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THE CEYLON
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Vol. VII. (New Series) NOVEMBER, 1925. Part II.

WRITERS ON THE ROMAN-DUTCH LAW, PARTICULARLY GROTIUS.

By R. W. Lee, Rhodes Professor of Roman-Dutch Law, and Fellow of All Souls College, Oxford.

(Specially Contributed to the "Ceylon Law Recorder.")

In my last article I spoke of the origins of Roman-Dutch Law in the Netherlands. I go on to speak of the principal writers from whom we derive our knowledge of this law, directing attention more particularly to those who are most frequently consulted as authorities at the present day. Much interesting information upon this topic will be found in Mr. Justice Wessels' valuable *History of the Roman-Dutch Law* (Grahamstown, Cape Colony, 1908) and in an extensive review of this work by Mr. Justice Kotzé in Vols. xxv-xxvii of *The Southern African Law Journal.*

The writers of the 15th and 16th centuries have receded far into the background and are seldom consulted. It is sufficient to mention the names of Nicolaus Everardus, Joost Van Damhouder and Paul Merula. Everard may be regarded as the earliest writer on the Roman-Dutch Law, properly so called, i. e. after the reception. He was the first President of the Supreme Council of Mechlin (Lee *Introduction to Roman-Dutch Law*, 2nd ed. p. 5.) He was one of the earliest civilians to shake off the fetters of the Roman Law of contract and to recognize that a pact may be actionable, although it is not clothed in any of the vestments of the Roman Law (Kotzé in *S. A. L. J.* Vol. xxvii, p. 31). Damhouder, whose *floruit* was half a century later than Everard's was the author of works on Criminal and Civil Practice. The original edition of the first of these is embellished with wood-cuts figuring the various crimes known to the law in a manner which is sometimes more amusing than edifying. As to its substance, it has been said that he incorporated practically the whole of the work of an earlier criminologist Wielant (which was not printed until 1872, but was known to Damhouder) "without shame and without

acknowledgment." (*Law Quarterly Review*, Jan. 1925, p. 40.) Merula was the author of a work on Civil Procedure published in 1592. This remained a legal classic until the end of the 18th century, when it was edited and expanded by Van der Linden and another contemporary jurist.

From these old writers we turn to the greatest name in the history of Roman-Dutch Law namely Huig de Groot, better known as Hugo Grotius. This is not the place to recall the life-story of this remarkable man; remarkable as classical scholar, theologian, philosopher, statesman, poet, dramatist, lawyer, and in how many capacities besides! His great treatise *De Jure Belli ac Pacis*, published in 1625, the tercentenary of which we are now celebrating, has justly entitled him to be regarded as the father of our modern system of public international law. Everyone has heard of his imprisonment in the Castle of Loevestelin and of his escape in a chest supposed to contain books. This happy idea was inspired and carried out by the resource and devotion of his wife Maria Reigersbergen and a clever servant girl Elsje Houwening. The chest is stated to have been two inches short of four feet in length, and Grotius was above the middle height. Was there ever such a *multum in parvo* since the world began! His imprisonment lasted from 5th June, 1619 to 22nd March, 1621. During this time besides other literary activities he wrote a book which may safely be described as the most important contribution ever made to the literature of Roman-Dutch Law, viz., his famous *Introduction to the Jurisprudence of Holland*, or (as it is usually, but inaccurately translated) *to Dutch Jurisprudence*. As a work of systematisation it is beyond praise. It was not designed for publication being intended for the instruction of the author's sons. But, as often happens in such cases, the fear of piracy compelled the writer to give his work to the public in 1631. In this same year it went into five editions, authorised and pirated. The first annotated edition with notes in Dutch by Groenewegen van der Made appeared in 1644. In 1765 Wilhelm Schorer, President of the Supreme Court of Zeeland, added en extensive commentary in Latin. This is the latest formal commentary to be published. But apart from commentaries on the text Grotius may justly be considered to have inspired and rendered possible the *Roman-Dutch Law* of Van Leeuwen, published in 1664. His work has also been the guiding light of academic study. Scheltinga, a Professor at the University of Leyden, lectured upon it in the middle, and van der Keessel, another Leyden professor, at the end of the 18th century. These lectures are still sometimes procurable in manuscript, but have never been published. Van der Keessel's *Theses Selectae*, which have been translated into English by the Ceylon Advocate Lorensz, contain in abbreviated form the substance of the Professor's lectures. The *Introduction* of Grotius has been twice translated into English, first by Charles Herbert, a British Guiana Advocate (1845), and more recently by Sir Andreas Massdorp, late Chief Justice of the Orange Free State. Neither of these versions is free from inaccuracies. In all the later editions the text of Grotius is divided into numbered paragraphs. In the editions published before 1727 this was not so. It is important to bear this in mind when one has occasion to look up a passage in Grotius cited by Van Leeuwen or Voet. I have explained the methods of citation adopted by these writers in a note to be found on

p. 16 of the new edition of my *Introduction to Roman-Dutch Law.*

Space does not permit me to do more than make passing reference to some other authors and their works I have spoken of Van Leeuwen's *Roomsch-Hollandsch Recht*. Another work from the same busy hand is a treatise in Latin known as *Censura Forensis.* A South African translation of this work was designed, but only partially carried out, and the stock (I believe) was destroyed by fire. Practically, therefore no translation is procurable. This, perhaps' is the reason why this work, as it seems' has los something of its former vogue. A much slighter work but one which has been held in esteem for more than a century is Van der Linden's *Handbook* (published in 1806.) It has been translated by Sir Henry Juta, and the parts which are of present interest also by Mr. G. T. Morice. Mention may also be made of *The Opinions of Grotius as contained in the Hollandsche Consultatien* translated and annotated by D. P. de Bruyn (London,—Stevens and Haynes, 1894.) Of Johannes Voet and his famous commentary upon the Pandects I shall take occasion to speak in a future article.

THE DRAFT MORTGAGE ORDINANCE.

An Ordinance to amend and consolidate the Laws relating to Mortgages is under consideration and it is intended that the new Ordinance should come into operation on 1st January, 1926. The present draft reproduces under Chapter IV the law in respect of Conventional Mortgages and Bills of Sale as set out in Ordinance No. 8 of 1871 and No. 21 of 1871 without amendment. It also reproduces the provisions of Ordinance No. 8 of 1918 but with an important extension. Under Chapter III Mortgages to secure Future Advances are effective to the full extent of the charge intended to be created irrespective of whether the property secured is *movable* or immovable. Ordinance No. 8 of 1918 affected only mortgages of immovable property.

The primary object, however, of the intended legislation is "to remedy certain difficulties which have arisen under Chapter XLVI of the Civil Procedure Code." In order to effect this the New Ordinance repeals the entirety of Chapter XLVI and Section 201 of the Code and substitutes in their place its own Chapter II. It is impossible to say on a consideration of the present draft that this object has been attained. One leaves it with the feeling that although the offending limb has been cut off, its substitute is likely to bring on the pain again. When De Sampayo, J, concurred with his brothers in *Suppramaniam Chetty v. Weerasekera* [1] and sacrificed his better judgment as expressed in *Bodiya v. Hawadiya* [2] it was because he felt that a settled state of the law was at times more advantageous to the country than even a correct decision.

It cannot be said that our Courts have not, though with considerable difficulty, enunciated certain definite principles in the construction of Chapter XLVI. The trend of authorities from *Punchi Kira v. Sangu* [3] is that the Roman-Dutch Law as to procedure is superseded by the Code and that a mortgagee is obliged to combine in **one action** his hypothecary claim against the land as well as his personal claim against

1 (1918) 20 N. L. R. 170
2 (1913) 16 N. L. R. 463
3 (1900) 4 N. L. R. 42

his debtor. The effect of the provisions of Sections 640, 641 and 642 of the Code may be considered as fairly settled by the view taken by Three Judges in the case of *Thambaiyar v. Paramasamy Aiyar* [4] where they laid down that a mortgagee must **sue** the *mortgagor* whether he is in possession or not and in the event of his death, his *executor or administrator* if the property mortgaged amounts to or exceeds Rs. 1000/- in value and his *legal representative* if the property is under Rs. 1,000/- but *never his heirs*. The requirements of Section 643 and 644 and of the amendment of the Land Registration Ordinance providing for the registration of a *lis pendens* were crystallised by Bertram, C. J., in the recent case of *Saravanamuttu v. Sollamuttu* [5] when he said "In order fully to protect himself against all eventualities, the mortgagee has to **register** first of all his *mortgage*, secondly his *address*, thirdly, when he sues to enforce his mortgage, his action as a *lis pendens*, fourthly his *decree* when he obtains it, and finally his Fiscal's *Transfer*"—One may add, and give **notice** of the action to every grantee, mortgagee, lessee or other *puisne incumbrancer who* has (a) a subsequent deed and has (b) registered his deed and (c) his address and has (d) notified the mortgagee of the same.

These then are the terrors that beset a mortgagee when he winds his way along the treacherous paths of Chapter XLVI! All the requirements as thus stated are so simple and capable of compliance even by a Proctor's clerk that one wonders whether the difficulties are not more in the nature of myth than of fact, whether the fault does not lie with the negligence of some Notaries and Proctors than with the framers of this much maligned chapter. "It is the business" continued the learned Judge, "of those who advise him (the mortgagee) to see that these things are done. If he fails to do any one of them, he has to depend upon the ingenuity of Counsel to rescue him from what in this respect appears to be *the inveterate negligence of Notaries and Proctors*." Inasmuch as the mortgage still remains the most popular form of investment in this country one may in the manner of Dean Swift suggest that the Registrar of the Supreme Court should issue to every Proctor and Notary together with his certificate a Tabular Statement of these duties with directions that it should be framed and hung up in a conspicuous place in his office and perused and checked every time he attests or sues upon a mortgage bond. This would mean only a slight amendment to Section 1 of Ordinance No. 12 of 1848 touching the admission of Advocates and Proctors and, but that it may be treated as a legal joke, it may dispense with the necessity of further mortgage legislation and secure the peaceful repose of future mortgagees.

The difficulties in the law of mortgage have, in fact, arisen not from the nature of the requirements of the Civil Procedure Code but from an attempt to escape from the effect of non-compliance and to lay down with precision its consequences. The latter, too, have now taken definite form as a result of a few considered judgments. The main feature that emerges from them is the principle of **equitable relief.** A mortgagee may fail to avail himself of the privileges of Section 643 and 644 and of the registration of the *lis*. If he does so, the title based on a sale in execution of his decree may be defeated by a subsequent instrument but his money remains a charge on the land until

4 (1917) 19 N. L. R. 385
5 (1924) 6 Cey. Law Rec. 23

repayment. A secondary mortgage, however, is always a secondary mortgage and a party claiming rights thereunder cannot, in any event, claim priority over rights under a prior mortgage. This, in effect, is the result of *Moraes v. Nallan Chetty*, [6] *Krishnappa Chetty v. Horatala*, [7] *Anohamy v. Haniffa* [8] and *Saravanamuttu v. Sollamuttu*. [5] The way to this result was, indeed, arduous and one hears doubts and dissentient voices along the track. Learned Judges agree and disagree while one (*nefandum dictu !*) agrees with two others and for the same reasons while the two in question disagree and for different reasons. But out of this wood the principle of equitable relief stands out clear and affords a working basis for even a negligent Proctor and some consolation for the unfortunate mortgagee.

It remains to consider the provisions of the new Ordinance and their effect. Does Chapter II give effect to the established principles or, even if it does not, does it settle the law? The answer is in the negative. It takes away the restriction placed upon the mortgagee as to the number of actions but he brings more than one at his own risk as to costs. This removes a great hardship placed on a mortgagee and the proviso as to costs is a safeguard against abuse. It is also in accordance with the view taken by De Sampayo, J., in *Bodiya v. Hawadia* [2] and by Bertram, C. J., in *Moraes v. Nallan Chetty* [6] where he doubted that the effect of the Civil Procedure Code was to restrict the mortgagee to one action.

The Ordinance next proceeds to take away the definite provisions established by the Code or by decisions in respect of the parties who may be joined and substitutes therefor the terms "*necessary parties*" and persons who are "*not necessary parties.*" A *necessary party* is the mortgagor if he retains any interest in the property or is liable for the payment of any part of the debt, and every person who has *any* interest in the property or any mortgage over it to which the mortgage in suit has priority. In the two latter cases the test of time is the date of the registration of the *lis pendens*. There is the further restriction that if the person claims on an instrument *capable of registration* or on a grant of administration such instrument or grant should be registered before such date. In the case of an instrument executed on or after 1st January, 1926, such person must register a *document* containing his name, the nature of his interest and address and if the instrument was executed before 1st January, 1926, he may either do so or register his address under Section 643. All other persons are persons who are not necessary parties. It cannot by any means be said that this distinction is unambiguous or restricts the joinder to such persons as would be considered deserving notice of the action. "Necessity," it has been tritely said, "is the mother of invention" and only future decisions will show how far her domain extends. The situation, however, becomes acute when the slippery law of registration is invoked as an aid to the construction of necessity. The mortgagee might well offer another votive tablet to his patron god.

The distinction is without doubt unsatisfactory. It rips up the old question whether the heirs of a mortgagor may be sued and would seem to necessitate the administration of small estates when the amendment that is urgent is an extension of the value in

6 (1923) 4 Cey. Law Rec. 198
7 (1923) 25 N. L. R. 39
8 (1923) 5 Cey. Law Rec. 174
5 (1924) 6 Cey. Law Rec. 28
2 (1913) 16 N. L. R. 463
6 (1923) 4 Cey. Law Rec. 198

respect of which administration is necessary. And again, what is an instrument "capable" of registration. The word is more extensive than "requiring" registration and a party who does not register his instrument as it is not affected by the Land Registration Ordinance may wake up to find his rights wiped out by a prior mortgagee. The word *any* when used in statutes excludes limitation or qualification of any kind whatsoever and one sees a vision of a long line of necessary parties that would make even an industrious mortgagee cry, hold. enough !

The next difficulty arises by the extension of the date of intervention to the date of the confirmation of the sale and the right given to persons who are not necessary parties to intervene. Just as much as the Ordinance fails to make provision for the manner of the registration of the *document* referred to above, it fails to provide for confirmation of sales under a mortgage decree. Sales under the present law require no confirmation. The extension of the time to the date of confirmation of the sale takes away the binding effect of the decree and leaves the door open for dilatory pleas.

The other provisions of Chapter II are more or less subsidiary. Section 7 gives effect to the prin iple of equitable relief. Sections 8 and 9 empower the Court to insist on the registration of the *lis pendens* and the decree in a mortgage action and to defer the entering of the decree and the order to sell until certificates of registration are filed. The object of the Sections seems to be to protect a mortgagee against himself ! Section 10 takes away the effect of *Walker v. Modideen*, [9] the last horror, if, with all respect, it may so be termed, that made many a Proctor's hair stand on end. It enables the Court to give directions as to the manner and conduct of the sale even after decree and in the absence of directions provides that the provisions of Chapter XXII shall apply. It would be well, however, to validate even titles acquired prior to the Ordinance on sales held under the directions of the Court subsequent to the decree as the long established practice acquiesced in both by mortgagor and mortgagee was to obtain such directions later and the decision in *Walker v. Mohideen* [9] leaves the title to a large number of properties in suspense. It is to be hoped that the new Ordinance will be passed only after full consideration of the difficult problems that confront the legislature in its enactment ; for, we would rather bear the ills we have than fly to others that we know not of.

N. E. W.

THE PRIVY COUNCIL.

RULES AND ORDERS.

(Continued from Page viii.)

Non-Prosecution of Appeal.

34. *Dismissal of appeal where Appellant takes no steps in prosecution thereof.* Where an Appellant takes no step in prosecution of his Appeal within a period of four months from the date of the arrival of the Record in England in the case of an Appeal from a Court situate in any of the countries or places named in Schedule B hereto, or within a period of two months from the same date in the case of an Appeal from any other Court, the Registrar of the Privy Council shall, with all convenient speed, by letter notify the Registrar of the Court appealed from that the Appeal has not been prosecuted, and the Appeal shall thereupon stand

[9] (1924) 6 Cey. Law Rec. 47

dismissed for non-prosecution as from the date of the said letter without further order and a copy of the said letter shall be sent by the Registrar of the Privy Council to any Respondent who has entered an Appearance in the Appeal.

35. *Dismissal of appeal for non-prosecution after appellant's appearance and before lodgment of Petition of Appeal.* Where an appellant who has entered an appearance:—

(a) Fails to bespeak a copy of a written Record, in accordance with, and within the periods prescribed by Rule 22 ; or

(b) having bespoken such copy within the periods prescribed by Rule 22, fails thereafter to proceed with due diligence to take all such further steps as may be necessary for the purpose of completing the printing of the said Record ; or

(c) fails to lodge his Petition of Appeal within the periods respectively prescribed by Rule 29 ;

the Registrar of the Privy Council shall call upon the appellant to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar shall, with all convenient speed, by letter notify the Registrar of the Court appealed from that the Appeal has not been effectually prosecuted, and the Appeal shall thereupon stand dismissed for non-prosecution as from the date of the said letter without further order, and a copy of the said letter shall be sent by the Registrar of the Privy Council to all the parties who have entered an appearance in the Appeal.

36. *Dismissal of appeal for non-prosecution after lodgment of Petition of Appeal* : —Where an appellant, who has lodged his Petition of Appeal, fails thereafter to prosecute his appeal with due diligence, the Registrar of the Privy Council shall call upon him to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar shall issue summons to the appellant calling upon him to show cause before the Judicial Commi tee at a time to be named in the said summons why the appeal should not be dismissed for non-prosecution provided that no such summons shall be issued by the said Registrar before the expiration of one year from the date of the arrival of the Record in England. If the Respondent has entered an Appearance in the Appeal, the Registrar of the Privy Council shall send him a copy of the said summons, and the Respondent shall be entitled to be heard before the Judicial Committee in the matter of the said summons at the time named and to ask for his costs and such other relief as he may be advised. The Judicial Committee may, after considering the matter of the said summons, recommend to His Majesty the dismissal of the Appeal for non-prosecution, or give such other directions therein as the justice of the case may require.

37. *Restoring an Appeal dismissed for non-prosecution.* An Appellant whose Appeal has been dismissed for non-prosecution may present a Petition to His Majesty in Council praying that his Appeal may be restored.

(To be continued on Page xxviii.)

LAWYERS' BENEVOLENT ASSOCIATION.

A meeting of the Managing Committee of the above Association was held on October 28 in the

Chambers of the Attorney-General, the President of the Association.

There were present Mr. L. H. Elphinstone, K. C. Attorney-General, (in the chair), Mr. E. W. Jayewardene, K. C., Messrs. G. A. Wille, A. C. Abeywardene, J. T. Bartlett, N. K. Choksy, C. de Jong, O. A. Jayasekera, A. E Keuneman, Peri Sunderam, A. B. Tillekeratne, G. W. Prins, D. E. Wanigasooriya and G. E. G. Weerasinghe.

The Committee sanctioned the payment of a donation of Rs. 3,480 to the children of the late Mr. F. R. A. Pereira; as the children are minors, the share due to each of them to be deposited to his credit in the Ceylon Savings Bank.

Messrs. A. V. Pereira, S. E. Wijesooria, S. Siva Subramaniam and C. de Saram, Proctors, and Mr. C. J. C. Jansz, Advocate, were admitted as members. The applications of four members, who had lost membership through default in payment of their subscriptions, for re-admission, were allowed.

It was resolved that the rule passed at the last annual general meeting with reference to the debiting of a member's account with any commission charged by the Bank for collecting the amount of his cheque, do apply to all cheques, etc., received on and after October 1, 1925.

It was also resolved that the payment of a dividend out of the reserve fund, as recommended by the Auditor, be deferred till the fund wsa larger.

It was next resolved that moneys lying to the credit of members who had "lapsed" more than a year previously, be paid out to them.

In addition to the Treasurer and Secretary the following were authorised to sign cheques and endorse deposit receipts :—Mr. Allan Drieberg, K.C., a Vice-President, and Messrs. E. W. Jayewardene, K.C., and A. B. Tillekeratne, members of the Committee.

THE "MANUFACTURE" OF CRIMINALS.

Lord Hewart's View.

Lord Hewart, Lord Chief Justice, the principal speaker at the third day's public sitting of the International Prison Congress in the Imperial Institute, South Kensington, recently discussed the problem of "Alternatives to imprisonment."

Lord Hewart said that nothing was farther from his intention than to say anything disparaging about imprisonment itself. Prison was always running the risk of being judged by what were regarded as its failures; always in danger of being made famous by some notorious or frequent wrongdoer. The superficial criticism which resulted was doubly unfair, and, indeed, grotesque. It was unfair because the chief success of prison consisted in preventing people from becoming prisoners. It was unfair because with the prisoner himself the success of prison consisted precisely in this—that in relation to prison he was never heard of again. He went back to join the citizen body, and his association with prison was happily forgotten for ever.

It was easy for a judge or magistrate faced with the dreadful task of passing sentence to be impressed by the number and variety of the prisoner's previous convictions. The judge had not, and still less had the public, any such vivid reminder of the enormous number of those who after serving one term of imprisonment were never again in the hands of the police. Any fair estimate of the results achieved by prison must obviously take account not merely of particular instances, but of the total mass, especially when, as in these days, so much imagination, patience, insight, and devotion were happily applied to the noble work of helping the prisoner both in prison and after imprisonment.

A Grave Responsibility.

The question was whether prison might not be deliberately and carefully imited and curtailed by the adoption lf other methods in suitable cases. The best

alternative to imprisonment was to refrain from offences against the law; the worst alternative to imprisonment was to let the offender off. It was not suggested that the ends sought by imprisonment should be diminished, much less that they should be abandoned. Society had come more and more to recognise that it owed a duty not only to its common security but also to the individual offender himself.

Lord Hewart said they heard sometimes of what was called standardised sentences. "The standardisation of sentences means the abdication of the judge," declared Lord Hewart. "Nothing is more injurious to the public interests than the manufacture of criminals. It is not generally recognized that there are few more effectual ways of manufacturing criminals than to send young offenders unnecessarily to prison, where they may easily find themselves far more comfortable than they expected to be: where they may perhaps make acquaintance with men and methods likely to bring them to ruin, and where, after serving some short sentence they may abandon for ever their repugnance to prison and all that it involves. Grave, indeed, is the responsibility of those who otherwise than in a case of clear necessity send young youths or girls, or indeed any man or woman, to prison for the first time." (Cheers.)

Lord Hewart said the value of probation could hardly be exaggerated and its opportunities had by no means as yet been fully explored. He dealt with the provisions of the statute dealing with first offenders, and remarked that with such a law what mischievous nonsense it was to deplore the painful necessity, which did not exist, of sending youthful offenders to prison for trivial offences.

A Suggestion to Magistrates.

Although the Probation Act was now eighteen years old, he said, there were still many petty sessional divisions where no probation officer had yet been appointed. There was no reason whatever why any petty sessional division should be denied the advantages to be derived from a probation officer's services. He warned them against the temptation to become perfunctory, and urged the necessity for extreme care and patience in drawing up orders for probation. Magistrates would render a useful service if, when they released an offender on probation, they followed up the case and saw for themselves that the probationer was behaving himself and abiding by the conditions. He pointed to work possible for woman magistrates, and emphasised the importance of making the probationer realise that he was only released because it was believed that was the best way of enabling him to live down his offence.

Lord Hewart gave statistics showing that under the Borstal system 70 per cent. of the boys, and 80 per cent. of the girls never got into trouble again. He urged his hearers to put aside the heresy that there were some cases in which it might be right to consult the interests of the offender, and other cases in which it was necessary to consult the interests of the public.

"Upon any fair analysis," he added, "these interests are found to coincide." (Cheers.) The State might be compelled to be stern: it must not be cruel. It could not afford to be indifferent. By all means let them keep alive the feeling of terror in the contemplation of serious crime and its punishment, but let them at the same time resist the beginnings. Let then not forget that more than half of the uncharitable

judgments of the world were due to lack of imagination. Let them remember that magnanimity owed to prudence no account of her motives.

Mental Examination.

After a long discussion, the conference accepted the following resolution, passed by one of the sections :—

"It is necessary that accused as well a convicted offenders should be physically and mentally examined by specially qualified practitioners, and that the necessary services should be installed for this purpose in the institutions. Such a system would help to determine the biological and socialogical causes of criminality, and would suggest a suitable treatment for the individual effender."

Some of the delegates strongly objected to any interference with a prisoner before trial, but the president, Sir Evelyn Ruggles-Brise, assured the Congress that they had no desire to interfere with the ordinary procedure of criminal justice

Law Students' Magazine.

If there is variety in the current issue of the Law Students' Magazine there is also a good deal of vehemence. Two examples of the latter will convey some idea of the high seriousness with which the editor and his contributors have essayed their task. In an editorial on "The Council of Legal Education," there occurs the following passage : "Lectures are intended to aid the student to acquire a knowledge of law and the lecturers must aim at kindling the spark of legal talent in the minds of students. The lecturers have done very little in this direction in the past ; they evince very little interest in the students. They often come late and dictate stereotyped notes some of which are antiquated and suitable for students of law in England. If rising young lawyers with burning ambition in their hearts to be learned in the law are appointed as lecturers, the students will share the fruits of their studies." Having tilted at their own Gamaliels, the law students seek even bigger game. In an article on "Ceylonese and the Supreme Court Bench," a writer who signs himself "Justice" says, "The judges not recruited from the African Colonies will not know the Roman-Dutch Law—the common law of Ceylon—and they will have to study it after they assume duties. They will be learning the law at the expense of poor clients to whom justice will not be meted out. Our new Chief Justice is an example of such recruitment." In justice to the editor of the Law Students Magazine and his contributors, it must be mentioned that these blemishes, are overshadowed by much that is excellent in the publication. The variety of its contents may be gathered from the titles of some of the articles : "Conduct of Cases," "A Society of Proctors," "Prescription among Co-owners," "The Extreme Penalty of the Law," "How Ceylon can be Free," "Nationalism," "Legal Procedure in India" and a poem and a piece of music.

Present: Dalton, J. and
Schneider, J.

KALIMUTTU VS. MUTTUSAMY.

402 D.C. Chilaw 7306.

Decided: Sept. 22, 1925.

Trusts Ordinance of 1907, Section 102—Administration of Religious Trust—Undisputed incumbency of Temple by Kapurala for 25 years—Appointment of Successor—Validity of appointment—Trustee a Corporation Sole.

HELD:—It is not the duty of the Court to direct charity property to be employed in such a manner as it thinks it will be the most beneficial for public purposes, but to carry into effect the intentions expressed by the founders so far as those intentions are not inconsistent with any existing law. [*Attorney-General vs. Bourchett* (25 Beavan 116) followed.]

Hayley with *Tisseverasinghe* and *S. Rajaratnam* for appellant.

Balasingham with *Arul Anandam* for respondents.

Dalton, J:—This is an action by eight persons as plaintiffs, under the provisions of Section 102 of the Trusts Oridnance, 1917, asking for an order of the Court:—

(1) Directing the defendant to account for all properties belonging to the Munnessaram temple since 1912 to the date of the action, and to bring into Court all moneys unaccounted for and remaining in his hands;

(2) Restraining the defendant by injunction from receiving and appropriating the 'undial' offerings during the annual perahera festival, and any income derived from the temporalities;

(3) Appointing a person to act as receiver *pendente lite*;

(4) Directing the appointment of a board of trustees; and

(5) Settling a scheme for the management of the temporalities of the said temple and trust.

The defendant, it is sufficient to say at present, is the incumbent of the temple. As will appear later he claims to be more than that. The plaintiffs claim to be person "interested," within the meaning of Section 102 (2) of the Ordinance, in the temple, and also to be "hereditary trustees of the temporalities income and offerings belonging to the said temple," and charge the defendant with neglect and waste of the temporalities, pawning the jewelleries and precious stones belonging to the temple and substituting tinsel and paste, leading an immoral life in Colombo and neglecting his duties as priest whereby the temple is brought into disrepute, and its services are neglected.

Evidence was led at length and the learned trial Judge made an order dated October 3, 1924, on the claim, the following of which are the material parts:—

1. The Hindu temple of Siva at Munnessaram and the lands, income, undial and other offerings and temporalities thereof are a charitable trust within the meaning of the Trusts Ordinance 1917.

2. A scheme to be settled and a Board of Trustees be appointed for the management of the Trust, the scheme to be submitted by the plaintiffs and defendant for the final approval of the Court

3. The defendant is ordered to submit to the Court:

   (a) A detailed account of all the income, undial and other offerings and all emoluments received by him during the last three years out of the said temple.

   (b) A statement of all the leases of temple properties given by him and an account of the various sums of money received by him upon the said leases; and

   (c) A full, true and sufficient statement and inventory of all the property movable and immovable belonging to the temple.

4. Until the final scheme is settled the defendant is restrained from incurring any expenditure of an extraordinary nature on behalf of the temple, and from leasing any of the properties belonging to the temple.

From this order the defendant has appealed on the following grounds:—

(1) The plaintiffs have failed to comply with the provisions of Section 102 (3) of the Ordinance inasmuch as it does not appear that the petition addressed by them to the Government Agent in 1920 upon which the latter is sued was in respect of the subject matter of the plaint in this action;

(2) The temple and its property does not constitute a charitable trust within the meaning of Section 102;

(3) It has not been proved that any five of the plaintiffs are "interested" parties within the provisions of Section 102 (2);

(4) The plaintiffs are not trustees, hereditary or otherwise, as claimed;

(5) The temple in question is a Paratham temple;

(6) Even if it be held that the temple constitutes a "charitable trust" within the meaning of the Ordinance, and that the defendant is a trustee thereof, the evidence does not establish and the Court does not find any breach of trust or misconduct on his part, beyond the fact that defendant has granted a few imprudent leases.

The facts which are not in dispute show that the temple, held in veneration by Buddhists as well as Hindoos, is one of considerable antiquity. The first authentic record appears to be a Royal grant of lands to the temple in the year 1448 by means of a sannas inscribed on its walls. This inscription appears to have been removed from the older buildings and built into the present one. In 1596 the temple is said to have been sacked and destroyed by the Portuguese, and after being re-built in the interval, to have been destroyed a second time about the year 1600. Thereafter there is a record in the Government Archives of the further Royal grant of lands on a copper plate in the year 1675. The temple however appears in course of time to have fallen into disrepair, until it is stated that in 1804 Brahamin priests ceased to officiate there. Evidence is produced of official correspondence in that year dealing with the area of the land given to the temple and the amount of paddy to which the priests of the temple were entitled. Between 1804 and 1873 the affairs of the temple seems to have suffered still greater neglect, during which the buildings naturally suffered. In the latter year, however, an action was commenced in the District Court of Chilaw by eleven persons who claimed to be "trustees" of the said temple at Munnessaram to vindicate title to certain lands occupied by the defendants in that action. The defendants who included the Police Headman and Vel Vidane claimed title by prescription to the lands in dispute. By his judgment dated May 13, 1875, the District Judge decreed as follows:—

> "It is decreed that the plaintiffs be and they are hereby declared proprietors, *qua* trustees of the Munnessaram temple, of the portions of land marked B, C, D and E in the survey plan filed in this case, that they be quieted in the possession thereof and that the defendants do pay all costs of this suit."

It was in the course of that case that Kumaraswamy Kurukkal, an important person in this case, first appeared on the scene. Up to that time he had no connection with the temple, but was called by the plaintiffs to give expert evidence about the sannas. One Sinnetamby Kapurala is said to have been incumbent at the time, but it is admitted that the temple was in ruins and overgrown with jungle. Kumaraswamy Kurukkal appears to have interested himself in it and became chief priest of it "by virtue of a reply of His Excelleney the Governor of this Island bearing No. 1299 dated 8th July, 1875," as set out in a Power of Attorney granted by him in 1878 (Exhibit D 3). What the Government had to do with the temple, or what was the nature of the application to the Governor do not appear. The plaintiff's case is, however, that Kumaraswamy was chosen by the twelve persons mentioned in the case No. 20181, Chilaw, who claimed to be trustees, to be incumbent in place of Sinnetamby Kapurala who was old, sickly and incompetent. However that may be, it is admitted that he got the villagers together, broke down

the ruins, and re-built and restored the temple, spending a considerable sum of money on it, officiating himself at the temple, or arranging for its services to be carried on.

As Kumaraswamy Kurukkal lived in Colombo, in 1878 he appointed one Muttu Aiyer who, in the words of the Power of Attorney—

> "has been hitherto appointed by me as such without a legal writing or authority to manage the affairs of the said temple, to be my true and lawful attorney, for me and in my name as chief priest as aforesaid and to continue as officiating chief priest aforesaid, and to defend all suits in respect of the said temple and premises and to ask demand sue for recover and receive of and from all persons whomsoever liable .....all sum or sums of money, debts, dues, rents, profits, and produce due and payable hereafter to me as Chief Priest.....to build, construct, repair and improve the said temple and premises and to let, lease and demise any lands belonging thereto upon such terms as he shall think proper,"etc., etc.

Kumaraswamy died in 1919, and so far as he is concerned it is clear from the documentary evidence in respect of his actions, between 1878 and 1909, he considered himself to be a trustee of the temple, in whom the temple and its appurtenances were vested. No question arose during those years of the plaintiffs or any of the villagers being trustees. In 1885 he raised money on mortgage (D1) mortgaging the income of the temple. In 1886 Muttu Aiyar, his attorney, took action in the District Court of Chilaw against the Attorney-General of the Colony to stay the sale of land alleged to belong to the temple. In that action (D2) plaintiff described himself as trustee of the temple and of the lands, property and temporalities belonging and appertaining thereto. It is admitted by the plaintiffs that he also brought another action to vindicate title to temple lands. It is in fact also admitted that during Kumaraswamy's lifetime no question arose between him and any other person contesting his position and the rights he claimed in respect of the temple and its lands. Some trouble arose in 1909 between Kumaraswamy and Muttu Aiyar, who was dismissed but he was taken back in 1902 and 1903. Muttu Aiyar eventually died in 1912.

Meanwhile in 1902 Kumaraswamy had executed an important document. The defendant, Somasakanda Kurukkal is his grandson, and by deed D7 in that year Kumaraswamy appointed him to act jointly with him and under his directions during his life time, and after his death to act as sole trustee and manager of the temple and its properties. The deed recites that for 25 years Kumaraswamy had been trustee, manager and director of the temple, and that as he was getting old and infirm and unable to attend to the temple affairs personally, he was "desirous of vesting the said temple and the properties belonging thereto in a trustee." The appointment of the defendant is then made, and the property vested "for ever in trust for and to the following use and purposes and subject to the following conditions," fully set out in the deed.

In considering the plaintiffs' claim it is most material to consider the position and attitude taken up by Kumaraswamy, for they admit that they had no complaint against him of any kind. He undoubtedly acted over a long period as sole trustee of the temple and its properties, without interference or question and no claim of any other person other than Kumaraswamy, Muttu Aiyar and the present defendant to be a trustee has ever been put forward between 1878 and the commencement of the present action.

This action commenced in August, 1923, is brought by the plaintiffs, in two capacities, first as hereditary trustees of the temple and its temporalities, and secondly, under the provisions of Section 102 of the Trusts Ordinance 1917, as persons interested in this temple as a religious trust.

They set up that the temporalities of the temple and the "Undial" offerings have been from time immemorial "under the management, control, and supervision of eleven trustees by right of hereditary succession and election by the surviving trustees as the occasion arose," that they are the next of kin of the "previous trustees" and have acted as such since

the death of their "predecessors in title." The "previous trustees" referred to would appear to be the plaintiffs in the action D.C. Chilaw No. 20181 of 1873 already mentioned. It is true that those plaintiffs were found to be "proprietors *qua* trustees of the Munnessaram temple" but the only evidence available in that case is that of the first plaintiff who says he was "Kapurala and trustee," being chosen as such by twelve other persons whom he also called trustees. From his evidence, they might be nothing but a board of electors, as he alone seems to have had full control and management of the temple property. I do not think further that much can be inferred from the use of the word "trustee" in the action of 1873. The question in issue was whether lands claimed by the plaintiffs were temple lands or had been acquired by the defendants by prescription. The term "trustees" may have been loosely applied to persons interested as worshippers, or villagers, in the temple and its properties. Whatever the twelve people were, however, I am quite satisfied that the plaintiffs have failed to prove that they are their next of kin. James Perera, the second plaintiff, merely says he is a son of Don David Perera, Vel Vidane Aratchy, who died in 1901. A person of that name appears as the third plaintiff in the 1873 suit. If he was the father of James Perera he sat by from 1873 to 1901, allowing Kumaraswamy and Muttu Aiyar to raise money on mortgage, bring actions in respect of the temple property, and act generally as if Kumaraswamy was also trustee, without objection. Not one of the witnesses can produce documentary evidence of any kind that either Kumaraswamy Kurukkal, Muttu Aiyar or defendant recognised them as trustees or co-trustees after 1875; there is evidence to show that they were worshippers at the temple and so interested in it, but nothing more.

The third plaintiff says he is a son of Ranhamy Gabode Lekama, and brother of Nalliah Gabode Lekama. Ranhamy Gabode Lekama appears to be the name of the tenth plaintiff in the 1873 suit. This third plaintiff, however, says he did not become a trustee until July, 1912, when ten other trustees elected him. His evidence is vague and indefinite. He knew nothing about the moneys with which the temple had been rebuilt, did not know of the appointment of defendant by Kumaraswamy as his successor, and yet admits that he had signed documents (P14 and P15) respecting meetings at the temple and the hoisting of the flag by order of the defendant. His real claim I think may be summed up in words he used, "the Devale belongs to us the villagers."

The seventh plaintiff claims to have succeeded his uncle 15 years ago. He admits, however, that his father signed the bond D1 in 1885 as a witness only. The evidence of the eighth plaintiff is no more definite as regards his claim to be a trustee. The first plaintiff states he is the son of Sinnetamby Kapurala, already mentioned, but his cross-examination make it clear that he was no trustee, but merely a worshipper at the temple, as he is described by the third plaintiff. This description the third plaintiff also applies to the fifth and seventh plaintiffs, and I have no doubt it adequately described the amount of their interest in the temple and its property. The remaining plaintiffs have failed to substantiate their claim to be trustees or the next of kin to alleged previous existing trustees. I am therefore unable to agree that the learned trial Judge is correct when he says there is no reason to disbelieve the plaintiffs when they say that they succeeded their ancestors as trustees of the temple. The evidence is, in my opinion, most vague, indefinite, and unsatisfactory on a matter which the plaintiffs had properly to establish before they could maintain their claim as "hereditary trustees."

Where, however, they claim as parties interested in the religious trust, it is a different matter. Mr. Hayley, I understand, admitted he could not contest the finding of the trial Judge that the temple and its property and appurtenances did constitute a charitable trust within the meaning of the Trusts Ordinance. It seems to me that the evidence, documentary and otherwise, led for the defence is conclusive on that point although the defendant himself at one time maintain-

ed a different attitude. The interest of at least five of the plaintiffs, within the meaning of Section 102 (2) of the Trusts Ordinance, to enable them to maintain this action, is also I think satisfactorily established. An objection was taken that no plaint had been submitted to the commissioners appointed under Section 102 (2) to hold the statutory enquiry which must precede the action, but it seems to me that the real subject matter of the action was before the commissioners, and in view of the powers of amendment given by section 102 (7) this objection was not pressed.

The result then to this point is that the plaintiffs have established their right to maintain this action, in respect of a religious trust of which defendant is sole trustee and of which they are some of the beneficiaries. In their claim they allege he is guilty of breach of trust neglecting the temple, committing waste, pawning the jewellery and precious stones of the temple, leading an immoral life, neglecting his duties as priest and bringing the temple into disrepute. On these charges the learned trial Judge comes to no conclusion. He says "I do not think it is necessary for me to examine these charges in detail. If I think it will be in the interest of the temple to appoint trustees, instead of leaving it in sole charge of the defendant it is my duty to do so." I regret I am unable to agree with him, for I think these charges were of the essence of plaintiffs' case and it is extremely unfortunate that the trial Judge did not deal with them. As we were informed he is no longer in the Chilaw District, it is impossible now to send the case back for a finding to be arrived. The plaintiffs and the defendant were entitled to have a definite finding on these serious charges. If the plaintiffs established them, they would have been entitled to an order of the Court settling the future management of the trust; if they failed I do not think this Court should interfere with the trust as it now exists. The cases in which the Court interferes to alter or modify trusts under the powers given in Section 100 of the Ordinance are fairly well defined. In *Attorney-General v. Boucherett*: cited in course of the argument, the Master of the Rolls, dealing with the powers of the Court in respect of charitable trusts says "It is not its duty to direct charity property to be employed in such manner as it thinks will be the most beneficial for public purposes, but to carry into effect the intentions expressed by the founders so far as those intentions are not inconsistent with any existing law. The authorities show this very distinctly, that the Court cannot vary or modify existing charity trusts, so as to meet its own views with regard to what it may think most beneficial and for the general advantage of the public; nothing but an act of Parliament can do that."

If the charges framed by the plaintiffs had been sustained in whole or in part it could undoubtedly have been said that the intention with which this trust was founded were not being carried into effect, and the Court would have been justified in exercising its powers of varying the trust. It is true that the defendant has granted leases of temple property for a period longer than is allowed by his deed of appointment, but the evidence of the witness Corea, which was not questioned in cross-examination, shows the rents paid were fair and reasonable, and the lands were being cultivated in the same way as other village lands. There is no evidence that defendant has committed waste in respect of the immovable property. It was urged, however, that he has pawned or disposed of temple jewellery. That is one of the matters which the learned trial Judge does not deal with. A perusal of the evidence, having regard also to the unsatisfactory nature of the evidence of some of the plaintiffs to which I have already referred, does not satisfy me that this one of the charges has been established beyond a reasonable doubt. It is unfortunate that they have not been dealt with in the Court below, and a definite finding in respect of them come to by the learned Judge. Mr. Balasingham for the plaintiffs (respondents) has, however, taken the judgment as it stands and does not ask this Court to come to any finding of the charges. Had he done so I should have been compelled to say the plaintiffs had failed

to substantiate them in any material respect. The granting of the leases, although contrary to the deed, has not been shown to have resulted in any loss to the trust or to have caused any failure in the intention for which the trust was founded. There is evidence to show that jewellery of the temple was pawned in 1912, but it does not appear what was done with the proceeds. It is clear, however, on the other hand that the temple from early in Kumaraswamy's days was in debt, sometimes in a large sum, on account of the building and other expenses incurred, which debts defendants had to meet. In 1913 it is true that when asking (see p 23) for Police protection for the temple during the annual festival defendant said the temple jewellery was worth Rs. 8,000 whereas now he says in his evidence it is worth only about Rs. 1,000. The terms of his petition in 1913 appear to me to be somewhat exaggerated, and no doubt defendant states his case as strongly as possible to obtain what he was seeking. It is this matter of the jewellery which raises any question in my mind as to whether or not the Court would be justified in granting any part of the claim of the plaintiffs. On the whole I am of opinion, as I have stated, that sufficient ground has not been shown for doing so. Books seem to have been properly kept (D19) which the plaintiffs, or some of them, admit they never asked for nor cared to examine. Lists of temple property, movable and immovable, were produced by the defendant from his books. The offerings, whether daily offerings or undial offerings, appear from the evidence of the witness Sunderam Kurukkal called by the plaintiffs, to have been properly dealt with at the time of which he speaks.

There is only one further matter that remains to be mentioned. During the trial the defendant certainly took up the position that he was answerable to no one, no earthly authority, if I may put it so. He said " I am only answerable to God in case I mismanage." In arguing the appeal for the defendant Mr. Hayley has been unable to justify or support that attitude. I have, therefore, thought it unnecessary, for the purposes of this case, as it has gone, to deal with the arguments arising out of the claim that the temple is the " Parartham " temple (although it might have been necessary to do so, had ground be shown for varying the trust), and that the position of the defendant was that of the head of a " Muttu " as found in South India. Mr. Balasingham cited authority for the proposition that the head of a " Muttu " is not a mere trustee, but a corporation sole. (Tirtha Swami v. Tirtha Swami (2).) Defendant now admits he is a trustee within the meaning of the Trusts Ordinance, and I have to deal with him on that basis. The plaintiffs have not succeeded in their contention that he has been guilty of any breach of trust, whether he occupy the position of the head of a "Muttu" or not, such as would justify the Court in making or require the Court to make a decree under any of the provisions of Section 102 of the Trusts Ordinance.

The action of the plaintiffs should, therefore, in my opinion, have been dismissed, but in view of the fact that defendant denied the existence of a trust, without costs. I would, therefore allow this appeal with costs.

Schneider, J: I agree.

Present: Schneider, J.

A. SANERIS SILVA VS. PIERIS APPUHAMY.

522 P.C. Gampola 11954.

Decided: September 28, 1925.

Vehicles Ordinance No. 4 of 1916, Section 49—Special procedure to recover fares—Criminal Procedure Code, Section 312 (2)—Right of accused to be heard.

HELD: The obligation to pay hire for a vehicle taken on hire is purely civil and contractual, and Section 49 of the Vehicles Ordinance only seeks to provide a speedy means of enforcing a purely civil right. It is not an offence to make default in payment of such hire.

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(1) 25 Beavan 116.
(2) 27 Madras L. R. 435.

Where a warrant has *improvide emanavit*, the Police Magistrate has the power to recall it, and should do so when an application is made for the purpose.

Unless there is a clear indication to the contrary, a person is entitled to be heard before an order to his prejudice can be made.

In a special application under the Vehicles Ordinance, the caption should indicate the Section under which it is made.

N. K. Choksy for accused-appellant.

Schneider, J:—The question raised by this appeal is of great practical importance and calls for careful consideration. The proceedings in the case appear to have been initiated by an affidavit by one Silva who styles himself "complainant" and three persons "accused" in the caption of the affidavit. It is to the effect that a balance sum of Rs. 194 was due to the complainant for the hire of a vehicle to the accused and that the accused had failed and neglected to pay that sum. There is nothing to show how that affidavit came on record, or what the Court was invited to do. The date of the affidavit is August 13, 1925. An entry by the Magistrate on the same date at the bottom of the affidavit shows that Mr. Jonklaas had appeared for the complainant and that the Magistrate had directed the issue of a Distress Warrant returnable on August 27. The warrant appears to have been issued on the very day the Magistrate made his order. The affidavit is headed "In the Police Court of Gampola" but there is no indication that an application was being made under some special provision of the law. It seems to me desirable that in special applications of this kind the caption should indicate under what special law or rule the application is being made. In this case the caption of the affidavit should have been "In the matter of the application of A. B. under the provisions of Section 49 of "The Vehicles Ordinance No. 4 of 1916." The proceedings are intended to be under Section 49 of "The Vehicles Ordinance No. 4 of 1916." Before proceeding to consider the provisions of that Section I would follow the history of the case. On August 18, a Proctor filed an affidavit from the first accused to the effect that he had received information of the issue of the warrant and that he had no notice of the proceedings and had a "valid defence to the charge." The Proctor moved for the recall of the warrant, and an enquiry, the Magistrate disallowed this motion stating that he did not know "under what Section the application was made." On August 24, the accused's Proctor filed a petition of appeal against the order of the Magistrate and once again moved that the Court would be pleased to withdraw the warrant pending the decision of the appeal. On this occasion the Magistrate heard the appellant's Proctor who appears to have argued that as the recovery of a fine is suspended by an appeal so the warrant should also be suspended. The Magistrate refused to order the recall of the warrant. The petition of appeal is in the ordinary form of such a petition in a criminal case. It bears a certification as to the matter of law stated in it, to satisfy the requirements of the Criminal Procedure Code.

I shall now proceed to consider the Section in question. Apparently the provisions in this Section fell into two different parts. It first provides that upon the refusal or omission to pay the sum "justly due" for the hire of a vehicle and upon complaint "and summary proof of the facts" a Police Court or a Municipal Court having jurisdiction shall award (1) "reasonable satisfaction" for the complainant's "fare and costs" and also (2) "reasonable compensation for loss of time in attending to make and establish such complaint."

It then provides that upon the "neglect or refusal" of "the defaulter to pay the same" (that is the sum or sums awarded according to the provisions in the earlier part) "it shall be recovered as if it were a fine imposed by such Court."

The procedure for the recovery of a fine is to be found in Section 312 (2) of the Criminal Procedure Code. It is by way of a warrant issued to the Fiscal for the levy of the amount by distress. The powers of the Fiscal under such a warrant are prescribed

in that Section. I searched the record in this case, but in vain, to find what the warrant was which the Court had issued to the Fiscal. There is no special form for such a warrant to be found among forms given in Schedule III of the Criminal Procedure. Unless the Court in this case had been careful to indicate to the Fiscal that the warrant was one issued under Section 312 of the Criminal Procedure Code it is probable that the Fiscal might fail to observe the restrictions imposed by that Section. In all the circumstances the Magistrate would have acted more wisely if he had instructed the Fiscal not to enforce the warrant till the appeal had been decided.

The language of the Section is plain that the warrant is to issue only upon the neglect or refusal to pay the sum awarded by the Court. In this case even if the proceedings be regarded as that the Magistrate had awarded the sum mentioned in the affidavit, although there is no express order to that effect, he should not have issued the warrant as no demand for payment had been made after the sum had been awarded, and consequently, there had been no "neglect or refusal" to pay. As the warrant had "*improvide emanavit*" he had the power to recall it, and should have done so when he was moved to do it. The obligation to pay hire for a vehicle taken on hire is purely civil and contractual. Nowhere is it declared to be an offence to make default in payment of such hire. Section 49 only seeks to provide a speedy means of enforcing a purely civil right. An analogous provision is to be found in "The Maintenance Ordinance 1889" (No. 19 of 1889). The Magistrate in this case appears to have been of opinion that the person to whose prejudice an order is made under the provision of the Section had no right to be heard at all. Unless there is a clear indication to the contrary, a person is entitled to be heard before an order to his prejudice can be made. I see nothing in the provisions of this Section to indicate that the person against whom the order has to be made is to be denied his ordinary lawful right of being heard in his defence. The language of the Section suggests that the procedure should be an adaptation of the procedure prescribed for summary trials before a Police Court or a Municipal Court. The Section speaks of "complainant," "acts committed," "defaulter," "offender." If upon material placed before the Magistrate he is satisfied that there is "justly due" some sum for the hire of a vehicle he should issue a summons on the person against whom the complaint is made and, if necessary, try summarily the issue between the parties, and then upon summary proof he should enter his award. If this award is entered in the presence of the person against whom the claim is made, the Magistrate might then and there direct that payment should be made by a particular date. Non-payment by such a date would then be evidence of the "neglect" or "refusal" spoken of in the Section, which would give rise to the procedure for the recovery of the sum as a fine. It is worthy of note that in speaking of the compensation which might be awarded the Section speaks of the compensation awarded for loss of time, not only in attending to make the complaint but also to establish it, which might be regarded as suggesting an attendance after the complaint had been made.

The question whether a person had the right to be heard in a proceeding under an analogous provision, namely, Section 51 of "The Excise Ordinance, No. 8 of 1912," I held that as a matter of sound judicial discretion an order should not be made without hearing the person who should be affected by the order, see *Sinnatamby v. Ramalingam* (1).

In the present case the Magistrate does not appear to have followed the correct procedure.

I think the complainant's Proctor should have filed a motion with the affidavit, or submitted some pleading to indicate what relief he was seeking. I direct him to do that now.

I set aside all the proceedings since the filing of the affidavit and order that the warrant be recalled forthwith. The case will be remitted to the Magistrate for proceedings in

(1) (1924) 26 N.L.R. 371.

due course after the complainant's Proctor has submitted what I have directed him to submit to the Court.

The appellant will have his costs of this appeal taxed as in an action in the Court of Requests for the recovery of the sum of Rs. 194.

Present: Maartensz, J.

SAHABANDU vs. AHAMED CASSIM.

52 C.R. Galle 4546.

Decided: 4th Sept., 1925.

Private Nuisance — Coconut Tree Overhanging a House—Right to a Decree of Court.

HELD:—The owner of a land over which a tree overhangs has the right to a decree ordering such tree to be cut down.

Soertsz for appellant.

Samarakoon for respondent.

Maartensz, J:—This is an action and an appeal which appears to me to have been the result of a certain amount of feeling between the parties. The plaintiff claims to have a coconut tree of the defendant which overhangs his house cut down. The Commissioner has found on the facts in favour of the plaintiff and has given judgment accordingly, and he has remarked that the law on the point is clear. In the circumstances of this case I am prepared to follow the judgment of Withers, J., in the case of *Matar v. Kirithatkandu* (1) where he held that the owner of a land over which a tree overhangs has the right to a decree ordering such tree to be cut down. I am not prepared to follow the judgment of Lawrie, J., in the case of *Mendis v. Singho* (2) as I agree with Sir Thomas de Sampayo that an overhanging tree which does not affect the public is a private nuisance to which the provisions of the Criminal Procedure Code do not apply.

I accordingly dismiss the appeal with costs.

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(1) 2 S.C.R. 95.
(2) 2 Bro. 342.

Present: Branch, C.J. and Schneider, J.

HORNE vs. MARIKAR ET AL.

81 D.C. (F.) Kandy 31387.

Decided: 17th September, 1925.

Land Registration Ordinance, 1891, Section 16—Letters of Administration—Are they among "instruments" which are registerable?—Effect of Section 17 of the Ordinance.

HELD:—A grant of administration is expressly mentioned in Section 16 of the Land Registration Ordinance, alongside with a probate of a Will, among "instruments" which are registerable.

By virtue of Section 17 of the Ordinance, a grant based upon unregistered letters of administration "shall be deemed void" as against a duly registered deed upon which an adverse claim is made.

H. V. Perera for appellant.

A. E. Keuneman for respondents.

Branch, C.J.:—It is unnecessary to recapitulate the facts of this case which are fully set out in the judgment of my brother, Schneider, which I have had advantage of reading.

The conclusion arrived at in that judgment expresses the view I held at the close of the argument and consideration has not altered that view. I concur and I agree with the order proposed.

Schneider, J.:—This action has been tried and decided in the District Court upon statement of facts in writing agreed upon by both parties. The learned District Judge dismissed the plaintiff's action and he has appealed. For the purpose of the appeal I take the following facts from the statement mentioned and from the other documents, which have been put in evidence. One Miskin sued two persons, as defendants, to recover judgment upon a mortgage bond in his favour. During the pendency of the action he died intestate leaving a wife, Rahamath Umma, and two sons as his heirs. Rahamath Umma, his widow, was appointed Administratrix of his

estate on August 24th, 1917, in testamentary action D.C. Kandy No. 3329. She was substituted plaintiff in place of her deceased husband in the action upon the mortgage bond. In execution of the decree entered in that action the property mortgaged—Ambatalawa Estate—was sold on September 11th, 1920, and was purchased by one Saravanamuttu "for and on behalf of the substituted plaintiff, Rahamath Umma, widow of A. D. Miskin, deceased." She paid for the purchase by being given credit for a sum of Rs. 10,135 upon an order of Court directed to the Fiscal to give credit for that sum to the substituted plaintiff. There was a balance sum of Rs. 165 due to the Fiscal in connection with the purchase which she appears to have paid in cash. Presumably this money also belonged to the estate of her deceased husband or was a loan by her to that estate. In the order of the Court requiring the Fiscal to give credit, substituted plaintiff is described as "Rahamath Umma, administratrix of the estate of the deceased plaintiff, A. D. Miskin." The sale of the land was confirmed by the District Judge on November 14th, 1922. In the order confirming the sale Rahamath Umma is described as the "Administratrix of the deceased plaintiff, A. D. Miskin." The Fiscal executed a transfer of the land on November 29th, 1922. This transfer was registered on November 29th, 1922. In the recitals in this transfer the Fiscal set out the relevant facts which I have already mentioned regarding the sale in execution, the purchase and the manner of payment of the price, but he conveyed the land to "Rahamath Umma, widow of A. D. Miskin, deceased." This transfer, it would appear, was not regarded by the District Judge as being in accordance with the order of the confirmation of the sale. This is evidenced by the deed of rectification dated the 10th of December, 1923, issued by the same Fiscal. In this deed it is recited that the Secretary of the District Court had called upon the Fiscal to rectify the error in his transfer to Rahamath Umma, by inserting the designation of the purchaser as "the substituted plaintiff, Rahamath Umma, administratrix of the estate of the deceased plaintiff, Adjuru Darwasse Miskin." The deed then proceeds to rectify the transfer in accordance with the direction of the District Court. In the testamentary action No. 3329 in which she was administering her husband's estate, Rahamath Umma obtained the sanction of the District Judge on August 23, 1922, and on March 1, 1923, to sell Ambatalawa Estate for the payment of the costs of the administration of her husband's estate. The land was sold to the 2nd defendant and conveyed to him by her on April 3, 1923. The purchase money is still lying in deposit in the testamentary action pending the decision of this action which was instituted in December, 1923. In this action the plaintiff prayed to have it declared that he was entitled to all the interest of Rahamath Umma in Ambatalawa Estate. He also prayed for an order on the defendants to pay him his share of the profits, if any, of that estate from the 15th of November, 1923. He did not specify what share it was that he claimed. He stated that he had obtained a decree against Rahamath Umma in her personal capacity and in execution of that decree had caused the Fiscal to seize and sell her right, title and interest in the estate in question on May 27, 1921, and that he obtained a transfer of the estate from the Fiscal on November 22, 1922, which he duly registered on January 27, 1923.

It was admitted that neither the letters nor the two orders of the Court sanctioning the sale of the estate by the Administratrix were registered and that plaintiff was not noticed of the application by the Administratrix for sanction to sell the estate. The learned District Judge dismissed the plaintiff's action holding that in the events which had happened the second defendant was entitled to the estate in question.

On appeal it was contended by Mr. Perera on behalf of the plaintiff that the Fiscal's transfer of the estate to Rahamath Umma was in her personal capacity and that the plaintiff was therefore entitled to the whole of the estate. This contention is not entirely consistent with the

plaintiff's claim as laid in the plaint. It would not probably have been made if Counsel had noticed that his Proctor in the District Court cleared whatever ambiguity there was in the plaint by stating that he "claimed only the share of Rahamath Umma as an heiress of Miskin."

This statement must be regarded as an admission that the purchase of the estate by Rahamath Umma enured to the benefit of her husband's estate. That being so it makes no difference in what light the Fiscal's transfer in her favour is to be viewed. But had it been necessary to consider the question of the effect of that Fiscal's transfer I should have had no hesitation in holding that it was conveyed to her in her capacity as Administratrix and this for several reasons. One of them is that the Fiscal is a ministerial officer of the Court deriving his authority to sell or transfer property from the Court. As at present minded I would hold that he can transfer property which he has sold only in strict accordance with the orders of the Court. In this instance he had obviously made an error in his transfer and the Court had the power to direct a rectification of that error. The combined effect of his transfer and of its rectification was to vest the title to the estate in Rahamath Umma in her capacity solely as Administratrix, beyond any doubt whatever.

Mr. Perera's next contention has to be carefully considered. He submitted that the decision in *Fonseka vs. Cornelis* (1) governed this case. The same argument appears to have been addressed to the District Judge. But the Judge thought that the circumstances of this case were different. He thought that the estate in question at no time formed part of the estate of the deceased Miskin and therefore never vested in his heirs. He thought that Rahamath Umma as one of the heirs had a "personal saleable interest" and that this interest was vested in the plaintiff. He thought that if any portion of he "land" remained available after the deceased's estate had been duly administered the heirs were entitled to demand from the administratrix that such remaining portion should be conveyed to them in the proportions laid down by the Mohammedan Code.

I am unable to agree with the District Judge that the land never at any time vested in the estate of the deceased Miskin. Miskin had obtained the decree in the action on the bond in his life time. The land was bought with the proceeds which were realisable upon that decree. The land, therefore, formed part of his estate undoubtedly from the date of its purchase. It might be regarded as having formed part of that estate even earlier if it be correct to deem that upon its purchase it took among the assets of the estate the place of the money of the estate which was expended upon its purchase. But it is sufficient if it formed part of the estate from the date of its purchase for the heirs of the estate to be vested with title from that date. It is settled law that title to immovable property belonging to the estate of a person dying intestate does not vest in the administrator but passes to his heirs, but that the administrator retains the power to sell the property for the purposes of administration. See *Gopalsamy vs. Ramasamy Pulle* (2) and *Silva vs. Silva* (Full Bench) (3).

Rahamath Umma accordingly became vested with title to a share of the land as one of the heirs *ab intestato*. When the plaintiff caused her interest to be seized and sold by the Fical, after the purchase of the land by her as Administratrix, and obtained a transfer of that interest from the Fiscal, he became vested with that interest. He could be deprived of it only by a sale of the land for the purposes of administration. As a matter of fact the land was sold for those purposes and the second defendant in the circumstances would have a title superior to the plaintiff even as regards the share of Rahamath Umma.

The question which arises upon these facts is whether the registration of the transfer in favour of the plaintiff while the letters of admi-

(1) (1917) 20 N.L.R. 97.

(2) (1911) 14 N.L.R. 238.
(3) (1907) 10 N.L.R. 234.

nistration were never registered enables the plaintiff to defeat the defendants' claim which is adverse to his claim. It is this very question which came up for decision before the Bench of three Judges, which, according to the report, was a "Full Bench" of this Court in *Fonseka vs. Cornelis* (1). The only difference is that in that case the "instrument" which had not been registered was a probate of a Will, whereas in this case the instrument is a grant of administration. But this difference does not matter. A grant of administration is expressly mentioned in Section 16 of the Ordinance alongside with a probate of a Will among "instruments" which are registerable. The question for decision in this case would, therefore, appear to be identical with the question decided in *Fonseka vs. Cornelis* (2). It was held in that case that the probate of a Will was an "instrument" registerable under the provisions of the Ordinance by virtue of the provisions in Section 16 and 17, and that by virtue of Section 17 a duly registered deed affecting land belonging to a deceased person's estate gets priority over any claim based on an unregistered probate. The Section declares that the grant of administration in this case upon which the second defendant bases his title to the whole land "shall be deemed void as against" the plaintiff who claims upon a duly registered grant a share adversely to the grant which has not been registered.

I would therefore set aside the decree of the District Judge dismissing the plaintiff's action and hold that he is entitled to the share to which Rahamath Umma would have succeeded by intestate succession. That share appears to me to be an undivided ¼th, but I would leave the District Judge free to determine what that share is when the case comes again before him for final adjudication. The plaintiff will be declared entitled to the share in the land which Rahamath Umma would have taken as an heir of her husband and the case will go back to the District Court for the determination of the other matters in dispute between the parties. The plaintiff will have his costs against the defendants both of the trial which has already taken place and of this appeal.

Present: Schneider, J. and Jayewardene, J.

PEIRIS VS. GREEN.

114 D.C. Colombo 13211.

Decided: October 14, 1925.

Prescription—Is possession of a lessee adverse to that of a mortgagee ?—Prior Registration—Executors de son tort.

HELD:—The validity of a lease is not affected by the subsequent sale in execution, for "Hire goes before sale."

The execution purchaser takes the place of the lessors under the lease and the possession of the lessees is not adverse to persons claiming through the execution purchaser.

Drieberg, K.C., with *Canakaratne* and *F. H. B. Koch* for appellant.

Keuneman for respondent.

Jayewardene, J:—In this case there is a contest between the plaintiff and the defendant to a land called Moragahalanda. This land was admittedly the property of a man called Allis Rodrigo. He died leaving three sons and four daughters as his heirs and an estate which was evidently considered to be small, for it is not suggested that it was one for which letters of administration ought to have been taken out. Shortly after his death all the heirs, seven in number, joined in granting a lease of this land to three persons for a term of 40 years by their deed of lease No. 6024 of the year 1884, (D6). The rent for the whole term was paid in advance. During his life time Allis Rodrigo had entered into a mortgage bond in the year 1880 by which he mortgaged a field called Nemadagaha Kumbura. After his death the mortgagee one Menchina Rodrigo, sued all the heirs except one to enforce the mortgage bond, and a mortgage decree was duly entered on the 25th of January, 1887 (D3). In the plaint she alleged that the defendants were the heirs and representatives of the mortgagor and that they were in possession of the property, meaning, it may be, the mortgaged property.

It is however clear that they also had possession of the land in dispute, for they had leased it out and their agents, the lessees, were in possession under them. In plaints it has not been unusual to describe such heirs as executors *de son tort*. *Vand. Rep. 158.*

In execution of the mortgage decree the mortgaged property was sold first and immediately after the land in question as the proceeds realised by the sale of the mortgaged property did not satisfy the decree. No serious objection can I think, be taken to the procedure adopted as the heirs were parties to the action. After the substitution of some parties in place of parties who had died during the interval, a Fiscal's transfer No. 5089 of the year 1891 (P3) was issued to the purchaser. The plaintiff is the successor in title of the purchaser on a series of conveyances. The defendant has purchased the land from the heirs of the deceased Allis Rodrigo, the very persons against whom the land had been sold in execution. The defendant contends that his title is superior to that of the plaintiff both on prescription and on registration. It is argued for him that the lease by the heirs was subject to the Fiscal's transfer in favour of Menchina Rodrigo, and the latter and her successors in title by allowing the lessees to possess the land, enabled them to acquire a title by prescription against the purchaser as their possession was adverse to her. As regards registration it is pointed out the Fiscal's transfer has been registered in a wrong folio and is void as against the later transfer in the defendant's favour by the heirs which is registered in the "right folio." The learned District Judge overruled the defendant's contentions and upheld the plaintiff's title. For the decision of the questions involved here it becomes necessary to consider the position of heirs of small estate before the Civil Procedure Code came into operation in the year 1891. In *Loku Appu v. Banda* (1885) *7 S.C.C. 3*, it was laid down following a long series of judicial decisions of this Court that where intestate estates are small the whole of the heirs of the intestate are the representatives of the intestate estate and are the proper persons to sue and to be sued, and that in the case of such estates it is not necessary to take letters of administration. The Civil Procedure Code now defines a small estate as an estate not exceeding Rs. 1,000 in value and for the purposes of substitution, etc., of parties a "legal representative" means in the case of an estate below the value of Rs. 1,000 the next of kin who have adiated the inheritance. Section 394, 519 and 542.

In *Visenti Fernando v. Domingo Perera* (1887) 8 S.C.C. 54, it was held that a purchase on a conveyance which all the heirs of an intestate had joined in executing was valid and was not liable to be declared ineffectual at the instance of an administrator subsequently appointed.

There Clarence, J., said:—

> "It has been decided, and it is the law, that except where the inheritance is small, no one but a legal representative, executor, or administrator, can maintain an action for the recovery of money or other property claimed as due to the estate of a deceased person. But it has never yet been held that if the whole of the heirs of an intestate convey property of the intestate to a purchase on *bona fide* sale, such conveyance is, *ipso facto*, bad. I know of no reason why any such doctrine should be laid down; and any such ruling if made now would be an innovation, which would largely unsettle titles to land."

and Dias, J. said:—

> "Before plaintiff took out administration to Nikulas, the common estate of Nikulas and his wife vested in their heirs and they had a perfect right to convey as they did the land in question to the defendants; and the plaintiff cannot be allowed, by a subsequent administration to overturn that title, except under special circumstances, which do not exist in this case."

In that case it appeared that the sale had been effected to pay off two encumbrances on the land and Clarence, J. in continuation of his judgment said:—

> "It is undoubtedly good law that purchasers who take from the

heirs, and not from a properly appointed legal representative, take subject to the risk of having to defend their purchase, should the administrator show *prima facie* cause entitling him to follow the assets in their hands,—certainly so in the case of merely voluntary conveyances. In the present case, it is admitted on the pleadings that the intestate's heirs sold this land to pay off two encumbrances, and that the encumbrances were in fact paid off. Yet plaintiff seeks to eject the purchaser, and to sell the land to another purchaser freed from the encumbrances."

In the present case we have no administrator, the transactions are by and against the heirs. In my opinion the lease was executed by all the heirs, it must be placed on the same footing as a lease by an administrator. Vand. Rep. 164. It has not been proved that the lease was executed for the payment of any debts. After the lapse of more than 40 years it would be difficult to prove such a fact even if that had been the case, but the fact that all the heirs have joined in executing one lease and in realising the full consideration in advance is a strong indication that the money must have been obtained for the discharge of some obligation of the interest. I would regard the lease as a lease by persons who were the legal representatives and heirs of the intestate. Decree was entered in the mortgage decree against those persons in the same capacities, although they were described as executors *de son tort* in the caption to the plaint. The lease has been granted by, and the mortgage decree on which the Fiscal's transfer followed has been entered against persons having the same character and status. If so, the validity of the lease would not be affected by the subsequent sale in execution as by our law "Hire goes before sale." The *bona fides* of the lease have never been questioned and the execution purchaser was bound to recognise it and take his rights subject to the lease. When the execution purchaser became the owner of the land, she by operation of law took the place of the lessors under the lease and the possession of the lessees became her possession. *Silva v. Silva* (1913) 16 N.L.R. 315.

If the lessees possessed for more than 10 years, she would acquire a title by prescription through them. The heirs of Allis Rodrigo, the original owner, had no title to convey to the defendant and he got nothing by the conveyance in his favour from them. It is clear that the execution purchaser did not abandon her right to the land as even before the execution of the conveyance in her favour she sold her rights to one Caldera (P4), who on the same day sold to William (P5). In 1892 William sold to Henricus de Silva (P6) whose heirs sold a ¾ of the land to the plaintiff in 1918 (P7). These transfers show that the purchaser and her successors in title considered themselves entitled to the land, but owing to the lease which only expired in 1924, they could not get possession. The defendant had himself taken an assignment of the lease in 1902. As regards the question of registration: the deed which comes into conflict with the Fiscal's transfer is the deed by the heirs in favour of the defendant. This deed was executed in the year 1906 (P7). By that time more than 10 years had elapsed after the issue of the Fiscal's Conveyance; and the lessee the benefit of whose posessession the plaintiff can claim, had acquired a title by prescription for the execution purchaser and her sucessors in title.

In the circumstances no question of registration can arise, as the plaintiff can rely on his title by prescriptive possession independently of his deeds: *Appuhamy vs. Goonatilleke* (1915) 18 N.L.R. 469. It becomes unnecessary therefore, to discuss the question of registration.

In my opinion, the judgment of the learned District Judge is correct, and the appeal would be dismissed with costs.

Present: Maartensz, J.

WIJEWARDENE v. JAYASURIYA.

In Revision P.C. Colombo 1242.

Decided Sept. 29, 1925.

Application for revision—Powers of higher Court to interfere with a

conviction where there is evidence to support it.

HELD: Where an accused person has no right of appeal, the Supreme Court will interfere with a conviction only where it is shown to be clearly and manifestly wrong.

H. V. Perera for appellant.

Allan Drieberg, K.C., with *J. S. Jayewardene* for respondent.

Marrtensz, J.—This is an application to this Court to set aside the conviction of the accused who was convicted of causing hurt to one W. N. Wijewardene.

The accused is the Principal of Prince of Wales College, Moratuwa. The complanant was a teacher at the school.

The application for revision was strongly pressed on the ground that the Magistrate should not have convicted the accused on the uncorroborated testimony of the complainant and on the ground that the Magistrate had not taken into consideration the ill-feeling that the accused had towards the complainant.

I have given anxious consideration to the case for I have no doubt that the conviction is a matter of great concern to a man in the position of the accused. But as the accused was sentenced to pay a fine of Rs. 20 and has no right of appeal, I can only interfere with the conviction if it is shown to be clearly and manifestly wrong. *Queen Empress v. Chagan Dayaram* (I.L.R. 14 Bom. 331.)

In the case of *Queen Empress vs. Lakshmi Nayakan*, (I.L.R. 19 Mad. 238), it was laid down that the High Court will not consider a case in which there is evidence to support the conviction, because the sentence is not appealable, for to do so would substantially in any case allow an appeal.

On the principles laid down in these cases with which I respectfully agree I cannot set aside the conviction only because I disagree with the view taken by the learned Magistrate.

There is in this case evidence to support the conviction and although it is quite possible I may have taken a different view of the evidence, I cannot interfere in revision. I accordingly refuse to grant the application.

Present: Schneider, J. and Jayewardene, J.

MOHIDEEN ET AL. VS. MOHAMADU.

129 D.C. (Inty.) Kurunegala 10875.

Decided: October 2, 1925.

Civil Procedure Code S. 40 and 43 —Objection to plaint on the ground of prolixity and of containing particulars other than those required—Should the plaint be returned for amendment ?

HELD:—The fact that the plaint does not mention without prolixity the particulars required by Section 40 and 43 of the Civil Procedure Code, and that it contains particulars other than those required, do not of themselves constitute a sufficient ground for returning it for amendment.

Mr. Justice Schneider quoted with approval the dictum of Bonser, C.J., in *Fernando vs. Soysa* (2): "The plaint was accepted by the District Judge and cannot be returned for amendment. It is now part of the record and can only be dealt with by the Court."

Hayley for appellant.

Drieberg, K.C., with *H. V. Perera* for respondent.

Schneider, J:—The plaint in this action was accepted in the ordinary course by the Judge who directed that summons should issue. Summons was made returnable on the 20th of August, 1925. But on the 7th of August the first defendant filed a motion and moved that the Court should return the plaint for amendment on the ground that it did not comply with the provisions of the Section 40 of the Procedure Code, and that the Court should have refused to entertain it in the first instance, and should have returned it for amendment under the provisions of Section 46. The procedure adopted by the first defendant is justified by the decisions which have been cited at the argument of the appeal by Mr. Hayley of the first defendant-appellant. He cited the case of *Read v. Samsudeen* (1), *Fernando v. Soysa* (2), *Soysa v. Soysa* (3), *London*

(1) (1895) 1 N.L.R. 292.
(2) (1896) 2 N.L.R. 40.
(3) (1913) 17 N.L.R. 118.

and Lancashire Fire Insurance Co. v. P. and O. Company (4) *and Avva Umma v. Casinader* (5). In one of those cases namely, *London and Lancashire Fire Insurance Co. v. P. and O. Company* (3), there is a dictum of Pereira, J. to the effect that an objection on the ground of misjoinder of parties should be taken at the earliest opportunity, and that if it were not so taken it should be deemed to have been waived by the defendant, and that such an objection should be taken by way of motion or application to put the plaintiff's to their choice as to the names of the defendants to be struck off the record and what defendants are to be retained. He purports to make this observation with reference to the provisions of Section 22 of the Civil Procedure Code. It appears to me that he had not noticed the words in that Section, "and in all cases before the hearing." In the case of *John Sinno v. Julis Appu* (5), Wendt, J. pointed out the necessity of taking the objection to a misjoinder before the parties came to trial. The learned District Judge, having heard the first defendant, and also the plaintiffs upon the first defendant's motion, disallowed the motion, holding there was no necessity for any amendment of the plaint.

The 1st objection taken to the plaint was that it did not state correctly or without prolixity the particulars required by Section 40 and 43 of the Procedure Code; and the second objection was that it contained particulars other than those required. There seems some reason for these two objections, because there are allegations in the plaint which need not have appeared in it. But it appears to me that there was no necessity for that reason to return the plaint for amendment, or for the Court to make any amendment for the plaint.

The third ground urged against the plaint was that it did not disclose any cause of action against the second defendant, and the fourth ground was that it was wrongly framed by reason of misjoinder of parties and causes of action. The plaint has not been very elegantly framed. There are two causes of action appearing in it. In the first cause plaintiffs seek to recover a sum of Rs. 16,000 odd from both the defendants on the ground that they have acted together fraudulently in order to deprive the plaintiff's of that sum of money. It would appear, therefore, that as regards that cause of action there is no misjoinder of parties.

The second cause of action is that the first defendant by retaining possession of certain immovable property put himself into a position for appropriating the rents.....and profits of these properties which amounted to a sum of Rs. 79,000 odd from the 14th of May, 1918, up to February, 1925. This would appear from reading paragraphs 8 and 12 together. In the 11th paragraph the plaintiff alleged that the second defendant was made a party to the action as he actively supported the first defendant, "in perpetrating the fraud above referred to, and in committing the misappropriations of the amounts claimed." If paragraphs 11 and 12 are permitted to retain the position they do in the plaint now, it is not as clear as it might have been that the second defendant is charged with having been a party with the first defendant in the misappropriation of the sum mentioned in the 12th paragraph. It should be noted that the period of the misappropriation is fixed in the 12th paragraph as from the 14th of May, 1918, whereas by reading paragraph 8 and 11 together it would appear that the second defendant is not charged in the plaint with having supported the first defendant in misappropriating the income arising before the 14th of June, 1919. It appears to me that what was intended to be stated in the plaint would be rendered clear if paragraphs 11 and 12 were transferred, paragraph 12 being placed before paragraph 11. When that is done the second cause of action would also include both the defendants. Accordingly there would be no misjoinder of causes of action or of parties. I therefore direct that the District Judge should transpose the two paragraphs mentioned, namely, 11

(4) (1914) 18 N.L.R. 15.
(5) (1922) 24 N.L.R. 199.
(6) (1907) 10 N.L.R. 351.

and 12 in the manner indicated by me.

There was one matter I intended to refer to but have not done so far, and that is to draw attention to the following words of Bonser, C.J. in *Fernando v. Soysa* (2) "The plaint was accepted by the District Judge and cannot be returned for amendment. It is now part of the record and can only be dealt with by the Court."

At Mr. Hayley's request I add that the first defendant would be entitled to file his answer after the amendment had been made by the District Judge.

It is apparent that all the trouble has arisen because the plaint was not drawn up with that amount of care which should have been bestowed upon it, and that the first defendant had justification for moving the Court as he had done. I would, therefore, direct that each of the parties should bear his own costs here and in the Court below.

Jayewardene, J:—I entirely agree.

Present: Schneider, J. and Jayewardene, J.

APPUHAMY vs. GAMARALA.

78 D.C. Kurunegala 9606.

Decided, Oct. 7, 1925.

Kandyan Law—Intestate Succession—Rights of a father to inherit the property of a child, the issue of a binna marriage, to the exclusion of distant, maternal relatives—Conflicting views of Sawer and Armour.

HELD.—The rule laid down by Sawer should be read with the limitation laid down by Armour, that a father's right to inherit the property of a child born of a *binna* marriage is not lost when there are only distant maternal relations.

Drieberg, K. C. with *Amerasekera* for appellant.

Hayley for respondent.

Jayewardene, J.—This case raises a question of inheritance under Kandyan Law, which is not covered by authority. The lands in dispute belonged to a brother and sister, Gallerala and Tikiri Etana, by inheritance from their father Kapuruhamy. Gallerala died leaving Guruhamy who married Menik Etana. Guruhamy died leaving his widow and a son Hitihamy. Hitihamy died and left a daughter Punchi Menika, who was married to the defendant in *binna*. She too died leaving her surviving, her husband, the defendant, and a daughter Ran Menika, who was married to the plaintiff. Ran Menika died intestate and without issue. The plaintiff is the great grandson of Tikiri Etana, one of the original owners. The contest is between Ran Menika's *binna* married husband, the plaintiff, and her *binna* married father, the defendant, who has also obtained a deed of gift for the lands in dispute, from Menik Etana, the widow of Guruhamy, dated July 14, 1922. At the date of Ran Menika's death her maternal great grandmother Menik Etana, her father, and her husband were alive. The learned District Judge said that the question raised in the case was one of great difficulty and with much hesitation upheld the claim of the plaintiff as he was a member of the family to whom the lands belonged and had a better right than the defendant, who was an outsider, and whose title was also derived from an outsider.

The plaintiff claims the lands not as the husband of the *propositus* Ran Menika, for he was married to her in *binna*, but as a descendant of the original owner Kapuruhamy. It is contended for the defendant that although married to the mother of the *propositus* in *binna*, he is her heir to the exclusion of the plaintiff who is a very distant relation, being the great great grandson of a great grand uncle of the *propositus*. If he as father does not exclude the plaintiff, he claims that his transferee the maternal great grand mother of the *propositus* was her heir. It is necessary, therefore, to ascertain, so far as the same is material for the purposes of this case, the rule which governs the right of intestate succession to property which a person, the issue of a *binna* connection, had inherited or acquired from the mother, in the absence of direct descendants. Now as regards the father Sawer says:—

"The father is not the heir of the property of his children born in a

binna marriage, which they have acquired through their mother; the maternal uncles or next of kin on the mother's side being the heirs to such property; but the father will succeed to such children's property if otherwise acquired."—Modder's Edition of Sawer's Digest Chap. 1, Sec. 50, p. 17.

Armour states the law thus:—"If the child was the issue of a *binna* marriage, and if, after the death of that child's mother, the father had deserted the child and left it entirely to the care of the mother's family, in that case the father will have no right to the reversion of any property that belonged to the child; that property will, therefore, at the child's death, devolve to his or her nearest of kin on the mother's side, in preference to the father, and in preference to the said child's paternal half brother and half sister, it being premised that the father was not also an *ewassa* cousin of the said child's mother.

"But if the child, albeit the issue of a *binna* connection, had remained under the father's care after the mother's demise, in that case the father will be entitled to a reversion of the child's estate in preference to any child's distant maternal relations (mother's granduncle's son for instance) and that whether the father was or was not also an *ewassa* cousin of the said child's mother."—Pereira's Armour, page 77.

Marshall adopts the law as laid down by Sawer.—Marshall's judgments, page 344.

These conflicting views have been considered by this Court in many cases and the rule as laid down by Sawer was adopted by the Collective Court in *Appuhamy v. Dingiri Menika* (1889) 9 S.C.C. 35. This decision has been followed since: See *Ran Menika v. Mudalihamy* (1913) 16 N.L.R. 131, and *Appuhamy v. Tikiri Menika* (1913) 17 N.L.R. 1. Although Lawrie, J. in *Dingiri Menika v. Sumathani* (1897) Modder's Kandyan Law Page 497, doubted the correctness of the rule as laid down by Sawer and thought that Armour ought to be followed in preference to Sawer. However, the rule as laid down by Sawer is too strongly established to be questioned now. But it is possible to give some effect to the rule as stated by Armour in the second paragraph quoted above without unduly restricting the rule as given by Sawer, that is that the father ought to be preferred to the child's distant maternal relations such as the mother's grand uncle's son. There is nothing in the decided cases to prevent the adoption of such a course. Thus in *Appuhamy v. Dingiri Menika* (supra) the maternal grandmother and the mother's uterine half sister were preferred to the father. In *Ran Menika v. Mudalihamy* (supra) also the maternal grandmother and in *Appuhamy v. Tikiri Menika* (supra), the maternal grandmother and the mother's brother and sister were preferred to the father. In *Ran Menika v. Mudalihamy* (supra) Lascelles, C.J. dealing with the conflicting views of Sawer and Armour said: "As a matter of construction I should have held that it (that is Armour's opinion) was applicable only to cases where the claimants on the maternal line stood in a more remote degree of relationship to the *propositus* than that of great aunt." This construction receives support from the *Niti Niganduwa* where it is laid down that "if the proprietress dies leaving her father and her maternal grandfather's elder or younger brother or cousin all her property including all her maternal lands will devolve on her father."—(Le Mesurier's and Pannebokke's translation p 114). This would apply to a father married in *binna* for whenever there is a difference between the rights of persons married in *diga* and *binna*, the *Niti Niganduwa* is careful to draw a distinction. It also shows that while a maternal grandfather might himself exclude the father, his brothers and cousins would not. In my opinion, therefore, the rule as stated in Sawer should be read with the limitation laid down in Armour, that a father's right to inherit the property of a child born of a *binna* marriage is not lost when there are only distant maternal relations. As regards the requirement that the father should not have abandoned the child, but should have had the child under his care after the death of the mother, it may fairly be presumed that the father did his duty by his child.

There is positive evidence that he lived with the wife's grandmother, Menik Etana, and looked after her. With whom could his daughter have lived except with her great grandmother ? It is not suggested that he abandoned the child or left the village and lived elsewhere. I think it must be held that this requirement has been complied with. In the present case the plaintiff is the great-great-grandson of a great-granduncle and cannot be preferred to the defendant, the father.

A question was also raised with regard to the rights of Menik Etana, the great-grandmother of the *propositus*, who transferred her rights to the defendant. It was contended for the plaintiff that there was no proof that Menik Etana was the mother of Hitihamy, the grandfather of the *propositus*. I find in the record an affidavit by the plaintiff (P3) in which he states that Guruhamy was married to Menikhamy in *diga* and died leaving a son Hitihamy and complains that Menikhamy is proposing to sell her husband's share in the family lands. This was in 1919. This document proves conclusively that Menik Etana *alias* Menikhamy was the great-grandmother of the *propositus* and not the second wife of Guruhamy. A maternal grandmother under the Kandyan Law is only entitled to a life interest in the property of her grandchild inherited from her mother. The right of the maternal great-grandmother cannot be greater than that of the grandmother, so if the latter has only a life interest, the former can also have only a life interest. But in *Ran Menika v. Mudalihamy* (supra), the maternal grandmother, it was said, took an absolute interest in her grandchild's property. This appears to be in conflict with the law as laid down in *Punchi Menika v. Dingiri Menika* (1875) Ram. (1872-1876) 130, which followed an earlier case reported in (1837) Morgan's Digest p. 201 s542. See also *Ran Menika v. Ukku Menika* (1905) Modder's Kandyan Law p603.

If Menik Etana became entitled to an absolute interest, her deed of gift of the 14th of July, 1922 would vest that right in the defendant, and he would be entitled to the property. If she had only a life interest the defendant would be the person entitled to *dominium*.

For these reasons I hold that the defendant's right is superior to that of the plaintiff. The appeal will therefore be allowed and the plaintiff's action dismissed with costs in both Courts.

Present : Maartensz, J.

KING vs. PERERA.

79 D.C. Criminal 7,638.

Decided : October 1, 1925.

Charge of Receiving Stolen Property—Burden of Proving Guilty Knowledge—Where the Accused Gives an Explanation which Might Reasonably be Considered to be true.

HELD.—In the circumstances of the case, the explanation given by the accused of how he came to be in possesion of the stolen property is one that may reasonably be true, and on the principle laid down in the case of *R. v. Ambramovitch*, he is entitled to the benefit of that explanation.

L. H. de Alwis for appellant.

Rajakarier for Crown respondent.

Maartensz, J.—The accused in this case, a tailor, was charged with and convicted of dishonestly receiving 3 rolls of cloth, property in the possession of the Ceylon Wharfage Company, knowing them to be stolen and of retaining the same rolls of cloth knowing them to be stolen, and was sentenced to 3 months' rigorous imprisonment on each count, to run concurrently. It is contended in appeal that the Crown had not discharged the burden of proving that the accused knew the property in question to be stolen property. It was urged that the learned District Judge convicted the accused on a disbelief of the evidence given by accused on the footing that the onus of proving that he came by the property honestly was on the accused once the prosecution had proved that the property in question was stolen property. I was referred to the case of *Perera v. Marthelisappu* (1) where

(1) (1919) 21, N.L.R., 312.

Sir Anton Bertram laid down, following the case of *R. v. Ambramovitch* (2) that the onus of proving guilty knowledge was not shifted from the Crown once the Crown had proved that the property was stolen but that the burden always remained with the Crown and that if an explanation is given by the accused which might reasonbly be true the accused is entitled to an acquittal although the jury are not convinced that it is true. What explanation may be considered reasonably true is explained by Sir Anton Bertram in the case of *Attorney-General v. Rawther* (3), I have therefore to consider whether the explanation given by the accused in this case may reasonably be true. The facts are very brief. About 12-30 a.m. on the morning of the 21st May sub-Inspector Goonesekera on information received went into the accused's house and found him examining 3 rolls of clothes which he had apparently just taken out of a gunny bag lying in the kitchen. He was making this examination in the kitchen which was visible from the road with one plank of the door left open, so that apparently there was no concealment of what he was doing. The accused at once explained that a man named Marthenis had brought a gunny bag sewn up and left it there saying he would come back for it immediately and that he, the accused, was examining the contents when the Inspector arrrived. Marthenis was arrested that night and at once corroborated the accused's statement in the statement he made to the Police Inspector and his evidence corroborated accused's evidence in the District Court.

The accused is a tailor and his evidence is that he works till late at night and Marthenis was a neighbour of his. The rolls of cloth were seized by the Police very shortly after Marthenis gave the cloth to the accused. The accused as far as the proceedings go appears to be a man of good character, and in my opinion under the circumstances in this case the explanation given by the accused is one that may reasonably be true and on the principal laid down in the case of *R. v. Ambramovitch* he is entitled to the benefit of that explanation.

I accordingly set aside the conviction and acquit the accused.

(2) (1914) 84, L.J.A.B., 397.
(3) (1924) 25, N.L.R., 385.

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