THE

APPEAL COURT REPORTS,

EDITED BY

A. L. DE WITT & G. E. G. WEERESINGHE,

PROCTORS.

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1907.

JUDGES OF THE SUPREME COURT.

(*July—December, 1907.*)

Chief Justice:

THE HON'BLE SIR JOSEPH TURNER HUTCHINSON, KT.

Puisne Justices:

THE HON'BLE MR. HENRY LORENZ WENDT.

" " JOHN PAGE MIDDLETON.

" " ALEXANDER WOOD RENTON.

" " JOSEPH RICHARD GRENIER (*Acting*).

LAW OFFICERS OF THE CROWN.

Attorney-General:

THE HON'BLE MR. ALFRED GEORGE LASCELLES, K.C.

" " JAMES CECIL WALTER PEREIRA, K.C. (*Acting*).

Solicitor-General:

MR. JAMES CECIL WALTER PEREIRA, K.C.

" HERMAN LOOS (*Acting*).

" BENJAMIN WILLIAM BAWA (*Acting*).

ERRATA.

On page	2	line	36	for "*Silva*" read "*Singho*"
,, ,,	3	,,	37	for "*Sinnetamby*" read "*Tambayah*"
,, ,,	17	,,	12	for "or" read "of"
,, ,,	,,	,,	22	for "*Materie*" read "*Materia*"
,, ,,	24	,,	3	for "constructed" read "construed"
,, ,,	25	,,	3	for "6" read "5"
,, ,,	50	,,	23	for "moveables" read "immoveables"
,, ,,	61	,,	3	after "S. C. C." read "205"
,, ,,	91	,,	8	for "testator" read "executor"
,, ,,	,,	,,	14	after "had" read "been"
,, ,,	,,	,,	17	for "was" read "were"
,, ,,	,,	,,	34	for "Bowbey" read "Bowley"
,, ,,	104	,,	1	for "agreed" read "argued"
,, ,,	107	,,	31	for "40" read "48"
,, ,,	144	,,	31	for "v" read "r"

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THE KING *vs.* VEDA.

No. 1,343, D. C. (Cr.) KEGALLE.

Present: MIDDLETON, J.

ARGUMENT: *4th June*, 1907.

JUDGMENT: *5th June*, 1907.

Autre fois acquit—*Withdrawal of indictment under sec.* 202, *Criminal Procedure Code—Recommittal—Criminal Procedure Code, secs.* 185, 191, 252, *&* 225.

The word "discharge" in sec. 202 of the Criminal Procedure Code is used in its ordinary sense, and does not import an acquittal.

A discharge by a District Judge under sec. 202 does not bar the right to a renewed enquiry or recommitment.

In this case the accused was, on the 20th December, 1906, discharged by the District Judge on the indictment against him being withdrawn on the motion of the Crown Proctor, under section 202 of the Criminal Procedure Code. Subsequently fresh proceedings were taken, and the accused indicted before the District Judge on the same charge, the indictment having been duly amended. Counsel for the accused raised the plea of *autre fois acquit*, and the District Judge upheld the objection and acquitted the accused. The Attorney-General appealed.

Walter Pereira, K.C., S.-G., for appellant:—The District Judge was wrong in upholding the plea of *autre fois acquit*. The discharge of the accused under sec. 202 does not amount to an acquittal. (*Vide* definition of "discharge",

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sec. 3.) The authority on which the District Judge acted [*Ukkurala* v. *David Silva* (1 N. L. R. 339)] has no application to a case of this kind. The District Court cannot go behind the indictment presented by the Attorney-General and question the validity of the proceedings on which it is based.

Queen v. *Kolendaval* (1 S. C. R. 198).
King v. *Haramanis* (8 N. L. R. 139).

A. St. V. Jayawardene for accused-respondent:—The discharge of the accused under sec. 202 bars further proceedings in the same case. It may be the discharge is no answer to a fresh charge in a different proceeding; but no fresh preceedings have been taken in this case, and a recommittal on the old proceedings is bad. A discharge under sec. 202 has at least the effect of a discharge under sec. 191, and it has been held that a discharge under the later section is a bar to a continuation of further proceedings (in *re Vellavarayan*, 7 N. L. R. 116; *Eliatamby* v. *Sinnatamby*, 2 Bal. 20). When a discharge is not to bar further proceedings the Code expressly so provides (*vide* sec. 157, Criminal Procedure Code, and *c.f.* secs. 156 and 158 of the Criminal Procedure Code). In the present case evidence was gone into, and the accused was placed in jeopardy of his liberty, and it is not proper that he should be tried again for the same offence. The principle laid down in *Qucen* v. *Kolendaval* (1 S. C. R. 198) and *King* v. *Haramanis* (8 N. L. R. 139) has no application where the plea raised is one of *autre fois acquit*. The order of discharge should have been an order of acquittal, and amounts to an order of acquittal.

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JUDGMENT.

MIDDLETON, J.—The Attorney-General appeals against an order of the District Court acquitting the accused, the District Judge puporting to follow a ruling of Withers, J., in *Ukkurala* v. *David Silva*, 1 N. L. R. p. 339. I agree with the learned Attorney-General that that case has no application to this case, as in that case, which was under sec. 228 of Ordinance No. 22 of 1890, now re-enacted by sec. 194 of the Criminal Procedure Code, the Magistrate ordered

the discharge of the accused where the law required him to acquit him.

In the present case, on the 20th December, 1906, owing to a document required for the prosecution not having been noted on the indictment, objection was taken to its being used in evidence; and the objection being upheld, the Crown Proctor applied under sec. 202 of the Criminal Procedure Code to withdraw the indictment.

The Judge permitted this to be done, and discharged the accused.

Subsequently it would appear fresh proceedings were taken on the indictment duly completed by the insertion of the name of the required document in the list of the productions, and it was with the accused brought before the District Judge again, presumably the Attorney-General having directed the accused to be re-committed, and filed either an amended or new indictment.

The Counsel for the accused thereupon raised the plea of *autre fois acquit*, which the District Judge held good and acquitted the accused; while his Counsel before me has relied to some extent on the same ground, but in addition urges that the re-committal of the accused was irregular, and called my attention to secs. 185, 191, 250, and 252 of the Criminal Procedure Code, and to 7 N. L. R. p. 116.

I think it is clear the word "discharged" in sec. 202, looking at sec. 3 of the Code, is used in its ordinary sense, and does not import an acquittal. The principle involved is, that no man ought to be twice brought into danger for the same crime. The withdrawal of the indictment removes the foundation on which the trial must be based, and takes the accused out of the jeopardy involved in the trial thereon. The District Judge could not try him without the indictment, and has not tried him, and, therefore, has not acquitted him, and he was not, therefore, brought into danger on the 20th December, 1906. A discharge under sec. 191 may, as Pereira, A.P.J., holds in *Eliyatamby* v. *Sinnetamby*, 2 Balasingham 22, operate under secs. 151 (1), 194, and 195; or if fresh proceedings are taken on the same charge, be supported on an acquittal by plea of *autre fois acquit*, as was held in 7 N. L. R. p. 116; but a discharge

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under section 202 in my opinion is in no sense an acquittal, as there is no danger of conviction when the indictment is withdrawn; and the Judge's duty is not to acquit, but to discharge. In my judgment also sec. 185 will not apply to cases of this kind, but only to the special circumstances embodied in that section. The ruling of Chief Justice Burnside in *Queen* v. *Kolendaval*, 1 S. C. R. p. 198, and that of Chief Justice Layard in *King* v. *Haramanis*, 8 N. L. R. p. 139, seem to me to support the view contended for by the learned Solicitor-General, that the District Judge in the presence of an indictment good on the face of it, and supported by the commitment by the Attorney-General, has no jurisdiction to enquire into the validity of the commitment.

In all non-summary cases where an accused has been discharged he is liable to re-arrest for further enquiry and commitment, and a discharge by a District Judge under sec. 202 does not appear to bar the right to renewed enquiry or recommitment. I must confess that I do not suppose the authors of the Criminal Procedure Code contemplated that sec. 202 would be used in the way adopted in the present case, for it seems to me that an amendment might have been made by the District Judge, and, if necessary, an adjournment given to the accused if it appeared that immediate trial after amendment would have prejudiced him, which I doubt. In my opinion the acquittal by the District Judge must be set aside, and the case sent back to him for trial in due course.

SADO *et al* *vs.* NONA BABA *et al.*

No. 8,108, D. C., Galle.

Argument: *20th & 29th May*, 1907.

Judgment: *7th June*, 1907.

Present: Wood-Renton, J., & Grenier, A.J.

*Misjoinder of parties—Causes of action—Husband's liability for wife's tort—*Onus *of plaintiff to prove* dolus malus*—Civil Procedure Code, secs.* 5 *&* 11.

Objections to misjoinder of parties and of causes of action should be taken in the Court of first instance.

Bullock v. *London and General Omnibus Company* (1 K. B. 264) followed.

A woman married after the matrimonial rights and inheritance Ordinance of 1876, who commits an injury without the complicity and participation of the husband, makes only her own estate liable for damages.

The plaintiff in a case of malicious prosecution cannot satisfy the *onus* on him of proving *dolus malus* by merely putting in the deposition in the criminal case.

Moss v. *Wilson* (8 N. L. R. 368) and *Corea* v. *Pieris* (9 N. L. R. 276) followed.

The plaintiffs in this action sued the defendants for the sum of Rs. 1,000 as damages suffered by reason of a false charge of mischief by fire preferred by the 1st defendant against the plaintiffs. The defendants pleaded that the said charge was true, and claimed the sum of Rs. 500 in reconvention. The District Court held that the charge was false, and made without reasonable and probable cause, and condemned the defendants to pay plaintiffs Rs. 200 each and costs. The defendants appealed.

H. J. C. Pereira for the defendants-appellant:—The action is wrongly constituted, inasmuch as two plaintiffs cannot join in the same action on two separate and distinct causes of action [see *Appuhami* v. *Marthelis Rosa* (9 N. L. R. 68), decided on the authority of *Sadler* v. *Great Western Railway Company* (1896) A. C. p. 450]. Sec. 11 of the Civil Procedure Code only allows them to join in respect of the *same cause of action*.

Moreover, the 2nd defendant, who is the husband of the 1st defendant, is not liable for his wife's tort (see Tambyah p. 31; Walter Pereira, vol. ii. p. 118).

On the facts there is no proof of *dolus malus*. Merely putting in the proceedings in the criminal case will not do: there must be a clear finding of malice against the defendant before he becomes liable for an action for malicious prosecution [see *Moss* v. *Wilson* (8 N. L. R. 368) and *Corea* v. *Pieris* (9 N. L. R. 276)].

de Sampayo, K.C., for the plaintiffs-respondent:—The authority of *Appuhamy* v. *Marthelis Rosa* is not disputed, but the objection should have been taken at the earliest possible opportunity (Civil Procedure Code, sec. 22). In this case

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the objection was taken only in the petition of appeal, and it is submitted that after judgment the objection comes too late [*Bullock* v. *London and General Omnibus Company* L. R. (1907) 1 K. B. p. 264]. As regards the 2nd defendant, the evidence shows that he conspired with his wife, the 1st defendant, to lay a false charge against the plaintiffs, and is therefore equally liable. Moreover, a husband is liable for his wife's torts [see Pereira's Institutes, vol. ii. p. 116]. As to *dolus malus*, the 1st defendant professed to have personally witnessed the commission of the alleged offence; and if that evidence was false, there is evidence of actual malice. A reckless charge, and much more an intentionally false charge, implies *dolus malus* (see de Villiers on Injuries, pp. 23 and 207).

H. J. C. Pereira in reply:—In the case of *Bullock* v. *London and General Omnibus Company*, a plaintiff sued two defendants in the alternative—a thing which is allowed under our Code (see sec. 14 of the Civil Procedure Code, and 1 Br. 256). It was in respect of one cause of action. It was held by the Court of King's Bench that one of the defendants, since he had failed to object at the trial, was too late in starting the plea of misjoinder for the first time at the hearing of the appeal. One can well understand that case: such a case is provided for under sec. 22 of the Civil Procedure Code. But the present one is entirely different. Here two plaintiffs join on two distinct and separate causes of action, which cannot be done at all under sec. 17 of the Civil Procedure Code. Such a joinder makes the whole case void: that is our law. Hence an objection founded on what our law does not allow can be taken at any moment. Under sec. 22 if this had been an action on *one cause of action*, the objection to the misjoinder of plaintiffs will be too late; but our contention is that any objection to a misjoinder of causes of action can be taken at any moment. As regards the liability of a husband for his wife's tort, the law is clear that since the Ordinance No. 15 of 1876 the husband is not liable (see de Villiers' Law of Injuries, pp. 48 and 49).

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JUDGMENT.

WOOD-RENTON, J.—This is an appeal from a decree

of the District Court of Galle condemning the appellants, who are husband and wife, to pay to the respondents a sum of Rs. 200 for false and malicious prosecution. Mr. H. J. C. Pereira impeached the judgment of the District Court on three grounds: (i.) that the action was wrongly constituted; (ii.) that, in any event, judgment ought not to have been entered against the 2nd appellant—who is the husband of the 1st—inasmuch as he was not shown to have been in any way a party to the charge preferred by his wife against the respondents; and (iii.) that the respondents had failed to establish *dolus malus* as defined, for the purpose of cases like the present, by the well settled jurisprudence of the Supreme Court.

I propose to deal with each of these points in turn.

(i.) And first, as to the constitution of the action. Mr. Pereira contended, on the strength of the decision in *Appuhami* v. *Marthelis Rosa* [(1906) 9 N. L. R. 68] following that of the House of Lords in *Sadler* v. *Great Western Railway Company* [(1896) A. C. 450] that the action was bad, inasmuch as the causes of action of the respondents were separate and distinct, and could not be joined under sec. 11 of the Civil Procedure Code. Speaking for myself, I think that the objection would have been a sound one if it had been taken in time. So long as the words "the right to any relief claimed" and "the same cause of action" in sec. 11, and the definition of "cause of action" in sec. 5 of the Civil Procedure Code remain unaltered, I do not think that litigants in this Colony can get the benefit of the English decisions, of which *The Universities of Oxford and Cambridge* v. *Gill* (1899), 1 Ch. 55, may be taken as an example, and which allow the joinder of parties who have "any right to relief" arising out of the same transaction or series of transactions. It was found necessary in England so as to clear the way of such a joinder to substitute, in R. S. C. Order 16, r. 1, for the words "the right to any relief" the new words "*any* right to relief". No such substitution has been effected in Ceylon. Moreover, sec. 11 of our Civil Procedure Code contains the limiting clause "in respect of the same cause of action", which did not appear in the old English Rule; in the new one we have the words "the same transaction or series of transactions", which, in view of the

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definition of the term in sec. 5 of the Civil Procedure Code, cannot be regarded as an equivalent for "cause of action" here. On these grounds, I think that we are still under the old dispensation of *Smurthwaite* v. *Hannay* (1894) A. C. and *Sadler* v. *Great Western Railway Company* (*ubi sup.*). In the present case, however, no objection to misjoinder was taken at the trial; and I think that, now that judgment has passed between the parties, we ought not to entertain it. The recent English case of *Bullock* v. *London General Omnibus Company* (1907) 1 K. B. 264 is an authority for this course. I cannot see that the ruling of the Court of Appeal on the point in any way depended on the special facts of the case. "If, in fact," said Collins, M. R. (*ubi sup.* at p. 270) "there was such a misjoinder, it was for the defendants to take steps to remedy it; and it is much too late to complain of the irregularity if there was one." Cozens-Hardy, L. J., and Farewell, L. J., express themselves in equally general terms. I think that the principle which they concur in affirming is sound, and that we should follow it here.

(ii.) I pass now to Mr. Pereira's second point. It is agreed that the parties were married after the Matrimonial Rights and Inheritance Ordinance, 1876 (No. 15 of 1876) came into operation; and it results, I think, from the evidence that the 2nd appellant in no way inspired or adopted his wife's charge against the respondents. He was not sued on that footing, and the record discloses no facts on which a judgment against him based on it could stand. The question, therefore, arises whether, and, if so, to what extent, a husband, married after the Ordinance of 1876, and married out of community, is liable for his wife's independent tort. In my opinion he incurs no liability at all. "When a woman," says Voet (47, tit. 10, sec. 3; De Villiers p. 49) "who is married out of community of property commits an injury without the complicity and participation of the husband, only her own estate will be liable for damages"; and see Nathan (*Common Law of South Africa* iii., sec. 1,547) to the same effect. It was, of course, proper that the husband should be made an added defendant in the action, but the judgment against him as a joint tort-feasor by implica-

tion of law is, in my opinion, bad; as regards him, the damages must be set aside and the appeal allowed.

(iii.) As regards the wife, I have come to the conclusion that the appeal should, on the merits, be dismissed. I do not agree with the view attributed by the learned District Judge to Burnside, C. J., that in cases of malicious prosecution "very slight evidence on the part of the plaintiff of want of reasonable and probable cause is all that is required", or that the plaintiff can satisfy the *onus* upon him by merely putting in the deposition in the criminal case. *Moss* v. *Wilson* [(1906) 8 N. L. R. 368] and *Corea* v. *Pieris* [(1906) 9 N. L. R. 276] clearly show that this is not now at any rate the jurisprudence of the Supreme Court. But I think that on the question whether *dolus malus* has been proved there is a material difference between those cases and the present one. In *Moss* v. *Wilson* and *Corea* v. *Pieris* the defendant, in bringing the charge which formed the subject matter of the suit, was acting on information supplied by others. In the present case the 1st appellant purported to have herself seen the respondents setting fire to her house. It appears to me that, in view of this fact, the learned District Judge was quite entitled to consider, not only the demeanour and credibility of the 1st appellant, but also the inherent improbabilities of her story,—such as the commission of arson in broad day-light, and her entire indifference to the fate of her young children, whom she left in the house before it was set fire to, and who, for aught that she knew to the contrary, were at the mercy of the flames. On the whole, I see no reason to differ from the District Judge's finding that *dolus malus* was established.

I would dismiss the appeal with costs as regards the 1st appellant, and allow it with costs as regards the second.

GRENIER, A.J.—I concur.

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SANMUGAM CHETTY *et al vs.* KHAN *et al.*

No. 21,181, D. C., Colombo.

Present: Wendt, J., & Grenier, A.J.

Argument: 21*st February*, 1906.

Judgment: 27*th February*, 1906.

Cession of action—Purchaser under a simple writ of property subject to a mortgage.

A person, who purchases one of several mortgaged properties after the institution of the mortgage action, and who is therefore bound by the mortgage decree subsequently obtained without the necessity of his being named in the action, is not entitled to pay and claim cession of the mortgage decree, inasmuch as the condition of being sued by the creditor by the hypothecary action and compelled to pay the debt is essential to the right of the purchaser to pay and claim cession.

Nor can he seek to release the property purchased by him by paying a *pro rata* share of the debt, but he may, if he choose, pay the whole debt without any cessiou and thus release his own property.

The facts appear in the judgment of Wendt, J.

Dornhorst, K.C., for petitioners-appellant.

de Sampayo, K.C., for defendants-respondent.

F. M. de Saram for substituted 1st plaintiff-respondent.

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Judgment.

Wendt, J.—The facts out of which the present appeal arises are as follows:—Messrs. E. John & Co., on 28th February, 1905, obtained in the present action a decree absolute against the defendants, Mrs. Cowasjee and her son (now deceased), for Rs. 16,413·70 with interest thereon, due upon a primary mortgage of Ashbourne, Salem, and Gravesend Estates. In default of payment forthwith of this sum there was the usual direction for sale by the Fiscal. The plaintiffs having assigned their decree to Messrs. Framjee, Bhikajee & Co., the latter were, on 17th July, 1905, substituted as plaintiffs in their room, and took out execution

ou the 3rd August. On 6th September, 1905, the appellants, a firm of Natukottai Chetties, presented their petition against the dismissal, of which this appeal is brought. They alleged that the substituted plaintiffs having seized all three estates, had directed the Fiscal to sell only Salem and Gravesend, omitting Ashbourne, which was worth Rs. 20,000; that petitioners, on some date which was not ascertained, had obtained a decree against the defendants in a Kandy action for an unsecured debt of Rs. 7,338·90, and had thereupon caused the Fiscal to sell in execution, and had themselves purchased Salem Estate for a sum of Rs. 14,000, obtaining a Fiscal's conveyance on 30th June, 1905; that having obtained another decree (date unascertained) against defendants for Rs. 2,500, the petitioners had in execution of it purchased Gravesend Estate. The petitioners expressed their willingness to pay the substituted plaintiffs the amount of their decree and costs of action on obtaining from them a cession of their action against defendants. They also expressed their willingnes to pay any balance of the decree that might remain unsatisfied if Ashbourne Estate were first sold in execution; and they prayed that ou their paying the Court the amount of the decree the substituted plaintiffs be ordered to execute a cession of action, or in the alternative that the Fiscal be directed to sell first Ashbourne Estate, the petitioners paying any uncovered balance of the decree.

This petition was opposed both by the substituted plaintiffs and the surviving defendant, Mrs. Cowasjee. An affidavit by her was put in, in which she stated that petitioners' purchase of Salem Estate was subject to plaintiff's mortgage decree; that the Estate was worth about Rs. 35,000; that Gravesend was worth about Rs. 2,500, and had been purchased by the petitioners for Rs. 10 (subject to plaintiff's decree); that the decree obtained by petitioners against her had been fully paid and satisfied; that in order to pay petitioners and other creditors she had raised a loan of Rs. 10,000 on the secondary mortgage of Ashbourne Estate; and that if either of petitioners' prayers were granted, they would be enabled to secure Salem Estate free from encumbrance for the sum of Rs. 14,000 paid by them. The valuation of Salem and Gravesend in 1st defendant's affi-

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davit was not contradicted by the petitioners.

The position then is this: The petitioners purchased Salem and Gravesend for Rs. 14,010 knowing they were subject to a mortgage of Rs. 16,000, which they would have to pay in addition if they wished to keep the estates. Those two sums together make up Rs. 30,010, which is considerably below the value of the estates. If petitioners paid the amount of the decree and obtained a cession from substituted plaintiffs, they would execute the decree against Ashbourne, which, being admittedly worth Rs. 20,000, would satisfy the decree and leave the petitioners the owners of Salem and Gravesend free from encumbrance at a price representing less than half their value. The same result would follow if the substituted plaintiffs were compelled to sell Ashbourne first. In either case the secondary mortgagee will suffer if Ashbourne is worth no more than petitioners value it at. These results certainly appear inequitable; but petitioners say they are in law entitled to what they ask, and we have to examine their claim.

Appellant's Counsel put their case on the analogy of a surety paying the debt and claiming (as he is entitled to do) cession of action against his co-sureties. Petitioners, it was said, should be regarded as co-debtors with the defendants, because their land was liable to be sold for defendants' debt. But they are not liable for the debt in the sense of being liable to be sued for it: their only liability is that they cannot withhold the lands purchased by them from sale unless they satisfy the mortgage debt, and that liability is limited to the value of the lands, which may amount to only a fractional portion of the debt. Voet, in the passage cited by appellants (lib. 20. 4. 5.) deals with the case of a third party being in possession of one of several mortgaged subjects and being "compelled" to pay the whole debt, and says that it is not clear that he is entitled to cession against possessors of the other mortgaged subjects. After mentioning the existence of a conflict of authority, Voet adds: "But the better opinion is that generally cession of actions should be made *pro rata* against the principal debtors and the other possessors of the other pledges in favour of any possessor or detentor whomsoever who, when sued by the hypothecary action, offers the whole debt" (Berwick,

1st Ed. 373). Voet's reasoning in the sentences following those I have quoted shows that the condition of being sued by the creditor is essential to the right of a possessor to pay and claim cession. He contemplates the case of possessor who cannot be deprived of his possession without a decree obtained against him. Now, if the petitioners purchased Salem and Gravesend before the institution of the mortgage action, they would be in that position, if the transfer of the *dominium* to them was valid as against the creditors. In that case, assuming the substituted plaintiffs became the purchasers at the forthcoming sale, they could not eject the petitioners. But if the petitioners purchased subject to the result of the mortgage action already instituted, they would be bound by the mortgage decree, although not named in the action, and could not hold the land as against the purchasers under that decree. As I have already pointed out, the petitioners do not disclose the dates of their purchases. Assuming they are not bound by the mortgage decree, they have not satisfied Voet's condition of being sued by the creditors by the hypothecary action and compelled to pay the mortgage debt. They cannot therefore claim the cession of action. But even if the privilege spoken of by Voet be accorded to petitioners, they will not get what they want. The cession is to be *pro rata*, which I suppose means there shall be a valuaton of the property possessed by the party paying, and that cession will follow for only such a part of the debt as is proportionate to the rest of the hypothecated lands. Although their present application fails, the petitioners are of course entitled to pay to the Fiscal the amount of the decree in full, and so secure the release of their lands. They will then be the owners of those lands at the price of Rs. 14,000 *plus* the mortgage debt—a position which presumably they contemplated when they effected their purchases.

The appeal is dismissed with costs.

GRENIER, A.J.—I agree.

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LUCIYA *vs.* BABA.

No. 38,723, P. C., GAMPOLA.

Present: WOOD-RENTON, J.

ARGUMENT: 16*th May*, 1907.

JUDGMENT: 21*st May*, 1907.

Maintenance—Father's liability—Elements of proof—Ordinance No. 19 of 1889.

An applicant under sec. 3 of Ordinance No. 19 of 1889 must prove:

(i.) That the respondent is the father of the child.

(ii.) That the child is of tender years within the meaning of the Ordinance, and is unable to maintain itself.

(iii.) That the respondent is refusing or neglecting to maintain it; and

(iv.) That he has sufficient means to enable him to do so.

The Ordinance of 1889 imposes upon the father of every child under the age of 14 years, whether legitimate or illegitimate, the duty of maintaining it, provided the child is "unable to maintain itself".

The fact that the mother is nursing the child should be taken into account in fixing the amount of the maintenance; but it has nothing to do with the inception of the father's liability. If by reason of the nursing the mother requires additional sustenance, such sustenance is within the meaning of the Ordinance a necessary part of the maintenance of the child.

Sethu v. *Janis*, 2 N. L. R. 103, explained.

The applicant sued respondent for maintenance. The Police Magistrate gave judgment for applicant and ordered maintenance. The respondent appealed.

B. F. de Silva for appellant:

(*a*) There was grave doubt as to who the actual father was, and the respondent should be given the benefit of that doubt (*Sinchohamy* v. *Gunavathamy*, 5 N. L. R. 123).

(*b*) The child, being an infant in arms, required no maintenance (*Sethu* v. *Janis*, 2 N. L. R. 103).

The same view was held under the old Vagrants Ordinance 4 of 1841 (repealed by the Maintenance Ordinance)—*Lawarinahami* v. *Pedro Appu*, 6 S. C. C. 75; *Cannathey* v. *Canakar*, 3 S. C. C. 148.

Also cited Voet 25. 3. 6.

No appearance for applicant.

c. a. v.

JUDGMENT.

WOOD-RENTON, J.—The appellant was sued in the Police Court of Gampola under sec. 3 of the Maintenance Ordinance, 1889 (No. 19 of 1889) for neglecting to maintain a child, of which the applicant alleged him to be the father. The Police Magistrate ordered him to pay a monthly sum of Rs. 2·50 by way of maintenance until the child attained the age of 10 years. The only ground on which the appellant challenged this order in his petition was a denial of the paternity. I see no reason to differ from the finding of the Police Magistrate on that point. It is true that the applicant seems to be a woman of loose character. But there was ample corroboration of her evidence, if the witnesses who furnished it were to be believed. At the argument before me, however, the appellant's Counsel took a fresh point. It would appear that the child in question was only about 3 months old at the date of the Police Magistrate's order. It was urged, therefore, on the strength of the decision of Sir John Bonser, C. J., in the case of *Sethu* v. *Janis* [(1896) 2 N. L. R. 103], that in view of its tender age the child presumably was being nursed by the mother, and that, therefore, it needed no maintenance at the hands of the father. Apart from authority, I would have said that this contention was negatived by the language of sec. 3 of the Maintenance Ordinance itself.

It appears to me that the Ordinance imposes upon the father of every child under the age of 14 years, whether legitimate or illegitimate, the duty or maintaining it, provided that the child is "unable to maintain itself". The question whether the mother is nursing the child is no doubt an element, which the Court should take account, in fixing the amount of the maintenance. But it has, in my opinion, nothing to do with the inception of the father's liability. By the very terms of sec. 3 of the Ordinance of 1889 the test of that liability is the ability of the child to maintain itself. The section clearly points to cases in which a child, although under the age of 14 years, is earn-

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ing its own livelihood, and in which therefore it would be unfair to burden the father with the expense of supporting it. It seems to me that all that an applicant under sec. 3 of the Ordinance of 1889 has to prove is (1) that the respondent is the father of the child, (2) that the child is of tender years within the meaning of the Ordinance and is in fact unable to maintain itself, (3) that the respondent is neglecting or refusing to support it, (4) that he has sufficient means to enable him to do so. If these facts are established, the applicant's right to an order for maintenance is made out. It then becomes the duty of the Police Magistrate to consider what amount of maintenance ought to be allowed. In dealing with that issue he has the right to take into his consideration all the circumstances of the case before him —the means of the respective parties, the age of the child, and the question of the maintenance it actually requires. It appears to me that for this purpose the term "maintenance" should be taken in its widest sense. A child has a right to shelter, clothing, and, if necessary, to medicine as well as food; moreover if the mother is in fact nursing the child, she is herself entitled to additional sustenance if she needs it, and such sustenance is, within the meaning of the Ordinance, a necessary part of the maintenance of the child. It is in this way that I should construe the Ordinance in the absence of judicial authority imposing upon me a contrary interpretation. The only direct decision that I have been able to find under the Ordinance of 1889 is that of Sir John Bonser in the case of *Sethu* v. *Janis*, to which I have already referred. It was there held by the learned Chief Justice that where a child needs no maintenance other than the sustenance afforded by the mother no order should be made against the father under sec. 3 of the Ordinance of 1889. It would appear from the terms of the judgment in this case that Sir John Bonser considered that the word "maintenance" might well include other elements than food, for he sent the case back for inquiry as to whether any maintenance except the sustenance of the child by the mother was needed. So far, therefore, he does not contradict the view that I have already expressed as to the scope of that term in the Ordinance of 1889. If he intended to go further and to hold that where a woman

is nursing her child, and where the child requires no food other than that which it derives from her, she has no claim as against the father, on the child's behalf, to any allowance for the purposes of her own sustenance, I can only say with the greatest respect that I do not agree with him, and that I must decline to follow his decision. The appellant's Counsel urged that in the class in life to which the present parties belong the cost of clothing an infant child was so small that it could practically be disregarded: that is a circumstance of which a Police Magistrate can take account in determining the amount of an allowance. It cannot effect the construction or an enactment of general application. The only other cases on the point now in issue are a group of decisions reported in 6 Supreme Court Circular at pp. 75 and 76 (P. C., Negombo, No. 52,743; P. C., Negombo, No. 53,680; P. C., Negombo, No. 53,288), in which it was held (in two cases by the Full Court) that, on a charge of maintenance brought by the mother of a child still in arms, the father could not be held criminally liable for not maintaining it so long as it required no nourishment except that derived from the mother. If these decisions had been *in pari materie*, they would of course have bound me. But they were given under a provision in the Vagrants Ordinance 1841 (No. 4 of 1841), sec. 3, sub-sec. 2, which imposed a criminal liability upon a father whose neglect to maintain his child made it "chargeable to others". It is true that the reasoning in these cases proceeds to some extent on the same lines as that of Sir John Bonser in *Sethu* v. *Janis*. But the judges who had to construe the Ordinance of 1841 had not before them the test of liability created by sec. 3 of the Ordinance of 1889, namely, the question whether the child is "unable to maintain itself". I hold, therefore, that the decision above-mentioned in the three Negombo cases are not binding upon me, and I dismiss the present appeal.

Muttiah Chetty v. Marikar

MUTTIAH CHETTY *vs.* MARIKAR.

No. 1,513, D. C., PUTTALAM.

Present: MIDDLETON, J., & GRENIER, A.J.

ARGUMENT: *7th June*, 1907.

JUDGMENT: *12th June*, 1907.

Decree against several persons—Civil Procedure Code, sec. 339.

The 2nd proviso to sec. 339 of the Civil Procedure Code, that where a decree against several persons has been transferred to one of them it shall not be executed against the other, is an enactment of substantive law, and being such it could not be waived.

Walter Pereira, K.C., S.-G. (with *Elliott*) for substituted plaintiff-appellant and 2nd defendant.

H. J. C. Pereira (with *Chitty*) for 1st defendant-respondent.

c. a. v.

JUDGMENT.

MIDDLETON, J.—The original plaintiff in this action obtained a judgment on a money bond against two defendants jointly and severally, the 2nd defendant being a surety on the bond for the 1st defendant.

The 2nd defendant paid the plaintiff the whole amount due and obtained an assignment of the decree in his favour from the plaintiff.

The 2nd defendant then, with notice to the 1st defendant, obtained an order of the Court substituting himself as plaintiff, issued a writ, and seized certain property of the 1st defendant, which was sold, and the proceeds paid into Court; but the sale was not confirmed by the Court.

The 1st defendant then moved to set aside the sale on the ground of material irregularity under sec. 282 of the Civil Procedure Code, and on the further ground that the sale was void under the 2nd proviso to sec. 339 of the Civil Procedure Code, which says that where a decree against several persons has been transferred to one of them it shall not be executed against the others.

The learned District Judge, who has delivered a judgment commendable both in reasoning and lucidity, held, and his finding is not disputed on this point, that there was no material irregularity under sec. 282; but set aside the sale on the ground that the writ being illegally issued the sale was void, basing his judgment on *Palaniappa Chetty* v. *Samsudeen* (8 N. L. R. p. 325) and a case reported at page 230 of Sutherland's Weekly Reporter.

The 2nd defendant appeals against this order, first on the ground that the proviso to sec. 339 lays down the procedure to be followed, and does not enact substantive law; and that the order substituting 2nd defendant as plaintiff having been made *inter partes* without appeal by the 1st defendant, shews that he waived his rights under the proviso to sec. 339, and was therefore now estopped from disputing the legality of the writ.

Sections 53 and 756 were quoted as shewing certain matters of procedure which might be waived, and the case reported in 3 Balasingham p. 47 was relied on by the learned Solicitor-General as supporting his argument.

The observations of Lascelles, A.C.J., at p. 344 of 9 New Law Reports on the judgment of the Privy Council in *Rewa Mahton* v. *Ram Kishen Singh* (Indian Law Reports 14, Calcutta, p. 627), to the effect that a purchaser who buys at a Fiscal's sale under a decree of a competent court is not bound to assure himself that the proceedings on which the judgment is based are free from error in law or in fact, was also relied on. With that I perfectly agree; and I doubt if this sale had been confirmed by the Court under sec. 283 to the purchaser whether it would not have been too late to raise the objection.

The purchaser is, I understand, a party to these proceedings, but has not appealed, a fact which may be attributable as much to the desire to avoid further costs and trouble in the matter as to acquiescence in the order appealed against.

The question seems to be, whether the proviso to sec. 339 is substantive law or procedure?

If it is a matter of procedure, it is contended that the 1st defendant might and did waive the proviso as to execu-

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tion by one against other co-obligors in sec. 339 by assenting to the 2nd defendant being substituted as plaintiff.

Sir Frederick Pollock, in his introduction to the Encyclopœdia of the Laws of England, vol. i. p. 4, says: "The law of duties, rights, and remedies, together with the needful auxiliary rules, is often called substantive law by modern writers.....The rules which fix the manner and form of administering justice are called Rules of Procedure or Adjective Law."

This appears to me to be an apt description and distinction between the two classes, and I feel bound to hold that a proviso, even though it may be included in what was intended as a Code of Procedure which imperatively directs that where a decree against several persons has been transferred to one of them it shall not be executed against the other, is a substantive enactment defining the rights of the co-obligors under the judgment, and not a rule which fixes the manner and form of administering the law.

The learned Solicitor-General has suggested that the reason for the proviso is to prevent confusion; but in my opinion the reason is to be found in the judgments of Peacock, C.J., and Phear, J., in the case reported in Sutherland's Weekly Reporter.

The object of the original decree was fulfilled by payment of one of the persons ordered to pay to the plaintiff, and the decree in one sense came to an end.

The bond merged in the decree, and the decree was satisfied by payment by one of the co-obligors liable on the decree.

His only remedy is an action for contribution on his assignment—an entirely new right of action.

The case is different from that of an outsider who does not satisfy the judgment by obtaining an assignment of the plaintiff's rights under it, because he was not liable under it; the outsider therefore can be substituted for the plaintiff and proceed to execute the process, as Phear, J., puts it provided for the purpose of securing obedience to the order.

In my judgment therefore the proviso to sec. 339 an enactment of substantive law.

It has been held in the case of *Hewitson* v. *Fabre* [(1889) 21 Q. B. D. p. 6] that the service of a writ out of the jurisdiction, instead of notice of the writ, as required by order 11, r. 6, is a nullity, and the order of service, and all subsequent proceedings in the action, were set aside after judgment had been signed in default of appearance, and after proceedings had been taken on the judgment in the foreign court. No consent or waiver by the parties either can give jurisdiction in any case where the court has no jurisdiction at all (per Jervis, C.J., in *Wellesley* v. *Withers*, 1855, 4 Ell. & Bl. 750, 759).

It is however here admitted that if this be an enactment of substantive law it could not have been waived by the 1st defendant.

Moreover, the debt in the decree having been satisfied before execution the sale ought not to be confirmed under sec. 283.

I think, therefore, that the order of the District Judge must stand and the appeal be dismissed with costs.

GRENIER, A.J.—I entirely agree. The proviso to sec. 339 is a matter of substantive law, and it was admitted by appellant's Counsel that if it were so it cannot be waived.

MARIAHAMY *vs.* SAPARAMADU *et al.*

No. 5,709, D. C., NEGOMBO.

Present: MIDDLETON, J., & GRENIER, A.J.

ARGUMENT: *7th June*, 1907.

JUDGMENT: *26th June*, 1907.

Partition Ordinance (No. 10 of 1863) sec. 17—Alienation of land during pendency of proceedings for partition.

A purchaser from a person who has bought at a Fiscal's sale any interest in a land which is the subject of partition derives no title whatever by his purchase.

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Annamalai Pillai v. *Perera* [(1902—03) 3 Browne p. 200, and 6 N. L. R. p. 108] followed.

A forced alienation, such as takes place when the Fiscal sells by virtue of a writ in his hand, is not obnoxious to the provisions contained in sec. 17. The sale is good and passes title, and the purchaser is at liberty to take the place of the execution-debtor in the partition case.

Perera v. *Perera* [(1906) 9 N. L. R. 217] followed.

H. J. C. Pereira for substituted plaintiff-appellant.

de Sampayo, K.C., for defendant-respondent.

c. a. v.

JUDGMENT.

GRENIER, A.J.—This is a partition action. The plaintiff alleged that Harmanis Saparamadu and his wife were the original owners of the land sought to be partitioned, and that they died about twenty-five years ago leaving five children and an estate under the value of Rs. 1,000. The children were (1) Louis, (2) Paaris, (3) Joronis, (4) Inasiappu, (5) Mariahamy, who each became entitle to a 1/5th share. Inasiappu died unmarried and issueless, and his share devolved on the survivors, each getting an additional 1/20th. The husband of Mariahamy, on her death and the death of their child, sold 1/5th to Paaris, reserving to himself the 1/20th which came to him through Inasiappu. Paaris died leaving him surviving his widow, the plaintiff, and an only child Sutogis. The plaintiff is the administratrix of the estate of Paaris. The plaintiff claimed to be entitled to 9/20th, allotting to 1st defendant, Louis, 5/20th, to 2nd defendant, Joronis, 5/20th, and 3rd defendant, Paaris, 1/20th.

The 1st defendant alone filed a statement of claim, and he prayed for a declaration of title to a 4/15th share of the land and house standing on it, and for compensation in respect of a plantation that he had made of 90 cocoanut trees, valuing the improvements at Rs. 150. The case appears to have been heard *ex parte*; and after the examination of the plaintiff the District Judge entered an interlocutory decree for partition, allotting the shares as follows:—

Plaintiff 9/20th

Louis 5/20th
Joronis 5/20th
3rd defendant 1/20th,

and a commission was issued to Mr. Tissera to partition the land accordingly. This was on the 24th February, 1905. Before the partition was confirmed by the Court, and final decree entered, the reason for the delay not being quite clear, one Don Charles Saparamadu Appuhamy, who was subsequently substituted as plaintiff, came into the case, alleging that on a writ of execution against the original plaintiff as administratrix of the estate of Paaris and the 1st defendant personally their 11/15th shares were sold and purchased by one Karunaratna, who had sold the same to him. The Court, by its order dated the 14th November, 1906, substituted Don Charles Saparamadu Appuhamy as plaintiff in the room of the original plaintiff, who admitted that her interest had passed to him. On the same day the order of substitution was made there was a discussion in the Court below in regard to the right of Don Charles Saparamadu Appuhamy to be substituted plaintiff, as the conveyance to him by Karunaratna was one made during the pendency of the partition proceedings. The District Judge decided that the sale by Karunaratna was void on a true construction of sec. 17 of the Partition Ordinance 10 of 1863. The District Judge was right in so deciding. This Court has held that a forced alienation, such as takes place when the Fiscal sells by virtue of a writ in his hand, is not obnoxious to the provisions contained in sec. 17. The sale is good and passes title, and the purchaser is at liberty to take the place of the execution-debtor in the partition case (see *Perera* v. *Perera*, 9 N. L. R. p. 217). This Court has also held [see *Anamaly Pillai* v. *Perera* (1902—03) 3 Br. p. 200, and 6 N. L. R. p. 108] that sale in the circumstances in which the substituted plaintiff purchased is absolutely void, and not voidable only, that is to say, that the purchaser from a person who has bought at a Fiscal's sale any interest in the land which is the subject of partition derives no title whatever by his purchase. All the previous decisions were reviewed in the case of *Anamalay Pillai* v. *Perera*, and in my opinion the construction placed by Moncreiff and Middleton, JJ., on

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sec. 17, in view of the language employed in it, was eminently correct. In *Dewar Umma* v. *Ismail Marikar*, 3 Bal. p. 99, Wood-Renton, J., has constructed sec. 17 in the same way in which it was construed in *Anamaly Pillai* v. *Perera* by a majority of the Court. The limitation placed by Clarence and Dias, JJ., on the words "any owner" in sec. 17 is not justified, because it will result in introducing into the enactment certain words of qualification repugnant to the plain intention of the Legislature, which was to expedite and make easy the settlement of land disputes by means of partition actions. I would, therefore, hold that the sale to substituted plaintiff by Karunaratna, although Karunaratna was no party to the action, was absolutely void, because it was a sale by the owner of certain shares pending partition proceedings. The District Judge was, however, wrong in dismissing the action. The appellant's conveyance having been held to be void, it was open to the District Judge, considering that this was a partition action, to strike his name out and order that Karunaratna be made a party in the place of the original plaintiff, re-apportioning the shares by allotting to Karunaratna the 11/15th he had purchased which belonged to the original plaintiff and 1st defendant, and then entering a fresh interlocutory decree on that footing. Although the original plaintiff has admitted that her interests have passed to Karunaratna, the District Judge will hold an enquiry into his title as derived both from her and the 1st defendant as a precautionary measure. The decree appealed from, dismissing the action, will, therefore, be set aside, and the case sent back for the purposes I have already indicated. There will be no costs of this appeal.

MIDDLETON, J.—I agree in the order proposed by my brother Grenier.

In *Baban* v. *Amarasinghe* [(1878) 1 S. C. C. p. 24] Phear, C.J., laid it down that an alienation pending partition proceedings must be treated as void as against those proceedings, but good *aliunde*.

In *de Silva* v. *Carlina* [(1891) 9 S. C. C. 141] Clarence and Dias, JJ., limited the prohibition in sec. 17 of the Partition Ordinance to owners, parties to the proceedings,

and followed the ruling in *Baban* v. *Amarasinghe* and in 1 S. C. R. p. 14.

In *Wijeywardana* v. *Seetalahamy* [(1900) 6 N. L. R. p. 190] Lawrie, J., and Browne, A.J., followed the ruling in *de Silva* v. *Carlinahamy*, when Lawrie, J., expressed his disapproval of it.

In *Annamaly Pillay* v. *Perera* [(1902) 6 N. L. R. p. 108] my brother Moucreiff and myself held, as members of the Full Court—my brother Wendt dissenting—that a sale of property the subject of a partition action pending the partition proceeding was absolutely void under sec. 17 of the Partition Ordinance.

In *Perera* v. *Perera* [(1906) 9 N. L. R. p. 217] the Full Court, including my brothers Wendt and Wood-Renton and myself, held that a sale by the Fiscal of property the subject of a partition action was not within the terms of sec. 17. The decision of these Full Courts are unquestionably binding on us, and I therefore agree that the sale by Karunaratna to the substituted plaintiff must be held to be void, and the decision of the District Judge affirmed on that point.

BLISS *vs.* MCNICOL *et al.*

No. 38,939, P. C., HATTON.

Present: WOOD-RENTON, J.

ARGUMENT: *3rd July*, 1907.

JUDGMENT: *4th July*, 1907.

Labour Ordinance (*No.* 11 *of* 1865) *sec.* 19—"*Notice*"—"*Wilfully and knowingly retaining.*"

To constitute a sufficient "notice" within the meaning of sec. 19 of Ordinance No. 11 of 1865 all that is necessary is that an accused party should be fixed with knowledge—which must be in writing—that a servant in his employment is claimed under a contract of service by some one else.

It is of the very essence of the offence contemplated by sec. 19 that there should be a wilful detention with knowledge by the accused that the person detained is the servant of another man.

Bliss v. *McNicol*

vanLangenberg for complainant-appellant.

Bawa for accused-respondent.

c. a. v.

JUDGMENT.

WOOD-RENTON, J.—If it had been necessary to decide the point, I should have been prepared to hold that the letters which were written by Mr. Bliss to Mr. McNicol on the 29th September and the 26th October, 1906, constituted a sufficient "notice" within the meaning of sec. 19 of Ordinance No. 11 of 1865. It was pointed out by Mr. Bawa yesterday—and the observation is just—that the statute itself prescribes no form of notice; and, in my opinion, all that is necessary is that an accused party should be fixed with knowledge—which of course must be conveyed to him in writing—that a servant in his employment is claimed under a contract of service by someone else. It is clear, on the one hand, that a mere casual reference to this fact might quite well prove insufficent to satisfy the statutory requirements. On the other hand, I do not think it is necessary that the written notice for which sec. 19 provides should contain any formal intimation to take proceedings against the person to whom it is addressed, under sec. 19, if the servant in question should not be surrendered. In the present case we have letters written for the express and sole purpose of informing Mr. McNicol that the servant Sandai, whom Mr. Bliss claimed, was in his service; and we find also in the letter of 26th October, 1906, a distinct intimation on the part of Mr. Bliss of his intention to prosecute Mr. McNicol's kangany for harbouring Sandai if she was not given up. It appears to me that this correspondence is quite sufficient to satisfy the requirements of sec. 19 as to notice, even if both parties regarded the letter as being mere precursors to the issue of warrants of Sandai's arrest.

I pass now to the second question of law which has been brought before me on this present appeal, and which involves the construction of the words "wilfully and knowingly retain" in sec. 19 of Ordinance No. 11 of 1865. It was argued by Mr. Bawa that all that is necessary for the purpose of securing a conviction under that section is to

fix the employer with the notice of the complainant's claim. The employer is then, said Mr. Bawa, in effect put on his enquiry, and if it is found by the court of law which deals with the matter that the servant is not legally in his service, he is liable to be fined and imprisoned, whether he was acting *bona fide* or not. It appears to me that this construction of sec. 19 is unsound. It is of course possible for any court of law to formulate an external standard which is capable of being applied mechanically. Each case must be decided on its own facts. At the same time I have no doubt but that it is essential for the prosecution in a charge of the kind with which I am dealing here to prove somehow that the accused knew that he was keeping the servant of another man. It is obvious that fact may be proved in spite of the putting forward by the accused of some rival claim; but the proof must, in the long run, exclude *bona fides*. It is an elementary principle of criminal law that guilty knowledge is an essential element in the constitution of offences, whether they are offences at common law or by statute; and so deeply embedded is this principle in English jurisprudence that the Courts have again and again implied the requirements of proof of *mens rea* in these cases even if the statute has been silent upon the point (see *Reg.* v. *Tolson*, 29 Q. B. p. 168). The only class of cases in which this construction has been departed from are cases in which the obvious intention of the legislature has been held to be to penalise a particular act irrespective altogether of the mental state of the person who commits it [see *Bank of New South Wales* v. *Piper* (1897) A. C. 383; *Cundy* v. *Lecocq* (1884) 13 Q. B. D. p. 207; the judgment of Mr. Justice Wright in *Sherras* v. *de Rutzen* (1895) 1 Q. B. p. 915; the recent case of *Brooks* v. *Mason* (1902) 2 Q. B. p. 743]. It appears to me to be of the very essence of the offence charged here that there should be a wilful detention with knowledge by the accused that the person detained is the servant of another man. It is perfectly obvious when we turn to the facts and apply to them this construction of the law that Mr. McNicol was rightly acquitted. It was frankly admitted by Mr. Bawa in his argument that he imputed no personal misconduct whatever to Mr. McNicol, and it is stated indeed that the present

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case has been brought solely for the purpose of obtaining a legal decision on the points of law.

In so far as the facts are concerned, I entirely agree with what Mr. vanLangenberg said yesterday, that it was quite impossible as between man and man for any person to have acted with greater fairness than was shown by Mr. McNicol towards Mr. Bliss.

It was so far back as 1904 that Sandai deserted Mr. Bliss's employment. It was not until the 12th of December, 1906, that she was actually discovered; and it was only in the months of September and October that Mr. McNicol had any intimation of Mr. Bliss's claim. It was stated by Mr. McNicol that he had got the woman from the coast, and he was entitled in law to hold her as his servant until the claim of Mr. Bliss to her service had been judicially established. It does not appear from the evidence that Mr. McNicol offered any objection to Mr. Bliss's kangany coming over to his estate for the purpose of identifying Sandai; but even if that identification had taken place, he would still, in my judgment, have been entitled to dispute its accuracy, under all the circumstances of the present case, until the issue had been formally decided by a court of law. It is, of course, a matter of common knowledge that kanganies are not always honest; and even where they are honest, mistakes may readily occur in the identification of Tamil coolies. I have no hesitation in holding that Mr. McNicol in his conduct as a whole, and especially in his offer to keep Sandai to all intents and purposes as a mere stake holder until the question of the rival claim had been adjudicated upon, did all that was required of him either in law or by the demands of fairness and honesty. The appeal is dismissed.

In re the Estate of PUNCHI BANDA, deceased. *Punchi Banda*

No. 2,313, D. C., Kandy.

Present: Wendt & Middleton, JJ.

Argument: 30*th January*, 1907.

Judgment: 8*th February*, 1907.

Kandyan Law—Intestacy—Succession.

A *diga*-married father of an intestate dying without issue is entitled to inherit, before the uterine half sisters and brother of his deceased mother, the property derived from his mother, which she in turn inherited from her father.

Walter Pereira, K.C., S.-G., for petitioners-appellant.

H. J. C. Pereira for administrator-respondent.

c. a. v.

Judgment.

Wendt, J.—This is a petition for the judicial settlement of the administrator's account on the footing that the petitioners are the sole next of kin and heirs of the intestate. The deceased, Punchi Banda, was a Kandyan, and he died intestate and without issue. He left no brothers and sisters or their issue, but was survived by his father (the respondent), by his mother's mother Ukku Menika, and by the petitioners, who are his mother's uterine half-sisters, being issue of Ukku Menika by a second marriage. His estate apparently consisted exclusively of lands inherited from his mother Punchi Menika, which she had in turn inherited from her father Punchirala, the first husband of Ukku Menika. The marriage of respondent and Punchi Menika was in *diga*. Letters of administration were granted to the respondent (who, as *diga*-married father, claimed to be sole heir) in preference to Ukku Menika and a brother of the present appellants, who were counter applicants.

The present petition was dismissed by the learned District Judge, who held that the father was the sole heir; and appellants have appealed. The District Judge followed the case, D. C., Kandy, No. 23,620, *Austin* 155, decided in 1852. There the District Court had held that the father

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was heir-at-law of his child in respect of land which the child had inherited from her mother, in preference to the issue of the mother's paternal aunt. The unsuccessful parties appealed (admitting, however, in the petition of appeal, as the District Judge informs us, that the marriage was a *diga* one); but the Supreme Court affirmed the decision of the Court below. No reasons for the judgment of this Court are recorded.

Admittedly, it has often been decided that the father is not the heir of his child born in a *binna* marriage, in respect of property inherited from the mother, But the learned Solicitor-General argued that the *binna* marriage in the cases so decided was a mere accident, and that the *ratio decidendi* applied equally to *diga* marriages. We cannot assent to that contention. The institutional writers on Kandyan Law, who are our ultimate written authorities, appear to draw a distinction on this point between the two kinds of marriages. Sawers at page 8 of the first printed edition says:—"Failing immediate decendants, that is, issue of his own body by a wife of his own or a higher caste, a man's next heir to his landed property is his father, and if the father be demised, the mother, but this (*i.e.*, in the case of the mother) for a life interest only." He does not expressly state that it is a condition precedent to the father's inheriting that he should have been married in *diga*, but we know that the *diga* was the most common form of marriage (see. p. 34); and it would be a safe construction to understand this *dictum* as implying that form. Moreover, he states expressly on p. 14:—"The father is not the heir of the property of his children born in a Beena marriage, which they have acquired through their mother." He adds: "The maternal uncle or next of kin on the mother's side are the heirs of such children"—relations whom the *diga*-married father apparently excludes. Remembering that in the *binna* form of marriage the husband (with little or no property of his own—the wife having a large estate) lives in the wife's house and is maintained by her, whereas in the *diga*-marriage the wife becames a member of her husband's family, and forefeits in favour of her brothers all claim to inherit her father's property—there appears to be reason for the distinction between the husband's rights as

derived from the two forms of marriage. (See *Naide Appu* v. *Palingurala*, 2 S. C. C. 176.) *Punchi Banda*

An undoubted difficulty, however, in ascertaining the rule of inheritence is introduced by the passage at p. 9 of Sawers: "A wife dying intestate leaving a son who inherits her property, and that son dying without issue, the father has only a life interest in the property which the son derived or inherited from or through his mother; at the father's death such property goes to the son's uterine brothers or sisters, if he have any, and failing them to the son's nearest heirs of his mother's family." Sir Charles Marshall ("Judgments" pp. 338, 340) transcribes the passage I have quoted from pages 8 and 9 of Sawers, merely noticing that the limitation of the mother's right to a life interest is opposed to the author's later statement at page 9, that the mother is absolute heiress at law of her children dying without issue, and that she has the power of disposal of the father's paravany estate which she inherits through them. The later authority, Armour, however lays down (First Edition, p. 124; Perera's Edition, p. 76) that "the father (by *Jaateke Urume*) is entitled to inherit the lands and other property which his deceased infant child had inerited from the mother, in preference to the relatives of the person from whom that property had been derived to the said child's mother". He puts a case in which a mother having (presumably owing to the father's having predeceased) inherited her child's paraveny property, has a son by a second marriage (in *binna*) who inherits the property from her. This son dying in his father's care, that father will inherit the property in preference to the representatives of the original owner from whom it had descended to the first child—provided there is no other child of the mother living. Where the *binna* father, not being the mother's *ewessa* cousin, had after her death deserted his child and left it entirely to the care of the mother's family, the child's property would devolve on the next of kin on the mother's side, in preference to the father. Where, however, the father had looked after the child until its death, he would succeed in preference to the child's "distant maternal relations (mother's granduncle's son, for instance)—and that whether he was or was not the *ewessa* cousin of the

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mother". These passages are an amplification, with exceptions of the rule quoted from p. 14 of Sawer's.

In this unsatisfactory state of the authorities, the learned District Judge, whose long administration of the Kandyan Law in the District Courts of Kandy and Kurunagalle entitles his opinion on a controverted point to very great weight, has accepted the view adopted in the case in Austin. No decided case negativing the father's right, which was there recognised, has been brought to our notice, and I think the judgment of the Court below should be affirmed.

I may add that at the argument, when Counsel agreed that Ukku Menika was alive, I felt a difficulty in holding that her children, the appellants, were nearer of kin than herself to the issue of her deceased daughter—in other words that the half sisters were nearer of kin than the common mother. It is, however, unnecessary to decide this point or another point (which was dealt with in our judgment on a former appeal), viz., whether, if the principle of the property going back to the source whence it came is adopted, the appellants are in the line of succession at all, being strangers in blood to Punchi Menika's father from whom she had inherited.

MIDDLETON, J.—I agree in view of the conflicting character of the original authorities that we should affirm the learned District Judge's judgment following the case reported in Austin p. 155, and hold that a *diga*-married father of an intestate dying without issue is entitled to inherit, before the uterine half sisters and brother of his deceased mother, the property derived from his mother, which she in turn had inherited from her father.

ANNAMALAY *vs.* DE SILVA *et al.*

No. 8,170, D. C., GALLE.

Present: WOOD-RENTON, J., & GRENIER, A.J.

ARGUMENT: *30th & 31st May*, 1907.

JUDGMENT: *14th June*, 1907.

Promissory note—"Material alteration"—Addition of signature of witness after actual making of the note.

Obiter, per WOOD-RENTON, J.: The addition of the signature of a witness to a promissory note at a later stage than the actual making of the note is a "material alteration" which would preclude the payee from suing upon it.

H. J. C. Pereira (with *A. St. V. Jayawardene*, for 1st defendant-appellant.

Bawa for plaintiff-respondent.

The following authorities were cited in the course of argument:—

Christacharlu v. *Karibasayya* (I. L. R. 9, Mad. 399—402).
Sitaram Krishna v. *Daji Devaji* (I L. R. 7, Bom. 418).
Suffell v. *Bank of England* (9 Q. B. D. 555).
Davidson v. *Cooper* (13 M. & W. 343 & 352).
Bills of Exchange Act, sec. 64 (2), Byles [Latest Edition] p. 341.

c. a. v.

JUDGMENT.

WOOD-RENTON, J.—I have no doubt but that this appeal should be allowed on the facts. The learned District Judge has expressly disbelieved the respondent's statement that he was in Ceylon at the time of the making of the promissory note on which the action was brought. Both the attesting witnesses—Adimulla Chetty and Muttaiya Pulle—depose to the respondent's presence on the occasion in question; and the same taint of discredit which the Judge attaches to his testimony on this point must therefore be affixed to theirs also. The witness Ismail give no evidence as to the alleged signature of the note by the appellant at all. Moreover, as regards Muttaiyah Chetty, the learned

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Judge says that his signature to the note "seems plainly to have been written recently". In this state of things, I think that the respondent's action ought to have been at once dismissed, on the ground that the making of the note by the appellant had not been proved, and that the learned Judge was not entitled to supply the respondent (as he has, in effect, done) with a case, by inferences, from the appellant's failure to call his co-defendant and alleged co-maker of the note (who in his answer admitted his own signature) as a witness at the trial or from the supposed business relations of the parties.

An interesting question was argued before us as to whether if the signature of Muttaiyah Chetty was added at a later stage than the actual making of the note its addition would not be a "material alteration" which would preclude the respondent from suing upon it. It is now settled law (i) [see *Aldons* v. *Cornwell* (1868) L. R. 3, Q. B. 573; *Crediton* (*Bishop of*) v. *Exeter* (*Bishop of*) (1905) 2 Ch. 455] that the rule in *Pigot's* case [(1614) 11 Rep. 26 *b*] that any alteration of a deed by the obligee after execution invalidates the instrument, applies only to material alterations; but (ii) that an alteration may be material, even although it does not alter the terms of the contract between the parties, if it alters the business effect of the instrument when used for ordinary business purposes [*Suffell* v. *Bank of England* (1882) 9 Q. B. D. 555]; and there is Indian authority [*Sitaram Krishna* v. *Daji Devaji* (1883) I. L. R. 7, Bom. 418] which if it ought to be followed would show that such an alteration of a promissory note as is here alleged would be material. But before deciding this important point of law I should like to have had (i) a clearer finding than the learned District Judge has given us of the fact of the posterior alteration having been made, and (ii) some evidence as to the business effect of such an alteration if made. I propose therefore that we should decide the present case solely on the facts; and on these I would allow the appeal with costs.

GRENIER, A.J.—I agree to allow the appeal.

GOONEWARDENE *vs.* ORR.

NO. 2,161, C. R., HAMBANTOTA.

Present: WOOD RENTON, J.

ARGUMENT: 24*th* & 25*th June*, 1907.

JUDGMENT: 11*th July*, 1907.

Appeal—Date from which time runs in cases in which leave to appeal is necessary—Civil Procedure Code, sec. 175—*Court of Requests Ordinance (No.* 12 *of* 1895) *sec.* 13 (2).

The date from which time runs for filing an appeal in cases in which leave to appeal is necessary and has been given in the Court of Requests is the date of judgment, and not the date of the granting of the leave; hence leave to appeal must be obtained, and the appeal must be filed within seven days as required by sec. 754 of the Civil Procedure Code.

In this case the plaintiff sued the defendant for the value of goods sold. On the 15th November, 1906, the Commissioner of Requests gave judgment for the plaintiff as prayed, and on the 3rd December, 1906, the defendant filed his petition of appeal. This was the seventh day from the date leave was granted, and the fourteenth from the date of judgment.

A. St. V. Jayawardene, for plaintiff-respondent, took the preliminary objection that neither had the appeal been filed nor had the security been perfected within the time required by law (sec. 754, Civil Procedure Code). Where an unsuccessful party wishes to appeal under sec. 13 of Ordinance No. 12 of 1895 with the leave of the Court leave must be obtained, and the petition of appeal must be filed within seven days under sec. 754 of the Civil Procedure Code (*Arnolis* v. *Lewishamy*, 2 N. L. R. 222). The present appeal is therefore clearly barred.

Bawa for defendant-appellant:—Where a party wishes to appeal with the leave of the Court he is not bound by the time limit in sec. 754 of the Civil Procedure Code. He can on the analogy of sec. 13 (2) file his petition within seven days of the leave being granted. Otherwise there might be great hardship to suitors in courts where the Commissioner is also the Assistant Government

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Agent and holds other offices which takes him away from his judicial duties for any length of time. The application for leave may be made within the appealable time; but owing to the absence of the Judge the leave may not be granted until the appealable time is over. In such a case what is a party desiring to appeal to do? *Actus curiæ neminem gravabit.*

Jayawardene in reply:—Under the Criminal Procedure Code in certain cases an accused cannot appeal except with the leave of Court [sec. 355 (1)]. In such cases the accused must file his appeal within ten days, as in the case of ordinary appeals. In the instances given by Mr. Bawa the appellant might obtain leave to appeal notwithstanding lapse of time, or a petition of appeal may be filed with the application for leave to appeal.

JUDGMENT.

WOOD-RENTON, J.—In the present case I have come to the conclusion that it is impossible for me to interpret the Civil Procedure Code, sec. 754, and sub-sec. 2 of sec. 13 of the Court of Requests Ordinance of 1895 in the sense in which the appellant's Counsel contended. The question raised is as to the date from which time runs for filing an appeal in cases in which leave to appeal is necessary and has been given in the Court of Requests. It is provided by sec. 13 (1) of the Court of Requests Ordinance of 1895 that the time runs, in case of refusal of leave by the Commissioner, from the date of such refusal. But there is no such extension of the ordinary time limit in cases where leave is given. It appears to me to be impossible for a court of law to supply this *casus omissus.* I appreciate fully the inconveniences which the law as it stands must cause in individual cases, particularly where the Commissioner of Requests holds other offices which may impose upon him itinerary duties, and I think that the Legislature ought to intervene. But I have been unable to find any authority which would justify me in interfering as a court of law. It was held in an American case (*Kennedy* v. *Gibson*, 8 Wallace p. 498) by the Supreme Court of the United States that where provision had been made by

statute for suits against an asssociation being brought in the District Court, but no provision had been made as to the tribunal for suits brought by associations, it was within the competence of a court of law to supply the omission. It seems to me, however, that the *ratio decidendi* of that case is to be found in the fact that unless the Court had intervened the statute would be unworkable, and we find the same principle applied in the only other cognate case that I have discovered—*Yeadon Local Board* v. *Yeadon Waterworks*, 41 Chancery Division p. 52. In the present case it is clear that however great may be the hardship which the law as it stands may cause we cannot say that the Ordinance is unworkable, and for that reason I feel unable to interfere. It will be competent for the appellant, if so advised, to move the Court by way of revision; but I was pressed at the argument to decide the point of law, which I have now done to the best of my ability.

The appeal is dismissed with costs.

RAMAIYA *vs.* SINNO.

No. 9,314, C. R., NAWALAPITIYA.

Present: WOOD-RENTON, J.

ARGUMENT: 24*th June*, 1907.

JUDGMENT: 1*st July*, 1907.

Cattle, acquisition of property in—Voucher—Ordinance No. 10 *of* 1898, *sec.* 5 (1).

The effect of sec. 5 (1) of Ordinance No. 10 of 1898, taken in conjunction with the old rules of 21st September, 1900, and the later rules of 22nd September, 1905, is to make possession of vouchers a condition precedent to the acquisition of any property in cattle.

A. St. V. Jayawardene for defendant-appellant:—The judgment of the Commissioner is clearly wrong. The plaintiff admittedly had no vouchers for his cattle, and without vouchers it is not possible for him to establish his regular title to the cattle, which was put in issue by the par-

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ties. In a similar case Lascelles, A. C. J., held that an alleged owner of cattle could not succeed in an action to recover cattle unless he produced vouchers. As the cattle were purchased in Colombo, the rules regulating the transfer of cattle in the Western Province will apply.

Wadsworth for plaintiff-respondent:—The Commissioner has held that the defendant stole the cattle from plaintiff's possession a few days after his purchase. Under sec. 110 of the Evidence Ordinance No. 14 of 1895 possession is presumptive proof of ownership; but such presumption does not apply when the possession has been obtained by force or fraud. A man cannot be allowed to take advantage of his own wrong in order to shift the burden of proof to his opponent. Where, therefore, as in this case, the plaintiff has been deprived of his property by theft, he cannot be called upon to prove his title (*Jadabnath* v. *Sarmah*, 7 W.R. 174; *Paroy* v. *Debya* 12, W. R. 472; Field's Indian Evidence Act, sec. 110). If plaintiff's action is dismissed, he will not be able to recover his cattle.

Jayawardene in reply:—Hard cases make bad law. The law has been rightly down by Lascelles, A.C.J.; and to rule otherwise would be to nullify the provisions of the Transfer of Cattle Ordinance (No. 10 of 1898), which was intended to prevent the traffic in stolen cattle. There is still a remedy open to the plaintiff: he could even now get vouchers from the vendors and sue the defendant to recover his cattle. This is not a possessory action. If it had been a possessory action, different considerations would apply.

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JUDGMENT.

WOOD-RENTON, J.—It appears from the evidence in this case that two coast bulls, which had been bought by the respondent in Colombo, were stolen from him on the 17th December, 1906, and were found in the possession of the appellant two days later. Criminal proceedings for theft and dishonest receipt of the cattle in question were instituted by the respondent against the appellant in the Police Court; but the learned Magistrate thought that the evidence was insufficient, declined to commit, and referred

the respondent to his civil remedy. It was stated by the respondent in giving evidence in the Court below that he had no vouchers for the stolen cattle; and althought his point was not taken in the Court of Requests, the whole argument before me turned on the question as to whether under these circumstances he was entitled to recover possession of the cattle even from a possessor in the position of the appellant, with a strong moral odour of dishonesty attaching to him. In my opinion, the present case is governed by the decision of Acting Chief Justice Lascelles in C. R., Colombo, No. 1,000.* After careful consideration I entirely agree with Mr. Lascelles that the effect of sec. 5 (1) of Ordinance No. 10 of 1898, taken in conjunction with the old rules of 21st September, 1900, and the later rules of 22ud September, 1905, is to make the possession of such vouchers a condition precedent to the acquisitiou of any property in cattle. It is of course clear that the present case is a very hard one. There can be little moral doubt but that the appellant came by the respondent's bulls by dishonest means. At the same time I do not think we have any right to fritter away the salutary provisions of the Ordinance and of the rules to which I have just referred. It was contended by Mr. Wadsworth in the course of his argument that the rules of 1905 would not apply at least to one of the stolen bulls, since those rules only came into operation in November, while the bull in question was bought in the preceding July. But as the purchase and sale took place in Colombo, the acquisition even of that bull without vouchers would be prohibited by the rules of 21st September, 1900, which apply to the Western Province.

The appeal must be allowed with costs.

Vide Don Davit v. *Podi Singho* [(1906) 3 Bal. 39].—Editors.

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PERERA *vs.* PERERA *et al.*

No. 3,292, C. R., Pasyala.

Present: Wood-Renton, J.

Argument: *27th & 28th June*, 1907.

Judgment: *8th July*, 1907.

Lease, deed of—Stipulation to determine lease—Lessor's right.

A deed of lease contained the following stipulation: "And I (the lessor) have hereby reserved the power of releasing this lease after amicably settling the amount due to the lessee, if it is found necessary to sell this land by me, the lessor."

Held: That such a condition in a lease could not be carried out—otherwise than by consent—except by appropriate judicial proceedings, in the course of which it would be competent for the lessee to set up, as against his lessor, or anyone claiming under him, all equitable rights to compensation.

Walter Pereira, K.C., S.-G. (with him *Bawa & Savundranayagam*) for plaintiff-appellant.

vanLangenberg for defendants-respondent.

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Judgment.

Wood-Renton, J.—In my opinion this appeal must fail. The plaintiff-appellant sued the defendants-respondent to recover the sum of Rs. 70, being the value of the ground share of a crop of paddy removed by them from a land called Pillewa, in the village of Bataliya. The owner of this land, Paul Abraham Appuhamy, had leased it to the 1st respondent for 5 years from 18th April, 1902; and the 2nd, 3rd, and 4th respondents were cultivators under the 1st. The lease contained a clause of forfeiture in default of payment by the lessee of any of the yearly instalments, by which the rent was made payable, and the lessor expressly reserved to himself the power of "releasing the lease after amicably settling the amount due to the lessee" if he desired to sell the land. By the deed of 2nd December, 1905, Appuhamy sold the land to the appellant free from incumbrances, and without any reference to the 1st respondent's lease At the date of the sale the 1st respondent was in arrears with the

payment of his rent; but he alleges that Appuhamy, on his side, was indebted to him for the value of improvements. In view of the course that the case has taken, it is unnecessary for me to go into the state of accounts between the parties. On 4th December, 1905, Appuhamy wrote to the 1st respondent intimating to him that he had sold the land "and the remaining term of the lease" to the appellant, and requesting him to pay the rent to the appellant thenceforward. On the following day the appellant, through his Proctor, wrote both to the 1st respondent, informing him of the sale and requiring him to pay the rent for the then current month, and to deliver up the premises on the 31st December, and also to the 2nd, 3rd, and 4th respondents, demanding by right of his purchase the ground share of the existing paddy crop. The 1st respondent, by Proctor's letter dated 24th January, 1906, agreed to deliver up possession on satisfactory proof of the appellant's title and to pay rent to the appellant up to the date of such delivery. The appellant has obtained possession of the land. The paddy crop has, however, been reaped by the 1st respondent. The appellant admits the claim of the 2nd, 3rd, and 4th respondents to the cultivators' share, and he sues only for the ground share, which has been assessed by the Police Vidane of Bataliya and three minor headmen at Rs. 70. The Commissioner of Requests has dismissed the appellant's action substantially on the ground that the 1st respondent's lease was still in force at the date of the sale and that therefore the appellant had no right to the ground share of the crop, which appears from the evidence to have been sown about the Sinhalese New Year, 1905, and to have been nearly ripe in the following December. In effect I think that the decision is sound, although I propose to state my own view of the law and the facts in somewhat different terms. By his deed of sale the appellant acquired the rights of his vendor, and nothing more. On 2nd December, 1905, the rent due by the 1st respondent was in arrear. It was therefore open to Appuhamy, at that date, if he had thought proper to have taken proceedings against the respondent in virtue of the forfeiture clause, for the cancellation of the lease. It was open to him also to sell the land demised; but under the lease he had no power as

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between himself and the 1st respondent to execute any deed of sale which had the effect of cancelling the lease, unless and until the amount, if any, due by him to the lessee had been settled. If it could be settled amicably, good and well. There is no law to prevent a lessee from surrendering the lease. If not, it would have to be settled judicially in an action for cancellation. Appuhamy availed himself of neither of the courses which I have indicated. He took no proceedings under the forfeiture clause. He made no proposal for a settlement of accounts. On the contrary, in his letter of 5th December, 1905, he tells the 1st respondent that he has sold the land and the residue of the lease and calls upon him to attorn to the appellant. It follows that at the date of the sale the 1st respondent was entitled as against Appuhamy to the ground share of the growing crop, and that the appellant can stand in no better position than his vendor. It is true that the 1st respondent must be taken to have by his letter of 24th January, 1906, attorned tenant to the appellant until the delivery up of possession of the subject of the lease. But attornment affects the landlord as well as the tenant. It involves, so long as the relationship lasts, an acceptance by the former of the rights of the latter under the lease; and in the present case one of those rights as I have shown was the right to the ground share of the paddy crop now in dispute. An attempt was made at the trial to prove that the appellant had been in possession of the crop by his watchers since the beginning of January, 1906. The learned Commissioner of Requests did not accept the evidence adduced by the appellant on this point; and I see no indication on the face of the record of any intention on the part of the 1st respondent, *while surrendering the residue of his term*, to abandon his rights as an out-going tenant. The appellant, if so advised, may sue the 1st respondent for the recovery of any rent due to his vendor, and in such an action the question of compensation for improvements can be considered. But it is the clear right of the 1st respondent, and even more clearly the right of the other respondents, who are sued merely for the part that they played in reaping the crop, to have the action dismissed, and I dismiss it accordingly with all costs here and below.

I desire to add that in my opinion such a condition in a lease as existed in the present case could not be carried out—otherwise than by consent—except by appropriate judicial proceedings, in the course of which it would be competent for the lessee to set up, as against his lessor, or anyone claiming under him, all equitable rights to compensation. I think that this view is supported both by English and Roman Dutch Law. And as the question was argued before me in the present case, and has frequently been touched upon in other cases, I propose to deal with it here. The Court of Equity in England was from an early period accustomed to grant relief against the payment of the whole penalty on money bonds; and the statutes 4 and 5 Ann. c. 16 secs. 12 & 13, and 8 & 9, Will. iii. c. 11 conferred a similar jurisdiction on the Courts of Law. In the course of time this equitable jurisdiction was extended to forfeiture clauses in leases for non-payment of rent. This extension proceeded on the theory that the forfeiture clause—like the penalty in the bond—was only a security for the recovery of money. The statute 4 Geo. 2 c. 28 recognised this jurisdiction, but limited (sec. 3) the time within which the lessee in default might claim relief. An attempt was at one time made to extend the jurisdiction in equity to relief against forfeiture for non-payment of rent to breaches of other conditions in leases, *e.g.*, covenant to insure. But this was effectually checked by the decision of Lord Eldon in *Hill* v. *Barclay* (1811) 18 Ves. 56 and C. F.; *Bowser* v. *Colbey* (1841) 1 Hare 969; and *Barow* v. *Isaacs & Son* (1891) 1 Q. B. 417. Later on the Legislature interposed, and first the Court of Equity (22 & 23 Victoria c. 35, secs. 4—9) and afterwards Courts of Law (23 & 24 Victoria c. 126) were unable to grant relief against breaches of covenants to insure if (*a*) no damage had resulted from the default, (*b*) the default was due to accident or mistake, or, in any event, not to gross negligence on the part of the lessee, and (*c*) there was an adequate insurance on foot at the time of the application to the Court. The Conveyancing Acts 1881 and 1892 have completed the work of the Legislature in developing this branch of the Law—the former requiring (sec. 14) a lessor before re-entry for breach of condition (other than non-payment of rent) to notify the breach to

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the lessee and call upon him to remedy it: the latter conferring (sec. 4) on sub-lessees an independent right to relief [*Gray* v. *Bonsall* (1904) 1 K. B. 601] for breach of any of the conditions in the head lease. Non-payment of rent is still dealt with by the Court in the exercise of its old equitable jurisdiction, and relief has been granted to a lessee even where—as in the case before me in the present appeal—the lessor had regained peaceable possession without the assistance of any Court of Law. From the foregoing survey will be seen that, in England, both the Courts and the Legislature have been working steadily together (the Legislature stepping in where the arm of equity or of law was shortened) to prevent the forfeiture of leases for breach of condition.

The same spirit is to be found in Roman Dutch Law. Voet (19, tit. 2, sec. 18) expressly declares that the tenants of rural and urban tenements are not to be ejected without judicial authority, and that the question of ejectment or damages is one that should be left entirely to the discretion of a careful and circumspect judge.

The necessity for judicial authority for cancellation of a lease results from the decision in *Silva* v. *Dasanayake* (1898) 3 N. L. R. 248; relief against forfeiture even for a careless omission to perform a covenant has been granted in *Perera* v. *Thalif* (1904) 8 N. L. R. 118; and c.f. *Amarasinghe* v. *Sagoe* (1902) 2 Bro. 397; D. C., Kurunegalle, 3,704 (1877) Ram. (1877) 234: *Siribohamy* v. *Rattaranhamy* (1890—91) 1 C. L. R. 36; while the rights of lessees to compensation for improvements have been affirmed in a series of decisions of which the latest is *Mudiyanse* v. *Sellandyar* (1907) A. C. R. 174—a case in which the right was upheld even against third parties.

VAITTY *vs.* JACCOVA *et al.*

No. 11,518, C. R., BATTICALOA.

Present: WOOD-RENTON, J.

21st June, 1907.

Deed—Deed of donation—Will.

Where a duly executed instrument contained:—"....I the undersigned Jusai Sautia, for and in consideration of the love and affection I have in (*sic*) my sister Jusai Elizabeth ....till now and ever since the separation of my wife....from me about 25 years ago until now for having kindly treated me and with the greatest care prepared and supplied my food and in consideration of having procured medical aid and attended on me during the terms of my illness and as I have every hope that she will treat me in the like manner hereafter, I have executed (this) deed of donation....."

"This property shall be possessed by me during the life-time....and after my death the same shall be taken charge of by the said Elizabeth as her donated property....and reserving to myself the right if I wish to revoke the deed and appropriate the property to myself, I executed this deed of donation."

Held: That the instrument could only take effect as a will.

Bawa for defendant-appellant.

vanLangenberg for plaintiff-respondent.

JUDGMENT.

WOOD-RENTON, J.—In this case I have come to the conclusion that Mr. Bawa's argument on behalf of the appellants should prevail. The only question I have to decide is, whether the instrument under which Jusai Elizabeth claims title to convey the property in dispute should be regarded as a will. It serves no useful purpose in cases of this kind to go through a bead-roll of authorities in order to compare the facts with the terms of the instrument which I have here to construe. I propose, therefore, simply to state only the principle which has to be applied in the decision of cases of this description. It has been laid down in Williams on Executors, vol. 1, p. 82 (10th Ed.) in language which has repeatedly been accepted by the English Courts as correct [see case *Miller v Foden* (1890)

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15 Probate Division p. 105; and *In re Baxter* (1903) Probate p. 12]. "It is undoubted law," says Williams, "that whatever may be the form of a duly executed instrument, and, notwithstanding that it may be in the form of a settlement or deed of gift, or a bond, if the person executing it intends that it shall not take effect until after his death, and it is dependent on his death for its vigour and effect, it is testamentary." I proceed to apply this principle to the facts of the present case. It is quite clear that the instrument in question is in form a deed of donation, and not a will. It describes itself as a donation. It commences with the familiar words "Know all men," etc. It recites as its consideration the past and prospective services on the part of the donee. It sets out in the body of the instrument the full value of property conveyed; and the stamp which the duplicate bears seems to correspond to that which would be required under the Stamp Act in the case of a deed of donation of property of that value. In dealing with this case I have given full weight to all these elements, and I am setting them out in my judgment as strongly as I can. At the same time I think there are decisive circumstances on the other side. It is clear to me, to quote the language of Williams, that this instrument does depend "for its vigour and effect" on the death of the donor. It is quite true that he reserves to himself the possession and produce of the property conveyed during his lifetime; but I am unable to see that Jusai Elizabeth took any interest in it whatever so long as the donor was alive. He expressly reserves to himself the right to revoke the instrument at any time; and I think it results clearly from the terms of the document as a whole that both the *corpus* of the property and its immediate enjoyment were at his absolute disposal.

Under these circumstances the instrument can only take effect as a will, and the present appeal must be allowed with costs.

SILVA *vs.* SILVA.

No. 17,764, D. C., KANDY.

Present: HUTCHINSON, C.J., WOOD-RENTON, J., & GRENIER, A.J.

ARGUMENT: 13*th* & 14*th March*, 1907.

JUDGMENT: 1*st July*, 1907.

Administration—Powers of executors and administrators—Right of heirs—Title to property of intestate—Validity of conveyance by heirs —English and Roman Dutch Law—Civil Procedure Code, sec. 547.

The introduction of the English Law relating to executors and administrators did not affect, much less destroy, the distinctive character, status, and rights of the heir as the term is understood both in the Roman Law and the Roman Dutch Law.

On the death of a person his estate, in the absence of a will, passes at once by operation of law to his heirs, and the *dominium* rests in them.

A conveyance by the heir or devisee of his share of the immoveable property of the deceased is not void. The personal representative still retains the power to sell it (with the special authority of the Court if the provisions of the grant of administration so require) for the purposes of the administration; but his non-concurrence in the conveyance does not otherwise affect its validity.

A deed of ratification granted to a purchaser of property from a minor by the minor himself after he comes of age is in effect a conveyance.

In this case one Don Lewis de Silva died intestate on the 12th August, 1903, leaving as his heirs his brother, the 1st defendant, and his nephew, Mendis Appu. Letters of administration to his estate was granted to the 1st defendant. On the 6th February, 1906, the accounts of the estate were judicicusly settled and Mendis Appu was declared entitled to half the estate. Mendis Appu, by deeds dated 24th March, 1905, and 25th January, 1906, sold and transferred to plaintiff for valuable consideration his half share. Then, on the 5th April, 1906, after the judicial settlement, Mendis Appu again sold the same share to the 1st defendant. The 1st defendant mortgaged the property to the 2nd defendant. Plaintiff brought the present action for declaration of title to the said property, and prayed that the

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defendants be ejected therefrom. There was no evidence led on either side, and the main question was whether the conveyance by Mendis Appu to the plaintiff was valid without the assent or concurrence of the administrator. The learned District Judge (Mr. J. H. Templer) held that the conveyance was valid, and gave judgment for plaintiff. The defendant appealed.

H. A. Jayawardene for appellants.

vanLangenberg for respondent.

c. a. v.

JUDGMENT.

HUTCHINSON, C. J.—The plaintiff claims an undivided half of immovable property which formerly belonged to Don Lewis de Silva.

De Silva died intestate in 1903, leaving as his heirs his brother (1st defendant) and his nephew, Mendis Appu; and letters of administration to his estate was granted to the 1st defendant.

On March 24, 1905, Mendis Appu, whilst still a minor, purported to sell and, by deed of that date, to convey his one-half of the property to plaintiff. This deed was registered on the 25th March, 1905.

On the 25th January, 1906, Mendis Appu, by deed of this date, after reciting this former deed and that he had since attained his majority and wished to confirm the sale, declared that "I hereby ratify and confirm the Deed No. 7,786, dated 24th March, 1905, and the sale and conveyance thereby effected; and I do hereby declare that I have sold, assigned and transferred the lands therein mentioned, viz. .....to G. M. N. de Silva.....and that I have no further right or interest therein." This deed was registered on the 9th April, 1906.

On the 6th February, 1906, the District Court of Kandy made an order in the testamentary action that the administrator "render his account on the footing that he and Mendis Appu are the heirs of the deceased and are each entitled to a half share of the deceased's estate".

On the 5th April, 1906, Mendis Appu sold, and by deed of that date conveyed to the 1st defendant the same share

which he previously sold to the plaintiff; and on the same day the 1st defendant mortgaged it to the 2nd defendant. This conveyance to the 1st defendant was registered on the 10th of the same month.

The defendants claimed under the deed of the 5th April, 1906, and contended that the first conveyance to the plaintiff was void, because Mendis Appu was then a minor, and that the deed of ratification was void because a void conveyance cannot be ratified, and that moreover both the deeds on which the plaintiff relied would have been ineffectual, even if Mendis Appu had been of full age at the date of the first of them, because no conveyance from the administrator had been obtained.

The District Judge heard and decided the above points without any evidence except that of the documents. He held: (1) That the defendants were not estopped by sec. 115 of the Evidence Code from setting up the above defence; (2) that the deed of the 24th March, 1905, was void, and, therefore, could not be ratified; (3) that the deed of the 25th January, 1906, amounted to a conveyance; (4) that a conveyance by the administrator was not necessary. On these rulings he gave judgment for the plaintiff, and the defendants now appeal against that judgment.

No question of fraud on the part of the defendants was raised at the trial; and, therefore, although the first conveyance to the plaintiff was registered a year before the 1st defendant's purchase—and it seemed unlikely that the defendants were ignorant of the plaintiff's purchase—we must assume that the defendants paid their money in good faith and that this is a contest as to which of two innocent persons must suffer for the fraud of Mendis Appu. By the deed of 25th January, 1906, Mendis Appu says in effect: "The former deed was ineffectual because I was then a minor: I want to confirm it, and I accordingly declare that I have sold and conveyed the property to de Silva." In my opinion the District Judge was right in holding that it was in effect a conveyance.

The objection that it was ineffectual because the administrator did not concur in it is founded on a *dictum* of Bonser, C. J., in 5 N. L. R. 15, in which he repeats what he

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had said in a previous case a few days before: "It seems to me that if a person desires to prove title to property and finds it necessary to deduce title to that property, either from or through a former owner who died intestate, he must prove one of two thiugs,—either that administration has been taken out to the intestate and that the administrator has conveyed the intestate's estate to him or to his predecessor in title, or that the intestate's estate was of less value than Rs. 1,000, so that administration was unnecessary."

A grant of administration empowers the administrator according to the common form "to administer and faithfully dispose of the property and estate, rights, and credits of the deceased". By sec. 540 of the Civil Procedure Code: "The power of administration which is.....conveyed by the issue of a grant of administration extends to every portion of the deceased person's property, movable and immovable, ...and endures for the life of the administrator or until the whole of the property is administered." Does that mean that when the administrator has discharged all the debts and liabilities, and has handed over to the heirs or allowed them to take over the movables, and has filed his accounts and obtained a judicial settlement of them, there is still something else for him to do, viz., that the movables are still vested in him and he must convey them to the heirs?

I do not find any enactment vesting the immovables in the executor or administrator. Sec. 547 of the Civil Procedure Code enacts that no action shall be maintainable for the recovery of any property belonging to the estate of the deceased (where the estate amounts to Rs. 1,000) unless grant of probate or letters of administration duly stamped shall have first been issued to some person as executor or administrator, and that, if any such property is transferred without probate or administration being first taken out, the transferor and transferee shall be liable to a fine and to pay the costs of the stamps which ought to have been affixed to the probate or letters of administration. There is nothing to vest the property in the executor or administrator, and in fact it has been held by the Full Court in *De Kroes* v. *Don Johannes*, 9 N. L. R. 7, following an earlier case, that no assent on the part of the executor is required

to pass to the devisee the immovable property specifically devised by the will.

We are asked to hold, not merely that an alienation by the heir without the administrator's concurrence does not deprive the administrator of his power to resort to the alienated property, if necessary, for the purposes of administration, but that the alienation is absolutely void. The *dictum* of Bonser, C. J., to this effect was quite unnecessary for the decision of either the case in 5 N. L. R. or the Kandy case there referred to: in the latter case Lawrie, J., founded his judgment on the short point (which had not been taken in the Court below) that the case was one within sec. 547, and that the action was not maintainable because no probate or administration had been taken out; and that was the only point in either of those two cases.

In a case reported very shortly in Ramanathan 195 (1866) the administrator was ordered to join in a conveyance, because "nothing has occurred to divest the administrator of the legal estate which is vested in him by the letter of administration"; but it does not appear what the property was, and no reasons are given. In Ramanathan 273 (1867) the Supreme Court said, that since the charter of 1833, which gave power to District Courts to appoint administrators and grant probates, the law of executors and administrators is the English Law. And the Judicial Committee of the Privy Council in the judgment reported in Moore's P. C., 8 N. S. 90 (1871) p. 122 said: "It is stated in the judgment in Ceylon (and the form of the probate and all the proceedings in this case with which they have been furnished show their lordships that it is correctly stated) that an executor in Ceylon has the same power as an English executor, with the addition that it extends over all real estate, just as in England it extends over chattels personal." In vanderStraaten 273 (Full Court 1871) the Court said, that the lands of a deceased person "pass to his representatives in the same manner as his personal property"; but that "we wish not to be understood as implying any intention to break in upon the long established course of law here, according to which our courts have given validity to conveyances made by the

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heirs and widows of intestates although there has been no grant of administration". And in that action, which was brought by a purchaser from an heir of an undivided share for declaration of title to and possession of the purchased share, one of the defendants being the administrator, the Court, finding that all the debts had been paid, gave judgment for the plaintiff.

In *Fernando* v. *Perera*, 8 S. C. C. 54 [Full Court (1887)] the heirs of an intestate had sold and conveyed to A a part of the intestate's land and with the proceeds of sale paid off mortgages on the land. Afterwards the plaintiff took out administration and sued A in ejectment for recovery of the land. The majority of the Court held that the conveyance passed the land to A.

In *P. Chettiar* v. *C. Pandary*, 8 S. C. C. 205 [Full Court (1889)] it was held that a purchaser from the heir took title, subject to be avoided by the legal representative. In *Tikiri Menika* v. *Tikiri Menika* 9 S. C. C. 63 (1890) the plaintiff, claiming to be one of the heirs of an intestate, sued the coheirs for declaration of his title: the defendants disputed the plaintiff's legitimacy. Burnside, C. J., and Dias, J., held that the plaintiff could sue without taking out administration, as the judgment dealt only with the title and made no order for possession, and did not conflict with administrator's right to deal with the property.

In *Tikiri Banda* v. *Ratwatte*, 3 C. L. R. 70 (1894) the intestate died in 1883; administration was taken out in 1884; and the heir sold in 1886; then the administrator sold, but not for the purpose of the administration. Lawrie and Withers, JJ., held that the purchaser from the heir was entitled. In *De Kroes* v. *Don Johannes*, 9 N. L. R. 7 [Full Court (1895)] the plaintiffs sued in ejectment. The Court found that under the will of W. M. de Kroes the property was vested in his son G., and had to be divided after G.'s death among 6 children. G. having died his widow and children brought this action. The Court following *Cassim* v. *Marikar*, 1 S. C. R. 180, held that the devise being specific the concurrence of G.'s executor was not necessary. There are several cases (4 N. L. R. 201, 7 N. L. R. 299, 8 N. L. R. 223) deciding that since sec. 547

of the Civil Procedure Code the Court ought for the protection of the revenue to insist on administration being taken out notwithstanding any admissions by the parties as to the value of the estate: but these cases do not seem to have any bearing on the present question.

It appears, therefore, that since the Charter of 1833 the executor or administrator in Ceylon has the same power as regards the immovables as an English personal representative had at that date as regards chattels. And under the English Law a conveyance by the personal representative was not essential, but only his assent, to the validity of a conveyance of chattels, including chattels real, by the next of kin or devisee.

And in my judgment the cases which I have quoted establish that a conveyance by the heir or devisee of his share of the immovable property of the deceased is not void. The personal representative still retains power to sell it (with the special authority of the Court if the terms of the grant of the administration so require) for the purposes of the administration, but his non-concurrence in the conveyance does not otherwise affect its validity. I see that by sec. 79 of the new Registration Ordinance 5 of 1907 on the death of a registered owner his legal representative "shall be registered as the owner". What the effect of this enactment may be on the law as laid down in *De Kroes* v. *Don Johannes* and the other cases above quoted I need not now consider. In my judgment this appeal should be dismissed with costs.

WOOD-RENRON, J.—I concur. Mr. vanLangenberg's clear and able argument has convinced me reluctantly that the *dictum* of Bonser, C. J., in *Fernando* v. *Dochchi* (1901) 5 N. L. R. 15, to which my Lord the Chief Justice and Grenier, J., have referred is not good law. On grounds of policy I would have adopted it if I could. I have been unable to find any direct English authority on the point. But the view that we are now taking appears to me to derive some support by way of analogy from the arguments and the judgment in the recent case of *Kemp* v. *Inland Revenue Commissioners* (1905) 1 K. B. 581.

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GRENIER, J.—The two main questions argued before us on this appeal were (1) whether it was competent in law for heirs to alienate immovable property without assent or concurrence of the administrator, and (2) whether such an alienation was absolutely void. In determining these two questions it is necessary to bear in mind prominently that there is no distinction observed in Ceylon between movable and immovable property in the administration of a testate or intestate estate, and executors and administrators are entitled to deal with either kind of property in due course of administration. The introduction of the English Law relating to executors and administrators did not, in my opinion, as submitted by Mr. vanLangenberg for respondent, effect, much less destroy, the distinctive character, status, and rights of the *heir* as the term is understood both in the Roman Law and the Roman Dutch Law. Administration as known to English Law formed no part of the jurisprudence either of the Roman Law, or its later development the Roman Dutch Law, at any stage. The most that can be said is, that an executor under the English Law corresponds to the heirs, *designatus*, or *testamentarius* in the Civil Law as to the goods, debts, chattels of the testator. The heir, however, by underteking administration made himself personally liable for the debts of the deceased's estate. This liability he was afterwards allowed to avoid by means of the benefit of Inventory and the act of Deliberation. The benefit of Inventory and the act of Deliberation, I need hardly say, have no place now in our Law. In applying, therefore, the English Law of administration we must, in the absence of special legislation as there is in South Africa, take into account certain conditions relating to the common law rights of the heirs of an intestate, more especially those rights which accrue by succession and inheritance. On the death of a person his estate, in the absence of a will, passes at once by operation of law to his heirs, and the *dominium* vests in them. Once it so vests, they cannot be divested of it except by the several well-known modes recognised by law.

Such being the possession of the heirs, the point which next arises for determination is, what relation an ad-

ministrator bears to them when such a person is appointed by the Court. It is clear that the title cannot be in both the administrator and the heirs at one and the same time. Indeed, this is rendered impossible by the title having passed already to the heirs on the death of the intestate. An administrator is invariably appointed some time after the death of the intestate; and if by the mere fact of his appointment the title passes to him, then it means that the heirs have been divested of it in a manner which is not recognised or supported by any rule of positive laws relating to the transfer of immovable property. Besides, in strict law it is impossible to conceive a state of things by which title to immovable property is temporarily suspended, or is vested in no one, for that is what will inevitably result if the heirs do not become vested with the title of their intestate immediately on his death, and there is an interval of time, long or short, between that event and the appointment of an administrator.

Clearly a grant of administration, viewed by itself, is not a conveyance or assignment by Court to the administrator of the title of the intestate. The very terms of a grant negatives such a contention.

Now, there is express provision in the Civil Procedure Code, secs. 331 to 333, which enables the Court, in cases where the decree is for the execution of a conveyance and the judgment-debtor neglects or refuses to comply with the decree, to execute and pass a conveyance to the judgment-creditor in the form prescribed by sec 333; such a conveyance has the same legal effect as one executed by the party ordered to execute the same, although not attested by and executed before a notary public.

A practice, not uniform perhaps as to details only, has, in consequence of the anomalous position which an administrator occupies as regards the immovable property of his intestate, grown up in our Courts, and which I think may correctly be described now as inveterate, by which the Court when it has ordered the sale of immovable property belonging to an intestate estate permits, and sometimes expressly orders, the administrator to execute the necessary conveyances.

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These orders are really in effect decrees of Court, and are bound to be carried out. In a generality of cases, if not in all, there is attached to the conveyance by the administrator the order of Court authorising the sale, obviously in order to prevent any future question as to the power of the administrator to sell.

Apart from this practice, however, the Court has undoubtedly the power to require an administrator, or even an auctioneer duly appointed by it, to convey; and the very terms of the conveyance executed on all such occasions sufficiently indicate the source from which the authority to convey is derived. At the same time, in the case of all such conveyances the requirements of the law in regard to notarial attestation of all instruments affecting land or other immovable property are strictly complied with.

It is a fallacy, therefore, to suppose, as urged by respondent's Counsel, that an administrator obtains an absolute title to the estate of his intestate. What happens is, that, on letters of administration being granted to him by the Court, he is entrusted and charged with the estate of the deceased for purposes connected with the proper administration and settlement of it: the *persona* of the deceased is, by a legal fiction, continued in him until, under the provisions of chap. 54 of the Civil Procedure Code, the estate is finally settled by the Court, or a distribution of the same is made amongst the heirs.

An administrator, as the term is understood in the English Law, cannot deal with any part of his intestate's property as if it were his own absolute property, or, to use the language of the Roman Dutch Law, as if he had the *dominium* or the *plena proprietas*, the right of full and complete ownership. He cannot sell, mortgage, or in any way alienate except for the payment of debts; and when he does so he has almost invariably, according to the practice which has obtained amongst us for considerably over half a century, to obtain the permission of the Court. The necessity for this permission is accentuated by the language employed in grants of administration; and in my own experience, which now covers a period of nearly one-third of a century, an administrator, as a rule, seeks the permission

of the Court before dealing with immovable property, although, perhaps, in some instances, the grant may be absolute and unfettered.

There is a very old definition in English Law of the term administrator which is very suggestive of his powers and duties, viz.: "He that hath the goods of a man dying intestate committed to his charge by the Ordinary for which he is accountable when thereto required."

It goes without saying that the rights, powers, and duties of executors and administrators are in many respects similar. Originally the Ordinary was bound to pay the debts of the intestate, so far as his goods would permit, as executors were bound in the course of a will. In order to prevent the continued abuse of the power which the Ordinary had over the residue in his hands, Stat. 31 E4 C11 A.D. 1357 was enacted, which provided that, in case of intestacy, the Ordinary shall depute the nearest and most lawful friend of the deceased to administer his goods; and administrators were placed on the same footing with regard to suits and to accounting as executors. The next and most lawful friend was interpreted to mean the next of blood who was under no legal disabilities. The Stat. 21 H8 C5 enlarged the power of the Ecclesiastical Judge, and permitted him to grant administration either to the widow or the next of kin or to both of them at his discretion. Under our law the widow of the intestate is, as a rule, preferred to all others.

There is nothing in the English Law to support the contention for the appellant that the assent of the executors is required to pass immovable property specifically devised; nor does that law require the assent of the executor to pass title to chattels real and personal, such as leases for years, rent due, corn growing and cut, grass cut and severed, etc.; cattle, money, plate, household goods, etc. Certainly no assent in the shape of a conveyance is necessary. But when lands are devised to executors to be sold for payment of the testator's debts, and they are sold for this purpose, the executor has then to execute a conveyance in favour of the purchaser for obvious reasons. An administrator in Ceylon deals with immovable property as well as movable

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property; and applying the English Law it seems clear that no conveyance from an administrator is necessary to pass title to the heirs, for that has been already passed by operation of law.

Thus far I have stated certain propositions which, in my humble opinion, are beyond controversy, as they appear to me to be supported both by the common law as far as the legal position of heirs is concerned, and by the English Law in relation to the powers and duties of administrators and executors. The point of practice I have referred to must be regarded as the inevitable resultant of the introduction of a system of mixed law and procedure into a system which was ill adapted to receive it in its entirety, much less to assimilate it, for the simple reason that in English Law an administrator only deals with the personal estate of the intestate, and the necessity for a conveyance is thus obviated. The property in the goods and chattels of the intestate, when sold for payment of debts, passes, I presume, by delivery. The immovable property in case of intestacy is governed by the law of primo-geniture, and therefore never fails to be administered.

It may be safely asserted that there is no legislative enactment in Ceylon which vests immovable property in an administrator in the sense that he is the absolute owner of it, and is at liberty to deal with it in any way he pleases. Mr. Jayawardene, in the course of his argument, referred us to sec. 547 of the Civil Procedure Code in support of the position he took up on this part of the case. That section was primarily intended for the protection of the revenue, as it had been long the practice for large estates to be unadministered, and for heirs to convey their interests without reference to the debts and liabilities of their ancestors. I would read the section as recognising the existence of a right in certain persons, presumably the heirs, to transfer immovable property belonging to an intestate; and the section was intended to prevent the exercise of the right without probate or administration having been *first* taken out. The word *first* connotes that if administration or probate has been taken out transfers may be effected. Now, it is clear that the words "grant of probate or letters

of administration to some person as executor or administrator" can only mean, taking them with the context, an act of the court by which it gives certain persons certain powers with reference to a testate or intestate estate. The section cannot possibly be taken to mean as enacting that the immovable property vests in some particular person, nor can it be said with any reason that the mere grant of probate or letters of administration has this effect. There are absolutely no words of vesting anywhere in the whole of the section, and I have no hesitation in holding against the appellant's Counsel on this point.

We are thus reduced to a consideration of the effect of some decisions of this Court bearing on the two questions I have stated. But before I deal with them I should like to point out this. In cases where an estate is under the value of Rs. 1,000, and administration is not compulsory, the heirs can deal with it by transfer or assignment, and the title that they pass is recognised by our law as a good title. In such case it is manifest that the rule of our common law regulating intestate succession applies, and on the death of the intestate the heirs by operation of law become vested at once with his title. Now, it can hardly be said that the mere grant of probate or letters of administration results directly in divesting the heirs of their title simply because their intestate has left an estate of the value of Rs. 1,000 and upwards. If in the one case the heirs are not divested of their title, with equal reason may it be asserted, in the absence of any express provision of the law vesting the title in the administrator, that in the other case too the same rule of law applies.

The argument that was founded on this aspect of the case appeared to be irrefutable.

The law surely did not intend to make a distinction between the two cases, but only required, in the interests of the revenue, that large estates should not go unadministered, because that would mean loss of stamp duty on probate and letters of administration.

I am confirmed in this view by the terms of sec. 547 of the Civil Procedure Code, which enacts that where property is transferred without probate or administration being first

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taken out to estates amounting to Rs. 1,000 the transferor and transferee shall be liable to a fine and to pay the cost of the stamps which ought to have been affixed to the probate or letters of administration.

As regards local decisions, the case of *De Kroes* v. *Don Johannes*, 9 N. L. R. p. 7, which was heard before the Full Court, of which I was a member, is in point. The Court held there that the devise being specific the assent of the executor was not necessary to vest title in the devisee.

The Full Court followed in this respect the decision of another Full Court in the case of *Cassim* v. *Marikar*, 1 S.C.R. p. 180; and there is therefore undoubted authority in support of the position which the respondent has taken up on this appeal. In *Cassim* v. *Marikar* Burnside, C. J., was of opinion that the case was one *primæ impressionis*, and therefore dealt with it on principle rather than on any decided authority. He held, following apparently some previous rulings, to which no specific reference is made, that on the death of an intestate his immovable property passes to his administrator, and that in case of testacy immovable property, the title to which is not derived or specially appropriated by the will, passes to the executor as against the heirs; but as regards immovable property specially devised the title to it passes to the devisee, but subject to the right of the executor to deal with it in the course of administration. I cannot gather, either from the judgment of Burnside, C. J., or Withers, J., what precisely were their views in regard to the nature or extent of the estate or title of the executor and administrator. But, in the result, Withers, J., held that no assent of the Ceylon executor or administrator is necessary to pass title to the heirs appointed in the will, because they have this title on the death of the testator or intestate, subject to the suspension of enjoyment, pending administration. He seemed to have thought, however, that the executor had a limited estate or title which could be extracted out of the inheritance and given by operation of law to him. If he meant by this that the executor or administrator when he entered into possession of the testate's or intestate's estate under the grant of probate or letters of administration had full and complete control over it for purposes of administration, I am quite

in accord with him.

In the case of *Pasupathu Chettiar* v. *Cantar Pondary*, 8 S. C. C., the Full Court held that although the purchaser of a deceased person's property who takes from any other than a legal representative takes a title which may be avoided by the administrator in the due course of administration, yet when a *bona fide* alienation had been made by the heirs and a legal representative appointed, who after a considerable time sought to reach the property alienated as assets necessary to be applied in payment of outstanding debts, he should make out a *prima facie* case showing that it was necessary to resort to the particular piece of property in question.

In the case of *Tikiri Banda* v. *Ratwatte*, 3 C. L. R. p. 70, Lawrie and Withers, JJ., were of opinion that succession to the estate of an intestate devolved immediately upon his death, and it was competent for the heirs-at-law to alienate the property pending the administration of the estate, and that such alienation vested good title in the alienee, subject only to be defeated by any disposition of it by the administrator in due course of administration.

The learned author of Laws of Ceylon, on p. 299, vol. 2, says that it may now be accepted as settled law that if a person desires to prove title to property deduced through a former owner he must prove either that administration has been taken out and that the administrator has conveyed the intestate's estate to him or to his predecessor in title, or that the intestate's estate was of less value than Rs. 1,000.

A close examination of the authorities cited by him has not helped me to come to the same conclusion as regards conveyance by administrators being the sole *media* for the transmission of title.

In the case of *Fernando* v. *Dochchi*, 5 N. L. R. p. 15, Bonser, C. J., without referring to any authorities laid it down broadly that title to property can only be proved in one of the two ways just mentioned above. I can only regard what he said as mere *obiter*, and of no binding effect. There is, however, an old case reported in vanderStraaten, p. 273, in which it was held by the Full Court, consisting of

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Creasy, C. J., and Temple and Lawson, JJ., that the immovable property belonging to a deceased person passed to his representative in the same manner as his personal property; but the Judges were careful to add: "We wish not to be understood as implying any intention to break in upon the long established course of law here according to which our Courts have given validity to conveyances made by the heirs and widows of intestates, although there has been no grant of administration."

I apprehend that since this important pronouncement was made by the Full Court in 1871 there has been no change whatever in our law, either by legislative enactment or by uninterrupted series of judicial decisions establishing a contrary view. Possibly it may be advisable to amend the law on the subject and make conveyances from executors and administrators the only means for transmission of title; but so long as the law remains unaltered, I cannot see how it can be laid down that it is not competent for heirs to alienate immovable property without the assent or concurrence of the administrator and that such alienations are absolutely void. I shall only refer to one other case, 222, D. C., Galle, 6,398, 10th October, 1903, in which Layard, C. J., avoided pronouncing any opinion as to whether the property of the intestate vested in the administrator and a conveyance from him was necessary, although Wendt, J., who sat with him, expressed an opinion to that effect.

The reason given by Layard, C. J., was, that until the point was properly raised and argued he would not decide it. In the case now before us we have had the benefit of an exhaustive argument, and at the conclusion of it the learned Counsel for the appellant seemed unable to support the appeal. I would dismiss the appeal with costs.

The following authorities were cited at the argument:—

In support of the appeal:—Morgan's Dig., p. 252; Williams on Executors, p. 467; *Cassim* v. *Marikar*, 1 S.C.R. 180; *Fernando* v. *Perera*, 8 S. C. C. 54; *Fernando* v. *Dochchi*, 5 N. L. R. 15; *Gunetileke* v. *Silva*, 5 N. L. R. 26; *Gunaratne* v. *Hamine*, 7 N. L. R. 299; Ram. (63–68) 195; *Loku Appu* v. *Banda*, 7 S. C. C. 3; *Moysa Fernando* v. *Alice Fernando*, 4 N. L. R. 201.

Contra:—*De Kroes* v. *Don Johannes*, 9 N. L. R. 7; *Tikiri Banda* v. *Ratwatte*, 3 C. L. R. 70; Ram. (77) 154; Wendt 83; In *re* the Estate of *A. Kappaneyiana*, 7 S. C. C. 78; *Thommipulle* v. *Naganather*, 7 S. C. C. 73; *Ayen* v. *Vettivaloo*, 7 S. C. C. 35; *Tikiri Menika* v. *Tikiri Menika*, 9 S. C. C. 63; *Pasupathy Chettiar* v. *Cantar Pandary*, 8 S. C. C. 205.

LABROOY *vs.* MARIKAR.

No. 2,625, M. C., Colombo.

Present: Hutchinson, C. J.

Argument: *24th July*, 1907.

Judgment: *2nd August*, 1907.

Municipal Council—By-laws—Rule 7, chap. 22—Rule 2, chap. 25—"Continued neglect after notice"—Ordinance No. 7 of 1887, secs. 122, 123 & 283—Ordinance No. 8 of 1901, sec. 4.

A person noticed in writing by the Chairman of the Municipal Council to take down a certain building, or alter it so as to bring it into conformity with the requirements laid down in the by-laws, and who after notice has failed or neglected to conform thereto, is guilty of failing to take down the building and for "continued neglect after notice" under rule 7 of chap. 22 of the by-laws made under sec. 4 of Ordinance No. 8 of 1901.

By virtue of sec. 6 of Ordinance No. 8 of 1901 the by-laws, after they have been duly published and laid before the Legislative Council, and confirmed by the Governor in the Executive Council, have the force of law, and their validity cannot be questioned, even though they may exceed the powers given by secs. 4 and 5 of that Ordinance.

Under sec. 283 of Ordinance No. 7 of 1887 a complaint against a person of having erected a building contrary to the requirements of the by-laws must be made within 3 months of the commission of the offence.

The accused-appellant in this case was charged on the 12th April, 1907, with having failed and neglected, after notice in writing issued by the Chairman of the Municipal Council of Colombo, under rule 7, chap. 22 of the by-laws, and duly served on him on the 4th February, 1907, to take down a certain building erected by him in contravention of the requirements laid down in that by-law, or so to alter it as to bring it into conformity with such requirements, an offence punishable under rule 2, chap. 25 of the said by-laws. The accused was tried on the 21st June, 1907, when the Magistrate added another charge, viz., that the accused in January, 1907, erected a dwelling house the doors and windows of which were not such as were required by rule 7, chap. 22 of the by-laws, and thereby committed an offence punishable under rule 2, chap. 25. The

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accused was found guilty of both charges, and was fined on the first charge Rs. 20 and a further sum of Rs. 35 for the continued neglect after notice, and was fined on the second charge Rs. 20.

A. L. R. Aserappa for accused-appellant:—The non-compliance with a notice of the Chairman to alter or pull down a building is not an offence. If it is an offence, a punishment is provided for it in sec. 7, chap. 22, viz., the pulling down of the building, and it is not punishable under sec. 2, chap. 25 [*Labrooy* v. *Haniffa* (1 A. C. R. p. 7)]. The latter section only applies to cases of offences for which no penalty is specially provided. The notice is bad because it is merely signed by the Chairman, and not sanctioned by the Council. That part of rule 2, chap. 25, which provides for a penalty of Rs. 10 a day for a continuing offence is *ultra vires*. It is not in accordance with the provisions of sec. 4 of the Ordinance 8 of 1901, which limits the penalty under the by-laws to Rs. 20. If it be *ultra vires*, then there must be a separate charge for each offence. The second charge by the Magistrate is stale, as not made within three months of the commission of the offence, as required by sec. 283 of the Ordinance No. 7 of 1887. Also cites 9 W. R. 279; Maxwell on Interpretation of Statutes, pp. 501, 513; 24 Q. B. D. p. 703.

F. J. de Saram for complainant-respondent:—The Chairman is the executive officer of the Council, and the notice is valid. [Sec. 47 of the principal Ordinance, and *Labrooy* v. *Ismail* (1 A. C. R. p. 38.)] Even if the sanction of the Council is necessary, the Chairman must be presumed to have acted with proper sanction (*de Saram* v. *Markar*, 1 Br. p. 385). The demand in the notice is a requirement lawfully made, and non-compliance with such a requirement is punished under sec. 2, chap. 25. The provisions of secs. 6 and 11 of the Ordinance No. 8 of 1901 were intended to shut out objections to the validity of by-laws after they have been once sanctioned by the Legislative Council. Once passed and sanctioned they have the force of law [so held in *Labrooy* v. *Ismail* (1 A. C. R. p. 42)]. Further, the continuous offence is created afresh day by day; and the penalty of Rs. 10 for each daily offence is within the

maximum penalty enacted by the Ordinance 8 of 1901. The charge clearly specifies what is the offence with which the appellant is charged.

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JUDGMENT.

HUTCHINSON, C. J.—The appellant was charged on the 12th April, 1907, with failing or neglecting after notice in writing issued under rule 7 of chap. 22 of the by-laws made under sec. 4 of the Municipal Councils Ordinance 8 of 1901, duly served on him on the 4th February, 1907, to take down a certain building, or alter it so as to bring it into conformity with the by-laws, thereby rendering himself punishabe under rule 2 of chap. 25 of the by-laws. On the 21st June the charge was heard, and after taking some evidence the Magistrate added another charge, viz., that the defendant in January, 1907, erected a house for a dwelling-house the doors and windows of which were not such as are required by rule 7 of chap. 22 of the by-laws, and thereby committed an offence under rule 2 of chap. 25. He convicted the defendant on both charges, and fined him on the first count Rs. 20 and a further sum of Rs. 30 for the continued neglect after notice, and fined him Rs. 20 on the second count.

The appellant argues that there was no power to impose a fine for the "continued neglect after notice", because the by-laws, so far as they authorise the imposition of such a fine, are *ultra vires*, and therefore void; and secondly, that there was no power to add the second charge, because by sec. 283 of the Municipal Councils Ordinance 7 of 1887 the complaint must be made within 3 months next after the commission of the offence, and this offence was alleged to have been committed in January, but the charge was not made until June.

The by-laws are made under sec. 4 of the Ordinance of 1901, which amended the Ordinance of 1887. Sec. 122 of the Ordinance of 1887 gave power to the Municipal Council to make by-laws for various purposes; and sec. 123 provided "that no fine for any infringement of a by-law shall exceed Rs. 20; and that in case of a continuing infringement no fine shall exceed Rs. 10 for every day after written notice from the said Council of such infringement".

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These sections are now replaced by secs. 4 and 5 of the Ordinance of 1901, sec. 4 of which enacts that the Council may make such "by-laws as may seem necessary or expedient for the purpose of carrying out the provisions of this Ordinance and may impose penalties for the contravention thereof not exceeding a fine of Rs. 20"; and sec. 5 enacts that the by-laws "may provide among other things for the matters therein enumerated". There is no power given here to make a by-law imposing any penalty except the fine of Rs. 20. It looks as if the power to impose an additional fine for a continuing breach was designedly omitted.

The respondent, however, contends that by virtue of sec. 6 of the Ordinance of 1901 the by-laws have the force of law, and that their validity cannot be questioned even though they may exceed the powers given by secs. 4 and 5. For sec. 6 enacts that no by-law shall have effect until confirmed by the Governor in Executive Council, and that all by-laws when so confirmed shall be published and laid before the Legislative Council, which may within 40 days thereafter amend or annul them, and that all by-laws so amended, and such as are not amended, shall be proclaimed in the *Gazette*, and shall come into force on such proclamation, "and shall thereafter be as legal, valid and effectual as if the same had been enacted in this Ordinance".

Did the legislature intend by the enactment of sec. 6 to do away with all possibility of questioning the validity of any by-law made or purporting to be made under the Ordinance? If so, then a by-law which authorised a penalty greater than or different from that which is expressly prescribed in sec. 4—imprisonment, for instance—or a by-law for an object not authorised by the Ordinance, must be held valid if it purports to be made under the Ordinance and has been confirmed and published and laid before the Council and proclaimed in the way prescribed by sec. 6. If that was the intention of the legislature as expressed in sec. 6, we are bound by it.

If that is the true construction, then perhaps in the same way all rules purporting to be made under any

Ordinance which gives power to make rules must, unless a contrary intention appears, be treated like Ordinances, and cannot be questioned, although they may not be such as the Ordinance authorises; because sec. 11 of Ordinance 8 of 1901 enacts that when published in the *Gazette* they "shall have the force of law".

My own opinion is that that was not the intention of the legislature. There is however a decision of Middleton, J., exactly in point. He held in *Labrooy* v. *Ismail*, reported in 1 de Witt & Weeresinghe's Appeal Court Reports, p. 42, that by reason of the enactment in sec. 6 the validity of this by-law cannot be called in question. I have not been able to find any other decision directly in point; but in an English case, *Institute of Chartered Patent Agents* v. *Lockwood*, Appeal Cases (1894) p. 347, three of the judges expressed an opinion (though it was not necessary for the decision of the case), and another of the judges expressed a different opinion that an enactment in an English act, substantially to the same effect as that in sec. 6 of our Ordinance, had the effect of giving the force of law to a by-law so that it could not be questioned by the Courts. I will, therefore, follow the decision of Middleton, J., and hold that this by-law cannot be impeached for being *ultra vires*.

The objection to the second count is in my opinion valid, and I set aside the conviction on that count. The conviction and the penalties imposed on the first count are affirmed.

POOTWATCHY *et al.* *vs.* MARIKAR *et al.*

No. 20,468, D. C., Colombo.

Present: Lascelles, A.C.J., & Middleton, J.

Argument: 26*th July*, 1906.

Judgment: 13*th August*, 1906.

Fidei commissum—*Equitable conversion—Purchase at Fiscal's sale* bona fide *and for value—Prescription Ordinance* (*No. 22 of* 1871)—*Acquisition of title by prescription by minor through agency.*

In an action for a declaration of plaintiffs' title to certain shares of two houses, which originally belonged to C. S., who

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died leaving a will directing his executors to sell *inter alia* the said two houses for the payment of his debts, and after payment of such debts out of the proceeds the balance should be invested in the purchase of lands to be conveyed to his children in equal shares subject to a *fidei commissum* in favour of their respective children, and where the executors were able to pay the debts by sale of some only of the lands of C. S., and the two houses in question were accordingly not sold, the plaintiffs contended that the effect of the provision in the will of C. S. was to impress a *fidei commissum* in favour of his grandchildren in respect of the said houses.

Held: That there was no authority for such an extension of the doctrine of equitable conversion.

In order to attach the conditions of a *fidei commissum* the intention of the testator to do so must be shown with regard to a definite and specific property.

Held, also: That a purchase at a Fiscal's sale *bona fide* and for value cannot be set aside on the ground that the judgment in execution of which the property was sold was improperly given against the defendant.

A purchaser who buys at a Fiscal's sale under a decree of a competent court is not bound to assure himself that the proceedings on which the judgment is based are free from error in law or in fact.

Further: That the Prescription Ordinance does not debar a minor from obtaining a title by prescription through agency.

There were two trials in this case. At the first trial the following issues were framed :—

1. Is it competent for the plaintiffs in this case to prove that the debt sued on in No. 2,514 is not a debt of Cader Saibu's estate?

2. In terms of any provision in Cader Saibu's will is there a *fidei commissum* impressed on the property now in question?

3. Has the added defendant acquired a valid title by prescription?

On the 29th May, 1905, the District Judge (F. R. Dias, Esq.) delivered the following judgment :—

The plaintiffs in this action are seeking a declaration of title in respect of a half share in two houses in the Pettah, which admittedly belonged to one K. K. Cader Saibu in 1880.

This man died in 1888 leaving a last will, of which he appointed one Samsudeen and Saraya Lebbe (the 3rd

defendant) the executors, and they obtained probate and administered the estate. The two houses in question were not specially devised to anyone, but with certain others were directed to be sold for the payment of all debts and liabilities of the testator, and the balance of the proceeds was to be invested in landed property in favour of the testator's two children Mohamed Cassim and Saffa Umma (the 2nd defendant) in equal shares, to be possessed by them for life, and thereafter to devolve on their respective children.

It is alleged that the debts of the estate were paid off without recourse to these two houses, and that consequently they became vested in Mohamed Cassim and Saffa Umma, subject to the conditions prescribed in the will in regard to the land that was to be bought for them out of the residue. Mohamed Cassim died in 1893, leaving an only son Mohamed Haniffa, who, in 1902, purported to sell and convey his half share to the 1st plaintiff, and that is the subject of this action.

Although the executors themselves did not sell these houses for the payment of debts, it appears however that under a writ issued in case No. 2,514 of this Court against them in their capacity as executors of Cader Saibu they were sold by the Fiscal and duly conveyed by him to the purchaser, a Chetty named P. L. K. R. Adinamalagey, so far back as June, 1890.

In July, 1890, the Chetty sold the houses to the added defendant, who claims absolute title in herself.

It is now contended on behalf of the plaintiffs that the Fiscal's sale under the writ against the executors was a bad sale, inasmuch as the debt for which the executors were sued had been incurred by them upon two promissory notes made by them after their testator's death, for which they should have been held personally liable, and not the estate. In other words, the Court is now called upon, in a contest with an utter stranger, to reopen a case that had been decided more than 15 years ago, and annul all proceedings had thereon.

The plaintiffs' Counsel referred me to the case of *Mohideen* v. *Fernando* (8 S. C. C. 198), where it has been

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held that an executor cannot bind the testator's estate by any contract which he may make, even for the benefit of the estate, so that the decree in that old case should have been against the executors personally, and not one to be satisfied *de bonis testatoris.*

Assuming the facts to be as stated, we need not doubt that that was the proper way in which the decree should have been entered. But seeing that the decree had been entered against the executors in their representative capacity, and the properties duly seized and sold and gone into the hands of innocent purchasers, against whom no allegation of fraud or collusion is made, are we entitled in such an action as the present to look behind that decree which still subsists? It seems to me that if such a thing were possible there would be no end to litigation, and the title of no man would be safe who had bought property at an execution sale against an executor or trustee. If there had been any irregularity or error on fact or of law in any action that ought to be shewn in that very action, and rectified by application to the original court which passed the decree or by way of appeal from or review of the judgment. It is not the province of a fresh action to shew irregularity or error in another suit; for if that were permissible the humblest court in the country might be called on to set aside the decisions of the highest.

If the objection now raised to the proceedings in the old case be well ifounded "it would really not advance the plaintiffs' case, for it would not shew a ground for a new suit, but only shew that a judgment had been obtained on insufficient allegations and evidence which would merely be a ground for proceeding in error or appeal in the original suit", as has been held by the Privy Council in the Ceylon case of *Gavin* v. *Hadden*, 8 Moore's P. C. Reports (N. S.) p. 118. It would appear moreover from that decision that in Ceylon, where the courts are courts both of law and equity, it would not be a good objection to say that for monies advanced to an executor or administrator for the purposes of the estate an action cannot be maintained against him in his representative capacity or judgment and execution had against the testator's estate.

Apparently the attention of the judges who decided

the case cited from 8 S. C. C. had not been called to this Privy Council case.

I find against the plaintiffs on the first issue framed, and dismiss their action with costs.

The plaintiff's thereupon appealed; and in appeal the dismissal of the action was set aside and the case remitted for a new trial, when the District Judge delivered the following judgment.

In my order of the 29th May last I have sufficiently referred to the facts of this case. I then held that it was not competent for the plaintiffs to seek to prove in these proceedings that the debt for which Cader Saibu's executors were sued, and in satisfaction of which the two houses in claim were sold by the Fiscal, was not a debt of Cader Saibu's estate, but a personal debt of the executors. The Appeal Court being of opinion that that ruling does not finally dispose of the matters in issue, it has become necessary for us to consider the other two issues framed at the first trial, viz., whether any *fidei commissum* has been impressed on these properties by Cader Saibu's will, and whether the added defendant has acquired a valid title by prescriptive possession. A further issue has now been proposed by plaintiff's Counsel, and accepted, as to whether or not the plaintiffs are entitled to succeed by reason of the prior registration of their Deed P2 from Mohamed Haniffa.

The first and last of these issues depend entirely on the answer to the question,—what was the interest in these two houses which Mohamed Haniffa had under his grandfather Cader Saibu's will? It will be remembered that the testator did not devise these houses to any of his children, as to enable any of them to claim any title under the will. What he intended to do, and clearly expressed in his will, was to vest these particular properties and five others in his executors, as trustees, for a specific purpose, viz., to sell them, and with their proceeds pay off his debts and liabilities. If any balance was left over after payment of those debts, he directed his executors to divide it into two, and invest it in the purchase of one or more lands for his two children Mohamed Cassim and Saffa Umma (the 2nd defendant), to be possessed by them, during their lives, and

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thereafter to pass to their respective children. The two houses in claim were never sold by the executors, nor did they transfer them to the testator's two children, nor do any act by which they divested themselves of the title vested in them by the will. Mohamed Cassim died in 1893, never having obtained any title or possession, and left an only child Mohamed Haniffa, who attained his majority in 1901. In April, 1902, this young man, professing to have title under his grandfather's will, conveyed a half share of these two houses to the 1st plaintiff by his transfer P2, which has been registered in July, 1903. This is the title which the plaintiffs are now claiming as against the added defendant, who, in addition to a title by prescription, is asserting a title derived through the executors themselves. It appears that in an action of this Court, No. C2514, brought by a Chetty against the two executors in their respective capacity, both these houses were sold by the Fiscal so far back as 1890, and conveyed to the purchaser, the Chetty, by the two transfers D1 and D2. These two deeds have never been registered. In July of the same year the Chetty sold them to the added defendant by the deeds marked D3 and D4, registered in November, 1890. From these circumstances it is perfectly clear that there can be no competition between Mohamed Haniffa's deed, relied on by the plaintiffs, and those relied on by the added defendant, for the simple reason that the interests involved are not identical, nor are the grantors the same, and consequently no question of prior registration can arise.

It should also be noted that neither Mohamed Cassim nor his son Haniffa had any title to these houses under the will; so that the latter's conveyance P2 to the 1st plaintiff conveyed no title at all. The title always remained in the executors until such time as they sold the properties for the purposes named in the will. The utmost that Mohamed Cassim or Haniffa was entitled to do was to compel the executor to sell the lands, pay the debts, and buy fresh lands for them in terms of the will. But that is not, and cannot possibly be the same thing as a freehold interest in these houses, which Haniffa professed to convey to the 1st plaintiff. On the other hand, the Fiscal's sale in execution against the two executors under a solemn decree of Court

had the effect of transferring all the right, title and interest of those executors, and of their testator, to the purchaser, whose rights have since July, 1890, been vested in the added defendant. It has been proved conclusively, and practically admitted by the plaintiffs, that from the Fiscal's sale in 1890 up to the present time neither the executors, nor Mohamed Cassim, nor Haniffa, have had a single day's possession of the premises, which have been continuously possessed and enjoyed by the added defendant. She is still a minor, and her possession has been exercised through her grandfather Uduma Lebbe and her own father (both of whom are now dead) till 1824, and ever since then through her uncle and guardian the 1st defendant. These men have been regularly renting out the houses, recovering their rents, and paying their taxes, for and on behalf of the added defendant; and at this moment the 1st defendant is in quiet possession on her account, so that her title by prescription is abundantly established. It has been urged that no prescription could have begun to run against Mohamed Haniffa until he had attained his majority in 1901, as he was under legal disability at the time the houses vested in him in terms of the *fidei commissum* created by the will.

I am unable to subscribe to any such construction of this will, which in my opinion makes no pretence of impressing a *fidei commissum* on any of the lands directed to be sold. Even if we can put such a forced construction on this document, from the fact that the testator directed his executors to buy fresh land and subject them to *fidei commissum* in favour of his grandchildren, it seems to me that the plaintiffs must still fail. Rightly or wrongly the Fiscal sold these houses in 1890 as against the executors, in whom title was then vested, and possession at once passed from their hands into those of the Chetty and of the added defendants. From that moment prescription began to run as against the executors and all those who could derive any title through them as representatives of Cader Saibu's estate, and the minorty of the beneficiary Mohamed Haniffa was of no avail to interrupt that prescription.

In my opinion the added defendant has established a perfect title both on paper and by prescription. It was

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contended that under the Roman Dutch Law a minor cannot acquire property by prescriptive possession, but in questions of prescription we do not at the present day look to that law. We are governed solely by our local Ordinances relating to prescription, which have swept away all the antiquated Roman Dutch Law on the subject. (Vide Pereira's Laws of Ceylon, vol. 2, p. 268, and cases there cited.) There is nothing in either of our Ordinances which places a minor defendant in an action in a less advantageous position than if he were a major, if the question involved relates to prescriptive possession.

I dismiss the plaintiff's action with all costs from the commencement.

This was an appeal from the second judgment of the learned District judge.

Walter Pereira, K.C.,S.-G., for plaintiff-appellant.

de Sampayo, K.C. (with him *Bawa*) for defendant-respondent.

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JUDGMENT.

LASCELLES, A. C. J.—It is unnecessary to recapitulate the facts of this case, which are fully stated in the judgment of the District Judge. The plaintiff's title is founded upon a conveyance by Mohamed Haniffa, dated the 10th April, 1902, of an undivided half share of the two houses in question to the 1st plaintiff.

Mohamed Haniffa's right to make this conveyance depends upon the contention that under the terms of the will of Cader Saibu (Mohamed Haniffa's grandfather), and in the events which have happened, the property in question passed to the testator's children impressed with the character of a *fidei commissum*. Cader Saibo by his will directed his executors to sell the property now in dispute, and with the balance of the proceeds, after payment of debts, to purchase other properties, which were to be divided between his children and held by them subject to a *fidei commissum*. The executors failed to sell the property. It is now argued that the property which ought to have been sold should be regarded as standing in the place of that which should

have been bought, and as having devolved in the manner and subject to the conditions which the will declared with regard to the property which the executors were directed to purchase. This is a startling extension of the doctrine of equitable conversion, for which no authority was cited. In order to attach the conditions of a *fidei commissum* the intention of the testators to do so must be shown with regard to a definite and specific property.

The heirs of Cader Saibu may have had a right, after the executors had failed to carry out the sale, to compel the executors to execute a conveyance, as was subsequently done, of this property to them, subject to the conditions declared in the will.

But, apart from this conveyance, this property has not by virtue of any act or operation of law devolved in the testator's children or their heirs subject to a *fidei commissum*. The conveyance by Mohamed Haniffa was thus a nullity, Mohamed Haniffa having no title under his grandfather's will or otherwise.

The plaintiffs also claim under a conveyance dated 14th July, 1904. During the argument no reference was made to the circumstances in which this deed was executed; but on the following day the Solicitor-General brought to our notice the fact that this deed was executed by the District Judge of Colombo under sec. 332 of the Civil Procedure Code.

Upon reference to District Court Colombo case No. 18853, it appears that Mohamed Haniffa and the 1st and 2nd plaintiffs sued the executors of the will of Cader Saibu claiming that they should be ordered to convey to him na undivided half share in the two houses now in dispute. The defendants ultimately agreed to execute the conveyance, but failed to do so; whereupon the District Judge executed the conveyance, which was registered subsequently to the institution of the present proceedings. I can find in the record no reference to the previous sale of these houses under a writ against the executors in 1890, and it is clear that the existence of this sale was not disclosed to the Court.

The appellants complain of the refusal of the District

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Judge to frame an issue whether the deed registered on the 15th March, 1905, subsequently to the institution of the action prevailed against the Fiscal's deed of 1890.

In my opinion the District Judge was right. The deed in question was registered after the pleadings had been closed, the issues fixed, and the hearing had been concluded. It was not until the 2nd March, after the case had been remitted for retrial, that application was made to add this issue. I do not think that at that stage the District Judge could properly have admitted an additional issue, which would have altered the whole scope of the action.

But the Fiscal's conveyance of 1890 is impeached on the ground that the judgment on which it is founded could not have been lawfully given against the executors in their representative capacity. This objection seems to be disposed of by the judgment of the Privy Council in *Gavin* v. *Hadden*, L. R. 3, P. C. p. 726.

Even if we suppose that the principles laid down in the subsequent case of *Fanhall* v. *Fanhall*, L. R. 7 ch. Ap. 125, are applicable to Ceylon, and that an executor cannot be sued as executor on a promise made by him, that case is no authority for the proposition that a purchase at a Fiscal's sale *bona fide* and for value can be set aside on the ground that the judgment in execution of which the property is sold was improperly given against the defendant in his capacity of executor. A purchaser who buys at a Fiscal's sale under a decree of a competent court is not bound to assure himself that the proceedings on which the judgment is based are free from error in law or in fact. If it were held that purchasers at judicial sales were bound at their own risk to make such inquiries, the authority of such sales would be gravely impaired. See on this point the observations of the Privy Council in *Rewa Mahton* v. *Ram Kishin Singh*, I. L. R. 14, Cal. p. 25.

With regard to the claim of the added defendant to have established a title by prescription; the conveyances by Adinamalagay Chetty purported to be in consideration of a payment made by the added defendants for and on behalf of the 1st defendant. Since the date of these conveyances (1890) there is no question but that the rents of

the premises have been received on the added defendant's behalf by her grandfather, father and by her guardian, the 1st defendant.

I can find nothing in the Prescription Ordinance to support the contention that the minority of the added defendant prevented her from acquiring a prescriptive title. The possession of the father and grandfather must be presumed to be, and that of the defendant certainly was, on behalf of the added defendant. (*Thomas* v. *Thomas*, 2 Kay and Johnson p. 79). For the above reasons, I agree with the judgment of the District Judge, and would dismiss the appeal with costs.

MIDDLETON, J.—The primary intention of the testator in this case was that his property should be sold and his debts paid by the executors, that the balance proceeds should be divided equally amongst his children, converted into immovables and impressed with a *fidei commissum*. Rightly or wrongly the executors were sued for debt of the testator, and upon judgment writ issued against the property in question, and it was sold and purchased by the added defendant's predecessor in title in 1890.

If that judgment was wrongly given, and the sale improperly held, the Court had jurisdiction both to give the judgment and order the sale, and it is not in the province of a fresh suit to shew irregularity or error of fact or law in another suit [*Gavin* v. *Hadden*, 3 P. C. p. 726 (1871)]. *Prima facie* then the property was sold as the testator intended for the payment of his debts, and could not therefore have been impressed with a *fidei commissum*, which was only to alight on the balance of the proceeds on conversion into immovables. The case of *Rewa Mahton* v. *Ram Kishin Singh* (I. L. R. 14 Cal. p. 25) is also authority for holding that the purchaser was not bound to enquire into either the correctness of the order of execution or correctness of the judgment upon which it issued, and there is no question that he purchased *bona fide* for value.

The purchaser sold to the added defendant on the 26th July, 1890, and his transfers were duly registered on the 14th November, 1890. The added defendant, though a

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minor, has been in possession of the property ever since through her uncle and grandfather, who acted as her agents in the collection of the rents, neither the executors nor the heirs of the deceased having interfered. I do not see that the Prescription Ordinance debars a minor from obtaining a title by prescription through agency. See also *Thomas* v. *Thomas* (2 Kay and Johnson p. 79). Against this title the plaintiff sets up a double title: (1) title by purchaser from Mohamed Haniffa in 1902, registered in 1903. It is sufficient to say that Haniffa had no title to convey, inasmuch as the property had never passed to him by any transfer or operation of law.

The plaintiff further claims title under a conveyance, dated the 14th July, 1904, from the executors. The circumstances under which this deed was executed shew that it was brought about in ignorance of the existence of the sale in 1890, registered the same year.

In my opinion, the added defendant's title must prevail against both those set up by the plaintiff, and I agree that the judgment should be affirmed with costs of the appeal.

ARUMOGAM *vs.* VAITILINGAM.

No. 43,073, P. C., JAFFNA.

Present: MIDDLETON, J.

16th September, 1907.

Revision, application for—Criminal Procedure Code, secs. 356 *&* 357—*Affidavit—Stamp—Stamp Ordinance* (*No.* 3 *of* 1890) *part I. sch.* 3.

An affidavit tendered in support of his application by an applicant seeking revision of an order by a magisterial court under sec. 357 of the Criminal Procedure Code cannot be received in evidence without a stamp, as required by the provisions in sch. 3, part I. of the Ordinance No. 3 of 1890.

The applicant in this case sought to bring in revision an order made by the Police Magistrate of Jaffna, and in support of his application filed a petition and an affidavit, which was unstamped. The Registrar of the Supreme Court referred the matter to the Supreme Court for a ruling as to whether the affidavit in question should have been stamped.

Bawa for applicant:—Under sch. 3, part I. of Ordinance No. 3 of 1890 affidavits which are required or authorised by law to be made in criminal matters are exempt from stamp duty. Now, this affidavit is authorised by the law, because the Supreme Court will not entertain an application for revision without an affidavit. This affidavit will come under the word "authorised".

Akbar, C.C., for the Crown:—Under sec. 357 of the Criminal Procedure Code no affidavit is necessary. When the Attorney-General moves for instance no affidavit is filed by him. The affidavit is filed in this matter merely for the convenience of the Supreme Court or of the client. Under sec. 422 sub-sec. (2) the statute law definitely requires an affidavit where the applicant is a private person; and it is only in affidavits of this nature that the exemption can be claimed.

JUDGMENT.

MIDDLETON, J.—An affidavit has been tendered by a party-applicant seeking revision of an order made by a

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magisterial court under sec. 357 of the Criminal Procedure Code. That affidavit is unstamped, and it is contended on behalf of the Attorney-General that it cannot be received in evidence without a stamp owing to the provisions in sch. 3, part I. of the Ordinance No. 3 of 1890. The objection to it is that, although it may be an affidavit made in a criminal matter, yet it is not an affidavit which is required or authorised to be made in a criminal matter. On the other hand, for the applicant, supporting the affidavit, it is contended that the affidavit is required for the purpose of founding the application in revision. I am informed by the Registrar, who is the legal custodian of and authority with regard to the practice in this Court, that affidavits of this description are invariably required to be stamped; and following the rule that *cursus curiæ est lex curiæ*, I should be inclined to hold that this affidavit did require a stamp.

On looking, however, to the provisions in the schedule the words "required or authorised by law" appear to me to involve a direction of the statute law that only those affidavits in criminal matters which the Legislature requires or authorises to be made are exempt from stamp duty. It is not contended here in support of the contention that this affidavit needs no stamp, that the statute law either requires or authorises it to be made on an application like the present, and I must hold in favour of the contention of the Crown that this affidavit must bear a stamp.

FINLAY *vs.* DENISON.

No. 3,091, C. R., Colombo.

Present: Hutchinson, C. J.

Argument: 23*rd July*, 1907.

Judgment: 2*nd August*, 1907.

Landlord and tenant—Letting of house not inhabitable—Liability of tenant to pay rent for period during which house was uninhabitable.

A tenant who is temporarily deprived of the use of the sub-

ject let is not relieved of his liability to pay rent if the cause which deprived him of its use is due to the act or default of a party against whom he has a legal remedy.

The plaintiff in this case sued the defendant for rent for two months. The defendant pleaded that he was not in occupation from 19th July to 15th August, owing to the foulness of a Municipal drain which ran past the house, and claimed a remission of rent on that account.

The learned Commissioner (J. S. Drieberg, Esq.) gave judgment for the plaintiff, and the defendant appealed.

F. J. de Saram for defendant-appellant:—If a tenant has just cause for quitting he is not liable to pay rent further than for so long as he had use of the thing. "Just cause" includes the case of "just cause from fear though out of actual peril" (Voet xix. 2. 23; Nathan vol. ii. p. 814). The appellant was not bound to ascertain when the house became habitable again. It was the duty of the landlord to inform the tenant when this occurred (vanLeuwen vol. 2, Bk. iv. chap. 21, sec. 7).

Schneider for plaintiff-respondent:—The principle in Voet is antiquated, and not applicable. The appellant has a remedy against the Municipal Council, and a landlord can only be rendered liable in case of his own neligence.

de Saram in reply:—Even if the appellant has a remedy against a third party, this does not do away with his rights against the landlord. No authority is quoted against the principle laid down in Voet.

c. a. v.

JUDGMENT.

HUTCHINSON, C. J.—The plaintiff sues for rent for the months of July and April, 1906, of a house which he let to the defendant. The letting was from 1st July to 31st October, 1906. The defendant entered into actual occupation of the house on the 11th July; and his defence is that he then found the house uninhabitable by reason of the foulness of a drain which runs down the road past the house, and which belongs to and is under the control of the Municipality of Colombo, and that because of the house

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so being uninhabitable he quitted it on the 19th July, and did not occupy it again until the 15th of August; and he therefore denies his liability to pay rent from the 19th July to the 15th August. The question is, whether he is bound to pay rent for that period.

The Commissioner found that the house was uninhabitable from 19th to 28th July, by reason of the foulness of the drain; but he held that the defendant was not on that account entitled to a remission of rent, and he gave judgment for the plaintiff for the amonnt claimed.

The defendant contends that, by Roman Dutch Law, the fact of the house becoming unfit for habitation as aforesaid was sufficient cause for the defendant quitting it and not paying rent. He relied on the law as laid down in Voet xix. title 2. sec. 23.

No reported case has been quoted in support of this contention.

Voet, in the passage referred to, seems to mean that if by the act of God or of a hostile force, or by any other cause against which the tenant has no remedy, he is deprived of the use of the property leased for the purpose for which it was leased, he is absolved from his obligations under the lease; but I do not think that he means that if the tenant is so deprived by a cause against which he can defend himself, such as the act of a trespasser, he is thereby absolved. In this case the house was rendered temporarily uninhabitable by the act or default of the Municipality, which was apparently an illegal act or default against which the tenant had his remedy by suing the Municipality. In my opinion the lessor is not bound to defend the tenant against the acts of trespassers. I think, therefore, that the defence fails, and the appeal should be dismissed with costs.

RAYMOND *vs.* ROUSSA.

No. 37,402, P. C., GALLE.

Present: MIDDLETON, J.

ARGUMENT: *19th August & 12th September*, 1907.

JUDGMENT: *17th September*, 1907.

Port Rules—Ordinance No. 6 of 1865—Due proclamation under sec. 6—Liability of a serang for breach of a Port Rule—Sec. 34.

To make the serang liable for mooring a lighter contrary to the Port Rules framed under sec. 6 of the Ordinance No. 6 of 1865 it must be shewn that he gave directions for it to be moored.

If one of the crew moored, it would make the tindal responsible, who ought to see that the Port Rules are observed by his crew.

This was a case in which the serang of a lighter was charged with having moored it to the fender of the jetty, contrary to the Port Rules framed under sec. 6 of the Master Attendants Ordinance of 1865. The accused pleaded that he was not responsible for the mooring of the boat, but he was convicted, and he appealed.

Bawa for appellant:—Under sec. 6 of Ordinance No. 6 of 1865 the "Port Rules that are made by the Governor in Executive Council should be promulgated by proclamation in the *Government Gazette* at least one month before the same shall take effect, and a copy and translations thereof in the vernacular languages of the district shall be fixed in some conspicuous place in the office of the Master Attendant of every port". In this case the prosecution has not proved that all these things have been done. Secondly, the accused is a serang, whose duty it is to supervise the unloading of the boats. He has nothing to do with the mooring of the boats. Moreover, the proper party who should be charged, as the Ordinance indicates in secs. 23 and 24, is the tindal, who is the coxwain of the boat, and who is directly responsible for the mooring of the boats.

Akbar, C.C., for complainant-respondent:—As regards the first point, the general principle of *omnia presumuntur rite esse acta* will apply. See in particular sec. 114, Illus-

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tration (e), of Ordinance No. 14 of 1895 (*Queen Empress* v. *Ram Chandar*, I. L. R. 19 All. 493; *The Municipality of Sholapur* v. *The Sholapur Spinning and Weaving Co.*, I. L. R. 20 Bom. 732). Moreover, this was not the defence of the accused in the lower court. As regards the second point, the accused was found guilty under sec. 34 of Ordinance No. 6 of 1868, which runs as follows:—"If any master or person in charge of a vessel .....or other person....." This section is specially framed to meet objections of this kind. There was evidence in this case to prove that the serang had some sort of control over the boat, and this is enough under sec. 34.

Mr. Justice Middleton sent the case back for further inquiry as to the duties of a serang; and on the further evidence recorded His Lordship delivered the judgment appearing below.

c. a. v.

JUDGMENT.

MIDDLETON, J.—This was a conviction of the accused styled a serang for breach of a Port Rule proclaimed in *Gazette* No. 6,155 of 23rd November, 1906, made under sec. 6 of "The Master Attendants Ordinance 1865", in mooring a boat to the fender of the jetty.

The first point raised before me was that there was no proof of the rule having been duly promulgated by posting it in the vernacular language in a conspicuous place, under the proviso to sec. 6 of the Ordinance.

This point was not taken in the court below as defence to the charge, as it might have been if the accused was really not aware of the rule; and I do not propose to give effect to it now, but act on the presumption that the official act was regularly performed under sec. 114(e) of the Evidence Ordinance.

The ruling of Chief Justice Edge in *Queen Empress* v. *Ram Chandar*, 19 Allahabad 493, following the ruling of the Bombay Court in the *Municipality of Sholapur* v. *The Sholapur Spinning and Weaving Co.*, 20 Bombay 732, deals with this question in a way that commends itself to my judgment.

I sent the case back however for evidence as to what was the position and duties of a serang in connection with lighters loading and discharging cargo.

It is clear in the present case that the serang was present in charge of the coolies who were loading a lighter with goods from the jetty.

The prosecution cannot say if the tindal was present, and the evidence for the defence does not allege it.

The lighter was undoubtedly moored in contravention of the port rule, and the accused serang ordered it to be unmoored at the request of the Master Attendant.

The evidence for the prosecution shews that the serang is responsible for the placing of the cargo from the lighters and issues orders to the coolies, and that the tindal works under the orders and directions of the serang, and that the serang was prosecuted because the tindal merely carries out his orders; further that the tindal works under the orders and direction of the serang, and is in immediate charge of the lighter.

For the defence it is argued that the serang is responsible for the loading of goods for shipment and sees the goods are properly stacked on the jetty; further that the tindal sees to the loading of the lighter and controls the lighter.

In spite of the action of the serang in ordering the lighter to be unmoored, which might only have been a proper compliance with the Master Attendant's request, I am by no means convinced that the serang here was responsible for the way in which the lighter was moored.

In the ordinary course of navigation the tindal, who is the coxswain of the boat, as the Magistrate says, would see that the lighter was moored, and give directions for its mooring; and although perhaps the serang might tell him where to lay his boat, he would not necessarily say to what he was to tie or moor it.

It is by no means clear that in the present case the serang controlled this duty of the tindal.

The relationship of master and servant did not exist between the serang and the tindal so as to make the tying

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up of the lighter the act of the serang, unless the contrary is shewn.

To make the serang liable here I think it must be shewn he gave directions for it to be moored to the fender.

If one of the crew moored it to the fender it would make the tindal responsible, who ought to see that the Port Rules are observed by his crew.

I therefore think the conviction must be quashed and the accused acquitted.

MUTTIAH *vs.* FERNANDO.

No. 1,090, D. C., Colombo.

Present: Lawrie, A. C. J., & Withers, J.

Argument: 6*th June*, 1893.

Judgment: 13*th June*, 1893.

Fiscal's sale, application to set aside—Material irregularity in publishing and conducting sale—Moveable property—Civil Procedure Code, secs. 276 *&* 282.

Section 276 of the Civil Procedure Code recognises the right of our Courts to set aside sales of moveables by the Fiscal when there has been material irregularity in the publicatiou and conduct of a sale, and when the party impeaching the sale has suffered substantial injury.

Ram. (1872—76) p. 248 followed.

Wendt (with him *de Sampayo*) for defendant-appellant.

Dornhorst for plaintiff-respondent (execution-creditor).

c. a. v.

Judgment.

Lawrie, A. C. J.—This is an application to set aside a Fiscal's sale on the ground of material irregularity in publishing and conducting it, whereby the applicant sustained substantial injury.

The petitioner stated that the property included certain interest in two portions of land situated at Kitulgoda;

but he has not produced the deed, nor has he proved that any interest in the land was sold.

We must deal with the sale as of moveable property, viz., of a debt due to the defendant.

The sale has not yet been perfected by delivery or assignment; it has not yet become absolute.

I am of opinion that the 276th sec. of the Code recognises the right of our Courts to set aside sales of moveables when there has been material irregularity in the publication and conduct of the sale and when the party impeaching the sale has suffered substantial injury. See also on this point a decision of Clarence, J., in 20,307, D. C., Chilaw, reported in Ram. Rep. 1872-1876, p. 284.

The Fiscal seized the property in question by giving notice to the defendant that he was prohibited from recovering from John Jacob Cooray a certain debt alleged to be due from him to the defendant, viz., the defendant's right title and interest claim and demand whatsoever and the moneys due and to become due and payable under and by virtue of a Deed No. 1,847, dated 10th October, 1889, assigned over by Deed No. 2,033, dated 19th July, 1890, ...in your favour, and that the said John Jacob Cooray was thereby prohibited and restrained until further order from making payment of the said debt or any part thereof.

I presume that the Fiscal caused notice of sale to be given by beat of tom-tom and otherwise to secure publicity both at the place of sale and also when the seizure was made not less than 3 days and not more than 14 days before the date of sale.

There is no evidence of the manner in which the property was described at that notice of sale, but we know that the Fiscal advertized the sale in the *Gazette* in these terms:—

"On Saturday, 17th December, 1892, the following property mortgaged with the plaintiff by bonds dated July 10 and November 28, 1890, to wit, all the defendant's right title and interest claim and demand whatsoever and all moneys due to or to become due and payable under and by virtue of Deed No. 2,033, dated 19th July, 1890, attested by M. C. Perera Goonewardene of Colombo, Notary."

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The Fiscal made a mistake in not giving in the advertisement all the information he had. From the seizure I have quoted it is proved that the Fiscal knew that the deed of 19th July, 1890, was an assignment to the defendant of a debt due by John Jacob Cooray under a deed dated 10th October, 1889.

That I think ought to have been stated in the advertisement. As the advertisement stands it conveyed no information to possible bidders from which they could learn or gather what was the nature of the right about to be sold.

But there is this to be said in defence of the Fiscal, that he advertised the property in exactly the same terms as the defendant himself had used in the mortgage bond.

The defendant is I think estopped from saying that the description is insufficient because it is his own description, and if he had so chosen he might have caused the description in the *Gazette* to be enlarged; but he took no steps to do so.

The sale took place. The defendant's interest in the deed fetched only Rs. 5.

It is my opinion that there was no irregularity in publishing and conducting the sale. The order dismissing the petition must be affirmed with costs.

WITHERS, J.—The following property, which had been seized in execution of the judgment recovered in this action, was put up for sale at the office of the Fiscal at Colombo on the 17th December, 1892, and knocked down to one Pitchi Tambi for and on behalf of C. Carthikesar for Rs. 5:—

"All the defendant's right title interest claim and demand whatsoever and all the moneys due and to become due and payable under and by virtue of Deed 2,033 dated 9th (*sic*) July, 1890, attested by Magellege Cornelis Perera Gunawardana of Colombo, Notary."

The sale of the property was reported by the Fiscal to the Court of Execution on the 29th of December, 1892. On the 28th of January following, that is to say at almost the last possible moment, the execution debtor applied to

the Court of Execution for an order to set aside the sale of the property above described on the grounds appearing in his petition of that date and in a memo. of objections to be found at p. 82 of the record. Very much the same objections were preferred before us, but stress was chiefly laid on the objection that: (1) the property being an interest in land was not sold on the spot as required by the 273rd sec. of the Civil Procedure Code, but at the Fiscal's Office; that (2) the execution debtor's interests in the lands were not sufficiently described; and (3) that the amount for which this property was leviable was not duly notified.

Appellant's Counsel admitted that he asked for relief under the 282nd sec. of the Civil Procedure Code, which on the face of it applies only to immoveable property; and he was quite unable to satisfy us that what was sold and purchased on the occasion in question was immoveable property.

This being so it was argued on the other side that the appeal must fail on the ground that the court had no power to set aside the sale of moveable property on account of material irregularity in publishing or in conducting the sale.

But in view of the case cited to us by appellant's Counsel, and the provision of sec. 276 of the Civil Procedure Code, I am not prepared to decide that our courts are incompetent to grant relief in the case of substantial damage caused to a person impeaching the sale of moveable property for irregularity in the publication or conduct of the sale.

The appellant having complained in effect that he has been seriously damaged by the irregular publication and conduct of the sale of immoveable property, I do not think he is entitled to shift his ground and say, supposing I am wrong in calling it immoveable property, and supposing that what was advertised and sold was moveable property, I have been damaged all the same. Allow, however, that he can do so. The appellant has still to satisfy us that he has been substantially prejudiced by the way in which his property has been advertised and sold.

One argument put for him was this:—Only Rs. 5 were

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bid for this property, whereas the fact of it being advertised in the *Government Gazette* indicates a value exceeding Rs. 1,000.

If the Fiscal put this value on it, was he aware of the fact disclosed in appellant's petition that the ultimate obligor of the chose in action was an adjudicated insolvent? If the mode of describing the property was likely to prejudice the appellant only, why was the appellant not careful to ask the Fiscal to put to in a fuller and better advertisement? And if he refused, solicit the Court's intervention? He could have told the Fiscal exactly what was required. The advertisement is a transcript of the very words of the appellant's mortgage to the plaintiff.

But did no one except the purchaser in fact attend the sale? And were those who attended not apprised by the appellant or some one on his behalf of the nature of the property which was being exposed for sale? Of the circumstances attending the actual sale we have no sort of information.

Rs. 5, for all we know, may have been the full value of the rights sold.

It may have been a very speculative investment. Here again we are completely in the dark. It is because the appellant has quite failed to satisfy us that he has been substantially prejudiced in this matter that I would affirm the order of the learned Judge with costs.

ARUNASALEM CHETTY *vs.* MOOTATAMBY.

No. 22,697, D. C., Colombo.

Present: Lascelles, A. C. J., & Middleton, J.

2nd July, 1906.

Plene administravit, *plea of—Judicial settlement—Civil Procedure Code, ch.* 55.

With regard to the plea of *plene administravit*, the English Law applies, and it is not obligatory on an administrator to obtain a formal judicial settlement under sec. 729 of the Civil Procedure Code from the Court as a prelimiuary to such a plea.

The facts appear in the judgment of the learned District Judge (J. R. Weinman, Esq.) which is as follows:—

The only issue I have to decide is, whether defendant has fully administered the estate of the deceased, and whether he has any assets of the deceased in his hands.

The testator died in August, 1902; and probate to his will was issued to the defendant in testamentary proceedings 1,788 in March, 1903. The testator called for the claims against the estate, paid all claims preferred, filed his final account in 1904, and transferred the immoveable property to the devisee under the will. The plaintiff made no claim to the executor on the note in suit, and the executor says, and I have no reason to doubt it, that he first heard of the note after he had sued.

There can be no question that the executor has no assets whatever in his hands. All the assets, after the creditors were paid, was passed over to the legatee.

For the plaintiff it is contended that an executor or administrator can only plead *plene administravit* after his accounts have been judicially settled—that in fact a judicial settlement is the only proof and only evidence of a *plena administratio*. This is a startling doctrine, for there may be more than one judicial settlement of estates. The Court may, to quote the words of sec. 725, "from time to time" compel such a settlement. In my opinion an executor may plead *plene administravit* before he settled such accounts, and cases may arise where he could not advance a similar plea even after the accounts had been judicially settled. The plea is, that the defendant had no goods which were of the testator at the time of his death in the hands of the defendant as executor to be administered, or had at the time of the commencement of the suit or ever since. To quote the words of Erskine, J, in *Jackson* v. *Bowbey*, Carrington and Marshman, 102 and 103: "The plea here is *plene administravit*; and the question is whether at the time of action brought the defendant had any goods of the testator in his hands which he had not administered. The plaintiffs are bound by that affirmatively. The defendant must shew that he administered all he had; and though

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the plaintiffs are entitled to a verdict if they show that the defendant had one shilling of the testator's unadministered, yet the measure of the plaintiffs' damages is not the amount of their debt, but only so much as they can shew the executor has not administered but has still in his hands."

The plaintiff in this case has waited for nearly four years before he preferred his claim. He gave no notice of the debt to the executor at any time. The executor has fully administered the estate. He has no assets whatever in his hands.

The plaintiff's action entirely fails, and is dismissed with costs.

F. M. de Saram for plaintiff-appellant.

H. J. C. Pereira for defendant-respondent.

JUDGMENT.

LASCELLES, A. C. J.—In this case it is admitted that the defendant as executor has paid off the debts of the estate and has transferred the property to the persons entitled thereto. He is now sued for a sum of money alleged to have been owing by the testator to the plaintiff.

Now, it is admitted that the ordinary English Law with regard to executors and administrators is in force in Ceylon ; but it is contended that chap. 55 of the Civil Procedure Code has effected a change in that law, and that it is no longer open to an executor to plead that he has administered in full the estate of his testator unless there has been a judicial settlement under sec. 725 of the Code. In our opinion there is no section in the Code which supports this contention.

Under sec. 729 it is optional for the executor or administrator to apply to the Court for judicial settlement, the object being to enable the executor or administrator to protect himself, if he pleases, where the business is complicated. There is nothing in the chapter which warrants an inference that there was any intention on the part of the legislature to change the ordinary law with regard to the plea of *plene administravit.*

In my opinion the opinion of the District Judge is right, and must be affirmed.

MIDDLETON, J.—I agree. I can see nothing in the Civil Procedure Code to show that it is obligatory on an administrator to obtain under sec. 729 a formal judicial settlement from the Court as a preliminary to a plea of *plene administravit.*

It may be true that the defendant can maintain no release from the fact of advertisement; but the fact that he had done so makes his position a stronger one.

It seems to me that the English practice applies, and the case quoted by the learned District Judge in his judgment of *Jackson* v. *Bowley* (Carrington and Marshman, pp. 102 and 103) is in point.

The appeal must be dismissed.

In the matter of the Last Will and Testament of the late DAVID HENRY JAYANETTI.

T. C. JAYANETTI, Executor-Appellant.

No. 390 (Testy.) D. C., KALUTARA.

Present: HUTCHINSON, C. J., & MIDDLETON, J.

21st September, 1907.

Contempt of Court—Failure of executor to file accounts—Power of Court to punish as for contempt—Civil Procedure Code, sec. 718—*Courts Ordinance* (*No.* 1 *of* 1889) *sec.* 59.

The failure on the part of an executor to file accounts is, under sec. 718 of the Civil Procedure Code, an offence punishable as a contempt of Court; and sec. 59 of the Courts Ordinance gives the District Court power to impose a penalty in such a case.

In this case the executor did not file his final account on the due date, the 13th June, 1905; and on several subsequent occasions he neither appeared nor tendered his account. On the 27th March, 1907, attachment was issued against him; and on the 12th June, 1907, he was brought up before the Court, when he was called upon by the Judge to

Davia Henry Jayanetti

shew cause why he should not be punished for contempt of Court in that he failed to carry out the orders of the Court, viz., to file his final account. He was fined Rs. 250, and he appealed.

H. A. Jayawardene for executor-appellant:—Under sec. 59 of the Courts Ordinance the District Court or the Court of Requests has only jurisdiction to punish for contempt of Court when the offence of contempt is committed *in facie curiæ*; and when the contempt is *ex facie curiæ* then the offence must be specially made punishable as contempt of Court by any law for the time being in force. [MIDDLETON, J.:—But has not a Court the inherent power to punish as for contempt any disobedience to its lawful orders?] No; the question is fully discussed by Mr. Justice Wendt in *Perera* v. *Perera* (8 N. L. R. 343); and also in *Narayan Chetty* v. *Jusey Silva* (8 N. L. R 162); *Annamalay Chetty* v. *Gooneratne* (1 N. L. R. 49); *Silva* v. *Appuhamy* (4 N. L. R. 178); *Ferguson's* case (1 N. L. R. 181). Under sec. 137 of the Civil Procedure Code non-compliance with summons is specially made punishable as for contempt of Court. Under sec. 358 the Fiscal is liable for contempt of Court under certain circumstances, and also under sec. 663 disobedience to injunction is specially made punishable, etc. There is no such thing as a filing of final account under the Civil Procedure Code. The proper course is for the judge to call upon the executor for a judicial settlement of the account under sec. 725 and under sec. 727; if the executor fails to comply with the order under sec. 725, then the Court has power to revoke the grant of probate.

Akbar, C.C., for the Attorney-General:—Under sec. 718 of the Civil Procedure Code if an executor fails to file in Court an inventory and valuation and account (or a sufficient inventory and valuation or sufficient accounts) required by law within the time prescribed therefor, then the Court has got the power to deal with him as for a contempt of Court. Under sec. 538 it is the duty of the executor to file in Court within a time appointed by the Court an inventory of the deceased person's property and effects with a valuation of the same; and under sec. 553 every executor and administrator has to file in the District Court on or before the

expiration of twelve months from the date of probate or grant of administration a true account of his executorship or administration. It is these sections that are referred to in sec. 718.

JUDGMENT.

HUTCHINSON, C. J.—This is an appeal from a fine imposed by the District Judge of Kalutara for contempt of Court. The appellant is an executor under a will. On the 30th January, 1905, probate was issued to him, and the Judge noted that the inventory was due on the 14th March.

On the 14th March, 1905, the executor was present. Inventory was not filed, and three days were allowed for it.

On the 17th March it was filed. Then there were some proceedings, and delay as to payment of the deficiency of stamps on the probate.

On the 13th June, 1905, the executor's proctor asked for two months' time to file final account. That was allowed.

12th August, 1905, the executor was absent; time for account was extended to 14th September.

14th September the executor was absent, and proctor present; time for account extended to 23rd November.

23rd November executor absent; time extended to 21st February, 1906.

21st February, 1906, executor absent; proctor said: "Will bring him on 9th March."

9th March proctor asked for time; it was etxended to 27th March.

Then there followed seven successive adjournments, the executor being absent each time, although notified to appear. Then on 20th February, 1907, the executor absent. At his proctor's request allowed till 6th March to appear.

6th March he did not appear.

13th March he did not appear. Proctor said he had no instructions. Warrant issued for 27th March.

On 27th March, and on three subsequent occasions in April and May, there was no appearance; executor was reported not to be found.

Then on 12th June he was brought up under the

David Henry Jayanetti warrant, having been duly served with summons to appear on that day to shew cause why he should not be committed as for contempt for failure to carry out the order of Court, to wit, file final account.

On that day, being called upon to shew cause, he made a statement, and his proctor made a statement on his behalf, and the District Judge fined him Rs. 250 for his contempt. It is clear from this statement of facts that appellant has no merits; and if the Judge had power to make the order he did make, the penalty imposed was certainly not excessive. It has been argued on his behalf that a judge of the District Court has no power in such a case to impose a penalty as for contempt of Court. The power of the District Court to deal with contempt of Court is defined by sec. 59 of the Courts Ordinance. The only question is, whether the offence which the appellant committed was an offence which is declared by law to be punishable as for contempt of Court. In my opinion it is so declared by sec. 718 of the Civil Procedure Code. Here the appellant was under an obligation to render an account on the 12th of August, 1905, under an order to that effect which was made on the application of his proctor, and which is still in force, and which has never been either wholly or partially complied with. Failure to comply with that order and with all the many subsequent orders which were made giving an extention of time was a contempt of Court under sec. 718.

In my opinion the appeal ought to be dismissed.

MIDDLETON, J.—I agree. The appellant in this case has repeatedly failed to furnish the accounts within the time limited by the Court to do so by an order of the Court. He is an executor, and under sec. 538 of the Civil Procedure Code he is bound to file an inventory, and he further enters into a security bond by which he undertakes to render a true and just account of his administration. Under sec. 553 of the Code he is bound to file an account within twelve months of the date of probate. The question then here is,—is this failure on his part an offence declared by any law for the time being in force to be puuishable for contempt of Court? That is the question under sec. 59 of the Courts Ordinauce. Under sec. 718 of

the Code although it begins by speaking of the rights of creditors, yet the section goes on to say that the Court may of its own motion, if it is satisfied that the executor is in default, make an order requiring the delinquent to file the account, or further accounts as the case may be, and in default to shew cause why he should not be attached. The section goes on to say that upon the return of the order if the delinquent has not complied with it the Court can issue a warrant of attachment against him, and deal with him as for a contempt of Court.

Therefore, I think it clear that the District Judge had the power under that section to punish the executor in the way he has done.

I agree that the appeal should be dismissed.

THE KING *vs.* JAYAWARDENE.

No. 2,839, D. C. (Cr.) Chilaw.

Present: Grenier, A.J.

Argument: *27th September*, 1907.

Judgment: *1st October*, 1907.

Security to keep the peace—Criminal Procedure Code, sec. 80.

A person can be bound over to keep the peace under sec. 80 of the Criminal Procedure Code only when such a person is convicted of an offence which involves a breach of the peace or of committing criminal intimidation by threatening injury to person or property or of being a member of an unlawful assembly.

Hayley for accused-appellant.

Fernando, C.C., for the Crown-respondent.

c. a. v.

Judgment.

Grenier, A.J.—There are no grounds upon which I can interfere in this case. The District Judge has in a well considered judgment found that the appellant dishonestly removed a large quantity of cocoanuts from the complainant's land, and that at the time he removed them he was

The King v. *Jayawardene*

armed with a gun. The charge of theft has clearly been made out against the appellant, and the conviction must be affirmed.

The District Judge was not justified however in ordering the appellant to give security to keep the peace for two years or for any period whatever. The appellant was not convicted of criminal intimidation, and theft does not involve that offence, nor can it be said that the appellant has committed a breach of the peace.

Section 80 of the Criminal Procedure Code clearly specifies the class of cases in which an accused may be bound over to keep the peace, and the offence of which the appellant has been convicted does not fall within the class.

Mr. Advocate Prins as *amicus curiæ* has referred me to two cases of this Court in which it was held that an order binding over a person to keep the peace under sec. 80 can be made only when such person is convicted of an offence which involves breach of the peace or of committing criminal intimidation by threatening injury to person or property or of being members of an unlawful assembly. (See Supreme Court Minutes, 10th July, 1900, P. C., Panadure, No. 8,138*; and Supreme Court Minutes, 30th November,

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*KARAMANIS *vs.* ARNOLIS.

No. 8,138, P. C., PANADURE.

Present: BONSER, C. J.

10*th July*, 1900.

vanLangenberg for appellant.

JUDGMENT.

BONSER, C. J.—In this case the appellant has been convicted under sec. 484 of the Penal Code of intentionally insulting a headman, and thereby giving him provocation knowing it to be likely that such provocation would cause him to break the public peace. It is alleged that he called the headman a "pariah". From what one knows of village society in Ceylon, that would be a grievous insult, and is certainly such an insult as is contemplated by sec. 484. The Magistrate, in addition to fining the accused Rs. 15, bound him over to keep the peace under sec. 80 of the Criminal Procedure Code. In my opinion he was not justified in doing this. The only cases in which a person can be bound over to keep the peace under that section are when he is convicted of an offence which involves a breach

1903, P. C., Nuwara Eliya, No. 33,947†.)

The sentence will be amended accordingly.

RATWATTE *vs.* DULLEWE.

No. 17,701, D. C., KANDY.

Present: HUTCHINSON, C. J., MIDDLETON & WOOD-RENTON, JJ.

ARGUMENT: *26th & 29th July*, 1907.

JUDGMENT: *29th August*, 1907.

Contract of sale—Failure by vendor to give purchaser vacant possession —Remedy of purchaser.

A. bought certain immoveable property at a public auction on conditions of sale by which on payment of a part of the purchase money his vendor agreed to execute a conveyance, and on payment of the full purchase money he was to enter into possession of the property. A. paid the entire purchase money, but found a tenant of a third party in possession of the property purchased. A.'s vendor executed a conveyance, which was tendered to A. by letter, but refused.

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of the peace—which this is not—or of committing criminal intimidation by threatening injury to person or property—which this is not—or of being members of an unlawful assembly—which this is not.

The sentence will be amended accordingly.

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†LEBBE *vs.* HAMID *et al.*

No. 33,947, P. C., NUWARA ELIYA.

Present: WENDT, J.

30th November, 1903.

vanLangenberg (with *Prins*) for accused-appellant.

JUDGMENT.

WENDT, J.—There is evidence to support the Magistrate's finding that the appellants were guilty of insulting the complainant, and I will therefore not interfere with the convictions or with the sentences of fine. The order requiring the appellants to give security to keep the peace is however not justified by sec. 80 of the Criminal Procedure Code, the offence of which they were convicted not being criminal intimidation and not involving a breach of the peace. See P. C., Panadure, 8,138, Civ. Min. 10th July, 1900, *per* Bonser, C. J. That order is therefore set aside, and the bonds executed by the appellants declared void.

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Held per curiam: That A. was entitled to a rescission of the contract of sale and the return of the purchase money.

On payment of the purchase money A. was entitled to enter into possession, by which is meant actual detentive possession, and not symbolical possession by means of a title deed.

The execution and delivery of a conveyance in conformity with the statute of frauds confers the *dominium* on the purchaser, and so gives him a title to maintain an action against a third party in possession without or under a weaker title.

Per MIDDLETON, J.: That if A. here had accepted the conveyance tendered him by his vendor his proper and only remedy was to have sued the third party for declaration of title, and called upon his vendor to warrant and defend his title.

Bawa for defendant-appellant.

H. A. Jayawardene for plaintiff-respondent.

c. a. v.

JUDGMENT.

HUTCHINSON, C. J.—This is an appeal by the defendant against the judgment of the District Court of Kandy.

The claim is for rescission of a sale of a house, and for return of the purchase money paid by the plaintiff to the defendant. The house was sold by public auction by the defendant as administrator of the estate of an intestate, subject to certain conditions of sale. The plaintiff was the highest bidder at the sale, and paid the deposit and afterwards the balance of the purchase money in accordance with the conditions. He complained that the defendant had failed to put him in possession.

After paying his deposit the plaintiff found that a man called Felsinger was in occupation of the house as tenant under one David Dullewe, and that Dullewe disputed the vendor's title and claimed to be the owner. The plaintiff delayed paying the balance for a few days in consequence of this adverse claim, and only paid it when told that if he did not the deposit would be forfeited.

The defendant contended that the purchase was complete when the purchase money was paid, and that the plaintiff's only remedy was to sue Felsinger or Dullewe; and he offered to give the plaintiff, and, after this action was brought, he did actually execute, a conveyance of the house to the plaintiff, which, however, the plaintiff refused to

accept. The plaintiff claimed that the defendant was bound to deliver to him quiet possession. He claimed to be entitled to this under the conditions of sale. The conditions, however, do not contain anything express on the point.

At the trial the main issue was,—whether the defendant was bound, by conditions of sale or otherwise, to put the plaintiff in possession? Both Felsinger and Dullewe were called as witnesses by the plaintiff, and gave evidence; and Dullewe stated the ground of his claim, which was that the intestate had gifted the house to him in 1893, and that he had taken the rents for his own use ever since that date.

The District Judge disbelieved this statement of Dullewe; but he held that the purchaser was entitled to demand that the vendor should put him in possession; and the decree was that the defendant should put the plaintiff in possession, or, in the alternative, that the sale be declared void and the defendant should pay to the plaintiff a sum representing the purchase money and certain expenses which the plaintiff had paid, with interest and costs.

The appellant's contention is that the purchaser is bound to accept a conveyance even though he cannot get actual physical possession of the property; that the vendor's only obligation is to deliver the *dominium;* and that the Roman Dutch Law in case of non-delivery does not give an action to set aside the contract but only an action for damages.

He also argued that delivery of a deed of transfer is delivery of possession.

Where the question is between the purchaser and a third person delivery of a deed of transfer may be enough to entitle the purchaser to sue as owner. That was the point in the case reported in 3 Supreme Court Circular p. 61. And physical possession, as distinct from a mere right to it, may by agreement of the parties be effected in any way to which they both assent; and where there is no one actually in possession, or no one disputing the title, the deed of transfer is usually accepted as delivery of both title and possession. But that does not touch the present question, which is between the vendor and the purchaser, viz., whether the vendor is bound to place the purchaser in actual possession.

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vanLeeuwen, iv. chap 19, sec. 10, says that the vendor is bound to give possession of the property free from all *bona fide* possessors. That seems to me to be right, whether the thing sold be moveable or immoveable. It is not enough for the seller to say to the buyer: "It is true that I have not got the thing in my own possession or power: it is in the hands of A. B., who is claiming it as his own; but now you have a right to sue A. B. for it, and that was all that I contracted to sell you."

The defendant on the appeal has alleged that Dullewe's claim is not made in good faith, and is indeed set up at the instance of the plaintiff in order to enable him to get out of his contract. No such allegation was made in the District Court, and there is no evidence to support it.

Finally, the appellant contends that the plaintiff can at most only claim damages; that the Roman Dutch Law does not allow action to set the contract aside in case of non-delivery of possession. We were referred to Voet, Book 18, Title 5, sec. 3, where, however, I do not find any such rule laid down; and to the case of *Perera* v. *Amaris Appu*, 1 Supreme Court Circular 54.

In that case the plaintiff alleged that he had bought certain land from A. and had been placed in quiet possession of it, and been afterwards forcibly ejected by B.; he sued A. and B. claiming a declaration of his title, and possession and damages, and that A. should warrant and defend his title. The District Judge found that neither the plaintiff nor A. had any title, but that the land belonged to B.; and he ordered that the contract of sale by A. to the plaintiff should be cancelled, and that A. should pay all the costs of both the plaintiff and B. On appeal by A. the Supreme Court set aside the order made against A. on the ground, which was no doubt technically right, that although A. was liable to the plaintiff in damages, if he had not placed him in possession, yet as "no question on the contract of sale or issue as to damages, or indeed any other issue, had been raised" between the plaintiff and A. no order could be made against A. in that action. That is no authority for the proposition that no action would lie against A., but only that the Court should not in that action give the plaintiff some-

thing for which he had not asked and as to which there had been no issue. The Court said: "If he (the vendor) fails to afford such (quiet) possession, the purchaser's only remedy is by action *against the vendor himself*, on the contract, for specific performance thereof or for damages. Until delivery, although the contract is complete, the property in the subject of sale does not pass so as to enable the purchaser on that right alone to sue a third person for the possession." The object of the first part of the above sentence seems to have been to point out that the plaintiff, never having had possession, had no right to sue B., and it was wrong therefore to make A. pay B.'s costs. The Court does not expressly say, and I am not sure that it meant, that the plaintiff could not claim against A. a decree that the contract should be rescinded: it merely said that in that action he had not claimed either rescission or damages.

The defendant in this case was, in my judgment, bound to deliver quiet possession to the plaintiff. He refused to do so, that is he refused to carry out the contract. He is therefore liable to return the purchase money and to pay damages. The right to a declaration that the sale is rescinded is consequent on the right to return of the purchase money; for the return of the money could only be ordered on the ground that the sale was no longer in force.

The appeal should be dismissed with costs.

MIDDLETON, J.—The question here is,—whether the District Judge was right in holding that the plaintiff vendee was entitled to judgment for rescission of a contract of sale of immoveable property and the return of the purchase money when the defendant vendor had in fact notarially conveyed to him but the conveyance had not been accepted nor actual vacant possession by the plaintiff been obtained.

The contention of the defendant-appellant was that having executed a conveyance the title of the land was thereby vested in the defendant, who had thus acquired all he had bargained for, *i.e.*, the *dominium* which would enable him to obtain the actual possession by ouster of the claiming occupant.

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It was thus agreed that the plaintiff's only remedy was to sue the claiming occupant for declaration of title, making the vendor a defendant in the action to warrant and defend his title.

The facts in the case are that the plaintiff bought the property at public auction on conditions of sale by which on payment of the purchase money the defendant agreed to execute a conveyance and that on payment of the full purchase money the purchaser should enter into possession of the property.

The plaintiff paid the entire purchase money, but found a tenant in possession of the property, who paid rent to a third person, Dullewe, up to the date of the plaintiff's purchase in September, 1905.

This tenant has apparently declined to pay rent until it can be ascertained who is capable of giving a legal receipt, although he admits he tendered the rent to Dullewe on more than one occasion, who refused it.

A conveyance appears to have been executed by the defendant, and has been tendered to the plaintiff by letter, but refused or ignored, and plaintiff says he knows there was a title deed for the land in the name of defendant's intestate.

Dullewe was examined, and asserted that the property was his by gift from defendant's intestate, and that he was not prepared to give possession either to the plaintiff or defendant. He also admitted that he had prepared a list of defendant's intestate's property with a view to obtain letters of administration, and that the property in question was put in that list.

It seems to be good and settled law (*D. Appuhamy* v. *P. Appuhamy and Others*, 3 S. C. C. p 61, following 2 Lorenz 49) that the execution and delivery of a conveyance of land in conformity with the Statue of Frauds confers the *dominium* on the purchaser, and so gives him a title to maintain an action against a third party in possession without or under a weaker title.

I have no doubt, therefore, that if the plaintiff here had accepted the conveyance tendered by the defendant he might maintain his action against Dullewe for declaration

of title, and might have called upon his vendor to warrant and defend the title conferred.

In fact, I thiuk it would be his proper and only remedy ; but here the purchaser has not accepted the conveyance.

The question is also,—whether a purchaser is bound to accept such a conveyance when he knows that the result of doing so will necessitate the bringing of an action in order to acquire that physical possession which any person of sense would desire to acquire on a purchase?

The law holds he is entitled to vacant possession on his purchase (Voet, Book xix. Tit. 1 sec. 10. Berwick p. 173); and Voet quotes from the Digest to shew that a vendor is understood to deliver vacant possession when he makes such delivery of the thing sold that it cannot be reclaimed by another person, and where therefore the purchaser would be successful in a suit of possession.

Vacant possession according to Voet may possibly (Berwick p. 174) be distinguished from actual physical detention ; and it would seem that the Roman Dutch Law does not require an actual physical delivery of possession of immoveable property, but merely a delivery of a clear title to have such possession.

Vacant possession might, therefore, be given if a notarial conveyance were accepted by the purchaser.

Are the facts connected with the assertion of possession by Dullewe of such a character that the plaintiff would be justified in refusing acceptance of the conveyance and asking for a rescission of his contract and the return of the purchase money ?

It may be said on the one hand that Dullewe has not, and knows he has not, a title to the property ; that the tenant Felsinger is aware of the transfer by the defendant to the plaintiff and of Dullewe's want of title; and that all plaintiff could have to do would be to give notice to the tenant either to quit or pay rent to him, and he could obtain the physical possession he contends he is entitled to.

There is, however, on the other hand the fact that Dullewe claims the property, that there is a possibility that he may maintain and succeed in an action against the

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administrator defendant on the ground of prescription or in other words an uncertainty whether the defendant has a good title.

If the plaintiff accepts the conveyance he will, I think, be almost inevitably obliged to take legal proceedings to establish a clear title to the premises he has bought.

It was incumbent, I think, on the defendant to have cleared the title before asking the plaintiff to accept the conveyance, and no man ought on equitable grounds to be compelled to accept a strong probability of a law suit in the place of that quiet possession which a purchaser is entitled to.

Under the contract also, here the purchaser was entitled to enter into possession on payment of the purchase money which I take to mean actual detentive possession and not symbolical possession by means of a title deed.

This he has been unable to obtain and I think, therefore, that on both grounds I have indicated he is entitled to succeed in this action and that this appeal should be dismissed with costs.

WOOD-RENTON, J.—I have considered this case with all the care which Mr. Bawa's able and most strenuous argument on behalf of the appellant demanded. But in view of the facts, think that the judgment appealed against is right.

It is clearly the duty of vendor of immoveable property to give the purchaser vacant possession. The Roman Dutch writers affirm this proposition in no uncertain terms:—

Tradere hic non est simpticiter de manu in manum conferre aut in nudam detentionem emptorem deducere; sed vacuam possessionem praestare, id est, liberam ab omnibus possessoribus et detentoribus justis. (Cens. For. iv, C. 19, s. 10).

In Bk. 19 tit. 1, ss. 10, 11, Voet expresses himself to the same effect (and cf. also the definition of vacant possession by Berwick (p. 173 as 'possession unmolested by the claims of any other person in possession": and Burge ii, 538). Now, what do we find in the present case? Mr. Felsinger is in possession of the property sold, as the

tenant of David Dullewe. David Dullewe is called as a witness, and he declares that the property belongs to him, and that he will not give it up to the respondent. There is no finding or evidence of collusion between the respondent and Dullewe. It is true that the learned District Judge takes an adverse view of Dullewe's claim. But that claim cannot be set aside without independent legal proceedings. I think that a vendor who has merely put, or offered to put (for the deed of conveyance has not been delivered to the respondent) his purchaser in a position to sue a third party, who without any collusion with the purchaser is setting, up and really means to try to enforce (whatever his view may be of the ultimate prospect of success) an adverse title, is not giving the kind of "vacant possession" that the law requires.

What then is the respondent's position? He has paid the entire purchase money, and in exchange has been furnished with title—or the promise of a title—to bring a lawsuit. We are asked to say that under these circumstances he has no right to cry off the bargain and reclaim his money. I do not think that any of the authorities cited by Mr. Bawa oblige us to affirm this startling proposition. It has been held [*Appuhamy* v. *Appuhamy* (1880) 3 S. C.C. 61] that the execution and delivery of a conveyance transfers title to a purchaser so as to enable him to sue a third party in possession without title or under a weaker title, even [*Don Andris* v. *Illangakoon* (1857) 2 Lor. 49] although he never had possession of the property himself; and there are other decisions to the same effect [*Wijanaika* v. *De Silva* (1906) 9 N. L. R. 366; *Allis* v. *Sigera* (1897) 3 N. L. R. 5; *Perera* v. *Baba Appu* (1897) 3 N. L. R. 40; *Fernando* v. *Jayawardene* (1896) 2 N. L. R. 309]. But none of these cases decide that a purchaser is bound to adopt the remedy which they say is open to him; and *Appuhamy* v. *Getchohamy* [(1907) A. C. R. 97], decided by my brother Middleton, is a direct authority to the contrary. I think that we should follow that decision here. I have been unable to find any passage in Voet or in the *Censura Foresnis* which decides that where a vendor fails to discharge the initial obligation of giving vacant possession it is not

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competent to the purchaser to claim cancellation of the contract.

I would dismiss the appeal with costs.

PELPOLA *vs.* PIERIS.

IDROOS LEBBE Accused-Appellant.

No. 684, C. R., COLOMBO.

Present: LASCELLES, A. C. J.

19*th October*, 1906.

Contempt of court—Sec. 372 of the Civil Procedure Code—False statement—Its essential element.

It is essential that a false statement in order to render it an offence punishable under sec. 372 of the Civil Procedure Code should be made wilfully and with an intention to pervert the course of justice.

A false statement made with a desire to worry and annoy some person does not amount to a contempt of court under that section of the Code.

Perera v. *Perera* (8 N. L. R. 343) followed.

The accused was a process-server; and in his affidavit of service of summons stated that the defendant in this case was pointed out to him for service of summons by one Alwis, whereas, as a matter of fact, the defendant was pointed out to him by one Peter.

He attributed the fact of the false statement to a desire on his part to worry and annoy Peter.

The Commissioner of Requests found the accused guilty of having committed a contempt of court under sec. 372 of the Civil Procedure Code, and imposed a fine of Rs. 100.

The accused appealed.

H. A. Jayawardene (with *B. Koch*) for accused-appellant.

JUDGMENT.

LASCELLES, A. C. J.—This is an appeal from a conviction of the appellant under sec. 372 of the Civil Procedure

Code for making a false statement of fact in an affidavit, which is an offence punishable as contempt of court. The appellant is a process-server, and he is charged with having falsely stated in the affidavit of service that the defendant was pointed out to him by one B. Alwis, whereas, in fact, he had been pointed out by one P. L. S. Peter, the plaintiff's brother.

It is admitted that the defendant was actually served, and it is not easy to see what object the appellant could have had in view in giving the name of B. Alwis instead of P. L. S. Peter as the man who pointed out the defendant. Now, it has been held in the case of *Perera* v. *Perera*, reported 8 N. L. R. p. 343, that it is an essential element in an offence punishable under sec. 372 that the false statement should be wilful and intended to pervert the cause of justice. Here, the Commissioner is satisfied that the false statement was intentional and that it was not the result of accident or misunderstanding; but he does not find, nor could he do so on any material before him, that there was any intention on the part of the accused to mislead the Court or to pervert the course of justice. He attributes the fact of the false statement to a desire to worry and annoy P. L. S. Peter, between whom and the plaintiff there seems to have been a quarrel. The appellant may have commited an offence punishable under some other provision of the law, but I am clear that he has not committed an offence amounting to contempt of court under sec. 372 of the Civil Procedure Code.

The conviction is set aside.

UDEAPPA CHETTY *vs.* APPUHAMY.

No. 14,026, C. R., KURUNEGALA.

Present: GRENIER, J.

1st October, 1907.

Writ, re-issue of—Stamp duty—Irregularity—Civil Procedure Code, secs. 273 & 282—Stamp Ordinance 1890, Part II., Schedule.

A writ which has to be re-issued on account of the laches of

Udeappa Chetty v. *Appuhamy*

the Fiscal does not require to be re-stamped, and a sale in execution of such a writ is good.

Schneider for judgment-debtor appellant:—The sale is bad, and should not be confirmed for the following reasons. The sale was not held "on the spot" as required by sec. 273. The sale is a suspicious one. The purchaser, who is a relative of the Fiscal Aratchy who conducted the sale, was not present at the sale, and the price paid was very small in comparison with the real value of the land. The re-issue of the writ was not stamped, and this vitiates the whole sale and renders it void. See *Palaniappa Chetty* v. *Samsudeen* (8 N. L. R. 325) and *Mutappa Chetty* v. *Fernando* (9 N. L. R. 156).

Prins for purchaser-respondent:—The sale was held on the road bounding the land, admittedly within two fathoms of it, and this is sufficient "notice" as to what was being sold. The price generally deteriorates at these judicial sales, and it has been held that the price being small does not prove there was material irregularity in conducting the sale. See *Silva* v. *Uparis* (3 C. L. R. 75). The objection to the want of re-stamping re-issue of the writ is taken here for the first time. Had it been taken in the lower Court, the returns, etc., might have been examined, and reasons given as to this omission for not stamping afresh. Even if these objections be considered irregularities, there is no proof that "substantial injury by reason of such irregularity" resulted.

JUDGMENT.

GRENIER, A.J.—This is an an appeal by the judgment-debtor from an order of the Commissioner disallowing his application to have the sale in execution of his property set aside on the ground of certain irregularities. The writ was re-issued twice, and it was on the third occasion that the sale in question took place. There were several points discussed in appeal; but in my opinion the only point I need consider is whether the writ of execution should have been freshly stamped each time it was re-issued. Mr. Schneider, on the authority of a case reported in 8 N. L. R. 325, *Palaniappa Chetty* v. *Samsudeen*, argued that the sale

was absolutly void, as the writ under which it was held was not stamped every time it was re-issued. On reference to the writ I find that it was not executed the first time because the officer entrusted with it was ill, and the second time because the officer had other duties to perform. No levy whatever was made under the writ, and it was when the writ was issued the third time that the execution-debtor's property was sold and a certain sum realised. It is not true, as stated in the petition of appeal, that the debt was reduced by the sale of a cart and bull belonging to the execution-debtor. The question therefore is,—whether the judgment-creditor was bound to supply stamps for the writ each time it was re-issued, although it was not through any negligence or fault of his that the writ was not executed on the occasion of its first and second issue. I am prepared to concede that if the judgment-creditor had been paid a portion of his claim, and the writ had been returned to Court, the writ could not properly be re-issued without a fresh stamp. But I am certainly not prepared to go the length of saying that any sale held under such a writ would be null and void because, as pointed out by Acting Chief Justice Lascelles in *Muttappa Chetty* v. *Fernando*, reported in 9 N. L. R. p. 156, I am quoting his own words, "the provisions of the Stamp Ordinance with regard to the re-issue of writs have in view a purely fiscal purpose, and I cannot read them as an enactment that the writ if re-issued after having been returned into Court is a nullity, whether stamped or not". I fully concur in that view. There is no suggestion here that anyone but the Fiscal, who is simply the ministerial officer of the Court, was responsible for the re-issue of the writ, and I do not think it was ever the intention of the Legislature to impose a stamp duty on every fresh issue in the circumstances that have transpired in this case. Certainly the judgment-creditor was not to blame in any way, because he had placed his writ in the hands of the Fiscal after having complied with the provisions of the Stamp Ordinance, and if no sale took place on the first or second occasion of its issue, it is plain that he cannot be made to suffer on account of the laches of the Fiscal.

I am of opinion, therefore, that the writ was a good

Perera v. *Fernando* one under which the sale in question took place, and that the appeal must be dismissed with costs.

PERERA *vs.* FERNANDO.

No. 394, C. R., Colombo.

Present: Wood-Renton, J.

Argument: 13*th June*, 1906.

Judgment: 14*th June*, 1906.

Crown land—Prescription—Rights of occupier—Compensation—Crown grant—Ordinance No. 12 *of* 1840, *sec.* 8.

Section 8 of Ordinance No. 12 of 1840 confers on the possessor of Crown land a statutory interest. His rights either to a Crown grant or to compensation when the land is required for public purposes are, however, subject to the condition that he shall be ready and willing in the former case to accept a grant and to pay the prescribed compensation, and in the latter case to give up the land on the required compensation being tendered by the Crown.

If he fails to comply with this condition the parties are remitted to their ordinary rights under the common law, *i.e.*, it will be competent for the Crown, whether it desires land in the occupation of a *bona fide* possessor for more than ten and less than thirty years for public purposes or not, to eject him by ordinary process of law subject to his legal rights to compensation for improvements.

It will, *a fortiori*, be competent for the Crown to avail itself of the same procedure subject to the same condition when land is required for public purposes.

vanLangenberg for appellant.

c. a. v.

Judgment.

Wood-Renton, J.—This case raises an interesting question of law as to the legal position of persons who are in possession of Crown land, and as to the construction of sec. 8 of Ordinance No. 12 of 1840.

On the record, as it stands, there is some doubt as to the facts; and I should like to state, in the first place, what is the view I take of the law. As there is every prospect of the case coming up again in appeal, it seems to me there is no reason why I should send it at this stage for argument before two or more judges. It was pointed out by Mr.

Justice Wendt in the case of D. C., Colombo, No. 15,126,* and by Mr. Justice Grenier in the case of *Podda* v. *Pabulis and others*, 8 N. L. R. 358—and there can be no doubt as to the fact—that the right which a possessor and improver of land acquires under sec. 8 is something greater and higher than that of the holder of the mere agreement to convey. He is entitled after ten years' and less than thirty years' uninterrupted possession of such land to claim a grant from the Crown on payment of half its improved value; and, if the Crown requires the land for public purposes, it can only exercise its right of resumption on payment to the possessor of half the improved value of the land and the full value of any buildings which may have been erected thereon. The question which is raised by the present appeal will assume ultimately one of two alternative forms. In the first place, what is the position of a possessor of Crown land after more than ten years' and less than thirty years' occupation if he does not claim, and is unwilling to accept, a grant of the land on condition of paying to the Crown half its improved value. I am assuming, for the purpose of this question, that

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*MOHAMADO ALI *et al.* *vs.* SENEVIRATNE *et al.*

No. 15,126, D. C., Colombo.

Present: Moncreiff & Wendt, JJ.

25th March, 1904.

Dornhorst, K.C., for plaintiffs-appellant.

Walter Pereira (with *H. A. Jayawardene*) for 1st defendant-respondent.

Judgment.

Wendt, J.—This is an action to vindicate from the defendant a parcel of land valued at Rs. 700 on the strength of a grant from the Crown. The land is 6 acres 3 roods 9 perches in extent, and is depicted in the plan at p. 139 of the record as lot No. 655, *alias* lot 4,838. It contains 290 bearing cocoanut trees, and is in fact (as it was at the date of the Crown sale) a fully planted garden. On the 17th January, 1899, the Crown put this lot up for sale by auction, describing it merely as "chena overgrowing with lantana", and plaintiffs became the purchaser at the price of Rs. 305, a price appropriate to land of the description I have quoted, but much below the value of a planted garden. Plaintiffs obtained a Crown grant for the land on 7th October, 1899, and they complain that defendant is in unlawful possession.

Defendant claims a right to the land arising out of the following facts. His father-in-law, Sarpiano, being the owner of the 16 acres block lying on the east of the lot in question, encroached on the latter and put down some cocoanut plants. About 5 or 6 years thereafter, that is to say about 28 years before action, defendant on his marriage went to live on this lot with Sarpiano's consent, and ever afterwards possessed and improved it. On the 14th February,

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the Crown is not claiming the land for public purposes. In such a case, what are its rights as landlord? In the second place, what is the position of the possessor if the Crown does claim the land for public purposes, and he refuses to accept the compensation for which the statute has made provision? I shall state my views in regard to those questions freely, in the hope, and, indeed, in the certainty, that they will shortly come up for review before a higher authority. It is clear that sec. 8 of Ordinance No. 12 of 1840 confers on the possessor of Crown land under the circumstances contemplated by the questions stated above a statutory interest in the property. But I do not think it is an unfettered interest. I think that the section attaches by implication a condition precedent to the enjoyment by the possessor of his rights either to a Crown grant or to compensation when the land is required for public purposes, viz., that he shall be ready and willing in the former case to accept a grant and to pay the prescribed compensation, and in the latter case to give up the land on the required compensation being tendered by the Crown. If he

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1888, the land was put up for sale at the Colombo Kachcheri, and the defendant became the purchaser of it under sec. 8 of the Ordinance No. 12 of 1840, at the price of Rs. 70, being half the improved value. He had to pay in addition Rs. 24·30 for fees and charges, making a total of Rs. 94·30. This he did in three instalments, viz., on the day of sale Rs. 31·30, on 21st March, 1888, Rs. 40, and on 17th September, 1898, Rs. 23. No grant was, however, issued to him, but he continued in undisturbed possession of the land. The Attorney-General, who was made a party to the action, as representing the Crown, pleaded that the sale to plaintiff was made by mistake, and that the Crown had already found that defendant had cultivated and improved the land, and had recognised his right to a grant under sec. 8, the land not being required for public purposes or for the use of His Majesty the King. On behalf of the Crown, the Attorney-General expressed his readiness and willingness to repay to plaintiffs their purchase money with interest and to obtain for defendant a grant under sec. 8.

The most important question argued before us was as to the nature of the right acquired by an improver of Crown land under sec. 8 of the Ordinance of 1840, the plaintiff contending that it did not amount to an interest in the land, but at most to a right of action against the Crown if it disposed of the land to a third party; while defendant submitted that the section gave the improver a statutory right to hold that land against the Crown—a right which the Crown could not defeat by transferring the land to another. The learned District Judge decided in favour of the defendant, and the plaintiffs have appealed.

The question involved is one of great importance, because of the very frequent occurrence of encroachments on Crown land under

fails to comply with this condition precedent, I think that the parties are remitted to their ordinary rights under the common law of the Colony. It will then be competent for the Crown, whether it desires land in the occupation of a *bona fide* possessor for more than ten and less than thirty years for public purposes or not, to eject him by ordinary process of law subject to his legal rights to compensation for his improvements, whatever these rights may be. It will, *a fortiori*, be competent for the Crown to avail itself of the same procedure subject to the same condition when land is required for public purposes. I am convinced myself that this construction of the statute is sound for the following reason. By the law of this Colony, and by the laws of most civilized countries, where private property is required for purposes of public utility, the state is expressly authorised to exercise its right of eminent domain compulsorily on payment of compensation to the owners in accordance with defined rules.

I cannot think that in such a case as the present, when the property in question is Crown property, as to which no common law prescriptive rights have been ac-

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the circumstances mentioned in sec. 8, although no case quite similar to the present, of a conflict between the improver and a transferee of the Crown, appears to have occurred,—at least none has been cited to us. The cases mentioned by the District Judge, in his order of 9th December, 1902. dealt indirectly with the question without laying down any decisive ruling. After giving the most careful consideration to the matter, I think the District Judge was right; and in so thinking I am glad to have the support of the high authority of Bonser, C. J., who, in *Casipillai* v. *Ramanater*, 2 N. L. R. 33. expressed the same view, although it was not necessary for the decision of that case.

It is a general principle that a person cannot convey to another a better title to land than he himself has. At the same time it is recognized that a mere contract to convey land to one person is not such a fetter on the title as would prevent the owner from conferring a good title by conveying the land to an innocent third person. In my opinion the right which a possessor and improver of land acquires under sec. 8 is something greater and higher than that of the holder of an agreement to convey. He has possessed and improved the land, and that would under the common law entitle him to retain possession against the owner until he was paid the full value of his improvements. The Ordinance substitutes for that right the right to claim half the improved value of the land and full value of all buildings if the Crown desires to turn the possessor out on the ground that it requires the land for public purposes or for the use of His Majesty. If the land is not so required, the possessor cannot be turned out,

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quired, it can have been the intention of the Legislature to enable a mere possessor of land to set the title of the Crown as landlord, and the interests of the whole community, at defiance by refusing to avail himself of the compensation which it has placed at his disposal. On the facts as they stand it is doubtful whether the plaintiff in this case, who sues by the authority of the Attorney-General, is claiming the land for public purposes or not; and I think—subject to anything the Solicitor-General may say on the point—that the best order for me to make is to set aside the judgment and decree appealed against and leave the plaintiff to take such proceedings for the establishment of his rights as he may think fit. The case will then be decided in the Court of Requests in the light of the law as I have tried to define it; and if it comes up in appeal, there will be no difficulty in securing its re-argument before two or three judges.

I only desire to add that the view which I have expressed as to the nature of the interest in Crown lands created by sec. 8 of Ordinance No. 12 of 1840 seems to me to derive indirect corroboration from a decision delivered a few days ago by His Lordship the Chief Justice in the

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but is entitled to a grant of the land on paying half its improved value. Now, it cannot be contended that if a man has entered upon and improved my land under circumstances entitling him to the *jus retentionis* I could defeat his right by merely transferring the land to another; that this other could obtain ejectment against him without compensating him for the improvement of the land. Yet, this is what plaintiffs are seeking to do, and, in my opinion, they are not entitled to do it.

It was contended for the plaintiffs that the Crown had the right at any time summarily to eject defendant from the land without process of law. That has yet to be decided, but at any rate it could only be done if the land was required for the purposes mentioned in the section, and that is not suggested here. Further, it could only be done "on the possessor being paid the half of the improved value", which was not done here. On the contrary, the Crown by its officers accepted defendant's payment of half the improved value, and agreed to give him a grant.

For these reasons I think the decree appealed from should be affirmed with costs.

MONCREIFF, J.—I entirely agree with my brother Wendt's opinion. I think that the defendant acquired a statutory interest, which became indefeasible when, the land not having been required for public purposes for the use of the King, the Crown definitely accepted the half improved value from him.

in the case of C. R., Avisawella, No. 4,817,* S. C. No. 150. The appeal is allowed on the terms I have stated.

Woutersz v. Carpen Chetty

WOUTERSZ *vs.* CARPEN CHETTY *et al.*

No. 8,350, D. C., Galle.

Present: Hutchinson, C. J., & Wood-Renton, J.

22nd October, 1907.

Postponement of trial, application for—Refusal—Withdrawal of Counsel.

Where Counsel for the plaintiff asked for a postponement of the trial on the ground of the plaintiff's illness, and where the postponement was refused and the trial went on and the plaintiff's Counsel took no part in the further proceedings,

Held: That Counsel had no right to withdraw from the case under such circumstances, but it was his duty to proceed as far as he could with the examination of the witnesses who were called on the other side and to have adduced all the witnesses on his side who were present and available.

This was an appeal from an order of the District Judge (G. A. Baumgartner, Esq.) refusing a postponement of the trial of a case. The circumstances in which the order was made as appear in the record are as follows:—

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*KUNDA *vs.* FERNANDO.

No. 4,817, C. R., Avisawella.

Present: Lascelles, A. C. J.

7th June, 1906.

E. W. Perera for plaintiff-appellant.

Judgment.

Lascelles, A. C. J.—This is an appeal from a decision of the Commissioner of Requests in a partition case awarding ¼ of certain lands to the plaintiff and ¾ to the defendant.

The land in question was conveyed to the plaintiff and defendant in consideration of payment of half improved value by three Crown grants dated the 6th December, 1901.

It is admitted that the improvements in consideration of which the grants were made were the work of the defendant alone. The grants were made out in the joint names of the plaintiff and the de-

Woutersz v. *Carpen Chetty*

"29th January, 1907.

"Mr. Goonewardene for 1st defendant.

"Mr. J. S. Jayewardene, for plaintiff, asks for postponement on the ground of the illness of the plaintiff. Medical certificate produced.

"Mr. Goonewardene opposes postponement.

"The Court points out that there is nothing before it to shew that the personal attendance of the plaintiff is necessary, and therefore a postponement cannot be given.

"Mr. Jayawardene tenders a medical certificate, and simply states that he leaves the matter in the hands of the Court.

"Mr. Wickremesinghe, for 2nd defendant, points out that he desires to guard himself from liability for costs.

"I refuse the postponement asked for.

"Mr. Jayawardene states that he is not ready to go on without the plaintiff. He takes no part in the further hearing."

H. J. C. Pereira for plaintiff-appellant.

Bawa for defendants-respondent.

JUDGMENT.

HUTCHINSON, C. J.—This is an action under sec. 247 of the Civil Procedure Code. The plaintiff and the 1st de-

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fendant because the former had contributed a portion of the purchase money. The defendant seems to have paid the first instalments of Rs. 4·50 and Rs. 14·85, and the balance was made good by the plaintiff.

The Commissioner considers that at the time of the sale the defendant had a good title to half the land, and that what was transferred was only one-half of the land. He regards the payments made by the plaintiff as affecting only half the land, and considers that the plaintiff is therefore only entitled to ¼ of the land.

This decision is based upon a misapprehension of sec. 8 of the Ordinance No. 12 of 1840. The defendant under that section was not entitled to half the land. He had merely a right to a grant of the land at half the improved value.

When a Crown grant is made to several persons without specifying their respective interests it is clear, in the absence of any express agreement to the contrary, that their shares must be taken to be equal.

The decree must be varied by ordering the lands in question to be partitioned in equal moieties between the plaintiff and the defendant.

fendant both summoned witnesses. When the case was called on for trial Mr. J. S. Jayawardene, for the plaintiff, asked for a postponement on the ground of plaintiff's illness, and produced a medical certificate. The Judge pointed out that there was nothing to show that the personal attendance of the plaintiff was necessary, and therefore a postponement could not be given. He says: "Mr. Jayawardene tenders the medical certificate and simply states that he leaves the matter in the hands of the Court." The Judge then refused a postponement. The defendant then called some evidence. Mr. Jayawardene took no part in the further hearing; and judgment was given for the defendant.

When Mr. Jayawardene said he "left the matter in the hands of the Court", I think the Court naturally inferred that he meant to go on with the case and do his best if the postponement was refused. Counsel has no right to withdraw from a case without the consent of the Judge. He ought to have cross-examined the defendant's witnesses, and to have called his own witnesses; and if it then appeared likely that the plaintiff's evidence might be very material, the Judge would surely have allowed a postponement in order that the plaintiff's presence might be procured.

I do not feel disposed now to order a new trial. I dismiss the appeal.

WOOD-RENTON, J.—I entirely agree. I am clearly of opinion that Mr. Jayawardene had no right to withdraw from the case under the circumstances disclosed in the record. It was his duty as an Advocate to proceed as far as he could with the examination of the witnesses who were called on the other side and to have adduced all the witnesses on his side who were present and available. If it transpired that his client, who was absent, was a material witness, I feel quite sure that the learned Judge would have granted him a postponement for the purpose of securing her examination; and if any application for such a postponement had been refused, it is obvious that the appellant would have stood in a peculiarly strong position in the Appeal Court.

I have no hesitation in the case whatever.

Adara-hamy v. Abraham

ADARAHAMY *vs.* ABRAHAM *et al.*

No. 5,775, C. R., Balapitiya.

Present: Middleton, J.

Argument: 16*th* & 17*th September*, 1907.

Judgment: 30*th September*, 1907.

Action under sec. 247 of the Civil Procedure Code—Test of jurisdiction —When contestatio *arises—Character of action.*

In an action under sec. 247 of the Civil Procedure Code the test of jurisdiction is the amount due on the writ at the date of seizure.

The *contestatio* arises at that date, and an action under sec. 247 is in its character rather an appeal from the decision in the claim inquiry than a new and substantive action.

This was an action under sec. 247 of the Civil Procedure Code. The house and land involved in the action was admittedly over Rs. 300 in value. The decree in the case in which the writ issued was dated the 27th April, 1905, and was for a sum of Rs. 242·50 with interest thereon at 9 per cent. per annum from that date till payment in full plus the costs of suit, Rs. 28·75. The seizure on the writ took place on the 20th May, 1906, and at that date the amount of writ was Rs. 298·34. This action was brought on the 13th September, 1906, and then the amount due on the writ exceeded Rs. 300. The defendants contended that the action was outside the jurisdiction of the Court of Requests. The Commissioner (F. D. Pieris, Esq.) held that as the amount of the writ at the date of seizure was under Rs. 300 the action was within his jurisdiction. The defendants appealed.

de Zoysa for defendants-appellants:—The Court of Requests has no jurisdiction to entertain this action. According to the principle laid down in *Ponnambalam* v. *Paramanayagam* (9 N. L. R. 48), the jurisdiction in cases under sec. 247 is determined by the value of the property seized or the amount of the decree, whichever is less. Applying that principle to this case, as both the value of the land and the amount of the writ at the date of the institu-

tion of this action were over Rs. 300, the Court of Requests had no jurisdiction. The value of the land is admittedly so; but the Commissioner has held that he has jurisdiction as the amount of the writ at the date of the seizure was under Rs. 300. The Commissioner is wrong. The amount of the writ at the date of action brought (which is clearly over Rs. 300 in this case), and not the amount of the writ at the date of seizure, should be considered in deciding the question of jurisdiction. The action is brought to have property declared liable to be sold in satisfaction of an amount which exceeds Rs. 300 [*Madhusudun Koer* v. *Rakhal Chunder Roy* (15 Cal. 104)].

A. St. V. Jayawardene for plaintiff-respondent:—The Commissioner was right in holding that the right of the parties to action under sec. 247 should be taken as they stood at the date of seizure. The Court should not take cognizance of what happens after that date [*Silva* v. *Nona Hamine* (10 N. L. R. 44); *Silva* v. *Kirigoris* (7 N. L. R. 195)]. The action under sec. 247 is a sort of appeal from the order in the claim proceedings.

De Zoysa in reply:—The principle contended for by respondent is not sound. For if between the date of seizure and the date of the institution of the action under sec. 247 the amount due on the writ is so reduced as to leave only a sum under Rs. 300 payable, must action still be brought in the District Court simply because at the date of the seizure the amount due was over Rs. 300?

c. a. v.

JUDGMENT.

MIDDLETON, J.—This was an action under sec. 247 of the Civil Procedure Code by the judgment-creditor against the claimant whose claim had been upheld.

The Commissioner of Requests gave judgment for the petitioning judgment-creditor, and the defendants appealed.

Only three points were taken before me by their Counsel, the findings on the facts not being disputed.

The first point was that the test jurisdiction of the

Adara-hamy v. *Abraham*

Court as regards value in an action such as this was the amount of the decree at the date of the inception of the action, and not at the date of the seizure.

It was distinctly laid down by the Full Court in *Ponnambalam* v. *Paramanayagam* in 9 N. L. R. p. 48 that the value of the subject matter of an action under sec. 247 must be determined by the amount of the decree or the value of the property seized, whichever happens to be less.

In *Madhusudun Koer and another, defendants* v. *Rakhal Chunder Roy and another, plaintiffs* (15 Cal. 104) the Court, following the decisions of the Courts of Bombay, Madras, and Allahabad, held that the amount which was to settle the jurisdiction in an action similar to our action under sec. 247 was the amount of the debt, and not the value of the property seized.

This decision does not conflict with the decision of our Full Court, but limits it.

The question here is, as it might have been in both these cases, at what time is the amount of the debt to be ascertained, at the inception of the action or upon the seizure?

In my opinion it must be ascertained following the reasoning in the judgments of the Full Court in *Silva* v. *Nona Hamine* (10 N. L. R. 44) by looking at the rights of the parties as they existed at the date of seizure. The *contestatio* arises as that date, and an action under sec. 247 is in its character rather an appeal from the decision in the claim inquiry than a new and substantive action.

In my opinion, therefore, the test of jurisdiction is the amount due on the writ at the date of seizure.

As that amount is admitted to be less than Rs. 300 I am clearly of opinion that the Court of Requests had jurisdiction to try and determine this case.

As regards the points—(1) as to the Deed P., excluding the houses, (2) as to Don Harmanis not being entitled to claim more than one-eighth—they were met on the argument, and were not seriously pressed.

The 1st defendant and his brother purported to purchase under D., the larger house in question under a Fiscal's

sale, and it hardly lies in his mouth now to deny Don Harmanis' title thereto.

As regards the one-eighth, the Deed of Gift No. 14,610 conveyed the entirety of the land. That deed, though apparently frequently impugned, has not been declared void, and the Commissioner of Requests has held, and apparently rightly so, that Don Dias, the father of Don Harmanis, and his donor under No. 14,610 (father and son) had exclusive possession of the land for upwards of 10 years.

I therefore dismiss the appeal with costs.

WEERAPPA CHETTY *vs.* ISABELLA.

No. 4,405, D. C., Negombo.

Present : Hutchinson, C. J., & Wendt, J.

29th October, 1907.

Fiscal's sale, application to set aside—Objections—Objections urged other than those stated in the petition—Civil Procedure Code, secs. 282 *&* 341.

When dealing with a proceeding under sec. 282 of the Civil Procedure Code no other objections can be considered than those mentioned in that section.

This was an application under sec. 282 of the Civil Procedure Code to set aside a sale. The respondent, who was substituted as defendant in the room of her deceased husband, the original defendant, filed a petition setting forth certain objections to the sale being confirmed. On the day of enquiry none of the objections mentioned in the petition were enquired into or urged, but the Counsel for the respondent objected to the sale on the ground that the provisions of sec. 341 of the Code had not been strictly complied with. The District Judge upheld the objection and set aside the sale.

The plaintiff appealed.

Sampayo, K.C. (*F. M. de Saram* with him) for the appellant:—The order of the District Judge setting aside the

Weerappa Chetty v. *Isabella*

sale is wrong. The objection taken by the respondent is not one coming under the provisions of sec. 282 of the Civil Procedure Code. If the respondent was in any way prejudiced, she should have moved the Court to stay the sale, for in this case the record shows that the respondent had been served with the notices previous to the sale and was therefore fully aware of all that had been done. The provisions of sec. 341 of the Code are not applicable to a proceeding under sec. 282. Under the latter section the respondent must show that she had suffered substantial loss by reason of certain irregularities in the publishing and conducting of the sale in execution, and this she has failed to do. The petition is bad for want of an affidavit to support it. The provisions of sec. 341 are applicable to a stage before the actual sale takes place, and the record shows that the provisions of this section have been practically complied with.

Bawa for respondent:—If the provisions of sec. 341 have not been strictly complied with, the sale is void *ab initio*. There was no proper decree against the respondent, and therefore no binding sale. He referred to *Bastian Pillai* v. *Anapillai* (5 N. L. R. 165) and D. C., Galle, No. 5,741,* decided on the 5th April, 1906.

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* DE SILVA *vs* UJATI HAMY.

No. 5,741, D. C., GALLE.

Present: LASCELLES, A. C. J., & MIDDLETON, J.

5th April, 1906.

A. St. V. Jayawardene for plaintiff-appellant (writ-holder).

Bawa for petitioners-respondent.

JUDGMENT.

MIDDLETON, J.—This was an appeal against an order made on the 6th February, 1906, declaring the sale of one bag of paddy sowing extent of the field Moragala Kumbura, held under writ in this case on the 8th September, 1905, to be a nullity and setting it aside.

The appellant, the judgment-creditor against one Ujati Hamy, under his writ caused the Fiscal to seize and sell one bag of paddy sowing extent out of eight bags paddy sowing extent of the field Moragala Kumbura on the 30th August.

The respondents to this appeal, who preferred claim to 5 bags extent in the said field, sought for and obtained an order from the

Sampayo in reply referred to *Gooneratne* v. *Perera et al.* (2 N. L. R. 185).

JUDGMENT.

HUTCHINSON, C. J.—The District Judge set aside the sale on the ground that sec. 341 of the Civil Procedure Code had not been complied with. As to the sale, I think it is too late now to take that objection. He also refers to the fact that the writ under which the sale took place orders the sale of "the defendant's" property, and that the defendant named in the writ is the present respondent who was substituted for the original defendant, deceased, and that, if we are to be verbally accurate, the original defendant's property could not be seized under that writ, and the private property of the respondent ought not to be seized, because she is merely defendant in her representative capacity. The writ was at first issued in the lifetime of the

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Court to stay the sale on the ground that they were entitled to the one bag paddy sowing extent of the said field by purchase from on K. P. Lewis who bought the same from the 2nd respondent, the appellants judgment-debtor Ujati.

On the 1st of September, 1905, the Court, through its Secretary, ordered the Fiscal to stay the sale. Some correspondence thereupon ensued between the Fiscal and the writ-holder's Proctor with reference to the claim of the latter, which resulted in the Fiscal carrying out the sale on the 8th of September.

The respondents then applied to the Court, and on the 6th February, 1906, an order was made setting aside the sale in execution and declaring it a nullity. Against this order the writ-holder now appeals.

It would seem that the writ-holder was the purchaser of the property in question at the sale for Rs. 6.

It was argued before us on the authority of *Asmutunnissa Begun* v. *Ashruff Ali and others* (I. L. R. 15 Cal. p. 488), that the case before us was on all fours with that case, and that sec. 282 of our Civil Code of Procedure being the same as sec. 311 of the Indian Code of Procedure a person in the position of the claimants in this action would not come within the words "any person whose immoveable property has been sold" under this chapter.

A case was also quoted from vol. 7 of the Bombay Law Reporter, p. 1, shewing from the judgment of Lord Davey, quoting the judgment of Sir Barnes Peacock in *Kishen Chunder Ghose* v. *Mussumat Ashoorun* that even if the claimant's property in this case had been sold that such a sale would be a nullity, and might be disregarded without any proceedings to set them aside.

The questions that we have to decide are, whether the claimant being a transferor from the judgment-debtor had power to apply to the Court under sec. 282; and if not, whether the District Court had power to cancel this order on any other ground?

I think it is pretty clear on the petition filed by the claimants that their application was made under sec. 282.

Weerappa Chetty v. *Isabella*

original defendant; it had been returned and lately re-issued with the addition of the present respondent's name written in red ink "in the room of the deceased" original defendant. That is not strictly accurate; but it was clearly intended that under it the property of the original defendant should be seized, and so the Fiscal understood it. I do not think that the irregularity is enough to invalidate the sale. I should therefore set aside the order of the District Judge.

There were two other objections to the sale raised by the petitioner in the District Court. One was that it did not take place at the advertised time, and the other was that it was not properly advertised. If the petitioner wishes for an enquiry as to the validity of those two objections, and as to whether she has sustained substantial injury by reason of either of those irregularities, she must be allowed to do so. The order will be to set aside the order of the District Court and send the case back to enquire into these alleged irregularities.

That section differs from sec. 311 of the Indian Civil Procedure Code inasmuch as it includes, not only the decree-holder or any person whose "immoveable property has been sold under this chapter", but also "any person establishing to the satisfaction of the Court an interest in such property".

Thus I think the section goes further than the section of the Indian Code, and would enable a person having an interest in the property sold to claim.

It is true that the claimants' immoveable property has not been sold inasmuch as it is only possible for the Fiscal to sell the judgment-debtor's property; but, considering the somewhat undefined nature both of the claim made by the petitioner and that of the property sold by the Fiscal, I do not think it unreasonable to hold that the claimants may be said to have an interest in the property sold in satisfaction of the writ by the Fiscal and that they would for that reason be entitled to come in under sec. 282.

I think, however, that putting aside sec. 282 and looking at the deliberate disregard by the Fiscal of the Court's order in putting up for sale property as to the ownership of which the Court was then enquiring, that the Court have an inherent right to say the sale carried out by the Fiscal had not been ordered, and for that reason to set it aside as entirely *ultra vires*.

In this case the appellant as judgment-creditor has himself brought about the sale by inducing the Fiscal to do that which the Court had ordered him not to do; and if the sale is set aside, the only person affected by such cancellation will be the appellant, the person who improperly brought it about.

Under these circumstances therefore and for these reasons I would refuse to interfere with the order of the District Judge and would dismiss this appeal with costs.

LASCELLES, A. C. J.—I agree.

The appellant will have his costs of this appeal.

WENDT, J.—I agree with what has fallen from my lord in regard to the grounds upon which the District Judge proceeds. As regards the irregularities upon which Mr. Bawa relies, it appears to me there are no merits whatever behind them. The respondent had notice of the application to substitute her as defendant in place of her husband deceased, also of the application to substitute the appellant in place of the original plaintiff, and also of an application by the appellant to issue execution on the decree. The respondent did not appear in response to any of those notices. Thereafter the land was actually seized, and after the usual interval put up for sale. It was only after the sale took place that the respondent came forward for the first time. I find it difficult under these circumstances to resist the conclusion that she was aware all along of what was taking place in the action, and that her husband's property had been attached in order to satisfy his debt. It is impossible to say that any injustice was done her. I do not think she is entitled to any relief upon the grounds which have been discussed. I agree that the case should go back for the determination of the objections laid under sec. 282.

BUCHCHI APPU *et al.* *vs.* ABEYASURIYA *et al.*

No. 7,368, D. C., GALLE.

Present: WENDT, J., & GRENIER, A. J.

ARGUMENT: 25*th July*, 1905.

JUDGMENT: 1*st August*, 1905.

Fiscal's conveyance—Transfer to a purchaser who is already dead—Validity of such transfer.

A conveyance made in favour of a purchaser who is already dead at the date of the transfer passes no title; and in this respect there is no distinction between a private sale and one carried out by the Fiscal.

Buchchi Appu v. *Abeya-suriya*

E. W. Jayawardene for plaintiffs-appellant.

de Kretser for defendants-respondent.

c. a. v.

JUDGMENT.

WENDT, J.—The defendants have obtained judgment in this action on the strength of a title to the land pleaded by the added defendant and based on a Fiscal's conveyance.

The facts relating to that title are as follows:—The 3rd plaintiff was the admitted owner of the share of the land in question, when in 1887 it was sold in execution of a judgment against him. One Pedris was the highest bidder, and he procured insertion of the name of Missi Nona, then a girl of 10, as the purchaser. Her father paid the price, but no conveyance was taken out. Missi Nona died in 1895, leaving a husband (the added party) and daughter; and the latter died in 1896. In 1897 the Fiscal, at the added party's instance, executed a conveyance transferring the land to Missi Nona. The question is, whether that instrument passed any title in view of the fact that the grantee was already dead? (In the circumstances proved there is no question of prescriptive possession.)

My impression is that this question has more than once been decided by us in the negative on similar facts; but appellants have not referred to any case but those mentioned in the judgment. In D. C., Kandy, No. 8,298, Bonser, C. J. (21st October, 1896)* in giving plaintiff leave to with-

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*ANNAMALE CHETTY *vs.* RAWTER.

No. 8,298, D. C., KANDY.

Present: BONSER, C. J., & LAWRIE, J.

21*st October*, 1896.

Dornhorst for plaintiff-appellant.

Wendt for defendant-respondent.

JUDGMENT.

BONSER, C. J.—There are many difficulties in the way of the plaintiffs succeeding. Amongst others I may mention that the Fiscal's conveyance is to a man who at the time was dead, and also

draw from the action, said: "There are many difficulties in the way of the plaintiff succeeding. Amongst others I may mention that the Fiscal's conveyance is to a man who at the time was dead." The District Judge says this was not a final adjudication of the point. That is true; it could not amount to *res judicata* between the parties to that action because plaintiff was permitted to withdraw. But the Chief Justice's opinion is none the less an authority on the bare question of law when it arises again between other parties. My brother Grenier approved of this view in *Ukku Menika* v. *Lape* (6 N. L. R. 361), and I think it is right. Sale and purchase of land is a contract which is not completed until a conveyance from the vendor has assured the property to the purchaser. If before that has been done the purchaser died, the contract cannot possibly be completed by the execution of a conveyance to the dead man. In this respect I see no distinction between a private sale and one carried out by the Fiscal. Of course the legislature might conceivably enact that in such circumstances as the present the Fiscal shall transfer to the deceased purchaser, and that such transfer shall operate as though the purchaser had died possessed of the land; but it is sufficient to say that it had not so enacted. The fact that the form of conveyance assures the property to the purchaser, "his heirs, executors, administrators and assigns", makes no difference. Heirs, etc., cannot take *pari passu* with their ancestor: they can only inherit from him, and that only where he dies possessed. The purchaser here was not the owner at the time of her death. Nor is the case of the defendants helped by the enactment in sec. 289 of the Civil Procedure Code, that "the grantee in the conveyance is deemed to have been

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that there was no order of Court authorising the Fiscal to make the conveyance as required by sec. 58 of Ordinance No. 4 of 1867, which governs this case.

The plaintiff asks leave to withdraw this action and to bring a fresh action.

The proper course will be to substitute for the order made by the District Judge an order giving plaintiff leave to withdraw from this action on condition of his paying the costs of this case and the costs of this appeal. If the costs are not paid within one month from the receipt of this record by the Court below, then the appeal stands dismissed with costs.

LAWRIE, J., agreed.

Soysa v. *Manuel*

vested with the legal estate from the time of the sale". That does not imply that the purchaser in his own proper person shall in every case be the grantee of the Fiscal's transfer; but the grantee must be the person entitled to stand in the shoes of the deceased purchaser.

For these reasons I think the Fiscal's transfer confers no title on the added party, and the plaintiffs are entitled to judgment on that issue. There was one issue (No. 4) as to improvements, which the learned District Judge has not decided; and the case must therefore go back for its determination. The plaintiffs will have the costs of appeal. The District Court costs will be disposed of by the District Judge in his final judgment.

GRENIER, A. J.—I agree.

SOYSA *vs.* MANUEL.

No. 7,743, C. R., PANADURE.

Present: GRENIER, A. J.

ARGUMENT: *2nd October*, 1907.

JUDGMENT: *21st October*, 1907.

Writ of execution, application for—Practice—Civil Procedure Code, sec. 224, and sch. ii., form 42.

An application for writ of execution made under sec. 224 of the Civil Procedure Code is not by petition bearing a stamp on it, but in the form No. 42 as given in the schedule to the Code.

Chetlappah Chetty v. *Kandyah* (2 Bal. p. 61) disapproved.

This was an appeal from a judgment of the Commissioner of Requests of Panadure (T. W. Roberts, Esq.) holding that an application for writ of execution should be by petition, and that such petition should be stamped.

W. H. Perera for appellant:—By sec. 224 of the Civil Procedure Code an application is to be made, and there is no mention of a petition in that section. Hence there are no stamp fees due on the written application which is re-

quired under sec. 224. Moreover, the Code gives a special form for this application (Form No. 42), which form is not in the shape of a petition. The practice of the District Court of Colombo is not to require a petition for an application under sec. 224, and it is the same in almost every other Court of the Island.

Akbar, C. C., for the Attorney-General:—The form No. 42 is not mentioned in sec. 224 as form No. 43 is referred to in sec. 225. In *Chellappah Chetty* v. *Kandyah* (2 Bal. 61) Chief Justice Layard held that form No. 42 ought not to be followed. In the same judgment the Chief Justice was of opinion that the application under sec. 224 ought to be by petition. It is true that that judgment has been overruled recently by the Full Court in a D. C. Matara case, but not on this point. By sec. 347, "where there is no respondent named in the petition of application if more than one year has elapsed between the date of the decree and the application for its execution the Court shall cause the petition to be served on the judgment-debtor, ...provided that no such service shall be necessary if the application be made within the date of any decree passed in appeal .....". It will be noticed that the word "petition of application" is used, and this section only contemplates the execution of decrees under heads (A), (B), and (C) of sec. 217, because in decrees under heads (D), (E), (F), and (G) provision is made by secs. 331, 332, and 334, that the application for the writ should be served on the judgment-debtors. So sec. 347 only contemplates the execution of decrees under heads (A), (B), and (C), because in these decrees the judgment-debtor is not made a respondent to the petition of application. If sec. 347 is read with sec. 224, as it ought to be read, it is submitted that an application under sec. 224 must be by way of petition. Once this is admitted, under schedule B. part II. to the Stamp Ordinance (No. 3 of 1890) every petition used in a District Court or a Court of Requests must be stamped.

Perera in reply:—The case reported in 2 Bal. 61 has been overruled in every particular; and in the schedule of the District Court proceedings in the Stamp Ordinance, after specifying that notice of trial is liable to stamp duty,

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there is a significant omission of the application for writ also being liable to stamp duty. Nothing could have been easier than to insert between "notice of trial" and "writ of execution against property" the words "application for writ", if the legislature really intended that application for writ should also bear a stamp.

JUDGMENT.

GRENIER, J.—The question in this case is, whether an application for writ of execution should be by petition, and whether the petition should be stamped. I must say that when the affirmative proposition was made before me I was a good deal surprised, because ever since the Civil Procedure Code came into operation, and it is now nearly twenty years ago, I have known of no instance in which application for writ was made by petition bearing a stamp on it. The practice has been otherwise. The Civil Procedure Code makes no provision, so far as I can see, for the application to be made by petition. On the contrary, sec. 224 prescribes a form, No. 42, given in the second schedule, for the application; and this form has been adopted I believe in all the Courts of the Island from the time the Code came into operation. Reading sec. 224 with the form, it seems to me clear that by no stretch of language could it be said that the terms "application" and "petition" are used interchangeably in the Code. An application for writ is distinct from a petition; and in secs. 224 and 225 the difference is accentuated by frequent and repeated use of the former term, with never a reference to the latter term. I should be very loathe to disturb a practice of such long-standing unless I was satisfied that there was really no foundation for it. I have carefully read the judgment of the Commissioner, but I am not convinced that his conclusions are right. I may mention that the practice in the District Court of Colombo is not to stamp an application for writ; and on enquiring from the District Judge of Kandy I was informed that the practice is the same in his Court.

I do not agree with the judgment reported in 2 Bal. p. 61 that an application for writ should be by petition. The words of sec. 224 reads: "The application for execution of the

decree shall be in writing, signed by the applicant or his proctor, and shall contain the following particulars." If the Legislature intended that the application should be by petition, nothing was easier for it than to have said so; and the absence of the word "petition" and the use of the words "in writing" indicate to my mind that the application was not to be by petition, but was to be in the form No. 42 in the schedule. The form is headed as follows:—"Form of application for execution of a decree by seizure and sale of moveable property." Underneath are the words:—"See secs. 224 and 225." Assuming that the form is defective, which I do not think it is, the phraseology employed in it negatives the contention that an application for writ should be by petition.

The practice I have referred to has been sanctioned for nearly twenty years, as I have said before; and I am by no means satisfied that the Commissioner has taken a right view of the question submitted to him, although he has discussed it with much ability.

I would allow the appeal with costs.

UTUMA LEVAI *vs.* MAYATIN VAVA *et al.*

No. 2,786, D. C., Batticaloa.

Present: Middleton, J., & Grenier, J.

Argument: *8th October*, 1907.

Judgment: *15th October*, 1907.

Deed—Donation—Will.

A duly executed instrument contained, *inter alia*, the following clauses:—"I.....for and in consideration of the confidence, love, and affection I have towards my son.....I hereby donate, assign, and set over unto him the seventy-three head of oxen.....subject to the hereinafter described conditions and directions which is to take place after my death....."

"Therefore by virtue of this instrument my son.....shall accept after my death the aforesaid cattle.....and he my son shall take over and possess and enjoy the same as his own property for ever."

Utuma Levai v. *Mayatin Vava*

Held: That the instrument was a donation *inter vivos* to take effect after the death of the donor, and not a testamentary disposition.

Vaity v. *Jacova* (2 A. C. R. 46) disapproved.

The plaintiff in this action sued the defendant for the recovery of several head of cattle, basing his title on deed No. 1,856, dated 25th February, 1902, and above referred to. The defendants contended that the said deed could only take effect as a last will. The District Judge held in favour of the defendants, and the plaintiff appealed.

A. St. V. Jayewardene, for plaintiff-appellant, contended that the document in question is deed of gift, and not a testamentary disposition. In construing a document the actual words used by the parties in describing it is of paramount importance. In this case the document is described as a deed of gift, and the expressions used in the body of the deed itself clearly shew that the property was donated, and not devised or bequeathed. The donation is no doubt to take effect after the donor's death, or, as the books have it, the efficacy of the documents depends upon the death of the donor. That is the effect of every gift where the property is donated to a person with a reservation of the life interest in the donor's favour. This kind of donation is well known to the Roman Dutch Law and to our law—Voet 39. 5. 4.; 2 Burge p. 143; 6 S. C. C. p. 13; 2 C. L. R. 52; and 4 N. L. R. 28. It may be contended that the decision of Wood-Renton, J., in *Vaity* v. *Jacova*, 2 A. C. R. 46, supports contention, but that case seems to have been decided according to the English Law, and there is nothing to shew that the Roman Dutch Law authorities were cited at this argument, and it may also be justified on this ground that the donor of that gift reserved to himself the right of revocation. It is humbly submitted that this judgment in *Vaity* v. *Jacova*, 2 A. C. R. 46, is against the weight of authority. In this case if there is any doubt as to this intention the acceptance of the gift by the donee which is expressed on the face of this deed itself is conclusive of its being a gift.

H. A. Jayewardene for respondent:—The judgment is

right. The donee, the present plaintiff, has obtained probate of a document very similar to this and given to him by the same donor. That shews that the parties considered the documents were in the nature of testamentary dispositions, not donations. In this case the donee got no interest in the lifetime of this donor, and it was only after the latter's death the rights under the document enured to the plaintiff. He relied on *Vaity* v. *Jacova*, 2 A. C. R. 46, which is an authority exactly in point.

A. St. V. Jayewardene in reply.

c. a. v.

JUDGMENT.

MIDDLETON, J.—I agree that looking at the terms of the Deed No. 1,856, dated 20th February, 1902, from the translation at p. 27 of the record, and the fact that it is signed by the plaintiff, it must be constructed as being a donation *inter vivos* to take effect after death duly accepted by the donee at its execution, and therefore irrevocable in the eye of the Roman Dutch Law which governs us in these matters.

Voet xxxix. 5. 4. (Mr. de Sampayo's Translation) Burge vol. ii. p. 143, and the decisions reported at 4 N. L. R. p. 288, 6 Supreme Court Circular p. 13, 2 C. L. R. p. 52 shew that this is one of a class of deeds well-known in Roman Dutch Law, as Dias, J., said in 6 Supreme Court Circular p. 15.

I agree, therefore, with my brother Grenier that it is not to be treated as a testamentary document the revocability of which is an undisputed element in it, and that consequently the judgment of the learned District Judge must be set aside and judgment entered for the plaintiff on the basis proposed by my brother.

GRENIER, J.—The principal question argued on this appeal was whether Deed No. 1,856, dated 25th February, 1902, on which the plaintiff based his title to several head of cattle described in the schedule annexed to the deeds was a testamentary disposition or a deed of donation.

When the deed was first read to us by appellant's Counsel I was certainly of opinion that it was in the nature

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of a last will, and that the appellant could make no use of it until he had taken out probate; but, at the close of the argument, our attention was drawn to a portion of the deed which clearly shewed that the person who executed it and the person in whose favour it was executed regarded the instrument as deed of donation *inter vivos* to take effect after the death of the donor.

The presence of clear words of acceptance on the part of the donee indicated beyond all doubt that neither party regarded the deed as containing a testamentary disposition. Possibly had there not been this clause of acceptance in the deed there would have been much room for controversy as to its real character.

I need hardly say that the Roman Dutch Law recognises donations *inter vivos* which are to take effect after the death of the donor; the gift is a present one taking effect immediately on due acceptance by the donee, but the possession of the thing donated is postponed till the death of the donor.

It is manifest that there are no words in this deed from which it may be inferred that the donor had any intention to revoke it and to take back what was gifted at any time before the death. But that really makes no difference one way or the other in view of the attitude which both the parties to it took up at its execution. A donation *inter vivos* is in its nature irrevocable once it is accepted; and in that respect it differs from a last will, which the testator may revoke at any time he likes.

There is nothing in this deed to shew that the donor intended it to be other than an irrevocable gift; and this being so, we think the District Judge was in error in regarding the deed as a testamentary disposition, requiring probate in order to give it vitality.

In the course of the argument we were referred to a case reported on p. 46 of the Appeal Court Reports in support of the contention that the deed in question was a testamentary disposition. With much respect for the learned Judge who decided that case, I think he went too far in holding that the deed then before him was a testamentary disposition. To my mind, it was, applying the principles of the Roman

Dutch Law to it, a donation *inter vivos* which was to take effect after the death of the donor.

The principles underlying donations *inter vivos* are so clear that it seems unnecessary to refer to any decided cases on the point; but I would cite D. C., Kandy, No. 90,200, 6 S. C. C. p. 15, and D. C., Chilaw, No. A400, 2 C. L. R., p. 52.

On the facts we think that the plaintiff is entitled to succeed in view of our decision on the law. The plaintiff is entitled to the possession of the animals in question which are the subject of this action, and the respondents had no right to remove them from his custody.

The judgment of the Court below will be set aside and the respondents will be ordered to restore the cattle removed by them to the plaintiff; such cattle to remain with the plaintiff until the 2nd defendant attains his majority.

SEDANA HAMY *vs.* SENARATNE.

No. 17,116, P. C., Panadure.

Present: Wood-Renton, J.

Argument: 17*th October*, 1907.

Judgment: 25*th October*, 1907.

Maintenance—Period within which application must be made—Previous abortive application—Ordinance No. 19 *of* 1889, *sec.* 7.

Where originally an application for maintenance was made within the prescribed time limit and the respondent evaded service of process, and in consequence of non-service of process the Court struck the case off its list,

Held: That there is nothing in sec. 7 of the Maintenance Ordinance which prevents a fresh application being entertained in such circumstances although more than 12 months had elapsed since the birth of the child.

Further: That the mere ministerial act of a Court in striking off its list an application for maintenance in such circumstances is not an adjudication upon the application on its merits or a final disposal of the case.

The petitioner, the respondent to an application for

Sedana Hamy v. *Sena ratne*

maintenance, filed a petition asking for a revision of the order made against him ordering him to pay maintenance at the rate of Rs. 7·50 a month.

A. St. V. Jayawardene for petitioner-respondent:—This application is not maintainable, as a previous application had been made in respect of this same cause of action, but the case was struck off the file. The proceedings thereby terminated, and it amounts to a dismissal. The second order is wrong, as the application was clearly made more than 12 months after the birth of the child (sec. 7 of Ordinance No. 19 of 1889). Further, the evidence of the applicant is not corroborated; and the amount awarded is excessive, as the evidence shews that he only earns Rs. 15 a month.

V. M. Fernando for respondent-applicant:—Striking off the roll does not amount to a decision of the claim. According to the Civil Procedure Code, when a case is struck off the roll it might be re-listed. Proceedings for maintenance are really civil (see 4 N. L. R. 4, and 4 N. L. R. 121). Therefore, striking off a case for maintenance has the same effect as the same order in a civil case. The order is correct, as the first application was made within one year, and this is not a fresh application. Further, the evidence of the woman is corroborated by that of the headman. The order of Rs. 7·50 a month is not excessive, as the applicant had been badly treated, and in view of the conduct of the respondent in marrying another woman even after giving notice of marriage with the applicant. The respondent has other income besides the Rs. 15 he earns.

JUDGMENT.

WOOD-RENTON, J.—It results from the evidence in the present case:—in the first place, that the applicant kept the respondent as his mistress, and was the father of the child on behalf of whom maintenance is claimed; in the second place, that he had paid nothing towards the maintenance of the child in question, and has married another woman in breach of his promise to the respondent; and in the third place, that he has persistently evaded service of process. It is conceded that the application of the respond-

ent for maintenance was made within the twelve months limit which is prescribed by sec. 7 of the Ordinance No. 19 of 1889. But as sec. 16 of the Ordinance requires that all the evidence should be taken in the presence of the respondent or of his pleader, and as in default of successful service on the respondent the Police Magistrate struck the case off the list in his Court, it is now contended on behalf of the applicant that there has been a failure on the respondent's part to comply with sec. 7, and that it is impossible for a fresh application to be entertained, inasmuch as more than twelve months have elapsed since the birth of her child. It would certainly be very unfortunate if, in such a case as the present, the law compelled me to give effect to a plea of this character; and I have come with satisfaction to the conclusion that there is no such duty incumbent upon me.

For the purposes of the present case I do not consider that it is necessary for me to rely on the analogy, which was pressed upon me by Mr. V. M. Fernando, from sec. 88 of the Civil Procedure Code. It would be difficult to give effect to an analogy of that kind in proceedings under the Maintenance Ordinance, for although there is authority to the effect that maintenance is in the nature of a civil debt, it is clear from secs. 15 and 16 of the Ordinance itself that questions of procedure are intended to be regulated on the analogy of the criminal law. But I think that Mr. Jayawardene's point fails on the text of sec. 7 of Ordinance itself. It is provided, in effect, by that section, as I understand it, that the original application for maintenance must be made within twelve months from the birth of the child on whose behalf maintenance is claimed. There are only two cases in which that requirement can be dispensed with: in the first place, where the father of the child has himself maintained it or paid money for its maintenance within the period of twelve months after its birth; and in the second place where, within such twelve months, he had ceased to reside in the Island of Ceylon. In these two cases it is not necessary that the original application should be made within the twelve months limit. In the case of maintenance by a father within that limit I suppose that the question whether an application would be

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entertained might turn on the promptitude with which demand for it was made after maintenance had been withheld. In the case of absence from Ceylon, sec. 7 itself gives the applicant an additional period of twelve months after the return of the putative father to this Island; but I do not think that there is anything in sec. 7 which deals with a case where an original application has been made within the prescribed time limit and where the Court has found it impossible to adjudicate upon that application in consequence of the evasion of service by a respondent. In the course of the argument no authority was cited to me—and I have been unable to find any—in support of the proposition that the mere ministerial act of the Court in striking off its list an application for maintenance under such circumstances should be held to be an adjudication upon the application on its merits or a final disposal of the case. In the absence of such authority I decline to affirm that proposition; and I hold that the decision of the learned Police Magistrate is right on the facts. It appears to me, however, that the maintenance which has been awarded in this case is excessive; and in accordance with the view expressed by the learned Magistrate himself in his letter of 23rd ultimo returning the record to this Court, I reduce the maintenance allotted to the applicant from Rs. 7·50 to Rs. 5·00 a month.

With this variation I dismiss the application with costs (Rs. 21).

FERNANDO *vs.* ANDRIS.

No. 5,375, D. C., Galle.

Present: Layard, C. J., & Moncreiff, J.

1st March, 1905.

Trial—Application for postponement—Material in support.

Postponement of the trial of a case was refused, and the plaintiff's proctor declined to call any evidence,

Held: That such evidence as was available should have been called, and there being no evidence the dismissal of the plaintiff's action was right,

Also: That in all cases in which the legal adviser of a party finds it necessary to make application for a postponement he shou'd do so on material supported by affidavit; and where a medical certificate is produced to shew that a witness whose evidence is essential in the opinion of the legal adviser of the party, is ill the affidavit in support of the application for postponement should refer to the certificate and state the qualification or otherwise of the person who gives the certificate.

JUDGMENT.

LAYARD, C. J.—In this case the proctor for the plaintiff moved for a postponement owing to the plaintiff's absence. In all cases in which the legal adviser of a party finds it necessary to make application for a postponement he should do so on material supported by affidavit; and where a medical certificate is produced to shew that a witness whose evidence is essential in the opinion of the legal adviser of the party is ill the affidavit in support of the application for postponement should refer to the certificate and state the qualification or otherwise of the person who gives the certificate. In the present case all that was adduced was a medical certificate with regard to the plaintiff's health. There was no material before the District Court, neither is there any material before this Court to shew that the evidence of the plaintiff was essentially necessary for the purpose of the plaintiff continuing this action. It may be that the plaintiff was not in a position to establish his case by other evidence than that of the plaintiff.

After the District Judge had refused to grant a postponement the plaintiff's proctor should have called such evidence as was available on behalf of the plaintiff, and should not have declined to call any evidence. There being no evidence the order of the District Judge dismissing the plaintiff's claim is right. It would never do for this Court to encourage parties in the Court below to decline to proceed with a case simply on the ground that the District Judge had refused to grant a postponement. I am not satisfied that the plaintiff's evidence in this case was material for the successful conduct of the case by his legal adviser.

The judgment of the District Judge dismissing the plaintiff's claim must be affirmed, but out of indulgence,

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and at the request of appellant's counsel we give liberty to the plaintiff to bring a fresh action should he be so advised.

The appeal is dismissed with costs.

MONCREIFF, J., agreed.

PERERA *vs.* PERERA.

No. 15,487, D. C., KANDY.

Present: HUTCHINSON, C. J., & WOOD-RENTON, J.

ARGUMENT: *23rd October*, 1907.

JUDGMENT: *4th November*, 1907.

Petition of appeal—Petition signed by a proctor who is also appellant—Civil Procedure Code, sec. 755.

Where the appellant is himself an advocate or proctor, the provisions in sec. 755 of the Civil Procedure Code are satisfied if he draws and signs the petition of appeal himself.

Silva v. *Coope Tambe* [Ram. (1853—1855) p. 66] followed.

The appellant in this case was Mr. Charles vanDerwall, a Proctor practising in the District Court of Kandy. He claimed a lien for his costs over a sum of money deposited in Court. The District Judge disallowed his claim, and Mr. van Derwall appealed. The petition of appeal was signed only by the appellant, and a preliminary objection was taken at the hearing of the appeal that the petition did not comply with the provisions in sec. 755 of the Civil Procedure Code.

F. J. de Saram, Jr., for substituted plaintiff-respondent:—The appeal is by Charles van Derwall, the proctor for the plaintiff and first substituted plaintiff, and not one by either plaintiff or first substituted plaintiff. The appellant is not represented by any proctor; and his petition of appeal is not signed by a proctor or advocate as required by sec. 755 of the Civil Procedure Code. Nor has he stated his grounds of appeal to an officer of the Court and obtained a petition of appeal signed by such officer. The present petition of appeal is only signed by the appellant, and

should have been rejected. The word "proctor" has been held to mean "the proctor on the record". [*Assauw* v. *Billimoria* (2 C. L. R. 86) and *Perera* v. *Molligoda* (9 S. C. C. 65)]. The mere signature of a proctor to the petition is insufficient. The fact that the appellant is a proctor should not be considered. Also cites *Agris Appu* v. *David Appu* (6 N. L. R. p. 223).

vanLangenberg (*Bawa and H. J. C. Pereira* with him) for appellant:—The object of sec. 755 is to prevent frivolous appeals. Here the object is attained by the fact that the appellant is a proctor.

c. a. v.

JUDGMENT.

HUTCHINSON, C. J.—The appellant is a proctor. He was proctor in the action for the original plaintiff; judgment had been given for the plaintiff, who then died, and the present plaintiff was substituted for him, and he employed another proctor. The appellant claimed a lien for his costs over a sum of money in Court, the proceeds of execution of the judgment. The District Judge disallowed his claim, and he appeals against the order of the District Judge.

A preliminary objection is taken by the plaintiff that the petition of appeal does not comply with sec. 755 of the Civil Procedure Code inasmuch as it is signed only by the appellant.

Section 755 enacts that all petitions of appeal shall be drawn and signed by some advocate or proctor, or else they shall not be received: provided that any party desirous to appeal may state *viva voce* his wish to appeal, and the grounds of his appeal, which shall be taken down in writing by the Secretary of the Court in the form of a petition of appeal, when it shall be signed by the party and attested by the Secretary and be received without any signature of any advocate or proctor.

Where the appellant is himself an advocate or proctor the words of this enactment are satisfied if he draws and signs the petition himself; but it is not so clear that the real meaning and intention of the enactment are satisfied. It looks as if the intention was that some advocate or proctor other than the appellant should draw and sign on

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his behalf, with a proviso that he may dictate his petition to the Secretary and get the Secretary to attest it. But the Legislature has not expressed this; probably it did not think of the case where the appellant is an advocate or proctor: it is a case omitted. It is arguable that the Legislature, if it had intended that the petition should be drawn by some proctor "other than the appellant", would have inserted those words; or on the other hand that if it had intended that a proctor-appellant might draw his own petition it would have inserted the words "unless the appellant is himself a proctor".

There is, however, a decision which seems to be in point, *Silva* v. *Coppe Tamby*, reported in Ram. (1853—1855) 66. This is a decision on the rule of 1843, which is in the same terms as sec. 755, and the Judges held that a proctor-appellant need not employ another proctor to draw and sign his petition of appeal, but that his own signature with the addition "Proctor of the District Court" is enough. The case is referred to in Thompson's Institutes I., p. 180, where the author in a foot-note says: "The rule was introduced in the hope that professional men would not give their aid to vexatious and frivolous appeals", giving as his authority No. 4,401, D. C., Colombo, 10th August, 1846.

The reason given by the Judges for this decision does not seem a good one. But the decision does not appear to have been overruled or dissented from, and I think we ought to follow it. I would therefore overrule the preliminary objection.

WOOD-RENTON, J.—I agree that we are bound by the authority of *Silva* v. *Coppe Tamby* (1846) Ram. 1853—1855. p. 66, decided under a rule (v 2 of the Rules of 12th December, 1846), identical in tenor, and even in terms, with sec. 755 of the Civil Procedure Code, to overrule the preliminary objection, taken on behalf of the respondent to the admission of the present appeal. I desire to add, with the greatest respect for the learned Judges who decided that case, that I should not be prepared to follow it as *ratio scripta*. I do not think that the proposition with which the judgment commences, that "proctors, attorneys, and solicitors are privileged to sue or be sued in their respective

courts *in person*" is strictly accurate in itself, or constitutes any foundation for the conclusion, deduced from it, that a proctor of the District Court need not employ another proctor to sign his petition of appeal. It is true that in England a proctor, attorney, or solicitor *was* privileged to sue or to be sued only in the court to which he belonged—on the principle that his attendance was constantly required there for the despatch of business. It is also true that this privilege was sometimes asserted in person [see *Chatland* v. *Thornley* (1810) 12 East 544] although it was latterly held that it could only be pleaded by attorney [see *Groom* v. *Wortham* (1842), 2 Dowl. N. S. 657 and cf. *Hunter* v. *Neck* (1841), 3 Man. and Gr. 181]. But just as the privilege itself existed for the convenience of the courts and their officers and of suitors, so the right of the proctor, attorney or solicitor, in so far as it was recognised, to assert the privilege in person, had nothing to do with his professional standing. When an unsuccessful attempt was made in *Hunter* v. *Neck* (*ubi sup*) to induce the court to hold that a plea by which the defendant alleged that he was an attorney of another court, and privileged to be sued there, must be pleaded in person, the claim was based solely on the contention that, if he appeared by attorney, he must be taken to have submitted to the jurisdiction which he challenged. I do not think that the privilege relied on by the Judges in *Silva* v. *Coppe Tamby* has any real bearing on the question at issue in that case or in the present one.

Moreover, as a mere matter of construction sec. 755 of the Civil Procedure Code seems to me to require an appellant, whether he be a proctor or an advocate or a layman, either to present his appeal under the signature of an advocate or proctor, or to avail himself of the proviso to the same section, and have it recorded and forwarded by the Secretary or Chief Clerk of the court below. This interpretation of the section results clearly, I think, from the use of the words "any party desirous to appeal" in the proviso. It appears to me that the proviso prescribes the mode, and the sole mode, in which an appeal can be received in this Court without being authenticated by the signature of an advocate or proctor.

As a matter of policy, there are no substantial reasons

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why this construction of the law should have been maintained. It may quite well be that the identification of appellants and the exclusion of the undesirable services of the baser sort of petition-drawers and of touts were among the objects of sec. 755 of the Code of Civil Procedure; and, of course, that section affords no absolute safeguard against the presentation of frivolous petitions, inasmuch as, whatever may be the view of an appeal taken by an advocate or proctor, any party may have it brought before the Appeal Court by means of the proviso. At the same time the enactment embodied in sec. 755 of the Code was designed to check frivolous appeals (see Thomson's Inst. I, 180, and No. 4,401, D. C., Colombo, 10th August, 1846): and the fact that his proctor or advocate refused to sign an appeal would, in many cases, act as a wholesome check on a vexatious litigant. Experience has shown that the legal profession itself may furnish, from both its branches, types of this class who stand in great need of such restraint. In saying this, I am, of course, treating the question as an abstract one, and not referring in any way to the position of Mr. van Derwall, against whose good faith, in the present matter, no imputation whatever is suggested.

I agree, however, that *Silva* v. *Coppe Tamby* is binding on us here, and that the preliminary objection must fail.

BOARD OF HEALTH AND IMPROVEMENT, TRINCOMALIE *vs.* SUBRAMANIAPILLAI.

No. 224, D. C., Trincomalie.

Present: Hutchinson, C. J., & Middleton, J.

5th December, 1906.

Local Boards—Power to lease—Ordinance No. 2 of 1901—Nature of lease—Frauds and Perjuries—Ordinance No. 7 of 1840.

Local Boards have the power to make contracts for the sale of the privilege of collecting market fees.

An agreement, whether it be a sale or a lease, for a year of the right to take and appropriate the rents and tolls which were due, or would become due, from the stall-holders being an agree-

ment establishing an interest in land or immoveable property is of no force or avail in law unless such agreement complies with the terms of sec. 2 of Ordinance No. 7 of 1840.

Walter Pereira, K.C. (with *Wadsworth*) for defendant-appellant.

Sampayo, K.C., for Local Board respondent.

JUDGMENT.

HUTCHINSON, C. J.—The Local Board of Trincomalie sues on an agreement made by it with the defendant for the sale to the defendant of the privilege of collecting certain market fees. The agreement is evidenced by the conditions of the sale, which are headed: "Conditions under which the privilege of collecting fees from the occupants of the fish and vegetable market at Big Bazaar in Division No. 3, and at the Inner Harbour Market in Division No. 1, Trincomalie, for the year 1905 is sold."

That document is signed by the defendant, who writes at the foot of it: "I do hereby acknowledge to have this day purchased the privilege of collecting the market fees from 1st January to 31st December, 1905, for the sum of Rs. 990, on the conditions above specified, and hereby bind myself to perform the same." And it is also signed by the Chairman of the Local Board. Amongst other conditions are stipulations that defendant shall pay the rent to the Board by instalments, that he shall give certain security for the payment of that rent, and the buildings shall be in his charge; and the fifth condition is: "Should the purchaser fail to perform any of the conditions of sale hereinbefore mentioned, the Chairman shall be at liberty not only to re-sell at the risk of the purchaser, but also to resume possession of the said privilege of collecting market fees or so much of the term thereof as may be unexpired; such re-sale or redemption shall in no way release the purchaser from payment to the Local Board of any instalments which may have fallen due under the conditions."

The plaintiffs allege that the defendant made default in payment of all the instalments after the first, and that he made other defaults, in consequence of which they, on the

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26th August, 1906, re-sold the privilege which they had sold him, and their claim is:

(1) for all instalments of rent due from him under the agreement up to 31st August, 1905;

(2) for interest thereon;

(3) for Rs. 70 as damages, being the deficiency on the re-sale. The defence in the answer was, that the agreement relied on by the plaintiff was *ultra vires* of the Board; the defendant admitted that he had enjoyed the privilege of collecting the rents until the 31st August, 1905, but said he had regularly paid all the instalments due up to that date. The District Judge decided in favour of the plaintiffs, and the defendant now appeals.

As to the first question, whether the Local Board had power to make a contract for the sale of this privilege of collecting the market fees, I think that the Board had power to make it. Chap. iv. sec. 56 (5) of Schedule D. of the Ordinance No. 2 of 1901 clearly implies that the Local Board has power to lease rents, tolls and fees payable in respect of public markets; though no express power is given therein for making such a lease, I think it is necessarily implied in those rules.

I think, however, that this agreement was in substance a sale or lease (it matters not which) for a year of the right to take and appropriate the rents and tolls which were due or would become due from the stall-holders. I cannot doubt therefore that it come within the meaning of sec. 2 of Ordinance 7 of 1840, being an agreement for establishing an interest in land or immoveable property, and is therefore of no force or avail in law because it was not made in manner prescribed by that section. As, therefore, it is for no force or avail, damages cannot be recovered for the breach of it; neither can the claim be maintained for arrears of instalments due under it.

That puts an end to the action in its present form; but now comes the question which often arises, and is hard to decide, where it appears on the evidence that the plaintiff is entitled to something which he might have claimed in the action, but which he has not claimed; for one ought if

possible to give a decision which will settle all matters in controversy between the parties arising out of the transaction which forms the subject of the action.

The plaintiffs claim to recover the money due under the agreement; but they have not claimed in the alternative for anything which the defendant ought to pay to them in consequence of the benefit which he has obtained from the agreement if the agreement is held void.

Now, the defendant admits that he enjoyed the privilege of collecting the fees up to the end of August. He says on the other hand that he has paid all instalments due under the agreement to that date; but it is now admitted that he has not done so; and it seems clear that he ought to account to the plaintiff for the fees which he has received.

I think that the District Court ought to have amended the plaintiffs' claim by adding a claim for those fees in the event of the agreement being declared invalid, and this we must do now. The judgment of the lower Court must be set aside; and as the parties are unable to agree as to the sum which the defendant should pay to the plaintiffs in respect of the fees he has received, less his necessary expenses of collecting them, the case must go back to the District Court to fix and give judgment for that amount. As to the costs in the lower Court, the defendant has succeeded on a technical objection to the validity of the agreement on which the plaintiff sued, and he did not make an offer to refund the money which he actually received in pursuance of the agreement. The defendant must have his costs of this appeal; but the costs in the lower Court are left to the discretion of the District Judge.

MIDDLETON, J.—I concur with the opinion of my Lord, and have nothing to add with regard to the law as to the power of the Local Board to lease.

I think that this purchase of the privilege of collecting the fees for one year payable in respect of the vegetable market was practically an agreement which dealt with an interest in land. It seems to me that under such an agreement the defendant might have taken possession of the

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stalls, the fees in respect of which he was to collect, and so get possession of such of them as were not licensed.

In my view, as the parties cannot agree on the amount the case must go back for the ascertainment, not of a sum as compensation to the plaintiff, but of a sum as for moneys received by the defendant on behalf of the plaintiff. It may be necessary to take evidence to ascertain what this amounts to; but in default of clear evidence on the part of the defendant it seems to me that it would not be inequitable to hold that he had received a sum equal to that which he agreed to pay to the plaintiff for the privilege of collecting the rents.

PERERA *vs.* PERERA.

No. 15,487, D. C., KANDY.

Present: HUTCHINSON, C. J., & WENDT, J.

ARGUMENT: 13*th November*, 1907.

JUDGMENT: 21*st November*, 1907.

Proctor—Costs—Lien—Money deposited in Court—Roman Dutch Law—Civil Procedure Code, secs. 75 *&* 212.

A proctor has a lien upon the amount decreed in respect of the costs payable to him under the decree, and that charge is not affected by a claim in re-convention or set off.

This is an appeal from an order of the District Judge of Kandy, (J. H. Templer, Esq.), dated 10th June, 1907, which is as follows:—

"The facts of this case are shortly as follows:—Mr. vanDerwall originally instituted this case on behalf of the original plaintiff. The latter died after judgment, and Mr. vanDerwall appeared for A. V. Dorchina Perera, who was substituted plaintiff for the original plaintiff deceased. Subsequently A. V. Dorchina Perera sold her rights under the judgment to E. W. Hendrick Silva, who appointed Messrs. Jonklaas & Son his proctors, and was thereafter substituted plaintiff in lieu of A. V. Dorchina Perera. Certain properties of the judgment-debtor were seized in

execution; and although claims as to the proceeds of sale of the properties seized were made, there was no claim to the third. Before the monies realized by this property were drawn by the 2nd substituted plaintiff Mr. vanDerwall put in a claim of lien over the proceeds of sale for costs in bringing the action to a successful issue under the original 1st substituted plaintiff. This claim was noted by Mr. de Saram, who ordered that Mr. van Derwall should have notice before 2nd substituted plaintiff drew any portion of the money realized. This order was not brought to my notice, and I allowed 2nd substituted plaintiff to draw the money realized by the proceeds of sale over which there wss no pending dispute. Subsequently Mr. Jonklaas, on behalf of his client, moved to draw the interest which had accrued on this sum. Mr. vanDerwall then came forward and renewed his claim for lien on the proceeds of sale.

As far as I can make out, the sale of the land in question was held under 1st substituted plaintiff's writ on 24th October, 1905. The sale of the decree to 2nd substituted plaintiff does not appear to have taken place till November, 1905, and 2nd substituted plaintiff was not actually substituted till 17th January, 1906.

The questions I am asked to decide are: first, has a proctor a lien on the proceeds of a sale in execution levied during the period he was proctor in the case? And, second, does he lose that lien by ceasing to be a proctor for any of the parties in the case?

I have not had access to 2 Menzies Reports cited by Mr. vanDerwall; and the passage cited from Jayawardene on Mortgage p. 35 relates to documents only, and not to monies realized by sale; and I do not think that any such lien as Mr. vanDerwall contends for exists—assuming that so long as Mr. vanDerwall represented the substituted plaintiff in the case he possessed such a lien. I think that the objection taken by Mr. Barber is sound, that Mr. vanDerwall has no longer any *status* to appear in the case and claim his lien unless it appears by the deed of assignment that 1st substituted plaintiff expressly reserved her proctors' lien for costs when she assigned her interests in the decree to 2nd substituted plaintiff. It is not suggested by

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Mr. vanDerwall that any such reservation was made in the deed of assignment in this case.

The very essence of a lien in my opinion is that the person claiming the lien has the property over which the lien is claimed in his custody or control, and monies which have been paid into Court after Fiscal's sale under writ and can only be paid out by order of Court cannot be said to have ever come into the custody of a proctor in the case before they have beeen actually paid over to him. Neither do I think such monies can be reasonably construed as constructively in such proctor's control. Assuming they could be so construed, I certainly think such proctor would lose such constructive possession as soon as he ceased to be a proctor in the case. Accordingly, I uphold Mr. Jonklaas' motion of 7th May, and allow the same, and I disallow Mr. vanDerwall's counter-motion of 15th May.

I make no order as to costs.

I find I have not dealt with D. C., Kandy, No. 56,429, cited by Mr. vanDerwall. I cannot follow the reasoning of Mr Cayley, afterwards Sir R. Cayley, in that case, which however at the utmost decides only that where judgment in full and costs have been recovered by a succes-ful party, so that the costs can be ear-marked as due to the proctor rather than to the plaintiff, a creditor of such plaintiff cannot seize such ear-maked costs where the plaintiff has not in fact paid such proctor his costs, but such costs must under the circumstances be considered as due to the proctor rather than to the plaintiff. These facts do not apply to the present case, where the amount at present realized and available for plaintiff's writ is altogether insufficient to cover the debts due to the judgment-creditor.

I desire however to express my dissent from the conclusion come to by Sir R. Cayley. It seems to me that the very existence of a proctor or attorney in a case depends on his employment as the agent and representative of his client, and he has in my opinion no personal rights in the case apart from those belonging to his client. Strictly speaking all his costs should have been paid to him by his client before any recovery from the opposite party is made. The very essence of allowing the successful party costs is

to recoup him for moneys actually spent by him in bringing his case to a successful issue. It was never intended to encourage proctors to take up cases on spec and then if successful enabling them to sue the unsuccessful party as a matter of right to recover their costs. Yet this is the length one must go to if Sir R. Cayley's decision is correct. Sir R. Cayley himself points out, as I understand him, that there was no such right by the Dutch Laws."

Bawa, A. S. G. (*van Langenberg* with him) for appellant:—The appellant's proxy has not been revoked as required by sec. 27 of the Civil Procedure Code. In the Code secs. 75 and 212, both assume the existence of a proctor's lien. In the Cape such a lien has been upheld (2 Menzies p. 321), also in Ceylon in the District Court (D. C., Kandy, No. 53,429), and by Supreme Court [*Vaitelingam* v. *Gunesekera* (1 S. C. C. p. 71); *Ayenperumal Pulle* v. *Abdul Cader* (5 S. C. C. p. 90)], as a general principle personsare allowed a lien in return for services performed. (Nathan vol. 2 p. 956).

F. J. de Saram (with *B. F. de Silva*) for respondent:—The appellant's proxy has ceased under sec. 27 of the Code, as soon as his client's interest terminated, and all proceedings were satisfied as regards his client, *i.e.*, on the assignment of his client's whole interest to the respondent. There is no authority in the Code or in the Roman Dutch Law authority to support the contention that the lien claimed does in fact exist. The scope of a proctor's lien is clearly defined. (Voet 3. 1. 6. & 3. 3. 1.; 1 Nathan vol. ii. p. 956 & Jayawardene p. 34), and gives a right of retention over documents in the possession of the proctor. The case in 2 Menzies p. 321 was decided on the English procedure which allows the lien now claimed. The proviso in sec. 212 of our Code is taken from sec. 111 of the Indian Code, which is based on the English procedure. There is no similar proviso in the old rules and orders in force before our Code. The local authorities cited do not hold that the lien asked for exists.

If in fact such a lien exists, then it is now too late to enforce it. It should have been given effect to before the assignment to the respondent, or the assignment should

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have been subject to the lien. The only equities to which the assignment is subject are those mentioned in sec. 340 of our Code. Other equities are only valid against an assignee with notice (I. L. R. 16 Cal. p. 619). *Ayenperumal Pulle* v. *Abdul Cader* (5 S. C. C. 90), is a case of equitable relief for fraud and *Vaitelingam* v. *Gunesekera* (1 S. C. C. p. 71) is a different case from the present and assumes the right now claimed.

c. a. v.

JUDGMENT.

HUTCHINSON, C. J.—This is an appeal by a proctor, who was proctor for the original plaintiff, against an order disallowing his claim to have a charge for his costs in the action upon money which is in Court representing the balance of a sum which was recovered under writ of execution on the judgment obtained by the original plaintiff. The judgment was obtained on the 25th July, 1904. Afterwards the plaintiff died, and another plaintiff, for whom the appellant was also proctor, was substituted as plaintiff, the substitution being only necessary for the purpose of an appeal which was afterwards abandoned. In November, 1905, after proceeds of execution had been paid into Court, the substituted plaintiff sold her interest in the judgment to the respondent, who on the 17th January, 1906, was substituted as plaintiff and employed another proctor, although the appellant's proxy was never formally revoked as required by sec. 27 of the Civil Procedure Code.

On the 15th August, 1906, the appellant moved the Court that his claim to costs might be noted, and that notice might be given to him of any motion by the respondent to draw the amount realised in execution of the decree. This was allowed on the 17th.

On the 26th March, 1907, the respondent applied for an order for payment to him of part of the money in Court; this was granted on the 15th April. Through an oversight the appellant was not notified of this application.

On the 7th May the respondent applied to draw the balance in Court. On the 15th May, the appellant applied to draw it for his taxed costs in the case. These applications were heard, and on the 10th June the District Judge

disallowed the appellant's application, and allowed that of the respondent, holding that plaintiff's proctor has no lien for his costs on the proceeds of execution levied during the time when he was proctor for the plaintiff in the case, and also that, assuming that he had such a lien, he lost it when he ceased to be proctor.

The client cannot revoke his proctor's appointment without leave of Court; and the Court would doubtless, except under special circumstances, not give leave except upon payment of the proctor's costs, if he asked for it. But there does not seem to be any law or authority directly in point as to the existence of a right for the proctor to have his costs paid out of the proceeds of execution of a judgment recovered by his client in the litigation in which the proctor acted for him. Secs. 75 and 212 of the Civil Procedure Code, however, recognise the existence of some such right, although they do not expressly enact that there shall be such a right or define the circumstances under which it shall exist. Sec. 75 says that a claim in reconvention "shall not effect the lien upon the amount decreed of any proctor in respect of the costs payable to him under the decree", and sec. 212 says that "the Court may direct costs payable to one party by another to be set off against a sum which is admitted or found in the action to be due from the former to the latter, but such direction shall not affect the lien upon the amount decreed of any proctor in respect of the costs payable to him under the decree"? What are the "costs payable to him under the decree"? The decree never orders any costs to be paid to the proctor. I do not see what the phrase can mean, unless it means such of the costs, which the other party is ordered to pay to the proctor's client, as the proctor is entitled to recover from his client. These enactments appear to me to assume that for those costs the proctor has a "lien" or charge on the amounts decreed, and to enact that that charge shall not be affected by a claim in reconvention or a set-off. I do not see how any effect can be given to those enactments without holding that a proctor has such a charge.

I therefore hold that a proctor has such a charge, and I would allow the appeal and direct that the money in the

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District Court be paid to the appellant in or towards satisfaction of his taxed costs as proctor for the original and the 1st substituted plaintiffs, and that the respondent do pay the appellant's costs of this appeal.

WENDT, J.—I agree. The passages cited to us from authorities on the Roman Dutch Law had no direct bearing on the kind of charge which the appellant here claims. They dealt with liens, more properly so called, viz., the right to detain some coporeal thing until payment of a debt. The Cape case of *Thomas* v. *Barker*, 2 Menzies 321, which was cited to us, appears to have been decided upon principles of English Law, and to be therefore of doubtful authority. There does not appear to be at the Cape any such recognition of a proctor's rights as is contained in secs. 75 and 212 of our Code of Civil Procedure. As these two sections stand in our Code we must give effect to them. It is noticeable that in adopting the Indian Code to our requirements the Legislature has put the substance of the Indian sec. 111 into the two sections of our Code which I have referred to, and the effect of the enactments must have been carefully considered. It cannot be got over by the suggestion that they slipped in *per incuriam* in taking over the Indian provisions. If a proctor is not to have a charge for his costs upon the amount recovered by his efforts, I do not see what effect can be given to the words of secs. 75 and 212 relied upon by the appellant.

I think, therefore, that the appeal ought to succeed.

GHOUSE *vs.* BEDDEWELLA.

No. 15,569, C. R., KANDY.

Present: MIDDLETON, J.

ARGUMENT: 15*th November*, 1907.

JUDGMENT: 18*th November*, 1907.

Contract—Promise—Ordinance No. 7 of 1840, sec. 21—Appeal—Respondent's rights—Civil Procedure Code, sec. 72.

Where A acknowledged his indebtedness to G by writing,

and B paid a portion of his claim and entered the same in the same paper writing,

Held: That such a document is not inconsistent with inferences other than a promise to undertake payment, which must be unequivocally gathered on the part of B from the writing.

Also: A respondent to an appeal may support the judgment of the Court below on other grounds than that on which the judgment is based even though he has filed no cross-appeal.

Plaintiff sued defendant for the recovery of Rs. 61, as balance due for clothes supplied to one Andrewewa at defendant's request. The defendant had paid plaintiff Rs. 15, and initialled the entry of the payment on a chit (A) signed by Andrewewa for the value of the clothes. The chit (A) was as follows:—

"Amount due to S. M. Ghouse Rs. 76.
T. A. Andrewewa.
28-8-1905.
1906, 30th May, paid Rs. 15.
K. B. B."

Defendant denied that the clothes were supplied at his request, and that he incurred any liability for their value by his payment. The issue framed at the trial was: "Did defendent undertake to pay the plaintiff's bill?" The Commissioner found that the defendant was a surety for the payment, and that the document (A) satisfied the requirements of the Ordinance No. 7 of 1840, sec. 21.

Wadsworth for defendant-appellant:—The document (A) is a mere receipt for a payment by defendant to the plaintiff. It does not contain a promise bargain or agreement within the provisions of sec. 21 (1) of Ordinance No. 7 of 1840.

F. J. de Saram for plaintiff-respondent:—The document must be read with the evidence found in plaintiff's favour, and the promise can be clearly inferred. *Jayasinghe* v. *Perera* (8 N. L. R. p. 62). If document (A) is not a valid guarantee, appellant can support decree by challenging the correctness of the finding in the judgment (sec. 72 of the Civil Procedure Code and *Rabot* v. *de Silva*, 8 N. L. R. p. 82). The issue framed has been wrongly understood by

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the Commissioner. It should be construed thus: "Did the defendant order the clothes to be supplied to Andrewewa?" and this is the true issue to be tried. The evidence which is believed by the Commissioner establishes this, and the Supreme Court can find on that real issue and support the decree.

Wadsworth in reply:—Respondent has not got leave to appeal, and cannot challenge the finding of the Court below. The facts cannot be touched, and the finding being wrong in law the appeal must succeed.

JUDGMENT.

MIDDLETON, J.—The point taken by appellant's Counsel in this case is that as the Commissioner has found that the defendant merely understood to be responsible for the debt of Andrewewa the document A put in evidence by the plaintiff is not a sufficient "promise, contract, bargain or agreement in writing" to satisfy the requirements of sec. 21 (2) of Ordinance No. 7 of 1840.

The respondent's Counsel referred me to the ruling of this Court in *Jayasinghe* v. *Perera*, 9 N. L. R. p. 62, and *Beling* v. *Vethecan*, 1 Appeal Court Reports p. 1, quoted in the former case as sustaining the contrary view.

As I said, however, at the argument that the words in A are not inconsistent with inferences other than a promise to undertake payment, and as my brother Wendt put it in *Jayasinghe* v. *Perera*, I think the promise must be unequivocally gathered from the writing, which is not possible here.

Counsel for the appellant on this ruling contended that he was entitled to succeed as there was no cross appeal, and in fact could not be any appeal on the facts without leave, and suggested that the only course was to order a new trial on the issue as to whether the defendant ordered the clothes himself from the plaintiff to be supplied to Andrewewa.

The trial of the issue agreed, *i.e.*, did defendant undertake to pay the plaintiff's bill? has, in my opinion, elicited all the facts necessary to decide this suggested new issue,

and I see no reason to put the parties to the expense and trouble of a new trial.

I think, following the ruling in *Rabot* v. *Silva*, 8 N. L. R. p. 89, that the respondent is entitled to support the judgment on any of the grounds decided against him in the Court below.

It seems to me that on the facts an inference in the affirmative of the suggested issue might very well have been drawn by the Commissioner in lieu of the inference arrived at by him. I shall draw that inference, and allow the judgment to stand, although not on the grounds relied on by the learned Commissioner.

The appeal will, therefore, be dismissed with costs.

PUNCHI APPUHAMY *vs.* MUDIANSE.

No. 1,823, D. C., Kegalle.

Present: Middleton & Wood-Renton, JJ.

2nd July, 1907.

Order refusing to frame an issue—Proper time to appeal.

The proper course for a party appealing from an order refusing to frame an issue is to appeal at once from that order.

Pieris v. *Perera* (10 N. L. R. 41) followed.

Schneider for appellants.

A. St. V. Jayawardene for respondent.

Judgment.

Middleton, J.—In this case the defendants appeal practically against an order of the District Judge refusing to allow a certain issue to be framed. It was proposed to frame this issue when the case was sent back for rectification of the decree. The District Judge refused to allow the issue to be framed, and the matter, which then required a decision by the Court, went on to trial. The case has now come back to us, and the learned Counsel desired to appeal against that order disallowing the issue—trial having

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taken place on the questions which the Court was of opinion it had to decide. It seems to me, looking at the decision at p. 41 of 10 N. L. R., that as the Full Court has held that an appeal may lie from an order refusing to frame an issue, that the proper course for the appellants in this case was to have appealed at once from the order disallowing the issue made by the District Judge. It is possible that if this had been done much expense and inconvenience might have been saved; and I do not think that where a party has been content to go to trial without having framed the issue which he says is vital to his case, that he ought at the end of the proceedings to be permitted to come and say that the issue he desired should have been the one to have been tried.

In my judgment this appeal ought not to succeed. I understand this is the only point in the case, and I would dismiss the appeal with costs.

WOOD-RENTON, J.—I entirely concur, and I will merely point out that by allowing this appeal the very object which the decision in *Pieris* v. *Perera* (10 N. L. R. p. 41) is intended to secure would be frustrated. Our present decision, of course, in no way affects the powers of the Supreme Court in revision.

WICKREMASINHA *vs.* JEWATH HAMY.

No. 7,510, D. C., GALLE.

Present: LASCELLES, A. C. J., & WENDT, J.

ARGUMENT: *7th & 8th June*, 1906.

JUDGMENT: *13th June*, 1906.

Writ, re-issue of—Fresh stamp—Sale in execution—Application to set aside—Civil Procedure Code, sec. 282.

Under a writ issued in execution of a decree property was seized, but the sale was stayed on the application of the plaintiff, and the writ was returned to Court,

Held: That such a writ could not be re-issued without being re-stamped.

Palaniappa Chetty v. *Samsudeen* (8 N. L. R. 325) followed.

The principle that a *bona fide* purchaser of property sold in execution is not bound to inquire into the correctness of the order for execution does not apply to a case where the application to have the sale set aside is made before confirmation of the sale and during the interval of time which the Court allows for such application.

For the purpose of applications under sec. 282 to set sales aside on the ground of irregularity it can make no difference whether the sale is to strangers or to the execution-creditor.

Bawa for appellant.

vanLangenberg for respondent.

c. a. v.

JUDGMENT.

LASCELLES, A. C. J.—This is an appeal from an order of the District Judge of Galle declaring the sale of certain property under the writ in the action to be void.

The material facts are follows:—On the 25th February, 1905, writ issued in execution of a mortgage decree. On the 14th June, 1905, the sale was stayed on the application of the plaintiff, and the writ was returned into Court.

On the 11th August, 1905, the writ was re-issued, property was seized and was sold under the writ on the 14th September.

On the 6th October the defendant moved to have the sale set aside on the ground of material irregularity in publishing and conducting the sale. The petition did not allege that the writ was not stamped according to law.

On the hearing of the motion it was brought to the knowledge of the Judge that the writ, when re-issued, was not stamped, and the Judge, on the authority of *Palaniappa Chetty* v. *Samsudeen* (8 N. L. R. p. 325), declared the sale to be void.

Against this order an appeal is lodged on several grounds. It has been contended, in the first place, that there was no necessity for stamping the writ on re-issue. In my opinion the judgment of this Court in *Palaniappa Chetty* v. *Samsudeen* is conclusive on this point. In circumstances very similar to those of the present case this Court held that a writ re-issued without being re-stamped

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is a nullity, and gave no authority to the Fiscal to seize and sell the property of the execution-debtor.

The main ground of appeal, however, was the decision of the Privy Council in *Rewa Mahton* v. *Rama Kishen Singh* (I. L. R. 8, Cal. p. 18). The passage relied on was as follows:—"A purchaser under a sale in execution is not bound to inquire whether the judgment-debtor had a cross judgment or a higher amount any more than he could be bound in an ordinary case to inquire whether a judgment on which an execution issues has been satisfied or not. These are questions to be determined by the Court issuing execution. To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchasers under execution. If the Court has jurisdiction a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of judgment upon which execution issues."

The facts with which their Lordships were dealing in that case were essentially different from those now before us. In the Indian case application to set aside the sale had been made under sec. 311 (corresponding to our sec. 282) of the Code of Civil Procedure. This application failed both in the Court of first instance and on appeal. The sale was then confirmed; a suit was then entered by the respondent in the Privy Council to have the sale set aside.

The principles laid down in that case obviously have no application to a case like the present one, where the application to have the sale set aside is made before confirmation of the sale and during the interval of time which the Code allows for such applications.

It is true that the original application to set aside the sale did not proceed upon the ground that the writ was unstamped. But I think that it was competent for the Judge when an irregularity going to the root of the authority of the Fiscal was brought to his notice to set the sale aside. This was the course taken by this Court in *Palaniappa Chetty* v. *Samsudeen*, where the fact that the writ was unstamped appears to have been brought to the notice of the Court for the first time during the hearing of the appeal.

I do not think that the present case can be differentiated from *Palaniappa Chetty* v. *Samsudeen* on the ground that the sale in the latter case was to the execution-creditor. In a sale where the sale had been confirmed the difference would be material as is shown to the Indian cases quoted in O'Kinealy. But for the purpose of applications under sec. 282 to set sales aside on the ground of irregularity it can make no difference whether the sale is to strangers or to the execution-creditor himself.

I would affirm the order.

WENDT, J.—I agree.

JOHN SINGHO *vs.* JULIS APPU.

No. 7,344, C. R., PANADURE.

Present: WENDT, J.

ARGUMENT: 25*th October*, 1906.

JUDGMENT: 26*th October*, 1906.

Possessory action—Non-joinder of lessor—Civil Procedure Code, sec. 22—Lessor and lessee—Right of lessee to sue third party in ejectment—Jurisdiction—Test.

In a possessary action brought by the lessee against the person ousting an objection to the non-joinder of the lessor is an objection for want of parties which should under sec. 22 of the Civil Procedure Code be taken at the earliest possible opportunity and in all cases before the hearing.

A lessee has such an interest in the land devised as will entitle him to sue in ejectment.

Perera v. *Baba Appu* (3 N. L. R. p. 48) commented upon.

In such an action the test of jurisdiction is the value of plaintiff's interest, and not the value of the land.

A. St. V. Jayawardene for defendant-appellant.

vanLangenberg (with him *R. L. Pereira*) for respondent.

c. a. v.

JUDGMENT.

WENDT, J.—This is an action by a lessee to recover from defendant possession of the leased land. Plaintiff says he took possessiou upon his lease, and defendant ousted him two and a half months later. The subject of the lease is a defined portion of Dawatagahawatte; but defendant, who claims an undivided interest in the land and admits the lessor's right to an undivided one-teuth share, denies

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that the lessor was entitled in severalty to the defined portion demised. The Commissioner has upheld the lessor's right by prescription to that portion, and has given plaintiff judgment. The lessor was not a party to the action although he was called as a witness; and the most important point argued by defendant, the appellant, was that in the lessor's absence no declaration of title could be made. Now, this is clearly an objection for want of parties, and one which sec. 22 of the Code requires to "be taken at the earliest possible opportunity and in all cases before the hearing". It therefore comes too late when taken, as it is said to have been, on the trial day.

If taken in due time it would have been open to plaintiff to add his lessor as a co-plaintiff. The decision which appellant's Counsel referred to as establishing that a third party could not be brought in with the view to his prescriptive title being proved by one of the original parties, is said to have been rendered in an action under sec. 247 of the Code, and if a sound decision must be limited to that class of cases to which peculiar considerations apply. The decision was not produced, and I have not been able to refer to it.

Going by the record, however, it appears to me that the first issue was framed to raise only the question whether a lessee has such an interest in the land demised as will entitle him to sue in ejectment. That he has is, I think, settled law, notwithstanding the qualification which Lawrie, A. C. J., imposed on his concurrence with the judgment of Withers, J., in *Perera* v. *Baba Appu*, (3 N. L. R. p. 48). If the objection to his doing so be that the defendant may have to litigate afresh with the lessor, the misjoinder is a matter which which, while it inconveniences defendant, does not affect plaintiff's right of action, therefore the objection was one which defendant could waive.

As to the valuation of the suit, I am of opinion that not the value of the land has to be looked at, but the value of plaintiff's interest, and that has not been shown to exceed Rs. 300.

On the merits I see no reason for differing from the Commissioner.

Appeal dismissed with costs.

NAGAMUTTU *vs.* KATHIRAMEN *et al.*

No. 2,861, D. C., BATTICALOA.

Present: HUTCHINSON, C. J., & MIDDLETON, J.

ARGUMENT: *28th November*, 1907.

JUDGMENT: *10th December*, 1907.

Public servant—Debt contracted by public servants—Liabitity of administrator to be sued—Ordinance No. 2 of 1899, sec. 2.

The Public Servants Liabilities (Ordinance No. 2 of 1899) does not prevent an action against a public servant after he has ceased to be a public servant, or against his representatives after his death.

This was an action upon a promissory note for Rs. 500, made by one Sinnatamby Vanniah, dated the 21st December, 1902, while he was a public servant. The 1st defendant was in default while the 2nd defendant opposed the action on the ground that the deceased's administrator was not liable as the deceased was a public servant. The learned District Judge (G. W. Woodhouse, Esq.) gave judgment for the plaintiff on the ground that the deceased had expressed a desire in his will (which was disputed) that all his just debts should be paid. The 2nd defendant appealed.

Bawa, A. S.-G., for appellant:—The administrator as continuing the *persona* of the deceased, who was a public servant, cannot be proceeded against in view of sec. 2 of Ordinance No. 2 of 1899.

vanLangenberg (with him *Prins*) for respondent:—Sec. 2 of Ordinance No. 2 of 1899 applies only to public servants while they acted as such public servants, and not after they had ceased to be such, either by reason of dismissal, retirement, or death, and that therefore the administrator of such public servant could be proceeded against for the recovery of debts contracted by a public servant whilst acting as such. The object of Ordinance No. 2 of 1899 was merely to prevent the dislocation and disarrange-

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ment of public affairs that would inevitably result if public servants were sued upon contracts made by them whilst in service.

c. a. v.

JUDGMENT.

HUTCHINSON, C. J.—The claim in this action is for principal and interest due on a pro-note made by Sinnatamby Vanniah, on 21st December, 1902, in favour of the plaintiff. Sinnatamby Vanniah is dead, and the defendants are sued as his administrators. The 1st defendant did not appear. The answer of the 2nd defendant was that the action was not maintainable because when the liability was contracted Sinnatamby Vanniah was a public servant, and therefore by reason of Ordinance No. 2 of 1899 he was not liable to pay the debt. He also denied generally the allegations in the plaint, but the only issue settled was whether the plaintiff can recover against Sinnatamby's estate in view of Ordinance No. 2 of 1899. The Ordinance, after reciting that "it is expedient to protect public servants from legal proceedings in respect of certain liabilities", enacts in sec. 2 that "no action shall be maintained against a public servant upon, amongst other things, any promissory note made by him"; but "this section does not apply to the case of a public servant who, at the date when the liability sought to be enforced is contracted, is in receipt of a salary in regard to his fixed appointment of more than Rs. 300 a month", nor "to a liability contracted by a person prior to the date when he became a public servant". And nothing in this Ordinance is to affect the right of the holder of any security to bring an action to realise it. It was admitted by the plaintiff that Sinnatamby Vanniah was a Vanniah and a public servant. There is no admission as to the amount of his salary; but I think the parties and the Judge assumed it to be common knowledge that a Vanniah's salary is less than Rs. 300.

The District Judge held that the plea put in by the 2nd defendant is open to the administrator as well as the deceased; but that the plaintiff ought to succeed because Sinnatamby Vanniah, in a document purportiug to be signed by him, and to be his will (though it had been

attacked as a forgery and had not been proved) had directed that his just debts should be paid.

The plaintiff's Counsel rightly admits that he cannot support the judgment on the ground given by the District Judge; but he supports it on the ground that the Ordinance only forbids an action against a public servant of the class mentioned in the Ordinance; that it does not prevent an action against him after he has ceased to be a public servant, or against his representatives after his death. I think that that construction is right.

The object of the Ordinance, as I gather it from the preamble and from the terms of the enactment, was to protect the public servants described in it from being sued upon certain contracts made by them whilst in the service, probably in order to prevent the public service being disorganised or inconvenienced by such actions. That object is attained if we give the plain and natural construction to the language of sec. 2. The contracts are not void, but the officer himself cannot be sued on them. In my opinion therefore the appeal should be dismissed with costs.

MIDDLETON, J.—I agree. The scope and object of the Ordinance was not in my opinion to nullify the legal objections of such public servants, but the benefit and protection of the public service which otherwise might suffer by the constant absence of its employees in Courts of Justice.

FERNANDO *vs.* ALWIS *et al.*

No. 21,327, D. C., COLOMBO.

Present: WENDT, J., & GRENIER, A. J.

15th February, 1906.

Postponement of trial, application for—Refusal—Subsequent procedure.

On the trial day when the case was called the plaintiff was ready. The defendants were both absent, and their proctor moved for a postponement producing a medical certificate as to

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the unfitness of the 2nd defendant to travel. The Court recorded that no witnesses of the defendants were present and, refusing the postponement asked for, entered judgment for the plaintiff as prayed for.

Held: The postponement having been disallowed, the trial should have proceeded. The issues should then have been ascertained if the defendant's proctor chose further to represent his clients; or if he retired from the case the plaintiff should have satisfied the Court by *prima facie* evidence in proof of the matters traversed in the answer.

F. M. de Saram for defendants-appellant.

E. W. Jayawardene (with *Akbar*) for plaintiff-respondent.

JUDGMENT.

WENDT, J.—This is an appeal by the defendants in the action, who were sued for the balance of an account between them and the plaintiff. The plaintiff alleged that he had made them advances from time to time aggregating Rs. 5,325·37, and that, as agreed, the defendants had sold and delivered to him plumbago in liquidation of the debt, leaving a balance of Rs. 1,349·42 due to the plaintiff, which he sought to recover. The defendants denied that they had received advances aggregating the sum mentioned by the plaintiff, and also pleaded that they had delivered more plumbago than plaintiff gave them credit for. In the result they admitted that they owed the plaintiff only Rs. 17·63, which they paid into Court for the use of the plaintiff. The 1st defendant, we are informed, is a proctor; and we think that it is not creditable to him that the plaintiff experienced such great difficulty in serving him with summonses, as the journal entries prove.

On the trial day, when the case was called plaintiff was ready, and the defendants were both absent, but their proctor moved for a postponement producing a medical certificate as to the unfitness of the 2nd defendant to travel. The Court recorded that no witnesses of the defendants were present and, refusing the postponement asked for, entered judgment for the plaintiff as prayed. The defendants have appealed, not on the ground that their application for a postponement should have been allowed, but that, under the circumstances, the Court was

bound to hear the case *ex parte* and to pass a decree *nisi*, which contention they have not attempted to support. It is argued for the appellants that the *onus* lay upon the plaintiff; and Counsel for the respondent admits that upon the pleadings it was so; but he argues also that when the motion for a postponement was disallowed the defendants must be taken to have abandoned their defence altogether. There is nothing in the case which requires us to take that view; and we think that the Court made a mistake in procedure in entering up an immediate decree. The postponement having been disallowed, the trial should have proceeded. The issues would then have been ascertained if the defendants' proctor chose further to represent his client; or if he retired from the case the plaintiff should have satisfied the Court by *prima facie* evidence in proof of the matters traversed in the answer. That course was not adopted, and we therefore feel unable to sustain the judgment for the plaintiff. The judgment and decree are set aside, and the case is sent back for trial in due course. The costs incurred in both Courts will remain costs in the cause.

GRENIER, A. J., concurred.

AHAMADO LEBBE *vs.* KIRI BANDA.

No. 18,026, D. C., KANDY.

Present: HUTCHINSON, C. J., & WOOD-RENTON, J.

ARGUMENT: 16*th October*, 1907.

JUDGMENT: 25*th October*, 1907.

Proctor—Appearance—Secs. 24, 85 *&* 86, *Civil Procedure Code.*

It is not sufficient that a proctor should be physically present in Court for the purpose of constituting him the representative of his client within the meaning of sec. 24 of the Civil Procedure Code.

In this case the plaintiff sued the defendants on a promissory note. The defendants filed answer denying that they made the note. The case was fixed for trial on the

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17th June, 1907. The entry on the record against that date is as follows:—"Plaintiff present, defendants absent, and no appearance for them by their proctor is put in though he is present." After evidence final judgment was entered for plaintiff as prayed for with costs. On the 24th June, 1907, the defendants filed an affidavit, and thereupon moved that the judgment entered be set aside and that the case be fixed for hearing.

On that motion the learned District Judge (J. H. Templar, Esq.) made the following order:—

"I think, as it seems probable from two judgments of Sir W. Bonser that have been brought to my notice, that my proper course was to have entered a decree *nisi* only instead of entering up judgment for the plaintiff, and following the decision of the Supreme Court in *Fernando* v. *Uduman* (5 N. L. R. p. 81) I decide to re-open the judgment, and to allow the defendants to appear and defend on payment of the costs incurred by the plaintiff at the hearing of the 17th June, 1907."

From this order the plaintiff appealed.

H. J. C. Pereira for appellant.

Garvin for respondents.

c. a. v.

JUDGMENT.

WOOD-RENTON, J.—In this case the appellant sued the respondents on a promissory note for Rs. 500, and the trial was fixed for the 17th of June. On that day the respondents were absent, and the entry on the record states that although their proctor was present he took no part in the proceedings. The learned District Judge heard evidence and then entered judgment in favour of the appellant. Two or three days later the respondents, whose defence was a denial of the making of the note in question, appeared and invited the learned Judge to re-open the proceedings on the ground that he ought to have treated the case as one in which there was a default of appearance on the part of a defendant, and to have simply entered a decree *nisi*, which it would be competent for the defendant afterwards on proper material to have set aside. It was

held by the learned District Judge in effect that this contention was correct, and he accordingly re-opened the proceedings. We have now to consider whether his view was right. On the argument of this appeal we were left in some doubt as to whether or not the respondents' proctor had taken any actual part in the proceedings; and we accordingly asked the learned Judge to tell us what his recollection was as to what had taken place. In reply he states that he is unable to say by the aid of his own memory what actually transpired at the hearing, and he has merely given us his impressions from a perusal of the record and certain statements made to him by the proctors on both sides, from which he concludes that the respondents' proctor took no part in the proceedings whatever. We have then to consider the question whether the mere physical appearance of a proctor in Court is such an appearance as will make the proceedings *inter partes* and prevent secs. 85 and 86 of the Civil Procedure Code from applying.

In my opinion it is not sufficient that a proctor should be physically present in Court for the purpose of constituting him the representative of his client within the meaning of sec. 24 of the Civil Procedure Code. Of course we are all familiar with the decisions in which it has been held, both in India and in Ceylon, that if a proctor should apply for postponement, or should do anything which can really be regarded as an act in the cause, he appears on behalf of his client for the purpose of the proceedings in which that act is done. But I think it would be straining the law if we were to hold that a client is bound by the mere casual presence in Court of a proctor who, so far as the record shews, had no instructions on behalf of his client, and who can only be said to represent that client in virtue of the fact that his name appears as proctor on the record.

I would dismiss the appeal with costs.

HUTCHINSON, C. J.—I concur.

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GOONEWARDENE *vs.* ORR.

No. 2,161, C. R., HAMBANTOTA.

(*In Revision.*)

Present: HUTCHINSON, C. J.

5*th December*, 1907.

Revision, application for—Appeal—Civil Procedure Code, sec. 753.

The power of revision should not be exercised where the remedy of appeal is open.

Bawa, A. S.-G., for applicant.

A. St. V. Jayawardene for respondent.

JUDGMENT.

HUTCHINSON, C. J.—This is an application for revision. The plaintiff sued the defendant in the Court of Requests for Rs. 102, for goods supplied. The defendant admitted owing something, but asked for an account; and he set up a claim in reconvention for Rs. 123, for professional services. The Commissioner refused to entertain the claim in reconvention, saying that it had better be tried by a separate action, and he gave judgment for the plaintiff for the amount claimed on the 15th November, 1906. On the 21st November the defendant applied for leave to appeal. Leave was granted, but not until the 25th, which was too late. Notwithstanding that he was out of time, the defendant filed his petition of appeal, which was dismissed on the 11th July, 1907, as being out of time. Hence this application. I see an expression of opinion by Acting Justices Pereira and Grenier in 2 Bal. p. 86 which I think I ought to follow. The effect of it is that the practice is not to exercise the power of revision under sec. 753 where the remedy of appeal is open; and here the party aggrieved might have obtained leave to appeal notwithstanding the lapse of time that has expired. The powers given by sec. 753 ought not to be exercised in such a case,

I dismiss the application with cost.

CARUPPEN CHETTY *vs.* HABIBU.

No. 22,644, D. C., Colombo.

Present: Hutchinson, C. J., & Middleton, J.

Argument: 26*th November*, 1907.

Judgment: 10*th December*, 1907.

Sale, application to set aside—Civil Procedure Code, sec. 282—Heir's interest in the property sold.

An heir to an estate has an interest in the property sold in execution of a judgment against the administratrix of that estate within the meaning of sec. 282 of the Civil Procedure Code.

vanLangenberg and Walter Pereira, K. C., A.A.-G., for appellant.

Bawa, A.S.-G. (with *F. J. de Saram*) for respondent.

Judgment.

Hutchinson, C. J.—The defendant is sued as the administratrix of the estate of Saibo M. M. Hadjiar deceased. Judgment was given against her for a sum of money. The plaintiff issued writ of execution for the recovery of that sum, and under the writ certain immoveable property was sold by the Fiscal, and was bought by the plaintiff.

The respondent to this appeal petitioned the Court to set aside the sale on the ground of certain irregularities. He was not a party to the action, but it is one of the heirs of the deceased intestate. The plaintiff objected that the petitioner is not a person having an interest in the property within the meaning of sec. 282 of the Civil Procedure Code: he contended that the property was vested in the administratrix, and that she is the proper party to move if there has been any irregularity. The petitioner replied that he is heir to three-quarters of the estate, and that his interest is real and substantial. The District Judge overruled the objection, and the plaintiff now appeals against that decision.

Sec. 282 enacts that the decree-holder, or any person

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whose immoveable property has been sold under this chapter, or any person establishing to the satisfaction of the Court an interest in such property may apply to set aside the sale on the ground of a material irregularity in publishing or conducting it.

Reference was made to D. C., Colombo, No. 81,499,* (9th May, 1883); 6 S. C. C. 95; 2 Weeresinghe's Rep. 47; 3 S. C. R. 41.

In the last quoted case the sale was made under the writ of a first execution creditor, and it was held that the second execution creditor, having an interest in the proceeds of sale, had an interest in the land. I think that was right. Here the petitioner has an interest in the proceeds of sale; the administratrix was a respondent to the petition, and was alleged to be hostile to him. In my opinion the petitioner has an interest in the property sold within the meaning of sec. 282. I would dismiss the appeal with costs.

MIDDLETON, J.—I agree.

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* No. 81,449, D. C., COLOMBO.

Present: CLARENCE, J.

ARGUMENT: *2nd May*, 1883.

JUDGMENT: *9th May*, 1883.

Dornhorst for appellant.

vanLangenberg for respondent.

JUDGMENT.

CLARENCE, J.—Defendant in this action is the administrator *testamento annexo* of the estate of Mr. W. Rudd. Plaintiffs, executors under the will of the mortgagee of a coffee estate, the property of Mr. Rudd, have obtained judgment on their mortgage and seized and sold and themselves purchased the coffee estate for Rs. 5. Appellants, representing themselves to be legatees under the mortgagor's will, now come forward and seek to impeach the sale under sec. 53 of the Fiscal's Ordinance. It appears that the owner was out of the Island when the sale took place, and that no one in this Island represented the estate. The learned District Judge declined to entertain appellants' application, holding them not to be parties within the meaning of the Fiscal's Ordinance. I think that is correct. I need not consider how far the Court might have jurisdiction upon the suggestion of persons in the position of appellants to suspend proceedings until a trustee or administrator of the testator's estate could be brought into existence in a case of urgency. It appears by the affidavit of one of the appellants that the administrator left the Island nearly a year before the sale, and yet no steps were taken by the persons interested to procure the appointment of a new representative. I see no reason to interfere with the District Judge's refusal to entertain appellant's application.

OSSENA LEBBE *vs.* CADAR LEBBE.

No. 5,936, D. C., KANDY.

Present: LAWRIE & WITHERS, JJ.

ARGUMENT: 12*th December*, 1899.

JUDGMENT: 19*th December*, 1899.

Mesne profits, action for—When maintainable.

In order to maintain an action for mesne profits founded on wrongful possession of land the plaintiff must have at the date of the decree for mesne profits a present possessory title.

Bawa for defendant-appellant.

Sampayo for plaintiff-respondent.

c. a. v.

JUDGMENT.

LAWRIE, J.—The plaintiff here brought an action to establish his title to land to which he alleged he had right by gift and succession from his father, but of which he had never been in possession. He sought to eject the defendant then in possession, and he prayed for damages and mesne profits.

During the pendency of suit, before the question of right was tried and while the defendant was in possession the land was seized and sold by the Fiscal under a writ against the plaintiff.

In my opinion this action for declaration should have been abated: it could be continued only by the purchaser the owner of the land; it may be in addition to the plaintiff the former owner, but certainly the purchaser was a necessary party, and this action for declaration of title could not go on without him.

On this ground I would dismiss the action.

The learned District Judge tried the issue of title, and in his judgment he finds for the plaintiff; but in respect of the sale and of the fact that the purchaser was no party to this action, the District Judge abstained from pronouncing a decree in ejectment, and gave the plaintiff a decree for mesne profits for the years prior to the Fiscal's sale.

Ossena Lebbe v. *Cadar Lebbe*

It is consistent with justice that if the defendant be a wrong-doer who with profit to himself kept the plaintiff out of possession he should be made to repay that profit which he has reaped by his injurious act. But the law seems well established that the right to demand mesne profits is consequential on obtaining a decree from possession. It seems denied to those who are not entitled to possess. It has been held that the right to recover mesne profits does not arise until possession is recovered. See Lord Hardwicke's decision in *Norton* v. *Frecker* [(1737) 1 Atkyns Rep. p. 523.] In the year 1758, in *Aslin* v. *Parkin*, Lord Mansfield reserved the point at the Assizes, and the opinion of all the judges was "*an action for mesne profits is consequential to the recovery in ejectment*" (2 Burr. Rep. p. 668), and in the foot-note to the chapter on "Trespass to Land" in *Bullen and Leake* 1 p. 538, there are many cases cited to the same affect.

It seems to work injustice in this case; but I think that certainly the law is that to maintain an action for mesne profits founded on wrongful possession of the land the plaintiff must have at the date of the decree for mense profits a present possessory title. Here the plaintiff in 1897 parted with and lost his right to sue for mesne profits.

If he had added the purchaser as plaintiff a decree for mesne profits might have been given, and he might have had an equitable right to demand so much of the damages recovered from the defendant as represented the mesne profits prior to the added plaintiff's purchase. As the action now stands the decree cannot be supported.

I set aside and dismiss the action with costs.

WITHERS, J.—When this case was argued before the Chief Justice and myself the only point on which we desired to hear Counsel was whether the plaintiff could get judgment for mesne profits in the absence of a decree for declaration of title. The hearing was adjourned for the production of authorities. My brother Lawrie and I have now heard the point fully discussed. The facts of the case which give rise to the point are briefly these. This is an action to vindicate a house and ground in the possession

of the defendant, who alleges he has a better right to the premises than the plaintiff.

The plaintiff has never had possession of the premises. According to him his late father owned the house and donated it to him in April, 1889. Plaintiff was a minor, if not an infant, at that time; but as his father died soon afterwards without revoking his gift, that effectively passed such title as the donor had to the plaintiff if he desired to accept the gift on his attaining majority. In July, 1892, the plaintiff being still under age instituted this action of *rei vindicatio* by his next friend, his mother.

This lady died on 14th October, 1893. The action however was carefully nursed for four years, when the plaintiff, on the allegation that he was a major of 24 (*sic*) years, applied for leave to proceed with the action in his own name. The District Judge states in his judgment that the plaintiff parted with his title to the premises on the 27th July, 1897. Notwithstanding this assignment the plaintiff was allowed to prove for his mesne profits from the date of his father's death to the date of his assignment. Was he competent to do this is the question we have to decide. Only one decision in point was cited to us, and that was an unreported judgment of mine in an appeal from a decree of the C. R., Avisawella, No. 3,494, in 1894 (July 28th).*

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* No. 3,494, C. R., AVISAWELLA.

28th July, 1894.

WITHERS, J.—Dissociated from a claim to a vindication of the property there was no cause of action for damages by way of mesne profits for unlawful detention, for this is clearly what the plaintiff seeks to recover in this action.

A claim for mesne profits is auxiliary to an action to recover immoveable property which is in the possession of the defendant, and can only be recovered in such an action *where the plaintiff has not re-entered into possession of the premises since his expulsion from them.*

Had the plaintiff re-entered into possession since the alleged ouster, this action would have been competent from him as damages for trespass to his premises during the interval between ouster and re-entry. Having no cause of action to support the particular claim herein his case fell to the ground, and his action was properly dismissed.

Hence I must affirm the judgment of dismissal, though I do not think the reasons for dismissing the action in the Commissioner's judgment can be supported.

Affirmed with costs.

Ossena Lebbe v. *Cadar Lebbe*

I regarded the action in the C. R. to be one for damages by way of mesne profits independent of any claim to a declaration of title, and I made the following observations:—

"A claim for mesne profits is auxiliary to an action to recover immoveable property which is in the possession of the defendant, and can only be recovered in such an action where the plaintiff has not re-entered into possession of the premises since his expulsion from them. Had the plaintiff re-entered into possession after the alleged ouster, this action would have been competent to him as damages for trespass to his premises during the interval between ouster and re-entry. Having no cause of action to support the particular claim herein his case fell to the ground and his action was properly dismissed."

I adhere to that opinion, which seems to me to have the authority of Voet to support it. See his Book 6, Title i, *de rei vindicatione.*

At all events there is a passage in Voet which exactly meets this particular case, 6. 1. 4. "*Sed et si litis contestatæ tempore dominus fuerit, qui hanc actionem movit, lite vero pendente dominum amiserit absolvi reum ratio dictat*" and for the following reasons "*Tum quia res devenit ad eum casum, a quo initium actio hebere et in quo considere non potint, quia deiit actionis interesse*". "*Tum denique quia sublatum est ac Exstinctum illud, quod unicum hujus actionis fundamentum est. Quibus usu abest, quod actio noxalis duret et condemnatio sequi debeat, si lite pendente actor a reo dominium servi consecutus it*". It was during this action that the plaintiff attained his majority, and decided to accept this gift; but I think it can make no difference in principle whether a plaintiff in this case has acquired the *nuda proprietas* before action or acquired it during action, for, as Voet observes in *lectio* 30 of that book "*restituendae veniunt ex hac actione res una cum fructibus*". I do not see how you can well dissociate the *res* from the *fructus*, and when the *dominium* goes the foundation of the action goes with it.

In my opinion the plaintiff's action must be dismissed.

In the matter of the Estate of JANE PERERA, deceased.

WICKREMASINGHE *et al.* *vs.* PERERA.

No. 2,191, D. C., Kandy.

Present: Hutchinson, C. J., & Middleton, J.

Argument: 23*rd September*, 1907.

Judgment: 11*th October*, 1907.

Inheritance—Illegitimate issue—Succession—Roman Dutch Law.

Adulterine offspring are not entitled to inherit their mother's property with the legitimate issue.

The consequential effects of the decision in *Karonchihamy* v. *Angohamy* (8 N. L. R. 1) would be that children born of the parents before the marriage would not be made legitimate by the marriage owing to the effect of sec. 22 of the Ordinance No. 2 of 1895, but would still be illegitimate.

An appeal from the judgment of the District Judge of Kandy (J. H. Templer, Esq.)

de Sampayo, K.C., for administrator-appellant.

van Langenberg for petitioners-respondent.

c. a. v.

Judgment.

Hutchinson, C. J.—I think that as the evidence shews that the petitioners were born during the continuance of their mother's marriage they should be presumed to be her husband's legitimate children (Ordinance No. 14 of 1895, sec. 112). Their Proctor admitted at the hearing before the District Court that they were illegitimate; but they are minors, and therefore not bound by that admission. No issue was tried as to whether they were illegitimate or not. I think that the judgment of the District Court should be set aside and the case sent back for trial of that issue. I agree with Mr. Justice Middleton's proposed order as to costs.

Middleton, J.—The question in this case is, whether the adulterine offspring of a deceased woman are entitled to inherit their mother's property with the legitimate issue.

Wickremasinghe v. *Perera*

It has apparently been admitted by the Proctor for the respondents to this appeal that they were in fact the issue of the adulterous consortment of their mother and a man other than her husband.

This is an admission against the interest of the respondents, who are minors, which the Court would not allow to be made on their behalf if upon that admission it found itself bound to decide against their claims.

The children in question are admittedly the offspring of low-country Singhalese, and not Kandyans.

The learned District Judge has held in favour of the respondents' claim on grounds which he has extracted from the judgments of myself and de Sampayo, A. P. J., in *Karonchihamy* v. *Angohamy* (8 N. L. R. p. 1).

The authorities on the question are VanderLinden (1 x. 3 p. 164 of Henry's Translation), who says that illegitimate children succeed to the inheritance of their mother *ab intestato* as the mother makes no bastards.

Grotius 2, 27 and 28 p. 190 of Maasdrop's Translation, Book 2, chap. 27, sec. 28, says: "In reference to the mother illegitimate children are in the same relation as legitimate, unless indeed they are sprung *ex prohibitu concubitu*, in which case they and their descendants cannot inherit *ab intestato*".

VanderKeesel, Book ii. chap. 7, sec. 345 (Lorenz's Translation) says: "In Dordrecht under a particular law and in South Holland adulterine and incestuous children also succeed to the mother."

Sec. 40 of Ordinance 15 of 1876, makes the rules of the Roman Dutch Law as it prevailed in North Holland to govern *casus omissi*.

VanLeeuwen, in the *Censura Forensis*, Part I. Book I. chap. 3, sec. 10, says: "*ex damnato vero coitu nati sunt adulterini et incestuosi qui neque patri neque matri eorumque agnatis aut cognatis succedere possunt.....nisi quoad alimenta necessaria.*"

The preceding sec. 8, as translated by Schreiner, p. 37, shews that the term "illegitimate" embraced both *naturales spurii* and those *ex damnato coitu nati*, the two former having

the right of inheritance from their mother, but not the latter.

Voet 38. 17. 9. says: "*nostris tamen et plurium aliorum moribus ita progeniti adulterinis accessendi sunt, et obe id ne matri quidem ab intestato heredes esse possunt.*"

I gather from Voet that there was some doubt as to whether bastards "*naturales*" or "*spurii*" could inherit from their mother according to the opinion of some writers.

I am not aware that the Ceylon law or Singhalese custom recognises any difference between incestuous and adulterine bastards and bastards not so procreated; but the English law gives no right of inheritance from the mother to any bastard.

It seems unreasonable and inequitable to apply the doctrine of the Canon law to the case of Singhalese.

VanLeeuwen (vol. i. p. 51 of Kotze's Translation) says: "Children procreated in adultery cannot be legitimated inasmuch as according to the ecclesiastical laws there can be no marriage with the woman with whom we have formerly lived in adultery."

The Full Court has held in *Karonchihamy* v. *Angohamy* (*ubi supra*) that it is not illegal in Ceylon for a man who has lived in adultery with a woman during the lifetime of his wife to marry such woman after the death of his wife.

Sec. 22 of Ordinance No. 2 of 1895, however, still enforces the principle of the Roman Dutch Law, that children procreated in adultery cannot be legitimated.

But sec. 37 of Ordinance No. 15 of 1876 lays it down that legitimate children inherit the property of their intestate mother, but not that of their father or that of the relatives of their mother.

The word "illegitimate" in its full significance would include adulterine bastards.

Under the Roman Dutch Law adultery was a criminal offence, and the offspring of adultery or incest were termed children *ex damnato coitu* owing to the influence of the Canon law upon the prevailing Dutch Civil Law.

In Ceylon, notwithstanding the Political Ordinance of

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1580, adultery is not a criminal offence and no case has been cited to us showing that the Courts have recognised either the incapacity of adulterine bastards to inherit from their mother or the converse.

The consequential effects of the Full Court decision in *Karonchihamy* v. *Angohamy* (*ubi supra*) would be that children born of the parents before the marriage would not be made legitimate by the marriage owing to the effect of sec. 22 of Ordinance No. 2 of 1895; but would still be illegitimate.

The law by recognising the marriage does away with the ecclesiastical ban of *damnatus*, but still refuses them specially the rights of legitimate children to inherit from their father.

Why therefore should not the offspring have the *status* of ordinary illegitimate children and inherit from their mother on the principle that a mother makes no bastards?

It seems to me that there is nothing to militate against such a conclusion except the effete principle of the old Roman Dutch Ecclesiastical Civil Law, which enacted that adultery was a crime and that the sins of the parents should be visited on the innocent offspring of it.

I do not wish to be supposed to be supporting the theory that adultery is no moral offence, but merely to enunciate what I deem to be a plain principle of equitable right founded on fair reasoning.

I am afraid, however, that Roman Dutch law, which must be held to apply to this case, is too clear to be disregarded.

With considerable reluctance, therefore, I feel bound to hold that if these petitioners are adulterine offspring, they are not entitled to inherit their mother's property with the legitimate issue. I think, therefore, that the judgment of the District Judge must be set aside and the case sent back for the trial of the issue whether these children are illegitimate or not as proposed by my Lord. The respondents should pay the costs of this appeal. The costs in the Court below to abide the Judge's decision.

SUPPLEMENT

TO THE

APPEAL COURT REPORTS.

SULTAN MARIKAR *et al. vs.* ASIA UMMA *et al.*

No. 2,211, D. C., KALUTARA.

4th June, 1907.

Powers of judge—Permission to call further evidence after judgment reserved—Evidence Ordinance, sec. 165.

Held, per WOOD-RENTON, J., & GRENIER, A. J.:—That a judge has no right under sec. 165 of the Evidence Ordinance, or under any other enactment, in any civil action to say, in effect, to a plaintiff, after the proceedings have been formally closed: "You have not made out your case; but I will give you a fresh chance of doing so."

Fernando v. *Johanis* [(1892) 1 S. C. R. 262] followed.

It is however competent for the Court, after judgment reserved, to call *ex mero motu* an independent witness to satisfy itself on some incidental point, such as the amount of a valuation [see *Hendrick Kure* v. *Saibu* (1900) 4 N. L. R. 148].

ATKINSON *vs.* PACKEER *et al.*

No. 4,302, P. C., HATTON.

11th June, 1907.

Labour Ordinance (No. 11 *of* 1865, *sec.* 19)*—Harbouring deserted coolies—Requisites for conviction.*

Held, per WOOD-RENTON, J.:—That in a charge for harbouring under sec. 19 of the Labour Ordinance it is necessary for the prosecution to prove: (i) that the coolies were actually in the employment of the Superintendent of the estate in question, (ii) that they absented themselves from his service without leave, (iii) that they were in fact harboured by the accused, and (iv) that in so harbouring the accused acted wilfully and knowingly. The fact of the accused having actually found employment for the coolies is sufficient harbouring to justify a conviction under the section if the element of guilty knowledge were established.

The existence of guilty knowledge in these cases must be an inference from the circumstances, for it deals with a mental state which in many cases would not be possible for the prosecution to prove by direct evidence.

PEIRIS *vs.* FERNANDO.

No. 7,431, C. R., PANADURE.

21st June, 1907.

Action—Dismissal—Failure of one party to appear to give evidence for the other side—Duty of judge—secs. 137, 145, 823, *&* 826, *Civil Procedure Code.*

Where a party to a suit failed to appear as a witness for the other side and in consequence the Commissioner dismissed his action and he appealed,

Held, per WOOD-RENTON, J.:—That it was quite competent for the Commissioner to deal with the appellant under secs. 137 and 826 of the Civil Procedure Code; but sec. 823 as re-enacted by the Court of Requests Ordinance of 1895 does not give a judge a right, in a case where, as here, evidence has been called on both sides, to treat the failure even of a party to a suit to appear for examination as a witness as a ground for disposing of the litigation otherwise than on the merits (see further sec. 145).

FERDINANDO *vs.* PERERA *et al.*

No. 5,979, C. R., PANADURE.

26th June, 1907.

Withdrawal of action—Notice to other side—Sec. 406, Civil Procedure Code.

Held, per WOOD-RENTON, J.:—That under sec. 406 of the Civil Procedure Code notice to the other side is not a condition precedent to an order giving liberty to withdraw.

DANORIS *vs.* MARICAR.

No. 4,159, C. R., MATARA.

26th June, 1907.

Promissory note—subsequent modification of terms—"Interest in land"—Ordinance No. 7 of 1840, sec. 2—Evidence Ordinance, sec. 92, proviso 4.

Held, per WOOD-RENTON, J.:—That where an agreement made subsequent to the making of promissory note conferred possession of a land in lieu of interest on the note, such an agreement established an "interest" in immoveable property within the meaning of Ordinance No. 7 of 1840, sec. 2; and oral evidence of such agreement to modify the terms of payment prescribed by the promissory note was prohibited in terms of proviso 4 to sec. 92 of the Evidence Ordinance.

LAYARD *vs.* SEVATHIAM.

No. 37,571, P. C., NAWALAPITIYA.

1st July, 1907.

Bail bond—Extension of bond by consent of bailsmen—Civil Procedure Code, sec. 411.

Where a case was postponed *sine die* and the bailsmen of the accused consented to an extension of the bond,

Held, per WOOD-RENTON, J.:—That there was nothing in law to prohibit such consent being given.

Held, also:—That a Police Magistrate had no power under sec. 411 of the Criminal Procedure Code to order the bailsmen to give security till a return was made to the warrant of attachment.

SILVA *vs.* SILVA *et al.*

No. 17,764, D. C., KANDY.

1st July, 1907.

Administration—Powers of executors and administrators—Right of heirs—Title to property of intestate—English and Roman Dutch Law—Civil Procedure Code, sec. 547.

Held, per HUTCHINSON, C. J., WOOD-RENTON, J., & GRENIER, A.J.:—That the introduction of the English Law relating to executors and administrators did not affect, much less destroy, the distinctive character, status, and rights of the heir as the term is understood both in the Roman Law and the Roman Dutch Law.

On the death of a person his estate, in the absence of a will, passes at once by operation of law to his heirs, and the *dominium* rests in them.

A conveyance by the heir or devisee of his share of the immoveable property of the deceased is not void. The personal representative still retains

the power to sell it (with the special authority of the Court if the provisions of the grant of administration so require) for administration; but his non-concurrence in the conveyance does not otherwise affect its validity.

A deed of ratification granted to a purchaser of property from a minor by the minor himself after he comes of age is in effect a conveyance.

PUNCHI APPUHAMI *vs.* MUDIANSE.

No. 1,823, D. C., KEGALLE.

2nd July, 1907.

Order refusing to frame an issue—Appeal—Proper time to appeal.

Per MIDDLETON & WOOD-RENTON, JJ.:—That the proper course for a party appealing from an order refusing to frame an issue is to appeal at once from the order disallowing the issue.

Where a party has been content to go to trial without having framed the issue, which he says is vital to his case, he ought not to be permitted at the end of the proceedings to come and say that the issue he desired should have been the one to have been tried.

Pieris v. *Perera* (10 N. L. R. 41) followed.

DE SILVA *vs.* DE SILVA.

No. 4,964, C. R., KALUTARA.

3rd July, 1907.

Promissory note – Oral evidence of contemporaneous agreement Evidence Ordinance, sec. 92, *proviso* 3.

Held, per WOOD-RENTON, J.:—Oral evidence of an agreement contemporaneous with the making of a note which would suspend the liability under the note until the condition embodied in the agreement had been fulfilled is the very thing sec. 92 (3) is intended to meet.

KARUPAY *vs.* KURUKAL.

No. 42,568, P. C., JAFFNA.

3rd July, 1907.

Police Magistrate—Power to adjudicate on rival claims to be manager of a temple where police fear a riot—Criminal Procedure Code, secs. 81, 148 *(d)*, 413 *&* 419.

Where a person calling himself the manager demanded the keys of a temple from the priest, who refused to give it, saying that the manager was another man from whom he had received the keys, and a Police Officer, fearing a riot, took the keys and produced them before the Police Magistrate, who ordered them to be given to the person claiming, on appeal by the priest,

Held, per WOOD-RENTON, J.:—That the dispute being merely a civil one the Police Magistrate had no jurisdiction to try it.

Held, also:—That sec. 81 of the Criminal Procedure Code gives a magistrate ample powers of safeguarding the public interest against the dangers of a riot without having recourse to sec. 419, which confers on him no civil jurisdiction at all.

ARNOLIS *vs.* PITCHE.

No. 4,040, C. R., COLOMBO.

5th July, 1907.

Ejectment – lessee against tenant—validity.

The plaintiff sued the defendant

for ejectment and to recover Rs. 200 for use and occupation. The defendant had taken the premises on rent from one Marikar on a written document, which was not notarially executed or stamped, agreeing to deliver up possession of the premises on the 31st December, 1905. On the 25th December, 1905, Marikar gave a lease of the same to the plaintiff for four years commencing from 1st January, 190[illegible]; and on 8th November, 1906, the plaintiff sent the defendant a notice to quit the premises and deliver up possession on the 31st December, 1905.

Held, per MIDDLETON, J.:—That the document signed by the defendant was inadmissible in evidence because it was not duly stamped and was not notarially executed.

Held, also: That the plaintiff had no title in him which gave him a right to send a notice to quit to the defendant.

No action could be maintained for rent against a monthly tenant of a landlord by a subsequent notarial lease unless the monthly tenant had attornied to the lessee, or the landlord had expressly assigned the benefit of his contract with notice to the monthly tenant.

PERERA *vs.* GUNAWARDANA.

No. 22,117, D. C., COLOMBO.

8th July, 1907.

Application to stay execution—Civil Procedure Code, sec. 343.

Held, per MIDDLETON, J.:—An order to stay execution is in its essence an order vesting in the discretion of the Court, and cannot be demanded as a right, except in cases where it is perfectly clear that injustice would be done if the order were not made.

NICHOLAS *vs.* WALKER, SONS & Co., LTD.

No. 3,011, C. R., COLOMBO.

16th July, 1907.

Next friend—Control of money in the hands of next friend– by the Court Sec. 499, *Civil Procedure Code.*

Held, per WOOD-RENTON, J.:—That although sec. 499 of Civil Procedure Code places no prohibition in the way of a next friend receiving money which has been recovered by him in the name of an infant, it is perfectly competent for the Court, through whose agency money has been recovered, to take whatever steps it deems necessary for the purpose of seeing that the money is actually applied for the infant's benefit.

See *Gynn* v. *Gilbard* (1860) 1 Dr. and Sm. 356 and *In re* McGarth (1891) 1 Ch. 143.

KUMARASWAMY *vs.* MURUKAN.

No. 7,028, C. R., POINT PEDRO.

17th July, 1907.

Writ—Re-issue—Previous application —Due diligence – Civil Procedure Code, secs. 419 *&* 337.

Where the heirs of a judgment creditor applied for execution after six years had elapsed since the previous futile issue of execution by the judgment creditor himself,

Held, per WOOD-RENTON, J.:—That the pleas of payment and of want of due diligence raised by the debtors are not inconsistent, and are open to him.

The creditor is entitled to lead evidence as to his having exercised due diligence and as to non-payment.

The failure to examine a debtor under sec. 219 of the Civil Procedure Code raises a presumption against the creditor, and as such can be rebutted.

SUPPLEMENT TO THE APPEAL COURT REPORTS.

CARNIE *vs.* FERNANDO.

No. 4,681, M. C., Colombo.

17th July, 1907.

Suffering premises to be in filthy state —Owner's liability.

In this case the defendant admitted that the land and well in respect of which the prosecution was undertaken were under his control. They were not let to, or in the occupation of, any third party. It was contended, however, that as the defendant was in India at the date of the discovery of the nuisance, and lived at some distance from the premises, that he could not be deemed liable either for keeping or suffering the premises to be in a filthy and unwholesome condition.

Held, per Middleton, J.:—That the premises here were under the defendant's control as owner, and in the eye of the law as occupier, and it was his duty to keep them in a sanitary condition.

SCHRADER *vs.* SILVA *et al.*

No. 14,525, C. R., Negombo.

17th July, 1907.

Deed—Action to set aside on ground of fraud—Prescriptive period—When it begins to run.

An action to set aside a deed dated 26th May, 1903, on the ground that it was executed by the 1st defendant in favour of the 2nd defendant in fraud of the plaintiff, who was a judgment creditor of the 1st defendant, was brought on 23rd October, 1906. The action was dismissed on the ground that it was prescribed, being instituted after the lapse of three years from the date of the deed. On appeal,

Held, per Middleton, J.:—That the cause of action accrues at the time when it is clear that the effect of the deed will be to defraud the creditors, not necessarily at the time of the execution of the deed.

Podisingho Appuhamy v. *Loku Sinho et al.* (4 N. L. R. 83) followed.

SUPPURUMANIAN CHETTY *vs.* CATHIRAVELU CHETTY.

No. 2,645, C. R., Colombo.

24th July, 1907.

Appeal—Findings of fact.

Held, per Hutchinson, C.J.:—That on an appeal from a judge's finding of fact, when there has been a conflict of evidence, the appellant, in order to succeed, must shew affirmatively that the conclusion of the judge was wrong, and not merely that on the balance of probability it was probably wrong.

FERNANDO *vs.* PUNCHI SINNO.

No. 30,370, P. C., Balapitiya.

2nd August, 1907.

Stolen property, retention of—Presumption of guilty knowledge—Evidence Ordinance No. 14 of 1895, sec. 114.

A watch-chain was stolen on the 16th March, 1907; and on the 9th June, 1907, it was found in the possession of the accused, who "wholly failed to account for the possession of the chain" and was convicted of retaining stolen property with guilty knowledge.

Held, per Hutchinson, C.J.:—That sec. 114 of the Evidence Ordinance creates no presumption of any kind from the fact of possession: it only says that the court may presume the existence of any fact which it thinke likely to have happened; and ths illustrations in that section are not

exhaustive. If a man is found in possession of stolen property of such a kind and within such a period after the theft that he must be able to remember and explain where he got it from, the Court should call on him to give that explanation; and if he gives a false explanation, or none at all, the Court may fairly presume either that he is the thief or that he knew that the property was stolen.

DINGIRI MENIKA *vs.* HEENA HAMY.

No. 1,365, D. C., RATNAPURA.

5th August, 1907.

Kandyan Law—Associated marriage—Issue—Registration—Evidence Ordinance (No. 14 of 1895) sec. 112.

Where under the Kandyan Law two brothers lived with one wife, and children were born during the associated marriage,

Held, per WOOD-RENTON, J., & GRENIER, A. J.:—(1) That associated marriages contracted subsequent to 1859 were illegal. [Ordinance No. 13 of 1859, and see *Hotuwa* v. *Gotia* (1900) 4 N. L. R. 93.]

(2) That the only "valid marriage" was that between the woman and her registered husband; and that the children in the present case having being born during its continuance were children of the registered husband. [Sec. 112 of the Evidence Ordinance.]

THE KING *vs.* BABUNDARA.

Crown case reserved.

No. 6, FIRST MATARA SESSIONS, 1907.

27th August, 1907.

Statement of accused—Statement made in Singhalese and recorded in English—Criminal Procedure Code, secs. 302 & 424.

Where a statement of an accused person was made in Singhalese, his own language, and recorded in English by the Police Magistrate, who was a a Singhalese gentleman,

Held, per HUTCHINSON, C. J., MIDDLETON and WOOD-RENTON, JJ.:—That the irregularity is cured by the evidence of the Magistrate, taken under the provisions of sec. 424 of the Code, as to the correctness of the statement made by the accused.

That the words "recorded under the provisions of sec. 302" mean purporting to be recorded under the provisions of sec. 302.

That if the statement of the accused is recorded in English, the burden of shewing it was impracticable to record it in the language of the accused is on the Crown, with whom that knowledge must be assumed to lie.

ELIATAMBY *vs.* MURUGAPPA.

No. 25,073, P. C. BATTICALOA.

28th August, 1907.

Evidence—Admissibility of evidence of wife of one accused against co-accused—Evidence Ordinance, secs. 30 & 100.

Held, per MIDDLETON, J.:—That the evidence of the wife of one of several co-accused cannot be heard against her husband, but could be considered only as against the other co-accused.

It would however be advisable in the interests of justice in such a case that the husband should be indicted separately.

PUNCHI AMMA *vs.* APPUHAMY.

No. 9,173, P. C., KANDY.

3rd September, 1907.

The parties in this case were divorced by the Provincial Registrar

of Kandy by an order which was registered. The divorce according to the certificate of registration was pronounced on the ground of inability to live happily together. The defendant on being sued for maintenance contended that the pronouncement of the Provincial Registrar estopped the appellant from denying that the parties had been separated.

Held, per MIDDLETON, J.:—That the decision of the Provincial Registrar and the question of effect of the evidence is not binding on a Police Court in a case between the same parties.

"In order to make the decision of one Court final and conclusive in another Court it must be a decision of a Court which would have jurisdiction over the matter in a subsequent suit in which the first decision is given in evidence as conclusive."

Mussamut Edun v. *Mussamut Bechun* [I. L. R. 22 Cal. 324 (1894)] followed.

OGILVY *vs.* CARUPEN.

No. 10,369, P. C., KANDY.

10th September, 1907.

Master and servant—Labour Ordinance (No. 11 of 1865)—Quitting service without notice—Appropriation of wages for advances—Consent of cooly—Secs. 11, 6 & (3) of the Ordinance.

Where a cooly was charged under sec. 11 of the Labour Ordinance for quitting service without notice or reasonable cause and he pleaded that his wages were overdue for 60 days, but it was alleged that his wages were set off against advances made to the kangany on account of the cooly,

Held, per MIDDLETON J.:—That until the man is personally and individully called upon and acquainted with the proposals of the superintendent he has reason for saying that he did not consent to the appropriation in question.

Held also:—That even in cases of appropriation as of right the cooly should be personally acquainted with the fact; and where it was not proved that he was so acquainted he was entitled to quit without leave.

HUTCHINSON *vs.* WELLASAMY.

No. 28,878, P. C., MATALE.

11th September, 1907.

Master and servant—Labour Ordinance (No. 11 of 1865) sec. 11—Quitting service without notice—Wages set off against wages of watchers—Consent—Ordinance 3 of 1889, sec. 3 (6).

A kangany said to owe Rs. 1,400 to the estate took most of his coolies, and watchers were appointed to watch him and his coolies; and the wages of the watchers were set off against the wages due to the kangany. In a prosecution of the kangany for quitting service without notice,

Held, per MIDDLETON, J.:—that the kangany was justified in leaving the estate, as he had reason to believe that his wages were overdue for over 60 days; and further that the deduction of the watchers' wages from the wages of the kangany should have been made with his express consent.

FERNANDO *vs.* PERERA *et al.*

No. 3,304, C. R., COLOMBO.

17th September, 1907.

Evidence, admission of by judge, after judgment reserved—Civil Procedure Code, sec. 134.

Where a Commissioner, after he had reserved judgment, allowed further documentary evidence to go before him without proper proof of it,

Held, per MIDDLETON, J.:—That such proceedings cannot be supported under sec. 134 of the Civil Procedure Code.

292, D. C., Kalutara, 2,911, S. C. M., June 4, 1907, followed.

A judge should not allow supplementary proof after a case is closed, unless it may be to inform himself on some matter of value or of a similar character as was allowed in *Hendrick Kure* v. *Saibu Marikar* (4 N. L. R. p. 148).

RATWATTE *vs.* PERERA.

No. 9,906, D. C. (Inty.) KANDY.

19th September, 1907.

Abatement of action, order of—Power of judge ex mero motu—*Civil Procedure Code, sec.* 402.

Per MIDDLETON, J., & GRENIER, A. J.:—That a District Judge has the power *ex mero motu* to make on order of abatement under sec. 402 of the Civil Procedure Code.

KURUNATHAPILLAI *vs.* SINNAPILLAI.

No. 2,823, D. C., BATTICALOA.

20th September, 1907.

Fidei commissum—*Construction of deed of gift.*

A deed of gift contained, *inter alia*, the following clause:—"The garden, house, well, and plantations of this value shall for ever from this day be possessed and enjoyed by them and the children of the womb of the said S. from generation to generation as dowry."

Held, per MIDDLETON, J., & GRENIER, A. J.:—That the words did not create a valid *fidei commissum.*

MADASWAMY *vs.* KARAPAIYAH.

No. 7,305, C. R., MATALE.

20th September, 1907.

Arbitrator, competency to decide a question of law.

Per GRENIER, A. J.:—That where a case is referred to arbitration, without any reservation as to questions of law, is is quite competent for the arbitrator to decide any question of law that might arise.

KANAVADIPILLAI *vs* IBRAHIM.

No. 2,563, P. C., KALMUNAI.

20th September, 1907.

Mischief—Shooting a buffalo—Penal Code, sec. 412.

Where a person was charged with mischief by shooting a buffalo, and was convicted under sec. 412 of the Ceylon Penal Code,

Held, per GRENIER, A. J.:—That an offence under sec. 412 of the Penal Cdoe is not triable by the Police Court, but by the District Court.

RAMEN CHETTY *vs.* DISSANAYAKE.

No. 24,803, D. C., COLOMBO.

20th September, 1907.

Promissory note—Wrongly stamped—Action under chap. 53, *Civil Procedure Code.*

Held, per MIDDLETON, J., & GRENIER, A. J.:—That the use of a judicial stamp on a promissory note instead of a revenue stamp is in effect a breach of the law (see 2 C. L. R. 89); also, that under sec. 705 of the Civil Procedure Code no action under chap. 53 can be taken on a promissory note wrongly stamped as aforesaid.

SUPPLEMENT TO THE APPEAL COURT REPORTS.

VANDERKONE *vs.* KAPPURDYAR.

No. 2,768, P. C., MANNAR.

21st August, 1907.

Vehicles—License—Ordinance No. 9 *of* 1901, *sec.* 6, *also sec.* (2) 42.

Per MIDDLETON, J.:—That sec. 6 of Ordinance No. 9 of 1901 is extremely wide, and a person who used his own cart, which was unlicensed, for the transport of timber which he had contracted to supply the Public Works Department, used it for reward in a manner contemplated by sec. 6 of the Ordinance, and which sec. 6 was intended to cover, and was rightly convicted under sec. (2) 42 of the Ordinance.

Karunaratne v. *Kira* (8 N. L. R. 335) followed.

SAMAHIN *vs.* RATNASABAPATHY.

No. 4,833, M. C., COLOMBO.

23rd August, 1907.

Suffering premises to be in a filthy condition—Liability of owner—Ordinance No. 15 *of* 1862.

Per MIDDLETON, J.:—That the Ordinance renders either the owner or the occupier liable, and leaves it at the option of the Municipality to proceed against either.

The arrangments between an owner and a tenant are not germane to a charge of this nature.

The owner is responsible for suffering the premises to remain in an unwholesome condition, and has his remedy against his tenant, upon whom the common law obligation lies of keeping the premises he occupies in a clean and wholesome state, so as not to be injurious to the health of any person.

GOONETILEKE *vs.* ABUDEEN.

No. 37,640, P. C., GALLE.

26th August, 1907.

Police Magistrate—Power to detain in the custody of the Police things produced—Sec. 413 (1) *Criminal Procedure Code.*

An accused was bound over to keep the peace, and the Police Magistrate, purporting to act under sec. 413 (1) of the Criminal Procedure Code, made an order that certain plumbago which was loaded into carts by the accused and his coolies for removal from a certain land should be detained in the custody of the Police,

Held, per MIDDLETON, J.:—That the plumbago was not such property as would be covered by that section, as apparently the offence which was brought before the Magistrate was in the nature of a charge of a possibility of riot and unlawful assembly, and it could hardly be contended that that section refers to such property as the plumbago in this connection.

HARRIS *vs.* APPUHAMY *et al.*

No. 1,096, P. C., AVISAWELLA.

28th August, 1907.

Obstructing public servant—Complaint —Penal Code, sec. 183.

Per MIDDLETON, J.:—That a Fiscal's licensed surveyor should have the previous sanction of the Attorney-General to make a complaint under sec. 183 of the Penal Code, or it should be made by the public servant concerned.

Brodhurst v. *Hendrick Singho* (4 N. L. R. 213) followed.

SUPPLEMENT TO THE APPEAL COURT REPORTS.

THE KING *vs.* TAMBIMUTTU.

No. 2,167, D. C. (Cr.), JAFFNA.

30th August, 1907.

Fraudulent alienation—Collatteral security—Charge under sec. 203, *Ceylon Penal Code—Presumption*—Onus.

The accused in this case was charged with having fraudulently transferred some property, intending thereby to prevent it being taken in execution of a decree which he knew to be likely to be made in a civil suit against him. The defendant had given a promissory note to the complainant and deposited title deeds of his property as a further security, but had subsequently obtained copies from the Registrar and transferred all the properties to his sister. It was contended for the appellant that no fraud had been proved, inasmuch as it was not proved by the prosecution that the accused had no other property. That this obligationon the pa rt of the prosecution might have been discharged by proof of the statements made by him under sec. 219 of the Civil Procedure Code.

The accused had pleaded in the civil suit that the promissory note was a forgery.

Held, per MIDDLETON, J.:—That as regards the proof of the examination of the accused under sec. 219 it could not be objected to unless the examinee had been compelled to answer questions which tended to criminate him under sec. 132 of the Evidence Ordinance.

Also:—That if the judge had reason to believe on the evidence that the accused falsely alleged that the promissory note was a forgery, and secondly that the accused had fraudulently deprived the complainant of the collateral security which he had purported to deposit with him, a strong presumption of a fraudulent intention to prevent the property in question being taken in execution of a future decree is raised, which could only be rebutted by proof on the part of the accused that he did in fact possess other property which could be taken in execution of this decree.

DE SILVA *vs.* RAJENDRA.

No. 5,593, M. C., COLOMBO.

10th September, 1907.

Municipal By-laws—Filling up of well dangerous to the public health—Powers of Chairman—Report of analyst—Owner—Regulation 25 *of December* 16, 1901, *made under Ordinance No.* 3 *of* 1897—*Sec.* 7 (1) *of the Ordinance.*

The defendant was charged with neglecting to fill up a well, which he was required to do by a notice issued by the Chairman of the Municipal Council in terms of Regulation 25 made under Ordinance No. 3 of 1897.

Held, per MIDDLETON, J.:—That the Chairman should prove to the Court that he has complied with the regulation as a condition precedent to the exercise of the Court's penal coercive powers.

The report of the analyst should be put in evidence.

There must be evidence that the water sent to the analyst was in fact taken from the well in question.

The option of deciding if the well is to be filled up or disinfected rests with the proper authority, *i.e.*, the Chairman.

Further: - That a person who held a power of attorney of the real owner and who collected the rents and managed the property on which the well was situate and was for the time being acting as its beneficial owner must be deemed to be an owner for the time being within the meaning to be assigned to that word under the regulation in question.

SUPPLEMENT TO THE APPEAL COURT REPORTS.

KANAPPAN *vs.* KANAPATHY-PILLAI.

No. 11,952, C. R., BATTICALOA.

13th September, 1907.

Mortgage—Assignment—Rights of persons not parties to the original contract.

A borrowed a sum of money from B on a mortgage bond, promising to pay the amount to B, or, if B should die without receiving payment, to C. C assigned the mortgage bond to D, who sued A upon it.

Held, per MIDDLETON, J.:—That D was no more a party to the original contract than C, his assignor, was, and had therefore no right to sue.

Further:—That there is nothing to prevent a person stipulating for payment to a third party in a contract, but the person to sue on the contract must be a party to it or, in a case of decease, his legal representative.

SAMMUGAN *vs.* SINNAPPEN.

No. 1,357, D. C. KEGALLE.

20th September, 1907.

Accused—Escape from custody—Punishment—Sec. 219, *Penal Code.*

The accused escaped while he was in custody on remand, and was sentenced to six months' imprisonment, which was to run concurrently with the sentence he was undergoing. In revision,

Held, per MIDDLETON, J.:—That the proviso to sec. 219 of the Penal Code intends that an escaped prisoner should undergo punishment for his escape in addition to that imposed for the offence for which he was in custody when the escape took place.

In Ceylon, there being no express proviso on the subject, a sentence would run from the time it is pronounced unless otherwise ordered.

YAPATHAMY *vs.* KAPURU-HAMY *et al.*

No. 7,121, C. R., KEGALLE.

23rd September, 1907.

Fiscal's sale, application to set aside—Property sold for less than real value.

Per GRENIER, A. J.:—That the fact that property has been sold by the Fiscal for less than its real value is by itself no ground whatever for setting aside a sale.

9 N. L. R. pp. 150 & 336 followed.

ZOYSA *vs.* EDORIS *et al.*

No. 30,731, P. C., BALAPITIYA.

24th September, 1907.

Mischief—Maiming an animal—Ceylon Penal Code, secs. 410 *&* 412.

Where a person cut off the ears and tail of a cow and was charged with mischief under sec. 410 of the Ceylon Penal Code,

Held, per GRENIER, A.J.:—That the charge was rightly laid under that section.

Further:—That the word "maiming" as used in sec. 412 implies an injury by which the speed or endurance or use of a domestic animal has been *permanently* diminished

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MUTTIAH CHETTY *vs.* DINGIRI *et al.*

No. 3,525, C. R., KANDY.

25th September, 1907.

Kandyan Law—Marriage of woman under the age of 21 *years—Minority.*

Per HUTCHINSON, C. J., MIDDLETON, & WOOD-RENTON, JJ.:—That mar-

riage does not confer majority on a Kandyan woman under 21 years of age.

Under the Kandyan Law a minor attains majority only on reaching the age of 21 years.

Further:—That a Kandyan woman under 21 years of age who jointly with her husband makes a promissory note is not liable on the note.

Uyandena Ukku v. *Yatawila Arumedureya* (146, D. C., Kurnegalle, S. C. Min. June 22, 1898) Modder, pp. 119-120, and vanderStraaten p. 251 followed.

SHANKS *vs.* ARUNACHALAM.

No. 3,899, C. R., COLOMBO.

26th September, 1907.

Brute animal—Injury—Liability of owner.

Per GRENIER, A. J.:—That the general rule of Roman Dutch Law is that the owner of a brute animal which has injured another person is liable for such injury, but the degree of liability varies according to the nature and habits of the animal and the circumstances under which the injuries were inflicted.

Folkard v. *Anderson*, Ram. (1860-1862) p. 68 followed.

SUPRAMANIAM CHETTY *vs.* KIDNASWAMY CHETTY.

No. 5,236, D. C., JAFFNA.

2nd October, 1907.

Summary procedure—Leave to appear and defend—Civil Procedure Code, chap. 53.

Per HUTCHINSON, C. J., & MIDDLETON, J.:—That under chap. 53 of the Civil Procedure Code when a defendant swears to facts which if true constitute a good defence, he should be allowed to defend unconditionality, unless there is something on the face of the proceedings which leads the Court to doubt the *bona fides* of the defence.

There are only two cases in which the Court can order the defendant, as a condition of being allowed to defend, to bring the money into Court—(1) when the defence set up is bad in law, (2) when the defence set up is good in law; but the Court has reasonable doubt, *i.e.*, a doubt for which reasons can be given as to the *bona fides* of the defence.

Per MIDDLETON, J.:—That the judge should state the grounds for the reasonable doubt he feels in order that the Supreme Court may be in a position to judge of their adequacy at once.

If he does not do so, unless they are apparent to the Appeal Court, his order will have to be reversed.

Annamaly vs. *Allie* (2 N. L. R. 251) and *Meyappa Chetty* v. *Chettambalam* (2 Br. 394) followed.

DISAN *vs.* BALAHAMY *et al.*

No. 3,856, D. C., MATARA.

3rd October, 1907.

Divorce, action for—Connivance—Damages.

Per HUTCHINSON, C. J., & MIDDLETON, J.:—That where the Court finds there has been connivance on the part of the plaintiff in an action for divorce it has no power to award damages.

In the matter of the Estate of IRAMUPILLAI.

No. 1,808, D. C., JAFFNA.

7th October, 1907.

Wilt—Proof of due execution.

Per MIDDLETON, J., & GRENIER, A. J.:—That the due execution of a document purporting to be a will of a deceased person should be proved although it is admitted that the handwriting and signature on the document was the deceased's.

SUPPLEMENT TO THE APPEAL COURT REPORTS.

FONSEKA *vs.* WILKIE *et al.*

No. 4,591, C. R., COLOMBO.

4th October, 1907.

Master and servant—Detention of register—Liability of Registrar—One month's notice before action—Sec. 461 of the Civil Procedure Code.

A servant sued his employer and the Registrar of Servants for the return of the plaintiff's register, and for damages for its detention.

Held, per HUTCHINSON, C. J.:—That as the Registrar acted in good faith in his official capacity in retaining the register he could claim a month's notice before an action was brought against him in terms of sec. 461 of the Civil Procedure Code.

Also:—That as the plaintiff in this action had sued in another action and recovered Rs. 15, a month's wages, in lieu of notice, he cannot also be entitled to damages for the detention of his book during eleven days of the period for which the employer has paid his wages.

BALAPPU *vs.* PERERA.

No. 28,840, P. C., MATARA.

10th October, 1907.

Criminal trespass—Mischief—Bona fide *claim.*

Per MIDDLETON, J.:—That where a purchaser of property acting *bona fide* cuts down some trees in the property purchased, he cannot be convicted of criminal trespass or mischief.

To constitute the offence of mischief it must be proved that the person charged with the offence had the intention to cause wrongful loss or damage to any person.

CORNELIS *vs.* DHARMAWARDENE.

No. 9,070, C. R., RATNAPURA.

11th October, 1907.

Deed of gift—Acceptance by uncle in favour of a minor.

Per MIDDLETON, J.:—That the acceptance of a deed of gift made by a father in favour of his minor child by an uncle of the minor on behalf of the minor is not a valid acceptance as not having been an acceptance of a legal or conventional guardian.

Fernando v. *Cannangara* (3 N. L. R. 6) and *Wellappu* v. *Mudalihamy* (6. N. L. R. 233) followed.

ABILINU *vs.* FERNANDO *et al.*

No. 8,149. P. C., NEGOMBO.

17th October, 1907.

Slaughtering stolen animal- Jurisdiction of Police Court.

Where the Magistrate found that two of the accused commited the offence of stealing the animal and all three committed the offence of slaughtering it,

Held, per HUTCHINSON, C. J.:—That in accordance with the case of *Baiya* v. *Nikulas* (1 Appeal Court Reports p. 49) the Police Magistrate's jurisdiction was ousted, and the case should have been dealt with as a non-summary case.

THE KING *vs.* PEDRICK *et al.*

No. 1,733, D. C. (Cr.), COLOMBO.

18th October, 1907.

Assessors, right of accused to be tried by.

Per HUTCHINSON, C. J.:—That the Legislature in sec. 400 of the Criminal Procedure Code intended to leave it to the discretion of the judge whether the trial should be before him alone or with assessors.

Applied. ARUMUGAM NAGALINGAM OF POLIKANDY *v.* ARUMUGAM THANABALASINGHAM [1953] A.C. 1

SUPPLEMENT TO THE APPEAL COURT REPORTS.

THE KING *vs.* SELLAN.

No. 1,834, D. C. (Cr.), KANDY.

25th October, 1907.

Trial, adjournment of.

Where the District Judge refused to grant an adjournment of the trial on the ground that the accused's plea had been taken,

Held, per HUTCHINSON, C. J.:—That there is nothing to prevent a judge granting an adjournment at any time during the trial of a case.

KANAGASABAI *vs.* MURUGAN.

No. 13,223, P. C., POINT PEDRO.

31st October, 1907.

Possessing and selling toddy—By whom complaint can be made—Ordinance No. 10 of 1844, secs. 41, 42 & 46.

Per HUTCHINSON, C. J.:—That a complaint on a charge of possessing and selling toddy without a license in breach of secs. 41, 42 and 46 of Ordinance No. 10 of 1844 might be made by any person.

CARPEN CHETTY *vs.* CASSIM *et al.*

No. 2,716, D. C., KURUNEGALLE.

6th November, 1907.

Bill of costs—Claim for concurrence—Sec. 352, Civil Procedure Code.

The claim in this case was for upwards of Rs. 5,000. The plaintiff obtained judgment, and Rs. 600 was brought into Court as proceeds of sale. The respondent, an execution-creditor of the same defendant in another action, came into this case and claimed a *pro rata* share in the Rs. 600 under sec. 352 of the Civil Procedure Code. The application was allowed with costs. The bill was taxed under class v. although the *pro rata* share of the respondent amounted only to Rs. 76·64.

Held, per HUTCHINSON, C. J., & WENDT, J.:—That the bill of costs should have been taxed in the class i. as the amount of respondent's share was less than Rs. 100.

1 N. L. R. p. 128 followed.

Also held:—That a claim to a share *pro rata* in a fund in Court would constitute an action within the meaning of the scale of costs, and that the subject matter of the claim is not the whole fund, but that which the claimant contends is his *pro rata* share.

ANTHONI MUTTU *vs.* SAMUEL.

No. 9,876, P. C., BADULLA.

7th November, 1907.

Mischief—Maiming—Penal Code, sec. 412.

Per WENDT, J.:—That the cutting of one of the teats of a cow is not maiming within the meaning of sec. 412 of the Penal Code.

JINADASA *et al. vs.* GUNERATNE.

No. 14,538, C. R., NEGOMBO.

7th November, 1907.

Account stated—What constitutes.

Per HUTCHINSON, C.J.:—That, where there were mutual accounts between parties, a statement signed by one of the parties subsequent to an oral agreement in which he ackowledged his indebtedness is an account stated.

SUPPLEMENT TO THE APPEAL COURT REPORTS.

SAMARAKONE *vs.* DEUTROM.

No. 4,505, C. R., COLOMBO.

7th November, 1907.

Master and servant—Liability of master for servant's negligence—Ordinary scope of employment.

Where a carter acted contrary to the express instructions of his master, but the master accepted the benefit of the irregularity committed, and the carter while so employed damaged a rickshaw,

Held, per WOOD-RENTON, J.:—That the servant was acting within the ordinary scope of his employment, and the master was liable for damages caused by the servant.

WIJESINGHE *vs.* BAWA.

No. 4,742, C. R. (Cr.), ANURADHAPURA.

8th November, 1907.

Contempt of Court—Affidavit before summons.

Where a plaintiff in a case took out a summons against the defendant to shew cause why he should not be committed for contempt of Court for breach of an injunction, and the parties appeared in Court,

Held, per HUTCHINSON, C.J.:—That the want of an affidavit by the plaintiff before the issue of summons was not a ground for dismissing the charges.

JAYAWARDENE *et al. vs.* ATAPATTU *et al.*

No. 4,744, C. R., COLOMBO.

8th November, 1907.

Partition—Interlocutory decree—Effect—Sec. 9 of Ordinance No. 10 of 1863.

Obiter, per WENDT, J.:—That a partition decree although only an interlocutory decree under sec. 9 of the Partition Ordinance, and therefore not conclusive as against the whole world, is yet conclusive against the parties to it so long as it stood unreversed.

MARIKAR *vs.* MACHCHIA.

No. 163, D. C., PUTTALAM.

12th November, 1907.

Contempt of Court—failure to file deeds—secs. 334 & 718, Civil Procedure Code.

A person was required to file certain deeds in Court on a certain day and failed to do so, but did so later. In the meantime summons was issued on him, under sec. 718 of the Civil Procedure Code, ordering him to shew cause why he should not be punished for contempt of Court in having failed to file the deeds,

Held, per HUTCHINSON, C. J., & WENDT, J.:—That it was not an offence under sec. 718, but that proceedings might have been taken under sec. 334, and that even then it ought to have been done on the application of the judgment-creditor, who is defined by sec. 217 to be the party in whose favour the order is made.

PERERA *vs.* FERNANDO.

No. 27,150, P. C., CHILAW.

20th November, 1907.

Theft—Cattle—"Soon after"—Sec. 114 of Evidence Ordinance.

Per WENDT, J.:—That the lapse of one year after loss and previous to discovery in the case of alleged theft of cattle cannot said to he "soon after" within the meaning of sec. 114 of the Evidence Ordinance.

SUPPLEMENT TO THE APPEAL COURT REPORTS.

THE KING *vs.* LAVANA MARIKAR.

No. 1,761, D. C. (Cr.), COLOMBO.

21st November, 1907.

Cheating—Mortgagor not disclosing prior encumbrance—Ceylon Penal Code, sec. 400.

Per MIDDLETON, J.:—That a mortgagor of property who suppressed the fact that the property had been seized in execution of a writ and induced his mortgagor to advance money on the mortgage was guilty of the offence of cheating.

PERERA *vs.* ALWIS *et al.*

No. 16,947, D. C., KANDY.

21st November, 1907.

Champerty—assignment of rights—agreement.

Per HUTCHINSON, C.J., & WENDT, J.:—That the consideration for an agreement which is champertous is unlawful, and cannot be enforced.

An assignment of one's rights, although it is in its nature champertous and made for an illegal or immoral consideration, is not void, although under certain circumstances it might be set aside.

NUGU *vs.* SLEMAN *et al.*

No. 4,819, C. R., ANURADHAPURA.

6th December, 1907.

Absence of parties—Procedure—Ordinance No. 12 *of* 1895, *sec.* 8(4).

On the date fixed for trial the plaintiff was absent, but was represented by proctor. The 1st defendant was absent and not represented, and the 2nd defendant, who was also absent, was represented by his proctor.

Held, per MIDDLETON, J.:—That a dismssal of the action under sub-sec. 4 of sec. 8 of Ordinance No. 12 of 1895 was bad.

PUNCHIRALA *vs.* PUNCHIRALA.

No. 3,988, C. R., KANDY.

6th December, 1907.

Fraudulent alienation—Intention

Held, per HUTCHINSON, C.J.:—That fraudulent intention cannot be inferred from the mere fact of a transfer of some of his property by the judgment-debtor to his brother immediately after issue of writ of execution. It is necessary to prove circumstances from which it may be fairly inferred that the debtor by the transfer left himself without means to pay the judgment debt and that the transferee was aware of that and knew that the object of the transfer was to defeat the judgement creditor.

GURUSWAMY PILLAI *vs.* PALANIAPPA *et al.*

WIGGIN, petitioner-appellant,

No. 6,358, C. R., HATTON.

20th December 1907.

Prohibitory notice—Claim by party noticed—Secs. 229 *&* 230, *Civil Procedure Code.*

The appellant, an estate superintendent, was served with a prohibitory notice under sec. 229(a) of the Civil Procedure Code, at the instance of a judgment-creditor of the 1st defendant, a kangany in his employ; the appellant appeared under sec. 230 of the Code, and set up a defence that the 1st defendant was in debt to the estate and that by custom he was entitled to appropriate the wages due to the kangany in liquidation of that debt. The Commissioner ordered attachment of the wages due to the kangany.

Held, per WOOD-RENTON, J.:—That sec. 229 taken in conjunction with sec. 230 provides for the inclusion of debts due to the judgment-debtor as to whose existence there is no dispute. These sections are confined to cases in which the party noticed would have had no defence if he had beed sued by his own creditor, the judgment-debtor, and that where the debtor of the judgment-debtor could set up a claim of set off against his own immediate creditor he is not subject to the summary provisions of those sections.