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CREASY'S

CEYLON REPORTS:

JUDGMENTS OF THE SUPREME COURT

BETWEEN

1859 AND 1870.

EDITED BY

HARRY CREASY, Esq.,
ADVOCATE.

1/31/06
Caswell

WITH COMMENTS AND WITH NOTES OF ENGLISH AND OTHER CASES

BY

SIR EDWARD CREASY,
EX-CHIEF JUSTICE.

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PART I.

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CREASY'S REPORTS.

ACTION.

In the following important case, commonly known as Gunn Fraser's case, the Supreme Court had to consider (1) the nature of the tenure by which the civil servants of Ceylon hold their offices; (2) the continuing paramount authority of Her Majesty to dismiss such officers at will; (3) how that authority may be exercised; and (4) the right to sue the local Government for alleged breaches of contract and for alleged delicts. The Supreme Court had also occasion to pronounce that it is not proper or competent for a District Court or for the Supreme Court to review a decision of the Governor and his Executive Council as to the merits of a case, when the procedure directed by the Colonial Rules and Regulations has been substantially followed.

The circumstances of the case will appear sufficiently from the judgment.

SUPREME COURT.

16th July, 1868. D. C., Galle, No. 26,793.

The plaintiff in this case, Mr. George Gunn Fraser, was on the 30th of July, 1858, appointed by the then Governor of this island Deputy Post Master General of Galle.

The material words of the letter of appointment are as follows:—

"His Excellency the Governor has been pleased to appoint you Deputy Post Master General, Galle."

On the 30th of April, 1860, the Post Master General in England

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appointed Mr. Fraser, as Post Master of Galle, to the office of Packet Agent at Galle; the letter stated that the office of Packet Agent at Galle was in future to be filled by the Post Master at Galle.

Mr. Fraser continued to hold these appointments until the occurrences hereinafter mentioned.

In the beginning of 1866 complaints were made as to alleged irregularities of Mr. Fraser in attendance at his office in Galle. A correspondence ensued on this, but there was not then any formal official inquiry under those Colonial Rules and Regulations, which we shall fully refer to presently.

On the 7th of March, 1866, the acting Post Master General for the island, by direction of the Governor, informed Mr. Fraser that "His Excellency is of opinion that the good of the service requires an exchange of duties between you and the Deputy Post Master General of Kandy, and I have therefore to direct you to take charge of the Kandy Post Office without delay."

Mr. Fraser in reply declined the appointment at Kandy, and protested against being deprived of his appointment at Galle without a hearing before the Executive Council, as is provided for in the Colonial Rules and Regulations.

On the 21st of March, 1866, Mr. Cairns, the then acting Post Master General for the island, by the Governor's direction, took possession of the Post Office at Galle, against Mr. Fraser's protest; and since then Mr. Fraser has not been allowed to attend to the duties of that office, and he has also ceased to act as Packet Agent.

On the 14th of April, 1866, Mr. Fraser inquired by letter from the Colonial Secretary whether he was to consider himself suspended from pay and office: he at the same time repeated his refusal to take charge of the Kandy Post Office.

A letter of 26th April from the Colonial Office informed Mr. Fraser that he had not been suspended, but that it had been thought desirable that he should be transferred to Kandy.

By letter of 29th April to the Colonial Office Mr. Fraser complained that he had been virtually suspended, and again declined the Kandy appointment.

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By letter from the Colonial Office of 8th May, 1866, Mr. Fraser was informed that his case would be brought before the Executive Council with a view to his suspension, on the charge of disobedience of orders, in refusing to take charge of the Kandy Post Office, when directed to do so; and he was asked to submit, in writing, any defence which he desired to offer.

Mr. Fraser, on the 13th of May, 1866, sent to the Colonial Secretary a written justification of his conduct. The subject appears to have been brought before the Executive Council, and on the 26th of June, 1866, the following notification was sent to Mr. Fraser, from the Colonial Secretary :—

"His Excellency the Governor has laid before the Executive Council your letter of the 13th ultimo, with the previous correspondence on the subject of your removal from Galle to Kandy, and your refusal to proceed to the latter station ; and I have it in command to inform you that his Excellency, with the advice of his Council, has formally suspended you from office, for contumacy in declining to proceed to the station allotted to you, and he will accordingly submit to the Secretary of State a recommendation that you be removed from the public service."

Mr. Fraser appealed against this decision to the Right Honourable the Secretary of State for the Colonies. The result of that appeal appears by the following letter from the Right Honourable the Earl of Carnarvon, the Secretary of State for the Colonies, to the Governor of this island, date, Downing Street, 5th October, 1866 :—

"I have the honour to acknowledge the receipt of your two despatches, Nos. 133 of the 27th June, and 174 of the 8th August, the first reporting the circumstances under which you had removed Mr. George Gunn Fraser from his appointment as Deputy Post Master at Galle, the second enclosing a memorial from Mr. Fraser appealing against your decision."

"After having fully considered this correspondence, I see no reason to disapprove of the course which you have adopted in suspending Mr. Fraser, and I have therefore to confirm his suspension. I request you will inform him that I have received his memorial,

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but that it does not appear to me to affect the justice of your decision.

"But whatever may be the equity of Mr. Fraser's claim to salary after he ceased to perform his duties, I do not think that he should be deprived of any advantage which the rules of the service may be reasonably said to secure to him, and I therefore think that, in accordance with the 87th clause of the Colonial Regulations, he should be allowed to draw his salary up to the day on which he was suspended from office.

"I have, &c.,

"CARNARVON."

This decision was, on the 10th November, 1866, notified to Mr. Fraser by the following letter from the Colonial Office:—

"Your memorial dated the 29th July last, appealing against the decision of Government in reference to your removal from the office of Deputy Post Master at Galle having been forwarded to the Right Honourable the Secretary of State for the Colonies, I am directed to acquaint you that the Governor has received a despatch confirming your suspension, and requesting that you may be informed that his Lordship, after having fully considered your memorial, does not think that it affects the justice of the decision of the Government in your case.

"His Lordship, however, has been pleased to direct that you be allowed your salary up to the day on which you were suspended from office."

The Colonial Government had on the 13th of June, 1866, paid Mr. Fraser £20 19*s.* 3*d.* as the amount of salary due to him up to the 21st March, 1866 (the day Mr. Cairns took possession of the Galle Post Office). They subsequently on the 3rd December, 1866, paid him the further sum of £79 14*s.* 7*d.* as the amount of salary due from the 22nd of March to the 26th of June, 1866, the last-mentioned date being that on which notice was given to him of his formal suspension.

It was admitted and agreed by the learned counsel on both sides, on the argument before us, that the amount of salary due for the

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Packet Agency also up to the 26th June, 1866, has been paid: the date of this payment was not mentioned, but it must have been after the following letters.

On the 6th day of December, 1866, Mr. Fraser wrote to the Colonial Office complaining that his salary as Packet Agent was still due. He then evidently claimed it up to the 26th of July only, which he speaks of as the date when he was "constitutionally suspended from office."

In answer to this, he was, by letters of 13th and 31st December, 1866, directed to apply, if he thought fit, to the Postmaster-General in England for his salary as Packet Agent from the 22nd of March to the 26th of June, 1866.

On the 5th day of November, 1867, Mr. Fraser brought the present action against the Queen's Advocate He states in it that he was and is a public servant of this Colony, by Colonial and Imperial appointment: that he was employed as Deputy Post Master at Galle at a salary of £300, and as Packet Agent with a salary of £100.

That on the 21st March, 1866, he was, without cause, and in opposition to the Colonial Rules and Regulations, evicted from his office, and has since then been deprived of them and their salaries.

Taking his collective salary at £400 a year, he claims from 21st March, 1866 (the day of his eviction), to the 31st October, 1867, *i.e.*, to within five days from action brought. His gross claim as Post Master for the year 1866 is £333 6*s.* 8*d.*, but he admits payments amounting to £100 13*s.* 10*d.* This is obviously made up of the sums £20 19*s.* 3*d.* and £79 14*s.* 7*d.* already mentioned (see his examination), so that in fact he is suing for his salary as Galle Post Master from the 26th of June, 1866, to the time of action, and for his salary as Packet Agent from the 1st March, 1866, to the time of action brought. It may be important to observe the exact nature of each of the claims.

The Defendant, in his Answer, admits that the Plaintiff was for some time a public servant of the Colony, and admits his employment at the salaries mentioned. The other allegations in the libel are denied. The Defendant asserts that the Plaintiff was sus-

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ment by some other office being offered to him. But he cannot have any legal right to retain the office, which he received on the terms of holding it during pleasure, when it pleases the Crown or the authorized Ministers of the Crown to suspend or remove him.

To apply these principles to the present case, Mr. Fraser, who held the Galle Post Mastership during pleasure, was, on the 26th of June, 1866, suspended from that office by the Governor of the island, acting in his capacity as Governor appointed by Her Majesty, and acting as by Her Majesty's authority. On the 5th of October following, Her Majesty, by her Secretary of State for the Colonies, confirms the said suspension of Mr. Fraser from his said appointment. The effect of confirmation and ratification (independently of the effect of Rules and Regulations) was to make the suspending order of the 26th July, Her Majesty's own order, and as such it was clearly valid against Mr. Fraser.

We are further of opinion that the order of suspension of the 26th June, 1866, was made in conformity with the Rules and Regulations. We consider that we have no right, and that the District Court had no right, to review the decision of the Governor and Executive Council on the merits of the case. All that we have a right to do, as to this question, is to see whether Mr. Fraser's case was tried before the Governor and Executive Council in the manner directed by the Rules and Regulations. It would be very improper in us to express an opinion one way or the other on the decision in which that trial terminated.

Now if it is clear that Mr. Fraser has no right of action in respect of his appointment as Post Master as to anything that happened on or since 26th June, 1866, it is clear that he has no right of action at all, so far as the Post Mastership is concerned; for the pleadings, the examination, and the evidence in the case show plainly that he has been paid all his salary as Post Master up to the time when (in his own words), he was "constitutionally suspended."

We now turn to his claim for salary as Packet Agent. There is nothing in the pleadings as to any of this having been paid. This appears to be an Imperial, not a Colonial appointment. He has given no evidence to show that it was the duty or the custom of the

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Colonial Government to pay him; nor has he given any evidence to show that the Imperial Government have refused to pay him. We might have directed evidence to be taken on this point, but the admission on the argument that the money has been paid rendered that course unnecessary. Still as the payment is not pleaded, and its date is uncertain, we must consider the Plaintiff's right as to this part of his case separately.

We cannot see that Mr. Fraser could have a right of action against the Queen's Advocate of this Colony, in respect of the affairs of the Packet Agency. The Defendant has objected generally that the Plaintiff has no right to maintain this action against him as representative of the Crown, in respect of any of the causes of action which the Plaintiff had averred. We think on this part of the case, that a distinction may be drawn as to the Plaintiff's claim for salary due under his Colonial appointment as Post Master, and his claim for salary due under his Imperial appointment as Packet Agent. We humbly consider that Her Majesty's predecessors and Her Majesty have been graciously pleased to lay aside, as to this island, part of the prerogative of the Crown as to immunity from being sued. By Proclamation of the 23rd September, 1799, it was amongst other things published and declared that the administration of "justice and police in the settlements and territories of the island of Ceylon with their dependencies, shall be henceforth and during His Majesty's pleasure exercised by all Courts of Judicature, civil and criminal magistrates, and ministerial officers according to the laws and institutions that subsisted under the ancient Government of the United Provinces, subject to such deviations and alterations by any of the respective powers and authorities hereinbefore-mentioned, and to such other deviations and alterations as shall by these presents or by any future Proclamation, and in pursuance of the authorities confided to us, deem it proper and beneficial for the purpose of justice to ordain and publish, or which shall or may hereafter be by lawful authority ordained and published."

Afterwards, the Ordinance No. 5 of 1835 (which was allowed and confirmed by Her Majesty) repealed parts of the said Proclamation; but expressly reserved and retained so much of it as doth

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publish and declare that the "administration of justice and police within the settlements then under the British dominion, and known by the designation of the Maritime Provinces, should be exercised by all the Courts of Judicature, civil and criminal, according to the laws and institutions that subsisted under the ancient Government of the United Provinces."

The Ordinance of 1835 itself expressly re-enacts this, and uses the following words: "Which laws and institutions it is hereby declared are, and shall henceforth continue to be, binding, and administered through the said Maritime Provinces and their dependencies, subject, nevertheless, to such deviations and alterations as have been, or shall hereafter be, by lawful authority ordained."

We humbly consider that by these declarations of the Royal will, Her Majesty's subjects in this island, who had or might have any money due to them from the local Government for wages, for salary, for work, for materials—in short, for anything due on an obligation arising out of contract—were permitted to retain the old right given by Roman-Dutch law to sue the Advocate of the Fiscal, now styled the Queen's Advocate, for recovery of their money. And if the present Plaintiff could have shown that any money was due to him under his Colonial appointment as Galle Post Master, he might have maintained this action. He might have done so in respect of salary due for any period during which he actually served, and also in respect of the further period for which he, still holding the appointment *de Jure*, was ready and willing to serve, but was prevented from serving by the wrongful act of his employer; but we cannot see how the Plaintiff can sue the Colonial Government through the Queen's Advocate in this Colony, for an omission of the Imperial Government to pay salary due under an Imperial appointment. The only way in which, as it seems to us, he could frame a case against the Colonial Government, is by charging them with having obstructed him and prevented him from fulfilling the duties of the Packet Agency; whereby his employers (the Imperial Government) refused to pay him the salary for the Packet Agency. This would be a claim on an obligation arising *ex delicto*, and we greatly doubt whether such an action was ever maintainable here against the

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Advocate Fiscal, any more than a Writ of Right could have been maintained in England against the Crown for damages for a wrong, as to which see Tobin *v.* The Queen, 33 L. J., C. P., 199. It is, however, unnecessary to give now a positive decision on this matter, as it is clear that with regard to the time up to 26th of June, 1866, the Plaintiff as Packet Agent has received no consequential damage through any act of the Ceylon Government, but has been paid his salary up to that date. As to the time subsequent to the 26th of June, 1866, this Plaintiff has clearly no right to sue the Queen's Advocate here. Either the Packet Agency is a matter between him and the Imperial Government alone, or if that appointment is to be considered under all the circumstances as merely ancillary to the Colonial Galle Post Mastership, then, inasmuch as he was lawfully suspended from the principal appointment on the 26th of June, 1866, he was thereby lawfully suspended from the ancillary appointment also.

Judgment: "That the District Court decree of the 6th of April, 1868, be set aside, and judgment of nonsuit entered with costs."

If the reader wishes for authority as to the application to acts of State of the maxim in the law of principal and agent, that "omnis ratihabitio retrohahitur et mandato æquiparatur," he may usefully consult the cases of Burun *v.* Denman, 2 Ex., R. 167, and Secretary of State in Council, *v.* Kammachee Boye Sahaba, 13 Moore P. C., 12.

There have been numerous recent decisions in the English Courts as to when an Action is or is not maintainable.

It is proposed to advert in this place to those cases in which the question has been whether there was any right of action at all. Cases in which the Courts of this Colony and other Courts have considered the nature of the tribunal before which an action is to be brought, in what manner it is to be brought, and the like, will be more conveniently cited and discussed under the title JURISDICTION. Some other cases in which the Courts have had to determine the extent of particular branches of the law, for instance of the law

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as to suing for DEFAMATION, will be best taken under the separate subdivisions of these Reports, which are assigned to those particular branches respectively. But here I will take general cases, as to the actionability or non-actionability of alleged wrongdoers. In several of them—in some, for instance, in which the Court had to determine what damage is actionable—other questions arose in the same case; but it is quite practicable, and it is desirable to single out that part of each case which deals strictly with Right of Action.

The prevalent error on this subject is to suppose that whenever a man has sustained undeserved harm, and can connect that harm with the conduct of another person, either in acting or in omitting to act, the harmed man has a right to sue such person for compensation. The maxim commonly cited in behalf of such a Plaintiff is the well-known one, "*Sic utere tuo ut alienum non lædas.*" This maxim is most valuable; and, as the Judicial Committee of the Privy Council have recently observed (Madras Railway Company *v.* Zemindar of Carmetinagarum, decided July 3, 1875,) "it expresses a principle recognized by the laws of all countries." But in applying this maxim due effect must be also given to the maxims "*Nemo damnum facit, nisi qui id fecit quod facere jus non habet;*" "*Quod quisque propter defensionem sui faciat, jure fecisse videatur;*" "*In jure non remota causa sed proxima spectatur,*" and others of restrictive import. Dr. George Phillimore has well remarked concerning maxims and rules of Jurisprudence, that "To ascertain the meaning of a rule, it is not enough that it should be considered separately and apart from other rules; but the Judge must inquire whether it is not circumscribed and modified by others of equal validity and importance. Justice can never contradict Justice. Right can never be opposed to Right. The equity of no rule, therefore, that is founded on right reason can, in reality, be opposed to that of any other; each has its proper scope and its full operation within certain limits. It is the knowledge of this equity, and the general view of this spirit and purpose of the laws, that furnishes the solid basis of usage, as well as the proper rules from their interpretation." (Phillimore on Jurisprudence, p. 25.)

The limitary rule that a harmed man has no cause of action

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where no legal right has been affected, is tersely stated in Rogers *v.* Rajendro Dut. Moore P. C., vol. xiii., p. 210. "It is essential to an action in tort, that the act complained of should be legally wrongful as regards complainant, *i.e.*, it must prejudicially affect him in some legal right. The fact that it will, however directly, do him harm in his interests is not enough."

The same limitary rule as to "*Damnum sine Injuria*" not being actionable is very forcibly illustrated by the words of Chief Justice Sir Vicary Gibbs in Deane *v.* Clayton, 7 Taunton, 489. The Court of Common Pleas were divided in opinion in that case; but in the more recent case of Gardiner *v.* Crump, 8 M. W., 789, the Barons of the Exchequer adopted Sir Vicary Gibbs's judgment in Deane *v.* Clayton, "as sound law." This maxim, "*Sic utere tuo*," &c., was much discussed in Deane *v.* Clayton; and Mr. Justice Burroughs quotes it from "Jacobs' Law Grammar" in a fuller form, which more clearly exhibits its meaning. "*Prohibetur ne quis faciat in suo, quod nocere possit in alieno; et sic utere tuo ut alienum non lœdas.*" The words of Sir Vicary Gibbs, to which I particularly refer, are these: "I know it is a rule of law that I must occupy my own so as to do no harm to others. But it is *their legal rights only* that I am bound not to disturb. Subject to this qualification, I may occupy or use my own as I please. It is the rights of others, and not their security against the consequences of wrongs, that I am bound so to regard."

Actions are becoming very numerous in India, and in some of our greater colonies, as well as in England, as to the right to compensation which a man has, whose property has been harmed in consequence of something done or left undone by his neighbour on his—that neighbour's—property. I do not mean cases where there is proof of malice, or of negligence in the manner in which the act complained of has been done; but cases where the Plaintiff attempts to maintain his claim on the general principle that "when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non lœdat alienum.*" The case of Fletcher *v.* Rylands, 3 Law Reports, H. L. 330, is an important authority on

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this subject; but it must be read by the light of subsequent decisions.

The defences which may be set up, are indicated by a passage in the judgment delivered by Blackburn, J., in the Court of Exchequer Chamber, in the same case (2 L. R. 1 Ex. 265), a passage cited with approval by Lord Cairns, C., and Lord Cranworth on the final appeal to the House of Lords.

The epitome of the law laid down in Rylands and Fletcher, so far as it was strictly within the *subjectam materiem* of the facts of the case (to which extent only it is incontrovertible authority), is correctly given by the reporters as follows:—

"Where the owner of the land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages.

"But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned."

The part also of the judgment of Court of Exchequer Chamber (delivered by Mr. Justice Blackburn) cited by Lord Cairns in the House of Lords was strictly part within the boundaries of the *subjecta materies.* I, therefore, quote it. It is very instructive:—

"We think that the true rule of law is, that the person who for his own purposes brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the Plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neigh-

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bour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued; and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

On the other hand, some of the expressions used by Lord Cranworth in Fletcher *v.* Rylands go beyond the limits of the *subjecta materies.* I mean these words at p. 341 of the report: "When one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo, ut non lædat alienum.*" The same may be said of the adoption of the doctrine in the old case in Raymond, the case of Lambert *v.* Bessey: "If a man doeth a lawful act, yet if injury to another arises from it, the man who does the act shall be answerable."

It is absolutely necessary, in examining the cases on this subject, to consider what was strictly the *subjecta materies* in each case. For it is impossible to reconcile or to harmonize all the *dicta* of the judges. In order, therefore, that the binding effect of each judgment may be correctly ascertained, "the peculiar circumstances of the cases to which it was applied, as well as the general propositions which occur in the decisions, must be observed and considered. For, those general propositions being thrown out by the tribunals with a view to the decision of a specific case, they must be taken in conjunction with, and must be limited by, the specific or individual peculiarities by which that case was distinguished." I am quoting and adopting

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the words of John Austin (Austin on Jurisprudence, 4th edition, by Campbell, vol. ii., p. 647), though I do not go so far as that eminent jurist in maintaining that all such general propositions, "occurring in the course of a decision, as have not this implication with the specific peculiarities of the case are to be regarded commonly as extra-judicial, and commonly have no authority." On the contrary, such judicial enunciations of principles are always to be received with respect; the amount of respect being proportioned in each case to the dignity of the court, the character of the judges constituting it, the concurrence or discrepancy of their opinions, the fulness of the discussion, and to the learning and wisdom displayed in the judgment itself. But the extent to which each judgment is conclusive on an inferior court, and nearly conclusive on a co-ordinate court, does not exceed the measure of the strict connection of such judgment with the facts of the particular case.

The facts of the case of Fletcher *v.* Rylands are very fully set out in the still more recent judgment of the Judicial Committee of the Privy Council (delivered on July 3, 1875), in the case (already mentioned) of The Madras Railway Company *v.* the Zemindar of Carvetinagarum. I shall quote the greater part of this judgment, as it was delivered by Sir Robert Collier. It will be seen that it shows that defendants in such cases are not liable to action, if they have been acting under statutory powers, or in discharge of a public duty, and if there has been no negligence. All questions connected with the storing of water in tanks are of great practical importance in Ceylon.

Sir Robert Collier gave the following judgment: The Madras Railway Company claimed in this suit damages against the Defendant, the Zemindar of Carvetinagarum, for injuries occasioned to their railway and works by the bursting of two tanks upon his land. The Defendant denied that the injuries complained of resulted from the bursting of the tanks. He asserted that if they did so arise the bursting was caused by no act or negligence of his, but by *vis major*, or the act of God. He further pleaded in these terms:—

"4. The tanks referred to in the plaint have existed from time immemorial, and are requisite and absolutely necessary for the cultiva-

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tion and enjoyment of the land, which cannot be otherwise irrigated; and the practice of storing water in such tanks in India, and particularly in this district, and in the zemindary of Carvetinagarum and the adjacent districts, is lawful, and is sanctioned by usage and custom. The said zemindary is a hilly district, and the ryots will be unable to carry on their cultivation without such tanks, they being the chief source of irrigation, and the omission to store quantities of water in such tanks will be attended with consequences dreadful to the inhabitants of the country.

"7. The defendant could not have avoided collecting a quantity of water in the tanks during the monsoon, and he has not failed to use any reasonable care that may be expected from him. There were also several tanks and channels above his tank belonging to Government and other people, which also burst at the same time."

"It was contended that the damage arose through want of proper care on the part of the defendants in the construction of their works, but this contention was abandoned. It was found by both Courts, and is not now disputed, that the works of the plaintiffs did suffer serious damage from the bursting of the tanks; these last two questions, therefore, need not be further referred to. The issues, as far as they are material to this appeal, agreed to by the parties, were: 1. Whether the injuries complained of were the result of *vis major*, or the act of God, or other influences beyond the defendant's control. 2. Whether defendant is liable for any, and if so what, damages sustained by the plaintiffs. The evidence given in the cause may be summarized as follows:—It was shown that the tanks of the defendant, which were ancient tanks, the date of their origin not appearing, were constructed in the usual manner; that the banks were properly attended to and kept in repair, that sluices and outlets for the water were provided of the kind usually employed both in private and Government tanks, and usually found sufficient, and which had proved sufficient to prevent any overflow or bursting of the tanks in question for 20 years; but that an improved description of sluice, of recent introduction, would be still more efficacious. That at or some days before the accident there had been an unusual and almost unprecedented fall of rain, described by the Deputy-

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Inspector of the railway as the heaviest he had ever seen during his residence of 13 years in the locality, and by witnesses for the defendant as exceeding any fall of rain for 20 years; that this extraordinary flood, which caused the neighbouring river to overflow, and possibly brought down to the tanks whose overflowing is complained of the contents of other tanks at higher levels, proved more than the sluices could carry off; that the banks of the tanks were overflowed, and finally carried away. Upon these facts the Acting Civil Judge of the Civil Court of Chittoor found for the defendant, holding that he was not liable in the absence of negligence, and that he had not been negligent. This judgment was affirmed by the High Court on appeal. The appellant now contends that the judgment of the High Court should be reversed on two grounds—1st. That the defendant, by storing up water on his land rendered himself liable in damages should it escape and do injury to other persons, even though he might not have been guilty of negligence. 2nd. That both the Indian Courts have applied an erroneous rule of law to the consideration of the question of negligence. The case mainly relied upon in support of the first contention is Fletcher *v.* Rylands (Law Rep., 3, House of Lords, 330), which it becomes necessary to examine. In that case, the plaintiffs, the owners of a mine, sued for damages, the defendants, owners of some adjacent land, who had constructed a reservoir on their land for the purpose of working a mill, from which reservoir water flowed through some disused mining works into the plaintiffs' mine, and flooded it. It was held by the Exchequer Chamber and by the House of Lords that the plaintiffs were entitled to damages against the defendants. The grounds of this judgment are stated very clearly and shortly by the then Lord Chancellor (Lord Cairns) and Lord Cranworth. The Lord Chancellor says:—

"The principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners and occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of the land, be used; and if, in what I may term the natural use of that land,

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there had been any accumulation of water, either on the surface or underground; and if by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing some barrier between his close and the close of the defendants, in order to have prevented that operation of the laws of nature. . . On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose, which I may term a non-natural use, for the purpose of introducing into the close that which, in its natural condition, was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land; and if, in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if, in the course of their doing it, the evil arose . . . of the escape of the water and its passing away to the close of the plaintiff, and injuring the plaintiff, then, for the consequence of that, in my opinion the defendants would not be liable."

Lord Cranworth thus states the principle of the decision :—

"If a person brings and accumulates on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage . . . and the doctrine is founded in good sense. For when one person in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non lædat alienum.*"

But the principle that a man, in exercising a right which belongs to him, may be liable, without negligence, for injury done to another person, has been held inapplicable to rights conferred by Statute.

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This distinction was acted upon in Taughan *v.* the Taff Vale Railway Company (5, Hurlston and Norman, 679), where it was held by the Exchequer Chamber that a railway company were not responsible for damage from fire kindled by sparks from their locomotive engine, in the absence of negligence, because they were authorized to use locomotive engines by Statute Chief Justice Cockburn observes:—

"Where the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence—that if damages result from the use of such a thing independently of negligence, the person using it is not responsible.

"This view is fortified by the consideration that the Legislature may be presumed not to have conferred special powers on persons or companies, without being satisfied that the exercise of them would be for the benefit of the public as well as of the grantees. On the same principle it was decided that a waterworks company laying down pipes by a statutory power were not liable for damages occasioned by water escaping in consequence of a fire-plug being forced out of its place by a frost of unusual severity. Blyth *v.* The Birmingham Waterworks Company (25 and 7 Ex., p. 212). On the other hand, in Jones *v.* The Festiniog Railway Company (3 Law Rep, Q. B., 733), it was held that a Railway Company, which had not express statutable power to use locomotive engines, was liable for damage done by fire proceeding from them, though negligence on the part of the company was negatived. It has been argued on the part of the respondent that the case of Rylands *v.* Fletcher, decided on the relations subsisting between adjoining landowners in this country, has no application whatever to India. Though that case would not be binding as an authority upon a Court in India not administering English law, their Lordships are far from holding that, decided as it was, on the application of the maxim, *Sic utere tuo ut alienum non lædas*, expressing a principle recognized by the laws of all civilized countries, it does not afford a rule applicable to circumstances of the same character in India; they are of opinion, however, that the circumstances of the present case are essentially distinguishable.

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The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognized by Hindoo and Mahomedan law, by regulations of the East India Company, and by experience older than history, as essential to the welfare, and, indeed, to the existence of a large portion of the population of India. The public duty of maintaining existing tanks, and of constructing new ones in many places, was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved on zemindars, of whom the defendant is one. The zemindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under Indian law, by reason of their tenure, with the duty of preserving and repairing them. From this statement of facts referred to in the judgment of the High Court, and vouched by history and common knowledge, it becomes apparent that the defendant in this case is in a very different position from the defendants in 'Rylands *v.* Fletcher.' In that case the defendants, for their own purposes, brought upon their land, and there accumulated, a large quantity of water by what is termed by Lord Cairns a 'a non-natural use' of their land. They were under no obligation, public or private, to make or to maintain the reservoir; no rights in it had been acquired by other persons, and they could have removed it if they had thought fit. The rights and liabilities of the defendant appear to their Lordships much more analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed. The duty of the defendant to maintain the tanks appears to their Lordships a duty of very much the same description as that of the railway company to maintain their railway; and they are of opinion that, if the banks of his tank are washed away by an extraordinary flood, without negligence on his part, he is no more liable for damage occasioned thereby than they would be for damage to a passenger on their line, or to the lands of an adjoining proprietor occasioned by the banks of the railway being washed away under similar circumstances. See Withers *v.* The North Kent Railway Company (27 and 7 Ex., p. 417). The second ground on which the appellant relied was not so clearly stated; their Lordships understood

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it to be, in substance, that the Court below and the High Court estimated by a wrong standard the amount of care which the law requires of the defendant. It should be observed that the question of negligence was little, if at all, argued in the High Court, and that no assistance was there afforded in determining it by the appellant's counsel. The Judge of the Court below quotes and applies to the case the following definition of negligence by Baron Alderson: 'Negligence consists in the omitting to do something that a reasonable man would do, or in the doing something that a reasonable man would not do, in either case unintentionally causing mischief to a third party;' and the High Court confirm this view of the law. Without adopting every expression of the Judge of the inferior Court, their Lordships are unable to say that the case has been decided on an erroneous view of the law. On the question of fact whether or not negligence was proved by the evidence, they see no sufficient reason for departing from their ordinary rule of not disturbing the concurrent finding of two Courts; although, had the question come before them as a Court of First Instance, their finding might possibly have been different. For these reasons their Lordships will humbly advise Her Majesty that the Judgment of the Court below should be affirmed, and the appeal dismissed with costs."

Attention should also be drawn to the case of Smith *v.* Fletcher (Law Rep., Exchequer, ix. p. 64).

In that case the defendant's mines adjoined and communicated with the plaintiff's; and in the surface of the defendant's land were certain hollows and openings, partly caused by and partly made to facilitate the defendant's workings. Across the surface of their land there ran a watercourse, which, in the year 1865, was diverted by them into another channel. In November, 1871, the banks of the watercourse (which were sufficient for all ordinary occasions) burst in consequence of exceptionally heavy rains, and the water escaped into and accumulated in the hollows and openings, where the rains had already caused an unusual amount of water to collect, and thence by fissures and cracks passed into the defendant's and so into the plaintiff's mines. If the landhad been in its natural condition the water would have spread itself over the surface, and have been innocuous.

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The defendants were not guilty of any actual negligence in the management of their mines.

At the trial of an action brought by the plaintiff to recover the damage he had sustained, the learned judge directed a verdict for the plaintiff, holding that the case was governed by Fletcher *v.* Rylands (Law Rep. 3 H. L., 330), and that the defendants were absolutely liable; and rejecting evidence offered by the defendants, that every reasonable precaution had been taken to guard against ordinary emergencies:—

Held (reversing the judgment of the Court below), that the case was not beyond all question governed by Fletcher *v.* Rylands (Law Rep., 3 H. L., 330); that the water coming from the natural overflow and that coming from the diversion of the watercourse, might possibly admit of different considerations that if the evidence tendered had been received, there might have been questions for the jury, and that under all the circumstances there ought to be a new trial.

The opinion of the jury at such trial ought to be taken as to whether what was done by the defendants was done by them in the ordinary, reasonable, and proper mode of working the mine.

There yet remains to be noticed the late case of Nichols *v.* Marsland (Law Rep., Excheq. 10, p. 255), in which the Court of Exchequer has gone further in upholding the defence of *vis major* than had been done (I believe) in any prior case.

In Nichols *v.* Marsland, the facts were these: On the defendant's land were artificial pools of large quantities of water, which the defendant had caused to be collected there, by damming up a natural stream with artificial embankments. A "terrible thunderstorm," accompanied by heavy rain, greater and more violent than any other within the memory of the witnesses, carried away the embankments, and the released water flooded and damaged the plaintiff's adjoining land. The jury found as a fact that there was no negligence in the construction and maintenance of the works. They also gave their opinion that the mischief was caused by *vis major*. The judgment of the Court (Kelly, C. B., Bramwell, B., and Cleasby, B.) was delivered on July 12, 1875, by Bramwell, B., who took the distinc-
on that a storm may not be the act of God, or *vis major*, in the

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sense that it was *physically* impossible to resist it, and yet have been *vis major* in the sense that it was *practically* impossible to do so. He put the case that the mischief might not have happened if the works had been ten times, or a hundred times as strong. "But," he added, "those are not practical conditions: they are such that to enforce them would prevent the reasonable use of property in the way most beneficial to the community.

"So understanding the finding of the jury, I am of opinion the defendant is not liable. What has the defendant done wrong? What right of the plaintiff has she infringed? She has done nothing wrong, she has infringed no right. It is not the defendant who let loose the water and sent it to destroy the bridges. She did indeed store it, and store it in such quantities, that, if it was let loose, it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be. Then why is the defendant liable if some agent over which she has no control lets the water out? Mr. McIntyre contended that she would be in all cases of the water being let out, whether by a stranger or the Queen's enemies, or by natural causes, as lightning or an earthquake. Why? What is the difference between a reservoir and a stack of chimneys for such a question as this? Here the defendant stored a lot of water for her own purposes: in the case of the chimneys some one has put a ton of bricks fifty feet high for his own purposes: both equally harmless if they stay where placed, and equally mischievous if they do not. The water is no more a wild or savage animal than the bricks while at rest, nor more so when in motion: both have the same property of obeying the law of gravitation. Could it be said that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or an earthquake? If so, it would be dangerous to have a tree, for a wind might come so strong as to blow it out of the ground into a neighbour's land and cause it to do damage; or a field of ripe wheat, which might be fired by lightning and do mischief.

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"I admit that it is not a question of negligence. A man may use all care to keep the water in, or the stack of chimneys standing, but would be liable if through any defect, though latent, the water escaped or the bricks fell. But here the act is that of an agent he cannot control.

"This case differs wholly from Fletcher *v.* Rylands. There the defendant poured the water into the plaintiff's mine. He did not know he was doing so; but he did it as much as though he had poured it into an open channel which led to the mine without his knowing it. Here the defendant merely brought it to a place whence another agent let it loose. I am by no means sure that the likeness of a wild animal is exact. I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable. But this case, and the case I put of the chimneys, are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community. I think this analogy has made some of the difficulty in this case. Water stored in a reservoir may be the only practical mode of supplying a district and so adapting it for habitation. I refer to my judgment in Fletcher *v.* Rylands, and I repeat that here the plaintiff had no right that has been infringed, and the defendant has done no wrong. The plaintiff's right is to say to the defendant, *Sic utere tuo ut alienum non lædas;* and that the defendant has done, and no more."

There are many points of analogy between these cases and the cases as to when *vis major* supplies a good defence to an action for the non-performance of a contract. These last-mentioned cases are cited and referred to under the title "AGREEMENT" in this volume.

A case of considerable difficulty and importance came some time ago before the Supreme Court of Ceylon, in which it seemed that it would be necessary to determine the question of a landowner's liability to his neighbours for a matter, which is not unfrequent in parts of the old planting districts of the island, and which is very likely to come before the Courts again The defendant had bought land, had cleared it, and had planted it with coffee. But, as the speculation appeared to be a failure, he abandoned the land; and

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the seeds of weeds which grew there, were wafted by the winds to the plaintiff's plantations in the neighbourhood, causing extra expense to the plaintiff in keeping his own land clear of weeds. He sued the defendant for this. The case went off on some by-point; and, on account of the small area of the defendant's land, the trifling amount of actual damage in the particular case, and the fact that the defendant was an insolvent, it was not thought right to compel the parties to amend their pleadings, and go to trial again. But the mischief proved in another case of the kind may be very great; and it may become necessary to have the matter tried out and decided.

We were disposed to direct the Judge of the inferior Court (if the case had been remitted for new trial), to make careful inquiry, and to find explicitly whether the plaintiff in his enclosing, planting, or other operations on his land, had done anything which would increase the amount of noxious weeds which the land would produce (supposing such increase not to be kept down by continued cultivation or other care), beyond what it would have naturally produced, if it had been left in its original natural state of uncleared jungle.

See, as to this subject, the late case of Wilson *v.* Newberry (Law Rep., 7 Q. B. 31), where the clippings of yew trees in defendant's land found their way to plaintiff's land and poisoned his horses. And see the old case of Tenant *v.* Goldwin (1 Salk., 360), there cited.

Another complicated and difficult class of questions as to when an Action is, or is not maintainable, arises from the doctrine that a Cause of Action must not be too remote. The Latin maxim on the subject is, "*In jure non remota causa sed proxime spectatur.*" In Lord Bacon's maxims the rule is expressed thus: "It were infinite for the law to consider the causes of causes and their impulsions one of another. Therefore it contenteth itself with the immediate cause, and judges of acts by that, without looking to any further degree."

It has also been generally considered that the act complained of must, in order for an action to be maintained on it, have been an act working naturally, and in the regular course of things, towards the mischief which the plaintiff suffered. It is not enough that the act furnished occasion to some malignant or eccentric person to do

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some other act, wrongful in itself, and thereby to work the mischief. This limitation is illustrated by the well-known old case of Vicars *v.* Wilcocks, in 8 East., p. 1. But Vicars *v.* Wilcocks must be read by the light of Lynch *v.* Knight (3 H. of L. Cases, 577), as pointed out by an able writer in the *Law Times.* In Lynch *v.* Knight, Lord Wensleydale says: "I strongly incline to agree, that to make the words actionable by reason of special damages, the consequence must be such as, taking human nature with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words, not what would reasonably follow, nor what we might think ought to follow."

I will now state some of the recent cases on the subject, without attempting to harmonize them either with the older cases, or with each other. In the first to be mentioned a very rigid course of restriction was followed. In Sharp *v.* Powell (Law Rep., 7 C. P., 253), the defendant's servant, in breach of a Police Act, washed a van in a street and allowed the water to run down the gutter. Owing to a severe frost, the water which had overflowed the causeway about twenty-five yards off, froze there, and the plaintiff's horse slipped on it, and broke its leg. The Court of Common Pleas held that this was a consequence too remote to be attributed to the wrongful act of the defendant. On the other hand in Smith *v.* London and South-Western Railway Company (Law Rep., C. P., 6, 14), the Court of Exchequer Chamber overruling the Court of Common Pleas (Law Rep. 5, C. P., 98), held the defendants liable under the following circumstances: In this case the defendants' servant had left the trimmings of hedges in heaps along the side of the line. Owing to the heat of the weather, the trimmings became very dry and were ignited by a spark from a passing engine. The fire spread across a stubble field and finally burnt down the plaintiff's cottage at a distance of 200 yards from the railway. It was admitted that no reasonable man could have foreseen that the fire would cross a stubble field and a road and so get to the plaintiff's cottage.

In Sneesby *v.* the Lancashire and Yorkshire Railway Company (Law Rep., 9 Q. B.), the admitted facts showed that the plaintiff's cattle

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had been frightened through the negligent conduct of the defendant's servants, and in their fright they escaped from plaintiff's close, and after having gone along the road for some distance, they got into a garden, and thence they at last got on to a railway, where they were killed by a passing train. They got on to a railway of defendants' through a defective hedge. But it was not agreed that the defendants were bound to repair that fence; and the Court of Queen's Bench treated the loss as "the same as if the cattle had fallen into an unfenced quarry, or as if the railway on which the cattle got had been the railway of some other company." Blackburn, J., said, "No doubt the rule of our law is that the immediate cause, the *causa proxima*, and not the remote cause, is to be looked at: for, as Lord Bacon says, 'It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judges of acts by that without looking to any further degree.' The rule is sometimes difficult to apply; but in a case like the present thus much is clear, that so long as the want of control remains without any fault of the owner, the *causa proxima* is that which caused the escape, for the consequences of which he who caused it is responsible."

In the judgment of Quain, J., the following expressions occur: "It is well established that a person is liable for all the consequences of his wrongful act: of which the well-known case of Scott *v.* Shephard (2 W. Bl, 882), is an instance; where a squib, having been thrown in a crowd, and having been hastily thrown away by two other persons and ultimately injured the plaintiff, the wrongdoer the original thrower was held liable. In a case of contract the question is very different. In tort the defendant is liable for all the consequences of his illegal act where they are not so remote as to have no direct connection with the act, by the lapse of time for instance."

This decision has been affirmed by the new Court of Appeal; the Court being constituted by Lord Cairns, C., Lord Coleridge, C. J., Bramwell, B., and Brett, J. (Law Rep., 1 Q. B. D., 42). This judgment, and that in Lynch *v.* Knight, being, as they were, decided by High Appellate Courts, must be regarded as superior in authority to the other cases.

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With regard to the defence of CONTRIBUTORY NEGLIGENCE, great attention should be paid to the conflicting judgments of Blackburn, J., and of Denman, J., in Rawlings *v.* London and South-Western Railway Company (Law Rep., 10 Exch. 104). In that case, the Exchequer Chamber, by a majority of two only, overruled the decision of the Court of Exchequer (reported in Law Rep., 9 Ex. 71). It would occupy far too large a space of this volume if I were to make it a general rule to balance the reasonings of the high English authorities, though I have sometimes ventured to do so. Thus much seems clear from the case—that the negligence on the part of the plaintiff which alone (if ever) can excuse the defendant's negligence, must itself have been negligence which was "directly a part of the proximate cause of the injury." It is not enough that the plaintiff's negligence was merely a "*causa sine quâ non.*"

See also, as to Contributory Negligence, the case of Adams *v.* Lancashire and Yorkshire Railway Company (Law Rep., C. P. 4, 733), especially the conclusion of Brett, J.'s, judgment. See also Burrows *v.* March Gas Company (5 Exch. 67), both as to contributory negligence on the part of a plaintiff, and to defendant's not being exonerated by a concurrent act of negligence on the part of a third person. Attention must also be directed to Child *v.* Hearn (Law Rep., 9 Exch. 176), to Armstrong *v.* Lancashire and Yorkshire Railway Company (Law Rep., 8 C. P., 57), and Thorogood *v.* Bryan, Law Rep., 8 C. D., 115), which last is a rather startling case.

In Thorogood *v.* Bryan, the plaintiff, a passenger by an omnibus, was run over by a second omnibus, of which the defendant was owner; and it was held that if the jury thought that want of care in the driver of the plaintiff's omnibus conduced to the accident, their verdict must be for the defendant, for the plaintiff must be taken to be identified with the driver of the omnibus in which he was passenger.

On the other hand, in the case of "the *Milan*" (reported in Lushington's Admiralty Cases, p. 388), Dr. Lushington declined to be bound by Thorogood *v.* Bryan. Doubts also have been thrown on that case by the Editors of Smith's Leading Cases in the note to Ashby *v.* White (vol. i., p. 300, 7th edition), a note, which will well repay careful perusal.

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It seems also from the argument in Armstrong *v.* Lancashire and Yorkshire Railway Company, that Williams, J., in Tuff *v.* Warman (2 C. P., N S., 750), spoke of Thorogood *v.* Bryan as having been "criticized." Also, "In America, it appears from Shearman and Redfield on Negligence, 2nd ed., p. 53, s. 46, to be held that, "where the negligence of any other person is imputed to the plaintiff, it must appear that such person was the plaintiff's agent in the transaction; and either that he was under the plaintiff's control, or that he controlled the plaintiff's personal conduct: and the American cases of Caton *v.* Boston and Lowell Railway Company and Webster *v.* Hudson River Railway Company, are referred to; which fully support the proposition—where the driver is the plaintiff's servant or agent, there may be no remedy. But in the case of a railway train, omnibus, or public conveyance, the passenger has no voice in the selection of the driver."

This seems to be sound common sense. The general principle seem to be quite intelligible that where the mischief is proximately caused by the concurrent acts of two distinct wrongdoers, each wrongdoer is liable. The exception made that where the plaintiff himself has by his own personal act, or that of his servant or agent, contributed proximately to the mischief, he should be barred from recovering, is also intelligible; because to allow him to recover under such circumstances would be to allow him to take advantage of his own wrongful act, contrary to the well-established maxims of both English and Roman law, "*Nullus commodum capere potest de injuriâ suâ propriâ:*" "*Nul prendra advantage de son tort demesne:*" "*Nemo ex suo delicto meliorem suam conditionem facere potest.*" To carry the exception further seems to deserve the comments made in the note to Ashby *v.* White.

I will conclude this title with some decisions of our Ceylon Courts about other kinds of Action. Two of the judgments, which I am about to cite, decide that no action is maintainable merely because one party has harassed the other by unsuccessful legal proceedings. The third pronounces that a plaintiff may maintain a civil action though he has previously failed in a criminal prosecution for the same matter. The last arose out of a curious state of circumstances,

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where a second lessee sued a first lessee for waste and damage done to the estate by the first lessee, before the first lessee's lease had expired, but after the second lease had been granted.

IN THE SUPREME COURT.

June 18, 1866. D. C. Caltura, No. 18,636.

" The Supreme Court thinks that this case was properly dismissed. It is a general principle that in order to maintain an action for wrongful prosecution of civil suits without probable cause, the complaining party must aver and prove that the person who took these proceedings against him did so out of malice. See De Medina *vs.* Greve, 15 L. J., Q. B., 284. In the present case there is neither allegation nor proof of malice.

" The mere averment of intent to injure is insufficient, as will be seen from the argument and judgment in the English authority already referred to."

June 11, 1860. D. C. Colombo, No. 24,345.

(Present: Stirling, Acting C.J., and Morgan, J.)

The plaintiffs, as executor of Ramaya, complain that the defendants claimed a certain land, which was seized in execution to satisfy a judgment obtained by certain parties against the estate of Ramaya, and brought an action to substantiate this claim, but which action was dismissed: that owing to such claim and action, and the delay which they gave rise to in satisfying the debt due by the estate, the plaintiffs, as executors aforesaid, sustained damages to the amount of £600, which they seek to recover from the defendants. The Court gave plaintiffs judgment for £300 4*s.* 6*d.*, being the difference between additional interest which they had to pay the holders of the writ against the estate, and the rents and profits received from the gardens. Against which judgment the defendants appeal.

It appears to the Supreme Court that, no malicious or corrupt motive in making the claim or prosecuting the action being alleged or

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proved against the defendants, they are not liable in damages. The case is one falling within the principle of Davis *v.* Jenkins, in which it was held that though the act complained against was productive of inconvenience, and even positive loss to the defendant, yet it is *damnum absque injuria*, for which no action would lie. The principle of the action is well stated by Mr. Broom in his "Commentaries on the Common Law," p. 80: "In the second of the three instances above put, that viz. of an action brought unsuccessfully, but which nevertheless causes inconvenience and anxiety of mind, nay, even positive loss to a defendant, the reason why redress and pecuniary compensation for the inconvenience so caused cannot (at all events in the absence of any malicious or corrupt motive) be enforced, would seem to be, that our courts of justice are open to all suitors, who there seek to prosecute their claims in the manner prescribed by law; and that anything having a tendency to stifle or prevent such inquiring, ex gr. the fear of being mulcted in heavy costs beyond that comparatively reasonable amount ascertained by taxation, according to the scale allowed by law, would be highly inexpedient.

"Inasmuch, however, as this objection was not taken in the pleadings, or at the trial, and the same might have been taken at the outset by general demurrer, the costs are divided."

SUPREME COURT.

August 14, 1862. C. R. Kornegalle, No. 3,083.

"Decree set aside, and the case remanded for hearing. The Court of Requests of Kornegalle has jurisdiction over the district of Muddewelletanne, and the case can be heard in Kornegalle Court; and the fact of plaintiff having failed before the justice of the peace to prove the charge of theft against defendant will not prevent him suing defendant civilly to recover his buffalo."

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IN THE SUPREME COURT.

1863, July. C. R. Matara, 14,838.

This was an action brought by a lessee against a prior lessee for wasteful damage to the estate committed by the prior lessee whilst that prior lessee's lease was still current, and before the term of the plaintiff's lease had commenced, but after the plaintiff's lease (the term of which was to commence *in futuro*) had been executed. The damage to the estate was such as to prejudice and injure the plaintiff when he came into possession.

It was objected that the plaintiff could not maintain such an action, and a decision of this Court 19,121 D. C. Matara, was referred to. On examination it appears, that in that case the injury was committed before the second lessee's lease was executed, a difference which makes that decision no authority in the case now before us. Several English cases were cited to show that the second lessee could not bring trespass for such an injury; but those cases all depend on the peculiar doctrines of the English law as to actions, and on the principles of feudalism which are so largely embodied in the English law of real property. We try the case by a different standard; it seems to us that the defendant is under an obligation, arising out of Delict, to make compensation to the plaintiff for the damage which the defendant's injurious act has caused him, that injury having been committed at a time when the plaintiff had acquired a lawful interest in the property.

For further cases and comments connected with the subject of ACTION see, TITLES AGREEMENT AND CONTRACT, DAMAGES, DEFAMATION, FRAUDS ORDINANCE OF, JURISDICTION, JUSTICE, LAW, MASTER AND SERVANT, MINOR, MESNE PROFITS, OBLIGATION, POLICE, POSSESSOR, PRESCRIPTION, PRINCIPAL AND AGENT, PROVINCIAL ROAD COMMITTEE, &c., &c.

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ADMINISTRATORS AND EXECUTORS.

SOME of our practitioners and our Courts continued to maintain the old Roman Dutch system as to Heirs, Administrators, and Executors, notwithstanding the Charter of 1833. In the following case the Supreme Court, after full hearing and inquiry, decided that the Charter of 1833 brought the English law, as to such matters, into full operation in the Colony.

Other important points received discussion and adjudication in the case (which is commonly known as the "Staples *v.* De Saram" case) as to the grant of letters of administration, as to the fiduciary character of Executors and Administrators, and the illegality of their purchasing any part of the estate, and as to Devastavit.

SUPREME COURT.

July 17, 1867. D. C. Colombo, 43,213.

The Supreme Court first referred to the judgment of the learned District Court Judge (Mr. Lawson), in which the facts are fully set out. That District Court judgment was as follows:—

"This is an action brought by three of the heirs of the late Mr. W. A. Staples against Mr. C. H. De Saram, his administrator, alleging numerous acts of maladministration of the estate of deceased, and praying for damages, and for a further account of such administration.

"The intestate, W. A. Staples, died in Kandy on the 22nd of May, 1848, leaving issue the plaintiffs and a daughter, since married, who has not joined in this suit. The eldest child was about nine or ten years old at the time of their father's death; and their mother had died before him; but there were brothers of their father then living in the Colony, who were his next-of-kin. On the 23rd of May, 1848, the day following the death of W. A. Staples, the first Defendant, who was not in any way related to the deceased, applied

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for administration of his estate, on the ground that he was an intimate friend, and that 'he was willing to administer the estate with a view to secure the interests of the children.' Upon this application citation was issued to the next-of-kin, but none appeared. Mrs. Smith, however, who was the mother of the deceased's wife, but in no way of kin to him, came forward, and applied for administration, and thereupon the Court granted joint administration of the deceased's estate to the two applicants on the 29th of May, 1848; and they proceeded to deal with and dispose of the property of the estate. The plaintiffs now complain that they have rendered no account of these dealings, and they complain of several acts of maladministration specified in their libel. These charges the Court will have to consider in order; but, in the first place, it must be observed that the original grant of administration was, in both instances, irregular and against the rules laid down for the granting of letters of administration in the rules and order of Court. Where a man dies intestate these rules provide that administration should be granted, in the first place, to the widow or widower; and if there be *none*, or *none* willing to act, then to the next-of-kin, failing whom, to a creditor; and if there be no application from any person filling any of these characters, then to the Secretary of the Court of the District in which the deceased left property. Now neither of the applicants in the present case fills any of these characters; and the letters of administration granted to them might at any time have been avoided on that ground. This will not affect the validity of the letters of adminstration while unrevoked; nor will it diminish the powers possessed by the administration under those letters: but it is important to observe that both the administrators, whose actions are now questioned by the heirs, came forward as volunteers, and without any interest in the estate, for the purpose of protecting the interest of the minors."

The District Court then proceeded to consider the first charge against the defendants, viz., that of not rendering accounts; and found that no proper account had been rendered by the defendants, and that the plaintiffs had fully made out their right to an account, and ordered such an account to be delivered.

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The next charge against defendants was that of selling part of the intestate's property, called the Hantalle Coffee Estate, 1st, At less than its real value; 2nd, That the sale took place two days after the date advertised; 3rd, That the defendant, in breach of trust, sold the estate without authority from the Court, and during the minority of the heirs.

As regards the first point, the District Judge found against the defendants, holding that they ought not to have sold the estate, and the sale was grossly mismanaged.

Concerning the second and third charges, the Court found as follows, viz.—

"That the first defendant, in breach of trust, sold the estate without the authority of the Court, and during the minority of the heirs. Passing over the first point for the present, on the second point the Court finds in favour of the defendants. It is clear that the sale was properly advertised and took place on the day fixed in the advertisement. The plaintiffs have been led into the mistake by an error in one of the accounts filed in the case, in which the day of sale is stated to have been on the 30th of July instead of the 28th. But as to the real fact, there can be no doubt that the sale took place on the 28th. This supposed irregularity in the sale was made the ground for a charge of fraud and collusion between the late Mr. Staples and the first defendant. The Court thinks it right, therefore, here to state that there appears to be no ground for any charge of fraud against the first defendant, either with reference to this or any other matter brought against him, though there is too much reason to accuse him of negligence and want of consideration for the interests committed to him, by which those interests have materially suffered.

"With regard to the charge of selling without authority of the Court, if by this it is intended that the administrators had not power under the letters granted to them, to effect a valid transfer of the real property of the deceased, the Court must again find in favour of the defendants. The letters of administration, of which a copy is filed in the administration case, contain a power to dispose of the property and estate, rights and credits of the deceased, and there is no clause requiring a reference to the Court for authority to sell real

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property; and it has invariably been held by the Courts of this country that under such a power an administrator has a right to sell the real as well as the personal property of his intestate. . . . .
But the Court holds that the plaintiffs have established the allegations contained in their libel, to the effect that the first defendant was guilty of a breach of trust in selling the estate during the minority of the heirs without leave of court, and is liable to pay the loss so incurred.

"The next charge is that the administrator and administratrix allowed a house in Cross Street, Kandy, to be sold in December, 1853, on a judgment debt of a simple contract creditor, when they were in possession of funds to pay off the debt; that this sale was illegal because made to the proctor of the administrator and administratrix; and that the administratrix, who received the purchase money, has never accounted for it. In the present condition of the accounts, it is impossible to say whether the administrator and administratrix had money in their hands or not; but the Court holds that the objection to the sale on the ground of the purchase having been made by the solicitor of administrators is groundless, inasmuch as the sale was not made by them, but by the Fiscal, and they had no power to prevent any person who pleased from bidding at the sale. It appears, however, that the balance sum of £60 has not been accounted for; and the second and third defendants must be charged with this sum, and interest from the date of the sale, the amount having been received by the administratrix.

"The administratrix must also account for a sum of £101, being price of two lots, Nos. 35 and 36, near the Kandy Lake, sold to Dr. Peries, the amount of which has never been brought to account. The administrator himself purchased two other lots near the Kandy Lake, which he still possesses. This purchase the Court holds to be altogether illegal; and it is admitted by the defendants' counsel that it is illegal by the law of England relating to administrators; but it is contended that, by the law of Holland, a tutor may purchase the property of his ward under certain circumstances, as where there are two such tutors, and only one purchases, and where the sale is by public auction, both which circumstances concur in the present case;

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but without looking into the law of Holland on this subject, the Court holds that the office of administrator having been borrowed from the law of England, the powers and privileges attaching to it, and the limitations to which they are subject, must be determined by the law of England alone. Evidence has been called from all quarters of the island to prove that it has been the custom for administrators to purchase the property of their intestates; but the custom is a bad custom, and against law, equity, and common sense.

"To allow an administrator to purchase is to give him an interest in opposition to his duty. His duty is to sell his intestate's property for the best price that it will fetch. If he is allowed to purchase, his interest is that it should go cheap; and it appears that, though administrators frequently purchase their intestates' property for themselves, they always do it through a third party, whose name is returned to the Court as the purchaser; and this concealment has been carefully kept up in the present instance, the name of Mr. Edema having been returned as the purchaser, without any reference to the first defendant. The first defendant must, therefore, be decreed to re-convey to the heirs the property so purchased by him."

After thus referring to the judgment of the District Court, the Supreme Court proceeded to adjudicate as follows:—

"In this case we fully agree with the opinion expressed by the learned District Judge, that there is no ground for believing the present appellant, the late administrator of the estate of Mr. de Saram, to have been guilty of fraud or peculation, or of any deliberate dishonest design for benefitting himself, or others, at the expense of the children of the deceased. But we also fully agree with the learned District Judge in holding that the administrator has acted with great and grievous negligence and want of consideration for the interests which he himself had caused to be committed to his charge. Immediately after the death of the intestate he volunteered to become administrator, though neither relative nor creditor; and he then stated that he did so 'with a view to secure the interests of the deceased.' It is painful to contrast the language of that application for administration in August, 1848, with the confessions of default and delay made (and properly made) in the present petition of appeal, and

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with the long chain of proofs of neglect of duty which appear on the record of the motions and orders of Court made in the testamentary case—a record which extends over a period of nearly thirteen years, until at last the Court withdrew administration from those by whom it was so flagrantly and perseveringly misused.

"There has been, and there has rightly been, a general finding against the defendants, on the general charge of neglect of duty, though there has been no specific decree as to anything being paid or done by the defendants in respect of it. But we, on considering whether the judgment of the District Court is or is not to be received or varied, are not bound to do more than to deal with those parts of the judgment against which the first defendant has appealed. There is no other appeal before us.

"The specific matters as to which the learned District Judge has ordered compensation to be made, and which this appeal complains of, are, strictly speaking, eight in number, but they may be conveniently classified under three heads; for the last six are essentially of the same nature; whereas the first and the second are of a wholly distinct character.

"The first is a charge of devastavit in the improper sale of a share in a coffee estate called Hantalle.

"The second is that the administrator (the present appellant) improperly became himself the purchaser of certain lots of building ground.

"The third class of charges require the defendants to make good certain sums of money for which they have failed to account.

"We will take these charges in the same order, and begin with that relating to the Hantalle estate.

"The deceased was half owner of a coffee estate called Hantalle. The deceased's brother, Mr. John Staples, was the owner of the other moiety. About a year after the deceased's death, this estate was put up for sale by the administratix and by Mr. John Staples, and it was sold for £2,110, of which one-half, *i.e.*, £1,055, was due to the administrator and administratrix as representatives of the intestate.

"The defendants were charged by the plaintiffs with not having properly advertised the sale, but that charge (which was caused by a

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blunder in one of the defendants' accounts) is rightly considered by the District Judge not to be well founded.

"The District Judge himself censures the defendants for not having applied to the Court to appoint a guardian to act in behalf of the children as to mortgaging or selling this Hantalle property. But we think that the arguments urged in the petition of appeal and by the appellant's counsel at the hearing on this point, are very weighty. It seems to us that the course indicated by the learned District Judge would have been strange and unprecedented; and it could only have been thought necessary on the hypothesis that the administrator and administratrix (who were themselves by their very office bound to guard the children's interests) had made up their minds to sacrifice those interests, and ought therefore to have got some one appointed to watch their own conduct.

"Notwithstanding the high respect which we pay to the opinion of the learned District Judge of the Colombo Court on matters of this nature, we cannot agree with him on this occasion.

"It remains then to see whether the defendants committed a devastavit in selling this Hantalle property, either by a flagrantly injurious sale, when no sale was necessary, or by grossly misconducting the sale, so that a fair price was not obtained.

"The death of the intestate, and the sale of the Hantalle property, were both in the time of the well known coffee panic, which operated so disastrously on those who owned coffee estates, or were in any way interested in the coffee planting speculations in this island during the year 1847, and several following years. The depressed state of property of this description at the time of the intestate's death, and of the sale, is explicitly and emphatically evidenced by the appraisement in this very case. At the foot of the inventory made on the 29th of May, 1848, is an entry respecting this very Hantalle property, in which the appraisers say, 'With reference to the coffee plantation or estate called Hanalletem, the appraisers have determined to put a nominal value only, as all property of this kind is at present unsaleable, and cannot be considered or valued as a marketable commodity.

"'We wish it to be understood that it is not in consequence of any

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failure or declension of any part of the estate, but purely from *general depression* and scarcity of money; and we further say, that however valuable this property may be, it will be impossible to realize at present, unless at a great sacrifice. We therefore say one thousand pounds.

"Mr. Brown's evidence in the present case, as well as that given by the defendant himself, show the extent and the continuance of this depression. Now this Hantalle property was not only property of little available value at that time, but it was property of such a kind that it required a continual outlay for its upkeep, and for its preservation from falling into absolute worthlessness.

"The agent who had supplied advances was refusing further supplies, and the part owner, Mr. John Staples, was insisting on the administrator and administratrix paying their fair share of expenses; and he was urging them to concur in a sale. His letter of March 15, 1849, is a very important document in the case. Without going into detailed figures, we may safely state that through the paucity of assets in the defendants' hands, and the need of providing for the children's maintenance, and of keeping down the interest on encumbrances on the house property, it was impossible for them to find the funds for keeping up and working the Hantalle coffee estate, unless they sold off the houses. A letter of 18th March, 1849, proves that this plan was discussed, but that the administrator thought it unwise to sacrifice the house property for the sake of keeping up the coffee estate, which last he regarded as a mere speculation. We, who now look back on this with the knowledge of what has occurred in the interval, can see that it would have answered well if the coffee estates had been kept up even at the cost of alienating some of the houses; but the question is, 'What means for forming a judgment did the administrator possess at the time?' He may have not unreasonably thought it probable that coffee estate property, instead of reviving and increasing in value, would probably get worse and worse, and that the expense of its up-keep would swallow up the funds to be realized by the sale of the other property; so that the result of such a proceeding would be to leave the orphans stript of the house property, and mere pauperized owners of a number of unprofitable and unsaleable acres.

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"But the conduct of the administrators is objected to because they sold under a condition which allowed the purchaser nine months credit without interest. Such a condition is certainly strange, and requires explanation. The explanation seems to us to be given by reference to the state of the money market at this time as to such property. We think there is truth in the argument that unless bidders had been tempted by such a condition, there would have been no chance of effecting a sale at all. It is to be observed that the sale was in July. Mr. Brown's evidence proves that the usual season for gathering the crop extends from October to January. A buyer might naturally be induced to come forward, if he found that he would not have to pay until the time came by which he might hope to have realized the money-value of the crop, of which he could already see the promise on the trees. The question first occurs, why could not the administrators wait to realize this crop themselves? The answer is that they were under immediate and constant pressure for finding money for expenses; and that several months of very great expense were yet to come before the promised crop could be picked, pulped, and carted to Colombo, where cash might be obtained for it in the ordinary way of business. And after all it was mere matter of speculation how far the then promising crops might fail, and how far the price obtainable for coffee might not sink lower and lower between July, the time of sale, and the time when the crop was to become an available commodity in the market. By selling and placing the purchaser in immediate possession, the administrators at once relieved the intestate's estate from the need of raising any more funds for Hantalle expenses; and they put an end to what they considered to be a state of undesirable speculation.

"Having regard to these circumstances, we do not think that the price obtained at the sale was grossly inadequate, if, indeed, it was at all inadequate, to the fair value. The fact that the purchaser resold in 1851 at an advanced price is little proof against the defendants, when the fluctuating nature of the value of coffee estates is remembered. An ingenious argument was framed as to this matter, on the part of the respondents, from Mr. Brown's answers as

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to the yield per acre, and the price of coffee in that year. But this is met by the remarks already made as to the expenses to be incurred between the time of the sale and crop time, and as to the uncertainty which must have existed in July, 1849, as to the crop itself, and as to how far prices might fall before the crop could be turned into cash. No witness has been called for the plaintiff to prove that the price obtained at the sale was inadequate. Yet there must be many experienced planters still in the island who remember well the season and the prices of 1849, and who were well acquainted with this Hantalle property. The defendants *have* given evidence on this head. Their witness, Mr. Brown, gives important testimony to show that the price obtained at the sale was about the fair value. Altogether, on this part of the case, we think that the defendants acted as to the disposal of the Hantalle estate, not only honestly, but with reasonable care and sound discretion.

"We must, therefore, overrule that part of the District Judge's judgment which is adverse to the defendant as to this matter.

"The next charge relates to certain lots of building ground, which had belonged to the intestate, and which the administrator, by the interposition of a fictitious purchaser, Mr. Edema, himself purchased from the intestate's estate, and still possesses. The District Judge held that this purchase was illegal, and that the law of England, which forbids such purchases, is to be followed, and not the Roman-Dutch law, by which it is said that such purchases would, in certain peculiar cases, be allowed.

"We quite agree with the District Judge on this subject, and we adopt, without repeating, his observations as to the impolicy of allowing such purchases, and as to the system of concealment practised by interposing a fictitious purchaser.

"We think it right, however, to add some remarks of our own as to our law of executors and administrators being entirely a graft of English law, and not a mixture of the old laws of Holland and those of England. We take it that the charter of 1801 introduced the English law on the subject here as to Europeans other than the Dutch inhabitants. Executors and administrators were to be appointed with respect to such Europeans' estates, and the testamentary

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law was to be followed, as is prescribed in the Diocese of London, in England. The same charter provided that the Dutch inhabitants should, in such matters, retain their old laws and usages.

"Then came, in 1833, the Royal Charter, which is still in force, and which, by its 27th clause, empowers the District Courts generally to appoint administrators to the estates of intestates, to grant probates to executors, and to exercise other powers in matters connected with such offices. This last-mentioned charter is not, in this respect, limited to any class of persons here; but it applies to the estates of all and any persons dying within any of the respective districts of the District Courts of the Island. We think that these charters introduced—the first as to one class of our population, the last as to the whole population of the island—an entirely new law, and one that could never be blended, or co-exist, with the old Roman-Dutch law, which dealt with heirs *ex testamento* and heirs *sine testamento*, This old system was, in our opinion, entirely abrogated, as being quite incompatible with the English which was ordained.

"There was no such office as that of administrator under Roman-Dutch law.

"In cases of intestacy, the heir by descent (or heir appointed by law, *heres legitimus*, as he was sometimes called) came in as heir; and proceeded to 'adiate' purely, or under benefit of inventory, or to take out the Act of Deliberation, just as the heir nominated by will. All this has ceased to exist, and the English forms and practices as to administrators are copied. So as to executors. Such an office was not wholly unknown to the Roman-Dutch law in its later times; but the Roman-Dutch executor was a very different functionary from the one who bears that name under the English system. He was little more than the agent of the heir appointed by the will. He could not alienate or sell without the heir's consent, and if the heir would not accept the inheritance the executorship became a nullity.

"It has been said that the English law as to executors and administrators could not be fully adopted here, on acount of the peculiar distinctions which the English law makes as to real and personal property.

"But that has never been found to cause any difficulty or incon-

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venience. We recognize the same power of executors and administrators over land and other immovable property here which the English law gives them over chattels real: and thus an entire estate, landed as well as personal, is administered. Two cases have been referred to, which occurred in British Guiana, in which the Privy Council is supposed to have recognized certain rules of the old Roman-Dutch law as still prevailing in Guiana in testamentary matters. But this is no authority for Ceylon cases, inasmuch as the English law of executors and administrators has never been authoritatively established by Royal Charter in Guiana. This may be gathered from Mr. Herbert's book, called the 'Dutch Executor's Guide,' from which many of our preceding remarks on the functions of Roman-Dutch heirs have been taken.

"With regard to the point immediately before us, the setting aside a purchase from the estate by an executor or administrator, we follow unhesitatingly the English rule, and say, in the words of Lord Eldon: 'One of the most firmly established rules is, that persons dealing as trustees and executors must put their own interest entirely out of the question: and it is so difficult to do this in a transaction in which they are dealing themselves, that the Court will not inquire whether it has been done or not, but at once says that such a transaction cannot stand.' (See the note to Mr. Justice Williams' book on Executors, p. 1669 of the edition of 1856.)

"We are told that it is a common practice in Ceylon for executors and administrators to buy of the estates, that is, to sell to themselves. Being a bad practice, it ought to be all the more promptly and strictly checked if it has become common. We are not much impressed by what has been said as to the extensive inconvenience which will be caused if such sales are set aside. This Court would follow the practice of English Courts of Equity in such matters, and reject stale applications when there has been long acquiescence in the state of things at last complained of, especially if the interests of *bonâ fide* mesne purchasers would be affected by the Court's interference. But in the present case, though there has been long lapse of time, there has been neither acquiescence nor laches.

"We think it, moreover, right to say that, even if this matter is

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to be determined by Roman-Dutch law and not by English law, we are not satisfied that this purchase could be held good. We do not feel it necessary to go through the Dutch authorities in detail. Most of them will be found referred to by Burge in the pages 463, 464, 465, of his second volume. The general rule that a guardian, or other person holding a similar fiduciary office, cannot purchase part of the ward's estate is broadly and clearly laid down; but two exceptions are indicated. One is where the guardians purchase *palam et bonâ fide* at a public sale by auction. This exception is, we think, only applicable to such sales by auction as are caused by the action of a hostile creditor, and not to a sale by auction which is instituted and directed by the guardian himself. The other exception is when a guardian purchases from his co-guardian.

"Admitting that the spirit of this exception might be satisfied if the co-administrator took an active and principal part in the direction of the sale, and evidently had exercised an independent and careful judgment as to the purchase by the other administrator being for the good of the estate, we think that nothing of the kind has been proved to have been done here. All the evidence we have is that of the first defendant himself, who says that the administratrix knew of the purchase by him. It is consistent with that evidence that the purchase may have come to her knowledge after it happened; and it is to be remembered that she would not be apprised of it by the conveyance, as that must have been, not to the defendant, but to the nominal purchaser, Mr. Edema. Indeed, the employment of this fictitious purchaser seems to us to be, of itself, fatal to the validity of the defendant's purchase under Roman-Dutch law, which most emphatically requires that a purchase by a guardian should be made '*palam et bonâ fide*' by the guardian himself, and not '*per impositam personam*.' (See Burge, p. 464.)

"But while we adjudicate that these purchases are to be set aside, we think it, on the other hand, reasonable that the defendant should have back his purchase-money. Indeed, on this being pointed out, it was assented to on the part of the plaintiffs. The purchase-money is to be repaid without interest, and the plaintiff, on the other hand, is to make no claim for mesne profits of the land."

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The Supreme Court then proceeded to adjudicate as to the alleged omissions and irregularities about receipts and accounts relating to special sums: but the decisions on these points turn on special facts and circumstances too lengthy to copy here, and establish no general principle.

The Supreme Court finally modified the decree of the District Court, according to the rules and findings in the Supreme Court judgment.

Afterwards, in 1871, the same point, as to the English law respecting executors and administrators prevailing in Ceylon, was decided by the Supreme Court in a case of Lewis *v.* Adrian; and his Excellency the Governor, Sir Hercules Robinson, at the request of the Supreme Court, directed the case to be published in the *Colonial Gazette* of 2nd Dec., 1871. As the Supreme Court noted in the still later case of D. C., Colombo, 61,760, reported by Mr. Grenier, in his second volume, D. C., 53, "In the case of Lewis *v.* Adrian, we set out fully our reasons for holding that the English law as to executors and administrators is in full operation in this island, and has been so since, at least, the charter of 1833. When an intestate's estate is of very trifling value, we might, in accordance with custom, forbear to enforce the law which requires the taking out of administration. But we could not follow such a course in cases like the present, where the assets were substantial, amounting to £150. We have no right to set aside the clear law of the land for the purpose of favouring what we may deem the interest of the heirs in a particular case, and we have no right to deprive the Crown of any part of its revenue. But though in such a case administration must (at least, if applied for) be granted, the administrator is always under the supervision of the District Court. He is always to be looked on as a trustee, and he is liable to be controlled and made responsible, like any other trustee, if he thwarts and violates the purposes of his trust. In the very case referred to, of Lewis *v.* Adrian, in which we carefully and explicitly declared the law as to administrators, we

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treated the then defendant as a trustee thwarting the purposes of the trust, and we, therefore, refused to give her the reversal of the judgment against her, to which she would have otherwise been entitled."

It is, however, needless to multiply Colonial authorities on this point, as it is now established by the Judicial Committee of the Privy Council. That paramount appellate tribunal ruled in the case of Gavin *v.* Haddon, reported in Law Rep., 3 P. C., 707, as follows:—

"The Supreme Court at Ceylon being a court of law and equity, it is in accordance with the practice of that Court, that for moneys *bonâ fide* advanced to an executor or administrator for the purposes of the estate which he represents, a suit may be sustained against him in his representative character, and judgment and execution may be had against the testator's or intestate's estate: if, however, the executor or administrator deals with such estate in breach of his duty, a person who is party to such dealings, or takes any property of the testator with knowledge of a breach of trust, will not be allowed to retain any benefit therefrom. An executor, by the law in force in Ceylon, has the same powers as an English executor, with the addition that it extends to immovable as well as movable property."

The judgments of our Supreme Court which I am now about to quote do not require any special comment or explanation.

SUPREME COURT.

1867. D. C. Colombo, No. 3,182.

Letters of administration should be applied for within five years.

Judgment.

"The Supreme Court has in former cases referred to the rule followed in the English Ecclesiastical Courts respecting the time within which application ought to be made for probate or letters of administration. That period is five years. An applicant who

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comes at a later date must satisfactorily account for his delay. (See Williams on Executors, Vol. I., pp. 292, 393.) This Court has recommended, and again recommends, that rule for general adoption here.

"In the case before this Court there had been a delay for many years, and no reasons for the delay were shown. The application should have been refused."

1867, Sept. 27. D. C., Galle, No. 1,012.

In this case a deceased person had appointed two executors under her will, A and B. A took out probate and administered the estate; on A's decease, A's executor applied for administration to the original estate. B, the second executor under the will, now opposed this, and applied for probate. The District Judge, in his order of July 5, 1867, refused the motion on the ground that B had renounced the trust, and opposed the grant of probate. *In appeal*, the Supreme Court set aside this order as follows:—

JUDGMENT.

"Even supposing the appellant had formerly renounced his appointment of executor, he is not precluded from acting on the death of the co-executor who proved the will. Upon the death of him who proved, no interest is transmitted to his executors, if any of those who refused be surviving." (Williams on Executors, 3rd edition, Vol. I., p. 185.)

1864, July 6. D. C., Badulla, No. 342.

In this case the respondents, who claim to be grand-nephews of the intestate, applied, twenty-two years after his death, for citation and appraisement, and for grant to them of letters of administration. They showed that the widow was, and had been, ever since the death, in possession of the lands, and then alleged that she was alienating

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portions of them to the prejudice of the applicants, who were entitled to succeed to the lands as next of kin. The District Court made an order for the issue of the citation and of the commission of appraisement. The widow entered an opposition to the application of the alleged next of kin, and a motion was made on her behalf that the citation and commission should be suspended until the objection to the application should be argued and determined. The District Court disallowed this motion, against which disallowance the present appeal has been taken.

JUDGMENT.

"The Supreme Court has frequently expressed its opinion that stale letters of administration should not be granted, except under very exceptional circumstances, showing the need of such a grant, and unless the delay of the applicants is satisfactorily explained. See D. C., Jaffna, 7,529, Lorenz. Reports, p. 95; D. C., Caltura, 484, 18th November, 1852, where the Supreme Court followed the rules of the Prerogative Court of Canterbury, as to not granting either probate or letters of administration after a lapse of five years, unless the delay were satisfactorily accounted for. See Williams on Executors, Vol. I., pp. 292 and 393. See also D. C., Chilaw, 14,103, 18th June, 1850, in which Sir W. Carr sanctioned the refusal of stale applications for administration, and truly remarked that 'such stale applications, unless sought for some special purpose, only serve to foment family disputes and litigation.' See also D. C., Galle, 29th March, 1854.

The practice of the Colombo District Court in such matters is to refuse the application for citation and commission of appraisement in the first instance, unless the applicant accounts for his delay, and shows the need of administration being granted though so long after the death. This is, the Supreme Court thinks, the right practice, as it saves the expense of citation and appraisement in cases where it is not proved to the Court that letters of administration ought to issue.

Had this practice been followed in this case, the order for citation and commission would never have been made at all, as the applicants

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gave no explanation of why they had delayed for twenty-two years, and showed no necessity for the appraisement as administrators. If, as remainder men, they have any just cause of complaint against the widow for waste, there is another legal remedy open to them. Under these circumstances, the motion on behalf of the widow to suspend the execution of the *ex-parte* order for citation and appraisement, until the question of the grant of administration had been settled, was, the Supreme Court thinks, reasonable, and ought to have been allowed. With regard to the fine imposed upon the appellant for contempt, the Supreme Court thinks that her conduct before the District Court amounted to contempt, but that it may be sufficiently punished by a fine of smaller amount. The decision of the District Court of the 2nd November, 1863, disallowing the motion made on behalf of the widow is set aside, and order is to be made for the suspension of the citation and commission of appraisement until the case has been argued and determined on the opposition of the widow to the issuing thereof, and to the grant of letters. Order inflicting the fine amended by reducing the amount from £20 to £1."

AGENT. *See* PRINCIPAL AND AGENT.

AGREEMENTS, CONTRACTS, &c.

AGREEMENT, PROMISE, POLLICITATION, ACCEPTANCE, CONSENSUS, PACT, CONSIDERATION, CONTRACT, OBLIGATION, SOLUTION, PERFORMANCE, ETC.

THESE subjects are so closely connected that it will be a saving of space and time to deal with them collectively.

Our Ceylon legislators, judges, and legal practitioners generally imitate the English writers and lawyers in using habitually the word "Contract" as synonymous with the words "Convention," "Pact," and "Agreement," or "Consensus." But, as Sir Henry Maine has remarked in his work on "Ancient Law," this was by no means the

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case with the Roman jurists. And as, in investigating Ceylon law, we have continually to borrow light from old Rome, it is important to understand accurately the nomenclature of the ancient jurisconsults. Moreover, an explanation of this matter will aid a student very materially in understanding the whole rationale of Obligations arising out of Contract.

The first step towards the entering into such an Obligation was a signified promise, or an offer or act implying a promise by one party. The second step was the acceptance of such promise by the other party, the said other party expecting that such promise would be kept. We are in the habit of calling (according to our English legal terminology) the first party, *i.e.*, him who makes the promise, the Promis*or;* and of giving the title of Promis*ee* to the other party, *i.e.*, to him to whom the promise is made. English lawyers, in their customary professional language, say that as soon as there has been a signified promise and a signified acceptance there is a contract. Not so the Roman lawyers. They would, in such a case, say that there was a Consensus, a Convention, or a Pact. "Whether this ultimately became a Contract depended upon the question whether the law annexed an Obligation (*i.e.*, a legal obligation) to it. A Contract was a 'Pact,' or 'Convention,' *plus* a (legal) Obligation. So long as the Pact remained unclothed with the (legal) Obligation it was called 'nude,' or 'naked.'"—MAINE, *Ancient Law*, p. 323.

"At first the Roman law only clothed with a legal obligation four kinds of engagements. These were—

"I. The Verbal Contract, in which it was essentially necessary that a specified form of words should be gone through.

"II. The Literal, in which an entry in a ledger or account-book gave the legal obligation, and turned the agreement into a Contract.

"III. The 'Real Contract,' where the delivery of the '*Res*' created a Contract.

"IV. The class of 'Consensual Contracts,' which embraced (*a*) *Mandatum*, (*b*) *Societas*, (*c*) '*Emptio Venditio*,' and (*d*) *Locatio Conductio.*

"As to these specific Consensual Contracts, no formalities were required to create them out of the 'Pact.'" (*Maine*, p. 333.)

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At last "the Prætor of some year announced in his edict that he would grant actions upon Pacts which had never been matured into Contracts, provided only that the Pacts in question had been founded upon a Consideration ('*causa*.')

"Pacts of this sort are always enforced under the advanced Roman jurisprudence."—*Maine*, p. 337.

As to the word "Obligation," Sir H. Maine says: "The Obligation is the 'bond,' or 'chain,' with which the law joins together persons, or groups of persons, in consequence of certain voluntary acts. The image of a '*Vinculum Juris*' colours and pervades every part of the Roman law of Contract and Delict. . . . . [This] explains an otherwise puzzling peculiarity of Roman legal phraseology, the fact that 'Obligation' signified rights as well as duties; the right, for example, to have a debt paid, as well as the duty of paying it. The Romans kept the entire picture of the legal chain before their eyes, and regarded one end of it no more and no less than the other." —*Ancient Law*, p. 324.

In the passages cited, Sir H. Maine speaks of "Legal Obligation," "*Civilis Obligatio*," as the Romans termed it. But the Roman jurists recognized also the existence of "*Naturalis Obligatio*," which nearly (but not altogether) corresponds with what we now call "a Moral Obligation," as contradistinguished from a Legal Obligation. As to how far the Roman Courts gave effect to "*Naturales Obligationes*," see Poste's Gaius, p. 292, Maine, p. 335; also Warnkœnig, *Institutiones Juris Romani Privati*, par. 758, and Phillimore's Maxims, 196. Generally speaking, we may say that an action could not be brought on them, but a defence might be founded on them.

This preliminary sketch (for the materials of which I am almost wholly indebted to Sir Henry Maine) will, I am sure, be valuable to students, who want to discern clearly, and appreciate thoroughly the principles upon which the decisions of wise tribunals have been based as to Promises, Pacts, Considerations, Contracts, Obligations, and the other subject-matters of this title. In what follows I shall make frequent use of Mr. Dudley Field's "New York Code,' issued in 1865. I shall, of course, take care to adopt nothing from it that is not based upon such authorities as would be recognized in the Ceylon Law Courts.

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"It is essential to the existence of a Contract that there should be (1) Parties capable of contracting; (2) Their consent; (3) A lawful object; and (4) A sufficient cause or consideration." (*Field*, p. 223.) With respect to the parties, the disabilities of infants or minors, of married women, and of persons of unsound mind will be considered under distinct titles. For the present we will assume that the parties have general capacity.

With respect to the essentials of consent, "the consent of the parties to a Contract must be (1) Free; (2) Mutual; and (3) Communicated by each to the other; but the consent need not be verbally expressed. An understanding between the parties is sufficient." —*Field*, p. 225.

In the larger number of contracts each party undertakes or promises to do certain things, and the convention is called Bilateral, or Synallagmatic. It is called an Unilateral Convention when there is a single promise and a single acceptance. (See Poste's Gaius, p. 295.) But as all Synallagmatic Conventions may be analyzed, and resolved into several Unilateral Conventions, it is practicable to treat each separately; and it is natural and best in such an investigation, as we are now making, to take the normal case of a single promise and a single consent. We must also observe carefully the true legal meaning of the word "Consent," which is not properly tautologous with "Assent," though it is so employed in common conversation.

We will first of all suppose the Promise to have been made, and duly communicated to the Promisee. It does not at once become binding. Until acceptance it is a mere proposal, or, as the Romans called it, a "Pollicitation," and it may be withdrawn. But when the Promisee has accepted the proffered promise, and signified to the Promisor (either expressly or tacitly) his, the Promisee's, belief or expectation that the Promisor will act as he has promised, then there is a Convention, a Pact, an Agreement, a "Consensus." "The Consent, which is of the essence of a Convention, is formed of the intention signified by the Promisor, and of the corresponding expectation signified by the Promisee.

"This is called the 'Consensus' of the parties, because the intention and expectation chime or go together, or because they are

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directed to a common object." (1 Austin, p. 324, and Poste's Gaius, p. 293.) "*Pactum est duorum Consensus atque conventio ; pollicitatio vero offerentis solius promissum.*"—Dig. 50, 12, 3.

It is a very important matter to understand thoroughly that it is the Expectation created by a Promise, which is the foundation of the Promisee's right to ask for performance. This is proved by Paley (" Moral Philosophy," Book III., part 1, c. v.), and still more fully by Austin (Vol. I., p. 326, *et seq.*) By remembering it, we shall be able to understand thoroughly the principle of interpretation, which is to be followed in the not uncommon and sometimes difficult case of the words of a Promise being susceptible of more than one meaning, either from the phraseology itself, or by reason of the circumstances of the transaction. It is usual now to cite and adopt the rule laid down by Paley in his " Moral Philosophy," Book III., part 1, c. v., which is the same as the rule laid down by St. Augustine as to how the promise of an oath is to be fulfilled. Paley's words are as follows:—

"Where the terms of a promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time that the promisee received it." But Archbishop Whately, in his most valuable edition of the " Moral Philosophy,'' justly remarks that " Paley is nearly, but not entirely, right. A man expressing himself very carelessly might not only intend, but might really suppose the other to understand, something quite wide of what his words conveyed, or could fairly convey. He is bound, not by what he did apprehend the other to understand, but by what he had good reason to apprehend was understood. Every assertion, or promise, or declaration, of whatsoever kind, is to be interpreted on the principle that the right meaning of any expression is that which may be fairly presumed to be understood from it. This may chance to be different from what the other party actually did understand.

"You are not bound to be answerable for his mistakes. And again, it may be different from what you yourself inwardly meant, if you were designing to mislead the other by an equivocation, or if you expressed yourself carelessly or inaccurately. But in whatever

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sense it might reasonably be expected that a declaration of any kind would be understood, this is to be regarded as the true sense, and the sense to which you are bound."

This principle of interpretation is used by Blackburn, J., in his judgment in the late important case of Smith *v.* Hughes (Law Rep., Vol. VI., Q. B., p. 607), a case to which reference will be made when we come to the portion of this title which deals with concealment of facts. Blackburne, J., says, "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party, upon that belief, enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." The learned Judge refers to the case of Freeman *v.* Cooke (2 Ex., p. 663) as stating correctly the rule of law. The said statement, in Baron Parke's judgment in Freeman *v.* Cooke, is as follows:—

"If, whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, and would believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be precluded from contesting its truth."

I will add the following words from the judgment of Hannan, J., in Smith *v.* Hughes:—"In considering the question in what sense a Promisee is entitled to enforce a promise, it matters not in what way the knowledge of the meaning in which the Promisor made it, is brought to the mind of the Promisee, whether by express words, or by conduct, or previous dealings, or by other circumstances."

Next we will look to how a Proposal may be revoked.

"A Proposal may be revoked at any time before its acceptance is communicated to the Proposer, by the Proposer communicating to the Promisee his (the Proposer's) intention to revoke; or, by the lapse of the time prescribed in such proposal for its acceptance; or, if no time is so prescribed, by the lapse of a reasonable time without communication of the acceptance; by the failure of the acceptor to fulfil a condition precedent to acceptance; or, by the death or insanity of the Proposer."—*Field*, p. 230

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We will next revert to the subject of "Consensus," and of the Promisee's communication of the acceptance and implied expectation, which constitute his share of the "Consensus."

"If a proposal prescribes any conditions concerning the communication of its acceptance, the Proposer is not bound unless they are conformed to: but in other cases any reasonable and usual mode may be adopted. Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal."

"Any person who is a party to a complete contract or obligation cannot be permitted to take the benefits of that contract, and at the same time to repudiate the obligations placed upon him by it. That is a principle depending not upon any technical rule of law, but upon the first principles of equity and of justice." (From the judgment of Lord Chancellor Cairns, in Learmouth *v.* Miller, Law Rep , 2 H. L., Scotch Appeals.)

"An acceptance must be absolute and unqualified; or must include in itself an acceptance of that character, which the proposer can separate from the rest, and which will conclude the person accepting. A qualified acceptance is a new proposal." (Field, pp. 234, 235.)

However absolute and complete a Consensus may appear to be, it may be in reality insufficient, if it is not actual and free. And this requisite of having been freely made, and of having been real, applies to the promise as well as to the acceptance.

An apparent Consent is not real and free when made through, or in consequence of (1) Duress; (2) Undue Influence; (3) Fraud; (4) Mistake (including accident and surprise); or (5) Drunkenness. The incapacitating effect of immature age, of coverture, and of unsoundness of mind, has been already alluded to, and will be fully noticed under appropriate titles. (See Field, p. 226, not followed *verbatim.*)

Consent is deemed to have been obtained through one of the vitiating means mentioned in the last rule only when such consent would not have been given if such cause had not existed. In order to create incapacity, it is not essential that the duress, or fraud, &c., should have been the *sole* inducement to consent. (Field, p. 226.)

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We will now take these incapacitating causes separately:—

"Duress." The Romans spoke of this defence as "Metus;" alluding to the effect of the unlawful force or constraint which had been employed. According to Professor Gousmidt (see his work on the Pandects, p. 131 of the English translation), "Metus" was a good defence, though the plaintiff had not caused the "Metus." But in order that constraint should "produce such effect, it was requisite—1st. That the fear should have been well-founded; taking into account the physical condition of the person against whom the menace was directed. 2nd. That the fear should have been produced by menaces against the life, the physical person, or the liberty (not against the fortune merely) of the person menaced; or that it should have been produced by menaces against the safety and the honour of himself and children." The modern law of the American and English Courts as to Duress may be found in Field, and in the notes to Marriott *v.* Hampden, in 2 Smith's Leading Cases. Mr. Field (p. 226) makes separate defences of "Duress" and "Menace;" but they are both clearly branches of the effects of "Vis," as understood in Roman law.

The next head of defence is that of "Undue Influence."

"'Undue Influence' consists in the use by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority, for the purpose of obtaining an unfair advantage over him. It is a general rule of equity that no one can be permitted to make a selfish use of a personal confidence reposed in him. It is not necessary in such cases to show that there was any deception practised. It is sufficient to show that the confidence reposed was taken advantage of for purposes of gain." (Field, p. 231, the phraseology being slightly changed.)

2. It is a case of Undue Influence "when a person takes an unfair advantage of another's [relative] weakness of mind. Thus, a parent may not acquire anything from his child by the exercise of parental authority; and the same rule applies to any one standing in the relation of a parent, or who has a great ascendancy over the mind of the person making the gift.

3. "Undue Influence may be exercised in taking a grossly

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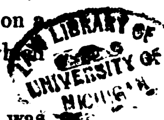
oppressive and unfair advantage of another's necessities or distress." (See Field, p. 231, not followed *verbatim*.)

There have been some important recent decisions on the very interesting, but often difficult, subject of Undue Influence.

As to the first head, in Lyon *v.* Horne (Law Rep., 6 Eq., 655), the influencing person, B, was not a relation of the donor, A, but was a person who pretended to be a "Spiritual Medium," and who persuaded A (a widow) that her deceased husband wished her to make certain deeds and donations in favour of him, B. The Court held it to be proved that B exercised dominion and influence over A's mind; that B acquired the deeds of gift by means of that dominion and influence; and the Court set the deeds aside. Sir G. M. Giffard, V.C., in his judgment cited, and adopted the words of Sir S. Romilly, in his "celebrated reply in Huguenin *v.* Baseley" (14 Vesey, p. 273), that in such cases where relief is given, "the relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another."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In Rhodes *v.* Bate (Law Rep., Vol. I., Chancery, p. 252), it was attempted (as often is done), on the part of the defendant Bate, to uphold the deeds made in his favour, on the ground that the plaintiff, the donor, had executed those deeds freely and voluntarily, and without pressure and solicitation on the part of him, Bate; and that she perfectly understood their nature. Such was found to be the fact. It was also a fact that she was much under the influence of the other defendant, her brother-in-law; and that the two defendants were much mixed up in many transactions; and the Court held that a confidential relation subsisted between her and the defendant Bate. The Court (Sir G. Turner, L.J., and Sir Knight Bruce, L.J.), affirmed the decree of V.C. Stuart, granting to the plaintiff the relief prayed for. Parts of the judgment of Sir G. Turner, L.J., are of great general importance. He said, "I take it to be a well-established principle of this Court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in con-

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ferring them. This, in my opinion, is a settled general principle of the Court, and I do not think that either the age or capacity of the person conferring the benefit, or the nature of the benefit conferred, affects this principle. Age and capacity are considerations which may be of great importance in cases in which the principle does not apply; but I think they are of little, if any, importance in cases to which the principle is applicable. They may afford a sufficient protection in ordinary cases; but they can afford but little protection in cases of influence founded upon confidence. And, as to the nature of the benefit, the injury to the party by whom the benefit is conferred cannot depend upon its nature.

"This general principle, however, must, as it seems to me, admit of some limitation. It cannot, I think, reasonably be said, that a mere trifling gift to a person standing in a confidential relation, or a mere trifling liability incurred in favour of such a person, ought to stand in the same position as a gift of a man's whole property, or a liability involving it, would stand in. To carry the principle to this extent would, I think, interfere too much with the rights of property and disposition, and would be repugnant to the feelings and practice of mankind. In these cases, therefore, of merely trifling benefits, I think this Court would not interfere to set them aside upon the mere fact of the proof of a confidential relation, and the absence of proof of competent and independent advice. In such cases, the Court, before it would undo the benefit conferred, would, I think, require some further proof—proof not merely of influence derived from the relation, but of *mala fides*, or of undue or unfair exercise of the influence.

"These are the principles by which, in my opinion, this case must be tried. It was argued, indeed, on the part of the plaintiff, that there was another general principle of this Court applicable to the case, that a volunteer can take no benefit derived under the fraud of another person. But I think that the defendant Bate cannot be considered to stand in the position of a mere volunteer, and that this principle, therefore, has no application to the case."

Sometimes it is attempted to support such transactions by arguing that their original defect makes them not absolutely void, but only voidable; and that consequently they may be rehabilitated, and

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established by subsequent confirmation. On this subject there is the recent case of Moxon *v.* Payne (Law Rep., VIII. Chancery, p. 881,) which applies to cases of undue influence as well as to cases of absolute fraud. It determines that such exercise of undue influence and imposition cannot be condoned, unless the parties, at the time of the supposed condonation, have "full knowledge of all the facts, full knowledge of the equitable rights arising out of those facts, and an absolute release from the undue influence by which the frauds were practised. To make a confirmation or compromise of any value in this Court, the parties must be at arm's length, on equal terms, with equal knowledge, and with sufficient advice and protection."

With respect to the consequence of taking grossly oppressive and unfair advantages of another person's circumstances in the making of a bargain, there is the recent important case of Earl of Aylesford *v.* Morris (Law Rep., VIII., Chancery, p. 484), in which the Chancellor, Lord Selborne, affirming the decree of Wickens, V.C., gave relief against an unconscionable bargain between a money-lender and a young heir just out of his minority. Part of the argument in the case had reference to the old doctrines of the Equity Courts as to expectant heirs, as held before the repeal of the Statutes against Usury, and the alteration of the law as to the sale of reversionary interests. But the judgment of Lord Selborne is based upon broader principles. He quotes Lord Hardwicke's language as to cases generally which raise—"'from the circumstances or conditions of the parties contracting—from the weakness on one side, from the usury on the other, or the extortion or advantage taken of that weakness—a presumption of fraud.'" Lord Selborne proceeds to observe that,—"Fraud does not here mean deceit or circumvention; it means unconscientious use of the power arising out of these circumstances and conditions; and where the relative position of the parties is such as *primâ facie* to raise this presumption, the transaction cannot stand, unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable. This is the rule applied to the analogous cases of voluntary donations obtained for themselves by the donees; and to all other cases where influence, however acquired, has resulted

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in gain to the person possessing, at the expense of the person subject to it. Lord Cranworth, in a recent case in the House of Lords (Smith *v.* Kay), said that no influence can be more direct, more intelligible, or more to be guarded against, than that of a person who gets hold of a young man of fortune, 'and takes upon himself to supply him with means, pandering to his gross extravagance during his minority, and extorting from him, or at least obtaining from him, for every advance that he has made, a promise that the moment he comes of age it shall all be ratified, so as to make the securities good.' The circumstances of the particular case in which these words were spoken differed widely from those of the case now before us; the element of personal influence is here wanting. But it is sufficient for the application of the principle if the parties meet under such circumstances as, in the particular transaction, to give the stronger party dominion over the weaker; and such power and influence are generally possessed, in every transaction of this kind, by those who trade upon the follies and vices of unprotected youth, inexperience, and moral imbecility.'"

It is to be observed that, in this case, relief was given against the "unconscientious bargains," although, as the Lord Chancellor expressly stated, the money-lender, "the appellant, was not alleged or proved to have been guilty of deceit or circumvention, and the plaintiff had no merits of his own to plead." No costs were allowed.

See also the similar case of Miller *v.* Cook (Law Rep., Equity Cases, Vol. X., p. 641.) There also the plaintiff sought to be relieved from an unconscionable bargain with a money-lender. The plaintiff's counsel stated that he did not rest his case on the special fact of the security given having been reversionary, or on the usurious amount of the interest, but on general principles. Sir John Stuart, V.C., granted the relief which was prayed, stating that "the repeal of the usury laws has not affected the right of the Court to give relief against unconscionable bargains." He pointed out that the contract gave the money-lender a power of sale, "the terms of which were oppressive, and put the plaintiff completely at his mercy."

"Fraud is either actual or constructive. Actual fraud consists in any of the following acts committed by a party to the contract, or

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with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." (Field, p. 229.) Observe, as to this, the words of Lord Cairns in Reise River Company *v.* Smith (Law Rep., 4 H. L., 73), that if persons make assertions of fact, as to which they are ignorant whether such assertions are true or untrue, they become, in a civil point of view, as responsible as if they had asserted that which they knew to be untrue." Other cases to the same effect are collected in the valuable note to Chancellor *v.* Lopus (1 Smith's Leading Cases, p. 176, 7th edition). It is enough to show that the defendant made the assertion recklessly, or without belief that it was true, and with intent to induce another to act on the faith of it, and thereby risk the sustaining of damage.

Mr. Field gives us a third specimen of actual fraud—"The suppression of that which is true by one having knowledge or belief of the fact." I think that, according to the preponderance of other American authorities, and of English authorities, this should be limited to certain exceptional classes of cases. In the recent important case of Smith *v.* Hughes (Law Rep., Vol. VI., Q. B., 604), Cockburn, C.J., cites and adopts the rule as to the effect of concealment of facts as laid down by Mr. Justice Story in his work on Contracts, Vol. I., sect. 516: "The general rule, both of law and equity, in respect to concealment, is that mere silence with regard to a material fact, which there is no legal obligation to divulge, will not vitiate a contract, although it operates as an injury to the party from whom it is concealed." But (see sect. 518) "an improper concealment of a material fact, which the party concealing is legally bound to disclose, and of which the other party has a legal right to insist that he shall be informed, is fraudulent, and will invalidate a contract." The discussion in Cicero's "De Officiis," Lib. III., cap. xii., xiii., xiv., and xv., as to the difference between concealment and reticence, was referred to in the argument and judgment in Smith *v.* Hughes. With regard to a supposed case, analogous in principle with some mentioned by

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Cicero, Sir Alexander Cockburn says: "The case put of the purchaser of an estate in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honour would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding." The English Judge here takes the distinction admitted by the great Roman jurists to exist in some cases between the "Honestum" and the "Licitum." See the fiftieth book of the Digest, chap. xvii., sect. 144, "*Non omne quod licet honestum est.*" Cicero himself would have decided differently—at least he would have wished for a different decision. (See chap. xv. and xvii. of the same book of the "De Officiis.")

With regard to the question which naturally arises after hearing what has been said about the English and American law as to the effect of concealment—the question "When is it that a party is legally or equitably bound to disclose to the other all material facts within his knowledge?" I can, on this occasion, only give a general answer, based principally on Story's work on Contracts, Bigelow's edition, p. 615, *et seq*, and on Story's Equity Jurisprudence, sects. 214, *et seq*. This duty of full and frank disclosure attaches in contracts of marine insurance, and in engagements whereby one party persuades another to become surety for him. It attaches generally in all cases where there is a fiduciary relation between the parties, either growing out of the special circumstances of the particular case, or out of the position which they occupy with regard to each other, as, for example, in family agreements and compromises.

By the Roman law, as codified under Justinian, a vendor could rescind a contract for the sale of land, on proof that the purchase-money was only half its value. (See Poste's Gaius, 341, citing Cod. 4, 44, 2.)

"Constructive Fraud consists, 1. In any breach of duty which, without any actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or, 2. In any such act or omission as the law especially declares to be fraudulent, without respect to actual fraud." (Field, p. 230.)

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See also the notes to the late (7th) edition of Smith's Leading Cases, Vol. II, p. 86, *et seq.* And see the old Roman law as to "Dolus," in Poste's Gaius, p. 398.

There have been numerous important decisions of late years on the subject of Fraud.

In the case of Barnich *v.* The English and Joint-Stock Bank (Law Rep., 2 Ex, 259), the judgment of Willes, J. (which was approved and adopted by the Privy Council in the case of Mackey *v.* The Commercial Bank of New Brunswick), may be considered to have settled the question of a principal, though morally innocent, being responsible for false representations made by his agent. Mr. Justice Willes stated the law on the subject thus:—

"With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.

"That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the acts of masters abroad improperly selling the cargo. It has been held applicable to actions of false imprisonment, in cases where officers of railway companies, intrusted with the execution of bye-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the bye-laws. It has been acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringement of a ferry, or such like wrong. In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

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In the very important case of the Panama, &c., Company *v.* The Indiarubber, &c., Company (Law Rep., X, Chancery Appeals, 515), the Court considered the fraudulent conduct of one party having surreptitious dealings with the agent of the other party after the contract had been entered into. The material facts were as follows:—

A telegraph-works company agreed with a telegraph-cable-company to lay a cable; the cable to be paid for by a sum payable when the cable was begun, and by twelve instalments payable on certificates by the cable-company's engineer, who was named in the contract. Shortly afterwards the engineer, who was engaged to lay other cables for the works company, agreed with them to lay this cable also for a sum of money, to be paid to him by instalments, payable by the works company when they received the instalments from the cable company:—

Held, that, under the circumstances, the agreement between the engineer and the works company was a fraud, which entitled the cable company to have their contract rescinded, and to receive back the money which they had paid under that contract.

Per James, L. J.:—"Any surreptitious dealing between one principal to a contract and the agent of the other principal is a fraud in equity, and entitles the first-named principal to have the contract rescinded, and to refuse to proceed with it in any shape."

Per Mellish, L. J.:—"As the works company had by their fraudulent conduct prevented the cable company from having the full benefit of the contract, the cable company were entitled to have the contract rescinded."

Decree of Malins, V.C., affirmed.

The following is part of the judgment delivered by James, L. J.:—

"I am of opinion that where anything in the nature of a fraud in the eye of the Court is committed, a man has the right at once to sever the connection; and I cannot bring my mind to doubt, that if you find a case where, in the contemplation of this Court, a principal is conspiring with the servant of the other principal to cheat his master in the execution of a contract, then in common sense, common justice, common honesty, and in this Court, the master is entitled to say, 'I will have nothing more to do with the business;'

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and in this Court a surreptitious sub-contract with the agent is regarded as a bribe to him for violating or neglecting his duty."

Mellish, L. J., in giving judgment, said as follows: —

"I am not quite certain that I go the full length to which the Lord Justice has gone in thinking that because a person has been a party to a fraudulent act of this kind after the contract was made, the mere fact of his having been guilty of such fraudulent conduct, supposing that a full remedy for the fraud could be otherwise obtained, would entitle the other party to say, 'Because you acted fraudulently, therefore I will have nothing more to do with you, and I will not carry out my contract with you.' I am not aware of any authority which has gone to that extent. As far as I know, the consequence of fraud is, that the Court will see that the party defrauded obtains, as far as can be given, full redress for the fraud."

In the case of the Venezuela, &c., Directors *v.* Kinsch (Law Rep., H. L., Vol. II., p. 99), it was decided that "Where a person believes that he has been misled by representations which are false or deceptive into taking shares in a proposed company, it is his duty to raise the objection at an early period, and to be guilty of no needless delay.

"The same rules as to false or deceptive representations which are applicable to contracts, between individuals, are also applicable to contracts between an individual and a company. No misstatement or concealment of any material facts or circumstances ought to be permitted in a prospectus issued to invite persons to become shareholders in a projected company. The public are, in such a case, entitled to have the same opportunity of judging of everything material to a knowledge of the true character of the undertaking as the promoters themselves possess.

"Where there has been fraudulent misrepresentation, or wilful concealment of facts, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it, that he might have known the truth by proper inquiry."

In the argument on this case an objection was made to the plaintiff's right to relief, on the ground that, if he had made proper inquiry, he might have ascertained whether the representations

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contained in the defendant's prospectus were true or not. Lord Chelmsford, in his judgment, thus disposed of that objection :—

"It appears to me that when once it is established that there has been any fraudulent misrepresentation, or wilful concealment, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it, to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty.'

"I quite agree with the opinion of Lord Lyndhurst, in the case of Small *v.* Attwood that 'where representations are made with respect to the nature and character of property which is to become the subject of purchase, affecting the value of that property; and those representations afterwards turn out to be incorrect and false to the knowledge of the party making them, a foundation is laid for maintaining an action in a Court of common law to recover damages for the deceit so practised; and in a Court of equity a foundation is laid for setting aside the contract which was founded upon that basis."

See further, as to false representations and dishonest concealments, practised by persons connected with public companies in order to induce persons to take shares, the cases of Peek *v.* Gurney (Law Rep., H. L., Vol. VI., p. 377), and Swift *v.* Winterbotham (Law Rep., 8 Q. B., p. 253), referred to in Smith's L. C., Vol. II., p. 91. Part of the judgment in the last-mentioned case is as follows :—

"It is well established that, in order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made to a third person, to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view of its being acted on, and the plaintiff is one of the public who acts on it, and suffers damage thereby."

The precise effect of fraud in making a contract voidable, is thus stated in the case of Dawes *v.* Harness (Law Rep., X., C. P., 167) :—

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"Fraud does not *per se* avoid the contract. The true legal doctrine is that fraud merely renders the contract voidable; that is to say, gives an option to the party defrauded to disaffirm the contract, but until he disaffirms it it remains good."

As to this, the important rule must be attended to that, "If Fraud is established, the onus of proving waiver by Laches lies on the fraudulent party." See Lindsay Petroleum Company *v.* Hurds (Law Rep., V., P. C., 221).

See further, as to Laches, that title—and also titles "Ordinance against Frauds," and "Evidence," part Estoppel.

The effect on a contract and on the rights of the parties which is produced by non-compliance with the formalities enjoined in certain cases by the ORDINANCE OF FRAUD, will be considered under that title.

It remains for us, in this part of our subject, to consider the effect of Mistake, where there has been no fraud.

"Mistake may be either of fact or of law." We will take first "Mistake as to fact."

There have been two recent decisions of the Supreme Court of Ceylon, one as to movable, and the other as to irremovable, property. In the first, the principle of Roman-Dutch law was followed, according to which a material error as to the substantial nature of the article sold will vitiate the sale, although there was no fraud, and the vendor as well as the vendee was not aware at the time of the sale that the article was not such as he represented it to

SUPREME COURT.

January 24, 1865. C. R., Colombo, No. 29,876.

The facts were that defendant, the vendor, had sold to the plaintiff a chain and ring, which articles both parties believed to be gold at the time; and plaintiff, himself a goldsmith, tested them at the sale. On the day after the sale plaintiff discovered these articles to be gilt.

The Commissioner of the Court of Requests decided in favour of the plaintiff; and the Supreme Court affirmed that decision in the following judgment:—"The Supreme Court thinks the judgment right

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on the authorities cited by the Commissioner; and also on the authority of Voet, Lib. XXI., Tit. 1, and on the authority of Vanleeuwen, Censura Forensis, IV., C. xix. 15.

"These two authorities are very clear on the point that the purchaser's right to recover in such a case is not affected by the fact that the vendor was ignorant, at the time of the sale, that the article was not that which it was represented to be.

"In a case where the spuriousness of the article was so extremely difficult to detect as in the present case, the Supreme Court does not think that the plaintiff's right to recover is barred by the fact that he himself was a goldsmith by trade. Voet, in the chapter already referred to, sect. ix., p. 746, certainly says, '*Scientiæ autem emptoris simile habendum si emptor artifex fuerit.*' But he goes on to add, '*et secundum artis suæ præcepta scire facile potuerit atque debuerit vitium quod subest.*'

"In the argument before us most reliance was placed (and very fairly placed) on the fact that the vendors told the purchasers to test the articles themselves. If the vendors had clearly and distinctly said, 'These articles may be gold, or they may be some other metal—test them yourselves, and buy them on your own judgments, whatever they may be,' we should have held that this action was not maintainable in the absence of proof that the vendors knew for certain that they were not gold. But it seems to us what really took place was this: the rings were sold as gold rings, and the purchasers were invited to test them in such a manner as would lead the purchasers to use their own judgment as to the quality of the gold, and not as to the fact whether the rings were substantially gold rings, or substantially something else with a merely gilt surface."

The other case (D. C., Kandy, 44,095) was that of the sale of an estate, in which there was found to be a very serious discrepancy as to the acreage really sold and the acreage described in the conditions of sale. The case (known as the case of Harmanis *v.* Templer) came before the Court in the form of an application by

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the purchaser to have certain instalments repaid to him, which were in the hands of the defendant, who, as Fiscal, had sold the estate under a Writ of Execution against the property of one Ameesekere.

The judgment of the Supreme Court recited these facts, and set out that at the sale the plaintiff had become "the purchaser of two lots, and as such purchaser paid the deposit required by the conditions of sale." The judgment proceeded as follows :—

"Before the other instalments became due he ascertained, as he alleges, that the quantities of the lands purchased by him were far short of the descriptions of the amount given in the conditions of sale.

"He paid the remaining instalments only under protest. The conditions of sale had provided that the deposit should be forfeited if the instalments were not duly paid.

"The Fiscal has not paid over the money to the execution-creditor, but he has obtained an order from the District Court of Kandy for the purchase-money being retained in that Court, to abide the event of this suit.

"With regard to the first lot purchased by the plaintiff, the printed conditions of sale described it as The Coffee Estate called Ampittia, containing in extent about three hundred (300) acres.

"At the hearing of the appeal there was a dispute of fact between the parties as to what was sold on Ampittia estate. It was certainly not one block of land; the estate was made up of several parcels. Forty-three deeds were laid on the table at the time of the sale, as being the title-deeds of what was then sold.

"The plaintiff says that all that he got under the sale was the aggregate of the lands to which these deeds related, and that the aggregate acreage was only one hundred and forty-two (142) acres. It has been contended at the appeal that the plaintiff, under that sale, became also owner of another distinct parcel of land, containing one hundred and forty-nine (149) acres, which was in the village of Ampittia, and which appears to have been mortgaged at the time of the sale, not to the execution-creditor, Mr. Rosemali Cocq, but to Dr. Dickman.

"If these 149 acres are added to the 142 which plaintiff admits

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having got under his purchase of this lot, the difference of acreage between the description and the reality would come within the protection of the word 'about.'

"But it seems clear to us, as a matter of fact, that this parcel of 149 acres (which had been mortgaged to Dr. Dickman) formed no part of what was sold to plaintiff at the Fiscal's sale. We think the evidence shows that, though within the village of Ampittia, this 149 acres parcel was not known as part of the Ampittia estate. Moreover, the letter from the execution-creditor's proctor to the Fiscal (which is in evidence) shows that the Ampittia estate, which the Fiscal was required to seize and sell, was specially mortgaged to the execution-creditor.

"Accordingly we find that forty-three (43) deeds which relate to and cover the parcels, amounting to 142 acres, were produced at the sale, as the title-deeds of what was being sold; but none of these forty-three deeds includes any part of the 149 acres parcel which was mortgaged, not to the execution-creditor, but to Dr. Dickman.

"Moreover, so far from plaintiff having got possession of this 149 acres parcel in consequence of his purchase at the sale, he has actually acquired it since by an entirely distinct purchase from Dr. Dickman.

"We therefore think that the conditions of sale, under which the plaintiff bought the first lot, misdescribed it to the extent of 158 acres out of 300.

"We think that the word 'about' cannot protect the vendor in the case of so large a deficiency. The English authorities on this subject are to be found in Lord St. Leonards' work on 'Vendors and Purchasers,' pp. 324 and 325, ed. 1862. The civil law may be seen in 'Pothier on Sales,' p. 108 (Cushing's translation.)

"It is said that the Deputy Fiscal at the sale told the bidders to look at the plans on the table; and that the plaintiff might, by inspecting and calculating the area of the parcels in each plan, have learned the true aggregate acreage. We do not think that it would have been possible to do this in the haste and confusion of an auction-room; and we hold also that, even if it were practicable, the plaintiff was not bound to do it. Nor was he, in our judgment, bound to go

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and inspect the land and have it measured before he went to bid at the sale. The conditions of sale professed to describe the acreage; and the same description had been given by the defendant in the advertisement of the sale in the Government *Gazette*. The plaintiff had a right to trust to that description; and we are satisfied, as a matter of fact, that he did trust to that description, and that he was misled by it to an extent which cannot be got over by the word 'about' inserted in the description.

"The conditions of sale under which the plaintiff bought the other lot, Bokawella, described it as containing in extent about 150 acres. In reality its extent is only 108 acres.

"In this instance also we think that the plaintiff was misled by the description in the conditions of sale to an extent beyond the saving power of the word 'about.'"

Judgment was given for the plaintiff.

Notice of appeal to the Privy Council was given, and the case came on a second time before the Supreme Court as a Court of Review.

After hearing it re-argued, the Supreme Court gave the following judgment in Review:—

Judgment in Review.

On this case coming on before us in Review, we were referred by the learned counsel for the defendant to the evidence given by Mr. Wall, that he bid nearly as much as the plaintiff, though he, Mr. Wall, knew of Dr. Dickman's mortgage, and knew also that Dokkewelle contained only 106 acres.

We had not forgotten this evidence when we determined on our former judgment, but we thought then, as we think now, that the right to redress of a purchaser, who has been deceived by a serious misdescription, would be rendered illusory if the vendor could defend himself by proving that some third person knew of the deficiency, and yet would have given for the property as much, or nearly as much, as the plaintiff was misled into giving. Opinions as to the value differ widely from each other, and special properties have often

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particular values for particular persons. There is nothing to show that Mr. Wall communicated his knowledge to the plaintiff, and we do not think that the plaintiff's rights are affected by that gentleman's knowledge or estimate.

The present judgment of this Court of Review is, that we affirm and repeat the judgment of the Supreme Court delivered on the 11th of July last."

The appeal to the Privy Council was abandoned.

By far the most important of the recent English cases as to Mistake is the case of Lord Gilbert Kennedy *v.* the Panama, &c., Mail Company, reported in Law Rep., Q. B., Vol. II., p. 580. That case shows the important distinction between the effects of fraudulent misrepresentation and of innocent misrepresentation ("innocent" not meaning simply "ignorant"). That case also contains a most masterly explanation of both the English and the Roman law as to the kind of mistake which is regarded as a mistake as to substance, and on which no valid contract can be founded.

There had been an innocent misrepresentation by the Panama Mail Company as to certain shares which Lord Gilbert Kennedy was induced to take. He wished to have the contract treated as a nullity.

The pith of the judgment was as follows (see the reporter's epitome):—

"In order to entitle a party to rescind a contract, it is sufficient to show that there was a fraudulent representation as to any part of that which induced him to enter into the contract. But when there has been only an innocent misrepresentation, it is not ground for a rescission, unless it was such as that there is a complete difference in substance between the thing bargained for and that obtained, so as to constitute a failure of consideration."

The case is so important, and the reasoning of the Court so luminous, that I shall quote part of the judgment in detail.

It was delivered by Blackburn, J. That learned judge, after set-

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ting out the main facts of the case, referred to the contention on behalf of Lord Gilbert Kennedy, that the shares received by him were shares differing in substance from those which he had bargained for; and that the shareholder was therefore entitled to return the shares as soon as he discovered this, quite independently of fraud, on the ground that he had applied for one thing and got another. Mr. Justice Blackburn proceeded to state that if the shares obtained were really different things in substance from those which Lord Kennedy applied for, "this would, we think, be good law. The case would then resemble Gompertz *v.* Bartlett (2 E. B., 849), and Gurney *v.* Wormersley (4 E. B., 133), where the person, who had honestly sold what he thought a bill without recourse to him, was nevertheless held bound to return the price on its turning out that the supposed bill was a forgery in the one case, and void under the stamp laws in the other; in both cases the ground of decision being that the thing handed over was not the thing paid for. A similar principle was acted upon in Ship's Case (2 De G. T. and S., 544). There is, however, a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission, unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration.

"The principle is well illustrated in the civil law, as stated in the Digest, lib. xviii. tit. "De contrahendâ Emptione," leges 9, 10, 11. There, after laying down the general rule that, where the parties are not at one as to the subject of the contract, there is no agreement, and that this applies where the parties have misapprehended each other as to the *corpus;* as where an absent slave was sold, and the buyer thought he was buying Pamphilus, and the seller thought he was selling Stichus, and pronouncing the udgment that in such a

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case there was no bargain because there was 'error *in corpore*,' the framers of the Digest moot the point thus: '*Inde quœritur si in ipso corpore non erretur, sed in substantiâ error sit, ut puta si acetum pro vino veneat, œs pro auro, vel plumbum pro argento, vel quid aliud argento simile: an emptio et venditio sit?*' and the answers given by the great jurists quoted are to the effect that, if there be misapprehension as to the substance of the thing, there is no contract; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding. Paulus says: '*Si œs pro auro veneat, non valet, aliter atque si aurum quidem fuerit, deterius autem quam emptor existimaret: tunc enim emptio valet.*'

"Ulpianus, in the eleventh law, puts an example as to the sale of a slave very similar to that of the unsound horse in Street *v.* Blay (2 B. Ad. 456). And, as we apprehend, the principle of our law is the same as that of the civil law; and the difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration."

Reference on this subject may also be made to the case of Smith *v.* Hughes (Law Rep., Vol. VI., Q. B. 604), already cited, when we were speaking of Fraud; and the student may also refer to the authorities which will be presently cited under the title "Warranty."

As John Austin observes (Vol. II., p. 407, *et seq.*), almost all systems of jurisprudence recognize a distinction between the effect of ignorance of Fact and the effect of ignorance of Law. With respect to the last, the maxim that "*Ignorantia juris haud excusat*" is of almost universal application. Austin's explanation of the reasons why this rule (which, undoubtedly, often works much individual hardship) obtains so widely, deserves perusal. The working of the rule in Roman law is thus stated in Poste's Gaius, p. 393:—

"We have seen that ignorance of the specific constituents of an action is a ground of exculpation. This must not be extended to ignorance of the obligations to which a person is subject under

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certain circumstances, or of the sanctions by which these obligations are enforced. Hence the maxim that a party in suit may allege ignorance of fact, but cannot allege ignorance of law. '*Regula est, juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere.*' (Dig. 22, 6, pr.) '*Sciant ignorantiam facti non juris prodesse, nec stultis solere succurri sed errantibus.*' (Ibid, § 5.) 'The rule is, that the law is known to everybody at his own peril.' 'Ignorance of fact may be pleaded, not ignorance of law; the relief is accorded to error, but not to stupidity.' The rule is founded on expediency. It would be impossible for a Court to decide whether a party was really ignorant of the law, or, if this could be determined, whether his ignorance was inevitable or the effect of negligence. From the impossibility of deciding such a plea, it is not allowed to be pleaded, and ignorance of law is always assumed to be a case of negligence. The knowledge of law, however, which everybody is presumed to possess, does not exist as a matter of fact, even among the well-disposed. All systems of law are more or less irrational, and contain many provisions which are hardly surmisable by any but professional lawyers. To mitigate the injustice that the maxim would often produce, the Roman jurists admitted an exception in favour of women, minors below the age of twenty-five, and soldiers. These classes were permitted to plead ignorance of the law, except the obvious dictates of natural law, and were relieved against the forfeitures and obligations thereby incurred."

The late case of Cooper *v.* Phibbs (Law Rep., 2 H. L., 149), has introduced an important qualification of the general rule that "*Ignorantia juris haud excusat,*" at least so far as that rule was commonly misunderstood. It will be no longer safe to act universally on the dictum in Midland Railway of Ireland *v.* Johnstone (6 H. L. C., 788), that "The construction of a contract is clearly matter of law, and if a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be at law."

In Cooper *v.* Phibbs it was decided that where two parties enter into an agreement under a mutual mistake as to their relative and respective rights, either of them may come to a Court of Equity to be

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relieved from it. Such relief will be given on the principles of *good conscience alone.* In that case the objection was raised that, in order to entitle a party to such relief, the mistake ought to be one of fact and not of law. And the dictum in Midland Railway of Ireland *v.* Johnstone was cited. But Lord Westbury, in his judgment in Cooper *v.* Phibbs, dealt with the objection as follows:—"It is said, '*Ignorantia juris haud excusat;*' but in that maxim the word 'Jus' is used in the sense of denoting general law—the ordinary law of the country. But when the word 'Jus' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake. . . . . . But when the appellant comes here to set aside the agreement, an obligation lies upon him so to constitute his suit as to enable a Court of Equity to deal with the whole of the subject-matter, and, once for all, to dispose of the rights and interests of the parties in the settlement."

A contract may also be set aside on the ground that the party making it was too drunk at the time to know what he was about. But it is not absolutely void. It is capable of ratification by the man when he comes to his senses. This was determined in the late case of Mathews *v.* Baxter (Law Rep., VIII., Ex., p. 152).

We now come to that part of the law as to Contracts, which deals with the "Causa" or "Object" of the making of a Convention or Pact, and which determines whether the Pact is or is not to be clothed with the chain of obligation, as made for sufficient cause; or whether it is one which the law will not enforce, as being either a mere nude Pact, or a Pact having some illegality or immorality, or impossibility as its object.

We are in the habit of translating the "Causa" of the Pact, by the word "Consideration," a term not adequate to the original, but so rooted in usage, that it is not likely now to be generally abandoned. Mr. Field, however, in his Code, employs a good expression for the purpose. He calls the "Causa" the "object" of the contract: and

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sometimes speaks of the "Consideration for the object of the Contract."

The Roman jurists in some instances made a distinction between the kinds of objects of a Contract, which supplied the inducement to the parties to enter into it. One class of objects of a contract, or of motives for it, existed, when the contract was to take away something from the Promisee, or to impose some burden on him, which might be the burden of seeing that the Promisor acquired a benefit from the transaction. Such a cause for the Contract was called a "Causa onerosa;" but when the object of the parties was simply to do some benefit to the Promisee, the cause was termed a "Causa lucrativa." (*See* Brissonius' "De Verborum Significatione ad vocem Lucrativus.") But this last class of causes was not always noticed in discussing the binding validity of a Contract; and when the word "Causa" alone is used to denote that the Contract had a sufficient legal object, "Causa" means "Causa onerosa." The English law as to Consideration will be found very fully discussed in the notes to the case of Lampleigh *v.* Braithwaite, and the case of Collins *v.* Blantern, in the first volume of Smith's Leading Cases.

Mr. Field states the general principles of law as to object (consideration) as follows (New York, Code, p. 237 *et seq.*) :—

"The object of a Contract is the thing which it is agreed, on the part of the party receiving the consideration, to do or not to do.

"The object of a Contract must be lawful when the Contract is made, and possible and ascertainable by the time the Contract is to be performed.

"Everything is [for this purpose] deemed possible, except that which is impossible in the nature of things.

"Where a Contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire Contract is void.

"Where a Contract has several distinct objects, of which one at least is lawful, and one at least is unlawful in whole or in part, the Contract is void as to the latter, and valid as to the rest.

"Any benefit conferred, or agreed to be conferred, upon the

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Promisor, by any other person, to which the Promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise.

"An existing legal obligation resting upon the promisor, or a moral obligation, originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise."

The English law as to Moral obligations being sufficient to sustain a promise is different from the doctrine deduced by Mr. Field from American authorities. The "elaborate judgment of the Court of Queen's Bench in Eastwood *v.* Kenyon (11 A. & E. 452)," followed by later decisions, is considered to have settled the law in England that, as a general rule, a mere moral obligation, however sacred, is not a sufficient foundation for a binding promise, and that it is legally operative in those cases only, where an effective legal right would have existed if it had not been for some legal barrier in the way of suing, such as is caused by infancy, or by the Statute of Limitations, or the like. See the note to Lampleigh *v.* Braithwaite, at page 148, Vol. I., of the last edition of the Leading Cases.

Perhaps in Ceylon it may be open to investigate and consider judicially, on fit occasion, whether the doctrine of the English courts or that of the New York Code is consonant with Roman-Dutch Law.

"The consideration of a Contract must be lawful.

"If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void.

"When a consideration is executory, it is not indispensable that the contract should specify its amount, or the means of ascertaining it. It may be left to the decision of a third person, or be regulated by any specified standard.

"When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained, or when it leaves the amount thereof to the discretion of an interested party,

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the consideration must be so much money as the object of the contract is reasonably worth.

"Where a contract provides an exclusive method by which its consideration is to be ascertained, which method is on its face impossible or unlawful, the entire contract is void.

"Where a contract provides an exclusive method by which its consideration is to be ascertained, which method appears possible on its face, but in fact is, or becomes, impossible or unlawful, such provision only is void. Pothier (on Sale, p. 24) holds that the contract in such case is voidable, and this view has been adopted by some writers in this country [*i.e.*, America] (Story on Sales, 220; 1 Pars. Cont., 5th ed., 525); but it seems more probable that the common law would regard the contract as made for a reasonable consideration, to be ascertained in any usual way."—Field, p. 240–242.

I will now set out a decision (in 1866) of the Ceylon Supreme Court that an undertaking to refrain from prosecuting for theft is illegal under Roman-Dutch law, and that a bond to enforce such an undertaking is void.

IN THE SUPREME COURT.

July 31, 1866. D. C., Colombo, No. 34,920.

JUDGMENT.

"Part of the consideration for the bond in this case was an undertaking to forbear criminal proceedings against a thief. The late learned Acting Judge of the Colombo District Court held that such a consideration, though illegal by English law, was not so by Roman-Dutch law.

"The Supreme Court thinks that this holding was wrong. The District Judge seems to have been led to it by reference to some passages in *Voet* and *Grotius*, which speak of its being illegal to engage to remit the punishment of a crime not then yet accomplished. It was argued thence, that if the crime had been accomplished, a

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contract to remit the punishment would be good. But this argument seems to the Supreme Court to be quite erroneous.

"The instance cited from *Voet* and *Grotius* is given by those authors to exemplify the rule that contracts are illegal, the object of which is to tempt to future guilt or immorality. They nowhere say that it is legal to bargain for impunity for past offences, and to thwart the course of justice by causing the proceedings in a criminal court to be dropped in consideration of a private payment. A man's right to compromise a civil action brought by him to get a compensation in money for the effects of an offence committed against him, may be a very different matter. But the object of criminal proceedings is to repress crime, and to protect the public by bringing criminals to justice. To aid in this is a public duty. To impede or corruptly neglect this, is an offence against the public: and a bond given to induce a man to do so, is really a bond given to induce him to commit an offence. It is clear to us that such practices are forbidden by the Roman-Dutch law as strongly as by the laws of England. Voet's words are unmistakable. He lays it down as a general requisite for contracts being enforceable in the courts of law, that they must be 'negotia non juri publico contraria quæve ad publicam spectarent lœsionem' (2. 14. 16). It cannot be said that it would not be contrary to justice and injurious to the community, if bonds like the present were upheld, and if wealthy criminals were thereby enabled to break the law with impunity; inasmuch as it would be open to them, when detected, to make effective bargains with their prosecutors, and so clog the course of justice with their gold.

"We were referred to an English case, Keir *v.* Leeman (6 L. B. R. 308), in support of the proposition 'that the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. But the same learned judge who in that case used those words, added as follows: 'But if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.'

"Now the offence in the present case is theft, and that offence is

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certainly of a public nature, for the honest part of the public have a direct and most urgent interest in the repression and punishment of thieves.

"Judgment to be entered for defendant."

In the English case of Pearce *v.* Brooks (L. R., 1 Ex. 213) it was decided that a person who makes a contract for sale or hire with the knowledge that the other contracting party intends to apply the subject matter of the contract to an immoral purpose, cannot recover upon the contract: it is not necessary that he should expect to be paid out of the proceeds of the immoral act.

The immediate object of this publication does not compel me, and available space would hardly permit me, to continue the topic of Agreements and Contracts further, by discussing here the law as to Rescission or as to how the obligations arising out of Contract may be discharged, released, varied, or sufficiently performed. The doubts and difficulties connected with the subject of Novation of Contract have been rather displayed than settled by the decisions which have lately been given by high tribunals in England, in the copious litigation which has arisen in consequence of the insolvency of certain Insurance Companies. But an important judgment has lately been pronounced on another very material branch of the Law of Contract, which I shall advert to here, on account of its practical interest—I mean as to the law of how far a contractor is discharged from his contract by a supervening impossibility to perform it.

The case to which I draw attention, is that of Howel *v.* Coupland (L. R., 9 Q. B. 462).

The marginal note, in which the reporters epitomize the facts and the judgment, is as follows:—

"Plaintiff and defendant entered into an agreement in March, whereby defendant agreed to sell and plaintiff to purchase 200 tons of Regent potatoes grown on land belonging to defendant in W., at rate of £3 10s. 6d. per ton, to be delivered in September or October, and paid for as taken away. In March defendant had sixty-eight acres ready for potatoes, which were sown, and were amply sufficient to grow more than 200 tons in an average year; but in August the

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potato blight appeared, and the crop failed; so that the defendant was able to deliver only eighty tons. The plaintiff having brought an action for the non-delivery of the other 120 tons:—

"Held, that the contract must be taken to be subject to the implied condition that the parties shall be excused if, before breach, performance becomes impossible from the perishing of the thing without default in the contractor."

The following is an extract from the judgment delivered by Mr. Justice Blackburn:—

"The principle of Taylor *v.* Caldwell (9. L. T. Rep., N. S., p. 350), which was followed in Appleby *v.* Mayers, in the Exchequer Chamber, at all events decides that where there is a contract with respect to a particular thing, and that thing cannot be delivered owing to its perishing without any default in the seller, the delivery is excused. Of course, if the perishing were owing to any default of the seller, that would be quite another thing. But here the crop failed entirely, owing to the blight, which no skill, care, or diligence of the defendant could prevent. Does that excuse the performance of the contract, when the contract was to deliver only a porto n of the specific thing? It seems to me that it makes no difference, and that the ruling in Taylor *v.* Caldwell applies: that is, that, if from the nature of things the thing to be delivered is liable to perish, then, there is an implied condition that, if the delivery becomes impossible owing to the thing perishing without default of the seller, he is excused."

I proceed to quote some very important passages of the judgment delivered by Mr. Justice Quain.

Quain, J.:—"I am of the same opinion. The contract is for the sale of 200 tons of Regent potatoes, grown on a particular farm in possession of the defendant; *therefore no Regent potatoes, except they were grown on that farm, would satisfy the contract;* and if, as it seems to me, it was essential in order to satisfy the contract, that the potatoes should be grown on that particular farm, then the contract is for part of a specific thing, viz, the crop off those particular fields. If the contract had been for the whole, it seems to be conceded that the failure of the crop would have excused the defendant; but there

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can be no distinction in principle whether the contract be for the whole or only part of a particular crop, the same rule must govern in either case; and the doctrine of Taylor *v.* Caldwell applies. The contract contemplates, whether it be for the whole or only 200 tons of the crop, that the potatoes should be produced on this particular land, and if none are produced owing to the blight, then owing to the intervention of "Vis major," or the act of God, the parties are excused from the performance of the contract on either side. In Sheppard's Touchstone, p. 382, it is said: 'Where the condition of an obligation is to do one of two things by a day, and at the time of making the obligation both of them are possible, but after, and before the time when the same are to be done, one of the things is become impossible by the act of God, or by the sole act of the obligee himself; in this case the obliger is not bound to do the other thing that is possible, but is discharged of the whole obligation. . . . And when the condition of an obligation is to do one single thing, which afterwards, before the time when it is to be done, doth become impossible to be done in all or in part, the obligation is wholly discharged; and, yet, if it be possible to be done in any part, it shall be performed as near to the condition as may be.' Here the defendant does deliver 80 tons, all that he is able to deliver. There is no question of default or negligence on the part of the defendant, nor have we to consider whether more land ought to have been sown. The single question is whether this was not a contract to deliver 200 tons of the potatoes which a particular land is expected and ought to have produced; but the land, owing to a cause over which the defendant has no control, does not produce 200 tons altogether; and if such be the contract, whether the defendant be not excused. I think that he clearly is excused."

Ceylon readers will be reminded of the Wallarambe coffee case reported in Mr. Grenier's Reports for 1873. It will be seen that the decision of the Supreme Court in that case is not contradicted by Howell *v.* Coupland; inasmuch as, according to the judgment of the Supreme Court in the Wallarambe case, the contract there was not to deliver part of any particular crop, and might have been satisfied by the delivery of other Wallarambe coffee, which (as

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the facts of the case showed) might have been procured in the market.

"Pothier on Sales" and "On Obligations," may be beneficially consulted on this as on all subjects of the kind. The true principle on which the various authorities may be harmonized seems to be not an assumption that the law applies the maxims '*Nemo ad impossibile tenetur*,' and '*Actus Dei nemini facit injuriam*,' capriciously or exceptionally, but that in certain cases the contractor is considered to warrant that there shall be sufficient material for him to perform his promise with. He is then bound to make good his warranty, or give compensation for the breach of it, although performance of the contract may have become impossible by supervening impossibility without any fault or negligence on his part.

APPEAL.

IN THE SUPREME COURT OF CEYLON.

9th Oct., 1861. C. R., Harispattoo, 2,545.

No appeal lies from an order of a Court of Requests opening up judgment for a second time, such an order not being a final judgment.

Semble, that the Supreme Court can deal with such an order, if brought before its notice on an appeal from a final decision in the case.

"In this case judgment was re-opened on the motions of the defendant on two occasions. The plaintiff now appeals against the order of the Commissioner opening up judgment for the second time. The facts appear sufficiently in the

JUDGMENT.

"It is urged by the plaintiff that there is no power to re-open judgment by default a second time. We certainly do not agree in that view; but certainly such an indulgence ought never to be

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granted on such an unsatisfactory affidavit as was used in the present case. The defendant's proctor says in it, that he himself was prevented by illness from attending the Court, and that it was impossible for him to warn his client. He does not show why or how it was impossible for him to do it, nor does he show why he could not have obtained the aid of some other proctor to act for him, at least to the extent of requesting an adjournment.

"This suit was instituted on the 27th of April, 1860. It was prolonged to the 20th of September by a string of adjournments, none of which appear to have been caused by any neglect or default of the plaintiff.

"On the 20th of September plaintiff obtained judgment by default for the first time. Defendant applied on the 30th of November to open that judgment, and on the 27th of February in this year the Commissioner decided that the judgment should be opened; and the 9th of April was fixed for the hearing. The defendant on the 23rd of March filed his answer, but on the 9th of April neither he nor his proctor were present, and the plaintiff had judgment by default for the second time. On the 29th of April the defendant's proctor files an affidavit of excuse, and on the 27th of June defendant furnishes a stamp for notice to plaintiff to show cause why the judgment should not be opened. The Court appoints July the 29th for hearing this matter, and on that day decides to re-open judgment a second time, examines the parties, and then further postpones the case for the plaintiff to get up his witnesses.

"It is not to be wondered at that the plaintiff should feel aggrieved at these fifteen months of the law's delay, in a claim for five pounds and ten shillings. But we are of opinion that we cannot entertain his present appeal against the order of July 24th. The Court of Requests Ordinance gives an appeal 'to any party who shall be dissatisfied with any final judgment, or order having the effect of a final judgment.' (This is re-enacted by 11 of 1868.)

"But the order of the Commissioner to re-open the judgment by default is not a final judgment, or order having the effect of a final judgment, as against the plaintiff, who, when his case proceeds, may, for aught that we know, be the successful party.

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"It is true that the following Ordinance as to Rules of Practice speaks (of appeals) against any judgment or order of the Court of Requests; but we must interpret these words by the words of the principal Ordinance, especially as the second Ordinance distinctly purports to provide Rules of Practice for regulating the jurisdiction in the Courts of Requests, and it does not profess to do anything more.

"We do not, however, wish it to be understood that the present plaintiff, if the final judgment of the Court of Requests should be against him, with costs, would not have the power of appealing against that judgment, and of bringing in that appeal before the effective notice of the Supreme Court any substantial errors of law, or in fact, committed by the Commissioner in any part of the action (see the latter part of the Court of Requests Ordinance), and we wish at once to express our regret at observing such dilatory proceedings in courts which ought to be courts of summary justice."

SUPREME COURT.

July 1, 1862. D. C., Jaffna, 11,832.

"An appeal petition, purporting to be signed and drawn by a proctor, is sufficient under the Rule."

IN THE SUPREME COURT.

July 24, 1863. D. C., Colombo, No. 2,784.

In Re De Raymond *v.* Piachaud.

As to security for costs on appeal against grant of probate.

Per Senior Puisne Judge:—"In this case, the respondent, Mr. Stork, applied for probate to the last will of Mrs. De Raymond. The appellant, Mr. Piachaud, opposed the grant, but the District Court decided that probate should be granted to Mr. Stork. Against this decision an appeal has been lodged, and the question now before the Court is, whether the appellant Mr. Piachaud, should give security

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under the 8th section of the Rules of Court. The District Judge having decided that he must give security for the full value of the estate, it has been contended by the respondent's advocate, that not only the probate, but the property of the testatrix is in litigation, and that under the 4th clause of the 8th section of the Rules of Court, security must be given for the full value of that property, the subject of that litigation.

"I consider that the probate only is in question, the granting of which vests in the executor the right of collecting and administering the property, and vests that property in him when ascertained and collected. It does not always happen that the person opposing the grant of probate is in possession of any of the property of the estate, and it sometimes happens that the property named in the will has no real existence, in which case there would be no ground for requiring security in appeal, and though in this case the appellant admits he possessed property, still it appears that he does so as a trustee or administrator. Therefore the having probate would not necessarily vest the property subject to those trusts in the executor, but it has been said that the District Court, in deciding what security must be given, must ascertain the value of the property. This would involve an inquiry into the trust deed, and the District Court would have to decide whether or not those trusts were at an end by the death of the testatrix; an inquiry which I do not think could or ought to be made in a testamentary case. Being therefore of opinion that the probate only is directly in question in this case, that the property is unascertained and only indirectly concerned, and that the question of granting probate does not necessarily take the property from the appellant, I do not think he can be called upon to give security.

"The judgment, therefore, of the District Court requiring security in appeal is set aside, and the appeal is allowed without security, except for costs."

Per Second Puisne Judge:—"This appeal arises out of the trial of a will in the District Court of Colombo, in which probate was granted to the appellant, Mr. Stork. The opponent has appealed against the grant of probate, and was decreed by the Court below to furnish security (under the 4th clause of the 8th section of the Rules

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and Orders, page 83) to the full amount of the property mentioned in the will, before being permitted to prosecute this appeal. Against this latter decree, ordering security, the opponent further appeals, and it is this last appeal that the Court is now called upon tó decide.

"This order or decree of the Court below is founded on the 3rd and 4th clauses of section 8 of the Rules and Orders, which provide, that in appeals against final judgment, decree, orders, or sentences, security shall be given by the appellant for the due prosecution of the appeal and other matters, to an amount defined in those clauses.

"The Queen's Advocate appeared with Mr. Lorenz for the appellant. And the first point raised was, that section 8 does not apply to appeals in testamentary cases, notwithstanding that it has been the practice to apply those Rules to testamentary cases, ever since the time of the framers of the Rules.

"I am of opinion they do apply. The Rules divide the jurisdiction of the District Courts into civil, testamentary, matrimonial, and criminal jurisdiction in the first instance; but when the Rules come to speak of appeals, they divide the appeal, not into jurisdiction, but into matters, *i.e.*, civil and criminal matters, words more extensive than the word jurisdiction. I think that in the general acceptation of the phrase used, an appeal from the testamentary jurisdiction is a civil matter. And the Rules intend it so to be taken. I am confirmed in this view from the reflection, that if civil matters are to be confined to civil jurisdiction, there will be no Rules for appeals in testamentary and matrimonial causes, and we should be driven to the conclusion that framers of the Rules thought that Rules for appeals in testamentary and matrimonial causes were unnecessary. A very forced conclusion, as it is plain that there is the same occasion for such Rules, as in the civil and criminal jurisdiction.

"Again, the language of the Rules in section 8 points to testamentary jurisdiction. The opening words of clause 1 of section 8 and also of the amended Rule of the 12th December, 1843, are: 'Every party intending to appeal from any judgment, decree, sentence, or order, &c.' these words include technical names of the decisions of the three classes of civil courts in England, the word 'judgment' principally applying to the Common Law Courts, 'decree' to the

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Equity Court, and 'sentence' to the final decisions of the Ecclesiastical Courts, their determination being called either *interlocutory decrees* or *definitive sentences.* It is impossible to perceive why the word sentence was introduced into these clauses, unless the framers of the Rules looked to decisions of the District Court in its testamentary jurisdiction, in the nature of the definitive sentences of the Ecclesiastical Court upon whose regulations the Testamentary Rules of the District Court are modelled. I am therefore of opinion that the Rules in section 8, and as amended on 12th December, 1842, do apply as far they can be applied to the testamentary and matrimonial causes of the District Court.

"It was further urged by the counsel for the appellant that sentence granting probate is an interlocutory order in the cause and therefore excepted from the Rule requiring security under the proviso attached to the 3rd clause of section 8, the other side contending that the sentence is final. It is perhaps unnecessary to determine whether the sentence is final or interlocutory, because if it is interlocutory no security is required, and if it is final it can only be final as to the probate, the only question yet decided and the only subject of litigation yet mooted, which, being neither 'movable property, money, debt, personal demand, or land that has changed condition,' cannot under the Rule of the 4th clause of section 8 be made the measure of security. To say (as contended by the respondent) that the decision as to probate is a final sentence in the cause, and that nevertheless the actual property passed under the will is the subject of litigation, is to blow hot and cold; for if the property is the final issue, probate must be interlocutory, but if probate is a final sentence, then the property is not yet litigated.

I deem it, however, advisable to determine in this case whether probate is an interlocutory degree or a definite sentence. I am of opinion that probate is (as in the English Ecclesiastical Courts) in the testamentary jurisdiction of the District Court of a definite sentence, that is, a final judgment. I have not had time to refer to the Rules and proceedings of the modern Court of Probate, nor is it necessary, as the Testamentary Rules of this Colony follow the old

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and not the new Rules of probate in England. There appears to be no English decision as to whether probate is an interlocutory decree or definite sentence, indeed it could not be expected, for, although in general in England probate is followed by inventory, yet there were provisional ecclesiastical jurisdictions in the country in which inventory preceded probate, and in which probate was the last act of the Court; but though inventory here follows probate, I think probate to be a final judgment.

"Interlocutory judgments are those given in the middle of a cause upon some plea, proceeding, or default which is only intermediate, and does not finally determine or complete the suit, such for example, as a judgment on a plea in abatement, or a judgment in demurrer, where an issue of fact is yet to be tried, or a judgment by default where the damages have yet to be assessed; or generally any decision which establishes a right but does not hand over to the plaintiff the specific thing sued for, whether that be damages, debt, a chattel, land, a title, or a trust. Final judgments are those that at once put an end to the suit by declaring that the plaintiff has either entitled himself, or has not, to recover or obtain the specific thing (corporal or incorporal) that he sues for.

Now a suit for probate (which this is) is a suit to determine the validity of the testament, and is also for a claim for a trust; and the probate itself "commits the administration of the estate to the executors named in the will;" surely this is a final award of the specific thing sued for by the plaintiff, that is, the decree finally declares the testament valid, and for the purpose of carrying out that trust appoints the executor.

But it is said that probate is followed by the invèntory; yet it does not follow that even if it is not the last act of the Court, nevertheless it is in such suits as this in reality the last decree of the Court: for the inventory and account are ordered and decreed in the probate itself, and all that the Court subsequently does is to see its own decree carried out just as execution is ordered after final judgment or committal for contempt after the non-performance of a trust previously decreed. It was urged by Mr. Lorenz that a new executor might be appointed by the Court; but that would merely

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be by a decree supplementary to its definitive sentence of probate for the purpose of bearing to its ultimate usefulness that final judgment. Therefore I am of opinion that the Rules in section 8 do apply to testamentary matters, and that probate is a final judgment and not an interlocutory order. Yet nevertheless I think security is not required for permission to prosecute an appeal against a definitive sentence of probate, because the Rules do not order that security when anything not 'movable property, money, debt, personal demand, or land affected in its actual occupation,' is the subject of litigation. The declaration of the validity of a testament is none of these things. The reason of this exception will be found in Marshall's Judgments, page 22, and it is shown there that the security is in fact given because the subject of litigation is in fact endangered by the delay of the appeal; as the subject of litigation in this case is the validity of the testament, it is difficult to see how it could in any way be endangered by the delay of an appeal, and even if I had adopted the view of the respondent, and looked upon the estate ultimately to be passed 'as the subject of litigation,' it may be very reasonably asked how is its value to be computed, or can it be computed at all? The Court below computes it by the property named in the will. That is plainly wrong, especially in this case, where part of the present property so named is in trust, and nearly all the remainder in the hands of an administrator. Several well-known instances can be cited of wills bequeathing property actually not even existing; even in sensible wills, debts and other charges are seldom noticed. Nor can we adopt the view of the respondent, that the Court is to take evidence of the property likely to pass under the will, plainly that would be prejudging all the actions that might possibly arise upon the will, and in the absence, too, of the possible parties to those actions: besides the complications on this question of security would be endless were such a rule to obtain. I therefore agree that the decree of the Court below as to security be set aside, and the appeal allowed without security; as to the subject of litigation, security for costs has been given; and in all cases security for costs must be given."

Decree of District Court set aside.

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IN THE SUPREME COURT.

Sept. 11, 1867. C. R., Matale, 20,036.

The stamp for the Judgment of the Supreme Court, must be supplied to the clerk of the Court from which the appeal is taken, within the time limited for perfecting the appeal.

Judgment.

" In this case the judgment was given on the 6th of May, 1867; and the petition of appeal filed on the 8th of May, the security bond also appearing to have been given in due time; but the case was not forwarded to the Supreme Court (as stated by the Commissioner) because the appellant did not furnish the stamp for the judgment of the Supreme Court till 20th July, 1867, whereby the defendant and appellant has been enabled to keep the plaintiff from deriving the benefit of the judgment. The Stamp Ordinance, No. 14 of 1861, in the schedule for Courts of Requests, requires the appellant, in appeal to the Supreme Court, to furnish to the clerk of the Court the proper stamp for the decree or order of the Supreme Court. This stamp must be given within the time limited by the Rules for perfecting the appeal, to prevent injustice to the respondent by being kept out of his judgment."

Appeal rejected.

See further on this subject Titles Police Courts, and Practice. Many decisions as to Police Court appeals have become immaterial in consequence of the late Ordinance, which gives an appeal from these Courts on facts as well as on law.

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ARBITRATION.

SUPREME COURT.

July 22, 1862. C. R., Jaffna, 27,420.

An objection to making an award in Rule of Court cannot be taken for the first time before the Supreme Court on appeal.

JUDGMENT.

"It appears abundantly on the face of the proceedings that the arbitration was consented to by all parties.

"Parties to an arbitration who have any objection to make to an award must do so before the Court below in the first instance. They are not to raise objections for the first time before the Supreme Court under the guise of an appeal.

ASSESSMENT.

SUPREME COURT.

Nov. 28, 1867. D. C, Kandy, 41,609.

Provincial Committee held not liable for wrong assessment if made with due diligence and bonâ fide.

JUDGMENT.

"In this case the plaintiff, who is the proprietor of certain lands in the Kallibokke District in the Central Province, sues the defendants, as Provincial Road Committee of that province, for having assessed him in respect of his said land at an excessive amount for the formation of a certain new road. The Supreme Court is of

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opinion that the plaintiff is not entitled to recover. No malice or mala-fides is imputed to the defendants, and it appears that in assessing the various amounts on the several estates in the district, they acted honestly and to the best of their judgment and ability.

"The members of this board serve this office compulsorily (see cl. 21, Ord. 10, of 1861); they receive no pay or emoluments for their service, and as a body they have no funds, but pay into the Colonial Treasury all moneys that come into their hands. They have power to sue rated proprietors who neglect or refuse to pay their assessment. No suit was brought by them to recover this assessment from the plaintiff. He, by his agent, paid it under protest, and the Provincial Road Committee in due course paid it over into the Colonial Treasury.

"We think it unnecessary to decide whether the assessment on the plaintiff was or was not excessive under the 5th clause of the Ordinance No. 11 of 1868, which directs the assessment on each estate to be made by dividing the sum of money equal to a moiety of the total cost of constructing each section of the proposed road by the total number of acres of the estate *interested in and capable of using each such section.* The questions how much of an estate is interested in a particular new road, and in what *sections* of the road various portions of the estate are interested, must generally be matters of opinion and questions of discretion. There are conflicting opinions, and there is conflicting evidence, in the present case; but we are satisfied that the defendants inquired into and considered the subject carefully, and to the best of their ability, and that they formed their opinions and exercised their discretion honestly.

If they nevertheless came to an erroneous estimate, and put down the plaintiff's estate at too high an assessment (and whether it was too high we do not decide one way or the other), they did not in our opinion thereby make themselves liable."

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ASSESSORS.

S. C., Dec. 6, 1876. D. C., Colombo.

ASSESSORS.

Power of the District Judge to appoint.

The facts of this important case appear sufficiently from the

JUDGMENT DELIVERED BY THE CHIEF JUSTICE.

"In this case, when it came on for trial, in November last, the counsel for the prisoners moved that Assessors should be associated with the judge at the trial. The Deputy Queen's Advocate opposed the motion, arguing that the Ord. No. 11 of 1868 made no provision for empannelling Assessors, and that the District Judge was bound to try the case alone. The learned District Judge adopted this opinion, and in a long and careful judgment he stated that he had no power in the present state of the law to order assessors: and he accordingly refused the motion. The present appeal is against that refusal. As the question is one of considerable importance I should not have dealt singly with the case, but I should have reserved it for a full court, had it not been for the circumstance that the very same question in this very case has already been brought before the three judges officially. At the time of the trial an Ordinance was pending in Council, intended to give effect to certain rules lately promulgated by the judges for the District Court. The learned District Judge of Colombo thought it desirable that new rules as to assessors should be prepared by the judges, and sanctioned by the same Ordinance. He brought the subject before the notice of His Excellency the late Governor, who desired on it the opinion of the judges of the Supreme Court.

"The subject was thereupon carefully considered by my colleagues, Mr. Justice Temple, Mr. Justice Lawson, and myself. We had before us the reasons of the learned Deputy Judge for holding that the law, as it stood and as it now stands, did not empower him to try cases with the aid of assessors. We came unanimously to the conclusion that district judges had and have already full power to do so,

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and that no rules on the subject were necessary. I have a copy of our joint official letter to his Excellency on the subject, which I read out when this case came on for discussion before the Supreme Court. I then stated that if any argument was brought forward, which at all shook my belief in the soundness of the opinions expressed in that letter, I should be willing to adjourn this case until the return of Mr. Justice Stewart from England, when it might be brought on before a full court.

"But the Deputy Queen's Advocate, who appeared for the respondent, stated that he had nothing to say. I consider that the learned District Judge had power to order assessors, and I, therefore, now set aside his order rejecting the application for assessors; an order which was made by him, as he states, under the belief that he had no such power.

"In giving reasons for the present judgment I shall use the substance of the letter already referred to; and this may be considered as the opinion of the three judges, and not of the one alone, who now pronounces it.

"It is desirable in the first place to look carefully to the clause of the Administration of Justice Ordinance No. 11, 1868, which purports to provide for assessors being associated with the District Judge. That clause is the 59th. It is as follows: 'It shall be lawful for the District Judge or additional District Judge in his discretion, at his own instance, or upon the application of any party in any cause or proceeding in the District Court, to have three assessors associated with him at the hearing and decision of such cause or other proceeding, and such assessors shall be selected, summoned and be otherwise subject to such rules as are hereinafter prescribed.' The learned District Judge of Colombo appears to hold (and I think correctly) that the first part of the clause, if it stood alone, would give the District Judge power, in general terms, to associate assessors with himself in cases where he deemed it desirable; and that the first part of the clause would also, if standing alone, give the District Judge an implied authority to do all that might be necessary to give the clause its proper effect. But he thinks that the power is limited by the last words of the clause; and that, inasmuch as no rules, such

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as those which the last part of the clause indicated, have been prescribed in the subsequent part of the Ordinance, and as no such rules have been made by the judges, there is a fatal defect in the Ordinance, and that the District Judge has no practical means of giving effect to the contemplated power of associating assessors. He thinks that the Legislature did not intend the District Judge to be entrusted with any discretion in these practical particulars. It appeared, however, to the three Judges of the Supreme Court, and it still appears to me on careful examination of the Ordinance, that the framers of it did not make any such omission; and that the portions of the Ordinance, which follow the 59th Clause, do contain rules enough about assessors to satisfy the meaning of the last part of the 59th clause; so that a District Judge now possesses the power of associating assessors (which power is given by the first part of the 59th clause) subject to the rules imposed by the subsequent parts of the Ordinance, to which more particular reference will made.

It is to be remembered that the 59th clause had already fixed the number of assessors.

On turning to the 120th and following sections, it will be found that careful provision is made for ascertaining the qualifications and disqualifications of assessors as well as of jurors.

The Fiscals are to make three lists of persons qualified as jurors and as assessors; an English list, a Sinhalese list, and a Tamil list. The lists are to be published.

A person summoned as an assessor before a District Judge may object to his liability, and the District Judge may relieve him from serving. Another clause, 134, gives the District Judge power to fine any person who makes default after being duly summoned as an assessor.

Surely we have here a good many rules about assessors, all contained in the parts of the Ordinance which follows the 59th clause. Careful provision is made by the qualification clause as to what persons are to be selected from the community as fit to serve as assessors. There are practical regulations as to their being arranged in lists, and as to other matters. The District Judge may enquire

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into, and may determine the liability af persons summoned as assessors. He may fine those who do not obey the summons.

Moreover, there is a very important clause which will be commented on presently, the 75th clause, which defines the respective functions of the District Judge and of the assessors, at the trial. It seems hard, when we have all these clauses subsequent to the 59th clause, to hold that the framers of the Ordinance were so oblivious as to prescribing practical rules about assessors, as indicated in the last part of the 59th clause, that they have suffered the highly important first part of the 59th clause to become inoperative, and the powers, which it purports to give, to be made nullities.

The Ordinance unquestionably contains a body of rules as to the empannelling and challenging of jurors, in which assessors are not mentioned; see clauses 126 to 130 inclusive.

The main object of these last-mentioned clauses is to ensure that the jury, in each case, shall be formed without the influence of an official person being exercised as to its composition. There are no analagous clauses as to assessors.

There seem to be good reasons why the framers of the Ordinance did not insert any, if we bear in mind the very great difference between the nature of the functions of jurors, and the nature of the functions of assessors. When this is attended to, it will be seen that an amount of discretionary power may be safely and beneficially given to a judge in the choice of assessors, which would create natural alarm and objection, if given to a judge as to the choice of jurors. Assessors do not, as jurors do, decide authoritatively and conclusively the question of fact as to guilty or not guilty. They do not decide authoritatively and conclusively any question at all. On the other hand, while juries have nothing to do with questions of law, assessors are empowered to deal with questions of law, just as much as they deal with questions of fact. Assessors give their opinion in open court on all questions whether of law or of fact, which the judge declares to have arisen for adjudication—(see section 75 of Ordinance 11 of 1868) which expressly applies to prosecutions in District Courts, as well as to civil proceedings But (as is enacted by the same clause), if the District Judge is dissatisfied with the

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assessor's opinions, and if he pronounce an opinion different from theirs, "the opinion of such judge shall prevail, and shall be taken as to the sentence, judgment, or order of the whole court."

It is in the District Judge's discretion to determine whether he will have the aid of assessors at all; and it is also in his discretion to determine whether, when that aid has been given, he will or will not be guided by it. It seems reasonable and desirable to leave him also full general powers to obtain the assistance of such assessors as he thinks will be most useful to him. For instance, in a case involving questions of Kandian Law, a District Judge might naturally wish to have three Kandian chiefs as his assessors. In a case involving questions of mercantile usage, a District Judge would probably, if he wished to have assessors, prefer three eminent merchants. In cases of damage to shipping by collision, a Deputy Judge would again most benefit by having three men of nautical experience associated with him.

Many other cases might be suggested, in which it would obviously be for the interests of truth and justice that the District Judge should have very full authority in choosing his assessors.

In the judgment of the Supreme Court, the Ordinance No. 11 of 1868, as it now stands, gives the District Judge that power.

The only limit is that his assessors must be selected from one of the three lists of jurors and assessors prepared by the Fiscal, as required by the Ordinance in clauses 120 to 129 inclusive. With those published lists before him, with the power to determine whether any one summoned before him as assessor is qualified and liable to serve, with the power to fine any one summoned as assessor who does not attend, a District Judge cannot have any practical difficulty in securing the attendance of a sufficient number of proper assessors. He may direct them to be summoned from what list he pleases, from the English list, from the Sinhalese list, or from the Tamil. He may, if he pleases, leave it generally to the Fiscal to summon three assessors from a specified list, in which case the most convenient course would be for the Fiscal to take three of those persons qualified as assessors, living in the neighbourhood of the court, whose names stand next, or nearly next, in rotation for jury service. Or, the Dis-

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trict Judge, if he thinks that other persons on the lists would give more assistance as assessors, may direct such persons to be summoned.

The Ordinance, in the judgment of the Supreme Court, gives all necessary powers without wanting additional clauses in itself, or requiring the supplementary aid of judge-made rules. As it stands, it is sufficient; and superfluous legislation is always a mistake and a mischief.

In conclusion, I would remark that the learned District Judge was quite right in holding that the old rules of 1833 have been abrogated, as appendages of an old abolished system.

Decreed, "that the Order of the District Court of Colombo, of the 2nd day of November, 1871, be set aside, and case sent back for the District Judge to exercise his discretion as to having assessors associated with him in this case."

BAIL.

IN THE SUPREME COURT.

June 8, 1865. J. P. Kandy. 6,173.

Principles on which a Justice of the Peace should take or refuse Bail.

JUDGMENT.

Per C. J.—"In this case the committing magistrate has refused to take bail, and an application has consequently been made to this Court, under the 84th section of Ordinance No. 1 of 1864, which enacts that—'in every case in which any person considers himself aggrieved by the proceedings of any justice in having committed him to prison, or refused to admit him to bail or in having required excessive bail,

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it shall be competent to such person to apply to the Supreme Court, which shall make such order thereon, as the circumstances of the case shall seem to require. Such applications shall be subject to the rules and regulations relating to appeals from police courts.'

"It is clear to us that the words which direct us to 'make such order thereon as the circumstances of the case shall seem to require,' empower and require us to use our discretion as to whether we shall make an order directing the justice of the peace to take bail, or take bail ourselves; and if so, in either case to what amount; or, whether we shall refuse to make any order to bail at all, and leave the prisoner in custody to await his trial.

"The principles according to which judicial discretion, as to bailing or not bailing, should be exercised, are well stated in Burn's Justice, title Bail, section II. It is truly pointed out that the test is to consider the probability or improbability of the accused person's appearing to take his trial, or absconding; and not merely to consider whether he seems to be innocent or guilty; although this last mentioned consideration forms one of the elements of the true test.

"To adopt the words of the Editor of Burn, 'the enormity of the offence, the rank and station of the accused, the presumption of his guilt or innocence, the severity of the punishment for the crime charged, may all be taken into consideration in estimating this probability.'

"First, then, let us see what is the nature of the charge against this prisoner? The charge is, in substance, that he, being employed by one of the banks in an important and confidential position, unfaithfully and dishonestly appropriated and stole his employer's money to the amount of £4,000. Such a charge is a very heavy one.

"Next, what is the social position of the accused? He is evidently a person of wealth, influence, and good connexion among those of his own race: so that the desire, for their sake as well as his own, to avoid the shame and exposure of a public trial and conviction, would be likely to operate strongly; and the means also of escaping altogether from justice, if he was once set at large, would be ready and abundant.

"Thirdly, as to the presumption of his guilt or innocence. On

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this we wish to say as little as possible, lest his case at his trial should be in any way prejudiced. We will therefore only remark on this point that, as the depositions stand, they shew a strong case against him.

"Fourthly, as to the severity of the punishment. That of course, if he is convicted, will be regulated to a very great extent by the discretion of the judge, who in apportioning the punishment would weigh carefully all the favourable as well as the unfavourable circumstances that may be brought to his notice at the trial. It is enough for the present to remark that persons guilty of such crimes are liable to very heavy punishment. On every one, therefore, of the general principles which are to determine the question of bail, we are led to a decision to refuse it here. And there is also the strong special circumstance, that this man has already absconded when this very charge was preferred against him. We feel that the probability of his absconding again, if once released from custody, is so great, that it is our duty to refuse to make any order for his being bailed."

SUPREME COURT.

April 20th, 1869. P. C., Nuwara Eliya, 6,868.

Principles on which a Police Magistrate should take or refuse Bail, while an appeal against a conviction is pending.

Judgment.

Per C. J.—"There appears to be in this case legal evidence of the contract, and of the breach of contract by gross neglect of duty. The Police Magistrate was quite justified in using his discretion as to what statements of the several witnesses he believed or disbelieved. With respect to the Magistrate's remarks on the extra punishment now brought upon by defendants by frivolous appeals being put in for them, that is a matter which this Court cannot deal with. If there are proctors who habitually put in frivolous appeals, those who choose to employ them, and seek to profit by their astuteness, must

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take the consequence of such seeming astuteness proving worthless. But in all cases where there is an appeal and an application to be bailed while the appeal is pending, the Magistrate should consider whether or not the defendant, if bailed, will in case of the sentence being affirmed, be reasonably sure to appear and undergo it. He should not refuse bail merely because he thinks the conviction sure to be affirmed, although this will form an important (but not the sole) element in his judgment as to the probability of the defendant absconding. In this case a long period of extra imprisonment will be brought on the defendant by this appeal. But the unusually long delay in disposing of the appeal is in no respect the Magistrate's fault. If the appellant had been a little more prompt in his appeal, and not deferred putting it in until nearly the last possible moment, it would have been heard and determined by this Court more than a fortnight ago. And, when the Magistrate refused bail, the defendant might have made immediate summary application to any Supreme Court Judge, at any place, under the new Administration of Justice Ordinance, which empowers a judge to direct that bail shall be taken, and not merely to take it himself. The cumbrous and dilatory process of bringing a prisoner before a judge by Habeas Corpus to be bailed is now no longer necessary. But as this provision of the new Ordinance may not yet be generally known, this Court is anxious that a very long period of extra imprisonment should not be undergone by this defendant. The Supreme Court has no power to remit any portion of the sentence; but if a petition is presented in the proper quarter for remission of part of the term imposed by the present sentence, that petition will be supported by this Court."

SUPREME COURT.

July 17, 1867. D. C., Kurunegalle, 17,335.

Suits by the Queen's Advocate to enforce Recognizance of Bail, though in criminal cases, may be brought on the civil side of the Court.

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JUDGMENT.

"It is often a question of some difficulty, whether a particular case comes within the civil or criminal jurisdiction of the District Court. In this case, in a suit for the recovery of money due on recognizance, the District Court held that it was a civil procedure, and the Crown entitled to costs.

"The question for consideration in this case is whether the proceedings under the 11th section of the Ordinance, No. 6, of 1855, for the recovery of the amount due on a recognizance to her Majesty, are of a purely criminal character, or whether they are of a civil nature, rendering stamps and costs recoverable on behalf of the Crown as in other crown suits.

"It would appear that the practice up to the time of the Judgment now appealed from, has been to regard the procedure as Civil, and accordingly to allow the Deputy Queen's Advocate to recover the amount of both stamps and costs. See Sir Charles Marshall (p. 280). 'Recognizances when forfeited are properly sued for by civil action.'

"The Supreme Court has carefully examined the Ordinance, and is of opinion that the procedure hitherto prevailing is neither wrong, nor unauthorized.

"In this view, besides the reasons we are about to give, we are confirmed by the collective judgment of our predecessors (see B. & V., p. 109) in Negombo, D. C., 10,424; where it was held that the proceedings under the Ordinance 12 of 1840, for the summary ejection of parties from crown lands, are civil and not criminal.

"We would, moreover, observe that in the Rules and Orders of September 16, of 1842, for regulating the proceedings under the said Ordinance 12, of 1840, there occurs the following direction 'here set forth distinctly the nature of the *offence*,' and further in the prayer are these words, that 'upon due proof and conviction thereof.' These expressions so strong in favor of the construction now given occur in the Ordinance under consideration.

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"In the first place, irrespective of the Ordinance, it is clear that a Recognizance only creates a civil liability, to be sued and recovered by a civil action. Blackst. (vol. 2, p. 341). 'A Recognizance is an obligation of Record which a man enters into before some Court of Record or magistrate duly authorized.

"'It is in most respects like another bond; the difference being chiefly this, that the bond is the creation of a *fresh debt* or *obligation de novo.* The Recognizance is an acknowledgment of a former *debt* upon record; the form whereof is that A. B. doth acknowledge to come to our Lady the Queen, to the Plaintiff, to C. D, or the like, the sum of and with consideration,' and again, 4 Blackst., p. 252. 'If the condition of such Recognizance be broken, the Recognizance becomes forfeited or absolute; and being estreated or extracted (taken out from among other records) and sent up to the Exchequer, the party and his sureties having now become the Queen's absolute *debtors*, are sued for the several sums in which they are respectively bound.' In the passage from which the above extracts are taken allusion is made to the Recognizances entered into before a magistrate or a trustee of the peace in respect of a criminal offence. See also Manning's Exchequer, p. 136, where in a note reference is made to a Recognizance in a case of embezzlement.

"The Recognizance now before us is in the criminal form. The fact that it was given for the appearance of a criminal offender cannot in our opinion alter the character of the Recognizance itself. The criminal is not necessarily the sole party to the obligation; and, as in the present instance, we may have co-cognizors as sureties, to whom no criminality is attachable, and who can only be regarded as mere debtors to the crown. Then is there anything in the Ordinance, No. 6, of 1855, which renders wholly criminal that which was heretofore a civil proceeding? The 11th section does not alter the nature of the liability of the proceeding. This section seems to us only to affect the mode of Procedure, by authorizing a summary process as an alteration in place of the ordinary and more formal and more dilatory suit by information. An application is to be made by the Queen's Advocate, or Deputy Queen's Advocate, for a summons—and then as prescribed in the section a warrant of distress is

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to issue 'to recover the amount due, together with the reasonable costs of such application by distress and sale of the property of the debtors.'

"The first part of the Ordinance deals with the recovery of pecuniary penalties awarded by any court upon conviction. But it is remarkable that in the second section which relates to the recovery of such penalties, the expression used to denote expenses is different from that employed in the 11th section. In the former section the words are 'reasonable charges.' The corresponding words, in the 11th section are 'reasonable costs of such application.'

"This change of expression does not appear to be without significance. In the recovery of penalties, the interference of the Queen's Advocate is not required. It is otherwise as respects Recognizances —he is to make the application—his intervention is necessary, and he is to be allowed his costs; a term perfectly familiar and well-known in our Civil Procedure, and apparently made use of instead of 'charges,' the word used in connection with the undoubtedly criminal portion of the Ordinance.

"As respects the proviso at the end of the 10th section, whereby, if no sufficient distress can be had, the parties are liable to be proceeded against as provided by the 5th clause, it appears to us that though, in such case, the debtors are required to be imprisoned, with or without hard labour, in the discretion of the Court, this does not necessarily determine that the antecedent proceeding was not civil. The proviso in our opinion is an addition to, and intended, if need be, to follow the civil liability.

"Accordingly stamps being recoverable in Crown civil cases, we are of opinion that the judgment of the District Court is erroneous, and that the Deputy Queen's Advocate is entitled to include in his bill the amount charged by him. As to what should be reasonable costs, it is difficult to fix upon any stated rule. No rule is given, but we recommend that as far as is practicable, the costs should be taxed according to what the amount would be allowed in an action upon a bond for a similar amount. The Chief Justice has some doubts upon the point, but is not convinced to the contrary; and it is not desirable to delay any longer the adjudication of this case."

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BOND.

SUPREME COURT.

July 7, 1870. D. C. Galle, 27,232.

The Assignee of a bond is affected by all equities that existed as against the grantee.

JUDGMENT.

"The fact that the plaintiff is the assignee of a bond on which, at the date of the assignment, no interest had been paid from its execution, a period of no less than seven years, places his claim in an unfavourable aspect, even supposing that the evidence as to the payment of consideration for the assignment is to be depended upon. There is clear proof to establish that the bond was given in part payment of the purchase amount of a land, the possession of which was never delivered to the grantors; in consequence whereof (see judgment in No. 27,326,) the deed of transfer was decreed to be cancelled. The equities on the bond as between the grantors and the grantee would extend to the assignee. See Graham *v.* Johnson (L. J. Rep. 1869. Chancery, N. P. 376). Judgment of D. C. for defendant set aside, and nonsuit with costs to be entered."

See also as to this point the case of Mangles *v.* Dixon (3 H. L. C., 702), and the case of Rodgers *v.* Comptoir de Paris (6, Moore, P. C., 555). Observe the remarks in the last case as to negociable instruments. There are some interesting comments on the same subject in Poste's Gaius (p. 352, and p. 169).

CARRIER.

The judgment of the English Court of Common Pleas in the following very important case of Nugent *v.* Smith (reported in L. R., 1 C. P. D., 19) enters very fully into the subject of who are common carriers, and as to the nature and extent of the special

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liability in respect of loss or damage, which the law imposes on common carriers, shipowners, and innkeepers.

The judgment, of which I proceed to set out some parts in substance, and others verbatim, was delivered by Mr. Justice Brett, on November 2, 1875.

The Court quoted and adopted Story on Bailments, § 469, as to the English law being taken from the Roman. They then cited, among other authorities, the words of Jervis, C. J., in Crouch *v.* London and North-Western Railway Company, that "when a party who holds himself out as a common carrier accepts goods, the common law ingrafts upon such acceptance a contract to carry safely and to insure, subject only to two exceptions, viz., the act of God and the Queen's enemies." They ruled that a shipman, who holds himself out as a common carrier, is liable for damage sustained by the property, although the damage occurred during part of the voyage which was beyond the realm. "A general ship is by the mere fact of her being so put up, made in all respects a common carrier; though she is going to a foreign port." The Court then proceeded to "determine exactly what it is that makes a man a common carrier." The words of the judgment in this respect are as follows:—

"It is not every person, who undertakes to carry goods for hire, that is deemed a common carrier. A private person may contract with another for the carriage of his goods, and incur no responsibility beyond that of an ordinary bailee for hire, that is to say the responsibility of ordinary diligence. To bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire, as a business; not as a casual occupation, pro hâc vice. A common carrier has, therefore, been defined to be, one who undertakes for hire, or reward, to transport the goods of such as choose to employ him from place to place." (Story, § 495.) In Fish *v.* Chapman (2 Kelly's (Georgia) Reports, 349), it is held, in what we venture to call a powerful and business-like judgment, that is, well applying the principles of law to the business

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of the country, that, 'to constitute a man a common carrier, the business of carrying must be habitual, and not casual. The undertaking must be general, and for all people indifferently. He must assume to be the servant of the public, he must undertake for all people.' 'When it is said that the owners and masters of ships are deemed common carriers, it is to be understood of such ships as are employed as general ships, or for the transportation of merchandize for persons in general, such as vessels employed in the coasting-trade, or in general freighting business, for all persons offering goods on freight for the port of destination.' (Story, § 501.)

"The real test of whether a man is a common carrier, whether by land or water, therefore, really is, whether he has held out that he will, so long as he has room, carry for hire the goods of every person, who will bring goods to him to be carried. The test is not whether he is carrying on a public employment, or whether he carries to a fixed place; but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently, who send him goods to be carried. If he does this, his first responsibility naturally is, that he is bound, by a promise implied by law, to receive and carry for a reasonable price the goods sent to him upon such an invitation. This responsibility is not one adopted from the Roman law on grounds of policy; it arises according to the general principles which govern all implied promises And his second responsibility, which arises upon reasons of policy, is, that he carries the goods upon a contract of insurance. This policy has fixed the latter liability upon common carriers by land and water, not because they hold themselves out to carry for all persons indifferently; if that were all, there would be no ground for the policy, it would be without reason; many other persons hold themselves out to act in their trade or business for all persons indifferently who will employ them, and the policy in question is not applied to such trades; the policy is applied to the trade of common carriers because, when the common law adopted that policy, the business of common carriers in England was exercised in a particular manner, and subject to particular conditions which called for the adoption of that policy."

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The Court of Common Pleas pointed out in this judgment the fact that "Carriers" are not mentioned in the Roman edict on which the extra liability is founded. The Prætorian edict, cited by Ulpian, and embodied with his comment in the 4th Book of the Digest, Title 4, specifies "Nautæ, caupones, stabularii." That is to say, ship-masters and the class of persons who carried on the business of inn-keepers. (See note by Denman, J., on Nugent *v.* Smith, p. 29.) "The Roman edict," says Story, "it will be at once perceived does not extend in terms to carriers by land. But in most, if not in all modern countries, the rule which it prescribes has been practically expounded so as to include them."

The Court of Common Pleas in Nugent *v.* Smith, cites this passage from Story; and proceeds to explain how it was that the English law brought the trade of common carriers into the same condition as to liability for goods entrusted to them, in which the Roman law had placed ship-owners and innkeepers. As by the Ceylon Ordinance, 22, 1866, English law is expressly made applicable in Ceylon to carriers by land, it is immaterial to consider whether the Dutch law had or had not treated them as liable equally with "Nautæ, caupones, and stabulari."

The Court of Common Pleas then proceeded in Nugent *v.* Smith, to deal with the question whether a shipowner, who carries goods, is necessarily subject to liability as an insurer, exceeding that of an ordinary bailee for hire, in cases where the shipowner does not conduct his carrying business in such a manner as to make him a common carrier. They decided that he is so liable. Indeed the words of the Prætorian edict (from which the English law in this respect is drawn) are explicit on the subject of "nautæ." That edict is cited by Voet in his Comment on the Pandects, Book 4, Title 9. The Ceylon Ordinance also, 22, 1866, would make that law applicable in the colony, even if there could be any doubt as to the legal position of ship-owners according to the law of Holland.

The result is that by the law of Ceylon all carriers of goods by land, if common carriers, and all ship-owners who are carriers of goods by water, whether common carriers or not, are responsible for the loss or damage of goods entrusted to them, unless such loss or

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damage is occasioned—1st, by the act of God; 2ndly, by the Queen's enemies; or, 3rdly, in consequence of any negligence or misconduct on the part of the sender of the goods, or those for whom he is responsible. This last exception is not usually mentioned in the old law books; but there can be no doubt of its validity. The Ceylon and English cases which I am about to quote fully recognize it. It arises from the principle that no man shall take advantage of his own wrongful conduct, as to which see *supra*, Title Action, p. 30.

In applying to the Government railways what has been said about the liability of carriers by land, attention must be paid to the express legislation on this subject as to these railways.

The Ceylon Supreme Court decisions, which I proceed to report, were given in cases of carriers by water, who appear to have acted as common carriers. But they were also all cases of claims against ship-owners.

The first of these cases decided that the carrier [or ship-owner] is not liable for damage occasioned by an inherent defect of the article when shipped, or for injury occasioned by the negligence of the sender.

IN THE SUPREME COURT.

Dec. 15, 1865. D. C., Colombo, 38,039.

In this case a cask of brandy, entrusted to the defendant to be conveyed from London to Colombo, had leaked out, and the plaintiff brought an action to recover damages. Part of the judgment of the Supreme Court is as follows:—

"The questions for consideration are (1), did the injury result solely from the defendant's negligence in stowing the cask in his vessel; or (2), was the injury occasioned by plaintiff's negligence alone; or (3), did the plaintiff contribute to the injury by his own negligence?

"If the first is proved the plaintiff will be entitled to recover. If the 2nd or 3rd be proved, the defendant will be entitled to succeed."

The Supreme Court considered that the injury had resulted from the cask being defective, and that the defendant was not liable.

Reference was made, during the argument of this case, to Waite *v.* North-Eastern Railway Company (Jurist 59), and Martin *v.* Great

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Northern Railway Company (24 L. J., C. P.). Other English cases bearing on the subject will be found in Vol. I., Smith's Leading Cases, p. 227. See especially Blower *v.* Great Western Railway Company (L. R., 7 C. P., 662). The words of Willes, J., in that case, deserve especial attention. After mentioning that a common carrier (and a ship-owner, according to Nugent *v.* Smith, is necessarily in the same predicament) is not only liable for negligence, but "he is further liable as an insurer for losses which occur through no negligence on his own part." Mr. Justice Willes proceeds as follows: "It is only necessary, therefore, to observe that an insurer is not liable for accidents happening through the inherent vice of the thing insured, but only for such as happen through adventitious causes. This is well explained in Smith's Mercantile Law (8th ed., 354), where it is said: "The underwriters are not liable for a loss which is necessarily incidental to the property rather than occasioned by adventitious causes, such as loss by worms (Rohl *v.* Parr, 1 Esp., 444); or rats (Hunter *v.* Potts, 4 Camp. 203); or the self-ignition of damaged hemp." (Boyd *v.* Dubois, 3 Camp. 133). So in Bræss *v.* Maitland (6 E. B., 470), goods of a dangerous nature were delivered to a ship-owner to be carried, but were so packed as to conceal their real character; and in consequence of the insufficiency of the packages, other parts of the cargo were injured, and it was held by a majority of the Court of Queen's Bench that an action lay against the shippers. That case was followed by Hutchinson *v.* Guion (5 C. B., N. S., 149), and Hearn *v.* Garton (2 E. & E., 66), and the same law was laid down in Alston *v.* Herring (11 Ex., 822) with regard to goods causing corruption to themselves. The rule is very accurately laid down to the same effect in Story on Bailments, § 492, where the authorities are all collected; "although the rule is thus laid down in general terms at the common law, that the carrier is responsible for all losses not occasioned by the act of God or of the King's enemies, yet it is to be understood in all cases that the rule does not cover any losses not within the exception, which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity or quality in the course of the voyage, or from their

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inherent natural infirmity and tendency to damage, or which arise from the personal neglect, or wrong, or misconduct of the owner or shipper thereof. Thus, for example, the carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruits in the course of the voyage, from their inherent infirmity or nature, or from the ordinary diminution or evaporation of liquids, or the ordinary leakage from the casks in which the liquors are put, in the course of the voyage, or from the spontaneous combustion of goods, or from their tendency to effervescence or acidity, or from their not being properly put up and packed by the owner or shipper; for, the carriers' implied obligations do not extend to such cases." It is clear, therefore, that the key to the correct decision of the question raised in this case is given by considering the defendants as insurers, who have not been guilty of negligence; and see Angell on Carriers, § 214a; Redfield on Railways, 3rd ed., 129.

In the next case, that of D. C., Colombo, 45,999, decided in the Supreme Court, Dec. 3, 1867, the ship-owner, who had stored a quantity of creosoted timbers in his hold, which tainted and damaged other articles (corks) placed near them, was held liable to the owners of the damaged articles, though they had shipped them merely as "packages."

The Supreme Court said:—

"Our only reason for pausing before we affirmed the judgment for the plaintiffs in this case, was the fact, which appears from the bill of lading, that the goods in question were shipped by the plaintiffs' agents without any description of their nature or quantity, but merely as packages, the contents of which were unknown. It might be fairly argued, in such a case, that the master cannot be expected to take as much care not to stow the goods near dangerous neighbours as when he has warning of their nature. But the mischievous neighbours in this case, that is, the creosoted timbers, were of such an extremely offensive and noxious nature, that almost every other kind of cargo was sure to be tainted and damaged by being stowed in any part of the same hold. The master who ships such notoriously and grossly injurious articles as creosoted timbers,

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ought to take care that he stows within the range of their mischievous influence nothing which he has not ascertained to be of such a kind that the tainting odour of creosote cannot injure it."

As to how far a carrier can be excused by want of full information of the contents of parcels, see the English cases collected in the note to Coggs *v.* Bernard (1 S. L. C., p. 227).

The next case requires no comment.

IN THE SUPREME COURT.

June 25, 1867. D. C., Colombo, 44,739.

In the present case several barrels of flour and kegs of butter had been thrown from the slings into the sea, from striking against the cargo boats alongside while the vessel was discharging her cargo in the Colombo roads.

The District Court had disallowed, in the defendant's account with the plaintiff, an item of £19 odd, being the value of the above-mentioned lost or damaged goods.

On appeal, the Supreme Court held that the item for the lost goods was properly charged, remarking: "It seems to us that this loss was not caused by any of the exceptional causes mentioned in the bill of lading, and that it was not caused by any misconduct or negligence of the owner of the goods or persons in his employ. It is in this last-mentioned particular that it differs essentially from another case recently before this Court, where goods had been lost while being discharged. In the case now before us, the plaintiff, as a common carrier, was bound to deliver the goods safely, unless the loss was caused by any exceptional causes expressly mentioned in the bill of lading. To say that they were lost by accident is no answer."

Before leaving this subject, I would refer the reader to the case of Redhead *v.* Midland Railway Company (Law Rep., 2 Q. B., p. 412) as to the distinction between the liability of a carrier of passengers and the liability of a carrier of goods for hire, when

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damage is caused by a defect in the vehicle, the defect being of such a nature that it could not have been certainly guarded against in the process of construction, or discovered by subsequent examination.

CATTLE TRESPASS.

The following case decided that the owner of land who seizes cattle on it damage-feasant, may avail himself of the common-law right of distress, which existed in Dutch as it does in English law. The remedy given by the Ordinance 2, 1835, is cumulative.

IN THE SUPREME COURT.

June 30, 1863. C. R., Kandy, 30,619.

In this case the defendant had seized plaintiff's cattle in the act of trespassing, and demanded from the plaintiff five shillings before he would give them up.

The Commissioner having decided that the defendant was not entitled to detain the cattle, gave judgment for plaintiff. In appeal, the Supreme Court directed—

"That the case be sent back to the Court below for the Commissioners to find whether or not the five shillings was paid as asserted, and whether the five shillings, if paid, was a fair remuneration for the damage done."

The first defendant would not be concluded by the opinion of his cangany on that point. On the other hand, the defendant had no right to detain the cattle until something by way of fine was paid over and above the amount of damage.

This case has been considered solely with reference to the Ordinance No. 2 of 1835; and it is clear that the defendant had not complied with the provisions of that Ordinance so as to justify under it. But the remedy given by that Ordinance to holders of land is cumulative; and does not take away the old remedy by distress when cattle are taken "damage-feasant." (See cases in Austin's Reports, p. 102; Nell's Reports, p. 95; the Amberley Railway Company *v.* Midland Railway Company (L. J. 23, L. J. 2 D., 16);

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and see Van Leuwen, p. 494 (which shows that a right to seize and detain cattle found trespassing existed under the Roman-Dutch law, analogous to the English law of distress damage-feasant.)

In this case the taking of the cattle damage-feasant is admitted. The question is, did the defendant detain them after sufficient compensation for the damage had been tendered?"

The next case involved more than one point of practical importance.

1st. Where a licence has been obtained to shoot trespassing cattle, all reasonable endeavours should first be made to catch and identify the animal. If this is not proved to have been done, the person shooting the animal is liable to its owner.

2nd. The ordinary measure of damage is the value of the animal; but this may be reduced, if the owner appears to have grossly misconducted himself in the matter.

3rd. The person shooting the bullock may set up, by way of reconvention, a claim for compensation for the damage done by the animal.

IN THE SUPREME COURT.

July 10, 1868. C. R., Matale, 21, 307.

The judgment of the Supreme Court was as follows:—

"The defendant ought to have given evidence at the trial of the circumstances asserted in his petition of appeal, namely, that it was impossible to seize or identify the trespassing animal. In the absence of such evidence the Commissioner was right in giving judgment against him. The licence to shoot is correctly interpreted in the judgment.

"The owner of the property (or those acting under him) ought to make all fair endeavours to seize or identify the trespassing animal before they shoot it. In cases where from the nature of the ground, or the viciousness of the animal, or other reasons, it is self-evident that all endeavours to seize or identify would be useless, it may be

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excusable to shoot at once. But there is no proof of this kind in the case before us.

"While we consider that judgment was rightly given against the defendant, we are by no means satisfied with the finding of the Commissioner as to the amount of damages. He has given the full amount of the value which the plaintiff's witnesses set upon the animal. In the case of C. R., Kurunegala, 7,976, decided in the Supreme Court, on Dec. 4, 1863, we very fully discussed the law as to the measure of damages in such cases; and we decided that, if there has been misconduct on the part of the owner of the animal, the damages may properly be reduced below the animal's value. In that case there was clear proof that the plaintiff had wilfully and intentionally turned his buffalo out to trespass on the defendant's coffee estate, and that the defendant, although his licence to shoot was defective, had acted without the least malice or intentional impropriety. We there reduced the damages from five pounds to five shillings.

"There is not in the present case the same clear proof of intentional misconduct on the part of the plaintiff; but the manner in which he proved his case is very suspicious. He rests it on the admission that the defendant shot the buffalo, and on mere evidence of value. He does not come into the box himself; and he gives no means for telling whether he intended the buffalo to trespass on the coffee estate, or whether he took reasonable means to prevent such trespassing.

"The charge made by him that the said defendant removed and appropriated the meat of the animal is proved to be untrue. For all that appears, the plaintiff had the carcase himself. The owner of the animal, which is killed while in the act of trespassing, if he wants to recover its full value, ought to present a much fuller and clearer case than is furnished here. We shall reduce the amount of damages by one half.

"As we pointed out in the Kurunegala case, it is always open for the defendant, in a case like the present, to set up by way of reconvention, a claim for compensation for the damages done by the trespassing animal to his property.

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IN THE SUPREME COURT.

May 5, 1870. C. R., Galle, 39,858.

Where a number of cattle, belonging to different owners, trespass on an estate, the damage to be paid by the owner of any particular animal may be fixed by dividing the gross amount of the damage by the number of the cattle.

The Commissioner, who tried the case, had nonsuited the plaintiff for want of express proof of how much damage was done by the defendant's bull. The Supreme Court set aside this nonsuit, and remarked that—

"The Court below was not restricted to exactly the amount of damages sustained by the plaintiff from that one bull, for that would be placing the defendant, a wrong-doer, on precisely the same footing as if the bull had entered with the plaintiff's permission." (See Broom's Common Law, p. 352.)

IN THE SUPREME COURT.

May 2, 1868. P. C. Matale, 31,194.

In this case the Defendant was convicted under the Ordinance for cattle trespass. It appeared that the land was not fenced. The Supreme Court set aside the conviction: pointing out that in proceedings under the Ordinance, it is necessary either to prove that the land was fenced, or that the local custom was for such land to be unfenced.

IN THE SUPREME COURT.

Feb. 21, 1860. P. C. Ballypitta Modera, 18,570.

JUDGMENT OF MORGAN, J.

The Ordinance No. 2 of 1835 is imperative in requiring that the damage shall be assessed by the "principal resident Headman of the village or district," and three or more respectable persons of the

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neighbourhood, if their attendance can be procured. The words "principal Headman of the village" do not necessarily refer to the Modliar of the entire district: it would be sufficient if the local Headman—the principal one in the village—assess the damage. In the absence of all evidence, the Supreme Court cannot ascertain that either the Vidahn Aratchy or Police Officer is not the principal Headman of the village.

IN THE SUPREME COURT.

May 12, 1870. P. C. Negombo, 20,887.

Held that, "Ordinance 2 of 1835, 113, does not require that three persons should in all cases assist the Headman in assessing damages, but only where the attendance of such persons can be procured. The prosecutor should have been called upon for evidence to show that the attendance of three persons could not be procured; and if he failed to satisfy the Court on that point, the defendant should have been acquitted."

CONDITION. POLICY OF THE LAW.

The following decision is especially important on account of the observations of the Court on "The Policy of the Law," as furnishing ground of objection to a condition in a will. The same principle would apply to conditions introduced on other occasions.

"It is not against public order for a testator to protect his estate and representative against unsuccessful attempts to litigate his will: although a condition of forfeiture for contesting would be inoperative to protect an illegal disposition, or to render operative an invalid testament."

"*Semble,* that under English law, effect is given to a condition of forfeiture, so long as it is a "*conditio rei licitæ,*" if there is a gift

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over on trust thereof. "The whole law on this subject appears to have been considered and put upon a sound foundation by the Court of Exchequer in Cooke *v.* Turner (15 M. W. 727).

"The determination of what is contrary to the so-called "policy of the law," necessarily varies from time to time. Many transactions are upheld now by our Courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains: but its application varies with the principles which for the time being guide public opinion." (Eventural *v.* Eventural, Law Rep., Vol. VI., P. C. Cases, p. 1).

CONTEMPT OF COURT.

The most important decisions of the Supreme Court on this subject do not come within the period to which (so far as regards local decisions) this volume is limited. They will be found in Mr. Grenier's reports. They have made it unnecessary to report several cases that occurred before the English decision of the Queen *v.* Lefroy (Law Rep., 8 Q. B., 134); nor is it necessary here to do more than advert to that decision itself.

There are, however, some judgments of our Supreme Court which may be usefully set out here, as to the caution which ought to be used in dealing with cases of Contempt, or supposed Contempt, committed in the face of the Court. There has been often a great tendency in those who preside over our inferior tribunals to deal summarily with perjured witnesses as guilty of Contempt of Court. When it is remembered how tedious and costly regular prosecutions for perjury are, and how often they fail, the eagerness of judges, especially of young judges, to inflict a sure and speedy punishment on false witnesses appears natural enough; but it is nevertheless necessary to watch and restrict it closely in the true interest of justice. Were this not done, it would be found that perfectly honest

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men would be unwilling to come forward as witnesses and to expose themselves, if they got confused or made blunders, to the risk of immediate punishment by a possibly impatient judge. The benefit also to the accused of trial by jury on a charge of perjury, would be practically almost abolished. If such a change is to be made, it must be made by the legislature, and not by arbitrary judicial action.

IN THE SUPREME COURT.

Sept. 17, 1866. C. R., Colombo, 43,832. D. C., Jaffna, 15,369.

In these cases orders fining certain witnesses for Contempt were set aside; and the Supreme Court, in its judgments, made the following remarks:—

"The Supreme Court has repeatedly pointed out the necessity of caution and forbearance in the employment by Judges and Commissioners of the power of committing for Contempt; although the existence of such a power is indispensable for the due administration of justice, and it ought to be firmly put in force on proper occasions. But it would be hazardous in the extreme to give a general sanction to the use of this summary punishment, as it has been used by the Commissioner of the Court of Requests on the present occasion, for such a merely constructive contempt, as the attempt to deceive the Court by false evidence. Without saying that there never can be cases of such flagrant and insolently audacious falsity as to amount to Contempt of Court, we have no hesitation in saying, that such cases must be very extreme and very rare; and that the present case is not one of them.

"It may be well to bear in mind, that mere falsehood does not amount to prevarication, and we would draw attention to the valuable advice as to committals for Contempt, which is contained in the judgment of the Supreme Court delivered by Sir William Rowe on the 3rd of June, 1857, in case No. 18,928, C. R. Jaffna, which is reported in part two of Lorenz's Reports, p. 85."

D. C., Jaffna, No. 15,369.—*Set aside.*

"Great caution ought to be used in exercising the power of com-

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mitting for Contempt of Court, when the supposed contempt does not consist of direct insult to the Judge, but of a merely constructive contempt, such as that of making a false statement. For the Judge to punish such falsity by summary fine or committal is to take away from the accused the benefit of trial by jury. Attention may be usefully directed to the remarks as to Contempt of Court, which are to be found in Stephen's Blackstone, vol. IV., p. 391, and to the judgment delivered by Sir William Rowe in this Court, in case No. 18,928, C. R. Jaffna, reported in the second part of Lorenz's Reports, p. 85."

Judgments to the same effect may be found in P. C. Chavagacherry, 18,833, before the Supreme Court, on July 13, 1860; P. C. Pangwelle, 596, before the Supreme Court, April 15, 1861, and in other cases.

COSTS.—*See* PRACTICE.

DAMAGES.

We have already had occasion to consider to some extent under title "Action," the question in respect of what matters a claim for compensation by way of Damages is maintainable when the injury has arisen not directly from actual wilful malice, but indirectly only from want of due care. (See p. 26, *supra.*) We must now revert to this; and we must also further examine the necessity of the damage being the direct and proximate consequence of the defendant's act or negligence, and whether a plaintiff may recover Damages, not only for actual loss which he has suffered, but also in respect of profits which he might have made, if the defendant had kept his engagement with him, or had not been guilty of any tort

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towards him: that is to say, whether he may claim not only for "Damnum emergens," but also for "Lucrun cessans." We now have to consider obligations arising out of contract, as well as obligations arising out of delict. It might seem best to deal with each class separately for the sake of clearness; but they often illustrate each other.

The Award made by the Arbitrators at Geneva in the celebrated Alabama controversy, is a valuable authority in this matter. I do not mean the prompt rejection by the Arbitrators of the monstrous indirect claims put forward on account of the alleged prolongation of the Civil War through the aid given to the Southern cruisers, and the like; but to their treatment of the claim which the United States brought forward for compensation for the loss of the profits which the merchant ships destroyed by the *Alabama* and her consorts might have made, if they had been allowed to prosecute their voyages. This claim was argued; but was unanimously disallowed by the Arbitrators. The joint award of Mr. Adams, Count Sclopis, M. Staempfli, and Count d'Itajube, on this part of the case, was as follows: "Prospective earnings cannot properly be made the subject of compensation; inasmuch as they depend in their nature upon future and uncertain contingencies." Sir Alexander Cockburn, when concurring with this point of his colleagues' award, stated that in such a case "an indemnity against actual loss is all that, by the law of England or America, or by any principles of general jurisprudence, can possibly be awarded." (See Blue Book, North America, No. 2, 1873, pp. 5 and 253.)

The whole subject of the law of Damages in actions founded on contract, as well as actions founded on delict, is ably and copiously investigated in the well-known treatises of Sedgwick and of Maine; and in the notes to Vicars *v.* Wilcock (2 Smith L. C., p. 537, *et seq.*, 7th edition). (See also Dudley Field's New York Code on Damages, pp. 565 to 582.) On many points there is a great conflict of opinions; but I believe that the least disputed and also some of the most important doctrines to be found in these books may be generally summed up as follows:—

In actions for the breach of an obligation arising from delict,

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where the defendant has not been guilty of oppression, fraud, or malice, the measure of damages is the amount which will compensate for all the actual detriment proximately caused thereby.

Where there has been oppression, fraud, or malice, the jury in addition to the actual damage, may give exemplary damages.

In actions for the breach of obligations arising from contract, where there has been no fraud, the measure of damages is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, which the party in fault had notice, at the time of entering into the contract, would be likely to result from such breach, or which in the ordinary course of things would be likely to result therefrom.

Ampler damages may be given where there has been fraud. See especially on this the case of Mullet *v.* Mason (Law Rep., 1 C. P., 559). It is cited in the notes to Smith's Leading Cases, p. 557; as are passages from the French jurists, which deserve consideration; especially a passage from Pothier, showing that some kinds of damage may be too remote to be recoverable, even where there has been fraud.

Sedgwick, Maine, Dudley Field, and the Editors of the Leading Cases deal copiously with authorities from English, American, and French law; but, so far as I can ascertain, they take no notice of the Dutch jurists, to whom we look mainly for guidance in cases coming before the Courts of Ceylon.

There is much on the subject in Voet, who is the highest of Roman-Dutch authorities.

It is also worthy of preliminary remark, that the Scotch law (which frequently throws light on Roman-Dutch law) differs from the English and American. Lord Kaims (Principles of Equity, Book I., Pt. 1, Ch. i., as cited in Sedgwick, p. 64) divides resulting damage into "certain" and "uncertain." The first ought always to be allowed. Uncertain damage ought to be allowed where a criminal act is the cause of the loss [which, I take it, would include all cases of what the Roman law calls "dolus"]. Uncertain damages ought not to be allowed where the act complained of is mere fault without malice, that is "culpa." "Such, according to Lord

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Kaims, is the Scotch law in principle: but, in point of practice, the Scotch law leaves every case at large to the jury, or those who discharge the functions of the jury, to give what they consider to be fair compensation, having regard to all the circumstances of the case, among which they may include the benefit which the pursuer has lost of contracts made by him with third parties. See the case of Watt *v.* Michell (Cases in Court of Session, 1839, p. 1157), which was upheld in Dunlop *v.* Higgins (House of Lords Cases, vol. 1., p. 381).

The general rule of the Roman law required the wrong-doer to make good (*præstare*) "*id quod interfuit.*" The "*id quod interest*" contains, or may contain, two elements: 1st, "*Damnum emergens,*" the actual loss arising from the breach of obligations: 2nd, "*Lucrum cessans,*" the loss of the profit which might have been made if the obligation had been kept.

The great question in the cases which commonly arise for decision has regard to this latter head, the "*Lucrum cessans.*" Is the defendant, having regard to the nature of the transaction and of the business, liable for "*Lucrum cessans*" at all? And, even if he be liable for some kinds of "*Lucrum cessans,*" is he liable for every kind, and, if not, is he liable for the "*lucrum*" which is specially in question.

Voet deals most explicitly with this topic in his comment in the 45th book of the Pandects, title 1, (paragraph 9 of the Commentary, p. 896 of vol. 2 in the Hague edition of 1734). He there professes to treat of the nature "*Præstationis ejus quod interest.*" The student should explore carefully the original passage in Voet, whose meaning is in parts obscure, owing in great degree to that unfortunate fondness which he and other jurists of his age and country indulged in for poetical metaphors, and recondite phrases. He mentions the ways of estimating the amount of "*id quod interest;*" and adds that, according to common understanding, account should be taken both of advantage which a man has lost, and of the injury which he has sustained, through the fraud of the adversary, or through such neglect as he (the adversary) is bound to make good: and it is the duty of the judge to estimate this on principles of equity. "*Accep-*

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tione magis vulgatâ [id quod interest] est utilitas amissa, et damnum acceptum adversarii dolo vel culpâ tali quam præstare tenetur, quod officio judicis ex æquitate æstimatur."

The reader should note carefully this doctrine of Voet, that it is for the judge to deal with questions of "*lucrum emergens*" according to principles of equity.

Voet proceeds to point out some important limitations in the right to give damages for "*lucrum emergens.*" He says it must only be done when "*Lucri effulserit certa spes; nam si illud vel incertum nimis, vel nimis longè petitum est, ejus habenda ratio non est.*" I think I can best give the meaning of Voet's "*lucri cujus effulsit certa spes,*" by using some homely words, which I take (not, however, literally) from the very sound and sensible paper of Messrs. Cohen and Young, drawn up in the Alabama case (see Blue Book 4, 1872), which was prepared by direction of the Board of Trade, and used by the English officials, as to what kind of profits the owners of the captured American whalers might be allowed to charge for. A distinction was taken between "secured earnings," meaning the profit to be expected from blubber on board and fish actually caught, and between prospective profits in respect of fish which it was thought the vessels were likely to catch. I would use the phrase "reasonably secured profits" to express the "*lucrum* the hope of which had certainly "dawned," as Voet phrases it.

Voet put the case of a purchaser of wine, where the vendor fails to deliver the article. Voet (after Paulus) says the buyer is not entitled to damages in respect of profits which he might have made by speculations in the re-sale of the wine to third parties, any more than he would be entitled to compensation, supposing it had been a case of sale and non-delivery of wheat, and supposing the purchaser's family to have been starved for want of the wheat. Voet states, however, the following as an exceptional case: If the vendor contracted to deliver the wine at a particular place, at which place the buyer was in the habit of selling wine at a profit, the buyer ought to be allowed compensation for the loss of such customary profit. Voet evidently mentions this exceptional case on account of a dictum of Ulpian cited in the XIIIth Book of the Digest, T. 4,

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s. 2: which Voet had already commented on in his first volume, p. 670. He there treats this case as exceptional to the general rule, which he states to be as follows: "*Non modo in stricti Juris sed et in bonæ fidei judiciis, ejus tantum lucri, quod circa rem ipsam consistit, non verò adventitii, quod ex negociatione speratur, ratio haberi solet.*"

I have not written this out in English. I confess my inability to do so to my own satisfaction; although I believe the Latin to be perfectly intelligible; and that, *if* rightly understood, it will give a key to solve most difficulties in questions as to damages for breach of contract. I take the meaning of the whole passage to be as follows: "The plaintiff cannot recover in respect of uncertain profit dependent on contingencies, merely because he had a hope or an expectation of realizing such profit by dealings with third parties: he can only recover in respect of such profit as is clearly connected with the subject-matter of the contract between him and the defendant, and which in fact was one of the surrounding circumstances of that contract, present to the minds of the contracting parties, so as to form part of the basis of the contract itself." I give a very long paraphrase of the Latin words; but I cannot express my understanding of those words in a more succinct manner; and, if I am correct in my gloss on Voet's text, that text gives principles for deciding these questions thoroughly consonant with Baron Alderson's judgment in Hadley *v.* Baxendale, which will be quoted presently. I think too, that, according to this interpretation, the apparently exceptional case about the sale of the wine, in the extract from Ulpian, is quite intelligible. I understand that as a case in which the purchaser's habit of reselling wine at a particular place for profit was notorious, and must have been present to the mind of the vendor when he contracted to deliver the wine at that particular place, which was, in fact, the purchaser's wine-shop.

In the comment on the 45th book, Voet concludes his 9th paragraph by laying it down as clear that, in defining the interest in respect of which a party is entitled to compensation, regard must be had not to the special position of that party as to wants, liabilities, purposes, and opportunities, but to the usual and natural position of persons in

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general. Such I take to be the sense of Voet's words, "*Illud extra dubium est, in definiendo eo quod interest neutiquam affectionis peculiaris rationem habendam esse, sed communem, ut ita dicam, affectionem oportere spectari.*" This rule would, I take it, be subject to exception when the special wants, purposes, &c., of the party were made known to the other party, and formed part of the basis of the contract. The maxim would then apply that "*conventio vincit legem.*"

Other passages bearing on this subject may be found in Voet. Reference may also be made to Van Leuwen, Censura Forensis, pt. I., iv., 15, 6. "*Et damni cessantis et lucri emergentis ratio* "*habetur: pro utilitate quo circa res ipsas est, secundum communem* "*rerum functionem.*"

I do not feel required here to make any positive deductions of law from the Roman-Dutch authorities; but I venture to think that they may deserve examination and consideration when cases as to Damage came before tribunals which are to be primarily guided by Roman-Dutch law; and that decisions by English and Anglo-American Courts are not in such cases absolutely conclusive on such tribunals. The great thing to remember is the caution of Voet that the Judge is to determine such matters on principles of equity: which is, indeed, a leading rule of the Roman law. It certainly seems equitable, in cases where no fraud has been practised, not to make a contractor liable for damages in respect of matters which were not brought to his notice at the time of making the contract, and which he could not reasonably have anticipated. The arguments on this subject used by Baron Alderson, in his judgment in the celebrated case of Hadley *v.* Baxendale (9 Exch. 341), are very strong:—

"If the special circumstances under which the contract was actually made, *were communicated* by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he

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at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, for such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them."

The New York Code extends the effect of notice at the time the contract was made to notice given before breach, but given while it was still in the defendant's power to perform his contract. This would to many appear to be equitable; but there is a late English case which is very strongly opposed to it. I mean the case of Horn *v.* Midland Railway Company (Law Rep., 8 C. P. 131). It is, however, to be observed that there was a division of opinion on the Bench; and the words used by Kelly, C. B. (who was one of the majority) at the beginning of his judgment, are remarkable: "The rules by which this case must be determined are the creatures of authority; and we have not so much to consider, in determining it, what might be just or unjust, reasonable or unreasonable, under the circumstances of the case, in the absence of previous decisions, as to consider the cases, that have been decided on the subject, and to deduce from them the general principles that must govern our judgment." (See also Die Elbinger *v.* Armstrong, Law Rep., 9 Q. B. 473.)

The cases hitherto cited, both those in ancient and those in modern times, have been cases where there has been no "dolus," or malice, or fraud. It is generally agreed that where this element of aggravation exists, it is competent to give ampler, or, as they are often termed, "exemplary damages." Mere negligence, or "culpa," unaccompanied by "dolus," will not in general suffice for this purpose. But the "negligentia" may be so gross, so "crassa," (in the language of the old jurists) as to be placed on a level with actual fraud and malice. Some observations on the "lata culpa," which is looked on as "versutia" and treated as "dolus," will be found in Voet on the Pandects, Book XVI. T. 3, s. 7. (See also Poste's Gaius, p 396.) There are some useful remarks on this subject in a book cited with commendation by Lord Selborne (then Sir Roundell Palmer) in his

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argument against allowing interest on the Alabama claims. It is an American treatise by Shearman and Redfield, and contains this passage: "Exemplary, vindictive, or punitive damages, can never be recovered for anything less than 'gross negligence.' 'Gross negligence' means such entire want of care as to raise a presumption that the person in fault is conscious of the probable consequences of his carelessness, and is indifferent, or worse, to the danger of injury to the person or property of others. It is only in cases of such recklessness that exemplary damages should be allowed."

The highest authority on the subject, so far as regards fraudulent sales, is Ulpian, in a passage embodied in the XVIIIth book of the Digest, T. I., 13.

Ulpian, in the passage there cited from him, discusses the subject at great length. Voet does not comment on this extract: but many very sensible and valuable remarks on it have been made by Pothier, which will be found at p. 97 and the seven following pages of Evans's translation of Pothier on Obligations, called by Evans "Pothier on Obligations or Contracts." Of course Pothier has not the especial authority which a Roman-Dutch jurist has in our Courts, but Pothier's opinions and reasons are everywhere studied with merited respect.

Reference may also be made generally to the observations of Sir Robert Phillimore in the first part of his first volume on International Law, Chapter VIII. as to the amount of compensation due where there has been "dolus."

As a general principle on the subject of Damages, it is declared in the New York Code, that "Damages must in all cases be reasonable; and where an obligation of any kind appears to create a liability to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered. (See James *v.* Morgan, 1 Levinz, 111; Thornborow *v.* Whitacre, 2 Ld. Raym., 1164.) In the first case, the defendant had agreed to pay for a horse sold to him, a farthing for his first shoe-nail, two farthings for the second, four for the third, and so on for the thirty-two nails in the horse's shoes. This of course amounted to many thousand pounds sterling, for which the plaintiff sued. But the

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Court directed the jury to assess the damages at the actual value of the horse, which was found to be eight pounds. In the latter case a somewhat similar bargain was entered into, the damages claimed being an enormous sum. The action was sustained on demurrer, and it appears that the Court was at first about to give judgment for the whole sum demanded; but the case of James *v.* Morgan was mentioned, and was admitted of all "hands to be good law." An attempt was made to distinguish it, but ultimately Thornborow *v.* Whitacre was settled, apparently with the sanction of the Court, by the repayment of the consideration received for the contract (2s. 6d.) and costs."

Certainly we should expect the same equitable principle of controlling the amount of damages to be applied in Courts where the jurisprudence is based on Roman law. One of the leading maxims of that law is, "*In omnibus quidem, maxime tamen in Jure Æquitas spectanda est*" (50 Digest 17, 12).

It will be remembered how the English Courts have endeavoured to diminish by subtle distinctions the iniquity of allowing a party to recover a large sum of money by way of liquidated damage for breach of contract where the actual damage has been but trifling. The Roman-Dutch law gives the Judge a general power of limiting and diminishing the amount, if the sum named in the contract is excessive, having regard to the consequences of the actual breach. (See Vanderlinden, p. 206, and Van Leuwen, Cens. For. iv. 15, 2.)

On the subject of calculating interest on the sum which, if paid at the time of the wrong complained of, would have been a fair compensation for such wrong, and of adding interest to that sum in the amount of damages awarded, see title INTEREST.

DEBTOR AND CREDITOR.

The first three Ceylon Supreme Court cases set out under this head relate to preferential claims over debtors' property made by creditors holding mortgages and other securities.

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IN THE SUPREME COURT.

July 5, 1870. D. C., Galle, 27,719.

Where a guardian had, without leave of Court, specially mortgaged the land of her ward, but, before her insolvency, became herself owner of the land, the ward having died, the Supreme Court held that the mortgage, though primarily invalid as against the ward, became valid between the mortgagor and mortgagee on the former becoming owner of the property. The Supreme Court gave the creditor the rank of a general mortgagee, coming after subsequent special mortgagees, but before subsequent general mortgagees, and before general creditors.

The judgment of the Supreme Court was as follows:—

" A widow was possessed of one fourth of a certain garden in her own right; and her two minor children were entitled to another fourth. On the 2nd day of October, 1866, she mortgaged her children's fourth for a sum of £30, to one Wickremaratna Don Johannes de Silva, expressly for the purpose of procuring funds for the maintenance and nourishment of her children, but without a decree or order of any Court.

" Afterwards, by the death of her children, she succeeded as heir to their fourth; but the exact date of this acquisition has not been proved. On the 3rd day of August, 1869, Don Johannes de Silva obtained judgment against Maria Fonseka personally on the mortgage bond, for the principal sum of £30, and interest from the 2nd of October, 1866, at 12 per cent. per annum. (See case 25,986.) On the 3rd of December, 1865, Maria Fonseka, jointly with one Adrian, gave a bond to one Salman, for £60, with interest at 12 per cent., payable six months after date, and in this bond one Manuel Dias joined as security. The bond was simply personal, and contains no mortgage, special or general. On the 3rd day of October, 1866, Salman brought an action on his bond (case No. 25,339, Galle), and obtained judgment against his three debtors on the 28th February, 1867; under this judgment property of the surety was seized,

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whereupon he paid and satisfied the debt. On the 8th November, 1867, Don Manuel Dias, the surety, instituted an action for the recovery of the sum so paid by him against the principal debtors, Adrian and Maria Fonseka, and obtained a judgment on 15th January, 1868, under which he seized, as the property of Maria Fonseka, the fourth share of the garden which had belonged to her children, and was mortgaged to Don Johannes de Silva, which was sold for £42, and Don Johannes de Silva claimed the proceeds of the sale by virtue of his above stated mortgage. The questions which have been raised for the consideration of the Court are—1. Whether the mortgage by Maria Fonseka of her children's share was valid at the time of its execution; and 2. Whether supposing it to have been invalid at that time, it was rendered valid afterwards by the acquisition of the property by Maria Fonseka as heir to her children, so as to give priority to the mortgagee over a subsequent general creditor. It must be observed that Manuel Dias, having succeeded to the position of the original creditor, was entitled to all the rights and remedies which that creditor possessed, and no more. He is, therefore, only in the position of an unsecured creditor without hypothec, special or general, over his debtor's property. 1. On the first question stated above we have no hesitation in saying that the case falls within the general rule that a guardian cannot alienate or encumber the property of his ward without the authority of a Court of competent jurisdiction. (See Voet. lib. XXVII. tit. 9, n. 4; Sande Deciones Frisicœ, lib. II., tit. 9, def. 17; and Burge, Vol. III., p. 953.) There are certain exceptions to this general rule, as when lands are sold by the tutor to pay off a previously existing valid mortgage, but none bearing upon the present controversy. And so strictly was this rule applied in Holland that where a tutor bought a land for his ward, leaving part of his purchase-money on mortgage, the mortgage was held invalid against the minor. (See the section of Voet cited above.) 2. Upon the second question it appears to be quite clear that on the acquisition of the property by the guardian the mortgage was binding as between himself and his creditor. But we have to consider the precise place which such security would take in marshalling the claims of various creditors against the land mort-

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gaged. The law on this subject laid down by Voet, and cited with approbation by Burge (Vol. III., p. 175), is that, if a person specially mortgages, as his own, lands belonging to another, and afterwards acquires a title to them, the right of the creditor over such lands will be the same as that possessed by a general mortgagee, and will bear date from the time of acquisition of the property by the mortgagor. So that the creditor will rank as a general mortgagee after all subsequent specific mortgagees, and before the general unsecured creditors, and general mortgagees of later date. And this Voet states to be the law even where, as in the present case, the mortgagee had notice of the original infirmity of his creditor's title. And this rule appears to be in accordance with justice and equity, for a subsequent special mortgagee having notice of the want of title of the mortgagor at the date of the preceding mortgage, may justly consider himself protected against it when advancing money on the same security; but a general creditor, trusting solely to the personal credit of the person to whom he gives credit, has no specific interest in any property of his debtor, and no right to realize in liquidation of his debt anything more than what his debtor possesses at the time of seizure. He occupies, therefore, precisely the place of his debtor in any controversy after seizure as to the rights of claimants to the property seized. And, as we have seen that the mortgage under consideration is good as between mortgagor and mortgagee, it must be good as between the mortgagee and such an unsecured creditor."

SUPREME COURT.

Sept. 8, 1870. D. C. Galle, 28,947.

The facts of this case are briefly these: The defendant purchased an arrack-rent for the year 1866–67, for £1,600. Plaintiff paid this sum to Government for the defendant without obtaining any cession of the Government securities. Defendant subsequently purchased the arrack-rent of the same district for 1867–68, entering into a bond dated June 26, 1867, for securing the payment. The first instalment fell due on July 31, 1867. On July 29, 1867, the

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defendant mortgaged to plaintiff the lands now in question as security for the £1,600 plaintiff had paid for him to Government. The plaintiff obtained judgment on the mortgage bond and had the land sold in execution. The Crown now claims priority to the proceeds of the sale, in satisfaction of the debt due on the bond of June 26, 1867. Held, setting aside decision of District Court, that the case falls under Ordinance 14 of 1843, clause 5; that the Government claim to preference accrued at the date of the signing of the bond of June 26, 1867. That the rights of the Crown did not pass to plaintiff without cession for securing his payment.

The judgment of the District Court is to be set aside, "and it is decreed that the claimant (the Queen's Advocate) be declared to have preference over the plaintiff to the proceeds of sale in dispute. The defendant in this case was the purchaser of the arrack-rent of the Galle District for the year 1866–67, for the payment of which he mortgaged the lands which have now been sold in execution, and concerning the proceeds of which sale the present dispute has arisen between the plaintiff and the Government. It appears that, on the purchase of the arrack-rent as above, defendant became indebted to Government in a sum of £1,600, and that the plaintiff paid to the Government the sum so due on account of defendant. The precise date of this payment does not appear, but it must have been early in 1867. After this payment the defendant purchased arrack-rent of the same district for the year 1867–68, and entered into a bond, for securing the purchase-money, dated the 26th June, 1867. By this bond, the defendant mortgaged specially to Government for the payment of the purchase-money of the rent of certain lands, not including those now in question, and gave a general mortgage over all his property. The first instalment of the purchase-money for the rent fell due on the 31st July, 1867.

"On the 29th July, 1867, the defendant mortgaged these lands in question to plaintiff, as security for repayment of the £1,600 paid by him in satisfaction for the debt due in respect of the arrack-rent for the former year. On the mortgage the plaintiff obtained judgment, and caused the land to be sold, and the question for the consideration of the Court is, whether the plaintiff or the Government

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is entitled to priority on the distribution of the proceeds of this sale, which are still in deposit. For the Crown it is contended, 1. That the defendant being a renter, all his property became bound to Government under the 4th section of the Ordinance 14 of 1843, for the payment of all debts due by him, in the same manner as if it had been specially mortgaged for that purpose on the day when he assumed the office of Government renter; and 2. That if the Defendant is not a renter, within the meaning of the term as used in the 4th clause, then he is a Government debtor simply, and his debt, at the time when it accrued, that is at the date of the purchase of the rent, or at least at the date of the execution of the bond of the 26th June, has under the 5th clause of the same Ordinance priority over all subsequent debts to private persons, even when secured by special hypothecation. For the plaintiff it was contended 1. That the defendant's debt to the Crown comes under the 5th clause of the Ordinance, and that the date from whence the right to preference must be reckoned is the day on which the first instalment of rent fell due, that is the 31st July, two days after the execution of the bond to plaintiff; and 2. That the plaintiff, having paid off a Government claim, became entitled, without cession of the securities held by Government, to stand in the place of Government in the same manner as if all the Government securities had been assigned to him at the date of payment.

The second of these arguments on the part of plaintiff does not appear to have been advanced in the District Court; but the Judge held that the plaintiff was entitled to preference on the ground that the debt to Government did not accrue until the 31st July. The Supreme Court is of opinion that the District Judge was right in considering the case as falling under the 5th, and not under the 4th clause of the above-cited Ordinance. The words of the latter clause are, "farmer, or renter, or other officer employed in the collection, receipt, charge, or expenditure of revenue, public money, stores, or other property, belonging to Government, or any other public accountant."

Now the arrack-renter receives in respect of his contract with Government, no money but the price of his own arrack, and what he

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purchases from Government is the right to prevent any one else from selling arrack within the time and district limited by his contract. He receives no money or goods for which he has to render account to Government, and is a debtor, and not an accountant, of the Crown; and therefore his case is provided for in the 5th clause, which relates to debtors, and not in the 4th, which relates to public accountants. But under the 5th clause, the Court holds that the date from which the Government claim to preference accrued was the date of the contract made with the defendant for the sale to him of the arrack-rent for the year 1867 and 1868, and not the date on which the first instalment of the purchase-money became due and payable. The obligation to pay arose when the contract was signed, though by the terms of the contract, the date of payment was postponed. On the second objection raised by the plaintiff, the Court is of opinion that the rights of the Crown in respect to defendant's former liabilities did not pass to the plaintiff without cession in consequence of his discharge of those liabilities. The decision of this Court on the case 29,669 of the District Court of Colombo, is directly in point, and conclusive on the subject. (See Minutes of 1862, August 14.)"

IN THE SUPREME COURT.

1870, Nov. 3. D. C., Colombo, 811.

Landlord's Lien on Goods of Tenant to be satisfied before Prior Special Mortgages.

In this case the District Judge of Colombo had ruled that the tacit hypothec given by the law to a landlord over the property of his tenant ranked as a special mortgage, and dated from the time when the rent first fell due; and he gave priority in a judgment (which is here fully set out) for the holder of a special mortgage which bore date four months previously to the time when the rent first fell into arrears. On appeal the Supreme Court collectively overruled this decision, holding that the landlord's lien was a privileged claim, and ranked over all claims that are not privileged.

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JUDGMENT.

"The question for adjudication in this case was the conflicting claims of a landlord and a mortgagee to the proceeds of certain shop goods sold by the provisional assignee of an insolvent, with the consent of the landlord, who had previously seized the same, under a judgment dated the 31st May, 1870, in case No. 55,782, for arrears of rent due by the insolvent from October, 1869, to February, 1870. The mortgagee disputed the landlord's right of priority to the proceeds, and claimed preference under his special mortgage bond dated the 3rd June, 1869. The District Judge held as follows: 1. The Insolvency Ordinance 7 of 1853, cl. 52, does not apply to the present case, because the landlord's seizure for rent was before the act of insolvency. The landlord's right is therefore precisely what she has under general law, independent of the statutory insolvency law, and is that of a tacit hypothec, having the same value as a special mortgage while the goods remain on the premises or being removed are arrested immediately. This privilege is not limited by the general law of Holland to the arrears of rent due for any particular period; though it is by the special laws of certain places to the rent for the past and current years. (Vander Keessel, 453.) In Ceylon, there being no special law of limitation, the hypothec exists for the whole arrears of rent. If the mortgage in question was a special one in fact as well as in form, it will rank with the landlord's hypothec according to their respective priority in date. If it was only in legal effect a general one, it will be postponed to the landlord's hypothec independent of its date. (Voet ad Pand., 20, 4, 28.) We have therefore to examine (1) whether the mortgage was a special or a general one, and if the former, we shall have next to ascertain (2) what is the operative date of the landlord's hypothec. As the landlord's hypothec can only extend over the goods found in the premises demised, the only words in the mortgage deed, which need consideration, are the following 'do specially mortgage with N. F. V. all the stock-in-trade wares and merchandize which are now or hereafter in the course of my trade may or

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shall belong to me.' The goods now in question are the shop goods or stock-in-trade found in the demised premises. The objections raised to the mortgage having the force of a special mortgage are (1) that the goods were not specified and so to speak inventorized or catalogued (2) that it affects future acquisitions as well as what belonged to the debtor at the time of the contract. It is certainly the general rule of mortgages that, to be special, the subjects must be specially described in the deed. '*Pignus aliud generale est omnium bonorum, aliud speciale, quod nominatur et in specie obligat*' (Censura, IV. c. vii. sec. 7); but there appears to be an exception to this rule in the case of movable property: and this is very precisely stated in the Censura, IV., 7, 8, where talking of a deed of mortgage the author says, '*cujus ea vis est apud nos, ut licet non in specie nominentur mobilia, attamen specialiter obligentur per generalem clauselam omnium bonorum tam mobilium quam immobilium.*' It appears from what follows and from IV. 11, 16 of the same work, that this exception is due partly to ancient and invariable practice, and partly to the indirect effect of a certain fiscal provision in an Ordinance of Holland of 5th February, 1605. It is clear, too, from what Voet says, that a 'class' of movables will be specially bound without more detailed enumeration. '*Specialis* (*hypotheca*) *est, quâ res singulares, vel etiam certæ rerum universitates, puta greges aut tabernæ, sunt obligatæ;*' and he adds (which is the very case in point) that (*tabernâ obligatâ*) if the shopkeeper should sell the goods in the shop from time to time and purchase others, all such as are afterwards found in that shop are considered subject to the mortgage. (Voet ad Pand. XX. 1, 2.) And he also states in paragraph 6, that, under the new law, both present and future property is embraced in a general mortgage. In the present case the present and future property mortgaged could not possibly be detailed nominatim in consequence of its fluctuating character, but it was, so to speak, earmarked by being described as property of a special class, viz., 'stock-in-trade.' The deed must therefore be held to have the legal effect, as well as name, of a special mortgage. II. The next question is what are the respective operative dates of the competing mortgages; the rule being '*prior tempore jure potior est.*'

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(Voet XX. 4, 28.) As to the date of the written mortgage there is no question; it operates from the 3rd June, 1869. With respect to the landlord's claim I consider that it began actually to have the effect of a mortgage on the date of her seizure of the goods, which was not till after her judgment, which is dated 31st May, 1870, but that its effect, when then established, relates back to the date when the right of retention or seizure accrued, which was from the date of the first arrear of rent. I come to this conclusion on the strength of a passage in Vander Keessel (Thesis 437), where he says that though a tacit mortgage gives place to a prior special mortgage, there is an exception to this rule when it has been confirmed by an arrest: and in Thesis 453, where he says that the landlord's right arises 'not by virtue of the arrest but of the right of retention which is confirmed by the arrest.' The date of the first arrear of rent was some time subsequent to October, 1869, that is to say subsequent to the operation of the deed of special mortgage, which, I consider, is therefore entitled to preference over the proceeds of the goods seized in the shop in question: and it is so adjudged. NOTE.—It may facilitate an accurate decision on the point involved, if I also note that I did not overlook the passage in Voet cited in Vander Keessel's Dictata, viz. XX. 2, 3, in med. commencing with the words '*Qualis preclusio,*' where it is stated that such arrest not only confirms the right of hypothec to the landlord, but also gives it a preference '*sed et prœlationem ei tribuit,*' although by the Roman law it was only considered as a 'simple hypothec.' But I did not conceive that this passage has the force of attributing to it a preference over special hypothecs, existing prior to the date of the house being rented, for this would be inconsistent with many other passages, and is not so stated by Voet in the passage in question; while in the view I have adopted the passage is quite consistent with the effect of the arrest relating back to the date of the renting, and then ranking from that time with special mortgages in the order of their priority. So also in the Dictata it is merely said that after the arrest the landlord is preferred '*cœteris creditoribus*' generally, without any special reference to special mortgagees or privileged creditors, who, I therefore presume, are not contemplated in the general class

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of '*cæteri creditores*,' treating the expression as simple creditors or ordinary creditors." Against this ruling the landlord appealed on the following grounds: I. That the conventional mortgage of the 3rd June, 1869, being in substance an assignment of all the debtor's property was a fraud on the creditors, and especially on the landlord, who permitted the debtor to remain in the house on the faith of the property kept and stored there. II. That assuming the conventional mortgage to be a valid hypothec, it was not entitled to priority against a landlord's lien or tacit hypothec, which is privileged as against all other mortgages. (Voet ad Pand., XX., 2, 3, in med.) III. That the rule in Voet XX., 4, 28, relied upon by the Court below expressly excludes privileged hypothecs, as more fully explained by Vander Keessel in his Dictata [Vander Keessel, *Dictata ad Grotii Introd.*, *lib.* II., *part* 48, § 36. Hypotheca tacita seu legalis, quamvis sit generalis, eandem vim habet jure Hollandico cum hypothecâ speciali; ita scilicet, ut si antiquor sit, præferatur hypothecæ speciali posteriori (Groenweg. ad. 1, 47, Dig. XLIX., 14; Voet ad Pand., XX., 1, § 16). Nam in hypothecis legalibus nihil innovatum est per *Ord. Polit.*, art. 35, sed omnia relicta dispositioni juris civilis (Dig. XX., 4, 1, 8); quod etiam agnoscitur in *de Waarschonwing van den* 5 Feb. 1665, in verbis "*mitsgaders uit kragte van legaal hypotheck bij de geschreven Roomsche Rechten geintroendeerd en dien volgende binnen deze landen in de practycque gericipieerd.*" Ab altera parte hypotheca specialis prior præfertur hypothecæ legali posteriori. Sed hoc patitur exceptiones nounullas; I in casu, quo hypotheca legalis habet adjunctum privilegium, uti res sese habet in iis, qui in ædificii vel alterins rei reparationem vel conservationem crediderunt; de quibus diximus ad § 13, quo pertinet decisio Curiœ *ap. Neostad. dec.* 35. II in invectis et illatis in prædium conductum, ut et in fructibus in prædio rustico natis, si hæc arresto fuerint præclusa, ut requiri vidimus, ad § 17; hoc casu atuem locator præfertur cæteris creditoribus, ut nominatim docetur in quibusdam statutis *ad dict.* § 17 adductis. Vide et Voet *ad tit. Dig. in quib. caus. pign vel etc*, § 3 *in med.* Hac in parte itaque derogatur est juri civili; *l.* 9. *pr*, *Dig. qui pot. in pign.* III in pignore rei mobilis, quæ tradita est creditori, nam cum in re mobili etc. *Vander Keessel*

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ad Grotii Introd., lib. ii., part 48, § 17, "*provided he follows the property immediately.*" Cum in jure hypothecæ apud nos valeat regula "Mobilia non habent sequelam," ut cum Auctore dicemus ad § 29, sequitur hypothecam illam legalem, quam habet locator in invectis et illatis vel in fructibus prædii rustici, nou aliter effectum habituram, nisi bona ista in prædio locato inveniantur, et antequam avehantur arrestum ipsis imponatur (Groeneweg. de ll. abrog., Dig. XX., 5 ? 9; Voet ad d. tit. § 3; etc.). Sunt tamen loca, ubi etiam a conductore avecta bona persequi licet locatori, et apprehendere, veluti in urbi Naarden (Rechtsgel. Obs. Suppl., part iv., p. 214), vel ubi ea adhuc mensem arresto apud alium præcludere possit locator (Keur. van Leid. art. 135); Quin imo non tantum ob mercedem seu pensionem jam debitam, sed et in securitatem mercedis postea demum cedentis hæc preclusio fieri possit, ut in autiquis consuetudinibus Haganis refextur apud Jurisconsultos in *de Rechstg. Obs.* (part 1, obs. 72). The above extracts were furnished by the late Mr. Advocate Lorenz from the original MS. Dictata of Vander Keessel.]

In Appeal.

In appeal, the Supreme Court agrees with the District Court in holding that the mortgage in respondent's favour is a special mortgage, and that it is of prior date to the claim of the appellant, whether that claim dates from the seizure or from the time when the first instalment of rent fell due, and that the mortgage would be entitled to priority if the appellant had nothing more than a tacit hypothec for the recovery of rent due over the property of her tenant seized in the house leased to him. But this Court holds, on the authority of the dicta cited below, that a lessor has not only a tacit hypothec over the property of the lessee under seizure of the premises, but that his claim is privileged and therefore entitled to preference over all claims that are not privileged, whether secured by hypothec or not. "*Qualis preclusio nostris moribus non modo jus hypothecæ locatori firmat sed et prœlationem ei tribuit, licet jure Romano simplex tantum hypotheca videatur competiisse.*" (Voet, Lib. XX., Tit. 2, sec. 3.) "*Eoque fundamento a Curiâ Ultrajectina judicatum fuit,*

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dominum ædium in rebus præclusis potiorem esse pupillis, quibus idem ille aedium conductor ex administratione tutelæ jam ante cœperat obligatus esse. (Voet, Lib. XX., Tit. 2, sec. 3) *Tacitam hypothecam habent pupilli minores et reliqui quibus curatores dantur in bonis tutorum curatorum et esrum qui pro tutore vel curatore gesserunt.* (Matthæus de auctionibus, Lib. 1, Cap. XIX., sec. 50.) *Præterea hypothecam cum privilegio habent, qui crediderunt in refectionem ædium, &c. Adhæc domini prædiorum locatorum in invectis et illatis, quoties ea præcludi curaverint.* (Voet, Lib. XX., Tit. 4, sec. 19.) With these passages that quoted from Vander Keessel and appended to the appeal petition agrees."

No comment is needed on the following case as to the invalidity of a Composition Deed where the debtor has privately arranged with some of his creditors to put them in a better situation than the others.

SUPREME COURT.

Dec. 18, 1862. D. C., Colombo, 2,853.

"The defendant in this case had on the 10th of April, 1861, made an arrangement with his creditors, by which they agreed to give him time to pay his debts. He was to pay half within two years, and the other half within three years from the date of the agreement. At the time when this agreement was made there was a private understanding and arrangement between the defendant and one of the creditors named Sinne Tamby, that Sinne Tamby should have the defendant's promissory note at four months, for £180, being about half the amount of Sinne Tamby's claim.

"When the plaintiff discovered that this preference had been given to Sinne Tamby, he, the plaintiff, brought his action to recover the debt due to him, the plaintiff, at once; and he contends that he is not barred by the agreement of April, 1861. (That agreement has generally been spoken of in the proceedings as 'the composition deed,' and though the term is not strictly accurate, it is sufficiently so to make it convenient to retain it in this judgment.) The plaintiff says that the composition deed is vitiated by the private arrangement

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between the defendant and Sinne Tamby, which was a fraud upon him, the plaintiff, and the other creditors, who signed on the faith that all were to be treated alike.

The Supreme Court thinks that this contention is well founded, and that the plaintiff is entitled to recover. To adopt the language of Chitty on Contract, p. 591, 'Where a debtor in embarrassed circumstances enters into an arrangement either by deed or otherwise with his creditors to pay them a composition upon their claims, or to discharge the demands in full, or by instalments, at stated intervals, any private agreement between the debtor and one of the creditors, who professes to join in the general arrangement, that the debtor, or a third party for him, shall pay a further sum of money, or give him better or further security than such as is provided for the other creditors, is void, as a fraud on them. The creditors bargain for an equality of benefit as to payment and security, there is a tacit understanding that all shall share alike, *pari passu*, and that it shall not be competent to one of them, without their knowledge, to stipulate for any *additional* benefit or security to himself;' and a little further on he rightly says, 'It makes no difference that the favored creditor has realized nothing under such agreement, for it is the mere fact of such an agreement being made which constitutes the fraud on the other creditors.'

"The general principle laid down in this passage (and many similar passages in other text books might easily be added) has not been denied in the argument for the defendant in the present case. It was certainly suggested that no real preference was given to Sinne Tamby, inasmuch as the debtor was by the term of the composition deed at liberty to pay the first moiety to his creditors at any time within two years, and the promissory note given to Sinne Tamby was for the payment of a moiety of the debt due to him at a period within the two years. But it is obvious that a creditor who was to be necessarily and definitely paid at the end of four months, would be in a better position than creditors who might be kept waiting at the debtor's option for the full term of two years. And the mere fact that the promissory note was to be a further security for Sinne Tamby than was given by the deed which was common to all,

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would of itself stamp this private agreement with Sinne Tamby as an illegal one. (See Leicester *v.* Rose, 4 East., 371.) But it was further maintained on behalf of the defendant that although the private arrangement with Sinne Tamby was illegal and void, so that Sinne Tamby could not enforce it, yet that it did not operate so as to vitiate the composition deed as between the debtor and the other creditors, and so to remit them to their original rights. No case was cited to support this proposition, but we were told that no case could be found in which the contrary had been held. A remark like this was made during the argument in Mallalieu *v.* Hodgson (20 S. I., Q. B. 343.) The observation then was as follows: 'There is no direct decision that a creditor can recover his original debt, the composition deed being tainted by fraud.' This observation is not strictly correct. For there is the case of Denham *v.* Fowlie (in Dowling's Practice Case, Vol. III., p. 43), in which a debtor had fraudulently misled his creditors as to the amount of his assets. A composition deed which they had signed under the influence of such misrepresentation was held void, and his creditors were decided to be at liberty to sue him for their original debts. The same point was similarly determined in the case of Viner *v.* Mitchell (reported in Moody and Robertson, p. 337). These are authorities on the principle of the present case, for it is just as much a fraud in a debtor to conceal a private agreement of preference from the bulk of his creditors, and to keep them under a delusion as to their being fair and equality in the transaction, as it is in him to conceal part of his property, and so keep them under a delusion that he is a poorer man than really is the case; nor does it make any difference whether there is an express covenant in the deed for fair disclosure and equal treatment, or whether these things are left to implied covenant which always exists in such matters.

"The paucity of express authorities on the subject is not to be wondered at if we consider the circumstances under which composition with creditors generally takes place. The debtor is generally not merely insolvent, but almost penniless; and it is generally his friends that provide the means of making some repayment to the creditors for the sake of which they forego their balance or give a

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long letter of license. If it turns out that there has been a fraudulent preference of one or more creditors over the rest, it is seldom that the debtor is worth the trouble and expense of suing.

"On principle the case is quite clear; the plaintiff had a just claim against the defendant payable immediately. The plaintiff gave a promise not to enforce that claim for two years. Why did he give that promise? On the faith, among other reasons, that he and all the creditors were being fairly and honestly dealt with, and that none was in any way preferred to the rest. The defendant was deceiving the plaintiff all the time. The defendant, in obtaining the plaintiff's signature to the deed, committed an act of dishonesty, of which the law will not permit him to avail himself. The plaintiff's promise to forbear suit having been made without adequate consideration, and in consequence of fraud practised on him, is not binding on him, either morally or legally. He had a perfect right to bring this action, and the judgment of this Court is in his favour accordingly."

ECCLESIASTICAL LAW.

The principal decisions of the Privy Council on Colonial Ecclesiastical Law during the last sixteen years have been in cases which have arisen in the South African colonies. (See Long *v.* Bishop of Capetown, 1 Moore, P. C., N. S., 411; *Re* Lord Bishop of Natal, 3 Moore, P. C., N. S., 115; Bishop of Natal *v.* Gladstone, Law Rep., 3 Eq., 1; and the Bishop of Capetown *v.* the Bishop of Natal, Law Rep., 3 P. C., 1.) These cases all have reference to the status and the authority of bishops appointed by the Crown in parts of Her Majesty's dominions beyond England and Ireland. They are sometimes spoken of as if they were either inapplicable to Crown colonies; or as if they positively decided that the Crown has power to appoint bishops with effective Ecclesiastical Courts, and with coercive jurisdiction, in Crown colonies, although, in a settled

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colony, or in a colony which has once received an independent legislature, the Crown may, indeed, by its sole authority, create a bishop and a bishop's see, but cannot by mere Prerogative confer on such a bishop, in such a colony, powers analogous to those exercised in England by archbishops and bishops by means of the lawful Ecclesiastical Courts of the Established Church. Such, indeed, are the words of part of the judgment in *Re* the Lord Bishop of Natal, "Although in a Crown colony, properly so called, or in cases where the letters patent constituting a bishopric and appointing a bishop in a colony, are made in pursuance of an Act of Parliament, a bishopric may be constituted, and ecclesiastical jurisdiction conferred by the sole authority of the Crown, yet the letters patent of the Crown will not have any such effect or operation in a colony or settlement which is possessed of an independent legislature."

The distinctions between the status of a bishop having such jurisdiction, and the status of a bishop who does not possess it, is very fully explained in Lord Romilly's judgment in the case of *Re* Lord Bishop of Natal. (See also the case of The Queen *v.* Eton College, 8 E. and E., 611; another case which arose out of the appointment of a colonial bishop.)

But although the words of the Judges who delivered the decisions in some of these cases certainly seem to imply that the Crown has, in this respect, unlimited powers of legislation for a Crown colony, and can therefore effectively create Ecclesiastical dignitaries, and coercive Ecclesiastical Courts, it may be permissible, after careful examination of the circumstances, the arguments, and the judgments, to express a doubt whether the matter has been conclusively settled. It was not necessary to go this length, in order to determine any of these cases.

They were all cases of colonies with independent legislatures. The argument against the coercive authority of the colonial bishop was substantially as follows: "The statute of 16 Ch. 1, c. 11, abolished the High Commission Court, which had been established by 1 Eliz., c. 1: and the revival of the High Commission Court, or the institution of any similar Court, is especially provided against by 13 Ch. 2, st. 1, C. 12; and 1 Will. and Mary, Sess. 2, c. 2. To

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set up a Court of this kind would be 'contrary to fundamental principles,' and is therefore beyond the power of the Crown to accomplish, by virtue of its own authority, even in a Crown colony. '*A fortiori*' it is clear that the Crown cannot do so in a colony with an independent legislature."

Now, this last limited point is all that was necessary for the decision of the Courts in the cases referred to. In none of these cases does the Court expressly deal with the general objection raised to the setting up by Crown authority of any coercive Ecclesiastical tribunal in any colony whatever.

I am not venturing on the expression of any opinion on the subject. Some of the expressions used in the judgments, which I have referred to, are in favour of the existence of such a power in the Crown with regard to Crown colonies; and unquestionably such expressions, coming from such Judges, deserve very respectful attention. (See too the Stat. 28 & 29 Vict. 63, which is discussed under the next title.) I only say that the matter may yet be deemed arguable; and I shall, therefore, not pass over it as completely settled. Moreover, whatever may be the case as to the Anglican Episcopalian community in Ceylon, the legal position of the numerous other religious communities in the colony must be determined by the authority of these cases; and I therefore proceed briefly to state their substantial provisions. I will begin with the judgment delivered by that great jurist, Lord Kingsdown, in Long *v.* Bishop of Capetown:—

"The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body—in no better, but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body, which will be binding on those who expressly, or by implication, have assented to them.

"It may be further laid down that where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, the decision of such tribunal will be binding when it has acted within the scope of

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its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice.

"In such cases the tribunals so constituted are not in any sense Courts. They derive no authority from the Crown; they have no power of their own to enforce their sentences; they must apply for that purpose to the Courts established by law; and such Courts will give effect to their decisions, as they give effect to the decisions of arbitrators, whose jurisdiction rests entirely upon the agreement of the parties."

This law is fully upheld in the other cases that have been mentioned. It is most copiously illustrated by Lord Romilly in his elaborate Judgment delivered in Bishop of Natal *v.* Gladstone: and it has very recently been expressly cited and recognized by the Privy Council in a Canadian case, Brown *v.* Curé of Montreal (L. C. VI., P. C., 192). The Judicial Committee, in that case, said also as follows:—

"Even if this church (the Roman Catholic Church in Canada since the cession) were to be regarded as a private and voluntary religious society, resting only upon a consensual basis, Courts of Justice are still bound, when due complaint is made that a member of the society has been injured as to his rights in any matter of a mixed spiritual and temporal character, to inquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury."

The first of the local judgments on Ecclesiastical matters, which I am about to report, had reference to the affairs of the Roman Catholic community at Negombo.

SUPREME COURT.

August 11, 1866. D. C., Negombo, 1,421.

Judgment of the Supreme Court.

"That the first part of the Judgment of the District Court of Negombo, of the 26th day of July, 1866, which is in favour of the

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plaintiff as to the right of appointment, be affirmed, and that the part of the Judgment which relates to the temporalities be set aside.

"There are two main subjects for consideration in this case.

"The first is, who has the right to appoint the officiating priests of the Church?

"2nd—who has the property in the fabric, the land, and other temporalities?

"The plaintiff claims both these in his Ecclesiastical character as Roman Catholic pro-administrator of the Southern vicariate of Ceylon; adding in his amended Libel a prayer in the alternative, that the property may be declared to be either in him or in the officiating priest appointed by him.

"The defendants deny this, and say, that both the right to the appointment of officiating priests, and the right to the temporalities, are vested in trustees on behalf of the people of Negombo, appointed from time to time.

"We quite agree with the learned District Judge in his last judgment, that the plaintiff has given abundant proof that he and his predecessors in office have for a long time appointed the officiating ministers of this Church.

"The defendants have given no proof of any value in support of their counter-assertion in this matter. They have tried in the argument of this case to dispute the plaintiff's title by objections quite beside the merits as between these parties. These objections were based on alleged differences between the Ecclesiastical position of some of the plaintiff's predecessors, who were Vicars Apostolic, and others who were Vicars General. The Concordat of 1857 gives an answer to these objections. But even without it, the substance of the plaintiff's claim is made out; and it is clear that the appointments have been made by the chief local dignitary of the Roman Catholic Church for the time being, which the plaintiff is at the present time.

"We think that the plaintiff's right to make these appointments is supported, not only by the Law of Prescription, but also by the principle, that when the Court has to direct what shall be the management of a religious institution, it will, in the absence of express proof

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of the founder's intentions, look to what has been the usage of the congregation and ministers and others officially interested in the subject; and the Court will, in the absence of any proof to the contrary, presume that such usage has been in conformity with the original design.

"We therefore affirm the first part of the District Court Judge's Judgment, which is in favour of the plaintiff, as to the right of appointment.

"With regard to the temporalities, the District Court Judge has directed that they shall be vested in certain trustees. No party to the suit asked the Judge to decree this, and he has given no adjudication on the issues raised as to the property in the temporalities.

"Both the parties now before the Court have appealed upon this part of the judgment; and it must be *set aside*.

"It appears to us, that the evidence shows the property in the temporalities to be in the priest appointed by the plaintiff to officiate in the Church. This point is not so clear as the other; but a careful examination of the evidence leads us to think that the proprietary right is in the priest, rather than in the plaintiff, who appoints the priest. We think that the defendants have entirely failed to make out their allegation of the proprietary right being in the congregation's trustees.

"There are numerous witnesses called on the plaintiff's side, who speak distinctly to the constant exercise of the proprietary right by the priests. We do not think that this is overborne by the evidence, that on one occasion the bishop, at the request of the congregation, appointed trustees to manage the revenues, who only acted for a few months. Nor do we attach much weight to the priest's accounts being shown to the people as well as to the bishop. It is to be remembered that the revenues of this Church consist almost, if not altogether, of voluntary contributions. The fish-rent is a purely voluntary contribution. It is perfectly natural that the Ecclesiastical rulers of the Church should seek to keep the good opinion of the congregation; and above all else, care to satisfy them that the money which the congregation contributed was properly spent and honestly accounted for. Nor is there much in the fact that the

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congregation were liberal enough to rebuild the church, when the priest thought that a repair would be enough. The priest evidently consented to avail himself of the congregation's liberality; and it is in our own judgment clear that it was the priest who ordered and directed the rebuilding.

"The fact of the priest showing his accounts to the bishop, and evidently deferring greatly in all matters to the bishop's opinion, does not, we think, show the proprietary right to be in the bishop, rather than in the priest. It is to be remembered that the priest is not appointed for life, or for any term certain, but can be changed at the bishop's discretion. It seems to us natural that the bishop should watch over the management of the temporalities by the priest for the time being, and that the priest should seek to be on good terms with the bishop, without our holding that the bishop had the proprietary right, as well as the right of appointment.

"No evidence having been given about the alleged movables, or as to damages, no adjudication on those heads was necessary.

"Judgment for plaintiff to stand, but to be amended as follows:—

"1.—It is decreed, that the plaintiff, as pro-administrator of the Southern Vicariate of Ceylon, be declared, and he is hereby declared, to be entitled to appoint from time to time as may be needful, Roman Catholic priest, or priests, to officiate in the Roman Catholic church of Doowe in the Libel mentioned.

"2.—That the said church and premises (excepting the movables) in the Libel mentioned are hereby declared to be the lawful property of the officiating priest for the time being so appointed by the plaintiff as aforesaid; such church and premises to be held by the said officiating priest in trust for religious purposes only, including the maintenance and repair of the said church, and other similar matters connected therewith.

"3.—That such officiating priest, so appointed as aforesaid, be restored and quieted in possession of the said church and premises.

"Each party to bear his or their own costs."

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SUPREME COURT.

July 2, 1867. D. C. Galle, 23,466.

In this case, which arose out of a dispute between parties of the Mahomedan creed, the Supreme Court pronounced a Judgment that the Civil Courts should not interfere in matters purely Ecclesiastical. The main facts are recited in the

JUDGMENT.

"A Mahomedan woman sued the defendant, a Mahomedan priest, for damages for failing to attend at the burial of her child, and to perform the usual ceremonies and rites, although notice had been given him to attend. The child was not born in wedlock; and, therefore, according to Mahomedan usages, the priest was not bound to attend the burial; but the plaintiff contends that, inasmuch as she was chastised under the directions of the priest after the child's birth, the effect of that chastisement was to purify her, and to re-admit her to all the privileges of a Mahomedan woman. The dispute appears to the Supreme Court to be altogether of an Ecclesiastical nature. No doubt, in the words of Sir W. Norris, we are bound 'by law to protect all classes of the people in the free and undisturbed exercise of their religious rites and ceremonies;' but on the other hand, as is laid down in the same Judgment by the same high authority, 'if the inquiry be of a purely Ecclesiastical nature, it certainly is not the business of this or any other Court of Justice to decide such matters.' (See Sir C. Marshall, p. 657.) We would remark that in this case there was no denial of sepulture. The body was buried in the graveyard.

"In the case of King *v.* Coleridge, 8 B. and A., p. 806, it was held that the mode of burying the dead is a matter of Ecclesiastical cognizance, and the Court refused a mandamus to bury in a particular manner. It was stated by Holroyd, J. :—'It seems to me that the mode of burial is as much a matter of Ecclesiastical cognizance as the

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prayers that are to be read or the ceremonies that are to be used at the funeral.'

"We are accordingly of opinion that the Judgment of the District Court in favour of the Plaintiff is erroneous, and that it should be set aside."

IN THE SUPREME COURT.

November 30, 1839. D. C. Matara. 22,946.

In this case the Supreme Court decided respecting Buddhist priests and Buddhist temple lands as follows :—

"It is beyond the power of an incumbent of a temple to alienate the property of that temple to another, or to make any compromise by which the rights of the temple may be affected."

See further as to Ecclesiastical Law, the next title, and see also titles JURISDICTION, PERPETUITY.

ENGLISH LAW, DUTCH LAW, COLONIAL LAW.

Under this composite heading we shall have to consider recent authorities as to the legislative power of the Crown in Ceylon, as to the extent to which Roman-Dutch law was introduced when the Dutch colonized Ceylon, and as to the extent to which English law has been introduced here directly or indirectly. The first, and by far the most important, of these topics has been already adverted to, when we were dealing with ecclesiastical matters. As we have seen, one of the propositions maintained before the Privy Council in several late ecclesiastical cases (though not formally adjudicated on in any of them) was the proposition that the power of the Crown, when acting by prerogative only, and not by virtue of statutes passed by the Imperial Parliament, is not unlimited even over Crown colonies, but is subject to certain exceptions and restrictions.

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This topic (the importance of which it is hardly possible to exaggerate, either in a constitutional point of view, or with reference to practical legislation and interpretation of law in Ceylon) has been lately before the English tribunals in other cases besides the ecclesiastical controversies spoken of in the last article. The case of Phillips *v.* Eyre (Law Rep., 6 Q. B., p. 1) is one of the most instructive. I shall also have occasion to refer to the still more recent case of Attorney-General of Hong-Kong *v.* Sing (5 P. C., 190.)

No one disputes the plenary paramount power of Queen, Lords, and Commons, as constituting the Imperial Parliament of Great Britain and Ireland, to make whatever laws such Parliament pleases, for any or every part of the dominions of the British Crown. And there is no question, which our present duty requires us to discuss, as to the constitutional status of a colony which has been originally settled by Englishmen, or which has once received the right of having an independent legislature of its own. We have to look to the case of Crown colonies only, which have become parts of the Queen's dominions by conquest or cession, and which continue to be Crown colonies, inasmuch as the Crown has never granted them a local legislature, with an assembly, of which at least a majority is elected by the colonists, so as to entitle it to be called a representative body. This is the definition of a colonial representative legislature given by the late statute, 28 & 29 Vict. 63.

This (which is entitled an Act to remove doubts as to the validity of Colonial Laws) is a very important statute. The following are the portions applicable to Crown Colonies:—

"The term 'Colony' shall include all of her Majesty's possessions abroad in which there shall exist a Legislature, as hereinafter defined.

"The terms 'Legislature' and 'Colonial Legislature,' shall severally signify the authority, other than the Imperial Parliament or her Majesty in Council, competent to make laws for any colony.

"The term 'Colonial Law' shall include laws made for any colony, either by such Legislature as aforesaid, or by her Majesty in Council.

"An Act of Parliament, or any provision thereof, shall in con-

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struing this Act be said to extend to any colony when it is made applicable to such colony by the express words, or necessary intendment of any Act of Parliament.

"Any Colonial Law which is or shall be in any respect repugnant to the provisions of any Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

"No Colonial Law shall be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid.

"Every Colonial Legislature shall have and be deemed at all times to have had full power within its jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein."

Many constitutional matters of deep interest were debated, and several were decided, in Phillips *v.* Eyre. The immediate matter before the Court was whether an action in an English Court for assault in Jamaica was barred by an Act of Indemnity passed *ex post facto* by the Legislative Council of Jamaica, and confirmed by the Crown. The whole of the Judgment of the Court of Error, delivered by Willes, J., deserves careful perusal. I here advert to those parts only which bear upon our present topic; and, in reviewing them, valuable light may be gained from the observations made by Mellish, L. J., in the subsequent Privy Council case of The Attorney-General of Hong-Kong *v.* Sing, in which Phillips *v.* Eyre was considered. The first passage of Willes, J.'s Judgment, which I will quote, is as follows: "A confirmed act of the local legislature lawfully constituted, whether in a settled or conquered colony, *as to matters within its competence*, and the limits of its jurisdiction, has the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament."

The question still remains, "What matters are 'within the com-

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petence' of a subordinate legislature in a Crown colony, and of the Crown itself?"

A subsequent part of Willes, J.'s Judgment bears upon this question. I mean the part (p. 23 of the report) where he deals with the objection that the colonial law under consideration "was contrary to natural justice, as being retrospective in its character, and taking away a right of action once vested." The words of Willes, J., might of themselves seem to imply that this objection was considered as bearing upon the law under consideration, only when a foreign tribunal was asked to enforce it But the observations of Mellish, L. J., in the Hong-Kong case, show that the Court of Error treated the objection as going to the root of the local law which was discussed; and as denying the power of the Crown to legislate, either directly or indirectly, contrary to the principles of natural justice, or contrary to the fundamental principles of British Government. Willes, J., in his Judgment distinguishes statutes of indemnity from other *ex post facto* laws, which attach a new character of criminality to actions gone by. Valuable American authorities are cited. My limits allow me only to state generally that the validity of the Jamaica Act of Indemnity to bar the action in England was recognized by the Court of Error in Phillips *v.* Eyre, as it had been previously by the Court of Queen's Bench. (See Law Rep., 4 Q. B., p. 225.)

I now will draw attention to the important dictum of Mellish, L. J., in Attorney-General of Hong-Kong *v.* Sing (Law Rep., 5 P. C., 190), that a declaratory statute passed by the legislature of a Crown colony cannot invalidate a formal decision already given by a competent Court. Lord Mellish, addressing the counsel for the appellant, said: "I have an impression that a Crown colony has not jurisdiction to make such a law. It was held in Phillips *v.* Eyre (Law Rep., 6 Q. B., 1) that it can pass acts for indemnifying people; but I think everybody was of opinion on that occasion that they clearly could not have passed an act of attainder; and this is an act of attainder on your hypothesis."

The Crown officers (who were arguing for the appellant) said on this:—

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"This is a Crown colony, and the Queen can give any powers.

Mellish, L. J., replied, "She cannot give a power which deprives English subjects of their rights. She cannot give a power, for instance, to make torture lawful in Hong Kong."

The Crown counsel rejoined on this: "We are not prepared to say she cannot, unless you find an act of the Imperial legislature cutting short the power."

The allusion to torture in this important dialogue between the Court and the Crown counsel had of course reference to General Picton's case, reported in Vol. XX. of the State Trials, where it was argued that a law to inflict torture ceased to be valid immediately on the country becoming British territory. General Picton's case never received any formal adjudication. And, as we have just seen, Crown lawyers may deem it to be their duty to refrain from admitting that there are limits to the Crown's right of legislation for Crown colonies. But those who read attentively Mr. Nolan's argument in Picton's case (the report of which begins at p. 741 of the 20th Vol. of the State Trials), and the authorities cited by him, will probably concur in the view now generally taken of the subject, that "laws contrary to the fundamental principles of the British constitution cease at the moment of conquest." (Forsyth, cases in Constitutional Law, p. 13.)

This subject is of such importance in practice, as well as in theory, that I shall briefly refer to some of the older authorities. I call it important in practice, because not only those who propose and who vote for laws here, but those also who administer justice here, are (if this doctrine as to constitutional limitations of Crown power is correct) bound legally, as well as morally, to have regard to the humane rules which have been established as fundamental principles in England. Especially there is to be regarded the maxim of the Bill of Rights that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This means "cruel and unusual" with reference to general practice and public feeling in modern times. It applies also to sentences which are given in nominally civil proceedings, but which are substantially criminal sentences, such as would be the

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imposition of an excessive fine, or excessive term of imprisonment for contempt, or a decree that a Defendant in a libel case should go through a Palinode of a very degrading and unnecessarily offensive character.

The great authority as to the Crown power over Crown colonies is Lord Mansfield's justly celebrated Judgment in Campbell *v.* Hall (Cowper's Reports, 209; and State Trials, Vol. 20; p. 239, Ed. 1817). The report in the State Trials is by far the fullest, and appears to be most accurate. Lord Mansfield there lays down certain propositions of colonial law, of which I will refer generally to the 1st, 2nd, 3rd, 4th, and 5th (they will be found in my treatise on "The Constitutions of the Britannic Empire," p. 166), and I will set out the 6th in Lord Mansfield's own words, which are as follows: The 6th and last proposition is, "That if the King (and, when I say the King, I always mean the King without the concurrence of Parliament), has a power to alter the old and introduce new laws in a conquered country, this legislation being subordinate—that is, subordinate to his own authority in Parliament—he cannot make any new change contrary *to fundamental principles*, he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament; or give him privileges exclusive of his other subjects; and so in many other instances which might be put."

I will advert to another authority, which tends to show that the Crown's power of re-enacting old laws or introducing new ones in a Crown colony is not unlimited, to the case of Fabrigas *v.* Mostyn, in 11 State Trials, 185, being a report of that case at a different stage of the proceedings from those reported in Cowper, 161. In the argument before De Gray, L. C. J., reported in the State Trials, the Lord Chief Justice puts the case of torture; and says, "The torture, as well as banishment, was the old law of Minorca, which fell, of course, when it came into our possession. . . . . . Every English governor knew he could not inflict the torture: the constitution of this country put an end to that idea."

This is cited by Mr. Nolan in the powerful and learned argu-

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ment in Picton's case, of which I have already spoken. Other authorities will be found there, which I have not space to particularize. I will refer also generally to the judgment of Lord Stowell in Ruding *v.* Smith (2 Hagg., C. R. 380), as cited by Mr. Forsyth at p. 13 of his "Constitutional Cases."

Still, however fully the principle may be conceded that there are limits on the Crown's power to uphold or introduce laws in a Crown colony by mere force of the Crown's Prerogative, it may probably be necessary in future cases to consider carefully the full effect of the new statute, 28 & 29 Vict., c. 63, the provisions of which have been already cited. It is fairly arguable that the authority of the Imperial legislature is now given to all legislation in and for Crown colonies, which is effected either by Ordinance passed by the local legislatures and not disallowed by the Crown, or by Order of her Majesty in Council, except in such cases only where the local ordinance or the Order in Council expressly contravenes the provisions of an Imperial statute purporting to embrace the colonies in its operation, or necessarily extending to them by reason of its subject matter. It is true that this view of the new statute was not taken in the Hong Kong case to which I have referred; but the matter was not then under the regular consideration of the Court. I do not venture on any expression of opinion, beyond remarking that there is much wisdom in the maxims of Roman jurisprudence, by which, whenever law is doubtful, the "Benignior Interpretatio" is preferred, and "Æquitas" is "maxime spectanda."

I will now pass on to another branch of our subject; and draw attention to recent decisions which throw light on the often-occurring questions of what amount of Roman-Dutch law prevailed in Ceylon, when the British became possessors of territories formerly under Dutch rule; and also on the general principle of how far the laws of civilized European settlers must be modified when they are applied to natives of very different race and creed.

First with respect to the extent of Roman-Dutch law.

The case of Thurburn *v.* Stewart (7 Moore, P. C. C., N. S.) before the Privy Council, established the doctrine that in ascertaining what portions of the law of Holland the Dutch settlers brought

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with them to their colony at the Cape, the same rules must be used, which have been established in the numerous judicial investigations that have become necessary as to the amount of English law which has been brought by English settlers to English colonies. The circumstances of Dutch colonization in Ceylon are so closely analogous to those of Dutch colonization at the Cape, that Thurburn *v.* Stewart is to be regarded as a clear authority as to "the laws and institutions of the ancient Government of the United Provinces," which the British found subsisting here near the close of the last century, when Ceylon became a Crown colony of the British by conquest and cession. Full comments on these topics will be found in the Supreme Court judgments in the Mortmain case, reported by Mr. Grenier in his 2nd volume, p. 69, and in the Plumbago case reported by him at the end of the same volume.

There has been very lately before the Privy Council a case in appeal from the Straits Settlement in its division of Penang, in which this and other matters of great interest were discussed, and in which the Privy Council adopted the law laid down by the Chief Justice of the Straits Settlement in a previous judgment. In the case of Yeap Cheah Neo *v.* Ong Cheng Neo (Law Rep., vol. vi., P.C. 381), after pointing out that for the purposes of that case it was immaterial whether Penang was to be regarded as ceded or as newly settled territory, the Court proceeded as follows: "It has been held that statutes relating to matters and exigencies peculiar to the local condition of England, and which are not adapted to the circumstances of a particular colony, do not become a part of its law, although the general law of England may be introduced into it. Thus it was held by Sir W. Grant that the Statute of Mortmain was not of force in the island of Grenada. The subject is discussed at large in Mayor of Lyons *v* East India Company" (1 Moore, P. C. 175).

Their Lordships then proceeded to consider whether the devises in the case before them amounted to devises in perpetuity, so as to be void under the law of Penang, as well as under English law.

The Court followed the previous decisions of the English Courts, in holding that the Statutes of Mortmain and against superstitious uses did not apply to the colony of Hong Kong; but they held that the

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English common law against perpetuities, being a matter of public general policy, did apply to the colony; and that a devise was void, which infringed the English law as against perpetuities, and did not come within the exception made by English law in favour of charitable uses. The Court stated that they agreed with the judgment of Sir Benson Maxwell, Chief Justice, in his judgment in the case of Choah Choon Nish *v.* Spottiswoode, reported in Wood's Oriental Cases. They used the following words: "Their Lordships' decision on the bequest they have last considered, accords with the judgment of Sir P. Benson Maxwell in the case already referred to. It appears to them that in that judgment the rules of English law, and the degree in which, in cases of this kind, regard should be had to the habits and usages of the various peoples residing in the colony, are correctly stated."

Through the kindness of my friend Sir Benson Maxwell, I have been favoured with a loan of "Wood's Oriental Cases," containing the judgment which the Judicial Committee of the Privy Council has thus eulogized and adopted. I believe that there is no other copy of this book of Oriental Reports to be obtained in Europe, or anywhere except in the Straits Settlement, and I shall therefore quote the more freely (but with some abridgment) from the parts which throw most light upon our subject.

"The question is whether this devise or bequest is valid.

"No difficulty arises in respect of the Mortmain Act; for that Act is not law here (Attorney-General *v.* Stewart, 2 Mer. 163), and consequently lands may be devised for any uses, which are recognized by our law as charitable. The term charity receives, in questions of this kind, a peculiar but wide meaning; and although the Statute of Charitable Uses may not be law here, I think that it may be laid down that not only the various objects mentioned in its preamble—such as gifts and devises for poor people, for sick and maimed soldiers and sailors, for schools, education, and learning, for the repair of churches, bridges, and other public works, and other purposes, which it is unnecessary to enumerate—but also, as in England, all objects having any analogy to such uses, would be regarded as charitable. Lord Cranworth said, in the case of the

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University of London *v.* Yarrow (26 L. J., ch. 430), that every object beneficial to the community is a charity in the legal sense of the term; it is wide enough, at all events, to comprise gifts for the support and diffusion among men of every kind of religion, provided it be not immoral or cruel, or otherwise against public policy; and I do not doubt that the validity of a bequest for the maintenance or propagation of any Oriental creed, or for building a temple or mosque, or for setting up or adorning an idol (as in an Indian case mentioned by Mr. Woods), would be determined in this Court on the same principle, and with the widest regard to the religious opinions and feeling of the various Eastern races established here. I make these remarks, not because they are necessary to the decision of the case, but to guard against my present judgment being misunderstood, as questioning the validity of any Eastern charity. In the case before me, however, the devise is plainly not charitable; it has not any charitable object whatever, whether general or special, in the sense of a benefit to any living being. Its object is solely the benefit of the testator himself.

"But if the devise is not a charity, on what ground can it be supported? It is clear that in England it would be void. All such legacies, whether they be designated superstitious or otherwise, are void upon another ground, viz., that not being for a public or quasi-public benefit, they attempt to create a perpetuity. The law of England, as I understand it, does not allow the owner of property, whether real or personal, to dispose of it for all future ages as he desires, except in one case, and that is when his object is of some general benefit to man, or 'charitable,' in the legal sense of the word. He may not settle either money or land on his children or descendants, or other persons, except for the limited period of lives in being and twenty-one years beyond: still less may he devote his property in perpetuity for his own supposed benefit, or for any other purpose not charitable.

"In this Colony, so much of the law of England as was in existence when it was imported here, and is of a general (and not merely local) policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject,

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in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them. Thus, in questions of marriage and divorce, it would be impossible to apply our law to Mahometans, Hindoos, and Buddhists, without the most absurd and intolerable consequences, and it is therefore held inapplicable to them. Tested by these principles, is the rule of English law which prohibits perpetuities, either of local policy unsuited to the infant settlement, or inapplicable by reason of the harshness of its operation to people of Oriental races and creeds? The rule is not founded by any statute, but is a rule of the common law, of great economical importance, and as well fitted for a young and small community as a great state; for both are interested in keeping property, whether real or personal, as completely as possible an object of commerce, and a productive instrument of the community at large. I am, therefore, of opinion that in this Colony it is not lawful to tie up property, and take it out of circulation for all ages, for any purpose not of any real or imaginary advantage to any portion of the community; and if the rule against perpetuities be law here, it might suffice to add that, as the property in question in this present case is chiefly if not wholly real, the rule must apply to it invariably, whatever may be the creed, race, or nationality of its owner, on the ground mentioned in Story, Conf. 4, sect. 440, that it is out of the question to subject property of that nature to any but the local law, and thus introduce in our own jurisprudence the innumerable diversities of foreign laws. But I am unable to see any reason for holding that the rule against perpetuities is less applicable to property in the hands of a Chinese and a Buddhist, than to property in the hands of an Englishman and a Christian; and I think that the former has no power to devise or bequeath property to be devoted, '*in sæcula sæculorum*,' to any purpose not charitable.

"For these reasons, I think this devise void, and that the property is distributable among the testator's next-of-kin living at his death."

Should cases like that of the Wolfendahl Church (reported in 2 Grenier) come before the Ceylon tribunals; and should bequests be impeached, not as was then done, on objections based on Mort-

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main law, or on old Roman law as to "Illicita Collegia," or on modern Dutch Anti-Catholic law, but on the law respecting perpetuities and charitable uses, it will be material to ascertain carefully what similitude or what diversity exists on these subjects between English law, which is founded on the English common law, and the law of Holland, which was founded on the Corpus Juris Civilis.

Several Ordinances passed in this Colony since 1860, and confirmed by the Crown, have brought many important subjects under English law, which previously had been dealt with here according to Roman-Dutch law. Among these may be mentioned the law of partnerships, joint stock companies, corporations, banks and banking, principals and agents, carriers by land, life and fire insurances. These (and others) are to be added to the list given in Ordinance No. 5, 1852.

The decision of the Privy Council in Hadden *v.* Gavin that the English law as to executors and administrators is fully established here, has been quoted already, under title "Administrator."

The decision of the Supreme Court as to the operation here of the English Mercantile Marine Act will be found in these Reports in the Colombo Harbour case, under title "Jurisdiction."

Comments on the importance of the Writ of Certiorari, which the Supreme Court has been empowered to issue by the Administration of Justice Ordinance, 1868, will be found in a case reported by Mr. Grenier, vol. 2, p. 125, D. C., of his Reports.

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