence the difficulty of proof in support of the libel. But considering the whole case, and taking into consideration the situation *Tyalmuttoo* was placed in, after her husband became insane, she at the time living in (what the Court considers proved,) her dowry dwelling-house, the Court is of opinion that her possession is proved."

On appeal against this decision, *Lorenz* (*Rust* with him) appeared for the appellants, and *Muttukistna* for the respondent; after hearing whom, the Supreme Court pronounced the following judgment:—

"The decree of the Court below is set aside, and the case remanded for a new trial.

"The Supreme Court considers, that the Answer denies, first, the genuineness of the Dowry Deed, and secondly, the right of the grantors to the whole of the lands; and that the plaintiff should therefore prove such Dowry Deed, as well as possession. As the Court seems to have been led into the error of holding, that the genuineness of the deed was not denied, by the position assumed by the plaintiff's counsel, the plaintiff must pay the costs of the hearing in the District Court, and of this appeal."

No. 18,412, *D. C. Matura.* } *Bodahenedigey* v. *Ganhewagey* and another.

In a suit to recover a fractional share of land, the plaintiff may at the trial, prove his right to a divided or undivided share.

The plaintiff, in this case, claimed 89-192nd parts of certain lands, viz:

18-192nd, by right of gift,
8-192nd, by right of his wife,
39-192nd, by right of inheritance,
and 24-192nd, by right of purchase;

and complained, that the defendants had entered into the said premises, and ejected the plaintiff from the same 89-192nd parts of the said garden; and prayed, that the plaintiff may be declared proprietor of the premises aforesaid, and be quieted in the possession thereof.

The defendants, by their Answer, denied the plaintiff's title, and the 2nd defendant claimed 137-192nd parts, as his own property.

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On the day of trial, the plaintiff, on examination, stated as follows :—" The land is divided, and has been held in separate portions for the last 10 years. The 2nd defendant consented to my holding my shares separate. There was no writing; but it was by word of mouth. I and 2nd defendant commenced holding our separate shares 8 years ago. The consent was *not* in writing. It was intended as a permanent arrangement."

Hereupon, the defendant's Advocate urged that a non-suit should be entered on two grounds : 1st, the Libel claimed undivided shares ; whereas in the plaintiff's examination, he claimed a divided portion.—2nd, that claiming a divided portion, he was without title, because the partition was not in writing.

The plaintiff's Proctor moved for a postponement, on the ground of the absence of his witnesses ; and desired the Court to record, that the plaintiff was indifferent whether the judgment were for a divided or an undivided share, the plaintiff desiring only the share claimed by him in the Libel.

The Court below was of opinion, that the plaintiff's statement was not only at variance with the libel, in claiming a divided portion, but was very inconsistent and contradictory in itself ; and that as the Ordinance No. 7 of 1840 required all sales of Land to be in writing, the plaintiff could not sue for a divided portion, as the division took place only 8 years ago. The plaintiff was thereupon nonsuited with costs.

On appeal, *Lorenz* for the plaintiff and appellant.] The Court below refused to hear evidence of the plaintiff's title, because on the day of trial he claimed a divided, instead of an undivided share ; notwithstanding, that in the same breath, he declared his willingness to take a judgment for an undivided share. It is unjust to parties to bind them down to strict language in their pleadings, or to decide a case on supposed admissions artfully extracted from them by a skilful Advocate. But look at the *variance* insisted upon :—the plaintiff in his libel claims (not an undivided or a divided share, but) an 89-192nd share, and in the examination he states, that this 89-192nd share had been divided off some years ago. How does that affect his right to claim that share, as if no division had taken place ? Has the division, which is supposed to be void for want of a writing, deprived him of his previous title to the property ?

Another question may arise, viz. whether the Judge was correct in holding a Partition to come under the Statute of frauds. But whether it does, or does not, he should have heard the evidence tendered.

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The judgment of the Court below was set aside with costs; and per *Curiam* :] The better and safer course for the District Court always to pursue, is to hear the evidence of the parties before deciding the case, and as plaintiff's material witnesses were absent and they had been duly subpœned, he was entitled to a postponement.

No. 8,414,
C. R. Caltura. } *Nonohamy* v. *Perera* and another.

A widow cannot sue upon a Bond granted to her deceased husband, unless she has obtained administration of his estate, or joins the heirs of the husband as plaintiffs.

This was an appeal against a judgment obtained by the plaintiff, (a widow, who had not taken administration of her husband's estate.) upon a bond granted to her deceased husband.

Per Curiam :] The plaintiff is not entitled to sue upon a bond given to her deceased husband. Either she must be appointed Administratrix and sue in that capacity, or she must join the heirs, getting herself, in case there be any minors, appointed *curator ad litem* for such minors. It is not expedient to insist upon the former course in cases of very small estates, but the latter is a simple and inexpensive one, and such as may easily be followed. It is only by pursuing either of these courses, that the plaintiff can legally represent the estate, and give a valid discharge to the debtor. The District Court has of course the power, whenever it sees fit to do so, to require a party appointed *curator ad litem*, to give security for the minor's share, or to order the same to be deposited in Court. The plaintiff in the present case ought to amend her plaint, and join her heirs in the manner herein prescribed, after which the defendant must be called upon to plead, and the case be heard *de novo*.

No. 17,952,
C. R. Jaffna. } *Mohamado Tamby* v. *Pitche.*

A promise to bar Prescription must be in writing.

Per Curiam :] It is only a *written* and not a *verbal* promise that can save a case from Prescription.

No. 12,311,
P. C. Kaigalle. } *Appoohamy* v. *Kiry Ettena* and others.

Circumstances negativing the *animus furandi*.

In this case, the defendants had been convicted of Theft, but on appeal the Supreme Court set aside the conviction on the following grounds:—

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"It is clear that the articles were not taken *animo furandi*. The hour of the day when, and the public manner in which, the alleged offence is said to have been committed, and the relationship of the parties, shew that defendants acted under a claim of right; and though they have laid themselves open to a charge of breach of the peace, or an action for trespass, yet they are clearly not guilty of Theft."

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Present Rowe, C. J., and Morgan, J.

No. 28,098, *D. C. Kandy.* } *Pallegedere Puncha* v. *Narandade Kallua.*

Rule as to Burthen of Proof at the trial. (see *ante*, p. 8.)

The judgment of the Supreme Court in this case, states the rule which ought to be followed in respect of the burthen of proof at a trial. The plaintiff had, by examination of the defendant, elicited certain facts in his favour, and thereupon contended that the burthen of proof lay on the defendant. The Court below having held accordingly, the defendant took the present appeal.

Mr. Advocate *Rust* appeared for the appellant.

Per Curiam:] The question upon whom the burden of proof lies, should be determined with reference to the pleadings of the parties, and any "declaration, admission or denial," elicited in the course of an examination had with the view of explaining the pleadings or supplying any defects in them, and entered in the proceedings "as part of the pleadings of the party making it." The examination of parties at the trial, is with the view not of explaining the pleadings, but of supplying evidence; and if a party conceives that the evidence obtained by the examination of his opponent, is sufficient for all the purposes of his case without further evidence, he ought to close his case, and leave it to the defendant to enter into his defence.

"The practice which seems to be gaining ground in some of the District Courts of examining a party at the commencement of a trial, and then upon such examination trying to throw the burden of proof on the defendant, is productive of much practical inconvenience. The plaintiff is thus enabled to divide his case, and adduce that evidence after the defendant's witnesses have been heard, which he ought to have led in the first instance; and indeed to do so with the sanction of the Judge, who having

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ruled that the *onus* was on the defendant, cannot properly refuse afterwards to hear evidence of the plaintiff. Undue weight is also thereby attached to isolated answers drawn out by questions skilfully framed by the cross examining counsel; and parties are thus held bound by admissions which they never intended to make, and which may be quite opposed to the real facts of the case. By an adherence to the course here prescribed, a course quite in accordance with the Rules and Orders, this inconvenience and the injustice to which it may sometimes give rise may be easily avoided. The 8th Rule authorizes the Judge to examine parties to ascertain the real issue; but although this power is, and can only be, seldom exercised by the Judge *mero motu*, yet there is nothing to prevent a party, who deems the pleadings of his opponent defective, in not containing all necessary information, or otherwise, to examine such opponent under the comprehensive words of the 29th Rule; and if any "declaration, admission or denial," is obtained by such examination, which should properly form part of the pleading and would serve to explain or illustrate it, he may move the Judge to exercise the power given him by the 8th Rule, and to enter such "declaration, admission or denial" as part of the pleadings of the party making it. Such examination must of course take place at an early stage of the case, for they will show the evidence necessary at the trial. At the trial, the issues should be well ascertained, and the party who is to begin should come prepared to do so. The examination that takes place then, is not with the view of explaining the pleadings, but of supplying the evidence. Upon the pleadings in the present case, the issue is clearly on the plaintiff, and he ought either to close his case upon the examination of the defendant, when he will not be allowed to call further evidence, excepting what is strictly evidence in reply, or to adduce his other evidence at once. It was irregular of him after such examination, (that is, in fact, after leading partial evidence,) and indeed after opening his case, as is recorded of him, to insist that the burden of proof was on defendant.

No. 28,688,
D. C. Kandy. } *Duff* v. *Crosbie.*

A joint owner of Land is entitled to call for a Partition.—Mode of effecting Partition.

This was an action for a Partition of the *Queensberry Estate*, situated in Kotmalie, and which belonged in equal shares to the plaintiff and defendant. The defendant by his answer, admitting the title of the plaintiff to an undivided half of the estate, pleaded 1st, that

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he had been the sole owner of the entire estate until the transfer of a half thereof to the defendant on the 7th of May, 1855; that such transfer had been effected on the solemn promise of the defendant that he would enter into partnership with the plaintiff; and 2nd, that the estate could not be divided into two parts of *equal extent and value* (as prayed for in the libel,) and that rather than consent to a division, he the defendant would sell his own share for £2,300 to the plaintiff.

The Court below, after hearing evidence as to the practicability of a division, directed a Commission to issue to Capt. *O'Brien* and Mr. *Kelso*, to inspect the estate, and to report whether it was possible to divide the estate into two portions of equal or nearly equal value; and in the latter case, to state what equivalent the party to whom the larger portion might be allotted should pay to the other; and whether the partition would have the effect of deteriorating the present value of the estate.

The Commissioners having sent in their Report, the Court below decreed a division in conformity thereto. And against this decree, the defendant appealed.

Dunuville, (*Rust* with him for the appellant,) contended that the estate was not capable of a division into two portions "of equal extent and value," as proved by the witnesses and by the Commissioners themselves. The Court below therefore in decreeing partition generally, gave a relief which was not prayed for: that the Court in fact acted *ultra vires* in granting a Commission to ascertain a fact which was the very point in issue—viz: the practicability of the partition. 2. The Commissioners' Report was incorrect; (and this was attempted to be shewn by an affidavit and documents produced to the Court below:) and 3. The Commissioners had not sworn to their Report.

W. Morgan, (*Lorenz* with him for the respondent,) admitted that the last objection was indeed fatal; but would only render it necessary to send the case back for the purpose of swearing the Commissioners to their Report. As to the other objections, it was clear that the District Court had a right to issue a Commission to ascertain a fact not otherwise ascertainable, and that in the most satisfactory manner possible, viz: by a reference to professional men who had been to the spot and examined the estate with a view to the point in dispute. The question of *practicability* thus decided, the mere *difficulty* or *inconvenience* of a partition, did not entitle a party to object to it. *Agar v. Fairfax*, 17 Ves. 533; *E. of Clarendon v. Hornby*, 2 P. Wms. 446. Nor would a general agreement *not to call for a partition*

(granting such an agreement to have been entered into,—but this had not been proved,) prevent a partition; for such an agreement is null and void. 2 Burge, tit. *Partition.*

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Rowe, C. J.] You can no more compel two persons to continue co-tenants against their will, than you can compel them to marry against their will. The partition must take place. It cannot be contended that an estate of 260 acres is incapable of division. The case ought to go back for the examination of the Commissioners, with liberty to the defendant to adduce evidence of any incorrectness in their Report, which, if shewn to be incorrect, must of course be amended.

Morgan, J.] The Commissioners should not be paid till they have done their duty, and effected a partition to the satisfaction of the Court.

Judgment was afterwards formally pronounced by the Court as follows:] The decree is set aside, and the case sent back for the Commissioners to be examined as to their Report, and for the parties to adduce evidence, if they wish to do so, for and against the proposed partition: costs to stand over.

The District Court was quite right in issuing a Commission, but notice should have been given to the defendant to apprise him of the time when the Commissioners were to hold their sittings and inspect the land with the view of dividing it. After the Report was made, the Commissioners should have been examined thereon as ordinary witnesses, and the defendant should have been allowed an opportunity to substantiate by evidence his objections to such Report. The course prescribed by the Ordinance 21 of 1844, which to a great extent accords with the common law practice in such cases, should in applications of this kind be followed as far as practicable.

As however the defendant was wrong in not having taken part in the proceedings of the Court, when issuing the Commission, though he had an opportunity allowed him for doing so, the costs in appeal are divided. The costs of the District Court are to abide further orders.

No. 8,673, *D. C. Jaffna.* } *Toussaint* v. *Nagemutto Chettiar.*

Per Curiam:] A party can only be condemned in treble costs where a suit has been instituted.

Treble costs, when decreed.

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No. 13,768,
D. C. Kurnegalle. } *Punchy Rahle* v. *Menick Rahle.*

In an action for an undivided share of Land, the stamp is calculated according to the value of the share claimed.

In this case the plaintiff claimed a fourth share of certain lands, and his Proctor used stamps of the first class with reference to the value of such share. But the District Judge held that the stamps should be regulated according to the value of the whole land, as the plaintiff's interest therein was an undivided one.

On appeal,—

Per Curiam :] It appears to the Supreme Court that as one-fourth of the land was claimed by the plaintiffs and was in dispute, their Proctor was quite right in using stamps in the first class. It can make no difference, as respects the class, whether the interest claimed in the land be divided or undivided: the value of such interest must regulate the use of stamps.

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Present Rowe, C. J., and Morgan, J.

No. 691,
C. R. Matura. } *Adrian* v. *Don Matthes* and another.

A Fiscal's Sale will not be set aside on the mere ground that it was not held at the spot; especially where a change has taken place in the situation of the parties, and the execution-debtor has acquiesced in the sale.

The facts of this case are stated in the judgment, which was as follows: (Mr. Advocate *Rust* appeared for the appellant.)

"It appears that under a writ of execution issued by the 1st defendant against the plaintiff, certain lands of his were sold on the 31st January, 1855, and purchased by the 2nd defendant for £9. On the 14th March, 1856, (for no other reason than that he had discovered in the meanwhile, that the sale of lands in execution must take place at the spot unless the Court orders otherwise,) the plaintiff brought the present suit to get the sale cancelled. Whatever the plaintiff's right might have been, had he applied for a stay of the sale, or within reasonable time after it took place, it is clear that he is not entitled to relief, considering his long silence and the change that has taken place in the situation of the parties: for it appears that the 2nd defendant as purchaser, has entered into the possession of the land, and has improved it. Moreover, Equity will not set aside a sale owing to mere irregularity of the proceedings, and in the utter absence of fraud. (See note to *Manaton* v. *Molesworth*, *Eden's Rep.* p. 18.)

The Supreme Court set aside the decree of the Court below, and dismissed the plaintiff's claim with costs.

No. 17,610, *D. C. Matura.* } *Aydroos Lebbe* v. *Ismael Lebbe.*

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A Fiscal's Sale set aside on the ground that it was not held in terms of the Ordinance No. 21 of 1844 (then being in force,) and was not conducted at the spot.

The plaintiff in this case, claimed the trees of the 2nd plantation of a certain garden under the following circumstances. The plaintiff's father being entitled to the whole of the 2nd plantation, had mortgaged it with the plaintiff on the 23rd January, 1831, with a right of possession in lieu of interest, and accordingly the plaintiff had entered into and continued in possession till his father's death, when he became entitled to 2-8ths of the 2nd plantation by right of inheritance, and his mother and brothers to the other portions. The 1st and 2nd defendants having obtained a writ of execution against one of the brothers, who was also the owner of the soil, caused the whole land to be sold by the Fiscal to 3rd defendant at the Matura Cutcherry, but not in terms of the Ordinance No. 21 of 1844. In the present action, the plaintiff prayed that the Fiscal's Deed might be cancelled, and the plaintiff's right of possession by virtue of his mortgage as well as his right of inheritance declared and upheld. The defendants denied the plaintiff's right.

Upon these pleadings the case came to trial on the 26th July, 1854, when it was submitted by defendant's Proctor that the action could not be maintained by the plaintiff as mortgagee against third parties, but that he should proceed against the mortgagor. The District Judge non-suited the plaintiff; but the Supreme Court set aside the non-suit, and remanded the case for a new trial.

The case then came on again on the 26th May, 1856, and after hearing evidence on both sides, the District Judge set aside the Fiscal's sale on two grounds: first, that it was not held in terms of the Ordinance No. 21 of 1844, and secondly, that the sale should have been held on the spot in terms of the Fiscal's Rules. From this decision the defendant now appealed.

Rust, (*W. Morgan* with him, for the appellant.)] There were many objections urged in the Court below by the defendants which would not be now pressed. The case rests upon two grounds; first, the insufficiency of evidence, and secondly, that the District Judge was wrong in point of law. Upon the first point it is submitted, that there was no evidence to shew that the sale was not held under the Odinance No. 21 of 1844. (He called the attention of the Court to the evidence.) On the second point it is submitted that the 19th clause of the Ordinance relied upon on the other side, did not apply to this case: because here the seizure by the Fiscal was of the whole and not of an

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undivided share. To bring it under the operation of the 19th clause, the seizure must have been of an undivided share or interest. The plaintiff's claim, if any, is for the proceeds of the sale. The 3rd defendant is a *bona fide* purchaser for value without notice, and is entitled to be protected. As to the sale at the Matura Cutcherry, it was only an irregularity for which the Fiscal would be responsible, but it would not vitiate the sale.

Dias for the respondent said that he seldom saw a better judgment from any District Court. A long string of objections raised by the defendant's Advocate, was fully met by the Judge below. The first point to be established was the plaintiff's interest in the premises in dispute. (Ordinance 21 of 1844, § 18.) This was pointed out by the District Judge at the outset, and evidence was fully gone into upon it. The plaintiff being entitled to 2-8ths of the trees, had a right to call for a sale under the Ordinance, which gave him certain privileges. The Fiscal's sale was bad *ab initio*; and not merely voidable, but absolutely void. The words of the Ordinance were imperative, and if the 3rd defendant had sustained any damage he had his remedy. The evidence clearly established that the 3rd defendant had purchased with notice; and even if that were not so, he was not entitled to relief. The argument, that the seizure being of the whole and not of an undivided share, the Ordinance did not apply, was more ingenious than sound. Such a construction would enable a party to defeat the object of the Ordinance by a wrongful seizure of the whole. [MORGAN, J. This case clearly comes under the Ordinance.] Another objection equally fatal was that the sale was in contravention of the Fiscal's Rules, (Fiscal's Rules, 11th July, 1840, Clause 11)* The sale was not conducted on the spot, and it was shewn in evidence that there was no order of Court authorising a deviation. It was also proved that there was no written or any other application by the parties, consenting to the sale being conducted elsewhere,

The decree of the Court below was—

Affirmed.

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* See No. 119, *Court of Requests, Matura,* (January 19th, 1856,) *ante,* p. 8. part I.

No. 18,549,
D. C. Matura. } *Salman* v. *Illangkoon* and others.

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A Purchaser of Lands, under a condition that he "should have no claim for less extent of land sold," is not entitled to a rescission of the sale or to compensation, on the ground that the actual extent is less by one-third than the extent mentioned in the Conveyance: but the Court will take the extent into consideration on a question of costs.

In this case the plaintiff claimed a field of the extent of one *amunam*, under a Conveyance from the 1st and 2nd defendants; and alleged that the other defendants had ejected him from a portion of the field so purchased by him, and prayed that he might be quieted in the possession of the disputed portion, and the 1st and 2nd defendants be required to warrant and defend his title. The 1st and 2nd defendants denied their liability to warrant, &c., on the ground that the Conditions of Sale under which the plaintiff had purchased, (and which were referred to in the Conveyance,) contained a clause that the purchaser "should have no pretension or claim whatever on them for less extent of land sold." The other defendants claimed title to the portion in dispute.

It appeared in evidence that without the portion in dispute the field purchased by plaintiff was about two-thirds of an *amunam*. The District Judge dismissed the plaintiff's case, and cast him in all the costs, including those of the 1st and 2nd defendants. From this the plaintiff appealed.

Dias, for the appellant.] As the District Judge had found the facts against him upon evidence, he would not trouble the Court upon the merits of the case; but he contended that the 1st and 2nd defendants were the proper parties to have been cast in the costs of suit. He further submitted, that they should have been condemned to refund to the plaintiff one third of the purchase money, with interest thereon. Admitting that the Conditions of Sale contained the clause referred to in their Answer, it was unreasonable to hold that such a clause would justify their selling to plaintiff two-thirds only of what they purported to sell. This clause in the Conditions, which is equivalent to the usual words inserted in Conditions of Sale,—"*more or less*," would, no doubt, prevent the purchaser from objecting to a slight difference in the extent; but it could not be held to cover a case like the present where the deficiency was more than one-third. The District Judge was clearly wrong in condemning the plaintiff to pay the costs of the 1st and 2nd defendants.

Lorenz for the respondent.] The Conditions of Sale admitted by the plaintiff, clearly exonerated the 1st and 2nd defendants from liability; and this very clause in the Conditions shewed that the vendors were not certain at the time of the extent put up for sale. In point of fact, the plaintiff was aware of the real extent of the field; and if he was not, the Conditions of Sale were sufficient notice to him to inquire. The rule *caveat emptor* must

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apply, and the expenses of this litigation, occasioned by the plaintiff's default, should be borne by him. The deficiency of extent in this case would clearly be covered by the clause in the Conditions.

Per Curiam.] That the decree of the Court below be affirmed, excepting as to that part of it which condemns the plaintiff to pay the costs of the 1st and 2nd defendants, who are decreed to pay their own costs. The clause in the Conditions of Sale will protect the first and second defendants from any claim for a rescission of the sale or for damages; but considering that the difference between the extent described in the deed, and that which the plaintiff now obtains, is great, it is not equitable that he should be made to pay the costs of the sellers.

No. 16,764,
D. C. Caltura. } *Silva* v. *Terunnanse.*

The obligee of certain bonds having delivered them to the plaintiff to be delivered to the defendant, which he did; *Held* that the plaintiff might afterwards sue the defendant for the re-delivery thereof.

Held also, that on a decree condemning the defendant to deliver the bonds or to pay the money due thereon, the Court ought not, in case of default, to proceed by attachment to enforce the judgment, the ordinary process of execution being available.

This was an action to recover from the defendant certain bonds delivered to him by the plaintiff. It appeared that the obligee of the bonds had handed them to the plaintiff, to be delivered to defendant, which he did. The plaintiff now prayed that the bonds, or the money due thereon, might be decreed to him. This the District Court decreed, and further ordered that "in default, the "defendant should be attached and committed to jail until he "shall have complied with either of the said orders." From this decree the defendant appealed.

Dias, for the Appellant, submitted that the plaintiff was not entitled to maintain this action, as he was not the party beneficially interested under the bonds. It was true that the plaintiff was the person who delivered the bonds to defendant; but that was simply as the servant of the obligee. [Rowe, C. J.—As a bailee had he not a right to sue?] There is no bailment here. The employment of the plaintiff by the obligee was merely as a servant. A bailee has a qualified right, and generally a right of possession, and therefore, in certain cases, he might maintain an action; but it has never been held that a person in the position of the plaintiff could maintain an action. The District Judge, by his decree in this case, treats the plaintiff as if he were the absolute owner of the bonds, for he condemns the defendant to pay him the amount.

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Per Curiam.] That the decree of the Court below be affirmed, excepting as to that part of the judgment which decrees that, in default of the defendant's paying the amount due on the bonds or returning the bonds, he shall be attached. Though the plaintiff is not the owner of the bonds in question, yet as they were specially bailed to him by his sister, and he gave them to the defendant, he is entitled to bring his action for their restoration. But as the judgment is in the alternative, and decrees a money payment, which can be enforced by the ordinary process of execution, the case is not one in which the defendant ought to be *gyzeled.*

This judgment will not, of course, bar the creditor under the bonds (in case she does not obtain payment thereof) suing the debtors upon the duplicates, on proving the delivery of the originals to the defendant, to account for her non-production of them.

No. 14,512,
D. C. Badulla. } *Rang Menicka* v. *Rang Menicka.*

The right of *Daru Urume* considered. By Kandian Law the children of several beds succeed *per stirpes* and not *per capita.*

One *Baligalle Vidahn* was the admitted owner of the land in dispute. By his first wife he left an only son, the 2nd defendant, and by his second wife (the 1st defendant,) four children, *Siatoo*, *Oukkumenika*, *Dingirimenika*, and a son who died without issue. *Siatoo* married the plaintiff, and had a daughter *Mootoomenika*, who died after her grandfather *Baligalle Vidahn.* The plaintiff by right of "*Daru Urume*," claimed one moiety of *Baligalle Vidahn's* property, moveable as well as immoveable. The 2nd defendant denied the plaintiff's right, and claimed a moiety, as the only child of the first marriage; and the 1st defendant alleged that she had taken out administration to *Baligalle Vidahn's* estate, and that she and her children were in possession of the lands; and also denied the plaintiff's right. No evidence was called on either side, but upon the pleadings and examination of parties, the District Judge decided "that plain-"tiff's husband and child being both dead, and plaintiff having "re-married, she could not now maintain her present claim on "the administrators of her father's estate, but was only entitled "to judgment in her favour for all the moveable property of her "deceased husband, as admitted in the 1st defendant's Answer. "Each party to bear its own costs." Against this decision the plaintiff appealed.

Dias. for the appellant.] The District Judge has entirely mistaken the nature of the plaintiff's claim, which is not as the widow of

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Siatoo, but as the mother and sole heiress at law of her daughter *Mootoomenika*. As the widow of *Siatoo* she would only be entitled to a life-interest over his share of the real property, but as the mother of *Mootoomenika* she would be entitled to the whole of that share which came to *Mootoomenika* from her father. This is a well-known principle of the Kandian Law, and is called the right of "*Daru Urume*." (*Armour*, 130, 132.) The District Judge seems to have confounded it with the right of a widow. According to the conclusion of his judgment, it is very difficult to say what he really decided; but on reference to other parts of it, it is beyond doubt that he mixed up the two rights together: as for instance, when he says "and the plaintiff's Counsel has been "unable to rebut the position taken by Marshall at page 326, "par. 51." Now this passage in Marshall, which the District Judge has put forward as an authority against the plaintiff's claim, relates entirely to the rights of widows. It lays down the law applicable to the case of a widow, who takes a second husband contrary to the wish of her first husband's relatives. [*W Morgan*,—The plaintiff's right to her "*Daru Urume*" is admitted.] Then the next enquiry is, what is the share which the plaintiff is entitled to? The 2nd defendant is not entitled to a half, but to a fourth; (*Armour*, 122, 123;) the children of the 1st defendant being entitled to the other three-fourths.

W. Morgan for the respondent.] The plaintiff is clearly entitled to that share of *Baligalle Vidahn's* estate, which devolved upon *Mootoomenika* from her father *Siatoo;* but her present claim is for one-half of all the moveable and immoveable property of *Baligalle Vidahn.* To this she is clearly not entitled. To *Baligalle Vidahn's* moveable property she has no right at all, because that must go to his widow, the 1st defendant. She has indeed a right to a share of the immoveable property; not to one-fourth, as contented for on the other side, but to one-sixth: that is, the 2nd defendant, as the only son of *Baligalle Vidahn's* first marriage, is entitled to one-half, and *Siatoo* to one-third of the other half. All that plaintiff is entitled to, is *Siatoo's* one-third of one-half, or one-sixth of the whole estate. It is not necessary to cite any authority to shew that the division among children of several beds is *per stirpes* and not *per capita.* That point has been decided in several collective decisions, notwithstanding many passages to be found in both Armour and Marshall in favour of the division *per capita.*

Per Curiam.] "That the decree of the Court below be set aside, and judgment entered up for plaintiff for one-sixth of all the immoveable property of *Baligalle Vidahn,* the father of *Sia-*

too, the plaintiff's husband. The Supreme Court is of opinion that the plaintiff is not entitled to one-half as claimed by her, because the second defendant, the only son of the first marriage of the said *Baligalle Vidahn*, is entitled to one-half, and the other half should be divided between the three surviving children of the second marriage, of whom *Siatoo* is one. Each party to pay his own costs."

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January 23.

Present ROWE, C. J., and MORGAN, J.

No. 10,370, *C. R. Calpentyn.* } *Ahamadorina* v. *Kadersaibo* and others.

A sale of Land, effected subsequent to a Lease, must be held subject to the Lease. A Lease for 9 years by a Mother, as guardian of her minor child, upheld against a subsequent sale by the Mother, acting in her own right (as heir of the minor who had since died,) the purchaser having notice of the Lease.

This was an action by the plaintiff to recover £9 10s. as damages. On the 23rd February, 1852, one *Porenjie Fernando* leased a garden to plaintiff for nine years, commencing from 13th April 1854. At the date of the lease, the garden was the property of a minor child of *Porenjie*. Shortly after the lease the minor died, and *Porenjie* became by inheritance the sole proprietor of the land, and as such on the 4th June, 1852, (before the commencement of the term of the lease,) sold it to 1st defendant and put him in possession thereof. The present action was to recover from the defendants, who had taken possession of the land, the value of the produce from the time the plaintiff's right, as lessee, had accrued to him. The Commissioner gave judgment for the 1st defendant, and from this the plaintiff appealed.

Dias (*W. Morgan* with him) for the respondents was called upon to support the judgment.] At the date of the lease to the plaintiff, the lessor had no right, the minor, the admitted proprietor of the garden, being then alive. It might be contended that the lessor, as the guardian of the minor, had a right to lease the minor's property ; but according to the Dutch Law, parents were not *ipso jure* guardians of their minor children, unless they were appointed by the Court, (3 Burge, 935-938.) It was the plaintiff's duty to have looked into the authority of the person whom he dealt with ; and it was not pretended in this case that the lessor was a properly constituted guardian. Even if she were a guardian appointed by Court, a lease like this for nine years would be clearly bad. Such guardians could not mortgage without the express authority of the Court, (3 Burge, 952 ;) much less could they lease for nine years. The plaintiff

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was not entitled to relief at all, because his very lease gave him notice of the minor's right. [*Morgan*, J. No doubt the minor would have been entitled to relief, had he come forward. But that is not the question here.] Even if the plaintiff were an innocent party, still as between him and the 1st defendant, a Court of Equity would decide in favour of the latter, according to the well-known rule, that as between two equally meritorious parties the Court will favour the party who has the legal title.

Lorenz (*Muttukistna* with him) for the Appellants.] The Commissioner has found the fact, that the 1st defendant was aware of the lease at the time of the purchase; and in fact one of the conditions of the subsequent sale was, that the 1st defendant should indemnify the plaintiff in respect of the lease.

Per Curiam.] The case ought to be sent back for the plaintiff to enter into proof of the damages claimed by him. The Supreme Court considers that, as the land was leased out to the plaintiff prior to the sale, and by the very party who sold it, the sale must be held subject to the lease, and can only take effect after the expiration of the term fixed by the lease. The plaintiff is therefore entitled to judgment; but as no proof of the actual damages incurred was adduced, the case is remanded for that purpose.

No. 11,872, *D. C. Galle.* } *Ahamadoe Lebbe* v. *Sinne Lebbe.*

Where an action was commenced by the plaintiff, Agent of A. B., which on the plaintiff's death, and with the consent of his administrators, was struck off the Rolls, but subsequently, on the application of A. B., was revived against the Executor of the defendant; *Held* that the

This case was instituted in 1845, by a person calling himself the attorney of the respondent. In 1846 the case came on for trial, but was put off on the Fiscal's return that the plaintiff was dead. No further steps seem to have been taken till 1848, when a notice was issued to the representatives of the deceased plaintiff calling upon them to shew cause why the case should not be struck off; when his administrator appeared, and set the case down for trial, but on the day of trial moved to *withdraw* it. The Court then ordered the case to be struck off the Rolls. In 1856, the respondent, calling himself the principal of the deceased plaintiff, moved to revive the suit against the executor of the defendant. The District Court allowed the motion; whereupon the defendant's executor took the present appeal.

Dias for the defendant and appellant.] The motion to revive the suit was irregular. In the first place the respondent should have made himself, as well as the executor of the deceased

defendant, a party to the suit. There is no affidavit shewing the respondent's right to move in the matter, and it is quite irregular and opposed to the practice of the Court, to allow a person to become a party to the record, without giving some satisfactory evidence to the Court (usually on affidavits) of his right. According to the pleadings, the deceased plaintiff could not be supposed to have sued merely as agent. He made use of his own name, and his acts throughout the proceeding are such as would make him, and not his principal, personally liable. In this view of the case, the act of his administrator in withdrawing the case in 1848, is conclusive and binding, and cannot now be questioned by the respondent. Lastly, the District Judge was wrong in casting the appellants in costs.

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revival was regular, though the application was not supported by affidavits.

W. Morgan and *Rust*, for the respondent, were not called upon by the Court.

The judgment of the Court below was affirmed, except as to the costs,—appellant paying the costs of the appeal.

January 24.

Present Rowe, C. J., and Morgan, J.

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No. 17,405, *D. C. Colombo.* } *Lama Ettena* v. *Domingo Mendis.*

The plaintiff, as widow and administratrix of her deceased husband *Hendrick de Soyza*, claimed certain lands of the value of £37 10s., alleging that the defendant had stopped the sale of them in 1852. The defendant pleaded not guilty, denied *H. de Soyza's* title, and asserted title in herself and her deceased husband, by Prescription.

The pendency of a suit which had abated by the death of one of the parties more than 15 years before action, *held* not to interrupt prescription.

The possession of a Mortgagee may become adverse, after the Mortgage has been put in suit and judgment recovered thereon.

It appeared in evidence that the lands in question had been mortgaged in 1815 by Balthazar de Mirando, who was admitted on all sides to have been the original owner, to defendant's husband and another, on the condition that the mortgagees should hold possession in lieu of interest, and, if the mortgage amount were not paid in two years, should become the owners. A judgment had been obtained on the mortgage-bond in 1825, and the lands, when exposed for sale, had been claimed by *H. de Soyza*, the son-in-law of Mirando, under a transfer of 1821. Upon this the defendant's husband and his co-obligee instituted a case, No. 47, praying that the lands might be declared liable to be sold in satisfaction of their judgment, and obtained a decree accordingly; (Sept. 20, 1826.) On appeal, the Provincial Court

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sent the case back for *H. de Soyza* to give evidence of his title; he accordingly filed his title-deed. Repeated motions were made by the then plaintiffs that the case should be decided, and the last proceedings in the case were had in January 1836, when plaintiffs were examined.

In the present case, evidence was led on the part of plaintiffs which clearly proved the possession of the defendant and her deceased husband; but it was contended that the pendency of the case No. 47 prevented the defendant from acquiring a title by prescription. The District Judge, however, held that it was no bar to prescription, and gave judgment in favour of the defendant.

Rust for the respondent.] The decree of the District Court is perfectly correct, although the reasons given by the Judge are not so. The law stated on the other side is admitted, but it does not apply to this case. The possession of the defendant and her husband for 30 years, is clearly proved by the plaintiff's witnesses, and such possession was an adverse one, and there is nothing to take the case out of the Statute. 1. The possession under the mortgage ceased, when the defendant's husband and his co-obligee sued upon it; and their possession since has been dehors the bond. No doubt the claim by *de Soyza* was an interruption, but it was made in 1825, and he must be held to have abandoned it; and no Court will assist him or his representatives in enforcing it. (2 *Story*, Equity Jurisprudence, § 1520; 3 *Burge*, 41.) 2. The pendency of No. 47 does not interrupt prescription. That suit was instituted by us and not by *de Soyza*. Again, no steps having been taken therein since 1836, it would be most unjust and inequitable to hold our possession interrupted by a suit brought by ourselves, in which the defendant could not be made to proceed. (See Ord. 8 of 1834, § 2.) 3. The suit No. 47 abated by the death of the defendant's husband, which is proved to have taken place 15 years ago, since which period the defendant has been in possession.

Per Curiam.] The decree of the Court below is

Affirmed.

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Present, TEMPLE, J., and MORGAN, J.

No. 5,412,
P. C. Ratnapoora. } *Lokoo Banda* v. *Adochia.*

Per Curiam :] All forest lands are presumed to be Crown property, until the contrary be proved. Where therefore a party claimed forest land under the Crown, and the defendant pleaded that the land belonged to a Temple, and that he held it under its tenants, it was for him to prove his title.

Forest lands are presumed to belong to the Crown, until the contrary is proved.

No. 6,104,
P. C. Ratnapoora. } *Gillemulle* v. *Sinne Lebbe* and others.

In this case the entries in the Plaint-sheet were found to have been very carelessly made. Under the head of "Judgment" it was recorded—"1st and 3rd defendants guilty;" which implied that they were found guilty of the crime charged, i. e. Theft, whereas the Magistrate's notes showed that he had convicted them of *Assault.*

A defendant charged with Theft cannot be convicted of Assault.

On appeal, the Supreme Court set aside the conviction, on the ground that "the defendants having been charged with simple Theft could not be convicted of Assault."

No. 3,781,
C. R. Ratnapoora. } *Carlina* v. *Punchy Appoo.*

In this case the plaintiff had split her claim, which was *under* £10, and brought two actions instead of one against the defendant. In appeal, the Supreme Court held that the proper course for the Commissioner in such cases would be to require both suits to be consolidated; but if one has already been decided, the plaintiff may (in case she recovers) be disallowed her costs for having unnecessarily brought two suits instead of blending both demands in one.

Where a plaintiff has brought two actions, when both claims might have been sued for in one action, *held* that the cases should be consolidated, or the plaintiff disallowed the costs of one of the actions.

No. 12,223,
D. C. Batticaloa. } *Pattenien* v. *Comarewellen.*

The judgment of the Supreme Court in this case fully sets out the facts. (Mr. Advocate *W. Morgan* appeared for the appellants.)

On a question of the due execution of

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a Will, the District Court is bound to find distinctly whether the Will was executed by the Testator in his sound mind,—the presumption of law being against forgery and in favour of sanity.

"The decree of the Court below is set aside, and the case remanded for a new trial; costs to abide the result. The Supreme Court is unwilling to direct a second new trial; but it is necessary to do so in order that the District Court may find definitely (1) Whether the Will brought forward is genuine or forged, and (2) Whether in case the Will is genuine, the deceased was in her sound mind at the time she executed it.

"At the first trial the District Judge found that 'the circumstances attending the alleged execution were most suspicious,' and that 'it appeared most doubtful whether 18 hours before 'her death, the deceased could have been sufficiently well to 'dictate and understand her Will, as she is said to have done.' At the second trial the District Judge records, 'I have before 'stated that I doubt the execution, and if executed I feel fully 'convinced that deceased was not in her sound senses, and I 'entertain the same opinion now.' Neither therefore at the first nor the second trial were the issues distinctly found, affirmatively or negatively. Considering that the presumption of law is against forgery, and in favour of sanity, it appears to the Supreme Court that a more positive finding of the issues raised is necessary before it can sanction the setting aside of the Will.

"The Supreme Court would suggest that at the new trial, assessors be summoned for the purpose of being associated with the Judge, in the manner provided for by the 2nd clause of the Ordinance 21 of 1852."

February 18.

Present, MORGAN, J.

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No. 13,520, *P. C. Bentotte.* } *Cornelis* v. *Perera.*

In order to a conviction under § 36 of the Arrack Ordinance No. 10 of 1844, for refusing to grant a permit for the removal of arrack, it should be proved that the defendant was the party legally em-

This was a charge under the 36th clause of the Arrack Ordinance (No. 10 of 1844) for not granting a permit to remove arrack under the 33rd clause. The defendant pleaded not guilty, but the Magistrate, after hearing the complainant's evidence, convicted the defendant, and from this he appealed.

Dias, for the appellant, submitted that though he was aware of the inability of the Court to entertain questions as to the sufficiency or insufficiency of evidence, he could not help remarking that he seldom saw a case in which the evidence was less satisfactory. He would, however, submit that the evidence did not support the charge. Under the 33rd clause, the parties liable to

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grant the permit were the Government Agent, or the licensed retail-dealer of the district from within which such spirit is to be removed; but when the quantity to be removed exceeded 35 gallons, the Government Agent alone could grant the permit: and even where the licensed retail-dealer could grant it, he could only do so for the removal of arrack within the limits of the district within which he was licensed to retail the same. First, there was no evidence that defendant was the licensed retail-dealer. It was proved that he was the arrack-renter, but that did not, necessarily, make him a retail-dealer. To hold that the arrack-renter meant a retail-dealer, would be to hold that the Government was a retail-dealer, for the purchaser of the arrack-rent was merely a substitute for the Crown, whose privileges over the Arrack Farm were purchased by him. There was no evidence at all as to the places "to or from which" the arrack was to have been removed. [MORGAN J.—The evidence seems to shew that the permit applied for was for 20 leaguers.] Just so. Even if the defendant were the retail-dealer, he could not grant a permit for any quantity beyond 35 gallons.

powered to grant such permit.

Per Curiam:] The conviction is set aside, and the case remanded for the admission of further evidence, and to give judgment thereon. It does not appear from the proceedings, that the defendant was legally empowered to grant the permit demanded of him. If, as would appear from the complainant's evidence, he wanted a permit to remove 20 leaguers, such permit could only be granted by the Government Agent,—if the quantity be less than 35 gallons the permit can be granted by the Government Agent, the licensed retail-dealer, or any other person duly authorised under the hand of the Government Agent. Moreover, in the latter case the licensed retail-dealer cannot grant permits for the removal of arrack beyond the limits of the district within which he is licensed to retail the same. All these matters should be duly inquired into, and the written application referred to in the evidence produced.

February 24.

Present, MORGAN, J.

No. 13,959,
P. C. Chavagacherry. } *Wedewanam* v. *Mader.*

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In this case the Magistrate had fined the complainant for bringing a false and frivolous complaint; but it did not appear that the Magistrate had heard any evidence on the part

A Magistrate cannot fine a complainant

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for bringing a frivolous complaint, unless he has heard his witnesses.

The use of indecent language in a private place, does not constitute a criminal offence.

of the complainant. On appeal the Supreme Court set aside the judgment, and remitted the fine, on the ground that the Magistrate was not in a position to state that the case was a frivolous one without hearing the complainant's witnesses. The use of indecent language towards any one in a private place, unaccompanied with violence, is only a ground for a civil action, and not a criminal offence.

March 18.

Present, TEMPLE, J.

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Where a defendant was fined for failing to attend and perform labour at P., under the Road-Ordinance, No. 8 of 1848, and it appeared that he was ordered to work elsewhere, the S. C. set aside the conviction.

No. 18,013, *P. C. Matura.* } *The District Committee* v. *Gamegey Siman.*

The plaint in this case was for "failing to attend and perform labour at the Polwattemodera Road, on the 30th April 1855, though required by the prosecutor, against the 44th and 76th clauses of the Ordinance No. 8 of 1848." The defendant pleaded not guilty, and stated that he had worked at the Belligam Rest House. At the trial it appeared that "defendant was taken from the Polwatte Party to go and work at the Rest House at Belligam." Thereupon the Court below adjudged him guilty, and sentenced him "to pay a fine of 5*s*., or suffer one month's hard labour.

On appeal against this sentence, the Supreme Court set aside the conviction; and *per* TEMPLE J:—"By the clause under which the accused has been prosecuted and found guilty, he is liable only to a fine, whereas the Court below has imposed the alternative punishment of one month's hard labour, which it has no authority to do. If a person convicted under this Ordinance does not pay the fine imposed, it will be recovered, under Ordinance No. 6 of 1855. The conviction moreover is for failing to attend to perform labour on the Polwattemodera road, whereas from the evidence it seems he was ordered to work elsewhere.

March 23.

Present, TEMPLE, J., and MORGAN, J.

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A previous non-suit does

No. 153, *C. R. Chavagacherry.* } *Cander Sinneven* v. *Servagamy.*

The plaintiff in this case complained that the defendant had entered upon certain lands of the plaintiff; and prayed that he

might be declared the sole proprietor of the said lands, and the defendants be ejected with costs. The defendant denied the plaintiff's claim, and at the trial put in evidence a judgment of the District Court of Jaffna of the 25th April 1856, between the same parties, and in respect of the same subject matter, in which the plaintiff had been non-suited. The Court below thereupon non-suited the plaintiff with costs.

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not estop the plaintiff from prosecuting the same claim in another suit.

On appeal, the Supreme Court held that the previous judgment of non-suit did not estop the plaintiff from prosecuting the same claim in another suit; and therefore set aside the judgment, and remanded the case for a new trial.

No. 13,918, *C. R. Galle.* } *Barton* v. *Black.*

A Horse-dealer, engaged to purchase horses, is entitled to commission at 2½ per cent. on the purchase-amount.

Nine pence a day was held a fair charge for stabling horses in the town of Galle.

Plaint.—That the defendant is indebted to the plaintiff in £8 15*s.* as follows:

2½ per cent. commission on £230, on the purchase of 10 horses for the defendant	£5	15	0
Stabling 10 horses for 8 days @ 9 a-day	3	0	0
	8	15	0

Defence.—That the defendant is not liable for commission, he never having employed the plaintiff to purchase the horses; and that, admitting the stabling for eight days, he is only liable at 6d. a day.

It was proved on the part of the plaintiff, that he, at the request of the defendant's clerk, *Morel*, went on board the vessel for the purpose of giving an opinion about certain horses which the defendant was anxious to purchase; that the plaintiff returned to defendant and stated that he considered £230 a fair price for them; whereupon the plaintiff and *Morel* struck the bargain, and had the horses brought ashore. No rate of commission was however agreed upon; but it was in evidence that when the defendant asked the plaintiff what he had to pay for his trouble, the plaintiff said "whatever you please." and the defendant said "you may expect a handsome commission," Mr. *Reid*, a Merchant, proved that 2½ per cent. was the ordinary rate of commission on the purchase of horses, and that in the absence of any express stipulation, the plaintiff would be entitled to 2½ per cent. The plaintiff proved also that 9d a day was the ordinary charge for stabling. The Court below hereupon gave judgment for the plaintiff. And on appeal thereupon,—

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Dias appeared for the defendant and appellant, and commented on the unsatisfactory nature of the evidence.

Lorenz for the respondent, was not called upon.

Temple J. said the judgment of the Court below seemed quite correct. Neither defendant nor his clerk knew much about the value of horses. *Reid's* evidence settled the rate of commission, and the charge for stabling did not seem to be excessive.

The judgment of the Court below was thereupon *affirmed.*

No. 157, *C. R. Chavagacherry.* } *Ambalawaner* v. *Perian Ayengen,* and 2 others.

A plaintiff cannot recover more than he has claimed.

The plaintiff in this case claimed $\frac{2}{8}$ shares of certain lands, of which the defendants had laid claim to $\frac{1}{8}$ share, worth £1 17*s.* 6*d.* The defendants denied the claim. The Commissioner, after hearing evidence, decreed "that the land be equally divided beween plaintiff and second defendant, and that the 1st and 3rd defendants do pay costs of suit."

On appeal, the Supreme Court set aside the decree of the Court below, and remanded the case for a new trial and further evidence. "The plaintiff claims only to be proprietor of $\frac{2}{8}$ths, whilst the Court has decreed the land to be equally divided."

No. 6,040, *C. R. Chavagacherry.* } *Mutto pulle* v. *Tewany Pulle,* and another.

Possession by the Mortgagee in lieu of interest interrupts prescription of the debt.

The plaintiff, as daughter of Teywer Weleyder, sued the defendants on a Bond dated 23rd January, 1845, granted to the said T. Weleyder by Soleyar and her son Maricam Wary, both deceased, (the defendants being widow and son of Warey;) and stated that in lieu of interest, he had been allowed to enjoy the produce of certain lands according to the said deed; but that in June last the defendants objected to the possession of the said lands, and refused to pay the amount. The defendants admitted the deed; but pleaded prescription under the Ordinance No. 8 of 1834. On the day of trial, the bond being admitted, the Proctor for plaintiff moved that judgment might be entered against the defendants; and judgment was accordingly entered for the plaintiff on the bond.

On appeal, the Supreme Court set aside the decree of the Court below, and remanded the case for a new trial. "According to the date of the bond, prescription may be pleaded; but it will not hold good if the land has been held by the plaintiff within

ten years from the date of the commencement of the action. On this point evidence should be heard, and it will be most satisfactory to hear evidence on both sides. The interest moreover of the plaintiff in the debt, as also the liability of the defendants to pay it, should appear."

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No. 3,608, *C. R. Ratnapoora.* } *Galwadookaladea* v. *Holepitialagey* and another.

Under Rule 17 of 21st Oct. 1844, the C.R. cannot enter judgment against a defendant without previous notice, though it has proceeded to trial on an answer filed by a co-defendant.

The plaintiff claimed a certain field, of 6 coernies in extent, and a garden of 4 coernies in extent, and prayed that he might be declared owner of the said lands, and the defendants (who had taken forcible possession thereof,) ejected therefrom, and condemned to pay the damages and costs. The first defendant was absent on summons duly served; but the second appeared and answered, admitting that he had no claim to the field, but claiming the garden under a deed from the first defendant. The Court below, having heard evidence, gave judgment for the plaintiff for the garden, with 10s. damages.

On appeal, the Supreme Court set aside the judgment, and remanded the case for a new trial, on the ground that final judgment had been recorded against the first defendant without notice. The first defendant not having appeared to the summons, the plaintiff should either have proceeded to interlocutory judgment against him, or waived him. (Rule 17, C. R.)

March 24.

Present, TEMPLE, J., and MORGAN, J.

No. 20,113, *D. C. Colombo.* } *Goonetilleke* v. *Wierekon* and others.

In ejectment against several defendants, three of whom disclaimed title, a judgment by consent was on the day of trial entered for the plaintiff. The three defendants who disclaimed, not having joined in the consent, the D. C. on

This was an action to recover certain lands. The 1st, 2nd and 3rd defendants claimed title, and denied the alleged trespass. The others pleaded to the merits. On the day of trial, the parties (the plaintiff, and some of the defendants, who were present,) were examined, and the following judgment entered up by consent. "Judgment for plaintiff with costs, plaintiff waiving damages:"—This was signed by the Judge and three of the defendants, but not by the 1st, 2nd and 3rd. Upon this judgment plaintiff issued execution, and seized the property of the 1st, 2nd and 3rd defendants, when they presented a petition to the District Judge, complaining that they were no parties to the

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their petition opened up the judgment; but on the subsequent trial, finding the *order* to open up judgment had not been signed on the Minutes, struck the case off the Trial Roll. The S. C. on appeal absolved the three defendants from the instance.

A Judge's fiat on a Motion or Petition is a sufficient order, without his signature to the Minutes.

settlement. The District Judge then wrote and signed on the back of the petition an order to open up the judgment. After this order, the plaintiff's Proctor set the case down for trial. It appeared that the order of the District Judge on the back of the petition was entered by the Secretary in the usual column for the orders in the case; but this was not signed by the District Judge. On the day of trial, the plaintiff objected that the case could not be heard, as the order to open up the judgment was not signed by the Judge. The objection was held good, and the case ordered to be struck off the trial roll. From this order the 1st, 2nd and 3rd defendants appealed.

Dias, for the appellants.] The first judgment of the District Court was a nullity, as the appellants were no parties to it. It was neither signed by them nor by their Proctor. There was nothing to shew that they were even present in Court; and it might be that the settlement was altogether a collusive transaction between plaintiff and the other defendants, to defraud the appellants. It was urged in the Court below, that the order to open up the judgment was not signed by the Judge. This is immaterial, for the order endorsed on the back of the appellants petition, and signed by the Judge, was a valid and binding order. There is no law or rule of practice which requires that the orders entered in the column for orders should be signed by the Judge. Orders are generally made on the motion paper itself, and whether they are transferred or not into the column for orders, they are valid and binding. The practice of entering all the orders in the pages of the record, seemed to have been adopted for the sake of convenience; but such a proceeding is not necessary to give them validity. The order endorsed on the petition was, however, entered by the Secretary in the usual place, and the omission to sign it seems to have been a pure mistake. The plaintiff's objections on the day of trial were quite irregular, as he himself had set the case down for trial; and if there was any irregularity in the order to open up judgment, it was waived by the plaintiff's conduct.

W. Morgan, for the respondent:] There was no valid order of the Court to open up the judgment already entered for the plaintiff. The endorsement on the Petition was not an order, but was merely intended for the guidance of the Secretary, whose business it was to enter the order in the usual place for orders, that is the column for orders at the beginning of the record. This, it was urged on the other side, was done simply for the sake of convenience. If that were so, where was the necessity for the

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initials of the District Judge to such entries. [MORGAN J. The necessity for a minute or order independantly of the Judge's fiat on the motion, existed when the District Judge sat with Assessors, whose vote was essential to every judgment or final order. But all that is now necessary is the Judge's fiat on the motion; and the entry of it on the record is merely for the sake of convenience and facility of reference.] I submit that the order on the petition was illegal, as it was an *ex-parte* proceeding without notice to the opposite party; and this seems to have been the view of the District Judge, when he declined to sign the order entered by the Secretary. [TEMPLE, J. If that was so, he could have put his pen through the order on the petition.] As to the objection that the plaintiff himself had set the case down for trial, I admit that the plaintiff was wrong, but that did not prevent his objecting to a proceeding so grossly irregular as trying a case in which there was a judgment already recorded.

The judgment of the District Court was modified by the first, second and third defendants being absolved from the instance; plaintiff paying their costs of the 29th January and in appeal.

No. 142,
C. R. Galle. } *Sinne Lebbe* v. *Monesinghe.*

A sale under the Partition Ordinance No. 21 of 1844, was set aside, where it appeared that an heir, though bidding nominally for himself, had purchased the land on behalf of a stranger.

In this case the plaintiff claimed a portion of land by virtue of a Fiscal's Transfer dated 27th November, 1852. The defendant denied the plaintiff's right to the owitte (being part of the land claimed by the plaintiff,) and claimed title to it himself on a Transfer from one *Don Juan*, dated 16th March 1854.

It appeared in evidence that the owitte formed a part of the land sold by the Fiscal; that the whole of the land belonged to several heirs (of whom *Don Juan* was one,) and had been sold under the provisions of the Ordinance No. 21 of 1844,, cl. 19.

The Court below having given judgment for plaintiff, the case came up in appeal; and *W. Morgan* for the appellant:] This was a sale under the 19th clause of the Partition Ordinance, and it appears from the evidence that the plaintiff procured one of the heirs to bid for the property, which was accordingly knocked down to such heir; and that after some time the heir requested the Fiscal to grant the conveyance directly to the plaintiff. This is clearly a fraud on the other heirs, for at that stage of the proceedings in auction, none but heirs were admitted as bidders.

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Rust for the respondent:] The Transfer was on the 27th November, 1852, after the Ordinance No. 11 of 1852, which repealed the Partition-clauses of No, 21 of 1844 had come into operation. There was however no irregularity, for the land was first put up among the heirs, and was purchased by one of them. It is true that he subsequently got the Fiscal to make a transfer in favour of the plaintiff, but there is no pretence for saying there was any fraud on the part of the plaintiff, his transfer being in 1852, while that under which the defendant claims is in 1854.

Per Curiam:] The Ordinance No. 21 of 1844, cl. 19, allowed the heirs only to bid in the first instance; it was not competent for any one of the heirs to bid, not for himself, but on behalf of a stranger. By such a proceeding, the other heirs and the intending purchasers might successfully have been defrauded The sale to the plaintiff, therefore, who was not an heir, but yet purchased as one, is illegal, and cannot be upheld.

No. 10,
D. C. Chilaw. } *Mahammadoe Lebbe* v. *Tamby Markar.*

A D. C. cannot remove Commissioners appointed to appraise an estate, unless upon good cause.

A Commission had issued to *Adam Caderewal Pulle* and *Mahamadoe Liddeck* to appraise the property of the estate of Aboewaker Naibia; but they shortly after returned it with a sworn report, that while engaged in inventorising certain property found in the house of the deceased, one Tamby Markar, without their leave or knowledge, removed a document out of one of the boxes, and was detected in attempting to conceal it in his waist-cloth; and that on another day he snatched the key of one of the boxes out of the hands of the Commissioners, and forcibly possessed himself of some of the articles in it. On receiving this report, the District Judge ordered a summons against Tamby Markar to answer for the contempt in resisting the Commissioners in the execution of their duty.

On the 25th November, 1856, Mr. *Muttukistna* appeared for Tamby Markar, and the Court "upon reading the Report of the Commissioners, was of opinion that the property being claimed as the property of another estate, the appraisers had no authority to include it in their appraisement without a special order to that effect; and that in resisting the appraisement, Tamby Markar did what he conceived to be his duty as administrator of the other estate. He was therefore discharged, and on the suggession of Counsel, two other appraisers were nominated to appraise the property."

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On appeal by the Administrator of Aboewaker Naibia, *Lorenz* for the appellant:] There are two points in appeal : 1. That the Court below acted irregularly in discharging the defendant in contempt; and 2. That the removal of the former Appraisers was uncalled for. [TEMPLE J. We are with you on the second point.] Then I will not press the other, on which however I may say I am equally confident of your Lordship's decision. The justice of the case will however be met by re-instating the former Appraisers.

Muttukistna for the respondent:] Tamby Markar acted in the discharge of his duty as administrator of the other estate. [TEMPLE J.—And suggested what he had no right to suggest,—the removal of the appraisers. Let him therefore pay the costs. He had able Counsel from Colombo, and the opposite party had none.]

The order of the Court below was set aside as to the appointment of the new appraisers; Tamby Markar paying costs.

No. 903, *D. C. Matura.* } *Liyenegey* v. *Wisentigey*, and others.

A party aggrieved by the obstruction of a path may proceed in a C. R. for damages, if under £10.

The Road Ordinance No. 8 of 1848 does not abridge the common-law right of a party in this respect.

In this case it was *held* in appeal, that a party aggrieved by another's obstructing a public path may proceed for damages in the Court of Requests, provided the amount of such damages be under £10. The right given to Provincial and District Road Committees by the Ordinance No. 8 of 1848, does in no way abridge the Common Law right of any subject to proceed civilly or criminally against parties creating obstructions on public or private paths, in the ordinary Courts of Law.

No. 7885, *C. R. Caltura.* } *Harmanis Peris* v. *Don Juanis.*

Where in an action for money, the exact amount due to the plaintiff on account of principal and interest had no been shewn, the S. C. directed a new trial.

In this case the Plaint set out that the defendant was indebted to the Government Agent in the sum of £1 10*s.*, for balance due by him in respect of a Still-license obtained by him in 1843, and for "surmounted" interest. The defendant denied the claim, and pleaded that in the year 1842 he paid to the plaintiff, as Clerk of the Revenue Department, the sum of £7 10*s.*, on account of the amount claimed in this case, as well as in another; but hat the Mohandram had failed to give him a receipt for the

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same. At the trial, evidence was entered into in respect of the identity of the defendant; and the Commissioner gave judgment for the plaintiff.

On appeal by the defendant, the Supreme Court pronounced judgment as follows:—"That the decree of the Court below be set aside, and the case be remanded for a new trial. The evidence at the trial touching the identity of the defendant is insufficient, but this defect is cured by the admission in the petition of appeal. The exact amount, however, due to the Government is not clearly shewn, and the Supreme Court cannot from the allegation in the plaint, 'principal and surmounted interest,' ascertain how much is due on account of principal and how much on account of interest. The circumstances under which the debt arose must also be clearly established.'

No. 8739, *C. R. Caltura.* } *Fonseka* v. *Don Juanis.*

Where the plaintiff claimed a sum of money on account of 'principal and interest' generally, the S. C. (notwithstanding a plea of payment) directed a new trial, and ordered the plaintiff to set out distinctly the particulars of his claim.

The plaintiff in this case complained that the defendant was indebted to Government in the sum of £9 13s. 7½*d.*, balance due by him on account of certain Still-licenses, for 1842, and for "surmounted" interest, which sum the defendant refused to pay. The defendant pleaded payment; but at the trial, after evidence judgment was entered for the plaintiff.

On appeal, the Supreme Court pronounced judgment as follows:—"That the decree of the Court below be set aside, and the case remanded for a new trial. The allegation 'principal and surmounted interest' is insufficient, and it should be clearly shewn how much is claimed on account of principal and how much on account of interest. The Supreme Court would be unwilling to remand this case after the plea of payment put in by the defendant, did it not feel that it was the duty of the plaintiff to have set out distinctly the particulars of the claim; and that by affirming the judgment, as it stands at present, it might sanction a claim for compound interest."

No. 18,928, *C. R. Jaffna.* } *Morogese Ayer* v. *Cathergamer.*

An allegation in a Petition of Appeal "that the Commissioner, to get

The judgment pronounced in this case sets out the facts:—

"It appears that the defendant applied for a postponement, and that a report of the illness of his witness, the Vidhan, was tendered; which report, judging from a subsequent entry by

the Commissioner, was not received owing to the same not having been 'signed by the Medical man and countersigned by the Vidhan of the village.' No record however of this application was made at the time in the proceedings, and the Commissioner proceeded to give judgment against the defendant, who subsequently appealed against the same. In the Petition of Appeal, 'drawn by R. Brodie,' this omission was referred to, and it was added, as a reason to account for it, that the Court-house was excessively crowded,—upwards of one hundred cases having been fixed for hearing on that day,—and '*that the Commissioner, to get rid of these cases, paid less attention than he would have done at other times*, and that this accounts for the want of a record of the said report.' For this statement, R. Brodie was noticed to attend Court, to answer for a contempt. He appeared on the 3rd February, when the following order was made:—

"The Petition-drawer, R. Brodie, is brought up and hands in another petition to the Court. He is committed to the custody of the Fiscal, to be brought up to-morrow for *sentence*."

"On the 4th February he appeared, and it is recorded that 'he having failed by his answer to satisfy the Commissioner that no contempt was intended, is sentenced to be imprisoned at hard labour for fourteen days.' On the 5th, (before the prisoner was called upon to perform labour,) the Commissioner, 'perceiving that he had inadvertently imposed hard labour which the Ordinance did not permit,' ordered the Fiscal to stay the same; but the imprisonment was carried out, notwithstanding the application of the said R. Brodie to stay the same pending appeal.

"The Supreme Court considers that the words complained against do not amount to a contempt of Court. It was quite true that no record was made of the sick-report tendered to the Magistrate to account for the absence of the witness, and there was nothing disrespectful, but the contrary, in the petitioner ascribing this omission to the pressure of business before the Court. But assuming that a contempt of Court was committed, and that the drawer of the petition could be made liable therefor, the course adopted by the Commissioner was highly irregular; for instead of committing the person charged, or taking bail from him to appear next day when the Court was to enquire whether or no a contempt had been intended, the Commissioner seemed at once to have found the fact, for he imprisoned the man to be brought up the next day (4th February) *for sentence*. No entry

rid of other cases, paid less attention than he would have done at other times," does not amount to a contempt.

The Commissioner having committed him to be brought up next day "for sentence;" and no entry appearing in the proceedings of the questions asked, and the answers given on his examination; *Held* on appeal that the proceedings were highly irregular.

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appears moreover in the proceedings of the 4th, to shew what the questions were which were asked, or the answers which were given.

"The Supreme Court regrets further to observe that the Commissioner persisted in carrying the sentence into execution, notwithstanding the appeal. Too much caution and forbearance cannot be evinced by those appointed to administer justice in cases of contempt, where the Court acts in vindication of its authority, and where there is danger of the Judge's feelings influencing his judgment.

"The Police Vidhan not having been summoned, and no affidavit having been tendered that he was a material and necessary witness, as is required by the Rules, the plaintiff was not entitled to a postponement. But the subsequent proceedings of the Commissioner were grossly irregular.

"The judgment of the Court below of the 26th January is therefore affirmed, and that of the 4th day of February set aside."

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Present, TEMPLE J., and MORGAN J.

No. 17,809, *P. C. Caltura.* } *Perera* v. *Batchy.*

A Wet-nurse is a menial servant under § 7 of the Servant's Ordinance.

In this case the defendant was charged with quitting the complainant's service without notice, in breach of clause 7 of the Ordinance No. 5 of 1841, (the Servant's Ordinance.) It appeared in evidence that the accused was employed as a Wet-nurse, and the Court below pronounced judgment as follows:—"The Court is of opinion that a Wet-nurse is not a menial or domestic servant, within the meaning of the Ordinance No. 5 of 1841. It is quite evident that these two words have reference to the ordinary servants of a household, whose duties are *manual*; those of a wet-nurse are manifestly of a far different character; for she, for a consideration, agrees to allow the infant of another to draw nourishment from her body: she is in fact a foster-mother. The accused is acquitted."

On appeal, the Supreme Court set aside the judgment; and *per* TEMPLE J:—"The Court is of opinion that a wet-nurse is a

domestic servant, and further that under the 7th clause of Ordinance No. 5 of 1841, the Magistrate must award imprisonment." 1857. *March* 26.

No. 18,066, *P. C. Caltura.* } *Fonseka* v. *Silva.*

A Toll-keeper is bound to have his badge on, when demanding toll, and it is not sufficient that the belt is suspended in the toll-house.

A cart carrying a passenger and his clothes, is a loaded cart, under § 11 of the Toll Ordinance.

This was a charge against a toll-keeper "for collecting toll without wearing a metal-badge, and taking a greater toll for an unloaded bullock-cart," in breach of the 11th section of the Ordinance No. 9 of 1845. The judgment of the Court below recites all the facts of the case, and is as follows :—

"The Court is of opinion that the cart was not a loaded one; a passenger and his clothes for the journey do not constitute a load, within the meaning of the Ordinance. The accused is found guilty of both charges. In awarding punishment, the Court must consider the circumstances in which the accused was placed, and the grounds on which he acted. There is every reason to believe that the accused considered he had a right to take toll as for a loaded cart. Then with regard to his not wearing a metal badge on the occasion, it appears that the accused when offered 4½*d.* left the toll-house for the purpose of examining the cart. After doing so, he said that he was entitled to 1*s.* as the cart was loaded. An altercation then took place (near the cart) on the road, between him and the complainant, by whom a rupee was then and there handed to the accused, with which he walked back to the toll-house, and there having changed the rupee, paid complainant 1*s.* He should not have demanded the shilling without the badge, which however appears to have been suspended in the toll-house and merely to have been forgotten in consequence of the altercation. The accused is under the circumstances fined one shilling,—one half to be paid to the informer."

On appeal, the Supreme Court (TEMPLE, J.) affirmed the judgment of the Police Court, as regards the want of the badge and the fine of 1*s.*, but set it aside as to the demand of 1*s.* toll, —the Court being of opinion that the bandy was a loaded one.

No. 8,868, *D. C. Jaffna.* } *Marimotto* and another v. *Wayremotto* and another.

In an action for breach of a Contract, whereby the defendants

This was an action brought by the plaintiffs to recover £15 damages, for breach of a contract entered into between the plaintiffs and defendants, whereby it was stipulated that the plaintiffs should marry their son to the defendants' daughter, and

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had agreed to marry their daughter to the plaintiffs' son, *Held* that the defendants having pleaded over, the Court could not notice the non-joinder of the son, or the non-allegation of his willingness to marry.

An order "that the case should lie over for 8 days, in order to enable the plaintiff to amend his Libel," is an appealable order.

cause the marriage to be registered before the lapse of six months next ensuing, from the date of the contract, and that, in case either party should fail to fulfil the terms of the Contract, such party should pay to the other a penalty of £15. (To this contract neither the bridegroom nor the bride was a party.)

The plaintiffs declared that though the six months had long since expired, yet the defendants refused to marry their daughter to the plaintiffs' son, notwithstanding *their* (the plaintiffs')readiness to have the marriage ceremonies performed and the marriage registered, and that thereby the defendants had rendered themselves liable to the plaintiffs in the damages claimed.

The defendants in their Answer asserted that they were always willing to perform their part of the contract; but that the plaintiffs had made default in not 'getting the marriage registered and the Tamil ceremonies performed,' according to the tenor of the contract.

On these pleadings the case came on for trial in the Court below, when the District Judge made the following order :

'The Court is of opinion that as the bridegroom is not a party to the contract, his willingness to marry the defendants' daughter should be averred in the Libel.

'Plaintiffs are allowed to amend their libel, or at the present stage to make the bridegroom a party to the suit. Case to lay over for 8 days; costs to stand over.'

Against this opinion an interlocutory appeal was taken to the Supreme Court.

H. Muttukistna appeared for plaintiffs and appellants.

M. Coomarasamy, who appeared for the defendants and respondents, was called upon by the Court to support the order.

Coomarasamy:] There is neither a grievance to complain of, nor an order to appeal against. What is considered an order here is a mere suggestion, which the plaintiffs were at liberty to adopt or not as they thought it best. If by disregarding the opinion thrown out by the Judge, the plaintiffs had been nonsuited, then indeed there would have been something to appeal against. As the case at present stands, the appeal is one which this Court ought not to entertain. (2) Supposing this was an appealable order, it was yet such an order as ought to be upheld and affirmed, because the securing of the consent of the son to the marriage was a condition *precedent* implied in the contract, which the plaintiffs were bound to perform before the defendants could be called upon to fulfill their part of the agreement. For, if otherwise, how can the defendants, even though themselves willing and

ready, marry their daughter to the plaintiffs' son, unless he consent to marry her. And if the contract fails on this ground, clearly the defendants are not liable in damages. The decree in No. 6,720, Jaffna, on which the plaintiffs rested their case in the Court below, is a decision in favour of the Order in the present case.

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The Judges holding the order appealable, that inasmuch as any defect in the Libel arising from the plaintiffs' omitting to aver therein the willingness of the bridegroom, or from his non-joinder as co-plaintiff, was cured by the defendants' pleading over without demurring thereto, it was not competent for them to question the sufficiency of the Libel on the day of trial, the order was set aside, and the case remanded for trial.

No. 7,046, *C. R. Kaigalle.* } *Kanetegey* v. *Ookoovalle.*

In this case the decision of the Court below was regarded as *coram non judice*, owing to the Commissioner having exercised the functions of that office after the expiration of his term of office, and without a Warrant from the Governor under the Ordinance No. 10 of 1843, § 2; or a fresh notification in the *Gazette* under the Ordinance No. 3 of 1853.

A Commissioner cannot act, after the expiration of his term of office.

No. 3,442, *P. C. Newera Ellia.* } *Sumeratne* v. *Cottabogodde.*

This was a proceeding under the Proclamation of the 5th August, 1819. The entry, from the evidence, appeared to have been 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 appeared to have been merely a question of title; and the Supreme Court was 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.

The judgment of the Court below was therefore reversed.

An *entry*, to be punishable under the Proclamation of 1819, must be accompanied with violence, or other circumstances calculated to provoke a breach of the Peace.

No. 18,591, *D. C. Matura,* } *Don Andris* v. *Illangakoon* and others.

The plaintiff in his Libel alleged that the 1st and 2nd defendants had, as Executors of the late *Johanna Clara de Saram*, sold him the moiety of a certain garden at a public auction, held on the

A Purchaser is entitled to sue in ejectment, though he never had possession of the property.

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27th December, 1854; and that having paid the purchase-money, he had obtained a Conveyance for the same; that after the sale, the 1st and 2nd defendants delivered over possession of the said moiety to the plaintiff; but that the 3rd and 4th defendants took forcible possession thereof, and disputed his title thereto. And he prayed that the 1st and 2nd defendants might be called upon to warrant and defend their sale; and the 3rd and 4th defendants, to show cause why the said property should not be adjudged to the plaintiff; and that in case the 1st and 2nd defendants should fail to establish their right thereto, they might be condemned to refund the purchase-money and expenses, amounting to £25 1*s.* 4*d.*

The 1st and 2nd defendants pleaded that the moiety in question was the property of the late *Johanna Clara de Saram*, and offered to prove the same.

The 3rd and 4th defendants pleaded that it never belonged to the late *J. C. de Saram*, but was their property, and that they had been in possession thereof for more than 10 years; and relied on the Ordinance No. 8 of 1834, § 2.

At the trial it was proved that the 3rd and 4th defendants had in 1843 taken the garden in rent from the deceased, for the term of three years; that a day before the auction, the 3rd defendant had requested one of the witnesses not to bid for the land against him; and had repeated the request whilst the auction was proceeding; and that he had requested another of the witnesses to bid for the land on his behalf. And the 3rd defendant himself in examination stated that he had requested one of the Executors (the 2nd defendant) to bid for and buy the land for him, "as he had no deed for it."

The Proctor for the 3rd and 4th defendants then examined the plaintiff, and obtained from him an admission that he never had actual possession of the property; and hereupon he contended that as the plaintiff had never had possession, he could only maintain his action against the sellers for the purchase-money and interest: and the "Court being of opinion that there was no evidence of actual possession by the purchaser under the Conveyance," decreed that the 1st and 2nd defendants should refund to the plaintiff the purchase-money, £25 1*s.* 4*d.*, and interest, and costs of suit.

On appeal by the plaintiff against this decree;

Lorenz appeared for the appellants, but was not called upon.

Muttukistna, for the respondents, contended that proof of the plaintiff's possession was necessary; and that at all events the case should be sent back for evidence, and the plaintiffs should be called upon to prove their title; for the Court below had not given any decree on that point. [MORGAN, J.—But the fact has been

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proved nevertheless ; and the 3rd defendant himself admits that he asked one of the Executors " to buy the land for him."] Yes; but he adds the reason, " because he had no deed for it.' [MORGAN, J.—Will any body bid for his own land if put up in auction by some one else, and pay full value for it, merely because he has no deed ?]

Per Curiam :] The decree of the Court below is set aside, and plaintiff is declared proprietor of the premises in dispute, and quieted in the possession thereof ; the 3rd and 4th defendants paying the costs of the plaintiff and of the 1st and 2nd defendants. The right of *J. C. De Saram* to the half claimed, is clearly established, as also the fact that the 3rd defendant held the same as her tenant. He and the 4th defendant were present at the sale to the plaintiff, and did not claim the land ; indeed he admits having asked Mr. Keuneman to bid for the same. The Plaintiff having a conveyance from the representatives of the rightful owner can recover the land, though by the wrongful act of the 3rd and 4th defendants, he was not allowed to obtain possession.

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Present, TEMPLE, J., and MORGAN, J.

No. 22,173, *D.C. Colombo.* } *Van Arkadie* v. *Askey,* Curator of *Van Arkadie.*

Libel :—That John Van Arkadie was indebted to the plaintiff in £20, being the amount due upon a Promissory Note granted to him as her Agent and recovered by him in the case No, 21,474, but which the said John Van Arkadie claims and asserts to be his own money. Prayer :—that the defendant as his Curator may be condemned to pay the same to the plaintiff.

Answer :—That John Van Arkadie was never indebted to the plaintiff, and was not her Agent as alleged ; but that the said Promissory Note was his own property.

An admission by the plaintiff that a certain horse was her son's, he being a minor under her protection, and frequently acting as her agent, held not to bar her from recovering the purchase-money, it being proved that the horse had in fact belonged to the plaintiff.

At the trial, it was proved by the two subscribing witnesses to the Promissory Note, that it had been granted in respect of a balance due by one *Bastian* on the purchase of a horse belonging to the plaintiff ; that a part of the purchase-money had been paid in cash, and that the Promissory Note was drawn in the name of her son John Van Arkadie, at the request of the plaintiff. Mr. *Drieberg*, the plaintiff's proctor in No. 21,474, stated that he had several transactions with the plaintiff and her son ; that he

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was always employed by the son, but that the business was the mother's, and that the son had till lately conducted all her affairs. The plaintiff herself was examined as a witness, and swore that the horse belonged to her.

The defendant then called a witness (*Silva* Modliar,) who stated that he had made an offer for the horse sometime before to the plaintiff; but that she said the horse was her son's, and she could make no bargain in his absence. On cross-examination, he proved the circumstances of the son, who was at that time a Government Clerk without salary, and could not have had sufficient money to purchase or keep a horse, and was besides 'rather an extravagant young man.'

The plaintiff being recalled by the Court, admitted that the horse she had sold to *Bastian* was the same spoken of by the defendant's witness.

The Court below thereupon held "that the evidence of the defendant's witness was conclusive; and that the plaintiff having admitted to him that the horse was her son's, the Promissory Note given for the horse must be considered as having been granted to him for his own use." Against this judgment the plaintiff now appealed.

Lorenz, for the appellant.] Granting the plaintiff to have made the admission, it does not follow that the horse has been proved to belong to her son. [TEMPLE J.—When I speak of the pony I bought for my little boy, I call him 'my son's pony.' But nevertheless the pony is mine; and if I sell him, the money is mine.] It is perfectly natural that a woman unused to business, and not wishing to enter into a bargain with a shrewd man like *Silva*, Modliar, should desire to speak to her eldest son, who appears to have had the management of her affairs.

Dias, for the respondent.] The only question was, whether the horse belonged to the mother or the son; and the Court below, upon the evidence, has held that it belonged to the son. It was a question of evidence.

Per Curiam:] The evidence clearly shews that the horse in question belonged to the plaintiff, and that in taking the Promissory Note, her son merely acted as her Agent. Judgment set aside, with costs.

No. 21,498,
D. C. Colombo. } *Pieris* v. *Rodrigo* and others.

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Where a Lease written in Singhalese purported to demise 'within these boundaries the large tiled house, four boutiques, and all other trees;' *Held* (upon the evidence of Interpreters,) that these terms included boutiques and sheds on the land, other than those expressly mentioned in the Lease.

The question in this case related to the construction of a Singhalese Lease. The words in the lease upon which the question turned, were —'within these boundaries the large tiled house, four boutiques, and all other trees thereof, were given on lease to *Telgey Anthony Pieris*.'

The plaintiff contended that every thing within the four boundaries had passed under the lease; but the defendant insisted that it only affected the things expressly mentioned in it; namely, 'the large tiled house, the four boutiques, and all other trees thereof.' It was also admitted by the plaintiff, that at the date of the lease, buildings, other than those mentioned in it, were on the land; namely, several boutiques, a cattle-shed, and two other sheds. The present action was brought by the plaintiff (the Lessee) to recover possession of the buildings not expressly mentioned in the case. On the day of trial, the plaintiff called the two Interpreters of the Court, whose evidence was to the following effect: First Interpreter,—'I have carefully read the lease on which this action is founded,—in that lease the half part of a garden is leased.—I have heard the examination of parties, and know the question at issue.' Question:—'Looking at the deed itself, and without reference to any extraneous matter, do you consider that it was intended thereby to include the garden and all in the case, or only the large tiled house, four boutiques and other trees and produce?' To this question the defendant's Counsel objected, on the ground that the witness could not be questioned as to the construction of the deed. The Court allowed the question, and the witness answered: 'I consider that the lease includes the garden and all in it. I have taken the whole lease into consideration before coming to this conclusion.' Cross-examined:—'The translation filed is correct. I speak from a knowledge of similar deeds of my own and others. The principal building in a garden is mentioned, and the minor buildings are included. If there were two houses of the same character, one would not be affected by a lease of the other, nor I think if there were two boutiques.' Re-examined:—'When I say that the translation is correct, I mean so far as it is possible to render it in English.' The evidence of the other Interpreter was to the same effect. Upon this, and the evidence of the Notary, the District Judge held that every thing within the four boundaries had passed under the lease. From this the defendant appealed.

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Dias, for the appellant, submitted that the whole of the evidence was illegal. Witnesses could not be examined as to the construction of a written instrument, as was done in this case. That was the duty of the Judge, after ascertaining the true meaning of the words used, and all the surrounding circumstances of the case. (1 *Taylor* on Ev. 50.) The evidence adduced went to contradict a written instrument. It established a right to land by parol. (2 *Taylor* on Ev. 894.) Independently of its illegality, the evidence received in this case was rightly objectionable, as it would amount to transferring a very delicate and difficult duty from the Judge to the Interpreter. The District Judge had a correct translation before him, and applying the principle, *expressum facit cessare tacitum*, he could come to no other conclusion than the one contended for by the defendant; namely, that the express inclusion of certain buildings necessarily excluded the rest. (2 *Taylor* on Ev. 927; *Webb* v. *Plummer*, 2 Barn. and Ald. 750.) This was the correct legal construction of the lease; but the surrounding circumstances of the case, namely, the existence of other buildings at the date of the lease, put it beyond doubt that that was the real intention of the parties.

Rust, for the respondent, cited 2 *Taylor* on Ev. 913, and *Marshall's* Judgments, 239.

The judgment of the Court below was *affirmed*.

No. 21,949,
D. C. Colombo. } *Semboogey* v. *Swarisgey*.

Where one of several heirs, being as such entitled to one-sixth share of certain land, sold it to the plaintiff; and having afterwards taken administration of the Intestate's estate, sold the whole of the land to A; *Held* that the plaintiff was entitled, as against A, to the share he had purchased.

The plaintiff claimed a parcel of land with the buildings thereon, under a Conveyance, dated 3rd February, 1844, from *Cornelis de Silva*, and complained that defendant, having sued out a writ of execution against one *W. Don Hendrick*, had seized and advertised the said premises, as the property of the said *Don Hendrick*.

The defendant pleaded, 1. that the plaintiff was not the owner of the premises, and that the vendor (*Cornelis*) had no right to sell the same; and 2. that the premises were the property of *Don Hendrick*, who had possessed it for more than 10 years, and had in July, 1847, mortgaged it to the defendant, by virtue whereof he had obtained judgment and issued execution.

At the trial, it appeared that the land had originally belonged to *Adriana Dias*, who died 20 years ago; that at her death, it devolved on her three children; that *Cornelis*, the plaintiff's ven-

dor, was the son of one of those children, and at the time of the sale to the plaintiff was, as such, entitled to one sixth part of the land; which sixth he sold to the plaintiff; that the plaintiff possessed it since the sale, and built a small house upon it, which was occupied by a tenant of his; that in 1847 *Cornelis* took administration of his grandmother *Adriana's* estate, and after having had it surveyed and inventorised, put up the *whole* of the land for sale, at which sale *Don Hendrick* (the execution debtor) purchased it, and subsequently mortgaged it to the defendant.

The Court below held that the plaintiff had not made out a title:—"He claimed the land 1. under the transfer from *Cornelis*, and 2. by virtue of his possession since 1840. And firstly, *Cornelis* had no right to sell a divided portion, the garden never having been divided; secondly, *Cornelis*, as administrator, had in 1847 included the whole of the garden in the inventory of *Adriana's* estate, and had had it surveyed, and this was a sufficient interruption of the plaintiff's possession; and indeed according to the return of the Fiscal, the plaintiff was not in possession at the time of the seizure." On appeal by the plaintiff,

Lorenz for the appellant (*Muttukistna* with him.)] There is abundant proof of a divided possession. Some of the witnesses indeed say that there was never a division, but one of them, an heir, states that the portion sold to the plaintiff lay between two separate portions belonging to herself. The judgment is evidently based on a wrong interpretation of the word *division*, by which the witnesses clearly meant a separation by fence or hedge (and this did not exist,) but which the Judge took from the Interpreter to mean a division of the soil among the joint-owners. This is apparent from the evidence of the third witness, who says at one time that the whole garden is in one, but the portions are divided—they are fixed portions,'—and immediately afterwards—'this garden was never divided by a hedge or fence;' and the word '*division*,' as used by other witnesses, must be understood in this sense. And one significant fact is conclusive on this point; viz. that the plaintiff has built, and at this moment is in possession, of a house on the portion in dispute. *Secondly*, no prescription can avail the defendant in this case. He claims the land as the property of his execution debtor, *Don Hendrick*. *Don Hendrick* claims under a sale from *Cornelis*, the very party from whom the plaintiff had previously purchased a sixth part of the land. In other words, *Cornelis* first sells his *one-sixth* share as an heir, and then proceeds to take administration of *Adriana's* estate, of whom he was heir, and sells the *whole*, as administrator, to *Hendrick*. *Hendrick* could have no better title to this parti-

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cular one-sixth than his vendor had. [TEMPLE, J.—Granting that *Cornelis'* title was imperfect in 1840, yet as soon as he took administration in 1847, it related back to his act in 1840, and confirmed it.] (*Lorenz* quoted Voet vi. i. 17.) Then, where the plaintiff already had a title from *Cornelis*, could *Cornelis* or his vendee by a disturbance of the plaintiff's possession divest him of that title? Prescription need only be resorted to where no other title exists; but a man who has title by purchase from the true owner needs no possession to support it; for his title is secure so long as some other party has not acquired a better title by an adverse possession for 10 years. If the plaintiff had been *disturbed* every day of his life since 1840, he could not lose the title he got at the sale; for otherwise, a vendor has only to disturb his vendee at stated periods, in order at the end of 10 years to oust him from the property sold to him.

W. Morgan, for the respondent.] The plaintiff was aware at the time of the sale that *Cornelis* had no title to sell, and it was agreed that *Cornelis* should take administration of *Adriana's* estate and give him a better title. [TEMPLE, J.—That does not appear in the plaintiff's deed.] The plaintiff has stated it in his examination as a witness. [TEMPLE, J—.That is illegal evidence, and ought not to have been received.] But the evidence is before us, and it shews that the plaintiff knew of the defect in his title, and took it on speculation. [TEMPLE, J.—And *Cornelis* sold it on speculation, and speculated well; for he got his price twice over.] *Cornelis* acted openly; he cited the heirs and held a public auction on the spot, and yet the plaintiff made no complaint till 1849, when the seizure took place, and even then he would not bring his action till 1856, when he was called upon by the Court to establish his claim. [MORGAN, J.—He was in possession.] The District Judge holds he was not. [MORGAN, J.—The Fiscal reports *he was; jointly 'tis true with Cornelis;* but *Cornelis*, as one of the family, was probably residing on the other portion.] *Cornelis* took administration of Adriana's estate, and this placed him in the same position as Adriana had been at the time of her death. [TEMPLE, J.—Twenty years ago! This is one of the many instances of a stale administration which does more harm than good. A party comes forward 10 or 15 years after the death of his grandmother, and after the heirs have acquired new rights, and desires to be placed in the position of his intestate twenty years ago.]

April 15. MORGAN J. now delivered the Judgment of the Court.] "The decree of the Court below is set aside, and it is

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decreed that plaintiff be, and he is hereby declared, the proprietor of the one-sixth of the premises in dispute; and that he be quieted in the possession thereof, the defendant paying costs.

"In view of the evidence of the co-heir *Isabella Silva*, and the lapse of time between the death of *Adriana Dias* and the sale by *Cornelis Silva* to the plaintiff, the Supreme Court is inclined to hold that the land was possessed by the heirs, and in divided portions. But independently of this, *Cornelis* was bound, after he sued out administration of the estate of *Adriana Dias*, to perfect the title he had previously given to the plaintiff; and as between the plaintiff and *Cornelis'* second vendee (the execution-debtor of the defendant,) the Court will, in equity, look upon that as done which *Cornelis* had agreed and was bound to do. The possession of the land by the plaintiff was sufficient notice to the execution-debtor of the previous sale by *Cornelis* who was clearly, on his part, guilty of fraud in selling that to the execution-debtor which he had previously sold to the plaintiff."

No. 17,097, *D. C. Galle.* } *Brohier* and another v. *Kallehegamegey.*

Commissioners under the Partition-Ordinance, having sued for their fees six years after they had filed their Report (the proceedings in the Partition-case being still pending;) *Held* that their claim was not prescribed either under § 6 of Ord. No. 8 of 1834, or under the R. D. Law.

This was an action for the recovery of £14 7*s.* 11½*d.*, for fees due to the plaintiffs, as Commissioners, for surveying and making a partition of certain land at the suit of the plaintiff, under the Ordinance No. 21 of 1844.

The defendant pleaded 1. *never indebted*; and 2. *prescription* under § 6 of Ordinance No. 8 of 1834.

It appeared in evidence that the plaintiffs had been appointed Commissioners under § 10 of the Ordinance No. 21 of 1844, and had given in their Report in March 1850. The defendant, at whose instance the proceedings for a partition had commenced, had however taken no further steps since the Report. And the plaintiffs in February 1856 brought the present action for their fees.

The Court below having given judgment for the defendant, on the ground of Prescription, the plaintiffs appealed against it.

Rust, for the appellants, was not called upon.

Lorenz, for the respondents.] There is a judgment of this Court (No. 2728, D. C. Galle) where § 6 of the Ordinance No. 8 of 1834, was held by *Rough* J. to be applicable to Proctors' fees; but I confess I am not prepared to contend that either a Proctor or Surveyor can be included under the terms 'artisans, labourers or servants.' [MORGAN J. quoted No. 564, D. C.

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Wadimoratchy, 18th February 1836.] But it is quite clear that the action is prescribed by the Dutch Law; *Edict. Car.* V, 4th October 1540, which fixes the period of two years as the term of prescription for the "fees or salaries of Advocates, Proctors, Secretaries, Physicians, Surgeons, Apothecaries, Clerks, Notaries *and the like*;" Voet *ad Pand.* xliv, 3 § 7; V. d. Keessel, 876. And this rule was recognized and acted upon by this Court in the case of a Doctor's bill; No. 2399, C. R. Ratnapoora, 23rd June, 1857. [TEMPLE J.—You have not pleaded it.] But the Court will take notice of the fact that *six* years have elapsed since the right accrued. [MORGAN J.—The right does not accrue till the Court makes the decree of partition; § 13, Ordinance No. 21 of 1844.] The plaintiffs' right to fees accrued when the Report was given. The Court may, at the time of making the decree, *fix the amount*, and have it paid out of the monies deposited in Court; but the plaintiffs are not thereby prevented from claiming their fees. The proceeding under § 13 is a more summary mode of recovering the fees; but the plaintiffs may waive it, and take to their common law right. Then, if the plaintiffs were entitled to recover in March 1850, and if, according to the Dutch Law, the lapse of two years raises a presumption of payment, *a fortiori* in this case, when there has been a lapse of *six* years, the Court should allow the defendant the benefit of that presumption. [MORGAN J.—All presumption is negatived by the proceedings in the case, which clearly shew to my mind that the plaintiffs had never been paid their fees.]

Per Curiam:] The decree of the 28th day of January 1857 is set aside; and it is decreed that plaintiffs do recover from the defendant the sum of £14 7 11$\frac{3}{4}$, and costs of suit. The Supreme Court considers that fees for work such as the plaintiffs have performed, surveying and dividing land, cannot be said to fall under the words "wages of artisans, labourers and servants," which are prescribed after the lapse of one year. An 'artisan' is one trained to manual dexterity in any art, mystery or trade; and the terms 'labourer and servant' would seem to extend only to cases where the relation of master and servant exists, to domestics menial and engaged in husbandry. The term 'wages' too is one ordinarily used to denote the hire paid or stipulated chiefly for services by manual labour, and is not applied to rewards given to professional men or men in office, which are called fees or salary. It further denotes the character of the person entitled to it, and points to the relation of master and servant. See *Lancaster* v. *Greaves*, 9 B. and C., 628 and *R.* v. *Heywood* and another, 1 M. and S., 624.

The Regulation No 13 of 1822, § 7., contains the very words 'wages of labourers, artisans and servants'; and in reference to them the Supreme Court, on the 18th February, 1836, decided (*D. C. Wadimoratchy*, No. 564) that a 'fixed sum, to be 'paid on the completion of a certain work, at some indefinite 'period, cannot be considered as wages within the meaning of 'the 7th clause, which evidently contemplated under that designation the minor earnings payable daily weekly, monthly or at 'such other short period as would justify the presumption of payment and the consequent prescription if not sued within one year.' The Supreme Court is further of opinion that, as by the 13th clause of the Ordinance No.21 of 1844, the District Court may at the time of making a decree of partition award to the Commissioners their remuneration, and no partition has yet been made, prescription in respect of the claim has never commenced to run. No objection has been made to the plaintiffs' bringing the present action, instead of applying for their fees in the partition-case; and in a case like the present, where the defendant is trying to take advantage of his own wrong, the Supreme Court is not disposed to allow him to take other pleas, but will hold him strictly to the record which only presents for consideration the question :—How far is the plaintiffs' claim prescribed by the 6th clause of the Ordinance No. 8 of 1834 ?

April 8.

Present, MORGAN, J.

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No. 17,050, *P. C. Jaffna.* } *Walliamma* v. *Moorger* and others.

Where on a complaint in October 1856, for an assault committed in May 1856, the Magistrate dismissed the complaint as 'frivolous and old,' the S. C. declined to interfere, although the defendant had pleaded guilty.

This was a charge of assault, instituted on the 2nd October, 1856. The assault was stated to have been committed on the 29th May, 1856. On the 4th March, 1857, the Magistrate examined the complainant, and, without entering into further evidence, gave judgment as follows : 'The complaint is frivolous and old. The accused are warned and discharged.'

On appeal by the complainant, the Supreme Court affirmed the finding of the Court below ; and *per* MORGAN J.—'It would have been more regular to have heard the evidence of the complainant's witnesses ; but in view of the staleness of the charge, the Supreme Court declines to interfere. The discharge of the accused after his plea of guilty must be taken as an acquittal.'

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May 18.

May 18.

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

No. 41,238,
P. C. Colombo. } *Andree* v. *Silva.*

Horses returning to their stables, after having carried the mails, are not exempt from toll under § 11 of the Ordinance No. 9 of 1845.

This was a charge by the plaintiff, the proprietor of the Galle Mail Coach, against the defendant, the toll-keeper at the Dehiwelle Bridge, 'for demanding and taking toll on two horses with harness, belonging to the Galle Mail Coach, which is exempted from payment of any toll; in breach of the 11th clause of the Ordinance No. 9, of 1845.'

It was in evidence that on the 26th January the Coach, drawn by the horses in question, had conveyed the mails from Ratmalane to Colombo, and that the horses having left the Coach at Colombo were returning to Ratmalane, when, on crossing the Dehiwelle Bridge, toll was demanded and taken for them. The Court below held that 'only horses actually drawing the public mails were exempted by the Ordinance,' and acquitted the defendant. The present appeal was taken against this decision by the complainant.

Lorenz for the appellant.] The complainant claims exemption from toll, in respect of horses returning from Colombo to Ratmalane after conveying the mails. They are not expressly exempted; but as a horse conveying the mails is exempted, it is submitted that a horse necessarily returning to the stables, after having conveyed the mails is entitled to the same exemption. The question arose in England in respect of an exemption under the 53 Geo. 3, c. 82, sec. 2, which exempted *carts laden with manure*, and it was held that a cart going empty to fetch the manure was necessarily exempted; *Harrison* v. *James*, 2 Chitty, 547. That exemption was passed in favour of agriculture: the present exemption is claimed on similar grounds; and the words of Lord Mansfield equally apply.—'The intention of the act was that no new burthen should be laid upon *Agriculture*,'—or, as in the present case, upon the means of communication; and the statute would be nugatory, if we were not to put the construction on the act which is contended for by the plaintiff.

Rust for the respondent.] By the 2nd clause of the Ordinance No. 9 of 1845, a toll of 6d. is leviable upon every horse loaded and unloaded. Clause 18 exempts carriages and horses drawing or carrying the public mails, and it is admitted by the complainant that these horses were not so employed at the time the toll of 1s. was levied. But, it is argued, on the authority of

Harrison v. *James*, that they are implicitly exempted. In that case, however, the object of the Legislature would have been *entirely* defeated, if a waggon going empty for the purpose of fetching a load of manure was held liable to the toll. The exemption was made in favour of Agriculture, and the waggon was necessarily employed in fetching manure. Here the contractor sends the horses back, not even for the purpose of carrying the mail, but to suit his private convenience. In *Harrison* v. *Brough*, 6 *Term Rep.*, 706, it was held that a horse ridden for the purpose of bringing cattle back from the pasturage was not exempted, although all cattle going and returning past a certain toll, for the purposes of pasturage, were exempted. The principle in that case governs this. By the 3rd of Geo. 4, c. 126, § 32, the exemptions are made not only in favour of horses, &c., carrying the mails, but in returning; and so as to the other exemptions. These horses were not exempt under clause 6 of the Ordinance, because no toll had been paid in respect of them. If a carriage goes through a toll, the charge is levied upon it, and if the horse returns a fresh charge is levied upon it; and this is the distinction as to exemptions in returning drawn in English cases. *Loring* v. *Stone*, 2 B. and C., 515.

Lorenz in reply.] The *necessity* of the horses returning to the stables is evident. It is not to be supposed that the coach proprietor would send the horses back to Ratmalane, unless the necessity existed for so doing; and that necessity arises from the fact that the mails are conveyed daily from Galle to Colombo. The case of *Harrison* v. *James* proves that an act containing a similar provision, and expressed in much shorter terms, was construed liberally; and the subsequent Turnpike Acts, by introducing an express provision respecting *returning* horses, merely enacted that which the Judges had previously held to be tacitly implied in the exemption; and in fact shewed that the Legislature really intended what the Judges, in the absence of words shewing that intention, had held to be their intention. The case of an ordinary horse being obliged to pay half-toll on his return proves nothing; for the present exemption is claimed on the ground that an exemption made by the Legislature is to be favourably construed, while *Loring* v. *Stone* proceeds on the ground that a carriage, which being liable to pay when going has so paid, is not thereby exempted from toll imposed on it when returning.

Rowe C. J.] We must construe the Ordinance literally; for at is the rule respecting the construction of statutes in Eng-

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land. The Judges in *Harrison* v. *James* have construed the exemption liberally, which at the present day, the Judges in Westminister Hall would not do. I very much question the correctness of that decision. The subsequent statutes, which expressly exempt *returning* horses, show that such an exemption is matter for Legislative enactment. We cannot legislate, but must administer the law as we find it; and we find no exemption. We ought to be called upon to measure the necessity for horses returning.—*Affirmed.*

No. 22,858,
D. C. Colombo. } *Coopen Chetty* v. *Bastianpulle.*

1. On a motion by the defendant to dissolve a sequestration; *Held* that the appearance of Counsel and Proctor in support of the motion, was sufficient *entering of appearance*, to entitle the defendant to be heard in appeal.

2. On a Bond granted in Cochin to A, with security of a Vessel, conditioned for the payment of £422 to his partner B, within seven days after the arrival of the vessel at Colombo; *Held* that the D. C might, in an action by B, sequester the vessel, upon proof that it was about to leave Colombo before the expiration of the seven days.

The plaintiff filed his Libel on the 11th May, 1857, and complained "that the defendant was indebted to him in the sum of £422, upon a certain Bond dated at Coch in the 24th April, 1857, whereby the defendant mortgaged to *Muttoo Carpen Chetty Allegappa Chetty* partner of the plaintiff, the brig *Mahomed Smdany*, and which said sum of money was to be paid to the plaintiff within seven days after the arrival at Colombo of the vessel;—that the vessel had arrived at Colombo on the 7th May, and the defendant had not yet paid to the plaintiff the said sum of money or any part thereof;—that the defendant was about to leave and sail from the port of Colombo, in the said vessel, for parts beyond the jurisdiction of this Court; and therefore prayed that the defendant might be condemned to pay to the plaintiff the said sum of £422, &c." This Libel was accompanied by an Averment by the plaintiff, and an Affirmation of a third party, to the effect "that the defendant was indebted to the plaintiff in the sum of £422; that the defendant did state to the plaintiff that he was about to apply immediately to the Customs authorities for his certificate of clearance to enable him to sail; and that he really did intend to sail from this port to the Coast, to avoid payment of his said debt to plaintiff." And upon these proceedings, the District Court issued a writ to the Fiscal to seize and sequester the said vessel until further directions.

On the 13th May, *Lorenz*, for the defendant, moved the Court to dissolve the sequestration, upon the several grounds mentioned in the judgment, which was as follows:—

"Mr. *Lorenz* moves to set aside the sequestration granted in this case, for the following reasons:—1. that there is no sufficient cause of action set out in the Libel, inasmuch as the instrument sued on is not in favour of the plaintiff; and the condition thereof is

not broken; 2. that there is not sufficient damage apprehended to justify such an order; 3. that this Court has no jurisdiction. Mr. *Rust, contra,* quotes Van der Linden, 430; Van Leeuwen, *Comm.* 543; Censura Forensis, P. II, lib. 1, c. 15, § 8, 9; Voet lib. II, tit. iv, § 19, 50.

"This is an application to set aside the sequestration of a certain vessel lying in the harbour of Colombo, granted by the Court on the 11th instant. The sequestration was applied for on the ground that the defendant was about to sail in the said vessel, which is mortgaged to plaintiff for a sum of £422. The application is not made under the circumstances referred to and provided for in the Rules of the Supreme Court, confirmed by the Ordinance of last year; but it appears to have been hitherto the practice of the Court to grant sequestration in cases not contemplated by the Rules and Orders of the Supreme Court, where the requisites prescribed by the Dutch Law authorities are present, and the Court in its discretion has considered such a remedy called for. This course has been adopted upon the ground that the Rules of the Supreme Court are intended only to prescribe the mode of procedure to be adopted in obtaining sequestration in the particular case of a fradulent alienation, and not to limit or curtail the remedy previously existing under the Dutch Law, which was much more extensive, applying also to cases where the defendant is *in meditatione fugæ*. This practice of the Court has been hitherto acquiesced in; and no decision to the above effect has been taken into appeal. It appeared to me, therefore, that I was bound by this practice, and that it could only be questioned in a higher Court; and as the circumstances of the case appeared to me to call for a sequestration, I allowed the motion. It is now moved to set aside this sequestration on the following grounds: 1. That there is no sufficient cause of action set out in the Libel, and two grounds of insufficiency are alleged:—First, that the instrument sued on is not in favour of the plaintiff. It is a document drawn at Cochin and signed by the defendant, by which the defendant, in consideration of £422 paid to him by *Moottoo Carpen Chetty*, mortgages to the said *Moottoo Carpen Chetty* his Brig, on condition that, if within *seven* days of his arrival in Colombo he should pay to the plaintiff, partner of the said *Moottoo Carpen Chetty*, the said sum, the deed should be void. It is argued that this is a bond to *M. C. Chetty* for £422, to become void on payment to plaintiff of the like sum in Colombo; and that plaintiff is not the obligee of the bond, but is only named in the condition as the person to whom the money is to be paid, upon which the bond is to become void. The instrument

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is executed at Cochin, and must be construed according to the rules of construction prevailing there; but in the absence of any express information respecting those rules, we must look to the intention of the parties as it can be collected from the instrument, which, though in some parts it follows the forms of expression used in a bond, is not a bond but a mortgage. I think that the words 'on condition that if the defendant pay &c.' means no more than 'for the purpose of securing the payment by defendant' to plaintiff; and that plaintiff being described as *M. C. Chetty's* partner shows that it was a partnership transaction, and that plaintiff might sue either in his own name or in his partner's name. The Libel alleges that the defendant is indebted to plaintiff, and proceeds to set out the instrument on which the debt accrued. The debt is sworn to, and I think that the instrument is capable at any rate of bearing such a construction as to sustain the action; and this is, I think, sufficient to sustain the grant of a sequestration. Further, in my opinion, the Court should always take a liberal view in construing Libels filed for the purpose of accompaning motions for sequestration or arrest. They are almost always drawn upon short notice, and must frequently be founded on instruments whose exact legal construction may admit of doubt. If the libel and the Affidavits are sufficient to shew a debt due from defendant to plaintiff, or for which plaintiff is entitled to sue, the Court should not refuse the motion for sequestration on the ground of any informality in the Libel, which may afterwards be amended. Here there is sufficient at any rate to shew a debt from defendant, for which plaintiff is entitled to sue, either in his own name, or, if not, then in the name of his partner. Secondly, it is said that the debt is not due, the action having been commenced before the expiration of seven days from the arrival of the ship in Colombo,—the period allowed for paying the debt. On this point I need only refer to the authorities cited at the Bar, which shew that sequestrations might be granted to secure a debt which was to become due on a future day, as well as to secure a present debt. The affidavit of the defendant shews that he did intend leaving the country without performing the condition or stipulation contained in his bond,—the period for the performance of which has now elapsed. 2. It is said that there is not sufficient damage to be apprehended to justify the sequestration. The damage to be apprehended is the absence from the country of both debtor and security. If he were about to proceed to Cochin, the case would be different; but this is not pretended, and

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we do not know his destination. It is said that the Court has no jurisdiction,—the cause of action having arisen at Cochin, and the defendant being resident out of the District of Colombo. This is a matter to be specially pleaded. But it appears that such a plea could not be sustained, as the money was to be paid in Colombo. The breach therefore of the Agreement, has taken place there, and part of the cause of action has arisen there: which is sufficient to give jurisdiction. (*Wilson* and another v. *Don David Bernard.**) If the affidavit of the defendant, to the effect that the vessel is incurring danger by remaining in the harbour of Colombo, were to be credited, I should at once dissolve the sequestration; but it is very difficult to believe that the brig 'Mahomed Samdany' would be safer at sea than in harbour during the present very boisterous weather.

"It is therefore decreed that the motion to dissolve the Sequestration granted on the 11th instant, be dismissed. Costs to stand over."

Against this Judgment the defendant took an appeal, on the grounds, 1. that the plaintiff was not entitled to sue for the debt claimed by him; 2. that, granting he was entitled to sue, he was not entitled to a Writ of Sequestration in respect of a debt, for which he had adequate security in the mortgage of the vessel; 3. that he had not shewn any apprehension of fraudulent alienation, or irremediable damages from the defendant being allowed to retain possession of his vessel.

Lorenz (*Mutukistna* with him) now appeared in support of the appeal.

Rust (*W. Morgan* with him,) for the Respondent, suggested to the Court that the defendant had not entered appearance in the case.

Lorenz.] The objection was taken in the Court below and overruled, on the ground that my appearance with a Proctor was a sufficient appearance. Mr. Ball has filed his Proxy from the defendant.

The Judges decided upon hearing the appeal.

Lorenz.] The plaintiff clearly cannot maintain an action on this instrument. It is a Bond or Mortgage to a Merchant in Cochin, conditioned for the payment of the money to his partner in Colombo, within seven days after the arrival of the defendant here. The Merchant in Cochin is the obligee, and is the only party entitled to sue on the Bond. Nor can even *he* sue on it, until there has been a breach of the condition. He lent the money to the defendant on the mortgage of his vessel; and the

* See part I. p. 147.

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condition of that loan was, that, if the defendant seven days after his arrival here, would pay the money to his partner in Colombo, the mortgage was to be void; but "otherwise to be and remain in full force and virtue." Nothing can be clearer than the intention of the parties, as gathered from the instrument;—that defendant might, if he choose, pay the money in Colombo, but that if he fails to do so, his vessel must remain subject to the mortgage. There is no covenant on the part of the defendant to pay the money to the plaintiff: the covenant was to pay it *at all events* to the Merchant in Cochin. [ROWE C. J. But the plaintiff is the partner of the Merchant in Cochin.] He does not sue as partner; nor is the merchant in Cochin made a party to the suit. The plaintiff sues expressly on the *condition* of the Bond, and as the payee named in that condition 2. But granting he might sue,—either as payee, or as partner, or on behalf of the firm, yet he has shewn no case for a sequestration. True there is an affidavit that the defendant is about to leave the country, and that is not denied. But every master of a vessel leaves the country, when he wishes to make use of his vessel. The Merchant in Cochin, when he lent the money on the vessel, knew that the vessel was going to leave Cochin for Colombo; and knew that it would then leave Colombo for some other port. He accepted the security, knowing the nature of it,—that it was something which must necessarily travel from place to place, and was built and held solely for that purpose: and therefore to complain of its leaving Colombo, is to complain of that which he knew would inevitably take place in the course of defendant's business. But further, it does not follow that *because* the vessel leaves Colombo, therefore the plaintiff loses his security; for, wherever the vessel may go, it still continues liable to his debt; for the bond is registered, and the defendant can neither sell nor re-mortgage the vessel, unless he produces the Registry, which contains the endorsement. It is a coasting vessel of 75 tons, and can go no further than perhaps Ceylon. It returns to the Coast; and the plaintiff has his mortgage on it, whenever he chooses to enforce it, provided he does so within the limits of his bond,—after the condition shall have been broken. 3. The plaintiff has shewn no case for a sequestration. Both the Ordinance and the Dutch Law require three things;—1st, a sufficient cause of action; 2nd, the absence of adequate security; and 3rd, a reasonable cause of apprehension, such as a fraudulent alienation or destruction of the property sought to be sequestered.

Fraud is not even alleged against the defendant. No irremediable damage can be shewn to arise from the departure of the vessel, because though the vessel leaves Colombo, it still continues liable to the debt, and may be seized and sold by the plaintiff at any port at which it may touch. The remedy sought is one of an extraordinary nature, and the plantiff must be held to the strict letter of the Law. If he has, through his own carelessness, failed to provide himself with sufficient security, he cannot claim the interference of a Court to better his position. It is attempted to detain a vessel in this port, at a time when it is dangerous to continue long in the harbour :—to prevent a vessel from pursuing the object for which it was built, and for which perhaps this very loan was advanced. And a Court ought not to adopt an unusual proceeding unless for good and valid reasons, which would entitle the plaintiff to claim its interference.

Rust for the Respondent.] The plantiff is entitled to sue in Colombo; for the contract is ambulatory. Although the instrument was made at Cochin, yet the defendant could be sued upon it wherever found. The plaintiff is not only the holder, but the obligee. The money is to be paid to him, and although the mortgage is somewhat informal, it is clear that the parties intended the payment to be made in Colombo, and to the plaintiff. It is in fact a bond with but one condition, viz., that the £422 is to be paid to the plaintiff within seven days after the arrival of the vessel at Colombo. [TEMPLE, J. Perhaps the circumstance that no Interest is reserved on the instrument shews an intention that the money was finally payable in Colombo.] The only answer to an action founded upon such an instrument, is performance. 7 Bing. 487 [ROWE, C. J. But can the plaintiff sue?—is not that right in the merchant at Cochin?] No; a consideration moving from the partner at Cochin to the defendant, by virtue of which he undertakes to pay to the plaintiff, will support an action at the suit of the plaintiff. There is an implied covenant to pay to the plaintiff. If B, in consideration of money received from A, promises to pay C, C can maintain an action on such a promise: and *a fortiori*, if the advance is made by one partner, and the payment is to be made to the other partner, as in the present case. [ROWE, C. J. Ought not the Cochin partner to have been made a co-plaintiff on the record?] He is out of the jurisdiction of the Court, and it has been frequently held, as in the Rajawelle case for instance, that a party out of the jurisdiction need not be joined. It is here argued that the plaintiff holds the security of the vessel; but the defendant was on the point of sailing away with her. Where

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would have been his security then? [TEMPLE, J. All you seek is to keep your security.] We want to make it available. [ROWE, C. J. We will not trouble you on this point, but do you contend that you are entitled to the writ, the debt not being due?] Certainly under the Dutch Law, which in this respect is considerably in advance of the English Law. I rely on the circumstances of the case, which clearly shew an intention on the part of the defendant to leave Colombo without paying the debt due by him. And by the Dutch Law, in order to entitle a plaintiff to a writ of sequestration, it is not necessary that the debt should be actually due at the time. The rule is clearly laid down in Van der Linden, 430,5; Van Leeuwen's *Comm.* 543 § 5; Censura Forensis, p. 2. lib 5. c. 15. § 25; Voet ii. 4. § 17 18, 19, 50. [ROWE, C. J. These cases speak of flight. Can you call that flight which is in the ordinary course of business?] The defendant is not about to sail in the ordinary course,—he reaches Colombo on the 7th, unloads as quickly as possible, and gets his clearance on the 11th without a cargo. His intention is best evidenced by his acts. He tried to get away within seven days. But an actual flight is not necessary,—if the party is about to leave the jurisdiction, it is sufficient. Here the defendant evidently contemplated flight to avoid payment of the debt which he admits to be due.

Lorenz, in reply.] So far from any fraud being shewn on the part of the defendant, he is admitted on all hands to have behaved in the most upright manner possible. There has not been the slightest attempt to conceal his intended departure. The plaintiff swears that he first heard of it from the defendant himself. The defendant, on appearance, so far from questioning any part of the plaintiff's case, admits every circumstance that could go against him. He admits the bond, the partnership, and his intention to leave Colombo; he simply contends that he never bound himself to pay the money to the plaintiff, but is ready to pay it to the man who lent it to him. Can it be said that the circumstances of the case are against him? Are not rather the circumstances against the plaintiff, who demands a debt which is not due to him, and sues for it before the time allowed to the defendant has elasped; and seeks to detain a vessel which he has accepted as a sufficient security; and to compel a party to give further security in a country in which he is a perfect stranger? And all that can be said to justify this extraordinary proceeding, is, that the defendant is under a condition to pay the money in Colombo. He has certainly agreed "that if he does *not* pay, then the security is to *continue*;" but there is nothing in the bond to shew either a

covenant on the defendant's part to *pay*, or a right on the plaintiff's part to recover. There is an election left to the defendant *either to pay* the money in Colombo, or to have his vessel still burthened with the security; but nothing has been shewn which could entitle this Court to deprive the defendant of that election which by the terms of the bond he is entitled to. It has been suggested by the Junior Puisne Justice, that no interest being reserved in the bond, it is probable that the parties intended that the debt should be paid in Colombo, and therefore did not stipulate for interest beyond the time of its intended payment. But the suggestion is equally applicable to the intention of the parties as contended for by the defendant: for if the money was ultimately to be paid in Cochin, as asserted by the defendant, the difference could be but a few days. Nor again can any inference be drawn from the absence of any stipulation respecting interest; for it is well known that Native Merchants generally include the intended interest *and a great deal more*, as a *bonus*, in the principal amount appearing in the instrument. The vessel may indeed go to pieces, as suggested by the opposite party, between this and Cochin: so may a house be burnt to the ground: and yet no sequestration has ever been applied for on the ground that a certain house mortgaged to the plaintiff is likely some day to be destroyed by fire. The law contemplates only an *act of the party*, in granting a sequestration. If a defendant be about to set fire to the house himself, or to alienate the vessel or to scuttle it, in order to deprive the plaintiff of his security, or avoid the payment of the debt, that would be good ground for a sequestration; but to ask the Court to interfere, because a house *may be* burnt down, or a vessel *may* sink, would be equivalent to asking it to make provision against the operation of the laws of nature. The plaintiff may claim security, if he has none; or detain the security he has, if such a right of detention was contemplated in the bond, or acquired by the lapse of the time agreed upon; but in the present case there is neither a right of action for the money, nor an apprehension of a loss by reason of the defendant leaving the country; while on the other hand, the plaintiff has security reserved to him wherever the vessel may go.

Rowe C. J.] The process of sequestration is an unusual and extraordinary remedy, which ought not to be resorted to, unless there be good and valid reasons shewn for its adoption. We would not feel ourselves called upon to grant such extraordinary remedy, or rather to uphold the decision of a Court which has granted it, unless we are convinced of the necessity which existed for exerting the authority here exercised. In this case

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it appeared to us at first that the plaintiff having accepted a security of a certain description—a vessel, which is locomotive in its very nature, and which in order to be useful must necessarily be carried from port to port,—he cannot complain if the defendant, in the pursuit of the object for which that vessel was built, should choose to navigate it from port to port. The plaintiff should be taken to have assented to its navigation, as a natural consequence of its peculiar nature. To prevent a vessel leaving a port, is to render it valueless to its owner, and to interfere with the legitimate pursuit of a commercial undertaking. But then we must look into the agreement of the parties, and examine whether they did not really intend that the money should be paid in Colombo, and that the vessel should be *there* liable for the payment of that money. If so, then the plaintiff had a right to sue for it, and would be entitled to detain the vessel until the money is paid; and the vessel would not be an adequate security for that money, unless it were so detained and forthcoming at the time the plaintiff had his Writ of Execution to levy on it. We are all agreed that the intention of the parties was that the money should be finally payable in Colombo. The Bond is ambiguous in its terms, and does admit of a different construction; but we cannot suppose the intention of the plaintiff to have been otherwise than to lend his money on the vessel *for the voyage, payable at Colombo.* The circumstance that no interest is reserved in the Bond in case of a breach of the condition, raises a presumption that the parties contemplated that the payment should be in Colombo. And at Colombo, therefore, the vessel becomes liable to be seized and sold for the debt so contracted; and a sequestration was therefore necessary to keep it here until the plaintiff is able to seize and sell it. The judgment of the Court below must therefore be affirmed.

Lorenz suggested a division of costs;

And in view of the ambiguous nature of the document, which in a measure justified the defence adopted, the Court decreed each party to bear his own costs.

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

In the goods of Galgamegey Carolis, deceased.

No. 1,116, *D. C. Galle.* } *Silva* v. *Saneratne.*

The facts of this case are stated in the arguments of Counsel.

The Father of the Intestate's widow is entitled to administration, in preference to the widow's second Husband, though supported by the widow's Mother.

W. Morgan for the Appellant.] The father of the deceased applied for administration *de bonis non* of the deceased. The estate had been previously under the administration of the widow of the deceased. The application of the father is opposed by the 2nd husband of the widow, supported by the mother of the widow. The estate of the deceased had not been divided by the previous administratrix (the widow), and on her death, her husband, who is entitled to a half share from *her* estate, is interested to the extent of ¼ of the original estate of the intestate. He managed the whole estate jointly with his late wife; and is the party best entitled to administration. [TEMPLE J.—The share to be administered you have no interest in.] But to ascertain that share we must administer the whole estate.

Rust, contra.] At the husband's death one-half went to his widow, the other to the father. Upon the widow's death, the father is entitled to administration *de bonis non*, not only by right of a greater interest, but also as next of kin. As to the second husband's intermeddling, that clearly can give no right to administration.

MORGAN J. quoted Toller, p. 117; *Eyre* v. *Shaftesbury*, 2 P. Wms. 121.

Per Curium:] The father of the deceased, both as next of kin and having a direct interest, is entitled to administration, whether original or *de bonis non*,—in preference to the husband of the administratrix, who is interested only as the representative of his wife.

In the goods of ——

No. 1,819, *D. C. Jaffna.* } *Caderasipulle* v. *Paramanander.*

1. The *Attorney* of a Husband is not entitled to administration of

In this case the District Court had granted administration of the estate to the Secretary of the Court, in preference to a party who applied as Attorney of the husband of the deceased.

On appeal by the husband's Attorney,

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the wife's estate.

2. The District Court having given administration to the Secretary, the Supreme Court refused to entertain an application in appeal that administration should be granted directly to the Husband.

Coomareswamy, for the Appellant, contended that the husband was entitled to administration in preference to all persons. [TEMPLE J.—But it is a third party who applies for administration; it does not appear to us that the *husband* applies for it.] He does so by his Attorney. The Power of Attorney gives a specific power to apply for administration "for him and on his behalf.' [ROWE C. J.—Should not a person resident within the see of Ceylon apply for himself?] *Coomareswamy* quoted 1 Wms. on Ex. 357,358. Administration may be granted to the Attorney of all the next of kin who are resident out of the Province. And in the present case administration need not necessarily be given to the Attorney, but directly to the husband for the application is made by his Proctor. It is only on default of parties entitled to administration that the Secretary can apply for it. [MORGAN J. The only difficulty is, who is the real applicant?] The real applicant is of course the husband, who applies by his Attorney. [MORGAN J. There are some circumstances which raise a suspicion against the Attorney. He does not seem to have come forward until the first administrator had put a debtor of the estate in Court.] The Court may make an order granting administration to the husband himself.

ROWE C. J. This is an extraordinary application. If the husband himself comes forward, he will be entitled to administration of course. But the Attorney had no right to administration, for he has applied that administration may be granted to him *personally*. The Court has under the circumstances of the case exercised a very proper discretion in granting administration to the Secretary. The alleged general Attorney must personally pay all costs.

No. 19,011,
D. C. Matura. } *Ibrahim Lebbe* v. *Harmanis* and others.

1. The Supreme Court received a Petion of appeal, though not signed by a Proctor, Counsel agreeing to sign it at the argument.

The plaintiff in this case obtained a Writ of Sequestration against the defendant, and pointed out a quantity of plumbago to the Fiscal's officer for sequestration. On his proceeding to execute the writ, the defendant and several others opposed and resisted the sequestration. The Fiscal's officer made a return to the Court of what had taken place, together with an affidavit of the facts stated in the return; and the Court thereupon issued a warrant of attachment against the parties who were alleged to have resisted the writ. The parties accused having been brought

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2. A third party resisting a sequestration, on a claim of right, cannot be committed for contempt till after the title has been determined by an incidental suit; but the D. C. cannot stay proceedings in the original case pending such incidental suit.

up, the plaintiff's Proctor moved that a day might be fixed to inquire into the alleged contempt; when the District Judge committed the defendant, and as regards the other parties made the following order:—

"The Fiscal is referred to the Police Court to prosecute the parties accused, if he be so advised; but it is the opinion of the Court, that before the District Judge can punish them for contempt, it must be shewn clearly that the accused (except the defendant) had no reasonable ground whatever for resisting the process of sequestration. The right to the property claimed by the claimant must be tried by the plaintiff in an incidental suit, and the present suit must be stayed."

Against this order the plaintiff now appealed.

Dias appeared for the Appellant.

MORGAN J.] This appeal cannot be maintained. It is not signed by a Proctor.

Dias proposed to sign the Petition, *nunc pro tunc*, withdrawing an obnoxious clause occurring in it. And the Court agreed to accept it.

Dias:] It is submitted that the opponents should have been tried for Contempt. They might have preferred their claim in due course; but they were not at liberty to resist the process of the Court. [MORGAN J.—The sequestration commands the Fiscal to seize property of the defendant—not of a third party. And that is the question to be tried,—whether the property belongs to the defendant or to the third party.] That is no ground for resisting the process of the Court. If the property sequestered did really belong to the claimants, that would be a ground for mitigation of punishment. But when the Court has directed a certain act to be done, that act must be done: and the party who is aggrieved has his remedy, either by application to the Court, or by an action for damages against the party who issued the sequestration. So in the case of a Writ fo Execution which is worded in the same terms—to seize the property "of the defendant;" the proper course is to tender security and prefer the claim. [ROWE, C. J.—Suppose a Fiscal's Officer comes to your house and seizes your goods as the goods of A., do you mean to say you cannot resist him? I mean not to the extent of a breach of the Peace—but can you not resist him?] That is my contention. [ROWE, C. J. Judgment for Contempt is the extreme rigour of the law. Can you punish a man because he said "This property is mine?"] Resisting a Sheriff's Officer is a contempt of Court. *Gobby* v. *Dewes*, 10 Bing. 112. [ROWE, C. J.—The Officer

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must act within the scope of his warrant "to take the goods of A." He cannot on that warrant take the goods of B; and if he does so, B can resist.] The Judge should have tried that point, viz: whether the goods were the property of A, or of B. He does not do so. He issues an attachment, and when the claimants are brought up, he refuses to try the question. [MORGAN, J.—The Judge cannot find the Contempt, until he has found the ownership of the property; and it was for the purpose of ascertaining the ownership that the District Judge has referred them to an incidental suit.] But then the District Judge commits *the defendant* for Contempt. [ROWE, C. J.—I can understand that; the defendant resisted process against his own property.] Your Lordships will admit, that if these parties, knowing the property to belong to the defendant, had knowingly resisted the sequestration, they are guilty of a Contempt. [MORGAN, J.—The proceeding for a Contempt is a matter between the Court and the Prisoner. What right has the plaintiff to interfere? In the Queen's Bench the Court is generally satisfied with the oath of the prisoner that he meant no Contempt.] The act complained against as a Contempt of Court, materially affected the plaintiff's rights. May not a party move for an attachment against an absent witness? [ROWE, C. J.—But when brought up, it is for the Court to punish him, or not, according to its discretion. Here the Court has exercised a very wise discretion in referring the point to be decided in an incidental suit, before it visits a party claiming property with the rigour of the law.] Secondly, the Court had no right to stay the proceedings in the principal case until the ownership of the property claimed has been settled.

Per Curiam:] The order of the Court below is *affirmed*, as respects discharging the accused from the charge of contempt and requiring the plaintiff to bring his suit, if so advised, to try the right to the plumbago; but that which directs the present case to be stayed pending the incidental suit, is *set aside*. Each party to pay his own costs.

There can be no contempt unless the plumbago belonged to defendant, and it was quite right for the Court to require this question to be first determined in an incidental suit. But as the present claim is one for money alleged to be due, there is no reason why it should be stayed.

No. 18,734, *D. C. Matura.* } *Mohamadoe Lebbe* v. *Assen Saibo* and others.

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Where the D. C. had by consent of both parties, appointed Commissioners to ascertain the value of certain land in question, with a view to ascertain the sufficiency of the stamps used in the case, the S. C. refused to entertain an appeal against the order.

The plaintiff in this case brought his action in the 2nd class (under £75) to recover certain lands which he claimed upon two Bills of Sale. The value of the land, as stated in the two Bills of Sale, was £80. The defendant pleaded to the merits, and issue being joined, the case was set down for trial. On the day of trial, the defendant was examined, and after the examination, his Proctor moved for a non-suit upon the ground that the case was instituted in the wrong class. The plaintiff's Proctor contended that the objection was too late, and should have been urged before filing Answer. The District Judge however thought otherwise, and ordered a Commission to appraise the land. To this the plaintiff's Proctor agreed; but afterwards appealed on the ground that he consented "under protest," and that the objection, if any, to the *class* of the case, had been waived by the defendant pleading over.

Dias for the Appellant.] The property claimed is, on the face of the Bills of Sale, of the value of £80. The action is brought in the 2nd class; but no objection being taken to this in the Answer, issue was joined, and the case came on for trial. The defendant's Proctor having taken the objection that the case had been brought in an inferior class, the parties agreed to the appointment of Commissioners to ascertain the value of the land. I confess that the entry as to the consent of the plaintiff's Proctor to the appointment, is a difficulty in my way. [MORGAN, J.—But can you amend the defect as to the stamps, under the new Stamp Ordinance?] Yes, by affixing other stamps to make up the value. No. 1335. *D. C. Tangalle*, 19th November, 1856. [MORGAN, J.—All that the Court there held was that it was not the fault of the plaintiff, but the fault of the Secretary. In that case some of the pleadings only were on insufficient stamp; and you might have taken out those pleadings and substituted others on the proper stamp.] The insufficiency of the stamp does not vitiate the pleading. *Marshall's* Judgts., 647.

Rust for the Respondent.] The order of the District Court was by consent, and it was not competent for one of the parties to appeal from such an order. The proceedings were wholly irregular, the case having been instituted in the wrong class; and it was not competent for the Court, as contended on the other side, to order the present pleading to stand upon the additional stamp being supplied. The District Judge should have quashed the proceedings, as was done in several cases by the Supreme

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Court. The Stamp Ordinance is imperative, and the discretion of the Court is entirely taken away.

MORGAN, J.] The proper course for the plaintiff to follow was to submit to a non-suit, and appeal against the order. He has appealed against an order to which he assented.

Dias]. We did so under protest.

MORGAN, J.] You ought to have submitted to a non-suit. Besides there is nothing to shew the insufficiency of the stamp now; and as you have agreed to a Commission to ascertain that very point, you cannot appeal against an order you have assented to.

Affirmed.

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Present, ROWE, C. J., TEMPLE and MORGAN, JJ.

No. 8,502. *D. C. Jaffna.* } *Ramen Chetty* v. *Casinader,* Modliar.

Where a judgment provides for the payment of the amount at a future date, the plaintiff may on default issue execution after a year from the date of the judgment, without a Rule to revive judgment.

Judgment had been entered in this case on the 9th January 1856, in the following terms:—

"That defendant should pay the plaintiff £1,500, in three instalments, viz. £500 on or before the 31st October, 1856; £500 on the 30th Jauary, 1858, and £500 on the 30th January, 1859."

The defendant having failed to pay the 1st instalment, which was due on the 31st October, 1856, the plaintiff on the 23rd February, 1857, (more than a year after the date of the Judgment) moved for writs of execution for the recovery that instalment. This motion was allowed by the Judge; but on the 9th March, 1857, the defendant moved that the writs sued out against him should be recalled and quashed, on the ground that they had been issued without judgment being revived in terms of the 35th clause of the Rules and Orders. The Judge thereupon ordered that the writs should be recalled and cancelled.

On appeal from this order.—

Mutukistna (*Coomarasamy* with him) appeared for the Appellants, but was not called upon; the Court being of opinion that the writ might issue without revival of judgment.

ROWE, C. J., quoted *Hitchcock* v. *Kemps*, 3 Ad. and E. 676.

The Judgment of the Supreme Court was as follows:—

"The Interlocutory order of the Court below is set aside, and the Writ of Execution should re-issue. The 35th Rule obviously refers to the ordinary class of cases where the Judgment has force

from the day it is pronounced, and where, from the lapse of a year, the presumption of payment arises. It cannot, however, apply to the present case where the judgment (dated 9th January, 1856) prescribes certain future periods of payment, to wit, £500 on the 31st October, 1856, £500 on the 30th January, 1858, and £500 on the 30th January, 1859, In such a case no Rule is required. According to the English practice, a practice which Lord Denman in *Hitchcocks* v. *Kemps*, 3. Ad. and E. 679, says, is well recognized, on which all persons have acted for a long series of years, and neither unreasonable nor inconvenient in itself, if the plaintiff has judgment with a *cessat executio*, or stay of execution, for a year, he may after the year take out his execution without a *scire facias* because the delay is by consent of parties and in favour of the defendant."

No. 16.298.
D. C. Galle. } *Assen Saibo* v. *P. J. Ludovici.*

The plaintiff in his libel stated that he was entitled to an eighth share of the Estate of the defendant's intestate. The estate has been originally administered by one *Sinne Lebbe Marcar*, who died before the Final Account; and administration *de bonis non*, was then granted to the present defendant. In an Account filed by *Sinne Lebbe Marcar*, there was an item of £87 10*s.* 5½*d.* brought into account as having been paid to plaintiff in 1842. This was disputed by the plaintiff, who claimed his 8th share out of the whole estate. To this Libel the defendant pleaded that he was not liable, as administrator, &c., to pay to the plaintiff the amount claimed in the libel, and also that the item referred to in the Account filed by *Sinne Lebbe Marcar* was sworn to by him, and was never contested by the plaintiff; and that he the defendant was not responsible for maladministration, if any, on the part of the said *Sinne Lebbe Marcar*. To this Answer the plaintiff demurred upon two grounds,—first, that the Answer did not admit, or deny, or confess and avoid, the cause of action set forth in the Libel; and secondly that the official capacity of the defendant being admitted, no issue of fact was raised for the plaintiff to reply to: and further that the Answer was, in other respects, bad, uncertain, informal, insufficient, and ill-pleaded. The District Judge over-ruled the Demurrer, holding that the Answer was sufficient. From this the plaintiff appealed.

1. In a suit against an Administrator a plea "that the defendant is not liable to pay the amount claimed in the Libel," and two other pleas wh. did not admit or deny the facts stated in the Libel, *held* insufficient, and set aside on demurrer.

2. The plaintiff having by pleading irrelevant matter, apparently led the defendant into error, costs were divided.

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W. Morgan for the Appellant.] The Answer is bad, There is no denial or admission of the allegations in the libel. It is true that no formality is necessary in pleading; but under the Rules and Orders, a clear denial or admission of the facts alleged, is required. The plaintiff's claim to 1-8th of the estate was neither denied nor admitted, and the correctness or incorrectness of the alleged payment contained in the Account filed by *Sinne Lebbe Marcar*, is left in equal uncertainty.

Dias for the Respondent.] Demurrers were always discouraged by this Court. Here there was a sufficient denial of the plaintiff's claim, which put him to the proof of his whole case. It is true that there is no express denial of the facts; but the Answer, in substance, amounts to that. The first paragraph of the Answer is a clear denial of the plaintiff's claim; for the non-liability of the defendant is equivalent to a denial of the plaintiff's claim so far as the defendant is concerned. All that follows might be struck ont as surplusage. The objection urged in this Court was neither taken in the Conrt below, nor in the Petition of Appeal; and the plaintiff, if sucessful here, is not entitled to his costs in either Court.

W. Morgan in reply.] A denial of the plaintiff's claim is insufficient; the facts which constituted that claim should have been distinctly admitted or denied. That has always been required by the Supreme Court. Under the general allegation that the Answer was in other respects bad, the Appellant is clearly entitled to costs, though the objection was not taken below.

Per Curiam:] The order of the Court below is set aside, and the demurrer upheld.

The defendant is bound by the Rules to "admit, or deny, or confess and avoid, all the material facts alleged by the plaintiff." The Answer is uncertain, for it does not appear therefrom whether the defendant denies altogether the plaintiff's claim, or merely avoids it by a plea of payment; and the plaintiff is entitled to demand that one or other issue be distinctly taken.

The defendant is allowed to amend his Answer. But as the plaintiff's libel contains much irrelevant matter respecting the Account of the original Administrator, which seems to have led to the error of the defendant in relying on that Account without taking a distinct issue, costs of the amendment and of this appeal are divided."

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Present, ROWE, C. J., TEMPLE and MORGAN, JJ.

No. 15,843.
D. C. Colombo. } *Silva* v. *Perera.*

Payment to the Plaintiff's Proctor, a sufficient discharge of a Judgment.

In this case the plaintiff had obtained Judgment against the defendant upon a Bond, issued execution thereon, and seized certain lands which were specially mortgaged under the Bond: On the day of sale, however, a third party claimed the land upon a Bill of Sale from the defendant, and he was directed by the Court to bring his action to establish his claim. An action was accordingly instituted, in which the claim was set aside with costs. Under these circumstances, with a view to preventing the property being sold in execution, the claimaint proposed to pay the amount of the Judgment on the Bond with costs of suit, amounting together to the sum of £36. This he paid into the hands of his Proctor to be paid over to the plaintiff, who had given his Proctor a receipt for the amount, to be delivered over to the claimant, on his paying the £36. This receipt was accordingly received by the Claimant on behalf of the defendant in the case. With respect to the appropriation of the £36, there was some arrangement between the plaintiff and the proctors on both sides. Part of this money, it appears, was detained by Mr. *Vanderstraaten* (the claimant's proctor) who held a writ against the plaintiff for that amount from the Court of Requests, and another sum was deducted by Mr. *Prins* (this plaintiff's proctor,) for his own costs. The plaintiff having had disputes with Mr *Prins* in respect of the sum received by him for his costs, and not being able to arrange matters with him, proceeded to re-issue the writ against the defendant for the full amount, to wit, £36. On the day of return the case was allowed to stand over on the motion of the defendant's proctor; and on a subsequent occasion the defendant appeared by his Advocate, who stated the above facts to the Court, offered, if necessary, to file affidavits to substantiate his statement, and also prayed the Court to fix a day for summarily inquiring into the facts stated by him. The Court, however, thought that such a proceeding was inadmissible, and ordered the writ to be re-issued against the defendant for the full amount of the plaintiff's claim. From this order the defendant appealed.

Dias, for the Apellant, produced two affidavits from Messrs. *Vanderstraaten* and *Prins*, and submitted that the statement made by him as counsel in the cause ought not to have been disregarded by the Court below. It was not to be presumed

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that counsel would make statements which he was not prepared to substantiate. Besides the defendant offered to file affidavits, but the Court would not allow him time to do so. The statement made by him was borne out by records, and the plaintiff's own receipt; and the usual course in such a case was to fix a day to inquire summarily into the matter. [MORGAN, J.—You ought to have had affidavits ready to support your statement. You took time to shew cause, and on the day fixed for shewing cause you produced no affidavits.] The plaintiff's receipt was conclusive, and upon the bare production of that receipt the rule should have been discharged. The defendant had nothing to do with the disputes between the plaintiff and his proctor, he having paid the whole of the money upon the plaintiff's receipt.

Rust, for the Respondent, filed an affidavit from the plaintiff, stating that his client had not received any part of the £36. It was true he had signed a receipt, a blank receipt as stated in his affidavit, but the money never came to him. It was admitted that Messrs. *Vanderstraaten* and *Prins* had deducted some £17, out of the £36; but the plaintiff had a right to his Writ of Execution till the whole of his Judgment was satisfied. [MORGAN, J.—What has the defendant, who paid the whole of the money, to do with the disputes between plaintiff and his proctor?] Mr. *Prins* was not the plaintiff's proctor in this case, and had no authority to receive the money. [MORGAN, J.—But he was his proctor in the connected case, and your client gave him the receipt to be given to defendant. TEMPLE, J.—If, as you say, a blank receipt was given by plaintiff to Mr. *Prins*, it shews that there was some arrangement between him and his proctor.]

Per Curiam:] The order of the District Court is set aside, and the Rule discharged; each party paying his own costs in the Court below and in Appeal.

The plaintiff's Receipt discharged the defendant from his liability, and he cannot be made answerable for the alleged default of the proctor.

No. 14,674, *D. C. Badulla* } *Koraremudianselagey* v. *Narangarawe*.

1 A Judgment for the land claimed by the plaintiff, is no bar to a second action for the mesne

The plaintiff had brought a case of ejectment against the defendant (No. 14,421) in respect of a certain field, and obtained judgment thereon. In the present case he sued for the recovery of £16 4*s*. being the value of the issues and profits of the same field during the time he was kept out of possession.

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The defendant in his Answer denied his liability to pay the sum claimed, or that the plaintiff had sustained any damages as alleged.

On the day of trial, the District Judge called upon the plaintiff "to argue the grounds on which he considered himself entitled to maintain his action;" and thereupon held that, as the Libel in the previous case claimed the profits of the field for which the plaintiff had got judgment, the present action was not maintainable; and that, as the judgment in that case did not allow any damages or profits, and had been acquiesced in by the plaintiff, it was a bar to the present claim.

The plaintiff appealed against this decision, on the ground that the judgment in the previous case did not deal with the question of damages, the plaintiff having produced evidence only in respect of his right and title to the land.

profits thereof, though claimed in the previous action,—the judgment being silent on that point, and no evidence having been given thereon.

2. The plaintiff will not however be entitled to the costs of the second action.

On Appeal,

Dias (*amicus curiæ*) mentioned No. 4,122, C. R. *Matura*, 28th January, 1851.

Per Curiam:] The order of the Court below is set aside, and the trial is to proceed. The defendant does not plead the judgment in 14,421 in bar, but takes issue with plaintiff on the merits. Furthermore, that judgment is quite silent as to the mesne profits claimed by the plaintiff, and cannot therefore operate as *res judicata*. The fact however of plaintiff not prosecuting his claim for mesne profits in No. 14,421, is a good reason why he should not be allowed his costs (in case he succeeds) of this second action so unnecessarily brought.

No. 19,550.
P. C. Jaffna. } *Sultan Markar* v. *Aronaselam* and others.

Where a Magistrate sentenced a prisoner to three months' imprisonment and a fine of £5, "and in default of payment to be imprisoned for 5 months more," the Supreme Court amended the sentence by striking out the latter part of it.

The defendants were charged with Assault; and after evidence heard were found guilty, and the first was sentenced to pay a fine of £5, and to imprisonment at hard labour for 3 months, and in default of payment to be imprisoned for 5 months more at hard labour; the second was fined £5, and the third was acquitted.

On Appeal by the defendants,

Mutlukistna, for the Appellants.] I will not draw your Lordships' attention to the excessive punishment, because the matter is not one on which an appeal lies. But in respect of the sentence, the Magistrate has clearly exceeded his jurisdiction. He could not award the *further* imprisonment. The course he ought to have pursued is laid down in Ordinance No. 4 of 1841,

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§ 21; and the Ordinance No. 6 of 1855. cl. 5, makes the same provision. It is not until distress issued and a return thereon, that the Magistrate can commit the defendant to further imprisonment in respect of the fine. [TEMPLE, J.—The Magistrate only did in anticipation what he would have been called upon to do hereafter. It is no part of the sentence.] I submit the Magistrate intended it to be a part of the sentence. The sentence against the second defendant in the same case is only a fine of £5, without the additional clause respecting imprisonment to follow in case of default. What part of the sentence will your Lordships set aside? [TEMPLE, J.—The question is whether it is a part of the sentence, or a mere provision in case of a future default?] The course in a case of default is clearly laid down in § 4 and 5. What is the default contemplated? The Magistrate sentences him to five months' imprisonment in default of paying £5. Supposing the prisoner pays £4 19s. and a shilling only remains due, he will still be in default, and be liable to five months' imprisonment. [ROWE, C. J.—Look at § 11 of No. 7 of 1854: it gives us power to "vary" the sentence according to Law.] According to Law. There is a case in which your Lordships held that an excessive punishment vitiates the entire sentence. [ROWE, C J.—The Magistrate fines the prisoner £5, and three months imprisonment certain. Then he goes on to add five months more in case of a default in paying the fine. The former part of the sentence is perfectly correct, the latter is not. We may vary the sentence by striking out the latter part. And if we do so how can we be said to prejudice the substantial rights of the prisoner? We do not interfere with the merits of the case, or the discretion of the Magistrate; but we only strike out the surplusage in the sentence. The punishment I admit is excessive, but that we cannot interfere with. The rest of the sentence is surplusage Suppose the defendant is detained,—not on the regular proceeding under the Ordinance,—but under that part of the sentence which is irregular, he has got a good case for a *Habeas Corpus*.]

Conviction *affirmed*; but the sentence against the first defendant was amended by striking out all except "that first accused is sentenced to be imprisoned at hard labour for three months, and to pay a fine of £5."

No. 1,012, *D. C. Galle.* } *Abeyawardene* v. *Wirasekere.*

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In a contest for administration, the better course is to fix an early day for determining the right to administration, instead of appointing an administrator *pendente lite*.

In this case a Will was produced by one of the Executors therein named, and application was made for Probate on the 1st May, 1855. One of the heirs of the deceased entered a *caveat* and filed Allegations. Pleadings were filed by both parties, and the case was set down for trial. There were several postponements in the case, and nothing was done till 1857, when a person calling himself a creditor of the deceased filed an application and prayed that administration *pendente lite* might be granted to the Secretary of the Court, or to such other person as the Court should consider fit. This application was founded upon two grounds,—first that the applicant had no person to proceed against, to enforce his claim; and secondly, that the property of the deceased was in jeopardy. This application was resisted by the opponent, on the ground that no such administration was necessary. The Court, however, overruled his objection, and granted administration *pendente lite* to the Secretary of the Court: and from this order the opponent appealed.

Dias, for the Appellant, submitted that no such administration was necessary. In the first place, a creditor had no right to make such an application. [MORGAN, J.—I cannot agree with you.] If he had, a strong necessity for such a step must be shewn. The contest between the executors and the opponent could be decided by the Court without delay. If the case was fixed for a distant date, the Court would entertain a motion to advance it. If the property of the estate was really in danger, and it became absolutely necessary to take care of it pending the suit, the 12th clause of Section IV. of the Rules and Orders has provided for such an extreme case, by authorising the Court to issue letters *ad colligenda*, which is a less expensive proceeding than granting a limited administration. There was no evidence, not even an affidavit before the Court, shewing any necessity for administration.

Per Curiam:] The order of the Court below is set aside, and it is ordered that the case be set down peremptorily for trial within a month from this date, taking precedence over other cases; costs of this appeal and of the proceedings in the District Court to be borne by the applicant and opponent personally.

The proceedings in this case have been very dilatory. On the 1st May, 1855, the Will was produced for Probate. Contrary to the Rules, and without any explanation to account for the delay, allegations in opposition thereto were received on the 17th No-

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vember, 1855. The case was then set down for trial on the 16th September, 1856, and on that day put off, for alleged want of time, to the 17th September, 1857. On the 17th March. the Court, at the instance of a creditor, who very properly complained of the delay, appointed the Secretary Administrator *pendente lite*, against which the present appeal is lodged.

Such an appointment. involving as it necessarily does much expense to the heirs, should not have been made unless delay, in finally determining the case, was unavoidable. The simpler course would have been to have advanced the trial. In Colombo, suits involving contests for Administration or Probate are not entered in the Trial Roll, but taken up at an early date, certainly within a month after the parties join issue,—having precedence over other suits. To this precedence such suits are entitled, regard being had to the interests of heirs (often minors) and creditors, which might otherwise be prejudiced by the delay. The Supreme Court would suggest the propriety of a like practice being followed by other District Courts.

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Present, Rowe, C. J., Temple and Morgan, J. J.

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No. 12,781, *P. C. Kaigalle.* } *Evatt* v. *Perera.*

A defendant, charged under the Toll-Ordinance with detaining a cart alleged to be exempt from toll, pleaded *not guilty*, and stated that having asked for and seen the Pass, he allowed the cart to proceed, and did not detain it. The defendant being convicted on evidence of the detention only: *Held* that no evidence was ne-

The defendant in this case was charged with "wilfully subjecting the plaintiff's cart with baggage, to a detention of two hours, whereas the same was exempted from toll; and also with taking one shilling as toll-money, whereas the same was not payable; in breach of the 11th clause of the Ordinance No. 9 of 1845."

The defendant pleaded *Not Guilty.*

At the close of the plaintiff's examination, the defendant made a statement as follows: "I deny the charge. I asked the carter for the pass about 10 or 11 o'clock at night; the carter said the cart belonged to Mr. *Evatt*, when he shewed the pass, and I passed the cart. I delayed the cart only one-fifth of an hour."

Evidence was then entered into as to the detention, and the payment of the shilling to the defendant. And the Magistrate thereupon found the defendant guilty, and sentenced him to pay a fine of £2.

On appeal against this sentence,

Rust for the defendant and appellant.] There is no evidence

of the plaintiff being an Officer on duty, under clause 18 of the Ordinance. He ought to have proved that he was entitled to the exemption; and in the absence of that proof, the defendant is clearly not guilty; for it is only the fact of the plaintiff being entitled to the exemption, which could have rendered the detention of his cart unlawful. [MORGAN, J.—You admitted the exemption; but denied the detention.] We pleaded *not guilty*; and it was for the plaintiff to have proved his whole case. [MORGAN, J.—You said you were not guilty, *because* you did not detain.] We said we were *not guilty*, and *further we did not detain*. Under the plea of *not guilty*, we were entitled to proof of the plaintiff's exemption, over and above the proof of the detention which we challenged by our subsequent statement.

Sed per Curiam,—Affirmed.

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cessary to prove the exemption.

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

No. 18,928, *C. R. Jaffna.* } *Murugaser Ayer* v. *Cathergamer* and another.

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A Court of Requests cannot commit for Contempt, except where the Contempt is *before* the Court.

A petition to the Supreme Court, *bona fide* seeking redress against the proceedings of a Commissioner, is a privileged communication, and cannot be treated as a Contempt of the Court of Requests.

This case came up on the petition of Mr. *Robert Brodie*, appealing against his committal by the Commissioner of the Court of Requests on a charge of Contempt.

Muttukistna appeared for the Appellant, and argued the case at great length.

The facts and arguments are fully set out in the Judgment, which is as follows:—

ROWE, C. J. delivered judgment:] This case has received from this Court the grave consideration due to its public importance.

The extent of the power vested in a Commissioner of the Court of Requests to commit for contempt, the privileged right of appeal from his decision, the vindication of the authority of the Supreme Court in the exercise of that appellate jurisdiction and above all the liberty of the subject, and the redress which the law affords to the humblest as well as the highest of those subjects, where that liberty has been unjustly abridged, have been all passed in review before us; and as the Commissioner did not avail himself, as he might have done, of legal assistance, we have not failed in the course of the argument addressed to us by the Appellant's Counsel to moot ourselves all such points as required to be thoroughly discussed in the interests of even-handed justice.

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The main present question for consideration is, whether an order made by Mr. *Purcell*, the Commissioner of the Court of Requests at Jaffna, on the 17th April last, wherein he adjudged *Robert Brodie* to be guilty of a contempt of that Court, in writing and forwarding to the Supreme Court of this Island a Petition of date the 27th February last, and whereby he sentenced the said *Robert Brodie* to be imprisoned in the Jail of Jaffna for fourteen days, is a legal order?

But for the proper understanding of the case it is essential to revert to the earlier proceedings which led to the transmission by *Brodie* of that Petition.

It appears then from the Records of the Jaffna Court of Requests, and from the documents and petitions filed or presented in the case, on all of which the Commissioner has now had full power of commenting, and on some of which he has commented, that on the 26th January last Mr. *Purcell*, as Commissioner of the Court of Requests at Jaffna, recorded in his Court a judgment in the case of *Murugaser Ayer* vs. *Cathergamer*, against which judgment a Petition of Appeal was filed on the 2nd February by the defendant; the drawer of that petition, as evinced by the signature thereunto affixed, was *Robert Brodie*. To that petition the Commissioner took exception, and an order was issued by him on the same day requiring *Brodie* to appear and answer for a contempt of Court in making in it the following statement:—"And the Commissioner, to get rid of these cases" [it had been alleged in the petition that upwards of a hundred had been fixed for hearing on that day, owing to a long absence of the Commissioner,] "paid less attention than he would have done at other times." On the 3rd February, *Brodie* appeared in pursuance of that order and handed in another petition to the Commissioner himself, alleging that the petition in which the above statement, so excepted to, occurred, was a Petition addressed to the Judges of the Supreme Court, and lodged, as prescribed by the Ordinance, with the Clerk of the Court of Requests, simply for transmission to the Supreme Court; and praying that the Commissioner would not interpose in the matter, as his Court had no right to interfere with a Petition of Appeal.

Notwithstanding this, as we think, warrantable exposition of the law, by this Petitioner, the Commissioner forthwith committed *Brodie* to the custody of the Fiscal to be brought up the next day for sentence,—having further, according to an averment in *Brodie's* subsequent petition of the 6th February (which averment is not negatived in any comment of the Commissioner,) refused to take bail for his appearance.

On the 4th February, *Brodie*, having been accordingly brought up, was sentenced, as the Commissioner records, "in pursuance of the 15th clause of the Ordinance No. 10 of 1843, to be imprisoned at hard labour in the Jail of Jaffna for 14 days."

On the 5th February, the following entry appears in the Records of the Commissioner's Court.

"With reference to the sentence of yesterday, the Magistrate perceiving that he has inadvertently imposed hard labour, which the Ordinance does not permit, it is ordered that the Fiscal do stay so much of the sentence as relates to hard labour.

"N.B.—The foregoing order was in the hands of the Fiscal before the prisoner was called on to perform hard labour."

On the 6th of February, *Brodie*, at that time a prisoner in the Jail at Jaffna, caused to be lodged in the Commissioner's Court a Petition of Appeal to the Supreme Court, setting forth, as we feel bound to say, in temperate but firm language, the circumstances which had led to his imprisonment, and praying the Supreme Court to reverse the sentence of the Court below.

This petition appears not to have reached the Registry of the Supreme Court at Colombo until the 15th February, 1857, and two of the Judges being at that time absent on their respective circuits, no immediate hearing of the case could be had.

In the meantime *Brodie*, having fulfilled the period of his imprisonment, transmitted direct to the Registrar of the Supreme Court a Supplementary petition, dated the 27th February, being the petition in respect of which he was subsequently committed a second time for contempt; which committal is the immediate subject of the present appeal.

On the 24th March, the first appeal came on for hearing in my absence on circuit, before my Brothers *Temple* and *Morgan*, and although this petition of the 7th February was then, together with all other documents in the case, duly brought before them by the Officers of the Court, it is worthy of remark that they, feeling doubtless that the Commissioner had at that time no opportunity of seeing and answering the very serious allegations therein contained, abstained altogether in their judgment from any comment thereon. They confine themselves, in their consideration of the legality of *Brodie's* first committal, entirely to the matter stated in his first petition of the 6th February, and set aside the order for that committal in language as moderate as the admonition therein conveyed to the Commissioner ought to have been salutary. After dealing with the facts and the law of the case, the judgment concludes thus:

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"Too much caution and forbearance cannot be evinced by those appointed to administer justice, in cases of contempt where the Court acts in vindication of its own authority, and where there is danger of the Judge's feelings influencing his judgment."

Unhappily for the decencies of justice, this sound advice was lost on the Commissioner; for no sooner is this judgment, together with the three accompanying petitions transmitted to him, on the 15th April, than we find him ordering *Brodie* to attend his Court on the 16th, on which day, bail being again refused, he is again committed. On the 17th, being again brought up, he is adjudged guilty of contempt in writing and forwarding to the Supreme Court the supplementary petition of the 27th February, sentenced to be imprisoned for 14 days, and finally, by the order of Mr. *Purcell*, then and there handcuffed and so conducted to the public Jail at Jaffna.

Against that adjudication and order *Brodie* has now in his petition of the 20th April appealed, praying that the judgment of the Court below, dated the 17th April, be set aside, and for such further relief as this Court shall deem meet.

In reviewing this petition, we come again and at once to the question, were the adjudication and order of the 17th April warranted by Law? And that leads to the immediate consideration of the extent of the power of committing for Contempt vested in a Commissioner of the Court of Requests.

Now, that Courts of Record generally have a power of punishing for contempt by fine and imprisonment, is an axiom of the English Common Law as old as the constitution of the Courts themselves. *Hawkins*, Pleas of the Crown, C. 22. *Comyn's* Digest, 'Attachment,' and the Civil Law, the Dutch Law, the Law of France and of America, although the punishment varies in degree, invest the Judge with a similar power.

A contempt thus promptly punishable consists for the most part in contumelious or contumacious behaviour, by words or acts, in the face, or in the immediate precincts, of the Court. "Every insult," says Lord Cottenham, "offered to a Judge in the exercise of the duties of his office, is a Contempt, (*Charlton's* case, 2 *Mylne* and *Craig*, 239;) any thing, in short, to use the language of Blackstone, "which demonstrates a gross want of that regard and respect to which Courts of Justice are entitled, and of which if they are once deprived, their authority so necessary for the good order of the kingdom, is entirely lost amongst the people; for laws without competent authority to secure their adjudication from disobedience and contempt, would be vain and nugatory." 4 Commentaries, 286.

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Further upon the same principle, in the superior Courts of Record is vested power to fine and imprison not only for contempts committed in the face or in the precincts of the Court; but for contempt of, or disobedience to, the process and judgments of such Courts, wherever within the realm and whenever committed, and for the publication anywhere within the realm of defamatory or libellous matter touching the Court itself, or any of its Judges when acting in their judicial capacity.—*The King* v. *Wiatt*, 8 Modern Reports, 123; *The King* v. *Almon*, Wilmot's Notes, 243. "It is evident," says Mr. Justice Erle "that although not published whilst the Court is sitting, such defamatory matter may have a strong tendency to paralyse the authority of the Court." (*Crawford's* case, 13 Queen's Bench.) Again Lord Hardwicke, when committing the Editor of the Evening Post for a publication amounting to a contempt, observes that "nothing can be more incumbent on Courts of Justice than to preserve their proceedings from being mis-represented." 2 *Atkyns*, 469. And finally we thus find the Court of King's Bench laying down at once the principle of Law, and the principle of action, in language which ought never to be absent from the mind of one on whom are cast the responsibilities of the judicial office.

"It is not on his own account," says, Mr. Justice *Holroyd*, "that the Judge commits, for that is a consideration which should never enter his mind. But though he may despise the insult, it is a duty which he owes to the station to which he belongs, not to suffer those things to pass which will make him despicable in the eyes of others. It is his duty to support the dignity of his station and uphold the Law, so that in his person at least, it shall not be infringed." *R.* v. *Dawson*, 4 Barnwell and Alderson, 329.

On which case and on the other authorities on this subject a recent learned Editor of Blackstone remarks, "In England, owing as well to judicial discretion and forbearance, as to the universal and deep-seated respect entertained for the administration of justice, the exercise of the power under consideration is very rare; but it is well that its existence should be known;"—(Warren's Blackstone, 541;) a sentiment in the justice of which this Bench entirely concurs.

It must be observed, nevertheless, that it is in the Judges of the Superior Courts only, as in men whose education, experience and habitual self-control, exercised daily in the face of the public, the Bar and the Press, may be presumed to qualify them to be safe depositories of such power, that this large discretion in com-

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mitting for contempt is vested. To inferior Courts the Common Law has conceded a more restricted jurisdiction. Hawkins, Pleas of the Crown, C. 22 ; *R.* v. *Revel*, Strange, p. 420 ; 2. Salkeld, 697 ; *R.* v. *Clements*, 4 Barnwell and Alderson, 218, *R.* v. *Bartlett*, 2 Sessions Cases, 176.

But in the case of a Comissioner of the Court of Requests, it is unnecessary to resort to such authorities in order to ascertain the limits of his power. That Office is one of recent creation in this Colony ; and we think that as it is by Ordinance alone that the Commissioner is made a Judge of a Court of Record, so his authority as such Judge has been purposely limited by Ordinance also. According to this view of the matter it is clear on reference to Ordinance No. 10 of 1843 § 15, that with the sole exception of a witness who has failed to attend in pursuance of a summons, and who for such failure may be attached, the only instances in which the Commissioner is thereby empowered to fine or imprison, are in the case of persons guilty of any contempt or prevarication *before* the Court.

Now the act for which *Brodie* was imprisoned on this occasion, was, as recorded by the Commissioner, for writing and forwarding to the Supreme Court the petition of the 27th February ; and inasmuch as that petition was sent direct to the Registrar of the Supreme Court by post, the publication of that petition in Colombo, certainly does not fall within the provision of the Ordinance. We are unanimously of opinion, therefore, that if the matter rested on this ground alone, the order for imprisonment of the 17th of April is illegal.

On reference, however, to a remark endorsed by the Commissioner on the proceeding, we find him stating that the petition of the 27th February was a Libel reflecting upon the administration of Justice in a minor Court,—which having been clandestinely forwarded to the Court above and returned to him to be filed as of Record—he, as the Judge of the Minor Court, had a right at Common Law to treat the matter as a contempt, and punish summarily, or to call upon the Crown Prosecutor to proceed by Indictment.

Now as the Commissioner has put forward these observations as his justification, we feel compelled by the course which he has thus adopted, to go further into the case and consider the validity of this defence.

It is perfectly clear then that a Petition or Memorial. although containing defamatory statements, if addressed by a party aggrieved to a public functionary for the purpose of obtaining redress,

—the party honestly believing that such functionary is empowered to give that redress,—is a privileged communication; (see *Fairman* v. *Jones*, 5 Barnwell and Alderson, p. 642; *Harrison* v. *Bush*, 1 Tur. N. S. 846.) So again a Petition presented to a Committee of the House of Commons, containing criminating matter, was held privileged, the Committee having power to enquire, although no power to give redress to the Petitioner;—a decision afterwards confirmed by the Queen's Bench. *Lake* v. *King*, 1 William Saunders, 181.

The question then arises,—Does *Brodie's* Petition of the 27th February, fall within this class of cases? And this makes it necessary to consider the contents of that petition, and the grounds for its presentation to the Supreme Court. According to that statement, after the Commissioner had committed the petitioner on the 4th February to the Gaol of Jaffna at *hard labour* (a sentence subsequently admitted by himself to be, as far as the hard labour was concerned, illegal,) the Senior Member of the Jaffna Bar was deputed by his brethren to represent to the Commissioner the illegality of that sentence. The Commissioner, it is stated, "was at first relentless; but on second consideration stayed the hard labour, conditionally, that nothing against the Commissioner be stated in the Petition of Appeal;"—and the petition goes on to aver "that the former petition of the 6th February, was accordingly carefully drawn without any detail of what transpired on the matter of the first contempt between the Commissioner and the Petitioner." In corroboration of which averment a cancelled paper is appended to this petition, being, as it is said, a petition of appeal, which was struck out in consequence of this compromise.

Now the whole of these statements in the petition of the 27th February, have been, since the 15th April last, fully known to the Commissioner; and as he commented to a certain extent on that petition, but passed over in silence this most material allegation, we are driven to the painful conclusion that it is true, that he, sitting as a Judge in a matter affecting himself personally, and sensible that he had imposed on *Brodie* a sentence (of hard labour namely,) not warranted by Law, consented to stay that part of the sentence on a condition only which restricted the appellant from setting forth the whole extent of his grievance in his Petition of Appeal.

That it was essential for the purposes of Justice that these facts should be brought under the notice of the Supreme Court, whilst the appeal was still pending, there can be no manner of

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doubt. We think, therefore, that under the special circumstances of the case, which shew that the petitioner had been thus prevented from stating his whole case in his original petition, and that the ordinary channel of transmission through the Commissioner's Court, as by Law provided, was thus virtually closed against him, he was justified, on his liberation from the Jaffna Gaol, in sending the Petition of the 27th February direct to the Supreme Court; and we are further of opinion that, as that petition embodies a statement of facts relevant to the issue then pending before that Court, and made by a party aggrieved, then *bona fide* seeking redress from the tribunal legally empowered to redress his grievance, the petition was in point of Law a privileged communication; and that the Commissioner, on the receipt of that petition, was not justified either by Common Law or by the Ordinance, in treating it as a contempt and committing the petitioner.

Having thus disposed of the important legal question submitted for our consideration, we wish it distinctly to be understood that this Court is by no means inclined to encourage, as a general practice, the presentation of Supplemental Petitions, when free and unconditional opportunity is given, as should invariably be the case, for the full statement of all that is necessary for this Court to know in the original Petition of Appeal; still less could it be tolerated that such a supplemental petition should be presented for the mere purpose of attempting by libellous matter to prejudice this Court against a Respondent.

We have no hesitation in saying that if statements put forward in that manner should be proved to be false, and that to the knowledge of the party making them, we should treat it as a malicious act of a contumelious stamp to mislead this Court itself, and punish the offender, as we undoubtedly have the power of doing, by ourselves committing him for Contempt. And this leads us to remark with regret that, whilst we make every allowance for the feelings of a man considering himself to have been unjustly imprisoned, and who, according to our judgment, had been unjustly imprisoned, we think some of the expressions in the Petition of the 27th February, intemperate and very reprehensible. It is stated that *Brodie* is a person to whom suitors resort for the purpose of getting petitions drawn. It is essential therefore that he, as well as all others frequenting Courts of Law, should understand that the cause of the Client is damaged, rather than advanced, by intemperate language; and that, although we have, in this instance, felt ourselves bound to vindicate in his person the free right of petition, it will be equally our duty to

confirm the condign punishment of all such as personally insult a Judge or degrade a Court of Justice by making it an arena for the display of their private antipathies. 1857. *June* 3.

On the conduct of the Commissi ner himself throughout these transactions we should willingly have been spared the pain of commenting; but, appealed to as we have been publicly in this case, we feel that no private or personal considerations ought to prevent our declaring, unequivocally from this Bench, our disapprobation of the whole tenor of his proceedings; and we more especially characterise as signal departures from the high tone and temperance which ought to characterise the judicial office:— firstly, his attempt to shackle the free right of Appeal by prohibiting *Brodie* from inserting in his first Petiti n any averments personal to him, the Commissioner; secondly, his precipitate committing of *Brodie* a second time, in perverse contempt of the mild caution of the Supreme Court, with the moral certainty moreover, that owing to the distance of Jaffna from Colombo, no appeal could possibly save him from having to endure the greater portion of the fourteen days' imprisonment; and lastly, the oppressive harshness with which (by virtue, as he records, of his power as a Magistrate, for as a Commissioner he certainly had no such power,) he placed handcuffs on his prisoner, and caused him to be thus ignominiously conducted to the Gaol of Jaffna. In that gaol it has been this man's great misfortune to have had twice to endure, unjustly and illegally, a period of fourteen days' imprisonment. The delay incidental to postal communication in this country and the absence of the Judges on circuit, made it impossible for this Court to interfere in time for his liberation on the first occasion; whilst on the second, we further remark with strong animadversion, that the Commissioner on the very day after he had committed the prisoner, when he actually anticipated, as appears from a passage in his judgment, that a Petition of Appeal to this Court would be immediately lodged, sent off all the documents in the case to the Colonial Secretary at Kandy, thereby not only depriving the Petitioner of his undoubted right to have them transmitted forthwith together with the Petition to Supreme Court, with a view to his immediate liberation, but also virtually attempting to substitute, on a pure question of law, the udgment of the Executive for that of the Supreme Court, the legally constituted tribunal. This attempt, which we are b und to say was immediately discountenanced in the highest quarter, eems to have originated, as we regret to observe, in the same spirit of defiance to all propriety, which characterises the lan-

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guage towards this Court in which the Commissioner has embodied his judgment of the 17th of April. We feel that the most severe visitation which could be inflicted on him as a Lawyer and a Judge in respect of that document, would be to give it general publicity by its insertion in extenso in this judgment. We think it most consistent,however, with the decencies of justice, to abstain from such an exposure; sensible that the dignity of this Bench will be best consulted by simply observing that, although Mr. Purcell has by such language clearly laid himself open to punishment for a grave contempt of the Supreme Legal Tribunal of this Island, we are content to take a more merciful view of his case than he did of that of Robert Brodie.

We feel that the well-established confidence and respect which has time out of mind attached to this Court, makes it unnecessary for us to resort to a more extreme course; but we also feel that we should be ill-deserving of that confidence and respect, as the vindicators of the right of Petition and the guardians of the liberty of the subject, if we did not publicly state for the information of the people of this country, that for such wrongs as have been endured by this Petitioner, the ordinary tribunals of this land are open and competent.

It is clear law that altho' a Judge of Record is not liable for any act done by him in the exercise of his judicial functions, provided that act be done within the scope of his jurisdiction, he is answerable for any act done by his command when he has no jurisdiction, and where he is not misinformed as to the facts on which his jurisdiction depends. *Holden* v. *Smith*, 14 Queen's Bench, 841.

Sitting, however, as we on this occasion do, as a Court of Appeal, all that remains for us is to declare that the Judgment and Order of the Commissioner of the Court of Requests of Jaffna of the 17th April last, be and the same is hereby set aside.

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

No. 10,976, *J. P. Colombo.* } *Apolonchyhamy* v. *Mayedonegey Tinna* and others.

The S. C. will not grant a Mandamus Procedendo against a J. P. where it appears that he has partly heard evidence, and dismissed the complaint; although such dismissal proceeded on a misconception of the Law.

Lorenz, on behalf of the Complainant, moved for a *Mandamus* to the Justice of the Peace for Colombo, to compel him to hear evidence on the complaint. On the 22nd May, the Complainant swore an affidavit charging the defendants with *Abduction*, in that they did "on the 21st instant, unlawfully and forcibly enter into her compound, and forcibly carry away her daughter *Innohamy*, against her will and consent;" and "charging the defendants with *Abduction*." The Justice thereupon issued a warrant, directing that *Innohamy* and the defendants should be brought up; and on the 27th May, the defendants being brought up, the Magistrate proceeded to examine a witness (a *Vidahn*,) who stated that he had accompanied the Police Vidhan who was entrusted with the warrant, and had found the 1st defendant and *Innohamy* in a *madua* on the side of the public road to Kandy; that *Innohamy*, on being questioned in the presence of the 1st defendant, said "I came of my own accord, and no force was used;" and that it seemed to him that she had not been forced away. Hereupon the Justice made the following entry:—

"There is no use in going further into this case. *Innohamy* said she had gone with the 1st defendant of her own accord. She said so under circumstances when she was likely to speak the truth. She now says that she does not wish to go with him. She is advised to go home with her mother.

"Case struck off.

J. DALZIEL, J. P."

Lorenz] The Complainant produces affidavits in support of her application, from which it will be seen that she had several witnesses in attendance before the Justice, to prove the abduction; but that the Justice after hearing the evidence of the Vidhan, refused to hear any further evidence. The record itself bears out this statement; for the Justice seems apparently to have been led away by the fact that the young woman *had consented*, and to have concluded from that, that there was no crime committed. It is quite clear that he was wrong on the Law; (V. d. Keessel, th. 72;) and that he has confounded the crime of Abduction with that of Rape. [ROWE, C J.—Perhaps the Justice was not made aware of the distinction. If he were applied to again, he may perhaps take up the matter and commit the de-

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fendant to trial. But can we compel him to proceed on with the present complaint ?] The Supreme Court has power under the Charter, § 36, to issue a *Mandamus Procedendo* ; and this is precisely a case where a Mandamus should issue ; for the Justice having a duty to perform, has positively declined to perform the duty on a mis-conception of the Law. [TEMPLE, J.—Why don't you go to another Justice of the Peace ?] Because, it is submitted, Mr. *Dalziel* has commenced to investigate, and is bound to go on with the complaint. Ordinance No. 15 of 1843, cl. 24. [ROWE, C. J.—But does a Mandamus lie where a Justice has partly heard a complaint, and dismissed it on the evidence before him ?] He has virtually refused to hear the complaint, because he thought the crime did not amount to Abduction. [ROWE, C. J. – Of course he was wrong there :—but still he had also some evidence of the fact before him. The rule on the subject is that where a Justice refuses to entertain the complaint on the ground of want of jurisdiction or the like, a Mandamus will issue ; but not where he has heard evidence in part ; for the Court is then unable to say whether the Justice based his decision on the fact or the law.] Here the Justice expressly goes upon the *law*.

Cur. adv. vult.

On a subsequent day (June 6,) *Lorenz* quoted *R.* v. *Keesteven*, 3 Q. B. 810 ; *R.* v. *Cumberland* (Justices,) 4 Ad. and El. 695.

ROWE, C. J. referred to *R.* v. *Bridgman*, 15 L. J. M. C. 44. The Justice is clearly wrong on the law ; but can we interfere ? He has partially enquired into the case ; and (no doubt incorrectly) has dismissed the case ; but if we are to set these Justices right in the law, in all cases where after entering upon evidence they come to a wrong conclusion, we shall be constituting ourselves a Court of Appeal in all points in preliminary investigations before a Justice.

Mandamus refused.

No. 8,993, *D. C. Jaffna.* } *Mohamadoe Ibrahim* v. *Cadeachepulle.*

1. Objections founded on the Stamp Laws can be taken by plea only where the instrument is not capable of being stamped before trial.

Libel :—That the defendant, on the marriage of his daughter with the plaintiff, promised to give him as *Kaykooly* £11 5*s*, and for and an account of the said *Kaykooly*, agreed and undertook to make over and give to the plaintiff, a piece of land called *Panankytotem*, as appeared by a *Cadotam* deed ; that defendant failed to make over the said land to the plaintiff, and so became liable to make over to the plaintiff the said amount of £11 5*s*., which the

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2. Where by a *Cadotam*, the *Kaycooly* was fixed at £11 5*s*. and the defendant agreed to transfer a piece of land on account of it, *Held* that an action was maintainable for the £11 5*s*. though the *Cadotam* was not notarial.

defendant refused to do. To this Libel the defendant demurred on the following grounds:—1. That the deed upon which the plaintiff founds his action is invalid, as it is not stamped under the Ordinance No. 19 of 1852; and that therefore it cannot be given in evidence, as provided for by the 5th cl. of the said Ordinance; 2. That the deed is invalid, because it is not executed in terms of the 2nd cl. of the Ordinance No. 7 of 1840, though it purports to make over and give to the plaintiff a piece of land, and that the libel is in other respects informal, irregular and insufficient.

After hearing argument, the Court below pronounced the following judgment:—"The Court acting on the decision (*Marshall*, p. 636) quoted by plaintiff's Proctor, decides that it is not necessary that the *Cadotam* should be stamped,—neither is it necessary that it should have been executed before a Notary for the purposes of this action. The action is for *Cingoal* (money), and not land. The demurrer is therefore dismissed with costs."

On appeal against this Judgment, *Comaraswamy* for defendant and appellant.] The Ordinance No. 19 of 1852, requires that every agreement or contract should be stamped; again, cl. 5 enacts that "no instrument whatsoever liable to be stamped shall be pleaded or given in evidence in any Court, or admitted in any Court to be good, useful, or available in law or equity, unless the same be duly stamped." The agreement in question, which is a *Cadotam*, or Mohamedan Marriage-Contract, and which purports to settle and transfer property, falls clearly under the provision of the Ordinance. The words of the exemption under "Agreements," viz, "agreements to marry, *not containing any settlement or transfer of property*," shew that contracts of this nature must be stamped to have any effect at all. [Rowe, C. J.—We are agreed that this document must be stamped. Temple, J.—But the original is not produced in Court; it is only a copy that is filed. What is there to shew the original *Cadotam* is not stamped?] It has been assumed both by the Proctors engaged in the cause, and the Judge who decided it, that the original is not stamped; else where is the necessity for either contending or deciding that the *Cadotam* does not require to be stamped? [Temple, J.—You ought to have had the original produced in Court; and when that is produced, it would be competent for you to object to its admissibility in evidence. You must not raise any objections to it at the present stage of the case, nor demur to it, as you have done.] The Ordinance No. 19 of 1852 does not state merely that an unstamped document is

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inadmissable in evidence, but it provides further that such a document cannot be *pleaded*, and that it is not useful for any purpose whatever. Here the entire action is based on the *Cadotam*; and if this fails, the action must fall to the ground. Your Lordships in a case from Kandy held that when a document, on which the action is brought, is unstamped, it could be demurred to. [MORGAN, J.—There it was competent to demur, because the Promissory Note, which was the foundation of the action, was not stamped, and could not have been stamped under any circumstances. See § 9 of the Stamp Ordinance. There is nothing to prevent the plaintiff from getting the proper stamp affixed to the original *Cadotam* against the day of trial. In the case from Kandy, the original Note was filed; but here a copy only of the *Cadotam* is produced.] The *Cadotam* forms part and parcel of the public Registry. Hence the difficulty of filing it with the Libel. Secondly, as to the Ordinance of Frauds. According to the tenor of the document, there is no promise whatever to pay money. The only promise or agreement is to transfer a piece of land. The *Kaycooly*, or marriage gift, from the defendant to the plaintiff is only estimated at 150 dollars. There is no contract to pay this 150 dollars; but an agreement to assign over a piece of land in lieu of it. Therefore, no action can be maintained for the money; and none for the land, because the agreement is not notarial. The action is not here for money, other than money due as damages arising from the failure of the covenant to transfer land; nor can the defendant be compelled to pay any damages for not fulfilling a contract, which by law is void. [MORGAN, J.—You cannot take advantage of your own wrong. The action is maintainable for money, the value of land, if not for the land itself.] It was the business of the plaintiff to see that the contract, by which something was stipulated in his favor was a valid instrument. The defendant has committed no wrong. She only avails herself of a provision of the law.

Per Curiam:] As to the first ground of demurrer, viz. the want of stamps, the Supreme Court considers that objections founded on the Stamp-Laws should only be taken by plea or demurrer, in cases where the instrument is not capable of being made good by being stamped before trial. (*Bradley* v. *Bardsley*, 15 L. J. (N.S.) Ex. 115; *Tilsley* on Stamp Laws, p. 214.) The Agreement declared upon in this case is not one of this description, and it may be stamped before trial. The fact referred to in the case quoted in Marshall, 636-7, that *Cadotams* are in prac-

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tice not stamped, may be a very good reason to entitle a party to remission of the penalty, but cannot be allowed to weigh against the stringent provisions of the Ordinance No. 12 of 1852.

The Supreme Court further considers that although the plaintiff could not recover the land given as *Kaycooly*, inasmuch as the instrument granting it is not notarial, still that as regards the 150 Rds. given as *Kaycooly* it is valid.—*Affirmed.*

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Present Rowe. C. J., Temple and Morgan, J. J.

No. 42,343, *P. C. Colombo.* } *Brampy Appoohamy* v. *Perera.*

A Bullock-cart is a vehicle for passengers, and as such liable to toll.

In this case the question was whether a cart in which 5 persons were travelling, constituted a *loaded* cart under the Ordinance No. 9 of 1845. The Court below had fined the defendant for having exacted from the plaintiff one shilling for such cart, as toll at the Cotta Bridge; and against this sentence the defendant now appealed

Rust for the Appellant.] The Police Magistrate of Colombo in No. 26,386, Civ. Min. 13th September, 1853, held that a cart loaded was not liable to pay 1*s*; and this judgment was affirmed by the Supreme Court. The 15th clause does not however explain the term *loaded* vehicles as loaded with *goods* only. But granting that the term may be so limited, yet it is submitted that the cart was liable to toll as a *cart conveying passengers.* It is true that the amount levied, (one shilling,) is the amount which may be charged for a loaded vehicle, and that the defendant ought to have charged 1*s.* 1½*d.* on the cart, as conveying passengers; but the fact of his taking less toll than he was entitled to, does not subject him to a penalty. [Morgan, J.—The 11th clause makes it penal to receive *greater* or *less* toll.] (*Rust*, after referring to the clause, begged his Lordship's pardon. He was not aware that such an absurdity existed in the statute book.) [Rowe, C. J., thought that those words applied to a case between a farmer and his sub-lessee, where the sub-lessee by taking less toll defrauds his employer. That was not the case here.] A bullock-bandy may be a vehicle for the conveyance of passengers. [Morgan, J.—I believe a *vehicle for passengers* has been defined to be one built expressly for the conveyance of passensengers, and adapted for that purpose.] [Rowe. C. J.—A bullock-bandy is built and adapted for the conveyance of passen-

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gers.] And I therefore submit that the defendant was entitled to charge toll in the present case. Of course he has charged less toll than he was entitled to, viz: the toll for a loaded cart, instead of the toll for a vehicle with passengers; but that does not render the defendant liable on the complaint of the party paying the toll.

ROWE, C. J.]—It seems to us that the decision must be set aside. The defendant may have claimed less than he was entitled to; but he is not charged with that: that would be a good charge by the employer against his employee, when the employee is bound to account for the receipts. But the question here is as to the defendant's right to the toll. Without deciding a bullock-bandy carrying passengers is a loaded vehicle, within the provision of the Ordinance No. 9 of 1845, the Court is of opinion that facts of this case, as found by the Police Magistrate, bring the bullock cart in question within the description of a vehicle for passengers drawn by 2 bullocks. The complaint in this case is that the tollkeeper charged too much in demanding one shilling; but as the toll for such a vehicle as the last mentioned was more than one shilling, the charge was not in excess. We express no opinion as to the old case No. 26,386, *Colombo*; for that case did not touch the point.

The Supreme Court declined to open up a previous judgment (affirming a conviction of the Police Court) on affidavits stating that the Magistrate had, in pronouncing the verdict expressed his disbelief of the only evidence on which the Supreme Court (in ignorance of this fact) had proceeded to affirm the conviction. Such affidavits

No. 19,744,
P. C. Jaffna. } *Hoffman* v. *Morris.*

This case had been heard in appeal, and a Judgment affirming the decree of the Court below had been recorded on the 22nd May, subject to a recommendation by the Judges to the Executive in respect of the punishment decreed against the defendant

On a subsequent day, ROWE, C. J., said that the Governor had, on such recommendation, remitted the sentence of imprisonment at hard labour, and reduced the fine of £5 to *five shillings*.

Rust (*Lorenz* and *Mutukistna* with him) now tendered affidavits of Mr. *Dyke*, the Government Agent, and Mr. *Price*, the District Judge of Jaffna, to the effect that the Police Magistrate in pronouncing judgment in the Court below, had expressly stated his disbelief of the evidence of the *Horsekeeper*—(on which alone the Supreme Court had relied in affirming the decision, as the only evidence on the record which could support the finding of the Magistrate.)

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The affidavits were as follows :--

"*I Percival Acland Dyke*, of Jaffna, do swear that I was present in the Police Court of Jaffna, on the 9th of May, instant, when the case of the abovementioned parties was under investigation; and I do remember the Police Magistrate, Mr. *Purcell*, after the evidence was closed, saying within the hearing of every one present, that in forming his judgment he should entirely reject, as unsatisfactory, the evidence of the horsekeeper of the Complainant,—the first witness examined for the Complainant,--or words to that effect."

ought to have been produced at the argument.

"*I Joseph Price*, of Jaffna, do swear that I was present in the Police Court of Jaffna, on the 9th of May, instant, when the case of the abovenamed parties was under investigation; and I do remember the Police Magistrate, Mr. *Purcell*, after the evidence was closed, saying within the hearing of every one present that he entirely disbelieved the whole of the evidence of the horsekeeper of the Complainant,—the first witness examined for the Complainant,—or words to that effect."

Rust.] It is our intention to ask the Court, upon these affidavits, to re-consider its judgment of the 22nd May, and to cancel it.

Rowe, C. J.] We shall hear you on Wednesday, if you like. But I may tell you that you will find some difficulty in the matter. We have considered the question very carefully, and we think it would be a dangerous practice to allow parties to move to open judgments, after they have been solemnly pronounced, and when it was in the power of the party to bring the matter to our notice at the hearing of the appeal.

Rust.] It was our intention to submit some authorities in support of our motion.

Rowe, C. J.] We shall hear you on Wednesday. We are unanimously of opinion that the young man *Morris* has been substantially acquitted of the charge preferred against him. The Executive have, of course, allowed a small fine to remain on the record, under the peculiar circumstances which we were bound to represent to them, namely, the existence of *some evidence* (however slight and unworthy, in our opinion,) which may have weighed with the Magistrate. But after reading these affidavits, we have now no hesitation in saying that *Morris* was *wrongfully convicted*; and that if the matter had been brought to our notice in due course, and at the proper time, we should have set aside the judgment at once. But looking to the facts and the peculiar circumstances of the case, we do not consider that we should be furthering the ends of justice by opening up the judgment

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already recorded. We do not however say that there may not be cases in which a judgment may be opened up, on affidavits, and under certain circumstances; but we say that the present is not such a case.

Rust said he was perfectly satisfied with His Lordship's expression of opinion, and would not press his motion.

Selby, who had on the previous appeal appeared for the plaintiff, here said that the Court was proceeding upon affidavits on which he had no opportunity of cross-examining the deponents.

ROWE, C. J.] We have refused to hear the motion, and therefore have no occasion to enter into the truth of the statements. In saying what I did, I took it for granted that the affidavits of these gentlemen were true. I say, *if* these affidavits are true (and I have no doubt they are,) *Morris* has been unjustly convicted. His Counsel may state it to him as the opinion of this Court.

June 18.

June 18.

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

No. 2,019, *C. R. Pt. Pedro.* } *Sanmogam* v. *Moroger.*

On a claim in execution, it is irregular, to enter into evidence to ascertain who was in possession, with a view to deciding which party is to bring the action. The Fiscal's Report is generally accepted as conclusive on this point.

The judgment delivered in this case sets out the facts.

The proceedings, sent up after a delay of seven months, are in a very confused and defective state and teeming with mistakes, so that the Supreme Court has had great difficulty in ascertaining from them the facts in question.

It appears that *Cander Myler*, (the plaintiff in the case No. 2,019) recovered judgment on the 1st August, 1854, against *Cander Sanmogam*, and issued his Writ of Execution,—upon which certain land was seized in May, 1855. *Comarer Moroger*, said to be living in a house standing on the land, opposed the seizure and gave security. The defendant (*Cander Sanmogam*) then brought a suit against the claimant (*Comarer Moroger*) in No. 3,189, to try his title to the land. The claimant (defendant in that case) pleaded to the jurisdiction. The plea being a good one, the plaintiff then contended (as it is recorded) that the "burden of proof rested on the defendant," and the Court ordered the case (No. 3,189) to stand over until it should determine in the suit in which the writ originally issued (No. 2,019) "*who should bring the case.*" Evidence was then heard in No. 2,019 as to possession, and the Court determined that the claimant should, within a stated time, bring his action in the District Court of

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Jaffna, to prove his title to the land in dispute. It further fined the claimant £1 for making false statements when examined.

It is clear that the after proceedings had in the original suit were irregular. When land seized in execution is claimed by a third party, the Fiscal is, in practice, called upon to report who was in possession of the land at the time of the seizure. If it appears *from the report* that the defendant was in possession, solely, or jointly with another, the claimant is called upon to bring suit. If, on the other hand, the claimant is in possession, or the Court is in doubt who is in possession, the party who pointed out the land for seizure is left to bring his action. To enter into evidence to ascertain who was in possession is *irregular*, for the Court would then, to a certain extent, be prejudging the merits of the main question as to the title to the land; and it would be equally *unnecessary*, for the party bringing the action will, if he proves the possession of the debtor at the seizure, be entitled to all the benefits which results in law from the presumption of possession, though he be plaintiff on record. It would have been wrong therefore in view of the return of the Fiscal in No. 2,019 to require the claimant to bring action, much more to require him to do so *after the defendant* brought his action, and failed therein on an exception to the jurisdiction of the Court. All that the Court had to do, when it upheld such exception, was to refer the parties to the proper Court, and not to take the subsequent proceedings it did in the original suit. All those proceedings were irregular, and the orders made thereon must therefore be set aside.

June 20.

June 20.

Present Rowe, C. J., Temple and Morgan J. J.

No. 29,208, *D. C. Kandy.* } *Neweregedere* and another v. *Neweregedere* and another.

Libel:—That *Newregedere Keeraale* died possessed of certain lands, leaving a childless widow (the first defendant) who as such widow was entitled to a life-interest in the said lands; and the plaintiffs (the brother and niece, and heirs-at-law, of the deceased) complain that the 1st defendant alienated the said lands to the 2nd defendant. Prayer,—that the 1st defendant may be declared to have forfeited her life-interest in the said lands, and that the 2nd defendant be ejected therefrom, and the plaintiffs put and placed in possession of the same.

By consent of both parties certain facts were assumed, with a view to the opinion of Assessors being obtained on a question of law arising thereon, and such opinion was obtained and recorded, but appealed from by one of the parties. The

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Supreme Court set aside the whole proceeding as irregular, and remanded the case for trial on the facts at issue, previous to the consideration of the question of law.

Answer:—that the plaintiffs were not the heir-at-law of the deceased; but that the 2nd defendant, as his adopted son, is his sole heir-at-law.

On the day of trial the defendants on examination admitted that the first had made a gift of the lands to the second; but stated that the lands were not the property of *Keeraale*, but of the 1st defendant; that the 2nd was the adopted son of 1st defendant; and that neither of them had any right to *Keeraale's* estate. Hereupon the Court (*W. H. Clarke*, A.D.J.,) made the following order:

"On the suggestion of the Judge, and by mutual consent of the Advocates for both parties, it is declared that the further hearing of this case be stayed until Wednesday next the 15th April; that on that day some of the chiefs shall be summoned to serve as Assessors, (under provision of the Ordinance No. 21 of 1852;) and that there shall be submitted to such Assessors, the question of Kandyan Law now raised, viz: Whether a widow, by transferring to a third party the lands she holds in right of her deceased husband, makes an absolute forfeiture thereby in favour of the heir-at-law. It is further agreed, that for the purposes of this question only, it shall be assumed that the lands now spoken of were *Keeraale's*; and that the question having been thus submitted on that assumption, shall not in any way prevent the defendant from disputing that fact."

On the 15th of April, the following proceedings were had.

Wednesday, April 15th, 1857.

Before W. H. Clarke, Esq., A. D. J; and

1. *Mollendande*, late *Ratte Mahatmeya*,
2. *Arranwawelle*, late *Ratte Mahatmeya*,
3. *Nugewille Basnaike Nil'eme*,

Assessors.

Evidence as to Kandyan Law and Custom called by the Court to assist it in coming to a right decision.

1. *Dehigame Ratte Mahatmeya*, affirmed:

"If a husband die leaving by his widow no children, and if that husband has no brothers or sisters or children by any other wife, then the widow becomes the absolute heir to the estate of her husband in parveny. If there be heirs, such as children or brothers and sisters, then a widow has a right only to maintenance out of the estate, which is proportioned to the wealth and respectability of the parties; and the amount of which in case of dispute is determined by the Judge, in proportion to the circumstances of the party. Amongst the poorer classes, the allow-

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ance would be 4 *amunams* and 2 *pellas* of paddy, and 2 cloths annually. Secondly, I am of opinion that if with the consent of the heirs, such widow be in possession, and if she should, while so in possession, sell or transfer the lands of her late husband to third parties, she would not thereby forfeit her right of maintenance as hereinbefore described,—though doubtless such sale would, as a sale, be invalid; in such a case the heirs' remedy would be by action against the vendee, to have the sale cancelled, and due maintenance awarded."

2. *Madoogalle Ratte Mahatmeya*, affirmed:—"I have heard the opinion of *Dehegamme Ratte Mahatmeya* read over. I agree with him in the former part of his opinion; but I think that, by act of sale to third parties, she absolutely forfeits her right to maintenance."

3. *Waterantenne Ratte Mahatmeya*, affirmed:—"I agree in the first part of *Dehegamme Ratte Mahatmeya's* opinion. I also think that the widow would forfeit her right to maintenance by selling to third parties her husband's estate, of which she was in possession as widow."

4. *Hewehette Ratte Mahatmeya*, affirmed:—"I am of opinion that by the act of sale above stated a widow would forfeit her right to maintenance."

5. *Perenegamme Ratte Mahatmeya*, affirmed:—"I am also of opinion that, by the act of sale to a third party of her late husband's land, a widow commits such an act as involves forfeiture of her right of maintenance thereon."

The Court now puts it to the Assessors on the evidence, and they state they are unanimously of opinion that a widow commits an act involving for feiture of maintenance by selling her deceased husband's land to third parties.

The Court concurs with the Assessors, and over-rules Mr. Vander Wall's motion for a non-suit on the point of Law; and the further hearing of the case is stayed, pending appeal to the Supreme Court by consent.

(Signed) W. H. CLARKE,
A. D. C.

On appeal against this order,

Morgan, W., appeared for the Appellant,

Lorenz for the Respondent.

But the Supreme Court refused to hear Counsel, and pronounced the following order:—

"The Interlocutory order of the Court below is set aside and the case remanded for hearing. One of the issues between the parties is whether the land belonged to *Keeraale* or the defendant.

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It is premature to consider the point of Law submitted to the Assessors, which will not arise if the 1st defendant was the owner. The first defendant should be allowed to amend her Answer, and put in issue on the pleadings that the land belonged to her and not to *Keeraale*. Costs to stand over."

A Contract to teach Devil-dancing is not *contra bonos mores*, and the reward stipulated for may be recovered by action.

No. 6,284, *C. R. Bentotte.* } *Mendis* v. *Naido Hamy.*

Plaint:—That the defendant is indebted to the plaintiff in £3 15*s.* for his trouble in teaching the defendant's son the art of Devil-dancing, at the request of the defendant.

Answer:—That the contract is *contra bonos mores*.

The Court below (*G. Stewart*, Commissioner,) after hearing evidence, gave judgment for the plaintiff. On appeal therefrom.

Lorenz for the Appellant.] An obligation tainted with illegality or immorality is void. 1 Smith's L. C., 279; Vander Linden 190. All writers on Ceylon have characterized Devil-dancing as not only contrary to the precepts of Buddhism, but as a practice resorted to only for the purpose of Fraud and Deception. Davy, p. 228, 229; Selkirk, p. 234. [Rowe, C. J.—It is a proceeding whereby the people seek to appropriate a wrathful deity. Where is the immorality of such a proceeding?] It is opposed to true religion and common sense, and is based on the ignorance of the people. It can only be practised for the purposes of deception and to extort money on the pretence of securing a supernatural effect. [Rowe, C. J.—Why should we not let the people have a devil-dance, if they choose to have it? The Legislature has not interfered with it.] The Legislature need not interfere with a proceeding in order to make it legally or morally wrong. All that is contended for is that, although the efficacy of Devil-dancing may be believed in by a particular class, and although the Legislature may properly abstain from interfering with the belief of individuals, yet, where it tends to immorality, the Courts of Justice should not lend their aid in enforcing a contract grounded on it.

Sed per Curiam.]—Affirmed.

A Fiscal's Sale, though irregular by reason of its not having

No. 2,569, *C. R. Ratnapoora.* } *Kuda Heneya* v. *Silva.*

In this case the plaintiff had obtained a judgment, issued execution, and sold certain land, the property of the defendant.

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been held at the spot, cannot be set aside except in a regular suit.

The sale took place at the Ratnapoora Cutcherry, and not on the spot, as required by the Fiscal's Rules. It appeared that owing to some irregular practices of the Fiscal's officers, Mr. *Mitford*, the late District Judge and Deputy Fiscal of Ratnapoora, ordered all Fiscal's sales to be held at the Cutcherry. At the sale in question, the present Appellant became the purchaser for £11 12*s*. It appeared that the sale took place after several postponements on the application of the defendant, who had applied for time to pay the amount of the judgment. After the appiontment of Mr. *Mooyaart*, as Deputy Fiscal as well as Commissioner, the defendant presented to him a petition complaining of the sale in question, on the ground that the land had been sold at a low price. Mr. *Mooyaart*, as Deputy Fiscal, reported the matter to himself as Commissioner of the Court of Requests, when he, as Commissioner, made the following order:—"It is ordered that the sale of the 29th day of December last be cancelled, and that the writ be re-issued for execution."

From this order, the purchaser appealed.

Dias, for the Appellant submitted, that the order of the Commissioner was quite irregular. Under the Fiscal's sale, the Appellant had acquired a good title, which could not be set aside or cancelled without a regular suit. The objection taken by the Commissioner in his report as Deputy Fiscal, was not the one urged by the defendant. His complaint was that the price was too low. The mere fact of the sale not having taken place at the spot, did not, as urged by the Commissioner, make the sale bad, under the 14th Clause of the Fiscal's Rules. The defendant might have consented to such sale; and the appellant, when properly brought before a competent Court, might have urged many other valid reasons for upholding it. These matters must be enquired into, not in the summary way the Commissioner has thought proper to do, but by a regular suit before a competent Court. The land in question was worth £11. 12*s*. and clearly beyond the jurisdiction of the Court of Requests; but, by the present proceeding, the Commissioner arrogated to himself a jurisdiction which he had not by law. Further, the Commissioner had no authority to bring a third party into a suit and to dispose of his right just as he pleased. Such a proceeding was clearly illegal and not binding; but if the present order were simply affirmed by the Supreme Court, it might be made use of against his client as a valid cancellation of his purchase.

Per Curiam:] The Order of the Court below is set aside, each party paying his own costs. The Supreme Court concurs with the Commissioner in holding that it was irregular to sell

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lands seized in execution at the Cutcherry, without an express order from the Court in each case authorizing the Fiscal to do so; and the practice which, it appears, prevails in Ratnapoora, of selling all lands at the Cutcherry instead of at the spot, without an order from the Court, should be put an end to at once. The Commissioner had no right, however, to set aside the sale in the summary way he did, in the original suit in which the writ issued. The purchaser should be left to his remedy against the Fiscal for refusing to complete the sale when the whole question would come properly before the Court for adjudication.

A Moorish wife may dispose of her own property, without joining her Husband.

No 8,859, *C. R. Matura.* } *Meera Kandoe* and another v. *Saroewa Oemma* and another.

The plaintiffs claimed certain lands which they alleged the 1st defendant (a Moorish woman) had sold and transferred to them, and which the 2nd defendant had since entered into and taken possession of. Prayer:—that the 2nd defendant be ejected therefrom, and the 1st defendant do warrant and defend the said sale, or in default thereof pay the purchase amount thereof with interest.

The 1st defendant having died since the institution of the suit, her heirs appeared on summons and filed a bill of sale in here favour from the original owner of the premises.

The 2nd defendant denied the plaintiff's title, and claimed the premises as his own property.

A Survey was then ordered; but subsequently, on the day of trial, the plaintiffs, having in their examination admitted that their vendor (the 1st defendant) was at the date of the sale to them a married woman, and that her husband, who was then alive, had not joined in the conveyance, *Kempsz* for the 2nd defendant objected that the sale by the 1st defendant was invalid. And the Court below (*H. Pole*, Commissioner,) was of opinion that the special laws concerning Mahomedans, (Govt. Proclamation, 5th Augt., 1806,) had reference only to matters of Inheritance and Marriage; and that the rules respecting a wife's absolute right of property, (McNaughten, pp. 245,254 and 255,) could not prevail in the absence of express enactment.

The plaintiff's suit was therefore dismissed.

On appeal, *Dias* for the plaintiff and appellant.] The land in dispute being the admitted property of the 1st defendant, the Commissioner has mistaken the law applicable to the case. The Dutch Law does not apply to Moorish parties; and the Mohame-

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dan Law should govern the case. Among Mohamedans there is no community of property, and in this respect their law is similar to the law which obtains in the Kandyan Provinces. The rule of the Dutch Law, that during the marriage the wife cannot dispose of her property, is founded upon the doctrine of community or property, by which the husband becomes absolute owner of the wife's property which comes into the community, and can dispose of it at his free will; but according to the Mohamedan law, the husband has no such authority, and the wife has the sole control over her property. This rule of the Mohamedan law has been acted upon in this country, and has been recognised by the Legislature. (Special Laws concerning Mohamedans, 1806, cl. 1.) Even according to the Dutch Law, a sale by a married woman or a minor is not void, but merely voidable; and none but the parties for whose benefit the law has been made, to wit, the married woman or the minor or their representatives, can avail themselves of it. The 2nd defendant was an utter stranger and could not urge the objection. In No. 13,320, *D. C. Colombo* (10th Feb., 1851,) which was an action against a Moorish woman, a demurrer on the ground that she was a married woman, was overruled.

Lorenz for the Respondent.] In the absence of an express legislative enactment, the rights of property must be governed by the law of the land, which requires the husband's consent to an alienation of the wife's property. [Rowe, C. J.—The wife here is absolute owner of her property. Morgan, J.—The husband in the Dutch Law may alienate, because he is absolute owner of all the common estate.] The right of alienation does not depend on the ownership of the property, but on the *status* of the person. The wife may be absolute owner of the property, but she is incapable of alienating it, because she has no status in the eye of the law, her husband being her guardian. Vander Linden, 84. So a minor may be absolute owner of his property, and yet he cannot alienate without the consent of the guardian. Rowe, C. J.—You give with one hand to a woman the absolute right to a property, and with the other hand you take it away by requiring the husband's consent to its alienation.] For the same reason that in the Dutch Law, a wife is absolutely owner of a half of the common estate, and yet is not permitted to alienate it without her husband's consent. That reason is that the right of alienation depends, not upon the nature of the title, but the status of the individual. [Rowe, C. J.—You are late in your objection. You put the parties to great expense by having a survey, and when you see the survey making against you, you take an

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objection to the plaintiff's title.] We could take the objection only at the trial, when the deed was put in evidence.

Per Curiam.] The Judgment of the Court below is is set aside, and the case remanded for a new trial; the Supreme Court being of opinion that the Vendor, being a Mohamedan woman had an uncontrolled right to dispose of her property.

June 24.

June 24.

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

No. 42,343, *C. R. Colombo.* } *Fernando* v. *Don Antho.*

A plaintiff suing to recover stolen property, is not bound to proceed criminally in the first instance.

This was an action instituted in November 1856, to recover £8. 10*s*. 11*d*. from the defendant, under the following circumstances. In May 1856, the plaintiff's son, with another, was charged with burglary before a Justice of the Peace at Colombo. A search-warrant was issued to the 1st defendant, a Peace-officer to search for the stolen property. The 1st defendant, with the prosecutor in the burglary case and several others, went to the plaintiff's house, and there, in the presence of plaintiff's wife and son, examined a box. The plaintiff now complained that a few days after the search, he being informed of it by his wife and son, went and examined the box, but found the sum of £8 10*s*. 11*d*. which was in it, missing. The witnesses for the plaintiff were himself, his wife and his son. Upon their evidence, the Commissioner gave judgment for the plaintiff against the 1st defendant. From this the 1st defendant appealed.

Dias, for the first defendant and appellant, before entering into the merits, had a preliminary objection to urge against the plaintiff's right to recover. According to the plaintiff's story, the 1st defendant was guilty of a felony, and no criminial proceedings had been instituted against him. He submitted that that was a necessary preliminary proceeding, as it was a rule of law that a man should not be allowed to make a felony the foundation of a civil action. It was true that he could proceed against third parties for the recovery of the stolen goods, (even that was not allowed in some old cases; *Simpson* v. *Woodfall*, 2 C. and P. 41;) but the felon himself could not be proceeded against civilly, before the criminal prosecution: *Stone* v. *Marsh*, 6 B. and C. 564; *White* v. *Spettigue*, 13 M. and W. 603; *Gibson* v. *Minet*, I. H. Bl. 569; *Davies* v. *The Bank of England*, 2 Bing. 411.) [MORGAN, J.—There is a case which was heard before the Privy Council in

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which it was held that the rule of law referred to by you did not exist in the Dutch Law]. The rule is founded on a principle of public policy, and is applicable here as well as in England. (He then argued upon the evidence calling the attention of the Judges to the suspicious circumstances in the case.)

Lorenz, contra, quoted Ord. No. 15 of 1843, § 46.

The Judgment of the Court was as follows:

"The decree of the Court below is set aside, and 1st defendant absolved from the instance; each party paying his own costs. The Supreme Court considers that the fact of the plaintiff not complaining till November of the loss which is alleged to have taken place in May, throws great suspicion on his story, which seems otherwise also an exceedingly improbable one."

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

No. 349, *C.R. Chavagacherry,* } *Sidembery* v. *Cadergamer* and another.

A Commissioner has no power to order the attendance of a witness at a place other than the Court; and a fine imposed on a witness for non-attendance at such place was set aside.

This was a land case, in which the Commissioner fined an *Odear* for failing to attend with the *Thombo* at the *locus in quo,* on the 25th May, as required by the Commissioner. The Commissioner reports that he gave an order to that effect to the *Odear* in open Court, to which order the *Odear* at the time took no exception; that he (the Commissioner) went himself to the land on the day appointed, a distance of 44 miles, which journey was fruitless in consequence of the absence of the *Odear;* whereupon, on a subsequent Court day, he ordered the *Odear* to be brought up, and fined him £1 for a contempt.

Judgment per ROWE, C. J.] It is much to be regretted that the laudable anxiety of the Commissioner to do justice between the parties, as evinced by the trouble he took in thus visiting the land, should have no better result; but the simple question for us is, whether the Commissioner was legally justified under the circumstances in imposing this fine; and we are of opinion that he was not. It is clear that he had no more power over the *Odear* than over any other witness; and, although the Ordinance No. 10 of 1843, § 15, authorizes him to fine or imprison any person summoned as a witness to attend his Court, and *not* attending in pur-

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suance of such summons, we think that it did not empower him to make the order in question.

The *Odear* states in his Petition of Appeal that he was engaged on duty at the Jaffna Cutcherry, 33 miles from the land in dispute on the 22nd, 23rd and 26th of May last; Monday the 25th, moreover, the day fixed on by the Commissioner, being the Queen's birthday. This statement is put forward as affording reasonable ground for his absence, on which statement we observe that it would have been more proper and respectful for him to have mentioned these matters to the Commissioner at the time the order was given, and that being a headman or a public functionary himself he should have been on that account all the more careful not to have allowed the Commissioner to make that distant journey on the supposition that his, the *Odear's*, assistance could be depended upon.

We think such conduct reprehensible, and do not doubt that, if it had been duly reported to the proper authoriries, he would have been suitably admonished. The sentence of the Court below, nevertheless, must be *set aside*.

No. 14,838, *C. R. Calle.* } *Meera Lebbe* v. *Natter Saib.*

On a Plaint, that defendant, in consideration of £3 15*s.* *agreed*, &c., *Held* that it was not competent for the plaintiff (the consideration being denied) to prove a payment of 15*s.* in cash, a P.N. for £3, and a previous part-performance by the defendant, as evidence that the whole consideration had been received.

Plaint:—That the defendant (a Mahomedan Priest,) by an Agreement entered into on the 1st November, 1852, did, in consideration of £3 15*s.* paid by the plaintiff, and of the customary charges to be paid on the performance of the ceremonies, agree to officiate as Priest at any festival, &c., of the plaintiff, and in default thereof to pay to the plaintiff £7 10*s.* (i. e. £3 15*s.*, being the amount advanced, and £3 15s., as damages;) that on the 15th April 1857, the plaintiff had a festival, at which the defendant, although requested, refused to attend."

Defence:—Want of consideration.

The plaintiff, on the day of trial, stated that he had paid only 15*s.* in money, and that he had given a promissory note for the residue £3, which however he had never paid. And hereupon the plaintiff's counsel proposed to call evidence,—as to the payment of the 15*s.*, and 2nd, as to the performance by the defendant of ceremonies since the agreement. But the Court (*C. H. De Saram*, Commissioner,) declined to hear evidence on these points, on the ground that the promissory note, given in lieu of the £3, had never been paid.

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On appeal, *Lorenz* appeared for the plaintiff and appellant.] A promise to perform is a good consideration, though not yet performed, for the party has his remedy to compel performance; *Com. Dig.* "*Accord*," B. 4. It ought indeed to be proved that the promise was *accepted* in satisfaction of the consideration; and that was the evidence the Court declined to hear. The acceptance may be gathered from the conduct of the creditor, or the special circumstances of the case. *Camidge* v. *Allenby*, 6 B. and C. 373; *Hebden* v. *Hastinik*, 4 Esp. 47. Here the evidence offered by the plaintiff would have established the acceptance of the promissory note as consideration, for if the defendant had since 1852 performed the ceremonies stipulated for, without calling on the plaintiff for payment of the note, that was evidence to go to a Jury of the defendant's intention to accept the note in satisfaction.

Rust, (*W. Morgan* with him) *contra.*] So far from the note having been accepted in satisfaction, it appears to have been handed to the defendant after the execution of the agreement. The plaintiff now seeks to recover a sum of money which he never paid to the defendant. That payment was clearly a condition precedent to the plaintiff's right to require performance of the agreement.

Lorenz, in reply.] To say that the payment of the note was a condition precedent to the plaintiff's right to enforce the agreement, is to decide the very question on which evidence was offered on behalf of the plaintiff. The consideration is denied by the defendant; and the plaintiff asserts the note to have been received in full satisfaction of the consideration. That was the issue in the case; and the Court below ought not to have refused the plaintiff a hearing.

ROWE, C. J., delivered the judgment of the Court.] We do not think that the plaintiff was entitled to call evidence on the points he has stated. The promissory note may or may not have been accepted in satisfaction of the consideration; but without expressing any opinion as to the said admissibility of evidence on that point, we are of opinion that that question was not raised at the trial, and the points on which evidence was really offered would not have met the defendant's plea.

Affirmed.

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No 1,856,
D. C. Tangalle. } *Seyedoe Ibrahim* v. *Cogan.*

A Pawnee is not liable for the value of the goods pawned to him, where they have been robbed from him without his default or negligence. He may, notwithstanding his inability to return the goods, recover the amount lent on them.

Libel:—That the Plaintiff, on the 15th February, 1844, deposited with the defendant certain articles of jewellery of the value of £45, and borrowed and received of him the sum of £20. That the plaintiff on the 15th November, 1854, tendered the sum of £20 and interest to the plaintiff, and demanded the said goods; but the defendant refused to receive the same or to redeliver the goods. *Prayer*:—that the defendant be condemned to deliver the said goods to the plaintiff or to pay him the value thereof.

Answer:—1. That admitting the said goods to have been received in pawn, the defendant is not liable to deliver them, because in October, 1854, the same were robbed from him without his default, and notwithstanding he had taken reasonable care and exercised due diligence in the safeguard thereof. 2. That the plaintiff is liable to pay to the defendant the said sum of £20 and interest;—which the defendant now claims in reconvention.

The *Replication* denied the first plea; and as to the second, the plaintiff was willing to pay the amount claimed in reconvention, if the goods be returned to him.

It was proved at the trial that the goods had been deposited by the defendant in an English chest of drawers, together with his other valuables; that the chest and the room in which it was placed, had been properly locked; and that during the defendant's absence at *Kirinde*, his house had been broken into by robbers at night, the chest beaten in, and the goods taken away. It was also in evidence that no one had slept in the room on the night of the robbery, and that the room might be broken into by robbers without passing through the rest of the house. It appeared also that the Military guard faced the house, and that there was another guard within 20 fathoms; that a Hospital Orderly slept in the adjoining room; and that the chest had been broken in from beneath as the robbers seemed to have found difficulty in opening it.

The Court below *(Rosemdlcocq,* D. J.,*)* hereupon dismissed the plaintiff's case; and entered judgment for the defendant in reconvention for £20 and interest, as claimed in his Answer.

On Appeal, by the defendant,

W. Morgan, for the appellant, was heard as to the facts.

Lorenz, for Respondent, cited *Coggs.* v. *Bernard,* 2 Ld. Raym. 917, and notes thereon in 1 Sm. L. C. 84; *Doorman* v. *Jenkins,* 2 A and E. 256; *Story* on Bailments, § 332,337; and as to the claim in Reconvention, *Voet ad Pand.* v. 1, § 78—80.

Per Curiam:]—Affirmed.

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

No. 14,538, *C. R. Calle* } *Paekier Tamby* v. *Siman* and another.

A party, enclosing fish within a *Madelle*, though he has not actually captured them, has sufficient possession of them to entitle him to maintain trespass against one who enters within the circle of the net and captures or disturbs the fish therein.

Plaint:—That on the 23rd February, the plaintiff, at great expense and labour, caused a large net to be cast and thrown into sea near the Bona Vista Hill, for the purpose of catching and taking fish, as he lawfully might have done. And the net having been cast as aforesaid, a large number of fish was enclosed within the net; but the defendants, unjustly and forcibly, and after the plaintiff had cast the net and enc'osed a quantity of fish, entered in boats, the space of water bounded by the net, and by casting hand-nets within the said space of water encompassed by the plaintiff's net, took up and appropriated to their own use a portion of the fish enclosed and secured by the plaintiff's net,—and which of right belonged to plaintiff; and further, the defendants did then and there maliciously cause the rest of the fish not taken by the defendant to escape out of the plaintiff's net, by frightening the fish therein, by means of plunging and dashing a number of oars in the water, and by other unlawful means. Whereby, and by reason of the grievances committed by the defendants, the plaintiff lost the fish which he otherwise would have taken up, and is in other respects damnified, to the extent of £10. *Prayer*:—that the defendants may be condemned to pay the damage aforesaid and costs of suit.

Answer:—Not guilty.

The Court below (*C. H. De Saram, Commissioner*) after hearing evidence, pronounced the following judgment:

"In this case it appears that at a very early hour in the morning of the 22nd February last, the defendants and several others were off Bona Vista in Canoes, catching fish with hand-nets, and that plaintiff later in the day encircled a large body of water with an immense net called a *Madelle*,—one extremity of it being cast some 30 fathoms from the defendants' boats.

"While this most cumbersome net was being dragged by parties on shore, but before the bag in which the fish are ultimately secured was attached, the defendants got within its circle, and with their hand-nets caught up and took away two canoes load of fish. It is alleged that not only did the defendants so take and carry away fish to the damage of the plaintiff, but that they did by their acts on the occasion, scare away a great number of fish, which were then within the compass of the plaintiff's net.

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"There can be no doubt that the ocean being common to all Her Majesty's subjects, the defendants had as much right as the plaintiff to fish off the coast at Bona Vista. The question then for consideration appears to be, 1st, whether the plaintiff by encircling a body of water as he did, acquired a right thereto, to the exclusion of others; and 2nd whether by that act, he secured to himself the sole and exclusive right to the fish within that circle.

"As regards the first point, it is clear that one subject can in no way deprive or abridge a fellow-subject of his common-law right; and that therefore the act of encircling a large body of water common to all, with a net, neither conferred on plaintiff an exclusive dominion thereof, nor took away the defendant's equal right thereto.

"Secondly, that as the fish were merely encompassed with a net, of itself inadequate and insufficient to ensure their ultimate capture, they were still *res nullius*, being *ferœ naturœ*. It is therefore the opinion of the Court that plaintiff had not acquired a right to the fish, to the exclusion of others.

"The Court has no reason to doubt that the defendants sailed within the plaintiff's circle, and caught up fish. If however they did this wilfully and maliciously, or after the bag had been attached to the net,—and when consequently the fish were, if not in the actual, in the constructive possession of the plaintiff,—they would perhaps have rendered themselves liable to an action for damages; but that does not appear to have been the case, for both parties were in pursuit of fish,—the defendants having commenced early, and the plaintiff later in the morning, and the defendant turned out to be the successful party.

"Under these circumstances the Court is of opinion that the plaintiff has not established his claim. It is adjudged that plaintiff be and he is hereby nonsuited with costs."

On appeal against this judgment by the plaintiff,

Dias (*Lorenz* with him) appeared for the plaintiff and appellant;

Selby (J.) for the respondents.

Dias.] The Commissioner finds that the defendants got within the circle after the plaintiffs had enclosed fish in it. Nobody therefore had a right to disturb them in the possession of the fish. The two ends of the net were already drawn on shore. The defendants were about 30 fathoms beyond; and sailed into the circle of the net and appropriated the fish enclosed by it. It is quite clear that the fish at that moment had already been re-

duced into possession and become the property of the plaintiff. Justinian, *Inst.* ii. i. § 12; Van Leuwen, *Comm.* 107; Grotius, *Introd.* p. 80; 2 Burge, 12. [ROWE, C. J.—I do not think we need trouble you on the Law. Is there any contest as to the facts? The Law of all countries recognizes the common right of people to catch fish, and when caught to keep it.] 1857. *July* 1.

Selby contra.] The question is—was the fish in the possession of the plaintiff? The fact of the possession is not found. These nets are very large, the width of them being at times 70 to 100 fathoms. It is clear that the water enclosed by the *Madelle* was a part of the water within which the defendants had a right to fish with hand-nets. [ROWE, C. J.—The fact of your being within the plaintiff's circle was entirely your own act.] I am ready to admit, if the fish had been already secured, the plaintiff would have been entitled to them. But the Commissioner himself finds that without the bag being attached, the fish could not be secured. The meshes are stated to have been large enough to allow of the passage of an elephant. [TEMPLE, J.—But the larger meshes are towards the shore.] If a piece of rope were used instead of the net, would the plaintiff be entitled to complain of the defendant coming within the circle made by it? [TEMPLE, J.—The meshes form a part of the net, and contributed towards keeping the fish within the circle, by frightening them away from it into the circle.] The evidence is unsatisfactory as to the principal point, viz:—whether the plaintiff had encircled the defendants or the defendants had entered the plaintiff's circle. [TEMPLE, J.—The Commissioner expressly finds that the defendants entered the plaintiff's circle.] Granted the defendants entered. They may have pursued a particular shoal of fish. [ROWE, C. J.—That does not appear in the evidence.] Both parties, says the Commissioner, were in "pursuit of fish." [ROWE, C. J.—"*Pursuit*" is an equivocal word. MORGAN, J.—The Commissioner gives the reason of the defendants entering. The *Madelle* was so large that it was inadequate to secure the ultimate capture of the fish; and *therefore*, the defendant had a right to enter the net, because the fish had not yet been captured, and were in fact *res nullius*.]

Per Curiam:—There is no question as to the Law. On the facts we are of opinion that the plaintiff had the fish under his coercion, and but for the acts of the defendants he would have reduced them under his actual possession.

Reversed.

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An order made on a claim for preference, against the Widow of one of the claimants, held not binding on his estate; and the fact of the money having been actually paid over, will make no difference.

July 22.

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

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

The judgment in this case pronounced by MORGAN, J. fully sets out the facts.

Rust appeared for the plaintiff and appellant; *Dias* for the respondent.

"This is a claim for preference, and the facts established in evidence appear to be these. One *Cornelis Perera Appoohamy* and his wife, granted a Bond on the 9th August, 1842, in favour of *Don Aberan* for £6 18*s*., money borrowed,—mortgaging 1-5th of *Kongahawatte*, described as 'belonging to them.' Judgment was given upon this bond in favour of the obligee in the case No. 13,362. Before that date however, on the 1st June, 184', *Cornelis Perera* appears to have solely granted a bond in favour of *Andris Rodrigo* for £4 10*s*., mortgaging half of *Kongahawatte* described as belonging to *him* the said *Cornelis Perera*; and on the 24th January, 1842, he again, *with his wife*, granted another bond in favour of the said *Andris Rodrigo* for £9., of which £4 10*s*. is said to be the amount secured by the bond of 1st June, 1842, and £4 10*s*, money then borrowed, mortgaging 1-5th of *Kongahawatte* described again as *belonging to the two persons*. *Andris Rodrigo* obtained judgment on this bond on the 3rd September, 1850; (see case 14,522.) The 1-5th of *Kongahawatte* having been seized under the writ issued in another case (No. 14,021,) instituted by certain simple-contract creditors of *Cornelis Perera*, a claim for preference was lodged by *Don Aberan* on the one hand, and *Andris Rodrigo* on the other. Before such claim was disposed of, *Aberan* died; and his widow was, at the instance of *Andris Rodrigo*, noticed to shew cause why the proceeds-sale of the land should not be paid to him; (see order of 2nd January, 1854, in case No. 14,021); and she having been absent on notice served, an order was made setting aside the claim of the said *Don Aberan*; (see order of 29th May, 1854, in case No. 14,021.) This order was subsequently appealed from by the widow; but affirmed by the Court on the 29th May, 1854. The widow now, she having been appointed in the course of the present proceedings *Curator ad litem* (see order of 13th August, 1856, in case No. 16,349,) of her minor children, (the said widow and children being the sole heirs and representatives of the estate of the late *Don Aberan*,) seeks to recover back the money drawn by *Don Andris*.

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"The questions arising for consideration are as follows:—

"1. To whom in fact was the land (1-5th of *Kongahawatte* belonging to *Cornelis Perera* and his wife,) first mortgaged?

"2. If to *Don Aberan*, can his representatives now recover the same after the order of the District Court, which was affirmed in appeal, and after the money has been actually paid over to *Don Andris*?

"In considering the first question, it should be borne in mind that *Don Cornelis* was entitled to two portions of *Kongahawatte*, 1-5th by right of his wife, and 2-5ths by right of purchase. The land, the proceeds of which are now claimed, is the 1-5th held by him in right of his wife. To whom was this portion first mortgaged? It is admitted that it is mortgaged by the Bond of the 3rd August, 1842, in favor of *Don Aberan*, and by that of the 24th January, 1843, in favor of *Don Andris*; and the only difficulty rests in determining whether it is also mortgaged by the Bond of the 1st June, 1842, in which case *Andris Rodrigo* would be clearly entitled to preference. The Supreme Court considers however that this was not the portion mortgaged by the Bond of the 1st June, 1842, (1.) Both husband and wife join in the Bonds of the 3rd August, 1842, and 24th January, 1853; and the part mortgaged is specially said to be the 1-5th belonging to both,—whereas the husband alone is the party to the Bond of the 1st June, 1842, and the part mortgaged is said to be the half belonging to him individually. (2.) The Southern boundary of the land mortaged by the Bond of 1st June, 1842, is described to be the land of *Bastian Appoohamy*, which it is clear from the evidence of the debtor, taken at the trial in this case, is the southern boundary of the portion purchased by the debtor, not that held in right of his wife. It is clear then that the portion in question was first mortgaged to *Don Aberan*; and it remains to be considered whether the money can be received back after the order setting aside the claim in the case No. 14,021, affirmed in appeal, and after it has been paid over to the defendant. An order, to bind the estate of *Don Aberan*, could only have been made after that estate was duly represented either by an Executor or Administrator, or by all the heirs sued as such, and duly authorized to appear in Court. The order in question was made at the instance of the widow only, and after *Don Andris* had notice of the death of *Don Aberan*. It does not appear that the widow was even in possession of her husband's estates, nor was she appointed, as she has been in this case, *Curator ad litem* of her minor children. The order cannot there-

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fore, as it appears to the Supreme Court, be held to bind the estate of *Don Aberan* then not duly represented.

Nor can the fact of the money having been actually paid over make any difference. By the Roman Dutch Law, when proceedings are adopted, (as in the case, No. 14,021,) to ascertain the priorities of the claims of several creditors, it is competent for parties, who were absent or ignorant of the proceeding, even after the decree had been pronounced and the proceeds distributed according to the order, by restoring things to their former state, to obtain another debate on the order of the preference. And the same time is granted to parties for assigning cause for their delay, as is allowed for their relief by *restitutio in integrum*. (3 Burge, 229, quoting *Matthæus de Auctionibus*, lib. 1. c. 11 and c. 17, and Voet. xx. 4. 10.)

The heirs not represented are clearly in the situation of parties absent or ignorant, and entitled to the like relief. There is no difficulty in restoring things to their former state, as the only interest affected is that of *Don Andris*, who had notice of the death of his opponent, and pressed on the claim against a party not representing his estate. He is clearly liable therefore to refund the sum which was improperly drawn by him, the same belonging of right to the estate of *Don Aberan*, viz. £6 18*s*. principal, and £6 18*s* interest, and £3 3*s*. 9*d*. costs. In view however of the laches of the widow in not then clothing herself with the necessary authority and opposing the claim of *Don Andris*, it seems equitable not to allow her costs, and the same are therefore divided; the costs of the widow being paid by her personally from her own share of the estate.

July 29,

July 29.

Present TEMPLE, J. and MORGAN, J.

No. 28,383, *D. C. Kandy.* } *Mammadoe Lebbe* v. *Dingiralle Aratchy.*

1. By the R. D. Law, a vendor is bound to warrant the title, though there be no express covenant in that behalf in the deed.

2. In the absence of any Kandyan Law on this point, the same rule

This action was brought to recover from the defendant half of the purchase amount of certain lands sold by the defendant to *Audel Cader Mohamadoe Candoe* (of whom plaintiff was son and sole heir,) and the cost of improvements made thereon. The facts of the case are fully set forth in the judgment.

W. Morgan appeared for the defendant and appellant, and *Rust* for the respondent.

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in the Kandyan Provinces.

3. Notice to warrant may be given after issue joined.

4. *Qu.* whether the vendor is liable, where the purchaser has compromised.

Judgment, per MORGAN, J.]—The facts of the case are as follows:—In February 1837, and in April 1841, the defendant sold to the plaintiff's father upon two deeds a piece of Chena land, and two pelas of a paddy field. The purchaser possessed these lands till August 1851, when two persons *Illookgedere Appoo* and *Illookgedere Kella*, brought an action claiming these lands, and praying that he be ejected from them. He, the purchaser, pleaded to this case, denying the title of these two persons and justifying under his seller, the defendant. After issue was joined between the parties, and after the case was set down for trial, the purchaser moved for a notice on the present defendant to intervene in support of his sale; but the defendant failed to do so, though the notice is reported to have been served upon him. On the day of trial the purchaser agreed to judgment being entered against him for half the lands; which was accordingly done, without any evidence on the part of the plaintiff.

After examining this case, and considering the evidence led by the plaintiff to prove the improved value of one of the lands, the District Court held in the suit now in appeal that defendant was liable to pay the half of the purchase-money with interest, plus half the improved value of one of the lands, and pronounced a decree accordingly. The defendant appeals against this decree on the ground that, as the plaintiff's father was aware of the defendant's title, he cannot be made liable in the absence of an express warranty in the conrract of sale; that the defendant did not obtain notice till after issue was joined in No. 24,976; and that the plaintiff cannot recover, he having expressly consented to judgment in that case.

The deed for the two pelas of the field contains a clause of warranty; but there is none in that for the Chena. This is however immaterial. It is no where shewn that the plaintiff's father knew of the defects in the title of the defendant,—who expressly describes the lands in the deeds as "his parveny property;"—and, by the Roman Dutch Law, (which as there seems to be no Kandyan Law, or custom having the force of Law, applicable to the decision of the question, is the Law for the determination of such question; see Ord. 5 of 1852, clause 5;) though the deed contains no warranty, the vendor, in every transaction, where the property of one is transferred to another for valuable considerations, incurs the implied obligation to warrant the purchaser against eviction. 2 Burge, 554; Voet, xxi. 2. § 1; Cens. For. lib. 4, c. 49, n. 11.

The fact also of notice having been given to the seller after

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issue was joined, makes no difference; as that notice was given on the 10th August 1852, and the case was decided on the 7th June 1853. Sufficient time therefore elapsed to admit of the vendor assisting before the judgment was pronounced. 2 Burge, 561.

The third objection, however, seems, judging from the decree, to have escaped the attention of the District Court. The purchaser ought not to have entered into a compromise with the claimants in the case 24,976, and surrendered the lands to them according to such compromise. Having done so, he cannot proceed against the vendor, without shewing that he acted *bona fide*; that the claimants had a right to the land; and that the seller's title was absolutely defective, in which case the purchaser's right of recourse continues competent to him notwithstanding the compromise. 2 Burge, 560, 1; Voet, xxi. 2. § 2, & 23. The admission in case No. 10,711—17,346 referred to by the learned Counsel for the appellant, and the stipulation as to division of costs, raise a presumption in favour of the purchaser, and would seem to show that the seller had really no title; but that case was not adduced in evidence, the defendant has not been heard upon it, and there is no finding by the Court below in respect of it.

In case the District Court ultimately finds the defendant liable, it will be necessary to consider in awarding damages, how far the plaintiff is entitled both to the interest upon the purchase-money, and a moiety of the full improved value of the land; and as respects such improved value, so far as it has arisen from improvements made by plaintiff and his father, how far the plaintiff was entitled to recover them from the party who ejected him, and improperly failed to do so,—in which case he cannot claim them from his vendor.

Upon these and the other points indicated in this judgment, the case obviously calls for further investigation, and it is hence that the Supreme Court remands it for a New Trial.

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August 8.

Present TEMPLE J., and MORGAN, J.

An action of slander will not lie for words used by a party in the course of his examination.

No. 14,667, *D. C. Badulla.* } *Attenaike* v. *Don Juanis.*

The words, upon which the present action of *slander* was based, were used by the defendant in a previous suit, instituted by him in the Court of Requests, when he was examined as a party, and in answer to a question put to him.

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Per MORGAN, J.]—For words so used, no action lies. "It often happens," says Borthwick in his Treatise on Libel, p. 215,—and this seems to be quite in accordance with the Roman Dutch Law on the subject, (see Voet, xlvii. 10. § 20,) "that a just right cannot be made good in a Court of Law, without being necessarily accompanied by some aspersion upon the conduct or character of some one; and when this reason does not apply, the law makes allowance for the partiality, prejudice, and warmth of feeling, which may compel a person, placed in this situation, of bringing or supporting an action *bona fide*, in vindication of his legal rights. It permits him in that situation to employ language which would be deemed unwarrantable in other circumstances. This privilege will protect a litigant in throwing out invectives against the opposite party and witnesses under examination, in the course of the process; and even in certain cases, though not to the same extent, against third parties."

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Present TEMPLE J., and MORGAN, J.

No. 18,609, *D. C. Matura.* } *Mohidin Lebbe* and another v. *Omoer Lebbe.*

An objection to a deed, for the want of stamp, will not be entertained for the first time in appeal.

The plaintiffs, as the daughter and son-in-law of *Alima Natchia*, claimed one-fourth part of a certain garden. They alleged in their Libel that one-half of the said garden originally belonged to one *Alima Oemma*, who died about 16 years ago; that letters of Administration of her estate were granted to three persons, two of whom having died, the survivor *Sultan Markar* (who had also since died) continued in the possession of the said half till January 1853, when a half thereof was sold under a writ issued against the said *Alima Natchia*, and the other half was claimed by the defendant. The defendant pleaded that *Alima Natchia* was only entitled to a fourth of the land, and that the other fourth belonged to him by inheritance. It appeared at the trial that the entire garden belonged to *Tanga Oemma* and her brother, the father of the defendant; that *Tanga Oemma's* only daughter *Isa Natchia*, married *Sultan Matejan*, and died in 1849, leaving an only daughter *Alima Natchia* (the mother of the plaintiffs:) that *Sultan Matejan*, who had in the mean time contracted a second marriage with *Sevata Oemma*, the sister of the second defendant, granted a *Cadotam* at the marriage of *Alima Natchia*, whereby he settled on her the half which had devolved upon his

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former wife *Isa Natchia* from her mother *Tanga Oemma*,—subject, nevertheless, to a life-interest in favour of *Sevata Oemma*. *Alima Natchia* and her husband both died within a year after their marriage. *Sultan Matejan* occupied the land in question from the date of his marriage with *Isa Natchia* till his death in 1847; and after his death, his widow *Sevata Oemma* continued to occupy till her death in 1851. It appeared also that the house of the defendant's father, which stood on the other half, having fallen down about the year 1845, he and the other members of the family had removed into *Sevata Oemma's* house, and continued to live with her till the time of the interruption.

There were other facts established in evidence, which will appear from the following judgment of the Court below, (*Pole*, D. J.)

"The dispute in this case is confined to the one-fourth part of the garden called *Mahaletta Mira Lebbegey Gederewatte*. It is admitted on both sides that *Isa Natchia* was originally entitled to half of the said garden and the entire house, and that in 1853, one-fourth thereof was sold under a Writ of Execution in case No. 16,006, as the property of *Alima Natchia* deceased. Both parties claim through the said *Isa Natchia*. It is admitted also on both sides that she was the mother of *Alima Natchia*, and that the second plaintiff was the daughter of the said *Alima Natchia*, and first plaintiff her son-in-law. A *Cadotam*, or Mahometan marriage-contract respecting dower, dated February 1836, is filed by the plaintiff, to shew that defendant admitted the said *Alima Natchia's* right by signing the said contract; and the defendant in his examination admits that in the said *Cadotam* he finds his name, but he denies his hand-writing. He admits however having been present at the said *Alima Natchia's* wedding. In this *Cadotam*, the donor, who was then the husband of *Sevata Oemma* (the sister of the defendant,) and the father of the donee *Alima Natchia*, gives the said half part of the land and house in question to his daughter *Alima Natchia* after his said wife's, said *Sevata Oemma's*, death; and it is admitted that the latter did not die till 1851. The plaintiff has also filed two Testamentary cases;—first, No. 109, which are the proceedings taken in the said estate of the said *Alima Natchia* and her husband both deceased, and in the inventory filed in that case, being of the property and effects of that estate, this half part of the said garden *Mahaletta Mira Lebbegey Gederewatte* and the house of 9 cubits covered with tiles and built bordering the street, are inventorized as the property of the said *Alima Natchia's* estate, and the de-

fendant's own brother-in-law was the guardian of the 2nd plaintiff in this case. Secondly, the Testamentary case No. 117, of the estate and effects of defendant's own father, who appointed him sole executor of the last Will. In these proceedings the defendant did not include the property now in dispute, nor any part thereof. From the documentary evidence adduced by the plaintiff, it is clear that from May 1837, when the said *Alima Natchia* died, leaving a daughter (the 2nd plaintiff in this case,) until January 1850, when the defendant filed the final account of his father's estate, he never laid claim to the property in dispute. On the contrary he allowed it to remain in the inventory of the estate of the said *Alima Natchia* for 13 years, without any claim whatever; and he actually admits in his answer that said *Alima Natchia* and her husband were entitled to one-fourth of the land and to one-half of the house in question, and that they posssessed the same till their death; and that subsequently the guardian of the 2nd plaintiff, the heir of the said *Alima Natchia*, possessed until 1853, when the premises were sold in execution;—and the Court, on reference to the said case, No. 16,006, under which a portion of the premises in question were sold, finds that, on the 14th April, 1853, one *Ahamadoe Lebbe Coomister Saiboedorey* purchased one-fourth of the garden, (except the planting share,) and the half of the house in question, as the property of the estate of the said *Alima Natchia*. On comparing the foregoing documentary evidence with the evidence adduced by the plaintiffs, the second witness for plaintiffs has (notwithstanding the defendant's denial of his hand-writing) satisfactorily proved that the defendant did sign the said document—the *Cadotam*,—and, by his so doing, the Court is of opinion that he not only admitted the donor's right, and the said *Alima Natchia's* right, to the said property in question, but he abandoned any right he might then have had or which might thereafter arise.

"From the other witness, it appears that *Sevata Oemma*, the sister of the defendant, died about 4 years ago, about the time of the marriage of the second plaintiff, who was born in 1837, and at the time of her marriage could not have been more than 15 years old; and, it having been admitted that her guardians were in possession of what was sold in 1853 under writ case No. 16,006, the only question is whether they were not also, at the time of the sale, in possession of half of the garden and the entire house,—*Sevata Oemma* having lived in the house until she died, according to the intentions of the donor of 1836, under the said *Cadotam*.

"The Court is of opinion, both from the documentary evi-

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dence, and by the admission made by the defendant, and the plaintiff's evidence, that second plaintiff's guardian had possession of half of the said garden and the entire house, from the death of *Alima Natchia* in 1837 until 1853; and that they had undisputed possession for 16 years; and that the remaining half of the house of 9 cubits and one-fourth part of the garden, which remained unsold, is the property of the second plaintiff, by inheritance and possession, from her mother *Alima Natchia*, who died in 1837, and by possession, through her guardian in Testamentary case No. 109, till 1853: and the judgment of the Court is that the plaintiff be quieted in the possession of the one-fourth of the garden *Mahaletta Mira Lebbegey Gederewatte*, and half of the house of 9 cubits built thereon on the road side, situate at Cadewedeye, which remained unsold, under the said writ No. 16,006, in 1853. The defendant to pay costs of suit."

Against this judgment the defendant appealed, on the grounds, that the *Cadotam*, not being attested by a Notary and witnesses, was of no force or avail in law; 2, that it was not admissible for want of proper stamp; 3, that *Alima Natchia*, having died previously to *Sevata Oemma*, the *fidei commissum* created by the alleged *Cadotam* was at an end, and no property vested in *Alima Natchia*; 4, that *Isa Natchia* was entitled only to half the garden; she having died leaving only a husband and a daughter, the daughter was only entitled to half of her estate, and therefore could recover only one-fourth of the land; and 5, that no exclusive possession was proved on the part of the plaintiffs.

Rust appeared for the Appellant: *Lorenz* for the Respondent.

Per Curiam:] That the decree of the Court below be affirmed. Second plaintiff is clearly entitled to the land, and the objection to the *Cadotam* not being stamped comes too late in appeal. *Isa Natchia* died in 1849, and the fact of the property not having been included in the estate of the defendant's father, (see case No. 117,) shows that the father did not inherit or possess it, and quite puts an end to the defendant's claim through his father.

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

No question can be put to a party during examination, the answer to which may tend to criminate him.

No. 17,348, *D. C. Galle.* } *Silva* v. *Mendis.*

This was an action for defamation. The defendant had presented a petition to the Governor, complaining of certain alleged malpractices of the plaintiff as a Notary. The plaintiff, in his libel, set out this petition, and claimed damages. The defendant

filed a simple plea of not guilty. Some time before the day fixed for the trial of the case, the Proctor for the plaintiff obtained a notice on the defendant to attend Court, on a day therein named, to be examined *viva voce*. On that day the following proceedings were had, according to the record.

"Mr. *Ludovici*, for the plaintiff, moves to examine the defendant on the following points, in order to save the necessity and expense of summoning the Colonial Secretary to appear as a witness on the cause on the day of trial:—1st, whether the defendant admits or denies the Petition in question; 2nd, whether he forwarded or caused it to be forwarded to His Excellency the Governor.

"Mr. Advocate *Dias* contends that no such examination should be allowed, and refers the Court to Murray's Reports, No. 39, *Jayewardene* vs. *Cripps*.

"The Court does not see what hardship the defendant would be put to by being interrogated on the points alluded to by plaintiff's Proctor, and on the other hand the plaintiff appears to be *bona fide* in his object, viz., to save the expense and inconvenience of summoning the Colonial Secretary from Colombo.

"The Acting District Judge is of opinion that it is in the discretion of the Court to allow or refuse the examination; and as it sees no reason to the contrary, the objection is over-ruled, and it is ordered that the examination be proceeded with.

"Mr. Advocate *Dias* states that his clients were in attendance on Rule served, and that since the case had stood over by a previous order, private affairs had prevented their being present to-day, and intimates his intention of appealing against the order of the Court allowing the examination.

"C. H. De Saram,
"Acting District Judge."

On appeal against this order,

Dias, for the defendant and appellant, contended that the notice was issued irregularly. Before a party can be allowed to notice his opponent for an examination, he ought to satisfy the Court that such examination is necessary. It would be a great hardship, if a notice were always allowed as a matter of course: for the defendant might be residing at a distance, and the notice might be issued merely with a view of harassing him. [Rowe, C. J.—The District Judge may exercise his discretion in such a case. See clause 31. It would appear he has no discretion in any case not falling within the exception stated in that clause. The examination depends on the circumstance whether the Judge

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considers it would conduce to the purposes of justice.] No such circumstance appears on the record, and the motion for a notice seems to have been granted as a matter of course. [Rowe, C. J. The record is silent; but we must presume *omnia esse rite acta*.] Secondly, it is submitted that the defendant was not bound to answer the questions proposed to be put to him, as they would tend to criminate him. 1 Russell on *Crimes*, 220, 240; 4 Bl. *Comm.* 150, 151; 1 Taylor on *Evidence*, § 38, p. 53.

Lorenz, for the respondent, confined himself to the second objection.] The objection was premature. It was for the *party* to take the objection when the question was put to him, not for the Counsel during an argument on the motion. *Osborne* v. *London Dock Comp.*, 3. C.L.R., 313; *Boyle* v. *Wiseman*, 3 W. R. [Temple, J.—The party was taken to be present, and you proposed certain questions which his Counsel objected to. Your objection is very technical.] It is perfectly sound; for, although the defendant's Counsel may see objections to his clients answering the question, the client himself may be willing to answer them, i allowed to be put to him. [Rowe, C. J.—It will simply come to this then: you will go back with liberty to put the question, and the defendant when asked the question, will, I have no doubt, be advised to decline answering it. You had better compromise the matter. The petition may be proved without such examination, for it does not appear to be a privileged communication.]

Dias, referred to Rule 29th, which authorises the Court to disallow a question *being put*, where the *Court* considers that the answer to it would have the effect of criminating the party.

The order of the District Court was *set aside*, each party paying his own costs, on the ground that, under the 29th Rule, neither of the questions proposed to be put to the defendant could be leagllly put, as the answers would have the effect of criminating the party.

No. 13,531,
D. C. Kurnegalle. } *Essendy* v. *Menika* and another.

An Intervenient may claim adversely to both the parties in a suit

On the 23rd of February, 1855, the plaintiff filed his libel, claiming certain lands by right of his father, *Abadia Dureya*. The defendant denied the plaintiff's claim, and set up title in himself On the 5th January, 1857, a party calling herself the widow o *Abadia Dureya* intervened for herself and on behalf of her minor child, and denied the right of both plaintiff and defendant. After this intervention, the case came on for trial on several occasions'

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and on one of those occasions (the 21st July, 1857), a motion for a postponement by the intervenient's Proctor was allowed by the Court. Upon these pleadings the case came on again on the 11th August, 1857, and the following proceedings are recorded on that day:

"Parties and their Proctors present. On being interrogated as to their readiness to go to trial, the Proctors for plaintiff and defendant jointly answer that, before stating their readiness or not, they jointly move that the Intervention be set aside, as being adverse to the title of both parties, and that the case be proceeded with between plaintiff and defendant only.

"The Court is of opinion that the intervenient is entitled to be heard on the pleadings as they now stand, and that, under the 32nd clause of the 1st Sec. of the Rules and Orders, an intervention adverse to both parties is allowed; and the Court is further of opinion that the case No. 13115, District Court Chilaw, referred to by plaintiff and defendant, does not warrant the doctrine contended for by them.

"The Court now again calls upon plaintiff and defendant to state if they are ready to go on;—they again reply that they are ready as between themselves, but not as between themselves and intervenient, the latter not having served them with copies of the intervention or legal notice."

The Court then ordered the case to be struck off the rolls, directing the Intervenient to serve the opposite party with due notice of Intervention.

From this order the plaintiff and defendant appealed.

W. Morgan for the appellants.] An Intervention adverse to both parties cannot be allowed. [Rowe C. J. Look at the 32nd clause of the Rules.] In construing that clause, you cannot give the words *adverse* a larger meaning than the law allows. Intervenients by the Dutch law are of two kinds;—1st, where the Intervenient substitutes himself for one of the litigant parties, as in the case of a principal taking up a case instituted by his agent, or a daughter taking up a case instituted by the father for her dower; 2nd, when he intervenes in support of one or other of the litigants; (Van der Linden's Jud. Pr. b. 2. c. 5, sec. 4; Merula, 1, 4, t. 47, c. 1, sec. 1. Voet v. 1. 34.) The result of the Dutch authorities upon the point, is that a party can only intervene where it appears that his rights would be so affected as that they could not be rectified by another suit. A and B may litigate for land, and one of them obtain judgment; but if the land did not belong to either, but to a third party, such

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a judgment cannot bind the latter; so the Dutch law did not allow an intervention by him. If the word *adverse* were given so large a meaning as will be contended for on the other side, all kinds of claimants for the thing in contest, may come in and embarrass the proceedings. In fact it would be to allow several rights of be tried in the same case, which can only be done by several suits. It would lead to several independent judgments in the same case. The practice in claims in execution is analogous. The Intervenient cannot be heard, as she has not obtained leave of the Court to intervene. This is the invariable practice of the District Court here, and in outstations. You must file an application, setting forth the nature of your right, and if the Court is satisfied of the right upon the face of the application, it is allowed at once: but if such right is not clear, the Court then fixes a day for summary inquiry; (No. 15663, District Court, Colombo; Vanderlinden, Jud. Pr. b. 2, c. 5, sec. 4; Merula, l. 4. t. 47, c. 1. sec. 1; Voet. v. 1. 37.) In this case the Intervenient comes in long after issue was joined between plaintiff and defendant, and she cannot throw open the issue again by requiring the opposite party to answer the Intervention. (Merula, ib. sec. 5. 6; Voet. ib. sec. 34.)

Dias, for the Intervenient and Respondent.] I admit the correctness of the statement as to the practice of the Colombo District Court; but that has not been the practice in the outstations. It is not competent for the other side to take this objection. It would be otherwise, if we were bound to give them notice of our application. This, it will be admitted, we were not bound to do. The District Judge had a discretion to allow or reject the Intervention, and he having allowed it, the opposite party cannot object. Again, they were estopped by their own acts from now raising the objection. After the Intervention, the case came on several times, and on one occasion (27th January 1857,) the case was postponed, "parties not being aware of the Intervention." Under these circumstances, the opposite party must be taken to have waived all their objections both formal and substantial. Upon matters of Intervention we must first refer to the local law. The 32nd clause of the Rules and Orders was framed by Sir Charles Marshall for the very purpose of giving Interventions a more extensive operation than the Dutch law allowed; so that instead of narrowing the rule by bringing the Dutch law to bear upon it, we must use it for the purpose of giving the Dutch law a much wider operation. If the intention of the framers of that rule were to leave the Dutch

law where it was, there was no occasion for the words used therein ; and they were clearly intended to cover cases of Interventions adverse to both the litigants in the fullest sense of the word; indeed the majority of Interventions in this country is adverse to both parties. It often happens that after the institution of a suit, a survey is ordered and made, and third parties discover that their lands are drawn into the contest between a plaintiff and defendant, and then they apply to intervene. Indeed there is a case in which such a claimant was actually compelled by the Court to intervene. (No. 19557, District Court Colombo, No. 1 South.) In fact the decisions from 1853, many of them of Sir C. Marshall, have been uniform on the point ; and there is a case in which it was contended that if A. allowed his property to be litigated between B and C, and stood by without interposing his right, he was estopped from questioning the judgment in the case between B & C. (Morgan's Dig. p. 81.) The object of the framers of the 32nd clause was to avoid multiplicity of suits, and this is quite in keeping with the general spirit of the Dutch law. In the present case the Plaintiff and Intervenient claimed through the same party, and the difference between them is, whether the Plaintiff or the Intervenient is Abedia Dureya's heir-at-law. The case clearly fell under the class of cases referred to by Lordship the Chief Justice. (Voet 5. 1. 35, "*invito litigantium*, &c.") It is quite clear that plaintiff and defendant are colluding together to defraud the Intervenient. In her Intervention she says that she was about to prosecute the defendant for the land, when he put up plaintiff to sue him with a view to obtaining a collusive judgment. This statement is borne out by the record. On the day of trial the plaintiff's and defendant's proctors acted together, and the appeal petitioni also signed by both of them. If plaintiff and defendant were bona fide opposed to each other, this could not have happened.

Affirmed.

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Present TEMPLE J., and MORGAN, J.

A Lessee, who had forfeited his lease by non-payment of rent, and had moreover agreed to quit the premises, held not entitled to an Injunction against a party who had since purchased the premises from the Lessor.

No. 23,331, *D. C. Colombo.* } *Armogam* and another v. *Mahamadoe Saibo* and others.

The plaintiffs brought this action to be quieted in the possession of a spot of ground and a house thereon, which they had taken on a Lease dated the 14th July 1857, for a period of two years, from the owners thereof; and upon affidavits setting forth their lease and possession, and that the defendants were about to convert the spot of ground into a burial ground, they moved for an injunction to restrain them from so doing. The defendants opposed this motion on the ground that the Lease, which contained a clause rendering it void on non-payment of rent, had been forfeited,—and produced affidavits to the effect that the lessors had, on the 12th August 1857, transferred the property for valuable consideration to the defendants; that the plaintiffs were at the time aware of such transfer, and had agreed to quit the premises within a couple of days; that subsequently they failed to pay the rent which accrued due on the 14th August; and that due notice was given calling upon them to quit, which they failed to do; whereupon the defendant re-entered and took possession.

Upon these facts the District Court (LAWSON D. J.) made the following order:

"This is an application for an injunction to restrain the defendants from using as a burial ground a certain piece of land, which had been purchased by the 3rd, 4th and 5th defendants from the other defendants in the month of August last, but which had been leased to the plaintiffs for a term of two years on the 14th of July preceding. This lease demises the land, with the house standing thereon, to the plaintiffs for a term of two years, at a monthly rent of £1, reciting that £2 had been paid beforehand; but containing a proviso that this £2 was to be taken in payment of the rent for the last two months of the term. The defendants have appeared and opposed the motion, and filed affidavits to which I will refer presently. Independently of any facts disclosed in these affidavits, I think that the plaintiffs are entitled to an injunction:—and that on two different grounds, and under two different aspects of the question. I think that they may restrain the defendants, as their landlords, from committing a breach of the covenant for quiet enjoyment, to be implied from their lease; and that, without reference to their

relationship as landlords and tenants, they may restrain the defendants from an act which is a nuisance,—and a nuisance prejudicial to health, and not to be compensated by damages. But the defendants put in affidavits to show that the plaintiffs have forfeited their lease, and that the same has become null and void, because the plaintiffs have failed to pay their rent for two months, which rent is now due; and the deed contains a condition declaring the lease void on non-payment of rent. But here again, I think that this Court possesses, and is called upon to exercise, the power exercised by Courts of Equity in England, and confirmed to them by Statute, of treating such conditions as being in the nature of a penalty, and relieving lessees from their effect on payment of all arrears of rent. The plaintiffs in this case should, I think, have tendered the arrears of rent, but the omission may be met by postponing the issuing of the injunction until these arrears be paid into Court. It is therefore ordered that an injunction do issue of the nature prayed for, so soon as plaintiffs should have paid into Court the sum of £2."

Against this order the defendants appealed.

Rust (*Lorenz* with him) for the defendants and appellants.] The lease contained a condition that it should be void on non-payment of rent. This is distinguishable from the English right of re-entry; 2 Story, Eq. Jur. § 315; Hill v. Barclay, 18 Vesey, 56. By the Dutch Law non-payment of rent absolutely forfeits the lease. Van Leeuwen's Comm. 405; *Toussaint* v. *Sathrocalsinga*, (No. 4591, D. C. Jaffna,) Coll. Min, 3rd June 1852. Upon the forfeiture we entered into possession, and we are in possession; and the result of the injunction would be that the defendants, who are in possession, will be distrurbed by a wrong-doer, and that the plaintiffs will be entitled to hold the property for two years without paying any rent for it, or at least by driving the defendants into Court at the end of every month for the recovery of that month's rent. 2. The plaintiffs have not shown a clear right to the land; and this is essential to their obtaining an injunction; V. d. Linden, 440. It is distinctly sworn that they agreed to quit the property in a couple of days after the transfer. Such an agreement is not perhaps valid under the Statute of Frauds; but that would be a question for ultimate decision. But the defendants, who are third parties, having been induced by such agreement to enter into a contract with the lessors, are clearly entitled to protection as against the parties who have thus misled them by an agreement which they did not intend to fulfil. [Morgan J. In other words the plaintiffs can-

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not ask to be restored to the property, inasmuch as the rights of third parties have supervened.]

W. Morgan, (*Dias* and *Muttukistna*, with him,) for the respondents.] The defendant's conduct was not *bona fide*. On the 12th of August, two days before any rent was due, they go and take a conveyance from the lessors, to which no allusion is made in the lease. The plaintiffs received notice of the sale only after the conveyance. This shows clearly that the defendants were determined from the commencement to get rid of the plaintiffs. We come to Court with a valid lease in our hands, and the defendants have nothing to urge against it, except that we verbally agreed to relinquish it. Is it to be believed that the plaintiffs would have consented to give up a lease without any consideration, when by holding it on they might have compelled the defendants, who are anxious to get the ground, to make a favorable compromise? One month's rent had already been paid to the lessors. [TEMPLE J. But that was to be appropriated to the last month of the term.] It is not improbable that the plaintiffs made a mistake in this respect in appropriating it to the first month ins ead of the last; 2 Story §§ 1319, 1323. The lessor is always entitled to relief against forfeiture. [TEMPLE J. That rule would apply but for three circumstances sworn to, the non-payment of rent, the assent to the conveyance, and the rights of the third parties supervening.] But the lessor cannot re-enter without the intervention of the Court: he cannot take the law into his own hands. [*Morgan J.* And you are suing him for having done so. The question is whether, under the circumstances, you are entitled to the extreme remedy of an injunction. Certain facts are alleged against you, and you have not even filed counter-affidavits denying them.]

Lorenz in reply, was stopped by the Court.

JUDGMENT, per *Morgan J.*] The order of the Court below in this case, is set aside, and the motion for injunction disallowed; each party bearing his own costs in the Court and in appeal.

To justify the issuing of an injunction like the present, the party applying for it must establish an apparent right in his favour to the land in question, and a well-grounded apprehension of his suffering irremediable damage by the injury which he seeks to avoid. V. d. Linden, *Inst.* p. 44.

The interest of the plaintiffs in the land, to prevent burials—which is the object of the application—is that of lessees. It is clear from the affidavits and the order of the Court, acquiesced

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in by the plaintiffs, that a month's rent was in arrear when the plaintiffs first applied for an injunction; and two months' rent in arrear when the application was discussed in the Court and granted. By a clause in the Lease it was stipulated that the lease was to be null and void, "in default of any one of the monthly payments," when the lessees were to give up possession of the premises to the landlord. It is quite true that Equity will generally relieve a lessee in case of forfeiture, for the breach of covenant to pay rent; but the question for consideration is whether such relief can be afforded in case like the present?

It appears that the lessors on the 12th August last, transferred their right to the land to the defendants and another, as Trustees of a Mohammedan Mosque, who purchased the same for a burial ground. It is sworn, and no counter-affidavits have been filed, though time was stated to have been given by the Court for that purpose; that the plaintiffs had notice at the time the transfer, "and agreed to quit the premises, and promised to do so within two or three days thereafter."

It appears to the Supreme Court that, as the rights of third parties have thus become involved, and will be prejudiced should the lessees be relieved from the forfeiture, and, as it would be impossible, by merely paying the arrears of rent as decreed by the District Court, to place the lessors in precisely the same situation in which they stood before the sale, the case is not one in which relief ought to be afforded. "Undoubtedly" says the Lord Chancellor, in *Sanders* v. *Pope*, 12 Vesey 291, "unless it is plain that full compensation can be given, so as to put the other party in the same situation precisely, a Court of Equity ought not to act; for, such a jurisdiction would be arbitrary." In *Cage* v. *Russel*, 2 Vent. 352, and 13 Viner 458, it was held that "a forfeiture shall not bind, where anything *may be done afterwards*, or any *compensation* made for it, unless where there is a devise over to a third person."

Nor can the Supreme Court in an application like the present, the granting or refusal of which is a matter resting in the sound discretion of the Court, lose sight of the fact that the parties claiming the injunction have but a transient interest in the land,—an interest only for two years,—the loss of which can be amply compensated for by money, assuming them to be legally entitled to such copensation, and that it is clear, from their acquiesence at first, and promise to quit, and the subsequent proceedings, that the application is a vexatious one, preferred merely

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to embarass the purchasers of the land, and to keep alive, as was stated at the Bar, the differences which unfortunately divide the Moorish Community."

December 2.

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

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No. 19.285, *P. C. Caltura.* } *Sodial Hamy* v. *S. de Soyza.*

On a plaint against a Husband for neglecting to maintain his wife and children, it is no defence that the Husband is willing to receive the wife into his house, if it appears that he keeps a woman therein.

This was a charge by the complainant, the wife of the defendant, for not maintaining her and her children, in breach of the 3rd Sec. par. 2, of the Ord. No. 4 of 1844. The defendant pleaded not guilty, and stated that he was prepared to maintain her, if she would return home to him. In answer to this the wife proposed to call evidence to prove that the defendant was living with another woman, and that she could not live with the defendant, as the other woman was living under the same roof. The Police Magistrate rejected this evidence, and pronounced the following judgment. "The Ordinance provides for cases where the husband leaves his wife, &c. In the present case the wife positively refuses to return to her husband, as he is living in open adultery with another woman. This naturally, if true, renders return to him insupportable; but I scarcely think it competent for the Police Court to decide such matters, which more properly in my opinion should form the subject of a civil suit for divorce or separation *a mensa et thoro*." The Plaint being dismissed on these grounds, the Complainant appealed against the dismissal.

Dias for the complainant and appellant.] The evidence tendered was improperly rejected. Before the defendant could be brought under the Ordinance, it must be first shewn that he was under a legal liability to maintain his wife. It is true that if the wife left her husband without a just cause, she could not support a case for maintenance; but the question here is, was her refusal to return to her husband justifiable? Here the husband's conduct was such, that the wife was obliged to leave her home, and this was equivalent to an actual expulsion. (Hodges v. Hodges, 1 Esp. 441; Howliston v. Smyth, 3 Bing. 127.) The wife offered to shew that the conduct of the husband, (adultery and cruelty,) was such that she could not return to him; and it has been held that a refusal to live under the same roof with a prostitute was a sufficient justifiable cause. (Aldis v. Chapman, 1 Selw. N. P., 278, 279; 4 Burns' J. P. 107;

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6 Burns' J. P. 318.) The test to ascertain the liability of the husband to maintain his wife and children under the Ordinance, is, to see whether, under the circumstances, a third party could maintain an action against the husband for necessaries supplied to the wife. That liability was founded upon an implied authority to the wife to pledge the husband's credit; and this implied authority was not taken away, if it could be shewn that the wife's refusal to return to her husband's home was owing to his own misconduct; (2 Saund. Plg. 197; Mainwaring v. Leslie, 2 C. & P., 507.)

Per Curiam.] Judgment set aside, and the case remanded for the wife's evidence; the Supreme Court being of opinion that in the event of her being able to prove that it was impossible for her to live in her husband's house, in consequence either of his cruelty or open adultery with a woman kept in his house, she would be entitled by Law to be supported by him.

December 4.

Present Rowe, C. J. and Temple, J.

No. 3,398, *D. C. Badulla.* } *Punchy Menika* v. *Kaloo Banda* and another.

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The sentence of a D. J., who, as J. P., but without a previous investigation, had committed the prisoners for trial before himself, and had sentenced them, without recording a verdict,—*affirmed*; but his discretion was questioned.

On the 27th September last, the complainant swore an affidavit against the defendants, stating that on the 19th, 20th and 21st May, the defendants with force and arms, &c., took her to the house of the 1st defendant, and committed an assault upon her; and that on the days aforesaid the defendants did unlawfully &c., and without any legal authority, imprison and detain her. On the 27th October the defendants were brought up before the Justice of the Peace, who had issued the warrant, and were asked what they had to say. They denied the charge; upon which they were severally committed to take their trial before the District Court, and on the same day they were tried by the same Magistrate, but in another capacity, viz as District Judge. Several witnesses were examined for the prosecution, and it appeared that upon a charge of having stolen a penknife, the property of the 1st defendant, the complainant had been brought to the house of the 1st defendant on three successive days, and ordered to stand in the sun. The defendants called no witnesses, and the Judge holding that the charge was proved, sentenced the 1st defendant to pay a fine of £15, with imprisonment at hard labour for one month; and the 2nd defendant to pay a fine

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of £10, with imprisonment for three months at hard labor. From this the defendants appealed.

Dias for the defendants and appellants.] There is no judgment in the case, the District Judge not having found the prisoners guilty, which he was bound to do before passing sentence. He complied with the first and last requisites of the law, namely, the trial and sentence, but omitted the second and most important one, namely, the conclusion upon the evidence, which is the verdict. A man cannot be punished before he is found guilty [ROWE, C J.—It is quite clear that the District Judge intended to convict the defendants. See the following passage in the judgment :—"The circumstances as proved this day are of a very serious nature. They shew that the oppressions of which so much has been said in England, are not confined to India, but is practised in the remoter parts of the Island."] It is quite clear what the District Judge intended to do, but that intention should have been legally recorded. A verdict, or a decree, must be certain beyond all doubt. It is the final conclusion upon the law and the facts, and should not be left to be inferred. Take the case of a Judge of the Supreme Court trying a prisoner with a jury and, without the verdict of the Jury, proceeding to pass sentence. [ROWE, C. J. The District Judge is both Judge and Jury.] No doubt; but a verdict of *guilty* or *not guilty* is of the very essence of a criminal trial, and the fact of the District Judge being Judge and Jury would take away the necessity for a verdict [TEMPLE, J. What does the Ordinance say about it? ROWE, C. J. Is there anything in the Rules and Orders to shew that the District Judge was bound to record a verdict?] The Rules and Orders do not expressly require it, but the law requires that a verdict should be recorded before passing sentence. This being a criminal proceeding, the District Judge was bound to act strictly within the law. Secondly, the District Judge had no jurisdiction to try the case. He is purely a creature of the Ordinance, and his jurisdiction is strictly defined. He has no jurisdiction to try a party criminally, unless that party has been committed before him by a Justice of the Peace, (Ordinance No. 12 of 1843, clause 3.) Here the party was not duly committed, because the Justice of the Peace did not make a preliminary investigation, which he was bound to do, before committing him for trial before the District Court. The Affidavit was sworn by the complainant on the 27th September, and on the 27th October the defendants were brought up, and without any preliminary inquiry, committed to the District Court, though by the 24th and 28th clauses of the Ordinance No. 15 of 1843, the Justice

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was bound to make such inquiry. [Rowe, C. J.—We cannot now inquire into the regularity or irregularity of the proceedings before the Justice of the Peace. The District Judge himself is not bound to do so. He has simply to try the party committed before him.] The District Judge's jurisdiction being under the Ordinance, he was bound strictly to comply with its provisions. He can only try a party who has been duly committed by a Justice of the Peace, and if he was not duly committed, as in this case, he had no jurisdiction, and the whole of the proceedings before him are null and void. The mere committal will not justify his trying a party; he must ascertain whether that committal was duly made. This view of the case is borne out by the 33rd clause of the Ordinance No. 15 of 1843, which required Justices to transmit a copy of all examinations taken by them to the Secretary of the District Court. In this case the defendants were committed at once to the District Court upon an *ex-parte* affidavit of the complainant. The Magistrate as J. P., had made up his mind as to the guilt of the defendants, and then and there, assuming another character as District Judge, proceeded to try them judicially. Under such circumstances the defendants could not expect a fair trial. The District Judge, as Judge and Jury, had prejudged the case. To avoid this inconvenience, as much as possible, the law has provided that matters of this kind should be referred to the Queen's Advocate, but that did not appear to have been done in this case. Lastly, the offence charged was out of the jurisdiction of the Court. The defendants were charged with assaulting and imprisoning the complainant, and exposing her in the sun for three days. This was too grave a matter for the District Court, and the punishment which the District Court was empowered to inflict was inadequate to the offence. My clients are quite prepared to take the opinion of a jury upon their case; and from the extreme improbability of the complainant's story, they are not without hopes, if the case should come before the Supreme Court. [Rowe, C. J. How can we interfere? The District Judge has not exceeded his jurisdiction. See clause 2 of the Ordinance No. 12 of 1843.] The District Judge could not assume jurisdiction by keeping within the quantum of punishment he is authorised to inflict. If that were so, he could try a manslaughter case, provided he took care to keep within the Ordinance as to the amount of punishment. It is true that in this country there is no scale of punishments, but the District Judge was bound to exercise a sound discretion, subject to correction by this Court; and in this case

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he has undoubtedly exercised a very bad discretion, which should be overruled by this Court. There was a case in which I appeared for the prisoner. He was tried by the Police Court of Awishawele, and found guilty, and punished. Afterwards he was put upon his trial before the Supreme Court for the same offence; when he pleaded the former conviction. The Supreme Court, after hearing argument, decided that this plea was bad, inasmuch as the Police Court of Avishawele had no jurisdiction to try the case; and the prisoner was twice punished; so that if the Queen's Advocate should think it desirable to try the present defendants before the Supreme Court, and the defendants should plead *autrefois convict*, the answer to that would be as in the Avishawelle case, that the District Court had no jurisdiction.

Rowe, C, J.] We intend to forward this case to the Queen's Advocate, and to bring to his notice the proceedings of the Magistrate. He has acted most indiscreetly in not having previously consulted the Queen's Advocate on such a grave and important charge. It is due to every body, that when charged with an offence, he should have a fair trial; and on the other hand it is due to the public, when that offence is of a grave nature, that the punishment should be of such a nature as will meet the gravity of his offence. The Judge, or rather the Magistrate in this case (for it is difficult to see in what capacity he has acted,) has taken on himself the responsibility of dealing with a case, which, if the facts were true, and if brought before me as a Judge of the Supreme Court, I should have dealt with in a far different manner. He has exercised a discretion, and we are bound to say has exercised it most unwisely. It is for the Executive to inquire into the matter; and we therefore refer it to them. The judgment must under the circumstances, stand *affirmed*.

December 11.

Present Rowe, C. J., and Temple, J.

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No. 5,140, *P. C. Navelapittia.* } *Fisher* v. *Palany Cangany* and others.

Estate-coolies are labourers under No. 5 of 1841. The payment of a cooly by the day does not necessarily make his engagement a monthly engagement.

This was a complaint against the defendants for breach of the 7th clause of the Ordinance No. 5 of 1841, for leaving the service of the complainant without giving due notice, and without reasonable cause.

It appeared in evidence that the defendants had been brought over from the Coast by one *Sangaly*, the Head-Cangany of the complainant, to work on the complainant's estate at *Doombe-*

gastalawe. On the first of October they quitted the estate without having given any previous notice. It appeared also that their wages had been paid monthly, at the end of every month, by the Head-Cangany, who received them from the complainant; and that although the defendants had not been paid their wages for August, they had already received advances in rice and cumblies, which were not covered by the month's wages. On these facts, *Shipton*, Acting Police Magistrate, found them guilty, and sentenced them to one month's hard labour. On appeal,

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W. Morgan for the appellants.] 1. The words *menial or domestic* should be understood before the word *Labourer*, in the 2nd clause of the Ordinance. Coolies do not come within the Ordinance, which only contemplates household servants or labourers, who perform their work *intra moenia*. *King* v. *Hullcott*, 6. T. R. 587. The defendants were not engaged as servants or labourers on monthly wages, but only during crop-time, until the crop should be gathered. This is not such a *permanent* service as to create the relationship of Master and Servant. *Ex parte Collier*, 2 M. and A. 30. 2ndly, There was no contract on the part of the defendants with Captain *Fisher*, but with *Sangaly*; for it was he who had engaged them, and who paid them their wages. 3rdly, It is evident that the Legislature never intended to include Estate Coolies within the provisions of this Ordinance; for even the other day a difficulty was felt and suggested on this point; and the Queen's Advocate was appealed to. In fact it has been stated that a new Ordinance is about to be proposed to remedy the defect,—a fact, which clearly shews that the Legislature never intended to provide for a case like the present. 4thly, It appears that the defendants had not been paid their wages: and this was a reasonable excuse. [ROWE, C. J. Is it? Or rather ought not the defendants to proceed to recover their wages? TEMPLE, J. They generally leave their wages in the hands of the Superintendent, who deducts from them the value of the supplies.] Lastly, It is submitted that the contract was for labour by the day; for it appears from the evidence that the defendants were paid daily wages. *Sangaly* says "August was a wet month, and they did not work a sufficient number of days to cover their account." The Ordinance expressly exempts daily labourers from the penalties imposed by it.

Lorenz for the respondent.] There can be no doubt as to the meaning of the term *labourer*; and we cannot restrict it to menial or domestic servants, for the terms *servants* and *labourers* are not only distinguishable, but are placed in opposition to each

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other in the Ordinance. [ROWE, C. J. referred to the previous Ordinance No. 16 of 1840, the provisions of which are precisely similar.] Again the Ordinance, which was repealed by No. 16 of 1840, viz. No. 3 of 1834, clause 17, refers only to *menial servants*, but extends the term to *coolies and palanquin bearers*; and the present Ordinance substitutes the term *labourer* for the latter. [ROWE, C. J. We will only hear you on the last point suggested by Mr. Morgan, viz. as the period of the engagement.] The Ordinance is clear on that point. It enacts that every engagement, except for work usually performed by the day, by the job, or by the journey, shall be considered an engagement for a month. The rate of payment may be calculated by the day; but if the work be not such as is usually performed by the day, it is a contract for the month. The two propositions are distinct. A servant may be engaged for work which cannot be completed for a month, and in such case, the work being such as is not usually performed by the day, the engagement must, under the Ordinance, be considered a monthly engagement; but when you come to pay his wages, you may count up the number of days on which the servant was actually employed, and pay him at so much per day:—for it is not an usual thing, even with household servants, to mulct a day's pay in case of absence or idleness. Looking at the surrounding circumstances, the monthly payment and the large advances made to the coolies, it is quite clear that the case falls within the 2nd Clause of the Ordinance.

ROWE C. J. delivered judgment.] The real point in the case is—does the case of these defendants fall within the exceptions stated in the 2nd clause of the Ordinance? It is perfectly clear that there is a distinction between *servants* and *labourers*: but the question is not whether they are servants or labourers; but whether they fall within the exception I have referred to. Sitting in appeal, we have no right to look beyond the present proceedings for information regarding the nature of the work. And from these proceedings, upon the facts before us, there is no trace of anything which could bear the semblance of *daily* labour. The observation of Mr. Morgan, founded upon a passage in *Sangaly's* evidence, is met by the fact that all the witnesses speak of the defendants as working permanently on the Estate and receiving *monthly* wages. They themselves never took the objection. And it is quite conceivable that although they were there as monthly labourers, yet their wages were to be regulated by the number of days they were at work, for this would afford the

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planter a check upon idleness and absence. But whatever may be the *rate of wages*, we must look to *work* and the *work alone* to determine the nature of the contract; and if the work is not such as is usually performed by the day, by the job, or by the journey, then it is a monthly contract. It may be a contract for six months, but if not in writing, it can only endure from month to month; and looking at all the facts, we are of opinion that the defendants, not falling within the exception, are clearly liable. This is our opinion on the Law, as supported by the facts. As to the merits of the case, we observe the Magistrate has found that the parties had absented themselves from their work, without a reasonable cause, and without giving notice, and we cannot interfere with his finding. There may be other kinds of contracts, which do not fall within the Ordinance; but on the facts before us in this case, the conviction is right.

Affirmed.

December 14.

Present ROWE C. J., and TEMPLE J.

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No. 374, D. C. *Matura.* { In the matter of the estate of *Polwatte Jana Nande Terunanse.*

Administration will not be granted to the *Sanjeke* Estate of a Buddhist Priest.

This was a suit for administration to certain property left by the deceased, consisting of a Buddhist Temple and the furniture and books therein, known as the *Velleadere Pansella.*

The judgment of the Court below fully sets out the facts:

"In this case the Applicants pray for administration of the estate of *Polwatte Jana Nande Terunanse*, for and on behalf of one *Piyetisse Samenare*, (a minor,) a fellow pupil of the Intestate; and they allege that the said *Piyetisse Samenere* was on the 6th June 1855, the date of their Application, under their tutorship. Afterwards, in their Answer to the Opposition, they claim as fellow students of the late Somene Terunanse, the donor to the said Polwatte Jana Nande Terunanse, and Piatisa Samenere, the minor; and they allege that the opponent was ordained a Priest of the Siamese sect; and that he then belonged to that sect and not to the Amerepoora sect. Again they say that, according to their religion, they have a legal right to be entrusted with the care and management of the Temple and the Sangeka property in question.

"The opponent, on the other hand, claims to have the Temple and its Sangeke property given over to his charge and management, as the principal pupil of the said late Somene Terunanse

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deceased, and the fellow student of the deceased intestate Polwatte Jana Nande Terunanse, and said Piatisa Samenere, the minor who disrobed himself.

"By the affidavits of death filed by applicants, the deceased intestate died on or about December 1854.

"It is quite apparent from the pleadings, and the applicants' answer to the opposition, that the grounds of their claim to have the administration of the intestate's estate, are totally different from those stated in their first application; and it is equally clear that they admit the property in question to be Sangeke property. In their examination also they admit the Deed of Gift, (produced by the first applicant), dated 31st January, 1854, from the said Somene Terunanse to the deceased intestate Polwatte Jana Nande Terunanse and Piatisa Samenere, his two pupils; but they have flatly denied that the books inventorised are sangeke-property, and allege them to be the private property of the said deceased intestate, and allege as a reason, because Somene *Terunanse* has by the said deed given him (*Piatisa Samenere* the minor), and the said deceased intestate *Polwatte Jana Nande Terunanse*, the care of the Sangeke property. On reference to the said admitted Deed of Gift, the donor expressly says, "this Temple worth about £20 including other lands and trees thereto appertaining, which have been offered to me, and which I have improved and held, as well as the relics of Buddhoo, Images and Books, and other things *belonging to me*, to be enjoyed as *Sangeka property*." These statements then, on the part of the applicants, are of themselves very unsatisfactory, to say the least.

"The Court will first consider the evidence adduced by the applicant. The first witness examined is the Chief Priest of the *Amerapoora* sect in Ceylon. He is a very old man. In the direct examination of this witness, it would appear that the opponent was *ordained* by the witness 16 or 17 years ago, as the pupil of one *Ballepittye Deera Nande*, as a Priest of the *Amerapoora* sect,—thereby disproving the allegations made by the applicants that the opponents were of the *Siamese* sect, and that consequently he would have no claim to Letters of Administration to the estate of the intestate, because he was of the *Amerapoora* sect. In his cross-examination, however, the direct evidence of this witness is materially weakened, for, he says, *he heard* all he had previously told the Court from *Balepittye Unanse*; and his recollection does not seem to serve him on matters connected with other ordinations, which one might expect. It appears

also on cross-examination that the applicants are of his sect, and the opponents are not so, though both are of the *Amerapoora* sect. The second witness proves the Deed of Gift. The third witness, a Priest of the Siamese sect states, that he once robed the opponent; but, he states, he must have been afterwards *robed* by a Priest of the Amerapoora sect, before he could by any possibility have been *ordained* by a Priest of the Amerapoora sect. The fourth witness is the minor called Piatisa. He denies that the opponent was ever a pupil of the said Somene Terunanse, through whom both parties claim. The evidence of this boy cannot be trusted; besides he was not born when the opponent was ordained a priest of the Amerapoora sect, to which sect both the said Somene Terunanse deceased, and the intestate belonged. But; this witness states that he does not associate with the opponenth he associates with the Dondra priests, the applicants. The sixt; witness is the chief or head priest of Matura and Hambantotte districts. He speaks of the Buddhist rules of succession to Sangeke property; but he states that the custom is that the pupil should succeed his tutor, though the property be not disposed of by deed or by word of mouth. The seventh witness speaks too of the robing of the opponent, but it is what he heard; that he was present at the last illness of the said Somene Terunanse, but he did not see the opponent there. He saw opponent at the funeral, on the burning of the body of said Somene Terunanse; and he states that the boy Piatisa, the fourth witness for applicant, must also have seen him at the burning of the body. The eighth witness is not material, though he states he knew the opponent 18 or 20 years, and that he always considered him a priest of the Amerapoora sect.

The Court is of opinion that there is nothing in the evidence adduced by the applicants to prove that they, as the fellow-students of *Somene Terunanse* deceased, which is admitted, havet the slightest right or title either to have Letters of Administration granted to them of the estate of the intestate *Polwatte Jana Nande Terunanse* deceased, or to the care and management of the Temple in question; or that the *Sangeke* property should be delivered over to them as prayed for in their answer :—for the first witness the Head Priest of Ceylon says, that, before a fellow student can succeed, a committee of priests should decide on his qualifications. And again the Head Priests of the *Matura* and *Hambantotte* Districts distinctly agree with the first witness, that a fellow student, unless appointed by the assembled priests,

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cannot succeed. The witness also states that the custom is for the pupil to succeed his tutor, though the property was not disposed of to him either by word or by deed.

The witnesses for the opponent, on the other hand, have most satisfactorily proved the right of the opponent to have Letters of Administration to the estate of the intestate *Polwatte Jana Nande Terunanse* granted to him. The evidence of the first witness, the Chief or Head Priest of the Galle District, a most intelligent man, is believed by the Court; and he distinctly proves that the opponent was a fellow pupil of the deceased *Somene Terunanse*, together with the intestate *Polwatte Jana Nande Terunanse*; that he personally assisted in the ordination of both the opponent and the said intestate *Polwatte Jana Nande Terunanse*; and that the said *Somene Teruuanse* acknowledged them to be his pupils in the presence of the assembled priests; and that this took place in 1842 or 1843. Nothing can be stronger than the evidence of this witness to this fact. This part of the evidence applies to the Pooijeka or personal property; for, he states that the Sangeke or common property, not disposed of, cannot be inherited by the pupil, but by all the Buddhist Priests, no matter where they are from, or of what sect; but that such common property must remain in the original place of deposit. The second witness for opponent confirms the evidence of the last witness as to the ordination of the opponent, with the intestate Polwatte Jana Nanda Terunanse, a pupil of the said Somene Terunanse; and his evidence is satisfactory. The third witness speaks to the same fact. Fourth witness states that opponent has always been considered a pupil of the said Somene Terunanse. The fifth witness speaks to the same fact. Sixth witness not material. The seventh witness' evidence is most material. This man is one of the principal Dayekkes of Velle-adere Temple,—the Temple in question. The books inventorized were delivered to him for safe custody by *Polwatte Jana Nande Terunanse*, the intestate; and he states that the deceased *Somene Terunanse* told him that the opponent was his pupil.

"The District Judge, therefore, is of opinion, as he has before stated, that it is satisfactorily proved, that the opponent was the fellow-pupil with the intestate *Polwatte Jana Nande Terunanse* deceased, of the deceased *Somene Terunanse*, and that they were all of the sect of the *Amerapoora* form; that the opponent is entitled to Letters of Administration to the property left behind by the said intestate; that all the property inventorized belonged to him the intestate, as the donce of the said *Somene Terunanse* deceased; and that they must all be considered as *Sangeke*

or common property, and should always be kept in the Temple *Velle-adere Panselle* in the garden called *Saigere Sayakkaregey* within *Cootoogodde*, and not removed from that Temple to any other, according to the express wishes of the donor the said *Somene Terunanse*: for, by the said Deed of Gift, the whole property was expressly given as *Sangeke* property, and it must ever remain so.

"It is decreed that the opponent has a right to the office of administering the said *Sangeke* property which was in the possession of the late *Polwatte Jana Nanda Terunanse* the intestate, and by him delivered to the care of Dayekke, the seventh witness for the opponent.

"It appearing to the District Judge that the applicants were not warranted, after the opposition filed, in disputing the opponent's claim to the office of Administration, they should consequently pay the costs of the proceedings."

On appeal against this judgment by the applicants.

Rust appeared for the applicants and appellants;

Lorenz for the opponent and respondent,

The argument in appeal was to a great extent confined to the question whether administration could be granted in respect to the property in question. And the Court took time to consider.

On a subsequent day, January 6th, 1858, ROWE C. J. delivered the judgment of the Court.

"In this case the District Judge has taken great pains in ascertaining the facts, and we think no sufficient doubt has been suggested at the Bar of the correctness of his decision, to warrant our sending the case back for a new trial. There appears to be no doubt that the opponent was ordained a second time in 1842 as Somene Terunanse's pupil, and that this was the last ordination. Some discrepancies exist in the evidence of the numerous witnesses who have been called on either side; but we think it right to defer to the judgment of the District Judge, who had better opportunities than ourselves of arriving at a correct conclusion as to the truth of their evidence. On the facts therefore we think his decision ought to be affirmed. But we are of opinion that this was not the proper way to try the rights of the parties, viz: by means of an Administration suit; because, in point of law, there can be no administration to a corporation sole as the intestate was. We hold therefore, that the order granting Letters of Administration to the opponent should be set aside, the appellants, however, paying all costs. But we think it right at the same time to express an opinion that the opponent has

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fully established his right as successor to the intestate, and is entitled to the custody and management of all the property inventorized in this case as Sangeke property."