REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF CEYLON

SITTING IN APPEAL

DURING THE YEARS 1882-83.

BY

H. L. WENDT,

ADVOCATE.

COLOMBO:

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1884.

JUDGES OF THE SUPREME COURT

During the Period Comprised in this Volume.

The Hon. Richard Cayley, Chief Justice.
The Hon. Lovell Burchett Clarence.
The Hon. Henry Dias.

The Hon. Lovell Burchett Clarence, (Acting) Chief Justice.
The Hon. Henry Dias.
The Hon. Samuel Grenier (Acting).

The Hon. Jacobus Petrus De Wet, (Acting) Chief Justice.
The Hon. Lovell Burchett Clarence.
The Hon. Henry Dias.

The Hon. Bruce Lockhart Burnside, Chief Justice.
The Hon. Lovell Burchett Clarence.
The Hon. Henry Dias.

The Hon. Bruce Lockhart Burnside, Chief Justice.
The Hon. Henry Dias.
The Hon. Archibald Campbell Lawrie (Acting).

QUEEN'S ADVOCATE.

The Hon. Bruce Lockhart Burnside.
The Hon. Charles Lambert Ferdinands (Acting).
The Hon. Francis Fleming.

MEMORANDA.

—o—

7th February, 1882. Upon the Hon. R. CAYLEY, C. J., leaving the Island owing to illness, the Hon. L. B. CLARENCE, Senior Puisne Justice, was sworn in as Acting Chief Justice, the Hon. H. DIAS, Junior Puisne Justice, as Senior Puisne Justice, and S. GRENIER, Esquire, Advocate, as Junior Puisne Justice.

29th May, 1882. The Hon. J. P. DE WET was sworn in as Acting Chief Justice, upon which the appointment of the Hon. S. GRENIER ceased.

21st May, 1883. The Hon. B. L. BURNSIDE was sworn in as Chief Justice, upon which the appointment of the Hon. J. P. DE WET ceased.

12th December, 1883. The Hon. L. B. CLARENCE, Senior Puisne Justice, going to England on leave, A. C. LAWRIE, Esquire, District Judge of Kandy, was sworn in as a Puisne Justice.

19th April, 1880. The Hon. B. L. BURNSIDE was sworn in as Queen's Advocate.

12th July, 1882. C. L. FERDINANDS, Esquire, Deputy Queen's Advocate, was sworn in as Acting Queen's Advocate upon the Hon. B. L. BURNSIDE proceeding to England on leave.

5th July, 1883. The Hon. F. FLEMING was sworn in as Queen's Advocate.

LIST OF CASES

REPORTED IN THIS VOLUME.

—o—

DISTRICT COURT (CIVIL).

DISTRICT COURT (CRIMINAL).

DISTRICT COURT (INSOLVENCY).

COURT OF REQUESTS.

LIST OF CASES

COURT OF REQUESTS—*contd.*

POLICE COURT.

JUSTICE OF THE PEACE.

BENCH OF MAGISTRATES.

CROWN CASES RESERVED.

ERRATUM.

Page 304, headnote, *for* CLARENCE, J. *read* BURNSIDE, C. J.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE SUPREME COURT OF CEYLON.

7th July, 1882.

Present—DE WET, A. C. J., CLARENCE and DIAS, JJ.

CROWN CASE RESERVED.

The QUEEN v. URANELIS and seven others.

Assault on Policeman in the execution of his duty—Absence of count for Assault at Common Law—Conviction of Assault at Common Law.

The defendants were indicted for cutting and wounding two policemen while in the execution of their duty. The jury, under the judge's direction, found that, (1) if the policemen were acting in the execution of their duty, the 1st defendant was guilty on the indictment, and the 2nd, 3rd, 5th and 8th defendants were guilty of assault and battery on a police constable in the execution of his duty, and the 4th, 6th and 7th defendants were not guilty; but (2) if the policemen were not acting in the lawful execution of their duty, the 1st defendant was guilty of cutting and wounding, and the rest were not guilty.

Held, that, it being admitted at the bar that the policemen could not be regarded as having been in the lawful execution of their duty, the conviction of assault at Common Law could not be sustained.

This was a case reserved, on a question of law, by Mr. Berwick, as Commissioner of Assize, from the First Criminal Sessions of the Supreme Court at Galle for 1882.

The charge was that the prisoners, on the 28th November 1881, "in and upon one Mathes and upon one Omar Abdulla, then being police constables in the execution of their duty, did make an assault and them the said Mathes and Omar Abdulla did beat, stab, cut, wound and ill-treat and other wrongs to the said Mathes and the said Omar Abdulla then did to the great damage of the said Mathes and Omar Abdulla."

The substance of the recitals in the account submitted by the Commissioner for the decision of the Full Court was as follows :

At the trial on the 19th May, it appeared that Mathes and Abdulla were policemen, and were in fact maimed and wounded by certain of the prisoners, when attempting (while not in uniform) to arrest the 4th and 7th accused upon a warrant signed by Mr. Mason, a J. P. for Galle, which ran as follows :

The Queen, on the complaint of Ukwattege Tettu of Udawelapitiya... ... ... Complainant.

Vs.

Obederis ... ...Accused.

To the Superintendent of Police, S. Province, Galle.

Take into your custody the bodies of Gammadegodde Lianege Obederis and (2) Kalagamakoralage Erolis both of Udawelapitiya charged with aggravated assault and bring them before me or other competent J. P. forthwith. Given under my hand at Galle this 26th day of October 1881.

J. D. MASON,
J. P. for Galle.

This warrant bore the indorsement " to be executed by the police under my command," signed by Captain Graham, Superintendent of Police, and dated 27th October 1881.

The question reserved was, " whether at the time of execution or attempted execution of the above warrant they were in the lawful execution of their duty as Police Constables."

It was admitted at the trial that no Police force had been established, under Ordinance 16 of 1865, at Udawelawitiya.

The Judge told the Jury that, if the persons injured were not lawfully authorized to arrest the accused, the 4th and 7th accused (against whom the warrant was directed) were entitled to use as much force as was reasonably necessary to resist their own arrest, and that the other accused (being the father, mother and brothers of the 4th and 7th accused) were entitled to use reasonable force in aiding their relatives ; but that, if one or more of the accused used deadly weapons or more violence, otherwise, than was necessary to avoid their arrest, they would be guilty of assault and battery or aggravated assault, according to the amount of violence used. On the other hand, if the persons injured had been in the lawful execution of their duty, then such of the

accused as had cut them, and those who had abetted them, would be guilty on the indictment.

The Jury after consideration returned the following special verdict : If the Court thought the constables had been in the execution of their duty, then the 1st accused was guilty of cutting a constable while in the execution of his duty, the 2nd, 3rd, 5th and 8th accused guilty of assault and battery on a police constable in the execution of his duty, and 4th, 6th and 7th accused not guilty ; but if the Court thought the constables were not in the execution of their duty, then the 1st accused was guilty of cutting and wounding, and the rest of the accused not guilty. Then, in order to have the question argued on a case reserved, the Commissioner told the Jury to assume that the constables were in the execution of their duty, and return a definite verdict. On this the Jury returned the same verdict as they had done previously on this assumption. The Judge then remanded the prisoners till the ensuing sessions at Galle, the 1st prisoner finding bail in Rs. 500 and the rest in Rs. 100 each ; making this difference, because the Commissioner thought there "was not a high probability that the conviction of the latter would be sustained." As regards the 1st accused the Jury thought he had used unnecessary and excessive violence in rescuing his brothers, and he therefore stood convicted of cutting and wounding in either view of the law, the decision of which would only affect the amount of punishment.

Ferdinands (Acting Q. A.) appearing for the Crown, now admitted that the conviction for cutting constables while in the execution of their duty could not stand for two reasons : (1) Because the constables were acting outside their province and district, and (2) because the warrant was not directed by name or designation to the particular persons who sought to enforce it ; but he contended that the first verdict of the jury should stand, which convicted the first accused of cutting and wounding, and acquitted the rest. Further, the 2nd and 3rd verdicts were worthless and of no effect, inasmuch as a jury could give but one verdict under our Ordinance, *guilty* or *not guilty*, and, once their first verdict had been accepted and recorded, they were *functi officio*. He contended not so much for this particular case, as for the principle involved, and would only press for the punishment of the first accused.

Grenier, for the prisoners, *contra*—The Ordinance No. 11 of 1868, section 44, directs the Supreme Court to consider and dispose of any question of law reserved by one of the Judges for the consideration of the Collective Court. Here the only question reserved is, whether at the time they were assaulted the constables were acting in the execution of their duty. It having been admitted now at the bar that they were not so acting, the prisoners were entitled to be discharged. There is in the present indictment no second count (as there usually is) charging an assault at Common Law, and this Court cannot therefore convict the prisoners of that offence. [CLARENCE, J.—There is a case reported in 4 S. C. C. 117, in which Mr. Chief Justice Cayley held that, though there was no such count for assault at Common Law, the Supreme Court could in appeal set aside the conviction under the Ordinance for resistance and convict of the Common Law offence.] The Supreme Court did not in that case convict without the Common Law count, but they amended the plaint (it being a Police Court case) by inserting that count under the 'large powers of amendment' vested by Ordinance in the Supreme Court. But I have not known a case in which an indictment was amended as that plaint was. *R* v. *Oliver* (1) there cited does not quite bear out the Chief Justice's position of conviction without count; for in that case the prisoner was charged (1) with assault with intent to do grievous bodily harm, and (2) with assault, and the jury having found a general verdict of guilty, the conviction was affirmed as on the second count. [The CHIEF JUSTICE—Just as in an indictment for robbery there are two elements, the assault and the theft, and the jury may convict of both or either. CLARENCE, J.—I remember a case tried when I was D. Q. A. before Mr. Cayley as Puisne Justice, in which on an indictment for conspiracy there were overt acts charged which amounted to offences in themselves, and at my request the judge directed the jury, that if they thought the overt acts proved, but not the conspiracy, they should convict of the offences so disclosed. By your contention that direction would be wrong.] The overt acts there were offences *per se*. [CLARENCE, J.—But the principle is the same as here. The acts of a simple assault are the same as of an assault on a constable in the

(1) 30 L. J., M. C., 12.

execution of his duty, and where the matter of aggravation is absent the assault still remains]. I contend there is but one verdict in the present case, viz the third; for the first two were hypothetical and assumed a certain state of the law. The judge then decided the law definitely and the jury brought in their final verdict, which must fall with the validity of the warrant, which was assumed. The conviction should be quashed.

Ferdinands, in reply—It was competent for the jury to convict of assault simply. [The CHIEF JUSTICE—But they have not done so]. I say they have. [reads first verdict] [The CHIEF JUSTICE—But the Commissioner apparently did not accept that as a final verdict]. He did, for it is endorsed on the indictment and signed by Mr Black, the foreman. [DIAS, J.—There can be no doubt that the jury intended to convict the first accused of assault, whatever the legality of the warrant might be; but there is the third verdict to the contrary]. I treat that as surplusage.

Their Lordships then delivered judgment as follows:

The CHIEF JUSTICE—I am of opinion that the conviction cannot stand; but as I have not looked into the authorities I should like to do so, in view of the importance of the case, before handing in a written judgment on the following points: (1) Whether a jury can find two valid verdicts; (2) Whether the jury having found a second verdict, the first is sustainable. My brother CLARENCE shares with me the opinion that the judge did not accept the first verdict.

CLARENCE, J.—On the first point, I find two verdicts signed by the foreman. In my opinion the Judge declined to accept the first verdict, and the jury acquiesced in the refusal by retiring again. The Judge (in order to raise the question) gave the jury what was in effect a misdirection, and they then returned the general verdict now under review. If it be conceded that the warrant is bad, that verdict cannot stand. On the second point, the question of the necessity for a second count, I should like to have time to consider. Both points arise here, and the decision of either would be sufficient.

[*Grenier*—The second point will not arise if the first be held in my favor]. Yes.

The CHIEF JUSTICE—It is always advisable to have two counts. There is only one point reserved, and it strikes me

the Judge had the last verdict in view when he reserved the question].

DIAS, J.—There is only one verdict, that last taken, and the only question is on that verdict—was the warrant good or bad? If it is conceded that it was bad, there is no course but to set aside the verdict.

Verdict set aside.

SUPREME COURT IN APPEAL,

10th and 28th February, 1882.

Present—CLARENCE, A. C. J., DIAS, J.

D. C. Ratnapura, 1828. } P. SUMANGALA UNANSE and another v. INDURUWA PIADASSA UNANSE.

District Court reserving judgment—Delivery by Judge in open Court—Ordinance 11 of 1868, § 75.

The District Court, after the trial of this case on 25th January 1881, reserved judgment. The judge, having been removed to another station, sent his judgment in the case to his successor, who caused it to be read in Court by an officer of the Court as the judgment in the case, on 27th September 1881.

Held, that this could not be regarded as the judgment of the District Court within the meaning of Ordinance No. 11 of 1868.

The facts sufficiently appear from the judgment of the Supreme Court.

Burnside, Q. A., (*Ferdinands* and *Grenier* with him) for defendant, appellant.

Van Langenberg (*Seneviratne* with him) for plaintiff, appellant.

(28th February) CLARENCE, J.—This is an action by two Buddhist priests, who claim by virtue of the will of a deceased priest to be entitled to certain property, which is averred to be under the "management of defendant," who is also a priest; and plaintiffs pray for an account of rents and profits. Defendant disputes the plaintiffs' right to the account prayed for; but it is not necessary to enter upon the ground of his defence. The case came to a trial or hearing on the 25th January 1881, when the then District Judge [*J. E. Smart*] reserved his judgment. In the meanwhile it appears that that gentleman in or about the following April ceased to be District Judge of Ratnapura, being removed to another office

and station. No judgment was delivered in the present case until September 1881, when the ex-District Judge appears to have forwarded to his successor a draft opinion, which that gentleman caused to be read in Court by an officer of the Court, as the judgment of the Court in the case. The first plaintiff and the defendant each desires to appeal from that judgment, and each takes the objection that the judgment delivered under the above circumstances is not the judgment of the Ratnapura District Court within the meaning of the Ordinance 11 of 1868 [§ 75]. We think that that is so.

DIAS, J., concurred.

Set aside. Proceedings of 25th January 1881 *quashed. No costs.*

Proctor for plaintiff appellant, *D. Jayetilleke.*
Proctor for defendant appellant, *Jurin de Zilva.*

22nd May and 8th June, 1882.

Present—DIAS and GRENIER, JJ.

D. C. Kalutara, 36,176. } HENDRICK v. FREDERICK.

Cession of Action—Surety paying off debt—Cession necessary for surety to reach immoveables mortgaged.

Plaintiff (a surety), bringing the amount of the debt into Court prayed in a previous suit that the defendant, the creditor, be decreed to accept the money and hand over to plaintiff the deeds hypothecated. Defendant drew the money out of Court. Plaintiff's *Rule Nisi*, calling upon defendant to execute in his favor a cession of action, having been discharged, on the ground that his libel was defective, plaintiff brought the present action to compel defendant to cede to him his right of action against the principal debtor.

Held, that plaintiff must be taken to have deposited the money conditionally on defendant's executing a cession of action.

Held also, that though the plaintiff could recover the mere money debt from the defendant without such cession, it was equitable that plaintiff should be given recourse to the mortgage security, which he could not reach (being land) without such cession in writing.

Held also, that cession, [if not made the condition of the payment], must be claimed within a reasonable time after payment.

Francisco Fernando was indebted to James VanRooyen in the sum of Rs. 100 and interest at 25 per cent. per annum upon a mortgage bond dated 23rd May 1878, the plaintiff being surety for Fernando. On 1st February 1881 Van

Rooyen assigned his bond to the defendant. The plaintiff instituted D. C. Kalutara 35526 against the defendant (alleging a previous tender of the sum due), to compel him to receive the sum of Rs. 147·27 then due on the bond and deliver over to plaintiff the deeds hypothecated with the defendant; but the plaintiff did not distinctly pray that the defendant be decreed to execute a cession of action. The answer there denied the offer of payment by plaintiff. On the 18th February 1881 the defendant drew the Rs. 147-27 deposited in Court. Three months after, the plaintiff called upon defendant by *Rule Nisi* to execute a cession to plaintiff of his right of action against the mortgagor. This rule was discharged by the District Judge, who pointed out the absence of the necessary prayer in the libel. The plaintiff therefore instituted the present action on the 7th October 1881, setting out the above facts, and the tender of a notarial cession of action for defendant's signature, and his refusal to sign it, and praying that defendant be decreed to deliver to plaintiff (concurrently with the hypothecated deeds) a sufficient cession of action to enable the plaintiff to recover the Rs. 147 27 from the principal debtor; and in default to repay to plaintiff the said sum with interest. The answer denied that defendant had now any right of action to cede, and that such cession was necessary for the purpose set out by plaintiff; and denied also the tender of the deed for signature.

After evidence heard for the plaintiff the District Judge (*Worthington*) gave the following judgment on 23rd January 1882:

"On reading available authorities I find plaintiff entitled to the assignment and cession of action which he seeks. *Van Leeuwen* (1) points out that the right of action or cession of action commences from the time of the obligee being satisfied, and the paragraph quoted from *Pothier* for defendant does not seem to be applicable, though the following one referred to by plaintiff's proctor is so s ill less. Apart from law, plaintiff should in equity have relief, and especially against the suspicious behaviour of defendant, whose opposition seems to be dictated by a desire to benefit his brother-in-law at plaintiff's expense. Let judgment be entered up for plaintiff as claimed."

(1) *Commentaries*, Bk. 4, cap. 4, § 13 et seqq, Engl. Trans. (1820), pp 332, 333.

Dornhorst, for the appellant, cited 3 Burge, *Col. and For. Laws*, 545; Digest, xlvi. 3, 76, xvii. 1. 28; Code, v, 58. 1; Van der Linden, (Henry's Translation), p 212; Voet, *ad Pand.*, xlvi. 1. 31; 3 Lorenz' Reports, pp 235, 319; Vanderstraaten's Reports, pp 91, 203.

Van Langenberg, for the respondent, cited 3193 D. C. Jaffna, (2); Austin's Reports, pp 67, 190; Ramanathan's Reports for 1860–62, p 148; D. C. Matara, 26949 (3) cited and approved in D. C. Badulla, 20149, (4).

Cur. adv. vult.

(8th June). DIAS, J.—By a mortgage bond of 23rd May 1878 the plaintiff bound himself as surety for the due payment of the amount appearing in the bond. On the 1st February 1881 this bond was assigned by the obligee to the defendant. The plaintiff, as surety, having failed to induce the defendant to accept principal and interest and assign the bond and the mortgage security to plaintiff, on the 9th February 1881 filed a libel against the defendant in D. C. Kalutara 35526, brought the money (Rs. 147·27) into Court, and prayed that the defendant might be decreed to accept the same and restore to the plaintiff "the said documents," whatever that may mean. The object of the plaintiff in instituting the case No. 35526 was to compel the defendant to receive the debt due on the bond and grant to plaintiff a *cession of action*; but through some negligence or ignorance on the part of plaintiff's proctor the libel was not properly framed for the purpose for which it was intended. The *cession of action* which the plaintiff claimed from the defendant is embodied in a deed, which was tendered to the defendant for his signature, before the institution of the case No. 35526; and though the libel is not properly framed in that action, the plaintiff must be taken to have paid the money conditionally on the defendant ceding to the plaintiff his right of action on the bond. The defendant filed his answer in 35526 on 17th February 1881, in which he denied the plaintiff's offer to pay the debt due on the bond;

(2) Morgan's Dig., p 107, para 427.

(3) Civil Minutes of S. C., 24th June 1875 (*Per* MORGAN, A. C. J. STEWART and CAYLEY, JJ. See Appendix A.

(4) Civil Minutes of S. C., 17th November 1876. See Appendix A.

but on 18th February the defendant drew the money which was deposited in Court; and it cannot in fairness be said that he received the money unqualifiedly. After the money was withdrawn, the plaintiff's proctor on the 27th May 1881 made an irregular motion, by which he tried to compel defendant to cede to the plaintiff his (the defendant's) right of action. This motion was properly rejected by the District Judge on 19th September 1881. Having thus failed to obtain a *cession of action* in the case 35526, the plaintiff instituted this case to compel the defendant to execute in favor of plaintiff a *cession of action*; and the defence relied on is, that the debt having been already paid, the defendant has nothing to cede, as his right of action had ended by the payment. As a general rule of law, there can be no doubt that when a debt is paid unqualifiedly by a surety as co-obligor, he cannot compel the creditor to give him cession of action for the simple reason, that his right of action was put an end to by the payment; but the writers on Dutch Law are not quite agreed as to the time when this *cession* may be claimed. *Voet* is of opinion, that a surety may claim *cession* at any time after payment (xlvi. 1. 30), but this I take to mean within a reasonable time. There is a case reported in *Morgan's Digest*, p 107, in which the Supreme Court held that *cession* may be claimed after payment; but all the authorities are agreed that if payment is made subject to the condition that the receiver should grant to the payer a *cession of action*, such *cession* may be obtained after payment. The case now before us clearly falls under the ast mentioned class of cases. As the debt is secured by a mortgage, the plaintiff cannot place himself in the position of the defendant, which he has a right to do, without a *cession of action*, duly executed before a notary and witnesses, and though the plaintiff may recover the mere money debt from the obligor without a *cession of action*, he cannot reach the mortgage security without such *cession*, and it is inequitable that the defendant should be allowed to deprive the plaintiff of this right. The object of the defendant in resisting the plaintiff's claim of *cession* is obvious. The land mortgaged by the bond appears to have been purchased by the defendant's brother-in-law, and what the defendant wants to do now is, as the District Judge puts it, to benefi his brother in-law at the plaintiff's expense.

The judgment appealed from is right, and must be affirmed.

GRENIER, J., concurred.

Affirmed.

Proctor for the Appellant, *D. de Silva.*
Proctor for the Respondent, *S. R. Fonseka.*

30th June and 13th July, 1882.

Present—DE WET, A. C. J., CLARENCE and DIAS, JJ.

C. R. Kandy, 19,410. } SANGERAVALO v. GRAY.

Cattle damage feasant—Custody of cattle seized—Publicum Stabulum—Apportionment of damages.

A herd of plaintiff's cattle had on several occasions trespassed on defendant's land and done damage, and one head of this herd was seized *damage feasant* and detained by defendant. Plaintiff, having tendered Rs. 2.50 (as the amount of damage done on the day of seizure by the animal seized), which was accepted as part payment and the cow not released, sued to recover his animal. Defendant claimed right to detain it till payment of the full amount of damages.

Held, that there was no *publicum stabulum*, or public pound, in Ceylon, and that defendant was entitled to detain the trespassing cattle in his own custody.

Held also, that it was for the plaintiff, as the wrong-doer, to apportion the damages among the several head of trespassing cattle; and that, proof on this point being wanting, everything would be presumed against him.

The plaintiff sued the defendant to recover Rs. 30, the value of a cow belonging to plaintiff, which defendant unlawfully detained. The defendant pleaded not guilty and averred the cow had been impounded while trespassing on Dodangalla Estate, of which defendant was superintendent, and claimed the right to detain it till payment of Rs. 10, the amount of such damages, which sum the defendant prayed plaintiff might be condemned to pay.

The Commissioner *(Ashmore)* gave judgment as follows: "In this case the judgment was postponed to enable Mr. Swan, who appears for the plaintiff, to quote to the Court authorities on the subject of distress *damage feasant*.

"With regard to the facts of the case, there is some dispute as to the amount of damage, but I understand it is

scarcely disputed that plaintiff's herd of cattle did trespass on the land of the defendant, and did do damage. There is some contradiction between defendant and his witness, Hami, on the subject, which I think arose from an intention on Hami's part to exaggerate as far as he could the laxity of the plaintiff in looking after his cattle. But it seems to be undoubtedly the case that all the damage was done within the time of Mr. Gray's two visits, that is within four days of the time when this cow was caught. The defendant's witness, Muniandy, a fairly intelligent Tamil, swore that he saw the cattle in the clearing every day for 3 or 4 days, the same herd presumably including the same cow. On the day when defendant visited the land he found the plaintiff's herd, the same herd, trespassing. One cow was seized then and there and the others got away.

"Plaintiff made a tender of Rs. 2.50 as the damage done, which defendant accepted, as he says, in part payment only. There can be no doubt as to the damage being considerable, for the defendant swears that he had to re-plant the clearing in great part, and there is no reason to disbelieve him, and the sum of Rs. 2.50 is an absurd estimate of the damage. The assessment on which plaintiff lays stress seems to have been carried on in a "hole and corner" kind of way without notice to defendant, and this Court can place no credit in it, the damage, absurdly enough, having been pointed out by the plaintiff. Plaintiff's claim is that the defendant must return the cow as he has no right to detain it, after his share of damage, covered by Rs. 2.50, is paid; and he sues defendant for the cow or its value. The defendant answers that he has a right to detain the cow and did so detain it until all damages, Rs. 10, done by plaintiff's herd be paid him, and he claims damages Rs. 10 in reconvention. Mr. Swan for plaintiff quotes Addison on Torts, cap. x, sec. 2, of distress damage feasant, to the effect that distress must be taken at the time damage is done; and further, "if many cattle are doing damage, a man cannot take one of them as a distress for the whole damage, but he may distrain one for its own damage;" and further quotes C. R. Galle 25,177, *Crowther*, p. 110, as to the principle on which that cow's damage should be estimated. With all respect for the authority of Addison I cannot think that if A's herd of 20 cattle trespass on B's land and B is able to seize only one head, he is unable to detain it until all damage done by A's cattle is

repaid to him ; and can only suppose that Addison refers to cattle of different owners, in which case no doubt the theory he puts forward is a sufficiently intelligible one. No cases are there quoted, and it is impossible without that assistance to ascertain what he means exactly. Some difficulty might arise as to the day on which the full damage was done, but it is surely for the plaintiff, whose cattle are caught actually doing damage, to separate that damage into its specific parts, and not for the defendant who was injured by him, or for the court before whom no evidence on the point whatever is led. Again, in this action plaintiff does not sue for damages for illegal detention, but for the value of his cow. Defendant's claim may be taken as a claim in reconvention for Rs. 10, which he is clearly entitled to get. But my opinion is that plaintiff must fail and the defendant is entitled to keep the cow until he is paid. It is ordered and decreed that the plaintiff's suit be dismissed with costs. And it is further ordered and decreed that the plaintiff do pay the defendant the sum of Rs 10 and costs of this suit."

Dornhorst for the plaintiff, appellant—(1) A person cannot keep cattle, seized *damoge feasant*, in his own custody, but must send them to the *publicum stabulum*. *Voet*, ix. 1, 3; *Grotius*, Introd., iii. 38, 11; *Groenewegen*, De Leg. Ab., ad Dig. ix. 2. 39; *Van Leeuwen*, Cens. For., Part i., v. 31. 4; *Id.*, Comm. (English Trans) p. 494; 3 S. C. C., 51. If there be no *publicum stabulum* in Ceylon, the only remedy is by ordinary action for damages. (2) Once the cattle have escaped, they cannot be seized on a subsequent occasion for the damage previously done. (3) Where a herd has done the damage, one cow cannot be detained till payment of the whole amount. *Addison on Torts*, chap. vii. sec. 2, 5th Ed., pp. 366, 367. As to apportionment of damages among several cattle, C. R. Galle, 25,177. *Crowther*, p 110, *Ramanathan*, 1863-63, p. 62. (4) Plaintiff's suit to recover his cow is dismissed, and though he is decreed to pay the defendant Rs. 10, the defendant is not decreed to return the cow on receipt of that sum. Further, plaintiff does not get credit for the Rs. 2 50 already paid. The damage was done on 4 different days, and if points (2) and (3) be held in plaintiff's favor, the Rs. 2.50 tendered and accepted is a fair compensation, and plaintiff is entitled to judgment.

Van Langenberg for the defendant, respondent – Ordinance 9 of 1876 provides procedure for summary recovery of damages caused by cattle, and repeals Ordinance 2 of 1835 relating to the same subject. The Supreme Court has held that the older Ordinance did not repeal the Common Law, which has been expressly reserved by the Ordinance of 1876. The present action is under the Common Law. I do not dispute the Roman-Dutch Law, but there being no public pound in Ceylon the only remedy is by private detention. In the case quoted from the S.C.C., the action (which was for the value of cattle that had been taken *damage feasant* and had died in the custody of the headman) was dismissed on the ground that the detention, whether by the proprietor or the headman, his agent, was lawful. D. C. Kandy, 18,947, *Austin*, 102, was an action (in 1846) for the recovery of the value of 2 bullocks which the defendant detained; and it was held that, there having been no tender of compensation, the detention was justified. C. R. Kandy, 30,619, *Creasy*, 117, citing *Van Leeuwen*, Comm., 494. [The CHIEF JUSTICE—Can you detain one cow for the damage done by a whole herd? CLARENCE, J.—Everything may be presumed against the owner of the cattle as a *spoliator*, and it will be for him to apportion and divide the damage.]

Dornhorst, in reply—The decision in *Austin* was that of a single judge, and is open to review now. There is a case in *Grenier* (1873), P.C., p 102, in which the Full Court decided that the Common Law remedy remained. In the present case the judge has found that 20 head of cattle did Rs. 30 of damage, and this one cow's damage on 4 days amounted to Rs. 10; so that the Rs. 2.50 tendered was fair compensation for the damage done on the day of seizure, and the detention after that tender was unlawful.

(13th July). CLARENCE, J.—In this action plaintiff seeks to recover from defendant the value of a cow said to be unlawfully detained by defendant. Defendant answers that the cow is detained as having been seized trespassing *damage feasant*, and claims in reconvention Rs. 10 for the damage done. The Commissioner has dismissed plaintiff's action and given defendant judgment in reconvention for Rs. 10. Plaintiff appeals.

There is no doubt that the cow was seized while trespassing *damage feasant*, but it was argued by appellant's counsel

that defendant had no right to detain the cow in his own keeping. but that he might and should have handed it over to a headman. It seems that according to the Roman Dutch Law the owner of the land trespassed upon had no right to detain the cattle in his own private keeping, but to send them to the pound, which Voet (ix. 1. 3.) styles *publicum stabulum*. There are no pounds in Ceylon, so far as I am aware; but headmen sometimes take over charge of distrained cattle. Under the Cattle Trespass Ordinance of 1876, a police officer or local headman is rendered a proper person to take charge of distrained cattle, but the 10th section of that Ordinance expressly reserves all Common Law rights to the person injured by the trespass. The defendant in the present instance did not choose to avail himself of the procedure provided by the Ordinance; neither did he hand over the cow to any headman. There is no doubt that the distrainor, by handing over the cattle to a headman, relieves himself of much responsibility, but in my opinion, if he is disposed to accept the responsibility of the charge of the animal, he may detain it himself. We are not now concerned with the Ordinance of 1 76, but with the Common Law, and I am not aware that the custody of a headman has ever come to occupy the place of the *publicum stabulum* to the length of being compulsory on the distrainor. I have always understood the law to be, that the distrainor relieves himself of responsibility if he gets a headman to take charge; but that if he chooses to detain the beast himself he may. This, it would seem, was also the opinion of CAYLEY, C. J., and my brother DIAS (*v.de* the concluding para. in the case reported, 3 S.C.C., 52). The case reported in *Austin*. p 102, seems also to proceed upon the same principle, since the detention in that case appears to have been detention by the defendant personally.

Having decided this point in defendant's favor, it seems to me unnecessary to enter upon the discussion of the various points which were urged with reference to the damage for which the cow was distrained. It appears that this cow, in company with several other head of plaintiff's cattle, had been for some days breaking into and damaging defendant's coffee; and at last the cow was seized. The evidence indicates that the total amount of damage done was considerably more than the Rs. 10 demanded by defendant. Under such circumstances I am not disposed to make presumptions

in favour of plaintiff, and all that I think it necessary to say is, that if in addition to the above facts there are any other facts which would limit the amount of defendant's lien on this cow further than the moderate amount at which defendant has placed it it is in my opinion for plaintiff to establish such facts, and he has not done so.

I think the judgment appealed against should be affirmed, with the variation that, plaintiff having paid Rs. 2.0.0, the judgment must be only for Rs. 7.50. Plaintiff, having failed in the main matters argued, must pay defendant's costs in appeal.

The judgment of DIAS, J., proceeded upon the same ground, and the Acting Chief Justice (DE WET) concurred in the above judgment.

Affirmed.

Proctor for Appellant, *Ed. Swan.*

Proctor for Respondent, *J. D. Jonklaas.*

[See a Paper on the subject of Cattle Trespass, in the *Legal Miscellany* for December 1864, No. 5].

14th and 18th July, 1882.

Present—DE WET, A. C. J., and CLARENCE, J.

D. C. Kegalla. 4,225. } SEKA LEBBE CASSIM LEBBE MARIKAR and others. v. REGINALD BEAUCHAMP DOWNALL and others.

Practice—Appeal to the Privy Council—Ord. 11 *of* 1868, *sect.* 52, *subsec s.* 3 *and* 11,

The Supreme Court delivered a judgment in this case on 22nd November 1881, which did not pass the seal of the Court till 28th March 1882. Appellant (the plaintiff) filed his petition of appeal on 8th April, and tendered his bond for security in appeal (the acceptance of which was unopposed) on 7th July, 1882

Held, that the 14 days within which (under subsect. 3) the petition of appeal had to be filed were to be reckoned from the date of the judgment sought to be appealed against passing the seal of the Court, and not from the date of its delivery in Court; and that therefore the petition was filed in time.

Held also, that the bond for security in appeal had been tendered within the three months of filing the petition of appeal, and was therefore in time.

The case came up on a question whether the security bond tendered by the Plaintiffs for their appeal to Her Majesty in Council was in time.

Judgment upon the plaintiffs' appeal from the District Court of Kegalla was delivered in the Supreme Court on the 22nd Nov. 1881 by CAYLEY, C. J. and CLARENCE, J. affirming the non-suit entered. *Van Langenberg* then pointed out that the execution of the power of attorney, upon the non proof of which the Judges' decision proceeded, had been admitted in the Court below; and it was ordered that the judgment should not pass the seal of the Supreme Court, pending the production of an affidavit by plaintiffs' Counsel. CAYLEY, C. J., then went on circuit, and shortly after took ill, and the affidavit was presented before CLARENCE, J. who, after hearing Counsel, ordered on the 27th March that the judgment previously delivered should pass the seal of the Court, declaring that, even taking that power of attorney as admitted, the chain of evidence was incomplete. The judgment was accordingly sealed on the 28th March, and on the 8th April plaintiffs filed their petition for leave to appeal to the Privy Council. On the 7th July, having given notice to the defendants' Proctor of their motion, *Wendt* moved that the security bond filed by the plaintiffs be accepted. For the convenience of the Judges it was ordered that the discussion of the motion should lie over for the Tuesday following, though it should be treated as having been made on the 7th. On Tuesday (the 11th July) *Grenier* for the Respondents wished the motion to be postponed to the 14th, and it now came up before the Judges sitting for Final appeals.

Grenier for the defendants contended, first, that the petition for leave to appeal was out of time, the fortnight within which it was due having been calculated from the date the judgment passed the seal of the Court, and not from the day of its original delivery in open Court by CAYLEY, C. J. A judgment becomes the judgment of a Court, when it is delivered in open Court by the judges as their decision. Sub-section 3 of section 52, Ordinance 11 of 1868, prescribes that a petition for leave to appeal shall be filed within 14 days of the judgment being pronounced, but it does not provide that such judgment shall bear date (and the 14 days be reckoned from) the day such judgment receives the seal of the Court. The words of the section are "given or pronounced," and the judgment in this case was "given and pronounced" on the 22nd November. [The CHIEF

JUSTICE—Section 57 says the "decision" of two judges shall be the judgment of the Court. CLARENCE, J.—But "judgment" in this section apparently means "decree."] The seal of the Court is meant merely to secure the authentication of the judgment, and its recognition by other Courts. [The CHIEF JUSTICE—The true test of the use of a seal is, could execution issue upon a judgment without it? Again, in a criminal case, the judge cannot pass sentence until the verdict of the jury has been indorsed on the indictment and signed by the foreman. I know of a case at the Cape, in which a similar appeal was lodged, and the copying of the documents to send to the Privy Council took six months, and in the meantime the recognizances had been perfected. CLARENCE, J.—The *decree* might be sealed the very day of delivery, and the copying of the *grounds and reasons* proceed afterwards].

Secondly, the security was not completed within 3 months of the petition for leave to appeal. That petition was filed on the 8th April, and the 3 months would have expired at midnight on 7th July. On that day, near 5 p m, the appellants tender their security bond. How could the judges have decided on the sufficiency of the security in that short while? [The CHIEF JUSTICE—Wonders can be done in 7 hours.] But it suffices that nothing *was* done. [The CHIEF JUSTICE—No one appeared to oppose the acceptance of the security, and to give the parties interested an opportunity of appearing we said "let the matter be mentioned on Tuesday, and we shall accept the motion as made *tunc pro nunc*"]. But the tender of the bond is not sufficient—the security must be "completed" within the three months. [The CHIEF JUSTICE—Suppose the appellant and respondent could not agree as to the amount of the security, and this difference continued till the time was nearly out, the appellant might come into Court just a few hours within the time, and say, "If the Court holds your objection frivolous, then I am in time; but if I wait till the time is out you may use the very argument you are now pressing." CLARENCE, J.—The would-be appellant tendered a security. If we had accepted it he would have been in time. For our convenience we adjourned the hearing and now discuss it. If that security, tendered on last Friday, be now held insufficient, I do not say we would entertain a fresh proposal. On the other point, my present opinion is

a strong one, (subject to anything you may show me to the contrary from Mr. Macqueen's book), that the judgment should date from the day it passes the seal. On the second point, I agree with the Chief Justice that Friday's motion was in time, and that if the security be held sufficient, it was certainly tendered in time. The CHIEF JUSTICE—Mr. Grenier is satisfied with the amount of the security.—CLARENCE, J.—Then, of course, *cadit quæstio.*] I do not question the value of the security, but only the fact of its being in time.

Van Langenberg, for the plaintiffs, *contra*—(He was only called upon with reference to the first point.) The record is the only evidence of the date of the judgment, and in it the decree is dated the 28th March. Immediately after the judgment had been delivered, what I thought an error was pointed out, and the judgment was ordered not to pass the seal. The true test is the C. J's, Could execution have issued? [Mr. *Loos*, the officiating Registrar, referred to by the Court, said it could not. *Grenier*—The Registrar can only speak to the practice, not the law.] The decision pronounced in November was a mere expression of opinion, and it cannot be denied that the judges have a right to re-consider their opinions, and that is what the judges here did.

Cur. adv. vult.

(18th July). CLARENCE, J.—This case now comes before us upon the plaintiffs' tender of security in appeal to Her Majesty in Her Privy Council. The matter was moved by Mr. *Wendt* for plaintiffs on Friday the 7th before the rising of the Court, but there not being then time to enter upon it we saved Mr. *Wendt*'s motion until that day week, when Mr. *Wendt* made his application and the objection was taken on behalf of defendants that plaintiffs were out of time. It is admitted on defendants' part that the security if tendered in time is sufficient, and the only question which we have to consider is—whether plaintiffs' security was in time when tendered on the 7th.

That question turns upon this consideration:—are or are not the fourteen days mentioned in subsection 3 of section 52 of Ordinance 11 of 1868 to be reckoned from the day on which Chief Justice CAYLEY and myself pronounced our judgments or opinions in open Court?

Subsection 3 requires the intending appellant to petition for leave to appeal from the "judgment, decree, or sentence" by which he may feel aggrieved "within fourteen days next after the same shall have been pronounced, made or given." That requirement complied with, the party has, by subsection 11, three months from the date of his petitioning for leave to appeal, within which three months he must give his security.

The judgments of Chief Justice CAYLEY and myself were pronounced in Court on some day in November 1881. Afterwards, while I was engaged with the Colombo Criminal Session which lasted from November 10th to December 9th, plaintiffs' counsel stated to the CHIEF JUSTICE that he feared there had been some misapprehension on our part with regard to the extent of plaintiffs' admissions, whereupon the CHIEF JUSTICE directed that the decree in appeal should not pass the seal until that suggestion had been considered and the case spoken to upon the point. I am not now aware on what precise date the CHIEF JUSTICE gave that direction, but I understand that it was within two or three days of the delivery of our opinions in Court. By the time I was released from the labour of the Colombo Criminal Session, Chief Justice CAYLEY had left Colombo on the Midland Circuit, and up to the time when he was overtaken by his lamented illness early in the present year, there had been no opportunity for our sitting to have this matter spoken to. After Mr. Cayley had left for England, the matter was placed in the paper and mentioned before myself alone; when after hearing what counsel had to say I was of opinion that our judgments or opinions had been pronounced upon no misconception as to the admissions; and on the 27th March I directed the Registrar that the decree in appeal should pass the seal. The decree was sealed next day, and on the 8th April plaintiffs presented their petition for leave to appeal.

Consequently, if the fourteen days are to be reckoned either from the day on which the decree was sealed or from the preceding day on which I directed it to be sealed, the plaintiffs were in time. Defendants' Counsel contends that the fourteen days have to be reckoned from the day in November on which Chief Justice CAYLEY and I pronounced our opinions; and if that contention holds good, plaintiffs of course are altogether out of time.

Without entering upon any general question whether in general the fourteen days should be reckoned from the oral delivery of judgment or from the sealing of the decree in appeal, it is plain that under the circumstances of the present case the fourteen days ought not to be reckoned from any date earlier at any rate than the 27th March, the day on which plaintiffs were definitively informed by me that the Supreme Court saw no reason to modify what had already been pronounced. Up to that time the matter had been distinctly, by direction of the CHIEF JUSTICE, held in abeyance. The CHIEF JUSTICE no doubt intended to consult me, and plaintiffs were given to understand that the matter was in the interim held in abeyance.

Plaintiffs are therefore in time in tendering their security.

Upon the general question I have as at present advised an opinion, but I do not find it necessary to state it.

DE WET, A. C. J.—Under the circumstances stated, and upon the principle *actus curiæ nemin facit njuriam*, I am of opinion that the plaintiffs are in time in tendering their security.

Security accepted.

17th and 31st March, 1882.

Present—CLARENCE, A. C. J., DIAS, J.

D. C. Kalutara, 35,733. } T. A. Dona ANA v. T. Don VISSENTY NAIDE and another.

British Ship—Registration—17 and 18 Vict. c. 104, s. 107—Fraudulent Registration.

Plaintiff sued to have a declaration of title to one-half of a dhoney, of which defendants were in the unlawful possession, the first defendant being entitled to the other half. The Court below found that the defendants had repaired the dhoney and fraudulently had it registered as their exclusive property under a different name.

Held, that plaintiff was not shut out by the registration from showing her title, notwithstanding that she had taken no steps to have her own title registered in accordance with the *Merchant Shipping Act*, 1854.

This was an action by plaintiff to obtain a declaration of title to, and to recover possession of, a half-part of a dhoney, which the defendants unlawfully kept in their sole posses-

sion. Plaintiff claimed title through her deceased husband who had been sole owner, and admitted the right of first defendant and his ward Gabo to the other half of the vessel.

The defendants pleaded in effect: 1st, that they were not guilty; 2ndly, that defendants had jointly built a dhoney called *Siriya Dewe Wilhelmina*, which was registered in Colombo as the defendants' property; 3rdly, that the said vessel never formed part of the estate of plaintiff's deceased husband.

At the trial on 15th September 1881, the District Judge (*J. H. de Saram*) after evidence heard on both sides as to the identity of the vessel, which was then lying in the Kalutara river, gave judgment for the plaintiff.

In appeal by the defendants,

Burnside, Q. A., (*Dornhorst* with him) for the appellants, contended that plaintiff's action was misconceived. The defendants were admittedly registered owners, and would therefore be presumed to be owners. Where the title to a ship comes strictly and properly in question, no claim can be received in opposition to the modes of conveyance required by the *Me chant Shipping Act*, 1854. Abbott, *Law of Merchant Ships and Seamen*, 12fth ed., p 56. *Follett* v. *Delany* (1); *M'Calmont* v. *Rankin*, (2); *Sla er* v. *Willis*, (3). Section 58 of the Act requires the registration of every alteration in the ownership, in order to make the register true evidence of the actual ownership. The ship in question was registered in March 1879 as a new ship under the name of the *Siriya Dewe Wilhelmina*, while the plaintiff claims it as an old ship under the name of *Fortitude*, in distinct contradiction of the register, which is made *prima facie* evidence by the Act (sect. 107).

He also referred to *Ex parte Yallop*, (4); *The Princess Charlotte*, (5).

J. Grenier (*Aluis* with him) for the plaintiff respondent *contra*—The Court below finds as a fact that the ship in question is identical with the one that belonged to plaintiff's husband under the name of the *For itude*; and that first

(1) 2 De Gex & Sm., 235.
(2) 21 L. T., 1; 8 Hare, 1.
(3) 1 Beav., 354.
(4) 15 Ves. Jun., 60.
(5) B. & L. Adm. Cas., 75.

defendant, having had half of the vessel left him by the will of plaintiff's husband, took a conveyance from the administrator for a share in a ship which he now says never existed. Section 107 of the *Merchant Shipping Act* makes the register only *prima facie*, and not conclusive, proof of the matters stated in it. *The Empress*, (1). The ruling in the case of *The Princess Charlotte*, (2) is entirely in favor of this view. Section 57 provides for the registration of title by contract, and section 58 requires the making of a declaration by a party acquiring title by succession. Now plaintiff's husband, Daniel Naide, having purchased at a Fiscal's sale and received no transfer, could not produce any document for registration and would only have had to make a declaration. The Act nowhere makes the absence of the declaration fatal to the transmission of title.

Burnside in reply—Plaintiff should have had herself registered as part owner on her husband's death. Having failed to do so, she has no title as against the registered owners.

Cur adv. vult.

(31st March). CLARENCE, A. C. J.—The plaintiff, who is the widow of one Don Daniel Naide, prays a declaration that she is the owner of one half of a dhoney, late the property of Don Daniel Naide. She avers that defendants have taken possession of the whole dhoney and deny her title to a half share. Defendants deny that they are in possession of any dhoney belonging to the late Don Daniel Naide. As to that issue of fact, the question was : whether a certain dhoney, which, when this case was tried, was lying at Kalamulla, and which is now registered in the name of defendants as owners as the *Siriya Dewe Wilhelmina*, is identical with a dhoney called the *Fortitude*, which formerly belonged to Don Daniel Naide. The 1st defendant is sole heir of Don Daniel Naide, and consequently entitled to half the property which belonged to Don Daniel Naide. The District Judge finds upon the evidence that the *Siriya Dewe Wilhelmina* is identical with the *Fortitude*, that the *Fortitude* was repaired, and that defendants registered her as above. It does not appear that the *Fortitude* was ever registered while in Don Daniel Naide's ownership, though she ought

(1) Swab., 160. Decided in 1856. Rep. also 3 Jur., N. S., 119.
(2) B. & L. Adm. Cas., 75.

to have been. We see no reason to disapprove of the District Judge's finding. The 1st defendant thus appears to have cheated the widow by registering the dhoney in a new name as owned by himself and 2nd defendant. The 2nd defendant based his defence on the same allegations as 1st defendant, contending that the *Siriya Dewe Withelmina* was built by himself and 1st defendant, and this defence has failed. We do not think this registration prevents the Court from declaring plaintiff to be entitled to the half share of which defendants have defrauded her. If we were to hold otherwise, it would be difficult to avoid holding that, if a ship were stolen, furbished up, navigated to some port, and there registered in a new name as a new ship, the new registration would be conclusive. We are disposed to think that we should have cast the 2nd defendant also in costs, but, as the District Judge in his discretion thought proper not to do so, we do not interfere.

We dismiss the appeal with costs. It is open to the plaintiff, by way of giving effect to the decree in her favor, to apply to the District Judge for an order directing the defendants to convey to her a half-share in the said *Siriya Dewe Wilhelmina*.

DIAS, J., concurred.

Appeal dismissed.

Proctor for plaintiff, *A. L d'Alwis*.
Proctors for defendants, *W. Vanderwall, D. de Silva*.

21st July and 18th August, 1882.

Present—DE WET, A. C. J., and DIAS, J.

D C. Kandy, 50,099 } PARUSSELLE DHAMMAJOTI UNNANSE v. TIKIRI BANDA PARANATALA and two others.

Second Action for same subject-matter—Staying proceedings in, till payment of costs of former action.

Plaintiff brought an action to recover from the three present defendants possession of a vihara and its endowments, and obtained judgment, which was reversed in Appeal by the Supreme Court, and his suit dismissed. Plaintiff then commenced the present action for the same subject-matter and declaring on the same cause of action, though tracing his title somewhat differently from the previous suit.

Held, following *Thomas* v. *Braine* (reported 3 S.C.C. 149), that the District Court has a discretionary power to stay proceedings in a second action till payment of the costs of the former action by the unsuccessful plaintiff.

Held also, that that discretion had been rightly exercised in the present case in making the order staying further proceedings.

The libel of the plaintiff averred that by a *sannas* dated Saka 1708 (A. D. 1785), Sri Rajadhi Rajasinha, the last King of Kandy, had granted the Degaldoruwe Vihara and its endowments to Moratota Nayaka Unnanse and his pupils in generations for ever. The grantee possessed the Vihara until his death, when he was succeeded by his pupils Dunumala Silawansa Unnanse, Sonuttara Unnanse, and Mahalle Sobhita Unnanse. After the death of the two former, Mahalle Sobhita became the sole incumbent of the Vihara as the only surviving pupil of the original grantee, Moratota Nayaka Unnanse. In 1849 Mahalle Sobhita, then in possession as incumbent, disrobed himself and took service under the British Government as Ratemahatmeya of Upper Hewaheta. He had then three pupils, viz. Paranatala Ratnapala the elder, Dunumala Unnanse (who died about 15 years ago) and Parusselle Dhammajoti (the plaintiff), who as such pupils entered into possession of the Vihara. At the time when Mahalle Sobhita disrobed himself the plaintiff was a *Samanera* (a priest of the first order) and very young, and was therefore placed by the said Sobhita in charge of the senior pupil Paranatala Ratnapala the elder, who was to educate him. Paranatala Ratnapala carried out this task (the plaintiff being in the joint possession of the Vihara with him) and treated the plaintiff throughout

as a pupil of his own. On the 7th May 1849, just before disrobing himself and taking office under the British Government, Mahalle Sobhita by deed confirmed the plaintiff in possession and conveyed the Vihara and its endowments to plaintiff and three other pupils of his, viz. Sirimalwatte Sumangala, Paranatala Ratnapala the younger, and Paranatala Sumana. The plaintiff, fully believing that he was the pupil according to the Buddhist religion of the said Paranatala Ratnapala the elder, as well as of the said Mahalle Sobhita, and that the former had power to execute the said deed in his favor, continued in the joint possession with his co-grantees under the deed of 1849, until they died or disrobed themselves, and thereafter in the sole possession of the Vihara, until he was dispossessed thereof by the defendants in 1877; when the plaintiff brought against them the suit D. C. Kandy, No. 81,630, in which he claimed the incumbency as pupil of Paranatala Ratnapala the elder, in virtue of the deed of May 1849, and recovered judgment in the District Court. The Supreme Court, however, reversed that decree, and dismissed plaintiff's claim, on the ground that plaintiff was not, according to Buddhist ecclesiastical law, pupil of the said Paranatala Ratnapala, the elder; and the plaintiff contends that his rights as the sole surviving pupil of Mahalle Sobhita remain intact, by which, according to the *sannas*, he is entitled to the incumbency. The libel went on to complain that the second defendant took wrongful possession of the vihara in 1877, and is with the first defendant in the wrongful occupation thereof, alleging that he holds the same under the orders of the first and for the benefit of the third defendant. The plaintiff prayed he might be restored to, and quieted in, the possession of the said vihara and its appurtenances, of the value of Rs. 40,000, and that defendants might be decreed to pay the plaintiff mesne profits and damages at the rate of Rs. 5,000 per annum.

This libel was filed by Mr. J. B. Siebel on the 27th January 1882, and on the 15th February Mr. C. Vanderwall, the proctor for the defendants, moved that proceedings in this action might be stayed until the plaintiff had paid the defendants the costs of the former action, amounting to Rs. 2,189. This motion was supported by an affidavit of the first defendant, deposing to the non-payment of the costs. The motion was discussed in the District Court,

and on the 27th April the District Judge (*Lawrie*) made the following order :—

"This is an application by defendants for an order to stay proceedings until the costs decreed to the defendants in case No. 81,630 be paid by the plaintiff.

At the discussion on this motion it was not denied that the plaintiff in March 1879 instituted the action 81,630 against the same defendants. In that libel plaintiff averred that as the sole surviving pupil of one Paranatala Ratnapala Unnanse, and as one of the grantees under a deed of May 1849 he was entitled to the possession of Degaldoruwe Vihara and to the endowments thereof.

His cause of action against the defendants was, that the second defendant had taken possession of the vihara and refuses to give up possession to him, alleging that he holds it by order of the first defendant for and on behalf of the third defendant, and that the defendants had taken the produce and endowments to their own use.

The prayer of the libel was that the defendants may be cited to shew cause why the plaintiff should not be declared entitled to, and put and placed in the possession of, the said temple and of its endowments, and the defendants ejected therefrom, and why they should not be decreed to pay damages and mesne profits from August 1877.

The defendants denied the plaintiff's right to the vihara. The case was keenly contested; it was repeatedly before the Supreme Court on appeals from interlocutory orders, and after a long trial and a careful and prolonged consideration of the evidence and of the law, the acting District Judge, Mr. R. Morgan, gave judgment for the plaintiff.

On appeal, the Supreme Court with equal care reviewed the evidence and the law, and reversed the decision of this Court, and dismissed the plaintiff's action with costs (1). The plaintiff gave notice of an appeal to the Privy Council, but that was disallowed (2).

So keenly had the case been fought, and so thorough was the investigation, that the defendants' taxed costs amounted to the large sum of Rs. 2,189. It is admitted that these costs have not been paid. Writ against property has been served, but the plaintiff has surrendered no property. The plaintiff is a Buddhist priest. It may be assumed he has none.

(1) Reported 4 S. C. C., 121. | (2) Reported 4 S. C. C., 155.

The defendants' costs were taxed in December 1881. In January 1882 the same plaintiff raised this action No 90,099 against the same defendants. In his libel he set forth a title to the same vihara, and his cause of action against the defendants is expressed in the same words, and the prayer of the libel is in the same terms, as corresponding parts of his libel in No. 81,630.

It is in these circumstances that the defendants pray that the Court do stay proceedings in this case until the costs in the former case be paid.

Such applications, though by no means frequent, were not unknown in our Courts, but recently the right of the District Courts to make such an order was impugned in the case No. 85,407 (D. C. Kandy). There after full discussion it was held that the District Courts had such a jurisdiction (1).

It is clear from that judgment of the Supreme Court, as well as from other authorities, that a District Court would be justified in exercising the power to stay proceedings when the new action is oppressive or vexatious, and in opposing the motion now before me the counsel for the plaintiff directed his arguments mainly to convince me that this was no vexatious suit. On that point I am with him. I have no reason to believe that it is vexatious. The high character of the Counsel and of the proctor for the plaintiff makes it certain that they would not have *advised* a "vexatious" action. Besides, I think that I would not be justified in characterising an action as vexatious before the pleadings and proof are before me. It would be monstrous were I now to prejudge the case and to decide that the plaintiff has no chance of succeeding. I go further than the plaintiff's counsel asked me to go. I shall not only *not* hold that this case is vexatious, but I shall assume that the claim now made is unanswerable, and that the defendants here will offer no defence and will consent to judgment being entered for the plaintiff.

But the question remains, Are the defendants not entitled to demand that before pleading or before consenting to judgment in this case, the costs incurred by them in the former case shall be paid? The earliest reported case in our Courts in which the question was raised is 8815 D. C. Colombo, 20th October 1841 (2). "The costs of a former

(1) 3 S. C. C., 149.

(2) Morgan's Dig., p 320.

suit which has been withdrawn must be paid, before a new suit for the same claim can be instituted." It is possible that in that case the condition of paying costs was attached to the permission to withdraw the action. If such a condition had been added, then until it was fulfilled and the costs paid the former action would be regarded as still pending, and if pending, no new action for the same claim could be entertained. That case does not assist me here. *Thomson's Institutes*, pp 482, 483, refer to a Galle case in 1852, but the particulars are not given. It may be gathered from 1 *Lorenz*, p 95 that the Supreme Court in D. C. Galle 13,329 stayed proceedings until costs of a former action were paid, but there the District Judge of Galle in the later case 16,937 refused to be guided by that judgment of the Supreme Court, and held that when a previous case had come to an end *not on the merits*, but on an issue utterly irrelevant thereto, the later action should not be stayed, and the Supreme Court affirmed that judgment. That is not a case like the present, and in my opinion gives me no guidance. The next case reported is D. C. Colombo, 19,144 (1). That was an action for the recovery of land. The same plaintiffs, as I read the report, had sued the same defendant, *first* (in 13,675) for injunction against a sale and for declaration of title, which action was settled by consent in a judgment which did not deal with the right to the lands; and *second* in an action for the land, in which the plaintiffs were nonsuited, because they had not properly set out their title as heirs. The same plaintiffs then raised a third action, and it was pleaded that their non-payment of the costs of No. 13,675 was a bar to maintaining the suit. The decision turned on a construction of the judgment by consent, and the Supreme Court held the payment was not a condition precedent to the right of the plaintiff again to sue. But at the same time, while the right of the plaintiff to sue was sustained, the Supreme Court decided that they were not entitled to obtain possession of the lands until they paid the costs in that former action. It is plain that this was a special case, and can hardly be relied on as an authority on either side here. In *Vanderstraaten's Reports* there are short notes of two cases on pages 150 and 233. These reports are meagre, the facts are not given. So far as they go, however, they support the contention that the power of staying pro-

(1) 3 Lorenz, 261.

ceedings shou'd be exercised only when the second action is deemed vexatious. I am not aware of any subsequent reported case, except that of *Thomas v. Braine*, 85,407 of this Court, already referred to (1).

I am inclined to hold the law to be that, when the merits of a case have not been tried and adjudicated on, and where the decision has been on some side issue or on technical grounds, or is a mere nonsuit, the non-payment of costs is no reason why the second action should not be maintained; but that, where the merits of a cause have been tried and adjudicated on and a decision adverse to the plaintiff given, with costs payable to the defendant, a plaintiff may not maintain a second suit to obtain a judgment identical with that he formerly asked for, until he pays the former costs. I take it that the power to stay proceedings should be exercised only when the prayers in the libels in both cases are the same; and that it is just that it should always be exercised where the Court has, after full investigation, refused to grant that prayer; and the plaintiff should not again be allowed to sue the same persons to attain the same object, until he pays the costs he has been decreed to pay. The cases in which the power can be exercised are but few; for in general the plea of *res judicata* is available to a defendant who has successfully resisted the same demand. Here I can give no opinion as to whether the plea of *res judicata* is or is not available. That is a matter not before me.

The plaintiff here, I understand, maintains that he has right to this vihara by two different lines of ecclesiastical descent. The Supreme Court has decided against his right through one of these lines, and he now seeks to set forth and to establish his right by the other line. I take it that the prayer of the libel being the same, the object to be attained being identical, on discovering that the title as presented by him in the former case was bad or doubtful, he might have moved for leave to amend his libel by averring his right by the other line of descent. If he had made such an application for leave to amend, it would have been granted only on payment of the costs which the defence to the first title had caused the defendants. The plaintiff did not take that course. He waited until the case was fully heard and until judgment was given, and now he proposes practically to amend his former libel. He does so by filing a

(1) 3 S. C. C., 149.

new one, but on the analogy of the condition on which alone he could have amended—that of paying antecedent costs—I hold he can have his claim again investigated only on the same condition.

There is another ground for staying proceedings, which however I refer to rather than rely on. In the case of *Thomas* v. *Braine* (1) Mr. Justice CLARENCE said, 'Taking it as established that the District Court has the power, we might resort to English authorities for assistance upon the question, Under what circumstances should the power be exercised?' If it be permissible to resort to these authorities (which I venture to doubt) it will be found, I think, that the right to stay proceedings until the costs of a previous action be paid, is exercised by the English Common Law Courts only in actions in ejectment. That supports the motion of the defendants here, for this is an action in ejectment, but the reason why the English Courts exercise the right is because judgment in ejectment is not *res judicata*. I quote from *Broom's Legal Maxims*, p 333: 'Although a judgment in ejectment is admissible in evidence in another ejectment between the same parties, yet it is not conclusive evidence, because a party may have a title to possession at one time and not at another'; and hence, he continues, 'there is the remarkable difference between ejectment and other actions with regard to the maxim under consideration (*Nemo debet bis vexari pro unâ et eadem causâ*).' And he adds, 'the Courts of Common Law have, however, sometimes interfered to stop proceedings in ejectment, either in order to compel payment of the costs in a former action, or when such proceedings were manifestly vexatious and oppressive.' He refers to a considerable number of cases, to which, however, I at present have no access. This rule of English Law favours the contention of the defendants, though I cannot lay much stress on a practice which seems founded on the rule that judgments in ejectment are not *res judicata*. But this case at least, according to the plaintiff, is a case of judgment in ejectment, which is not *res judicata*. On that footing only can he maintain the action. It is therefore (I assume) a case like those referred to by Broom, and the English practice and authorities may apply. As I have not read the English decisions on the point, I do not venture to rely on

(1) 3 S. C. C., 149.

them. But on general grounds I hold that, as the same demand here made by the plaintiff was investigated and was decided on the merits against him with costs, he cannot in justice repeat it on grounds which he might have stated in his former case, without first paying costs. The analogy of the condition under which he could have obtained leave to amend seems to be forcible.

I grant the motion of the 16th February 1882 with costs."

From this order the plaintiff appealed, on the following grounds chiefly: 1. The second action was not vexatious, as found by the District Judge. Only *vexatious* second actions are liable to be stayed till payment of previous costs. Though the second action is very similar to the first, it is not altogether the same, for the plaintiff now claims by a different title. 2. This is not an action in ejectment (D. C. Kandy 81630, 4 S C.C. 121); in such actions only do the English Courts, as found by the District Judge, exercise the power of staying the second action.

Grenier for the plaintiff, appellant, cited Voet, *ad Pand.*, II. 8. 1., XLII. 1. 26. *Grenier's Reports* (1874), D.C., pp 69,71. *Deneys* v. *Stofberg*, (1), and Roman Dutch Law authorities there cited. As to English Practice: 2 Archbold, *Q. B Practice*, 1 81; *Danvers* v. *Morgan* (2), *Pashley* v. *Poole* (3), *Edmunds* v. *Att. Gen.* (4), *Dawkins* v. *Rokeby* (5).

Van Langenberg, for the respondent (*Dornhorst* with him), cited *Morgan's Digest*, p. 320; 1 *Lorenz* p. 95; *Van der Liet* v. *Exors of Karnspeck* (6). *Hoare* v. *Dickson* (7). *Prowse* v. *Loxdale* (8). *Cobbett* v. *Warner* (9). *Tichborne* v. *Mostyn* (10).

Grenier was heard in reply.

Cur. adv. vult.

(1) 1 Menzie's Cape Reports, 301.
(2) 25 L. J., C. P., 144.
(3) 3 D. & R., 53.
(4) 47 L. J., Eq., 345.
(5) L. R., 7 H. L. Cas., 744.
(6) 3 Menzie, 395.
(7) 7 C. B., 164; 18 L. J., C. P., 158, S. C.
(8) 3 B & S., 896; 32 L J., Q. B., 227; 8 L. T., N. S., 314, S. C.
(9) L. R., 2 Q. B., 108.
(10) L. R., 8 C. P., 29.

(18th August). DIAS, J.—The question in this case is, whether a plaintiff, who was defeated on the same cause of action in a previous case, can proceed against the same defendants on the identical cause of action without paying the costs of the former suit. The plaintiff in this case, who is a Buddhist priest, instituted a suit 81630 D. C. Kandy, against these three defendants in March 1879. That case was keenly contested by both parties, and, after several orders and interlocutory appeals, was finally tried and decided in May 1880 in favor of the plaintiff. The defendants appealed, and in July 1881 the Supreme Court set aside the judgment of the District Court, and dismissed the plaintiff's action with costs. The cause of action in both cases is the same, but the plaintiff's title as set out in this case is different from the titles set up by him in the previous case. The taxed costs of the previous case amount to Rs. 2189, and the defendants very properly say that the plaintiff should pay this large sum of money before he can be allowed to put the defendants to any further expense in defending the same suit. This appears to be a very reasonable request. According to Buddhist Law a priest is supposed to be a pauper, though in point of fact Buddhist priests are wealthier than the generality of laymen. Seeing that the plaintiff had means of carrying out the protracted litigation in the former suit, I fail to see why he should not pay the costs of that suit at once. It is probable that the defendants are unable to recover these costs by the usual process of execution, and it appears to me that it is neither just nor reasonable that they should be put to further expense, which they may not eventually be able to recover from the plaintiff. The right of the District Court to stay proceedings under the circumstances of this case was once questioned, but this Court, by a series of decisions, held that the District Court had such power; and the last case on the matter is reported in 3 S. C. C., 149. There is no rule by which the District Judge is bound in the exercise of his discretion. Every case must be governed by its own circumstances, and I am not prepared to say that the learned Judge in this case exercised an unsound discretion. The order appealed from must therefore be affirmed with costs.

DE WET, A. C, J.—I am of opinion that the plaintiff, having been defeated in his former suit, cannot commence

fresh proceedings without having first satisfied the costs of the previous suit. The order appealed from must therefore be affirmed with costs.

Order affirmed.

Proctor for appellant, *J. B. Siebel*
Proctor for respondents, *C. Vander Wall.*

11th and 25th August, 1882.

Present—CLARENCE and DIAS, JJ.

C. R. Balapitiya, 29,712. } S. G. ASAGURU v. JAYETU GURU and two others.

Jurisdiction to give costs where the Court has no jurisdiction to try the action—Plea to the jurisdiction.

Plaintiff sued the defendants for damages for breach of an agreement to marry. The Defendants pleaded to the merits, justifying the breach. At the trial the Commissioner, holding he had no jurisdiction to try a matrimonial action, dismissed plaintiff's suit with costs.

Held, (without expressing any opinion as to the power of the Court in case the defendants had taken the plea to the jurisdiction) that the plea not having been taken by the defendants but originated by the Court, costs were improperly decreed to the defendants.

Held also, that the proper order would have been that the suit do abate.

The plaintiff in this suit claimed Rs. 56.50 as damages for a breach of promise of marriage. The defendants (the first of whom was the father, and the 2nd and 3rd the uncles, of the bride) answered, pleading "not guilty," denying "the wrongs and injuries complained of," justifying their refusal to carry out the promise, and disputing liability in damages. On the day of trial, the Commissioner (*L. G. Tate*) made the following order: "This is in effect a matrimonial cause. The real complaint is one of breach of promise. It is hardly necessary to point out that this Court has no jurisdiction in such cases. Plaintiff's action dismissed with costs."

The plaintiff appealed, chiefly on the ground that the Court had no jurisdiction to award costs, and the appeal first

came on before CLARENCE, J., on 27th July, by whose order the case was put on for argument before two Judges, and it now came up accordingly.

Grenier for the plaintiff appellant (*Van Langenberg* with him).

The Commissioner had no jurisdiction to award costs, and his only order should have been that the suit should abate. An action for breach of promise of marriage is expressly excluded from the jurisdiction of the Court of Requests by § 81 of Ord. 11 of 1868—16,129, C. R. Panadure, (1); 4,359, C. R. N'Eliya, (2); 33,130, C. R. Kandy, (3). [DIAS, J.—It is very hard on the defendant that he should not have his costs, because the plaintiff chose to sue him in a court that had no jurisdiction]. The Court of Requests is the creature of a Statute and can have no power outside that Statute. The same question of jurisdiction has been raised in England under the County Court Act, 9 & 10 Vict., cap. 95. The words of that Act are far larger than those of our Ordinance, but it was held in *Lawford* v. *Partridge* (4) that, when on the hearing it appeared that the Court had no jurisdiction to try the case, the Judge had no power to nonsuit the plaintiff or to award costs to the defendant. It was argued there that the Court had power to award such costs under § 79, which enacted "that if the plaintiff shall not make proof of his demand to the satisfaction of the Court, it shall be lawful for the Judge to nonsuit the plaintiff, or to give judgment for the defendant; and in case where the defendant shall appear and shall not admit the demand, to award to the defendant, by way of costs and satisfaction for his trouble and attendance, such sum as the Judge in his discretion shall think fit." The other section relied on was the 88th, which enacted "that all the cost of any action or proceeding in the Court, not herein otherwise provided for, shall be paid by or apportioned between the parties in such manner as the Judge shall think fit, and in default of any special direction shall abide the

(1) Grenier (1874), 20.
(2) Grenier (1874), 31.
(3) Civil Minutes of the Supreme Court, 8th June 1865.
(4) 26 L. J., Ex., 147; 1 H. & N., 621, S. C.

event of the action." It was held in the case cited that §§ 79 and 88 applied to cases over which the Court had jurisdiction. The Ord. 11 of 1868 has no provision similar to § 88. [CLARENCE, J.—Those are mere general clauses, and a Judge would be guided by the old rules as to awarding costs.] Our C. R. Rules are contained in Ord. 9 of 1859. [CLARENCE, J.—Those rules say nothing as to the incidence of costs, but only provide for their taxation. The incidence is left to Equity.] POLLOCK, C. B., held in the case cited that a Court had no such jurisdiction even under § 88, which enabled the Judge to make such order as to costs as he thought fit. [CLARENCE, J.—The question here is as to the general Common Law right of Courts]. I submit we cannot travel outside the Statute, and the English decisions never recognised such Common Law right in the County Courts outside the Statute. [DIAS, J.—The case you cite is also an authority for the position that the power to award costs is not inherent in a Court, but the object of special power given it]. Yes. And the Queen's Bench, not being the creature of a Statute, is not tied down by any such restriction. In *G. N. and L and N. W. Joint Committee* v. *Inett*, (1) though the Q. B. held that they had no jurisdiction to consider an appeal upon a case stated by Justices, because the case had not been transmitted within 3 days as required by Statute, yet they gave the Respondent his costs. *Lawford* v. *Partridge* was not there cited as it would have been inapplicable to the higher Court. [CLARENCE, J.— I see no difference in principle. I take it that if there be no provision to the contrary a small Court, however humble, must be governed by the same general principles as a higher tribunal. As the Q. B. said in *Inett's Case*, if the Respondent had not appeared to point out their want of jurisdiction they would have gone on to hear the appeal, and as he had appeared he was entitled to his costs]. I submit that the Court of Requests would not have the power to grant costs in *any* case, unless that power were given it by the Statute creating it. In the analogous case of appeals to the Supreme Court, where security has not been tendered in time, that Court (being a Superior Court independent of Statute) has rejected such appeals with costs. [CLARENCE, J.—I have been myself careful

(1) L. R., 2 Q. B. D., 284.

never to mention costs in such cases, having doubts of my jurisdiction, and leaving it to the parties to raise the question. DIAS, J.—Could the defendant bring an action in another Court to recover from the plaintiff the costs incurred in the first suit? If he could have got them at first he will not have them in the second suit. He must recover them in one of those ways, for when he has the right he must be allowed a remedy. CLARENCE, J.—If he may recover by separate suit there will be a circuity of action.] I do not admit he can, and it does not affect my argument. Coming to our own Ordinances. § 25 of Ord. 9 of 1859 directed the Commissioner to hear and determine the cause according to law, and directed costs to be taxed according to Schedule Q. to the Ordinance. [CLARENCE, J.—All this seems to leave the question untouched. There is no special provision, and so the general rules must govern.] The present action was dismissed. What costs are to be given? There was no hearing although the case was set down for it, for the Judge himself objected to the jurisdiction. Taking it as a "contested case" even, in which answer was filed, Table Q refers to cases within the jurisdiction. [CLARENCE, J.—There are some cases in which the want of jurisdiction is apparent on the plaint; others, like *Inett's Case*, in which the defendant must appear to point it out. Take the case of territorial jurisdiction—a defendant outside of it need not attend on summons, assuming that the Court will do its duty. Not that it always does, for I have known a Court of Requests entertain a suit for £ 50, in which no objection was taken to the jurisdiction, possibly because the defendant was a Coffee Estate!] The 84th section of Ord. 11 of 1868 empowers the Commissioner, in pronouncing his judgment or order in any case, to make such order respecting the payment of costs and expenses as to him shall appear just and reasonable. [DIAS, J.—That clause pre-supposes jurisdiction. CLARENCE, J.—There has been a very recent case in which the English Court of Appeal held that a Judge's discretion must be exercised according to the ordinary rules]. At the close of the last argument, Counsel for defendant cited a passage from *Voet* (Ad Pand., xlii. 1. 25). I take it that that passage refers only to Judges in appeal, who form a Superior Court [DIAS, J.—I see no difference in principle between an original Judge and an Appellate, but the distinction between competency on the main question and

competency on the question of jurisdiction is reasonable. CLARENCE, J.—At present my opinion is that the Court of Requests is decidedly governed by general rules, and that those rules are in your favor.]

Seneviratne for the defendant, *contra*—I cited *two* passages of *Voet* at the last hearing, the other being Book v. 1. 65:—"*Judicem certe ipsum, cujus jurisdictio declinatur, de eo cognoscere dubium non est*; *adeo ut in expensas quoque actorem temere vocantem condemnare queat, si semet ipsum pronunciet non competentem; cum enim in ista cognitione, quae de fori competentia est, ipse competens judex fuerit sequitur, ipsum in expensas quoque, istius quaestionis intuitu factas, posse damnare, etsi in principali negotio incompetens sit.*" It is admitted that where the Court of Requests has jurisdiction it may award costs, and it may therefore do so on the question of competency. [CLARENCE, J.—As I said before, there are certain cases in which the defendant has to appear and point out the want of jurisdiction, while in others appearance is not necessary, the objection being patent] *Voet* proceeds to deal with that:—"*Sed an is, qui vocatus est od judicem non competentem, venire teneatur, ut id doceat, an vero impune emanere possit et vocationem contemnere, non aeque expeditum.*" [DIAS, J.—According to that, in certain cases the defendant need not appear, and ought not then to have the costs of so appearing]. Where the ordinance is silent, the Roman Dutch Law must guide us, as laid down by *Voet*.

Grenier, in reply—[CLARENCE, J.—The House of Lords has given costs in such a case (*Mackintosh* v. *Lord Advocate*) (1)]. My remarks as to Superior Courts apply there. The Village Communities Ordinance, No. 26 of 1871, expressly provides that where a case cognizable by a Village Tribunal is brought before a Court of Requests the Commissioner shall stop the proceedings and refer the parties to the Village Tribunal, condemning the parties in costs in such manner as to such Court of Requests shall seem fit. This pro-

(1) Weekly Notes, May 6, 1876—L. R., 2 App. Ca., 41.

vision would have been unnecessary had any such right existed as is now contended for [CLARENCE, J.—It may have been enacted *ex abundanti cautela.*]

Cur. adv. vult.

(25th August). CLARENCE, J.—The libel in this action, which is a very obscure document, framed apparently without any professional assistance, claims that plaintiff is entitled to recover a certain sum of money in consequence of a certain marriage not having taken place. The defendants answered, pleading simply averments and denials of facts. When the case came on for trial, the Commissioner said, "The real complaint is one of breach of promise"—meaning breach of promise of marriage, and thereupon made an order dismissing plaintiff's action with costs. Plaintiff appeals. The proper order, of course, would have been to direct that the action should abate, instead of dismissing the action; but nothing now turns upon this mere matter of form. Upon the argument of the appeal, Appellant's Counsel admitted the action to be substantially an action for breach of promise of marriage, which is an action which Courts of Requests have no jurisdiction to entertain; but he pressed the appeal against the order as to costs. It has been held on various occasions in this Court, following the rule laid down at Common Law in England in *Lawford* v *Partridge* (1) and other cases, that where a Court has no jurisdiction, it can merely declare its own incompetency, and can make no order as to costs. It was so held by Sir E. Creasy in No. 33,130 Kandy, (2), and by Sir R. Cayley in two cases reported in *Grenier* (1874) p 20. Mr. *Seneviratne,* however, contended that the doctrine on which those cases were decided has since been abandoned in *Great Northern Committee* v. *Inett* (3), and cases there referred to; and further relied on *Voet*, v. 1. 65, which does not seem to have been cited in the cases decided in this Court. The question thus raised is one deserving of consideration, and there being decisions of two Chief Justices of this Court on the same side, based on *Lawford* v. *Partridge* and the English Cases, I think it desirable that if these decisions are

(1) 26 L J., Ex., 147; 1 H. & N., 621, S. C.
(2) Civil Minutes of the Supreme Court, 8th June 1865.
(3) L. R., 2 Q. B. D., 284.

to be reviewed it should be if possible by the full Court. Unless, therefore, it be necessary to review those decisions on this appeal, I should prefer not to enter upon that question. I do not think it is necessary, and for this reason—that, conceding, for the purposes of argument, that a Court of Requests may have power to give costs where a defendant has been summoned before it in a matter over which it has no jurisdiction, I do not think that the Court of Requests ought to give costs in a case like the present, where no objection to the jurisdiction was taken by the defendant party.

I think, therefore, that the order appealed against should be set aside so far as it directs plaintiff to pay defendants' costs. As the appeal only partly succeeds, the appeal petition embracing an appeal on the point of jurisdiction, which appeal has been abandoned, we should give no costs in appeal.

DIAS, J., concurred.

CLARENCE, J., intimated, after the delivery of the above judgment, that both he and his brother DIAS had formed an opinion on the question of jurisdiction to grant costs, which they did not think it expedient to declare now, in view of the former decisions of the Supreme Court.

Order as to costs set aside.

Proctor for appellant, *D. H. de Silva.*

Proctors for respondents, *D. E. de S. Wickramasinghe; D. J. Obeyesekere.*

[See C. R. Colombo No. 20,813, 3 S. C. C., 23, where BERWICK, J. gave costs, while holding that the Court below had no jurisdiction over the action. See also *Dias* v. *Perera*, D. C. Colombo 83,181, in Appendix E.]

13th and 27th July, 1882.

Present—CLARENCE, J.

C. R. Colombo, 30,492. } PITCHE CANNEN ASSARY v. M. ARUNASALEM ASSARY.

Stamp—Cancella ion of, under sec.t 9 of Ord. 23 of 1871 *—Adoption by maker of promissory note of Stamp-vendor's date on stamp—Completed note handed by maker to payee—Estoppel.*

Plaintiff as payee sued the maker of a promissory note dated 21st April 1879, which defendant impugned as a forgery. The stamp on the note was affixed at the left-hand top corner of the paper and had the maker's name written across it. It bore also some illegible initials and under them the date 21-4-79 apparently put by the stamp-vendor. The Court below after evidence called for the plaintiff held the note not duly stamped and nonsuited the plaintiff.

Held (following D. C. Colombo 63,498, *Civ. Min. of S.C.*, 13th July 1875) that, the stamp-vendor's date on the stamp being even with the date of execution of the instrument, the maker must be taken in cancelling the stamp with his signature to have adopted the date already on the stamp as his date of cancellation, and that therefore the stamp was duly cancelled as required by section 9 of the Stamp Ordinance, and consequently the note was duly stamped.

Semble, that if the maker had tendered to the payee the note in question as a note duly stamped and signed by himself—the appearance of the note itself being consistent with its being such—the Court would accept the note as duly stamped, until defendant showed the contrary, subject to any question of estoppel.

This was an action by the payee against the maker of a promissory note. The defendant in person pleaded "never indebted," and declared the note a forgery, alleging a conspiracy between plaintiff and the witnesses to the note.

At the trial, after plaintiff had called evidence to prove the due execution of the note, "Mr. Perera for the defendant pointed out that the promissory note was imperfect. The Stamp had not been duly cancelled as provided by clause 9 of Ord. 23 of 1871." The Court (*J. E. Smart*, Commr.) then ruled as follows: "I think this objection is a good one and must be noticed. The action is entirely on the promissory note, and as the instrument is not duly stamped it must fail. Plaintiff is nonsuited with costs."

In appeal by the plaintiff,

Grenier, for the appellant, contended that the note was duly stamped, inasmuch as the maker must be taken to have adopted, as the date of cancellation of the stamp, the date already put thereon by the stamp-vendor as the date of sale, which happened also to be the date of the making of the note. It was so held by the Supreme Court in D. C. Colombo 63,498 (1).

Dornhorst, for the respondent—The words of the 9th section of the Stamp Ordinance are clear and enact that no instrument "shall be deemed duly stamped ..... unless the person required by this Ordinance to cancel the adhesive stamps affixed to the instrument, cancel the same by writing or marking in ink, on or across the stamp, his name or initials ..... together with the true date of his so writing or marking, so that every stamp may be effectually cancelled and rendered incapable of being used for any other instrument." If the rule of this section be enforced, there will in every case be two dates on every stamp, which will at once show that it has been already used, and so fulfil the purpose of the rule. To relax the rule would be to open a door to the re-use of old stamps in cases where the initials are identical, or are illegible.

Cur. adv. vult.

(27th July). CLARENCE, J.—This action purports to be brought by the payee against the maker of a promissory note for Rs. 70, bearing date the 21st April 1879. The defence pleaded is, that the note is not the note of defendant, but a forgery. At the trial the plaintiff called some witnesses to prove that defendant brought the note to plaintiff and handed it to plaintiff ready stamped and signed. He also called some more witnesses to prove some admission as made by defendant. Defendant then, according to the Commissioner's note, took an objection that the note sued on was "imperfect by reason of the stamp not being duly cancelled as required by section 9 of Ordinance No. 23 of 1871." Defendant, I suppose, drew attention to the note as unstamped. On the note being tendered in evidence it might, if unstamped, be objected to on that ground, and I assume that on plaintiff's tendering in evidence this note,

(1) *Civil Minutes* of S. C., 13th July 1875. See Appendix B.

the making of which defendant denies, defendant objected that the note was unstamped. By section 8, if the stamp on the note has not been cancelled as required by section 9, the note is in effect an unstamped note.

Upon the question, whether or no the stamp has been duly cancelled, the materials are simply these. The note bears a stamp across which is written a signature purporting to be that of defendant, and underneath that signature are written some scarcely legible initials, and beneath those initials, close to the lower edge of the stamp, is the date "21/4/79," which is the date of the note. The suggestion offered by defendant is, I suppose, that that date was written by the stamp-vendor who sold the stamp, and not by the maker of the note, and that under those circumstances the stamp has not been cancelled as required by section 9. Certainly the appearance of the figures in question favours the supposition of their having been written by the stamp-vendor.

Now to my mind it is not necessary that the person cancelling a stamp should with his own very fingers write on it the date of cancellation. The Legislature is not likely to have meant that no one should be able to cancel a stamp who could not write figures. Without entering into details, I can imagine ways in which the maker of an instrument might utilise a date already written by another hand. In the case cited by Mr. Grenier, D. C. Colombo 63,498 (1), this Court seems to have approved the opinion of the learned District Judge of Colombo, that the maker of a note may adopt a date written by the stamp-vendor, by subscribing his name to it.

But so far as this case has gone, there is no finding upon the evidence, as to the truth or untruth of plaintiff's statement that defendant brought the note to him ready signed and with the stamp on it. Now if it be the fact that defendant came to plaintiff and tendered to plaintiff this note as a note duly stamped and signed by himself—the appearance of the note being consistent with its being such —then I should accept the note as duly stamped unless and until defendant shows the contrary, subject of course to any difficulty which might lie in his way in the nature of an estoppel.

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(1) *Civil Minutes* of S. C., 13th July 1875. See Appendix B.

Set aside, and the case sent back for further trial and adjudication, with liberty to both parties to adduce further evidence. All costs to be costs in the cause. *

Set aside. Further trial.

Proctor for plaintiff, *S. C. Obeyesekere.*
Proctor for defendant, *J. L. Perera.*

1st September, 1882.

Present—CLARENCE, J.

J. P. Colombo, 3,111. } The QUEEN v. ARMITAGE.
Ex parte ARMITAGE.

Jurisdiction of Supreme Court over case in which accused have been committed for trial before it—Case not yet on Calendar.

The two parties committed for trial in this case before the Supreme Court at Colombo on charges of theft, stellionatus, &c., moved the Court for a transfer of the prosecution to the current Session of the Court at Kandy, on the ground that the first defendant's medical advisers had directed him to leave the Island as soon as possible; and that the Colombo Session would delay his departure over two months.

Held, that, the Justice of the Peace being *functus officio*, the Supreme Court had jurisdiction to make the order asked for.

Held also, that sufficient cause had not been shown for making such order.

Grenier, for the accused, moved the Court for a transfer of this prosecution from the next Criminal Session of the Supreme Court at Colombo (to commence on 10th November) to the current Session at Kandy. He read an affidavit from the first accused, which set out that he, the accused, together with Charles Cyrus Armitage, the second accused, had been committed for trial at the November Session of the Supreme Court on the charges of (1) conspiracy to defraud, (2) theft and (3) false pretences; that he, the first accused, had had an attack of acute dysentery and conges-

* At the further trial before the same Commissioner, after further evidence called for the plaintiff, the Court was not satisfied that defendant had signed the note, and again nonsuited plaintiff. In appeal, before CLARENCE, J., on 22nd February 1883, the same Counsel appearing as upon the first appeal, this judgment was *affirmed*.

tion of the lungs on the 3rd May last, and had continued ill since then, his illness being aggravated by the anxiety and trouble attending the criminal proceedings against him. A medical certificate was annexed to the affidavit as part thereof, signed by Drs. Vanderstraaten and Tothill, who stated that they had been in attendance upon the deponent for the last four months, and were of opinion that his health would suffer seriously if he were prevented from leaving the Island at once, and that a serious relapse might be apprehended from any delay.

Nell, Acting Deputy Queen's Advocate, opposed the motion on behalf of the Crown, upon the following grounds:

1. The proposed transfer is impracticable. The papers connected with the prosecution cannot be got ready in time. Though Mr. *Grenier* had stated the Kandy Session would continue till about the 15th inst., the Q. A had on reference learnt that the probable date of closing would be the 9th inst. Further, the Criminal Session at Matale has been proclaimed to be held on the 11th inst. The Justice of the Peace consumed 15 days in going through the documentary evidence in the case, there being quite a little library of Mercantile Books produced.

2. E. C. Britton, an accused in the case, is out of the Island, and proceedings will have to be taken under the new *Fugitive Criminals Act* for his apprehension. The Crown proposes to try him on the same indictment with the first two accused, the first count being for conspiracy to defraud. [CLARENCE, J.—That would deprive the other accused of the benefit of his evidence.] That is for the accused's Counsel to consider. [CLARENCE, J.—When I was Queen's Advocate I always took that circumstance into consideration.]

3. The case involves the consideration of complicated commercial matters, and a jury composed of Mercantile men is a necessity, both in the interests of the prosecution and of the accused. Such a jury cannot well be secured in Kandy.

4. The Court has not jurisdiction to make the order. Section 45 of Ord. 11 of 1868 enacts that a prisoner shall be tried at the next ensuing session of the Supreme Court after his committal, at which he may properly be tried. This section must be read in connection with §§ 33 and 35. The names of these accused will appear in due course in

the Calendar of the November Session at Colombo But there is no provision in this Ordinance for the transfer of a case *before* it is put upon the Calendar at all. There is now no prosecution pending before the Supreme Court against these accused. Section 22 of the Ordinance provides for the transfer of cases on the Calendar only. [CLARENCE, J. —The J. P. has parted with his jurisdiction—he could not now discharge the accused, for instance. The Supreme Court must therefore have jurisdiction.] Had the case been on the present Kandy Calendar, the motion to transfer the case to Colombo might have been allowed under § 22. Section 35 directs a mandate to issue to the Fiscal to make a return of the persons in his custody committed for trial. On his return to this mandate (which is the Calendar) the cases are to be considered as pending before the Supreme Court. Then under § 37, the Supreme Court can only inquire into such cases as the Queen's Advocate elects to prosecute before it. The committal of the accused is for trial at Colombo: if therefore a transfer be now made to Kandy, the prosecution there will not be at the election of the Queen's Advocate. If the commitment be bad on the face of it, a Judge of the Supreme Court may discharge accused; but if the commitment be good, the Supreme Court can make no order till after the Fiscal's return.

Then as to the *affidavit*. It is insufficient. The ill-health of an accused is not a sufficient ground for a transfer. The medical certificate merely states that the accused will suffer severely; but he may recover before November. The fair implication in the statements of the affidavit seems to be that by a transfer to Kandy the accused may have the chance of leaving the Island alter an acquittal. Further, this certificate may be modified on a cross-examination of the medical men, and it does not even state what the accused's ailment is, and is quite devoid of particulars.

Even granting that the Court has the power contended for under § 22, the application can only be allowed "if the ends of justice will gain by the transfer." Where questions of such large mercantile matters arise, Colombo is the only suitable place for the trial. The application comes very late too, near the end of the Kandy sessions, and if the

transfer be made, the Crown will probably have to move for a postponement there. The same application, on the same insufficient grounds, may be made in every case.

Grenier, in reply—I have no desire that this case should be treated differently from all others.

1. The objection of impracticability conveys an imputation on the Queen's Advocate department which surprises me. The case was committed on the direction of the Queen's Advocate, and the evidence, documentary and otherwise, should have been fully prepared before such committal. [CLARENCE, J.—The J. P. generally commits only on a *primâ facie* case, which has afterwards to be elaborated]

2. As to Britton's absence—[CLARENCE, J.—I am with you in thinking that no cause has been shown on that ground.]

3. As to the necessity for a mercantile jury. The objection is a reflection on the character of the Kandy Jury. [CLARENCE, J.—I do not think Mr. *Nell* intended any reflection at all. It is well known that juries in Kandy are composed chiefly of planters who naturally are not very conversant with mercantile matters.] A mercantile jury need not necessarily try this case. If this were a civil case, I could understand the application for a mercantile jury or assessors. But this is a criminal matter, which any intelligent jury is competent to determine.

4. As to the Ordinance, § 33 does not apply. The mandate provided for by § 33 is entirely a matter of convenience for the Supreme Court. It does not follow that merely because a committed case is not inserted in the Calendar therefore it is not pending before the Court before which it is set down for trial. What if there be no return to the mandate, or if the Calendar be lost? § 45 empowers the Supreme Court to admit to bail any person awaiting trial before it. If the case be not pending before the Supreme Court, how can that Court make such order?

Mr. *Nell* thought an application for a postponement would have been more favourably viewed. I think otherwise: it would have been construed into a desire to evade our liability. Here we move for a more speedy trial. I guard myself carefully from making any reflection

on the impartiality of a mercantile jury, and also from expressing the slightest reluctance to go before such a jury, if one can be had to-morrow.

At the request of the Court *Grenier* then read over the passage in the affidavit having reference to the deponent's illness.

CLARENCE, J.—This is a matter calling for prompt and speedy disposal. If I have not the jurisdiction to make the order asked for, *cadit quaestio*. I am of opinion that the matter is now depending before this court. The Justice of the Peace is *functus officio*, and the matter must be pending before this court, and so I have jurisdiction. I am naturally delicate about adding to the labors of a brother judge sitting in Kandy, and shall promptly inform him if I make the order asked for. I know probably much less of the case than any other member of the public, but I know enough to feel sure that difficult questions of mercantile usage will arise at the trial, and it is therefore *prima facie* more desirable that a mercantile jury should try the case, than that it should go before an agricultural jury like that sitting in Kandy, though that is a very good jury for some purposes. There must be some inconvenience, no doubt, in the taking of the documentary evidence and the witnesses (most of them probably resident in Colombo) to Kandy. I have considered the affidavit; and, without intending to cast any reflection on the medical gentlemen, I must say their certificate does not appear to me sufficient. What I have heard also convinces me that the interests of justice will not be served by transferring the case against the will of the Queen's Advocate. I can perfectly understand the position of the unfortunate gentleman who has to wait so long with a sword hanging over his head; but I do not feel that I shall be justified in making the order asked for.

Order refused.

27th June and 8th September, 1882.

Present—De Wet, A. C. J., and Clarence and Dias, JJ.

D. C. Colombo Special No. 30. } Harvey, Brand & Co. v. Hedges and another.

Equitable assignment of mortgage debt—Insolvency—'Order and disposition' of Insolvent—Trust.

M., the owner of a coffee estate, mortgaged it to W. & Co. as security for funds supplied and to be supplied to him by W. & Co. for the working of the estate. W. & Co. subsequently, with notice to M., entered into an agreement with H. B. & Co. that the latter should advance to W. & Co. the monies necessary for them to keep their engagement with M., W. & Co. undertaking to hold the securities created by the mortgage bond as trustees for H. B. & Co. to the extent of their advances to W. & Co. W. & Co. having become insolvent, their assignees (the defendants) claimed the sum due upon the bond (which had been deposited in the hands of a stakeholder) for the benefit of the general creditors as against H. B. & Co.

Held, that the agreement of W. & Co. with H. B. & Co. constituted an equitable assignment to the latter of the former's rights under the mortgage though the *indicia* of title had remained with W. & Co.

Held, that therefore the right of action on the mortgage (which had been a *chose in action* in the order and disposition of the insolvent) did not pass to the assignees for the benefit of the general creditors, and that H. B. & Co. were entitled to the sum deposited as due under the mortgage bond.

This was a Special Case submitted to the District Court for decision, and set out the following facts :

1. In July 1871, Adolph Carl Theobald Meyer mortgaged his estate called "Tientsin" and its crops to Messrs. Wall & Co. to secure their past (£3,500) and future advances to him for the cultivation of the estate.

2. On 2nd June 1873, Wall & Co. executed a deed, the material part of which was as follows :

"And whereas Wall & Co. have requested Messrs. Harvey, Brand & Co. of London to lend and advance to them certain sums of money for the purpose of carrying out their said engagement with Meyer, which H. B. & Co. have agreed to do on the condition that for all sums to be advanced to W. & Co. as aforesaid, W. & Co. should hold the securities created in their favor by the said hereinbefore recited bonds, deeds and agreements in trust for the said H. B. & Co. Therefore know ye that the said W. & Co., in consideration of the premises and in pursuance of the last-mentioned agreement and for the purpose of securing

to the said H. B. & Co. the repayment of all moneys to be advanced as aforesaid, do for themselves, their heirs, executors, administrators and assigns, hereby declare and agree that W. & Co. shall stand and be possessed of the said mortgages and other securities created in their favor by the said several bonds, deeds, agreements, to wit, bond of 7th and 29th December 1868, deed of 12th January, 25th February, and 5th March 1869, bond of 10th August 1869 and said agreement of 19th July 1871, as Trustees for H. B. & Co. and for their heirs and assigns to the extent of all sum or sums of money to be advanced by the said H. B. & Co. for the purposes of the said agreement and free from any prior claim or right to the same securities which W. & Co. or their heirs, executors, administrators, or assigns have or may have by virtue of the said several bonds, &c., or otherwise."

3. Meyer, on 6th October 1873, wrote to H. B. & Co. as follows:

"With reference to a deed executed by Messrs. George Wall and Co. of Colombo transferring £5,500 of the debt due by me on Tientsin estate to you, which they are entitled to do under and by virtue of my agreement with them dated 19th July 1871, I beg to state that I am quite agreeable to the transfer thereby made, and confirm the same."

4. Meyer died on 2nd May 1877 leaving a will, and Letters of Administration with will annexed were granted on 8th January 1878 to Claus Budde by the District Court of Kandy.

5. Wall and Co. continued their advances under deed of 1871 until 25th June 1879.

6. Wall and Co. were declared insolvent on 5th March 1880, and Messrs. G. Hedges and R. A. Bosanquet were appointed assignees of their insolvent estate.

7. On 30th June 1880 the amount due to George Wall and Co. under agreement of 19th July 1871, by Meyer or his administrator, was Rs. 57,849·85.

8. H. B. & Co. duly made advances to Wall and Co. for the purposes of the deeds of 19th July 1871 and 2nd June 1873, and there is now due to H. B. & Co. from Wall and Co. a sum of £ 4,636 1s. 3d. for such advances up to 30th June 1880.

The question submitted to the Court is, whether the said amount of Rs. 57,849·85 passes by the insolvency of Wall

and Co. to the assignees, Messrs. Hedges and Bosanquet, for the benefit of the general creditors; or whether H. B. & Co. are entitled to recover the said amount of £ 4,636 1s. 3d. under and by virtue and in terms of the said deed of June 1873, with interest at 8 per cent from 30th June 1880 (or its equivalent in rupees); and who should pay the costs of this special case.

This special case was argued in the District Court before Mr. O. W. C. Morgan, the Acting Judge, who held as follows:

1. That the deed of 2nd June 1873 created a valid trust in favor of Harvey Brand and Co., and was not what the Assignees contended, "an equitable assignment."

2. That Wall and Co. were not "reputed owners" or holders of the mortgages, within the meaning of the 49th clause of the Insolvents Ordinance.

3. That though there was no statement on this point, it was probable that the title deeds of Tientsin estate were in the possession of H. B. & Co., and not of W. & Co., as otherwise the assignees would have produced them.

4. That it was admitted that the correct form of proceeding would have been under the 53rd clause of the Ordinance.

5. That, upon these findings, the sum of Rs. 57,849·85 did not pass to the assignees for the benefit of the general creditors, but that H. B. & Co. were entitled to recover £ 4,636. 1. 3. under the deed of June 1873 with the interest claimed, or its equivalent in rupees at current rate of exchange; and that the costs of the special case should be paid by the assignees.

On appeal by the Assignees, the Supreme Court (consisting of CLARENCE, A. C. J., and DIAS, J.) on 21st March 1882 reversed the decree of the District Court, holding that H. B. & Co. were not entitled to draw the sum of £ 4,636. 1. 3. The following are the material points in the Supreme Court judgment, delivered by CLARENCE, A. C. J.

1. The instrument of 2nd June 1873 does not transfer to H. B. & Co. any mortgage, nor does it purport to. The arrangement seems to have been that W. & Co., as between themselves and the debtor, should continue to be the mortgagees. It does not appear that the mortgages or any title

deeds which accompanied them in the hands of W. & Co. were handed over to H. B. & Co. We presume that if the deeds had been so handed over, the Case would have said so. The natural inference from the expression "stand possessed of the said mortgage, &c., on trust" is, that the deeds remained with Wall & Co. W. & Co's debt to H. B. & Co. is less than Meyer's to W. & Co.

2. If this be all, it seems clear that H. B. & C. could not have sued Meyer either for the whole debt or for the amount of their own advances to W. & Co. The letter to H. B. & Co. does not carry the matter any further. What was the notice which H. B. & Co. actually gave to Meyer, the Case does not say; but if the letter be correct, it was a notice that W. & Co. had assigned to H. B. & Co. £ 5,500 of the debt then owing by Meyer to W. & Co. If this was the notice, it was not correct in stating the purport of the deed of 2nd June 1873, the essence of which seems to have been that W. & Co. should remain the creditors of Meyer. H. B. & Co. can be no better off than if their notice to Meyer stated the facts accurately.

3. Consequently, this sum of Rs. 57,849·85 represents a debt due from Meyer's representatives to the estate of W. & Co. The present case is quite different from the English cases cited, which were cases of equitable assignments, where the equitable assignee had a right to sue; whereas here the arrangement seems to have been that the original creditor should continue to have the power of claiming the debt. The registration of the deed of June 1873 does not alter the matter.

4. Trust property, *ex naturâ*, does not pass to an assignee in Insolvency. Section 53 of the Ordinance merely provides procedure for getting the nominal ownership of trust property out of insolvent Trustees. If H. B. & Co. are held entitled to this £4636. 1. 3. as *cestuis que trustent*, their obtaining an order under section 53 would be mere matter of procedure to obtain payment. This £4636. 1. 3. cannot be deemed "trust property" exempt from the claims of creditors. The facts amount to no more than this: Meyer owes money to W. & Co., and it is in contemplation that a running account shall be kept up between them. W. & Co. contemplate incurring a debt to H. B. & Co., and say to them "To the extent of our debt to you we will hold Meyer's debt to us in trust for you." If the existence of

such a trust as this is to avail against the trustee's creditors, then, upon the same principle, if a man buys goods of a tradesman and says to the tradesman, "I will not pay you now, but I will consider myself trustee of the money for you," that would be a trust availing against the purchaser's creditors in the event of his becoming insolvent. If this £4636. 1. 3. really belongs to H. B. & Co. as *cestuis que trustent*, then it is in the reputed ownership of W. & Co. with their consent, in which case W. & Co's. assignee will be entitled on application to an order under section 49.

The case now came again before the Supreme Court, on the 27th of June, on the petition of Messrs. Harvey, Brand & Co. that the case might be heard in review preparatory to an appeal to Her Majesty in Privy Council.

Grenier (*Van Langenberg* and *Layard* with him) for Messrs. Harvey, Brand & Co., the appellants, opened the above facts to the Court. [DE WET, A. C. J.—Why was there no cession of the mortgage bond to H. B. & Co.?] We cannot tell. That would have been the safer course. But here there is no attempt to enforce the mortgage bond; the land is not sought to be touched. Meyer the debtor says (by his administrator Claus Budde) "Here is the money. You settle between you, which of you is entitled to it." [DIAS, J.—How are we to know how much of that money was Wall's, and how much H. B. & Co's?] That question does not arise (though answered in the special case), for if there be a confusion of funds, and there be enough to satisfy the *cestui que trust*, his claim must first be discharged. The *cestui que trust* could have followed goods if they had been bought with his money or money intended for him. Meyer's letter of 6th October 1873 confirms the trust in favor of H. B. & Co.; and if that money can be ascertained, the *cestui que trust* is entitled to get it. A trust need not be created by deed; it may be verbally. The authorities go the length of saying that, where money is given to an agent for a specific purpose which he fails to carry out (if, for instance, he buys on credit having appropriated the funds) even though he be recognised as "reputed owner," yet every coin of that money is impressed with the trust; and if the agent become insolvent, his principal can claim the goods which he may be taken to have bought with the money, though it is not so in fact.

There can be no stronger case on this point than *Harris* v. *Truman* (1) decided in the Queen's Bench by Justices FIELD, MANISTY and BOWEN in October 1881; in which it was held that the mere course of dealing between a principal and his agent, apart from any express agreement, was sufficient to establish a trust, and impress with it goods which the agent had purchased on credit though supplied with funds which he had spent otherwise. See also judgment of JESSEL, M. R., *In re Hallett's Estate*, (2) [Reads judgments of the District and Supreme Courts in the present case]. The question of "reputed ownership" was not submitted to the Court for adjudication; had it been, the District Judge should have called for evidence on the point, which was not touched by the Special Case. It cannot be said that here W. & Co. were reputed owners with consent of the true owners. Trust property, held by an insolvent, does not vest in his assignee for the benefit of general creditors. Robson's *Practice in Bktcy.*, p. 398, and authorities there cited. [CLARENCE, J.—No authority is needed for that proposition]. If H. B. & Co. advanced this money to be given to Meyer (which purpose W. & Co. faithfully carried out) there was a trust established; and why should we presume it was advanced for any other purpose? To sum up:—The question of mortgage and security is beside the present case. There is no prayer for preference as mortgagees. H. B. Co advanced money to W. & Co. for a specific purpose, known to the debtor Meyer, and that purpose was carried out by W. & Co. There is here no question even of fraud by an agent. The debtor says, "Here is the money which I by my letter to H B. & Co. authorised W. & Co. to pay—the money of which I had notice that it belonged to H. B. & Co.—the money that came through Wall & Co. merely as the agents of H. B. & Co. for its transmission." That money being ascertained—never having formed part of W. & Co's insolvent estate—is still impressed with the trust, and must go to Messrs. Harvey, Brand and Co.

Withers for the assignees, *contra*—H. B. & Co. apparently have two grounds of claim, (1) as equitable assignees, (2) as *cestuis que trustent*. But as to (1), the Supreme Court

(1) 45 L. T., N. S., 255.
Affirmed in appeal, L. R., 9 Q. B. D., 264.
(2) L. R., 13 Ch. D., 690, 707.

has held there was no such equitable right, as the *indicia* of title had not been handed over to H. B & Co. As to (2), this case is distinguishable from *Harris* v. *Truman* : *there* there was a fraudulent failure to perform a trust, but *here* the trust has been discharged by fulfilment of the specific purpose. Three things were necessary for a good trust, (1) sufficient words to create it, (2) a definite subject, and (3) a certain or ascertained object. Now, here there are no sufficient words. The deed of June 1873 does not say that W. & Co. will hold the *sums of money*, as received, in trust for H. B. & Co , but the *mortgages and securities*. This is no nice distinction, as appears from the judgment of Lord Abinger, C. B., in *Gibson* v. *Overbury* (3), which was an action in trover to recover certain *indicia* of title, where the deposit was intended merely to bind the papers and not to transfer the security, and it was held there was no trust of the debt secured by them. But assuming that this is trust property and that the sum in court represents the advances by H. B. & Co , the property will still fall under the "order and disposition" clause, and be for the benefit of the general creditors. That clause affects *cestuis que trustent* as much as true owners. "By true owner is meant he who has the right to determine the appearance of ownership in the bankrupt, whether legal or equitable." Could H. B. & Co. have taken these papers out of W. & Co's. hands ? Wall & Co might have assigned the debt over to a third party and handed the deeds to him. [DE WET, A. C. J.—Would that not be fraudulent in W. & Co ?] Fraudulent certainly ; but yet it was a possible contingency. The deed of 2nd June 1873 is called an "agreement," but it is only a deed poll, and its execution is not even endorsed on the mortgage bond of 1871. A third party might have acquired a better title than H. B. & Co. if he had taken an assignment for valuable consideration. I challenge my learned friend to show a single case in which an insolvent has been permitted at his own choice to give preference to one creditor, as *cestui que trust*, over another. I know a case (which I cannot now lay my hands on) in which an agent had misapplied part of the funds given him for a specific investment, and wishing to make amends had effected an insurance on his own life and had with the other securities left the policy with an indorsement on it reciting

(3) 7 M. & W., 555.

these facts; and it was held that the trust affected the amount of the insurance. But there is no one case in which an insolvent was allowed to draw up a deed poll declaring his property in trust for any one of his creditors. To allow this would be to make room for any number of fraudulent preferences. W. & Co's trust extends only to the securities, and not to the amount secured; which should therefore go to the assignees. There is one difficulty, however: what were these securities for? For moneys advanced to Meyer. If at his death there had been a certain sum due, the bond might have been put in suit against his representative for such sum. But here advances had been continued to Budde for two years after Meyer's death. Those were new debts contracted by Budde, and he would certainly by English Law be held personally responsible. These were debts outside the mortgage bond, which could not be enforced against Budde for debts contracted after the mortgagor, Meyer's, death. Wall & Co. would have no preferential claim for those advances.

Grenier, in reply—Taking the last argument for Respondent first, it is disposed of by the provision in the mortgage bond that it should bind the heirs, executors and administrators of the parties to it; and, further, the Special Case makes no difference between advances to Meyer himself and to his administrator. As to the duration of advances, it is only necessary to say that the advances to Budde were not after the expiration of that period. As to the distinction drawn in *Gibson* v. *Overbury* (3), that case was decided expressly on the "reputed ownership" clause, and therefore has no bearing on the present case. [Reads section 49 of Insolvents Ordinance]. This money in deposit never got into W. & Co's hands. How then can it be said to have been in their "order and disposition with the consent of the true owners"? It is quite plain from the words creating the trust, that whatever money was repaid was intended to go to H. B & Co. The true purport of the enactment in the "reputed ownership" clause is well explained by the Master of the Rolls in *Ex parte Wingfield, Re Florence* (4), to be that, where an insolvent is seen in the possession of another's goods, so as to get false credit on the appearance of ownership in himself, the true owner should forfeit his

(3) 7 M. & W., 555. | (4) L. R., 10 Ch. D., 594.

property, which should go to the insolvent's general creditors. In the present case, would any one have given W. & Co. credit on account of the first bond, which had been superseded by another that had been duly registered? Any creditor of W. & Co. would have searched the Registers and found the deed of trust registered, and would at once have seen that it would have priority under our Registration Ordinance. Further, as the learned CHIEF JUSTICE has remarked, had there been a subsequent assignment by W. & Co., such assignment would have been at once set aside at the instance of H. B. & Co. on the ground of fraud.

Withers added to the authorities he had cited, Lewin on Trusts, 11th Ed., p. 223, to show that a *cestui que trust* absolutely entitled would be a "true owner," as in this case he could have determined W. & Co's control over the deeds.

Cur. adv. vult.

(8th September). DE WET, A. C. J.—The question for decision under the circumstances in the case stated is, whether the amount of Rs. 57,849·85 due under the agreement of the 19th July 1871 passes by the insolvency of Messrs. George Wall and Co. to Messrs. Hedges and Bosanquet, the assignees of the insolvent estate, for the benefit of the general creditors of the estate, or whether Messrs. Harvey, Brand and Co. are entitled to recover the amount of £4636. 1. 3. under and by virtue and in terms of the deed of 2nd June 1873 with interest thereon at the rate of 8 per cent. per annum from the 15th day of June 1880.

In July 1871, the estate called Tientsin situated in Dickoya was vested in one Adolph Carl Theobald Meyer, and at that date the said Meyer acknowledged himself to be indebted to Messrs. George Wall and Co. in the sum of £3,500, and to secure that sum and *further advances to be made* he entered into an agreement with Messrs. George Wall and Co. dated the 19th July 1871, and thereby mortgaged, as security for the said sum of £3,500 and further advances to be made in terms of the said agreement, the said Tientsin estate and crops thereof. Under and by virtue of this agreement the relationship existing between the parties to the agreement was simply one of debtor and creditor —both as regards past advances as well as future advances

—the debtor mortgaging as security for the said advances the Tientsin estate and crops. Upon receipt of advances to Meyer he became the absolute owner of the moneys so advanced, leaving to Messrs. George Wall and Co. whatever right they possessed under the mortgage bonds for repayment of such moneys. On the 2nd day of June 1873 Messrs. Wall and Co. executed a deed poll which *inter alia* has the following provision:

"And whereas Messrs. George Wall & Co. have requested Messrs. Harvey, Brand & Co. of London *to lend and advance to them certain sums of money for the purpose of carrying out their said agreement with the said Adolph Carl Theobald Meyer*, which the said Harvey, Brand & Co. have agreed to do on the condition that for all sums to be advanced to the said George Wall & Co. as aforesaid, *they the said George Wall & Co. should hold the securities created in their favour by the said hereinbefore in part recited bonds, deeds and agreements in trust* for the said Harvey, Brand and Co., therefore know ye that the said George Wall, William Rose and John Smith Findlay, trading as aforesaid, in consideration of the premises and in pursuance of the last mentioned agreement *and for the purpose of securing to the said Harvey, Brand & Co. the repayment of all monies to be advanced as aforesaid*, do and each of them doth for themselves and himself, their and his heirs, executors, administrators and assigns hereby declare and agree that they the said George Wall, William Rose and John Smith Findlay, trading as aforesaid, shall stand and be possessed of the said mortgages and other securities created in their favour by the said several bonds, deeds and agreements * * * * * to the extent of all sum or sums of money to be advanced by the said Harvey, Brand & Co. for the purpose of the said agreement and free from any prior claim or right to the same securities, which the said George Wall, William Rose, and John Smith Findlay trading as aforesaid, their heirs, executors, administrators and assigns have or may have by virtue of the several bonds, deeds and agreements or otherwise."

The provisions of the deed clearly established the position of Messrs. Harvey, Brand & Co. with reference to the advances to be made by them and also to the securities then held by Messrs. Wall and Co. The moneys to be lent and advanced were to be lent and advanced, for a specific purpose, and were to be applied in a specific way. This was mutually agreed upon and understood by both the contracting parties. The moneys were to be advanced, not for the purpose of enabling Messrs. George Wall & Co. to deal with it as their own, for their own purposes, or in any way they pleased, but solely for the purposes for which the advances were to be made; but it was also mutually agreed upon that Messrs. Wall & Co. should stand possessed of the moneys and the securities as *Trustees* for the firm of Harvey, Brand & Co. to the extent of all sums of money to be advanced by Harvey, Brand & Co. *for the purposes of the agreement*.

This deed of 2nd June 1873 was duly registered in the Registrar of Lands Office, Ratnapura, on 4th June 1873 and signed by the Registrar of Lands. The effect of this Registration is obvious—after registration no subsequent alienee could acquire a preference over the heads of Harvey, Brand & Co. The original bond debtor apparently acquiesced in this new arrangement, for on the 6th October 1873 Adolph Meyer writes to Messrs. Harvey, Brand & Co. as follows : " With reference to a deed executed by Messrs. George Wall & Co. of Colombo transferring £ 5,500 of the debt due by me on Tientsin estate to you, which they are entitled to do under and by virtue of the agreement dated 19th July 1871, I beg to state that I am quite agreeable to the transfer thereby made, and confirm the same." Subsequent to the date of the agreement of the 2nd June 1873, certain advances were made by Harvey, Brand & Co., and it is admitted " *that there is now due to the said Harvey, Brand & Co. from the said George Wall & Co. a sum of £ 4636. 1. 3. in respect of such advances*" (*i. e.* advances made for the said purposes of the agreement).

George Wall & Co. were declared insolvent on 5th March 1880, and George Hedges and R. A. Bosanquet were appointed assignees of the insolvent estate. I am of opinion that the assignees of the estate are not entitled to the amount last named for the benefit of George Wall & Co's. creditors. Harvey, Brand & Co. having advanced that amount, they and they alone are now entitled to claim repayment of the same by reason of the trust created in their favour.

My judgment therefore is, that the judgment of the Court below be affirmed with costs in both courts.

CLARENCE, J.—After hearing this matter re-argued in review, I have come to the conclusion that the order originally appealed against was right, and should be restored.

The facts are these :—In July 1871 Meyer mortgaged Tientsin estate to George Wall & Co. to secure a present debt and future advances. Afterwards, in June 1873, George Wall & Co. entered into a notarial agreement with Harvey, Brand & Co. that in consideration of Harvey, Brand & Co. lending them moneys to enable them to make advances to Meyer, they would hold Meyer's mortgage in trust for Harvey, Brand & Co. to the extent of the moneys so advanced by Harvey, Brand & Co. to them. Meyer died

in May 1877. George Wall & Co. are indebted to Harvey, Brand & Co. for advances made under their agreement. Meyer's legal representative is indebted in a larger amount to George Wall & Co. for advances made under Meyer's agreement with them, and has paid the amount so due into the hands of a stake-holder. The sum thus in question is £ 4636. 1. 3.

I think that under these circumstances there is an equitable assignment of that amount of the whole debt, by George Wall & Co. to Harvey, Brand & Co. Now I take a debt such as this to be clearly within the "order and disposition" section of the Insolvency Ordinance: and if there has not been notice to the debtor of the assignment, the debt is in my opinion a *chose in action* in the reputed ownership of the insolvents, within the meaning of that section. Curiously the case does not set out what was the communication which Harvey, Brand & Co. made to Meyer about this matter. We only know that in reply to Harvey Brand & Co's. communication, whatever it may have been, Meyer on the 6th October 1873 wrote to H. B. & Co. the letter of that date, which admits notice of transfer to H. B. & Co. of £ 5,500 of the "debt due by me on Tientsin estate." The letter further refers in connection with that debt to an agreement, dated 19th July 1871, between Meyer and G. W. & Co. The 19th July 1871 is the date of the agreement between Meyer and G. W. & Co. already referred to. I take it that we are at liberty to draw legitimate inferences of fact from this part of the case, and although the proper way of proving the notice given would have been to show the terms of the notice itself, still the inference which I draw from the letter is that Meyer received notice from H. B. & Co. of an assignment to them of his debt to G. W. & Co., to the extent of £ 5,500. I think that takes the deed out of the reputed ownership of G. W. & Co. to the extent of the balance now due from G. W. & Co, to H. B. & Co.

I think therefore that the order of the District Judge should be affirmed, and that all costs should follow the event.

DIAS, J.—[After setting out the facts]. The question which we have to decide is, whether by the insolvency of Wall & Co. this sum of money had passed to the assignees of Wall & Co., for the the benefit of the general creditors;

or whether Harvey, Brand & Co are entitled to receive thereout a sum of £ 4636 1s 3d, or its equivalent in rupees. The decision of this question turns upon the application of the "order and disposition" clause of the Ord. No. 7 of 1853 to the facts stated in the Special Case submitted to the District Court.

The deed of 2nd June 1873 appears to me to be something more than a mere mortgage of a debt. It is an assignment by Wall & Co. of so much of the debt due from Meyer to them on the mortgage bond of 19th July 1871 as would suffice to pay whatever monies might be found due to Harvey, Brand & Co. under the deed of 1873. Meyer having had notice of this deed cannot successfully plead, as against Harvey, Brand & Co., a payment to Wall & Co. Supposing that the deed of 2nd June 1873 only amounted to a mere mortgage of a debt, and not to an absolute assignment, notice to Meyer the debtor would be as effectual to secure Harvey, Brand & Co., with regard to their claim on the debt from Meyer to Wall & Co. *Braid* v. *Mangles* (1). Though the debt was in form of a debt due to Wall & Co., it was in substance a debt due to Harvey, Brand & Co., to the extent of their claim against Wall & Co. on the deed of the 2nd June 1873. By the arrangement of the 2nd of June 1873 the beneficial interest in the debt between Meyer and Wall & Co. passed to Harvey, Brand & Co., to the extent of their advances to Wall & Co. under the deed of 2nd June 1873. *Winch* v. *Keeley* (2).

If the deed relied on as creating the trust is simply a mortgage of a debt and nothing more, Harvey, Brand & Co. should not have left the *indicia* of ownership in the hands of the mortgagors Wall & Co. Whether they were so left or not the Special Case does not distinctly say, but assuming that all the bonds and deeds were left in the possession of Wall & Co., I do not think it makes any difference. Wall & Co. are the mortgagees under the bond of 19th July 1871. The object of the deed of 2nd June 1873 confessedly was to keep the bond of 19th July 1871 alive. Wall & Co. made advances to Meyer under that bond, and by the deed of 2nd June 1873 they assigned to Harvey, Brand & Co. not the whole, but only so much of the debt of Meyer as would be sufficient to meet the advances to be made by Harvey, Brand & Co.

(1) 3 Ex. Rep., 394. | (2) 1 T. R., 623.

Under these circumstances it appears to me that the possession by Wall & Co. of the *indicia* of ownership is consistent with the trust. On the whole, I agree with the rest of the Court that our judgment of the 21st March 1882 should be set aside, and the judgment of the District Court of 14th October 1881 should be affirmed.

Judgment of the Supreme Court in Appeal dated 21st March 1882 set aside. Judgment of the District Court appealed against affirmed.

Proctor for the appellants, *F. C. Loos.*
Proctor for the respondents, *F. J. de Saram.*

11th August and 5th September, 1882.

Present—CLARENCE and DIAS, JJ.

P. C. Panadura, 4,275. } FONSEKA v. PERERA.

Arrack Ordinance, 1844—*Breach of section 26—Proof of possession of licence—Ordinance 5 of 1881, section 3.*

Upon a construction of section 3 of Ordinance No. 5 of 1881,

Held, that the word "condition" in this section might be construed to include the possession of the licence contemplated by section 26 of the Arrack Ordinance, 1844; and accordingly

Held, that the section under construction cast the burden of proving the possession of such licence on the defendant.

The defendant was charged with a breach of § 26 of Ordinance No. 10 of 1844. Evidence was led for the prosecution, and the defendant was convicted and sentenced to two months' imprisonment at hard labor. There was no evidence on the part of the complainant of the absence of a licence, as required by recent decisions of the Supreme Court in appeal. The Magistrate (*Drieberg*) held that the burden of such proof was now thrown upon the defendant by Ordinance No. 5 of 1881. The defendant appealed.

Dornhorst, for the appellant—Notwithstanding the Ordinance 5 of 1881 the complainant must lead evidence to show *primâ facie* that the defendant had no licence, that being an

essential part of the offence. The amending Ordinance of 1881 (§ 3), enacted as follows:

In any prosecution for any offence under the said Ordinance [No. 10 of 1844], if the information or plaint in any such case shall negative any exemption, proviso, or condition in the said Ordinance, it shall not be necessary for the prosecution or complainant in that behalf to give evidence of such negative, but the defendant or accused may prove the affirmative thereof in his defence, if he would have advantage of the same.

My argument is that this section is merely a re-enactment of § 65 of Ordinance 10 of 1844, which provided that "wherever in any clause of this Ordinance any person or thing is declared liable to any punishment, penalty, or forfeiture, but certain exceptions are therein expressed, excepting such persons or things under certain circumstances from such liabilities, it shall not be necessary to aver or show in any information or other proceeding for the prosecution of such offence, or for the recovery of such penalty or forfeiture, that the defendant or the subject of any such proceeding does not come within any such exception, but the proof thereof shall be upon the defendant." This clause has been held to contemplate such exceptions as the 32nd clause contains. [CLARENCE, J.—There is no doubt that, as a general principle, when an enactment says you shall not do a thing, and also that you may do it under certain circumstances, the proof of the excepting circumstances is upon the defendant; but where the legislature in one breath says you shall not do a thing except under special circumstances, then you must aver and prove the absence of those circumstances]. The absence of a licence under § 26 is neither an "exemption, proviso, nor condition" as contemplated by Ordinance 5 of 1881, but of the essence of the offence. The first case of late years on the point is P. C. Kandy 15,152 (1), where PHEAR, C. J., says, "This absence of a licence is a necessary ingredient in the statement of the rule, and is not an exception from it. The prosecution is consequently not relieved by the operation of clause 65 from the obligation of proving it to some extent at any rate, notwithstanding that it is a negative." So that this point is not affected by the Ordinance of 1881. In the next case, P. C. Kalutara 61,644 (2), CAYLEY, C. J., draws the distinction between the offences created by §§ 26 and 32. The last case was decided in 1881, just before the passing of the Ordinance (3), and re-affirmed the same

(1) 2 S. C. C., 165. | (2) 2 S. C. C., 179. | (3) 4 S. C. C., 155.

principle. The simple question is, is the possession of a licence an "exemption, proviso, or condition"? I submit it is not. *On the merits,* the evidence is of the usual character; that of a person who himself incites to the commission of the offence. The power to imprison for this offence was only given by Ordinance No. 8 of 1869, and the sentence imposed upon the defendant is excessive for the breach of a mere fiscal enactment,

Nell (acting D. Q. A.) for the Crown, on notice given by the Supreme Court—"Exceptions" occur in § 32, and the proof of them is provided for by § 65. Ordinance No. 5 of 1881 was evidently intended to deal with the requirements of such clauses as the 26th. [CLARENCE, J.—It is clear that the Ordinance meant to relieve the complainant of the burden of proving the negative, but it has used very funny language to express its intention.] The word "condition" covers the case of a licence. [CLARENCE, J.—It may be the mere synonym of "proviso" or of "exemption." In a bond it would mean the same as "proviso."] Any other construction of the word "condition" would render the Ordinance absurd and unmeaning. [CLARENCE, J.—Admittedly there are already two unmeaning words in the section, viz. "exemption" and "proviso"]. *On the merits,* the magistrate's decision has been arrived at with care and after visiting the spot, and is supported by the evidence.

Cur. adv. vult.

(5th September). CLARENCE, J.—Appellant appeals against a conviction on a charge laid under section 26 of Ordinance 10 of 1844.

This information is defective inasmuch as it does not aver the sale to have been a sale by retail. Selling arrack is no offence against this section, unless the sale was by retail, and the section defines sale by retail as sale of a quantity less then 35 gallons. Strange to say, the information as originally framed charged appellant with selling "a quantity of arrack less than 35 gallons," but the words "less than 35 gallons" were afterwards struck out by an amendment initialled by the Police Magistrate. The evidence for the prosecution, if true, proves that appellant sold a very small quantity, viz. a single glass. Complainant is an arrack renter's peon, and the evidence for the prosecution goes to show that an informer named Baba was sent in with

8 cents to buy a drink of arrack, and was served with the arrack by appellant. There was evidence for the defence, to the effect that appellant had only a small quantity of arrack for his own use, and that the bottle seized was introduced by complainant's party. The Police Magistrate, who visited defendant's premises, records that he saw no reason to disbelieve the witnesses for the prosecution. The conviction cannot stand unless we amend the information. As the necessary averments respecting the amount of liquor seem to have been deliberately struck out of the information by the prosecution, I am not disposed to restore them after verdict; and the less so inasmuch as there is no evidence of any sale to any person other than the professional informer Baba. I think, therefore, that the conviction should be set aside, and the information and proceedings quashed.

But we ought not to leave the case without a decision upon the main point argued before us, viz., the effect of the 3rd section of Ordinance No. 5 of 1881. There is no evidence negativing the possession by appellant of the Government Agent's licence; and it has been repeatedly held by this Court, in accordance with the well-known general principle, that the Ordinance having created an offence described as the offence of selling the arrack without a licence, the prosecution, besides proving the sale, must *primâ facie* indicate by evidence the absence of the licence; although it is otherwise where negative matter occurs, not in the direct description of an offence, but in some exception or proviso. The Police Magistrate considered that the 3rd section of the Ordinance of 1881 had shifted the onus on to the defendant, there being no evidence for the defence to show that defendant had the licence. It was argued in appeal that, whatever may have been the intention of the legislature in passing this enactment, it cannot be reasonably construed so as to have the effect thus assigned to it. The section runs thus:—[as set out *supra*].

It was not contended by the learned Deputy Queen's Advocate that either of the words "exemption" or "proviso" can have the desired effect of throwing on a defendant charged under section 26 of Ordinance 10 of 1844 the burden of showing that he had the Government Agent's licence. And indeed it seems plain that those words effect no alteration of the existing law. For it is well established,

as we have repeatedly had occasion to point out, that a defendant who seeks the benefit of an exception or proviso must prove the matter which would bring him thereunder. We have, then, remaining an enactment in these words :— "If the information shall negative any condition in the said Ordinance, it shall not be necessary for the prosecution or complainant in that behalf to give any evidence of such negative." Is the possession of the licence a "condition in the Ordinance of 1844"? The Ordinance says that it shall not be lawful to sell the arrack without having first obtained the licence. I confess that the phrase "condition in the Ordinance" is one which I find it difficult to interpret. The word "condition" seems to me to savour if anything rather of a proviso than of a mere description of a negative ingredient. It was argued—if "condition" be taken to mean "proviso," the section effects nothing ; to which waa made the reply, that as two out of the three words employed by the legislature obviously effect no alteration in the law, it need be no great matter of surprise if the third were found to have no greater effect. The word used is, to my mind, an ambiguous one : the section was, of course, intended to effect some alteration in the law. We may take the history of the matter into consideration. The enactment followed directly on the definitive decision of this Court, deciding that in an information under section 26 of the principal Ordinance the prosecution must adduce some evidence to negative the defendant's possession of the licence. Previous decisions of single Judges on the same point had been challenged by those who represented the Crown, and the point was again argued before Chief Justice Sir R. Cayley and myself. We were then pressed as before on the part of the Crown with the argument *ab inconvenienti*, the facility with which the accused person might produce his licence, and the alleged inconvenience of producing evidence from the office of the Government Agent to prove the negative. We felt bound, however, to adhere to our former decisions, which proceeded upon a well established principle. I think there can be no question but that the object of the enactment now in question was to alter the law as so laid down, and unless the language employed is language which cannot reasonably effect this purpose, I think we should construe it accordingly. I think it may be so construed. The principal enactment says it shall not be lawful to sell without the licence. I think we may view

this as imposing the "condition" of possessing the licence on the sellers; and by that process may construe the new enactment as casting on the seller the onus of proving his licence.

For the reason already assigned, however, I think that this conviction must be set aside, and the information and proceedings quashed.

DIAS, J., concurred.

Set aside. Information and proceedings quashed.

6th and 14th September, 1882.

Present—DIAS, J.

D. C. Cr. Negombo, 537. } The QUEEN

v.

D. C. Cr. Colombo, 356. } Ekanayekege HERAT SINNO.

Transfer of Prosecution by Supreme Court—Ord. No. 11 of 1868, sects. 22 and 119—Ord. No. 7 of 1874, *sect.* 1—"*Try.*"

Upon a transfer of a prosecution by the Supreme Court from the District Court of Negombo to that of Colombo after information filed in the former court by its Secretary, the District Judge of Colombo quashed another indictment for the same offence tendered by the Deputy Queen's Advocate, holding that the accused should be tried, if at all, on the information originally filed in the Negombo Court, and holding also that under sect. 1 of Ord. No. 7 of 1874 he had power only to *try*, and not to *hear and determine*, any prosecution before him by virtue of that section.

Held, that the order quashing the indictment was wrong; and that the Queen's Advocate could prosecute either on the original information or on any other he chose to tender.

Held also, that the word "try" in sect. 1 of the Ord. of 1874 must be construed as giving the District Court power also to hear and determine the matter of any prosecution before it by the Queen's Advocate.

This was a prosecution for a breach of sect. 11 of the Malicious Injuries Ordinance, 1846, and it was transferred by the Supreme Court from the District Court of Negombo

to that of Colombo, on the ground that the committing Justice was also the District Judge of Negombo. The following are the material parts of the order of transfer:

The Queen, on the complaint of H. W. Green, ... Complainant.

vs.

Ekanayekege Herat Sinno ... ... Accused.

Case No. 13385, J. P. Negombo. *Charge*, Malicious Injury to a Bridge.

Upon the motion of Mr. Ondaatjie, Deputy Queen's Advocate, submitted in Court this day, (due notice whereof having been given to the accused) and upon reading the record of the said Justice of the Peace Case, It is ordered that the above case be and the same is hereby transferred from the District Court of Negombo to the District Court of Colombo, for trial.

When the case came on for trial in the District Court of Colombo, *Layard*, for the accused, took the objection that that Court had no jurisdiction to entertain the charge. It had no jurisdiction of its own, inasmuch as the act complained of was committed outside its territorial limits; and it had no delegated jurisdiction by virtue of the Order of the Supreme Court, inasmuch as that order did not profess to transfer for trial before the District Court of Colombo any matter then pending before the District Court of Negombo, but a certain "Justice of the Peace Case No. 13385." It was further objected that, if the Colombo Court could try the matter at all, it should be upon the information filed in the District Court of Negombo, and not upon the fresh indictment tendered by the Deputy Queen's Advocate in the Colombo Court. The District Judge of Colombo (*T. Berwick*) quashed the information presented in Colombo, upholding the objection to the territorial jurisdiction, and being of opinion that the accused should be tried in Colombo (if triable at all) upon the information filed in the District Court of Negombo, just as, in a civil suit so transferred, the trial would proceed upon the pleadings filed in the original Court. Against this order the Queen's Advocate appealed.

The remaining facts of the case appear in the judgments of the Appellate Court.

[NOTE. By order of the District Judge of Colombo, the proceedings taken in his Court upon the record transferred from the District Court of Negombo were kept separate (under No. 537) from the proceedings consequent upon the information filed in the Colombo Court by the

Deputy Queen's Advocate, the record of which latter proceedings was numbered 356. The Appellate Court has accordingly treated these two records as two distinct cases, and has given judgment in each separately.]

Ferdinands, Acting Q. A., for the appellant—

The Court below has held that a District Court has power to try this case only by virtue of the Ordinance No. 7 of 1874, sect. 1, malicious injury to a bridge not being a charge otherwise cognizable by the District Court. It was held that that Ordinance only empowered the Court to "try," and not to "hear and determine" such matter. The word "try" must be taken to confer the power also of hearing, arriving at a conclusion, and punishing—See *Bacon's Abr.*, vol. 6, p 369, "*Statute*"; *Dwarris on Statutes*, p 703. Further, this having been a prosecution transferred under sect. 22 of the Administration of Justice Ordinance, 1868, the Court to which it had been transferred had the power of *hearing*, *trying* and *deciding* the same as fully and effectually to all intents and purposes as if such Court had originally power and jurisdiction. The judge was therefore clearly bound to try and dispose of the matter. Again, as contended in the Court below by the Deputy Queen's Advocate (*Ondaatje*), the Queen's Advocate has the power to prosecute before any court of criminal jurisdiction any offence for which any punishment is prescribed by Ordinance, even though such punishment be beyond the power of such Court to award. (Ord. 11 of 1868, sect. 119). In reply it has been asked, Could the Police Court try a charge of murder, if the Queen's Advocate chose to prosecute it there? The answer to this objection is, that for murder no punishment has been prescribed by Ordinance. The present charge is not one of those scheduled in the Ordinance of 1874 as not triable by District Courts. The appearance of the Queen's Advocate or his Deputy to prosecute in his official capacity, is, under section 3, sufficient proof of the case having been brought before it by the Queen's Advocate or his Deputy. But in the present instance there was also an indictment tendered, signed by the Deputy Queen's Advocate. The District Court was therefore bound to try and decide the matter, under sect. 1 of the Ordinance of 1874.

[He then proceeded to comment on the unjustifiable language of the District Judge of Colombo in speaking of

the legislation of the epoch during which the Administration of Justice Ordinance had been passed.]

No Counsel appeared for the respondent.

Cur. adv. vult.

(14th September). No. 537. DIAS, J.—The accused in this case, Ekanayekege Herat Sinho, was committed by the Justice of the Peace for the District of Negombo on the 19th August 1881, to be tried before the District Court of Negombo on a charge under the Ordinance No. 6 of 1846. On the 5th of October 1881, the Secretary of the District Court of Negombo presented an information against the accused, and the case came on before the District Judge on the 17th. On that day, the learned judge expressed his unwillingness to try the case, as he was the Justice of the Peace who committed the accused. Accordingly Mr. Ondaatje, Deputy Queen's Advocate, moved the Supreme Court to transfer the case from the District Court of Negombo to the District Court of Colombo. The motion was allowed, and, on the 26th of October 1881, the Supreme Court made an order accordingly. On the 1st of November notice was issued to the parties, and on the 12th the learned District Judge of Negombo informed the accused that the case would be heard in the District Court of Colombo on the 8th of December following. What took place in the District Courts of Negombo and Colombo, after the last order of the District Judge of Negombo, does not appear on record. But on the 22nd of June 1882 the following entry is recorded :—"Mr. D. Q. A. Ondaatje for the Crown ; Mr. Advocate Layard for the accused. The order of the Supreme Court dated 26th October 1881 is produced and read. The information filed in the Negombo Court is read to the accused."

Before the accused was called upon to plead, Mr. Layard objected to the jurisdiction of the Court. He urged, first, that the Colombo Court had no territorial jurisdiction, and, secondly, that it had no delegated territorial jurisdiction by virtue of the order of the Supreme Court, inasmuch as the Supreme Court order purported to transfer for trial a certain Justice of the Peace case, No. 13,385, J. P. Negombo, and entitled "The Queen, on the complaint of H. W. Green, *vs.* Ekanayekege Herat Sinho," and did not purport to transfer to the District Court of Colombo any cause, suit

or action then pending in the District Court of Negombo. This last contention is founded upon an entire misapprehension of the effect of the Supreme Court order of the 26th October 1881, which is as follows :—Victoria by the Grace of God, &c. The Queen, on the complaint of H. W. Green, complainant, *vs.* Ekanayekege Herat Sinho, accused. Charge, malicious injury to a bridge...It is ordered that the above case be and the same is hereby transferred from the District Court of Negombo to the District Court of Colombo, for trial." In the margin of the order is the following entry :—" Case No. 13,385 J. P. Negombo."

This marginal entry is no part of the order, and the case that was transferred was the case of The Queen *vs.* Ekanayekege Herat Sinho, then pending before the District Court of Negombo under No. 537. In that case an information had already been presented in the District Court of Negombo by the Secretary of that Court under No. 537, D. C. Negombo, and that case came on before the District Judge of Negombo more than once, and it appears to me astonishing how, in the face of all this, it can be seriously contended that this was not a prosecution pending before the District Court of Negombo, when it was transferred by the Supreme Court; but remarkably enough this objection was upheld by the learned Judge and the information was quashed. The learned Judge remarks that the order of the Supreme Court was wrongly framed by the Registrar of the Supreme Court, as he thinks, by mistake; and I further think that the remarks of the learned Judge on the Supreme Court order are owing to an entire misapprehension of the effect of that order. The order appealed from must therefore be set aside, and the case sent back for trial in due course on the information already filed or any other information which the Queen's Advocate may substitute for it. I may remark that it is much to be regretted that this case, which was transferred to the District Court of Colombo so far back as October 1881, nearly *ten* months ago, should not have been disposed of yet. Of all cases, criminal cases are those which should be promptly decided, but in this case a criminal charge has been allowed to be pending against the accused for nearly ten months, and is not yet disposed of. The order appealed from is set aside, and the case remitted to the District Court for trial as above directed.

No. 356. DIAS, J.—In this case, the accused, Ekanayekege Herat Sinho, was committed by the Justice of the Peace for the district of Negombo on the 19th of August 1881 to be tried before the District Court of Negombo, on a charge under the Ordinance No. 6 of 1846. On the 26th of October 188', the Supreme Court made an order transferring the case from the District Court of Negombo to the District Court of Colombo. On the 15th of December 1881, an information was presented by the Queen's Advocate, signed by his Deputy, Mr. Morgan; but before the information was presented, namely on the 8th day of December, the case was called and postponed till the 26th January 1882. On that day it was again postponed till the 9th February. There were several further postponements after that till the 22nd June, when the learned Judge, after hearing counsel on both sides, quashed the information presented by the Deputy Queen's Advocate. Against this order the Queen's Advocate appeals.

On the 15th of December 1881, when the information by the Deputy Queen's Advocate was first presented, certain proceedings seem to have taken place, on certain objections to the jurisdiction of the Court taken by the learned counsel for the accused, and one of those objections was that the Ordinance No. 7 of 1874 only authorized the District Court to *try* the offence, but did not authorize it to *determine* it. The Ordinance did not enact any such absurdity, and, in construing an Ordinance, Courts are bound by the rules of construction which are recognized by law. A power to try a case necessarily involves a power to determine it, else the trial would be an unprofitable waste of time. The jurisdiction of the District Court to try this case was not any jurisdiction conferred by the Ordinance of 1874, but it was a jurisdiction conferred by the order of the Supreme Court, which was an order made under the 22nd clause of the Ordinance No. 11 of 1863; and by that clause the court to which a cause is transferred, the District Court of Colombo in this case, is empowered to hear, try and decide the cause so transferred. The objection under the Ordinance of 1874 is therefore quite irrelevant and inapplicable. This objection was favourably received by the learned Judge, who, however, took time for further consideration. The Deputy Queen's Advocate, Mr. Ondaatje, then urged that, under the 119th section of the Ordinance No. 11 of 1863, the prosecution would lie. On this point the learned Judge has

written a long judgment, in which he makes some remarks on the Ordinance No. 11 of 1868 and the legislation of that period. On this part of the judgment, the learned Queen's Advocate, who appeared in support of this appeal, animadverted in strong terms on the language used by the learned Judge, as reflecting on the memory of two eminent men who at one time occupied the chief seat on this bench. The learned District Judge did not in terms refer to any persons, but criticized the legislation of 1868. If, however, his remarks were meant to apply to the two eminent persons* referred to by the learned Queen's Advocate, all that I can say is that the remarks are as undeserved as they are uncalled for. With regard to Mr. Ondaatje's argument, founded on the 119th section of the Ordinance No. 11 of 1868, I cannot agree with him. The clause applicable to the case is the 22nd clause of the Ordinance of 1868, which empowers the Supreme Court to transfer any cause, &c., pending in any original court. When a cause is so transferred, the court to which it is transferred has power and jurisdiction to hear and decide the same as fully and effectually to all intents and purposes as if such court (that is, the court to which the cause is transferred) had originally power and jurisdiction. The Supreme Court by its order of the 26th of October transferred the cause to the District Court of Colombo under the 22nd clause, and the objection to the jurisdiction is one in defiance of that order, and should not have been listened to by the District Judge; but on this very poor objection the learned District Judge proceeded to quash the information, thereby ignoring the order of the Supreme Court, which gave the District Court jurisdiction. The learned counsel for the accused seems to have urged a further objection, and that is an objection to the information itself as presented by the Queen's Advocate, apparently on the ground that, if the accused is to be tried at all, he should be tried on the information already presented to the District Court of Negombo. The learned Judge seems to have upheld this objection, though he has not very clearly stated so in his judgment. With respect to this objection, I may remark that, under the large powers conferred on the Queen's Advocate by the Ordinances No. 11 of 1868 and No. 7 of 1874, the District Court is bound to try all criminal charges which it has

* Sir Richard Morgan and Sir Edward Creasy.

jurisdiction to try, and which the Queen's Advocate shall bring or prosecute before such court. In this case the Supreme Court's order gave the District Court of Colombo jurisdiction to hear, try and decide this case, and the District Judge was bound to do so on the information presented by the Queen's Advocate. The remarks in the case No. 537 on the delay which has taken place in the trial of that case are equally applicable to this case. The order appealed from is set aside, and the case remitted to the District Court to be proceeded with in due course.

Order quashing indictment set aside.

[The case coming on for trial on the 12th October 1882, before LIESCHING, Acting District Judge, *Ondaatje*, D.Q.A., for the prosecution, *Layard* for the accused, the defendant was acquitted on the ground that the injury proved—taking some bricks out of the side wall of a bridge—had not been shown to have rendered the bridge dangerous or impassable, as required by sect. 11, Ord. No. 6 of 1846.]

8th and 22nd September, 1882.

Present—CLARENCE and DIAS, JJ.

D. C. Colombo, 87,285. } S. L. ASERAPPA v. H. J. DE ZOYSA.

Admission—Mortgage—Interim judgment for amount admitted—Sale of mortgaged property to satisfy part of mortgage debt.

Plaintiff sued to recover Rs. 1181·25 as principal and interest due upon a mortgage bond. Defendant admitting the bond impugned it as invalid for stipulating for usurious interest, and set out several different transactions, out of which in connection with the bond he admitted Rs. 283·52 to be due to the plaintiff. Plaintiff applied by *Rule Nisi* to have judgment entered up in his favor for the sum admitted, which rule was discharged.

Held, that the answer did not contain such an absolute admission of part of plaintiff's claim as entitled him to judgment therefor.

Held also, that plaintiff could not have a mortgagee's decree declaring the mortgaged land specially executable, enforceable piecemeal; but, if anything, only a judgment for a mere sum of money.

This was an action for the recovery of Rs. 675 as principal and Rs. 506·25 as interest at the rate of thirty per cent. per annum due upon a mortgage bond. The libel contained a prayer that the property mortgaged might be declared specially bound and executable for the satisfaction of the debt. The defendant filed a "demurrer and answer," impugning the bond as entirely invalid as stipulating for an usurious rate of interest; admitting the execution of the bond and his indebtedness thereon in the sum of Rs. 283·52. The answer further set out that the bond sued on was given in redemption of a promissory note for Rs. 580, upon which Rs. 58 had been paid, and which had been given by defendant to plaintiff when pressed for payment of a debt of Rs. 450, which sum of Rs. 450 defendant averred was the only consideration received by him. Payments amounting to Rs. 320·55 in reduction of the amount due upon the mortgage were also alleged, and defendant pleaded that 12 per cent. was a reasonable remuneration for plaintiff. Plaintiff filed replication joining issue on the averments in the answer, and a joinder in demurrer on the legality of the bond.

Plaintiff before replication filed obtained a *Rule Nisi* against the defendant, calling upon him to show cause why "judgment should not be entered against him for the amount admitted in his answer, pending decision on the balance of plaintiff's claim." The District Judge (*Berwick*) having discharged the rule on the ground that it was wrongly framed, with liberty to plaintiff to apply for a fresh rule, plaintiff appealed.

Grenier, for the appellant—The case clearly falls under the 4th Rule of Section 1 of the R. & O. of 1st October 1833. The Supreme Court has held in a similar case, that judgment may be entered for any admitted portion of the claim, and the disputed portion reserved for trial. *Esdaile* v. *Albrecht* (1). That was an action against a Commission Agent to recover the value of produce sold by him for plaintiff, and defendant having admitted part of the claim, judgment was entered for the part admitted and the case set down for trial as to the balance.

Layard, for the defendant, respondent—Plaintiff cannot seek to have judgment entered up for the admitted amount,

(1) D. C. Colombo 68,218. Civil Minutes of S. C., 17th December 1875. *Per* STEWART, A. C. J., CAYLEY and DIAS, JJ.

without admitting the truth of the transactions out of which defendant says the debt admitted arises. These transactions are widely different from those alleged in the libel. In *Esdaile* v. *Albrecht* (1) there was no dispute as to the transactions between the parties, the only question being with respect to the sum due thereon. There is therefore here no admission on which judgment can be signed.

Further, the present debt is secured by a mortgage, and the libel prays for a decree declaring the property mortgaged specially bound and executable to satisfy the judgment. Such property cannot be put up for sale to satisfy fractions of the debt, but can only be sold once for all. *Palmer* v. *Carlisle* (2). In *Esdaile* v. *Albrecht* there was no question of mortgage.

Cur. adv. vult.

(22nd September). CLARENCE, J.—Plaintiff sues on a mortgage, purporting to secure a principal sum of Rs. 675, with interest at 30 per cent. per annum. Defendant filed an answer, which he styled an "answer and demurrer," in which he admitted the mortgage to be his deed, and charged that the bond was void *ab initio* "by reason of its stipulating for usurious interest." The answer further went on to aver certain payments, and concluded by admitting that if interest were reckoned at 12 per cent. defendant would, on the footing of the bond, be indebted to plaintiff for principal and interest in the sum of Rs. 283·52. Plaintiff thereupon applied by Rule to have judgment entered up in his favor for the Rs. 283·52, "pending decision on the balance of plaintiff's claim," and now appeals against a refusal of the learned District Judge to make that rule absolute.

The meaning of plaintiff's application is sufficiently obvious. Plaintiff asks for a judgment for the Rs. 283·52 at once, leaving the plaintiff's claim to the balance still open, and leaving it open to the respective parties to take such steps as they may respectively be advised for the prosecuting or the repelling of the claim to the balance. The learned District Judge without assigning any reason refused to make plaintiff's rule absolute and discharged it without costs, but with liberty to plaintiff to apply for a fresh rule.

(1) D. C. Colombo 68,218. Civil Minutes of S. C., 17th December 1875. *Per* STEWART, A. C. J., CAYLEY and DIAS, JJ.

(2) 1 Sim. & St., 423.

Upon the argument of this appeal I entertained doubt whether a District Court is at liberty to enter up judgment piecemeal in the way thus asked. A decision, however, of this court was cited by Mr. Grenier, which certainly declared that the District Court had power to make such an order; but it seems to me unnecessary to enter at all upon that general question, because, assuming for the purposes of argument that the Court had power to enter up such partial judgment, the circumstances are plainly such as would not warrant any such judgment.

The judgment is asked for as on the footing of an admission that Rs. 283·52 is due. There is no such admission, for defendant has demurred. The demurrer may contain no element whatever of possible success. We have nothing whatever now to do with that question; but there being this demurrer there is no admission for the purpose of plaintiff's application.

Further than this, the action is an action on a mortgage, and plaintiff asks for the usual mortgagee's decree. He plainly cannot have a mortgagee's decree declaring the mortgaged land specially executable, enforceable piecemeal. If he is to have anything now it must be a mere judgment for a sum of money. I understood from Appellant's Counsel that plaintiff would be content on his present application with a judgment for Rs. 283·52, for which the land would not be specially executable, and that plaintiff would propose to enforce such judgment by levying on the land subject to the mortgage. In my opinion inconvenience and confusion would probably ensue if any such course were taken.

I think that the plaintiff's appeal fails and should be dismissed with costs. Plaintiff would have been better advised to press on his suit to a hearing instead of presenting this interlocutory appeal.

Dias, J.—I agree with my brother Clarence that the plaintiff's appeal should be dismissed on the ground that the answer does not contain an admission such as would entitle the plaintiff to have a judgment entered up in his favour for the amount admitted. I also think that, this being a claim founded on a mortgage bond, a partial judg-

ment such as the plaintiff claims is calculated to lead to much confusion and inconvenience.

Appeal dismissed.

Proctor for plaintiff, *P Coomara Swamy.*
Proctor for defendant, *D. A. Dissanayeka.*

11th August and 3rd October, 1882.

Present—CLARENCE and DIAS, JJ.

D. C. Colombo, 77,900.

PERERA
v.
DIAS and others.
Ex parte J. and C. JAYESEKERE.

Purchase in execution of land subject to mortgage—Subsequent purchase under the mortgagee's writ—Right of first purchaser to refund of purchase money.

Plaintiff on money judgment obtained issued writ and caused the Fiscal to sell (subject to a mortgage in favor of C.) an undivided interest in land belonging to the defendants, which was purchased by the respondents. This sale was never confirmed by the Court. Subsequently C., having obtained a mere money judgment on his mortgage bond, caused the same property to be sold in execution and purchased it himself.

Held, that under the 53rd clause of the *Fiscals Ordinance*, 1867, confirmation by the Court was necessary only for those sales which had been impeached, and that if no objection to the sale were lodged within 30 days it was confirmed *ipso facto.*

Held accordingly, that respondents were not under section 55 entitled to a refund of their purchase money.

On the 24th June 1879 the plaintiff obtained judgment in this case by default, against the first two defendants personally, and against the other three defendants as representing the estate of a third obligor deceased, for the sum of Rs. 180 and further interest, due on a debt bond dated 14th October 1873. Upon writ of execution issued by plaintiff the Fiscal sold on 26th January 1880, an undivided share of land belonging to the defendants, subject to a mortgage in favor of Andris Coorey by bond dated 30th March 1878. The purchasers were Julius and Charles Jayesekere, for the sum of Rs. 242, which was deposited in Court on 5th February 1880. Andris Coorey brought suit No. 81,081 on 17th March 1880, and obtained a simple money judgment for Rs. 214.60 on his mortgage bond by default, on

1st June 1880. On his writ the land was re-sold and purchased by the mortgagee plaintiff. The purchasers, on 3rd August 1881, obtained a Rule on the Fiscal to shew cause why the purchase money should not be refunded to them. On 17th August they obtained a similar Rule on the defendants. On October 11th the purchasers, having given the Fiscal notice, moved that, the sale to them not having been confirmed, they should be allowed an order of payment for the Rs. 242. This motion was allowed ; but on the plaintiff's appeal it was set aside and the motion was ordered to be discussed in the presence of all parties interested. The District Judge (*O. W. C. Morgan*) then made the following order, after discussion :—

"The Fiscal and defendants do not oppose this motion. The first sale, when the claimants became the purchasers, has not been confirmed. I do not see how the plaintiff can in any way be prejudiced. He has still the property specially mortgaged to him, against which he can proceed. I do not think the plaintiff had a right to proceed against property *not specially* mortgaged to him, before first discussing the special mortgage. The claimants have a right to a refund under the 55th clause of the Fiscals Ordinance. Motion allowed with costs."

The plaintiff appealed, contending (1) that, the first sale having been made subject to Coorey's mortgage, the purchasers, having had notice, should have protected their own interests ; (2) that, no objection having been taken to the sale within 30 days, the sale was confirmed by operation of law ; (3) that, reading § 55 of the Fiscals Ordinance with §§ 54 and 66, the claimants were not entitled to a refund ; (4) that, if a refund was due under those clauses, it should have been claimed by separate action.

Grenier, for the plaintiff—The practice of the District Court of Colombo, since the passing of the Fiscals Ordinance, has been that, if no objection be taken within 30 days, the sale is confirmed *ipso facto*. The Ordinance says that all sales shall be *reported* to the Court, but does not require the *confirmation* of every sale. But there is a decision the other way by STEWART, J., *D. C. Colombo* 51,457, (1). *D. C. Colombo* 80,714 (2) was a case which I argued myself

(1) Civil Minutes of S. C., 11th Dec. 1874.
(2) Civil Minutes of S. C., *Interloc.*, 19th Nov. 1880.

before CAYLEY, C. J., and CLARENCE J. The District Judge had held that a writ-holder could not draw the one-fourth purchase-money paid by a purchaser under the writ, inasmuch as that deposit did not form part of the eventual purchase-money The Supreme Court held that the one-fourth deposited was part of the purchase money and could be drawn after notice to the purchaser, before the completion of the sale; and also that a Fiscal's sale was *ipso facto* confirmed by no objection being taken within 30 days.

Ondaatje, for the purchasers, *contra*—We admit we bought subject to Coorey's mortgage, and that the mortgagee had a right to re-sell the land; but I submit that the Fiscal should have called upon the original purchasers (who were in possession) to pay the amount of the mortgage debt, and should only have re-sold in case of non-payment. [DIAS, J. —The party before us is not the Fiscal but the mortgagee-purchaser.] If we have to pay, we lose both the land and our money. [CLARENCE, J.—There is some hardship upon you. You could not have been turned out of the land (if you had been in possession under conveyance of the Fiscal) without a separate suit against you, as we have so often held.]

Cur. adv. vult.

(3rd October). DIAS, J.—[After setting out the facts]. The order of the learned Judge is based on the 55th clause of the Fiscal's Ordinance of 1867. He thought that, the sale at which the respondents purchased not having been confirmed, the respondents were entitled to a return of the purchase money. In the events which have happened, the construction placed upon the 55th clause by the learned Judge is erroneous. The 55th clause must be read with the 53rd clause. Under the 53rd clause the Fiscal is bound to report to the Court every sale of immoveable property, and if the sale is impeached by any party interested, the Court shall make a summary inquiry and confirm or disallow the sale. It is plain that if the sale is not impeached it does not require either confirmation or disallowance, and under the 56th clause, when the full amount of the purchase money is paid, the Fiscal is bound to execute a conveyance in favor of the purchaser. In this case the sale has not been impeached by any party, and the 55th clause of the Ordinance is therefore inapplicable. A purchaser in execution knows, or ought to know, that the Fiscal only sells

the interest of the execution debtor, and the purchaser takes the property at his own risk. In this case, however, the respondents' purchase was expressly made subject to the mortgage in favor of Andris Coorey. The respondents bought with notice of this mortgage, and they cannot complain of the subsequent sale under Andris Coorey's mortgage.

For the above reasons the order appealed from must be set aside.

CLARENCE, J.—I am of opinion that the respondents, the purchasers, have shown no ground for a refund of their purchase money. Whether or not the judgment, which the mortgagee is said to have obtained, is one which is binding against these respondents, I do not know. But the respondents, for aught that appears, purchased at their own risk the interest of the execution debtor as it stood at the sale, and there is no suggestion of irregularity in the sale.

I agree that this order is wrong and must be set aside, with costs in both Courts as against the purchasers respondents.

Order set aside.

Proctor for appellant, *E. H. Prins.*
Proctor for respondents, *J. R. J. Ondaatje.*

11th May, 1882.

Present—CLARENCE, J.

D. C. Kandy, 81,309. } Francis DE SILVA v. D. M. RANHAMY and 4 others.

Joint and several liability on judgment.

Where a judgment decreed that plaintiff should recover a sum specified from the defendants and out of the estate of an intestate person in their hands,

Held, that under this judgment the plaintiff might recover the whole amount from either defendant.

This was an action on two bonds, and judgment was duly entered against defendants by default, without a declaration

that the property mortgaged was specially executable for the judgment. One bond was granted by the first and second defendants, and the other by the first defendant and the father of both defendants. The father had died intestate, and the plaintiff sued the defendants personally, and also as representatives of the deceased man's estate. By both bonds property was mortgaged. Writ issued for Rs. 1,100 and costs. The first defendant having paid his share (Rs. 646·50) moved the Court to have writ recalled, the sale of his share of the property seized stayed, and the judgment as against him declared satisfied.

The District Judge (*Lawrie*) disallowed the motion in the following terms:—"I understand from the first defendant that the property now under seizure and advertized for sale on the 14th is one of the lands mortgaged in the deed to plaintiff. The judgment in this case is one to enforce that mortgage. It has not been fully satisfied. I think the land remains burdened, and a sale of it should not be stayed until the full debt has been paid. I cannot stay this sale."

The first defendant appealed against this order on the ground that, the judgment not being joint and several, it must be considered that he had satisfied the share of the judgment due by him, and that his interest in his father's estate, and the property mortgaged by him in the first bond, were not liable to be sold.

Wendt for the appealing defendant.

Clarence, J.—The appellant asks to have the sale stayed on the ground that he has already paid more than his share of the judgment entered against him and the second defendant. The judgment of the Court below simply decrees that plaintiff do recover from the defendants and out of the estate of the intestate in their hands the sum specified. On that judgment, so long as it stands, plaintiff may recover the amount from either.

Appeal dismissed.

Proctor for the plaintiff, *Barnes de Alwis*.
Proctor for the first defendant, *Edwin Beven*.

26th September and 19th October, 1882.

Present—CLARENCE and DIAS, JJ.

D. C., Matara, 32,371. } Don Simon SAMARAWERA v. N. K. A. S. DE SILVA.

Administration, necessity for—Action by surviving spouse to recover moveables belonging to the community—Minor child, rights of.

In an action by a husband to recover certain moveables that belonged to the community between himself and his deceased wife, which property the defendant detained, the defendant pleaded *non detinet* and that the plaintiff could not recover without obtaining admiostration to his wife's estate; there being also issue of the marriage.

Held, reversing the decision of the Court below, that plaintiff could recover the half to which he was himself entitled, and should be allowed time to obtain administration or to have himself appointed guardian *ad litem* of his minor child.

This was an action to recover possession of certain moveable property which it was alleged the defendant unlawfully detained, and which the plaintiff prayed might be restored to him or brought into court to be duly administered and divided between himself and his infant daughter who had succeeded to her deceased mother's half of the common estate. The plaintiff averred in his Libel that the property in question had been removed to the house of the defendant (his father-in-law) on the occasion of his (the plaintiff's) wife being taken there on account of her illness, and that after his wife's death, which took place shortly after, the defendant refused to give up the property.

The defendant answered pleading *non detinet*, and raising the objection that the plaintiff could not maintain the suit without obtaining letters of administration to his wife's estate. The District Judge (*Byrde*) having upheld the objection and entered up a judgment of non-suit, the plaintiff appealed.

Grenier for the appellant.

Dornhorst for the respondent.

Cur. adv. vult.

CLARENCE, J.—Plaintiff's wife died in the house of defendant, who is her father. Plaintiff avers that when he brought his wife there they brought with them a quantity of moveable property which he avers that defendant detains,

Plaintiff claims his own half and also the half which has devolved on the minor child of the marriage. He has not obtained letters of administration nor has he been appointed guardian *ad litem* of the minor. The District Judge considered that he ought to have obtained administration to his wife's estate before he could recover her share on the minor's account, and I am not prepared to interfere on that point; but no administration is necessary to enable plaintiff to recover his own half. Plaintiff appeals against a nonsuit without costs. I think that plaintiff should be allowed to proceed with his claim as to his own half, and try the issue of fact disclosed by defendant's denial that the property was brought, and that he should be allowed time to procure himself constituted the representative of his wife or guardian *ad litem* of the minor. I think the judgment appealed against should be set aside, and the case sent back for further proceedings. Defendant to pay appeal costs. All other costs to be costs in the cause.

DIAS, J., concurred.

Set aside.

Proctor for the plaintiff, *C. H. B. Altendorf.*
Proctor for the defendant, *Jonathan Silva.*

3rd and 19th October, 1882.

Present—CLARENCE and DIAS, JJ.

D. C. Colombo, 85,584. } C. E. GUZDAR & Co. v. The BRITISH INDIA STEAM NAVIGATION COMPANY.

Consignees, liability of, for landing charges—Charges of the Wharf & Warehouse Co.—Ord. 10 *of* 1876, *Schedule A* —"*Consolidated landing and shipping charges.*"

Plaintiffs were the consignees of certain rice which defendants had undertaken to carry upon Bills of Lading which gave them the right to land the rice at consignees' risk, with a lien on the goods for charges, according to a scale visible at defendants' agents' office. Defendants employed W. to land the goods, who detained 5 per cent of them till payment of landing and storage charges. Plaintiffs now claimed damages for this detention alleging a tender of a reasonable amount for such charges, no scale of charges being visible at defendants'

agents' office. The scale there visible was that contained in Schedule A to Ord. 10 of 1876, (being the scale charged by W.) which prescribed a "consolidated landing *and shipping* charge" of 10 cents per bag of rice, with a reduction of 10 per cent. when the goods were taken from the Wharf by consignees and not stored. W. claimed 9 cents a bag for the goods in question, which had been removed from the Wharf.

Held, that the charge of 9 cents per bag was for the processes necessary to be gone through in order to place the goods on the Wharf free to be removed by the owner, which processes must (in the absence of evidence to the contrary) be presumed to be covered by the expression "landing charges" in the Bills of Lading.

Held, therefore (there being no evidence that the amount tendered by plaintiffs was a reasonable payment for such "landing") that the detention by defendants' agent, W., of part of the goods till payment of 9 cents per bag on the whole consignment was justified, and that plaintiffs' action failed.

The libel of the plaintiffs alleged that their agent at Calcutta about 4th October, 1881, shipped (freight prepaid) on board the defendants' steamship *Socotra* for Colombo 4,711 bags of rice, to be delivered to plaintiffs. That there was a further shipment, about the 8th October, 1881, by the same agent Pestonjie Eduljie Guzdar, of 679 bags of rice on board the defendants' steamship *Bhundara* upon the same terms and conditions. That there was a further similar shipment of 1,018 bags of rice on board the defendants' steamship *Ellora* on the 8th October, 1881, which also the defendants undertook to carry and deliver to the plaintiffs at Colombo. That the steamships duly arrived at Colombo, and nothing excepted in the Bills of Lading happened, to prevent the delivery of the said consignments to the plaintiffs; but the defendants only delivered 4,195 bags out of the first consignment, 659 out of the 2nd, and 760 out of the 3rd. The plaintiffs claimed Rs. 5,000 as damages for the short delivery.

The answer, admitting great part of the libel, denied that none of the exceptions contained in the Bills of Lading had occurred; that plaintiffs had fulfilled all conditions to entitle them to full delivery; that the short delivered rice was wholly lost to plaintiffs; and that plaintiffs had sustained any damage. The defendants relied on the fact that the Bills of Lading contained, among the usual conditions, one to the following effect:

"*The Company to have the option of delivering these Goods into receiving ship or landing them at Consignees' risk and expense, as per scale of charges to be seen at the Agents' Offices, the Company having a lien on all, or any part of the*

Goods, against expenses incurred on the whole shipment..... If stored in receiving ship, godown, or upon any wharf, all risks of fire, dacoity, vermin, or otherwise, shall be with the merchant; and the usual charge shall be paid before delivery of the Goods."

The defendants alleged that they had landed the rice on arrival into the boats of the Wharf and Warehouse Co., as they thus had a right to do; the said company having authority under Ordinance No. 10 of 1876 to act as carriers, wharfingers and warehousemen, and to charge such reasonable rates for their services—not exceeding the maximum given in the said ordinance—as the directors might appoint. That the said W. and W. Company landed and warehoused the rice, which was ready for delivery to the plaintiffs upon their paying the Warehouse Company the said reasonable charges due under §§ 8 and 15 of the said Ordinance for such landing and storing,—the plaintiffs having under the Bills of Lading undertaken to pay the said charges. That the Warehouse Company, exercising their lien for charges given by § 15, delivered to plaintiffs the proportion specified in the libel of each consignment, and offered to make up the deliveries to 95 per cent, only detaining 5 per cent till payment of charges, which however plaintiffs did not pay. The answer concluded by denying liability to pay any damages and praying for a dismissal of the plaintiffs' action.

The plaintiffs in reply admitted the defendants' option as to *landing*, but denied that it extended to the *storing* of the rice, and that plaintiffs had agreed to pay any charges for landing and storing, before demanding delivery. They alleged further that they had agreed to pay only reasonable landing charges, according to a scale in the defendants' Agents' office, but the Agents had no such scale; and the plaintiffs tendered the usual rates and demanded delivery immediately on landing. The replication demurred to the plea of justification in the answer, inasmuch as the ground relied upon was an underpayment, not to defendant, but to a third party, who was no party to the contract on the Bills of Lading.

The rejoinder put in issue the existence or not of the scale of charges in the office, and the tender by plaintiffs of the reasonable landing charges; and there was a joinder in demurrer.

The case came to trial before Mr. BERWICK, District Judge, on 27th March 1882, when *Withers*, instructed by Mr. A. Alvis, appeared for the plaintiffs, and *Browne*, instructed by Mr. F. J. de Saram, for the defendant.

Counsel agreed that the goods short delivered, to the extent of 5 per cent of the consignments, were detained by the persons employed by defendants to land them, and that such detention was justifiable until the landing charges stipulated for in the Bill of Lading should be paid, such charges being specified as those in a "Scale of charges to be seen at Agents' office." After some discussion the Court ruled that the plea (on the point of landing charges,) that there was no Scale of charges in the Agents' office, was bad, as vague and indefinite in not specifying the day and hour at which the Scale was wanting. "But assume that the date and time were given," the Court went on to say—"the plea would still be bad. It might be that the plaintiffs called at the defendants' Agents' office at ¼ past 2 p. m. on Wednesday the 5th June, 1881, (or whatever the date and hour may be supposed) and asked to be shewn their scale of landing charges, and that he was told he could not see it just immediately because it had been sent to the next door office for a moment, but if he would be good enough to sit down and take a chair for five minutes, the scale would be sent for and shewn to him immediately: and if the defendant Company's Agents thus offered to the Plaintiffs at the said Agents' office within such a reasonable time as that of a few minutes, and were able as well as willing so to show it to them, it would be in my opinion absurd to say that the scale of charges was 'not to be seen at the Agents' office,' and these last words indicate the only reasonable construction that can be put upon the actual words of the plaintiffs' plea (in connection with the Bill of Lading): 'Defendant Company had no scale of landing charges in their office.' In order to make the plea good it must negative the words in the Bill of Lading, and say that no scale of charges was to be seen at the Agents' office, and the plaintiffs should further have alleged as part of their plea that they had asked at the office to to be shewn the scale and its exhibition had either been refused or unreasonably delayed. Then only could it be said (negativing the condition in the Bill of Lading) that no scale of charges was to be seen at the Agents' office. Although I think the plea

is defective I will, to save risk of costs in appeal, hear what evidence the plaintiffs may have to support it. The storage charges, and the alleged non-delivery of the rest of the goods besides 5 per cent on the consignments, involve different considerations."

Plaintiffs' Counsel then put in certain correspondence between the parties and closed his case, except on the point of damages. Defendants' Counsel called George Alston, who had held a power of Attorney from the defendants' Agents at the time the consignments arrived, and who proved that at that time there was a scale of landing charges in the Agents' office, copy of which scale he produced, another having been sent to plaintiffs in reply to a letter of theirs. The item of 9 cents per bag the witness pointed out as the landing charges to be paid by consignees.

The District Judge gave judgment on the 5th April. The questions in dispute were (1) whether the consignees are bound to pay landing charges at the rates authorised by the Wharf and Warehouse Company's Ordinances; and (2) whether they are liable at all for storing or warehouse charges. The Warehouse Company were simply defendants' Agents, and plaintiffs had no contract with them, and the landing must be taken to have been by defendants; similarly, demand of charges and detention for non-payment by the Warehouse Company must be considered demand and detention by defendants. Plaintiffs should have ascertained, before refusing to pay, whether the charges demanded by the defendants' Agents, the Warehouse Company, were excessive, by demanding sight of the scale of charges and giving reasonable time for its production. The charges have not been proved to be excessive, and this failure is fatal. The Warehouse Company's charges cannot be very unreasonable, since they are sanctioned by the Legislature, but the defendant was at liberty to adopt any scale, apart from reasonableness, provided it could be ascertained at the Agents' offices. The charge, and the detention for non-payment of them, were therefore justifiable. (2) As to wharehousing charges, defendant was bound to take reasonable care of goods during detention, and is entitled to charge reasonable rates for such care. Moreover, the Bills of Lading expressly provide for such storing, and stipulate

for the payment of storage charges before delivery. The charges made have not been shown to be unusual.

Upon these findings the plaintiffs were nonsuited with costs, and they appealed.

Grenier (*Withers* with him) for the plaintiffs, appellants.

Browne (*VanLangenberg* with him) for defendants, respondents.

Cur. adv. vult.

DIAS, J., delivered the following judgments on 19th October:

DIAS, J.—[After setting out the facts]. The attention of both parties seems to have been confined to the construction of the clause in the Bill of Lading, on which the defence is founded. The determination of this question materially depends on a piece of evidence which is not to be found in the case. In the early part of the correspondence between the parties on the subject, the plaintiffs desired the defendants to allow them (the plaintiffs) to land the rice themselves. This they were clearly not entitled to do, as the defendants had the option of landing the rice themselves at the expense of the plaintiffs. The Bills of Lading provide that the charges of landing are to be paid according to a scale of charges to be seen at the defendants' Agents' office. Alston, who was the defendants' agent at Colombo, says that when the three ships arrived he had a scale of charges in his office, and a copy of it was sent to the plaintiffs on the 19th October 1881. The plaintiffs received this copy, and, according to their letter of the 20th October, they returned it to the defendants' Agents. This scale of charges was before Mr. Alston when he was examined as a witness. It is not among the proceedings, and the officiating District Judge, who was written to on the matter, says, "that the document was only produced, but not put in evidence, and that the witness who produced it is now out of the Island." In the absence of this piece of evidence, we must look to the plaintiffs' letter of the 20th October, in which they say that what they received was the Rules and Regulations, and Tariff of charges, of the Wharf and Warehouse Company, Limited. This evidently means the Schedule A to Ordinance No. 10 of 1876, so modified as to cover only landing charges. In this Schedule A, rice per bag is put down at 10 cents, and where the

goods are removed from the Wharf a reduction of 10 per cent is allowed, and the 9 cents per bag referred to by Mr. Alston is evideotly a reduction on the Schedule of 10 per cent, so as to meet the case of simple landing. Assuming that the defendants insisted on their right to charge under the Schedule to the Ordinance, with a reduction of 10 per cent, I am of opinion that t e defendants have acted within their contract. The Schedule to the Ordinance is a scale of charges, not only for landing, but also for warehousing, goods; and where goods are not warehoused, the 10 cents per bag is reduced to 9 cents, which is all that the defendants claimed. They had a perfect right to do so, and also to retain the rice, or as much of it as was sufficient to cover their claims, till the whole amount was satisfied.

Under these circumstances it appears to me that the judgment of the District Judge is right, and that it must be affirmed.

CLARENCE, J.—[After setting out the facts.] When the rice arrived plaintiffs asked defendants to allow them to land it in their own boats. This defendants refused, and they were entitled to refuse. Defendants then landed the rice in the boats of the Wharf and Warehouse Co., and refused to procure to plaintiffs the rice out of the custody of the Wharf Co., except on the payment of that Company's statutory charges. The Wharf Company delivered most of the rice, and offered to deliver all but 5 per cent. of the total, but they asserted their intention to detain the 5 per cent. until the charges were paid. The sum which the Wharf Company thus claimed was 9 cents per bag, amounting on the whole consignment to Rs. 576·72. Plaintiffs tendered to defendants Rs. 265, which defendants declined to accept.

Without going through the pleadings in detail, it is sufficient to say that the question between the parties is—whether defendants were warranted by the Bills of Lading in refusing to deliver the whole of the rice until the Wharf Company's charge of 9 cents per bag had been paid. It is admitted that defendants have refused delivery of 5 per cent of the whole consignment.

By the Bills of Lading defendants were entitled to demand landing charges "as per scale of charges to be seen at the Agents' offices." It has been assumed that this means the Agents' offices in Colombo, the port of delivery. Plaintiffs in their replication assert that defendants "had no

scale of landing charges in their office," and defendants in rejoinder traverse that averment. Both parties no doubt meant to contest the question—whether there was a scale of charges to be seen at the office of defendants' Agents, who are Messrs. Alstons, Scott and Co. It appears from the evidence of Mr. Alston, who was called by defendants, that there was a scale of charges in Alstons, Scott and Co's office, who produced it at the trial. The document, however, seems not to have been formally put in evidence, and was taken away by the witness after having been inspected by the learned District Judge who tried the case. If there were any question as to the identity of this scale of charges, we might have allowed the document, which no doubt still exists in Messrs. Alstons, Scott and Co's office, to be now put in. There is, however, no question but that the scale so identified by Alston was a copy of the scale contained in Schedule A of the Wharf Company's Ordinance No. 10 of 1876, and the substantial question argued before us was—whether this was a scale of landing charges within the meaning of the Bills of Lading. Plaintiffs' counsel argued that the charge of 9 cents per bag on imported rice was not charged as a "landing charge," but as "consolidated landing and shipping charge"; that consequently there was no scale of landing charges to be seen at the Agents' office, within the meaning of the Bill of Lading, and consequently that there was no obligation on plaintiffs' part to pay any specific charges, but merely such amount as may be found reasonable, which it is contended their tender of Rs. 265 was. No evidence appears to have been adduced bearing directly on the question—whether the Rs. 265 was or was not a reasonable remuneration for landing 6,408 bags of rice. The question is not—whether the 9 cents is a charge which the Wharf Company are entitled to charge their own customers under their Ordinance, but whether it is a charge which the present defendants are entitled to make as against the present plaintiffs. There is no question concerning the Wharf Company's right to detain the rice, but the plaintiffs' contention is in substance this. They say to the defendants: "You had no scale of landing charges at your Agents' office, and consequently we have tendered you a reasonable amount. It is nothing to us that you have chosen to incur a charge of 9 cents per bag on the rice.

That concerns you and the Wharf Company. You were bound at whatever cost to yourself to free this rice for us as soon as we tendered our Rs 265."

The Schedule in which the 9 cents per bag appears puts 10 cents per bag as a charge for "receiving into boats, loading, conveying to the Company's Warehouses at the Wharf, warehousing, examining and weighing as required for Customs purposes, loading into carts, conveyiny to and warehousing in the Company's Warehouses and after delivery from the Company's Warehouses." There then follows the stipulation that "when goods are removed from the Company's premises at the Wharf by owners or consignees, and not placed in the Company's Warehouse, a reduction of 10 per cent. will be made in the undermentioned charges." It thus appears that the 9 cents are charged for everything short of storage in the Company's Warehouses, or in other words for everything which may be necessary to be done in order to place the goods on the Wharf, free to be taken away by the owner. The Bills of Lading seem to contemplate the whole contingent expenditure in these transactions as divisible into landing charges and storage charges. We have no evidence before us as to what the term "landing charges" is usually understood to cover. It certainly does not seem to me unreasonable to understand it as covering all that had to be done in this case, in order to place the goods free on the Wharf; and in the absence of evidence to the contrary I am not prepared to rule the contrary.

I observe also that there is no evidence to show that Rs. 265 was a reasonable amount.

For these reasons I agree with my brother DIAS that this appeal fails, and I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed.

Proctor for plaintiffs, *A. O. Joseph.*
Proctor for defendants, *F. J. de Saram.*

5th and 19th October, 1882.

Present—DIAS, J.

P. C. Colombo, 7,874. } Mallegallege BATCHY HAMY v. Tantrige HARMANIS PIERIS.

Non-maintenance of illegitimate child—Plea of autrefois acquit.

Defendant on a charge of not maintaining his illegitimate child (in breach of subsect. 2 of sect. 3 of the *Vagrants Ordinance*, 1841) pleaded *autrefois acquit*, showing that he had in a previous case been acquitted on a charge tendered by complainant of not maintaining the same child.

Held, that though there was no special verdict on the point the previous case must be taken to have disposed of the question of paternity, which was of the essence of the charge.

Held also, that, the non-maintenance of illegitimate children being a criminal offence, the previous verdict rendered the matter now in issue *res adjudicata*, so that the special plea ought to have been sustained.

The defendant was charged on a plaint dated 21st July 1882 with having "since one month" left his illegitimate child by the complainant without maintenance, in breach of subsection 2 of section 3 of Ordinance No. 4 of 1841.

The defendant pleaded not guilty, and *autrefois acquit* in case No. 5,372 of the same Court, which the Magistrate (*Boake*) now held was "clearly not a decision." Evidence was called on both sides, and the defendant convicted and fined Rs. 2. The defendant appealed.

Grenier, for the defendant, appellant—The verdict of acquittal entered in the case 5,372, in which the parties were the same, supports the special plea taken. Had there been a distinct finding that the defendant was not the father, it would have been conclusive. *P. C. Colombo*, 5,008 (1). I submit we cannot now, in the absence of such special verdict, determine which ingredient of the charge failed, paternity or non-maintenance. This being a criminal charge, the verdict of not guilty must be taken to discharge the defendant from any subsequent prosecution on substantially the same charge. The mistake hitherto has been to follow English authorities, which are wholly inapplicable. Under English law a proceeding against the putative father of a bastard child is not a proceeding *in poenam* to punish for

(1) Grenier (1873), P. C., 21.

a crime, but is practically a civil suit. Hence a second application by the mother was not in all cases barred by a previous failure to secure an order of affiliation. Our Ordinance, on the other hand, expressly makes non-maintenance a criminal offence punishable by imprisonment or fine.

Alwis, for the complainant, respondent—Non-maintenance is a continuing offence, and the fact that the defendant was acquitted of the charge of not maintaining his child in the month of January is no bar to his prosecution for not maintaining in June. The verdict in 5,372 may have depended upon failure of proof of non-maintenance, while paternity was proved. In the absence of express finding that defendant was not the father of the child the previous acquittal does not bar the present charge.

Cur. adv. vult.

(19th October). Dias, J.—This is a charge against the accused under the Ordinance 4 of 1841 for leaving his male illegitimate child by the complainant without maintenance or support. The accused first pleaded not guilty, and then pleaded *autrefois acquit*. This latter plea should have been first pleaded, but as the accused does not seem to have had the assistance of counsel I am willing to treat the plea of *autrefois acquit* as properly taken. The learned Judge overruled the plea of *autrefois acquit*, and tried and convicted the accused; and the question which I have now to decide is, whether or not the plea of *autrefois acquit* should have been upheld. In a previous case, No. 5,372, the complainant charged the accused with not maintaining the same child. After trial the accused was acquitted. In that case, as in this, the issues of fact which the complainant had to establish were 1st, that the accused was the father of the child, and 2nd, that he failed to maintain it. The very foundation of the charge was that the accused was the father of the child, and the accused having been acquitted in the previous case, the question of paternity was finally disposed of, and it is not competent for the complainant to re-try the same fact. Non-maintenance of an illegitimate child is no doubt a continuing offence, and if the case rested only on that issue, the previous verdict will not operate as *res adjudicata*; but the case here is different. The pater-

nity of the child as well as the desertion were in issue in both cases, and the previous case therefore is a bar to this case. See *P. C. Colombo* 5,008, (1).

Set aside. Defendant acquitted.

5th and 19th October, 1882.

Present—DIAS, J.

P. C. Gampola, 3,477 } AMBROSE v. SLEMA LEEBE.

Local Board Bye-law—Ordinance No. 7 of 1876—Power to create criminal offences by passing bye-laws for purposes not specified in the Ordinance—Ultra vires.

A Local Board established under Ordinance No. 7 of 1876 had passed a Bye-law making it an offence for any person after the 30th June of each year to keep a dog, for which the tax levied by the Board had not been paid, within the limits of the Board and without notice thereof to the Board. The Bye-law professed to have been made under section 35 of the Ordinance, and was published in the *Gazette* as having been approved by the Governor in Executive Council.

Held, that the bye-law in question did not fall under any of the eighteen purposes specified in section 35; and accordingly,

Held, that the bye-law was *ultra vires* of the Local Board.

Plaint—That the defendant did on the 12th day of August 1882 at Gampola, within the limits of the Local Board of Health, keep a dog for which no tax had been paid, and without notice thereof to the said Board, in breach of the 32nd clause of the bye-law of 22nd March 1881 made under the provisions of the Ordinance No. 7 of 1876.

The bye-law referred to was published in the *Government Gazette* of 25th March 1881, and purported to have been made under § 35 of Ordinance 7 of 1876, and to have received the approval of H. E. the Lieutenant Governor with the advice and consent of the Executive Council. It ran as follows:

"32. The tax chargeable on all dogs kept within the town shall be payable and recoverable on or before the 30th day of June in every year. If any person shall keep a dog within the town after the 30th day of June, for which no tax has been paid, he shall give notice thereof to the Board and shall, if he fails to do so, be guilty of an offence."

(1) Grenier (1873), P. C., 21.

Evidence was taken for the Complainant, and the Magistrate (*J. W. Gibson*) gave judgment as follows :

" The passing of the bye-laws and due proclamation thereof have been proved, and also that the dog makes the defendant's boutique its usual haunt. The defendant denies ownership, but the 2nd clause of Ordinance No. 9 of 1842 provides that any person, who shall knowingly suffer a dog to make his premises or house its ordinary place of resort, shall be deemed and held the owner, unless it shall notoriously belong to some inmate of the house, and this definition will clearly apply to actions brought under this Bye-law. Very likely the dog is without an owner, but the defendant by harbouring it has rendered himself liable to be held as owner. Defendant is found guilty, and sentenced to pay a fine of Rs. 20."

The defendant appealed.

Grenier, for the defendant—*First*. The Local Board may levy taxes, but it cannot create new offences, as attempted here. *Wittensleger* v. *Kellar*, (1), where it was held that even a bye-law requiring all owners of dogs to register them was *ultra vires*, notwithstanding its approval by the Governor. *Secondly*. The dog is not proved to belong to the defendant. The old enactment relied upon by the Magistrate only renders presumptive owners of dogs liable for damages done by them, and is altogether inapplicable to the facts of the present case.

The respondent did not appear on the appeal.

Cur. adv. vult.

(19th October). DIAS, J —This is a charge under a bye-law of the Local Board of Health at Gampola, of the 22nd March 1881, for keeping a dog for which no tax had been paid, and without notice to the said Local Board. The bye law referred to is to be found in the *Government Gazette* of 25th March 1881, and bears date the 22nd of that month. It purports to be a bye-law made under the 35th section of the Ordinance No. 7 of 1875. On referring to that section I find no authority in it to the Local Board to make a bye-law such as the one in question. That section authorises the Local Board to make bye-laws for eighteen specified

(1) 2 S. C. C., 163.

purposes, one of which is for the destruction of dogs. The bye-law in question makes it a criminal offence to keep a dog within the town under certain circumstances. The Ordinance gives no power to the Local Board to create offences. It only empowers them to make bye-laws in certain specified cases, and the breach of any such bye-law is made an offence by the 79th clause of the Ordinance. In making the bye-law in question the Local Board has acted *ultra vires*, and the confirmation of it by the Governor does not make it any more legal.

The verdict and sentence are set aside and the defendant is acquitted.*

Set aside. Defendant acquitted.

5th and 19th October, 1882.

Present—DIAS, J.

Bench of Mags. Kandy, 17,820. } J. T. FRANCKE v. MEYA LEBBE and another.

Bye-law, Municipal, dealing with same subject matter as earlier Ordinance—Ordinance No. 15 of 1862—Bye-law under Ordinance No. 17 of 1865.

Where an Ordinance of 1862 made it an offence punishable with a fine of Rs. 50 to obstruct certain officers in the execution of their duty in connection with the abatement of nuisances, and a bye-law made by a Municipal Council under an Ordinance of 1865 entitled its officers to the protection accorded by the Ordinance of 1862 to the first-mentioned officers, and made resistance to them in the exercise of their duty punishable with a fine of Rs. 10;

Held, that a charge of resisting an inspector appointed by the Municipal Council, while in the exercise of his duty, was rightly laid under the Ordinance of 1862.

The defendants were charged with resisting the complainant, a Municipal Inspector, while in the execution of his duty as such, in breach of section 16 of Ordinance

* The same judgment was passed in the following cases of the same Court, in which the charges were identically the same though against other parties; viz. Nos. 3478, 3479, 3485, 3486, 3489. In Nos. 3479 and 3489 the defendants had pleaded guilty, but as it appeared probable that this plea had been pleaded in consequence of the convictions obtained in the other cases, the Appellate Court considered it just to entertain the appeals in these two cases on the same footing as the others.

No. 15 of 1862. The facts sufficiently appear from the following judgment of the Court below (*J. B. Siebel* and *F. VanLangenberg*, Magistrates) delivered on 31st August 1882.

"In this case complainant called his witnesses on the 29th July and closed his case, and the defendants were not ready with their evidence. A postponement was allowed, on their special application, to enable them to call their witnesses on another day.

"On the 10th August instant, however, although witnesses were present, the defendants declined to call any evidence, their counsel contenting himself by raising certain objections to the plaint, which he contended was bad. These objections we have noted, and the points raised were discussed with much skill and ability by learned counsel on both sides. It was contended for the defendants that the charge should have been laid under the municipal bye-law, sections 18 and 22, chapter 20, of 9th September 1875, and not under the 16th clause of the *Nuisances Ordinance*, No. 15 of 1862, because the subsequent bye-law overruled the provisions of the Ordinance 15 of 1862, and also because they were inconsistent with each other, the bye law fixing Rs. 10 and the 16th clause of the *Nuisances Ordinance*, fixing Rs. 50 as penalty for the breach thereof.

"There seems apparently, at first sight, much force in the argument; but on careful consideration of the provisions of the bye-law referred to and of the 16th clause of the *Nuisances Ordinance*, we find that the supposed inconsistency does not really exist. The *Nuisances Ordinance*, No. 15 of 1862, was enacted by the Legislative Council of this island, was assented to by the Governor, and received the sanction of Her Majesty, and it is reasonable to suppose that the said Ordinance is still in force and must be regarded as law until specially repealed by the legislature.

"The *Municipal Councils Ordinance* 1865 empowers Municipal Councils to make bye-laws as they may deem expedient for any of the purposes of the Ordinance, and when such bye-laws are made and approved of by the Governor and the Executive Council they undoubtedly become law, and every one is required, by proclamation in the *Gazette*, to take notice thereof accordingly; but the mere fact of the approval of such bye-laws being proclaimed in the *Gazette*, though at a date subsequent to the enactment of any Ordinance bearing on the same subject, has not, we

think, the effect of revoking such ordinance or statute. Indeed it is extremely doubtful whether a bye-law, which is only a subsidiary or municipality-made law, can in any way supersede an ordinance which has not been specially repealed by a legislative enactment. The clause under which the present charge is laid being in our opinion still in force, we think that the complainant, who is a Municipal Inspector, is legally entitled to claim protection under it against a party who has molested him in the discharge of his duties, for bye-law chapter 10, section 1, specially provides "that the several officers appointed to be Municipal Inspectors shall have all the powers and protection in the discharge of their duties which are by the *Nuisances Ordinance*, 1862, accorded to Officers of the Board of Health." So it is clear that the complainant, who was on duty at the public market on the day in question, having been molested in the performance of his duties, was right in prosecuting his charge against the defendants under the Ordinance of 1862, and in claiming protection under the 16th clause thereof. In fact, we think that the complainant could elect to proceed either under the bye-law or under the Odinance.

"We notice also that, although the wording of the 16th clause of the said ordinance and of the bye-law referred to is substantially the same, the penalty in the one case is a sum not exceeding Rs. 50, and in the other a sum not exceeding Rs. 10. No inconsistency, however, results from this circumstance alone, inasmuch as the measure of punishment is a matter for the Court's discretion, and should be considered by us only after determining the question of fact as to whether the defendants are guilty of the charge preferred against them or not.

"We have been also referred by the learned Counsel for the defendants to a passage in Baron Puffendorf's work on the "Law of Nature and Nations," and to other authorities: but we think it unnecessary to refer to them at any length, because, for the reasons already given, we hold that the plaint is good, and we shall now proceed to consider the question of fact.

"The evidence adduced by the complainant in support of his charge appears to us to be not only satisfactory but trustworthy, and we hold it proved that the complainant was, in the execution of his duty, that is to say, whilst proceeding to examine fish in the defendants' stall, obstructed and

molested by the defendants, and we must find them therefore severally guilty of the charge.

"It would appear that the 2nd defendant (who is a partner of the first) prevented the complainant from making the necessary examination of the fish, and that the noise and uproar caused by him at the time brought the 1st defendant to the scene, and that the latter then joined the 2nd defendant in preventing the complainant from seizing and removing the fish and otherwise obstructed him in the discharge of his duties.

"The cross-examination of the complainant's witnesses by the defendants' counsel suggested the idea that the complainant made the seizure because the defendants had refused to let him purchase some fish on credit. The evidence before us, however, clearly establishes that such was not the case.

"The accused are severally found guilty and are adjudged to pay a fine of ten rupees each."

Defendants appealed.

No Counsel appeared for the appellants.

VanLangenberg, for the complainant respondent, was not called upon.

Cur. adv. vult.

(19th October). DIAS, J.—*Affirmed.*

26th October and 1st November, 1882.

Present—DIAS, J.

C. R. Colombo, 32,332. } BASTIAN PERIS v. The COLOMBO CLUB by its Secretary F. Horsford.

Club—Right of Secretary to represent in Court.

Plaintiff sued for wages for work and labour done for the defendant, a Club, and served summons upon the Club's Secretary.

Held, that the Colombo Club was not authorised to sue or be sued by any corporate name, and that plaintiff's right of action, if any, was against the individual persons who had contracted the debt.

The plaintiff sued the defendant for Rs. 98·12, for work and labour done, and materials provided for the defendant by the plaintiff as a carpenter, as per account particulars filed. Horsford filed answer, admitting receipt of summons, and denying that he had authority to represent the defendant in the case. On the day of trial the plaintiff swore he had done the work for Horsford, and that his account was correct. The Commissioner (*J. E. Smart*) held, "that service of the summons on the Secretary of a Club is good service, inasmuch as the Secretary is the recognised agent of the committee," and gave judgment for plaintiff.

In appeal by the defendant,

Layard for the appellant.
Brito for the respondent.

Cur. adv. vult.

(1st November). Dias, J.—This action is altogether misconceived. The defendant is described as "The Colombo Club by its Secretary F. Horsford." A summons was served on Mr Horsford, and, though not bound to take any notice of it, he appeared and pleaded that he did not represent the Colombo Club. The Commissioner gave judgment for the plaintiff, but against whom, the record does show. The so-called Colombo Club is not a person known to the law. If a body of gentlemen chose to represent themselves as the Colombo Club and contracted a debt to plaintiff, he was bound to sue them as defendants in the case. I am not aware of any law which authorises the Colombo Club to sue or be sued by any corporate name. Set aside and plaintiff non-suited with costs.

Set aside.

Proctor for the plaintiff, *H J. C. Pereira.*
Proctor for the defendant, *F. L. Daniel.*

26th October and 1st November, 1882.

Present—DIAS, J.

P. C. Dimbula, 6,550. } C. G. BELL v. DILLO.

Ordinance No. 11 of 186-, sect. 11—"Quitting service."

On a charge under § 11 of the *Labour Ordinance* of quitting service without notice or reasonable cause, the evidence showed that defendant was complainant's cook, having also to work in the bungalow, and that one evening, after preparing the dinner, he went away without leave (leaving his boxes behind) and returned the next morning.

Held, that these facts did not amount to a quitting of complainant's service within the meaning of the Ordinance.

The plaint charged the defendant with quitting the complainant's service before expiry of his term of service, without reasonable cause, and without giving due notice, he, the defendant, being a monthly paid servant of the complainant.

The evidence showed that defendant was a cook (having also to work in the bungalow) and one evening, after preparing the dinner, he went away from complainant's house (leaving his boxes behind) and returned the next morning, when he was informed his services were not further required. The Magistrate (*J. A. Bell*) convicted the defendant and sentenced him to imprisonment for one month at hard labor.

Defendant appealed.

Van Langenberg, for the appellant—Before a servant can be convicted of desertion there must be proof of an intention to desert. A mere temporary absence will not amount in law to desertion. The intention in this case to return was evidenced by the servant having left his personal goods behind.

Cur. adv. vult.

(1st November). DIAS, J.—This is a charge under the Servants Ordinance of desertion. The defendant, it appears, is a cook of the complainant, and there is no evidence that as such it was his duty to stay at the bungalow at night. He left at 9 p.m. of the 20th September, and returned the following morning. Besides, the evidence does not show

any intention on the part of the defendant to quit the complainant's service. Set aside and the defendant acquitted.

Set aside.

26th October and 1st November, 1882.

Present—DIAS, J.

D. C. Cr. Kurunegala, 2,036. } KADIRAWAIL v. KADER MEEDIN.

Theft—Animus furandi—*Debt due to defendant.*

Defendant was charged with the theft of certain jewels and a sum of Rs. 17. The evidence showed that the property had been taken from the dead body of a woman who at the time of her death was defendant's debtor on a promissory note. Defendant had also taken the jewels in the presence of neighbours, to whom he had declared that he took them as security till his debt should be paid.

Held, that this evidence disclosed an absence of the *animus furandi*, and that defendant was entitled to be acquitted on the charge of theft.

The defendant was indicted for stealing certain articles of jewelry and a sum of Rs. 17 in cash. The property was laid in the son of a woman named Ellemail, from whose body, almost immediately after her death, the articles and money were removed by the defendant. The District Judge (*Sharpe*) who tried the case convicted the defendant in the following judgment.

"The mother of the complainant in this case died rather unexpectedly, although she had been ill for some time, before daybreak on the morning of the 3rd April last, at Balalle, in the house which they two occupied; and the accused hearing the cries of the complainant, an intelligent boy of thirteen, went up to the house, and hearing of the woman's death entered the room where the body lay and proceeded at once to rifle the corpse of all the ornaments which the poor woman had on her person, and of the sum of rupees seventeen which had been tied up in a handkerchief wrapped round her. The complainant and neighbours (who had also come up) seeing this remonstrated with accused; who declared that he took the property in order to secure a debt which he asserted was due him by the deceased Ellemail. The by-standers discussed the question whether accused was

justified in doing so, but seem to have felt precluded from interfering to prevent accused walking off to his house with the property, which he proceeded to do. It has been ingeniously contended for the accused that this outrage, however revolting and unwarrantable, did not amount to theft, inasmuch as it was perpetrated under a supposed sense of right on accused's part, and of the necessity to secure himself in a remote locality: and evidence of a debt due by the deceased on a Promissory Note was put in at the trial. But the facts proved would in my judgment amount to robbery even under English Law, for by the doctrine of relation, the false statement made by the accused before the Justice of the Peace when he resolved to hark back and deny the entry of the house and removal of the property, and trust to shaking or impugning at the trial the evidence which might be adduced, amounted to conversion. Fortunately, owing to the fact of Mr. Ffinch, the Provincial Assistant of the P. W. D., happening next day to be at Balalle, and taking trouble to hold an informal enquiry, and to the evidence of the Rest House Keeper at the trial being very satisfactory, this design was frustrated. Under the more scientific and similar definition of "furtum" in the Civil Law which is stated as "the taking of moveable property without the knowledge and against the will of the owner with the view to benefit ourselves or others," the accused is, I think, plainly guilty. I brush away the technical cobwebs regarding ownership, and hold the property in the house to have at once vested in complainant on the death of the mother; for *Omnia præsumuntur contra spoliatorem*. The accused is therefore convicted, but I shall take into account in sentencing him the fact that he behaved subsequently with kindness in helping the boy to have the body of his mother decently interred. The accused is sentenced to be imprisoned at hard labor for four months."

The defendant appealed.

Grenier, for the appellant—The fact that a debt was due to the defendant by the woman has been abundantly proved, and the evidence on this point has very properly not been discredited. The witnesses for the prosecution have established that the taking of the articles was done openly and in their presence, and the defendant's intention was disclosd by his statement, made at the time, that he took

the articles as security for his debt. The learned Judge has altogether misapplied both the legal maxim and the legal fiction cited by him. The question of ownership is not touched by the presumption which he refers to, and which cannot in any sense support the title of the complainant. That title must be proved independently of mere presumptions. As to the defendant's subsequent denial before the Justice of the Peace, if such denial had stood alone, and it was shewn to be false, the defendant's theftuous intention might possibly have been presumed, but here any such presumption would be completely rebutted by the positive proof as to the *animus* of the defendant. His conduct no doubt was most indecent and improper, judged by our standard of propriety, but he cannot be convicted of theft. Besides, a great deal of hearsay evidence was improperly admitted at the trial, notably that of Mr. Ffinch, to whom allusion is made in the judgment.

Dumbleton, Acting D. Q. A., for the respondent—The Judge no doubt has not expressly discredited the evidence as to the debt, but that evidence is most unsatisfactory. In the absence of any proof that there were other heirs of the woman, the property was rightly laid in her son. No claim to it has been made by third parties. It is more than probable that the defendant's orginal statement, on which Counsel for appellant relied, was made when or after he was detected in the act of spoliation. His after-denial to the Justice of the Peace negatives the alleged innocence of his act and supports an *animus furandi.*

Cur. adv. vult.

Dias, J.—There can be no doubt that the accused took the gold ornaments from the person of the woman, after her death—but all the evidence goes to prove that he took them under a mis'aken belief that he had a right to take them till the debt due to him from the deceased was paid and satisfied. All that can be said is that the defendant committed a very heartless act of impropriety, but that is not sufficient to convict him on this information. The evidence seems to me to negative any presumption that the defendant took the articles *animo furandi.* This being so, the defendant is entitled to be acquitted.

Set aside. Defendant acquitted.

26th October and 7th November, 1882.

Present—CLARENCE and DIAS, JJ.

D. C. Kandy, 88,445. } Emily BARRIE v. ALLAH PITCHE.

Mortgage, hypothecation and part assignment of to mortgagee's creditor—Suit to enforce such mortgage against third party in possession of property mortgaged—Proof of debt due by party assigning.

S., the owner of Grotto Estate, mortgaged it in 1875 to W. to secure a debt and future advances. In 1876 W. by deed acknowledged a debt due to plaintiff, and as security hypothecated to plaintiff W.'s mortgage on Grotto, giving plaintiff a Power of Attorney to sue on W.'s mortgage to recover such part of S 's debt to W. as would cover W.'s debt to plaintiff. In 1878 S. sold Grotto to A. who re-sold to defendant. Plaintiff having in 1880 obtained judgment against W. and S. on the bond of 1876 declaring S.'s debt to W. executable *pro tanto* in satisfaction of that judgment, and declaring also the property mortgaged by S. to W. so executable, sought to sell Grotto in execution, and brought the present suit to set aside defendant's objection to such sale.

Held, that plaintiff's judgment against W. and S. did not bind the defendant, and that before she could seek to enforce S.'s mortgage to W., she was bound to establish as against the defendant that a debt was owing to her from W.; and this she had neither averred nor proved; and that plaintiff was therefore not entitled to the relief prayed against defendant.

The following judgment by *Lawrie*, D.J., explains the facts of the case:

"Mr. Shipton was owner of Grotto Estate. It is said that he mortgaged it to Mr. MacLagan for Rs. 8,000, but as that deed has not been produced I do not know whether the debt was secured over Grotto only or over other Estates also. Afterwards, when Mr. Shipton had contracted a large debt to Messrs. Wall, he granted to them a mortgage No. 1776, dated 5th and 17th November 1875, over several Estates including Grotto. The amount of the mortgage debt is said to have been Rs. 107,500. The Estates which Mr. Shipton mortgaged were probably not worth that large sum, but they were I presume worth at least Rs. 20,000, for in January 1876 Messrs. Wall, in consideration of a payment of Rs. 20,000, assigned to Mrs. Barrie their interest to that extent in the mortgage bond by Mr. Shipton to them. That deed was registered as an incumbrance over Grotto. The evidence before me is meagre, but I think I

understood that Messrs. Wall had possession of Grotto and the other estates mortgaged to them by Mr. Shipton, and that in 1878 they were anxious to be relieved of the trouble and expense of managing and cultivating these, and resolved to sell them for what they would fetch. Mr. Shipton had practically no interest in these; they were burdened above their value. After some negotiations, Abdulla was found to be willing to pay Rs. 3,000 for Grotto. That sum is said by Mr. Wall to have been the full value of the Estate, and in consideration of payment of that Mr. Shipton signed a transfer to Abdulla, in which he declared that the land was free from any incumbrance. How he could say that I cannot imagine, for at that time the Estate was burdened with the mortgage of Rs. 107,000, which has not yet been paid. The debt of Mr. MacLagan is said to have been paid off about that time. I do not know whether the discharge is registered. The register, however, still records that Mr. Shipton had mortgaged Grotto for Rs. 107,000 to Messrs. George Wall & Co., and that Messrs. George Wall & Co. had assigned or mortgaged their interest in that mortgage for Rs. 20,000 to Mrs. Barrie. If Abdulla trusted to the statement in the transfer to him, and thought that in consideration of payment of the full value he was buying an unburdened Estate, what he did buy—at least all that Mr. Shipton cou'd transfer to him, was the proprietary rights in an Estate already burdened above its value to Messrs. George Wall & Co. Mr. Wall seemed to think that the secondary mortgage to his firm and the assignment of that to Mrs. Barrie became null and void *ipso facto* by the sale to Abdulla for Rs. 3,000. If, he urges, the full price was much less than the amount of the primary mortgage to Mr. MacLagan, what was there left for the second mortgagee? It is, however, forgotten that the second mortgage was not discharged, that it remained in the register, and that the secondary mortgagees, though they negotiated the sale to Abdulla, did not bind themselves in any way and did not waive any of their rights. So far as appears from the proof, nothing was said by Messrs. Wall and Co. to the purchaser Abdulla, which would bar the firm realizing their mortgage over Grotto. Mr. Shipton expressly guaranteed that there was no burden on it, but he had no power to affect the rights of Messrs. Wall. But whatever part Messrs. Wall took in this, and however they may in equity be barred from insisting on the mortgage over the

land sold to Abdulla, it does not appear that that firm had any power to diminish Mrs. Barrie's rights; the firm had got Rs. 20,000 from that lady and had given her an assignment of a mortgage over certain lands. She was entitled to trust that they, at least, would do nothing which could lessen her rights, and I am of opinion that Messrs. Wall had no power to affect Mrs. Barrie's interests, and that in fact they did not affect them. Mrs. Barrie's rights as mortgagee over Grotto I hold remained and still remain intact, and no sale by Mr. Shipton, even though consented to by Messrs. Wall, could affect Mrs. Barrie's rights as appearing on the face of the record. The counsel for the defendant urged that Mrs. Barrie has no title to sue; he maintained that she should first have constituted her debt against Messrs. George Wall, or rather against the assignee in Messrs. Wall's insolvency, that she should then have seized and sold and purchased Messrs. Wall's interest in the bond to them by Mr. Shipton; that having purchased it, she should have sued Mr. Shipton and sold his rights in Grotto Estate and have called the present owner to shew cause why the land should not be sold under the mortgage. I do not know that I quite apprehend the objections to the course which Mrs. Barrie did take. She sued Messrs. George Wall and Mr. Shipton in one action in Colombo, and obtained judgment against them, and now she seeks to realize the mortgage against the present owner. I think she has a title to sue, that it would be waste of time to insist on her doing more than she has done. The present owner, the defendant, is to be pitied, for I think he has been deceived, and that he will lose the money he paid trusting to Messrs. George Wall and Co., but I cannot regret the judgment I now give, for it seems to me to be of the highest importance that the rule should be rigidly enforced, that a registered mortgage is a good and subsisting burden on land until it be discharged or until the land be sold in an action to which the parties interested in that mortgage were made parties. I am for giving judgment for the plaintiff with costs. No damages."

Defendant appealed.

Grenier for the appellant.
Browne for the plaintiff, respondent.

Cur. adv. vult.

(7th November). CLARENCE, J.—The substantial facts in this case are these:—In 1875 Dr. Shipton mortgaged (*inter alia*) "Grotto" Estate to George Wall & Co. to secure a debt and future advances. In January 18,6, by a deed of that date, George Wall & Co. acknowledged a debt of Rs. 20,coo as due by them to present plaintiff, and as security therefor hypothecated to her their own mortgage on "Grotto." This deed of January 1876 contained a Power of Attorney which purported to empower plaintiff to sue on George Wall & Co.'s mortgage; not however for the whole mortgage debt due to them but for Rs. 20,000 only. In 1878 Dr. Shipton sold 'Grotto" to one Abdulla who afterwards resold to present defendant. It appears by a note of the learned District Judge to have been admitted at the trial that a primary mortgage on "Grotto" prior to George Wall & Co.'s mortgage was paid out of Abdulla's purchase money, but on this appeal nothing turns on that.

In January 1880 present plaintiff brought action on her hypothecatory deed, that of January 1876, against the partners in the firm of George Wall & Co., the assignees under their insolvency, and Dr. Shipton. In that action she obtained a decree which included a judgment against George Wall & Co. for Rs. 20,coo, interest and costs, a declaration that Dr. Shipton's debt to them was *pro tanto* executable in satisfaction of that judgment, and a direction to the Fiscal to levy on (*inter alia*) "Grotto." There was also a declaration that "Grotto" and other estates were specially executable for the mortgage debt due on Shipton's mortgage to George Wall & Co., but that debt was not ascertained in the decree.

Plaintiff under that decree seized "Grotto." Defendant opposed the sale, and plaintiff now prays for a decree that "Grotto" is liable to be sold under the decree in the former action.

Defendant appeals against a decree in terms of that prayer.

Plaintiff's decree in her suit against George Wall & Co. and their assignees in Insolvency and Dr. Shipton is not binding on present defendant. She has the right by virtue of her hypothecatory deed and the judgment on it to attach the mortgage debt due by Dr. Shipton to George Wall & Co, whatever may be its amount. But as far as she may seek by virtue of her power of attaching or otherwise to enforce George Wall & Co.'s mortgage against defendant, she has to establish against defendant that a debt is owing to her by

George Wall & Co., and that she neither averred nor proved. And in fact her suit against present defendant is framed simply on the footing of a prayer to enforce as against the land in his possession a decree to which he is neither party nor privy.

Under these circumstances it seems to me that plaintiff has not entitled herself to the relief prayed for by her and decreed to her by the District Court, and in my opinion defendant should be absolved from the instance with costs in both courts.

DIAS, J., concurred.

Set aside. Defendant absolved from the instance.

Proctor for the plaintiff, *F. VanLangenberg.*
Proctor for the defendant, *M. C. Sidde Lebbe.*

31st October and 7th November, 1882.

Present—CLARENCE and DIAS, JJ.

Bench of Mags. Kandy, 17,879. } A. BAWA v. A. M. ASHMORE and G. H. VANHOUTEN.

Judge—Power to order removal of proctor appearing in cause—Bonâ fide belief that Court's business was being obstructed.

A Commissioner of Requests has clearly power to turn out of Court any one who obstructs or disturbs the business of the Court, even though such person be an Advocate or Proctor actually engaged in the pending case. It is also within the jurisdiction of the Commissioner, as a matter of course, to determine whether or not any person to whom his attention may be directed is so obstructing or disturbing the business as to render it expedient that such person be removed from the Court. And if the Commissioner have decided that point in the affirmative and acted accordingly, he is protected against action, civil or criminal, [unless he have acted with malice], and the correctness of his opinion on the facts cannot be reviewed by another tribunal in any separate action founded on such act.

The facts of this case sufficiently appear from the judgment of the Bench of Magistrates (consisting of Messrs. J. B. SIEBEL and F. VANLANGENBERG) delivered on 16th

September 1882, and that of the Appellate Court. The judgment of the Court below was as follows :

This case was tried by us on the 31st August last, but we were obliged to defer judgment as the first defendant wished us to refer to the Court of Requests case No. 19,822,* which was at the time before the Appellate Court. The Record was forwarded to us by the Commissioner only on the 8th instant, on its receipt by him from the Supreme Court.

The circumstances under which this Court entertained the plaint and ordered summons to issue against the defendants will appear on reference to the statement made by complainant on the 15th July last, and which was duly recorded by us in the minutes of the proceedings.

The two defendants (the first of whom is the Police Magistrate and Commissioner of the Court of Requests of Kandy, and the second an Inspector of Police) are charged in this action by the complainant, who is a Proctor of the Supreme Court, with assault and false imprisonment : and we shall here briefly state a few of the facts and circumstances connected with this charge as deposed to by the complainant's witnesses.

It would appear that complainant, who is practising in the Courts here, was retained by the defendant in case No. 19,820 of the Court of Requests. The case was fixed for hearing on the 12th of July, and when parties' names were called in due course, Mr. Bawa, the complainant, appeared and applied to the Commissioner (the 1st defendant) to be allowed to amend the answer in the case, which had been unskilfully drawn by a petition-drawer and filed by the defendant in person, and which answer the complainant thought should be amended by the defendant claiming title to the premises, which formed the subject of dispute. The complainant's application to amend was ultimately refused by the 1st defendant, but, before any order was definitively made, it appears that a discussion took place between the complainant and the 1st defendant which led to the complainant's removal from Court.

It would further appear that while the complainant was addressing the Court in support of his motion for the amendment the 1st defendant motioned to the complainant twice,

* For a note of this case, see Appendix D.

by waving his hand, to sit down, of which the complainant took no heed. The 1st defendant then directed the complainant to sit down. He replied that he would do so, if the defendant thought he had urged everything that could have been urged by him in support of his application. After making this remark the complainant continued addressing the Court, when the 1st defendant ordered the 2nd defendant to turn the complainant out of Court, which order was at once carried into execution by the 2nd defendant.

The facts above detailed are proved, and, we believe, undisputed in the 1st defendant's statement of defence; and we are now called upon to determine how far the defendants are criminally responsible, it they are responsible at all, for their acts.

The question raised, we are happy to think for the first time in the annals of our Courts, is one of great importance, involving, as it does, the mutual rights and privileges of Judges of Inferior Courts and members of the bar, and in whichever way we may decide this question, we hope that the unsuccessful party would, by an appeal to the Supreme Court, obtain an authoritative decision on the point.

If a Proctor, upon instructions from his client and in the exercise of his discretion, thinks it necessary to amend a pleading, whether filed by him or his client in person, has that proctor a right afterwards to appear before the judge and make an application for the amendment of such pleading? We think that his right to do so is undoubted, and that the judge is bound to hear and determine the application when so made.

We hold therefore that the complainant's application, made in the case above referred to, on the 12th July last, was a proper and a legitimate one, calculated to make the true issue *clearer* than it was, although the 1st defendant has characterized it as "extraordinary." Not only was the application disallowed, without, so far as can be gathered from the cross-examination of the witnesses and the statements in defence, the complainant being fully heard in support of his motion, but the complainant's efforts to be heard in support of the amendment resulted, as we said before, in his forcible removal from Court. The complainant, it must be borne in mind, was then in his professional capacity retained to defend the cause of his client, and, under these circumstances, was the 1st defendant justi-

fied in ordering the 2nd defendant to turn the complainant out of Court, and was the 2nd defendant justified in carrying this order into effect, and in so doing was he justified in resorting to force ?

We have no hesitation whatever in saying that the 1st defendant acted in a most arbitrary manner in giving the order, especially in view of the fact, supported by the defence, that there was nothing disrespectful in complainant's tone or manner. He clearly exceeded his powers and functions as a judge, and his conduct seems to us to have been altogether unwarranted and unjustifiable, and the case against him is rendered more serious by the aggravating circumstance that he persisted in his illegal order even after the complainant offered to sit down.

It is in evidence that, when the complainant was in the act of taking his seat, the 2nd defendant laid hold of him by his arm and *forcibly* removed him out of Court, and there detained him, and he was not allowed to return to the Court except to take his hat and papers, which were then lying on the table.

By the removal of the complainant from Court, and his detention outside, he was not only subjected to very great humiliation, but his client was deprived of his assistance and the benefit of his professional services, for we find that the case was proceeded with later, in the absence of the complainant.

It is very much to be regretted that the 1st defendant, one of the principal magistrates in this important province, should have so far forgotten his position and the consideration due to a Proctor holding the license of the Supreme Court to practise his profession in any Court in the Island, as to have treated the complainant in the manner in which the 1st defendant did. Such high-handed and arbitrary proceedings are much to be deprecated, for they are calculated not only to disturb the cordial relations between the Bench and the Bar, but also to affect the calm and impartial consideration of cases brought before the Court for adjudication, and, thereby, the administration of justice in this colony.

Judges have unquestionably certain powers conferred on them, and, amongst others, powers for preserving order and decorum in their Courts, but such powers must be exercised with calmness and moderation, and then only will the law protect them, when acting in their judicial capacity. In

like manner, practitioners as well as suitors have certain rights and privileges which cannot be set at nought by judges or magistrates. Certainly, no judge would be justified in resorting to unnecessary force or violence even in the assertion of well-founded rights, and in this case, we consider that unnecessary force was used by the second defendant, for we have it in evidence, first that the complainant's conduct and manner did not justify his removal, second that he offered to sit down before he was touched, and third that he was forcibly removed. If such acts as the first defendant has been proved to be guilty of are allowed to pass unnoticed and unpunished, no member of the profession will feel that he can with any sense of safety do his duty fearlessly and honestly, and suitors will thus have their interests sacrificed to a dread on the part of those who conduct their cases of their being publicly degraded. While saying this much we do not forget that practitioners and suitors are also undoubtedly liable to be proceeded against criminally and punished as for contempt, in the event of their abusing the rights and privileges allowed to them by law. As remarked by our late Chief Justice, Sir John Phear, in a case reported in the *Supreme Court Circular*, "Contempt is a criminal offence," and the definition of it is as follows: —"It is committed when any one does, says or exhibits any acts, words, or behaviour in disrespect of the authority of the court, such as have the effect or are calculated to have the effect, *first*, of preventing or disturbing the orderly course and seemly conduct of the public business of the Court, or, *secondly*, of obstructing, hindering or preventing the impartial action of the Court in the administration of Justice." (1) But we find none of these elements present in this case to constitute or warrant a charge of contempt, and, besides, it is not pretended that the complainant had acted in an improper manner, or that his conduct was in any degree contemptuous of the Court or in any way in disrespect of the Court's authority.

We find also that the *County Courts Act*, 9 and 10 Victoria, c. 95, s. 113, gives the judge power to commit persons for any insults wilfully offered to him or his officers, or for any wilful interruption of the proceedings of the Court or any other mis-behaviour in Court: but in the present case the witnesses all speak to the correct and respectful beha-

(1) *Sera Mudaly* v. *Ismail*, 1 S. C. C., 62.

viour of the complainant towards the 1st defendant. Indeed, if the complainant had behaved improperly, the first defendant had the power to deal with him as for a contempt of Court, or to report him to the Supreme Court; but, in the absence of any charge of the kind, we consider that the order of the 1st defendant to the 2nd defendant to remove the complainant out of Court was *ultra vires*, and the forcible removal of the complainant by 2nd defendant from Court and his subsequent detention outside was illegal, and that these acts of the defendants go to constitute the assault and false imprisonment charged against them in the plaint.

We were referred by the 1st defendant to District Court Kalutara case, No. 34,611, (1) as an authority in favor of his contention that he was justified in the steps taken by him against the complainant. We do not think that this case helps the contention of the 1st defendant at all, for the defence therein urged by the defendant (the Police Magistrate of Panadure) was that the plaintiff in that case misconducted himself, disturbed the defendant in the discharge of his duties and was guilty of a contempt of Court. In this case, however, the evidence is all the other way, and, to use the words of the witness Mr. Jonklaas, "the complainant was in no way disrespectful, either in language, tone, or manner."

We therefore hold that the charge against the defendants has been satisfactorily established, and, although the 1st defendant, in his defence, took upon himself the whole responsibility of the acts complained of, this does not, in our opinion, absolve the 2nd defendant from his criminal liability, for no person, far less a police officer, is bound to carry out an illegal order. We therefore find the defendants severally guilty of the charges preferred against them, and we think that the justice of the case will be met by adjudging the first defendant to pay a fine of Rs. 20, and 2nd defendant to pay a fine of Rs. 5.

At the close of the case for the prosecution, the defendants had made the following statements:

The first defendant stated that he wished to take upon himself the entire responsibility of the acts complained of. That the 2nd defendant (the Court Inspector) simply obeyed

(1) For a report of this case see Appendix C.

the 1st defendant's orders and was in no way to blame. That he (1st defendant) rested his defence on the evidence of Mr. Jonklaas, whose statements were correct as to what had transpired in Court on the occasion in question, and that he also conceded that the complainant was in no way disrespectful towards him. That as the complainant did not take his seat after he had been asked to do so a third time, he (1st defendant) was justified in having him removed out of Court. He also referred the Court to D. C. Kalutara No. 34,611 as supporting his contention that he was not liable criminally, and pointed out that no malice was proved against him. The first defendant also wished the Court to refer to C. R. Kandy No. 19,820, which had given rise to these proceedings.

The second defendant said that he was justified in carrying out the orders of 1st defendant, who was his superior and also a Justice of the Peace.

Defendants appealed.

Withers, for the defendants—I contend that, *First*, the Bench of Magistrates had no jurisdiction to entertain the present charge; *secondly*, that even if it had that jurisdiction, the plaint is defective, and discloses no offence in the sense to be mentioned hereafter, when read with the evidence. I do not controvert the facts, and so will not read the whole evidence. [CLARENCE, J.—It is unfortunate that the question has taken a criminal form, as the defendants might otherwise have given evidence on oath]. The judgment finds (1) that the act complained of was done in the exercise of judicial functions, *sedente curia*, and (2) that the act was arbitrary and *ultra vires*. [Reads evidence of witness *Jonklaas*] The argument I found on this evidence is that the act, whether indiscreet or not, was done in the execution of judicial duty, and therefore the Bench of Magistrates was incompetent to try the case. [CLARENCE, J.—Why incompetent? Any person may charge a judge with assault. *Maclachlan's Case* (1) is an authority. He was better advised and brought a civil action.] I say they may have tried, but should have acquitted. [CLARENCE, J.—That is a question on the merits—justification, not want of jurisdiction.] A Court cannot review the act of another

(1) L. R., 1 Ex. D., 376.

Court of the same degree of jurisdiction. Voet, *ad Pand.*, ii. 1. 52.

The Court here called upon the respondent, on the merits.

Grenier, for the complainant—The plea of not guilty shews the defendants did not rely on any want of jurisdiction. [CLARENCE, J.—We think that the question is whether the 1st defendant thought he was acting within his power when he committed the assault charged. Whether he had reasonable grounds for believing it, we think it unnecessary to consider.] On the contrary, if the defendant acted beyond his jurisdiction upon a mistake of law, he is clearly liable, upon the authorities—it may be otherwise on a mistake of fact. The power of exclusion is no doubt necessary, and if *bonâ fide* exercised will not render the judge liable. Here there was no reason for thinking public business was being obstructed. If one of your Lordships should shy an inkstand at an Advocate here, it would clearly be *ultra vires*. [CLARENCE, J.—*Res ipsa loquitur*] So here, too, Ordinance No. 11 of 1868, § 85, gives every proctor a right to appear and be heard in Court, and § 20 of Ordinance No. 9 of 1859 permits any party in the Court of Requests to move to amend at any stage. The complainant was therefore acting entirely within the scope of his privilege. A proctor doing the work of Counsel is allowed the same privileges. *Mackay* v. *Ford* (1). See remarks of POLLOCK, C. B. If therefore the Commissioner made an error in law and so gave the illegal order, he is liable. The one question is, *Had defendant reasonable ground for thinking the complainant was disturbing the work of the Court?* Now *Jonklaas* swears that he did not understand the motion of complainant to amend the answer to have been disallowed, and complainant therefore had a right to go on speaking. Remarks of TENTERDEN, C. J., in *Garnett* v. *Ferrand* (2). "Even inferior justices, and those not of record, cannot be called in question for an error in judgment, so long as they act within the bounds of their jurisdiction.....Corruption is quite another matter; so also are neglect of duty and misconduct in it. For them, I trust, there is, and always will be, some due course of punishment by public prosecution." Can it be said here the defendant acted within his jurisdiction? The complainant also offered to sit down, when the defendant first

(1) 29 L. J. Ex. 404. | (2) 6 B. & C., 611.

gave the order to turn him out. If there had been a row in Court, and the wrong person turned out, there would be reasonable ground for mistake. [CLARENCE, J.—I thought myself, when the appeal in the civil case came before me, that the motion to amend was unnecessary.] To resume: Where a County Court Judge issued a process which he had no right to issue, under a mistake of law, he was held liable *Houlden* v. *Smith* (1). Here the defendant was fully aware of the facts, and mistake could only have been of law. (See also *Calder* v. *Halket*, 3 Moore P. C., 28). If this law be accepted, I see no way of applying it to the facts that will excuse the defendants. It would be dangerous to give to petty Magistrates the power arbitrarily to eject from their courts duly qualified practitioners acting in the exercise of their lawful powers.

Withers, asked by the Court to furnish any authorities he had on the question of jurisdiction, mentioned *R.* v. *Borron*, (2) and *Thomas* v. *Chirton*, (3) citing *Rex* v. *Skinner*, (4) where a coroner was not held liable on indictment who told a Jury, "you have not done your duty; you have disobeyed my commands: you are a seditious, scandalous, corrupt and perjured jury." Lord MANSFIELD there said, "Neither party, witness, counsel, jury, or judge, can be put to answer, civilly or criminally, for words spoken in office." *Kemp* v. *Neville*, (5) was the leading case on the civil side of the question.

Cur. adv. vult.

(7th November). CLARENCE, J.—This is a criminal prosecution for assault. The defendants are—first defendant, a gentleman filling the judicial office of Commissioner of Requests, and second defendant, an officer of Police who acted under his instructions. Complainant is a Proctor practising in the Court of which first defendant is judge, and the act with which the complainant charges the defendants and seeks to have them criminally punished, is the removal of the complainant from the Court by the second defendant, at the bidding of the first defendant, at a time when complainant was actually engaged before first defendant in conducting a client's defence.

(1) 14 Q. B., 841. | (2) 3 B. & Ald., 432. | (3) 2 B. & S., 475.
(4) Lofft 55, 56. | (5) 10 C. B., N. S., 523; 31 L. J. C, P. 158,

This being a criminal prosecution, the only plea open to the defendants is the general plea of "not guilty," and they are debarred from appearing as witnesses in their own behalf. It is unfortunate that this should be so, the principal defendant being a judge whose defence may be that he directed the act complained of pursuant to some judicial ruling of his own on matters within his jurisdiction. A complainant, however, has the right to prosecute for assault either civilly or criminally. But if doubts arise from the evidence that the judicial officer thus made defendant to a criminal charge is thereby hampered in his defence, the defendant should have the benefit.

It seems that on the 12th July complainant appeared in the Court of Requests of which first defendant was judge, as Proctor for the defence, in an action which then came on for trial. Complainant, as Proctor for the defence, applied to be allowed to amend in a particular manner the answer which some petition-drawer had drawn for his client. The Commissioner, however, appears to have considered the application, which was opposed by the other side, as one which ought certainly not to be allowed: he seems to have thought that the new matter which complainant wished to introduce by the aid of his amendment was matter inconsistent with the answer as it stood: and on complainant's pressing the application, the Commissioner refused to hear him further on the point, and at length ordered his removal from the Court, which is the act complained of.

The civil case in question afterwards came before me upon an appeal by the defendant in the case against a judgment in favour of the plaintiff; and in appeal I set aside that judgment, and sent the case back for further evidence, it appearing to me that the point upon which the defendant by his Proctor had desired to adduce evidence, and to which the proposed amendment was directed, was already open upon the defendant's plea of the general issue. So far, therefore, from complainant's application to amend being improper on the score of inconsistency, it was in fact unnecessary, the defence aimed at being already open.

To remove a Proctor from the Court while actually engaged in conducting his client's cause was a measure of extreme harshness, justifiable only on the supposition that the Proctor was misconducting himself to the extent of obstructing or disturbing the business. It appears to be conceded that complainant did not behave disrespectfully,

otherwise than by not sitting down when desired to do so. Upon perusing the materials recorded in the present case, including the statement made by the first defendant before the Magistrates, I am by no means prepared to say that the circumstances warranted the first defendant in taking the extremely harsh measure of turning out of Court a Proctor actually engaged in conducting a client's defence. The complainant seems, under a mistaken view of the effect of his client's plea, to have applied to amend. The Commissioner, under an equally mistaken view, seems to have considered the application improper, and to have acted hotly and hastily in taking the step now complained of.

But these considerations do not dispose of the matter. The defence appears to be, that the Commissioner had the complainant turned out of Court because he considered him to be obstructing or disturbing the business of the Court. That is how I understand the statement which the first defendant is recorded as having made to the Magistrates; and if this matter is obscured by reason of the Commissioner being criminally instead of civilly prosecuted, he is entitled to the benefit of the doubt so arising. I think that a Commissioner of Requests has clearly power to turn out of Court any one who obstructs or disturbs the business of the Court, even though such person be an Advocate or Proctor actually engaged in the pending case. It is also within the jurisdiction of the Commissioner, as a matter of course, to determine whether or not any person to whom his attention may be directed is so obstructing or disturbing the business as to render it expedient that such person be removed from the Court. And if the Commissioner shall have decided that point in the affirmative and acted accordingly, he is protected against action, civil or criminal, and the correctness of his opinion on the facts cannot be reviewed by another tribunal in any separate action founded on such act. Now, in the present case, it appears that the Commissioner, the first defendant, considered that the behaviour of the complainant in not at once sitting down was such an obstruction or disturbance of the Court business as rendered it expedient that complainant be removed from the Court. So far as I understand what took place, I am far from being prepared to say that I can take the same view, but the Commissioner having (no doubt *bonâ fide*, though perhaps hastily) taken that view and acted upon it, it is not, as I conceive, competent for another tribunal investigating

the present charge to go behind that determination of his. I think, therefore, that the first defendant, and the second defendant who acted under his orders, are entitled to be acquitted on this charge of assault.

DIAS, J.—I am of the same opinion, and I concur with my brother CLARENCE as to the rule applicable to the case before us. That rule appears to me to be that a judicial officer, acting within his jurisdiction and exercising his discretion, is not liable to be sued either civilly or criminally for any injury inflicted upon another, whatever mistake he may have committed. This rule is recognised in all the cases which were cited at the Bar. The facts of this case are these. The first defendant was sitting as the Commissioner of the Court of Requests. A case was called on, and the complainant, who was a Proctor entitled to appear and practise before the Court, appeared before the first defendant, the Commissioner, and moved to amend his client's answer. The Commissioner thought that the proposed amendment was inconsistent with the answer already filed. In this opinion he might have been wrong, but what is material for the present inquiry is, that the Commissioner, though he did not make an express order to that effect, gave the complainant to understand that his motion would be disallowed. After this intimation the complainant persisted in urging his motion for an amendment, and the Commissioner thought, rightly or wrongly, that the complainant was disturbing the proceedings of the Court. The Commissioner then waved his hand, which the complainant says he thought was an intimation to him to sit down. Then followed the order by the first to the second defendant to remove the complainant out of Court. I agree with my learned brother that the first defendant's conduct in the matter was hasty and, I may add, very undignified; but I am of opinion that he acted within his jurisdiction as a judicial officer sitting in his Court as a judge, and that it is not competent to any other tribunal to review his acts and determine whether or not he exercised a sound discretion.

The verdict and sentence must, therefore, be set aside and the defendants acquitted.

Set aside. Defendants acquitted.

20th June and 11th July, 1882.

Present—CLARENCE and DIAS, JJ.

D. C. Matara, 31,034 } V. Don MATHES v. K. PUNCHY HAMY and 3 others.

Title to land—Donor conveying without title, but subsequently acquiring title—Voluntary conveyance.

S., being owner of one half *plus* one-fifth of a certain land, conveyed the whole land by way of gift to plaintiff, his son-in-law, on 25th January 1872. S. acquired title to the remainder soon afterwards. Plaintiff now alleged an ouster from possession by defendants, the widow and certain children of S.

Held, that plaintiff was entitled to judgment for whatever S. owned at the date of his conveyance to plaintiff, but that, that conveyance being a merely voluntary one, the title subsequently acquired by S. did not pass to plaintiff thereunder.

It appearing that S. was by arrangement allowed to possess the subject matter of the gift until his death,

Held, that fourth defendant, who was a lessee for an unexpired term under S., was entitled to be absolved from the instance, plaintiff having left it in the power of S. to deal with the property.

The facts sufficiently appear from the judgment of the Court.

VanLangenberg, for the plaintiff appellant, referred to Voet, *ad Pand.*, 39. 5. 10.

Seneviratne for the defendants, respondents.

Cur. adv. vult.

(11th July). The Judgment of the Court was now delivered by

CLARENCE, J.—Plaintiff, a son-in-law of one Siman deceased, claims certain land by virtue of a deed of gift dated January 25th, 1872, and sues the widow and certain children of Siman, averring that they have ousted him. The defendants deny the conveyance by Siman. It appears that at the date of the conveyance Siman had title only to a certain fractional share, but he appears to have acquired the remainder very soon afterwards. The Notary having been called to prove Siman's execution of the deed, the deed seems to have been admitted in evidence without objection. The fact appears to be, that Siman did execute the conveyance, but that he was permitted to remain in possession as long as he lived. It is admitted by defendants

that before his death he and his wife executed a deed of gift in favor of their children, not including the land now in question, by which plaintiff got no benefit. The whole evidence is not very clear, but the inference which I draw from it is, that Siman executed the deed by way of gift to plaintiff, and by arrangement was allowed to remain in possession till his death. There has been no time for plaintiff's title under his conveyance to be defeated by prescription, in any view of the nature of the occupancy of Siman and defendants. Under these circumstances we think that plaintiff is at any rate entitled to judgment for his half *plus* one-fifth, which Siman possessed at the date of his conveyance to plaintiff. But the conveyance being merely a voluntary one, we are disposed to think that Siman's subsequently acquired title cannot be availed of by plaintiff, and that plaintiff must take the subject matter of the gift as it stood at the date of his conveyance.

The 4th defendant is a lessee, who took a lease for 10 months from Siman, shortly before Siman's death. We think that he is entitled to be absolved with costs, plaintiff having so far as appears allowed Siman to deal with the property.

Set aside.

Proctor for the plaintiff, *C. H B. Altendorf.*
Proctors for the defendants, *Jonathan Silva; J. B. D. Keuneman.*

15th September and 14th November, 1882.

Present—CLARENCE and DIAS, JJ.

D. C. Kandy, 87,506 } YEGAPPA CHETTY v. C. LIESCHING.

Fiscal—Ord. No. 4 of 1867, sect. 51—Parate execution—"*Forthwith*"—*Applicability where the property sold is not the execution debtor's, but is surrendered by a friend of his.*

Plaintiff, as execution creditor in a previous suit, issued his writ, but his debtor having no property, S., a friend of the debtor's, surrendered his own property in execution of the judgment. The defendant, as Fiscal, sold the right, title and interest of the execution debtor in that property. The purchaser having failed to pay part of the purchase amount, the defendant, 9 months afterwards, resold the property, and

13 months after the resale applied for and obtained parate execution against the first purchaser and his surety to recover the difference between the amounts realised at the two sales, upon which levy a very small sum only was recovered. Plaintiff now brought action to recover the difference between the amount of his writ and the amount recovered, which difference he had lost by the negligence of the defendant in not reselling and not issuing parate execution, promptly.

Held, that parate execution was a proceeding instituted for the benefit of the execution creditor, and that, the application for parate execution having certainly not been made "forthwith," a required by sect. 51 of the *Fiscals Ordinance*, 1867, plaintiff would have been entitled to a verdict; but

Held, that the procedure provided by the Ordinance applied only to sales of the execution debtor's interest in property, which was admittedly *nil* in this case; and that on this ground the decree of the court below dismissing plaintiff's action and ordering defendant to pay the costs ought to be affirmed.

The facts of this case sufficiently appear from the judgment of the Court.

Grenier for plaintiff, appellant.

Layard for defendant, appellant.

Cur. adv. vult.

(November 14th). CLARENCE, J.—This is an action against a Fiscal. The facts are these:—

Plaintiff on the 5th June 1879 obtained a judgment (No. 80,393 District Court Kandy) against one Velle Pulle and one Vytilingam Pulle, for Rs. 701. 25, and certain interest and costs. Plaintiff sued out writ of execution, which was placed in the hands of defendant's Deputy for execution. The execution debtors did not pay or surrender any property, but one Supremanien, who seems to have been a friend of theirs, came forward and offered to surrender some property of his. Supremanien, on the 25th June 1879, addressed a letter to the Deputy Fiscal in these terms:—"I hereby surrender and authorise you to sequester and advertise for sale in satisfaction of the writ No. 80,393 District Court Kandy, the following property belonging to me as per title deeds herewith forwarded, namely,"—and then followed a description of a piece of land at Pannola, within the jurisdiction of the Deputy to whom the letter was addressed. Vytilingam Pulle handed this letter to the Deputy Fiscal with a letter addressed by himself to the Deputy Fiscal, in which he said:—"In satisfaction of the writ in No. 80,393 D. C. Kandy, I beg to surrender the property appearing in the annexed letter, which I shall thank you to sequester

and advertise for sale" Thereupon the Fiscal on the 28th October 1879 purported to put up for sale "the right and title of the deed of conveyance dated 13th April 1879 in favour of Supremanien Chetty of an allotment of land No. 4,233 of five acres and twenty-five perches in extent, situate at Pannola in Oyapalata." The Conditions of Sale were in the usual form, and contained this paragraph:—"Purchasers must distinctly understand that only the right, title and interest are sold of the person or persons against whom the writ of execution is issued, to wit Muna Palani Welle Pulle and Muna Wytilingam Pulle." One Kandasamy was declared the purchaser at the price of Rs. 750, and Kandasamy, and one Ramen Chetty as his security, signed the memoranda printed at the foot of the Conditions of Sale. Kandasamy made a part payment of one-fourth of the Rs. 750, but failed to pay the balance, which under the Conditions of Sale was due in two months. On the 26th July 1880 the Deputy Fiscal purported to re-sell under the same description and similar Conditions of Sale, when Supremanien himself was declared the purchaser at the price of Rs. 31. In August 1881 Parate Execution was issued against the original purchaser and his surety, when it appears that neither the purchaser nor any property of his were found, and the only levy made realised but Rs. 14.

Plaintiff now complains that the Fiscal was guilty of negligence in not re-selling before July 1880, and again in not issuing Parate Execution before August 1881; and plaintiff claims as damages the difference between the amount for which his writ issued and the amount realised.

Defendant in answer to plaintiff's libel demurs, charging that the foregoing facts disclose no cause of action.

The learned District Judge seems to have thought that the Fiscal having twice purported to sell, having twice, as the learned District Judge puts it, "undertaken the responsibility of selling," could not now shelter himself behind the irregularity of the whole proceeding, but not being satisfied upon the evidence that plaintiff is in a worse position than he would have been in had the Fiscal issued Parate Execution promptly, dismissed plaintiff's action, ordering the Fiscal, however, to pay the costs.

Plaintiff appeals.

Section 51 of the Ordinance clearly casts upon the Fiscal the duty of taking steps "forthwith" after the second sale, to obtain Parate Execution. This is a proceeding which

the Fiscal is to take for the benefit of the execution creditor. In the present instance he did not apply for Parate Execution until more than a year after the re-sale. I certainly think that that was not applying "forthwith"; and if this were all, plaintiff, in my opinion, would be entitled to the verdict. But I do not see how the provisions of the Ordinance with regard to Parate Execution can be applied to the proceedings which have been described. The whole proceedings were utterly irregular. The procedure provided by the Ordinance is provided with reference to the sales of the execution debtor's interest in property. Here the execution debtor had no interest whatever in the property. If Supremanien had conveyed the land to the execution debtor for the purpose of its being levied on, there would have been something to sell. The whole proceeding of purporting to sell the "right and title of such a conveyance in favor of Supremanien" under Conditions of Sale which stipulated that the sale passed only the interest of the execution debtor, is merely unmeaning. It is true that this absurd act was the act of the Deputy Fiscal, but it is also true that in no way could the Fiscal as the matter stood levy on Supremanien's land under his writ against the execution debtor. I do not think that the provisions of the Ordinance as to Parate Execution can be applied to such a proceeding; and, on this ground, I am prepared to affirm the judgment. Defendant has appealed against the judgment in so far as it decrees him to pay costs; and he at any rate deserved no costs.

Affirmed.

Proctor for plaintiff, *H. Goonetilleke.*
Proctor for defendant, *W. Pompeus.*

20th October and 24th November, 1882.

Present—DE WET, A. C. J., and DIAS, J.

In re HARRY CREASY, an Advocate of the Supreme Court.

Grenier, on behalf of the applicant *H Creasy*, moved that he be admitted a Proctor of the Supreme Court with or without an examination. The applicant was an Advocate, who in June 1881 had had his name removed from the Roll, and had apprenticed himself to a proctor with the view

of becoming a proctor. The object of the present application was to obtain a dispensation of the remainder of applicant's term of three years. The remaining facts appear from the order of the Court.

Cur. adv vult.

(24th November). Dias, J.—In November, 1873, Mr. *Creasy* was admitted and enrolled an Advocate of this Court. He practised as an Advocate till May, 1881, and during that period he acted for two years as a Deputy to the Queen's Advocate. In June, 1881, his name was taken off the Roll of Advocates on his own application, and on the 20th of that month he bound himself as an apprentice to Mr. *Julius*, a Proctor of this Court, and has served up to this day as such apprentice. He now applies to us, under the circumstances set out in his application and affidavit, to be admitted a Proctor of this Court, subject to any examination which we may think necessary.

This matter was argued last Friday by Mr Advocate *Grenier* on behalf of Mr. *Creasy*, and I had some doubts as to the powers of the Supreme Court to grant to Mr. *Creasy* a dispensation of the remainder of his term of service.

The Rules and Orders which now regulate the admission of Proctors are those of December, 1841. (See Rules and Orders, pp. 125, 127.) The 3rd clause of these Rules and Orders relates to the admission of Proctors of the Supreme Court, and the 4th clause to the admission of Proctors of the District Court. Whether Mr. *Creasy* was bound to Mr. *Julius* under the 3rd or 4th clause does not appear. These Rules and Orders do not give the Judges of this Court any discretion; but according to the two cases cited by Mr. *Grenier*, the Judges seem to have exercised such discretion, first in the case of Mr *G. Vanderwall*. This gentleman was apprenticed to Mr. *Smith*, a Proctor of this Court, under a deed of agreement of 19th December, 1857 for a term of 3 years under the 4th clause of the Rules and Orders of 1841. Mr. *Vanderwall* made an application to this Court in or about June, 1859, that is, a ter he had served only 18 months of his apprenticeship, to be admitted a Proctor of the District Court of Kandy. On the 27th of June, 1859, the Judges made an order for his examination. The examiners made a favorable report on the 7th July, 1859, when Mr. *Vanderwall* was admitted a Proctor of the

District Court of Kandy. There is no especial order of the Judges to be found in the Minutes, but they seem to have assumed that they had the power to dispense with 18 months of the term of Mr. *Vanderwall's* apprenticeship. All the papers connected with Mr. *Vanderwall's* application were placed before us, and they fully bear out the facts above stated.

The other case referred to by Mr. *Grenier* is that of Mr. *J. O. Oorloff.* All the papers connected with this gentleman's case are not before us; but there is a Minute of an Order of the 8th of April 1857, ordering the examination of Mr. *Oorloff* with a view to his being admitted a Proctor of the District Court of Ratnapura, and there is another Minute of 26th July 1857, admitting him to practise as a Proctor of the District Court of Ratnapura. We were, however, informed by Mr. *Grenier* that in Mr. *Oorloff's* case also the Supreme Court exercised a discretion as in the case of Mr. *Vanderwall.*

No doubt the learned Judges who had to deal with the cases above referred to thought, and I think correctly thought, that, under the Charter of 1833, clause 17, which gives them large powers with regard to the admission of Advocates and Proctors, they had a discretion outside the Rules and Orders of 1841. We then come to the Ordinance 11 of 1863. The 18th clause of that Ordinance is as nearly as possible a re-enactment of the 17th clause of the Charter. It is noteworthy that, at the date of this Ordinance, the Rules and Orders of 1841 were, as they now are, in force, and if the authority given to the Supreme Court was intended to be exercised subject to the Rules and Orders of 1841, the 18th clause of the Ordinance of 1863 was unnecessary. This leaves no doubt in our minds that the 18th clause was intended to apply to cases out of the Rules and Orders of 1841. No case of this kind has arisen since the Ordinance of 1858, and the two cases referred to by Mr. *Grenier* were cases covered by the 17th clause of the Charter of 1833, and as that Charter was repealed by the Ordinance of 1868 the framers of that Ordinance doubtless thought it proper to re-enact the provisions of the 17th clause of the Charter. Under these circumstances it appears to me that this Court has a discretion to admit Advocates and Proctors, irrespective of the Rules and Orders of 1841, but this is a discretion which must be very carefully exercised.

The next consideration is, whether Mr. *Creasy* has made out such a case as will entitle him to call upon us to exercise this discretion in his favor. Mr. *Creasy* has been acting as an Advocate for nearly 8 years, and during that time he occasionally filled the post of a Deputy to the Queen's Advocate. Mr. *Creasy* more than once appeared before me as Deputy Queen's Advocate on circuit as well as in the Appeal Court, and on those occasions he acquitted himself very creditably, and if I have a discretion in the matter, I should certainly dispense with any examination; but I think the 18th clause of the Ordinance of 1868 gives me no discretion. I think Mr. *Creasy's* application may be allowed, subject to an examination under the 7th clause of the Rules and Orders of 1841.

DE WET, A. C J.—I agree.

12th and 21st December, 1882.

Present—CLARENCE, J.

D C. Cr. Galle, 11, 75. } The QUEEN v. ARNOLIS PERERA ABEYEWARDENE.

Prosecution, commencement of—Timber Ordinance, No. 6 of 18 8—Limitation of prosecution—Sentence.

The defendant was on 7th November 1879 charged before a Justice of the Peace with a breach of the *Timber Ordinance*, 1878 committed on 16th January 1879. After evidence taken, the case was on 5th April 1880 laid over *sine die*. Summons was re-issued on defendant in June 1882, and after further proceedings defendant was on 21st September committed for trial, and was arraigned and tried on 2nd November 1882. He was found guilty and fined Rs. 100.

Held, that the prosecution did not commence upon the presentment of the indictment at the trial, but must be regarded as having been on foot at the date of the committal for trial.

As the charge on which the defendant had been committed and been tried was not *dehors* the charge contained in the original information,

Held, that the prosecution commenced when the defendant appeared to the summons, and that therefore it had been begun within the period limited by section 16 of the *Timber Ordinance*, 1878.

It appearing that the defendant had committed the offence in the *bonâ fide* belief of ownership, and that he had been cast in damages in a civil suit for the land concerned,

Held, that the fine of Rs. 100 was excessive, and ought to have been merely nominal.

This was a criminal prosecution by indictment by the Queen's Advocate before the District Court of Galle for a breach of the *Timber Ordinance* No. 6 of 1878, in felling and removing certain timber from a Crown land without a licence. The offence was laid on the 16th January 1879. The affidavit on which J. P. proceedings were begun was sworn on 7th November 1879 by *W. S. Fraser*, and his deposition was taken on 23rd December 1879 in the presence of the prisoner, who had previously appeared on summons and been held to bail. Various adjournments subsequently took place, some of them on account of the pendency of a District Court civil case in which the title to the land here in question was to be tried, and on 5th April 1880 the case was laid over *sine die*. Summons was re-issued on the accused on 12th June 1882, and after further proceedings the prisoner was on 21st September 1882 committed for trial before the District Court of Matara, charged with the breach of clause 8 of Ord. 6 of 1878. The Supreme Court on 26th September 1882 on application by the prisoner transferred the trial of the case to the District Court of Galle, where the trial took place on 2nd November 1882. The prisoner was convicted by the District Judge of Galle (*Roosmalecocq*) and sentenced to pay a fine of Rs. 100.

The defendant appealed.

Grenier, for the defendant, appellant—The prosecution is clearly barred by § 16 of the Ordinance, not having been commenced within two years of the commission of the offence. "Prosecution" must be taken to mean a proceeding before a Court having power finally to convict or acquit the prisoner, and not a mere preliminary investigation by a Justice of the Peace. Ordinance No. 11 of 1868, by which our system of Justices is regulated, clearly draws the distinction between the two. Section 140, which defines the Justice's powers, gives no power of conviction or acquittal. Section 113, which gives the Queen's Advocate the power to intervene and take up any "prosecution" at any stage, expressly mentions the District and Police Courts. I rely strongly on § 202, which empowers the Queen's Advocate, in case he "elects to prosecute" before a higher Court a person already under committal, to require the Justice to make a fresh committal for the purpose. [CLA-

RENCE, J.—The *Timber Ordinance* seems to employ the term "prosecution" in its colloquial meaning of taking legal proceedings.] But we must take the true legal signification, in construing an Ordinance, which is, to pursue to a conviction or acquittal. The *Administration of Justice Ordinance* clearly regards a Justice of the Peace investigation as preparatory to a "prosecution." I contend that the present prosecution was commenced with the tender of the Indictment in the District Court on 2nd November 1882.

On the merits:—the defendant was charged with unlawfully possessing certain timber felled from a Crown land, in a case reported 5 S. C. C., 69. The Supreme Court judgment in that case mentions the fact of the Crown having recovered judgment in ejectment against the defendant for the land in question; and defendant had to pay damages in the ejectment suit. The present fine of Rs. 100 is therefore excessive. If the prosecution had been commenced in time, the conviction seems right on the merits.

Nell, Acting D. Q. A., for the Crown, *contra*—[He was called upon only on the question of excessive sentence]—The object of the criminal prosecution is to check theft of Government timber, which seems to have been cut down on an extensive scale here. The damages recovered were for the actual money loss sustained by the Crown, and afford no reason for mitigation of sentence. It is similar to the two-fold action open to a private party damaged by larceny.

Cur. adv. vu t.

(21st December).—CLARENCE, J.—Two points have been argued by Appellant upon this appeal. The first point made is, that the conviction connot stand by reason of the prosecution not having been commenced within two years from the time of the commission of the offence.

The indictment, preferred in November last, charges the offence as committed in January 1879, and Mr. *Grenier* contended that the prosecution is to be deemed as having commenced when the indictment was preferred. The fact is that an information charging defendant generally with a breach of the 8th section of the *Timber Ordinance* by felling timber on the land in question, was sworn by Mr. *Fraser*, forester, before Mr. *Edge*, a Justice of the Peace, on the 7th November, 1879. As to details of this information,

I may have to speak presently. Mr. *Edge* entertained the information and directed summons to issue to the defendant. Summons was issued, and the defendant appeared on the 8th December. Evidence was adduced on the 23rd December. Subsequently, on the application of the defendant, the case was adjourned *sine die*, pending the decision of a civil action then in progress between himself and the Crown, in which the right of the Crown to the land in question was directly *sub judice*. The charge under the *Timber Ordinance* was then resumed. Mr. *Edge* in the meantime died, another Justice of the Peace took further evidence, and in September last defendant was committed for trial before the District Court. Now, under our present criminal procedure, the course of action adopted when it is sought to subject an offender to criminal trial before the District Court or Supreme Court is this: – First the complainant swears his information before a Justice of the Peace; then the Justice of the Peace entertains the charge and issues process, Summons or Warrant; investigates the charge, when the defendant appears before him; and finally commits for trial; then, when the trial-day arrives, an indictment is presented, on which the defendant is arraigned. This is the course of procedure in a case which actually comes to trial. It was decided in *Moralagodalianege Peris' case* (1) that the Queen's Advocate cannot arraign and indict a defendant who has not been committed for trial.

Such being the course of procedure in criminal cases, when we find the Legislature limiting, as in the *Timber Ordinance*, the right to proceed on a criminal charge by requiring that the "prosecution" shall be "instituted" or "commenced" within a given time, it is reasonable to suppose that by "prosecution" the Legislature means not the presentation of the indictment, but the proceedings before the Justice of the Peace. I regard the indictment as a step in the prosecution. The prosecution in my opinion clearly commenced with the proceedings before the Justice of the Peace.

I use the term "proceedings" advisedly, because there may be a question as to what stage of those proceedings should be deemed the commencement of the prosecution, for the purposes of an enactment in limitation of action;

(1) 3 S. C. C., 161.

but I think it clear that for such purpose the prosecution does not commence with the indictment. So far as we can derive any assistance from the English decisions, the current of authority is decidedly in favor of referring the commencement of the prosecution to the proceedings before the Justice. In *R.* v. *Willace*, according to the account of that case given in East, P. C. (vol. 1. p 186) the charge was under the statute 8 and 9 Will. III. c. 26 (since repealed), the 9th section of which barred the prosecution unless the prosecution be commenced within three months from the date of the offence. The defendant was arrested on May 5th and taken before a Justice, who on 8th May committed him for trial on a charge of suspicion of high treason in counterfeiting the current coin of the realm. The Assizes not coming on till August, more than the three months elapsed between the date of the offence and the perferring of the indictment. But it was unanimously held by the Judges, according to the report in East, that "the information and proceedings before the Magistrate" commence the prosecution for the purposes of the Act. There are various cases reported under the *Night Poaching Act*, 9 Geo. IV. c. 69 sect. 4., the words of limitation in which are similar to those in our *Timber Ordinance*. I do not think it necessary to refer to those cases at length. The current of decisions seems clearly to indicate what I think is but reasonable, that when a defendant is charged before a Justice who commits him for trial on that charge, it is not the indictment afterwards preferred, but the proceedings before the Justice that are to be regarded as commencing the prosecution.

Reference was made on appellant's part to the 112th, 113th, 114th, 195th and 202nd sections of the *Administration of Justice Ordinance*. I do not think any of those sections have any bearing on the matter. They simply refer to the control which is given to the Queen's Advocate over proceedings in criminal cases. The Queen's Advocate for instance is spoken of as "electing to prosecute" and so forth. He takes up the prosecution already commenced.

Then, if it is not the indictment, but some earlier stage in the proceedings, that commences the prosecution for the purposes of this enactment, when precisely does the prosecution commence? In some of the English cases under the *Night-Poaching Act* the warrant of commitment seems to have been selected as ascertaining a date from which the

prosecution was to be considered as having been on foot. For ins ance in *R.* v. *Austin* (1) where the offence was committed in January 1844, the defendant was committed for trial in December 1844, and the indictment was not preferred until more than twelve months from the date of the offence, but less than twelve months from the date of the committal, POLLOCK, C B., is reported to have held the committal as furnishing a date for the commencement of the prosecution, and so the prosecution was held to have been commenced in time. If we are to consider the prosecution as having commenced with the committal in the present case, it was not commenced in time, for the defendant was not committed for trial until September last, over three years after the commisson of the offence. The English cases are collected in *Russell on Crimes* and in *Archbold.* After examining those cases I do not regard them as laying down any rule that the committal furnishes the earliest date. I rather regard the Judges as having decided that at any rate when the committal took place within the prescribed period the prosecution was then on foot. We must bear in mind that, according to the English procedure, the written warrant of commitment for trial might be the first document in which the accusation was embodied, and consequently the earliest available documentary evidence. It might for instance be that the offender was arrested *in flagrante delicto*, and carried before Justices who proceeded to receive the testimony of the captors, and thereupon committed the prisoner for trial. *R.* v. *Hull*, (2) is perhaps an authority to the effect that the mere issuing of process against the defendant is not to be regarded as commencing the prosecution. It is not, however, necessary on this appeal to consider how that may be, because in the present case the defendant appeared and evidence was taken, long before the expiry of the two years. And in my opinion, where under our procedure an information is sworn, the person charged appears to the information, and an investigation is made by the Justice of the Peace, culminating in a committal on some charge identical with, or fairly comprised in the original charge, it is at any rate reasonable to consider the prosecution as on foot, as having commenced, from the time when the accused person appeared before the Justice of the Peace to answer the original charge. If the

(1) 1 C. & K, 621. | (2) 2 F. & F., 16.

technical charge on which the defendant is committed for trial is one which cannot be said to be included in the original information, then it may very well be that the prosecution on the charge set out in the committal cannot be dated earlier than the committal.

In the case before me I find that the original information charged the appellant with unlawfully and without license felling trees growing in the crown forest land in question. It is true that the information did not specify the kinds of trees felled, so as to afford any means of knowledge whether the trees felled were of the kinds scheduled in the Ordinance. Moreover, the information did not specify the date of the felling. But no objection whatever was made on defendant's part upon either of those grounds. The evidence adduced supplied those particulars, and after that defendant, claiming that the land was his own land, obtained the adjournment of the proceedings against him until the question of title should have been decided in the civil suit. Under these circumstances, as the charge on which the defendant was committed, and the charge on which the defendant has been indicted are not *dehors* the accusation embodied in the original information, I hold that the prosecution in which defendant has been convicted was commenced when he appeared to the Summons, and consequently that the prosecution is one commenced in time.

The ground on which the conviction has been impeached thus, in my opinion, fails.

The other point urged concerns the sentence only. There is reason to believe that when the defendant cleared this land he believed it to be his own. He purchased in 1878 from one Lewis, and the District Court in the civil suit upheld Lewis' claim of title. Afterwards the Supreme Court in appeal adjudged that the land was Crown land. Moreover, it appears that in the civil action the Crown recovered damages from the defendant. Under these circumstances I think that the fine imposed on defendant ought not to be more than a nominal one. I reduce the fine to Rs. 10.

Affirmed.

27th and 28th November, 1882 and 26th January, 1883.

Present—DE WET, A. C. J., CLARENCE and DIAS, J J.

Crown Case Reserved.

2nd Session, Kandy, No. 47. } THE QUEEN v. BUYE APPU.

Evidence—Oath or affirmation—Child of tender years, admissibility of the evidence of, after simple warning to speak the truth—Evidence improperly admitted.

Upon a charge of rape, the prosecutrix M., a child of between 9 and 10 years of age, gave her evidence without being sworn or affirmed, but after having been simply warned to speak the truth, and having promised so to do. The prisoner having been convicted,

Held, upon a case reserved, that a child, like every other witness, must be sworn or affirmed before its evidence can be received, and that therefore M.'s evidence had been improperly received.

Held also (*per* CLARENCE and DIAS, JJ., *dissentiente* DE WET, A.C.J.) that, this evidence having gone to the jury, the conviction could not be sustained, although there might be other evidence in the case sufficient to support a verdict.

This was a case reserved by DE WET, A. C. J., from the August Criminal Session of the Supreme Court at Kandy for 1882. The prisoner was tried on a charge of Rape committed upon a girl named *Malluthami*. *Malluthami*, a girl of about ten yea s of age, was called as a witness, and not appearing to the presiding judge to understand the obligation of an oath, was allowed to give her evidence after being warned to speak the tru h. The prisoner having been convicted, on *Eaton* who appeared for the prisoner moving in arrest of judgment, the following Case was reserved:

Malluthami, first witness. It appearing to the Court that this witness did not understand the nature of an oath, she was duly cautioned to speak the truth, and also was told the consequences of not doing so, and, promising to speak the truth, deposed as follows:—

* * * *

The question to determine is whether her evidence is admissible; and even supposing that the Court would rule that I was wrong in admitting the evidence, whether there was not sufficient evidence *aliunde* to justify the jury in bringing in a verdict of guilty.

The effect of the evidence called at the trial was as follows:

There were no eyewitnesses of the crime. *Malluthami*

herself deposed that she had been called into his house by the defendant and then ravished. The other evidence called proved that *Malluthami* had blood on her clothes and that blood had been found in defendant's house at a spot pointed out by *Malluthami*. The medical evidence was to the effect that the girl had been recently violated, but that no corresponding indications were found on the prisoner's person; and that a severe fall might have caused the injuries to *Malluthami*.

Seneviratne (assigned by the Court to represent the prisoner)—

The *Affirmations Ordinance*, No. 3 of 1842, makes no provision for the reception of the unsworn testimony of children. The Ordinance No. 3 of 1846 introduces the English Law of evidence for the time being into this Island. The English rule is, *In Judicio non creditur nisi juratis*. Best, *Evidence*, § 154, 5th Ed. p 220. Even an infant is not admitted to give evidence except upon oath. *R.* v. *Powell* (1). So all the Judges held in *Brasier's Case* (2) that the evidence of a girl even under 7 years of age was admissible, but only on oath, if she was found on strict examination to comprehend the danger and impiety of falsehood. [THE CHIEF JUSTICE—I think the affirmation in the Ordinance is in lieu of an oath, and can only be administered where an oath would be admissible if the witness had no conscientious objection to take one. I thought it not right to prostitute an oath, as understood by the Ordinance, by administering it to a girl who understood nothing of its obligation, and therefore warned her to tell exactly what had happened. She gave her evidence, and the Jury convicted the prisoner, upon which *Eaton*, who appeared for the defence, moved in arrest of Judgment.] The English Act, 32 and 33 Vict. c. 68, s. 4, provides that if a witness "shall be objected to as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration: *I solemnly promise and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth.*" Taylor, *Evidence*, § 1382. [THE CHIEF

(1) 1 Leach, Cr. Ca., 110. — (2) 1 Leach, Cr. Ca., 199.

JUSTICE—The leading case on the point is *R.* v. *Holmes* (1). See also Best, *Evidence*, §§ 151, 155]. In *R.* v. *Holmes* the witness was objected to as incompetent on account of youth, but WIGHTMAN, J., after questioning her on the *voir dire*, admitted her evidence; from which we must presume that she was sworn in due course.

On the second point reserved,—a Court of Review cannot tell what evidence was believed and what rejected by the Jury. To raise this question, a special verdict ought to have been taken. If the Court for Crown Cases Reserved is of opinion that any evidence was improperly admitted or rejected, it must set aside the conviction. Stephen, *Digest of the Law of Evidence*, Article 143.

Nell, D. Q. A., for the Crown, *contra*—The argument for the prisoner proceeds upon the assumption that by our law an oath is in all cases necessary. Now, though there are several Ordinances on the subject, there has all along been running the Common Law, which may have admitted of evidence without oath or affirmation. [CLARENCE, J.—But Ordinance 3 of 1842 says that "*every* such person shall make a solemn affirmation."] The Imperial Act 32 and 33 Vict. c. 68, which provides a specific form of affirmation in lieu of oath, was passed subsequent to our *Affirmations Ordinance*, 3 of 1842, and the form prescribed differs from that given in the Ordinance. This Act is in force in Ceylon by virtue of Ordinance 3 of 1846, and it is a question whether a promise in the words of the Act may not render the witness's evidence admissible, though given without the form of affirmation,

On the second point,—it was held that, although upon a case reserved it appeared that evidence had been improperly admitted, the Judges would not set aside the conviction if they were of opinion that there was other evidence to support the indictment. *R.* v. *Ball* (2). See the correction of the note to this case, in page iv of the preface to Denison's Crown Cases. See also *R.* v. *Oldroyd* (3). *P. C. Badulla* 3282 (4).

Seneviratne, called upon by the Court on the point covered by *Tinkler's Case* (referred to in the note to *R.* v. *Ball*)

(1) 2 F. & F., 788. | (3) R. & R., 89.
(2) R. & R., 132. | (4) 1 Lorenz, 17.

cited *de Rutzen* v. *Forr*, (1) arguing *a fortiori* in a criminal case.

Cur. adv. vult.

(26th January, 1883). De Wet, A. C. J.—The questions which have, upon motion made, been reserved for the opinion of the Collective Court are :—

Whether the evidence of a female child of between 9 and 10 years of age can be received without either the oath or affirmation having been administered.

In this case, before the child was called upon to affirm, considering her age and condition, I questioned her as to her knowledge of the binding nature of an oath or affirmation, and being thoroughly convinced of her unfitness either to take an oath or affirmation, I cautioned her to speak the truth and to tell the Court everything that had occurred, having reference to the alleged rape on her person. She replied that she would speak the truth, upon which her evidence was taken.

There is no statute law, as far as I can see, expressly regulating the admission or rejection of the evidence of a child, where no oath or affirmation has been administered, either on account of immature years or of not possessing a sufficient knowledge of the nature and consequence of an oath or affirmation.*

The only guides we have are the *dicta* and rulings of Judges in cases which have come before them. Some of these *dicta* and rulings are to be found reported in Taylor's and Best's *Law of Evidence*, while others are not found reported in either of those text-books.

One of the greatest of England's Judges, Lord Hale, P. C., vol. 1, p. 634, says :—"That if any infant appear unfit to be sworn, the Court ought to hear her information without oath, but he admits that such evidence is not of itself sufficient testimony to convict, because it is not upon oath."

Since then there has been a departure from the *dictum* laid down by that eminent Judge. For in *R.* v. *Powell*, reported in Leach's Cases in Crown Law, p 100, it was held by Mr. Justice Gould, at the Assizes for York in the year 1775, in a case of rape, that an infant under the age of 7

(1) 4 A. & E., 53.

* A Cape Act, shown by the Chief Justice to Counsel, contains a provision enabling a judge to receive a child's evidence, without oath, after administering a simple warning to speak the truth.

years cannot, under any circumstances, be admitted to give evidence except upon oath. In the case of *R.* v. *Brasier* charged with an assault with intent to commit a rape on the body of Mary Harris, an infant under 7 years of age, it was held that an infant witness under 7 years of age, if apprised of the nature of an oath, must be sworn, because no testimony is legal except upon oath. The child was not sworn or produced as a witness at the trial. "The case against the prisoner was proved by the mother of the child, and by another woman who lodged with her, to whom the child immediately on her coming home told all the circumstances of the injury which had been done to her; and there was no fact or circumstance to confirm the information which the child had given, except that the prisoner lodged at the very place where she had described, and that she had received some hurt and that she, on seeing him the next day, declared that he was the man. The prisoner was convicted. The judgment was respited on a doubt created by a marginal note to a case in Dyer's Reports, and it was submitted to twelve Judges for their consideration. The Judges, assembled at Sergeants' Inn Hall on 29th April 1779, were unanimously of opinion that no testimony whatever can be legally received except upon oath; and that an infant, though under the age of 7 years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of an oath or affirmation; for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath, the testimony cannot be received."

The ruling of these twelve Judges has since been followed in all cases where the testimony of a child is concerned. I am therefore of opinion that the evidence of the child in the present case should not have been taken in consequence of her not having taken the oath or affirmation.

With reference to the second point reserved for the consideration of the Court, no authorities convincing to my mind have been cited by the learned Counsel who appeared on behalf of the prisoner. On the authority, however, of

the case of *R.* v. *Tinkler* (1), cited by the learned Deputy Queen's Advocate who appeared on behalf of the Crown, I am of opinion that the Court has a right to consider the other evidence in the case, and determine whether there was sufficient evidence, independent of the child's testimony, to justify the jury in returning their verdict of guilty against the prisoner.

Rejecting the child's testimony altogether, I consider that there was sufficient evidence to justify the Jury in finding a verdict of guilty against the accused.

CLARENCE, J.—The primary rule of law, both here and in England, is that no witness is admissible to testify save on oath. Our Legislature, however, has permitted the substitution of an affirmation in statutory form in place of the oath. The law thus is that every witness must be sworn or affirmed, in order to render his or her evidence admissible. And in my opinion there is no exception to this requirement in the case of a child of tender years. It is not necessary to enter upon any consideration as to what are the requisites in order that a Sinhalese child may be a proper subject for affirmation as a witness, because in the case before us the child was neither sworn nor affirmed. Since the unanimous decision of the Judges in *Brasier's Case* (2), it has been settled law that a child, like every other witness, must testify on oath ; and as the Legislature now permits affirmation to be substituted in certain cases for the oath, I am of opinion that the testimony of a child is admissible only if the child has been sworn or affirmed. Consequently, the child in the present case not having been either sworn or affirmed, I think that her testimony was inadmissible.

Without the testimony of the child I do not think that the conviction ought to be sustained. But apart from that, no sentence, in my opinion, ought to pass upon the conviction. In this, as in other matters not actually detailed in our *Administration of Justice Ordinance*, concerning Trial by Jury, we ought, in my opinion, to administer Trial by Jury upon the principles by which Trial by Jury is governed in England, the country whence we derive it. And whatever uncertainty there may have been in past times, when procedure with regard to matters of evidence was

(1) Reported in a note to *R.* v. *Ball*, R. & R., 132.
(2) 1 Leach, Cr. Ca., 199.

less settled than now, as to the course to be pursued when material has been improperly admitted as evidence, I understand the rule now acted upon to be that stated by Mr. Justice Stephen in the passage cited by Mr. *Seneviratne*, viz:—"If in a criminal case evidence is improperly rejected or admitted, there is no remedy, unless the prisoner is convicted, and unless the judge in his discretion states a case for the Court for Crown Cases Reserved: but if that Court is of opinion that any evidence was improperly admitted or rejected, it must set aside the conviction."

I think, therefore, that the conviction in this case ought to be set aside, and the prisoner discharged.

DIAS, J.—On the first point, whether the girl could have been examined without oath or affirmation, I agree with the rest of the Court, but on the second point, I take the same view as my brother CLARENCE, and for the following reasons. Trial of Criminal cases by a judge and jury was imported into this country from England, and since its introduction we have always followed the course pursued in English Criminal Courts in such cases; and one of the fundamental rules of the system is, that the jurors are the sole judges of the facts, from whose judgment there is no appeal. On the other hand, all questions of law and practice which may arise in the course of the trial are to be decided by the presiding Judge, whose decision thereon is conclusively binding on the jury. But in certain cases power is given to the presiding Judge to reserve for the consideration of the Collective Court any matter of law or practice about which he may entertain doubts. In this case the jury found the prisoner guilty, and I do not think we are in a position to know what their verdict would have been if the girl's evidence was withdrawn from consideration, and if we exclude the girl's evidence and take upon ourselves to decide the question of fact upon the remaining evidence, we shall, I think, be taking upon ourselves the function of the jury.

For these reasons I agree with my brother CLARENCE that the conviction should be quashed and the accused discharged.

Conviction set aside.

27th November, 1882.

Present—DE WET, A. C. J., CLARENCE and DIAS, JJ.

Crown Case Reserved.

2nd Session Badulla, No. 1. } The QUEEN v. Kathiriachchige HENDRICK and another.

Coin Ordinance, No. 5 of 1857, sects. 12 and 13—Conviction under both sections—Sentence.

The first count of an indictment charged the prisoner, in the words of section 12 of the *Coin Ordinance*, 1857, with uttering 6 counterfeit coins. The second count charged him, also in the words of that section, with uttering 6 counterfeit coins while having 28 other such coins in his possession. The third count, in the words of section 13, charged a possession of 28 such counterfeit coins with intent to utter. The jury having convicted the prisoner on all three counts, and the Court having sentenced him to imprisonment at hard labor for two years as for the conviction under the second count:

Held, upon a case reserved, that the offences charged by the first and third counts were included in that charged by the second count, and that no further sentence should pass as for the conviction upon the first and third counts.

This was a Case Reserved by DE WET, A. C. J., presiding at the second Criminal Session of the Supreme Court at Badulla for 1882. The prisoners were tried on the 6th October on charges under the *Coin Ordinance*, 1857. The first count of the indictment charged both prisoners with uttering 6 counterfeit rupee coins, "against the form of the Ordinance" &c., in terms of the first part of section 12. The second count charged the first prisoner with uttering 6 counterfeit rupee coins while having 28 other such coins in his possession, "against the form" &c. The third count charged the first prisoner with having in his possession, with intent to utter, 28 such counterfeit coins, "against the form" &c., in terms of section 13. The maximum punishment prescribed for the offence charged in the first count is imprisonment at hard labor for one year, and for each of the other offences charged imprisonment for two years at hard labor. The jury found the first prisoner *Hendrick* guilty on all three counts, and the second prisoner guilty on the first count. The Acting Chief Justice then sentenced the prisoner *Hendrick* to two years' imprisonment at hard labor as upon the second count, and the second prisoner to imprisonment for one year at hard labor, reserving the

question whether the offence charged by the second count did not include the offences charged by the first and third counts, and whether it was competent for the jury to convict on all three counts.

Grenier (assigned by the Court) appeared for the prisoner *Hendrick*.

[He referred to 2 Will. 4. c. 34, sects. 7, 8 (on which the Ordinance 5 of 1857 was founded) and 24 & 25 Vict. c. 99, sects. 9, 10, 11. *Rex* v. *Robinson* (1). *Reg.* v. *Gerrish* (2)].

Nell, D. Q. A., appeared for the prosecution.

DE WET, A. C. J.—We think that the other two offences are included in that charged by the second count, and that no further sentence should be imposed as for them.

29th November, 1882 *and* 18*th January*, 1883.

Present—DE WET, A. C. J., CLARENCE and DIAS, JJ.

C. R. Pussellawa, Lr. A. } C. W. HORSFALL v. The QUEEN'S ADVOCATE.

Crown, liability of under rating enactment—Police Ordinance, 1865, *sect.* 49—*Objections to assessment—Ordinance* 5 *of* 1867, *sect.* 1—*Roman Dutch Law*—Vectigalia.

Section 1 of Ordinance 5 of 1867 covers exactly the same subject-matter as sect. 49 of the *Police Ordinance*, 1865, and a little more, inasmuch as it provides for an appeal. The provisions of section 1 of the Ordinance of 1867 must be regarded as substituted for the provisions of the Ordinance of 1865, and as impliedly repealing them.

By Proclamation of the Governor in Executive Council, dated 4th December 1869, under section 34 of the *Police Ordinance*, the percentage on the assessed annual value, leviable on the buildings in the town of Pussellawa, as tax for the maintenance of Police, was fixed at 5 per cent. From 1871 to 1881 certain Government buildings in that town, occupied by the Public Works Department, were assessed for, and paid, the tax like private buildings. In the assessment of annual values of the buildings for the year 1881, under section 37, the Government buildings were not assessed; and the Governor by Proclamation of 10th June 1881 fixed the percentage leviable at $7\frac{1}{2}$ per cent.

H., whose estate of Rothschild had been assessed for the tax, and on whom a notice had been served under section 40 computing the tax at $7\frac{1}{2}$ per cent. on the assessed annual value, objected before the Court of

(1) 1 M. C. C., 413. | (2) 2 M. & Rob., 219.

Requests to paying the 7½ per cent., and contended that the increase from 5 per cent. was owing to the omission from the assessment of the above P. W. D. buildings, which were liable to be so assessed under the *Police Ordinance*. The Court below having ordered a new assessment to be made including the Government buildings,

Held, that H. had in effect required the Court below to alter the percentage fixed by the Governor's Proclamation, which it clearly had no power to do, no appeal being given from the determination embodied in the Proclamation.

Upon the question whether the Crown was bound by section 34 of the *Police Ordinance*, 1865:

Held, that if the Crown's prerogative had not been divested by statute, the mere fact of the Crown having waived it for 10 years did not stand in the way of its now being asserted.

Held also (following *Ex parte the Postmaster General, re Bonham*, L. R., 10 Ch. D., 595) that the fact that section 33 expressly bound the Crown did not necessarily render the Crown liable under section 34.

Held, that there was not in the Ordinance expression of a clear intention that the Crown was to be bound, and that the law must therefore be considered not to have been changed by the Ordinance.

This was an inquiry under § 49 of Ord. No. 16 of 1865, into the non-assessment of certain Government buildings in the town of Pussellawa for Police purposes under this Ordinance, whereby the tax payable by other and private buildings in the town had been increased from 5 to 7½ per cent. on the assessed annual value. The Governor in Council, by Proclamation of 4th December 1869, defined the limits of the town of Pussellawa and fixed the tax leviable at 5 per cent. on the annual value. By subsequent Proclamation dated 2nd February 1871 the limits of the town were extended so as to include the Government buildings now in question. By another Proclamation, of 10th June 1881, the percentage was raised from 5 to 7½ per cent. This increase was owing in part to the exemption of certain Government buildings occupied by the Public Works Department. The present objections were raised by Mr. *C. W. Horsfall*, in respect of Rothschild Estate, the property of the Ceylon Company, Limited, the buildings on this estate having been assessed.

At the hearing below, the Crown was represented by *Vanderwall*, proctor, and the Objector appeared in person and gave evidence on oath. The Commissioner (*J. W. Gibson*) ruled as follows:—

First, with regard to the Crown's argument, that under § 1 of Ordinance 5 of 1857 the objection could only be to the assessment and not to the percentage fixed under § 34 of Ordinance 16 of 1865; the Court held that the present ob-

jection was to the assessment for omitting to tax certain buildings. The 34th section rendered liable "all houses and buildings of every description to an amount equal to such percentage of the *bonâ fide* annual value" as the Governor should appoint; excepting only "buildings appropriated to religious worship, and such as are placed in charge of military sentries" It was only fair that Government too should pay for a benefit enjoyed equally with private persons, viz. that of Police protection. This was apparently the opinion of the Government at the date of the Proclamation of 1871, which first included these Government buildings within the town limits. And the proclamation of 30th June 1881, which fixed the rate at $7\frac{1}{2}$ per cent., made no mention of any new exemption.

Secondly, on the argument that the Crown had the prerogative right to exempt any buildings it chose, and that the procedure prescribed for recovering the tax could not be enforced, nor costs recovered, against the Crown. On this point, the Ordinance makes the buildings not expressly exempted liable, and can only be repealed by another Ordinance.

The Court below therefore ruled the assessment bad, and ordered a new one to be made including the buildings in question—the Government to pay all costs.

The Queen's Advocate appealed, and the appeal was argued by *Dumbleton*, Acting D. Q. A., for the appellant, and *Layard* for the respondent, on 8th November 1882, before CLARENCE, J., and on 17th November before DE WET, A. C. J., and CLARENCE, J., and finally, on 29th November 1882, before the Full Court (DE WET, A. C. J., CLARENCE and DIAS, JJ.)

Nell, D. Q. A., for the Crown (*Dumbleton* with him.)—The Crown is not bound unless mentioned in the Ordinance expressly or by implication. The fact that certain Government buildings are expressly exempted does not render other Government buildings liable. *Ex parte the Postmaster General in re Bonham* (1) where the decision turned upon §§ 32 and 49 of the Bankruptcy Act of 1869, by which the Crown was held not bound, though by another section Crown debts were made first charges. The fact that for 10

(1) L. R., 10 Ch. D., 595.

years the Crown has consented to pay the tax does not debar it from raising the question now.

Layard, for the Objector—From 1871 to 1881 the Crown has paid assessment on these buildings, and the objection is now taken. [THE CHIEF JUSTICE—That does not preclude the objection. There was a case in which the Crown owned certain Railways in a colony, and was sued for damage caused by the sparks of locomotives. The Colonial Government had been in the practice of not objecting to being so sued, but on the arrival of a new Attorney-General, he thought the Crown was not so liable and raised the question; and the Privy Council held he was right. DIAS, J.—I do not suppose you argue the Crown is bound by its acquiescence hitherto?] No. The case of *Ex parte the Postmaster General* merely re-affirmed the well-known principle, that the Crown is not bound unless expressly mentioned in a statute, or unless such liability is deducible by necessary implication therein. See the Report in 48 L. J. Bank., 84. [THE CHIEF JUSTICE—The Crown here seems to say to people in villages and rural districts, We will help you by contributing; but to large towns it says, We stand upon our prerogative: you alone must pay.] Not so: § 33 specifies certain purposes for which the people pay, and others for which the Crown pays. The Crown provides the salaries of Police Superintendent and Inspectors, all other costs being borne by the people, except where (as in the present instance) a force has been created under § 8. Where such a force is established, its expenses are levied under § 34 by the assessment of houses. The implication of the Crown's liability is perfectly clear. Had it been the intention of the Legislature to exempt *all* Government buildings, they would not have specified only *a few*. [CLARENCE, J.—The remarks of JESSEL, M. R., in the case cited apply here: it does not follow that because the Crown gave up its right as to certain buildings that exemption should be extended to others.] The argument there was that there was no necessary implication, which I contend exists here. Besides, the P. W. D. buildings, not having the protection of military sentries, require that of the Police, and should pay for such protection as private buildings do. [CLARENCE, J.—There is a difficulty in the way of our interfering. The Governor is empowered to fix the percentage recoverable, and no appeal to us is given

from his determination.] We could only object on receipt of notice under § 40, which is issued after such percentage has been fixed. But the Supreme Court has the power of amending the assessment by supplying any omission, under § 1 of Ordinance 5 of 1867.

Nell, in reply—The Proclamation of 3rd June, published in the *Gazette* of 10th June, 1881 declares the force in Pussellawa to have been established under § 7. [CLARENCE, J.—But § 8 contemplates others than large towns, and Pussellawa is not a large town.] Rural police is described in § 33, and seems to be the punitory measure of quartering a force upon a disorderly district.

Cur. adv. vult.

The following judgments were read in Court on 18th January 1883, by CLARENCE, J.:—

CLARENCE, J.—This matter comes before us on the Queen's Advocate's appeal against an order made by the Commissioner on an objection taken before him to the assessment of Rothschild Estate under the *Police Ordinance*, 1865. The respondent in appeal, the objector, represents the owners of Rothschild Estate; and it appears that that Estate, a part of it, is within the limits of the town of Pussellawa as defined by Proclamation for the purposes of the Ordinance.

When Mr. *Dumbleton* opened the Q. A.'s appeal before me, Mr. *Layard* raised the question, whether any appeal lies. I am of opinion that the appeal does lie, and for these reasons:—I regard this as a proceeding under sect. 1 of Ordinance 5 of 1867, which expressly gives the appeal. Mr. *Horsfall's* objection seems to have been laid before the Commissioner orally, and not embodied in any written statement presented to the Commissioner, and it seems to have been regarded by the Commissioner as an objection preferred under sect. 49 of the Ordinance of 1865. But I think that these objections are now governed by sect. 1 of the Ordinance of 1867. Sect. 49 of the Ordinance of 1865 provided that any person served with the assessment notice under sect. 40 might object before the Court of Requests. The Ordinance of 1867, sect. 1, covers exactly the same subject-matter and a little more. It provides that any person aggrieved either by assessment or non-assessment

of any tenement may object before the Court of Requests, if the amount of the rate does not exceed £10, and before the District Court if the rate exceeds £10: and then an appeal is expressly given to the Supreme Court. This covers the subject-matter of section 49 of the Ordinance of 1865 and goes a little farther, inasmuch as there is provision for an appeal against non-assessment. It appears to me, therefore, that the provisions of section 1 of the Ordinance of 1867 must be regarded as substituted for the provisions of section 49 of the Ordinance of 1865, and as impliedly repealing them. I think it only just to the respondent, there having been no specific written objection presented to the Court of Requests, to regard his objection as made under the enactment which applies, and not under one which I regard as repealed; but the only enactment under which in my opinion it is now competent for him to proceed is one which expressly gives an appeal to this Court.

Respondent's objection is an objection to the assessment of certain property of his principals, the Ceylon Company, Limited. The property in question, bearing assessment Nos. 115, 116, and 117, has been assessed at an aggregate value of Rs. 4,060. A Proclamation dated the 3rd June 1881 fixed the percentage at $7\frac{1}{2}$ per cent., and the Assessment Notice on which Respondent's objection is based is filled in with amounts computed on that footing. Respondent does not object to the settlement of the rateable value at Rs. 4,060, but he objects to being required to pay $7\frac{1}{2}$ per cent. on that value. The grounds of the objection are, that certain Government buildings belonging to the P. W. D., but not otherwise ascertained in the materials before us, have not been rated, whereas, as he contends, they should have been.

Under the Ordinance 5 of 1867 persons interested may object to the assessment or non-assessment of any property. If any one finds that some one else has not been rated, whose property he considers liable to contribute, he may under this section object to the non-assessment. Thus Mr. *Horsfall* may have formally objected to the non-assessment of these P. W. D. buildings. His objection, however, was not so framed. His letter of notice to the Government Agent, sent in compliance with the requirements of the Ordinance, shews an objection to the assessment of his own property, Nos. 115, 116, 117. If

the objection had been formally made to the non-assessment of the P. W. D. buildings, the Commissioner might, if satisfied that those buildings were liable to be rated, "supply the omission." Those are the words of the Ordinance. The only question open upon the objection taken was whether the Commissioner had power to amend the assessment of Nos. 115, 116, 117 in the manner which Mr. *Horsfall* desired. The fact of the non assessment of the P. W. D buildings is put forward as material in support of the objection to the assessment of Nos. 115, 116, 117.

Putting formalities aside, Mr. *Horsfall's* contention arises thus:—Up to last year the Government buildings in question were assessed for the tax, and the percentage payable all round was settled at 5 per cent. The advisers of the Government now consider that the Government ought not to contribute any longer, and is not bound to contribute. The Committee of Assessors appointed under Ordinance 7 of 1866 have not assessed the Government buildings, and H. E. the Governor, by Proclamation dated the 3rd of June 1881, fixed the percentage at $7\frac{1}{2}$ per cent. Of course the Committee of Assessors are not under the orders of the Governor in the matter of assessing any property. Their duty is simply to assess at such values as seem just in their own eyes all property which in their judgment is liable to be rated. As a fact, these P. W. D. buildings do not appear in the Assessment List. Whether they were in the first instance omitted by the Assessors, or whether the Government Agent has assumed to strike them out, considering himself entitled to do so under sect. 37, we do not know. The learned Deputy Queen's Advocate admitted on the part of the Crown, that the Government are advised that they are not bound to contribute in respect of Government buildings, and that the Government do not intend to contribute; and Mr. *Horsfall* urges that the reason why the percentage was last year raised from 5 to $7\frac{1}{2}$ per cent. is because the Government resolved not to pay for Government buildings, and in furtherance of that intention determined to raise the necessary amount of money by an increased percentage to be levied from the rest of the property in the town. Mr *Horsfall* contends that under the Ordinance of 1875 the Government buildings are liable to contribute, and consequently that the percentage ought not to have been raised. Now, it is to my mind as clear as anything can be, that even assuming these Government

buildings to be rateable, the Court of Requests had no power on that ground to touch this assessment. The Court of Requests of course had power to alter the rateable value, but that is not what Mr. *Horsfall* complains of. He complains of the percentage. The percentage is fixed by H. E. the Governor in Executive Council, under section 34 of the Ordinance of 1865. It is there provided that the Governor may from time to time by Proclamation determine the amount necessary to be raised; and the Governor is also directed from time to time by like Proclamation to appoint the percentage on rateable value by which the levy is to be actually made. There is no appeal from the determination embodied in the Governor's Proclamation. What Mr. *Horsfall*, in effect, has asked the Court of Requests to do is, to amend the Governor's Proclamation, and that the Court of Requests had clearly no power to do. The Proclamation having fixed the percentage, neither the Court of Requests nor this Court in appeal from the Court of Requests, has any power whatever to go behind it.

The order which the Court of Requests has made, and from which the Queen's Advocate appeals, is an order "that a fresh assessment be made" including the Government buildings in question. If the objection had been formally taken to the non-assessment of the Government buildings, and it appeared that in point of jurisdiction the Court of Requests and not the District Court was the proper tribunal to entertain the objection, the Court of Requests would have had power under the Ordinance of 1867 to "supply the omission," which may perhaps mean that it might direct the assessors to assess the buildings. That, however, would not affect the liability of Mr. *Horsfall's* property, Nos. 115, 116, 117, to pay the percentage saddled upon them by the Proclamation of 1869. Possibly, if it be decided that the Government buildings are rateable, H. E. the Governor may by some future Proclamation alter the percentage, but that is a matter with which the Court has no concern. The only question before the Court of Requests was, whether the assessment of Nos. 115, 116, 117 ought to be amended. The Court was not asked to alter the rateable value, and the Court has no power to meddle with the percentage. For these reasons the order appealed against is wrong and must be set aside.

The substantial question, however, which the objection was intended to raise was, whether, under section 34 of the

Ordinance of 1865, these Government buildings are rateable. That question was argued at length before us; and it seems to me very undesirable that we should quit this appeal without pronouncing our opinion upon it. It may, and probably—if we do not decide it—will, be raised again upon a formal objection to the non-assessment of those buildings. There is no doubt whatever about the general principles. The Crown does not pay taxes upon Crown property. That is a prerogative of the Crown. Moreover, the Crown is not bound by a rating enactment, or any other general enactment which would divest any prerogative of the Crown, unless the enactment affects the Crown either by express terms or by necessary implication. The question we now have to consider is, whether section 34 of the Ordinance of 1865 binds the Crown, thereby divesting the Crown, *quoad* this Police Tax, of its prerogative of immunity from taxation.

Some reference was made during the argument of this appeal to the fact that up to last year the buildings now in question always were with the assent of the Government assessed for the tax. But that is a matter which we cannot take into consideration. It merely amounts to this, that up to last year the Crown was willing to pay. If the prerogative has not been divested by statute the mere fact that the Crown may have waived it for some years does not stand in the way of its now being asserted. The simple question is whether this enactment divests the Crown of the prerogative.

There are some sections of the Ordinance of 1865 which expressly bind the Crown. For instance, the 33rd section declares that certain specified expenses shall be defrayed by the Government. The same section also enacts that the expenses of the Police in rural districts shall be defrayed in equal shares by the Government and the proprietors of estates. But it does not follow, because some sections of a statute expressly bind the Crown, that all other provisions of the statute are therefore binding. See for instance the able judgment of the Master of the Rolls in *re Bonham, ex parte the Postmaster General* (1). The section which we now have to consider is section 34, dealing with the provision for the expenses of Police in non-municipal towns. That section does not expressly name the Crown as a con-

(1) L. R., 10 Ch. D., 595.

tributory to the tax, and it does not follow that, because the Crown has been willing to contribute in rural districts, therefore it is to be considered as bound to contribute in non-municipal towns. Section 34 enacts that in non-municipal towns the tax shall be leviable upon "all houses and buildings of every description and on all lands and tenements whatsoever." These are merely general words and do not by themselves bind the Crown. But at the end of the section there is an exemption in favour of places of worship and buildings "such as are placed in charge of military sentries;" and it was strenuously argued for respondent—and I confess to having been much struck by the consideration—that, on the principle *expressio unius est exclusio alterius*, this is only explicable upon the hypothesis of an intention that all Government buildings except those under military sentry should pay. It certainly is difficult to understand why the exemption in favour of buildings under military sentry was inserted, if Crown property in general was not to be taxable, but there are other provisions of the Ordinance connected with sect. 34, which seem to me entirely irreconcilable with an intention that houses, lands, &c, belonging to the Crown should be rateable. Sections 38, 39, 40, 41 all have reference to liability of the lands, houses, &c., rateable under section 34, and their owners and occupiers. Section 38 empowers the Committee of Assessors to require the owner or occupier to furnish certain information; and whoever refuses or fails to furnish such information within one week is rendered liable to a fine of £5. Now it is impossible that this can have been intended to apply to houses, &c., owned by the Crown, and yet it applies to all houses, &c, rateable under section 35. Similarly the provisions in section 41 as to seizure of moveable property on the premises are provisions which it is impossible to consider as intended to apply to houses, &c., owned by the Crown. If on the one hand I cannot explain the exemption of buildings under military sentry if the Crown is not to be bound, still on the other hand I cannot reconcile sections 38 and 41 with the supposition that the Crown is to be bound. I can only, then, fall back upon the principle put by Sir George Jessel in the case already cited, that "if it is intended to make a clear and strong alteration of the law, you expect to find clear and strong words to effect that alteration." If there be doubt we must regard the law as unchanged by the Ordinance. It

is sufficient, in my opinion, to say that I do not find in the Ordinance expression of a clear intention that the Crown is to be bound.

In my opinion this appeal succeeds, the order appealed against must be set aside, and respondent's objection to the assessment of Nos. 115, 116, 117 overruled, with costs in both Courts.

DIAS, J.—I concur on both points.

DE WET, A. C. J.—I agree with the judgments, and have only to add that by the law of the land Crown property is not liable to be taxed for Municipal purposes. The principle is that the Crown is not bound by any statute, if it be not expressly made to be so bound. This is the principle of the English Law, and nothing can be found in the Roman Dutch Law to contradict that principle. In Voet, 39. 4. 28, it is clearly laid down that the *Fiscus*, which represents the Crown to all intents and purposes, is not liable to pay *vectigalia*. The *vectigalia* was not only considered in the nature of a State tax, but also applied to Municipalities. *Vide* Voet, 39.4.9, where the word used to denote rates is *vectigalia*.

Set aside. Objections overruled.

1st February, 1883.

Present—CLARENCE, J.

P. C. Chavagachcheri, 6,889. } Kathiramer KANTHER v. Ampalavanar KOVINLAR.

Jurisdiction of Police Court—Paddy Ordinance, No. 14 of 1840, sects. 6 and 14—Penalty of double value of Government share of crop—Queen's Advocate's certificate under Ordinance 11 of 1868, sect. 99.

Section 14 of the *Paddy Ordinance*, 1840 enacts *inter alia* that any proprietor, who shall thresh the crop of his field liable to tax, without giving due notice to the headman, shall on conviction be fined to the amount of double the value of the share due to Government as tax.

The defendant, having been charged with a breach of section 14, was convicted and sentenced by the Police Court to pay a fine of Rs. 69, being double the value of the Government share.

Held, that in the absence of the Queen's Advocate's certificate con-

templated by section 99 of the *Administration of Justice Ordinance*, 1868, the Police Court had not the jurisdiction to entertain the charge.

The defendant in this case was charged with a breach of sections 6 and 14 of Ordinance No. 14 of 1840, in that the defendant did on the 2nd September 1882 thresh the crop of his field, which was liable to tax, without giving notice to the complainant, who was the renter, of his intention to thresh the same. The Police Magistrate (*Haines*) after hearing evidence on both sides convicted the defendant and fined him Rs. 69, half to be paid to complainant.

The defendant appealed.

J. Grenier, for the appellant, cited *P. C. Galle* 84167 (1), *P. C. Matale* 21833 (2).

S. Grenier for the complainant, respondent.

CLARENCE, J.—Set aside and information and proceedings quashed. In the absence of the certificate contemplated by sect. 99 of Ordinance 11 of 1868, the Police Court had no jurisdiction to entertain this charge, for the section of the Ordinance under which the charge is laid requires the Court to fine the defendant double the value of the share, which in this case gives an amount of more than Rs. 60.

Proceedings quashed.

27th and 28th November, 1882 *and 1st February*, 1883.

Present—DE WET, A. C. J., CLARENCE and DIAS, J J.

Crown Case Reserved.

4th Session Colombo, No. 4. } The QUEEN v. Kathiriatchige PERIS APPU.

Witness who does not understand the obligation of an oath —Oath or affirmation.

Upon a charge of Rape, the prosecutrix D. was called as a witness. She was about 10 years of age, understood the difference between truth and falsehood, and that it was not right to tell what was not true; was possessed of great natural intelligence, but was wholly uninstructed,

(1) Grenier (1873), 39.

(2) Civil Minutes, Sup. Ct., 8th March 1882.

and satisfied the Court that she did not understand the obligation of an oath. She was affirmed and examined, and the jury convicted the prisoner mainly on her evidence.

Held, upon a case reserved, (*Per* CLARENCE and DIAS, JJ., *dissentiente* DE WET, A. C. J.) that to render D.'s testimony admissible it was not necessary that she should comprehend the nature of an oath; and that she was a proper person to be affirmed; and that the conviction should therefore be confirmed.

Per DE WET, A. C. J.—In all cases, no witness can give evidence except upon oath or solemn affirmation; and the presiding judge having been satisfied that D. did not understand the obligation of an oath, or its equivalent a solemn affirmation, she should not have been called upon to make an affirmation. D.'s evidence having been illegally admitted, and the jury having convicted on that evidence solely, the conviction should be set aside.

This was a Case Reserved from the November Session of the Supreme Court at Colombo for 1882. At the trial before DIAS, J. and a Sinhalese Jury on 20th November 1882, *Dumbleton*, Acting D. Q. A., conducted the prosecution, and the prisoner was undefended. The prisoner having been convicted, DIAS, J., stated the following Case for the opinion of the Collective Court:

"The prisoner was indicted for Rape upon a girl called Durihamy of about 10 years of age. When this Durihamy was called as a witness, the interpreter asked her what her religion was. She answered that she had no religion. Upon this I put her a few questions for the purpose of ascertaining whether she understood the obligation of an oath. She gave very intelligent answers, but on the whole I was satisfied that she did not understand the obligation of an oath. She, however, understood the difference between truth and falsehood, and that it was not right to speak what was not true; but she did not seem to understand the consequences of speaking what is not true. The girl appeared to be between 10 and 12 years of age and possessed a great deal of natural intelligence, but she was wholly uninstructed, and seemed to have grown up without any training at all. She gave a very intelligent account of what happened to her, and in all respects I was satisfied that she was a witness on whose evidence I might act. Accordingly I had her affirmed and examined, and on her evidence mainly the Jury found the prisoner guilty. Having some doubts as to the correctness of the course I pursued in affirming a witness who, in my opinion, did not understand the obligation of an oath, I reserved the point for the consideration of the Collective Court, and remanded the prisoner.

"The question which I submit for the consideration of the Collective Court is, whether a witness of 10 years of age, who is naturally intelligent and able to give an intelligent account of what she knew, could be examined as a witness on her oath or affirmation though she does not understand the obligation of an oath."

The case was argued in connection with *The Queen* v. *Buye Appu*, *ante*, p 135.

Nell, *D. Q. A.*, for the Crown. The prisoner was unrepresented.

Cur. adv. vult.

(1st February, 1883). DE WET, A. C. J.—In all cases, whether criminal or civil, no witness can give evidence except upon oath, or solemn affirmation, as provided by law. This rule applies equally to infants as well as to adults. The legal consequences which flow from giving false testimony, after oath taken, or affirmation made, are in both cases identical. If, in the case put, the presiding Judge was, as he says, satisfied that the child did not understand the solemn obligation of an oath, or its equivalent the solemn affirmation, I am of opinion that she should not have been called upon to make an affirmation. As, upon her sole testimony, (to my mind illegal under the circumstances) the prisoner was convicted, I am of opinion that the conviction was bad and should be set aside.

CLARENCE, J.—I do not think it was necessary in order to render this child's testimony admissible, that she should comprehend the nature of an oath. It appears to me that she was a proper person to be affirmed, and having been affirmed in the statutory manner, her evidence was in my opinion properly left to the Jury. This conviction, in my opinion, should be confirmed.

DIAS, J., concurred in the judgment of CLARENCE, J.

Conviction sustained.

[2nd February 1883. The prisoner was brought up before DIAS, J., sitting in Criminal Session, and sentenced to three years' imprisonment at hard labour].

1st and 8th February, 1883.

Present—CLARENCE, J.

D. C. Colombo, 85,069. W. S. BENNETT and another v. Niel Gow. *Ex parte* J. A. ROBERTSON.

Contempt of Court—Breach of Injunction—Power of District Court to issue injunction affecting property outside its territorial limits but the subject of suit before it—Agent of party enjoined—Notice—Committal for defined period.

In an action in the District Court of Colombo to enforce a mortgage of a coffee estate situated within the jurisdiction of the District Court of Kandy, the District Court of Colombo issued an injunction against the defendant and his agents to restrain them from coppicing the cinchona trees growing on the mortgaged property. R., the defendant's manager of the estate, after the issue of the injunction, directed his subordinate the superintendent of the estate to uproot all the cinchona trees growing on the estate. Upon motion to commit R. as for a contempt of Court:

Held, that the District Court of Colombo, having otherwise jurisdiction to entertain the mortgage suit, had power by injunction to restrain the defendant (and any agent of his, though not a party to the action, and resident outside the court's territorial jurisdiction) from acts upon the land concerned in the action.

Quaere, whether, the defendant having submitted to the jurisdiction of the court, it was open to his agent R. to raise the question of jurisdiction.

Held also, that the fact of R. being the manager and agent of defendant (on whom the injunction had been served) was not sufficient proof, upon the present motion, of notice to R. of the injunction; and that it was for the plaintiffs to show, beyond reasonable doubt, that at the time of the alleged breach R. knew of the existence of the injunction.

It was proved that at the time of uprooting the cinchonas R. lived 20 miles from the estate, and directed the uprooting by letter to the superintendent, who inquired whether R. had authority to do so, and stated that his reason for hesitating to uproot was the fact that there had been a legal dispute about cinchona cutting. Upon this R. forwarded a letter from defendant informing the superintendent that he had the right to uproot, having consulted his legal advisers. R. had no direct notice of the injunction.

Held, that though these facts did not justify the committal of R., it was a case in which R. should pay all the costs in the court below.

On 17th August 1881 the plaintiffs commenced this action to recover the sum of Rs. 89,652.57 due on a bond dated 8th October 1877, and to have *Nithsdale* Estate, Dimbula, specially mortgaged by the said bond, declared bound and executable to satisfy the said debt. There was also a prayer for provisional judgment.

Answer was filed on 17th November 1881, denying breach of conditions, on non-fulfilment of which the action was founded, and setting up various defences on the merits. After further pleading, joinder of issue was entered of record on 27th March 1882.

On 4th May 1882, Mr. *A. O. Joseph*, Proctor for the plaintiffs, moved on affidavits that an injunction do issue restraining the defendant and his agents from coppicing the Cinchona trees on *Nithsdale* Estate until the determination of this action. The affidavit of Mr. H. H. Corfe, tendered in support of the motion, set out that he was Visiting Agent of Messrs. Sabonadiere & Co., and had been engaged in the business of reporting on corps, &c, for 4 years; that he knew *Nithsdale* Estate, which consisted of 242 acres of land, planted with Cinchona, Succirubra and Officinalis; that he had just visited *Nithsdale* Estate and found that out of the Succirubra trees over three years old thereon, computed at 26,000 in number, some 8,000 had been coppiced, and he had been informed by Mr. Kerr (who was afterwards shown to be defendant's Superintendent of *Nithsdale*) that it was the intention of the defendant to have all the Succirubra so coppiced, with the exception of some that had been shaved; that the deponent considered that the coppicing that had been done and that was to be done was calculated seriously to depreciate the value of the Estate as mortgage security, because, under any circumstances, the stools or stumps of the trees so coppiced would not give any return for 2 or 3 years after operation, and a certain percentage of them would die; and that those that lived would be of little or no improved value, while, under ordinary circumstances, they would go on improving in value for several years.

The plaintiffs also put in an affidavit by Mr. *A O. Joseph*, their Proctor, to prove that *Nithsdale* was the only security the plaintiffs had for their debt, and that the rest of the defendant's property in the Island was heavily encumbered, even *Nithsdale* having mortgages on it subsequent to plaintiffs'.

At the hearing of this application on 13th May 1882, the defendant tendered his own affidavit to prove that coppicing would not depreciate the value of the Estate, and that, even if the Cinchonas were all put out of the question, the plaintiffs had sufficient security, and that the rooting up had been only of plants that had struck slab-rock and were dying off, and that Mr. Corfe had not visited the Estate as

Visiting Agent as alleged. In a later affidavit, in answer to Mr. *Joseph's*, the defendant further justified the removal of the Cinchonas as rendered necessary by good husbandry.

The plaintiffs' motion was allowed, and on 17th May the Injunction issued, which was as follows:

"To Niel Gow of Forest Creek Estate, Dimbula, his contractors, servants, workmen and agents, and every of them, Greeting.

Whereas by a certain order of Owen William Cecil Morgan, Acting Judge of the District Court of Colombo, bearing date the 17th day of May 1882 and made in a certain action wherein the abovenamed William Stephenson Bennett and Eliza Frances Bennett are plaintiffs and you the said Niel Gow are defendant, it was ordered that a writ of Injunction should issue to enjoin and restrain you the said Niel Gow, your contractors, servants, workmen and agents, from coppicing the Cinchona trees growing on *Nithsdale* Estate in the district of Agra Ouvah, Dimbulla, in the Central Province, until after trial of this action or till further order, We therefore do hereby strictly enjoin and command you the said Niel Gow and your contractors, servants, workmen and agents, and every one of you, from coppicing the Cinchona trees growing on the said *Nithsdale* Estate in the aforesaid district until after the trial of this action, or until our said Court shall make order to the contrary, and We further command you the said Niel Gow to pay to the said plaintiffs the costs of preparing, issuing and serving this writ."

The Supreme Court, on 18th August 1882, dismissed the appeal which defendant had lodged against the order granting the Injunction. (*Per* CLARENCE and DIAS, JJ. Reported 5 S. C. C., 79).

The Fiscal returned that this writ had been served on the defendant at Forest Creek Estate Bungalow on 7th June 1882. On 21st September 1882, plaintiffs moved for an *Order Nisi* on the defendant, and *John Affleck Robertson* as his aider and assistant, to show cause why they should not be committed to prison for a contempt of Court in disobeying the Injunction of 17th May 1882. This motion was supported by the affidavit of John Northmore, one of the Attornies of the plaintiffs in the Island, who deposed to having visited *Nithsdale* Estate on 13th September 1882, and having found nearly all the Cinchonas over a year old

uprooted ; that deponent had been informed by C. Minto Gwatkin, lately a superintendent of *Nithsdale*, that in his presence the defendant, assisted by *John Affleck Robertson* of Wotton Estate, Dimbula, had caused the Cinchonas to be uprooted about 20th July 1882, and subsequent days ; that Gwatkin had shown deponent a letter addressed by Robertson to Gwatkin, from which deponent inferred that Robertson then acted as defendant's agent.

The Acting District Judge (*Liesching*) on 22nd September examined Mr. C. M. Gwatkin on oath. He deposed to having been Manager of *Nithsdale* from June 1st to August 15th 1882, and to have received his orders as such from Robertson, to uproot the Cinchonas, in writing, which instructions witness had destroyed on leaving the estate. Witness produced copies of letters written by him to Robertson on 13th, 14th, 19th and 20th July (C, C1, C2, C3,) and proved the signatures of defendant and of Robertson to letters A and B, (both of 20th July). Witness wrote E in reply to A. Witness proceeded on 21st July to uproot the growing Officinalis trees, and the large Succirubra trees of 4 and 5 years old, and the stools of trees already coppiced. Robertson was not present. Two hundred coolies a day were at work, some borrowed from other estates. Robertson was kept informed of all work going on. Some seven or eight hundred thousand trees, some only a year old, were uprooted, and the bark removed to Waverley Store. Defendant had told witness verbally to remove the bark there before any seizure was made under writ of Court. Bark had not previously been stored on Waverley, which was another estate. Witness had never konwn any one to uproot trees of one year old for his own profit, but considered it was devastation. It was not good husbandry to uproot the stools of Cinchonas after coppicing.

Upon these materials the District Judge issued the *Order Nisi*, calling upon defendant and *Robertson* to show cause on 29th September 1882 against committal for contempt of Court. On 29th September *Layard*, plaintiff's Counsel, stated that defendant had left the Island under an assumed name before the application for the Order had been made.

The discussion on the Order was adjourned for 5th October, on which day *Browne* appeared for *Robertson* and cross-examined the witness Gwatkin. *Layard* represented plaintiffs.

The Court, setting out the facts, ruled as follows: Knowing of the existence of the Injunction, *Robertson* had caused an immense number of Cinchonas to be, not *coppiced* but *uprooted*, to the serious injury of the estate and of the mortgagees, and it was now contended he had not disobeyed the Court, inasmuch as he did not *coppice*. On this point, the order of the Supreme Court, in appeal from the allowance of the Injunction, showed their Lordships thought the security on the estate would be reduced by coppicing. It was an aggravation of the contempt, that *Robertson* had uprooted thousands of young Cinchonas. He was therefore guilty of a contempt, for which the Court sentenced him to be imprisoned without hard labour for 6 months and to pay the costs of the *Order Nisi*. He was allowed bail pending appeal.

The following were the letters produced and relied upon :—

A.

Forest Creek, Dimbula, 20th July, 1882.

C. M. Gwatkin, Esqr., Superintendent,
Nithsdale Estate.

Dear Sir,—I have seen the Correspondence between yourself and Mr. J. A. Robertson regarding the harvesting of the Cinchona on Nithsdale. I have consulted my legal advisers regarding this matter and I have to inform you that I am quite justified in ordering the harvesting of the Cinchonas as you were instructed by me through Mr. Robertson. I therefore have to direct you to carry out this order without further delay with all hands irrespective of weather. I am much surprised at your questioning my orders as my Superintendent.—Faithfully yours, NIEL GOW.

B.

Forest Creek, 20th July, 1882.

Charles Minto Gwatkin Esq.

Superintendent, Nithsdale Estate, Agra Patnas.

Dear Sir,—I enclose an official letter from Mr. Gow *re* the harvesting of the Cinchonas as previously advised by me. You will please lose NO TIME in carrying out my instructions regarding same with EVERY cooly you have. Your answer per bearer assuring me you will at once comply with Mr. Gow's request and my orders will oblige, which will

save time and further delay in the carrying out of this most important work—Yours faithfully, JOHN A. ROBERTSON, Manager for Mr. Gow.

[A. was enclosed in B.]

Extracts from letters of *Gwatkin* to *Robertson*.

C.

July 13, 1882.

Do I in any way compromise myself by carrying out your instructions with regard to the Cinchona cutting? I suppose you have a right to do this, or you would not ask me to do it, but if it compromise me I cannot go on.

C 1.

July 14, 1882.

I wrote you yesterday by the coolie who went with the carpenter, and again repeat the purport of my letter with regard to the Cinchona. Are you legally justified in instructing me to cut the Cinchona, and do I in *any way* compromise myself by carrying out your instructions? If you are justified I can soon cut them out, but if not I must decline to do so. I will not in any way mix myself up with the legal or private affairs of the Estate.

C 2.

July 19, 1882.

I beg to call attention to my letter of 14th. As I therein stated I would not mix myself up with the legal or private affairs of the estate, which are matters between yourself, Mr. Gow and those it may concern, and am awaiting a reply to my letter with your assurance that I am doing nothing illegal with regard to the cutting out the Cinchona, before proceeding to do so.

C 3.

July 21, 1882.

As I have Mr. Gow's assurance that he has consulted his legal adviser on the Cinchona cutting, and is justified in doing or ordering to be done the harvesting of the Cinchona, the work will be put in hand to-morrow morning. Why I hesitated in doing this was that I knew there had been some legal dispute before about the cutting of the Cinchona and I wished to be perfectly clear on this point, that I am

doing nothing illegal by carrying out the order given by you.

E.

Nithsdale, July 21st, 1882.

Niel Gow Esqr., Forest Creek.

Dear Sir,—I am in receipt of your letter of 20th. The reason I hesitated in carrying out Mr. Robertson's instructions was that I knew there had been some legal dispute about the Succ: harvesting. But since I have your assurance that your legal adviser informed you that you are quite justified in harvesting the Cinchona, as I was instructed by Mr. Robertson, the harvesting will be proceeded with with all possible despatch.—Yours very truly, C. MINTO GWATKIN.

Robertson appealed on the grounds, (1) that the Court had no jurisdiction to bind him by Injunction, he having been at the time the Injunction issued resident in the Central Province, and beyond the territorial jurisdiction of the District Court of Colombo, and he having also been no party to any action then pending before the District Court of Colombo; (2) that no contempt had been intended, and the respondent had offered to apologise, which was sufficient vindication of the Court's dignity and authority.

Browne (*VanLangenberg* with him) for *Robertson*, the appellant.

First, the District Court had no power to bind the appellant by an Injunction, he being outside its territorial jurisdiction, and neither himself nor his property concerned in any action pending before it. The Colombo Court had jurisdiction in the action only because the bond sued on was executed in Colombo, while both the obligor and the mortgaged property were in Dimbula, within the jurisdiction of the District Court of Kandy. The Court could certainly restrain the defendant by Injunction, and also his servants, but these latter, it is submitted, only while they were within the territorial jurisdiction, which *Robertson* was not. The District Court has a strictly territorial jurisdiction. *D. C. Kandy* 6,625 (1). Though that case was decided on the Charter and before Ordinance 11 of 1858 which now regulates jurisdiction, yet the analogy is the same, the

(1) RamaNathan (1861), 18.

Ordinance introducing no new principle here. As to summonses, the Rules made by the Judges under the Charter of 1833 (1) enabled them to be directed to the Fiscal of another district and served there without the intervention of the Court having jurisdiction over such other district. But writs of attachment and execution have to be indorsed by the Court within whose jurisdiction they are to be executed. Sect. 55, Ordinance 4 of 1867. Fiscals are only bound to execute process directed to them, "according to the extent of the jurisdiction" of the Court issuing them. Sect. 59. Now, such jurisdiction, in the case of a District Court, is distinctly defined by sect. 65 of Ordinance 11 of 1868. [CLARENCE, J.—Service of an Injunction is not necessary: notice to the party enjoined would be sufficient.] Yes, if the Court had jurisdiction to issue it. Now, *Robertson* has been for 9 or 10 years resident outside the Colombo Court's jurisdiction, he is no party to the action, and none of his immoveable property is concerned therein. How then can that Court extend its jurisdiction outside its territorial limits? It is not like the case of the Queen's Bench in England, whose process runs throughout England: the only similar question there might be as to its effect in Scotland, perhaps. The present plaintiffs, besides, are not without their proper remedy. They might file a libel and obtain an Injunction from the District Court of Kandy; or they might upon proper materials obtain such Injunction from the Supreme Court (which certainly has jurisdiction over the whole Island) under sect. 24 of Ordinance 11 of 1868. *Bird's Case* (2). The fact of the existence of such another remedy is an argument against the allowance of the one asked for. The mere relation of principal and agent does not confer on a court having jurisdiction over one party jurisdiction over the other who is outside its territorial limits. *The Carron Iron Co.* v. *Maclaren* (3).

Secondly, even if the Injunction had been rightly issued, there is no proof that *Robertson* deliberately disobeyed it. There is proof of service of the Injunction on the defendant, but not on *Robertson*. [CLARENCE, J.—I shall assume that defendant's "Manager" had notice of it, unless he shows the contrary by affidavit or otherwise.] (*a*) In Northmore's affidavit *Robertson* is said to have assisted the

(1) R. & O., r. 23, p. 66. | (2) Morg. Dig., p. 203.
(3) 5 H. L. Cas., 416.

defendant in uprooting the Cinchonas. Now, *Robertson*, it is proved, lived 20 miles off, and was not once on the estate while the uprooting was going on. (*b*). Further, the Injunction was against *coppicing*, and *uprooting* is not a breach of it. [CLARENCE, J.—It is much worse. You may as well contend that cutting off a man's arm is not worse than cutting off his hand only.] It is a debateable point as to whether coppicing or uprooting is better husbandry, and many planters hold opposite views. For replanting is going on at the same time with the uprooting, and in the rotation of crops there is a constant return, which is not the case with coppicing. [CLARENCE, J.—I do not think it is at all debateable.]

Thirdly, if *Robertson* be held guilty of a contempt, the punishment is excessive. *Robertson* appeared immediately on notice to answer for his contempt, and after protesting he had meant no contempt of the Court offered through his Counsel to apologise. He is a European proprietor of estates himself, resident 18 or 19 years in the country, and it is an excessive sentence to commit him to jail without the option of a fine. [CLARENCE, J.—Subject to what I may hear from the other side, I think the proper order would have been to commit him to custody till he should purge his contempt. *Grenier*—That was the order we asked of the District Court. CLARENCE, J. (to appellant's Counsel)—Do you object to the general power of the District Court to punish a contempt not *in facie curiæ*? There is the case of the *Observer* newspaper. Only that here the Court had made an order which was disobeyed, while none had been made on the newspaper writer, who was no party to any action.] There is also the case of the *Times* newspaper, the editor (Allardyce) and publisher (Widlake) of which were charged with a contempt of this Court. There, on the editor's taking upon himself the whole blame of the matter, the publisher was absolved and an apology was accepted, to which as full publication was given as to the objectionable matter. [CLARENCE, J.—I should like to see the reasoning of the Judges in the *Observer* case.]

Grenier (*Layard* and *Withers* with him) for the plaintiffs, respondents.

Neither of the newspaper cases has any application here. In the *Observer* case the editor was charged with having

published contemptuous matter of the District Judge in his judicial capacity, and it was held that a District Court, like an English County Court, could not punish for a contempt not committed in the face of the Court. While here is an Injunction issued by a competent Court; and where a Court has power to issue a process, is it impotent to punish for a disobedience thereof? The power is absolutely necessary for the due working of the Court, and it has been so held in the case of English County Courts. *Ex parte Martin* (1). So in Ceylon, in *Odayappa Chetty's Case** a party was fined £100 as for a contempt in prostituting the process of the Court, because he procured service thereof on a person other than it was issued for, and obtained a false return by the server. [CLARENCE, J.—Could a Court of Requests enforce its orders by attachment?] Certainly. Sir Edward Creasy held in a case in which the seizure of a public servant's salary was for the first time discussed, that the Court of Requests of Colombo could punish the Deputy Fiscal of Batticaloa for a contempt committed at Batticaloa. *C. R. Batticaloa,* 1055 (2). Under sect. 25, Ordinance 4 of 1867, such Fiscal is amenable to the Court issuing the process, but punishable by the Court within whose territorial jurisdiction he acts. That section of the *Fiscals Ordinance* expressly provides for service of all processes, other than writs of sequestration and execution, in any part of the Island without judicial indorsement.

As to the objection to the regularity of the course adopted, Lord *Lyndhurst* says, in *Durant* v. *Moore* (3): "Upon principle I think that the order to shew cause does not in any way prejudice a defendant; for as he must be personally served, if he has merits, he may on shewing cause be dismissed. Such an order is not more hard than an order for immediate committal. On the contrary, it is less so; for it gives the defendant longer time to consider and answer the affidavits made against him by the plaintiff. Upon principle, I think that an order to shew cause why a party should not be committed for breach of an Injunction may be served personally; and for this I consider the case of *Budge* v *Hughes* to be a conclusive authority. These proceedings, therefore, have been quite regular." [CLAR-

(1) L. R., 4 Q. B. D., 214.
(2) RamaNathan (1865), 164.
(3) 2 R. & M., 34.
* See Appendix G.

ENCE, J.—The point you refer to was mooted by me. I was not aware that the order was *ex parte*.] It is clear from the correspondence that *Robertson* knew of the Injunction, and yet continued his instructions to Gwatkin to uproot. Gwatkin demurred to carrying them out, and *Robertson* then wrote the conclusive letter B. of 20th July, in which he speaks of "*my* orders," and signs himself "*manager* for Mr. Gow." Gwatkin clearly proves that such uprooting of young plants is devastation and is never done for profit.

The Injunction is against the defendant, and his contractors, servants and agents, and *Robertson* as his manager is an agent. But even if he were not, he is liable as knowingly assisting the defendant. *Wellesley* (*Lord*) v. *Lord Mornington* (1). [CLARENCE, J.—Any stranger who did so with notice would be equally liable.] Had *Robertson* sworn that he did not know of the Injunction, it would have been different, but such evidence is absolutely wanting.

As to jurisdiction, the jurisdiction of a District Court is not strictly territorial under section 65 of Ordinance 11 of 1868; for it could entertain an action in which the cause of action arose in part only within its territorial limits. If the District Court had power by a mortgage decree in this action to bind the defendant and his property situate in another part of the Island, it is idle to argue that defendant's manager might disregard an Injunction in regard to that very property, which admittedly bound the defendant himself. Had it been shown that the Injunction was totally void for lack of jurisdiction to issue it, then indeed might the whole world have meddled with the estate with impunity. *Shaw's Case* (2) decided that the District Court had a territorial jurisdiction, which does not preclude the existence of other jurisdiction also.

As to the sentence, what we asked for was committal till *Robertson* should purge his contempt. When he had done this (perhaps by depositing the value of the Cinchonas uprooted), the Court might accept his apology. An apology alone was accepted in the *Times* case, because the Supreme Court could not be said to have sustained any damages, but it would have been different had the offender smashed some of the Court furniture, *sedente curiâ*. The full value

(1) 11 Beav., 180. | (2) RamaNathan (1861), 18.

of such furniture would then have had to be deposited before acceptance of any apology. [CLARENCE, J.—Have the English cases gone the length of requiring such a party to deposit the full value when he has not himself received the benefit of it ?] Perhaps not ; but if *Robertson* had the money realised, he should have tendered it to the Court: if he had not, that should have been shown by affidavit.

Browne, in reply—It has not been shown that an injunction has binding force outside territorial jurisdiction and on a person who is no party to the action. A Court may punish breach of its process, but only when committed within its territorial limits. The *Fiscals Ordinance* only provides for service of *lawful* orders of the Court outside its limits. A warrant of execution against this very estate would be of no avail unless indorsed by the Judge of the Kandy Court, in whose territorial jurisdiction it is. Had *Robertson* refused to appear on the notice to show cause, he could not have been arrested without similar indorsement on the back of the warrant. As to the benefit of the Cinchonas uprooted, it must be presumed Gow, the defendant, got it, whose manager *Robertson* was. The bark was put in Waverley Store, which it is proved does not belong to *Robertson*.

Cur. adv. vult.

(8th February). CLARENCE, J.—The Injunction in this case was issued by the District Judge on the 17th May last, and it was served on the defendant, at Forest Creek Estate in Dimbula, on the 17th June. The defendant appealed ; this Court adjourned the appeal for further affidavit evidence, and eventually, on the 18th August, dismissed the appeal. In the meantime, on the 26th July and during the next few days, the Cinchona on *Nithsdale* Estate was entirely uprooted by Mr. Gwatkin, the Superintendent on the estate, who acted upon instructions which he had received from the defendant and the defendant's manager, the present appellant.

The object of this proceeding undoubtedly was to enable the defendant to realise for himself the proceeds of the bark, in order that it might not be available for seizure by the plaintiffs, and to this end, the bark, as soon as harvested, was placed in a neighbouring store, belonging, not to *Nithsdale*, but to another estate. It seems, therefore, that this

was done before the appeal came on for hearing in this Court.

It was, I confess to my surprise, suggested in argument in support of the appeal, that there had been no breach of the Injunction, inasmuch as the Injunction forbade coppicing, and what was done was uprooting. This is an argument which may be simply passed over as not requiring any further notice. So far as the nature of the act is concerned, a more flagrant violation of the Injunction can hardly be imagined. The Injunction forbade cutting down to the root, and root and all were torn away. The defendant, it appears, has left the Island. The plaintiffs, as soon as they learned what had happened, moved to commit both defendant and appellant, Mr. *Robertson*, and the defendant having left the Island, the application was pressed against appellant.

It has been contended by appellant that he ought not to be committed for breach of this Injunction, for that the Injunction is in itself a mere nullity; that the District Court of Colombo had no jurisdiction to grant the Injunction in the matter of land lying outside the district of Colombo. The action is brought on a mortgage bond executed in Colombo. Consequently, in my opinion, the District Court of Colombo had jurisdiction to entertain the action, by virtue of section 65 of Ordinance 11 of 1868, and incidentally to the action had also jurisdiction to issue the Injunction. The defendant himself appears never to have contested the right of the Court in point of jurisdiction, to entertain the action or to grant the Injunction. The defendant appealed against the Injunction on the contention that the circumstances did not warrant it. I may say also that it seems to me questionable whether, the defendant having submitted to the jurisdiction, this appellant can raise the question of jurisdiction. I need not, however, discuss this, because, in my opinion, the Court had jurisdiction to issue the Injunction. The jurisdiction of the Court to entertain the action seems to carry with it *ex necessitate* this further power to protect the plaintiff's interest, if necessary, by an Injunction to restrain the defendant and his agents from acts on the land.

The only remaining question is the question of fact, whether this appellant, knowing of the Injunction, has violated it. Appellant lives some 20 miles from *Nithsdale* Estate, and was not himself present when the Cinchona was uprooted; but if, knowing of the Injunction, he in-

structed Mr. Gwatkin to uproot the Cinchona, that was disobedience of the Injunction. And if it appear that the appellant has knowingly disobeyed the Injunction, he certainly ought to stand committed to gaol. I could not uphold the order as it now stands, sentencing him to six months' simple imprisonment, but I should simply order him to be committed, which is the proper order in such a case, leaving it to him to purge his contempt and move to be discharged.

But before appellant can be committed, we must be satisfied, beyond reasonable doubt, that he knew of the Injunction. See *Ex parte Langley, re Bishop* (1). What is proved amounts to this: Mr. Gow, the defendant, was living on Forest Creek Estate, some 20 miles away from *Nithsdale*, and Mr. *Robertson*, the appellant, was living on an estate of his own, Wotton, about 2 miles from Forest Creek. Appellant managed *Nithsdale* for the defendant, the resident superintendent being Mr. Gwatkin, who has given evidence. Appellant, shortly before the 13th July, directed Mr. Gwatkin to uproot the Cinchona on *Nithsdale*. Thereupon Mr. Gwatkin wrote him several letters, asking whether he was "legally justified in instructing him to cut the Cinchona," and whether Mr. Gwatkin would be in any way compromising himself by carrying out those instructions. Then, on the 20th July, *Robertson* wrote to Gwatkin the letter of that date, in which he says: "I enclose an official letter from Mr. Gow *re* the harvesting of the Cinchona, as previously ordered by me. You will please lose no time (words doubly underlined) in carrying out my instructions." And enclosed was a letter from Mr. Gow, the defendant, to Gwatkin, in which defendant peremptorily ordered Gwatkin to carry out the instructions which he had received, adding a paragraph evidently intended to convey (what one can hardly imagine to have been the case) that his legal advisers had advised him that he was justified in what he was doing. After that Mr. Gow came to *Nithsdale* and stayed there about a week, apparently superintending what was being done to the Cinchona. Appellant's action in the matter, so far as has been made to appear, was confined to giving the first order to Gwatkin about the 13th July, and subsequently writing the letter of July 20. If I were satisfied that appellant when he did that much knew of the existence

(1) L. R., 13 Ch. D., 110; 49 L. J. Bank., 1; 28 W. R., 174.

of the Injunction, I should commit him; but I cannot commit him on the above materials. He has made no affidavit denying knowledge of the Injunction, but I do not consider that plaintiffs have made out a case calling for an affidavit on his part. I was at first impressed with the suspicion, arising from his employment under the defendant, that he knew of the Injunction; but I must have more than this before I can commit him to prison. He might have been examined in Court, for he attended the District Court in obedience to the summons issued to him, and was present at the discussion of this application on the 5th October, but plaintiffs did not think it proper to take that step, and so put him to state on oath whether he had any and what information about the Injunction.

I cannot commit appellant to prison, but I think it a case in which he ought to pay the costs of the application to commit, seeing that his act, done on behalf of the defendant, began the mischief. (Compare *Rantzen* v. *Rothschild* (2)). Appellant must pay the costs of the application in the District Court, but as he has to a considerable extent succeeded in appeal, I cannot make him pay any appeal costs. There will be no costs in appeal.

I may point out that the plaintiffs seem to have omitted the precaution of giving notice of the Injunction on the land itself.

Committal set aside.

Proctor for appellant, *V. A. Julius.*
Proctor for respondents, *A. O. Joseph.*

30th June, 1882 *and* 13*th February*, 1883.

Present—De Wet, A. C. J., Clarence and Dias, JJ.

D. C. Colombo, 79,606. } Tantrige Johanna and six others v. Tantrige Harmanis.

Inheritance ab intestato—*Collation*—Donatio simplex, *liability of to collation.*

S., the owner of three lands, conveyed by deed to the defendant, his only son (the youngest of seven children) undivided half-shares of the

(2) 14 W. R., 96.

lands, reserving to himself the right of possession so long as he should live. S. having died intestate, the plaintiffs (his wife and children) raised the present action to eject the defendant from certain encroachments made by him on the remaining halves of the lands, which the plaintiffs claimed to inherit exclusively, the defendant being unwilling to collate the subject matter of his gift. Defendant claimed, in addition to the halves gifted to him, an undivided one-fourteenth of the estate of S. as one of seven children of S.

Held, that the gift, not having been made in consideration of marriage or for other special purpose, was a *donatio simplex*, and as such not liable to collation except in two cases, viz. *first*, if it was expressly made liable to collation; and *second*, if some of the donor's children have received dowries, and the *donatio simplex* be given in lieu of a dowry.

Held accordingly, that the gift to the defendant was not liable to collation.

Siman Perera deceased and his wife *Anna*, the seventh plaintiff, were married in community of goods and had six daughters (represented by the first six plaintiffs) and one son (the youngest child) the defendant. On 18th June 1874, *Siman Perera*, by deed of gift conditioned to take effect in possession after the donor's death, conveyed to the defendant half shares in the three lands which constituted the immoveable property of *Siman Perera* and his wife *Anna*. *Siman* died intestate about February 1879, and in October of that year the present action was begun. The plaintiffs alleged that defendant was in possession of more than his deed of gift gave him, having encroached on the other halves of the lands, and was also in the forcible possession of certain moveables that belonged to the common estate. The plaintiffs excluded defendant from the inheritance of his father, on the ground that, defendant having received by gift more than his legitimate share of the inheritance, he could not claim to inherit any portion *ab intestato* without bringing the subject of the gift into collation. The defendant claimed, in addition to the halves conveyed by the deed, one-fourteenth undivided share of *Siman's* estate, as one of his seven children. As regarded the moveables, defendant set up a family arrangement by which they were given to him.

The District Court (*O. W. C. Morgan*, Judge) upheld plaintiffs' contention as to the lands, and gave defendant judgment only for the shares conveyed by his deed, dismissing his claim to inherit *ab intestato* because he was un-

willing to bring the subject-matter of the gift into collation. Plaintiffs got judgment for Rs. 75 as the value of the moveables.

The defendant appealed.

The case was first argued on 24th March 1882 before CLARENCE, A.C. J., and DIAS, J., by *Browne* for the appellant and *Wendt* for the respondents. The case was put on for re-argument before DE WET, A. C. J., when he should arrive in the Island, and it now came up accordingly.

Browne, for the defendant, appellant.

First, On the question of Collation. The law that should govern this case is the *Placaat* of 1599 (1). By a Resolution of the Governor of Ceylon in Council, dated 20th December 1758, the Letters Patent of the Dutch East India Company (dated 10th January 1651) together with the documents thereto attached, were forwarded to the Courts of the Island "for their guidance and due observation." This *Placaat* was one of the five annexures to those Letters Patent, the *Political Ordinance* of 1580 and the *Interpretation* thereof dated 13th May 1594 being two others. It was held by the Supreme Court (*Sir Hardinge Giffard* being Chief Justice) in 1822 (2) that the *Placaat* of 1599 was the system of Law in force in the Island, by virtue of the aforesaid Resolution of the Governor of Ceylon. That *Placaat* repealed the *Political Ordinance* so far as it concerned a part of Holland, and enacted a different system of Succession. [DIAS, J.—That decision was overruled by a subsequent case (3) in which it was held that the *Political Ordinance* ought to govern in Ceylon.] Even if the *Ordinance* should govern, its 29th section enacts that, "if children shall have received from their parents any estate or effects in dowry or donation on account of marriage, or for the purpose of aiding them in trade or merchandise, or otherwise, and shall on the death of their parents be desirous of sharing in the estate equally with the other children, such children must first bring into the common estate all what they had previously received, or the real value thereof." Reading this section without punctuation, I submit it contemplates only gifts on account of marriage, or for the purpose of special

(1) VanderStraaten's Reports, Appendix, p XVII.
(2) VanderStraaten's Reports, Appendix, p XXII.
(3) VanderStraaten, 172.

assistance—in trade, in merchandise, or for any other special purpose; and that the words "or otherwise" should not be construed as meaning "any gift whatsoever." All gifts of love or affection such as this, made (after all the daughters had been married and dowried) to the only son, with whom the donor was living, would not be such special gifts nor liable to collation, but would fall under the general rule as laid down by Burge (1): "In the opinion of a numerous body of Jurists no collation of such gifts (viz. *donationes simplices*) takes place; and such may be considered as the doctrine of the civil law." [DIAS, J.—The Ordinance 15 of 1876, sect. 39, renders liable to collation what children have received over and above their brothers and sisters either on occasion of marriage or to advance or establish them in life; but that Ordinance cannot govern this case.] The passage from *Van der Keessel* relied on by the plaintiffs in the Court below (Thesis 349) contains a very great advance on his text of *Grotius* (*Introduction*, Lib. II. chap. XXVIII § 14). *Grotius* only makes donations, which children or grandchildren have received for the purposes of their marriage, or to start them in trade or business, liable to collation, while *Van der Keessel* includes even simple donations among those to be collated. [He proceeded to read, as part of his argument on this point, the judgment of Mr. *Berwick*, District Judge, in D. C. Colombo Testamentary No. 3,567 (2).]

Secondly, *On the merits*, as regards the lands, the defendant is entitled to all within the boundaries which he has proved to have existed at the date of the gift to him. [CLARENCE, J.—You cannot contradict your deed, which gives you a half irrespective of any boundaries]. Then, the plaintiffs have alleged a specific ouster which they should prove. The evidence shows that the defendant only continued to possess what he had cultivated during the father's life time. *In respect of the moveables*, the District Judge has found they were of the value of Rs. 75, and not Rs. 394 as plaintiffs alleged, and he has adopted the defendant's list, except as to one item of Rs. 15. When the plaintiffs succeeded as to so small a fraction of their claim, they should not have had costs.

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(1) *Colonial and Foreign Law*, vol. 4, p 680.

(2) See Appendix F.

Wendt (*Brito* with him) for the plaintiffs, respondents, *contra.*

First, As to Collation. It is clear from the 29th section of the *Political Ordinance* that, as a rule, even simple donations are liable to collation when children divide an inheritance with a surviving parent. If the words of the *Ordinance* itself admit of any doubt, there is the authoritative interpretation put upon them by *Van der Keessel* (Thesis 349) which, he says, is rendered necessary by the whole analogy of the Roman-Dutch Law. It was to be expected that *Van der Keessel's* Commentary (which was published in the year 1800) should contain an advance on his text of *Grotius*, who wrote in 1620, for to bring the *Introduction* up to the present state of the law was the object of the *Select Theses* of *Van der Keessel*. As to *Burge*, he professes to give the doctrine of the pure Civil Law. By that law there was no collation whatever with a surviving parent, and such collation was a provision of Statute Law, viz. of the *Political Ordinance* (1). Again, even assuming that as a general rule *donationes simplices* are not liable to collation, yet there are two cases in which they are, viz. (*a*) when this condition has been expressly attached to the gift by the donor; and (*b*) when some of the donor's children have received dowries or donations in contemplation of marriage, and others simple donations—the gift in the latter case partaking of the nature of one *ob causam accepta* and so liable to be collated (2). The defendant has himself proved that his six sisters had been married out previously to this gift and had received dowries, the shares of land given to the defendant being an analogous gift and so bound to be collated, as in *Voet's* second exception to the rule. Considering the very purpose of collation, viz., the prevention of inequality among the shares of the children, it is clear the present donations should be collated, as the property donated amounts to an entire half of all the father's estate. [DE WET, A. C. J.—That argument would apply in the state of the law in the time of *Voet*, when the principle of "legitimate portion" was in force; but my brother DIAS points out that by Ordinance 21 of 1844 that principle was abolished in Ceylon, as it has been lately at the Cape.] That Ordinance contemplates only testamentary dispositions. Besides, even in the time of *Voet*, a father could work a great in-

(1) Van Leeuwen, *Cens. For.*, pt. 1, lib. 3, cap. 13, § 21.
(2) Voet, *ad Pand.*, XXXVII. 6. 13.

equality among his children, by saving to each his "legitimate portion" (which was but a fraction of his estate) and giving the bulk of his property to one child, which that child might have refused to collate. Further, collation has never been compulsory in all cases, but only where the donee wishes to take a share by inheritance in addition to the gift. The defendant here may keep his simple donations, provided he does not claim the additional one-fourteenth by inheritance. The very magnitude of the gift would raise a presumption that the father intended to exclude inheritance by defendant. The judgment of Mr. *Berwick* cited lays down that collation of all considerable gifts, except where specially provided otherwise, is the rule of the Roman-Dutch, as of the Scotch, Law.

Secondly, On the Merits—As regards the lands, sufficient cause of action has been shown by the proof that the defendant is in possession of more than his deed gave him and refuses to give up the excess to the plaintiffs. This excess is more even than the one-fourteenth share which the defendant claims. Though the Judge has partly adopted defendant's list of the *moveables* he has not accepted it altogether; and further the main cause of dispute was the land, and the plaintiffs having succeeded on that issue are entitled to their costs.

Cur. adv. vult.

(13th February, 1883). Present—CLARENCE, J. The following judgments were read :—

DE WET, A. C. J.—From the pleadings and evidence in this case it appears that the father of the defendant, prior to his death which happened in the early part of the year 1875, donated to the defendant, by deed of gift dated 1st June 1874, certain properties described and set forth in that deed. The questions to be decided are, 1. Is the gift of the 1st June liable to be brought into collation? 2. Has the defendant encroached upon any portion of ground not included in that gift? 3. Has the defendant taken forcible possession of the articles enumerated in List W. annexed to the libel, forming part of his deceased father's estate.

With reference to the first question, *Voet* (*ad Pand.*, 37. 6. 13) lays down the law as follows: "But as the conditions upon which all things given by a deceased person during his life-time to his descendants are not the same, it

seems advisable to discuss the chief points with reference to the same. That collation ought to take place of dowry given by parents, and of *donatio ante nuptias*, is manifest from the following title, *De Dotis Collatione*, and there the question will be found fully treated of. But with reference to the question whether a simple *donatio* made by parents to children ought to be brought into collation, we must separate *donatio remuneratoria* from *donatio simplex*. A *donatio remuneratoria* is one which the father confers upon his own son, not as his son, nor from common affection, but as being the author of some benefit conferred upon him (the father)—that is, a donation which a father would have made even to a stranger, if that stranger had conferred upon him the same benefit which the son had conferred upon him. For, as the son holds such a donation not as a donation but upon a different right, and as it cannot be regarded as *profectitia*, but must be regarded rather as *adventitia*,—that is, property obtained by design and remarkable service —it seems that collation of such a donation ought in no case to be made, as *Vinnius* following many other authorities lays down (*de Collatione, cap.* 13, *num.* 12). But concerning simple donation itself, it seems necessary to say that it is not liable to collation except in two cases, one of which is, if the parent who gives attaches to his gift this condition, &c. * * * * * * *
Vinnius lays down that, among Zeelanders, Burgundians and the French, collation ought to be made of a simple donation: but since this does not appear to be received by a constant practice by our customs, it is best that we should adhere to the principles of the Civil Law, to which view the opinion of *Van Leeuwen* is more inclined. *Vide Van Leeuwen, Roman-Dutch Law, lib.* iii, *cap* 16, English Translation (1820) p. 309, in which passage for "single" read "simple" gifts, the Dutch words being *enkele giften*.

Again in Lybreghts, *Redenerend Vertoog over't Notaris Ampt* (vol. 1, cap. 14, num. 8) we find the following laid down by that authority. "*Simplex donatio*, or simple gilt, is not collated, *cum liberi non teneantur conferre ea quæ pure atque simpliciter iis a parentibus donata fuerint, nisi parentes id expresse jusserint.*"

Huber, (*Heedendaegse Rechtsgeleertheyt*, lib. 3, cap. 32, sect. 14) lays down the law as follows: "If parents have donated anything to their children from motives of generosity, the same need not be collated, and this has reference

to children who are still *in patris potestate* as well as to those who have been emancipated (*extra patris potestatem*) ; for although gifts to children *in patris potestate* are invalid *ab initio*, still the gifts not having been revoked are confirmed by death, so that they enure to the benefit of the children, as if by virtue of a testamentary disposition, and consequently are not liable to be collated."

Lybreghts also lays down the same proposition, but adds, "Still the difficulty remains how a child will be able to prove that this or that has been donated to him or her. The safest plan is to be furnished with written proof." In other words, to avoid the question whether or not donations are to be brought into collation, the donees should be furnished with evidence of the donor's intention.

In this case there is the deed itself, which clearly sets forth the names of the donor and donee, the subject-matter of the gift, and no injunction that the gift should be brought into collation. (*Vide* Deed of gift). Taking the authorities I have quoted into consideration, I am of opinion that the gift is not liable to be collated, and that the defendant is entitled to the subject-matter of the gift, and also to his share of the paternal inheritance as it existed at the date of his father's death.

Looking at the evidence, it cannot be denied that there has been an encroachment—unwittingly, no doubt—on the part of the defendant upon the other portions of the lands set forth in the libel. With reference, therefore, to the claim as regards the immoveable property, I am of opinion that the defendant is entitled to the portions only marked A in the plans put in at the trial, marked X, Y, Z.

The evidence does not satisfy me that there has been a forcible possession by the defendant of the moveables mentioned in the List W. As regards the jewelry, there is sufficient evidence to shew that a valuation was made of them, and that the defendant paid to the heirs the value of such jewelry.

The only part of the judgment of the District Judge which can be sustained is that part of it having reference to the alleged trespass.

My judgment therefore is for the plaintiffs, Re. 1 damages for the trespass. Defendant is restrained from trespassing upon the lands marked C, B, and B in the plans, X, Y, Z put in at the trial; and no order will be made as to costs in this Court or in the Court below.

CLARENCE, J.—In 1874 *Siman Perera*, the father of defendant, gifted by deed to defendant portions, described in the deed, of three lands named Delgahawatte, Delgaha-owitte, and Potuwile Cumbure. He died in 1875, intestate, leaving him surviving children and grandchildren and a widow, the mother of his children.

The present action is brought against defendant by the widow and the representatives of defendant's brothers and sisters, who complain in substance that defendant has possessed himself of more of his late father's estate than he is entitled to. They contend that defendant has encroached beyond the boundaries of the gift upon adjoining lands of his father's, that he has forcibly taken possession of certain moveable property, and lastly that he is not entitled to participate in the inheritance *ab intestato* except on the terms of bringing into collation that which was conferred upon him by the gift.

I see no reason to disapprove of the District Judge's finding with regard to the moveable property, or with regard to the questions of encroachment. The defendant, who declines to bring into collation anything taken by him under the gift, is entitled so far as the gift is concerned to neither more nor less than what is described in the gift-deed. I think that with regard to Delgahawatte the deed conferred on defendant plots A and C as shewn on plan X; with regard to Delgaha-owitte, plot C on plan Y; and with regard to Potuwile Cumbure, plot C on plan Z: and for the reasons assigned by the District Judge.

There then remains the question of collation :—whether defendant is entitled to participate in the inheritance *ab intestato* without bringing his gift into collation.

It was not disputed on the argument of the appeal, that the gift to defendant must be regarded as a *donatio simplex*. For what particular purpose (if any) the gift was made, or what in particular moved the defendant's father to make the gift, we do not know. We only know that the gift was made, with the intention, apparently, that the donor should continue to enjoy the land as long as he should live.

Whether or not *donationes simplices* are subject to collation, is a question which appears to have been very much debated amongst Roman-Dutch Jurists. In the present case the acting District Judge, following a dictum of *Van der Keessel* (Thesis 349), has held that the gift should be collated. In a previous case decided by the present Judge

of the same Court in 1876, Mr *Berwick* held, after a review of authorities, that a *donatio simplex* is not subject to collation; but held further, that in the absence of all evidence a considerable gift given by a parent to a child should be presumed to be given *tanquam dotis portionem constituens*. We have now to decide in appeal.

The conflict of opinion among Roman-Dutch Jurists is considerable. *Voet* (37. 6. 13) after stating that dowry and marriage gifts must be collated, and that *donationes remuneratoriæ* need not, proceeds to deal with the *donatio simplex*, and states his own opinion as follows:—"*Dicendum videtur eam non nisi duobus in casibus collationi obnoxiam esse.*" He then states those two case to be as follows:—(1) When the parent in making the gift has said so (i. e. that there is to be collation); and (2) when some of the children have received dowries or marriage gifts, which have to be collated, and the other children simple donations only; in which case, *Voet* says, the simple donations are also to be collated, in order to prevent inequality.

As I read sect. 29 of the *Political Ordinance* of 1580 (Translation appended to Vanderstraaten's Reports,) nothing is there laid down to the contrary.

We were also referred, as authority against the collation, to Burge (vol. 4, p. 680). Mr. *Wendt*, on the other hand, relied on *Van Leeuwen* (*Cens. For.*, 3. 13. 33 *et seqq.*) and the passage above cited from *Van der Keessel*.

Mackeldeins, *Systema Juris Romani hodie Usitati, art.* 696, states the rule much as *Voet* states it.

The Acting CHIEF JUSTICE, whose opinion I have had the advantage of perusing, cites further Dutch authorities in favor of the non-collation.

The distinction between a *donatio simplex* and a gift made on marriage or for advancement in business is, I suppose, that the latter is assumed to be merely an anticipation, prompted by the exigence of circumstances, of the child's presumptive share, and the former, for lack of any such consideration, is assumed to be a pure and simple bonus to the recipient.

I admit that the point is one of considerable difficulty, but upon the best consideration which I am able to give it, the position taken by *Voet*—that a *donatio simplex* need not be collated—commends itself to me as the true one. On this point, therefore, I agree with the Acting CHIEF JUSTICE that the judgment of the District Court must be set aside.

On the questions of fact, as I have already said, I do not see my way to interfering with the decision of the District Court.

The decree in appeal, according to my view, should therefore be :—

Set aside the Judgment appealed against.
Decree that plaintiffs are entitled to
plot B in Survey X
plots A, B ,, Y
plots A, B ,, Z
and that defendant is entitled to
plots A, C in Survey X
plot C ,, ,, Y
plot C ,, ,, Z
Parties to bear their own costs in each Court.

DIAS, J.—I had the advantage of reading the opinions of the Acting CHIEF JUSTICE and of my brother CLARENCE, and as I take the same view as they do on the question of collation, it is unnecessary that I should say anything more on that part of the case. In all other respects the judgment of the District Court appears to me to be right, and I have no objection to the decree formulated by my brother CLARENCE. Parties will pay their own costs in both Courts.

Set aside. Decree in appeal as formulated by CLARENCE, J.

Proctor for appellant, *W. P. Ranesinghe.*
Proctor for respondents, *James de Livera.*

22nd February and 1st March, 1883.

Present—CLARENCE, J.

C. R. Colombo, 33,634. } W. G. HALL v. BASTIAN Appoohamy.

Fiscals Ordinance, No. 4 of 1857, sect. 48—Sale of moveable property over £750 in value—Fiscal's commission.

Held, that the words "when the proceeds do not exceed the sum of seven hundred and fifty pounds sterling" in sect. 48 of the *Fiscals*

Ordinance, 1867, applied only to the proceeds of the sale of immoveable property, and did not affect the rate chargeable by the Fiscal on the proceeds of the sale of moveables.

The following Special Case was submitted to the Court of Requests, Colombo, for decision.

1. The present defendant, being the execution-creditor and holder of writ in the suit No. 81,780 of the District Court of Colombo, caused the plaintiff as Fiscal to sell on 3rd October, 1882, by public auction under the said writ certain moveable property, to wit, an incomplete ship in the Colombo Roadstead, belonging to the execution-debtor.

2. At the said sale the defendant became the purchaser of the said moveable property for Rs. 8,100.

3. The plaintiff as Fiscal is entitled to recover from the defendant a certain fee, in terms of the 48th section of Ordinance No. 4 of 1867, on the proceeds. That part of the said section which governs the present case runs thus:

The Fiscal or Deputy Fiscal shall charge a fee of three per cent. on the proceeds actually recovered and return thereof made to the Court in respect of every sale and resale of moveable property, and two per cent. on the proceeds of sale of immoveable property belonging to the debtor when the proceeds do not exceed the sum of seven hundred and fifty pounds sterling. When the proceeds exceed that sum, the Fiscal or Deputy Fiscal shall charge a fee of fifteen pounds sterling, and of ten shillings for every hundred pounds of the proceeds over and above the said sum of seven hundred and fifty pounds.

4. The plaintiff claimed as his fee under the above section Rs. 243, being at the rate of 3 per cent. on the said sum of Rs. 8,100.

5. The defendant disputed the said claim and contended that by the afore-recited section, in cases when the proceeds of sale whether of moveable or immoveable property exceed £750, the Fiscal could charge only £15, and 10 shillings for every £100; and calculating at this rate the fee would amount to only Rs. 153, and the defendant paid to plaintiff the said sum and refused to pay the balance Rs. 90 claimed by plaintiff.

6. The plaintiff on the contrary, urging that the defendant's contention would apply only in cases of the sale of immoveable property and not to the present case where moveable property has been sold, persists in claiming the balance Rs. 90 from defendant.

The question to be decided by the Court is whether, in cases of the sale of moveable property, where the proceeds exceed the sum of £750, the Fiscal can charge his fee at the

rate of 3 per cent., or whether he is not bound to charge only £15 for £750, and ten shillings for every hundred pounds of the proceeds over and above the sum of £750. In the event of the Court deciding that the Fiscal can charge at the rate of 3 per cent., then judgment must be entered in favor of the plaintiff for Rs. 90 and costs of suit. If the Court holds otherwise, the plaintiff must pay defendant's costs.

The Commissioner (*Smart*) decided as follows:

Clause 48 runs thus: "The Fiscal shall charge a fee of 3 per cent. on the proceeds of the sale of moveable, and 2 per cent. on proceeds of sale of immoveable property when the proceeds do not exceed £750 sterling." Then comes a full-stop, which terminates the sentence. I read this to mean that where property is sold of less value than £750 a fee of 3 per cent. may be charged on the proceeds if the property is moveable, and 2 per cent. if it is immoveable. Then follows this sentence: 'when the proceeds exceed that sum'—that is to say, if property whether moveable or immoveable is sold and its proceeds exceed £750—then a fee of £15 shall be charged, with 10 shillings for every additional £100. If the Ordinance meant to exclude moveable property from this rule, then there would have been special mention of it as in the previous sentence. The clause relates to the sale of property, moveable and immoveable indiscriminately."

The plaintiff appealed.

Nell, D. Q. A., for the plaintiff, appellant—

The limiting words "when the proceeds do not exceed the sum of £750 sterling" attach only to the words immediately preceding, providing for the sale of immoveable property, leaving 3 per cent. to be charged on *every* sale of moveables. The absence of a comma or other stop after the words "belonging to the debtor" clearly shows this. This is the punctuation in the volume declared by the Ordinance No. 7 of 1872 to contain the true version of the Ordinances up to 1870. When the language of a statute is ambiguous, the punctuation is a valuable guide to the meaning of the Legislature. See remarks of Lord *Romilly*, M. R., in *Barrow* v. *Wadkin* (1). Though there the Roll of Parlia-

(1) 24 Beav., 330.

ment was taken to be the best evidence, it was found unpunctuated, and the case was decided on the general scope of the Act in question, 13 Geo. 3, c 21, s 3. If we take the comma after the word "property" as dividing the clause into two parts, we have the former part of it providing for all sales of moveables, and the latter part for all sales of immoveables. Again, there is no provision for the resale of immoveables. Further, considering the reason for the remuneration, there is more trouble required on the Fiscal's part in the sale of moveables (involving custody, cataloguing, sale in lots, &c.) than of immoveables. The distinction I contend for seems carried out in sect. 49 too.

Grenier, for the defendant, *contra*—

The words "when the proceeds" after the full-stop evidently cover the proceeds both of moveable and immoveable property. The difference in the present case between the two rates is only Rs. 90; but what if the Fiscal had to sell a steamer worth over £50,000? Is the Fiscal then to charge 3 per cent. on that sum for what costs so little trouble, and to have only 2 per cent. on the proceeds of a coffee estate, where there are the formalities of notices, &c.? Further, half-fees are chargeable on stay of sale of *all* property without distinction of rate. The words of the statute are clear, and no ingenuity need be resorted to for ascertaining the intended meaning.

[During the argument, the copy of the Ordinance in question, signed by the Governor and filed in the Supreme Court, was brought into Court, and the learned judge remarked that though it agreed with the authorised volume in having no stop after the word "debtor," yet the punctuation on the whole in that copy was grossly incorrect, there being no full-stop after the word "sterling" though the following word began with a capital letter.]

Cur. adv. vult.

The substance of the following Judgment was delivered in Court by CLARENCE, J. on 1st March 1883, the written Judgment being subsequently handed in.

CLARENCE, J.—Respondent, being execution creditor in a District Court action, issued his writ, under which the Fiscal, who is appellant, seized certain moveable property,

to wit a ship, and sold it under the writ. The property was bought by respondent at the price of Rs. 8,100.

The question which I have now to decide is, whether upon the true construction of the 48th section of the *Fiscals Ordinance*, 1867, the Fiscal is entitled to charge three per cent. on Rs. 8,100; or whether he is only entitled to charge at the rate of £15 for the £750 *plus* 10 shillings per cent. on the surplus over and above that sum. That is to say, the question is, whether the words commencing with line 9, "when the proceeds exceed that sum the Fiscal * * * shall charge a fee of £15 etc.," apply to sales of moveable as well as of immoveable property, or whether they apply only to sales of immoveable property when the proceeds are over £750.

I confess that when the question was first presented to me I felt considerable doubt upon the construction of the enactment, so much so that I suggested to Counsel whether the point should not be argued before the Full Court. Upon consideration of the matter those doubts have been removed, and as Counsel prefer to have my decision rather than delay the matter by a re-argument before the Full Court, I will state the conclusion at which I have arrived.

I have compared the section as printed in the 1874 Edition of Ceylon Legislative Enactments with the copy furnished by H. E. the Governor to be filed of record in this Court. And I find that these two prints of the section tally in all respects except on two points of punctuation. In the 1874 edition there is no comma before "when" in line 7. In our copy there is a comma there. In the 1874 edition there is a full-stop at the end of line 8. In our copy there is no full-stop, but the next line begins with a capital letter. This merely shews that the punctuation of the enactment as printed in our, which is the original, copy has been careless.

I find that the enactment is taken from the 10th section of the Rules and Orders of 11th July 1840, which were repealed by the Ordinance of 1867. Substantively the only difference between the enactment, as printed in the Rules and Orders (page 124) and as now printed in our copy of the Ordinance of 1867, is that in the Rules and Orders, after the words "seven hundred and fifty pounds sterling," there is a semicolon and the word "but." I do not think that this comparison of the original Rules and Orders and the two prints of the present enactment throws much light

on the question; but I think it favours the construction at which I have arrived rather than the contrary one.

In all three prints the enactment begins by declaring that the Fiscal is to charge three per cent. on "*every* sale" of moveable property, and that he is to charge two per cent. on the sale of immoveable property when the proceeds do not exceed £750. Now I cannot satisfactorily account for the use of the word "every" unless it was intended to include all sales of moveable property, to whatever amount. Read the enactment up to that point, and it implies that all sales of moveables, to whatever amount, are to pay three per cent.; and that sales of immoveables up to £750 are to pay two per cent. There then is something still to be provided for, viz. sales of immoveables over £750; and those are provided for in the next few lines. I believe this to be the meaning of this enactment, and that there has merely been a little awkwardness in the punctuation and the frame of the last part of the clause. The words "every sale * * * of moveable property" are to my mind quite inconsistent with the other construction; and, moreover, had it been the intention of the Legislature to give 3 per cent. on moveables only up to £750 it would have been so easy to place that meaning beyond doubt by omitting the "every" and beginning the clause after this fashion—"When the proceeds, &c., do not exceed £750 the Fiscal shall be entitled to charge 3 per cent. on the proceeds of moveable property and two per cent. on the proceeds of immoveable property, but," &c.

There is another consideration which was adverted to in argument and which seems to favour the construction which I am now putting on the Enactment. It was urged that moveable property being in general sold in a number of small lots, the sale is more troublesome than a sale of immoveable property, which would be sold in one lot or at most comparatively few lots, and that on that ground the Legislature probably intended that all sales of moveables should pay a higher rate than sales of immoveables. I think that that is so. Doubtless if sales of immoveable property were conducted on Conditions of Sale having due reference to the execution debtor's title, the task of managing such sales would be one requiring far more trouble and responsibility than sales of moveables; but we must consider the practice as it exists and has existed, and so far as my impression goes, Fiscal's sales of immoveable property are

not conducted in this country on conditions of sale as to title.

As the parties to this Special Case, viz. the Fiscal and the execution creditor who is the purchaser, desired my opinion on the point, I have now stated it. I may, however, observe that there is a party interested in the question, viz. the execution debtor, who is no party to this case, and who is therefore not *ex necessitate* bound by the result of the case; and I may further observe that the point would have been more appropriately raised, to say the least, in the District Court case. Since, however, the two parties to this appeal have been to the trouble and expense of contesting this Special Case, I have thought it right to give my decision.

The result is, that according to the terms of the arrangement between appellant and respondent, I find, as between appellant and respondent, that appellant is entitled to the Rs. 90 mentioned in the case, and to his costs of the case in both Courts.

Set aside.

Proctor for *W. Hall*, *W. B. Rodrigue.*
Proctor for *Bastian*, *P. CoomaraSwamy.*

26th September and 29th November, 1882 *and*

13th March, 1883.

Present—DE WET, A. C. J., CLARENCE and DIAS, JJ.

D. C. Kandy, 89,917. } F. W. NEATE v. Maria DE ABREW Haminey.

Servitude ne luminibus officiatur—*Acquisition by prescriptive possession*—Juris quasi possessio—*Ten years' uninterrupted enjoyment*—*Ordinance* 8 *of* 1834, *sect.* 2—*Ordinance* 22 *of* 1871, *sect.* 3—*Kandyan Provinces, law in force in*—*Regulation* 13 *of* 1822—*Ordinance* 5 *of* 1852, *sect.* 5.

Plaintiff and defendant owned adjoining lands. Plaintiff's house stood close to the boundary, and his sitting-room and bed-room had windows looking out on defendant's land, through which plaintiff had for over ten years uninterruptedly enjoyed light and air. Defendant began to build on her own land so as to shut out such light and air from plaintiff's windows, and plaintiff sought an injunction to restrain her from so doing.

Held, that the servitude claimed by the plaintiff (*ne luminibus officiatur*), being a negative servitude, could not, under the Roman Dutch Law, be acquired by prescription in virtue of bare enjoyment for the necessary period, such enjoyment involving no invasion of the neighbour's *dominium*.

The Regulation 13 of 1822 repealed "all laws heretofore enacted or customs existing" in the maritime districts of the Island " with respect to the acquiring of rights or the barring of civil actions by prescription"; and this repeal was kept alive by the subsequent Ordinances, 8 of 1834 and 22 of 1871. Ordinance 5 of 1852, sect. 5, provided that, on a *casus omissus* arising in the Kandyan Provinces, resort should be had to the law on the subject in force in the maritime provinces.

Held, that consequently the Roman Dutch Law on the subject of prescription was in effect repealed for the Kandyan Country also.

There being no local Kandyan law on the subject of prescription, and the case therefore falling under Ordinance 8 of 1834 or Ordinance 22 of 1871,

Held, (following *C. R. Point Pedro* 41 (1), that ten years' enjoyment of the use, convenience or advantage, which would be enjoyed by the owner of the dominant tenement if there were a servitude in existence, brings the correspondiog servitude into existence, by virtue of sect. 2 of Ordinance 8 of 1834 (corresponding to sect. 3 of Ordinance 22 of 1871); and that the plaintiff, having had the uninterrupted enjoyment (without express permission or licence) of these window-lights, deriving light from defendant's land, was entitled to have the defendant restrained by perpetual injunction from building so as to obscure them.

C. R. Point Pedro 41 (1) dissented from by CLARENCE, J.

The libel, which was filed in January 1882, alleged that the plaintiff, as partner of J. N. D'Esterre, the owner of a land called Dewategahamulahena, had been in the possession of, and had resided in the building on, the said land, since October 1870. That the said building contained a drawing-room and a bed-room, each of which obtained air and light through a window from the open and vacant ground on the S.W. side, which open ground formed part of a land belonging to and in the possession of D. H. Fonseka, the defendant's late husband. That plaintiff became sole owner on 7th June, 1877, and had enjoyed for a period of 10 years all the light and air that came into his drawing-room. That the defendant who had succeeded her husband in possession, wrongfully intending to injure the plaintiff and to deprive him of the use of the said window, had laid the foundation of a wall to be erected at a distance of $3\frac{1}{2}$ feet from the S. W. wall of plaintiff's dwelling house, and had continued to build the said wall, which had attained the height of 4 feet, to the plaintiff's damage of Rs. 4,800. The libel concluded with a prayer for a declaration of title

(1) RamaNathan, 1860-62, 75.

to the free and unrestricted enjoyment of light and air, and for damages, and for an *ad interim* injunction.

The answer denied the prescriptive enjoyment of 10 years, and denied that such enjoyment conferred any right on plaintiff, and put the alleged trespass in issue, justifying the building as on the defendant's own land. The defendant prayed for a dismissal of plaintiff's suit and for a decree for Rs. 500 damages caused to the defendant's wall by plaintiff pulling down a part thereof, and for a dissolution of the *ad interim* injunction granted by the Court.

At the hearing in the Court below *VanLangenberg* and *Eaton* appeared for the plaintiff, and *Beven* for the defendant. After evidence heard on both sides the District Judge (*Lawrie*) gave the following judgment :

It forms no part of the defendant's case to deny that the building which she intends to erect will interrupt the entrance of light and air into two of the plaintiff's rooms. She may admit to the fullest extent every word which the plaintiff and his witness have said. But "it often happens in the ordinary proceedings of life that a man may lawfully use his own property so as to cause damage to his neighbour which is not *injuriosum*, or he may, while pursuing the reasonable exercise of an established right, casually cause an injury, which the law will regard as a misfortune merely, and for which the party from whose act it proceeds will be liable neither at law nor in the forum of conscience." (Broom's *Legal Maxims*, 197). One of the illustrations which Broom gives of this is, "So a man may lawfully build a wall on his own ground in such a manner as to obstruct the lights of his neighbour, who may not have acquired a right to them by grant or adverse possession. He may obstruct the prospect from his neighbour's house."

The question for decision here is, Has the plaintiff acquired a right to prevent the defendant from building up to the boundary of her own land? It is not said that the plaintiff has asserted such a right except by having windows in his own house, nor is it said that the defendant has done anything which infers her acquiescence in the acquisition by the plaintiff of such a right, except that she has not until now built on her own ground.

I am of opinion that the mere circumstance of having made no objection to his having opened these windows does not infer acquiescence by the defendant, nor confer on the

plaintiff a right to prevent her making full use of her own property.

I have not been referred to any passages in writers on Roman-Dutch Law which support the plaintiff's contention. The defendant's Counsel referred me to Grotius, II. 34. 22, 23 (Herbert's Translation, p. 209). "Window right, that is a right to have a window looking over another's ground, and confers a right of free light or *jus luminibus non officiendi* .....But the sufferance of a window which overlooks the land does not of itself and without other aid afford proof of servitude." I have looked at Voet's *Commentary*, VIII. 2. 10, 11. I find nothing there which shows that the servitude *ne luminibus officiatur* can be acquired by the mere existence of windows overlooking another's ground. Formerly by the law of England the acquisition of this servitude after immemorial enjoyment rested on a presumption of a lost grant. There is no such ground here, but on such a question as this the old Common Law of England is not of authority in this Colony. Even that Common Law —in the words of COLERIDGE, J., in *Truscott* v. *Merchant Tailors' Company* (1)—has been simplified and almost "new-found" by the Act 2 and 3 Will. 4 c. 71. Lord WESTBURY in *Tapling* v. *Jones* (2) says, "The right to what is called 'an ancient light' now depends upon positive enactment. It is matter *juris positivi*, and does not require, and therefore ought not to be rested on, any presumption of grant or fiction of a licence having been obtained from the adjoining proprietor." That Act of Parliament, 2 and 3 Will. 4 c. 71, is of course not law here. By it nothing but 20 years' enjoyment of light gives prescriptive right to it. Of the English cases there are, certainly, some which support the plaintiff's contention, while others favour the defendant's, and of the latter I refer to the reasoning in *Webb* v. *Bird* (3) and *Chasemore* v. *Richards* (4). But at the same time I hold that the law of England has nothing to do with this class of cases in Ceylon. By the law of Scotland, founded on Roman Law—therefore here of more weight than English Law—the acquisition of this servitude depended on a presumed grant, and by that Law (see *Stair* 2. 7. 9; Erskine's *Institutes* 2. 9. 10; Bell's *Principles*, §§ 994-1005),

(1) 11 Ex., 863; 25 L. J. Ex., 173.
(2) 34 L. J. C. P., 344.
(3) 13 C. B., N. S., 841; 31 L. J. C. P., 335.
(4) 7 H. L. Cas., 349.

the mere circumstance of having made no objection to a neighbouring proprietor opening a window will not infer a grant of servitude of light or prospect. I have not found any case in our local Reports in which the question as to how the servitude *ne luminibus officiatur* can be acquired is discussed. I am of opinion that by our Prescription Ordinance, either 8 of 1834 or 22 of 1871, no one can acquire a right in or over his neighbour's land merely by exercising ordinary acts of ownership over his own land. To confer a right by prescription, there must be possession by the person asserting the right. I have read carefully the judgment of Sir Edward Creasy in *C. R. Point Pedro* 41, (6), where he discusses the *possessio* or *juris quasi possessio* of servitudes. It is, I think, a fair inference from that judgment to hold that there must be the exercise of a *jus in re*, something done *on or to the subject* over which the servitude is claimed. There must be actual enjoyment, not a mere claim of title, an abstract right. There Sir Edward Creasy defined "possession" when applied in legal language to a servitude, such as the *jus itineris*, to be "the exercise of a *jus in re* with the *animus* of using it as your own, as of right, not by mere force or by stealth, and not as a matter of favor, *nec vi, nec clam, nec precario.*"

I am of opinion that the plaintiff has no right to prevent defendant from building on her land, that the injunction should be re-called, and that the action should be dismissed with costs.

The plaintiff appealed, and the appeal was argued on 26th September 1882, before CLARENCE and DIAS, JJ.

Van Langenberg, for the plaintiff—

1. There is such a servitude as that contended for, though this appears to have been doubted in the court below. Henry's *Van Der Linden*, p. 169. [*Grenier*—I admit that such a servitude is known to our law, but I deny its acquisition in the present instance.]

2. As to acquisition by prescriptive possession. Ordinance No. 8 of 1834 must govern this case. Do servitudes come under the "immoveable property," for the prescriptive acquisition of which in 10 years sect. 2 provides? The interpretation clause of the later Ordinance (22 of 1871) includes servitudes and easements in "immoveable

(6) RamaNathan, 1860-62, 75.

property," the term of prescription being 10 years. It has been held that right of way is "immoveable property," under the old Ordinance. *C. R. Point Pedro* 41 (1). "By parity of reasoning, all easements and servitudes that issue out of lands are immoveable property under the Ordinance." (2). So a person may, through enjoying the right uninterruptedly for 10 years, acquire the servitude of having his tree overhang his neighbour's ground. *C. R. Colombo* 39,971 (3). As to English Law, *Staight* v. *Burn* (4), though that Law is entirely different from the Roman Dutch on this point. It is proved that the lights in question existed uninterruptedly for over 11 years; so that the title by prescription is made out.

Grenier, for the defendant, *contra*—

There is a difference between the possession of corporeal and of incorporeal property, and the term *juris quasi possessio* was invented to cover the latter case. Further, as there must be the *traditio* of immoveable property before a vendee can sue a third party in ejectment, so there must also be the *quasi traditio* of a servitude before it can be acquired by possession, which differs in its character in the case of a positive as distinguished from a negative servitude. "Modern writers on Roman Law are much divided in opinion whether servitudes were really constituted *pactionibus et stipulationibus*, by agreements and stipulations alone, or whether we are always to understand that, to perfect the title, what is termed *quasi traditio* was necessary. That is, whether, as *traditio* was necessary to transfer the property in a corporeal thing, so it was necessary, in order to transfer the property in an incorporeal thing, that the person to whom it was transferred should be placed in the legal quasi-possession of his right. If the servitude was a positive one, it is very easy to see how this quasi-possession could be established; for directly the right was exercised with the *animus possidendi*, and permitted to be so exercised by the owner of the *res serviens*, the person in favour of whom the servitude was constituted would have the quasi-possession. But when the servitude was a negative one, when the owner of the *res serviens* was merely bound *not* to do something, the only evident mode by which possession could be said to be gained was, when the owner of

(1) RamaNathan, 1860-62, 75.
(2) 2 Thomson, *Instit.*, 182.
(3) RamaNathan, 1863-68, 234.
(4) L. R., 5 Ch, App., 163.

the *res dominans* successfully resisted an attempt of the owner of the *res serviens* to do the thing which he was bound by the servitude not to do...On the whole, it seems the better opinion that quasi-tradition was a necessary part of the constitution of a servitude" (1). "The possession of negative easements may be acquired in two ways—by adverse user, and by legal title; i. e., 1st, by resistance to the attempt to obstruct the user; 2nd, by any juridical proceeding, which in its form is capable of transferring the right of easement." (2) [CLARENCE, J.—Under the English Law mere enjoyment uninterruptedly for 20 years confers title. You contend that by our Law here there must in addition be something active done by the owner of the dominant tenement.] Yes. If, for instance, the defendant put up a screen, which plaintiff removed, and defendant desisted from further interruption, there would be the necessary action on the part of the claimant of the servitude. [CLARENCE, J.—That may be the Civil Law, but it seems inequitable that a man who has enjoyed a light for an indefinite length of time should be deprived of it for want of the *quasi traditio.*] In England, Act 2 and 3 Will. 4 c. 71 expressly says that 20 years' continuous enjoyment is sufficient to vest title. Section 3 of that Act enacts "that when the access and use of light to and from any dwelling house, workshop or other building shall have been actually enjoyed therewith for the full period of 20 years without interruption, the right thereto shall be deemed absolute and indefeasible." Our Ordinance speaks of "adverse possession" and not mere enjoyment, and we must resort to our Common Law and not the English Law to find what the possession applicable to servitudes is. [CLARENCE, J.—The Judge in the Point Pedro case holds apparently that simple enjoyment would be enough.] Yes, but that enjoyment, to afford prescriptive title, must have a juridical beginning. In England the practice is to put up a screen opposite your neighbour's window, to prevent the Statute running. Here we have to interpret "adverse possession." How can a man who builds on his own land be said to act adversely to his neighbour? [CLARENCE, J. —Your argument seems to amount to this, that a servitude can be acquired by opposition only and not by acquiescence.] Not so: rather by acquiescence on the part of the owner of

(1) Sandars' *Justinian*, 6th Ed., 123.
(2) Savigny *On Possession* (Perry's Trans.) 386.

the *res serviens* after a successful resistance by the owner of the *res dominans* to the obstruction of light. If, as in this case, the plaintiff pulled down the defendant's wall, and the defendant acquiesced for 10 years, the plaintiff would undoubtedly acquire a servitude by prescription. My position is supported by Voet (1). *Interim praetermittendum hæud videtur, non eo solo induci servitutis præscriptionem, quod forte vicinorum unus jure suo in re suâ longo tempore usus non est, ac inde commodum alter vicinus percepit. Quid enim, si arbores in suo non plantaverit, viridaria non fecerit, altius in suo non ædificaverit, atque ita contigerit, ut vicina lumina diutissime remanserint non obscurata, liberiorve prospectus haud impeditus? Perperam sane vicinus inde sibi altius non tollendi, prospectui luminibusve non officiendi, servitutem asseruerit; cum altius exstruere in suo, et similia facere, res meræ facultatis sint, quarum intuitu præscriptio probata non est; sed omni tempore libertas salva.* Voet cites Neostadius, who says, *Cum enim naturalis hæc aeris in culinam perceptio sit facultatis tantum, nullo unquam tempore præscriptionem parere potuit: hoc amplius, quod negativa hæc servitus non nisi hominis præcedente facto acquiri potuit. Factum enim prohibitionis intercessisse oportuit et præterea huic prohibitioni obtemperatum: quorum neutrum hactenus intercessisse vel fatente actore verum est* (2). The light to which a man is naturally entitled is the perpendicular light of the sun, not the lateral light over another's land, which can only be acquired by servitude. [CLARENCE, J.—The use to which the rooms are put is also an element for consideration. So a diamond merchant needs more light than ordinary for his trade. Then there are cases which deal with the right to 45 degrees of light.] But that is under the *Metropolitan Buildings Act*, and does not apply here.

Van Langenberg, in reply—The defendant admits 10 years' possession, but says prescriptive possession should originate with some adverse assertive act on the part of the plaintiff, such as the bringing of an action to remove an obstruction to the light. If this argument prevail a servitude will never be acquired by prescription, for plaintiff could not have brought such an action successfully if he had not already acquired the right to the light. Had the contemplated obstruction been put up within the 10 years, the

(1) *Ad Pand.*, viii. 4. 5. (Hoskyns' Trans.) 41.
(2) *Supr. Cur. decis., decis.* 98.

plaintiff would have had no remedy, but our uninterrupted enjoyment for that period confers on us a right which cannot now be resisted.

The case was subsequently (on 29th November) put on for reargument before the full Court (DE WET, A. C. J., CLARENCE and DIAS, JJ.) when Counsel agreed to leave the case without further argument, furnishing their lordships with copies of the above report of the argument.

Cur. adv. vult.

(13th March, 1883). DE WET, A. C. J.—The libel in this case alleges that the plaintiff was the owner of a land called Dewetagahamule hena, and while in possession of the same had resided in a building in the said land since October 1870; that the building contained a drawing-room and a bed-room, each of which obtained air and light through a window from the open and vacant ground on the S. W. side, which open ground formed part of the land belonging to and in the possession of D. H. Fonseka, the defendant's late husband; that plaintiff had enjoyed for a period of 10 years all the light and air that came to his drawing-room; that the defendant wrongfully intending to injure the plaintiff and to deprive him of the use of the said window, had laid the foundation of a wall to be erected at a distance of three and a half feet from the S. W. wall of plaintiff's dwelling-house, and had continued to build the said wall, which had attained the height of four feet, to the plaintiff's damage of Rs. 4,800. The libel prayed for a declaration of title to the free and unrestricted enjoyment of light and air, and for damages, and for an *ad interim* injunction.

The answer denied the prescriptive enjoyment of ten years, and denied that such enjoyment conferred any right on plaintiff, and put the alleged trespass in issue, justifying the building as on the defendant's own land. The defendant prayed for a dismissal of plaintiff's suit, and for a decree for Rs. 500 damages caused to the defendant's wall by plaintiff pulling down a part thereof, and for a dissolution of the injunction granted by the Court.

From the evidence in this case it is quite clear to my mind that the obstruction complained of will, if proceeded with, interrupt the entrance of light and air into the rooms of the plaintiff's house as alleged in his libel, That every

man is of right entitled to the enjoyment of light and air is clear law, and it is equally clear that the defendant in this case has no legal right to continue the obstruction complained of. To support these propositions I need only quote some few passages from *Van Leeuwen*. That author, in his work on Roman-Dutch Law, in treating of the right of property and of urban servitudes, lays down the following (Ed. 1820, p. 106 *et seq.*):

"All rights to any goods consist either in any property, or in the right of possession. Property is that right which appertains to every thing, whether it be in possession or not; because it may consist of property without possession or possession without property: in consequence of which, property is distinguished into full and defective property. Full property is that which any person has, besides the right of possession, and also the complete use thereof. Defective property is when a thing belongs to one person, the benefit of which is enjoyed by another (usufruct); or in which there is some defect, so that the proprietor cannot fully dispose of it agreeably to his desire (servitude)."

In page 189 of the same edition he lays down the following:—

"The benefit inferior to usufruct is service, that is, the right of prohibiting something beyond or without the common right, or of doing to or in another's house or upon another's ground something for his own benefit: for otherwise, according to common right, another is at liberty to do in or upon his own property whatever he pleases, without molestation by another. Services, therefore, are understood to be two-fold: *commanding*, in what belongs to another; and *suffering*, from another in so far as respects one's own property."

Again in page 192: "Services are usually divided into house services and rural services, which differ from each other in the following respects, viz. all rural services consist in doing or suffering, while house services consist not only in doing or suffering, but also in an obligation of not doing something upon one's own property, which otherwise is permitted to be done, such as not to build higher, not to surround or prevent the light, or to do similar acts. Moreover, rural services may from their own nature be done by turns and intervals, whereas house services are lasting and continual." In page 197 the following is laid down: "A service, on account of which a person may not do whatever

he pleases out of regard for another, consists of impediment of building higher, of free light, free prospect ; right of opening windows, prohibition of sight, and the like. Impediment of building higher is that right, by which one neighbour may prohibit another from raising his building in height, as otherwise according to common right he would be at liberty to raise the same as high as he pleases even to the hindrance of another, which in some respect agrees with the right of having a free light and includes the service that the light may not be impeded by any higher building, by virtue of which it ought to remain so far from such lights that the same cannot be shaded by any building or trees."

Huber (1) lays down the following :

"The right that my neighbour shall not build so as to obstruct my light. I do not lose it, even though he should not so build for 50 years, but only if he has built and obstructed my light, and I have acquiesced in the same for 10 years."

This, amongst many other authorities, being the law, and as I am clear upon the facts as elicited in evidence that the building which the defendant intends to erect will interrupt the entrance of light and air into two of the rooms of the plaintiff, I am of opinion that the judgment of the District Court should be set aside, and that judgment be given in favour of plaintiff restricting the defendant from interfering with the plaintiff in his right to the enjoyment of light and air as set forth in his libel. The appellant to have his costs in this Court as well as in the Court below.

CLARENCE, J.—In this case the plaintiff, the owner of a house in Nawalapitiya, seeks a perpetual injunction restraining defendant, the owner of the adjoining plot of land, from building so as to obscure certain windows in plaintiff's house. At the conclusion of the trial the learned District Judge dismissed plaintiff's action with costs, and dissolved an *interim* injunction which had been granted. Plaintiff appeals.

The facts are clear. The windows in question have existed since 1870. They look out upon defendant's land. Up to December 1881 or January 1882, there was no wall on defendant's land within 40 feet of the windows, so that

(1) *Heedendaegse Rechtsgeleertheyt*, Bk. 2, cap. 45, sec. 5, Dutch Edition 1768, p. 294.

the windows, which are those of sitting-room and bed-room, enjoyed a free access of light. In December 1881 or January 1882, defendant began building a wall in front of the windows, at a distance of about three and a half feet. The evidence satisfies me that the building of this wall, which at the date of the trial had been built to a height of 8 feet, must very materially darken the rooms in question; and the sole point for decision upon this appeal is, whether or not plaintiff had, at the time when defendant began the building, acquired a right as against defendant to the window lights which he now claims. It is not disputed that for a period of more than ten years previous to the commencement of the obstruction, plaintiff and his predecessors in title had enjoyed free access of light and air to the windows in question from the defendant's ground. Plaintiff contends that he had thus acquired by prescription a right to these lights as against the owner of the adjoining land.

What plaintiff thus claims is the servitude *ne luminibus officiatur* of the Roman Dutch Law, corresponding to the easement of window-light of the English Law.

There can be no question but that, under the Roman Dutch Law a negative servitude such as this is could not be acquired by prescription in virtue of bare enjoyment such as plaintiff has had in this case. The essential difference between the user in the two kinds of servitude, negative and positive, is obvious. In the positive kind, such as way or path, the user is attended by an actual invasion of the neighbour's *dominium*. Every time I cross my neighbour's land to get to the high-road I commit a trespass against his right, and a certain number of years' undisturbed practice of so doing conferred under the Roman Dutch Law the prescriptive right to do so in perpetuity, creating in fact the servitude of right of way. But in the negative right, such as window light, the enjoyment is not attended necessarily by any invasion of the neighbour's *dominium*. Voet (*ad Pand.*, viii. 4. 5) is as distinct as possibly can be in laying it down that bare enjoyment will not create the negative servitude by prescription; and he cites from Neostadt (*Decis.* 98) a decided case which is precisely on all fours with the present, in which the owner of the windows failed to establish his right, although until the neighbour began to obstruct them they had remained unobstructed from beyond the memory of man.

This undoubtedly was the Roman Dutch Common Law

with regard to the character of the enjoyment necessary in order that this servitude might be created by prescription. The length of the necessary term might of course be a matter of local legislation.

It is, however, equally clear that the Roman Dutch Common Law on the matter has been swept away by repeal. There is no local Kandyan Law on the matter. The Regulation No. 13 of 1822 repealed " all laws heretofore enacted, or customs existing with respect to the acquiring of rights or the barring of civil actions by prescription." That repeal, however, was expressly limited to laws and customs enacted or existing "within and for the maritime districts of this Island." The repeal was kept alive by the subsequent Ordinances of 1834 and 1871. The 5th section of the Ordinance No. 5 of 1852 enacts that " where there is no Kandyan Law or custom having the force of law applicable to the decision of any matter or question arising for adjudication within the Kandyan Provinces, * * * the Court shall in such case have recourse to the law as to the like matter or question in force within the maritime provinces, which is hereby declared to be the law for the determination of such matter or question."

Consequently the Roman Dutch Law on the subject of prescription is in effect repealed for the Kandyan Country also. The only questions then remaining are, whether the Ordinance No. 22 of 1871 applies to the creation of the servitude *ne luminibus officiatur*; and, if so, with what effect? If the Ordinance does not apply, then there is no law in Ceylon under which this servitude can be acquired by prescription.

In 1858 it was held by this Court (2) that the 2nd section of the Ordinance No. 8 of 1834 does not apply to servitudes. That was a claim of right of way, and the Court, while holding that the Ordinance did not apply to servitudes, presumed a grant, on account of the immemorial time throughout which the way seemed to have been enjoyed. In 1860, however, that decision was reviewed by Sir Edward Creasy (*C. R. Point Pedro* 41 (3)), who held expressly, overruling the older decision, that the Ordinance did apply to the creation of the servitude of right of way. The third section of the Ordinance No. 22 of 1871 re-enacts *totidem verbis* the second section of the Ordinance of 1834.

(2) *D. C. Colombo* 22909, 3 Lorenz, 119.
(3) RamaNathan, 1860, 75.

Sir E. Creasy was of opinion that the *juris quasi possessio* spoken of by jurists when dealing with servitudes fell within the scope of the phrase "possession of immoveable property" as employed in the Ordinance, and the conclusion of the Court was summed up as follows:—"Altogether, the Supreme Court has no doubt that the words 'possession of immoveable property' in the Ordinance may apply to enjoyment of a right of way. There must be actual enjoyment, not mere claim of title or abstract right; and the Supreme Court may define 'possession,' when applied in legal language to a servitude, such as the *jus itineris*, to be the exercise of a *jus in re* with the *animus* of using it as your own as of right, not by mere force, not by stealth, and not as a matter of favour,—*nec vi, nec clam, nec precario.*"

With unfeigned respect for the eminent judge who pronounced this decision, I am wholly unable to subscribe to the reasoning by which the conclusion is arrived at. I state my own opinion, of course, with diffidence, when I find myself obliged to differ from the considered opinion of a former Chief Justice of this Court. That a servitude is immoveable property is indisputable, but the terms of the Enactment appear to me incapable of being by any logical process construed so as to effect the *creation* of property of that kind. They appear to me to deal only with property already in existence at the beginning of the ten years. Until the servitude has somehow been brought into being, there is no property in it in any sense whatever: it has no existence. And I think that the fallacy in the judgment reported in RamaNathan is apparent in the extract which I have quoted from that judgment, in the employment of the phrase "the words 'possession of immoveable property' may apply to enjoyment of a right of way." I think the words "possession of immoveable property" do apply to the enjoyment of a right of way. But the words of the Ordinance are "ten years' possession." Now in the case decided by Sir E. Creasy no *right* of way existed during the 10 years, and therefore none would be enjoyed. The fallacy lies in confusing the act of using the way, with the servitude or right to do so. The servitude once in existence, it would no doubt become, as property, capable of being a subject-matter for the Ordinance; but in my judgment the words of the Ordinance cannot reasonably be interpreted as applying to the creation of the servitude. It is within my

recollection that Chief Justice Sir John Phear felt himself unable to construe the Enactment as applying to the creation of servitudes.

The decision reported in RamaNathan has, however, been steadily acted upon ever since, so far as concerns rights of way; and that being so, I feel myself bound by it, however much I may disapprove of the *ratio decidendi*. Being then so bound, can I for the purposes of the present case distinguish from the case of positive servitudes, like right of way, negative servitudes such as that now in question? I am of opinion that I cannot. For I take the decision of Sir E. Creasy to be, that the ten years' enjoyment of the use, convenience or advantage which would be enjoyed by the owner of the dominant tenement if there were a servitude in existence, brings the corresponding servitude into existence. I think the decision wrong, but I consider myself bound by it, and being so binding on me, it seems to me to apply equally to negative and positive servitudes.

The result, then, is that the mere uninterrupted enjoyment for ten years (not, of course, by express permission or licence) of window-lights, deriving light from a neighbour's land, entitles the owner of the windows to have the adjoining landowner restrained from building so as to obscure them. This in effect places the matter on the same footing (with a shorter prescriptive term) as that of the English Act 2 & 3 Will. iv c. 71 sect. 4, prior to which juries in England used to be allowed to presume a lost grant in the existence of which nobody believed.

Although the result is not one at which I could by my own judgment have arrived had the matter been *res integra*, I think it equitable as between man and man, and am therefore scarcely disposed to regret the conclusion forced upon me.

For the foregoing reasons I am of opinion that the decision appealed against should be set aside and judgment entered for plaintiff, and a perpetual injunction decreed as prayed for. I am further of opinion that leave should be given to plaintiff to apply to the Court hereafter to assess damages, if so advised. Defendant must pay plaintiff's costs in both Courts.

I have had the opportunity of perusing the judgment of the Acting Chief Justice, and while I arrive at the same conclusion as the Acting Chief Justice, viz., that the plaintiff in this action is entitled to the perpetual injunction

which he claims, I do so on very different grounds, and I cannot part with the case without recording my respectful, but emphatic, dissent from the view I understand the Acting Chief Justice as enunciating.

The question for decision in this case is, whether or not the plaintiff has, by his ten years' enjoyment of his windows, acquired by prescription as a servitude the right to prevent the defendant, an adjoining owner, from building on defendant's land so as to obstruct plaintiff's windows. The question is—not whether the plaintiff has or has not lost through the operation of prescription a servitude previously acquired, but whether he has acquired a servitude by prescription. With great respect for the present head of this Court, I must point out that the mere opening of windows which derive their light from an adjoining land owned by another person does not entitle the owner of the windows to restrain the adjoining owner from building so as to darken them. He may acquire that right in two ways: either by express contract, or by prescription.

Dias, J.—[After setting out the facts.] The Kandyan Provinces, or so much of the Island as was not subject to the Dutch, were subject to Kandyan Law, except so far as that Law was repealed or modified by Legislative enactment. The first written law on the subject in the Kandyan Provinces, so far as I can ascertain, is the Proclamation of the 18th September 1819, which only dealt with a certain class of actions. This was followed by the Regulation 13 of 1822, which was not confined to any particular province or provinces, but was applicable to the whole Island. That Regulation was a comprehensive measure. It was not confined to actions merely, but it dealt with the acquisition of property by prescription. It repealed all written and unwritten laws on the subject in the Maritime Provinces, and laid down certain rules applicable to the whole Island. The Proclamation of 1819 seems to have escaped the notice of those who framed the Regulation, and that Proclamation, so far as I can ascertain, was the only law in force in the Kandyan Provinces in 1822. The manifest object of the Regulation was to repeal all existing laws and consolidate in one enactment all the law written or unwritten on the subject of prescription. For some unaccountable reason the repealing clause of the Regulation of 1822 is confined to the Maritime Provinces. Probably there was not at the

date of the Regulation, or the framers of it thought there was not, any law or custom in the Kandyan Provinces on the subject of prescription, and they seem to have lost sight of the Proclamation of the 18th September 1819, which, however, was expressly repealed by the Ordinance 8 of 1834.

So far as I am aware, the Roman Dutch Law or, more correctly speaking, so much of that law as is in force in the Maritime Provinces, was, for the first time, introduced into the Kandyan Provinces by the Ordinance 5 of 1852. Up to that time the Common Law of those provinces was the Kandyan Law. I am not aware of any decision of this Court or any other Court in which it was held that the Dutch Common Law was in force in the Kandyan Provinces, and I may refer to the 5th clause of the Ordinance 5 of 1852 in support of the opinion that the Dutch Common Law was not in force in the Kandyan Provinces. If that law was in operation in those provinces in 1852, there was no necessity to introduce it as the 5th clause did. I am therefore of opinion that the Dutch Common Law on the subject of prescription, or on any other subject, did not find its way into the Kandyan Provinces till 1852, and then only so much of it as was law in the Maritime Provinces; and in those Provinces, as I have already pointed out, the Roman Dutch Law on the subject of prescription was abrogated so far back as 1822.

In deciding the question before us, I do not think we can go out of the Ordinance 8 of 1834; and if the servitude in question cannot be brought within the operation of that Ordinance, no possession, however long, will give plaintiff the right which he claims. It was conceded at the argument that the servitude in question falls within the 2nd clause of the Ordinance 8 of 1834. Mr. *Grenier's* argument was based on the Roman Dutch Law applicable to the acquisition of negative servitudes. If the Roman Dutch Law is to govern the case, I have no hesitation in saying that the plaintiff has failed to make out his case; but as I have already pointed out the Roman Dutch Law on the subject is not in force in this Colony.

I had the advantsge of reading the opinions of my lord and of my brother CLARENCE, and I am not prepared to hold, in the face of a series of decisions to the contrary, that servitudes such as this are out of the Ordinance; and I think we must take the Ordinance of 1834 as containing all the law on the subject of prescription.

By the 2nd clause of that Ordinance proof of undisturbed and uninterrupted possession of immoveable property by an adverse title for ten years gives the possessor a right to such immoveable property, which, as has already been pointed out, includes real rights or servitudes. Admittedly the Plaintiff possessed the light which he claims for more than ten years before the interruption complained of, and his possession was not disturbed or interrupted by any one. Adverse title is defined in the Ordinance as a possession unaccompanied by payment of rent or produce or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person may be fairly and naturally inferred. The first part of this definition is inapplicable to this case; and it is not suggested that the plaintiff has done any act from which an acknowledgment of a right in the defendant or any other person may be fairly and naturally inferred. I therefore think that the plaintiff has established his right by prescription, and is entitled to a decree in his favour with costs in both Courts.

Set aside. Judgment for plaintiff.

Proctors for the plaintiff, *Barber & Eastlake.*
Proctor for the defendant, *E. Beven.*

28th February and 14th March, 1883.

Present—De Wet, A. C. J.

D. C. Ins. Colombo, 1,216. } *In re* Brahmenege Martinus Perera
Ex parte H. T. Perera.

Insolvent—Ordinance 7 of 1853, *sect.* 152—*Certificate in the Form R.*

P., an insolvent, had passed his examination and had his protection extended for one month from 23rd November 1880. He applied on 30th May 1882 for a certificate of conformity, but on the day fixed for considering it withdrew his application. No further order as to protection was made.

Held, that under these circumstances a certificate in the Form R. in

the Schedule to Ordinance 7 of 1853 was wrongly issued to a proved creditor.

Re Y. A. Pieris (1) followed.

Brahmenege *Martinus Perera* was adjudicated insolvent on 24th September 1880, on the petition of *J. M. Perera*. The second sitting was closed on 23rd November 1880, when the insolvent tendered his balance sheet, and his protection was extended for one month. On 28th March 1882, on the motion of the petitioning creditor's proctor, *C. H. Gomes* was appointed Assignee, and he made his report on 27th May 1882; and on 30th May, on the motion of the Insolvent's proctor, the 11th July was fixed for the determination of the grant or refusal of certificate. This meeting was adjourned to 25th July, when the application for certificate was withdrawn. On 6th September 1882 the Insolvent, by another proctor, renewed his application for a certificate, and a meeting of creditors for the purpose took place on 17th October, when a creditor opposed the granting of a certificate. The grounds of opposition lodged not being explicit enough, the meeting was adjourned, the application of Insolvent's Counsel for a grant of certificate forthwith being refused. After another adjournment, the certificate meeting was fixed for 31st October, when there was no appearance for the Insolvent. On 14th November 1882, Counsel for *H. T. Perera*, a proved creditor to the extent of Rs. 742, moved that a certificate in the Form R. might be granted to him. The insolvent's proctor, without contesting the facts on which the motion was based, opposed it on the sole ground that the *Insolvency Ordinance* did not give the Court authority to grant it. The Court (*T. Berwick*, Judge) thereupon made the following order:

"The Form R. annexed to the Ordinance is not in harmony with section 152 to which it refers. The Form as given in the Schedule is a bare declaration that the Insolvent has not at the time a protection order, a state of circumstances which might arise from a thousand causes, independently of any express refusal of protection. But section 152 avowedly only deals with the case in which protection has been actually refused. In the present case there has been no such refusal, and therefore the Court cannot act under section 152: in other words, cannot *under the authority of the Ordinance* give the certificate asked for. So far Mr. *Pereira's* [the Insolvent's proctor] argument is right, and in what the Court is now about to do it will not act under the Ordinance, but will exercise its own discretionary power in making a simple declaration of the truth when the ends of justice or the reasona-

(1) *S. C. Civ. Min.*, 4th November, 1873.

able interests of a party require this to be done. Now it is the truth that the Insolvent has no protection order. This circumstance arises from his own act in abstaining from taking out a certificate of conformity. Meanwhile the creditor is remediless. Having proved in the case, he has by legislative provision the status of a judgment creditor of the Insolvent, but in the present condition of matters he can neither (in the words of the Dutch proverb) make his debtor pay in his purse nor in his skin ; and if his debtor be not legitimately protected, the creditor should have at least the latter remedy so long as the law tolerates imprisonment for ordinary debt.

"I do not know or at present say that he will be anything bettered by what I am going to do, but at all events he is entitled to the aid of the Court in any reasonable effort for that end. Without, therefore, committing myself to any opinion as to what may be the lawful effect of the present order, I think it reasonable and just at his request to certify to a fact, viz. that the Insolvent has at present no protection order. The Secretary will frame the certificate in the precise words of the Schedule R., because these words will declare the truth in this case ; but as already said the declaration will not profess to be made under the Ordinance."

The Insolvent appealed.

Browne, for the Insolvent, appellant—The Ordinance No. 7 of 1853 provides a complete system of Insolvency Proceedings, and the Court has no power to deal with such matters outside the provisions of the Ordinance [DE WET, A. C. J.—But *Boni judicis est ampliare jurisdictionem suam ;* and in construing a statute the Court may place on it such a reasonable construction as will give the Court the most extensive power.] The present application was made under the Ordinance, and asked for a certificate in the form prescribed by the Ordinance. That form of certificate can only be issued in the cases defined by section 152, viz. when the Court has refused the Insolvent protection, or has refused or suspended his certificate. Neither of these conditions precedent exists here. The Supreme Court has held that under these circumstances the certificate cannot be granted. *D. C. Colombo, Ins.*, 817 (1).

Layard, for the applicant creditor, *contra*—It was the interest of the Insolvent himself to obtain an extension of protection, and his failure to do so ought not to be allowed to benefit himself. So, in England, it has been held that an adjournment of the Insolvent's examination *sine die*, with protection for two months, and no further order made, is a refusal of further protection under the Act of 1849,

(1) *Per* CREASY, C. J., STEWART and CAYLEY, JJ. *Civil Min. of S. C.*, 4th November, 1873.

on which our Ordinance of 1853 is founded. *Ex parte Scarth* (1).

Browne, in reply—The creditor's application here is not founded on any allegation of misconduct on the part of the Insolvent, while in *Ex parte Scarth* the examination was adjourned *sine die*, presumably because such misconduct was shown. In the present case the Insolvent has passed his examination.

Cur. adv. vult.

(14th March). De Wet, A. C. J.—In this matter it is clear from the learned Judge's finding that the *Insolvency Ordinance* did not empower him to grant the certificate applied for by the applicant, one of the proved creditors of the insolvent estate of appellant.

As it appears from the proceedings that the certificate of conformity of the Insolvent has neither been suspended nor refused, nor his protection refused, I hold that in terms of the judgment of the Collective Court in case No. 817, *D. C. Colombo* (2) the appeal must be allowed with costs to appellant in this Court and in the Court below.

Appeal allowed.

Proctors for the Insolvent, *J. G. Toussaint; H. J. C. Pereira.*
Proctor for petitioning creditor, *W. E. Mack.*
Proctor for opposing creditor, *J. G. Ohlmus.*

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(1) 30 L. T., 12.

(2) *Civ. Min. of Sup. Ct.*, 4th November 1873, *per* Creasy, C. J., Stewart and Cayley, JJ.

14th February and 3rd March, 1882.

Present—CLARENCE, A. C. J., and DIAS, J.

D. C. Galle, 46,340 } C. L. BOGAARS v. C. L. VANBUUREN.

Condictio indebiti—*Money paid under mistake of law—Costs—"Putting cases in evidence."*

S., the owner of a house which he had mortgaged to A., died, having by his will (of which defendant was executor) bequeathed a life-interest in the house to H. Plaintiff entered into occupation of the house as lessee of H A. obtained judgment on his mortgage against defendant as executor, and on 8th March 1879 sold the house in execution. It was bought by J., who shortly afterwards died. In June 1879 (plaintiff's lease expiring on 31st July) defendant, as executor, demanded of plaintiff Rs. 55 as rent for April and May, threatening legal proceedings. Plaintiff paid. Plaintiff was afterwards sued for the same amount, in respect of the same occupation, by J.'s representatives, and pleaded his payment to the executor, but was condemned to pay the amount and costs. Plaintiff now sought to recover from defendant the Rs. 55 *plus* the costs incurred in the action by J.'s representatives.

Held, reversing the decision of the Court below, that plaintiff (having paid with full knowledge of the facts, and if anything upon a mistaken view of the law) could not recover either the Rs. 55 or the costs of the former action.

Observations on the practice of "putting cases in evidence."

The defendant in this case appealed against a decree of the District Court of Galle (*A. H. Roosmalecocq*, Judge) giving judgment for the plaintiff in terms of his libel. The facts are sufficiently disclosed in the judgment of the Supreme Court.

Dornhorst for the defendant, appellant.
Layard for the plaintiff, respondent.

Cur. adv. vult.

(3rd March). The judgment of the Court was this day delivered by

CLARENCE, J.—This is an action to recover back money as paid under a mistake. The action is in fact that known to the Roman Dutch Law as *condictio indebiti*. The pleadings on both sides, the plaintiff's especially, are obscured by much irrelevant statement and pleading of evidence. The

facts, however, as admitted or otherwise established, appear to be as follows:

One *Stephens* owned a house, which he mortgaged to Dr. *Anthonisz*, and died, having by his will (of which defendant is executor) bequeathed a life interest in the house to Mrs. *Hilfield*. Plaintiff entered on occupation of the house on a lease from Mrs. *Hilfield* Meanwhile the mortgagee put his mortgage in suit, making the executor of the mortgagor defendant, obtained judgment and on the 8th March 1879 sold the house by Fiscal's sale in execution of his writ. Plaintiff's tenancy under Mrs. *Hilfield* would not expire until the 1st August. The house was purchased at the Fiscal's sale by one *Jansz*, who shortly afterwards died. In June 1879 defendant in his capacity as executor demanded of plaintiff Rs. 55 for use and occupation of the house for the months of April and May, threatening legal proceedings, Plaintiff paid. Plaintiff was afterwards sued by *Jansz's* representatives for the same amount in respect of the same months' occupation. Plaintiff then pleaded his payment to the executor, but it being proved that he had previously received notice of the sale in execution, judgment went against him for the amount claimed, with costs. Plaintiff now seeks to recover from the executor the Rs. 55 which he had paid to the executor, *plus* the costs incurred by the unsuccessful defence of the action by *Jansz's* representatives. Defendant, the executor, appeals against a judgment of the District Court decreeing him to pay the plaintiff both the Rs. 55 and the costs, in all Rs. 97.87. It was admitted that the decree could not be supported as to the costs, but respondent's Counsel contended that the decree was right as to the Rs. 55.

The case is wholly silent as to what passed between the executor and Mrs. *Hilfield* before her dealing with the house by way of lease. Apparently the executor assented to her dealing with the house. At any rate, the whole of his testator's interest in the house having, as he admitted in his Answer, been sold on the 8th March, it does not appear that the executor had any right to the Rs. 55 for use and occupation in April and May. The question then remains, whether plaintiff, having in fact paid the executor, can now recover the money back from him as *indebitum solutum*. It is nowhere averred by plaintiff that his payment to defendant was induced by any misrepresentation as to facts, or that plaintiff was in fact ignorant of any of the facts; and

if plaintiff's payment to defendant was due merely to plaintiff's ignorance of law, plaintiff cannot recover. In fact, so far as appears, plaintiff and defendant may have both been under the erroneous impression that defendant had a right to the money, although it would seem that subsequently defendant handed the money over to Mrs. *Hilfield*. Nor does it appear that there are any circumstances taking the case out of the ordinary rule that money paid with knowledge of the facts and under a mistaken view of the law cannot be recovered. For all that is shown to have happened is, that defendant caused to be sent to plaintiff a "lawyer's letter," in which defendant's proctor made a demand on plaintiff for the two months' rent on behalf of the defendant, who is described as "executor of the estate of the late J. P. Stephens," and threatened to sue at law if "an amicable settlement" were not made. Plaintiff thereupon chose to pay, and we fail to see any ground upon which his action to recover back the money can be supported.

The Supreme Court regrets to find from the District Judge's letter of the 26th February that the Galle District Court still allows "cases" to be put in evidence, although the impropriety of the practice has been repeatedly pointed out by this Court.

Set aside. Action dismissed.
Costs divided.

Proctor for the plaintiff, *W. D. de Vos.*
Proctor for the defendant, *J. W. L. Keegel.*

9th May and 8th June, 1882.

Present—CLARENCE, A. C. J., DIAS and GRENIER, J J.

D. C. Matara, 30,171. } M. G. LOKUHAMY v. S. ABEYHAMY.

Practice—Husband and wife—Power of wife, who has been deserted by her husband, to sue for property constituting the joint estate—Decree.

As a general rule, a married woman whose husband is alive cannot maintain an action, but where the husband is absent and has deserted

his wife, she may commence an action in respect of property forming part of the joint estate; but the wife, before she can proceed with the suit, is bound to summon the husband and give him an opportunity of taking up the suit if so disposed.

The defendant appealed against a judgment in favour of the plaintiff entered up in the Court below. The facts material to the issue decided sufficiently appear in the judgment of the Appellate Court.

J. Grenier for the defendant, appellant.
Drieberg for the plaintiff, respondent.

Cur. adv. vult.

(8th June). The judgment of the Court was now delivered by

DIAS, J.—This is an action by a married woman, whose husband is away somewhere in the Kandyan Provinces, to recover damages for an unlawful seizure of the property of herself and her husband. The defendant denies the plaintiff's right to the property, and the plaintiff's right to maintain the action. The case was tried on 12th January 1882, and after hearing the plaintiff's evidence, the defendant having called none, the learned judge gave plaintiff judgment, and we see no reason to think that he was wrong.

The principal point made by the appellant's Counsel at the hearing was that the plaintiff being a married woman could not maintain this action. No doubt, as a general rule a married woman, whose husband is alive, cannot sue third parties, but there are exceptions to the rule, and this case is one of the excepted cases. It appears that the plaintiff's husband had abandoned her and her children some time ago, and that being so, she has a right to defend the common estate of herself and her husband, in which she has a large interest; but before she can maintain an action she is bound to summon the husband, giving him an opportunity either to take up the suit himself or allow her to go on with the case without him. The libel in this case is framed with a view to meet the requirements of the law applicable to a case like this. The notice was issued to the husband through the Court and served on him on the 12th May 1880. When this case was argued, the notice itself was not with the papers, but it has been since sent up and is to be found at the end of the record. The return to the notice is not

legible, but the learned judge says it was served, and this is borne out by the journal entry of the 12th May, 1880 (p 3). The course adopted in this case by the plaintiff is not an unusual one, and has the sanction of Chief Justice Sir *Charles Marshall* (1).

The judgment of the District Court on the merits is right, but it will have to be amended by the decree being passed in favor of the plaintiff in trust for the common estate of herself and her husband Balahettige Don Jayan.

Affirmed.

Proctor for the plaintiff, *C. H B. Altendorff.*
Proctor for the defendant, *G. E. Keuneman.*

13th and 27th June, 1882.

Present—CLARENCE and DIAS, JJ.

D. C. Kandy, 87,172. } A. R. L. SINNAIYA CHETTY and another v. BABANIS Appu and another.

Mortgage—Mortgagee's remedy against third parties, transferees of mortgagor, in possession—Pleading—Continuance of mortgage debt—Merger of mortgage in judgment—Registration—Priority.

C. and P., on 6th January 1876, mortgaged three pieces of land to plaintiffs to secure a debt of Rs. 7,500. Plaintiffs, on 30th October 1879, obtained judgment on their mortgage and a mortgagee's decree. Plaintiffs sued out execution against the mortgaged property but found the defendants "in possession." The defendants had purchased the interest of C. in the mortgaged property at a sale in execution of a money decree obtained by plaintiffs, in another suit, after the date of the mortgage. Plaintiffs now, setting out the above facts, and averring that defendants "continued in possession objecting to the plaintiffs selling the said lands to satisfy the amount of the mortgage decree," prayed that the lands might be declared executable and liable to be sold under plaintiffs' writ in the mortgage suit.

Held, following *D. C. Matara* 29,149 (2) that this disclosed a misconception of plaintiffs' remedy, which should have been to aver and establish, as against the mortgagors' transferees, the mortgage and the continuance of the debt, and to pray (not that the lands be declared saleable under a previous writ issued against the mortgagors, but) that the lands be declared simply executable and saleable as against the transferees.

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(1) *Judgments*, p 218. | (2) 1 S. C. C., 80.

As to continuance of the debt, the plaintiffs merely averred that they had obtained a judgment against the mortgagors. Defendants did not demur, but denied the mortgage. The mortgage was *primâ facie* established by the admission in evidence, by consent, of plaintiffs' mortgage deed.

Held, that there was no sufficient averment of the continuance of the debt; and defendants were absolved from the instance, but without costs.

The facts material to the decision of this case appear in the judgment of the Supreme Court.

Canekeratne, for the defendants, appellants, cited *D. C. Matara* 29,149 (1), and *Pickard* v. *Sears* (2).

Dornhorst for the plaintiffs, respondents.

Cur. adv. vult.

(27th June). The judgment of the Court was now delivered by

CLARENCE, J.—This is an action by mortgagees against certain parties, not being the mortgagor, who are in possession of the mortgaged lands or some of them. The frame of plaintiffs' action is this:—Plaintiffs aver that by deed dated 6th January 1876 certain *Carupe Naden* and *Palaye Naden* mortgaged to plaintiffs three several pieces of land, to secure a debt of Rs. 7,500 and interest. Plaintiffs then aver that on 25th October 1879 they instituted an action, No. 83,836, on this mortgage against the mortgagors, and on 30th October 1879 obtained a judgment for Rs. 7,500, interest, and costs, and a decree declaring the mortgaged lands specially bound and executable for the debt. Plaintiffs then go on to aver that they sued out execution, but found present defendants "in possession"—the libel does not in terms say of what, but by inference from the context we may gather the meaning to be, that plaintiffs attempted to seize the mortgaged lands, but found them in the possession of defendants. The libel further accounts for defendants' possession by averring that defendants had purchased, under another writ, issued in a case No. 79,231 of the same Court, the interest of the said *Carupe Naden*. The libel then, after averring that defendants "continue in possession objecting to the plaintiffs selling the said lands to satisfy the amount of the said writ," concludes by asking that the lands in question may be declared executa-

(1) 1 S. C. C., 80. | (2) 6 A. & E., 474.

ble and liable to be sold under plaintiffs' writ in the case No. 83,836.

This libel in its face discloses a misconception of the plaintiffs' remedy. The mortgagor's interest in the land having passed to defendants, plaintiffs' mortgage right still, of course, remains; but to enforce this as against defendants plaintiffs, as pointed out by the judgment of this Court in *D. C. Matara* 29,149 (4), have to establish *de novo* their mortgage right as against the transferee of the mortgagors' interest, quite independently of anything that occurred in any suit against the mortgagors. And after averring their mortgage, and the continuance of the debt, their prayer should be, not to have the land declared saleable under a previous writ issued against the mortgagors, but simply to have the land declared executable and saleable as against the transferees. The writ issued in plaintiffs' previous action against the mortgagors would naturally include the costs of that action, which, as it appears to us, plaintiffs have no right to recover from the transferees.

Defendants in their answer do not notice this defect in the prayer of the libel The matters set up in the answer are these :—Firstly, defendants aver that they are each separately, and not jointly, entitled to one of the lands in question by purchase under the writ already mentioned, issued against *Carupe Naden*, whom they aver to have been the owner; and they aver that the remaining land out of the three specified in the libel was purchased, not by either of them, but by one *Salohamy*. But defendants do not in their answer base any plea, either of misjoinder of themselves or of non-joinder of *Salohamy*, on these averments. It would seem, however, from the Petition of Appeal, signed by the proctor who also signed the answer, that he intended the answer to be construed as setting up a plea of misjoinder. No such plea, however, is maintainable, since the two lands severally purchased by the respective defendants having been included by the original owner in the same mortgage, no reason appears why the transferees should not be made parties to the same suit. The defendants' answer next denies the fact of the mortgage to plaintiffs. This, however, we may here remark, has been *primâ facie* established by the admission in evidence, by consent of parties (as we are informed by the learned District Judge) of plaintiffs' mortgage

(4) 1 S. C, C., 80.

deed. The answer further pleads a conclusion of law, that defendants did not take subject to plaintiffs' mortgage; but no facts are pleaded as the grounds of that conclusion of law.

Defendants appeal against a decree declaring the two lands severally held by the defendants executable for the judgment obtained by plaintiffs against the mortgagors, and directing that the interest of the mortgagors as at the date of the mortgage be sold in satisfaction of the judgment.

It was argued amongst other matters, by the appellants' Counsel, that plaintiffs connot assert their mortgage as against these defendants by reason that the writ, in execution of which the sale took place at which defendants purchased, was a writ issued by plaintiffs themselves in the action No. 79,231 against *Carupe Naïen* and *Palaye Naden*. No formal proof of that fact has been noted, but we may assume that fact in defendants' favour. The paper-book of No. 79,231, which appears to have been before the learned District Judge, seems to indicate such to have been the case. Appellants' Counsel then quoted to us the well known case of *Pickard* v. *Sears* (1). To dispose of this contention it is sufficient to observe, that nowhere in this case have defendants established or even suggested any representation or conduct on the part of plaintiffs, which could be held to estop them from setting up their mortgage. All we know is, that plaintiffs first, under a writ not issued in execution of their mortgage, seized and sold the mortgagors' remaining interest in the land, which was purchased by these defendants. We do not know at what price defendants purchased; and they do not inform us whether or not they were aware of the existence of the mortgage. In fact, for anything that appears, defendants may have paid for what they bought no more than its fair value, having regard to the existing encumbrance.

It was next contended in appeal that defendants are entitled to succeed because their Fiscal's conveyances are registered; and although plaintiffs' mortgage was registered before either, appellants' Counsel contended that since the date of their judgment against their mortgagors, plaintiffs have lost the benefit of their registration, by reason of their mortgage being merged in their judgment. This contention,

(1) 6 A. & E., 474.

however, is quite untenable. Plaintiffs' mortgage, if unpaid, is still on foot for the purposes of this suit.

It was further contended that plaintiffs have not established the existence of their mortgage debt, and this contention must be sustained. Plaintiffs in their libel do not make any sufficient averment of the existence of the mortgage debt, inasmuch as they merely aver that they have had a judgment against the mortgagors. Defendants did not demur to the libel, but merely denied that the lands ever were mortgaged to plaintiffs. The frame of the decree, as it stands, is open to objection, but if plaintiffs had distinctly established the existence of their mortgage debt at date of institution of this suit, we might perhaps have been disposed to give them, under their prayer for further relief, a decree declaring the lands liable to be sold in satisfaction of plaintiffs' debt and interest, not including any costs of plaintiffs' action against their mortgagors. As the case stands, however, we think that the best course is to absolve defendants from the instance without costs in either Court.

Set aside.

Proctor for the plaintiffs, *M. C. Sidde Lebbe.*
Proctor for the defendants, *Edwin Beven.*

28th and 31st March, 1882.

Present—CLARENCE, A. C. J., and DIAS, J.

D. C. Kandy, 86,520. } P. L. R. M. RAMEN CHETTY v J. D HARDIE. *Ex parte* WHITTALL & Co.

Mortgage—Coffee estate—Mortgage of coffee crop with covenant to consign crop to mortgagee for curing, shipment and sale—Right of unsecured creditor to seize and sell such crop in execution—Preference and concurrence—Moveables, right of mortgagee to follow—Maxim Mobilia non habent sequelam.

On 1st October 1880 plaintiff obtained judgment on a cheque against the defendant, the owner of a coffee estate. On 2nd October defendant, by a deed which was registered within one week of its execution, "specially hypothecated, assigned and set over to the appellants, as a first charge free from all encumbrances," the crop of the estate for the

season 1880-81, to secure certain advances to be made by appellants to defendant, undertaking to consign such crop to appellants for curing, shipment and sale, defendant to be credited with the net proceeds. Appellants made certain advances in pursuance of this arrangement. Plaintiff thereafter issued his writ, seized and sold part of the hypothecated crop.

Held, that appellants, having a preferent right of hypothec over the coffee, had a right to prevent the plaintiff, who had no such hypothec, from selling such coffee in execution of his judgment.

The coffee having been sold under plaintiff's writ, and the proceeds deposited in Court:

Held, that, as long as the money remained in Court, the appellants as hypothecary creditors had a right to be paid thereout the amount of their advances in preference to the execution creditor or any others claiming concurrence with them.

In this case Messrs. *Whittall & Co.* appealed against an order of the District Court of Kandy (*A. C. Lawrie*, Judge) discharging a Rule *Nisi* which they had obtained against the plaintiff and the purchaser of certain coffee sold in execution under plaintiff's judgment, calling upon them to show cause why the proceeds of such sale should not be paid over to appellants. The facts appear at length in the judgment of the Supreme Court.

Layard for *Whittall & Co.*, the appellants.

VanLangenberg (*Dornhorst* with him) for the plaintiff, respondent.

Cur. adv. vult.

(31st March). The judgment of the Court was now delivered by

CLARENCE, A. C. J.—In this case a sum of money is standing in Court to the credit of the cause, being the proceeds sale of certain coffee sold by the Fiscal under writ issued in execution of the plaintiff's judgment. The appellants, Messrs. *Whittall & Co.*, claim a right to the whole of this fund, upon the strength of an instrument by which, as they contend, the coffee had been hypothecated to them. Appellants applied to the District Court to have the fund paid out to them. This application, which is stated by the learned District Judge to have been made with the consent of the execution debtor, the defendant to the action, was opposed by the plaintiff. The learned District Judge after hearing both the plaintiff and Messrs. *Whittall & Co.* dismissed the application with costs, and it is against that order that Messrs. *Whittall & Co.* now appeal.

The facts appear to be these. The defendant, Mr. *J. D. Hardie*, was in 1880 the owner of *Dambagastalawa* coffee estate, subject to certain mortgages in favour of two mortgagees named *Sikes*. It would further appear that the *Oriental Bank Corporation* claim to be mortgagees of the estate to the extent of nearly Rs. 12,000 by virtue of a mortgage bearing date the 12th October 1880, and at one time claimed a mortgagee's right over this coffee. No further notice, however, need be taken of the *Oriental Bank*, since the application of appellants is made with their consent.

On the 9th August 1880, the plaintiff instituted this action against the defendant, suing on a cheque. Provisional judgment was entered up on the 20th August, and final judgment on the 1st October. The judgment is for Rs. 5,075 with interest and costs.

On the 2nd October defendant executed the instrument under which appellants claim. It recites an agreement that appellants should on the execution of the instrument pay defendant a sum of Rs. 1,500 "to meet the expenditure already incurred in connection with the working of the said estate" (that is, *Dambagastalawa* estate) "from the 1st day of July 1880 to the 31st day of August 1880," and that appellants should from time to time make further advances to defendant for the purposes of the estate, the whole of the advances not to exceed Rs. 7,500, and appellants not to be under any obligation to make any advances after the crops and produce of the estate for "the season 1880-81" should have been picked and gathered: and for the purpose of securing such advances defendant by this instrument purported to hypothecate to appellants "all the coffee crop growing and to be grown on or gathered from the said estate for and during the season 1880-81." The operative words of the instrument are, "specially hypothecate, assign and set over unto the said *Whittall & Co.* as a first charge free from encumbrances." The defendant further covenanted with appellants that he would not without their consent harvest any cinchona bark, and further covenanted that as soon as the coffee crops should have been gathered, he would convey and deliver the same to appellants in Colombo. The instrument further provided that appellants were to cure the coffee so to be consigned to them, and at their option either sell it in Ceylon or ship it away for sale, defendant to be credited with the net proceeds. The

mortgagees, the Messrs. *Sikes*, are parties to the instrument, and assent to the hypothecation.

We suppose that by the "coffee crop of the season 1880-81" was meant the crop of coffee which would be the result of the blossoms of the early part of the year 1880, and which would be ripening on the trees about Christmas 1880, and would in ordinary course be gathered, pulped, and sent down to Colombo early in 1881. This, as it will be seen, is the construction which appellants place upon the record, and it seems to us the only construction possible.

Plaintiff issued writ in execution of his judgment, and seized the coffee, the proceeds of which are now in question. It is admitted that the coffee was seized as it lay in the estate store, after being gathered. We do not find in the paper book anything shewing precisely when the seizure was made, and the Counsel who appeared on the appeal were not able to inform us on that point. It appears from the note made by the learned District Judge that the proceeds of the coffee was Rs. 5,580·50. The sale was made on three successive days, the 13th, 14th, and 15th January. These latter dates are ascertained by the joint agreement of the Counsel who appeared on the appeal.

We now come to the action which has been taken by the appellants with regard to the seizure of the coffee.

The Fiscal reports the receipt of a letter dated the 13th January from appellants' Proctor, notifying that appellants "claim all proceeds to be realized by the sale of the said crop." According to the tenor of this letter appellants made no objection to the sale, but made a claim to the proceeds. We do not know when this letter reached the Fiscal.

On the 20th January appellants filed a libel in the District Court against defendant Mr. *Hardie*, the present plaintiff, and the Fiscal, praying for an injunction to stay the sale. The learned District Judge, however, in his note made in the present case, states that in consequence of the application being an urgent one he heard Counsel before the libel was filed, and on the 14th January refused the application for an injunction. An appeal was taken against that refusal, which was argued before me on the 17th February, and on the 18th February I reversed the order of the District Court and directed the issue of an injunction to restrain the Fiscal from selling after that date any of the coffee in question. As we have already seen, all the coffee had in fact been

already sold. We regard this injunction merely as an injunction *ad interim*.

It appears by the Fiscal's return that the *Dambagastalawa* estate itself was also seized under the plaintiff's writ and sold on the 13th January to a Mr. *Joseph* for Rs. 600. The low price was no doubt due to the circumstance of the estate being encumbered by mortgages.

On the 13th April appellants applied for and obtained a Rule *Nisi* calling on the plaintiff and *Joseph* "to shew cause why the sum of Rs. 5,470·81 levied by virtue of the writs issued in this case should not be paid over to appellants." This Rule appears to have been afterwards made absolute as against *Joseph* for default of appearance to shew cause, but plaintiff appeared and shewed cause. There would seem to have been a slip in the framing of the appellants' application, inasmuch as their claim was really preferred only to the proceeds of the crop hypothecated to them, which were only Rs. 5,580·50, whereas their application purported to lay claim to more. The Rule did not come on for discussion as between plaintiff and appellants until the 3rd August, when the District Judge heard Counsel. Counsel were also heard again on the 9th September, and on the 27th September the learned District Judge made the order against which Messrs. *Whittall & Co.* now appeal, discharging the Rule with costs.

The learned District Judge held it proved that on the 4th April 1881, defendant owed appellants Rs. 6,454·39; but, as the District Judge observes, appellants do not show when the payments were made so as to enable the Court to ascertain how much was due at the date of the Fiscal's seizure or of the sale. If it should prove desirable an inquiry might be directed upon that point. Meanwhile we notice that appellants when asking for their injunction claimed only Rs. 5,192·19 as advanced up to the 10th January.

The contract made between defendant and appellants may be stated as a contract by which defendant agreed to hypothecate to appellants certain *fructus industriales* then growing on the coffee trees on his estate, and further agreed to deliver the same to appellants when harvested. There was no sale of the coffee to appellants, no transfer of the property in the coffee and no delivery of the coffee by way of pledge. Without going into the Roman Dutch authorities with regard to hypothecation of moveable property, it

was held by the Privy Council in *Tatham* v. *Andree* (1) that a charge over moveable property might be created in Ceylon without delivery. Since then the Ordinance 8 of 1871 has enacted that no pledge or conventional hypothecation of moveables shall be valid and effectual so as to give the pledgee or mortgagee any lien, charge, claim, right or priority, over, to or in respect of such property, unless there shall have been delivery, or unless the pledge or hypothecation shall have been created by writing, and such writing registered in the Land Registry within 7 days. We take it, then, that in Ceylon a charge over moveables may be created although the moveables remain in the owner's possession, if the charge be created by mere instrument in writing, duly registered. The present instrument was registered within the 7 days.

The learned District Judge appears to have thought that there was inherent in the transaction something vicious, which precluded appellants from now asserting the contract as against plaintiff, a previous creditor of the defendant. We are not quite sure that we follow the reasoning of the learned District Judge. No question of fraudulent preference seems to arise, since the defendant does not appear to have become insolvent. Nor do we think that the transaction could be regarded as an act of bankruptcy. It does not purport to deal with the whole of defendant's property, and it does not seem calculated necessarily to delay or prejudice the defendant's existing creditors, of whom plaintiff was one. On the contrary it was an arrangement which might very probably benefit defendant's creditors by enabling defendant at a moment of pecuniary pressure to keep up the cultivation of his estate. One knows how quickly a coffee estate loses value if the cultivation be not properly attended to. The case seems one to which we may apply the remark of ERLE, J., in *Bittlestone* v. *Cooke* (2) that the power of raising a small sum on an emergency may often, in the exigencies of trade, be of immense value. Defendant, in order to obtain the means of discharging an existing debt and of carrying on his estate until the growing crop should have been got in, agreed with appellants, that in consideration of their advancing him the necessary funds by future advances not to exceed a certain limit, he would hypothecate to them the growing crop, and would in due

(1) 1 N. R., 554. | (2) 6 E. & B., 309.

time deliver it, when gathered, to them in order that they might sell it and out of the proceeds repay their own advances. This seems to us a perfectly unimpeachable transaction.

We take the instrument in question therefore to have effected a hypothecation in appellants' favour of certain moveable property, which, however, remained in defendant's possession, and which defendant covenanted thereafter to deliver to appellants, and we take it that the hypothecation would take effect as a security to the extent of the advances thereafter made by appellants pursuant to the agreement, at any rate up to the date of the seizure in execution.

But as *mobilia non habent sequelam*, the appellants acquired no right to follow the coffee into the hands of a purchaser, should it have been dealt with in the interim contrary to their agreement with defendant. They had, as we think, a right of hypothec over the coffee as it lay in the store at the time when the Fiscal seized it, and consequently a right to prevent the plaintiff, who had no such preferent right, from taking and selling the coffee in execution of his writ. Therefore, we think that the injunction to restrain the Fiscal from selling was rightly issued.

But the coffee having in fact been sold before the injunction issued, and the proceeds being now in Court to the credit of this action, have appellants the right by virtue of their hypothec over the coffee to claim the money? Upon this point we desired further argument, and the matter was again argued on this point.

The coffee was sold by the Fiscal in execution of a judgment obtained by a creditor against the defendant. Now it seems to have been a principle of the Roman Dutch Law, that a sale once made *sub hastâ*, in execution at the hands of the Fiscal, conferred on the purchaser a complete title, good as against all encumbrances, and, according to *Vander-Linden* and others, especial care was taken by means of advertisements to give all persons concerned an opportunity of opposing the sale; and as we understand the general principle (see *Voet*, xx. 1. 13) the purchase money succeeded in place of the thing sold, and the hypothecary creditor had a right of preference to be paid out of the money. We have now for many years allowed mortgagees of land to follow the land in the hands of the purchasers to whom, under our *Fiscals Ordinance*, the debtor's interest has been sold in execution of some simple money judgment. As to movea-

bles, which cannot be followed, we think that the hypothecary creditor, as long as the money remains in custody of the Court, has a right to be paid thereout the amount of his debt in preference to the execution creditor or any other creditors claiming in concurrence with him.

We think, therefore, that appellants have a preferent right over this fund, but to what extent we are not in a position to say, because we do not know, and Counsel were not able to inform us, on what dates appellants made their several advances.

Set aside.

Proctor for the plaintiff, *F. VanLangenberg.*
Proctor for *Whittall & Co., Thomas & Julius.*

21st and 31st March, 1882.

Present—CLARENCE, A. C. J., and DIAS, J.

D. C. Matara, 32,285. } S. L. M. IDROOS LEBBE MARKAR and another v. The DEPUTY FISCAL of Matara and two others.

Fiscal's Sale - Ordinance 4 of 1867, sect. 53—Irregularities—Action to set aside sale on grounds falling under sect. 53.

Section 53 of the *Fiscals Ordinance*, 1867, prescribes the sole procedure open to a party considering himself aggrieved by irregularities in the publishing or conducting of a Fiscal's sale, and such sale cannot be set aside in a separate action on grounds falling within the purview of section 53.

Plaintiffs appealed against an order of the District Judge (*A. H. Roosmalecocq*) dismissing their action with costs. The facts sufficiently appear from the judgment of the Supreme Court.

Dornhorst for the plaintiffs, appellants.
Roosmalecocq for the defendants, respondents.

Cur. adv. vult.

(31st March). The judgment of the Court was delivered by

CLARENCE, A. C. J.—Plaintiffs are the execution debtors in an action *D. C. Galle* No. 44,676, in which judgment went

against them, and under writ issued in execution of the judgment certain immoveable property of plaintiffs' was seized and sold, the present third defendant becoming the purchaser. Plaintiffs now bring this action against the Deputy Fiscal and a subordinate Fiscal's officer (who are the first two defendants) and the third defendant, praying that the sale may be cancelled, or in the alternative that defendants may be decreed to pay plaintiffs the difference between the auction price, which was Rs. 106, and Rs. 420, which plaintiffs aver to be the real value of the property. The reasons alleged in the libel for avoiding the sale are all matters falling within the purview of the 53rd section of the *Fiscals Ordinance*.

The defendants answer that the sale took place on the 28th August 1880, and plead the 53rd section of the *Fiscals Ordinance*. Plaintiffs do not dispute that the sale took place on 28th August 1880. The present action was instituted on the 29th January 1881.

The District Judge dismissed the plaintiffs' action with costs, holding that the 53rd section of the *Fiscals Ordinance* prevented plaintiffs maintaining this action. Plaintiffs appeal.

We think the decision of the District Judge was right, and that this appeal should be dismissed with costs.

In our opinion the intention of section 53 was to prescribe the sole procedure which should be open to a party considering himself aggrieved by irregularity or informality in the conduct of a sale.

Appeal dismissed.

Proctor for the plaintiffs, *C. H. B. Altendorff.*
Proctors for the defendants, *G. E. Keuneman, Jonathan Silva.*

26th May and 8th June, 1882.

Present—DIAS and GRENIER, JJ.

D. C. Kandy, 88,616. } S. R. M. IBRAHIM SAIBU v. WIRAPPEN and two others.

Fiscal—Ordinance 4 of 1867, sects. 5,83—Bond to Fiscal of Province—Assignment thereof by Deputy Fiscal of District.

Upon a seizure of certain property in execution, two persons claimed it as their own, and were allowed to retain possession on giving a bond to the Fiscal of the Central Province, undertaking to deliver the property to the Fiscal when called upon. The Deputy Fiscal of Matale professed to assign this bond to the plaintiff by indorsement as directed by section 83 of the *Fiscals Ordinance*.

Held, that the assignment was bad, having been made by a party having no interest in the bond.

This was an action by plaintiff, as the assignee of a security bond for Rs. 500 given in favour of the Fiscal of the Central Province, to recover that sum from the obligor and his sureties, as upon a breach of the conditions in the bond. Plaintiff appealed against an order of the District Court (*A. C. Lawrie*, Judge) dismissing his action with costs.

The facts sufficiently appear from the judgments in appeal.

There was no appearance of Counsel.

Cur. adv. vult.

(8th June). DIAS, J.—This is an action on a security bond granted to the Fiscal of the Central Province. The plaintiff issued execution in *D. C. Kandy* 69,296 against one Phoosa and seized a growing coffee crop, when the first defendant and one Kammachchi, a minor, claimed it. The Fiscal for the Central Province allowed them to retain possession of the crop on their giving security to take care of the crop and deliver it to the Fiscal when called upon. The bond is in the form of a penal bond for Rs. 500, and it is in favor of the Fiscal for the Central Province. The 2nd and 3rd defendants are sureties under the bond. On the 7th June 1881, the Deputy Fiscal of Matale assigned this bond to the plaintiff. The 2nd and 3rd defendants answered, and in the 6th paragraph of their Answer they

deny the validity of the assignment. On the face of the bond, the assignment is bad, as it is an assignment by a party who had no interest in the bond.

The *Fiscals Ordinance*, No. 4 of 1867, section 83, refers to assignments of security bonds, and it clearly contemplates assignments by Fiscals as well as by Deputy Fiscals; and though the 5th section of the Ordinance empowers Deputy Fiscals to exercise the powers and perform the duties of the Fiscal for the Province within the district of such Deputy Fiscal, I do not think that under this 5th section the Deputy Fiscal of a district can assign a bond made in favor of the Fiscal of the Province. This section doubtless authorises a Deputy Fiscal to take a bond like this in his own favor, but I do not think it delegates to the Deputy Fiscal the right and authority of the Fiscal as in this case. The learned District Judge has entered upon the consideration of several matters of law and fact, but we need not enter on these topics, as we think the assignment of the bond by the Deputy Fiscal of Matale did not convey any right to the plaintiff, and on this ground we affirm the dismissal.

GRENIER, J.—I am of the same opinion. Not only is the assignment to the plaintiff essentially defective, but, even assuming it to be a valid assignment, the breach of the conditions of the bond has neither been properly pleaded nor properly proved.

Affirmed.

Proctor for the plaintiff, *M. P. Sameresinghe.*
Proctor for the defendants, *F. A. Prins.*

12th and 19th September, 1882.

Present—CLARENCE and DIAS, JJ.

D. C. Kandy, 87,824. } V. P. DE MELL v. M. P. PERERA and another.

Mortgage—Mortgage effected after accrual of Crown debt—Right of Crown to "preference of payment"—Ordinance 14 of 1843, sect. 5—Sale of execution debtor's "interest"—Seizure, continuance of.

In 1873 the first defendant was the owner of certain land. In November 1873, S. obtained judgment for a large sum of money against the first defendant. In July 1879 the Queen's Advocate obtained judgment against the first defendant for certain money due by him to Government upon his purchase of an arrack-rent. In December 1879 first defendant mortgaged his land to plaintiff. In 1876 S. seized the land in execution of his judgment, but did nothing further under his writ. In January 1881 the first defendant's interest in the land was sold by way of a joint levy under the writs of S. and the Crown, and was purchased by the second defendant. Plaintiff now sued the defendants on the mortgage contract, praying that the mortgagor's interest as it stood at the date of the mortgage might be declared specially executable for the debt.

Held, that the seizure of the land effected by S. in 1876 must be taken to have been abandoned by 1879 when the mortgage was created; and that the mortgage was therefore not affected by such seizure.

The Fiscal having, at the sale at which second defendant purchased, sold the execution debtor's interest in the land:

Held, that this sale passed only the debtor's interest as at the date of seizure, when plaintiff's mortgage was in existence.

Held therefore, (affirming the decision of the Court below) that plaintiff was entitled to judgment.

Per CLARENCE, J.—The Ordinance 14 of 1843, by giving the Crown a "preference of payment" over other creditors, did not give it power to sell the property of its debtor free from all encumbrances created after the accrual of the Crown debt; and it is questionable whether the privilege of the Crown amounts to more than a right to preference *quoad* any assets which may from time to time have been realized and brought into Court, including perhaps a levy by a mortgagee under a mortgagee's decree.

The second defendant in this case appealed against a decree of the District Court of Kandy in favour of the plaintiff, declaring the mortgaged land specially executable for the mortgage debt. The land had since the mortgage been sold under a Crown writ against the mortgagor and purchased by second defendant. The remaining facts of the case appear in the judgments in appeal.

Ferdinands, A. G. A., for the second defendant, appellant.

Grenier (*Dornhorst* and *Seneviratne* with him) for the plaintiff, respondent.

Cur. adv. vult.

(19th September). CLARENCE, J.—I take the facts following as stated in the judgment of the learned District Judge. It was not suggested upon the argument of the appeal but that the learned District Judge's statement of facts is correct.

In 1873 *Pedro Perera* owned certain land, and in November 1873, *Harmanis Soyza* obtained a judgment against *Perera* for a large sum of money (case *D. C. Kandy* 59,848). In 1878 *Perera* purchased from Government an "Arrack rent." In May, 1879, he made default in the payments due by him to the Government under that purchase, and in July, 1879, the Queen's Advocate obtained judgment against him for a sum of money. (Case *D. C. Kandy* 82,145). In December, 1879, *Perera* mortgaged the land to present plaintiff, *de Mell*, who at once registered his mortgage. Meanwhile *Harmanis Soyza* had issued writ in 1876 in execution of his judgment, and under that writ the land now in question was seized, but the seizure was not followed up by any sale; and it is admitted by the learned Acting Queen's Advocate, who appears for the appellant, that there is no proof of anything further as done under that seizure. In January, 1881, *Harmanis Soyza's* judgment, and the Crown judgment against *Perera* were both unsatisfied. The land in question appears to have been seized about the end of 1880 in execution of both these judgments; and the land was by some joint arrangement sold on the footing of a levy under both judgments, and bought by *Migel Soyza*, present appellant. It appears that all the Fiscal then purported to sell was the debtor *Perera's* interest in the land, which without more would mean his interest as it stood at the date of the seizure. A contest then took place between the Crown and *Harmanis Soyza* for the proceeds of the levy, and it was held by this Court, affirming a decision of the District Court, that the Crown claim fell under section 5, and not section 4, of Ordinance 14 of 1843, that *Harmanis Soyza's* claim must be dated back to 1866, when *Perera's* debt to him was held to have been contracted, and that, consequently, the Crown claim had no right to preference over *Harmanis Soyza's*, and both must be paid in concurrence.

In the present action, *de Mell*, the mortgagee, sues *Perera* the mortgagor, and *Migel Soyza*, appellant, on the mortgage contract. The mortgage debt is still owing, and the relief which plaintiff prayed against appellant is a declaration that the land is specially executable under the mortgage, that is, liable to be sold as it stood at the date of the mortgage, or in other words, plaintiff seeks to sell the land over the head of appellant, who purchased subsequently to the mortgage.

Two points were argued in appeal by the learned Acting

Queen's Advocate, as the grounds on which we were asked to reverse the decision of the District Court.

The first point was that when plaintiff's mortgage was made in December, 1879, the land was still under seizure under *Harmanis Soyza's* writ issued in 1876. We know nothing more of that seizure than that the land was seized in June, 1876, and that no sale ever took place under that seizure. It would in my opinion be absurd to accept this as establishing that the land was still under seizure in December, 1879.

The second point, which was the point pressed, was that, having regard to section 5 of Ordinance 14 of 1843, the sale to appellant overrides plaintiff's mortgage.

It was not contended in appeal on respondent's part, that anything turns on the registration of plaintiff's mortgage.

Plaintiff's mortgage was made subsequently to the accruing of the Crown debt.

Whatever difficulty there may be in construing the English Law term "specialty" as employed in this Ceylon Ordinance, it is sufficient for the present purpose to say that it evidently was intended to include mortgages, and consequently, applying the enactment (sect. 5) to this mortgage and this Crown debt, the enactment amounts to a declaration that the Crown debt is entitled "to a preference of payment" over the mortgage debt. The question then is, What does that amount to?

The learned Acting Queen's Advocate contended that it gave the Crown the power to sell the land free of the mortgage and of every encumbrance created subsequently to the Crown debt. For my own part, as at present advised, I think it questionable whether the enactment does more than confer on the Crown a right to preference *quoad* any assets which may from time to time have been realized and brought into Court, *e. g.* money in Court as the proceeds of a levy (including probably a levy by the mortgagee under a mortgagee's decree) or assets under an insolvency, But it seems to me unnecessary to discuss this question, because it does not appear that at the joint levy made under the two writs, the Crown writ and *Harmanis Soyza's*, the Fiscal sold or professed to sell the debtor's interest in the land as it stood at the date when the Crown debt accrued, but merely the debtor's interest in the land, without more, and that would be his interest as it

stood at the time of the seizure. Now at the time of that seizure plaintiff's mortgage was in existence.

DIAS, J.—This is an appeal by the second defendant against the judgment of the District Court of the 6th March 1882. The plaintiff sues on a mortgage bond of 11th December 1879, against the first defendant as mortgagor, and against the second defendant as a party in possession of the mortgaged property. The plaintiff prays for a mortgage decree against both defendants. Interlocutory judgment was entered against the first defendant, who does not defend the action, but second defendant justifies his possession. He bought the mortgaged property at a Fiscal's sale in execution of two writs, Nos. 82,145 and 59,848. The first writ is a writ in favor of the Crown, but the Fiscal sold and the second defendant bought on 6th January 1881. The decrees in both cases are mere money decrees. It was contended for the second defendant that, as he bought under a Crown writ, he bought the estate free from all encumbrances created by the first defendant after the Crown debt had accrued. Under the 5th clause of the Ordinance 14 of 1843 the Crown has a tacit hypothec over all the property of its debtors from the date of the accruing of the debt. The Crown debt in question seems to have accrued before the date of plaintiff's mortgage, and if the decree in favour of the Crown is founded on that hypothec no doubt purchasers at a Fiscal's sale in execution of such decree will take the property so purchased free from all encumbrances subsequently created by the Crown debtor; but in this case the judgment in favor of the Crown is a mere money judgment against the first defendant, and all the Fiscal sold, and the second defendant bought, was the interest of the first defendant at the date of the sale, viz. 6th January 1881. At that date first defendant's right and title were subject to the plaintiff's mortgage of 1879. It was further contended for the second defendant that at the date of the plaintiff's mortgage the estate was *in custodiâ legis* under the writ No. 59,848. All that need be said on this point is that the seizure, which was made on the 30th June 1876, must be taken to have been abandoned. Besides, the decree in

59,848 was a money decree on a simple money claim.

For the above reasons the judgment appealed from must be affirmed.

Affirmed.

Proctor for the plaintiff, *Edwin Beven.*
Proctor for the second defendant, *W. Goonetilleke.*

18th August and 29th September, 1882.

Present—CLARENCE and DIAS, JJ.

D. C. Kandy, 87,943. } K. R. A. MUTAPPA CHETTY v. P. W. CONOLLY.

Fiscal, action against for neglect of duty—Prescription—Ordinance 4 of 1867, sect. 21—Accrual of cause of action.

Plaintiff, the holder of a writ against two persons, placed it in the hands of defendant, a Fiscal, for execution. Defendant purported to seize certain land of the execution debtors, but the seizure was bad for the omission of certain formalities. Between the seizure and the day fixed for sale, viz. on 20th January 1879, the execution debtors conveyed the property seized to A., who claimed the land and stayed the sale. Plaintiff brought an action to set aside A.'s claim as made pending seizure, which action was finally decided against plaintiff in appeal on 7th September, 1880, on the ground that there had been no valid seizure prior to the conveyance to A. Plaintiff brought the present action, for damages, against the defendant in February 1881.

Held (affirming the decision of the District Court) that plaintiff's cause of action accrued on defendant's failure to make a valid seizure, and that plaintiff's action, not having been brought within nine months of such accrual, was barred by section 21 of the *Fiscals Ordinance*, 1867.

The plaintiff appealed against a judgment of the Court below holding that his action was barred by prescription. The facts of the case fully appear in the judgment of the Supreme Court.

Van Langenberg for the plaintiff, appellant.
Layard for the defendant, respondent.

Cur. adv. vult.

(29th September). The judgment of the Court was delivered by

CLARENCE, J.—This is an action against a Fiscal. The question raised on the appeal is one of prescription. To plaintiff's libel defendant pleaded that the cause of action did not accrue within nine months of action brought, and pleaded the 21st section of the *Fiscals Ordinance*.

The substance of plaintiff's complaint is as follows:—Plaintiff, in January 1879, held a judgment obtained in a Kandy District Court action for a sum of money against two men named *Loku Banda* and *Punchy Banda*. Defendant then being Fiscal for the Central Province, plaintiff issued his writ and placed it in defendant's hands for execution, with instructions to seize and sell certain land of the judgment debtors. Defendant purported to seize the land, but in consequence of defendant's officer having omitted certain necessary formalities, there was no valid seizure. Meanwhile, between the date of the ostensible seizure and the date appointed for the sale, viz. on the 20th January 1879, the judgment debtors conveyed the land to one *Appuhamy*, who thereupon laid claim to the land, whereupon defendant did not sell the land, and plaintiff brought an action against *Appuhamy* for the purpose of setting aside *Appuhamy's* conveyance, but failed in that action by reason that, there having been no valid seizure prior to the conveyance, the conveyance was not obnoxious to section 42 of the Ordinance. Plaintiff's action against *Appuhamy* was dismissed on 12th January 1880, and that dismissal was affirmed in the Supreme Court on the 7th September 1880.

Plaintiff's present action was brought in February 1881. Plaintiff contends that his cause of action did not accrue until the Supreme Court judgment was passed. On the contrary, we think that plaintiff's cause of action accrued when the Fiscal failed to seize. Plaintiff had then a distinct right to have the land seized. The Fiscal, according to plaintiff's averments, failed to seize, and plaintiff had at once a cause of action and a right to be placed in the same position, by means of damages, as if the Fiscal had done his duty.

We think that when the Fiscal failed to seize, there was at once a breach of his duty to plaintiff, and damage to plaintiff. We think, therefore, that the decision of the learned District Judge was right and should be affirmed.

Affirmed.

Proctor for the plaintiff, *C. Vanderwall.*
Proctor for the defendant, *E. Beven.*

27th January and 14th February, 1882.

Present—CLARENCE, A. C. J , and DIAS, J.

C. R. Galle, 60,977. } S. B. DE SILVA v. T. V. K. PERERA and two others.

Practice—Lessor and Lessee—Action by lessee against trespasser—Joinder of lessor as defendant to warrant and defend title.

Plaintiff, a lessee who had been duly put in possession of the property leased, sued his lessor and two others, averring that second and third defendants had trespassed upon the property and forcibly appropriated certain goods of plaintiff's, and calling upon his lessor (the first defendant) to warrant and defend title, and, in failure, to pay plaintiff the rent advanced and the value of the goods appropriated by the trespassers. The trespassers having claimed and proved title to the property leased, first defendant was by the Court below decreed to repay the advance rent and cast in damages and costs.

Held (reversing the decision of the Court of Requests), that the first defendant had been improperly joi ned in the suit and was entitled to be absolved from the instance with costs.

D. C. Negombo 7,744 (1) approved *quoad hoc.*

The first defendant appealed against a judgment of the Court of Requests (*J. D. Mason*, Commissioner), decreeing him to repay to plaintiff certain rent received from him, and to pay Rs. 5 as damages, and plaintiff's costs.

The facts of the case are sufficiently disclosed in the judgments in appeal.

Roosmalecocq for the first defendant, appellant.

Cur. adv. vult.

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(1) 1 S. C. C., 54.

(14th February). CLARENCE, A. C. J.—Plaintiff avers a lease from first defendant of a cocoanut pit for two years from 22nd September 1880. He further avers that on 17th July 1881 second and third defendants forcibly ousted him and threw out his cocoanut husks and appropriated them. He thus joins these three defendants in one action: he asks that first defendant might be called on to warrant title, and on failure thereof may be condemned not only to return the rent paid by plaintiff, but to pay for the husks appropriated by second and third defendants; and in the alternative plaintiff asks for damages against second and third defendants for the husks.

The first defendant answers that he has performed his part of his contract with plaintiff, and objects to being sued in this suit jointly with second and third defendants. The second and third defendants allege title to the pit.

The Commissioner, in spite of first defendant's objection, called on him to warrant his title to lease, and holding on the evidence that he had failed to do so, decreed him to pay one year's rent already received from plaintiff in advance, and to pay Rs. 5 damages, and to pay plaintiff's costs. The second and third defendants, who according to the Commissioner have defended themselves successfully, are thus left to bear their own costs.

The first defendant appeals.

I think that the first defendant's objection to the constitution of plaintiff's suit was rightly taken in the Court below and should have been upheld. It is a mistake to suppose that a purchaser or a lessee, when suing a trespasser, has a right to join his vendor or lessor as a defendant party and call upon him to warrant title. As between plaintiff and first defendant all that appears on the pleadings is that first defendant leased to plaintiff, that plaintiff was in possession, and that the other defendants trespassed. A purchaser in possession, against whom an attempt is made to evict him by process of law, has a right to call on his vendor to defend the title, but it is no sequence of this that a purchaser coming into Court as a plaintiff to claim damages from a trespasser should be able to join his vendor as a co-defendant. This was in effect pointed out by Sir John Phear in *D. C. Negombo* 7,744 (1); and although upon another point (the right of a vendee who has

(1) 1 S. C. C., 54.

not obtained possession to maintain ejectment) there is a subsequent contrary decision of this Court, I do not understand the later decision as throwing any doubt on the principle just mentioned.

DIAS, J.—This is an action by a lessee against his lessor, who is the first defendant, founded on a tortious act of the second and third defendants. The plaint avers that on the 22nd September 1880 the first defendant leased to the plaintiff a cocoanut husk pit for two years; that on 17th July 1881 the second and third defendants forcibly took possession of the pit and appropriated the husks. The second and third defendants claim the pit as their property, and the first defendant denies his liability on the ground that he put the plaintiff in quiet possession of the pit, which plaintiff continued to possess uninterruptedly till the date of the alleged trespass. After hearing evidence on both sides, the Commissioner gave judgment for the plaintiff as against the first defendant, who now appeals. The judgment of the Commissioner is erroneous in law. The lease imposes no obligation on first defendant to prevent the second and third defendants from taking the plaintiff's cocoanut husks or, in default, to pay damages. If the first defendant is responsible for the tortious act of the second and third, every landlord will be liable to pay damages to his tenant whose house has been robbed.

Set aside. First defendant absolved. Plaintiff to pay all costs.

Proctor for the plaintiff, *A. T. Weerasooria.*
Proctor for first defendant, *D. O. Goonesekere.*
Proctor for second and third defendants, *D. Samarawikrama.*

3rd and 28th March, 1882.

Present—CLARENÇE, A. C. J., DIAS and GRENIER, JJ.

P. C. Chilaw, 14,398. } E. E. MODDER v. THOMIS *alias* Shadrach.

Vagrants Ordinance, 4 *of* 1841, *sect.* 4, *subsect.* 6—*Found in house for unlawful purpose—Fornication.*

The purpose of committing secret fornication is not an "unlawful purpose" within the meaning of subsect. 6 of sect. 4 of the *Vagrants Ordinance*, 1841.

The defendant was charged with being found in the complainant's house for an unlawful purpose. The Magistrate found he was there for the purpose of committing fornication with an inmate of complainant's house, and acquitted defendant, holding that this was not an "unlawful purpose" within the purview of the *Vagrants Ordinance*, 1841, sect. 4, subsect. 6. The complainant appealed. The facts are fully disclosed in the judgments of the Supreme Court.

(15th February). The case first coming on before CLARENCE, J., it was by his order put on for the full Court.

No Counsel appeared on the appeal.

Cur. adv. vult.

(28th March). GRENIER, J.—I think that the judgment of the Magistrate in this case is right, although I cannot adopt all his reasoning in support of it. The charge is laid under the 6th subsection of section 4 of Ordinance 4 of 1841. That subsection is copied almost verbatim from section 4 of the *Vagrant Act* (5 Geo. 4 cap. 83), and the judicial interpretation which has been placed upon the words "unlawful purpose," which occur in the English statute, will apply to the same words as used in our Ordinance. In *Hoyes* v. *Stephenson* (1) the Court of Queen's Bench decided that being in a garden (the term "garden" occurs both in the Statute and in our Ordinance) for the purpose of fornication is not being there for an "unlawful purpose" within the meaning of the *Vagrant Act;* that every immoral purpose is not necessarily an unlawful pur-

(1) 9 W. R., 53.

pose; and that the true construction to be placed upon the words "unlawful purpose" "is a purpose to do something forbidden by the statute or common law."

Now, the facts of the case, as I gather from the record, are, that the defendant was found, on the night of the 16th of November last, in the complainant's dwelling house in a room occupied by a maid servant. The defendant had not been forbidden the house by the complainant, and his visit on this occasion was no doubt with the consent, if not at the invitation, of the servant, who in her evidence says, "He" (the defendant) "is my husband, and had come to see me." She, however, adds, "We are not married." The Magistrate has found as a fact (and I see no reason to differ from his finding) that the defendant's purpose was to commit fornication with the maid servant. There is no statute law forbidding secret fornication of this kind, nor in my opinion is it forbidden by our common law. What the later Roman Dutch Law regarded as a criminal offence was public fornication (1).

It is unnecessary, in my opinion, to review in this case the decision of Justice *Stewart* in *P. C. Panadura* 22,247 (2), as the evidence does not establish that the servant, at the time of the alleged offence, was a married woman. True she says, "I was married to another man, but left him some three or four years ago at Negombo"; but she does not say that she was lawfully married, or that her husband is living; and for aught that appears on the record he may be dead. The Magistrate, moreover, has expressly held that there is no reason to suppose that defendant was aware that the servant had previously been married. The facts as proved in the Panadura case were entirely different.

CLARENCE, A. C. J.—I am clearly of opinion that this defendant is not shewn to have been on the premises in question for an unlawful purpose within the meaning of the *Vagrants Ordinance*. The case reported in 3 Grenier being at all events distinguishable, it is unnecessary now to consider whether it was rightly decided.

DIAS, J.—I am of the same opinion.

Affirmed.

(1) Van der Linden, *Instit.*, bk. 2, cap. 7, sect. 5; Henry's Translation, 356.

(2) 3 Grenier, P. C., 6.

19th May and 8th June, 1882.

Present—DIAS and GRENIER, JJ.

J. P. Colombo, 2,994. } C. MATTHEW v. C. CAROLIS and others.

Security to keep the peace—Ordinance 11 *of* 1868, *sect.* 229—*Refusal to require security—Appealable order.*

Held, (*per* DIAS, J., *dubitante* GRENIER, J.) that the order of a Justice of the Peace, refusing to require the defendants to give security to keep the peace, was an appealable order.

The complainant in this case, upon affidavit that the defendants had used towards him threats likely to provoke a breach of the peace, prayed that they might be required to find security to keep the peace. The Justice, believing there was no reason to fear a breach of the peace, refused to require such security, and complainant appealed against this refusal. The matter was first argued before GRENIER, J., by whose order it was put on before a fuller Bench.

Browne (*Templer* with him) for the complainant, appellant.
Layard for the defendants, respondents.

Cur. adv. vult.

(8th June). DIAS, J.—On the 6th April last the complainant swore an affidavit charging the five accused with using threats, and prayed that they might be bound over to keep the peace. The matter was investigated on the 15th April, when evidence was called on both sides, and in the result the Justice of the Peace discharged the accused. Against this order the complainant appeals. It appears that the complainant and another are rival dubashes, or persons supplying ships with provisions. The party opposed to the complainant is supported by some persons who are headed by *Carolis*, the 2nd accused. Disputes and cases and counter-cases seem to have been going on between these parties for some time. On these proceedings it is difficult to say which party is in the wrong, but one thing is clear beyond all doubt, that if some steps are not taken at once, these disputes are likely to result in a serious breach of the peace. The Justice of the Peace himself thought that the accused might have used threats towards the complainant, but he

did not think those threats were serious. From this opinion I entirely dissent, and it appears to me that 1st, 2nd and 3rd defendants should be bound over to keep the peace. No case, however, has been made out as against the 4th and 5th accused, who were properly discharged.

An objection was taken at the hearing of this appeal by the learned Counsel for the respondent, that the order appealed from is not an appealable order. This question depends on the construction to be placed on the 229th clause of the Ordinance No. 11 of 1868. That clause provides that in every case in which any person considers himself aggrieved by the proceedings of any Court, Magistrate or Justice, in having required or refused security to keep the peace or for good behaviour, &c. In this case the Justice of the Peace discharged the accused, or in other words, refused to require the accused to give security to keep the peace. It was contended for the respondent that the words "refuse security" meant the rejection of security on the ground of insufficiency or for some other cause. This construction does not seem to me to be borne out by the context. The clause seems to me to suppose two cases, viz. 1st, the case of a party accused who is required to give security, and 2nd, the case of the complaining party who prays that the accused party may be required to give security. The construction contended for by the respondent would only give an appeal to the accused party, and there is nothing in this clause or in any other clause of the Ordinance to shew why the complaining party should be in a worse position than the accused party. In my view of the Ordinance the order appealed from is an appeal able order.

GRENIER, J.—When this case originally came before me, sitting alone, I entertained grave doubts as to whether the order complained of by the appellant was an appealable order or not. The appeal was re-argued before me and my brother DIAS, and I cannot say that the arguments of the learned Counsel for the appellant have altogether removed those doubts. But I feel bound by the judicial interpretation which this Court has by several decisions placed upon the 229th section of the *Administration of Justice Ordinance*, and I will not therefore say that the appeal should be rejected.

Upon the merits of the case, I agree with my brother DIAS that the interests of justice demand that the first

three defendants should be required to give security to keep the peace. I should have felt disposed to require the complainant also to give security if the evidence had disclosed that he had in any way provoked the threats used by the defendants, or had himself evinced an intention to commit a breach of the peace. But, as it is, the evidence is all one way and affects only the defendants.

Set aside.

1st and 16th June, 1882.

Present—CLARENCE, J.

D. C. Colombo, 85,853. SAIBO MEERA MARKAR v. O. L. M. SAMSY LEBBE MARKAR *Ex parte* J. L. MOHAMADO LEBBE MARKAR.

Insolvency—Injunction—Assignee's right to restrain execution creditor of insolvent from selling moveables of insolvent in execution—Summary application.

Defendant was adjudicated insolvent on 10th January, and appellant was appointed his assignee on 14th February. Plaintiff obtained in this suit a money judgment against defendant on 16th January, issued writ, and on 23rd February seized in execution certain shop goods of defendant then in the custody of appellant as assignee, and advertised them for sale. Appellant, upon affidavit of these facts and notice to plaintiff and defendant, moved (in effect) in this suit that the Fiscal might be restrained by injunction from selling the goods in execution.

Held, that the application had been rightly refused by the District Court.

Semble, that the Court might have granted an injunction, had the application been made in the ordinary course upon a fresh libel filed.

Plaintiff in this action obtained judgment for Rs. 460, interest and costs, on 16th January 1882, against the defendant by default. The defendant was on 10th January 1882 adjudicated insolvent. The appellant was on 14th February appointed assignee of his insolvent estate, which was placed under sequestration. On the 21st February the Fiscal delivered over to appellant as such assignee certain shop goods of the insolvent which had been sequestered with the rest of his estate. On writ issued by plaintiff in execution of his judgment, the Fiscal, on 23rd February, seized these shop goods in spite of the assignee's protest. On 13th March, upon affidavit of these facts by the assignee,

and after notice to the plaintiff, the defendant, and the Fiscal, the assignee moved for a rule *nisi* on the plaintiff, the defendant, and the Fiscal, calling upon them to show cause why the seizure should not be set aside and the writ of execution recalled. The District Judge (*T. Berwick*) disallowed the motion, holding that the questions involved could not be disposed of upon summary proceedings like the present.

The assignee appealed.

Dornhorst for the assignee, appellant.
Layard for the plaintiff, respondent.

Cur. adv. vult.

(16th June). CLARENCE, J.—This is an appeal by an assignee in insolvency against a dismissal by the learned District Judge of an application which is rightly characterized by the District Judge as an application for an injunction to stay a sale in execution.

Plaintiff got judgment on the 16th January against the defendant for Rs. 460, claimed as rent due for a certain shop at Kayman's Gate. On the 23rd January plaintiff issued writ in execution of that judgment. On the 13th March the present appellant upon notice to plaintiff and defendant made his present application. The affidavit in support of the motion states that defendant was adjudicated insolvent on the 10th January, that appellant was appointed assignee on the 14th February, and that while certain shop goods of the defendant were in actual custody of the appellant as assignee, the Fiscal on the 23rd February seized them in execution of plaintiff's judgment, refuses to withdraw, and is about to sell.

The plaintiff's case in opposition to the motion was not called for by the learned District Judge; there are therefore no affidavits in answer to appellant's affidavit, and no material on which I can arrive at any conclusion on an important question of fact, which seemed to be shadowed forth in the argument before me, viz. whether the house in which the shop goods were seized is the house concerned in plaintiff's action for rent. I asked whether in order to save trouble and expense counsel could come to any agreement as to the fact with reference to that. Counsel, however, were unable to agree to anything. I do not know therefore whether plaintiff's claim falls within the purview of section

53 of the *Insolvency Ordinance*. I am not prepared to say that under no circumstances can an assignee in insolvency obtain an injunction to restrain a judgment creditor of the insolvent from selling under his writ. It is quite true that in the ordinary case in which goods seized by a plaintiff in execution against his defendant are claimed by a third party, the Court would be most unwilling to interfere at the instance of such third party by injunction. See for instance *Garstin* v. *Asplin* (1). And the assignee will of course have his action after the sale. But the claim of an assignee in insolvency stands on rather a different footing from that of the third party in the simple case just now put, inasmuch as the facts on which his claim of title to the goods is based are so much more easily ascertained. Our *Insolvency Ordinance*, based on the English Act of 1849, appears to confer no power on the District Court to issue injunctions in the matter of the insolvency. The English Bankruptcy Court has that power under the Act of 1869, and it is a power frequently exercised. See for instance *Re Bishop* (2). I am not prepared to say that cases might not occur in which the District Court if appealed to duly by libel might be justified in restraining on an assignee's application an execution creditor's sale.

But in the case before me I think that the assignee has at all events mistaken his proceedings. Whatever might have been his right had he made his application by filing a libel, I think he went wrong in preferring it summarily by way of motion in an action to which he is no party.

Appeal dismissed.

Proctor for the plaintiff, *J. W. Vanderstraaten.*
Proctor for the applicant, *John Ohlmus.*

(1) 1 Mad., 150.

(2) L. R., 13 Ch. D., 110.

2nd June, 1882.

Present—CLARENCE and DIAS, JJ.

D. C. Kandy, 88,489. K. R. SEYADU MOHAMADO v. G. A. MAC CAROGHER *Ex parte* G. A. MAC CAROGHER.

Fiscal—Execution—Ordinance 4 of 1867, sect. 44—Sale of debts—Common law proceeding.

The procedure for the attachment of debts prescribed by section 44 of the *Fiscals Ordinance*, 1867 does not preclude a plaintiff from selling in the ordinary course of execution debts due to his execution debtor, but simply provides an alternative and summary proceeding for the purpose.

The plaintiff in this case, upon a mortgage decree, seized and sold in execution the defendant's interest in a mortgage granted by one *Burke* to defendant. *T. W. Hall* became the purchaser. Defendant moved, under section 53 of the *Fiscals Ordinance*, 1867, to set aside the sale, on the ground that the procedure prescribed by section 44 should have been adopted by the plaintiff. The District Judge (*A. C. Lawrie*) having set aside the sale, the plaintiff and *Hall* appealed. The facts more fully appear in the judgment of the Supreme Court.

VanLangenberg for the plaintiff, appellant.
Browne for the purchaser (*T. W. Hall*), appellant.
Dornhorst for the defendant, respondent.

At the close of the argument, their Lordships delivered the opinions embodied in the following written judgments, which were subsequently handed in.

CLARENCE, J.—It seems in this case that the plaintiff got judgment against his defendant and proceeded to execution. It is not disputed that the property hypothecated by defendant to plaintiff included a mortgage granted to defendant by one *Burke*. Plaintiff in execution of his judgment seized that secured debt and sold it, the purchaser being Mr. *Hall*. Within 30 days after the sale the defendant applied to the District Court to have the sale set aside on the ground that there was irregularity in the sale, in that the Fiscal did not "comply with the requirements of sect. 44 of the *Fiscals Ordinance*" That sect. says,

"When the person against whom execution is decreed is entitled to money due to him by some other party, it shall be lawful for the party in whose favour such execution is decreed to call on the person owing money to his debtor to show cause why he should not pay the money due by him into Court. If he does not dispute the debt, he shall pay the same into Court within such time as the Court shall allow him, of which the Court shall make record, and if he fails to do so, the Court may issue execution against him without any further action or process."

Then follows some procedure applicable to the case in which an execution debtor's debtor disputes his debt. It seems to me that this provision simply offers to the execution creditor an alternative, which he may if he pleases adopt, but which he is under no obligation to adopt if he prefers to sell the debt as it stands. According to the law of this country debts are saleable. The *Fiscals Ordinance* expressly recognises that. Section 59 provides the means and prescribes the manner in which such choses in action are to be seized, and section 76 clearly contemplates not merely the seizure of the debt but also the sale. This execution creditor has got judgment against his defendant for this money and is forced, by reason of his defendant not voluntarily paying off the judgment, to resort to the Fiscal's action, and in my opinion he is entitled to deal with his defendant's property wherever he finds it and sell it in satisfaction of his debt, unless the Ordinance has subjected him to any restriction. I think that the 44th clause imposes no such restriction, but simply offers him an alternative mode of procedure, which he may or may not adopt in his discretion.

DIAS, J. concurred.

Set aside with costs.

Proctor for the plaintiff, *J. H. de Saram.*
Proctor for the defendant, *W. Goonetilleke.*
Proctor for *T. W. Hall, C. Vanderwall.*

27th June, 1882.

Present—De Wet, A. C. J, Clarence and Dias, JJ.

P. C. Colombo, 6,310. } D. J. Seneviratne v. Thegis Singho and 5 others.

Assault on police officer in the execution of his duty—Ordinance 11 of 1865, sect. 165—Warrant of arrest, description of offence in—Conviction of assault at common law.

Where a warrant of arrest against an accused party gave the names of the complaining and accused parties, and stated the charge to be "threatening to do bodily harm" :

Held (*per* De Wet, A. C. J. and Dias, J.) that the warrant sufficiently described a criminal offence.

Held also (*per* Clarence and Dias, JJ., following *P. C. Kalutara* 64,188 (1)) that upon a charge of assaulting a police officer in the execution of his duty, in breach of section 165 of the *Administration of Justice Ordinance*, 1868, the accused could be convicted of an assault at common law.

The six defendants were charged with an assault upon the complainant, a Peace Officer, when engaged in the execution of his duty as such, viz. in attempting to arrest one *Sameretunga* upon a warrant of arrest issued in J. P. Colombo case No. 5,247. This warrant was in the following terms:

WARRANT OF APPREHENSION.

The Queen on the Complaint of Don Andris de Silva Sameretunga of Cowdane ... ... Complainant.

Justice of the Peace } No. 5247 vs.

Don William de Silva Sameretunga of Waralappola ... ... Accused.

To the Peace Officer of Cowdane

Take into your custody the body of the above named accused, charged with threatening to do bodily harm and bring him before me or some other competent Justice of the Peace forthwith. Wrt. retble. 14th April next.

Given under my hand at Colombo this 31st day of March 1882.

(Signed) J. E. Smart,
Justice of the Peace for Col. Dt.

The Police Magistrate (*W. J. S. Boake*) acquitted the

(1) 4 S. C. C., 117.

defendants, holding that the warrant, by virtue of which the arrest was attempted, was bad, as it did not sufficiently describe the offence with which the party against whom it issued was charged.

The complainant appealed.

The appeal first came on before CLARENCE, J., by whose direction the case was put on for the Full Bench.

Dornhorst, for the complainant, appellant, cited *P. C. Kalutara* 64,188 (1).

Browne for the defendants, respondents.

Their Lordships, at the close of the argument, delivered the opinions contained in the following judgments, which were handed in on 13th July.

DE WET, A. C. J.—In this case, which is an appeal from the Police Court of Colombo, it appears that certain defendants were charged before the Police Magistrate of that Court with having on the 2nd April 1882 assaulted one *Don Joronis Seneviratne*, Peace Officer of Cowdane, in the execution of his duty, at a time when he went to arrest one *Don William De Silva Sameretunge*, who was charged under a warrant dated 31st March 1882, issued by a Justice of the Peace upon the complaint of one *Don Andris De Silva Sameretunge*, and with having contravened the provisions of section 165 of Ordinance No 11 of 1868

After hearing the evidence of the complainant, and upon the warrant of arrest being produced, the Magistrate acquitted the defendants, holding that the warrant was bad inasmuch as the allegation therein contained, namely "threatening to do bodily harm" was an insufficient description of a criminal offence. The principal contention raised by respondents' Counsel in this Court was, that the name of the person against whom the threat was uttered should have appeared in the warrant. I am of opinion that this was not necessary, as the warrant sufficiently described the nature of the offence, the name of the person complaining, and the name of the person complained against. Under these circumstances, therefore, holding as I do that the warrant was perfectly legal, the Police Magistrate is ordered to proceed with the case No 6,310 instituted by the appel-

(2) 4 S. C. C, 117.

lant against *Thegis Singho* and others for assaulting him in the execution of his duty.

CLARENCE, J.—As the other members of the Court think that this case should be sent back to the Police Court for further proceedings, I am content that that course should be adopted. It will at any rate be open to the Magistrate, should the evidence justify such a course, to deal with the case after the precedent reported in 4 S. C. Rep., 117. But if I were called upon to pronounce a decision as to the legality of this warrant, I should wish to take time to consider that point.

DIAS, J.—The question in this case is, whether the warrant of apprehension under which the prosecutor acted was or was not legal. Two questions were argued at the bar, viz. first, whether or not the defendants could be convicted of resisting the complainant in the execution of his duty as a Peace Officer: (this question depends upon the validity of the warrant); and secondly, assuming that the warrant was illegal, whether the defendants should have been convicted of an assault at common law. On the first question I am of opinion that the warrant was legal. It is a warrant in the form E. given in the Schedule to the Ordinance 11 of 1868. It was objected that the warrant was bad inasmuch as it did not state the name of the party against whom the threat was used. The answer to this objection is, that the statutory form of the warrant does not require it. Even if the form required it, I think there is sufficient on the face of the warrant to indicate the person against whom the threat was used The names of the complaining and accused parties are inserted in the warrant, and it may be reasonably presumed that the threat was used by the accused party against the complaining party. On the second question I agree with the opinion of Mr. Chief Justice *Cayley*, reported in the 4th Volume of the Supreme Court Reports, p. 118, that the defendants can be found guilty of common assault on this plaint.

Under these circumstances I agree with the rest of the Court that the case should be sent back to be proceeded with in due course.

Set aside.

[The defendants were on 14th August 1882 tried by the

same Magistrate and convicted both of the resistance charged and of common assault, but "under circumstances of great aggravation." They were fined one rupee each.]

1st and 2nd March, 1883.

Present—CLARENCE, J.

D. C. Colombo, 8,645. } F. M. AROOKIAMPULLE v. M. A. SAMBO and another.

Fiscal—Procedure to set aside sale in execution—Ordinance 4 of 1867, sect. 53—Summary proceedings—Statement of objections.

Observations on the course to be adopted in proceeding under section 53 of the *Fiscals Ordinance*, 1867 to have a Fiscal's sale in execution set aside for irregularity.

This was an action on a promissory note for Rs. 300 against a man and wife, and judgment was on 12th June 1882 entered for the plaintiff in default of defendants appearing. Upon writs of execution issued the Fiscal of Kandy seized and sold, on 17th October 1882, certain land of the defendants'. On 23rd November 1882, the first defendant moved (with notice to the purchaser at the Fiscal's sale) that it might be entered of record that he impeached the Fiscal's sale, and moved to read and file the affidavit of 1st defendant. This affidavit averred that, though the land sold was worth over Rs. 1,000, there had been no advertisement of the sale in the *Gazette* or any newspaper; and that there had only been two bidders at the sale.

The District Judge (*T. Berwick*) disallowed the motion in the following terms:

This motion is a superfluity (and therefore a mischief) and made under a misconception of the nature of the action intended and the proper procedure therein.

The Court is informed that the defendants' property has been seized and sold under the writ of execution on the judgment in this suit, and that the defendant desires to get this sale set aside on grounds of irregularity and informality, which he intends to allege and prove in due course. There are two—or I should rather say, three—modes of procedure appropriate to this action: the defendant might, on satisfying the Court by *ex parte* proof that there are sufficient grounds *primâ facie* for the proceeding, move the Court for a Rule Nisi on the various parties interested, to have the sale set aside and fresh proceedings taken on the writ; or, second, he might simply move the Court to set aside the sale, giving due notice of his motion, when parties would be heard thereon. In either of these cases, if the matter be contested, the Court would hear evidence on both sides if necessary, either by affidavit or *vivâ voce*. To neither of these modes of procedure is the present motion appropriate.

There is a third mode of procedure, however, which is that which probably lurks in the defendant's mind, and connected with the provision in the *Fiscals Ordinance*, which is in these words: "It shall be open to the debtor impeaching such sale on the ground of irregularity or informality to state or report to the Court his objections to the sale being confirmed, and the Court having inquired into the same summarily shall either confirm or disallow the sale as to it shall appear just and reasonable." The intended meaning of the word "summarily" baffles me. In England it means without the jury which the Common Law requires. The words "disallow the sale" I fancy to mean, "set aside the sale." If the defendant desires to proceed under this provision his course is simple and plain. He ought to file a paper or pleading setting out the grounds of law or allegations of fact on which he relies in support of the setting aside or non-confirmation of the sale. This Court will not inquire into these summarily, but will require the presence of both parties (or notice to them) before it either confirms or disallows the sale; and therefore the hearing of any testimony either *vivâ voce* or by affidavit, when or before these allegations are filed, would be altogether out of time. Having filed his allegations (upon the proper stamp which pleadings require) which should conclude with the prayer that the sale be set aside and cancelled (or, in the curious language of the Ordinance, "disallowed"), he can next use the ordinary procedure for bringing the other parties interested into Court, and for obtaining a decision on his prayer. If they do not appear on due notice, his application will be allowed as of course, or on such *ex parte* evidence as the Court may think proper. If they do appear, the Court will hear and decide upon such evidence, if any, as is offered on the respective sides.

It is obvious that the first branch of the motion before me, viz. that the defendant impeaches (or intends to impeach) the sale, is altogether inappropriate to the procedure just pointed out, and it is therefore disallowed.

In disallowing, as I also do, the second branch of the motion, viz. for liberty to read and file certain affidavits, I take the opportunity to make the following observations. First, premising that the motion was originally made simply to file, and not to read and file, the affidavits—By filing affidavits you record testimony. No testimony can be recorded unless it has been given, whether *vivâ voce* in the witness box, or otherwise. Therefore no affidavits can be filed until they have been read. It was therefore very necessary to insert the word "read" in making the motion, and I draw the attention of the local profession to this, because of the prevailing mis-conception on the subject.

As to "reading" the affidavits, that is to say as to offering certain testimony—(whether *viva voce*, by witnesses in the box, or documentary, is of no consequence)—there is only one class of cases in which testimony can be received behind the backs of the other parties interested; and that is, where it is offered as *primâ facie* evidence to justify the granting of a conditional Rule, or other purely *ex parte* proceeding: as, for example, an application for injunction very commonly is. You do not file your proof with an action for ejectment, but you reserve your proof till the day of trial. When both parties are before the Court, or have been cited, and the question is *contested*, is the proper time to offer your testimony. If there is no contest and the point is yielded, no evidence is required except in the few cases when the party is absent on citation and the Court thinks *ex parte* evidence desirable. It is only necessary to state these propositions to show that the proposal to tender affidavits in the present proceeding at the present time is altogether misconceived and a waste of stamps.

The plaintiff and first defendant appealed.

De Saram, for the appellants.

Cur. adv. vult.

(2nd March). CLARENCE, J.—I do not think that there need be any difficulty in carrying into effect the provisions of the 53rd section of the Ordinance with regard to the impeaching of execution sales. The party who desires to impeach the sale is to place his objections before the Court within the 30 days. The intention is, that he should lay before the Court a definite statement of his objections, committing himself definitely to specific objections. The best method of doing this will undoubtedly be to present to the Court a written statement of the objections relied on. The words of the enactment are "state or report." The Legislature probably had in contemplation that cases would arise (and in Courts of Requests actions, for example, such instances are probably not uncommon) in which the party may be without professional assistance and may be unable to write. It is no doubt open to a party in such case to present his objections to the Court orally, when the Court will of course reduce them to writing. The best course undoubtedly is to present to the Court a written statement of the objections, and this in District Court cases there will usually be no difficulty in doing.

I am informed by counsel that this is the course which was adopted by the appellants in the present instance, but as no written statement of objections is now to be found in

the paper book,* I am unable to express any opinion on the document so presented to the Court.

The objecting party having thus lodged his objections, the next step is to take order for their discussion, always supposing that the Court does not find them to be on their face untenable, in which case, of course, they may be at once repelled. Notice must, of course, be given to all other parties interested, and on the day fixed for the discussion the several parties may adduce their evidence in support of and in opposition to the objections. It hardly needs to be said that when a party intends to use affidavits the proper course is to give copies beforehand to the other side. The inquiry into the objections is to be "summary." There is, I think, no reasonable doubt as to what is meant by "summary" proceedings, viz. proceedings as brief and as devoid of technicalities or formalities of procedure as may be found compatible with the full investigation of the matter. The learned District Judge has referred to an instance, and nothing more, of proceedings in England which fall within the category of summary proceedings.

If it be the fact that appellants tendered to the District Court a written statement of the objections in virtue of which they proposed to impeach this sale, they adopted a proper course. The motion noted as to be made by plaintiff's Proctor, Mr. *C. Perera*, however, is ill-conceived.

I have already pointed out the proper course to be taken in lodging the objections. I suppose that the District Judge has rejected that motion, but if I were simply to dismiss this appeal the objecting parties would be out of time with their objections if any order has been made rejecting them. It does not clearly appear what order has been made. I shall assume that appellants have laid before the

* The following document is stitched into the paper-book (p 34):—
No. 86,645 16th Nov. 1882. Mr. Charles Perera files a statement of objections to the sale of defendant's property, to wit, Bingapitiya Welicanda Cumbure ... ... held on 17th Oct 1882, being confirmed.

Statement of Objections irrespective of Arguments to be urged at discussion.

1. The above property is worth from Rs. 1,000 to Rs. 1,500 and was not published in the Government *Gazette* as required by the Ordinance.

2. No notice of sale of the said property was given either to the plaintiff or to his proctor.

3. The Fiscal of Kandy was asked by plaintiff's agent not to sell the said property.

(Signed) J. W. MACK,
Secretary.

District Court some objections, not now to be found in the paper-book.

Set aside.

Proctor for the plaintiff, *Charles Perera.*

19th September, 1882, *9th March and 12th April*, 1883.

Present—De Wet, A. C. J., Clarence and Dias, JJ.

D. C. Kandy, 89,797. } G. MacCarogher v. J. F. Baker and another.

Possessory action—Nature of the possession necessary—Ability of an agent, who has possessed in right of the dominus, *to maintain possessory action.*

M., the owner of two coffee estates, sold an undivided half share of them to B, who gave M. a mortgage for the purchase amount over the property so sold on 2nd July 1876. M. died, leaving his brother the plaintiff (who was in England) his executor, and thereafter B. continued in the sole occupation and management of the estates. At B's request plaintiff came out to Ceylon, and took charge of the two estates in January 1880, and continued with B.'s consent in the sole occupation and management of them till September 1881, plaintiff himself finding all necessary funds for their upkeep. In July 1880 plaintiff raised such funds on a mortgage of M.'s half share, which (in August 1881) was sold in execution under the mortgage debt, and purchased by second defendant. In June 1881 plaintiff had again mortgaged M.'s half share to first defendant. In September 1881 plaintiff was deprived of his possession of the estates by T, who acted as the agent of the defendants and with B.'s knowledge and consent, to plaintiff's knowledge.

Held (*per* De Wet, A. C. J. and Clarence, J., *dissentiente* Dias, J.) that, plaintiff's occupation of B.'s half share having been in the character of agent for B., the right to maintain a possessory action in respect of that share was B.'s and not plaintiff's.

Per Dias, J.—Plaintiff, having been in possession of an undivided half share of the estates for a year and a day, when he was forcibly dispossessed, was entitled to be restored to possession, and to recover damages for the forcible dispossession.

This was a possessory action, in which the plaintiff sought to be restored to the possession of an undivided half share of each of two estates, *Esperanza* and *Eringobragh*. The facts are sufficiently disclosed in the following judgment of the Court below, and in that of the appellate Court.

(3rd April 1882). Lawrie, D. J.—There are two ques-

tions of fact to be determined here: *First*, was the plaintiff in possession of *Esperanza* and *Eringobragh* estates for a year and a day prior to September 1881? And, *secondly*, was he forcibly dispossessed by the defendants? If he has succeeded in establishing both these facts, then, it follows, I think, that he is entitled to a possessory judgment, even though the plaintiff's right to the land is doubtful. As to possession, I think there can be no doubt that Mr. *Mac Carogher* was in sole possession of the estates from January 1880 till September 1881. He was owner of an undivided half, and held a mortgage over the other half, and the owner and mortgagor of that half had specially requested him to come from England and take charge. The plaintiff's right, title and interest in an undivided half share of the estates was sold by the Fiscal on the 23rd August 1881, and was purchased by Mr. *Hall*. I am not aware whether Mr. *Hall* has got a transfer from the Fiscal. None has been produced. On 17th September 1881, Mr. *Tytler* arrived on the estate and handed to plaintiff a letter in these terms:—"This is to inform you that the bearer, Mr. *W. A. Tytler*, calls to take over charge of *Esperanza* and *Eringobragh* estates, and we have to request you will be good enough to hand over the properties to him." This letter was signed by Mr. *Hall*, purchaser at Fiscal's sale, and *John F. Baker*, mortgagee. Plaintiff objected to give up possession, and it was not until the 29th September, when Mr. *Burke* came to the estate, that the plaintiff so far yielded as to give to Mr. *Tytler* the keys of the store. To these keys, *Tytler*, as acting for the owners of an undivided half, was equally entitled with the plaintiff. I have read the accounts of what happened, as narrated by the three persons present, the plaintiff, Mr. *Tytler*, and Mr. *Burke*, and I am of opinion that nothing was done by the plaintiff which implied consent to his losing possession. Indeed, by giving up the keys, which he could not well retain exclusive possession of, he was not giving up possession of the land. The ouster was not committed then, but afterwards gradually by *Tytler's* taking the whole management, in picking all the crop without consulting the plaintiff or accounting to him. Notwithstanding the evidence called by the defendant, I decide the second question of fact for the plaintiff. I hold it proved that the ouster was by Mr. *Tytler* acting for defendants, assisted no doubt by *Burke*, but assisted by him on behalf of these defendants. They have

since then got all the crop, and it is, I think, mere pretence to say that *Burke* possesses or that *Tytler* acts for him. Since the plaintiff lost possession, his right, title, and interest as creditor in a mortgage over an undivided half of these estates granted to his deceased brother by *Burke* was sold by the Fiscal, and was purchased by *Hall* on the 3rd March 1882. Some months after, this action was raised. The position of Mr. *Burke* with regard to the estate, and with regard to the mortgage, seems full of doubt. With regard to the estate, he never paid a penny for it, but still he holds (or held) a transfer for half share. He threatened to abandon it after Mr. *Robert MacCarogher's* death, and it was at his urgent request that the plaintiff came out from home, and took charge. Since then *Burke* seems to have contributed nothing to the upkeep, but to have let the whole burden fall on Mr. *George MacCarogher*. With regard to the mortgage bond, just when the plaintiff's interest on it as creditor was about to be sold. Mr. *Burke* objected to the sale on the ground that the debt had been discharged. The plaintiff seems to me to be in some risk of losing everything. I am bound in this case to give him a part of the remedy he claims. I think he should have a possessory judgment for an undivided half of the land. The defendants have no right or title to deny him that. They have shewn no right to possess more than half. They have without right obtained possession of the whole, possession gained not quite, perhaps, by physical force, but with a threat of force and under compulsion of a kind quite as formidable as force. If the plaintiff gets this judgment, he will at least be in a position to raise questions between him and *Burke*. The defendants now interpose between *Burke* and the plaintiff; when their interposition is removed, the parties will be on a fairer relative position. During the possession by Mr. *Tytler*, the plaintiff has not contributed anything to the maintenance of the estates. Indeed it seems clear that his funds were exhausted, and I cannot give him any substantial damages. Indeed, it does not seem to me to be a case for damages at all.

Possessory judgment to be entered for plaintiff without damages, and with costs in the second class.

Both parties appealed against this judgment. The appeal was first argued on 19th September 1882 before CLARENCE and DIAS, JJ. Their lordships differing in opinion, Coun-

sel subsequently agreed to take the decision of DE WET, A. C. J., without further argument.

Grenier for the plaintiff, appellant.
Browne for the defendants, appellants.

Cur. adv. vult.

The Court delivered judgment on 12th April 1883.

CLARENCE, J.—This is in substance a possessory action, in which plaintiff seeks to be restored to possession of an undivided half share of two coffee estates, and also prays for damages against the defendants, viz., a sum of Rs. 6,500, which he claims as the value of half the crop, they having taken the whole.

The facts which led up to the acts complained of appear to be these: Plaintiff's brother owned the two estates and sold an undivided half share to one *Burke*. *Burke* paid down none of the purchase money, but gave plaintiff's brother a mortgage for the amount, Rs. 40,000, bearing date the 2nd July, 1876. Plaintiff's brother died, it does not appear precisely when, and plaintiff is now his Executor. In 1879 *Burke* had no funds wherewith to work the estates, and solicited plaintiff to come out from home, threatening to abandon the estates. Plaintiff came out in July 1879, and in January 1880 entered into occupation of the estates, and continued in the occupation and management of the entirety of the estates until September 1881, when occurred the acts of which plaintiff now complains. While plaintiff was thus in occupation *Burke* found no funds for the upkeep of the estates, and such funds as were provided were provided by plaintiff.

All this was with *Burke's* assent. In July 1880, plaintiff obtained advances for the upkeep of the estates from one *Seyado*, to whom he mortgaged his brother's remaining half of the estates. The crop, however, did not meet the expenditure, and in August 1881 that remaining half of the estates was seized under writ of *Seyado's* and sold to second defendant. In June 1881 plaintiff executed a mortgage bond in favor of 1st defendant, by which he purported to mortgage his brother's remaining half of the estates to 1st defendant in consideration of 1st defendant guaranteeing a debt due to the Oriental Bank Corporation by *Burke* and plaintiff's brother or plaintiff.

This bond purported to secure such payments as might thereafter be made by 1st defendant, and recited that plaintiff was in possession and had found funds for working the estates

On the 17th September 1881 a Mr. *Tytler* came to the estates, with the letter set out in the learned District Judge's Judgment, in which 2nd defendant as "purchaser at Fiscal's sale" and 1st defendant as "mortgagee" informed the plaintiff that Mr. *Tytler* had come to take over charge of the estates, and requested plaintiff to hand over the properties to him. The purchase here referred to seems to have been 2nd defendant's purchase of plaintiff's brother's half share, and the mortgage seems to have been the security created by *Burke* in June 1881, in favour of 1st defendant. What followed is described by plaintiff (pp 10, 11). The learned District Judge finds upon the evidence that both *Tytler* and *Burke* acted on behalf of defendants.

At the time when this interference with plaintiff's occupation of the estates took place, the plaintiff's right to the unsold half was good, but defendants certainly had no right to interfere with the occupation of any one who might be in occupation in respect of *Burke's* half. I fail, however, to see that a possessory action is maintainable by plaintiff in respect of *Burke's* half. Plaintiff by arrangement with *Burke* lived on the estates and worked them, and found all the money which was found for that purpose. When plaintiff's own half was taken from him, there remained to him nothing except his mortgage over *Burke's* half for the Rs. 40,000, and *Burke's* debt to him in respect of the funds which he had found. His occupation of the estates was merely in the character of agent for *Burke*, and though *Burke* would be entitled to assistance against any interference with his enjoyment, either in person or by deputy, of his half share, the right is in my opinion *Burke's* and not plaintiff's.

The case is probably a hard one on plaintiff, who seems to have expended money on the entire estates. The truth probably is that the estates were worth little, if anything, when plaintiff's brother sold the half to *Burke*, a transaction which on its face amounted to a loan of Rs. 40,000 on the security of coffee property worth the same amount, at six per cent. But however that may be, it appears to me that plaintiff is not entitled to the remedy which he seeks in the form of a declaration of his right to remain in possession,

or an order restoring him to possession. I am not, however, clear that plaintiff had not, to the amount of half the sum which he may have expended on the raising of the crop which defendants took, some right of lien or legal hypothec over that crop, which he should still retain if his deprivation of control over the crop is to be considered as having been effected by compulsion. There seems, however, to have been no attempt to ascertain how much is due to plaintiff for outlay, and no account decree is asked for. I think, therefore, that we must regard plaintiff as having failed to establish any title to relief on this head also. I think that the order in appeal should be:—

Set aside. Dismiss plaintiff's claim to a declaration that he is entitled to possession of one half of "Esperanza" and "Eringobragh" estates.

Absolve defendants from the instance with regard to plaintiff's claim of damages. Plaintiff to pay defendants' costs in both Courts.

DIAS, J.—This is a possessory suit by the plaintiff to be restored to possession of an undivided half of two coffee estates, of which he has been forcibly dispossessed. The plaintiff also claims Rs. 6,500 as damages. The entirety of the two estates originally belonged to the plaintiff's brother, who somewhere in 1876 sold an undivided half thereof to one *Burke*, who entered into possession and remained in possession till 1879. In 1879 *Burke*, being unable to carry on the cultivation, wrote to plaintiff who was then in England to come and take charge of the property. Plaintiff came out in July 1879, and in January 1880 entered into possession and carried on the cultivation till September 1881, when he was forcibly dispossessed by the defendants or their Agent, one Mr. *Tytler*. The plaintiff's brother having sold a half to *Burke*, the remainder passed to plaintiff under his brother's will; that half seems to have been sold on a writ of execution and purchased by the 2nd defendant.

The question for consideration is, whether in September 1881, when he was forcibly dispossessed by the defendants, the plaintiff was in lawful possession of an undivided moiety of the estates. This issue was found by the District Judge in the affirmative, and that finding is fully borne out by the recorded evidence.

This case is governed by the Roman Dutch law, there being no Kandyan law on the matter. All the Dutch authorities agree on this, that a person who has been in lawful possession for a year and a day, and has been unlawfully and forcibly dispossessed by another, is entitled to be restored to possession if application should be made to a Court within one year of such dispossession (1). The possession upon which such a remedy can be furnished is defined by *VanderLinden* as "a possession obtained neither secretly, nor by force, nor on condition of quitting on first notice." This definition of *VanderLinden's* is founded on the interdict *unde vi* (2). All the Dutch authorities which I had access to agree that the possession must be a lawful possession. This is reasonable enough, as otherwise the possession of a robber will entitle him to the same remedy (3). *VanderLinden*, however, goes further and lays down that even a *malâ fide* possessor is entitled to this remedy (4). I am, therefore, of opinion that in September 1881 the plaintiff was in lawful possession of an undivided moiety of the estates, when he was unlawfully and forcibly dispossessed by the defendants, and that the learned Judge was right in decreeing restoration to plaintiff. The defendants' appeal must, therefore, be dismissed.

The plaintiff also appeals against that part of the judgment which disallows his claim for damages. I think the plaintiff's appeal must succeed, and he is entitled to damages consequent on the wrongful dispossession on the part of the defendants. The case, I think, should go back for further hearing and adjudication on this point. The defendants should pay all costs in both Courts.

DE WET, A. C. J.—This case was argued before the Senior and Junior Puisne Judges, and as they cannot agree upon their Judgment, the matter has been referred to me.

After a careful perusal and consideration of the evidence and the Judgments of both my learned brethren, I am of opinion with my brother CLARENCE that there should be absolution from the instance, considering, as I do, that the

(1) VanderLinden, *Instit.*, Henry's Trans., p 185.

(2) Trayner's *Latin Maxims*, p 597. Voet, *ad Pand.*, 43. 16. 3. Ortolan's *Roman Law*, para. 2310, p 391. Hunter's *Roman Law*, 1st Ed., p 105.

(3) See further 3 Menzies' Cape Reports, 342, 343. Trayner's *Latin Maxims*, 602.

(4) Van Leeuwen, *Comm.*, Kotze's Trans., p 198.

plaintiff has entirely mistaken his remedy. I am, moreover, of opinion that plaintiff should be ordered to pay defendants' costs in this Court as well as in the Court below.

Set aside. Decree as formulated by CLARENCE, J.

Proctor for the plaintiff, *Edwin Beven.*
Proctor for the defendant, *Wm. Goonetilleke.*

12th and 26th April, 1883.

Present—DIAS, J.

C. R. Kandy, 20,351. } J. W. A. WRIGHT v. The MUNICIPAL COUNCIL OF KANDY.

Assessment for Police tax, objection to—Ordinance 5 of 1867, sect. 1—Limitation—Notice of action—Ordinance 17 of 1865, sect. 177.

Plaintiff, on 1st March 1882, received notice that the Municipal Council of Kandy, the defendant, had assessed plaintiff's house as of the annual value of Rs. 900, for the purposes of the tax for maintaining the Police in the town. On 3rd March, and again on 7th and 23rd August, 1882, the plaintiff protested against this assessment as excessive; and on 19th September was informed that the assessment had been reduced to Rs. 800. On 3rd October 1882, plaintiff brought the present action, praying that the assessment might be reduced to Rs. 600, the real value of the house.

Held (affirming the decision of the Court below), that the action was not maintainable, no notice of action having been given to the defendant, as required by section 177 of the *Municipal Councils Ordinance*, 1865.

Held also, that the present action, embodying the objection to the assessment, was barred by section 1 of Ordinance 5 of 1867, not having been commenced within 15 days of the receipt of notice of assessment.

Plaintiff sought by this action to have the assessment of the annual value of his house at Rs. 800 reduced to its real value, Rs. 600. Plaintiff had on 1st March 1882 received notice of an assessment at Rs. 900, and had objected to it as excessive on 3rd March, and on 7th and 23rd August, 1882. He received no reply to his letters till 19th September, when he was informed that the assessment had been reduced to Rs. 800. The present action was then brought on 3rd October 1882. The Court below (*T. M.*

Gibson, Commissioner) dismissed plaintiff's action, holding that it was not maintainable, by reason of no notice of action having been given in terms of section 177 of the *Municipal Councils Ordinance*, 1865, and by reason that it had not been commenced within 15 days of 1st March 1882 (when plaintiff had received notice of the original assessment) as required by sect. 1, Ordinance 5 of 1867.

Plaintiff appealed.

Sampayo (*Dornhorst* with him), for the appellant—The Ordinance of 1867 requires the householder "to object": plaintiff, by bringing an action in ordinary course, has in effect objected to the assessment. If, then, the action be treated (as it evidently was meant to be) as an "objection" to assessment, it would be absurd to require one month's notice, when the objection has to be taken within 15 days. Again, the objection was taken in time, because the assessment to which the action takes exception is not the assessment of which plaintiff received notice on 1st March, but the new assessment fixed by the defendant's letter of 19th September. That letter reduced the annual value from Rs. 900 to Rs. 800, and was therefore a new assessment, to which plaintiff was entitled to object anew.

Van Langenberg, for the defendant, respondent—The Court, before which the objection is lodged, has to "decide upon such objection in a summary way." This clearly contemplates some proceeding more short and simple than an ordinary action. Plaintiff's original objection was to the excess of Rs. 300 over the Rs. 600 which he considered the true value. That objection was lost by not being taken within 15 days. Plaintiff now seeks to repeat his objection to Rs. 200 of those Rs. 300. The action (*quâ* action) is also barred by section 177 of the *Municipal Councils Ordinance*, 1865, not having been begun within 3 months of the cause of action accruing.

Cur. adv. vult.

(26th April). Dias, J.—This is a proceeding under the 1st section of the Ordinance No. 5 of 1867. That section gives a summary remedy to a party dissatisfied with the assessment of his land for the maintenance of the Police Force. But the plaintiff in this case proceeds against the

Municipal Council by action. No objection on this score was taken by the defendant, and I shall treat the plaint as a summary application under the Ordinance. The plaintiff's house was assessed by the Municipal Council at Rs 900 a year. Of this assessment notice was given to the plaintiff on the 1st of March 1882. The plaintiff protested against the assessment on the 3rd March 1882 and again on the 7th and 23rd of August, and on the 19th of September he was informed by the Municipal Council that the assessment would be reduced from Rs. 900 to Rs. 800 per annum. The plaintiff says that the proper annual value of his house is Rs. 600, and he prays the Court to reduce the assessment to that amount. The defendant pleads that he did not receive the notice required by the 177th clause of Ordinance 17 of 1865, and he further pleads that under the 1st section of Ordinance 5 of 1867 the plaintiff's right, if any, is barred. The learned Commissioner decided in favour of the defendant, and I think that decision is right. The plaintiff had notice of the assessment on the 1st of March 1882 and he did not file his plaint till the 3rd October, and under the 1st section of the Ordinance the plaint or application to the Court should have been made within 15 days of the assessment and notice thereof. It was urged for the appellant that the delay is owing to the defendant who did not answer the plaintiff's letter of the 3rd of March till the 19th of September. The Ordinance, however, makes no distinction, and there is nothing in the Ordinance which will operate as an excuse for not taking action within 15 days. I think the opinion of the learned Commissioner on the two objections taken by the defendant under the 177th section of the Ordinance 17 of 1865 and the 1st section of the Ordinance 5 of 1867 is right.

Affirmed.

Proctor for the plaintiff, *J. D. Jonklaas.*
Proctor for the defendant, *J. W. Swan.*

13th and 18th March, 1883.

Present—De Wet, A. C. J., Clarence and Dias, J J.

D. C. Chilaw, 23,482. } A. A. I. Perera and another v. C. Wijesinghe and others.

Stamp—Deficiency of stamp—Stamping at trial on payment of penalty—"Original," "Duplicate," "Notary's Protocol"—Evidence—Ordinance 19 of 1852—Ordinance 23 of 1871, sects. 36, 39 and 40.

The value of the stamps to be affixed to an instrument must be determined by the law in force at the date of the instrument. But when an instrument, upon its tender in evidence, is held to be insufficiently stamped, the procedure for stamping it at the trial, and the amount of penalty payable, must be determined by the stamp law in force at the time of such tender.

When a notarial instrument has been executed in three copies (called respectively the "Original," "Duplicate," and "Notary's Protocol"), neither of these copies is receivable in evidence unless and until the proper stamp duty has been paid upon each and every copy.

The plaintiffs in this case appealed against a judgment of the District Court (*H. Nevill*, Judge) nonsuiting them with costs. The facts material to this report appear in the judgment of Clarence, J.

Ferdinands, A. G. A., (*Grenier* with him) for the plaintiffs, appellants.

VanLangenberg (*Seneviratne* with him) for the defendants, respondents.

Cur. adv. vult.

(28th March). Clarence, J.—This case comes in appeal under the following circumstances. The action is one in which the title to land is in issue. Amongst the matters upon which plaintiffs seek to found title is a certain document, which is described by the District Judge as marked "letter F," and which would appear to bear date the 15th September 1857. The plaintiffs, it seems, have to prove that deed, if it be necessary for the purposes of their case that it be received in evidence. The District Judge has expressed himself as unable to decide without the instrument. There being as yet no finding on any other part of the evidence, no finding at all in fact, we are not in a position to say how the case stands. If it be the fact (whether or no it is the fact we do not know) that plaintiffs cannot

establish their title without this instrument, then in the absence of the instrument the plaintiffs' action must fail; and plaintiffs in fact are appealing against a nonsuit.

It seems, however, that there has been some misunderstanding in the District Court with respect to the proof of this instrument. The plaintiffs first of all tendered what has been referred to on the argument of this appeal as "the Duplicate," viz. that copy of the instrument which the Notary had to retain for the purpose of sending it later on to the Registrar General or to the District Court, to be there filed and indexed. Notarial instruments were in 1857, under the Ordinance of 1852, as they now are under the later Ordinances, executed in triplicate, the three copies consisting of, first, the copy delivered out by the Notary to the parties, which has been referred to in the argument of this appeal as "the Original"; second, the copy which the Notary retains for the purpose of sending it in to be filed at a Central Office, and which has been referred to as "the Duplicate"; third, the copy which the Notary retains in his own possession, which in this country is popularly styled "the Notary's Protocol." It appears that at the trial on September 1st last, the plaintiffs produced what has been described as "the Duplicate." It is admitted that this was insufficiently stamped; but plaintiffs were and still are ready to pay the deficient duty and the penalty, and so stamp the instrument and render it admissible. An unfortunate misunderstanding, however, seems to have arisen with reference to the procedure and requirements in that behalf.

The Stamp Ordinance now in force is the Ordinance 23 of 1871. So far as there may be any question, what value of stamps does this instrument require, we must have recourse to the Ordinance 19 of 1852, which was the Stamp Ordinance in force at the date borne by the instrument. But in my opinion all questions as to the procedure necessary for supplying a deficiency of stamp duty, and so rendering the instrument admissible in evidence, must be determined by reference to the Ordinance in force at the time when the instrument is tendered in evidence. I think also that the intention of the Legislature is that the penalty payable should be the penalty prescribed by the Ordinance of 1871. Little, however, turns on that, since the penalty is the same under each Ordinance, subject to a possible reduction.

It is agreed that the "Duplicate" is not sufficiently stamped. The District Judge then had to ascertain, by reference to the Ordinance of 1852, what was the proper stamp duty. For the procedure to be adopted after that, we must go to the Ordinance of 1871. The Ordinance of 1871, as Counsel observed during the argument of the appeal, is not very clearly framed, but I think its intention can be discovered. Sections 39 40 deal with instruments tendered in evidence at the trial and then discovered to be insufficiently stamped. The party tendering the instrument is to pay into Court the amount of the deficient duty (which amount the Judge is to determine) *plus* the penalty required by this Ordinance, *plus* an additional penalty of five rupees. Section 41 empowers the Judge to allow the party seven days' time to find the money, but with that provision we are not now concerned. The party, then, has to pay the deficiency of duty, *plus* Rs. 5, *plus* the penalty required by the Ordinance. Now there is, no doubt, a little difficulty about the determination of that penalty. We have to go to the 36th section to find what the penalty is. That section is somewhat obscure, but the intention seems to be this—that the party may apply to the Commissioner of stamps, who may stamp the instrument on payment of the deficiency of duty, *plus* a penalty of Rs. 100, and who may also, with the Governor's sanction, reduce the penalty of Rs. 100. This is the only provision defining the penalty to which we can resort when called upon to determine what is the "penalty required by this Ordinance," within the meaning of section 39. The difficulty is this—the penalty contemplated in section 39 seems to be the penalty prescribed by section 36, but the penalty prescribed by section 36 is a penalty which may amount to Rs. 100 and which may be reduced by the Commissioner to a lower amount—a penalty, in fact, seeming to require for its determination a decision of the Commissioner of Stamps. There is, no doubt, a difficulty here. The only way out of the difficulty, which occurs to me, is to suppose that inasmuch as the Ordinance makes no provision whatever for any reduction of penalty by a judge, at the trial, the intention was that the full penalty of Rs. 100 should be paid, unless indeed within the seven days which may be allowed under section 41, a remission of penalty should be obtained from the Commissioner of Stamps. Unfortunately, in the present case, it seems to have been assumed in the District Court that the procedure to be

adopted was that prescribed by the Ordinance of 1852; and, instead of the Judge himself determining the deficiency of duty and then dealing with the matter according to the provisions of sections 39, 40 of the Ordinance of 1871, the hearing was adjourned in order that the party might procure the instrument to be stamped by the Commissioner of Stamps. The Commissioner of Stamps, so it is said—whether that be accurate or not I do not know—refused to stamp the instrument. What were the grounds for such refusal we do not know; but it is suggested that there was some difficulty as to who was to determine the penalty. There does not seem to have been any suggestion during the proceedings in the District Court, but that the deficiency of duty was owing to a mere mistake. The District Judge, it seems, declined to deal with the matter under the Ordinance of 1871. After this the plaintiffs, it seems, discovered in the possession of a member of their family what has already been referred to as the "Original." That document bears a stamp of one rupee which is the amount of stamp duty required by the Ordinances alike of 1852 and 1871 for such an "Original." The plaintiffs then asked to have that "Original" admitted in evidence, and so to avoid the necessity of stamping the document previously tendered. The District Judge declined to allow that, and plaintiffs stand nonsuited.

I am very clearly of opinion that the "Original" ought not be admitted so long as the "Duplicate" is insufficiently stamped. These two words "Original" and 'Duplicate," as thus employed, are somewhat misleading, so far as stamp duty is concerned. The stamp denoting the *ad valorem* duty is affixed to the "Duplicate," no doubt because that copy is afterwards filed in a Public Office: so that copy is really the principal copy so far as concerns stamp duty. The copy delivered out to the parties is required to bear merely a uniform stamp of one rupee, and that only where the *ad valorem* duty exceeds Rs. 2.50. The "Notary's Protocol" needs no stamp whatever. In these provisions the Stamp Ordinances of 1852 and 1871 are alike. The procedure prescribed for the Notary requires him to prepare three copies of the instrument, each of which is signed by the necessary parties and witnesses. Then, for the sake of convenience, the *ad valorem* stamp is affixed to one only of those three copies, viz. the copy which is ultimately filed in a Public Office. The "instrument" in fact

consists of three copies, to one of which the *ad valorem* stamp is affixed. The instrument is sufficiently proved by proving any one of the three copies, because so far as contents, execution and attestation are concerned, the three are equally alike. But it seems clear to my mind that the instrument cannot be proved by the admission of either copy unless the proper *ad valorem* duty has been paid. Otherwise, indeed, the consequences would be these :—A deed requires an *ad valorem* stamp of, say, Rs. 1,000 ; quite a possible case. The "Original" needs only a single rupee stamp. Without paying the *ad valorem* duty at all, a party would be able to prove the deed at the cheap cost of one rupee by tendering merely the "Original" : which, I think, is absurd.

Therefore, in this case, it being brought to the notice of the Court that the *ad valorem* duty due upon the deed has not been paid, the deed cannot, in my opinion, be proved by the production of either of the three copies until the deficiency has been duly atoned for.

I think that this case should be sent back to the District Court in order that the plaintiffs may have due opportunity of procuring this instrument to be properly stamped under section 40 of the Ordinance of 1871, that Ordinance casting on the District Judge the task of determining the deficient amount of duty.

There should, I think, be no costs of this appeal. Other costs may by left to be costs in the cause.

DE WET, A. C. J.—I concur in this judgment.

DIAS, J. concurred.

Proctor for the plaintiffs, *H. Ball.*
Proctor for the defendants, *T. Cooke.*

23rd February and 21st March, 1883.

Present—De Wet, A. C. J., and Clarence, J.

D. C. Kandy, 90,056. } K. Cornelis and three others v. U. Babanis and two others.

Voluntary donation of land—Subsequent lease for valuable consideration by donor—Contest between donees and lessees.

H., in 1871, conveyed to her minor children, the plaintiffs, certain land, with a declaration of irrevocability, reserving to herself the management of the property during the plantiffs' minority, and the power to lease it for terms not exceeding one year, on the expiration of a present lease then having 5 years to run. Upon the donees attaining majority, they were at liberty to divide the property. In 1872 H. leased the property to third defendant for a term ending in August 1878; and in 1873 to first and second defendants for 4 years from 1878 (with recital of the gift to plaintiffs), the entire rent being paid in advance. H. having died shortly after this, the present action was begun in 1882, during the minority of one of the plaintiffs, the first two defendants being in possession under their lease. The plaintiffs alleged a distinct ouster in November 1875, and prayed ejectment.

Held, that the deed of gift was intended to operate upon all the plaintiffs attaining their majority.

It appearing also that the greater part of the proceeds of the lease to the first two defendants had been applied to the discharge of a debt (probably contracted before the gift) due by the donor to first defendant:

Held, affirming the decision of the Court below, that plaintiffs were not entitled to recover.

The plaintiffs in this case appealed against a dismissal of their action with costs. The facts are sufficiently disclosed in the judgments in appeal. The District Judge (*A. C. Lawrie*) held that the ouster alleged had not been proved, and was of opinion that *Helenahami*, plaintiffs' mother, had had power to execute the lease under which defendants claimed the land.

Grenier for the plaintiffs, appellants.
VanLangenberg for the first defendant, respondent.
Seneviratne for the second defendant, respondent.

Cur. adv. vult.

(21st March). De Wet, A. C. J.—In this case it appears that during the minority of three children of one *Dona Helena Hamy*, since deceased, she gifted to them certain properties mentioned in a Deed of Gift bearing date 17th January, 1871, subject to the conditions therein con-

tained. While the deed was still in existence and during the minority of the donees, she subsequently, by her deed marked F., annexed to the libel, and for consideration therein expressed leased the said lands and premises, the subject matter of the gift, to the defendants, for a period of four years commencing from the 11th August, 1878 The lease was still in existence at the time of action brought by the donees.

On due consideration I am of opinion that the donees were entitled, at the death of the donor, to the property mentioned in the deed of Gift, subject, however, to the lease—a burden or encumbrance which was imposed upon the property gifted by the donor herself subsequent to the date of the deed of Gift.

The appeal must, therefore, be dismissed with costs.

CLARENCE, J.—Omitting irrelevant matters, the facts in this case are simple.

In 1871, *Helenahami* and her second husband executed a voluntary deed, dealing with the two houses in question, in favour of 1st, 2nd and 4th plaintiffs, who are children of *Helenahami* by her first husband. The deed is not a "deed of assistance." It simply purports to gift the property to 1st, 2nd and 4th plaintiffs, who were then all minors. There is an express declaration that the gift shall never be revoked. There is also a proviso that until the donees attain majority (meaning I have no doubt until they should all have attained majority) *Helenahami* should manage the property in order to provide maintenance for the donees until they should come of age; and for that purpose a power is reserved to *Helenahami* of granting leases for terms not to exceed one year each, on the expiration of a subsisting lease which then had 5 years to run. When the donees should have attained their majority, they were to be at liberty to divide the property between them.

In 1872, *Helenahami*, her second husband being now dead, executed a lease in favour of 3rd defendant,* for a term ending in August, 1878. In June 1873, *Helenahami* executed another lease in favor of 1st and 2nd defendants for a term of 4 years from August 1878. That lease recites that the rent for the full term had been paid in advance on the execution of the lease. *Helenahami* died very shortly after executing the lease.

* He never appeared to the action.

This action was instituted in January 1882, at which date the 1st and 2nd defendants were in occupation under the last mentioned lease. At the date of action brought 1st plaintiff had attained 21, 2nd plaintiff had married 3rd plaintiff, and 4th plaintiff was, and still is, a minor. The libel avers that defendants forcibly took possession of the property in November 1875, and prays that they may be ejected, and for mesne profits.

No attempt whatever was made at the trial to prove the forcible entry averred in the libel; and there is no doubt that defendants did not get into possession forcibly as alleged, but came in quietly as lessees under *Helenahami*.

The lease under which the defendants are in occupation is not within the powers reserved to *Helenahami* by the gift-deed; but the position of defendants is this—they are in occupation of the property as purchasers, *pro tanto*, for value, under an instrument granted by *Helenahami* after the making of the voluntary instrument. The contention put forward by plaintiffs is—that the voluntary instrument operates to entitle them now to possession in preference to the subsequent instrument made for value in favour of 1st and 2nd defendants.

The lease to 1st and 2nd defendants recites that the property had already been gifted to 1st, 2nd and 4th plaintiffs, and that the consideration for the lease was applied in greater part to the discharge of a debt due by *Helenahami* to 1st defendant upon a judgment. The lessees, therefore, had notice of the gift. The consideration for which the lease was made is distinctly averred in defendants' pleadings, and not even a suggestion is made by plaintiffs that the consideration was not a reality.

The English cases upon the subject of contests between volunteers and subsequent purchasers for value are based of course upon the statute of Elizabeth, which is not in force here. Without, however, entering upon any general consideration of the question, how far there may be Roman Dutch Law or Equity going to the same length as the English cases, I am of opinion that plaintiffs shew no right to recover in this action.

It is, at any rate, a principle of the Roman Dutch Law, to compel restitution of property alienated in fraud of creditors. See *Voet*, xlii. 8. Then, what are the circumstances here. Setting out of consideration the question whether plaintiffs under the gift have any right to the benefit of possession

until all have attained their majority, the circumstances are these :— Plaintiffs declare that defendants took possession forcibly in 1875. That is untrue. The truth is that a couple of years after making the gift the donor owed 1st defendant a sum of money for which he had obtained judgment, and to provide for the discharge of that debt she sold to 1st and 2nd defendants the leasehold interest by virtue of which they are now in possession.

When that debt was contracted, we do not know, but, having regard to the dates that we do know, the probability is that it was owing at the date of the voluntary deed. If *Helenahami* in 1873 was unable to pay that debt by reason of her having deprived herself of the property in question, the creditor could have insisted on avoiding the voluntary deed, in order that this property might become available for him. That is an action perfectly well known to the Roman Dutch Law and corresponds to the *Actio Pauliana* of the Roman Law. The debtor, however, in fact did not force the creditor to sue for the avoidance of the voluntary deed, but granted him a lease, and the beneficiaries under the voluntary instrument now come forward and claim to turn him out before the expiry of the lease. They do not pretend that the 1st defendant was not a creditor when the lease was executed, but they come forward with a false story of the defendants having forcibly taken possession of the property. I think that the judgment appealed against should be affirmed and this appeal dismissed with costs.

Appeal dismissed.

Proctor for the plaintiffs, *Edwin Beven.*
Proctor for the first defendant, *J. B. Siebel.*
Proctor for the second defendant, *C. Jayetileke.*

25th April, 1883.

Present—CLARENCE, J.

P. C. Mannar, 5,785. } Anthonipulle SAVERIMUTTO v. Thommai BASTIAN.

Toll—Ordinance No 14 of 1867, sections 17, 18—Evasion of toll—"One mile from the ferry."

Section 18 of the *Toll Ordinance*, 1867 enacts that "if any person,

not being a duly appointed toll-keeper, shall convey any goods, ... or any passenger not in his service, across any river or stream..... either at or within a distance of one mile above or below any road, bridge, ferry, canal, or place at which tolls shall be leviable such person shall be guilty of an offence."

Held, that the intention of the Ordinance seemed to be to mark out a belt of two miles of water, one mile on each side of the ferry, within which two miles no person is to cross from one bank to the other except by the ferry.

One of the toll-houses in the present case was situated at the end of a causeway projecting from the mainland into the sea, the other being on an island opposite. The defendant's boat, starting at a point half a mile from the root of the causeway, passed between the toll-houses, and landed its cargo on the island at a point two miles from the toll-house on the island.

Held, that defendant had not committed a breach of section 18.

Semble, that if the landing place had been within the mile, the defendant would have been liable, notwithstanding that his starting-place at the root of the causeway was more than a mile distant from the toll-house at the end of the causeway, but within the two-mile belt.

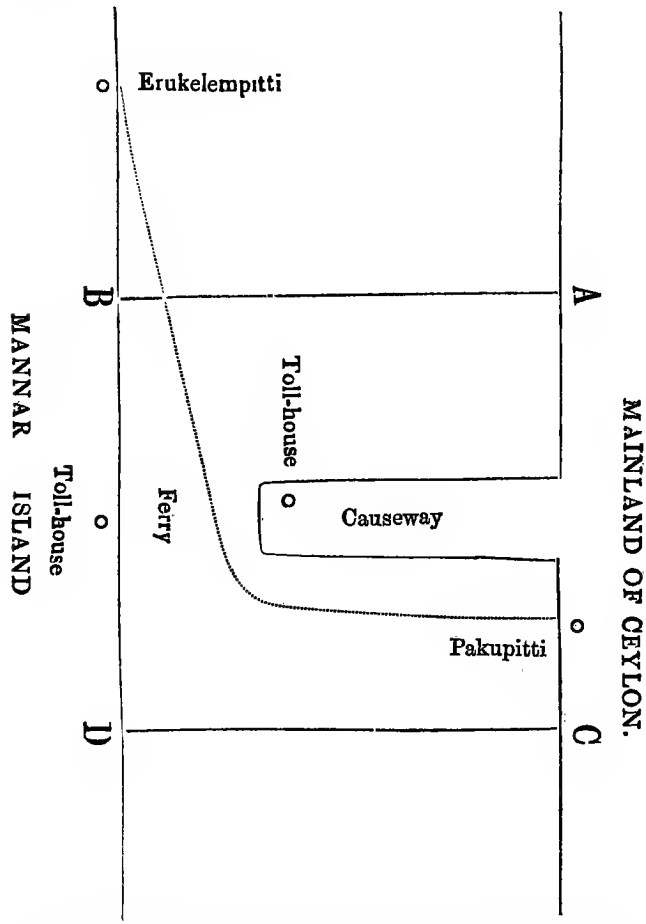
Plaint—That the defendant not being a duly appointed toll-keeper did on the 17th instant convey across the Mannar Channel goods not being his own by means of a boat within a distance of one mile from the Mannar Ferry, in breach of the 17th and 18th clauses of the Ordinance No. 14 of 867.

The facts sufficiently appear in the following judgment of the Police Magistrate (*S. Haughton.*)

"The question at issue in this case is one merely of the interpretation to be put on the wording of clause 18 of Ordinance No. 14 of 1857, the facts being admitted by the defendant. The ferry-renter complained to me in my capacity of Assistant Agent with regard to the conduct of the defendant and others, in consequence of which he was cheated, he believed, out of toll payable to him under the Ordinance. The offences appeared to me to be provided for in the 17th and 18th clauses of the Ordinance, and I instructed him to prosecute the offenders accordingly in the event of the continuance of the offence. Five cases were accordingly instituted by him, and four of them including the present case came on for trial yesterday. I reserved judgment, wishing to consider the question raised, and in the evening the defendants in the four cases presented to me Petition A. filed in the case. The question which I am now called upon to decide in my capacity as Police Magistrate is not without difficulty. I have referred to the old case, No. 2065, referred to by the Petitioners. It was one brought by the ferry-renter in 1852 against three men for

breach of the 13th and 14th clauses of the old Ordinance, No. 9 of 1845, (which are practically identical with clauses 17 and 18 of the existing Ordinance.) I find from the recordbook that the case was dismissed by Mr. Walker, the Magistrate at that time, and that the ferry-renter appealed against his decision, but the result of the appeal has not been recorded.

"The annexed sketch of the locality will serve to explain the circumstances of the present complaint by the ferry-renter.



"The lines A B and C D are lines at the distance of a mile from the Ferry and the Causeway, North and South

of it. The dotted line is the line taken by the defendant's boat in conveying goods between Pakupitti and Erukelempitti. The distance between the lines A B and C D is two miles, *i. e.* a mile on each side of the Causeway. The distance from the island toll-house to the mainland of Ceylon, across the ferry and along the Causeway, is about two miles also. The dotted line taken by defendant's boats is some five miles long from Pakupitti tó Erukelempitti.

"I maintain that defendant in this case has committed a breach of clauses 17 and 18 of the Ordinance in the matter of the conveyance of goods by him from Pakupitti to Erukelempitti under the circumstances. He conveyed goods not being his own across a stream (arm of the sea in this case) by means of a boat, within a distance of one mile from a ferry, in breach of the 18th clause of the Ordinance, and in doing so he evaded payment of toll, in breach of the latter part of the 17th clause, which enacts, "or if any person shall do any other act whatsoever *in order to evade or reduce payment of toll*, and whereby the same shall be evaded or reduced," &ca. The fact that defendant had obtained a coast-wise permit from the Customs authorities in no way exempts him from the consequences of evasion of the toll. Of course the case is different as regards ships and large boats which leave the ports of Mannar on coast-wise or other permits. Such boats, it is true, convey goods within a mile of the ferry, but they do not do so '*in order to evade toll.*' It is a fallacy to suppose that the local canoes which convey goods across the channel within a mile of the ferry on purpose to evade toll, are, merely because they have obtained a permit at the Customs, therefore in the same category as the vessels referred to in the last paragraph. Moreover, if the present evasion of toll now complained of were to become general, all the canoes in the place might take out Customs permits, to the abandonment of the ferry altogether, and the consequent ruin of the ferry-renter, loss to Government in the ferry revenue, and a corresponding loss of funds for the maintenance of the Mannar Causeway, only recently much damaged by a severe storm.

"Defendants, in addition to the possession of a coast-wise permit, lay stress on the fact that the places at which they load or unload the goods are more than a mile from the Mannar ferry; but the Ordinance is silent on the subject of *loading or unloading* within a mile of the ferry: it is the

"conveying" within a mile of the ferry that is the offence. Both places, it is true, are more than a mile from the toll-house, but if the Causeway be regarded as part of the ferry, which I consider it to be in a certain sense, then Pakupitti is barely half a mile from the Causeway at the mainland side. For every reason, therefore, I am inclined to think the clauses in question must be interpreted against the defendant, the alternative involving as it does the possible loss of the Mannar ferry revenue in future years in the event of the offence becoming more general. Defendant is accordingly found guilty and sentenced to pay a fine of twenty rupees, half to informer, namely complainant.

"As defendant is likely to appeal, the complainant is instructed if he (defendant) does appeal, not to prosecute the other cases further until the result of the appeal is made known."

Defendant appealed.

J. Grenier, for the appellant—To constitute a breach of the 18th section of the Ordinance both the places between which the goods have been conveyed must be within a mile of the ferry. *Cartigeser* v. *Murogappen* (1). That case was decided on a construction of section 14 of the Ordinance No. 9 of 1845, which section is practically identical with section 18 of the Ordinance of 1867. In the present case the landing place certainly was beyond the mile from the ferry.

No Counsel appeared for the complainant, the respondent.

CLARENCE, J.—I think this appeal entitled to succeed. I say nothing about the starting point of these boats, because I am by no means prepared to say that if a boat started near the root of the Causeway, travelled along the side, and landed its passengers within a mile of the ferry-house on the island, that would not be an evasion of the toll within the meaning of the Ordinance. It appears that the boats in question, starting somewhere near the root of the Causeway, go through the narrow passage between the end of the Causeway and the toll-house, and then before landing travel along the coast to a point about two miles from the toll-house. I think that a boat going through the passage on such a coastwise voyage as this, a voyage of which the

(1) 1 Lorenz, 142.

end is two miles from the ferry, is not within the Ordinance, even although the boat originally started from the opposite side of the water. The intention of the Ordinance seems to be this: taking the instance of a river-ferry by way of illustration, it marks out a belt of two miles of water, one mile on each side of the ferry, within which two miles of water nobody is to cross from one bank to the other except by the ferry. But all boats are perfectly free to start outside the two-mile belt, traverse the two miles of water, and land beyond the two-mile belt, on the opposite side; and that is reasonable enough. Otherwise you might have had this: a man starting in a boat ten miles below it and landing on the opposite bank would be liable to punishment, which is absurd. This seems to me the natural construction of the Ordinance, and the case decided under the repealed Ordinance (1 Lorenz, 142) is to the same effect.

I will not part with the case without expressing my obligations to the Magistrate for the very clear manner in which in his judgment he has shown the position of the locality.

Set aside. Defendant acquitted.

2nd May, 1883.

Present—CLARENCE, J.

C. R. Trincomalie, 35,985. } VALIPULLE v. KONAMALE PONNIAH.

Consideration, unlawful—Compounding criminal offence—Robbery.

In a suit to recover a sum of money agreed to be paid by the defendant in consideration of plaintiff's withdrawing a Justice of the Peace charge against the defendant of assault and theft from the person of the plaintiff,

Held, that the contract was against public policy, and therefore invalid.

Plaintiff brought suit to recover the sum of Rs. 10, and Rs. 35 the value of a necklace, which defendant had agreed to pay plaintiff in consideration of the latter withdrawing a charge she had lodged against the defendant before the Justice of the Peace charging him with assaulting her and

stealing from her person a necklace of the value of Rs. 35. Defendant denied both the assault and theft and the promise sued on.

After evidence called on both sides on the question of the promise, the Commissioner (*G. Haughton*) holding the plaintiff entitled on the evidence to Rs. 20, gave her judgment for that sum with costs in the first class.

Defendant appealed.

Drieberg, for the appellant—The consideration for the promise was unlawful, being a compounding of a felony. *D. C. Colombo* 34,920 (1). Plaintiff cannot therefore recover.

No Counsel appeared for the respondent.

CLARENCE, J.—This is an action on a promise, the consideration for which is stated in plaintiff's libel to be that plaintiff should withdraw a criminal prosecution for a robbery. Plaintiff avers that she was assaulted and robbed by defendant and compromised the prosecution upon defendant's making the promise now sued on. I think this was an agreement against public policy, which cannot be enforced by action. The case cited by Mr. *Drieberg* is a decision of this Court which covers this case.

The judgment is set aside and plaintiff's action dismissed. Defendant should have demurred to the libel instead of falsely denying that he made any promise. I give no costs of appeal. I may point out that this decision will not affect any action of plaintiff's based directly upon the assault and robbery alleged.

Set aside. Plaintiff's action dismissed.

Proctor for plaintiff, *C. Candappa*.
Proctor for defendant, *John R. Canagaratna*

(1) *Leg. Misc.*, 31st July 1866, p 53.

27th April and 4th May, 1883.

Present—CLARENCE, J.

D. C. Kandy, 91,573.

ABRAM SAIBO & Co.
v.
H. A. KERR.
Ex Parte T. C. KERR.

Mortgage—Coffee estate with the "live and dead stock" thereon—Bungalow furniture on estate.

Bungalow furniture, kept on a coffee estate for the use of the Superintendent, is *primâ facie* not covered by a mortgage of the "dead stock" on the estate. If any person be interested in maintaining the contrary, it is for him to satisfy the Court of any particular usage or circumstances, by reason of which such furniture does form part of the "dead stock."

Plaintiff having obtained provisional judgment (for Rs. 701.25 and interest) on a promissory note, issued writ and caused to be sold certain property of the defendant. *T. C. Kerr*, the claimant, having claimed the proceeds as a mortgagee, the following statement of facts was submitted by the plaintiff's and the claimant's proctors for the decision of the Court upon the claim :

Under D. C. Kandy writ No. 91,573 the "furniture" in the Bungalow on Kinrara Estate was seized. The plaintiffs in this case are unsecured creditors.

Under D. C. Colombo writ No. 88,271 the Kinrara Estate *with all the live and dead stock thereon* was seized. The plaintiff in that case holds a special mortgage of the Estate and of the live and dead stock thereon.

The sale under the mortgagee's writ is fixed for the 27th instant. He wishes the furniture to be sold as forming part and parcel of the Estate.

Mr. *Beven*, on behalf of the plaintiffs in D. C. Kandy 91,573, and Mr. *Vanderwall*, for the plaintiff in D. C. Colombo No. 88,271, solicit the opinion of the Court as to whether the furniture is to be regarded as part of the Estate and sold under the mortgagee's writ as such.

Mr. *Vanderwall* contends that furniture on the Estate comes under the denomination of "dead stock." Superintendence being necessary to the management of a coffee estate, it follows that furniture for the Superintendent's Bungalow would be as indispensable in most cases as machinery or implements. See judgment of Mr. *Berwick* in D. C. Colombo No. 71, 450 (1), copy of which is annexed. Moreover, the term "dead stock" covers everything that is opposed to "live stock." Mr. *Kerr* states that with a few exceptions the articles of furniture now on the estate were purchased by him *with the estate*.

Mr. *Beven* contends that, assuming Mr. *Berwick's* judgment to be an authority on the point (which he denies), it is not applicable to the case

(1) See Appendix H.

on which an opinion is now sought. In this judgment the question was whether the furniture belonged to the proprietor or the Superintendent; in this case it is admitted to be the property of the proprietor, the only question being whether it was mortgaged or sold. No mention is made specially of the furniture in the Bond, and it is submitted that it cannot be regarded as "dead stock." Furniture is no more the stock of an estate than the pots and pans of the coolies. To hold as a matter of law that all furniture in a bungalow belongs to the estate—for Mr. *Berwick's* construction comes to that—would have the effect of depriving the Superintendent of the right to any moveables that he may bring into his bungalow.

The District Judge (*A. C. Lawrie*) gave it as his opinion "that the furniture in a bungalow on an estate mortgaged, which mortgage includes live and dead stock, is not included in these words, and is liable to be seized and sold on the writ of an unsecured creditor."

The claimant appealed.

Browne, for the appellant, cited Voet, *ad Pand.*, xx. 1. 2, 6 (1). He referred to *Cullwick* v. *Swindell* (2); *Ex parte Sykes* (3); *Mather* v. *Fraser* (4); *Walmesley* v. *Milne* (5); *Meux* v. *Jacobs* (6). He read, as part of his argument, the judgment of *Berwick, D. J.*, in *D. C. Colombo* 71,450 (7).

The plaintiff did not appear upon the appeal.

Cur. adv. vult.

(4th May). CLARENCE, J.—Plaintiff sued the defendant, *H. A. Kerr*, on a Promissory Note, and obtained provisional judgment for Rs. 701·25, under which judgment plaintiff issued writ, and the Fiscal in execution of that writ seized and sold certain household furniture in the bungalow on Kinrara Estate. This levy seems to have produced Rs. 211·73 net, which sum appears to be in Court to the credit of this action. The money was afterwards claimed by a Mr. *T. C. Kerr*, who claims in the character of a mortgagee of the Kinrara Estate, and a kind of Special Case was submitted by the Proctors of plaintiff and Mr. *T. C. Kerr* for the decision of the District Court. It is not expressly stated, but I presume, that the mortgage under which Mr. *T. C. Kerr* claims is a mortgage made by the defendant to this action in favour of Mr. *T. C. Kerr* or some

(1) Berwick's Trans., pp. 263, 269.
(2) 36 L. J. Ch. 173.
(3) 18 L. J. Bk. 16.
(4) 25 L. J. Ch. 361.
(5) 29 L. J. C. P. 97.
(6) L R,, 7 H. L, 481.
(7) See Appendix H.

one in whose shoes Mr. *T. C. Kerr* stands. The mortgage deed is not before me, but it is agreed by both parties that the mortgage purported to hypothecate the estate with "the live and dead stock on the estate." Mr. *T. C. Kerr* contends that "live and dead stock" includes the bungalow furniture seized and sold under plaintiff's writ. The learned District Judge held the contrary and made an order allowing plaintiff to draw the money, and against that order Mr. *T. C. Kerr* appeals.

The sole question contested was, whether appellant's charge extends to the furniture. I have looked through the list of the furniture, and I find that it consists of ordinary household furniture, such as chairs, tables, almirahs, lamps, glass, crockery, and so forth. In my opinion the term "dead stock" as applied to a coffee estate does not *primâ facie* include such things as these. It is suggested on appellant's behalf that bungalow furniture on a coffee estate is a kind of stock in trade kept on the premises for the use of a paid Superintendent. All I think it necessary to say as to that is, that in my opinion articles such as these in the bungalow of an estate owner do not *primâ facie* answer to the idea of "dead stock" on the estate; and if any one is interested in maintaining that by reason of any particular usage or circumstances I ought to regard such articles as comprised in the description, it is for such party to satisfy me by laying before me some materials warranting me in so far extending the purview of the phrase. All that appears in this case is, that the furniture was on the estate, and was seized on plaintiff's writ against defendant.

I think that the decision of the District Judge was right and see no reason for taking away this sum of money from plaintiff at appellant's instance.

Appeal dismissed.

Proctor for plaintiff, *E. Beven.*
Proctor for claimant, *C. Vanaerwall.*

23rd and 31st May, 1883.

Present—BURNSIDE, C. J.

P. C. Negombo, 51,383. } A. SILVA v. N. E. SILVA and nine others.

Vagrants Ordinance, 4 *of* 1841, *sect.* 4, *subsect.* 4—*Gaming—Alternative charges—Naming of defendants in plaint—Conviction, uncertainty of—Accomplice, evidence of.*

Plaint—That in breach of the 4th section of the 4th clause of the Ordinance No. 4 of 1841 the 1st 2nd 3rd 4th 5th 6th 7th 8th 9th and 10th did game, play or bet with dice on the night of the 26th January instant at Timbirigascotua in a shed kept or used by 1st defendant for common and promiscuous gaming.

Upon appeal against a general verdict of "guilty,"

Held, that the conviction was bad for uncertainty, and (there being nothing on the record by which it could be amended) must be quashed.

Observations on the form of plaints, and on the evidence of accomplices.

The facts material to this report are disclosed in the judgment of the Appeal Court.

Dornhorst for the defendants, appellants.

Cur. adv. vult.

(31st May). BURNSIDE, C. J.—The conviction in this case must be set aside on more than one ground.

In the first place, I cannot find that the complainant charged any one with an offence. The complaint is in these words, so far as can be gathered from the mutilated form in which it appears: "That in breach of the 4th section of the 4th clause of the Ordinance No. 4 of 1841 the 1st 2nd 3rd 4th 5th 6th 7th 8th 9th and 10th did game, play, or bet with dice on the night of the 26th January instant at Timbirigascotua in a shed kept or used by 1st defendant for common and promiscuous gaming." If by 1 2 3 4 5 6 7 8 9 and 10 it is intended to designate the defendants, all I can say is that such a designation is one which a court of appeal cannot recognize. Again, the charge is laid in the alternative, "game, play, or bet." Now under the Ordinance it is an offence under certain circumstances to do any one of these acts, and it has been repeatedly pointed out that a charge of all three acts in the alternative, as one offence, is bad for uncertainty. The Police Magistrate has

not found of which act the defendants were guilty — whether of "gaming," "playing," or "betting." Such a conviction is therefore bad for uncertainty, and there is nothing in the record by which I could amend it so as to cure the defect.

Again, the Magistrate has convicted the 1st defendant of keeping the place in question for "common or promiscuous gaming," an offence under a wholly different section, and with which the first defendant was not charged.

Again, the Magistrate finds that some of the defendants "took part in the gaming." Now it may well be that a person takes part in the doing of an act and is not guilty of the act itself; and although, if this objection stood alone, I would not perhaps let it disturb a conviction otherwise good, yet in this case when the conviction is so essentially bad in other particulars, it is well that I should call attention to what might be urged as a fatal objection. I feel less scruples in quashing this conviction than I would have felt, had the evidence upon which it is founded been of a less doubtful character than it appears to me to be.

In the first place, the entire evidence is that of informers, if not accomplices, who, although they went to the place for the purpose of detecting crime, assert that they themselves gambled, and for this reason their evidence required corroboration, which it does not appear to have received in any material particular. Whilst I agree with the Police Magistrate in the evils which result from common and promiscuous gaming, it is my duty upon appeal to be careful that, where the law creates an offence like this attended with highly penal consequences, the conviction of an accused shall be subject to those recognized principles and rules of law and evidence which are wisely conserved as safeguards, and the violation of which is hazardous to the administration of justice.

Conviction quashed.

8th June, 1883.

Present—CLARENCE, J.

P. C. Negombo, 51,756. } R. M. KEITH v. W. J. FERNANDO and two others.

Resisting Police officer in execution of his duty—Ordinance 16 of 1865, sect 75—Ordinance 18 of 1861, sect. 13—Presence of complainant at trial—Using indecent language in the street.

Where defendant was charged by an Inspector of Police with resisting a police constable in the execution of his duty,

Held, that the presence of the constable at the trial was a presence of the complainant within the meaning of sect. 13 of Ordinance No. 18 of 1861.

The evidence showing that the duty the constable was engaged in at the time of the resistance was the arresting of one Jusa, who was brawling in the street and refused to desist at the request of the constable,

Held, that, apart from any special statutory power, the constable was justified in arresting Jusa and taking him into his custody.

Plaint—That the defendants did on the night of the 26th day of March 1883 at Main Street, within the jurisdiction of the Court, assault, resist and obstruct P. C. 564, Juanis Appu, in the execution of his duty as a Police Constable, whilst conducting W. J. Fernando, who was arrested for disorderly conduct in a public street, Negombo, to the Police Station, in breach of cl. 75 of Ord. No. 16 of 1865.

The constable No. 564 in his evidence stated: "On 26th March last *Jusa Sinno* was using indecent language on the Chilaw Road. I went up to him twice and told him not to. He did not listen, so I took him up." He then went on to state an assault upon him by the defendants. The next witness, *Alexandri*, stated, "*Jusa Sinno* was making a disturbance when the constable (complainant) arrested him, and took him as far as the Secretary's house," when the alleged resistance took place.

The 3rd defendant, who alone was tried, was convicted by the Police Magistrate (*W. E. Davidson*) and sentenced to six weeks imprisonment at hard labour.

The defendant appealed.

De Saram, for the defendant, appellant—It is noted that the complainant on the record, *R. M Keith*, was absent at

the trial. The charge should then have been dismissed, and not tried. (Section 13, Ordinance 18 of 1861). It is also not proved that the person now calling himself Policeman No. 564 was a Police Constable at the time of the assault. Further, the Court is not in a position to judge whether the words used amounted to "indecent language," none of the witnesses specifying the actual words used. It is possible that the constable was mistaken in thinking the words were indecent, they not being so in reality. [CLARENCE, J.—It is undesirable that witnesses should be made to repeat in the box all the obscene language they may have heard used in the street]. The witnesses should, at least, have explained what they meant by "making a disturbance." There is, again, no law that casts on a police officer the duty of arresting a person using indecent language in the street. Neither sect. 7 of the *Vagrants Ordinance*, 1841, nor sects. 52, 53 of the *Police Ordinance*, 1865, imposes this duty.

The respondent did not appear.

CLARENCE, J.—In this case I think every point has been urged which could be taken for the defence. The first point is that complainant (Inspector *Keith*) was not present at the trial. Now, I do not think that sect. 13 of Ordinance No. 18 of 1861 requires (at any rate in such a case as this) that complainant should be personally present. The expression used is, "if complainant shall not appear." Now, complainant is an Inspector of Police, and the substance of his complaint is an offence committed by resisting one of his officers in the execution of his duty. I think complainant appeared within the meaning of the Ordinance by being represented by his Police Officer. No doubt, if the actual presence of complainant in Court were necessary for the defence, it would be required; but there is not the slightest suggestion that defendant has in any way been prejudiced by the absence of the nominal complainant. In fact, everything in the case favours the contrary supposition.

The next point is that the policeman does not distinctly say he was a policeman at the date in question. This is probably an oversight, but I find the deficiency supplied by the evidence of other witnesses. I do not doubt that defendant struck the constable and rescued the man *Jusa* from his custody. The question then is, whether the constable had any right to arrest *Jusa*. Now, it is proved that the man *Jusa* was brawling in a public street and

refused to desist when required to do so by the constable, and in my opinion a constable, under those circumstances, irrespective of any special statutory permission, has a right to arrest a party so disturbing the public peace.

Affirmed.

16th February and 21st March, 1883.

Present—De Wet, A. C. J., Clarence and Dias, J J.

D. C. Kandy, 89,562. } W. M. Karunaratne v. J. W. H. Andrewewe and five others.

Kandyan law—Adoption for purposes of inheritance, requisites for—Marriage—Ordinance 6 of 1847, sects. 2 and 28—Ordinance 13 of 185, sect 35.

M. (a Kandyan Singhalese) and B. (a woman of European descent), professing Christianity, were in 1836 married according to the rites of that religion in Gampola. After 7th December 1849 (when the Ordinance 6 of 1847 was confirmed by Her Majesty by notice in the *Gazette*), B. being still alive, M. conducted as his wife M. M. (a Kandyan woman) according to Kandyan customs.

Held, that M 's second marriage was invalid and bigamous, under Ordinance 6 of 1847, sect. 28.

The requisites for a Kandyan adoption, for purposes of inheritance, discussed. *D. C. Kandy* 53,309 (1) approved.

This was an action brought by the plaintiff for the purpose of establishing his right as the adopted son and sole heir at law of *Henry Martyn* deceased. The first defendant was the Administrator of *Martyn's* intestate estate, the other defendants representing *Martyn's* children. The second, third and fourth defendants, and three minors represented by the fifth defendant (being the issue of *Martyn's* second marriage) set up a counter claim to being the sole heirs; and the sixth defendant, a nephew of *Martyn's*, also claimed to have been adopted by *Martyn* as son and sole heir to his property.

The facts, and the nature of the evidence adduced to prove adoption, appear in the judgments of the Court below and of the Appellate Court.

(10th July, 1882). Lawrie, D. J —I find as matter of

(1) Grenier (1873), D. C., 117.

fact: (1) That the deceased *Henry Martyn* was by birth a Kandyan. (2) That he was, when a boy, sent to a Christian School and was for the rest of his life a Christian, and was known as *Henry Martyn*. (3) That in 1836 he was married at Gampola (after publication of banns) by the Revd. Mr. Oakley to *Mary Anne Brackenburg*, a woman of European descent. (4) That *Martyn* and his wife had two children, who died when young; and about 1847, immediately after the death of the younger child, *Martyn* applied to *Babappuhamy, alias Abraham Wetasinghe*, and his wife *Elizabeth MacDonald*, to give him one of their children to be brought up by him and that *Wetasinghe* gave over the plaintiff to *Martyn*. (5) That at that time *Martyn* was a Conductor on Pinhayapitia Coffee Estate under Colonel *Byrde*, and so far as appears, had not then acquired much property. (6) That the plaintiff's father gave him over to *Martyn* on the understanding or promise expressed by *Martyn* that he would provide for the boy. (7) That *Martyn* (probably about 1850) told Dr. *Shipton*, in answer to a question, that the plaintiff was his adopted son. (8) That *Martyn* told *Abraham Wimalasooria* Mohandiram that he was bringing up the plaintiff as an heir to his property. (9) That about the time when these statements were made by *Martyn*, 6th defendant was given up to him by his parents on the understanding that *Martyn* would educate and provide for him. (10) That *Martyn* often told Mr. *De Saram* (Police Magistrate of Gampola from 1852 till 1860 or 1861) that he had adopted the 6th defendant and would make him his heir. (11) That *Henry Martyn* and his wife took care of both the plaintiff and sixth defendant, and that both of them were sent to school by them and spent their holidays at *Martyn's* house. (12) That when both boys were still young, *Henry Martyn* conducted as his wife, according to Kandyan customs, a Sinhalese woman, *Muttu Menika*, of caste equal to his own, the daughter of a Lekam, and that whatever unpleasantness this may have caused at first, his wife *Mary Anne Brackenburg* became reconciled to *Muttu Menika's* presence, and that they lived together with *Martyn* until their respective deaths. (13) That *Muttu Menika* bore to *Henry Martyn* several children of whom six survive, viz. 2nd 3rd 4th and the three minor defendants. (14) That these children were recognised by *Martyn* as his own, that he maintained them, sent them to School, had them baptized, and he and his

wife *Mary Anne Brackenburg* represented to the Clergyman who baptized them that they were her own children (15) That the plaintiff after his leaving school, when he was about 16, spent some little time at *Martyn's* house; that thereafter he was employed on the Railway, returning often to *Martyn's*, but that in 1869 he received an appointment in Badulla, and from that time until *Martyn's* death in 1880 he was seldom at *Martyn's* house. (16) That there is no evidence to shew that after *Martyn* had had children by *Muttu Menika*, he ever spoke of the plaintiff as his adopted son or heir; that in one letter, dated March 1874, he signed himself "your affectionate father." (17) That it is not clear from Mr. *De Saram's* evidence, whether *Martyn* spoke of *Senewiratne* as his adopted son after he had children by *Muttu Menika*. (18) That *Senewiratne* was at one time turned out of *Martyn's* house, but that he was afterwards reconciled to him, and that during the late years of *Martyn's* life *Senewiratne* lived either in or near *Martyn's* house and assisted him in several ways; that the letter addressed to Captn. *Byrde* in 1880 was not written by *H Martyn* and cannot be taken as his statement. (19) That *Martyn* married his eldest daughter to *Andrewewe*, then a clerk in the Pussellawa Court, who is now Ratemahatmaya, and that *Martyn* treated his other children by *Muttu Menika* as legitimate children. (20) That *Henry Martyn* survived both his wife and *Muttu Menika* and died intestate in 1880. (21) Thereafter *Andrewewe*, R M., was appointed Administrator of his Estate. (22) That the present action has been raised by *William Martyn* claiming the whole property as the sole adopted son and sole heir. That the 2nd 3rd 4th and 5th defendants, the children of *Muttu Menika*, claim the whole estate as the legitimate children and sole heirs of *Martyn*, and that *Senewiratne*, 6th defendant, claims as sole adopted son and sole heir.

On these facts I am of opinion that the plaintiff and 6th defendant have proved that they were originally adopted by *Henry Martyn* at a time when he had no children of his own; that their informal adoption by *Martyn* was not irrevocable; that it depended on his good will and pleasure; that there is evidence that long before his death, *Martyn*, having children of his own whom he treated as legitimate, had ceased to treat the plaintiff and 6th defendant as his *sole heirs* and adopted sons, though there was reason to believe he intended to leave them something if he made a

will; that in the circumstances described in the proof neither plaintiff nor 6th defendant has right to succeed to the Estate of the deceased, either separately or jointly, as adopted sons and heirs. That though the deceased treated his children by *Muttu Menika* as legitimate, and probably believed that in law they were legitimate, still they are by the Ordinance of 1847 illegitimate.

I hold that in 1836, when *Henry Martyn* was married in Kandy, there was no Ordinance which regulated marriages in the Kandyan Provinces, for the Regulations 7 of 1815 and 9 of 1822 applied only to the maritime settlements.

In 1836 Kandyans could be married in either of two ways:

(1) According to their own laws, manners, and customs.

(2) By a Christian Minister and according to the forms of any Christian Church.

Any doubts which might have existed as to the validity of marriages by clergymen prior to 1847 were removed by the Ordinance 6 of 1847, sect. 2. I hold that the marriage of *Henry Martyn* and *Mary Anne Brackenburg* in Kandy in 1836 was (*a*) a good and valid marriage (sec. 2). (*b*) No subsequent marriage by *Martyn*, solemnized after the notification in the *Gazette* of the confirmation of the Ordinance by Her Majesty, could be valid. The Ordinance of 1847 was confirmed by the Queen, by *Gazette* Notice, 7th December 1849. The Ordinance provided that any person married according to that Ordinance, and thereafter contracting another marriage before the prior marriage had been dissolved, was guilty of bigamy and liable to imprisonment for three years.

The Ordinance 13 of 1859, sec. 35, declared that the Ordinance 6 of 1847 at no time extended to marriages contracted in the Kandyan Provinces, by residents thereof, *according to the laws, manners and customs heretofore existing and in force among the Kandyans.*

But as the marriage of *Henry Martyn* and *Mary Anne Brackenburg* was *not* contracted according to the laws, manners and customs heretofore existing among Kandyans, the Ordinances 13 of 1859 and 3 of 1870 do not affect the question as to the validity and effect of that marriage, for it was a marriage between a Kandyan and a woman of European descent.

The only Ordinance then which regulates the validity and legal consequence of the marriage in 1836 is 6 of 1847, and that Ordinance, sec. 28, declares that any *subsequent*

marriage shall be void if the prior marriage shall not have been legally dissolved.

I hold it proved that *Martyn* conducted *Muttu Menika* after the confirmation of the Ordinance of 1847, and that there was no valid marriage between them.

I am thus obliged to hold that the children, 2nd, 3rd, 4th, and 5th defendants, are illegitimate. I am of opinion that Kandyan law applies, and that these children are entitled to all the acquired property of the deceased, but in the absence of his nearest legitimate heirs I cannot prejudge the questions which might arise between the children and them.

I dismiss the plaintiff's action. I refuse to enter up judgment as prayed for by the 2nd, 3rd, 4th, 5th, and 6th defendants, and I find the 1st defendant entitled out of the Estate to the costs to which he has been put. I find no costs due to or by other parties.

The plaintiff, and all the defendants with the exception of the first, appealed.

Ferdinands, A. G. A., for the plaintiff, appellant.

Dornhorst (*Withers* with him) for the 2nd, 3rd, 4th and 5th defendants, appellants.

Grenier (*VanLangenberg* with him) for the 6th defendant, appellant.

Authorities cited:—Marshall's *Judgments*, pp 352, 353; Austin, p 74; *D. C. Kandy* 53,309, Grenier (1873), 117; Sawers' *Digest*, p 25.

Cur. adv. vult.

(21st March). CLARENCE, J.—The circumstances out of which this appeal arises are these:—

The deceased, *Henry Martyn*, concerning whose property the parties are contending, was a Kandyan Sinhalese, who was supposed to have embraced Christianity. He married in 1836 an Eurasian woman, by whom he had no children who survived a tender age.

He then received into his family the present plaintiff, who claims to inherit the whole of the property as an adopted child.

Shortly after this, *Henry Martyn* went through the form of marriage according to Kandyan usage with one *Muttu*

Menika, a woman of his own caste. The learned District Judge finds on the evidence, and I see no reason to disapprove of the finding, that this took place after the Ordinance 6 of 1847 came into operation; and if so, then by virtue of section 28 of that Ordinance, *Henry Martyn* and *Muttu Menika* were not legally married, in as much as the Eurasian woman was still alive. By *Muttu Menika Henry Martyn* had six children, viz. *Sophia*, *Henry*, and *Charles*, who are the 2nd, 3rd and 4th defendants, and three minors, who are assumed to be represented in this suit by the 5th defendant as guardian.

The 6th defendant, who is the son of a brother or half-brother of *Henry Martyn*, also claims the whole of the property, as having been adopted by *Henry Martyn* somewhat before the alleged adoption of plaintiff.

Henry Martyn died in April 1880, and administration to his estate was granted to 1st defendant, who is the husband of the daughter *Sophia*.

The present action is instituted by plaintiff, praying an account as against the administrator, and a declaration that he alone is entitled to the whole estate, to the exclusion of *Muttu Menika's* children and 6th defendant.

The foregoing circumstances raise several questions of Kandyan Customary Law, viz.:—

Whether plaintiff has been legally adopted for purposes of inheritance.

Whether 6th defendant has been legally adopted for purposes of inheritance.

If so, has such adoption been in effect annulled, so far as inheritance is concerned, either as to the intestate's hereditary or acquired property, by the birth of *Muttu Menika's* children?

Do *Muttu Menika's* children, though illegitimate, inherit the acquired property?

All the parties are appellants, except the 1st defendant, the Administrator.

The learned District Judge has found that both plaintiff and 6th defendant were "adopted" by intestate, but that long before his death he ceased to treat them as sole heirs and adopted sons. Plaintiff's action has been dismissed with costs. The Administrator has been declared entitled to be paid his costs out of the estate, and the other parties are left to bear their own costs.

So far as plaintiff is concerned, the foundation of his

action is his claim to succeed as an adopted heir. The requisites to a claim of that kind are well explained in the judgment of Sir Richard Cayley, when District Judge of Kandy, which was adopted by the Supreme Court in Appeal (1). It is necessary to establish, not merely that there has been adoption, but that the adoption was with the view of the adopted child's inheriting. No special formalities are necessary, but some kind of public declaration or acknowledgment is necessary. The materials adduced on plaintiff's behalf appear to me insufficient for the purpose. They are as follows:—

Plaintiff himself says generally:—"He (intestate) looked to me as his heir. He always said that all his property would come to me." Mr. *Imray*, who knew intestate well, says:—"My impression was that he (plaintiff) was adopted by Mr. *Martyn*. I always understood that." This is but faint, and, moreover, there is nothing concerning heirship.

Dr. *Shipton* knew *Martyn* well, as his Medical man. He says:—"Plaintiff lived with *Martyn*. *Martyn* told me that he was his adopted son * * * They treated him as their child."

Plaintiff's father speaks of *Martyn's* promising to make plaintiff his heir, when the father gave him up.

Abraham Wimalasuriya Mohandiram knew *Martyn* for 42 years, and was intimate with him. This witness says:—"He (*Martyn*) was bringing up this child as an heir to his property. He said that once on my asking him."

It further appears that *Martyn* educated plaintiff as well as 6th defendant.

This material appears to me insufficient to establish affirmatively that plaintiff was adopted by *Martyn* for purposes of inheritance. The occurrence spoken to by *Wimalasuriya* Mohandiram is the only direct acknowledgment of adoption as heir spoken to by any of plaintiff's witnesses, and does not appear to have been made in public or an any notable occasion. There is nothing answering to the emphatic and solemn declarations established in the case adjudicated by Sir Richard Cayley.

This being so, plaintiff's action is not maintained; but I am unwilling under the circumstances to shut him out from all further chance of establishing his claim.

(1) *D. C. Kandy* 53,309, Grenier (1873), 117.

DIAS, J.—In my opinion the evidence adduced does not establish plaintiff's adoption by *Henry Martyn*.

The law of adoption is a very old Kandyan custom and has fallen into disuse of late. *Henry Martyn*, the alleged adopting parent, was a Kandyan Sinhalese by birth. He married a Burgher lady, became a Christian, and was for some time Interpreter of the Gampola Court. He seems to have withdrawn himself from all Kandyan social influences. He married a Kandyan lady, by whom he had children, and he seems to have lived and died under the belief that these children were legitimate.

The plaintiff is in no way related to *Henry Martyn*, and is the son of a low-country Sinhalese man. His mother was a Miss *MacDonald*, who seems to have been a school friend of *Henry Martyn's* Burgher wife. Where a Kandyan adopts a child with a view of making him his heir, he generally takes a nephew or some such near relation; and it is extremely unlikely that *Henry Martyn* should adopt an utter stranger, a son of a low-country Sinhalese man, though he had several children of his own. The probabilities are all against the adoption. The evidence adduced consists of certain statements said to have been made by *Henry Martyn* to some strangers, some of them being Europeans. These statements were not made on any special occasion, but casually in conversation.

According to Kandyan law, as I understand it, the intention to adopt must be clearly evidenced by declarations or other overt acts made in as public a manner as possible. *Henry Martyn* seems to have been a man of intelligence, above the average Kandyan, and if he really intended to follow the old fashioned law of adoption he would have done it by some writing about which there could be no dispute.

Under all the circumstances, the conclusion that I come to is, that *Henry Martyn* lived and died in the belief that his children by *Muttu Menika* were his heirs.

DE WET, A. C. J.—After reading the evidence in this case and the judgment of the District Judge, and having had an opportunity of perusing Mr. Justice CLARENCE and Mr. Justice DIAS' opinions, I am clearly of opinion that the plaintiff has failed in proving that he was the adopted son of *Henry Martyn*. Under these circumstances the judgment of the District Court must stand, and plaintiff be adjudged to pay the costs incurred by the administrator in

defending the action, leaving the other defendants to pay their own costs.

Affirmed.

Proctor for plaintiff, *M. C. Sidde Lebbe.*
Proctors for the 1st defendant, *Barber & Eastlake.*
Proctor for the 2nd, 3rd, 4th and 5th defendants, *C. Vanderwall.*
Proctor for the 6th defendant, *C. Jayetileke.*

26th April and 1st May, 1883.

Present—CLARENCE, J.

C. R. Matale, 3,747. } M. MAHAMADU TAMBY v. MAHAMADU ALI and another.

Mortgage—Mortgagee plaintiff purchasing property mortgaged in execution—Ejectment—Non-joinder of parties in possession in mortgage suit.

Plaintiff obtained judgment in a former action on a mortgage bond against his debtor, and bought the mortgaged property in execution on 18th January 1882. Plaintiff brought the present action against two defendants to obtain a declaration of title to, and possession of, that property, alleging that defendants had taken the crop off the land after plaintiff's purchase. The second defendant had on 19th April 1881 purchased the same land in execution of a money judgment against plaintiff's mortgagor during the subsistence of the mortgage.

Held, affirming the decision of the court below, that plaintiff, not having joined in his mortgage suit the purchaser in execution of the money judgment (the present second defendant) could not succeed in the present suit.

Plaintiff sued to recover possession of a ¾ share of a field which he had purchased on 18th January 1882 in execution of a decree in his own favour passed in a suit on a mortgage bond, in which present plaintiff was plaintiff, which decree had declared the land in question specially bound and executable to satisfy the mortgage debt. The present defendants were alleged to have taken the crop off the land and to be disputing plaintiff's title. The defendants in answer alleged that the land had been purchsed by 2nd defendant on 19th April 1831 in execution of a money judgment against plaintiff's mortgagor during the subsis-

tence of the mortgage, and that 2nd defendant had been in possession since his purchase.

At the trial, parties' proctors agreed upon the following points:

1. That 2nd defendant purchased this land under writ in *C. R. Matale* 45,341, on 19th April 1881.

2. That the land was specially mortgaged to plaintiff, and that plaintiff having obtained judgment on his mortgage bond sold up the specially mortgaged field and purchased it under writ in *D. C. Kandy* 88,359, on 18th January 1882.

3. That defendants disputed plaintiff's rights. It is disputed whether defendant did or did not take possession of the field after his purchase in April 1881.

4. The institution of *D. C. Kandy* 88,859 was on 31st July 1881.

The Commissioner (*L. G. Tate*) gave judgment as follows:—

"In this case I am of opinion that the purchase by 2nd defendant on 19th April 1881 must be upheld. He purchased the land subject to plaintiff's mortgage, and the mortgage would therefore follow the land. The suit on the mortgage bond would have to be taken against the purchaser at that sale. Plaintiff is non-suited with costs."

Plaintiff appealed.

Dornhorst, for the appellant, contended that whether or not the defendant was in possession at the institution of the mortgage suit was a question of fact, and required evidence to prove it in the absence of admission. Even if the defendant had been then in possession, all he could now demand of the plaintiff was proof of the mortgage debt as against defendant. The omission of plaintiff to join in his mortgage suit the purchaser under the money judgment did not for ever deprive plaintiff of his right to obtain possession of the land which he had bought in execution of his mortgage decree.

The defendants were not represented in appeal.

Cur. adv. vult.

(1st May). CLARENCE, J.—I think this judgment right. Defendant's purchase is, of course, subject to plaintiff's mortgage, but, according to previous decisions of this Court,

plaintiff's judgment against the mortgagor does not bind this defendant.

Affirmed.

Proctor for plaintiff, *F. A. Prins.*
Proctor for defendants, *J. B. Williamson.*

12th June, 1883.

Present—BURNSIDE, C. J., and CLARENCE, J.

D. C. Colombo, 1,950.

The QUEEN'S ADVOCATE
v.
Mututantrige HENDRICK CURE and others.
Ex parte C. LIESCHING, Fiscal for the Western Province.

Parate execution—Fiscals Ordinance, sect 51—Necessity for separate suit—Notice of motion to parties affected.

Parate execution, under sections 50 and 51 of the *Fiscals Ordinance*, 1867, should issue in the suit in which the original execution issued. No notice of the motion for parate execution need be given to the party affected, who may be heard upon motion to recall the writ.

In this case judgment by default was entered for the plaintiff for Rs. 687.48 and interest and costs against the second defendant, on 23rd March 1882, and against the first and third on 16th August 1882. Upon writ issued, the Deputy Fiscal of Panadura seized and sold in satisfaction of the judgment a share in a land called Ambegahawatte, the property of the first defendant. At the sale on 16th November 1882, *Mututantrige Marselino Cure* became the purchaser for Rs. 1740. His sureties were *Colombepatabendige Grigoris Perera, Dadegamuwage Don Bastian Peiris, Mututantrige Arnolis Cure*, and *Mututantrige Hendrick Cure*. The one-fourth purchase money was paid, but default was made in the payment of the balance, Rs. 1305, within two months of the sale, as stipulated in the Conditions of Sale. The property was accordingly resold on 27th February 1883, at the risk of the original purchaser, and was bought by one *Samuel Cure* for Rs. 512. On 19th March 1883, the Fiscal for the Western Province filed an affidavit setting out the above facts, and moved that parate execution might be issued against the first purchaser *Marse-*

lino Cure and his sureties, to recover the difference between the amounts realised at the two sales, viz. Rs. 1228. The District Judge (*T. Berwick*) disallowed this motion for want of notice, and the Fiscal appealed.

Layard, for the appellant—The application for parate execution has rightly been made in the suit in which the original execution issued. See remarks of CAYLEY, C. J. in *Liesching* v. *Silva* (1). It is of the very nature of *parate* execution that it should issue without notice to the party to be affected by it. Voet (*ad Pand.*, 42. 1. 48) speaks of "*executio parata sine formâ judicii.*"

The Supreme Court, considering the question of parate execution, said as follows (*Marshall's Judgments*, p 179): "Though the creditor, who took upon himself to aver the necessary facts, was permitted to arrive *per saltum* at that stage which in ordinary cases is only to be attained by regular steps, there was no reason why, from this point, the proceedings should differ from other cases. . . . . As an execution, obtained by regular and gradual proceeding, might still be challenged, ... and might be "taken off" by the Court from which it issued, if it appeared to have been improperly or irregularly obtained, so *a fortiori* such power of revision ought to exist in cases of parate execution . . . . . in which the seizure of the person or property is the initiation of the proceeding, previously to which the defendant has no opportunity of contesting the claim." And again (p 181): "Such right of opposition was the more necessary in a case like the present, where the defendant had no opportunity of opposing the application at the time of making it, since the Regulation was imperative on the court to issue the writ on the plaint (true or false) of the auctioneer, without further pleading or process."

The learned District Judge has himself pointed out that the right course for the party against whom the writ issues is to come in and move for its recall on proper notice to the plaintiff and Fiscal. *Davithami* v. *Meera Lebbe* (2).

BURNSIDE, C. J.—I think the writ should go It is an old form of proceeding engrafted on our *Fiscals Ordinance*. The very term *parate* seems to show that it must issue without notice and in the original suit. There can be no costs, of course.

(1) 4 S. C. C., 142. | (2) 3 S. C. C., 11.

CLARENCE, J.—I also think this writ should have issued *ex parte*. The purchaser against whom it issues will have an opportunity of contesting it by moving to have it recalled.

Set aside.

Proctor for the plaintiff, *H. Van Cuylenburg*.
Proctor for the Fiscal, *R. F. de Saram*.

1st and 19th June, 1883.

Present—BURNSIDE, C. J., and CLARENCE, J.

C. R. Batticaloa, 16,209. } KUMARAVALOE v. MOHIDIN BAWA and two others.

Bond—Prescription.

The plaintiff sued on an instrument which, after acknowledging the receipt of a sum of money, provided for the recovery of it with interest in case of default of payment. The parties, in the body of the instrument, called it a "money debt bond," "this bond," "this unprofessional bond"; it bore the stamp proper to a bond for the amount mentioned, and professed to create a general mortgage over all the property of the obligors. Plea, prescription.

Held, that this instrument was not a "bond."

Held also, that regard being had to the intention of the parties, as evidenced by the use of a bond-stamp and by other circumstances, it would be inequitable to allow the defendants to set up the shorter term of prescription as for a promissory note.

Observations on the requisites to constitute a "bond" in this country.

This was an action, begun on 29th August 1882, by the obligee against the obligors upon the following instrument, dated 5th September 1874:

"To Sidamperanather Kumaravelo of Navelkuda ..... the money debt bond granted by Isooboo Lebbe Mohadeen Bawa and Isooboo Lebbe Mohamado Tamby of Kattankudiaripu is to the following effect:—We have now received the sum of Rs. 45 from the said Kumaravelo, and in failure to pay the amount in full as principal within one month's time, we allow interest to be recovered by suing at the rate of 25 per cent per annum from the expiration of the time for payment till recovery, along with the principal from us and from all our property. Having thus consented we have written and granted this bond to Kumaravelo by Mohadeen Bawa and the other. Witnesses whereof are [here follow 3 names]. At the consent of the parties this unprofessional [informal, simple] bond was written by affixing a stamp of 15 cents."

The defendants first filed an answer in person, wherein they pleaded that they had in 1873 granted to plaintiff a bond for the debts of plaintiff's sister, after which they had made certain payments on that bond, and for the balance granted the bond in question, which they had paid and settled. An amended answer was subsequently filed, pleading that the cause of action was prescribed under section 4 of Ordinance No. 8 of 1834 and section 7 of Ordinance No. 22 of 1871.

At the trial, the Court (*R. C. Pole*, Commissioner) upheld the plea of prescription and nonsuited the plaintiff.

Plaintiff appealed.

The appeal was first argued before CLARENCE, J., by *Dornhorst*, for the appellant, and *Sampayo*, for the respondent. By direction of CLARENCE, J., the case was put on for argument before the Full Court, and, DIAS, J., being absent on Circuit, now came on.

Browne, for the plaintiff, appellant—A bond in our law is the equivalent of the *literarum obligatio* of the Roman Dutch Law. This is defined by Van der Keessel, Thesis DXXI (commenting on Grotius, Bk. 3, cap. 5, section 1) as follows:—"*Literarum obligatio*, which is used by Grotius in a wider sense than under the Roman Law, is any promise reduced into writing, to do something arising from any just cause or consideration, and even from any other nominate contract: and differs therefore essentially from the mere acknowledgment of a debt made in writing, to which no promise is annexed." The present instrument falls within this definition. It also professes to create a general mortgage over the obligors' property, which (though general mortgages are now abolished) indicates that the parties intended to enter into a bond. This intention is further borne out by the fact that the stamp of 15 cents affixed is that proper to a bond, a 5 cent stamp sufficing for a promissory note. If the present document be a "bond," the action on it will only be prescribed in 10 years. (Section 6, Ordinance 22 of 1871.)

Sampayo, for the defendants, *contra*—The old Prescription Ordinance, No. 8 of 1834, spoke in section 3 of bonds "whether notarial or not, and whether under seal or not." The corresponding provision in the new Ordinance, 22 of

1871, section 6, says nothing of bonds not under seal, apparently attaching to the word "bond" the meaning it bears in English Law, from which the term is derived. [CLARENCE, J.—The Ordinance of 1834 seems to recognise such a thing as a bond not under seal, which is a contradiction in terms]. As to the stamp, it is not open to parties to entirely change the character of an instrument by affixing a higher stamp duty; in this instance, to convert a promissory note into a bond, by affixing a bond stamp to it.

*Cur. adv. vult.**

(19th June). BURNSIDE, C. J.—The question for decision in this case is, whether a particular instrument not under seal is a bond or only a written security within clauses 3 and 4 of the Prescription Ordinance 8 of 1834.

By the 3rd section of that Ordinance, which is the prescription Ordinance applying to the present case, the instrument in question having been executed before it was re-

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* At the first argument, before CLARENCE, J., *Grenier* as *amicus curiae* referred the Court to the two following cases, in which a similar question had arisen.

In *C. R. Colombo* $\frac{3924^2}{37839}$, (Civ. Min. of Sup. Ct., 13th Feb. 1866) the material part of the instrument (which was in Tamil) was as follows:

"This debt bond which was caused to be written and granted to Gabriel Gomis ..... is as follows, to wit, owing to my necessity I have this day borrowed and received the sum of £ 6 on interest, which sum of £ 6 is to be paid on 6th September next ensuing with interest at the rate of 1½ per cent and after satisfying the same receive back this bond."

G. Stewart, Commissioner, held this to be a bond, "being simply an undertaking to pay an existing debt with interest." The plaintiff refusing to stamp the instrument as a bond, his action was dismissed, and on his appealing, the Supreme Court simply affirmed the judgment.

In *C. R. Colombo* 50617, (Supreme Ct. Civil Min., 13th June 1867) the above case was cited and relied on. Here the instrument (which was also in Tamil) was as follows:

"The debt bond which was caused to be written and granted on this 1st June 1866 to ..... to the following purport, to wit, I do hereby declare to have in a case of my necessity borrowed and received this day from the above person the sum of £ 3, equal to rix dollars 40. Therefore I do hereby agree to compute interest thereon at the rate of 2 per cent and to pay both the said sum of rix dollars 40 and interest on demand of the said creditor."

The question here too turned on the stamp, and the Commissioner (*H. W. Gillman*) after carefully considering the meaning of the Tamil words employed, held the instrument to be a promissory note. In appeal, the Supreme Court simply affirmed this judgment too.

pealed, an action or claim on certain instruments, and amongst them a "bond" conditioned for the future payment of money, whether under the seal of the obligor or not, is prescribed after 10 years; whilst by section 4, an action or claim upon a written security not falling within the description of instruments set forth in section 3, is prescribed after 6 years.

The plaintiff in his pleadings described the instrument as a "bond," and so contended at the trial. The defendant in the first instance filed an answer in person, in which he himself called the instrument a "bond," the execution of which he admits, and pleads payment. Subsequently he was allowed to put in a further answer, which he did by a proctor, and he then pleaded prescription under the 4th clause of the Ordinance. The learned Judge of the Court of Requests, without giving any reason, upheld the plea of prescription, and the plaintiff thereupon appealed. In the instrument itself (I quote from the translation which I find as a part of the record in the case—I do not myself know anything of Tamil—) it is stated that the obligor had granted this "money debt bond," and "had caused this *bond* to be written and granted," and in the attestation "at the instance of the parties this unprofessional bond was taken."

Although by the law of this Colony sealing is not necessary to the validity of any instrument, it seems to be a contradiction in terms to call an instrument not under seal a "bond," a word which has a recognised legal meaning, indicating an instrument under seal. In *D. C. Colombo* 80,998, 4 S. C. C., 85, a case in which I appeared as Counsel, I find it stated that "a bond is a bond and a deed is a deed, whether it has a seal or not, if in other respects it is executed as required by law." It is my misfortune that I am unable to see how this statement advances the argument. I can find no principle by which we can be guided in arriving at a conclusion on this point, and I am afraid that the question is more one of fact than of law. The parties to this instrument evidently treated it as a "bond," until the proctor for the defendant appears upon the scene; and taking this fact in connection with the fact that, by the translation of the instrument, it is declared to be a "bond," I think we must as a matter of fact treat it as a "bond."

The judgment of the Court of Requests is therefore set

aside with costs, and the case sent back to the Commissioner to deal with the issues raised by the first answer, the plaintiff being entitled to judgment on the plea of prescription.

CLARENCE, J.—The question raised by this appeal is, whether the instrument upon which the plaintiff sues is a "bond" within the meaning of section 6 of Ordinance No. 22 of 1871.

The instrument is in Tamil attested by three witnesses but not notarially. Its purport is that the defendants acknowledge to have received Rs. 45 from the plaintiff payable in one month from the date of the instrument (5th September 1874) and they agree that in default of such payment the principal may be recovered with interest at 25 per cent per annum.

The defendants first of all answered in person, admitting that they granted the instrument, but setting up what seems to have been meant for a plea of satisfaction. They afterwards filed a fresh answer signed by a proctor, which set up simply the defence *non accrevit intra sex annos*, and pleaded the 4th section of Ordinance 8 of 1834 and the 7th section of Ordinance 22 of 1871. The Commissioner without assigning any reason upheld the plea of prescription, and plaintiff appeals.

The instrument having been made in 1874, it falls, so far as prescription is concerned, under the Ordinance 22 of 1871. It certainly is a "written promise or contract," and as such must fall under the seventh section of that Ordinance if there be no other part of the Ordinance governing the matter. If section 7 is the section that applies, the present action is barred, not having been brought within six years. Plaintiff, however, contends that the instrument falls under section 6, the term of prescription in which is ten years. The actions embraced by that section are actions "for the recovery of any sum due upon any hypothecation or mortgage of any property, or upon *any bond conditioned for the payment of money*, or for the performance of any agreement or trust or the payment of penalty." Plaintiff contends that the instrument sued on is a "bond conditioned for the payment of money."

"Bond" is an English Law term having a specific meaning. It means a written obligation or acknowledgment of debt under seal. But as the English distinction between specialties or acknowledgments or contracts under seal and

promises not under seal has no place in the law of this Island, it becomes a difficult task to conjecture what was the intention of our Legislature in using the term "bond." The term is also used in the Ordinance 8 of 1834. There has been undoubtedly, in countries governed by the Roman Civil Law, a distinction drawn between instruments private and instruments authenticated by judicial officers or notaries, but there is not in our system anything like the English distinction between instruments under seal and instruments not under seal. It is therefore very difficult to find any principle on which we can interpret here a technical term borrowed from the English Law, in which its meaning had reference to a distinction which does not exist here. I think it best not to attempt to guess at the question, but to content myself by saying that, whether the word "bond" has been used by our Legislature in simple heedlessness, or with some definite intent, so far as concerns the instrument before me I see no reason why the instrument should be placed on a different footing from the simplest class of acknowledgments of debt or promises to pay. It is simply an acknowledgment of debt signed before witnesses, with an undertaking that if the debtor fails to pay on a specific date the creditor may recover it with specified interest. Whatever may have been meant by "bond" in our Ordinance, I see no reason why such an instrument as this should be called a bond and so placed on a different footing to a simple promise to pay.

If this instrument had been written in English, and being so written had styled itself a "bond," it might have been reasonably argued that the parties should be regarded as having mutually intended that it should entail the rights and liabilities attached by our Legislature te the word "bond." The instrument however is in Tamil, and the Tamil expression which has been translated "bond" means, so far as I understand it, simply particulars of debt.

By the kindness of Mr. *Grenier, amicus curiæ*, I was furnished, when this case first came before me, with reference to two previous cases which came up in appeal to this Court, and in which the point was mooted, what meaning is to be assigned to the term "bond" as employed by our Legislature. These cases however throw no light upon the question. In the first, $\frac{39242}{37839}$ C. R. Colombo, S. C. Civ. Min., 17th October 1865, the instrument was in Tamil, witnessed but not notarial, and styled itself கடன் பீடு or "debt note." It was in fact a simple acknowledgment

of debt with promise to pay. The question arose under the Stamp Ordinance, and the Commissioner held as follows: "The Court thinks that the instrument is a bond, it being simply an undertaking to pay an existing debt with interest." In appeal that judgment was simply affirmed, the Supreme Court stating no reasons. This is certainly a very unsatisfactory case.

In No. 50,617 C. R. Colombo, S. C. Civ. Min., 13th May 1867, the question also arose under the Stamp Ordinance. Here the instrument was also in Tamil, witnessed but not notarial; it styled itself கடன் பீடு and கடன் முத்திரை and was a simple acknowledgment of debt with a promise to pay. The case just quoted was cited, but the Commissioner held the instrument to be a promissory note, which decision was in appeal simply affirmed. So that this latter decision overrules the former, but in neither was there any discussion shewing that the difficulty of the question had been entertained. There is an older case reported in Morgan, Conderlag and Prins, No. 18, p 4, in which the Supreme Court said, "An instrument, which though inconsequentially termed a bond (for in words there is no magic) is but a mere acknowledgment of a certain sum of money lent and advanced, to be recovered from the debtor personally upon a condition, is no actual bond, and does not require ten years to be prescribed."

Thus, so far as authority goes, although there has been no discussion in this Court of the difficult question:—what did the Legislature mean by "bond"?—such authority as there is supports me in holding that at any rate such an instrument as this is not a bond.

But I do find one circumstance from which I infer that the parties when they made it supposed it to be a bond. It bears a 15 cent stamp, which having regard to the amount of the debt would be the proper stamp if it were a bond, whereas if it were only a promissory note 5 cents would have been enough. I do not attach much importance to the circumstance that in their first answer, drawn for them by some illiterate petition drawer, the instrument is styled a bond; but I can only explain the amount of the stamp by supposing that the parties considered the instrument to be of a more solemn character than a promissory note; and the inference which I draw is that they supposed it to be a bond. As I have already said:—Whatever a bond may or may not be, I do not think this is one, but since in my

opinion the parties joined in supposing it to be one when they made it, I think it would be inequitable to allow defendants to set up the shorter term of prescription. I may also observe that the defendants' first answer suggests the existence of matters subsequent to the making of the instrument, which having regard to section 13 of the Ordinance, would operate to postpone the commencement of the prescriptive term.

I agree that the judgment be set aside and the case sent back to the Court of Requests in order that defendants may have opportunity of supporting the pleas raised in their first answer. Defendants must pay the costs of this appeal and of the trial day.

Set aside. Further trial.

Proctor for plaintiff, *F. A. Speldewinde.*
Proctor for defendants, *C. Suppramanian.*

20th and 26th June, 1883.

Present—CLARENCE, J.

C. R. Colombo, 32,334. } F. C. Loos v. SEKANA LEBBE.

Insolvency—Property acquired pending insolvency, sale of in execution—Judgment on debt contracted pending insolvency—Right of purchaser to sue for rent—Surrender by assignee to Insolvent—Ordinance 7 of 1853, sect. 79.

Pending the Insolvency and before the certificate of K., who had a life-interest (acquired pending the insolvency) in a house occupied by defendant, plaintiff purchased K.'s interest in the house at a sale in execution of a judgment against K. obtained upon a debt contracted pending the insolvency. Plaintiff now sued defendant for use and occupation. Defendant admitted occupation, but pleaded the insolvency and his liability to the assignee for the rent.

Held, that the right to recover rent had passed to and was vested in the assignee, and that plaintiff's action had been rightly dismissed.

Quære, whether, if the assignee had surrendered the property in question to the insolvent, the plaintiff would have acquired any right by his purchase prior to such surrender.

Plaintiff began this action, on 16th August 1882, to recover Rs. 98 for the use and occupation during seven months of plaintiff's house by defendant, "as a monthly

tenant." Defendant admitted the use and occupation, but went on to deny that plaintiff had purchased the right and title of *J. G. de Kroes*, and that *Kroes* had any right in the house; and set out, among other immaterial matters, that defendant had received from *W. L. A. Phebus*, *Kroes'* assignee in insolvency, a notice that all *Kroes'* right had vested in his assignee, to whom all rent was payable; that the house was held subject to a *fidei commissum*, and *Kroes'* interest was therefore not alienable.

At the first trial (before *J. E. Smart*, Commr.) it was proved that *Kroes* had been declared insolvent on 14th October 1879; that the judgments (Nos. 82,953 and 83,142 *D. C. Colombo*) in execution of which plaintiff had purchased *Kroes'* right to the house, had been obtained on 20th December 1880 and 17th January 1881 respectively; that the debts on which these judgments had been obtained had been contracted after the insolvency; and that at the time of the insolvency *Kroes* had no interest in the house. Defendant further proved that since the judgment in *C. R. Colombo* 28,460 (June 1882) he had been making *Kroes* a subsistence allowance at the assignee's request.

The Court having given judgment for the plaintiff, on appeal by the defendant, the Supreme Court set the judgment aside and sent the case back for further trial. At the second trial (before *W. J. S. Boake*, Commr.) the evidence previously recorded was read of consent, and the assignee proved that the insolvency proceedings were still pending, that the insolvent's life interest in the house had been acquired pending the insolvency, that he had not surrendered the house to the insolvent, and that he had requested defendant (who had been in occupation of the house for 4 or 5 years) to pay the rent to *Kroes* as an allowance pending insolvency, but that, had such payment not been made to *Kroes*, he (the assignee) would have claimed the rent. *Kroes* obtained a certificate on 12th September 1882, his creditors being still unpaid.

The Court held that there had been no surrender by the assignee to the insolvent, and that (had there been such surrender) the assignee had not the power to make it:

further, that the sale pending insolvency was invalid.

Plaintiff's action was dismissed, and he appealed.

Van Langenberg for the plaintiff, appellant.
Browne (*Withers* with him) for the defendant, respondent.

Cur. adv. vult.

(26th June). BURNSIDE, C.J.—Pending the insolvency and before the certificate of one *Kroes*, who had been the owner of a house and premises in the occupation of the defendant, the plaintiff purchased *Kroes'* interest at a Fiscal's sale, and now sues the defendant for use and occupation. The defendant admits the occupation, but pleads the insolvency of *Kroes*, and says that he (defendant) is liable to the assignee for the rent.

He also says that the property was held by *Kroes* subject to a *fidei commissum* and therefore could not be sold as *Kroes'* property. If this were so, then the property would not have passed to *Kroes'* assignee, but as there has been no evidence on this latter point, I need not further notice it.

The learned Commissioner has given judgment for the defendant on the ground that, the property having passed to the assignee, the plaintiff has no title to sue. The plaintiff has appealed At the bar the plaintiff relied, as an estoppel, on a previous judgment obtained by him against the same defendant for the use and occupation of the same premises for some months previous to the action.

If the judgment operated as an estoppel, the plaintiff should have pleaded it. I do not find that it has been either pleaded or put in evidence. I am not therefore called on to decide upon its effect. It is clear that, upon the insolvency of *Kroes*, all his real estate, of which it is admitted the property in question formed a part, vested in his assignee under the 79th section of Ordinance 7 of 1853.

The plaintiff being a purchaser after the insolvency and before the certificate, acquired no right to claim rent from the defendant, who was in the occupation of the premises. Such right passed to and was vested in the assignee, and even supposing that the assignee had the right to surrender and had surrendered the property to the insolvent, of which there is no proof, it would be very questionable whether such surrender would give the plaintiff any rights against the defendant on the purchase which had been made pre-

vious to the surrender. The assignee, however, says that he has not surrendered, and that he told the defendant not to pay the rent.

Affirmed.

Proctor for the plaintiff, *H. VanCuylenburg.*
Proctor for the defendant, *W. B. Rodrigue.*

4th and 13th July, 1883.

Present—CLARENCE, J.

C. R. Colombo, 35,425. } H. JACOBS v. J. W. H. EBERT.

Landlord and tenant—Notice to quit—Increased rent for holding over.

Plaintiff as landlord gave notice on 20th February to the defendant his tenant to quit the plaintiff's house on 31st March, in default of which the plaintiff would charge the defendant rent at the rate of Rs. 50 instead of Rs. 31.50 per month for such time as the defendant should hold over. The defendant quitted the house on 15th or 18th April, and plaintiff brought this action to recover Rs. 50 as rent for April.

Held, that plaintiff was entitled to recover.

Defendant was plaintiff's monthly tenant of a house, paying Rs. 31.50 rent per month. Defendant entered at the end of March, 1882, paying a month's rent in advance. On 20th February 1883, plaintiff gave defendant notice to quit the house at the end of the following March, intimating that in the event of defendant's holding over after 31st March he would be charged rent at the increased rate of Rs. 50 a month. Plaintiff, alleging that defendant had held over till 18th April, claimed rent at the old rate for March, and Rs. 50 for the period held over in April. The defendant's answer admitted the receipt of the notice to quit, but denied plaintiff's right to give such notice, as there was no rent in arrear. The defendant brought into Court Rs. 15·75, being rent at the old rate for only 15 days in April, during which defendant continued in occupation; payment being pleaded of the rent for March, 1883.

The Court below (*W. J. S. Boake*, Commissioner) held that the original payment in advance covered the rent for

March 1883; but gave judgment for the plaintiff for Rs. 50 as rent at the increased rate for the days held over in April, 1883.

The defendant appealed.

Browne (*Layard* with him) for the appellant—A landlord cannot recover for the period held over any sum he pleases to fix. His action is for damages for use and occupation, which must be assessed in the usual way. Again, he can only recover for the precise number of days during which the tenant held over—not for a whole month, when the tenant has held over only 15 days.

Where the tenant has given notice of his intention to quit, and holds over, he is liable under an English Statute, 11 Geo. 2, c. 19, s. 18, to pay double rent, but that Statute does not operate here.

He also referred to Voet, *ad Pand.*, 19. 2. 32, Berwick's Transln., p 227.

Wendt, for the plaintiff, *contra*—The landlord, at the end of March 1883, was entitled to delivery of possession. He said to the tenant, "If you stay on beyond that time, I shall charge you at the rate of Rs. 50 a month." The tenant, having continued in possession without objection, must be taken to have acquiesced in the new terms. Woodfall, *L. & T.*, 11th Ed., p 698. *Roberts* v. *Hayward* (1). The action is clearly for rent, not for damages for use and occupation; and where the tenancy was from month to month, and the notice given extended over the whole month of March, it is only reasonable that plaintiff should recover for the whole of April, although defendant was in occupation only for fifteen or eighteen days in that month.

He also referred to Voet, *ad Pand.*, 19. 2. 9, 10, 13, Berwick, pp 197, 198, 201. Digest, 19. 2. 13. 11 *in fin.*

Cur. adv. vult.

(13th July). CLARENCE, J.—I think that this judgment is right. Defendant was a monthly tenant at a rent of Rs. 31.50 per month, the tenancy beginning from the 1st March 1882. In February 1883, plaintiff gave defendant notice that he should require defendant to quit on the 31st March following or pay an increased rent of Rs. 50 per

(1) 3 C. & P., 432.

month. Defendant so far as appears made no reply to plaintiff's notice, but simply continued to occupy the house until the 15th or 18th April (it does not appear which) when he left. The judgment appealed against gives plaintiff Rs. 50 for the month of April, defendant having paid up to the end of March, and of that defendant in my opinion is not in a position to complain. If we are to regard him as having assented to plaintiff's offer to let him the house at the increased rent, there is of course nothing more to be said; but if we are not to regard him as having actually agreed to a new tenancy, he is in the position of a tenant who has overheld after the determination of his term. Thus, taking the case on that footing, this is an action for use and occupation. It is no doubt to be presumed in the absence of material to the contrary that an over holding tenant continues to hold at the old rent, but that presumption may yield to circumstances. As Lord Denman puts it in *Mayor of Thetford* v. *Tyler* (1), it is a question for the jury, what the use and occupation are worth, and the fact that the landlord had given notice that he should require an increased rent of Rs. 50 in the event of the tenant staying on is very fair material on which to assess the use and occupation rent at Rs. 50 per month. See *Elgar* v. *Watson* (2).

Affirmed.

Proctor for the plaintiff, *J. N. Keith.*
Proctor for the defendant, *H. Marshall.*

4th and 17th July, 1883.

Present—CLARENCE, J.

C. R. Nuwara Eliya, 8,387. } G. COTTON v. A. H. CAMPBELL and others.

Club, action against, for goods supplied—Liability of Secretary to be sued—Practice—Execution.

A Club is not a partnership, neither is it a corporation capable of being sued through the representation of any officer or member of its body. The remedy of a tradesman who has supplied goods to the

(1) 8 Q. B., 95. | (2) Car. & M., 494.

Club is simply an action against those persons who have contracted with him ; and whatever judgment he may obtain is enforceable against those persons and their property.

Where the defendants were C., Secretary of the N E. Club, three other persons named, " and others members of the said Club," and judgment was entered against C. with a direction that it should be enforced only against the common property of the Club ;

Held, that this judgment was an absurdity, and that a judgment against C. was legally leviable on C.'s own property and on nothing else.

The facts of this case sufficiently appear from the judgment of the Appellate Court.

The first defendant, appellant, was not represented upon the appeal.

De Saram for the plaintiff, respondent.

Cur. adv. vult.

(17th July). CLARENCE, J.—The plaintiff in this action sues to recover a sum of Rs. 94.49 for dairy produce supplied to the Nuwara Eliya Club. So far as appears there seems no doubt that plaintiff supplied the goods and that he has not been paid. It is certainly most discreditable to the Nuwara Eliya Club that a tradesman should have been compelled to sue for the amount of a small undisputed bill.

Unfortunately the proceedings which have taken place in this action have been entirely misconceived, and seem to have been founded in a complete ignorance of what is a very simple and well known matter of law. A Club is not a partnership: neither is it a corporation capable of being sued through the representation of any officer or member of its body. The remedy of a tradesman who has supplied goods to the Club is simply an action against those persons who have contracted with him ; and whatever judgment he may obtain is enforceable against those persons and their property. The parties so responsible to the tradesman are those who have contracted with him either personally or through some authorised agent. The questions which arise in such cases—whether a defendant has contracted with the tradesman—whether he has authorised some other person to pledge his credit—and the like, are simply questions of fact to be determined according to the circumstances.

Unfortunately for the plaintiff the proctor who represented him in the Court of Requests seems to have completely misconceived the nature of the plaintiff's remedy. When

this appeal came on before me, I adjourned the hearing for a short time, in the hope that some settlement might be arrived at by which the unfortunate plaintiff would get his money without its being necessary for a Court of Appeal to deal with the confused mass of misconceived proceedings which has taken place. No such arrangement having been made, I am obliged to deal with the appeal in the ordinary manner.

The plaint states, as the defendants to the action, Mr. *Campbell* (the Secretary of the Club) three other gentlemen named, and concludes with the absurd item, "and others members of the Nuwara Eliya Club."

Under date November 30th, the Commissioner [*G. A. Baumgartner*] signed this entry in the paper-book: "Judgment for plaintiff as prayed against defendant against whom summons was served, with costs." It appears that at that time one of the defendants, Mr. *H. S. Saunders*, had been served, and this entry probably relates to him. The Commissioner, however, proceeded to modify this entry by a memorandum in which he directed that no writ should issue till that particular defendant's share of the debt should have been determined.

On the 8th January, the plaintiff's Proctor applied for execution against the common property of the Club, an application which can only be accounted for by supposing that the Practor was under the singular impression that a Club is a kind of corporate body, and that any member of the Club is a personage through whose representation the corporation may be sued. The Commissioner refused the application.

After this the appellant, Mr. *Campbell* the Secretary, was served, and he not having answered, the Commissioner proceeded to an *ex parte* hearing. Plaintiff was sworn, and from what he said it appeared that Mr. *Campbell* had succeeded Mr. *Hearn* as Secretary, that Mr. *Hearn* and Mr. *Campbell* had both been in the habit of ordering supplies from plaintiff, and that some of the goods in question in the case (how much plaintiff did not say) had been supplied before appellant assumed office. The Commissioner, however, appears to have viewed the action as an action against the Club sued by the representation of their Secretary. He pronounced judgment against Mr. *Campbell*, but directed that it should be enforced only against "the common property of the Club." This of course was an absurdity.

Under a judgment against Mr. *Campbell* levy might have been made on Mr. *Campbell's* property, but it could be legally made on nothing else. This took place on the 6th March.

On the 12th April, Mr. *Campbell* applied to have the judgment reopened. So far as appears by the Commissioner's note, the only material put forward as ground for reopening the judgment was a completely insufficient and scarcely intelligible attempt at an excuse for not filing answer. The Commissioner refused to reopen the judgment. Mr. *Campbell* now appeals against that order.

Other proceedings are minuted in the paper-book which need not be further noticed here. The Court and the two Proctors engaged seem to have gone astray upon the idea of execution against "the common property of the Club."

After consideration of this unfortunate mass of proceedings, I deal with it in appeal as follows:—I decline to interfere at appellant's instance with the judgment for Rs. 94.49 entered against him for default of answering. He has completely failed to excuse his default, and I shall not interfere simply on the merits with the judgment for this paltry sum. It appears by plaintiff's evidence that appellant has been in the habit since he assumed office of ordering goods of plaintiff, and although it was not made to appear at the *ex parte* hearing how much of the Rs. 94.49 worth of butter &c. was supplied on appellant's orders, and how much on those of his predecessor, Mr *Hearn*, I am not going for the sake of a defendant who is in default to take up the time of the Court of Requests or this Court in apportioning this paltry total of Rs. 94.49. The judgment against appellant for that sum will stand, and I must point out that as a judgment against appellant it is enforceable simply against appellant and appellant's property. Plaintiff has no right to levy under it upon any other property than that of appellant.

With regard to costs, appellant will bear his own costs in the Court of Requests, and will pay plaintiff's costs in appeal. As at present advised, I am of opinion that plaintiff's costs in the Court of Requests should be paid by his Proctor, whose incompetence appears to have been the primary cause of these mistaken and embarrassing proceedings, and I direct that plaintiff's costs in the Court of Requests be paid by his Proctor, unless within 15 days of

this date, and upon notice to plaintiff and to appellant, he shows cause before this Court to the contrary.

Affirmed.

Proctor for the first defendant, *A. Thomasz.*

12th and 19th July, 1883.

Present—DIAS, J.

C. R. Kandy, 21,032. } Meragalpedegedera HAWADIA v. Elamalpategedera SARANA.

Bond—Mortgage—Joint and several liability—Co-obligees—Recovery of share of one of the obligees.

Where a mortgage bond, purporting to secure a sum of Rs. 280 to four mortgagees, provided that in failure of payment "from this "mortgage and from the heirs and assigns of me the said debtor "the said principal and interest due the said four creditors or one "of them or any person assigned and authorized by the said four "persons are or is empowered to recover in full"; and plaintiff as the assignee of one of the creditors sued to recover Rs. 70 as the share due to the said creditor;

Held, that the plaintiff as representing one of the four creditors was entitled to recover the full amount of the bond, and was therefore clearly entitled to recover one fourth.

The facts sufficiently appear from the following judgment of the Court below (*T. M. Gibson*, Commissioner):

It appears that the defendant borrowed a certain sum of money from four persons on a mortgage deed No. 2676, and in that deed there is a clause stipulating "that the said principal and unpaid interest shall be "recovered in full by the said four obligees or one of them or any one "of them who may be assigned and authorized by the others to recover "the same." It is therefore quite clear that the case should be brought for the whole amount by all the four persons or by any one of them who may be authorized by the three others in some legal manner to do so. But one of these four persons without any legal authority has assigned over the fourth share of the whole amount to the plaintiff, and plaintiff relying on this assignment deed has brought this case for ¼th the amount appearing in the bond. There is nothing to shew that the four persons contributed an equal share to the loan and that the assignee is entitled to ¼th. Besides, the whole bond should be put in suit and the cause of action should not be split.

The English Law on this point is very clearly laid down in Addison on Contracts (6th Ed., Chap. xxx, sect. 2, p 1044): "A covenant with several persons for the payment of a sum of money is a joint covenant with all, in the performance of which they have a joint interest, so that one of them cannot sue for his particular share or proportion of the

entirety, but all must join in one joint action for the whole; and the pointing out of the share which each is to take of the entire amount will not create a separation of interests so as to enable the parties to maintain separate actions." Plaintiff's case dismissed with costs.

Plaintiff appealed.

[The material words of the bond in the original were as follows: මුදල්හිමි හතරදෙනාට නොහොත් එක් කෙනකුට් එක්කෝ එම හතර දෙනාගෙන් බාරවී බාල්ලබන කෙනකුට. These words were rendered, in the translation used in the Court below, "the said principal and unpaid interest shall "be recovered in full by the said four obligees or one of "them or any one of them who may be assigned and "authorized by the others to recover the same." The translator who gave this version sent up an amended translation with the record, in which he said the translation should run, "the four obligees or otherwise by any other person who may be assigned and authorized by the said four obligees to recover the same." By order of the Supreme Court a translation was made by the interpreter attached to that Court, which rendered the words as given in the head-note to this case].

Dornhorst, for the plaintiff, appellant—It is the privilege of the debtor to have only one action brought against him. That privilege he has renounced, and the objection to one of the creditors suing for his proportionate share does not lie in his mouth. Apart from the bond and its special stipulation, the plaintiff would have been entitled to recover, as one of four creditors, by the Roman Dutch Law. Van der Linden, *Instit*, Bk. 1, sect. 9, § 7 (Henry's Trans., 203). Pothier, *Obligations*, vol. 1, pt. 2, cap. 3, p 144 (Evans's Transl.). Van Leeuwen, *Comm.*, Bk. v, chap. 3, § 11 (p 524, Engl. Transl., 1820).

No Counsel appeared for the respondent.

Cur. adv. vult.

(19th July). Dias, J.—This case stood over from time to time for a correct translation of the bond. The defendant granted the bond in favour of four persons, one of whom assigned his interest in the bond to the plaintiff, who instituted this suit to recover one-fourth of the principal and interest due on the bond. In the amended answer the defendant denies the plaintiff's right to sue on the

assignment. The learned judge dismissed the case on the ground that the plaintiff cannot sue alone. Whether he can do so or not must be determined by the contract which is embodied in the bond. In that document the defendant admits to be indebted to four persons in Rs. 280, and in failure of payment the defendant authorizes the four creditors or one of them or any person assigned and authorized by the said four persons to recover the whole of the amount. According to this stipulation, the plaintiff as representing one of the four creditors, is entitled to recover the full amount of the bond. This being so, the plaintiff is clearly entitled to recover one-fourth.

Set aside and judgment entered for the plaintiff as prayed for with costs of suit in both Courts.

Set aside.

Proctor for the plaintiff, *Edward Swan.*
Proctor for the defendant, *J. D. Jonklaas.*

20th and 27th July, 1883.

Present—CLARENCE and DIAS, JJ.

D. C. Galle, 48,336. } P. D. J. DE SILVA v. W. HENDRICK and others.

Preference and concurrence—Fund in hands of third party, "fixed" by notice to pay creditor—Debt due by Municipality—Notice to Secretary—Ordinance 17 of 1865, sects. 52 ana 44.

Plaintiff, and A. and W. had each obtained judgment against the present defendant. The Municipality of Galle owed defendant a debt. On 24th July, the defendant, by word of mouth and by written notice, requested the Secretary of the Municipality to pay his debt to A. The debt not having been paid owing to the absence of the Chairman of the Municipality, the plaintiff (on 26th July) and W. (on the 27th) attached the debt under their respective judgments. Plaintiff having obtained a rule on A. and W. to show cause against the money being applied, solely or in concurrence, to the satisfaction of plaintiff's judgment, the District Judge discharged it with costs.

Held, that the notice to the Municipality had been rightly served on the Secretary; that the fund had thereby been "fixed" as the property of A.; and that plaintiff had shown no right to it.

The plaintiff in this case appealed against an order of the

District Judge (*A. H. Roosmalecocq*) discharging with costs a rule obtained by plaintiff on one *Abdul Kader* and one *Wirakoon*, calling upon them to show cause why a debt due to their common defendant by the Municipality of Galle should not be applied (entirely or in concurrence) to the satisfaction of plaintiff's judgment. The facts of the case sufficiently appear in the judgment of CLARENCE, J.

Withers for the plaintiff, appellant.
Dornhorst for *Abdul Kader*, respondent.

Cur. adv. vult.

(27th July). CLARENCE, J.—The point raised upon this appeal is a very simple one. The plaintiff in this action, one *Abdul Kader*, and one *Wirakoon*, had each in a separate action obtained judgment against the same debtor, one *Hendrick*. *Hendrick* had a sum of money owing to him by the Galle Municipality. *Abdul Kader* appears to have pressed *Hendrick* for payment, and *Hendrick* agreed to provide for *Abdul Kader's* claim with the money to come to himself from the Municipality. *Hendrick* in pursuance of that arrangement went with *Abdul Kader* to the Secretary of the Municipality, and having stated to the Secretary the arrangement that had been made between himself and *Abdul Kader*, handed to the Secretary a written order to pay the money to *Abdul Kader*, at the same time handing in his own receipt for the money. This took place on the 24th July. A clerk of the Municipality wrote out a cheque for the amount, but the Treasurer (Government Agent) who alone could sign the cheque, not being in the way, no cheque was then handed to *Abdul Kader*. Next day, July 25th, the plaintiff in this action served the Municipality with notice attaching the debt under his judgment, and on the 27th *Wirakoon* did the same In consequence of this action on the part of present plaintiff and *Wirakoon*, the money was not paid to *Abdul Kader*. Customary delay seems then to have taken place, and at length the plaintiff in this action obtained the issue of a rule in this action calling on *Abdul Kader* and *Wirakoon* to shew cause why the money should not be applied in satisfaction of plaintiff's writ or in concurrence. Thereafter the matter was discussed in presence of those three parties upon that rule, and the District Judge adjudging that *Abdul Kader* was entitled to the money discharged plaintiff's rule with costs.

When the facts are thus ascertained, it becomes plain that plaintiff's claim is altogether unmaintainable. The debt due by the Municipality to *Hendrick* had become fixed as the property of *Abdul Kader* before plaintiff purported to attach it. It would be difficult to conceive a more complete assignment of the debt than that which here took place. The moment *Hendrick's* order to pay *Abdul Kader* was shewn to the Secretary the money (to use the expression employed by Lord Thurlow in *Yeates* v. *Groves* (1)) was fixed. Mr. *Withers* in arguing the appeal very properly confined himself to the question of notice, and upon that point there can, we think, be no doubt but that the notice given to the Secretary was sufficient. It is true there is a Treasurer, by virtue of sect. 25 of the Ordinance, who has, so to speak, the key of the money box, but the notice was properly given to the Secretary. *Vide* sect. 44 of the Ordinance, which distinctly recognises the Secretary as the proper officer to receive notices, by enacting that all process in actions against the Municipality shall be served on him.

We do not know whether *Abdul Kader* is still unpaid by the Municipality. If not, all that can be said is that either he or his legal adviser has been unnecessarily supine.

Plaintiff's rule was rightly discharged by the District Judge, and plaintiff must pay *Abdul Kader's* costs of the rule. *Wirakoon* will pay his own costs of the rule: he need not have appeared.

Affirmed.

Proctor for the plaintiff, *W. H. Dias.*
Proctor for *Abdul Kader*, *W. E. de Vos.*
Proctor for *Wirakoon*, *A. T. Weeresooriya.*

(1) 1 Ves. jun. 281.

2nd and 7th August, 1883.

Present—DIAS, J.

D C. Ins. Kandy, 886. } *In re* A. C. CHAMBERLIN.
Ex parte T. C. ANDERSON and J. W. HOLT.

Insolvency—Mortgage cr ditor, who has realised security, proving for balance debt after one dividend has been paid—Right to payment of first dividend out of funds in Assignee's hands before payment of second dividend to other creditors—Ordinance 7 of 1853, sections 108, 109—District Court rescinding its own order allowing proof of claim.

C. was declared insolvent on 5th September 1879. On 26th November A. and H., mortgagees of a coffee estate belonging to the insolvent, commenced an action for realizing their security. They sold the estate under a mortgagee's decree and purchased it themselves for Rs. 10. Meanwhile a dividend had been declared and paid to the proved creditors. On 21st April 1882 A. and H. were allowed to prove a claim of Rs. 25,244.51 against the insolvent estate, being balance due on their mortgage, deducting certain payments already received by them out of the estate. On 11th September A. and H. moved that out of the monies in the Assignee's hands they might be paid (before any payment on account of second dividend) an amount equal to what they would have received as first dividend on the debt they had now proved had they been proved creditors at that date. The Court below refused this motion, and also refused to allow the mortgagees to prove any balance sum due on their mortgage bond, against the insolvent estate.

Held, that the District Court could not set aside its own order previously permitting the proof of the mortgagees' claim.

Held also, that by section 109 of the *Insolvency Ordinance* the act of proving a debt which is the subject of a suit is a relinquishment of that suit, and that appellants were rightly allowed to prove for their balance debt.

Held also, that in equity a creditor, who proves after a dividend has been made, is entitled to be put on the same footing as the creditors who have already received the previous dividends, [provided he does not disturb any dividend already paid].

Ex parte Stiles (1) and *Re Wheeler* (2) followed.

Archibald Charles Chamberlin was adjudicated insolvent, on his own petition, on 5th September 1879. He estimated his liabilities at Rs. 181,565.45 and his assets at Rs. 181,437, the latter consisting of Annfield Estate and some debts due to the Insolvent. On 19th September 1879, *T. C. Anderson* and *J. W. Holt*, professing themselves to be mortgagees of Annfield Estate, moved for and obtained the appointment of *T. C. Anderson* as Provisional Assignee, with power to take

(1) 1 Atk., 108. | (2) 1 Sch. & Lef., 242.

possession of the Estate and all other assets of the Insolvent. On 26th November, *Anderson* and *Holt* commenced a suit No. 84,243 for realising their mortgage, the Insolvent and his Assignee *Ambrose* being defendants. *T. C. Anderson* had previously been removed at his own request from being Provisional Assignee. Judgment was entered for the plaintiffs by consent of the Insolvent and his Assignee. The Assignee having sold some coffee found on Annfield Estate, deposited the proceeds in Court, and the sum of Rs 2866.94 was on 26th May drawn by *Anderson* and *Holt* as mortgagees of the crops.

On 21st April 1882, *Anderson* and *Holt* proved a claim of Rs. 25,244.51. They filed an affidavit of *T. C. Anderson*, setting out that they were creditors of the Insolvent in the sum of Rs. 25,000 and interest secured by a secondary mortgage of Annfield Estate; that on judgment obtained on their mortgage the Estate was sold by Fiscal and purchased by the mortgagees for Rs. 10, some coffee being bought by them for Rs. 445; that there was a balance sum due of Rs. 28,111.45, from which the sum of Rs. 2,866.94 already drawn was to be deducted; and that they had no other security for the balance due. They moved on 11th September 1882 that out of the monies in the Assignee's hands, they might be paid as first dividend the sum of Rs. 274.67 before any payment was made to other creditors on account of a second dividend, as they had not proved at the date of the first dividend.

On this motion, which was opposed by certain proved creditors, the District Judge (*A. C. Lawrie*) made the following order:

"The first question is whether Messrs. *Anderson* and *Holt* can prove at all. The 109th section of the Ordinance provides that "no creditor who has brought any action against any insolvent in respect of a demand prior to the filing of a petition for sequestration, or which might have been proved as a debt under the insolvency, shall prove a debt under such insolvency, or have any claim entered upon the proceedings, without relinquishing such action." I hold that this clause excludes Messrs. *Anderson* and *Holt's* claim from being received under the Ordinance. They had the choice, either of proving their claim, of allowing the Assignee to realize the Estate, and of ranking as preferential creditors on the price obtained for it, or of ignoring the insolvency proceedings altogether, and by raising action on their mortgage and

realizing at a time of their own choosing the mortgaged Estate and (as they did) of purchasing it of themselves at a nominal price of Re. 1. They chose the latter course, which doubtless was the one which best suited the circumstances in which they were placed. They were justified in what they did, but having chosen this course they cannot, in my opinion, now claim to be ranked on the proceeds of lands and property mortgaged to them, for the apparent balance of the secured debt (which, be it remarked, is not the real balance; for the Estate was worth more than a rupee).

"The clause of the Ordinance which I have quoted seems to me unambiguous: no creditor shall prove a debt, or have any claim entered upon the insolvency proceedings, without relinquishing any action against an insolvent for a debt proveable under the insolvency. Messrs. *Anderson* and *Holt's* debt was one proveable under the insolvency: that, of course, is admitted, for they now seek to prove it. They raised an action for its recovery; they did not relinquish that action—the Ordinance says distinctly that they cannot prove.

"Had I been of a different opinion, if I had held that their claim could now be entered on the proceedings, I should have held that they were entitled to the same rate of dividend as the other proved creditors.

"A creditor who comes in late, after a dividend has been declared and paid, cannot disturb that declaration and payment; but if there remain unallotted in the Assignee's hands a sufficient sum to give him an equal dividend with the other creditors, I think he is entitled to get it. The principle which underlies all insolvency proceedings is, to secure an equal distribution to all creditors of an estate insufficient to meet the claims of all in full. And had Messrs. *Anderson* and *Holt* here been entitled to claim at all, I should have held that they were entitled to the same number of cents for each proved rupee as any of the other creditors. I reject the claim of Messrs. *Anderson* and *Holt*; I refuse to allow them to rank as creditors of this insolvent estate, or to receive dividends therefrom. The Assignee is directed to prepare a new dividend sheet, omitting their claim, and I further order the Assignee within one week to bring into Court the sum of Rs. 252 deducted and retained by him as commission without the authority of Court."

Anderson and *Holt* appealed.

Layard, for the appellants.—The District Judge on 21st April 1882 allowed the appellants to prove their claim of Rs. 25,244.51, and he could not in January 1883 cancel that order and refuse to recognise the appellants' claim.

If *Anderson* and *Holt* be allowed now to prove for the balance due under their mortgage, they are entitled to a dividend equal to what they would have received had their claim been proved when the first dividend was declared; and if there be sufficient funds, they are entitled to be first paid such previous dividend, and the balance is to be divided among all the creditors, including those who have last proved. 1 Griff. & Holm., Ed. 1869, p 730. *Ex parte Stiles* (1). *Re Wheeler* (2). When they have realised their security, the mortgagees may prove for the balance left due, and are entitled to dividend on such balance, provided they do not disturb any dividend already made. 1 Griff. & Holm., 631, 648. *Ex parte Stiles*, and *Re Wheeler* were decided under the Act 6 Geo. 4 c. 16, which was repealed by Act 12 & 13 Vict. c. 106. Section 108 of our Ordinance is almost verbatim taken from section 188 of the Act of 12 & 13 Vict., which had adopted similarly the 109th section of the Act of Geo. 4.

Cur. adv. vult.

(7th August). Dias, J.—In this case Messrs. *Anderson* and *Holt*, who are the appellants, were mortgage creditors of the insolvent. On this mortgage they obtained a decree, and caused the mortgaged property to be sold in execution, and themselves became the purchasers for the nominal sum of Re. 1. For the balance of their judgment, to wit Rs. 25,244.51, they proved in the insolvency proceedings. Subsequently, on the 11th of September 1882, the appellants' Proctor made the following motion: "Messrs. *Anderson* and *Holt* not having proved their debt before the first dividend, Mr. Thomas moves that they may be paid out of the Rs. 2,100 in the hands of the Assignee the dividend they have failed to receive, amounting to a sum of Rs. 274.67, before any part of the said Rs. 2,100 be applied to the payment of the second dividend." This motion was discussed on the 22nd of January 1883, and the learned judge refused the motion on the ground that the appellants cannot be treated as creditors of the insolvent estate, as they had

(1) 1 Atk., 208. | (2) 1 Sch. & Lef., 242.

no right to prove as they did without previously relinquishing the action which they brought on their mortgage bond. It must be observed that this order deals with a matter not brought before the Court by the appellants' motion of the 11th September 1882. They proved their debt in the previous April. That order has never been set aside, and the order now appealed from has the effect of setting it aside altogether. Independently of the power of the District Court to set aside its own final order, the District Judge proceeded to give his opinion on a matter which was not before him. On this ground alone that part of the order must be set aside; but I think the District Judge's order is substantially bad.

The District Judge relies on the 109th section of Ordinance 7 of 1853. That section enacts that "no creditor who has brought any action against any insolvent in respect of a demand prior to the filing of a petition for sequestration, or which might have been proved as a debt under the insolvency, shall prove a debt under such insolvency, or have any claim entered upon the proceedings, without relinquishing such action;" and the clause goes on further to enact that the act of proving a debt under a petition for sequestration shall be deemed an election by the creditor to take the benefit of the petition for sequestration; or, in other words, the act of proving a debt which is the subject of a suit is a relinquishment of that suit. This clause seems to me to cover the case now in hand. The appellants were holders of a decree for a large sum of money. They realised their security, but there is still a considerable balance due to them. As regards this balance they must be taken to have relinquished their suit and placed themselves in the position of general creditors of the insolvent estate, and as such they are entitled to prove as they did for the balance still due to them. *Ex parte Woolley* (1). I am therefore of opinion that their proof of the 21st April 1882 should stand.

I now come to the question raised by the the appellants' motion, which is, that they are entitled to receive a previous dividend out of the monies in the hands of the Assignee before it is applied towards the payment of the second dividend. In respect of this previous dividend they claim a sum of Rs. 274.64. This amount may be right, but it will have

(1) 1 Rose, 394; 2 V. & B., 253.

to be verified by the District Court before it is paid over. I shall only decide the point, whether or not they are entitled to the payment which they claim. Our *Insolvents Ordinance* is founded on the English Act of 1849, and that Act, with regard to the question now in hand, is founded on a previous Act, 49 Geo. III. c. 121; and under these acts it was held that in equity a creditor who proves after a dividend has been made is entitled to be put on the same footing as the creditors who have already received the previous dividends. *Ex parte Stiles* (1); *Re Wheeler* (2). I am therefore of opinion that out of the monies now in the hands of the Assignee the appellants must in the first instance be paid a sum equal to the previous dividend which they failed to receive, and as to the balance they will be entitled to a share of the second dividend with the rest of the general creditors.

The order appealed from is therefore set aside, and the appellants are declared entitled to receive from the funds now in the hands of the Assignee a sum equal to their share of the previous dividend (the amount of which is to be ascertained by the Court) and to a further dividend out of the balance. The costs in both Courts will be paid by the opposing creditors.

Order set aside.

Proctor for the Appellants, *E. Dumaresq Thomas.*
Proctor for the Insolvent, *E. Beven.*
Proctors for the opposing creditors, *J. B. Siebel; W. Goonetilleke.*
Proctors for other proved creditors, *A. Van Twest; F. Van Langenberg.*

(1) 1 Atk., 208. | (2) 1 Sch. & Lef., 242.

22nd June and 28th August, 1883.

Present—BURNSIDE, C. J. and CLARENCE, J.

D. C. Colombo, 85,981. } F. G. MORGAN v. D. J. WIJEYEGOONETILLEKE and another.

Mortgage—Purchase by mortgagee, under third party's writ, of part of mortgaged property—Merger—Extinction of debt.

Plaintiff, who held a mortgage over eleven of defendant's lands to secure a debt of Rs. 4,000, obtained, on 23rd February 1882, a mortgagee's decree, and levied a sum of Rs. 596 by sale of part of the mortgaged property. A third party, having previously obtained a money judgment against defendant, seized and sold another part of the property mortgaged, expressly subject to plaintiff's mortgage, and plaintiff purchased for Rs. 100. The greater part of the mortgaged property still remained undiscussed.

Held, that defendant's motion, to have satisfaction of plaintiff's mortgage judgment entered up, had been rightly refused under these circumstances.

The facts of this case are disclosed in the judgments in appeal, and in the reasons for the order of the Court below as shown in the note to the judgment of the CHIEF JUSTICE. The judgment of the third party, under which plaintiff purchased, was a money judgment for Rs. 492.47½, dated 20th February 1882, obtained in *D. C. Colombo* 86,178 on promissory notes.

Layard, for the defendant, appellant—The plaintiff, by purchasing subject to his own mortgage, must be taken to have extinguished his own debt. He has succeeded to the place of his debtor, and *Voet* (1), treating of the modes in which a mortgage debt is extinguished, includes such succession in that category. *Si debitum principale solutione ... . vel confusione dum creditor debitori succedit, aliove simili modo, quo obligationes aut ipso jure aut ope exceptionis dissolvi solent, sublatum sit.....* The debtor has an equitable right (*ope exceptionis*) to have the debt declared satisfied.

The purchaser at the sale knew (for the mortgage was notified in the Conditions of Sale) that, in order to free the land which he was buying, he would have to pay the mortgagee Rs. 4,000. The plaintiff, though the mortgagee, can be in no better position than any stranger who purchased

(1) *Ad Pand.*, xx. 6. 2.

at the sale. The plaintiff in fact declared by his acts that he considered the land worth the Rs. 100 over and above the encumbrance on it.

Equity is strongly in the defendants' favour. Here was a mortgage of eleven parcels of land to secure the large amount of Rs. 4,000. The plaintiff could have each parcel sold separately, and could scare off intending purchasers (as he seems to have done here: for he purchased 13 acres of land for Rs. 100) by causing the Fiscal to give notice of his mortgage. In the present instance, the judgment on which the land was sold was for Rs. 461.35, and the levy has brought only Rs. 100. Each remaining parcel of mortgaged property could be sold *seriatim* till the balance was realised. The mortgagee becomes the purchaser of the mortgaged lands at one-tenth their market value, and yet the mortgage debt remains untouched. This entails utter ruin to the mortgagor. In view of these circumstances I would ask the Court to reconsider the judgment in *C. R. Ratnapura* 4,192 (1) which, in a parallel case, decided that the purchase by the mortgagee did not extinguish the debt.

Dornhorst, for the plaintiff, respondent—Assuming the law to be as contended, the defendant is still not entitled to have satisfaction of the entire debt entered up, because this particular land did not carry the entire encumbrance of Rs. 4,000, which was leviable on ten other parcels of land.

Voet, in the passage cited, lays down the universally recognised proposition, that upon the extinction of the debt the mortgage goes with it. The "succession" he mentions is clearly succession by inheritance: that is to say, where the creditor becomes the heir of the debtor and takes upon himself the rights and liabilities of the deceased. See Berwick's Translation of the passage (2).

Cur. adv. vult.

(28th August). BURNSIDE, C. J.—On the 13th of December 1881 the plaintiff filed his libel against the defendants, alleging that the first defendant by his bond dated the 20th May 1879 became bound to the plaintiff in the sum of Rs. 4,000 with interest; that as security he mortgaged to the plaintiff eleven distinct lands, which were described in the libel; and that the second defendant bound

(1) 3 S. C. C., 106. | (2) Page 444.

himself as security for the payment of the amount; that the principal sum with interest was still due: and he prayed that it be decreed that the defendants jointly and severally pay the sum so due with interest, and that the lands so specially mortgaged be bound and executable for the mortgage debt. Judgment on the 23rd February 1882, in default of appearance, passed against the defendants, and it was decreed that the plaintiff recover against the defendants, jointly and severally, the sum of Rs. 4,000, with interest at 12 per cent., with costs of suit, and that the eleven lands mortgaged be and were thereby declared executable for the decree upon the footing of the mortgage.

Upon this judgment and decree execution issued and a portion of the lands mortgaged was seized and sold, the proceeds whereof, amounting to Rs. 596.70, were applied towards the plaintiff's judgment.

Another judgment was recovered against the first defendant (but whether before or after the plaintiff's judgment does not appear, nor is it material) for the sum of Rs. 492.42½, upon which execution issued for that amount. Under this writ the Fiscal seized one of the lands specially mortgaged, and decreed bound and executable for the plaintiff's judgment, and it was on the 25th May put up for sale upon, amongst others, the following conditions:

"Notified mortgage in favor of Mr. F. G. Morgan, "plaintiff in case No. 85,981 D. C. Colombo, bond being "dated 20th May 1879, for Rs. 4,000 and interest and "costs of suit."

The plaintiff at such sale became the purchaser for the sum of Rs. 100.

Upon an affidavit disclosing the above facts a motion was made on the 28th February for an order directing the recall of the writ against property issued in this action at the plaintiff's instance on the 26th February 1883, and a declaration that the judgment debt by way of principal, interest and costs recovered by the plaintiff against the defendant in this action had been fully satisfied and discharged.

On the argument of this motion on the 5th March 1883, it was disallowed with costs, but the learned District Judge gave no reasons whatever for his order. The defendants thereupon appealed, and upon the argument Counsel directed their attention solely to the point whether the purchase by the plaintiff of a portion of the morfgaged land operated as an extinguishment of the entire judgment debt, so as to

entitle the defendants to have a declaration that the plaintiff's judgment and execution against them had been satisfied.

Before deciding that point, which is a new one and one of great importance, bearing upon the law of mortgage in this Colony, I thought it right that we should have before us the reasons and grounds upon which the District Judge refused to make the order. The case having been referred back to the District Court with that view, it has been returned to us, and having now perused the reasons* recorded by the District Judge for refusing to make the order, I think he was right and that we cannot interfere.

Before the question raised before us is ripe for decision more facts than those disclosed in the affidavit upon which the motion in the Court below was refused must appear. The plaintiff's judgment included in it a personal liability from the defendants beyond the mere mortgage debt for which the lands were specially liable; and although it may well be that the lands were discharged from the mortgage when the mortgagee became the owner, yet before they could claim to have the judgment and execution declared satisfied, they must show that their personal liability, not

* These reasons were contained in the District Judge's letter to the Supreme Court, dated 9th July 1883, and were as follows:

"I have not any very distinct recollection of the reasons for which the motion of 5th March last was disallowed, but as it was one to enter up satisfaction of judgment and was opposed, I presume that the defendant had failed to adduce evidence sufficient to convince me that the judgment had been satisfied. This supposition is confirmed by the contents of the Petition of appeal: for it admits that the judgment was for Rs. 4,000, interest and costs; and the only satisfaction alleged is the proceeds of a levy in execution realising Rs. 596.70 besides the argumentative satisfaction supposed to depend on the circumstances, that on *another* writ against the defendant at the instance of *another* creditor the present plaintiff had purchased for Rs. 100 lands which were sold to him subject to a mortgage over them in his (the plaintiff's) own favour for the very bond debt for which he holds the present judgment. The lands were up to the moment of his purchase of course only worth their gross present market value *minus* the amount of the plaintiff's incumbrance: and I presume that the *lands* ceased to be affected by the mortgage when the mortgagee became owner, but that though the *mortgage* and the *liability of the lands* was thus wiped out, the *debt* and the *personal liability* of the debtor to the creditor remain unaffected, at all events to the extent to which the present gross value of the lands, *minus* the price paid to the Fiscal for them, may happen to be less than the amount due upon the mortgage. But what that resulting value may be, there appears to have been no evidence offered either in the affidavit filed or otherwise: and neither does there appear to have been evidence of the amount due for costs, not embraced in the original mortgage.

only in respect of the mortgage debt but on the entire judgment debt, had been extinguished.

The appeal must be dismissed with costs.

CLARENCE, J.—Plaintiff has a judgment for Rs. 4,000, interest and costs against the two defendants, who are principal and surety. This judgment is founded on an instrument by which the first defendant as principal became bound to pay the Rs. 4,000 and interest, and mortgaged by way of security eleven various pieces of land and undivided shares of land. The second defendant bound himself as surety.

Plaintiff got his judgment, with the usual mortgagee's decree, on the 23rd February 1882, and it would appear that thereafter plaintiff seized and sold some of the mortgaged property, the proceeds of which, amounting to Rs. 596.70, were applied in reduction of plaintiff's judgment debt.

It would further appear that after this another creditor of the 1st defendant's, having a judgment against 1st defendant, purported to seize another item of the property which was comprised under plaintiff's mortgage, when the present plaintiff beame the purchaser for Rs. 100.

On affidavit of these facts the defendant moved the District Court to enter up satisfaction of present plaintiff's judgment; plaintiff opposed the motion, and defendants appeal against a dismissal of the motion with costs.

It appears to me that we are not in a position to interfere with the order appealed against. It is not as though plaintiff being mortgagee of a single item of land had simply bought the mortgagor's interest when sold under some other creditors' writ. The defendant's contention would then, I presume, have been, that plaintiff, having presumably acquired the mortgagor's remaining interest at the price of the marginal value over and above the mortgage debt, it would be inequitable were he allowed to recover the amount of the mortgage-debt and still retain the land. But in the present instance plaintiff has so bought the mortgagor's interest in a portion only of the mortgaged property still remaining unsold. Defendants did not ask for any inquiry, but simply for a declaration of entire satisfaction. To that, upon the materials disclosed, they could not in my opinion be entitled. I therefore think that this appeal should be

dismissed with costs, leaving it open to defendants to renew their application in some other form.

Appeal dismissed.

Proctor for the plaintiff. *J. W. Vanderstraaten.*
Proctor for the defendants, *W. P. Ranesinghe.*

5th and 12th October, 1883.

Present—CLARENCE, J.

D. C. Colombo, 86,619. V. S. T. RAMEN CHETTY v. A. BASTIAN SILVA and another *Ex parte* The QUEEN'S ADVOCATE.

Preference and concurrence—Fund in Court—Order of payment—Property passing to payee—Fund "fixed."

Claims of preference or concurrence in the proceeds of a levy can be brought forward so long as the money remains in Court, and no longer.

Plaintiff levied a sum of money on a mortgagee's decree founded on a special mortgage of his defendant's property, and on 12th October 1882 obtained an order of payment in his favour for the amount of the levy. The Government Agent refused to pay the proceeds to plaintiff, on the ground that the Crown had a preferent claim to them in virtue of a debt due by defendant to the Crown. On 19th March 1883, and subsequently, the Queen's Advocate moved for, and on 25th July obtained, an order for the payment of the money.

Held, that the Queen's Advocate's claim to preference had been wrongly entertained, as the money must be regarded as having got home to the plaintiff at the date of the order of payment to him, and as being no longer in Court.

In this case plaintiff obtained by default a simple money judgment against the second defendant on 5th June 1882, and against the first defendant on 22nd June 1882, for the sum of Rs. 500 and interest, due upon a mortgage bond whereby the defendants had bound themselves jointly and severally. The latter judgment contained a declaration that the property specially mortgaged was specially bound and executable to satisfy the judgment. Upon writ of execution issued the Fiscal levied a sum of Rs. 332.64, which he deposited in the Kachcheri on 7th and 28th September 1882. On 12th October, the plaintiff moved for and obtained an order of payment for the Rs. 332.64, in part satisfaction of the judgment. On 19th March 1883, the

Queen's Advocate moved for an order of payment for the Rs. 332.64 which, it was alleged, had been seized in the hands of the Government Agent under the Crown's writ in *D. C. Colombo* 1832. After several postponements, on 20th June 1883, the Queen's Advocate renewed his motion, filing a Petition of Intervention, which averred that the Crown had obtained judgment on 29th May 1882 against the defendants for Rs. 3766.16, in suit No. 1832, and prayed to have the sum in deposit paid out to him. The plaintiff having been heard against the motion, the Court after consideration ruled (on the assumption that the money was still in deposit in the Kachcheri) that the Crown in virtue of its prior general legal hypothec over the property of its debtors, was entitled to preference over the amount levied, even if levied upon property specially mortgaged to the plaintiff; and allowed the Queen's Advocate to draw the money in case it was still unpaid to the plaintiff. The Queen's Advocate took out an order of payment on 25th July.

The plaintiff appealed.

Withers for the appellant.

Ferdinands, D.Q.A., for the Queen's Advocate, respondent.

Cur. adv. vult.

(12th October). CLARENCE, J.—It is agreed that the sum of money, about which plaintiff and the Crown are disputing, is the proceeds of plaintiff's levy under his mortgage decree founded on defendant *Bastian's* mortgage. The Crown claims preference *quoad* the proceeds of this levy, claiming a legal hypothec in virtue of a debt due by *Bastian* to the Crown, for which the Crown got judgment on the 26th May 1882. Claims of preference or concurrence in the proceeds of a levy can be brought forward so long as the money remains in Court and no longer. Now this money came into Court in September 1882, and on the 12th October the then Acting District Judge, on plaintiff's application, made an order for payment in plaintiff's favour. It is agreed by Counsel at the bar that the money never has in fact been handed over to plaintiff, and that the reason why it has not is that the Government Agent, on plaintiff's applying at the Kachcheri for the money, refused to honour the order of the District Court, on the ground that the

Crown had a claim against the execution debtor *Bastian*. The first record of any steps taken by the Crown in this case occurs under date the 19th March 1883, when the Queen's Advocate is recorded as having made an application for the money. Nothing further seems then to have been done until the 31st May, when that application was renewed. The matter was ultimately discussed on the 27th June, after five postponements, with the result that the District Judge made the order against which plaintiff appeals.

This is not a seizure by the Crown in execution, but a simple claim of preference, and the claim in my opinion fails, because the money in my opinion must be considered as having got home on the date of the order of payment in favour of plaintiff. After that date I regard the money as no longer in Court, although the Government Agent (as it seems to me wrongfully) refused to make the actual cash payment.

Disposing of the matter upon this ground, it is unnecessary for me to express any opinion on the question, whether in fact the Crown has, by virtue of the debt due to the Crown by *Bastian*, a legal hypothec ranking over plaintiff's mortgage. On that question, and on the further question involved, viz. when *Bastian's* debt to the Crown is to be considered as having accrued due, I express no opinion.

Set aside.

Proctor for the plaintiff, *P. Muttucomaru.*
Proctors for the Queen's Advocate, *Loos & VanCuylenburg.*

26th October and 6th November, 1883.

Present—CLARENCE and DIAS, JJ.

D. C. Kandy, 89,110.

The QUEEN'S ADVOCATE
v.
Abayakun Rajakaruna Wahala Mudianselage LOKU BANDA and others.

Principal and Surety—Continuing guarantee, revocation of, by death of guarantor—Liability of guarantor's heirs—Negligence of principal obligor's employer.

The first defendant as principal, and the three other defendants as his sureties, were the obligors upon a bond conditioned for the due

accounting by first defendant to the Crown for all moneys received by him in the performance of his office. The Crown now sued the first defendant and the heirs of the sureties to recover an amount unaccounted for, being sums received by the first defendant for the four years 1878-81.

Answer: 1st, that no debt was due by the principal. The Court below found there was.

2nd, that the sureties had died before the defaults relied upon had been committed by the principal.

Held bad for not averring notice of such death to the obligee; also not established by proof of such notice.

3rd, that the gross negligence of the obligee, in continuing for four years the principal's employment, when he had failed to account for the receipts of the first year, relieved the sureties from liability.

It appearing that the sum unaccounted for, for the first year, was Rs. 3.66,

Held, that the defence was not sustained.

This was an action brought by the QUEEN'S ADVOCATE to recover from the first defendant, as principal debtor, and the second, third and fourth defendants, as his sureties, the sum of Rs. 2343.39 as due upon a penal bond, dated 29th June 1874, for Rs. 5,940, given by the defendants (binding their heirs, executors, administrators and assigns) in favour of Her Majesty, in order to secure the due performance by the first defendant of his duties as Korala of Maturatta. The libel averred that the first defendant had, in pursuance of his said duties, collected the commutation money for the Government share of the paddy crops of certain fields for the four years 1878-1881, and had failed to pay or account for the sum of Rs. 2,343.39. A decree was prayed for declaring the property mortgaged by the bond specially bound and executable for the judgment. Judgment was entered by default against the first defendant and his wife the fourth defendant. The second and third defendants were dead at the time of action brought, and their heirs were added as parties to the record in their room. These heirs filed an Answer, in which they denied the existence of the debt by first defendant, and pleaded that, the sureties having died before the accrual of the debt, they were not liable to pay it; and that the obligee (the Crown) had been guilty of gross negligence in not calling the first defendant to account, and the sureties were thereby absolved from liability.

The Court below (*A. C. Lawrie*, Judge) found that the debt was due by first defendant; that one of the sureties had died in 1876, before any debt existed, and the other in 1878, when the debt was only Rs. 3 65, and no breach of the obligation had been committed; that this

amount was so small that there had been no negligence on the part of the obligee in not calling for an account; that in 1879 the first defendant owed Rs. 581.62, and should certainly have been called upon to account for that sum early in 1880, which was not done; that, emboldened by impunity, the first defendant had in 1880 kept back Rs. 1,636.24½, and was only suspended from office in 1881 after he had collected Rs. 21.86½ for that year. The Court held that "the negligence was not so great as to absolve the sureties if they had been alive and to render inoperative the mortgage bond." Judgment was accordingly given with costs against the first and fourth defendants personally, and against the substituted defendants (representatives of the deceased sureties) to the extent of making them parties to the decree declaring the mortgaged property (some of which the Court assumed to belong to the sureties) specially executable for the debt. No costs were payable to or by the substituted defendants.

The following authorities were referred to in the above judgment:—*Instit.*, 3. 20. 2; *Dig.*, 46. 1. 4. 1; Smith's *Mercantile Law*, Chap xi, section 3, 9th Ed. p. 474; *Bradbury* v. *Morgan* (1); *Offord* v. *Davies* (2); Bell's *Commentaries*, Bk. iii, Pt. 1, Chap. 3 § 3; Marshall's *Judgments*, p 532.

The first and third substituted defendants appealed.

Van Langenberg, for the appellants—There is not sufficient proof (as the Court below seems to have felt) of the extent of first defendant's debt. The evidence is only that obtained by summing up certain indorsements made by the first defendant on the counterfoils of receipts granted by him. These entries may be admissions against first defendant himself, but are certainly insufficient as against the sureties, who are entitled to demand strict proof of their principal's indebtedness. Again, the sureties' death revoked the guarantee they had given of the first defendant's debt. *Bradbury* v. *Morgan* (3), relied upon by the Court below to the contrary, has been questioned and its authority considerably weakened in *Harriss* v. *Fawcett* (4), which was

(1) 31 L. J. Ex. 462; 1 H. & C. 249.
(2) 31 L. J. C. P. 319; 12 C. B. (N. S.) 748.
(3) 1 H. & C. 249.
(4) L. R. 15 Eq. 311.

affirmed in appeal (5). *Coulthart* v. *Clementson* (6) is a later case, decided in 1879, to the same effect. The Crown's continuing to employ the first defendant, after his defalcations and without the consent of the sureties, discharges the sureties from liability to make good any loss arising from the dishonesty of the first defendant during the subsequent service. *Phillips* v. *Foxall* (7); *Sanderson* v. *Aston* (8). A surety is released by the creditor giving the principal time to pay, without the surety's knowledge; and it is only equitable, as put by Sir Charles Marshall (9), that "unnecessary delay on the part of the creditor, in compelling fulfilment by the principal, inasmuch as the opportunity of recovering against the principal may thereby be lost, operates as a release of the surety and throws the risk of ultimate failure to obtain satisfaction from the principal on the negligent or indulgent creditor."

Ferdinands, D. Q. A., for the plaintiff, respondent—The evidence of debt is sufficient to bind the sureties. An account delivered by a principal charging himself is evidence against his surety. *Lysaght* v. *Walker* (10). It is neither alleged nor proved that the obligee had notice of the sureties' death. As to negligence, the mere giving of time to a principal will not discharge the surety (11), and the surety is not discharged by the delay of the creditor in suing. *Eyre* v. *Everett* (12); *Trent Navigation Co.* v. *Harley* (13). Mere negligence, even if gross, on the part of a creditor, unaccompanied by positive acts of concurrence in the defalcation of a debtor, will not discharge the surety, and is no ground of equitable defence. *Madden* v. *M'Mullen* (14). And here the court below finds there was no negligence.

VanLangenberg in reply.

Cur. adv. vult.

(6th November). CLARENCE, J.—This, so far as concerns appellants, is an action upon a Guarantee. By the obligation declared on, which was made in 1874, the 1st defendant *Loku Banda*, as principal, and three other obli-

(5) L. R. 8 Ch. App. 866.
(6) L. R. 5 Q. B. D. 42.
(7) L. R. 7 Q. B. 666.
(8) L. R. 8 Ex. 73.
(9) *Judgments*, p. 532.
(10) 5 Bligh N. S. 1.
(11) Van der Linden, *Instit.*, Bk. 1, sect. 10, § 6; Henry's Translin. p 211.
(12) 2 Russ. 381.
(13) 10 East 34.
(14) 4 L. T., N. S. 180.

gors, as sureties, purported to hypothecate certain lands. The condition of the obligation was, that *Loku Banda*, who had been appointed as Acting Korala, should whenever required duly account for all moneys coming to his hands as Korala. The libel averred that *Loku Banda* received on account of the Crown certain paddy rents of the years 1878, 1879, 1880 and 1881, and that he had failed to account for the moneys so received, and was thus indebted to the Crown in an amount of Rs. 2,343.39, for which sum plaintiff asks for judgment against the obligors, and for the usual mortgagee's decree. The Fiscal having reported that two of the sureties, *Kalu Banda* and *Punchirala*, were dead, the present appellants, their heirs, were by amendment substituted as parties defendant in the room of *Kalu Banda* and *Punchirala*. So far as concerns appellants, the judgment of the District Court is a decree declaring the lands mortgaged by the obligation specially bound and executable for a debt of Rs. 2,343.39.

It is a remarkable circumstance, that although the deed on which plaintiff founds purports to mortgage sixty four items of land, it is completely silent as to the title to and ownership of the property mortgaged. Four obligors, the principal obligor and three sureties, purport to mortgage these sixty four pieces of land. Whether they were all jointly entitled, and if so in what shares—or whether some of the lands belonged to the principal obligor and others to this or that surety—as to all this the mortgage deed is completely silent. It is to be supposed, since appellants have considered it worth their while to appeal, that some of the mortgaged lands belonged to the obligors whom they represent: if that be so, and if appellants succeed in establishing their defence to the action, an inquiry will be necessary to determine which are the lands to be excluded from the operation of the mortgage decree.

The defence set up by appellants in their answer is contained in these pleas:—

First, appellants deny that "first plaintiff" (a clerical error, probably, for "first defendant") is indebted to the Crown at all. On that issue the learned District Judge has found upon the evidence in favour of the Crown, and it has not been contended in appeal, that there is any reason for disturbing that finding.

Secondly, appellants aver that *Kalu Banda* and *Punchirala* died before "the alleged defalcations," and thereupon appel-

lants state, as a conclusion of law, that "the Crown has no claim against these defendants, as representing the Estates of the said deceased." It appears that *Kalu Banda* died in August 1878, and *Punchirala* in 1876, and that the moneys for which the principal obligor has failed to account to the Crown are due—Rs. 3.66 in respect of the year 1878, Rs. 581.62 in respect of 1879, Rs. 1,636.24½ in respect of 1880, and Rs. 21.86½ in respect of 1881, the year in which he was dismissed from office: so that the defaults in respect of which these appellants are now sued occurred after the death of the sureties whom they represent. The Guarantee sued on is a continuing Guarantee. It is not suggested that any notice was given to *Loku Banda's* employers of the death of the two sureties, *Kalu Banda* and *Punchirala*, and without entering upon any question as to what might have been the case had such notice been given, I am decidedly of opinion that this hypothecation by way of Guarantee was not terminated by the Guarantors' death, of which no notice was given to the Employers.

Thirdly, appellants have pleaded "that the Crown has "been guilty of gross negligence in allowing the 1st defen- "dant to continue the collection of taxes for four consecu- "tive years, when the accounts of the 1st year were not "closed," and "that by reason of such negligence the de- "fendants are relieved from the obligation of paying for any "alleged defalcations of the first defendant." This, it will be observed, is a very different kind of plea from the plea which was upheld in *Phillips* v. *Foxall* (15). Defendants say that they are absolved by the negligence of *Loku Banda's* employer in having continued *Loku Banda* in his employment for four consecutive years when the accounts of the first year were not closed. The four years here referred to appear to be the years 1878, 1879, 1880, 1881. During the year 1878 *Loku Banda* failed to account for the trifling sum of Rs 3.66. I certainly can see no ground on which the conduct of the Crown in continuing *Loku Banda* in office because he had not accounted for Rs. 3.66 can be considered as material for the exoneration of his sureties. In the year following, in 1879, *Loku Banda* failed to account for Rs. 581.62 and was still continued in office, which led up to his default of nearly three times as much in 1880. We need not speculate as to whether appellants could have founded a successful contention on the continuance of *Loku*

(15) L. R. 7 Q. B. 666.

Banda in office after his default of 1879 without notice to the sureties, because appellants have not in their plea set up any such contention. We cannot go outside the language of the plea.

For these reasons it appears to me that, there being no defence pleaded which avails to exonerate appellants from the Guarantee, their shares in the hypothecated lands, whatever they may be, are rightly decreed to be bound and executable.

As the Queen's Advocate on his side has not appealed upon the question of costs, it simply remains for us to dismiss the appeal.

DIAS, J., concurred.

Appeal dismissed.

Proctor for the plaintiff, *J. B. Siebel.*
Proctor for the substituted defendants, *Edwin Beven.*

28th and 3 th November, 1883.

Present—BURNSIDE, C. J.

P. C. Batticaloa, 19,718. } F. W. O. MODDER v. V. MUTTUKUTTY.

Judge, interest of—Prosecution at instance of the Court.

Upon a charge of theft coming on for trial against defendant in the Police Court, the complainant was absent. The Magistrate dismissed the charge, but (considering the charge too serious to be dropped) directed the Police officer attached to the Court to present a fresh plaint in his own name against the defendant. Upon this new plaint the Court tried and convicted the defendant.

The Supreme Court, upon appeal by the defendant, quashed the proceedings, holding that the Magistrate, having identified himself with the prosecutor, had rendered himself incapable of dealing with the case as a judge.

This was an appeal by the defendant against a conviction and sentence of the Police Court (*P. W. Conolly*, Magistrate). The facts sufficiently appear in the judgment of the Supreme Court.

Van Langenberg (*Weinman* with him) for the defendant, appellant.

Cur. adv. vult.

(30th November). BURNSIDE, C. J.—In this case a complaint was at first laid in P. C. Case No. 19,701 by the owner of a piece of cloth against the defendant, charging him with theft and with unlawfully receiving the cloth knowing it to be stolen. The case was fixed for hearing on the 26th October. It was called on that day, and the defendant was present, but complainant was absent. The Police Magistrate then very properly recorded that a charge of that nature should not be allowed to drop ; and what he should have done was to have adjourned the hearing and to have issued process compelling the complainant to appear and give evidence. In this way he would have been free to have dealt judicially with the case. Instead of doing this, he dismissed the case, and then directed the Police Sergeant of his Court to file a plaint in his own name against the accused charging him with theft. The Sergeant of Police did as he was directed, and the present plaint was lodged, which was heard by the Magistrate himself, and upon which he convicted and sentenced the accused. I cannot support the conviction. The Magistrate by directing the prosecution identified himself with the prosecutor and has rendered himself incapable of dealing with the case as a Judge. He would have been placed in a very difficult and embarrassing position if it had turned out that the charge was false or frivolous or vexatious. The officer acting under his directions would have fallen back on the instructions of his superior, and the Magistrate would have had the delicate task of deciding how far he himself was responsible for the penalties of a vexatious prosecution. On the other hand, the accused would have had just reason to complain that his rights against the complainant were prejudiced by the part which the Magistrate had taken in directing him to prosecute. The Police Magistrate has evinced a very praiseworthy desire to prevent the very improper practice of compounding offences without the permission of the Court, but I cannot too earnestly impress on Magistrates the absolute necessity of keeping the functions of judge and prosecutor distinct. Their proceedings as judges are open to the grossest objection when the essential difference between the two duties is not regarded.

Proceedings quashed.

14th and 20th November and 12th December, 1883.

Present—BURNSIDE, C. J.

P. C. Haldummulla, } GOVINDAI v. KARPEN.

Police Court—Practice—Presentation of plaint by complainant in person—Proctor, right of, to appear before plaint entertained—Ordinance 18 *of* 1871, *section* 2.

A plaint in a Police Court must be presented to the Magistrate by the complainant in person, and not through a proctor, unless the Magistrate dispenses with the personal appearance of the complainant.

The plaint in this case charged an assault upon the complainant, and was presented to the Police Magistrate by Mr. *J. D. Bartholomeusz* (a proctor practising in the Haldummulla Courts) acting as proctor for the complainant. The Magistrate (*L. O. Pyemont*) indorsed the following order upon the plaint:—

This plaint is submitted by Mr. Proctor *Bartholomeusz*. I decline to accept the plaint, as I hold that a proctor cannot appear in a Police Court case until the plaint has either been accepted or rejected by the Court. Complainant should present the plaint.

The complainant appealed.

Wendt, for the appellant—

The Magistrate does not record that the complainant was not in Court and ready to be examined if necessary, as required by Ordinance 18 of 1871, sect. 2; and the plaint discloses an offence cognizable by a Police Court, being in the form prescribed by Ordinance 18 of 1861. A party, in the absence of special provision to the contrary, would be entitled to professional assistance. The acceptance and rejection of plaints is a proceeding in open Court, as sect. 2 of the Ordinance of 1871 does not direct that this shall take place in chambers. Again, information of the date fixed for the hearing of the complaint is to be given to "the complainant, or his proctor or advocate" (Ordinance 18 of 1861, sect. 5); and under section 13, which provides for the dismissal of the charge in case "the complainant shall not appear" at the hearing, it has been held that appearance by proctor is sufficient. *P. C. Pasyala* 9,913 (1). Moreover, where the

(1) Civ. Min. of S. C., 10th August 1882.

plaint is drawn and presented by a proctor, one of the chief reasons for examining the complainant no longer exists, viz. the possibility that he does not understand the nature of the charge he is making. See the remarks of CAYLEY, C. J., in *P. C. Jaffna* Lr. A (1). So the provision as to examining the complainant has been held not to apply to a case in which the plaint is signed by the Queen's Advocate. *P. C. Colombo* 3,116 (2).

Cur. adv. vult.

(20th November). The record was sent down to the Court below with a request to the Magistrate to state whether, at the time the proctor presented the plaint, the complainant herself was present. The Police Magistrate replied that "the complainant was not before him when the plaint was presented to him by her Proctor Mr. *Bartholomeusz*." An affidavit of Mr. *Bartholomeusz* was forwarded with this letter, in which he deposed that when the plaint had been refused by the Magistrate, he (the proctor) had informed him that the complainant herself was standing outside the Court and could be called in for examination; but the Magistrate required the complainant alone to present the plaint, and refused to have the proctor or allow him to represent the complainant in any way.

(12th December). BURNSIDE, C. J.—The Magistrate was, in my opinion, right in not accepting the plaint from the Proctor, the complainant herself not being before the Court. In Police Court cases a complainant may no doubt be advised, and to a certain extent be represented, by a Proctor; but a Proctor would have no right, except in the presence of the complainant, to present a complaint on his behalf. The complaint is a personal one. The complainant's appearance before the Court, except the Police Magistrate chooses to dispense with it, should be personal; otherwise the Magistrate is prevented from doing that which by law he is authorized to do, i.e. examine the complainant on the presentation of the plaint. It was not the duty of the Magistrate to call the complainant in for examination: and until the Magistrate had accepted the plaint there was no proceeding before him on which the complainant could be represented by a Proctor.

Affirmed.

(1) 4 S. C. C. 36. | (2) 4 S. C. C. 120.

7th September, 23rd October, and 30th November, 1883.

Present—BURNSIDE, C. J., and CLARENCE, J.

D. C. Colombo, 85,440. } AREFFIN AHAMAT v. T. D. MARTINUS and another.

Jurisdiction—District Court or Court of Requests—Rs. 100 and interest—Practice in commercial matters—Costs—Proctor, status of, independent of client.

An action to recover Rs. 100 and interest thereon must be brought in the District Court.

The Court will follow the English practice in commercial matters, and will not give interest on claims for goods sold and delivered, on account stated, and such like, unless a specific agreement to pay interest be shown.

Where a proctor has appeared in the case simply as proctor for the plaintiff, and has signed plaintiff's petition of appeal against an order directing plaintiff's proctor to pay the defendants' costs, such proctor has no status to appeal on his own account against that order.

The plaintiff, and his proctor, filed in this case separate petitions of appeal against an order of the District Judge (*T. Berwick*) casting the plaintiff's proctor in the defendants' costs. The facts are sufficiently disclosed in the judgment of the Appellate Court.

Browne for the plaintiff, appellant.
Layard for the plaintiff's proctor, appellant.
Dornhorst for the defendants, respondents.

Cur. adv. vult.

(30th November). The judgment of the Court was delivered by

CLARENCE, J.—The plaintiff's libel claimed Rs. 110 for goods sold and delivered and on the common money counts. Defendants, who are Executors, pleaded the general issue. At the trial the plaintiff produced a document which the District Judge accepted as genuine, and as establishing an account stated between plaintiff and defendants' testator to the extent of Rs. 100 indebtedness. The additional Rs. 10 was claimed as money lent, but plaintiff offered no proof whatever in support of that claim. Thereupon the District Judge gave plaintiff judgment for Rs. 100 with interest at 9 per cent per annum from date of action, and considering that the action for Rs. 100 and

interest should have been brought in the Court of Requests, and suspecting that the Rs. 10 item had been improperly added to found District Court jurisdiction, he ordered defendants' costs to be paid by plaintiff's Proctor.

Plaintiff's Proctor presented a petition of appeal on his own account, as proctor, against that order, and also presented another petition of appeal, signed by him as plaintiff's proctor, purporting to be the petition of appeal of plaintiff against the order.

There is no appeal by the defendants against the judgment Both the appeals before us seek to relieve plaintiff's Proctor of defendants' costs. If the effect of that would be to throw them on the plaintiff, we could not entertain the question in the absence of distinct assurance satisfying us that the Proctor who has signed both appeal petitions had placed himself at arm's length from plaintiff. But in my opinion plaintiff's Proctor ought to be relieved of defendants' costs without throwing them on plaintiff, and therefore we may entertain as plaintiff's appeal the appeal petition presented by him as the appeal petition of plaintiff. The appeal presented by him on his own account ought not to have been presented, since so long as he appeared in the suit simply as proctor he had no status independent of plaintiff. That appeal must simply be rejected.

There being no appeal by defendants against the judgment for Rs. 100 and interest, we must take it that that judgment is right, and I may observe that were that matter open, I should not be prepared to say that judgment was wrong in giving interest. We must, in my opinion, follow the English practice in commercial matters, which does not allow a plaintiff interest on claims for goods sold and delivered, account stated, and the like, unless a specific agreement to pay interest is shown; but in this case the document which the District Judge accepted as proving the account stated contains mention of interest.

The question, then, simply is, whether it would have been within Court of Requests jurisdiction to decree payment of interest over and above the Rs 100. There is at any rate a judgment giving plaintiff Rs. 100 and interest on Rs. 100 at 9 per cent per annum from the institution of the action to the date of the judgment. That is a judgment for more than Rs. 100.

In my opinion, therefore, the Court of Requests had no jurisdiction, and therefore, irrespective of the Rs. 10, the

action cannot be said to have been improperly brought in the District Court. There is, therefore, no valid ground for giving costs to the defendants. But in the complete absence of explanation of the insertion in the libel of the claim of Rs. 10, which no attempt was made to substantiate, I do not think that we should take upon us to interfere with the District Judge's order to the length of giving costs to plaintiff.

I think that the order in appeal should be varied by expunging the order decreeing plaintiff's Proctor to pay defendants' costs, and in lieu thereof decreeing that plaintiff and defendants respectively bear their own costs.

Whether plaintiff's Proctor is entitled to recover costs from his client, is a question not now before us.

No costs to be given of this appeal.

Varied.

Proctor for the plaintiff, *E. F. Perera.*
Proctor for the defendants, *J. Ohlmus.*

6th and 12th December, 1883.

Present—DIAS, J.

C. R. Colombo, 250. } T. AMARIS APPU v. W. SADRIS PERERA and others.

Husband and wife—Surviving spouse giving bond for debt of deceased spouse—Liability of land belonging to the community to be sold under judgment on the bond—Children of the marriage, rights of.

The surviving spouse of a marriage contracted in the community of goods had (without the consent of the children of the marriage) granted a personal debt-bond for the amount of principal and interest due to the same obligee upon an older bond of the deceased spouse.

Held, that the entire property of the community was liable to sale in execution of the judgment obtained upon the survivor's bond, though the children of the marriage were no parties to it, or to the action founded upon it.

The purchaser at such sale takes an imperfect title, subject for its validity to proof on his part that the obligation of the survivor had been incurred for the purpose of paying off the debt of the community.

Ederemanesingam's Case (1), and *D. C. Caltura* 17,064 (2), specially considered.

(1) Vanderstraaten, 264. | (2) 3 Lorenz 235.

This was an action for a declaration of title to, and ejectment of the defendants from, certain land purchased by the plaintiff in execution of a judgment passed in *C. R. Colombo* 29,756, upon a debt bond dated 16th March 1878 executed in favour of the plaintiff in that suit by his defendant, *Nonohamy*. The Fiscal seized and sold (and the present plaintiff bought) in execution of this judgment, the land in question, which had belonged to the common estate of the obligor (*Nonohamy*) and her late husband. *Nonohamy's* children, the present defendants, who were minors at the time, were no parties to the bond and to the suit founded upon it. Plaintiff alleged that the defendants disputed his title to one-half of the land, and were in possession.

The Court below (*G. S. Williams*, Commr.) found that the bond, on which judgment had been obtained in *C. R. Colombo* 29,756, was granted by the widow *Nonohamy* in consideration of the obligee's cancelling a previous bond granted to him by her deceased husband, and was for the amount of principal and interest due upon the previous bond; but that the whole of the land in question had been improperly sold in execution of the personal bond of the widow, to whom an undivided half only of the land belonged, the other half being the property of the children of the marriage. The plaintiff was therefore nonsuited with costs, and he appealed.

Dornhorst for the plaintiff, appellant.
Van Langenberg for the defendants, respondents.

The following cases were referred to, in addition to those mentioned in the judgment:—*Wijeratna* v. *Abeyweera* (1); *Ferdinandis* v. *Fernando* (2).

Cur. adv. vult.

(12th December). Dias, J.—The facts of this case are these:—The land in dispute, an undivided half of Gorakagahadenia, originally belonged to *Jeronis Appu* and his wife, who were married in community. *Jeronis Appu* in his life-time was indebted to *Sidoris* on a bond of 24th April, 1877. His widow *Nonohamy* paid off her husband's debt by giving another bond of 16th March 1878 to the same creditor *Sidoris*, who put the bond in suit against *Nonohamy*, obtained judgment and execution, and caused the Fiscal to

(1) 5 S. C. C. 70. | (2) 5 S. C. C. 162.

sell the land in question, and at the sale the plaintiff became the purchaser. The defendants, who are the heirs of *Jeronis Appu*, dispute the plaintiff's right to the whole of what he bought. They only admit the plaintiff's right to half. Upon these admitted facts a question of law arises for consideration, viz. whether the survivor of two spouses has a right to create liabilities on the common estate for the purpose of paying off the debts of the community. The right of the survivor of two married persons to alienate or encumber the property of the common estate for the purpose of paying off debts for which the common estate was liable, is recognised by the Roman Dutch Law, and I may refer to two cases in which this law was upheld and acted upon by the Supreme Court collectively. In the first case, which is *Ederemanesingam's Case* (1), the Supreme Court says: "We come then to the second question proposed for our consideration, viz. what power has the surviving parent (who has not taken out administration) to alienate or encumber; and this question is also answered by the authorities cited above. He may alienate for the payment of debts incurred during the subsistence of the community, or for their necessary purposes, probably also for other purposes plainly beneficial to the estate." In this appeal we are only concerned with the first part of this opinion, viz. the payment of the debts of the common estate. In *Ederemanesingam's Case* the question was whether alienation by the survivor of immoveable property of the common estate for the payment of the debts of that common estate was good as against the heirs of the deceased spouse. This question the Supreme Court answered in the affirmative and upheld the right of the survivor to deal with the assets of the common estate for the payment of debts. The same proposition was laid down by the Supreme Court collectively in another case (2). In the present case the survivor incurred a debt to pay off a debt of the community; and in the two cases above referred to the survivor alienated the estate property for the same purpose: but the principle which underlies all these cases is the same. In all the three cases the property of the common estate was sold—in the two cases above referred to by a private conveyance by the survivor, and in this case by the Fiscal in execution of a judgment founded on a bond executed by the survivor. The plaintiff's purchase under the Fiscal's sale stands on the same footing as if he had

(1) Vanderstraaten 264. | (2) 3 Lorenz 235.

purchased from the survivor direct. It was urged for the defendants that they were no parties to the judgment and the execution under which the plaintiff purchased. This contention, I think, is not sound; yet, if it was, the same objection might have been urged in the two cases already referred to, on the ground that the survivor's conveyance was not binding on the heirs, as they were no parties to it. The survivor is supposed to represent all the parties interested in the common estate, and it is only on this ground that the survivor's acts were upheld as against the heirs. The surviving widow was the only debtor on the bond, and the creditor can only sue her on that bond, for the very obvious reason that he had no cause of action against the defendants. If the widow had a right to charge the property of the common estate with payment of the debts, it is plain that that charge can only be enforced by a levy on estate property. A purchaser under the above circumstances doubtless takes an imperfect title, and in the language of the Supreme Court in *Ederemanesingam's Case*, the plaintiff bought from the Fiscal "an imperfect title, subject for its validity to the proof on his part that the sale was for the payment of the debts" (of the common estate). That proof is forthcoming in this case, and the principle of the two cases already referred to applies.

It was admitted at the trial that the 2nd and 3rd defendants were married women, and the 4th and 5th defendants were minors; and they having relied on coverture and minority in their answers, they must be absolved from the instance with costs in both Courts as against the plaintiff. As between the plaintiff and the 1st defendant, the judgment appealed from must be reversed.

Set aside.

Proctor for the plaintiff, *J. E. R. Pereira.*
Proctor for the defendants, *W. P. Ranesinghe.*

APPENDIX.

Appendix A.

(To *Hendrick* v. *Frederick*, *ante* p 9.)

Present—MORGAN, A. C. J., STEWART and CAYLEY, JJ.

D. C. Matara, 26, 949. } *L. Dingiappu* v. *L. C. Don Andris.*

Party paying off mortgage—Succession to rights of mortgagee—Necessity for cession of action.

Ferdinands for the defendant, appellant.
Browne for the plaintiff, respondent.

(24th June 1875). *Per* CURIAM—The District Judge has not stated any reason for giving judgmeat in plaintiff's favour; but the plaintiff's Counsel's contention before the Court is that his client is entitled to judgment as being placed in the position of the mortgagee, whose mortgage he paid off in 1872. But no transfer of the mortgage or cession of action in favour of the plaintiff has been proved and it has been decided by this Court that such transfer or cession is necessary to entitle a person paying off a mortgage debt to the rights of the mortgagee.

Judgment of 23rd January 1875 *set aside*, and plaintiff nonsuited with costs.

Present—ANDERSON, A. C. J., STEWART and CLARENCE, JJ.

D. C. Badulla, 23,149. } *A. E. Sayadu Mahammado* v. *A. A. Assan Alyar.*

Stranger paying off mortgage—Right to s tand in mortgagee's shoes—Necessity for notarial assignme nt—Ordinance 7 of 1840, sect. 2.

Plaintiff declared upon a parol agreement to buy land of the defendant, in pursuance of which plaintiff had paid defen-

dant consideration, which it was now sought to recover as defendant had failed to convey. Part of the money paid by plaintiff had been applied to discharging a mortgage on the lands, and plaintiff prayed a decree declaring the lands specially executable for his judgment. Judgment was entered by default, and the lands sold.

These lands had been mortgaged to *Supremanian*, who assigned his interest by deed to *Peria Karuppen*, to whom the lands were also afterwards secondarily mortgaged. With a view to his purchase of the lands under the agreement, plaintiff paid off *Peria Karuppen*, but got no cession of action or assignment of his rights. Before this payment defendant had made a tertiary mortgage of the land to *Abubaker*, who assigned it by deed to *Annamalai*. *Annamalai* now contested the plaintiff's right to draw the proceeds realised by sale of the lands.

The District Judge (*C. E. D. Pennycuick*) held that, in view of Ordinance 7 of 1840, plaintiff was not entitled to priority, but that "as a matter of plain right and wrong, *Annamalai* should not be given preference, as he knew that the mortgage assigned to him was only a tertiary one and that *Peria Karuppen's* two bonds had preference." Plaintiff was therefore allowed to draw the proceeds, and *Annamalai* and his assignor appealed.

Ferdinands for the appellants.

Ondaatje for the plaintiff, respondent.

(17th November 1876). The judgment of the Court was delivered by

STEWART, J.—Set aside, and it is ordered that the claim of the appellants *Annamalai* and *Abubaker* to be paid in preference by virtue of the mortgage to the latter and the assignment thereof to the former, be allowed. To entitle plaintiff to stand in the place of *Peria Karuppen* it was essential that he should have obtained a transfer of the mortgage to *Peria Karuppen* or a legal cession of *Peria Karuppen's* right of action, neither of which the plaintiff possesses. See the judgment of the Supreme Court in *D. C. Matara* 26,949, 24th June 1875.

Appendix B.

(To *Cannen Assary* v. *Arunasalem Assary*, *ante* p. 43).

D. C. Colombo, 63,498. } *A. L. V. Moorogappa Chetty* v. *Simon de Silva.*

Stamp, cancellation of—Adoption of stamp-vendor's date.

Berwick, D. J.—The first question the Court has to decide is whether when a person gives another his signature to a stamped document, authorising him to fill it up as a Promissory Note for a certain sum, he may afterwards repudiate what is done in accordance with his own authority and directions, and deny that there is a valid obligation. For the decision of this question it makes no difference whether the document so authorised to be so created be a Promissory Note or some other species of obligation, such as a Bond or a Cheque. We have frequently, for instance, heard of this kind of authority to fill up blank Cheques.

There is no plea or evidence in this case that the plaintiff abused the power deputed to him by filling up the document of obligation for a larger amount than he had been authorised to insert—no plea or evidence of any fraud or imposition practised—and no plea or evidence of want of consideration.

I am of opinion that a man is not entitled to repudiate an act of this nature, done by his own authority, and in precise compliance with that. And that when, as in this case, the blank cheque or note was given for a debt actually due, a man is guilty of a fraud and imposition on his creditor, who gets his forbearance by the indulgence of an intended Promissory Note, with the intention of abusing that forbearance by turning round and disputing its validity. I hold that the document creates a valid obligation.

The other questions turn on the technical requirements to the validity of a Promissory Note under the Stamp Ordinance: that is to say, have the stamps been duly cancelled by the person on whom the Ordinance casts the duty of doing so, viz. in this case, by the defendant? On this part of the case I have merely to repeat the words of my judgment in case 62,495 (23rd October, 1873) in which I held that when a note is executed on the day which the stamp-vendor's memorandum on the stamp shews to have been

the date of the sale of the stamp, the maker may *adopt* the writing he finds already on the stamp and need not repeat the entry of the date, and *multo magis* when he cannot write, as is the fact here, where the maker can only sign by a mark, and cannot write a date. He cannot even cipher. In all other respects the facts are identical. The judgment in 62,495 is appended and is to be taken as herein incorporated.

Judgment will be entered for the Plaintiff with costs.

Note.—Defendant's counsel moved to be allowed to amend his pleadings by pleading fraud and want of consideration—which, being objected to by plaintiff's Proctor, the Court disallowed.

Judgment in No. 62,495.

(23rd October 1873). Berwick, D. J.—It is objected to the Promissory Note sued upon that it is invalid, inasmuch as it has not been duly stamped at the time of execution, and that it cannot now be stamped. The first question that arises is a general one applicable to all documents requiring stamps, namely, whether in order to being deemed "duly stamped", it is necessary that the date of cancellation should be written accross the stamp, (1) by the very *hand* of the person who cancels it by writing his name or initials or mark thereon; and (2) *simultaneously with his doing this.* In the present case the stamp bears on it the date "20th Novr. /72" written by the stamp-vendor: the document to which it is affixed was executed on the same date: and at the time of execution the maker of the Note simply wrote his name across the stamp without adding (or repeating) the date of doing so. It is contended for the plaintiff that he adopted the "true date" he found already on it.

The words of the 9th section of Ord. No. 23 of 1871 which apply are as follows:—"An instrument is not to be deemed duly stamped unless the affixed stamp be of not less than the proper amount of duty required by this Ordinance, and unless the person required by this Ordinance to cancel the adhesive stamp affixed to the instrument cancel the same by writing or marking in ink, on or across the stamp, his name or initials, or the name or initials of

his firm or principal, together with the true date of his so writing or marking, so that every stamp may he effectually cancelled and rendered incapable of being used for aoy other instrument."

This clause (with some modifications) was copied from the 24th section of 33 and 34 Vict. c. 97, which however had the very essential addition, which our legislators (for what reason I know not) have omitted, "or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time;" words which, though they refer to the various subsequent provisions for the different times when different instruments must or may be stamped, also seem to me to shew that the English Legislature did not mean to make the dating of the cancellation imperative.

(1) I will first dispose of the question, whether the date of cancellation must be written by *the very hand* of the person who writes his name, initials, or mark across the stamp for the purpose of cancelling it. Now, when I sign or seal a document or deed which a Notary or clerk has previously written out and dated for my signature, the dating and every word in it becomes, by my signing, as much my act as if I had written out every word with my own hand, although in truth the penmanship was that of a clerk. This is so obvious, that it is difficult to imagine, (and would require very conclusive evidence and unmistakeable language to shew) that the legislature intended more from the cancellor of a penny stamp than the law requires from the grantor of a solemn deed; and so, it is a perfectly reasonable presumption that the enactment in question did not mean to insist that the date, like the signature, need be in the parties' own handwriting, although such may be the strictly grammatical construction of the sentence. But the context and the very reason of the case clearly shew that the strict grammar must be disregarded and that the other is the just interpretation. For the enactment contemplates the case of persons who are unable to write, as it was to be expected that the Legislature would do in a country where a comparatively small number of peasant proprietors and other persons who have constantly to deal with stamped documents, can sign their names. People are therefore required by the Ordinance to write *or mark* their "name or initials," which (though a somewhat inaccurate expression) evidently means that people who

cannot write their name or initials are to sign by making their marks. The coupling of the two distinct verbs in the phrase "write or mark" necessarily implies distinct meanings or shades of meaning, and it must be taken that the liberty to "mark" is for those who cannot "write" and who can only sign by a mark. But such persons are not likely to be able to write or cipher a date, which *must* therefore in their case be done by others than the persons required by the Ordinance to cancel by their marks the stamps on documents they sign, issue or deliver.

The intention and true interpretation may be ascertained from another section of the same Ordinance, viz. sect. 13; or at all events it aids this interpretation. This is the section which is intended to enforce the due stamping of instruments by the sanction of a pecuniary penalty: and all that it requires is that it shall be the duty of every person signing as a party, or issuing or delivering any instrument &c, to *see* [which evidently means to *take care*] that the stamps are *distinctly* [not "duly"] cancelled *before* he signs, issues or delivers such instrument. It seems to me that an indictment framed on the only section which *defines* a specific pecuniary penalty for breaking the substance of the rule, viz. the cancellation of the stamp before execution or delivery of the instrument, would be bad if it charged the accused with not filling up the date with his own hand.

(2) As regards the necessity for the date of cancellation being noted *at the time of cancellation*,—there is nothing either in the English Act or the Ceylon Ordinance which expressly requires this (although the 13th section of the latter requires that the stamps must be cancelled before the signature, issue, or delivery of instruments, on pain of a pecuniary penalty for default). They simply provide that an instrument shall not be deemed "duly stamped" *until* it has been cancelled in the manner provided; and assuming the insertion of the true date of doing so to be a part of the requisite cancellation, the purpose of the Ordinance is satisfied by the true date being written at *any time*, whether that purpose be to aid in preventing the same stamp being subsequently used for another document, or whether it be to indicate whether the stamp was affixed "at the proper time." For either of these purposes it cannot matter what interval of time elapsed between the signing and the dating: only, till the true date is there, the stamp is not duly cancelled. Especially, for either of these purposes, it cannot

matter that the date of cancellation was written some minutes or some hours *previous* to the writing of the initials or signature; i. e. whether *unico contextu* with it, or otherwise. Mere *simultaneousness* is, therefore, I think, not necessary: at all events, not if the date was inserted or adopted with the object of cancellation; and this last remark suggests the only real difficulty I have on this part of the case.

Here the date was not put on the stamp *unico contextu* with the cancellation, but for quite a different object, vizt. by the stamp-vendor in order to shew the date of sale, which happened also to be the very date of making the instrument and the true date of cancellation; and the difficulty simply arises from the circumstance that in the event of the stamp being subsequently used on another document, either by the same person or by a person bearing the same name or initials as he who cancelled it, his fraud on the revenue would not be apparent on the face of the stamp itself, for the stamp-vendor's date would stand for its original purpose only, and the second user might add a new date of use to those initials which he found corresponding with his own. In this view, mere initialing, without a date distinct from that put by the stamp-vendor would not effect what the Ordinance desires, namely that every stamp "may be rendered incapable of being used for any other instrument." It was perhaps on this account that the alternative provision in the corresponding clause of the English Act (which appears to admit of other proof) was omitted in our Ordinance. But on the whole, seeing the remoteness of this contingency, which indeed involves that there be not only identity in the name or initials, but that the ordinary handwriting and signatures of two persons should be undistinguishable; seeing also the weighty considerations on the other side, the universality of the rule which enables a signatory to adopt that which he finds ready written and subscribes to; that, moreover, in this case being the "*true date*" of his own signature; seeing the absolute impossibility that "marksmen" should write the date with their own hands; I might almost add, seeing the great inconvenience to the public of having, as in my own case, constantly to date as well as initial 30 to 50 stamps on a single official or judicial document, an inconvenience which it is difficult to think the legislature contemplated; and keeping in view that enactments of this

kind should be construed so as to press as little as possible on the subject, consistently with their plain and rational interpretation, and without doing manifest violence to them ; —I incline to think that in a case such as this, where a man adopted and subscribed to that "true date" which he found on the stamp when he cancelled it by signing his name across it on the actual day on which he executed the instrument, the stamp was "duly cancelled" within the intention of the Ordinance.

Another question raised in this case is, whether the Promissory Note may now be stamped at the trial under sections 38, 39, and 40, if held to be insufficiently cancelled. Strictly speaking the above finding makes it unnecessary for me to give a decision on this point at present, but it is better that I should do so now, as it will save the expense of a second appeal in the event of the Supreme Court taking a different view from this Court on the other question, and will enable the whole cause to be finally disposed of at once in each Court, for the stamping now would practically end the case, there being no defence besides that founded on the Stamp Ordinance.

I am of opinion that even if the Note has not already been duly stamped by proper cancellation, it may now be stamped under sections 38, 39, and 40 by order of the Judge and then given in evidence : whereupon judgment would necessarily follow for the plaintiff.

Under these sections *all documents* tendered in evidence at a trial may be post-stamped by leave of the District Judge, provided only that the instrument in question "is one which may legally be stamped after the execution thereof." These words, however, I think contemplate instruments which, though they may be legally stamped by the Commissioner under certain circumstances and within a certain time in virtue of sections 23 and 36, cannot *otherwise* be legally stamped after execution. The question here, therefore, is whether a Promissory Note more than 14 days old may legally be stamped after its execution.

Now, the 8th section, which provides that no instrument "shall be pleaded or given in evidence or admitted to be good, useful or available in law unless it is duly stamped," does not *invalidate* or render *void*, though it suspends the operation of, an instrument : the invariable construction of similar English provisions having been that the word "unless" means merely "until." But until the recent Ordi-

nance No. 23 of 1871, Promissory Notes as well as Bills of Exchange stood here as at home on this peculiar footing, that they were absolutely *void* if not stamped at the time of their being made (or within 14 days, in case of urgent necessity). and could never be subsequently stamped so as to be made available in law for any purpose whatever. This was provided for in the previous Ordinance 11 of 1861 by the words at the end of sect. 15: "No person who shall take or receive from any other person any such Bill, Draft, Cheque, Order, or *Note* as aforesaid, either in payment or as a security, or by purchase or otherwise, shall be entitled to recover thereon, or to make the same available for any purpose whatever." There is a similar clause in the new Ordinance, but with this difference, that either by accident or design (I cannot say which) the word *Note* is omitted, and the question comes to this, Can the Court supply the omission? or, Is a promissory note identical with, or intended to be included in, any (and if so in which) of the things described as "bill of exchange, draft, cheque, or order," in the 24th clause (art. 3) of the new Ordinance?

A Promissory Note is a very different thing in its nature and some of its legal incidents from a Bill of Exchange, and no lawyer would intentionally confound them. Indeed it was not contended that a Bill of Exchange is a Promissory Note. But it was argued by the learned Counsel for the defendant that a Promissory Note is comprehended in the term "draft." If so it is contrary to the plain meaning of the term. Drafts and Cheques are identical with Bills of Exchange: they are directions to a third person to pay money, but not so are Promissory Notes. The English Act has closely adhered to this distinction; for sect. 53 and sect. 54 (of 33 and 34 Vict. c. 97) provide that "except as aforesaid" (the exception referring to the case of an instrument bearing an impressed stamp of sufficient amount but improper denomination) "no *Bill of Exchange or Promissory Note* shall be stamped with an impressed stamp after the execution thereof;" and that a person who takes or receives such "*bill or note*," not being duly stamped, "shall not be entitled to recover thereon or to make the same available for any purpose whatever"; and sections 48 and 49 respectively define the terms "Bill of Exchange" and "Promissory Note" for the purposes of the Act; the one as including *draft*, order, cheque, and letter of credit, and documents entitling a person to *draw* upon any *other* person

for a sum of money, and orders for payment of any sum of money in certain modes; but define a Promissory Note as "any document or writing (except a Bank note) containing a promise to pay any sum of money."

As our Ordinance was framed on that Act, the statutory definitions in the one are proper canons for interpretation of the other in case of any doubt or peculiarity, or variance from the ordinary legal meaning of words,—but indeed (so far as concerns the present case) there is no variance in the English Act from the ordinary legal distinction between bills of exchange and promissory notes. Neither by Common Law nor statutory law is a promissory note the same as a draft or Bill of Exchange, or order on another person. I cannot therefore consider it included in any of these terms.

Then can I supply the omission? I cannot tell whether the omission was designed or accidental. It may have been designed. It is by no means clearly known to me what is the ground on which the English Legislature excepted Bills and Promissory Notes, and Bills of Lading from the general rule, and the local legislature may well have applied a different policy in view of the peculiar circumstances of this colony where Promissory Notes bear such a remarkably disproportionate excess to Bills of Exchange in ordinary inland transactions. Is the Court to impose a new tax or burden on the subject which the Legislature has not thought fit to impose?

Again, assuming the omission to have been an accident and oversight, has the Court the power to remedy it, or should this be left to the Legislature? I think clearly the latter. The leading rules on the subject are that effect should only be given to a presumed intention when it is such an intention as the Legislature has used fit words to express (Dwarris, p. 561); words are not to be extended to comprehend a case within the supposed meaning of the Legislature, [with two exceptions, neither of which apply in this case] (Dwarris, 583); effect is not to be given to an intention not expressed, when it is an instance of *quod voluit non dixit:* a *casus omissus* can in no case be supplied by a Court of law; for that would be to make laws (Dwarris, 598); and lastly, acts imposing burdens on the public, including Stamp Acts, are in favour of the public to be strictly construed (Dwarris, 646, and Lord Tenterden's judgment in *Tomkins* v. *Ashby*, 6 B. and C., 542). Doubtless, Courts have

sometimes supplied words in a statute, but I know no case where they have done so in order to cause or extend a burden on the public; and however I might be disposed to supply new words necessary to give effect to the unmistakeable intention of a clause, I cannot supply a new penalty in addition to the pecuniary penalty (as I am asked to do here) which the Ordinance has not provided; nor will I supply a merely presumed or an omitted intention.

The argument drawn from the cirsumstance that the Ordinance makes it penal to make or issue a Promissory Note not duly stamped proves too much, for it would apply equally to receipts, acquittances and other documents which are clearly not void for want of being duly stamped, and may be poststamped by direction of the Judge, and then received in evidence. For these reasons I think that promissory notes may be stamped after execution under sec. 39, and I would direct this to be done in the present case, if I thought the document already insufficiently stamped. But in view of the opinion already expressed on the latter point such direction is unnecessary.

Judgment will be entered for the plaintiff for the amount of the Note in suit with interest thereon at 12 per cent. per annum from its date till judgment, and interest on the whole at the same rate from judgment till payment. The agreement to pay 24 per cent. has in other cases been held illegal.

It is to be particularly regretted that our Legislature has not followed the provisions of sect. 51, subsection 3, provisoes *a* and *b*, of the English Act, with respect to cancelling adhesive stamps on Bills and Notes.

In Appeal, before Morgan, A. C. J., Stewart and Cayley, J J., *Affirmed* for the reasons given by the learned District Judge, but interest allowed at the rate stipulated for. (*Civil Minutes*, 13th July 1875.)

This decision was followed (so far as concerns the stamping of promissory notes after execution) by the same learned Judges in D. C. Colombo, 65,822, decided the same day in appeal. So far as regards the adoption by the maker of the stamp vendor's date, the above judgment was followed by Dias, J. in D. C. Kandy, 84,050 (*Civil Minutes*, 26th May, 1880,) and by the Supreme Court in very many subsequent cases.

Appendix C.

(To *Bawa* v. *Ashmore*, *ante* p 115).

11th and 22nd March, 1881.

Present—CAYLEY, C. J., CLARENCE and DIAS, JJ.

D. C. Kalutara, 34,611. } *Juanis de Soyza* v. *G. D. L. Browne.*

The facts sufficiently appear from the judgments in appeal.

Van Langenberg for the plaintiff, appellant.
Browne for the defendant, respondent.

Cur. adv. vult.

(22nd March). CAYLEY, C. J.—We do not think that plaintiff was guilty of any contempt of Court in entering the Police Court when he did. A Police Court is open, so long as their is fair room, to any one who will behave himself properly and not disturb the proceedings, and if the effect of the Police Magistrate's order was to exclude the public generally from his Court we think that such order was *ultra vires*. The publicity of Courts of justice is an important safe-guard for the due administration of justice, and should be maintained. It may, however, be that the order was only intended to exclude persons from some particular part of the Court, where their presence might interfere with the business. It is not, however, necessary to decide upon the legality of the order. That the defendant *bonâ fide* thought that the plaintiff had committed a contempt in coming into the Court in spite of this order, we have no doubt, though there is nothing to show that plaintiff was aware of the order; but the fact that the defendant made a mistake in treating as a contempt that which was not a contempt will not render him liable to an action for damages, if he acted in his judicial capacity and within the scope of his jurisdiction. Now, the 107th section of the Ordinance No. 11 of 1868 confers upon Police Magistrates the power of causing persons who commit contempt of Court to be apprehended; so that apprehension for contempt is within the scope of a Magistrate's jurisdiction; and although in this case he may have acted (as we think he did) upon an erroneous view of the law, his act, though ill-advised, is not actionable. After causing the

plaintiff to be apprehended, the defendant ought in ordinary course to have charged him with the contempt, and then have taken bail from him to appear the next day and answer to the charge, or have remanded him if he could not give bail. Instead of this, the defendant caused the plaintiff to be detained in the Court, until he had finished hearing the case which he was then trying as Police Magistrate. It appears from the judgment of the District Court that the plaintiff was thus detained for about 10 minutes, when the defendant, thinking it unnecessary to take further proceedings, released him. A judge or magistrate must have some control over the arrangement of the business of his Court, and we do not think that the defendant acted beyond his powers in keeping the plaintiff in Court for 10 minutes (while he finished the case he was then hearing) before taking the proper proceedings for contempt; nor was he liable to an action for releasing the plaintiff without taking these proceedings. We accordingly think that the judgment of the Court below must be affirmed.

It need hardly be observed that the remarks of the plaintiff's proctor in the petition of appeal as to the manner in which the defendant in his (the proctor's) opinion gave his evidence are altogether improper. The plaintiff's proctor's opinion as to the demeanour of the defendant in the witness-box can have no possible bearing on the appeal; and the expression of such opinion, if inserted with the object of prejudicing the defendant's case, amounts to a contempt of this Court. Moreover, it appears from the District Judge's letter, which is filed in the case, that these comments of the proctor have no foundation in fact.

CLARENCE, J., concurred.

DIAS, J.—This is an action by the plaintiff against the defendant, Mr. *Browne*, who is the Magistrate of the Police Court of Panadura, to recover damages for causing the plaintiff to be assaulted when he entered the Panadura Court, and for illegal detention. The defendant pleads "not guilty," and says that, acting in his judicial capacity, he caused the plaintiff to be detained for misconduct in disturbing the defendant in the discharge of his judicial duties. The case was tried on the 31st May 1880, and it

appeared that on the day the plaintiff is said to have been detained, viz. the 28th January 1830, the defendant was engaged in hearing a Police Court charge, when plaintiff entered the Court and made a noise and came between the defendant and the accused parties in the Police Court case which was then being heard, when the defendant ordered the plaintiff to be detained as for a contempt of Court. It also appears that the Police Magistrate, Mr. *Browne*, had issued a general order last year that the Court house should be kept clear during the hearing of the cases, and that all parties not actually engaged in the Court should remain in the outer verandah. There can be no doubt of the right of a judge to do such acts as are necessary to preserve order in the Court, but a general order like the one issued by the Magistrate is not right, as every Court of justice is open to the public, who have a right to enter it not only as parties concerned in suits but even as spectators, provided they conduct themselves in a proper and orderly manner, so as not to disturb the proceedings of the Court. The question which the District Judge had to decide was, whether the defendant in doing what he did was acting in his judicial capacity. This issue was found in favor of the defendant, and the plaintiff's claim was accordingly dismissed. This dismissal, I think, is right and should be affirmed.

The District Judge in a letter calls our attention to some improper remarks in the petition of appeal. This petition of appeal is signed by plaintiff's proctor, and I agree with the District Judge that the proceedings do not warrant the remarks in the appeal petition, and I think that the conduct of the proctor, who attached his signature to the appeal petition, is highly reprehensible ; but I do not think it necessary to take any further notice of such conduct than to express my disapprobation of it.

Affirmed.

Appendix D.

(To *Bawa* v. *Ashmore*, *ante* p 111).

C. R. Kandy, 19,820. } *M. N. Cader Mohiadeen* v. *T. N. M. Ismail Lebbe.*

Plaint—The plaintiff in person sues the defendant for the recovery of the sum of Rs 70 being rent due by defendant to plaintiff for the use and occupation by defendant with plaintiff's permission of house No. 36 situated at Trincomalie Street, Kandy, belonging to plaintiff, from 22nd March 1881 to 25th May 1882, at the rate of Rs. 5 per mensem, which sum defendant has failed to pay though often demanded. And plaintiff prays for judgment against the defendant for the said sum of Rs. 70 and costs of suit.

Answer—The defendant in person answering says that he never occupied a house in rent belonging to the plaintiff, and that he was never indebted to him in the amount claimed or any part thereof as house rent. Wherefore defendant prays that plaintiff's action may be dismissed with costs.

Judgment (15th July 1882).

In this case defendant originally filed answer denying the use and occupation of plaintiff's house—that is, as I understand it, the house alluded to in the Libel; for if it has not that meaning, then it is without meaning at all. At the day of trial defendant by his Procter moved to amend his Answer by admitting being in possession (i.e. in use and occupation) of the house, and claiming it as his own property.

This extraordinay application was, as a matter of course, disallowed, and the case went to trial on the pleadings.

The defendant then admitted being in occupation, and judgment must necessarily go against him. He has by amendment shown himself unworthy of belief, and the Court will believe the plaintiff.

The order of the Court is that the defendant do

pay plaintiff the sum of Rs. 70.00 and costs of suit.

A. M. ASHMORE,
Commissioner.

The defendant appealed.

No Counsel appeared for him.
Dornhorst for the plaintiff, respondent.

(17th August 1882). CLARENCE, J.—The Libel and Answer appear to have both been drawn by petition-drawers. The term "rent" is used in both, but the intention of the Libel seems to be, to sue defendant for use and occupation of a certain house, and the intention of the Answer seems to be to plead *nunquam indebitatus*, under which plea it would be open to defendant to set up the defence that the house was his and not plaintiff's.

A Court of Requests case of this kind, however, is best not disposed of upon considerations as to the nature of the English action for use and occupation, or of the English plea of the general issue,—a plea which, I hope, may ere long be banished from our Courts.

It would seem that plaintiff claims the house in question as plaintiff's, and defendant claims it as defendant's. Both parties should have further opportunity of adducing evidence directed to that issue. Defendant's occupation seems to be admitted. As plaintiff does not appear to have taken any objection to defendant's going into the question of title, there will be no costs in appeal.

Set aside. Further trial.

Proctor for the plaintiff, *J. D. Jonklaas.*
Proctor for the defendant, *A. Bawa.*

Appendix E.

(To *Asaguru* v. *Jayetu Guru*, *ante* p 40).

D. C. Colombo, 83,181. } *Dias* v. *Perera*.

Jurisdiction of Court to grant costs where it has no jurisdiction to try the action.

The facts are sufficiently disclosed in the judgment of the District Judge (*Berwick*). At the trial on 5th December 1882, *Dumbleton*, instructed by J. E. R. Pereira, appeared for the plaintiff, and *Weinman*, instructed by E. F. Perera, for the defendant. The following judgment was delivered in Court on 11th January, 1883:—

This is an action at the instance of a husband, concluding for a divorce; and a plea to the territorial jurisdiction of the Court has been put in on behalf of the wife. It has been agreed by Counsel for the respective parties that this plea must be sustained, and it will, therefore, be decreed that this present suit by the plaintiff be dismissed for want of jurisdiction in the Court to determine it.

It remains to decide as to the question of costs, and this was the only question virtually argued before me, defendant's Counsel contending that she is entitled to costs, and plaintiff's Counsel opposing on the ground that if the Court has no jurisdiction to grant the prayer of the libel it has no power to award costs—no jurisdiction in the suit at all. Obviously the argument for the plaintiff seems opposed to reason and logic. It does *not* follow in reason or logic that because a Court has no jurisdiction to award the prayer of the libel it has no jurisdiction in the suit at all. If it were so, it would not have jurisdiction to decide that it had no jurisdiction: which is absurd.

It has, however, been decided in England that under the Common Law of that Kingdom a Court has no power to award costs when the subject or the object of the suit is out of its jurisdiction. It was in effect so ruled in the Court of Exchequer by Chief Baron Pollock and Baron Watson in 1857 in *Lawford* v. *Partridge* (26 L. J. Ex., N. S., 14); the gist of the ruling is summed up in the Chief Baron's words: "The Court has merely the power to declare its own incompetency at the trial, and direct

the suit shall abate." Again, in the following year, 1858, in *Peacock* v. *the Queen* (27 L. J. C. P. 225), the Court of Common Pleas having dismissed an appeal on the ground of its want of jurisdiction, the defendant's Counsel applied for costs, "but the Court thought that *under the circumstances* they ought not to be granted." This decision does not seem to be of much value on the general question, because it does not profess to be founded on any general principle, but on some peculiar circumstances, which seems to indicate that *under other circumstances* the Court would have decreed costs. In another case which occurred nearly 20 years later, *Brown* v. *Shaw*, decided in 1876 (L. R. 1 Ex. Div. 425), the defendant in a County Court suit appealed against a judgment of that Court, and the superior Court refused costs, Bramwell, B., giving what appears to me the extraordinary reason, that "the plaintiff need not have appeared. If we have no jurisdiction it is a matter *coram non judice*, and I think we have no power to grant costs. We must take it, then, that plaintiff's counsel has *appeared simply as amicus curiæ* to point out that we have no jurisdiction." We may take it as a matter of fact that plaintiff's counsel had not appeared as *amicus curiæ*, but that he appeared before it as plaintiff's Counsel on a retainer to plead for his client, and that he appeared on behalf of his client purely; and nothing can more conclusively demonstrate the inherent unsoundness of a settled principle than the necessity for bolstering it up with palpably false assumptions. The true test, whether a person was bound to appear to contest jurisdiction, or was to treat the suit with impunity as a mere nullity, is whether the incompetency of the tribunal depends on a special privilege personal to the party himself, as in the case of Consuls, Ambassadors, and the like, in which case the party must appear and specially plead his privilege. However, *Brown* v. *Shaw* virtually followed *Lawford* v. *Partridge*.

But in the very same year that *Brown* v. *Shaw* was thus decided, the highest tribunal in England, the House of Lords, in *Mackintosh* v. *the Lord Advocate* (L. R., 2 App. Ca. 41-78), when refusing to entertain an appeal from the Scotch High Court of Justiciary on the ground of their own want of jurisdiction, gave the respondent his costs. The Queen's Bench afterwards, in *Diss Urban Sanitary Authority* v. *Aldrich* (L. R., 2 Q. B. D., 179) expressly followed this

decision of the House of Lords; and again in *G. N. & L & N. W. Joint Committee* v. *Inett* (L. R., 2 Q. B. D., 285) L. C. J. Cockburn laid down a doctrine entirely different from that laid down by Barons Pollock and Bramwell in the case above cited. Lord Chief Justice Cockburn said, "The respondent is obliged to come here to inform us of the absence of jurisdiction; for if he did not, the objection would not appear, and judgment would be given against him. If he is obliged to come here by the action of the appellants he is entitled to his costs. It is clear that, to some extent, there is jurisdiction to hear and determine whether the appeal will lie or not. I am of opinion that, under these circumstances, there is jurisdiction to give costs." Thus exploding, I dare say, for ever in England the other illogical and irrational doctrine.

But as we are bound by our own Common Law, and not by the Common Law of England, reference must be made to it, and it speaks clearly and decidedly upon the point. "There is no doubt," says Voet, "that a judge, whose jurisdiction is declined, can so far take cognisance of the suit as to condemn in costs a plaintiff rashly suing before him, when he thinks that his is not the proper tribunal; for as he is the proper judge to decide the question of the competency of the tribunal, it follows that he can also condemn a party in the costs incurred in respect of that question, although he is incompetent to decide the principal subject of the action (*etsi in principali negotio incompetens sit*), just as a judge can condemn an appellant in the costs of an appeal, if he decides that the appellant has abandoned his appeal". *Ad Pand.*, 5. 1. (*de judiciis*) § 65.

Against this weight of authority—our Common Law concurring with the most recent and authoritative decisions on the English Common Law—have been cited certain local decisions* of the Supreme Court, all very probably in ignorance of, or at all events without any express reference to, our own Common Law on the subject, and based apparently on the erroneous notion formerly entertained of the English Law on the subject; for they are all, I believe prior to the House of Lords and Queen's Bench cases; and one of them, reported in Grenier, C. R. Reports for 1873

* *C. R. Ratnapura* 5,789, Vanderstraaten p. 34; *C. R. Panadura* 16,129, *C. R. Anuradhapura* 954, Grenier for 1873 (C. R.) p. 20; *C. R. Colombo* 20,813 3 S. C. C. 23.

(*Anuradhapura* 954) expressly refers as an authority to the now exploded case of *Lawford* v. *Partridge*. This has been over-ruled and superseded by the highest English tribunal. I do not think the Supreme Court would now follow it in opposition to our own Common Law and the manifest reason and logic of the question as demonstrated both by Voet and Lord Chief Justice Cockburn.

The decree will be that the plaintiff's suit in this Court be dismissed, and that he do pay defendant's costs.

[NOTE—No appeal was taken against this judgment.]

Appendix F.

(To *Johanna* v. *Harmanis, ante* p 175).

D. C. Testy. Colombo 3,567.

The following Order and Judgment of the District Court (*T. Berwick*, Judge) set out the facts of this matter.

INTERLOCUTORY ORDER.

10th June, 1872.

The question raised on the special case submitted to the Court is, whether three of the children of two spouses who have died intestate are bound to collate a gift of land received from them, in order to share in the succession to the deceased's estate. It will be well to note, though I do not think it will affect this particular case, that two of the devisees are children of their father's first marriage and one of them the only child of his second marriage. The other heirs are children of the first marriage. The gift is by the common father and his second wife.

There is no question of the law, that whatever is given by parents to children for their advancement and settlement in life, either on the occasion of their marriage or to set them up in trade or business, must be collated, if the recipients desire to partake in the general succession. The disputed question in this case is, whether they must collate *other* gifts called "simple gifts," i. e., *non ob causam acceptae*. The point has never before arisen, so far as I am aware, in our Courts, and it is a much disputed point among our Civil Jurists. The weight of authority however seems to be in favour of the doctrine that collation of such gifts does *not* take place under the Civil Law. It is so stated by Burge, vol. iv. p. 680; and I find that this is the view taken without comment by Warnkoenig, *Inst.* § 654, and also in a recent and learned English work on the *Modern Roman Law* by Tomkins and Jencken, p. 263.

Van Leeuwen, in the *Censura* (3.13. § 16) states that this is the more commonly received opinion, although he adds in § 17 that the rule is different in Zeeland, Burgundy, &c; and Voet expresses himself in the same sense as to the view entertained in Holland (*nostris moribus*) at the end of § 13 of his great work, lib. xxxvii, tit. 6.

The principal authority with which I was pressed to the opposite conclusion was that of an American edition of an English translation of Domat's great French work, § 2957.

Appendix F.

But whenever Domat is cited it must be remembered what his work really was, viz. an attempt to rearrange such doctrines of the Roman Civil Law as had been adopted into the French system; and I have referred to the original authorities relied on by him, and I am bound to say (though with all the reverence that is due to his name) that if his words are correctly translated (and I have not access to a French edition) the texts cited by him appear not to warrant his wide proposition but to be limited to the cases of gifts on account of marriage. Indeed the Rubric both to the Novel (18, c. 6) and the chapter (Code, 6. c. 20) cited by him expressly and *in terminis* refer only to collations of dowry and donations on account of marriage.

I should therefore have no hesitation in adopting what is stated to be the better and more commonly received doctrine by the high authorities already cited, were it not for a passage in Van der Keessel, a work of the very highest value here. In his Thesis 349 he lays down that, besides what has been given by the parents to the children on the occasion of their marriage or in advancement of trade or the like, "simple donations" must also be collated, and adds "this construction of the Art. 29 of the Political Ordinance of Holland being rendered necessary by the whole analogy of our law." And in Thesis 352 he mentions—what has certainly a very important bearing on this case—that the East Indian Colonies are governed by the Political Ordinance of 1580 and not by the Placaat of 1599. (For a good historical account of these two Acts and the Provinces to which they respectively apply, see Grotius, book 2, c. 28, and also Van Leeuwen's Comm., p. 289).

But Van der Keessel unquestionably referring to collation with a surviving parent and not to collation among children where both parents are dead, his Thesis is therefore not in point to the present case. But if he means his doctrine to extend to a case like the present, then it must be observed that his words contain a very long advance on anything in his text, which is Grotius 2. 28. 14; and he cites as his authority no judicial decision or commentator, but only certain collections of local customs; and I am inclined therefore to think that his construction of the Ordinance is entirely rested on his own view of the "analogy" (as he says) of the law. But both Grotius, in the very text

Van der Keessel is treating on, cites the Political Ordinance and so does Voet, but neither of these high authorities puts any such construction on it: on the contrary both Voet and Van Leeuwen give their opinion in a precisely opposite sense, and both admit that the LOCAL laws of Zeeland (the custom of which Van der Keessel cites and rests on) are different. Van Zurck (*Cod Bat. Collatie van Goederen in erffenis*, § 1, n. 8; Ed. 1758, p. 216) is express on the subject: *Simple donatie, buiten de voorschreve uitzetting, en kosten tot studie, ten zy de vader anders gewilt heeft, komt in geene collatie, maer in Zeeland wel. In Holland komen dan ook niet in collatie Bruilofts-kosten, nog Pillegaven.* "Simple donations, other than those aforesaid for advancement in life (starting in the world) do not come into collation, unless the father has desired otherwise." Considering then that this has been a much disputed question, if Van der Keessel's meaning is that children collate among themselves, apart from collation with the surviving parent on the division of the matrimonial *communio bonorum*, not only donations *ob causam* but "simple donations," then I am not disposed to look on his opinion, valuable as it is, as amounting to more than that of an individual opposed to the general weight of opinion: and it appears to me that in a case of this kind I ought not to attempt to form any decision for myself, which among diverse opinions is the best, but ought simply to follow that of which it can be said, in the words of Van Leeuwen, *communior et receptior est sententiæ*. Following this rule, I consider that if the gift in question is to be viewed as a *donatio simplex* it need not be collated.

Whether it should be so considered is a question on which I have not before me materials on which to form a sound opinion. If it was given to the three children who are the beneficiaries out of *special partiality and affection*, then I think it ought not to be collated. Especially so, if the other children were then married or provided for otherwise or were subsequently provided for before the father's death. On the other hand there may be circumstances which would shew that the gift was really intended simply to be a provision for them in anticipation of what they would get at their father's death; in which case it ought to be collated and ceases to be a *donatio simplex*; and I therefore wish the

case to be set down for evidence on this point before judgment.

I will, however, dispose at once of the ground on which it was mainly attempted to resist collation, viz. that the deed was not a deed of gift at all but executed for valuable consideration, viz. the discharge of a mortgage to which the land was subject. It was unquestionably a free and absolute gift of land subject to a mortgage, and I do not think that the personal covenant to discharge this debt in the least alters its character. There was at the least a gift of the difference of value to the donor between the value of the land and the amount of the debt. Indeed the deed truly calls itself a gift, and contains the usual clause of acceptance of it as a "gift." The only questions, therefore, are 1st, one of fact—was it a gift for advancement in anticipation of inheritance, or was it a "simple gift," i. e., *non ob causam*: and 2nd, one of law, viz. must gifts of the latter class be collated. On the point of law I have stated the view which I think the Court will most safely adopt. On the point of fact the case will be set down for evidence. Costs to stand over.

9th September, 1872.

It is stated by counsel that no evidence is forthcoming on either side—Judgment reserved.

JUDGMENT.

10th September, 1872.

It only remains, therefore, to decide whether, in the absence of all evidence, the presumption of law is in favour of a gift (that is to say, a *considerable* gift) from parent to child being a *donatio ob causam*, (viz. for putting out into life) or a *simplex donatio*, that is to say, as something extra to this mere purpose and from a special generosity or affection. I have not been able to find any authority in Roman Dutch Law which is directly to the point, but there is a great deal from which it may be inferred that such donations are, in case of doubt, to be presumed to be for advancement in life and therefore liable to be collated. *Indeed*

collation appears to be the rule or general proposition, and all other cases of considerable gifts which are not collated, mere exceptions grafted on the rule. Consequently the rule should be followed till authority be adduced for an exception. Thus in the *Censura* the principal proposition is laid down in these words before the author proceeds to details: *Huic collationi subjecta sunt omnia quae a parentibus, de quorum successione quaeritur, sunt profecta* (pt. 1. 3. 13); and *profectitia bona omnia conferenda sunt: adventitia non utique:* the distinction taken by these terms being between gifts received from parents and those received from strangers, (*Ibid* § 16); and this distinction drawn by the later Civil Law between *profectitia* and *adventitia*, which were both collated by the early Roman Law, reminds one of the universality of the rule in its first origin and application, when the law was introduced for the very purpose of enabling the forisfamiliated or emancipated children, who had acquired separate property or *adventitia*, to partake of an inheritance with those who remained partners in the common family and *in paterna potestate*, from which inheritance they would otherwise have been excluded. (See Groenewegen, *ad Cod.* vi. 20.) So by the Scotch Law, which is so parallel, not to say constantly identical, with Roman Dutch Law in matters of Civil Law origin, every provision given by father to child falls under collation (not including however the expense of suitable maintenance and education, nor inconsiderable presents) except where it appears (as by the provision being made on death-bed or otherwise) evidently to have been the grantor's intention that the child should have the provision as a *praecipuum* over and above his share of *legitimum*. Erskine's Inst. p. 940: and this rule of Scotch Law is adapted if not adopted from the Justinian Code, Lib. 3 tit. 28 § 29, and based on it. I also find in Zurck's Batavian Code, in the place where the Dutch Law is particularized as to what expenses on the occasion of marriage are included among those liable to be collated by the child, the following quotation, which I have been unable to trace to its source (as the reference is either not given or given at second hand) but which no doubt justly states the Civil Law on the precise point there discussed, and by a very fair application of the same principle would apply to other than gifts or disbursements on the occasion of marriage—*Æquius profecto est, ut in dubio haec omnia statuamus*

esse conferenda, tanquam dotis portionem constituentia, quamdiu non apparet alius parentis animus. Van Zurck, p. 217, v. *Collatie.*

For these reasons I think that the gift which is the subject of the special case should be collated, and it is ordered accordingly. Costs of the special case and arguments to be paid out of the estate.

[NOTE—No appeal was taken against this judgment].

Appendix G.

(To *Ex parte Robertson*, *ante* p 167.)

D. C. Colombo, 67,216. } *S. M. Odayappa Chetty.* v. *R. M. C. Muttayah Chetty.*

The facts sufficiently appear from the judgments of the Court below and of the Appellate Court.

(1st September 1875). BERWICK, D. J.—Mr. *Layard* urged mainly two points on behalf of his client. The first being his right to have a postponement of the hearing to enable him to subpoena witnesses to prove that the defendant himself had taken the copy of the Rule to the Fiscal's office and that therefore the process must (by inference) have been served upon him, and that the witnesses examined on the 27th must therefore have committed perjury: and the second being that the present proceedings are irregular.

On the first point he urged that his client is taken by surprise by the rule of the 27th instant whereby the proceedings subsequent to the filing of the libel were quashed and the plaintiff committed to answer for contempt, inasmuch as on the 27th and until the conclusion of the hearing on that day he had no notice that he would have to answer for a contempt, and had only appeared to answer the allegations of non-service of process contained in the defendant's affidavit of 30th June, and to prosecute his own motion for judgment for default of appearance; and that that is a distinct question from the question of contempt, which he ought now to be allowed to disprove by calling witnesses to contradict the evidence given for the defendant on the 27th instant, on which the proceedings were ordered to be quashed and on which he is now charged with contempt. It is quite true that the questions whether he should have judgment for default of defendant's appearance and whether he should be prosecuted for contempt are distinct questions but they involve one and the same issues of fact, which came on for hearing and evidence on both sides and trial and decision on the 27th instant. The defendant then called evidence which clearly proved that neither the summons nor the rule had been served on the defendant, and the plaintiff called no evidence to contradict that, though the defendant had filed his list of witnesses so far back as 30th June. The issue of fact being identical and having

been solemnly tried and adjudicated on upon full trial and examination of witnesses and their cross examination by by plaintiff's proctor, the issue must be taken as *res judicata*, and the Court thinks that the plaintiff is not now entitled to reopen it. Still *in favorem libertatis* the Court would be disposed to indulge the plaintiff if it had the slightest reason to think it even possible that the ends of justice would be thereby advanced. But everything points exactly the other way. In the first place the circumstances that he did not call his witnesses on the 27th instant and never filed any list during the two months the matter was standing for trial makes it highly improbable that honest testimony of the kind suggested can be produced. In the next place, when the plaintiff was committed on the 27th, he was allowed till the 30th to shew cause, and yet neither tendered affidavit nor asked for subpoenas. Again on the 30th the matter was allowed on the application of his Counsel to stand over for another two days and yet no affidavits from the witnesses are filed nor steps taken about the witnesses for their attendance to-day. To-day his Counsel states that to-day (since the case was first called on in the evening) his witnesses have been asked by his proctor Mr. Obeyesekere to make affidavits to this effect: that defendant was seen at the Fiscal's office with the copy of rule (inferring service) but that his witnesses have refused to do so: and also refuse to come to Court unless forced by subpoena. The circumstances that the witnesses would not make voluntary affidavits to that effect is pretty nearly conclusive that they are unable honestly to do so. Further his Counsel has informed the Court that it was almost so late as ½ past 3 p.m. to day or yesterday, (I am uncertain which day was stated) that the witnesses were asked to swear, and t is not suggested that the plaintiff was aware of their ability (if they be honestly able) to depose to such and such an effect long before. There is absolutely nothing to shew this Court either that these witnesses could not have been called on the 27th or that this plaintiff did not have knowledge till now of what they could depose to. As already said, and had the plaintiff any reason to believe that the proposed witnesses were in a position to prove what he stated, I would adjourn this matter that the subpoenas might be issued to them, even though affidavits would be the more proper mode of purging the contempt charged. Under these circumstances I think I went as far as I could go in the interests of

justice in intimating my willingness to adjourn the hearing if Mr. Obeyesekere could put in a precise affidavit and motion, of which I suggested the terms as follows, which I drafted, adapting them to the facts alleged for plaintiff at the bar:

"That from conversations he has had previously with A, B and C he has reason to believe and does believe that they are in a position to give credible evidence of facts which would shew the evidence given on the 27th ultimo by D, E and F to have been false, perjured, and which could purge his client of the contempt charged against him:—and that the said A, B and C decline to make affidavit thereof, and that he has reason to believe that such refusal is vexatious and obstructive of justice. Therefore prays that the said A, B and C be cited and compelled to give the evidence in open Court which they decline to give voluntarily by affidavit."

Mr. Obeyesekere would not make such an affidavit and the circumstances prove that there is not the slightest reason to anticipate that the suggested witnesses either could or would give the evidence required. There was therefore no ground whatever for an indulgence to which the plaintiff had no legal claim and which would only have been a farce and hardly consistent with the decency due to legal proceedings. And it is preposterous to say that the plaintiff has been taken by surprise in any respect whatever.

The second matter urged was that the proceedings were irregular inasmuch as they were not grounded on an affidavit charging plaintiff with contempt. The plaintiff had the return of the Fiscal stating that service had been made on a person "pointed out by a man on behalf of the plaintiff", and the evidence taken in his presence after due notice, on the 27th, and the order of that date, as well as the defendant's affidavit of 30th June, and I do not think that anything more was necessary.

The last objection taken by his Counsel was that there was nothing to connect plaintiff with the "man" who pointed out the party as defendant. It is sufficient in respect to this defence to say that besides the Fiscal's return, and besides the fact that no one else but the plaintiff could have any interest in the commission of the fraud, we have the broad fact that he himself moved to take the benefit of the fraud, and that the whole matter came before the Court

on his own Proctor's motion for judgment on the false and fraudulent service.

The Court has not the slightest doubt that the false service was made by the procurance of the plaintiff, and adjudges the plaintiff to have been guilty of a high contempt of Court and of the administration of justice in abusing the process of this Court by wilfully and falsely procuring a summons, and rule for judgment for default of appearance, to be served on the wrong party as defendant, with intent to deceive the Court, defraud the defendant, and pervert the course of justice.

In determining the punishment, the Court has in view that it is inundated with motions to open up judgment or avoid rule for judgment being made absolute, on the ground of false returns of service on the wrong party: and that this has become—notably among the chetties—one of the most crying curses of the country, and is rapidly converting the Courts of Justice into temples of injustice and fraud: that it is therefore necessary to impose such a punishment as may tend to check the alarming progress of this kind of fraud: and to adapt the nature of the punishment to the nature of the offence: to punish the party convicted in his purse, seeing that greed was the motive of the offence; and to make the punishment also disgraceful to him, as the crime is one of the most disgraceful character. He is therefore sentenced to be imprisoned for the term of nine months and to pay forthwith into Court for the use of Her Majesty a fine of one thousand rupees, and to be further imprisoned with hard labour till the whole of the fine be paid, provided that such further imprisonment is not to exceed the term of twelve months in addition to the former term of nine months.

In appeal by the plaintiff, the case was argued before Cayley and Dias, JJ. by *Ferdinands* (*Layard* with him) for the appellant, and *Grenier* for the respondent.

(1st October, 1875). Their lordships affirmed the judgment of the Court below save as to the imposition of imprisonment at hard labour in default of payment of the fine, and directed the Court below to proceed as provided by sect. 5 of Ordinance 5 of 1855, in case the fine was not paid as directed. The judgment proceeded as follows:

The appellant complains that his motion for subpœnas to two of his witnesses was improperly rejected by the District Court. This motion was made on the 1st September, two months after the appellant had notice of the nature of the proceedings against him. The defendant's affidavit, on which the proceedings are founded, was filed on the 30th June, and the case came on for hearing on the 27th August, on which day the appellant was committed to be brought up on the 30th. On the 30th the hearing was adjourned to the 1st September on the application of the appellant's Counsel, so that the appellant has no reason to complain that the proceedings were hurried, and that he had no time to subpœna witnesses. Mr. Obeyesekere in his affidavit says that he was instructed by two persons to draw an affidavit to the effect that Muttaya Chetty, during the latter end of June last, came to the Fiscal's office with a translation of the rule served on him in this case. A draft affidavit is produced, and it is alleged that the two persons named in it have refused to come to the District Court to swear to it without being duly subpœned. This seems to be a mere excuse to avoid swearing the affidavit, which could have been sworn to before any Justice of the Peace. Every safeguard to which a person charged with contempt is entitled appears to us to have been observed, and in view of the serious nature of the offence disclosed in this case, and its prevalence in this Island, we do not think the punishment too severe.

Appendix H.

(To *Ex parte Kerr*, *ante* p 278).

D. C. Colombo, 71,450. } *H. S. Saunders & Co.* v. *H. W. Banner.*

"Dead stock"—Bungalow furniture—Mortgage.

(3rd July 1879). T. Berwick, D. J.—I have had to delay giving judgment in this case until I should be furnished with a copy of the deed of sale under which the plaintiff purchased the estate mentioned in the pleadings, and this I only received two days ago. This document marked A is put in by consent. The amended Libel states the plaintiff purchased the Derry Clare Estate from the defendant and claims the value of certain furniture then in the Bungalow of the said estate as having passed under the deed of sale. It also alleges the usage that the "ordinary" furniture in an Estate Bungalow passes with the estate. The defendant does not claim the furniture in question; he denies that he sold it to the plaintiff, denies the alleged usage, and alleges that it was the personal property of his son who had been his superintendent of the Estate and who died there, as it would appear, shortly before the sale.

According to the terms of the Deed of sale the defendant sold "all the coffee Estate called Derry Clare bounded" ....." together with all the buildings, machinery, fixtures, tools, implements, live and dead stock, standing thereon or belonging thereto." There is no express mention of Bungalow furniture in the Deed and there does not appear to have been any express agreement in any form respecting it.

I think all the ordinary and necessary furniture kept in the Estate Bungalow by the proprietor for the use of the superintendent must be considered kept for the use of, and for the furtherance of the cultivation and management of, the Estate and must pass with it as a part of the "dead stock standing thereon" or "belonging thereto"; but that it passes in virtue of these terms in the deed, and without any regard to any usage. The usage of which evidence has been given only confirms the construction put upon these terms as that ordinarily put on them by the purchasers and vendors of coffee estates; but this contruction of these terms is I think

the natural and rational construction, and must stand independently of any usage. Obviously, ordinarily (though perhaps not invariably) *a bungalow for the residence of the Superintendent is essential to the proper management of a Coffee Estate;* and so is a reasonable amount of what is understood by "ordinary" furniture. And whatever "ordinary" furniture is brought into the Estate by the proprietor for the necessary use of his superintendent is as much brought there for the use and benefit of the estate as any purely agricultural implements, machinery, or cattle. A distinction may of course have sometimes to be drawn between ordinary furniture absolutely necessary for the use of the superintendent, that is to say for the use of the estate, and any articles of luxury—say, for example, a piano, which the proprietor may choose to send to his superintendent from either personal or liberal considerations, and which may be found on the bungalow at the time of sale. But it is impossible to hold that the vendor is bound to make good to his vendee anything not on or belonging to the estate at the time of the sale, and still more impossible to hold that he is bound to make up to his vendee the value of any furniture which did not belong to himself for the use of the Estate, but which happened merely to be in the bungalow at the time of sale, and was the private property of the superintendent or any one else. And this brings me to the only real point in this case which is a pure question of fact, namely, Was the the furniture in question the property of the defendant and also placed there for the sole use and benefit of the estate, or was it the personal and private property of his son and superintendent? The evidence does not afford sufficient materials to enable me to decide this question with any degree of certainty. And the mere allegation in the answer that it was the property of the son unaccompanied by any oath or direct evidence of any kind has no legal weight. It must be remembered, too, that the defendant is out of the Island and does not appear to have ever been in it. He is represented here by an Attorney, a man of business, and it does not appear that either the defendant himself or his Attorney is at present in possession of any *data* on which he can have any exact knowledge whether the furniture had been purchased and charged against the estate (that is against himself) or not. The plea in question has therefore no other significance morally as well as legally than that of

throwing on plaintiff the burden of establishing a doubtful question. In the absence of better evidence I shall have to be guided by the most probable presumptions. It may fairly be assumed from what has been said of young Mr. Banner's habits and position that he would surround himself with articles of luxury for his purely personal use and enjoyment, which had no relation to the needs of the estate, and which had been purchased or acquired by himself or given to him by his father for his own personal use. But in the absence of positive evidence either way I think it must also be presumed, especially in view of the evidence as to what is usually done in such cases, that the bungalow contained a certain amount of furniture supplied by the proprietor for use of whoever might happen to be there as superintendent at the time—supplied at the proprietor's cost for the use of the estate—and that upon the whole this presumption overrides any presumption arising from the negative evidence that as yet no entry has been found in the estate accounts of any charge against the estate on this account. That there was furniture in the bungalow of an ordinary character such as is generally supplied for the use of Estates has not been questioned. All things considered, I think the amount claimed for this, Rs. 650, is reasonable. Plaintiff will therefore have judgment for this sum and any costs of suit.

Addendum.

19th and 26th October, 1883.

Present—CLARENCE and DIAS, JJ.

D. C. Negombo, 12,730. } S. A. G. SILVA v. M. SARAH HAMY.

Registration—Priority—Ordinance 8 of 1863, section 39—Conflicting sales by the Fiscal of the same land—Fraud—Mortgage created pending seizure—Ordinance 4 of 1867, section 42.

The defendant, on 14th September 1880, bought a piece of land at a sale in execution of a money judgment recovered by him against S., and obtained a conveyance from the Fiscal on 21st February 1882, which was registered on 11th March following. Pending seizure under defendant's writ, S. mortgaged the land to plaintiff. Plaintiff put this bond in suit on 3rd December 1880, obtained a simple money judgment on it, had the land sold in execution on 17th February 1881, and purchased it himself. Plaintiff obtained his conveyance from the Fiscal on 24th February 1882, and registered it on the 27th. Plaintiff now sought to be quieted in possession against defendant, who set up her own title.

Held, that though plaintiff's mortgage was invalid by the operation of section 42 of the *Fiscals Ordinance*, yet his money judgment was not affected thereby.

Held also, that in the absence of any proof of fraud, plaintiff's conveyance prevailed, by virtue of section 39 of Ordinance 8 of 1863, and he was entitled to the decree prayed for.

The plaintiff in this case appealed against a judgment of the District Court (*F. J. de Livera*, Judge) nonsuiting him with costs on the ground that the sale to plaintiff, under a mere money decree, of the land which had previously been sold to the defendant, did not give plaintiff a superior title. The facts sufficiently appear in the judgment of CLARENCE, J.

VanLangenberg for the plaintiff, appellant.

Dornhorst for the defendant, respondent.

Siripina v. *Tikiria* (1) was referred to in the argument.

Cur. adv. vult.

(26th October). CLARENCE, J.—The land in question in this action was the property of one *Gregoris Silva*.

(1) 1 S. C. C. 84.

On the 14th August 1880 it was seized under a writ issued against *Gregoris* by present defendant. On the 8th September following, the land being still under seizure, *Silva* purported to mortgage the land to present plaintiff. The land was sold under defendant's writ on 14th September and purchased by defendant, but for some reason which does not appear defendant did not get her conveyance from the Fiscal until 21st February 1882. Meanwhile, plaintiff put his mortgage bond in suit on 3rd December 1880, and on the 17th December 1880 obtained judgment by default; not, however, a decree declaring the laid specially bound or executable, but a simple judgment for a sum of money. Under this judgment plaintiff had the land in question sold by the Fiscal on the 17th February 1881. Plaintiff himself purchased and got his Fiscal's conveyance on the 24th February 1882. Plaintiff's conveyance was registered on the 27th February 1882, and defendant's on the 11th March following. Plaintiff now claims to be quieted in possession as against the defendant, who sets up her own title against plaintiff; and the sole question contested between the parties is, which title is to prevail? No issue is raised by either party as to the actual cause of action in the shape of ouster or trespass, nor do the pleadings raise any issue as to the factum of either Fiscal's sale. Plaintiff's mortgage was invalid by the operation of the 42nd section of the *Fiscals Ordinance*, but that does not affect plaintiff's judgment for a sum of money. Having got a judgment in December 1880 against *Silva* for a sum of money, plaintiff had a right to levy on *Silva's* property, and the Fiscal selling under his writ any property of *Silva's* would make a good title to the purchaser. But when the Fiscal purported to sell this land in February 1881 under plaintiff's judgment, the land had in fact been already sold in September 1880 to the defendant. Plaintiff's conveyance therefore passes nothing to him, unless it derives effect from the *Registration Ordinance*. But in our opinion the effect of the 39th section of the Ordinance is to sink defendant's prior purchase, and thereby give effect to plaintiff's. When an owner of land conveys it to A for value, and subsequently executes another conveyance of the same land in favour of B also for value, it is true at the date of the second conveyance the owner has nothing left in him to convey, but by the operation of the Ordinance B's conveyance overrides

A's if registered before it. Unless the Ordinance has this effect, it has none at all, and this seems the actual construction of the enactment. We can see no difference in principle between a conveyance executed by the land owner *in propriâ personâ*, and one executed for him by the Fiscal. It therefore appears to us in the absence of, at any rate, any proof of fraud, that plaintiff's conveyance prevails, and that he is entitled to the decree for which he asks.

There must be a declaration of title in plaintiff's favour as prayed for with a decree quieting him in possession, and defendant must pay all costs in both Courts.

DIAS, J., concurred.

Set aside.

Proctor for plaintiff, *H. Bail.*
Proctor for defendant, *W. N. Rajepakse.*

DIGEST.

—o—

Affirmation

See EVIDENCE, 1.
— EVIDENCE, 2.

Agent

See CONTEMPT OF COURT.
— POSSESSORY ACTION.

Alternative charges

See VAGRANT, 2.

Animus furandi

See THEFT.

Appeal

See PRACTICE, 2.

Appealable order

See SECURITY TO KEEP THE PEACE.

Arrack

Arrack Ordinance, 1844—*Breach of section* 26 —*Proof of possession of license—Ordinance* 5 *of* 1881, *section* 3.

Upon a construction of section 3 of Ordinance No. 5 of 1881,

Held, that the word "condition" in this section might be construed to include the possession of the license contemplated by section 26 of the Arrack Ordinance, 1844; and accordingly

Held, that the section under construction cast the burden of proving the possession of such license on the defendant.

P. C. Panadura, 4,275. *Fonseka* v *Perera* ... 62

Assault

1.—*Assault on Policeman in the execution of his duty—Absence of count for Assault at Common Law—Conviction of Assault at Common Law.*

The defendants were indicted for cutting and wounding two policemen while in the execution of their duty. The jury, under the Judge's direction, found that, (1) if the policemen were acting in the execution of their duty, the 1st defendant was guilty on the indictment, and the

Assault—*contd.*

2nd, 3rd, 5th and 8th defendants were guilty of assault and battery on a police constable in the execution of his duty, and 4th, 6th and 7th defendants were not guilty; but (2) if the policemen were not acting in the lawful execution of their duty, the 1st defendant was guilty of cutting and wounding, and the rest were not guilty.

Held, that, it being admitted at the bar that the policemen could not be regarded as having been in the lawfnl execution of their duty, the conviction of assault at Common Law could not be sustained.

The Queen v. *Uranelis* 1

2.—*Assault on police officer in the execution of his duty—Ordinance* 11 *of* 1868, *sect.* 165—*Warrant of arrest, description of offence in—Conviction of assault at Common Law.*

Where a warrant of arrest against an accused party gave the names of the complaining and accused parties, and stated the charge to be "threatening to do bodily harm":

Held (*per* DE WET, A. C. J., and DIAS, J.) that the warrant sufficiently described a criminal offence.

Held also (*per* CLARENCE and DIAS, JJ., following *P. C. Kalutara* 64,188 (4 S.C.C., 117)) that upon a charge of assaulting a police officer in the execution of his duty, in breach of section 165 of the *Administration of Justice Ordinance*, 1868, the accused could be convicted of an assault at Common Law.

P. C. Colombo, 6,310. *Seneviratne* v. *Thegis Singho*... 246

3.—*Resisting police officer in execution of his duty—Ordinance* 16 *of* 1865, *sect.* 75—*Ordinance* 18 *of* 1861, *sect.* 13—*Presence of complainant at trial—Using indecent language in the street.*

Where defendant was charged by an Inspector of Police with resisting a police constable in the execution of his duty,

Held, that the presence of the constable at the trial was a presence of the complainant within the meaning of sect. 13 of Ordinance No. 18 of 1861.

The evidence showing that the duty the constable was engaged in at the time of the resistance was the arresting of one Jusa, who was

Assault—*contd.*

brawling in the street and refused to desist at request of the constable,

Held, that, apart from any special statutory power, the constable was justified in arresting Jusa and taking him into his custody.

P. C. Negombo, 51,756. *Keith* v. *Fernando*... 283

Assessment for Police tax

Assessment for Police tax, objection to—Ordinance 5 of 1867, sect. 1—Limitation—Notice of action—Ordinance 17 of 1865, sect. 177.

Plaintiff, on 1st March 1882, received notice that the Municipal Council of Kandy, the defendant, had assessed plaintiff's house as of the annual value of Rs. 900, for the purposes of the tax for maintaining the Police in the town. On 3rd March, and again on 7th and 23rd August, 1882, the plaintiff protested against this assessment as excessive; and on 19th September was informed that the assessment had been reduced to Rs. 800. On 3rd October 1882, plaintiff brought the present action, praying that the assessment might be reduced to Rs. 600, the real value of the house,

Held (affirming the decision of the Court below), that the action was not maintainable, no notice of action having been given to the defendant, as required by section 177 of the *Municipal Councils Ordinance*, 1865.

Held also, that the present action, embodying the objection to the assessment, was barred by section 1 of Ordinance 5 of 1867, not having been commenced within 15 days of the receipt of notice of assessment.

C. R. Kandy, 20,351. *Wright* v. *The Municipal Council of Kandy*. 260

See CROWN, 1.

Assignee

See INSOLVENCY, 2.
— INSOLVENCY, 3.

Assignment

See MORTGAGE, 1.
— MORTGAGE, 3.
— FISCAL, 4.

Autrefois acquit

See MAINTENANCE.

Bond

1.—*Bond—Prescription.*

The plaintiff sued on an instrument which, after acknowledging the receipt of a sum of money, provided for the recovery of it with interest in case of default of payment. The parties, in the body of the instrument, called it a "money debt bond," "this bond," "this unprofessional bond"; it bore the stamp proper to a bond for the amount mentioned, and professed to create a general mortgage over all the property of the obligors. Plea, prescription.

Held, that this instrument was not a "bond."

Held also, that regard being had to the intention of the parties, as evidenced by the use of a bond-stamp and by other circumstances, it would be inequitable to allow the defendants to set up the shorter term of prescription as for a promissory note.

Observations on the requisites to constitute a "bond" in this country.

C. R. Batticaloa, 16,209. *Kumaravaloe* v. *Mohidin Bawa.* 297

2.—*Bond—Mortgage—Joint and several liability—Co-obligees—Recovery of share of one of the obligees.*

Where a mortgage bond, purporting to secure a sum of Rs. 280 to four mortgagees, provided that in failure of payment "from this mortgage "and from the heirs and assigns of me the said "debtor the said principal and interest due the "said four creditors or one of them or any per-"son assigned and authorized by the said four "persons are or is empowered to recover in "full"; and plaintiff as the assignee of one of the creditors sued to recover Rs. 70 as the share due to the said creditor;

Held, that the plaintiff as representing one of the four creditors was entitled to recover the full amount of the bond, and was therefore clearly entitled to recover one fourth.

C. R. Kandy, 21,032. *Hawadia* v. *Sarana* ... 313

Bond to Fiscal

See FISCAL, 4.

Burden of proof

See ARRACK.

Bye-law

Bye-law, Municipal, dealing with same subject matter as earlier Ordinance—Ordinance No. 15 *of* 1862—*Bye-law under Ordinance No.* 17 *of* 1865.

Where an Ordinance of 1862 made it an offence punishable with a fine of Rs. 50 to obstruct certain officers in the execution of their duty in connection with the abatement of nuisances, and a bye-law made by a Municipal Council under an Ordinance of 1865 entitled its officers to the protection accorded by the Ordinance of 1862 to the first-mentioned officers, and made resistance to them in the exercise of their duty punishable with a fine of Rs. 10;

Held, that a charge of resisting an inspector appointed by the Municipal Council, while in the exercise of his duty, was rightly laid under the Ordinance of 1862.

B. M. Kandy, 17,820. *Francke* v. *Meya Lebbe*... 97

See LOCAL BOARD.

Cattle trespass

Cattle damage feasant—Custody of cattle seized —Publicum Stabulum—*Apportionment of damages.*

A herd of plaintiff's cattle had on several occasions trespassed on defendant's land and done damage, and one head of this herd was seized *damage feasant* and detained by defendant. Plaintiff, having tendered Rs. 2.50 (as the amount of damage done on the day of seizure by the animal seized), which was accepted as part payment and the cow not released, sued to recover his animal. Defendant claimed right to detain it till payment of the full amount of damages.

Held, that there was no *publicum stabulum*, or public pound, in Ceylon, and that defendant was entitled to detain the trespassing cattle in his own custody.

Held also, that it was for the plaintiff, as the wrong-doer, to apportion the damages among the several head of trespassing cattle; and that, proof on this point being wanting, everything would be presumed against him.

C. R. Kandy, 19,410. *Sangeravalo* v. *Gray*... 11

Certificate in the form R.

See INSOLVENCY, 1.

Certificate of Queen's Advocate

See JURISDICTION, 3.

Cession of Action

See PRINCIPAL AND SURETY, 1.

Child of tender years as witness

See EVIDENCE, 1.

Club

1.—*Club—Right of Secretary to represent in Court.*

Plaintiff sued for wages for work and labour done for the defendant, a Club, and served summons upon the Club's Secretary;

Held, that the Colombo Club was not authorised to sue or be sued by any corporate name, and that plaintiff's right of action, if any, was against the individual persons who had contracted the debt.

C. R. Colombo, 32,332. *Peris* v. *The Colombo Club* 100

2.—*Club, action against, for goods supplied—Liability of Secretary to be sued—Practice—Execution.*

A Club is not a partnership, neither is it a corporation capable of being sued through the representation of any officer or member of its body. The remedy of a tradesman who has supplied goods to the Club is simply an action against those persons who have contracted with him; and whatever judgment he may obtain is enforceable against those persons and their property.

Where the defendants were C., Secretary of the N. E. Club, three other persons named, "and others members of the said Club," and judgment was entered against C. with a direction that it should be enforced only against the common property of the Club;

Held, that this judgment was an absurdity, and that a judgment against C. was legally leviable on C.'s own property and on nothing else.

C. R. Nuwara Eliya, 8,387. *Cotton* v. *Campbell* 309

Coffee estate

See MORTGAGE, 5.
— MORTGAGE, 7.

Coin Ordinance

Coin Ordinance, No. 5 *of* 1857, *sects.* 12 *and* 13—*Conviction under both sections—Sentence.*

The first count of an indictment charged the prisoner, in the words of section 12 of the *Coin Ordinance*, 1857, with uttering 6 counterfeit coins. The second count charged him, also in words of that section, with uttering 6 counterfeit coins while having 28 other such coins in his possession. The third count, in the words of section 13, charged a possession of 28 such counterfeit coins with intent to utter. The jury having convicted the prisoner on all three counts, and the Court having sentenced him to imprisonment at hard labour for two years as for the conviction under the second count;

Held, upon a case reserved, that the offences charged by the first and third counts were included in that charged by the second count, and that no further sentence should pass as for the conviction upon the first and third counts.

The Queen v. *Hendrick* 143

Collation

See INHERITANCE.

Commencement of prosecution

See PROSECUTION, 1.

Commercial matters

See JURISDICTION, 4.

Commission

See FISCAL, 2.

Committal

See CONTEMPT OF COURT.

Common Law

See ASSAULT, 1.
— ASSAULT, 2.
— FISCAL, 6.

Community of goods

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See ADMINISTRATION.
— HUSBAND AND WIFE.

Complainant, nominal

See ASSAULT, 3.

Complainant's presence at trial

See ASSAULT, 3.

Compounding offence

See CONSIDERATION.

Condictio indebiti

Condictio indebiti—*Money paid under mistake of law—Costs—"Putting cases in evidence."*

S., the owner of a house which he had mortgaged to A., died, having by his will (of which defendant was executor) bequeathed a life-interest in the house to H. Plaintiff entered into occupation of the house as lessee of H. A. obtained judgment on his mortgage against defendant as executor, and on 8th March 1879 sold the house in execution. It was bought by J., who shortly afterwards died. In June 1879 (plaintiff's lease expiring on 31st July) defendant, as executor, demanded of plaintiff Rs. 55 as rent for April and May, threatening legal proceedings. Plaintiff paid. Plaintiff was afterwards sued for the same amount, in respect of the same occupation, by J.'s representatives, and pleaded his payment to the executor, but was condemned to pay the amount and costs. Plaintiff now sought to recover from defendant the Rs. 55 *plus* the costs incurred in the action by J.'s representatives.

Held, reversing the decision of the Court below, that plaintiff (having paid with full knowledge of the facts, and if anything upon a mistaken view of the law) could not recover either the Rs. 55 or the costs of the former action.

Observations on the practice of "putting cases in evidence."

D. C. Galle, 46,340. *Bogaars* v. *VanBuuren*... 209

Conflicting sales in execution

See REGISTRATION.

Confusio

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See MERGER.

Consideration

Consideration, unlawful—Compounding criminal offence—Robbery.

In a suit to recover a sum of money agreed to be paid by the defendant in consideration of plaintiff's withdrawing a Justice of the Peace charge against the defendant of assault and theft from the person of the plaintiff,

Held, that the contract was against public policy, and therefore invalid:

C. R. Trincomalie, 35,985. *Valipulle* v. *Ponniah* 276

Consignee

Consignees, liability of, for landing charges—Charges of the Wharf & Warehouse Co.—Ord. 10 *of* 1876, *Schedule A—"Consolidated landing and shipping charges."*

Plaintiffs were the consignees of certain rice which defendants had undertaken to carry upon Bills of Lading which gave them the right to land the rice at consignees' risk, with a lien on the goods for charges, according to a scale visible at defendants' agents' office. Defendants employed W. to land the goods, who detained 5 per cent of them till payment of landing and storage charges. Plaintiffs now claimed damages for this detention alleging a tender of a reasonable amount for such charges, no scale of charges being visible at defendants' agents' office. The scale there visible was that contained in Schedule A to Ord. 10 of 1876, (being the scale charged by W.) which prescribed a "consolidated landing *and shipping* charge" of 10 cents per bag of rice, with a reduction of 10 per cent. when the goods were taken from the Wharf by consignees and not stored. W. claimed 9 cents a bag for the goods in question, which had been removed from the Wharf.

Held, that the charge of 9 cents per bag was for the processes necessary to be gone through in order to place the goods on the Wharf free to be removed by the owner, which processes must (in the absence of evidence to the contrary) be presumed to be covered by the expression "landing charges" in the Bills of Lading.

Held, therefore (there being no evidence that

Consignee—*contd.*

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the amount tendered by plaintiffs was a reasonable payment for such "landing") that the detention by defendants' agent, W., of part of the goods till payment of 9 cents per bag on the whole consignment was justified, and that plaintiffs' action failed.

D. C. Colombo, 85,584. *Guzdar & Co.* v. *The British India Steam Navigation Co.* 84

Contempt of Court

Contempt of Court—Breach of Injunction—Power of District Court to issue injunction affecting property outside its territorial limits but the subject of suit before it—Agent of party enjoined—Notice—Committal for defined period.

In an action in the District Court of Colombo to enforce a mortgage of a coffee estate situated within the jurisdiction of the District Court of Kandy, the District Court of Colombo issued an injunction against the defendant and his agents to restrain them from coppicing the cinchona trees growing on the mortgaged property. R., the defendant's manager of the estate, after the issue of the injunction, directed his subordinate, the superintendent of the estate, to uproot all the cinchona trees growing on the estate. Upon motion to commit R. as for a contempt of Court:

Held, that the District Court of Colombo, having otherwise jurisdiction to entertain the mortgage suit, had power by injunction to restrain the defendant (and any agent of his, though not a party to the action, and resident outside the court's territorial jurisdiction) from acts upon the land concerned in the action.

Quaere, whether, the defendant having submitted to the jurisdiction of the court, it was open to his agent R. to raise the question of jurisdiction.

Held also, that the fact of R. being the manager and agent of defendant (on whom the injunction had been served) was not sufficient proof, upon the present motion, of notice to R. of the injunction; and that it was for the plaintiffs to show, beyond reasonable doubt, that at the time of the alleged breach R. knew of the existence of the injunction.

It was proved that at the time of uprooting the cinchonas R. lived 20 miles from the estate, and directed the uprooting by letter to the superintendent, who inquired whether R. had authority to do so, and stated that his reason for

Contempt of Court—*contd.*

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hesitating to uproot was the fact that there had been a legal dispute about cinchona cutting. Upon this R. forwarded a letter from defendant informing the superintendent that he had the right to uproot, having consulted his legal advisers. R. had no direct notice of the injunction.

Held, that though these facts did not justify the committal of R., it was a case in which R. should pay all the costs in the court below.

D. C. Colombo, 85,069. *Bennett* v. *Gow, Ex parte Robertson* 158

Conveyance without title

See TITLE.

Conviction

See ASSAULT, 1.
— ASSAULT, 2.
— COIN ORDINANCE.
— VAGRANT, 2.

Co-obligees

See BOND, 2.

Costs

See CONDICTIO INDEBITI.
— JURISDICTION, 1.
— JURISDICTION, 4.
— PRACTICE, 3.

Court

See JUDGE.

Court of Requests

See JURISDICTION, 4.

Creasy, Harry, *In re* 126

Crop, mortgage of

See MORTGAGE, 5.

Crown

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Crown, liability of, under rating enactment—Police Ordinance, 1865, *sect.* 49—*Objections to assessment—Odinance* 5 *of* 1867, *sect.* 1—*Roman Dutch Law*—Vectigalia.

Section 1 of Ordinance 5 of 1867 covers exactly the same subject-matter as sect. 49 of the *Police Ordinance*, 1865, and a little more, inasmuch as it provides for an appeal. The provisions of section 1 of the Ordinance of 1867 must be regarded as substituted for the provisions of the Ordinance of 1865, and as impliedly repealing them.

By Proclamation of the Governor in Executive Council, dated 4th December 1869, under section 34 of the *Police Ordinance*, the percentage on the assessed annual value, leviable on the buildings in the town of Pussellawa, as tax for the maintenance of Police, was fixed at 5 per cent. From 1871 to 1881 certain Government buildinga in that town, occupied by the Public Works Department, were assessed for, and paid, the tax like private buildings. In the assessment of annual values of the buildings for the year 1881, under section 37, the Government buildings were not assessed; and the Governor by Proclamation of 10th June 1881 fixed the percentage leviable at 7½ per cent.

H., whose estate of Rothschild had been assessed for the tax, and on whom a notice had been served under section 40 computing the tax at 7½ per cent. on the assessed annual value, objected before the Court of Requests to paying the 7½ per cent., and contended that the increase from 5 per cent. was owing to the omission from the assessment of the above P.W.D. buildings, which were liable to be so assessed under the *Police Ordinance*. The Court below having ordered a new assessment to be made including the Government buildings,

Held, that H. had in effect required the Court below to alter the percentage fixed by the Governor's Proclamation, which it clearly had no power to do, no appeal being given from the determination embodied in the Proclamation.

Upon the question whether the Crown was bound by section 34 of the *Police Ordinance*, 1865:

Held, that if the Crown's prerogative had not been divested by statute, the mere fact of the Crown having waived it for 10 years did not stand in the way of its now being asserted.

Held also (following *Ex parte the Postmaster General, re Bonham*, L. R. 10 Ch. D., 595) that

Dividend

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See INSOLVENCY, 4.

Dog, tax upon

See LOCAL BOARD.

Dominus

See POSSESSORY ACTION.

Donation

Voluntary donation of land—Subsequent lease for valuable consideration by donor—Contest between donees and lessees.

H., in 1871, conveyed to her minor children, the plaintiffs, certain land, with a declaration of irrevocability, reserving to herself the management of the property during the plaintiffs' minority, and the power to lease it for terms not exceeding one year, on the expiration of a present lease then having 5 years to run. Upon the donees attaining majority, they were at liberty to divide the property. In 1872 H. leased the property to third defendant for a term ending in August 1878; and in 1873 to first and second defendants for 4 years from 1878 (with recital of the gift to plaintiffs), the entire rent being paid in advance. H. having died shortly after this, the present action was begun in 1882, during the minority of one of the plaintiffs, the first two defendants being in possession under their lease. The plaintiffs alleged a distinct ouster in November 1875, and prayed ejectment.

Held, that the deed of gift was intended to operate upon all the plaintiffs attaining their majority.

It appearing also that the greater part of the proceeds of the lease to the first two defendants had been applied to the discharge of a debt (probably contracted before the gift) due by the donor to first defendant:

Held, affirming the decision of the Court below, that plaintiffs were not entitled to recover.

D. C. Kandy, 90,056. *Cornelis* v. *Babanis* ... 268

See TITLE.

Donatio simplex

See INHERITANCE.

Donor without title subsequently acquiring title

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See TITLE.

Duplicate of deed

See STAMP, 2.

Ejectment

See MORTGAGE, 8.

Equitable assignment

See MORTGAGE, 1.

Estoppel

See STAMP, 1.

Evasion of toll

See TOLL.

Evidence

1.—*Evidence—Oath or affirmation—Child of tender years, admissibility of the evidence of, after simple warning to speak the truth—Evidence improperly admitted.*

Upon a charge of rape, the prosecutrix M., a child of between 9 and 10 years of age, gave her evidence without being sworn or affirmed, but after having been simply warned to speak the truth, and having promised so to do. The prisoner having been convicted,

Held, upon a case reserved, that a child, like every other witness, must be sworn or affirmed before its evidence can be received, and that therefore M.'s evidence had been improperly received.

Held also (*per* CLARENCE and DIAS, JJ., *dissentiente* DE WET, A.C.J.) that, this evidence having gone to the jury, the conviction could not be sustained, although there might be other evidence in the case sufficient to support a verdict.

The Queen v. *Buye Appu.* 136

2.—*Witness who does not understand the obligation of an oath—Oath or affirmation.*

Upon a charge of rape, the prosecutrix D. was called as a witness She was about 10 years of age, understood the difference between truth and

Evidence—*contd.*

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falsehood, and that it was not right to tell what was not true; was possessed of great natural intelligence, but was wholly uninstructed, and satisfied the Court that she did not understand the obligation of an oath. She was affirmed and examined, and the jury convicted the prisoner mainly on her evidence.

Held, upon a case reserved, (*per* CLARENCE and DIAS, JJ., *dissentiente* DE WET, A. C. J.) that to render D.'s testimony admissible it was not necessary that she should comprehend the nature of an oath; and that she was a proper person to be affirmed; and that the conviction should therefore be confirmed.

Per DE WET, A.C.J.—In all cases, no witness can give evidence except upon oath or solemn affirmation; and the presiding judge having been satisfied that D. did not understand the obligation of an oath, or its equivalent a solemn affirmation, she should not have been called upon to make an affirmation. D.'s evidence having been illegally admitted, and the jury having convicted on that evidence solely, the conviction should be set aside.

The Queen v. *Peris Appu*... 155

See CONDICTIO INDEBITI.
— STAMP, 2.
— VAGRANT, 2.

Execution

See CLUB, 2.
— FISCAL, 6.
— FISCAL, 7.
— INSOLVENCY, 2.
— INSOLVENCY, 3.
— MORTGAGE, 5.
— MORTGAGE, 8.

Extinction of debt

See MORTGAGE, 9.

Fees

See FISCAL, 2.

Ferry

See TOLL.

Fiscal

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1.—*Fiscal—Ord. No. 4 of 1867, sect. 51—Parate execution—"Forthwith"—Applicability where the property sold is not the execution debtor's, but is surrendered by a friend of his.*

Plaintiff, as execution creditor in a previous suit, issued his writ, but his debtor having no property, S., a friend of the debtor's, surrendered his own property in execution of the judgment. The defendant, as Fiscal, sold the right, title and interest of the execution debtor in that property. The purchaser having failed to pay part of the purchase amount, the defendant, 9 months afterwards, resold the property, and 13 months after resale applied for and obtained parate execution against the first purchaser and his surety to recover the difference between the amounts realised at the two sales, upon which levy a very small sum only was recovered. Plaintiff now brought action to recover the difference between the amount of his writ and the amount recovered, which difference he had lost by the negligence of the defendant in not reselling and not issuing parate execution, promptly.

Held, that parate execution was a proceeding instituted for the benefit of the execution creditor, and that, the application for parate execution having certainly not been made "forthwith," as required by sect. 51 of the *Fiscals Ordinance*, 1867, plaintiff would have been entitled to a verdict; but

Held, that the procedure provided by the Ordinance applied only to sales of the execution debtor's interest in property, which was admittedly *nil* in this case; and that on this ground the decree of the court below dismissing plaintiff's action and ordering defendant to pay the costs ought to be affirmed.

D. C. Kandy, 87,506. *Yegappa Chetty* v. *Liesching* 123

2.—*Fiscals Ordinance, No. 4 of 1867, sect. 48—Sale of moveable property over £750 in value—Fiscal's commission.*

Held, that the words "when the proceeds do not exceed the sum of seven hundred and fifty pounds sterling," in sect. 48 of the *Fiscals Ordinance*, 1867, applied only to the proceeds of the sale of immoveable property, and did not affect the rate chargeable by the Fiscal on the proceeds of the sale of moveables.

C. R. Colombo, 33,634. *Hall* v. *Bastian* ... 182

Fiscal—*contd.*

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3.—*Fiscal's Sale—Ordinance* 4 *of* 1867, *sect.* 53—*Irregularities—Action to set aside sale on grounds falling under sect.* 53.

Section 53 of the *Fiscals Ordinance*, 1867, prescribes the sole procedure open to a party considering himself aggrieved by irregularities in the publishing or conducting of a Fiscal's sale, and such sale cannot be set aside in a separate action on grounds falling within the purview of section 53.

D. C. Matara, 32,285. *Idroos Lebbe* v. *The Deputy Fiscal of Matara* 224

4.—*Fiscal—Ordinance* 4 *of* 1867, *sects.* 5,83—*Bond to Fiscal of Province—Assignment thereof by Deputy Fiscal of District.*

Upon a seizure of certain property in execution, two persons claimed it as their own, and were allowed to retain possession on giving a bond to the Fiscal of the Central Province, undertaking to deliver the property to the Fiscal when called upon. The Deputy Fiscal of Matale professed to assign this bond to the plaintiff by indorsement as directed by section 83 of the *Fiscals Ordinance*.

Held, that the assignment was bad, having been made by a party having no interest in the bond.

D. C. Kandy, 88,616. *Ibrahim Saibu* v. *Wirappen* 226

5.—*Fiscal, action against, for neglect of duty—Prescription—Ordinance* 4 *of* 1867, *sect.* 21—*Accrual of cause of action.*

Plaintiff, the holder of a writ against two persons, placed it in the hands of defendant, a Fiscal, for execution. Defendant purported to seize certain land of the execution debtors, but the seizure was bad for the omission of certain formalities. Between the seizure and the day fixed for sale, viz. on 20th January 1879, the execution debtors conveyed the property seized to A., who claimed the land and stayed the sale. Plaintiff brought an action to set aside A.'s claim as made pending seizure, which action was finally decided against plaintiff in appeal on 7th September, 1880, on the ground that there had been no valid seizure prior to the conveyance to A. Plaintiff brought the present action, for damages, against the defendant in February 1881.

Fiscal—*contd.*

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Held (affirming the decision of the District Court) that plaintiff's cause of action accrued on defendant's failure to make a valid seizure, and that plaintiff's action, not having been brought within nine months of such accrual, was barred by section 21 of the *Fiscals Ordinance*, 1867.

D. C. Kandy, 87,943. *Mutappa Chetty* v. *Conolly*... 232

6.—*Fiscal—Execution—Ordinance* 4 *of* 1867, *sect.* 44—*Sale of debts—Common law proceeding.*

The procedure for the attachment of debts prescribed by section 44 of the *Fiscals Ordinance*, 1867, does not preclude a plaintiff from selling in the ordinary course of execution debts due to his execution debtor, but simply provides an alternative and summary proceeding for the purpose.

D. C. Kandy, 88,489. *Mohamado* v. *Mac Carogher, Ex parte MacCarogher* 244

7.—*Fiscal—Procedure to set aside sale in execution—Ordinance* 4 *of* 1867, *sect.* 53—*Summary proceedings—Statement of objections.*

Observations on the course to be adopted in proceeding under section 53 of the *Fiscals Ordinance*, 1867, to have a Fiscal's sale in execution set aside for irregularity.

D. C. Colombo, 86,645. *Arookiampulle* v. *Sambo* 249

8.—*Parate execution—Fiscals Ordinance, sect.* 51—*Necessity for separate suit—Notice of motion to parties affected.*

Parate execution, under sections 50 and 51 of the *Fiscals Ordinance*, 1867, should issue in the suit in which the original execution issued. No notice of the motion for parate execution need be given to the party affected, who may be heard upon motion to recall the writ.

D. C. Colombo, 1,950. *The Queen's Advocate* v. *Cure, Ex parte Liesching* 295

See MORTGAGE, 2.
— REGISTRATION.

Fixing fund by notice

See PREFERENCE AND CONCURRENCE, 1.

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Fornication

See VAGRANT, 1.

Forthwith

See FISCAL, 1.

Fraud

See REGISTRATION.

Fund in Court

See PREFERENCE AND CONCURRENCE, 2.

Fund in third party's hands

See PREFERENCE AND CONCURRENCE, 1.

Furniture on estate

See MORTGAGE, 7.

Gaming

See VAGRANT.

Guarantee, continuing

See PRINCIPAL AND SURETY, 2.

"Hear, try and determine"

See TRANSFER OF PROSECUTION.

Heirs, liability of

See PRINCIPAL AND SURETY, 2.

Holding over

See LANDLORD AND TENANT.

Husband and wife

1.—*Practice—Husband and wife—Power of wife, who has been deserted by her husband, to sue for property constituting the joint estate—Decree.*

As a general rule, a married woman whose husband is alive cannot maintain an action, but where the husband is absent and has deserted his wife, she may commence an action in respect of property forming part of the joint estate; but

Husband and wife—*contd.*

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the wife, before she can proceed with the suit, is bound to summon the husband and give him an opportunity of taking up the suit if so disposed.

D. C. Matara, 30,171. *Lokuhamy* v. *Abeyhamy* 211

2.—*Husband and wife—Surviving spouse giving bond for debt of deceased spouse—Liability of land belonging to the community to be sold under judgment on the bond—Children of the marriage, rights of.*

The surviving spouse of a marriage contracted in the community of goods had (without the consent of the children of the marriage) granted a personal debt-bond for the amount of principal and interest due to the same obligee upon an older bond of the deceased spouse.

Held, that the entire property of the community was liable to sale in execution of the judgment obtained upon the survivor's bond, though the children of the marriage were no parties to it, or to the action founded upon it.

The purchaser at such sale takes an imperfect title, subject for its validity to proof on his part that the obligation of the survivor had been incurred for the purpose of paying off the debt of the community.

Ederemanesingam's Case (Vand. 264), and *D. C. Caltura* 17,064 (3 Lorenz 235), specially considered.

C. R. Colombo, 250. *Amaris Appu* v. *Perera*... 343

See ADMINISTRATION.

Hypothecation of mortgage to mortgagee's creditor

See MORTGAGE, 3.

Improper admission of evidence

See EVIDENCE, 1.
— EVIDENCE, 2.

Increased rent

See LANDLORD AND TENANT.

Indecent language

See ASSAULT, 3.

Inheritance

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Inheritance ab intestato—*Collation*—Donatio simplex, *liability of to collation.*

S., the owner of three lands, conveyed by deed to the defendant, his only son (the youngest of seven children) undivided half-shares of the lands, reserving to himself the right of possession so long as he should live. S. having died intestate, the plaintiffs (his wife and children) raised the present action to eject the defendant from certain encroachments made by him on the remaining halves of the lands, which the plaintiffs claimed to inherit exclusively, the defendant being unwilling to collate the subject matter of his gift. Defendant claimed, in addition to the halves gifted to him, an undivided one-fourteenth of the estate of S. as one of seven children of S.

Held, that the gift, not having been made in consideration of marriage or for other special purpose, was a *donatio simplex*, and as such not liable to collation except in two cases, viz. *first*, if it was expressly made liable to collation; and *second*, if some of the donor's children have received dowries, and the *donatio simplex* be given in lieu of a dowry.

Held accordingly, that the gift to the defendant was not liable to collation.

D. C. Colombo, 79,606. *Johanna* v. *Harmanis* 172

See KANDYAN LAW.

Injunction

See CONTEMPT OF COURT.
— INSOLVENCY, 2.

Insolvency

1.—*Insolvent—Ordinance 7 of 1853, sect. 152—Certificate in the Form R.*

P., an insolvent, had passed his examination and had his protection extended for one month from 23rd November 1880. He applied on 30th May 1882 for a certificate of conformity, but on the day fixed for considering it withdrew his application. No further order as to protection was made.

Held, that under these circumstances a certificate in the Form R. in the Schedule to Ordinance 7 of 1853 was wrongly issued to a proved creditor.

Insolvency—*contd.*

2.—*Insolvency—Injunction—Assignee's right to restrain execution creditor of insolvent from selling moveables of insolvent in execution—Summary application.*

Defendant was adjudicated insolvent on 10th January, and appellant was appointed his assignee on 14th February. Plaintiff obtained in this suit a money judgment against defendant on 16th January, issued writ, and on 23rd February seized in execution certain shop goods of defendant then in the custody of appellant as assignee, and advertised them for sale. Appellant, upon affidavit of these facts and notice to plaintiff and defendant, moved (in effect) in this suit that the Fiscal might be restrained by injunction from selling the goods in execution.

Held, that the application had been rightly refused by the District Court.

Semble, that the Court might have granted an injunction, had the application been made in the ordinary course upon a fresh libel filed.

3.—*Insolvency—Property acquired pending insolvency, sale of in execution—Judgment on debt contracted pending insolvency—Right of purchaser to sue for rent—Surrender by assignee to Insolvent—Ordinance 7 of 1853, sect. 79.*

Pending the insolvency and before the certificate of K., who had a life-interest (acquired pending the insolvency) in a house occupied by defendant, plaintiff purchased K.'s interest in the house at a sale in execution of a judgment against K. obtained upon a debt contracted pending the insolvency. Plaintiff now sued defendant for use and occupation. Defendant admitted occupation, but pleaded the insolvency and his liability to the assignee for the rent.

Held, that the right to recover rent had passed to and was vested in the assignee, and that plaintiff's action had been rightly dismissed.

Quære, whether, if the assignee had surrendered the property in question to the insolvent, the plaintiff would have acquired any right by his purchase prior to such surrender.

Insolvency—*contd.*

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4.—*Insolvency—Mortgage creditor, who has realised security, proving for balance debt after one dividend has been paid—Right to payment of first dividend out of funds in Assignee's hands before payment of second dividend to other creditors—Ordinance 7 of* 1853, *sections* 108, 109—*District Court rescinding its own order allowing proof of claim.*

C. was declared insolvent on 5th September 1879. On 26th November A. and H., mortgagees of a coffee estate belonging to the insolvent, commenced an action for realizing their security. They sold the estate under a mortgagee's decree and purchased it themselves for Rs. 10. Meanwhile a dividend had been declared and paid to the proved creditors. On 21st April 1882 A. and H. were allowed to prove a claim of Rs. 25,244.51 against the insolvent estate, being balance due on their mortgage, deducting certain payments already received by them out of the estate. On 11th September A. and H. moved that out of the monies in the Assignee's hands they might be paid (before any payment on account of second dividend) an amount equal to what they would have received as first dividend on the debt they had now proved had they been proved creditors at that date. The Court below refused this motion, and also refused to allow the mortgagees to prove any balance sum due on their mortgage bond, against the insolvent estate.

Held, that the District Court could not set aside its own order previously permitting the proof of the mortgagees' claim.

Held also, that by section 109 of the *Insolvency Ordinance* the act of proving a debt which is the subject of a suit is a relinquishment of that suit, and that appellants were rightly allowed to prove for their balance debt.

Held also, that in equity a creditor, who proves after a dividend has been made, is entitled to be put on the same footing as the creditors who have already received the previous dividends, [provided he does not disturb any dividend already paid].

Ex parte Stiles (1 Atk. 108) and *Re Wheeler* (1 Sch. and Lef. 242) followed.

D. C. Ins. Kandy, 886. *Re Chamberlin, Ex parte Anderson*.. 318

See MORTGAGE, 1.

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Judge—*contd.*

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his own name against the defendant. Upon this new plaint the Court tried and convicted the defendant.

The Supreme Court, upon appeal by the defendant, quashed the proceedings, holding that the Magistrate, having indentified himself with the prosecutor, had rendered himself incapable of dealing with the case as a judge.

P. C. Batticaloa, 19,718. *Modder* v. *Muttukutty* 337

Judgment

Joint and several liability on judgment.

Where a judgment decreed that plaintiff should recover a sum specified from the defendants and out of the estate of an intestate person in their hands,

Held, that under this judgment the plaintiff might recover the whole amount from either defendant.

D. C. Kandy, 81,309. *De Silva* v. *Ranhamy*, 81

Judgment for admitted amount

See PRACTICE, 4.

Jurisdiction

1.—*Jurisdiction to give costs where the Court has no jurisdiction to try the action—Plea to the jurisdiction.*

Plaintiff sued the defendants for damages for breach of an agreement to marry. The defendants pleaded to the merits, justifying the breach. At the trial the Commissioner, holding he had no jurisdiction to try a matrimonial action, dismissed plaintiff's suit with costs.

Held, (without expressing any opinion as to the power of the Court in case the defendants had taken the plea to the jurisdiction) that, the plea not having been taken by the defendants but originated by the Court, costs were improperly decreed to the defendants.

Held also, that the proper order would have been that the suit do abate.

C. R. Balapitiya, 29,712. *Asaguru* v. *Jayetu Guru* 34

Jurisdiction—*contd.*

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2.—*Jurisdiction of Supreme Court over case in which accused have been committed for trial before it—Case not yet on Calendar.*

The two parties committed for trial in this case before the Supreme Court at Colombo on charges of theft, stellionatus, &c., moved the Court for a transfer of the prosecution to the current Session of the Court at Kandy, on the ground that the first defendant's medical advisers had directed him to leave the Island as soon as possible; and that the Colombo Session would delay his departure over two months.

Held, that, the Justice of the Peace being *functus officio*, the Supreme Court had jurisdiction to make the order asked for.

Held also, that sufficient cause had not been shown for making such order.

J. P. Colombo, 3,111. *The Queen* v. *Armitage.* 44

3.—*Jurisdiction of Police Court—Paddy Ordinance, No.* 14 *of* 1840, *sects.* 6 *and* 14—*Penalty of double value of Government share of crop—Queen's Advocate's certificate under Ordinance* 11 *of* 1868, *sect.* 99.

Section 14 of the *Paddy Ordinance*, 1840 enacts *inter alia* that any proprietor, who shall thresh the crop of his field liable to tax, without giving due notice to the headman, shall on conviction be fined to the amount of double the value of the share due to Government as tax.

The defendant, having been charged with a breach of section 14, was convicted and sentenced by the Police Court to pay a fine of Rs. 69, being double the value of the Government share.

Held, that in the absence of the Queen's Advocate's certificate contemplated by section 99 of the *Administration of Justice Ordinance*, 1868, the Police Court had not the jurisdiction to entertain the charge.

P. C. Chavagachcheri, 6,889. *Kanther* v. *Kovinlar.* 154

4.—*Jurisdiction—District Court or Court of Requests—Rs.* 100 *and interest—Practice in commercial matters—Costs—Proctor, status of, independent of client.*

An action to recover Rs. 100 and interest thereon must be brought in the District Court.

The Court will follow the English practice in commercial matters, and will not give interest

Jurisdiction—*contd.*

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on claims for goods sold and delivered, on account stated, and such like, unless a specific agreement to pay interest be shown.

Where a proctor has appeared in the case simply as proctor for the plaintiff, and has signed plaintiff's petition of appeal against an order directing plaintiff's proctor to pay the defendants' costs, such proctor has no status to appeal on his own account against that order.

D. C. Colombo, 85,440. *Ahamat* v. *Martinus*... 341

See CONTEMPT OF COURT.
— TRANSFER OF PROSECUTION.

Juris quasi possessio

See SERVITUDE.

Kandyan law

Kandyan law—Adoption for purposes of inheritance, requisites for—Marriage—Ordinance 6 *of* 1847, *sects.* 2 *and* 28—*Ordinance* 13 *of* 1859, *sect.* 35.

M. (a Kandyan Singhalese) and B. (a woman of European descent), professing Christianity, were in 1836 married according to the rites of that religion in Gampola. After 7th December 1849 (when the Ordinance 6 of 1847 was confirmed by Her Majesty by notice in the *Gazette*), B. being still alive, M. conducted as his wife M. M. (a Kandyan woman) according to Kandyan customs.

Held, that M.'s second marriage was invalid and bigamous, under Ordinance 6 of 1847, sect. 28.

The requisites for a Kandyan adoption, for purposes of inheritance, discussed. *D. C. Kandy* 53,309 (Grenier, 1873, p 117) approved.

D. C. Kandy, 89,562. *Karunaratne* v. *Andrewewe*. 285

Kandyan Provinces

See SERVITUDE.

Labour Ordinance

See MASTER AND SERVANT.

Landing charges

See CONSIGNEE.

Landlord and Tenant

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Landlord and tenant—Notice to quit—Increased rent for holding over.

Plaintiff as landlord gave notice on 20th February to the defendant his tenant to quit the plaintiff's house on 31st March, in default of which the plaintiff would charge the defendant rent at the rate of Rs. 50 instead of Rs. 31.50 per month for such time as the defendant should hold over. The defendant quitted the house on 15th or 18th April, and plaintiff brought this action to recover Rs. 50 as rent for April.

Held, that plaintiff was entitled to recover.

C. R. Colombo, 35,425. *Jacobs* v. *Ebert* ... 307

Lease

See LESSOR AND LESSEE.
— DONATION.

Lessor and Lessee

Practice—Lessor and Lessee—Action by lessee against trespasser—Joinder of lessor as defendant to warrant and defend title.

Plaintiff, a lessee who had been duly put in possession of the property leased, sued his lessor and two others, averring that second and third defendants had trespassed upon the property and forcibly appropriated certain goods of plaintiff's, and calling upon his lessor (the first defendant) to warrant and defend title, and, in failure, to pay plaintiff the rent advanced and the value of the goods appropriated by the trespassers. The trespassers having claimed and proved title to the property leased, first defendant was by the Court below decreed to repay the advance rent and cast in damages and costs.

Held (reversing the decision of the Court of Requests), that the first defendant had been improperly joined in the suit and was entitled to be absolved from the instance with costs.

D. C. Negombo, 7,744 (1 S. C. C. 54) approved *quoad hoc.*

C. R. Galle, 60,977. *De Silva* v. *Perera.* ... 234

Licence

See ARRACK.

Limitation

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Live and dead stock

Local Board

Local Board Bye-law—Ordinance No. 7 of 1876 *—Power to create criminal offences by passing bye-laws for purposes not specified in the Ordinance—* Ultra vires.

A Local Board established under Ordinance No. 7 of 1876 had passed a Bye-law making it an offence for any person after the 30th June of each year to keep a dog, for which the tax levied by the Board had not been paid, within the limits of the Board and without notice thereof to the Board. The Bye-law professed to have been made under section 35 of the Ordinance, and was published in the *Gazette* as having been approved by the Governor in Executive Council.

Held, that the bye-law in question did not fall under any of the eighteen purposes specified in section 35; and accordingly,

Held, that the bye-law was *ultra vires* of the Local Board.

P. C. Gampola, 3,477. *Ambrose* v. *Slema Lebbe* 95

Maintenance

Non-maintenance of illegitimate child—Plea of autrefois acquit.

Defendant on a charge of not maintaining his illegitimate child (in breach of subsect. 2 of sect. 3 of the *Vagrants Ordinance*, 1841) pleaded *autrefois acquit*, showing that he had in a previous case been acquitted on a charge tendered by complainant of not maintaining the same child.

Held, that though there was no special verdict on the point the previous case must be taken to have disposed of the question of paternity, which was of the essence of the charge.

Held also, that, the non-maintenance of illegitimate children being a criminal offence, the previous verdict rendered the matter now in issue *res adjudicata*, so that the special plea ought to have been sustained.

P. C. Colombo, 7,874. *Batchyhamy* v. *Pieris*... 93

Marriage

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See KANDYAN LAW.

Master and Servant

Ordinance No. 11 *of* 1865, *sect.* 11—"*Quitting service.*"

On a charge under sect. 11 of the *Labour Ordinance* of quitting service without notice or reasonable cause, the evidence showed that defendant was complainant's cook, having also to work in the bungalow, and that one evening, after preparing the dinner, he went away without leave (leaving his boxes behind) and returned the next morning.

Held, that these facts did not amount to a quitting of complainant's service within the meaning of the Ordinance.

P. C. Dimbula, 6,550. *Bell* v. *Dillo* 102

Maxim

Mobilia non habent sequelam.

See MORTGAGE, 5.

Merchant Shipping Act

See SHIP.

Merger

See MORTGAGE, 4.
— MORTGAGE, 9.

Minors, rights of

See ADMINISTRATION.
— HUSBAND AND WIFE.

Mistake

See CONDICTIO INDEBITI.

Money paid under mistake

See CONDICTIO INDEBITI.

Mortgage

PAGE

1.—*Equitable assignment of mortgage debt—Insolvency—'Order and disposition' of Insolvent—Trust.*

M., the owner of a coffee estate, mortgaged it to W. & Co. as security for funds supplied and to be supplied to him by W. & Co. for the working of the estate. W. & Co. subsequently, with notice to M., entered into an agreement with H. B. & Co. that the latter should advance to W. & Co. the monies necessary for them to keep their engagement with M., W. & Co. undertaking to hold the securities created by the mortgage bond as trustees for H. B. & Co. to the exteut of their advances to W. & Co. W. & Co. having become insolvent, their assignees (the defendants) claimed the sum due upon the bond (which had been deposited in the hands of a stakeholder) for the benefit of the general creditors as against H. B. & Co..

Held, that the agreement of W. & Co. with H. B. & Co. constituted an equitable assignment to the latter of the former's rights under the mortgage though the *indicia* of title had remained with W. & Co.

Held, that therefore the right of action on the mortgage (which had been a *chose in action* in the order and disposition of the insolvent) did not pass to the assignees for the benefit of the general creditors, and that H. B. & Co. were entitled to the sum deposited as due under the mortgage bond.

D. C. Colombo, 30. *Harvey, Brand & Co.* v. *Hedges*... 49

2.—*Purchase in executiou of land subject to mortgage—Subsequent purchase under the mortgagee's writ—Right of first purchaser to refund of purchase money.*

Plaintiff on money judgment obtained issued writ and caused the Fiscal to sell (subject to a mortgage in favor of C.) an undivided interest in land belonging to the defendants, which was purchased by the respondents. This sale was never confirmed by the Court. Subsequently C., having obtained a mere money judgment on his mortgage bond, caused the same property to be sold in execution and purchased it himself.

Held, that under the 53rd clause of the *Fiscals Ordinance*, 1867, confirmation by the Court was necessary only for those sales which had been impeached, and if no objection to the sale were

Mortgage—*contd.*

PAGE

lodged within 30 days it was confirmed *ipso facto*.

Held accordingly, that respondents were not under section 55 entitled to a refund of their purchase money.

D. C. Colombo, 77,900. *Perera* v. *Dias, Ex parte Jayesekere* 78

3.—*Mortgage, hypothecation and part assignment of, to mortgagee's creditor—Suit to enforce such mortgage against third party in possession of property mortgaged—Proof of debt due by party assigning.*

S., the owner of Grotto Estate, mortgaged it in 1875 to W. to secure a debt and future advances. In 1876 W. by deed acknowledged a debt due to plaintiff, and as security hypothecated to plaintiff W.'s mortgage on Grotto, giving plaintiff a Power of Attorney to sue on W.'s mortgage to recover such part of S.'s debt to W. as would cover W.'s debt to plaintiff. In 1878 S. sold Grotto to A. who re-sold to defendant. Plaintiff having in 1880 obtained judgment against W. and S. on the bond of 1876, declaring S.'s debt to W. executable *pro tanto* in satisfaction of that judgment, and declaring also the property mortgaged by S. to W. so executable, sought to sell Grotto in execution, and brought the present suit to set aside defendant's objection to such sale.

Held, that plaintiff's judgment against W. and S. did not bind the defendant, and that before she could seek to enforce S.'s mortgage to W., she was bound to establish as against the defendant that a debt was owing to her from W.; and this she had neither averred nor proved; and that plaintiff was therefere not entitled to the relief prayed against defendant.

D. C. Kandy, 88,445. [*Barry* v. *Allah Pitche*... 106

4.—*Mortgage—Mortgagee's remedy against third parties, transferees of mortgagor, in possession—Pleading—Continuance of Mortgage debt—Merger of mortgage in judgment—Registration—Priority.*

C. and P., on 6th January 1876, mortgaged three pieces of land to plaintiffs to secure a debt of Rs. 7,500. Plaintiffs, on 30th October 1879, obtained judgment on their mortgage and a mortgagee's decree. Plaintiffs sued out execution against the mortgaged property but found the defendants "in possession." The defendants had purchased the interest of C. in the mortgaged property at a sale in execution of a money

Mortgage—*contd.*

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decree obtained by plaintiffs, in another suit, after the date of the mortgage. Plaintiffs now, setting out the above facts, and averring that defendants "continued in possession objecting to the plaintiffs selling the said lands to satisfy the amount of the mortgage decree," prayed that the lands might be declared executable and liable to be sold under plaintiffs' writ in the mortgage suit.

Held, following *D. C. Matara* 29,149 (1 S. C. C. 80) that this disclosed a misconception of plaintiffs' remedy, which should have been to aver and establish, as against the mortgagors' transferees, the mortgage and the continuance of the debt, and to pray (not that the lands be declared saleable under a previous writ issued against the mortgagors, but) that the lands be declared simply executable and saleable as against the transferees.

As to continuance of the debt, the plaintiffs merely averred that they had obtained a judgment against the mortgagors. Defendants did not demur, but denied the mortgage. The mortgage was *primâ facie* established by the admission in evidence, by consent, of plaintiffs' mortgage deed.

Held, that there was no sufficient averment of the continuance of the debt; and defendants were absolved from the instance, but without costs.

D. C. Kandy, 87,172. *Sinnaiah Chetty* v. *Babanis*.. 213

5.—*Mortgage—Coffee estate—Mortgage of coffee crop with covenant to consign crop to mortgagee for curing, shipment and sale—Right of unsecured creditor to seize and sell such crop in execution —Preference and concurrence—Moveables, right of mortgagee to follow—Maxim,* Mobilia non habent sequelam.

On 1st October 1880 plaintiff obtained judgment on a cheque against the defendant, the owner of a coffee estate. On 2nd October defendant, by a deed which was registered within one week of its execution, "specially hypothecated, assigned and set over to the appellants, as a first charge free from all encumbrances," the crop of the estate for the season 1880-81, to secure certain advances to be made by appellants to defendant, undertaking to consign such crop to appellants for curing, shipment and sale, defendant to be credited with the net proceeds,

Mortgage—*contd.*

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Appellants made certain advances in pursuance of this arrangement. Plaintiff thereafter issued his writ, seized and sold part of the hypothecated crop.

Held, that appellants having a preferent right of hypothec over the coffee, had a right to prevent the plaintiff, who had no such hypothec, from selling such coffee in execution of his judgment.

The coffee having been sold under plaintiff's writ, and the proceeds deposited in Court:

Held, that, as long as the money remained in Court, the appellants as hypothecary creditors had a right to be paid thereout the amount of their advances in preference to the execution creditor or any others claiming concurrence with them.

D. C. Kandy, 86,520. *Ramen Chetty* v. *Hardie, Ex parte Whittall & Co.* 217

6.—*Mortgage—Mortgage effected after accrual of Crown debt—Right of Crown to "preference of payment"—Ordinance* 14 *of* 1843, *sect.* 5—*Sale of execution debtor's "interest"—Seizure, continuance of.*

In 1873 the first defendant was the owner of certain land. In November 1873, S. obtained judgment for a large sum of money against the first defendant. In July 1879 the Queen's Advocate obtained judgment against the first defendant for certain money due by him to Government upon his purchase of an arrack-rent. In December 1879 first defendant mortgaged his land to plaintiff. In 1876 S. seized the land in execution of his judgment, but did nothing further under his writ. In January 1881 the first defendant's interest in the land was sold by way of a joint levy under the writs of S. and the Crown, and was purchased by the second defendant. Plaintiff now sued the defendants on the mortgage contract, praying that the mortgagor's interest as it stood at the date of the mortgage might be declared specially executable for the debt.

Held, that the seizure of the land effected by S. in 1876 must be taken to have been abandoned by 1879 when the mortgage was created; and that the mortgage was therefore not affected by such seizure.

The Fiscal having, at the sale at which second defendant purchased, sold the execution debtor's interest in the land:

Held, that this sale passed only the debtor's

Mortgage—*contd.*

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Municipality of Kandy

See BYE-LAW.

Naming of defendants

See VAGRANT, 2.

Negligence

See PRINCIPAL AND SURETY, 2.

Ne luminibus officiatur

See SERVITUDE.

Non-joinder

See MORTGAGE, 8.

Notary's protocol of deed

See STAMP, 2.

Notice of action

See ASSESSMENT FOR POLICE TAX.

Notice of motion

See FISCAL, 8.

Notice to pay

See PREFERENCE AND CONCURRENCE, 1.

Notice to quit

See LANDLORD AND TENANT.

Oath or affirmation

See EVIDENCE, 1.
— EVIDENCE, 2.

Objection to assessment

See ASSESSMENT FOR POLICE TAX.
— CROWN.

Objection to execution sale

See FISCAL, 7.

Obstructing Court's business

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See JUDGE, 1.

Onus probandi

See BURDEN OF PROOF.

"Order and disposition"

See MORTGAGE, 1.

Order of payment

See PREFERENCE AND CONCURRENCE, 2.

Ordinance dealing with same subject as bye-law

See BYE-LAW.

Ordinances

No. 8 of 1834, sect. 2. *See* SERVITUDE.
No. 14 of 1840, sects. 6, 14. *See* JURISDICTION, 3.
No. 4 of 1841, sect. 3, subsect. 2. *See* MAINTENANCE.
————, sect. 4, subsect. 4. *See* VAGRANT, 2.
————, sect. 4, subsect. 6. *See* VAGRANT, 1.
No. 14 of 1843, sect. 5. *See* MORTGAGE, 6.
No. 10 of 1844, sects. 26, 65. *See* ARRACK.
No. 6 of 1847, sects. 2, 28. *See* KANDYAN LAW.
No. 5 of 1852, sect. 5. *See* SERVITUDE.
No. 19 of 1852 [repealed.] *See* STAMP, 2.
No. 7 of 1853, sect. 79. *See* INSOLVENCY, 3.
————, sects. 108, 109. *See* INSOLVENCY, 4.
————, sect. 152. *See* INSOLVENCY, 1.
No. 5 of 1857, sects. 12, 13. *See* COIN ORDINANCE.
No. 13 of 1859, sect. 35. *See* KANDYAN LAW.
No. 18 of 1861, sect. 13. *See* ASSAULT, 3.
No. 15 of 1862, sect. 16. *See* BYE-LAW.
No. 8 of 1863, sect. 39. *See* REGISTRATION.
No. 11 of 1865, sect. 11. *See* MASTER AND SERVANT.
No. 16 of 1865, sect. 49. *See* CROWN.
————, sect. 75. *See* ASSAULT, 3.
No. 17 of 1865. *See* BYE-LAW.
————, sects. 44, 52. *See* PREFERENCE AND CONCURRENCE, 1.
————, sect. 177. *See* ASSESSMENT FOR POLICE TAX.
No. 4 of 1867, sects. 5, 83. *See* FISCAL, 4.
————, sect. 21. *See* FISCAL, 5.
————, sect. 42. *See* REGISTRATION.
————, sect. 44. *See* FISCAL, 6.
————, sect. 48. *See* FISCAL, 2.
————, sect. 51. *See* FISCAL, 1.
————, ————. *See* FISCAL, 8.

Ordinances—*contd.*

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Original of deed

Paddy

Parate execution

Parties

Penalty

Plaint

Plaint, presentation of PAGE

See POLICE COURT.

Plea

See JURISDICTION, 1.
— MAINTENANCE.

Pleading

See MORTGAGE, 4.

Police Court

Police Court—Practice—Presentation of plaint by complainant in person—Proctor, right of, to appear before plaint entertained—Ordinance 18 *of* 1871, *section* 2.

A plaint in a Police Court must be presented to the Magistrate by the complainant in person, and not through a proctor, unless the Magistrate dispenses with the personal appearance of the complainant.

P. C. Haldummulla,——. *Govindai* v *Karpen* 339

See JURISDICTION, 3.

Policeman

See ASSAULT, 1, 3.

Police officer

See ASSAULT, 2, 3.

Police tax

See CROWN.

Possession

See POSSESSORY ACTION.
— SERVITUDE.

Possessory Action

Possessory action—Nature of the possession necessary—Ability of an agent, who has possessed in right of the dominus, *to maintain possessory action.*

M., the owner of two coffee estates, sold an undivided half share of them to B., who gave M. a mortgage for the purchase amount over the

Possessory Action—*contd.*

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property so sold on 2nd July 1876. M. died, leaving his brother the plaintiff (who was in England) his executor, and thereafter B. continued in the sole occupation and management of the estates. At B.'s request plaintiff came out to Ceylon, and took charge of the two estates in January 1880, and continued with B.'s consent in the sole occupation and management of them till September 1881, plaintiff himself finding all necessary funds for their upkeep. In July 1880 plaintiff raised such funds on a mortgage of M.'s half share, which (in August 1881) was sold in execution under the mortgage debt, and purchased by second defendant. In June 1881 plaintiff had again mortgaged M.'s half share to first defendant. In September 1881 plaintiff was deprived of his possession of the estates by T., who acted as the agent of the defendants and with B.'s knowledge and consent, to plaintiff's knowledge.

Held (*per* DE WET, A. C. J., and CLARENCE, J., *dissentiente* DIAS, J.) that, plaintiff's occupation of B.'s half share having been in the character of agent for B., the right to maintain a possessory action in respect of that share was B.'s and not plaintiff's.

Per DIAS, J.—Plaintiff, having been in possession of an undivided half share of the estates for a year and a day, when he was forcibly dispossessed, was entitled to be restored to possession, and to recover damages for the forcible dispossession.

D. C. Kandy, 89,797. *MacCarogher* v. *Baker*... 253

Power of judge

See JUDGE, 1.

Practice

1.—*District Court reserving judgment—Delivery by Judge in open Court—Ordinance* 11 *of* 1868, *section* 75.

The District Court, after the trial of this case on 25th January 1881, reserved judgment. The judge, having been removed to another station, sent his judgment in the case to his successor, who caused it to be read in Court by an officer of the Court as the judgment in the case, on 27th September 1881.

Held, that this could not be regarded as the

Practice—*contd.*

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judgment of the District Court within the meaning of Ordinance No. 11 of 1868.

D. C. Ratnapura, 1,828. *Sumangala* v. *Piadassa* 6

2.—*Practice—Appeal to the Privy Council—Ord.* 11 *of* 1868, *sect.* 52, *subsects.* 3 *and* 11.

The Supreme Court delivered a judgment in this case on 22nd November 1881, which did not pass the seal of the Court till 28th March 1882. Appellant (the plaintiff) filed his petition of appeal on 8th April, and tendered his bond for security in appeal (the acceptance of which was unopposed) on 7th July, 1882.

Held, that the 14 days within which (under subsect. 3) the petition of appeal had to be filed were to be reckoned from the date of the judgment sought to be appealed against passing the seal of the Court, and not from the date of its delivery in Court; and that therefore the petition was filed in time.

Held also, that the bond for security in appeal had been tendered within the three months of filing the petition of appeal, and was therefore in time.

D. C. Kegalla, 4,026. *Cassim Lebbe* v. *Downall* 16

3.—*Second action for same subject-matter—Staying proceedings in, till payment of costs of former action.*

Plaintiff brought an action to recover from the three present defendants possession of a vihara and its endowments, and obtained judgment, which was reversed in Appeal by the Supreme Court, and his suit dismissed. Plaintiff then commenced the present action for the same subject-matter and declaring on the same cause of action, though tracing his title somewhat differently from the previous suit.

Held, following *Thomas* v. *Braine* (reported 3 S.C.C. 149), that the District Court has a discretionary power to stay proceedings in a second action till payment of the costs of the former action by the unsuccessful plaintiff.

Held also, that that discretion had been rightly exercised in the present case in making the order staying further proceedings.

D. C. Kandy, 90,099. *Dhammajoti* v. *Paranatala* 25

Practice—*contd.*

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4.—*Admission—Mortgage—Interim judgment for amount admitted—Sale of mortgaged property to satisfy part of mortgage debt.*

Plaintiff sued to recover Rs. 1181.25 as principal and interest due upon a mortgage bond. Defendant admitting the bond impugned it as invalid for stipulating for usurious interest, and set out several different transactions, out of which in connection with the bond he admitted Rs. 283.52 to be due to the plaintiff. Plaintiff applied by *Rule Nisi* to have judgment entered up in his favour for the sum admitted, which rule was discharged.

Held, that the answer did not contain such an absolute admission of part of plaintiff's claim as entitled him to judgment therefor.

Held also, that plaintiff could not have a mortgagee's decree declaring the mortgaged land specially executable, enforceable piecemeal; but, if anything, only a judgment for a mere sum of money.

D. C. Colombo, 87,285. *Aserappa* v. *De Zoysa* 74

See CLUB, 2.
— CONTEMPT OF COURT.
— HUSBAND AND WIFE, 1.
— JURISDICTION, 1.
— JURISDICTION, 4.
— LESSOR AND LESSEE.
— POLICE COURT.

Preference and Concurrence

1.—*Preference and concurrence—Fund in hands of third party, "fixed" by notice to pay creditor—Debt due by Municipality—Notice to Secretary—Ordinance* 17 *of* 1865, *sects.* 52 *and* 44.

Plaintiff, and A. and W. had each obtained judgment against the present defendant. The Municipality of Galle owed defendant a debt. On 24th July, the defendant, by word of mouth and by written notice, requested the Secretary of the Municipality to pay his debt to A. The debt not having been paid owing to the absence of the Chairman of the Municipality, the plaintiff (on 26th July) and W. (on the 27th) attached the debt under their respective judgments. Plaintiff having obtained a rule on A. and W. to show cause against the money being applied, solely or in concurrence, to the satisfaction of plaintiff's

Preference and Concurrence—*contd.*

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judgment, the District Judge discharged it with costs.

Held, that the notice to the Municipality had been rightly served on the Secretary; that the fund had thereby been "fixed" as the property of A.; and the plaintiff had shown no right to it.

D. C. Galle, 48,336. *De Silva* v. *Hendrick* ... 315

2.—*Preference and concurrence—Fund in Court—Order of payment—Property passing to payee—Fund "fixed."*

Claims of preference or concurrence in the proceeds of a levy can be brought forward so long as the money remains in Court, and no longer.

Plaintiff levied a sum of money on a mortgagee's decree founded on a special mortgage of his defendant's property, and on 12th October 1882 obtained an order of payment in his favour for the amount of the levy. The Government Agent refused to pay the proceeds to plaintiff, on the ground that the Crown had a preferent claim to them in virtue of a debt due by defendant to the Crown. On 19th March 1883, and subsequently, the Queen's Advocate moved for, and on 25th July obtained, an order for the payment of the money.

Held, that the Queen's Advocate's claim to preference had been wrongly entertained, as the money must be regarded as having got home to the plaintiff at the date of the order of payment to him, and as being no longer in Court.

D. C. Colombo, 86,619. *Ramen Chetty* v. *Silva, Ex parte the Queen's Advocate* 329

See MORTGAGE, 5.
— MORTGAGE, 6.

Prescription

See BOND, 1.
— FISCAL, 5.
— PROSECUTION.
— SERVITUDE.

Presence of complainant at trial

See ASSAULT, 3.

Principal and Surety

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1.—*Cession of Action—Surety paying off debt—Cession necessary for surety to reach immoveables mortgaged.*

Plaintiff (a surety), bringing the amount of the debt into Court, prayed in a previous suit that the defendant, the creditor, be decreed to accept the money and hand over to plaintiff the deeds hypothecated. Defendant drew the money out of Court. Plaintiff's *Rule Nisi* calling upon defendant to execute in his favour a cession of action, having been discharged on the ground that his libel was defective, plaintiff brought the present action to compel defendant to cede to him his right of action against the principal debtor.

Held, that plaintiff must be taken to have deposited the money conditionally on defendant's executing a cession of action.

Held also, that though the plaintiff could recover the mere money debt from the defendant without such cession, it was equitable that plaintiff should be given recourse to the mortgage security, which he could not reach (being land) without such cession in writing.

Held also, that cession, [if not made the condition of the payment], must be claimed within a reasonable time after payment.

D. C. Kalutara, 36,176. *Hendrick* v. *Frederick*

2.—*Principal and Surety—Continuing guarantee. revocation of, by death of guarantor—Liability of guarantor's heirs—Negligence of principal obligor's employer.*

The first defendant as principal, and the three other defendants as his sureties, were the obligors upon a bond conditioned for the due accounting by first defendant to the Crown for all moneys received by him in the performance of his office. The Crown now sued the first defendant and the heirs of the sureties to recover an amount unaccounted for, being sums received by the first defendant for the four years 1878-81.

Answer: 1st that no debt was due by the principal. The Court below found there was.

2nd, that the sureties had died before the defaults relied upon had been committed by the principal.

Held bad for not averring notice of such death to the obligee; also not established by proof of such notice.

3rd, that the gross negligence of the obligee, in continuing for four years the principal's employ-

Principal and Surety—*contd.*

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ment, when he had failed to account for the receipts of the first year, relieved the sureties from liability.

It appearing that the sum unaccounted for, for the first year, was Rs. 3.66,

Held, that the defence was not sustained.

D. C. Kandy, 89,110. *The Queen's Advocate* v. *Loku Banda* 331

Priority

See MORTGAGE, 4.
— REGISTRATION.

Privy Council

See PRACTICE, 2.

Proctor

See CREASY.
— JURISDICTION, 4.
— POLICE COURT.

Promissory note

See STAMP, 1.

Proof of claims

See INSOLVENCY, 4.

Property mortgaged, third party in possession of

See MORTGAGE, 3.

Property sold other than debtor's

See FISCAL, 1.

Prosecution

Prosecution, commencement of—Timber Ordinance, No. 6 of 1878—Limitation of prosecution —Sentence.

The defendant was on 7th November 1879 charged before a Justice of the Peace with a breach of the *Timber Ordinance*, 1878, committed on 16th January 1879. After evidence taken, the case was on 5th April 1880 laid over *sine die*. Summons was re-issued on defendant in June 1882, and after further proceedings defendant was on 21st September committed for trial, and

Prosecution—*contd.*

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was arraigned and tried on 2nd November 1882. He was found guilty and fined Rs. 100.

Held, that the prosecution did not commence upon the presentment of the indictment at the trial, but must be regarded as having been on foot at the date of the committal for trial.

As the charge on which the defendant had been committed and been tried was not *dehors* the charge contained in the original information,

Held, that the prosecution commenced when the defendant appeared to the summons, and that therefore it had been begun within the period limited by section 16 of the *Timber Ordinance*, 1878.

It appearing that the defendant had committed the offence in the *bonâ fide* belief of ownership, and that he had been cast in damages in a civil suit for the land concerned,

Held, that the fine of Rs. 100 was excessive, and ought to have been merely nominal.

D. C. Cr. Galle, 11,075. *The Queen* v. *Perera*. 129

See TRANSFER OF PROSECUTION.

Prosecution at instance of the Court

See JUDGE, 2.

Publicum stabulum

See CATTLE TRESPASS.

Purchase in execution

See MORTGAGE, 2.
— MORTGAGE, 9.

Putting cases in evidence

See CONDICTIO INDEBITI.

Queen's Advocate

See JURISDICTION, 3.

Quitting service

See MASTER AND SERVANT.

Rating Enactment

See CROWN.

Refund of purchase-money

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See MORTGAGE, 2.

Registration

Registration—Priority—Ordinance 8 of 1863, section 39—Conflicting sales by the Fiscal of the same land—Fraud—Mortgage created pending seizure—Ordinance 4 of 1867, section 42.

The defendant, on 14th September 1880, bought a piece of land at a sale in execution of a money judgment recovered by him against S., and obtained a conveyance from the Fiscal on 21st February 1882, which was registered on 11th March following. Pending seizure under defendant's writ, S. mortgaged the land to plaintiff. Plaintiff put this bond in suit on 3rd December 1880, obtained a simple money judgment on it, had the land sold in execution on 17th February 1881, and purchased it himself. Plaintiff obtained his conveyance from the Fiscal on 24th February 1882, and registered it on the 27th. Plaintiff now sought to be quieted in possession against defendant, who set up her own title.

Held, that though plaintiff's mortgage was invalid by the operation of section 42 of the *Fiscals Ordinance*, yet his money judgment was not affected thereby.

Held also, that in the absence of any proof of fraud, plaintiff's conveyance prevailed, by virtue of section 39 of Ordinance 8 of 1863, and he was entitled to the decree prayed for.

D. C. Negombo, 12,730. *Silva* v. *Sarah Hamy* 383

See MORTGAGE, 4.
— SHIP.

Regulation 13 of 1822

See SERVITUDE.

Rent

See LANDLORD AND TENANT.

Rescission of order

See INSOLVENCY, 4.

Resistance

See ASSAULT.

Servitude

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Servitude ne luminibus officiatur—*Acquisition by prescriptive possession*—Juris quasi possessio—*Ten years' uninterrupted enjoyment*—*Ordinance* 8 *of* 1834, *sect.* 2—*Ordinance* 22 *of* 1871, *sect.* 3—*Kandyan Provinces, law in force in*—*Regulation* 13 *of* 1822—*Ordinance* 5 *of* 1852, *sect.* 5.

Plaintiff and defendant owned adjoining lands. Plaintiff's house stood close to the boundary, and his sitting-room and bed-room had windows looking out on defendant's land, through which plaintiff had for over ten years uninterruptedly enjoyed light and air. Defendant began to build on her own land so as to exclude such light and air from plaintiff's windows, and plaintiff sought an injunction to restrain her from so doing.

Held, that the servitude claimed by the plaintiff (*ne luminibus officiatur*), being a negative servitude, could not, under the Roman Dutch Law, be acquired by prescription in virtue of bare enjoyment for the necessary period, such enjoyment involving no invasion of the neighbour's *dominium*.

The Regulation 13 of 1822 repealed "all laws heretofore enacted or customs existing" in the maritime districts of the Island "with respect to the acquiring of rights or the barring of civil actions by prescription"; and this repeal was kept alive by the subsequent Ordinances, 8 of 1834 and 22 of 1871. Ordinance 5 of 1852, sect. 5, provided that, on a *casus omissus* arising in the Kandyan Provinces, resort should be had to the law on the subject in force in the maritime provinces.

Held, that consequently the Roman Dutch Law on the subject of prescription was in effect repealed for the Kandyan Country also.

There being no local Kandyan law on the subject of prescription, and the case therefore falling under Ordinance 8 of 1834 or Ordinance 22 of 1871,

Held, (following *C. R. Point Pedro* 41), that ten years' enjoyment of the use, convenience or advantage, which would be enjoyed by the owner of the dominant tenement if there were a servitude in existence, brings the corresponding servitude into existence, by virtue of sect. 2 of Ordinance 8 of 1834 (corresponding to sect. 3 of Ordinance 22 of 1871); and that the plaintiff, having had the uninterrupted enjoyment (without express permission or licence) of these window-lights, deriving light from defendant's land,

Servitude—*contd.*

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was entitled to have the defendant restrained by perpetual injunction from building so as to obscure them.

C. R. Point Pedro 41 (Ram. 1860-62, 75) dissented from by CLARENCE, J.

D. C. Kandy, 89,917. *Neate* v. *De Abrew*.. ... 188

Setting aside Fiscal's sale

See FISCAL, 3.
— FISCAL, 7.

Ship

British Ship—Registration—17 *and* 18 *Vict. c.* 104, *s.* 107—*Fraudulent Registration.*

Plaintiff sued to have a declaration of title to one-half of a dhoney, of which defendants were in the unlawful possession, the first defendant being entitled to the other half. The Court below found that the defendants had repaired the dhoney and fraudulently had it registered as their exclusive property under a different name.

Held, that plaintiff was not shut out by the registration from showing her title, notwithstanding that she had taken no steps to have her own title registered in accordance with the *Merchant Shipping Act*, 1854.

D. C. Kalutara, 35,733. *Ana* v. *Vissenty Naide* 21

Stamp

1.—*Stamp, cancellation of, under sect.* 9 *of Ord.* 23 *of* 1871—*Adoption by maker of promissory note of Stamp-vendor's date on stamp—Completed note handed by maker to payee—Estoppel.*

Plaintiff as payee sued the maker of a promissory note dated 21st April 1879, which defendant impugned as a forgery. The stamp on the note was affixed at the left-hand top corner of the paper and had the maker's name written across it. It bore also some illegible initials and under them the date 21-4-79 apparently put by the stamp-vendor. The Court below after evidence called for the plaintiff held the note not duly stamped and nonsuited the plaintiff.

Held (following D. C. Colombo 63,498, *Civ. min. of S.C.*, 13th July 1875) that, the stamp-vendor's date on the stamp being even with the date of execution of the instrument, the maker must be taken in cancelling the stamp with his

Stamp—*contd.*

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signature to have adopted the date already on the stamp as his date of cancellation, and that therefore the stamp was duly cancelled as required by section 9 of the Stamp Ordinance, and consequently the note was duly stamped.

Semble, that if the maker had tendered to the payee the note in question as a note duly stamped and signed by himself—the appearance of the note itself being consistent with its being such—the Court would accept the note as duly stamped, until defendant showed the contrary, subject to any question of estoppel.

C. R. Colombo, 30,492. *Cannen Assary* v. *Arunasalem Assary* 41

2.—*Stamp—Deficiency of stamp—Stamping at trial on payment of penalty—"Original," "Duplicate," "Notary's Protocol"—Evidence—Ordinance* 19 *of* 1852.—*Ordinance* 23 *of* 1871, *sects.* 36, 39 *and* 40.

The value of the stamps to be affixed to an instrument must be determined by the law in force at the date of the instrument. But when an instrument, upon its tender in evidence, is held to be insufficiently stamped, the procedure for stamping it at the trial, and the amount of penalty payable, must be determined by the stamp law in force at the time of such tender.

When a notarial instrument has been executed in three copies (called respectively the "Original," "Duplicate," and "Notary's Protocol"), neither of these copies is receivable in evidence unless and until the proper stamp duty has been paid upon each and every copy.

D. C. Chilaw, 23,482. *Perera* v. *Wijesinghe*... 263

Stamping at trial

See STAMP, 2.

Stamp-vendor's date

See STAMP, 1.

Statement of objections

See FISCAL, 7.

Stay of proceedings

See PRACTICE, 3.

Stock, live and dead

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See MORTGAGE, 7.

Succession

See INHERITANCE.

Summary proceedings

See FISCAL, 7.
— INSOLVENCY, 2.

Surety

See PRINCIPAL AND SURETY.

Surrender of property to insolvent

See INSOLVENCY, 3.

Surviving spouse

See ADMINISTRATION.
— HUSBAND AND WIFE.

Territorial jurisdiction

See CONTEMPT OF COURT.
— TRANSFER OF PROSECUTION.

Theft

Theft—Animus furandi—*Debt due to defendant*

Defendant was charged with the theft of certain jewels and a sum of Rs. 17. The evidence showed that the property had been taken from the dead body of a woman who at the time of her death was defendant's debtor on a promissory note. Defendant had also taken the jewels in the presence of neighbours, to whom he had declared that he took them as security till his debt should be paid.

Held, that this evidence disclosed an absence of the *animus furandi*, and that defendant was entitled to be acquitted on the charge of theft.

D. C. Cr. Kurunegala, 2,036. *Kadirawail* v. *Kader Meedin*.... 103

Third parties in possession of mortgaged property

See MORTGAGE, 3.
— MORTGAGE, 4.
— MORTGAGE, 8.

Threatening bodily harm

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See ASSAULT, 2.

Timber Ordinance

See PROSECUTION.

Title

Title to land—Donor conveying without title, but subsequently acquiring title—Voluntary conveyance.

S., being owner of one half *plus* one-fifth of a certain land, conveyed the whole land by way of gift to plaintiff, his son-in-law, on 25th January 1872. S. acquired title to the remainder soon afterwards. Plaintiff now alleged an ouster from possession by defendants, the widow and certain children of S.

Held, that plaintiff was entitled to judgment for whatever S. owned at the date of his conveyance to plaintiff, but that, that conveyance being a merely voluntary one, the title subsequently acquired by S. did not pass to plaintiff thereunder.

It appearing that S. was by arrangement allowed to possess the subject matter of the gift until his death,

Held, that fourth defendant, who was a lessee for an unexpired term under S., was entitled to be absolved from the instance, plaintiff having left it in the power of S. to deal with the property.

D. C. Matara, 31,034. *Mathes* v. *Punchyhamy* 122

Toll

Toll—Ordinance No. 14 *of* 1867, *sections* 17, 18 *—Evasion of toll—"One mile from the ferry."*

Section 18 of the *Toll Ordinance*, 1867 enacts that "if any person, not being a duly appointed toll-keeper, shall convey any goods, ... or any passenger not in his service, across any river or stream.....either at or within a distance of one mile above or below any road, bridge, ferry, canal, or place at which tolls shall be leviable such person shall be guilty of an offence."

Held, that the intention of the Ordinance seemed to be to mark out a belt of two miles of water, one mile on each side of the ferry, within

Toll—*contd.*

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which two miles no person is to cross from one bank to the other except by the ferry.

One of the toll-houses in the present case was situated at the end of a causeway projecting from the mainland into the sea, the other being on an island opposite. The defendant's boat, starting at a point half a mile from the root of the causeway, passed between the toll-houses, and landed its cargo on the island at a point two miles from the toll-house on the island.

Held, that defendant had not committed a breach of section 18.

Semble, that if the landing place had been within the mile, the defendant would have been liable, notwithstanding that his starting-place at the root of the causeway was more than a mile distant from the toll-house at the end of the causeway, but within the two-mile belt.

P. C. Mannar, 5,785. *Saverimutto* v. *Bastian* 271

Transfer of prosecution

Transfer of Prosecution by Supreme Court—Ord. No. 11 *of* 1868, *sects.* 22 *and* 119—*Ord. No.* 7 *of* 1874, *sect.* 1—"*Try.*"

Upon a transfer of a prosecution by the Supreme Court from the District Court of Negombo to that of Colombo after information filed in the former court by its Secretary, the District Judge of Colombo quashed another indictment for the same offence tendered by the Deputy Queen's Advocate, holding that the accused should be tried, if at all, on the information originally filed in the Negombo Court, and holding also that under sect. 1 of Ord. No. 7 of 1874 he had power only to *try*, and not to *hear and determine*, any prosecution before him by virtue of that section.

Held, that the order quashing the indictment was wrong, and that the Queen's Advocate could prosecute either on the original information or on any other he chose to tender.

Held also, that the word "try" in sect. 1 of the Ord. of 1874 must be construed as giving the District Court power also to hear and determine the matter of any prosecution before it by the Queen's Advocate.

D. C. Cr. Negombo, 537 } *The Queen* v. *Herat*
D. C. Cr. Colombo, 356 } *Singho* 67

See JURISDICTION, 2.

Trespasser

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See LESSOR AND LESSEE.

Trial

See ASSAULT, 3.

Trust

See MORTGAGE, 1.

Ultra vires

See LOCAL BOARD.

Uncertainty of conviction

See VAGRANT, 2.

Unlawful consideration

See CONSIDERATION.

Unlawful purpose

See VAGRANT, 1.

Unsecured creditors, rights of

See MORTGAGE, 5.

Vagrant

1.—*Vagrants Ordinance*, 4 *of* 1841, *sect.* 4, *subsect.* 6—*Found in house for unlawful purpose—Fornication.*

The purpose of committing secret fornication is not an "unlawful purpose" within the meaning of subsect. 6 of sect. 4 of the *Vagrants Ordinance*, 1841.

P. C. Chilaw, 14,398. *Modder* v. *Thomis* ... 237

2.—*Vagrants Ordinance*, 4 *of* 1841, *sect.* 4, *subsect.* 4—*Gaming—Alternative charges—Naming of defendants in plaint—Conviction, uncertainty of—Accomplice, evidence of.*

Plaint—That in breach of the 4th section of the 4th clause of the Ordinance No. 4 of 1841 the 1st 2nd 3rd 4th 5th 6th 7th 8th 9th and 10th did game, play or bet with dice on the night of the 26th January instant at Timbirigascotua in a shed kept or used by 1st defendant for common and promiscuous gaming.

Vagrant—*contd.*

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Upon appeal against a general verdict of "guilty,"

Held, that the conviction was bad for uncertainty, and (there being nothing on the record by which it could be amended) must be quashed.

Observations on the form of plaints, and on the evidence of accomplices.

P. C. Negombo, 51,383. *Silva* v. *Silva*. ... 281

Vectigalia

See CROWN.

Voluntary donation

See DONATION.
— TITLE.

Warrant and defend title

See LESSOR AND LESSEE.

Warrant of arrest

See ASSAULT, 2.

Wharf and Warehouse Company

See CONSIGNEE.

Witness

See EVIDENCE, 1.
— EVIDENCE, 2.