COURT OF APPEAL CASES

OF CEYLON:

BEING

Reports of Cases decided by the Supreme Court of Ceylon in its Original and Appellate Jurisdiction, and sitting as a Colonial Court of Admiralty and by His Majesty's Privy Council on Appeal from Ceylon.

EDITED BY

A. St. V. JAYEWARDENE,

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SUPREME COURT.

Vol. III. Part XII.

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PRINTERS:
THE CEYLONESE UNION Co., Ltd.
COLOMBO.

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PART III.

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——:o:——

PERERA *v.* DE SILVA.

No. 4708 D. C. Chilaw

Present: **Wood Renton A. C. J. & Ennis J.**

16th June, 1913.

Fidei Commissum—Jus Accrescendi—Ordinance No. 21 of 1844, Section 20.

Simon Moraes and his wife Justina Perera executed a last will dated 7th July, 1894, which contained the following clause:— "We do hereby give and bequeath to Lucia Perera (1st defendant,) Ana Perera (2nd defendant) and Maria Perera of Colombo (sisters of the testatrix) one just half of our property whatsoever belonging to us and the other one half to Philippa Moraes and Helena Moraes (sisters of the testator) who shall after our death hold and possess the same without mortgaging, selling, granting or otherwise alienating the same or any part thereof but shall only enjoy the rents and profits thereof and after their deaths the said share shall devolve on their lawful issue without any restriction whatsoever."

Maria Perera died without issue leaving a last will by which she appointed her husband (3rd defendant) her executor.

It was common ground that the will of Simon Perera created a *Fidei-Commissum*-and the question was whether upon the death of Maria Perera without issue her share passed to her executor or under the *Jus accrescendi* devolved on her co-devisees.

Held, that, as the intention of the testators was not to preserve the property intact but to divide it equally between the two groups, the sisters of the husband and the sisters of the wife surviving at the death of the testator, on the death of Maria without issue her share in the property was freed from the *Fidei-Commissum*, and the *Jus accrescendi* did not apply.

Per Wood Renton A. C. J. I think the language of the will itself excludes the *Jus accrescendi*. But, apart from that, there would be a serious question whether Section 20 of Ordinance 21 of 1844 which does not seem to have been considered by the Privy Council in *Tillekeratne v. Abeyesekera*[1] does not abolish that right as regards every will made after its enactment the dispositions of which do not expressly or, at least, by necessary implication recognise it.

Tillekeratne v. Abeyesekera[1] commented on.

This is an appeal from the following judgment of the District Judge of Chilaw *(T. R. E. Loftus, Esq.)*

This is an action under the provisions of the Partition Ordinance for the sale of an allotment of land with the buildings standing thereon.

There is a residental bungalow on the land which is now fast falling into ruins owing to the unwillingness of the shareholders to contribute towards its repairs, hence the present application.

The land and the buildings thereon belonged to Simon Moraes and his wife, Justina.

They executed a joint last will—vide P3 which is a copy. By it they conveyed one half of all their estates to Phillipa and Helena—the sisters of Simon Moraes; and the other half to Lucia, Ana and Maria—the sisters of Justina.

Phillipa died. Her five children sold and conveyed ¼ of the entire premises to plaintiff.

All parties are agreed that the will creates a *Fidei Commissum* in regard to this property.

6th Defendant relying on a decision reported in *6, Leader Law Reports Part VI. Page 58* contends that an action under the provisions of the Partition Ordinance is not maintainable, Lucia, Ana and Helena being yet alive. I do not think that the decision in question goes quite so far as that.

Phillipa is dead. Under the terms of the will her children take her share as a free inheritance. They are entitled to avail themselves of the provisions of the Partition Ordinance.

The dispute in the case is between 1st defendant and 3rd Defendant. 1st defendant contends that the moiety conveyed to Justina's 3 sisters was burdened *with one single Fidei-commissum and that Maria having died without issue her share devolved on Ana and herself.*

1. 2 N. L. R. 313.

The 3rd defendant (Maria's husband) claims 1/6 share of the premises by his wife's last will.

He contends that the moiety is burdened with 3 *Fidei Commissa*, and that Maria having died leaving no issue the *Fidei Commissum* in respect of her share lapsed and that she was consequently entitled to deal with the share by last will.

I have carefully considered the arguments of Counsel and the authorities cited. I am strongly of opinion that the present case is distinguishable from *Tilleheratne v. Abeyesekera* reported in *2 N. L. R. page 313* though 1st defendant claims that the language used by the testators in the present case is almost identical with that used in *Tilleheratne v. Abeyesekera*.

It seems to me that in all cases like the present it is of paramont importance to ascertain the intention of the testators.

In the cases relied upon by the 1st defendant it is more than abundantly clear that the intention of the testator was to preserve the property burdened with the *Fidei-Commissum* in the family for as long a period as possible.

In the present case the testators clearly intended that the lawful issue of the institutes should take the property as "a free inheritance."

The will contains no words which indicates that the testators wished that event deferred, or that the surviving institutes should take by substitution.

It is significant that of the 5 institutes only one claims this right of "accretion."

If 1st Defendant's contention is sound, then Plaintiff himself has no title, for Helena would be entitled to the possession of a moiety of the premises. But 1st defendant says that it is not her business to oppose Plaintiff's application on that ground.

Let decree be entered ordering a sale of the premises allotting shares as follows :—

Plaintiff	$\frac{1}{4}$
1st Defendant	$\frac{1}{6}$
3rd Defendant	$\frac{1}{6}$
4th Defendant	$\frac{1}{4}$

Ana's $\frac{1}{6}$ share of the proceeds of the sale will be deposited and 6th Defendant will be allowed the interest on it. If Ana dies leaving Elaris as her only lawful issue, then 6th Defendant can draw the sum so deposited.

The 3rd defendant will get the costs of contention. Other costs will be *pro rata*.

Perera v. de Silva.

Joseph Grenier K. C. (with *H. A. Jayewardene* and *De Zoysa*) for the 1st defendant appellant.—It is clear from the will that the testators created a *fidei-commissum* as to each moiety of the property; one moiety being given to Lucia, Ana and Maria and the other to Philippa and Helena. The moiety given to Lucia, Ana and Maria was thus constituted a joint and single *fidei-commissum*. Therefore, on Maria's death issueless, her share did not pass under her will but the whole moiety still remained to the remaining sisters and their issue See *Tillekeratne v. Abeyesekere*; *Vansanden v. Mack*;[2] *Jayewardene v. Jayewardene*.[3]

The argument in the lower Court on behalf of the 3rd defendant is not in point. *Jus accrescendi* has a bearing only in cases where, for instance, one of two joint legatees dies before the testator or (in the case of a *fidei-commissum*) where one Fidei-Commissary dies before the event happens on which the property is to go over. This has nothing to do with the present question as was explained in *Tillekeratne v. Silva*.[4] Even if the argument in question is valid, Counsel for the 3rd defendant admitted that if the parties were joined *verbis et re* the contention on behalf of the 1st defendant would be right. It is clear that they were, in fact, joined *verbis* as well as *re*, for the three sisters were mentioned in the group or class, and one moiety was given to them together.

H. J. C. Pereira (with *F. H. B. Koch* and *Canekeratne*) for the 3rd defendant-respondent.—The language of the will clearly shows that the intention of the testators was to create 3 separate *fidei-commissa* in respect of the half-share given to Lucia, Ana and Maria. If it were otherwise, it would inevitably follow that the last survivor of the three institutes and her children would become entitled to the

1. *2 N. L. R. 313.*
2. *1 N. L. R. 311.*
3. *8 N. L. R. 283.*
4. *10 N. L. R. 214.*

whole half-share to the exclusion of the children of the other two institutes. This could not have been intended as the will says that the property is to devolve on the lawful issue of the institutes "without any restriction whatever."

The law of *Jus accrescendi* does not apply in Ceylon now. It has been abolished by § 20 of Ordinance 21 of 1844. This section has not been considered in the case of *Tillekeratne v. Abeyesekera.*[1] § 7 of ordinance No. 21 of 1844 on which the judgment proceeds had been repealed long previous to that case. There was no appearance on behalf of the respondent in the above case at the hearing before the Privy Council. At any rate the law of *Jus accrescendi* does not apply to *fiduciarii.* Once the *fiduciarii* enter on the inheritance, a separation of interests takes place, and the *Jus accrescendi* becomes excluded (See *Morice's English and Roman-Dutch Law p. 304).* If there is no *Jus accrescendi*, then the simple rule of fidei-commission applies and my client becomes the absolute owner.

Joseph Grenier K. C. in reply.—On the death of Maria if her executor were to be entitled to her share, the intention of the testator would be defeated. The will shows that the intention was to impose a single *fidei-commissum.* [*Wood-Renton A. C. J.* What would be the position, if Maria left issue?] Then their interests would have been deferred till the death of the other two devisees. [*Ennis J.* On the death of the other two, how should the children of the three institutes share the property?] They will share the property equally.

c. a. v.

Ennis J. This was a partition action regarding the estate formerly belonging to Simon Mories and his wife and bequeathed by them in a joint will, one half to Lucia, Ana and Maria Perera and one half to Phillippa and Helena Morais. After their death "the said shares" were to devolve "on their lawful issue without any restriction whatever."

1. *2 N. L. R. 313.*

Perera v. de Silva.

Ennis J.

Maria Perera died without issue and the District Court has allowed $\frac{1}{6}$ share of the estate to her husband Louis de Silva.

The appeal has been presented by Lucia Perera on the ground that the interests of Maria Perera accrued to herself and Ana Perera on the death of Maria Perera.

The evidence shows that the intention of the will was to divide the property equally between the sisters of the husband on the one part and the sisters of his wife on the other, and the District Judge has found that it was the intention of the testators that the lawful issue of the institutes should take the property as a "free inheritance."

It has been argued for the appellant that as the form of disposition was not $\frac{1}{3}$ of a half to the 3 institutes jointly there was a right of survivorship.

The case of *Tillekeratne v. Abeysekera*[1] was the principal case relied upon in support of the argument. That case however does not appear to me to establish more than the principle that there is a right of accrual in a case where one of the institutes dies before the testator i. e. before the estate has vested in the institutes. In this case the 3 institutes entered into possession of the $\frac{1}{2}$ share left to them and it has to be considered whether the rule of *Jus accrescendi* still applied.

Section 20 of Ordinance 21 of 1844 was held in *Vansandan v. Mack*[2] to be suspended where the intention of the testator was to preserve the estate intact in the family.

In the present case the District Judge has found that this was not the intention of the testators but that it was their intention that the issue of the institutes should take the property as a "free inheritance."

1. 1 N. L. R. 311. 2. 2 N. L. R. 313

Perera v. de Silva

Wood Renton, A. C. J.

In the words of the will the property was to devolve on the lawful issue of the institutes "without any restriction whatever." If the rule of *Jus accrescendi* were to apply, to preserve the property intact, the property would devolve only on the children of the last surviving institute. This would be a restriction on the devolution of the property to the issue of the institutes who died first. I am therefore of opinion that the finding of the learned District Judge as to the intention of the testators was right; that the intention of the testators was not to preserve the property intact, but to divide the property equally between the 2 groups, the sisters of the husband and the sisters of the wife surviving at the death of the testators; and, that on the death of Maria without issue her share in the property was freed from the *fidei-commissum.*

I would dismiss the appeal with costs.

Wood Renton A. C. J.—I agree. The testator and testatrix clearly intended that the lawful issue of each institute, as well as the institutes themselves, should be benefited by the will. Neither expressly, as in *Tillekeratne v. Abeysekera*[1], nor by necessary implication, (*Vansandan v. Mack*[2]), does the will indicate that, on the death of one institute, the survivors are to take by substitution. The construction placed by the learned District Judge upon the will is therefore justified both by the intention of the testator and testatrix and by the language which they have used. It is also a construction the practical application of which presents no difficulty. The interpretation, on the other hand, which the appellant asks us to adopt compels us either to read the will as if it took account only of the lawful issue of the last surviving institute, or to add to it a clause which would do equal violence to its language, provided that, on the death of the last surviving institute, the lawful issue, then surviving, of all three institutes should

1. *2 N. L. R. 313.* 2. *1 N. L. R. 311.*

Perera v. de Silva

Wood Renton, A. C. J.

succeed. The appellants counsel seemed to favour this latter alternative. But the will throws no light on the question whether, if it were adopted, the succession would be by representation or *per capita*. To construe the will in either of the senses which the appellant's position involves would be to make a new will for the parties rather than to interpret their existing one.

I think that the language of the will itself excludes the *Jus accrescendi*. But apart from that, there would be a serious question whether § 20 of Ordinance No. 21 of 1844, which does not seem to have been considered by the Privy Council in *Tillekeratne v. Abeyesekera*[1] does not abolish that right as regards every will, made after its enactment, the dispositions of which do not expressly or at least by necessary implication recognise it.

The appeal must be dismissed with costs.

Appeal dismissed.

Proctor for appellant—*T. M. Fernando.*

Proctor for respondent—*C. V. M. Panditharekera.*

——:o: ——

TENNEKOON *v.* PERIS

No. 2072, D. C. Ratnapura.

Present: **Pereira & de Sampayo J. J.**

5th June, 1913.

Co-owners—one co-owner gemming on the whole land—action by person claiming to be co-owner for declaration of title and injunction—whether injunction should be allowed pending trial of action.

The plaintiffs asserting title to a half share of a field complained that the 1st defendant who claimed title under the other defendants who were entitled to the other half share of the land, were carrying on gemming operations on the land and appropriating the gems found therein and prayed for a declaration of title, possession, damages and an injunction,

Tennekoon v. Peris

de Sampayo J.

Held, considering the rights of co-owners as explained in *Silva Appuhamy v. Adria*[1] and also the difficulty in establishing the quantity and value of the gems that may be found and removed, the plaintiffs were entitled to an injunction pending the final determination of the rights of the parties.

This is an appeal from an order of the District Judge of Ratnapura (*Allan Beven Esq*:), dissolving an injunction. The facts appear in the judgment of de Sampayo J.

E. G. P. Jayetileke for the plaintiffs-appellants.—There is sufficient evidence on record to show that the appellants are co-owners of the field in question. According to our law one co-owner of a piece of ground having gems or minerals under it has no right to excavate and carry away what is found otherwise than with the consent of the other co-owners (see *Silva Appuhamy v. Adria*[1]). The property in question has hitherto been treated as a field and not as a gemming land and therefore it cannot be contended that the principle laid down in *Siyadoris v. Hendrick*[2] and *Silva v. Silva*[3] would apply. The defendants are clearly acting in excess of their co-proprietory rights and should be restrained by injunction pending the final determination of this action.

H. A. Jayewardene for the 1st defendant-respondent.

c. a. v.

de Sampayo J.

The plaintiffs asserted title to an undivided half share of a certain field by right of purchase and complained that the 1st defendant, claiming title under the other defendants, who, according to the plaintiffs, are co-owners with them, was disputing the plaintiffs rights and was carrying on gemming operations on the land and appropriating the gems found therein, and they prayed for declaration of title and possession and damages and for an injunction. On the

1. *2 S. C. C. 166.*
2. *6 N. L. R. 125.*
3. *6 N. L. R. 275.*

Tennekoon v. Peris

de Sampayo J.

application of the plaintiffs, the court issued an interim injunction. Subsequently the 1st defendant moved upon petition and affidavit that the injunction be dissolved. The present appeal is taken from an order dissolving the injunction. The plaintiffs brought this action within four days of their purchase of the share of land, while the 1st defendant has been gemming under some of the other defendants ever since July 1911. The District Judge was of opinion that the inducement for the plaintiffs to buy this share and to come into court was the recent discovery by the 1st defendant of a good deposit of gems in the land, and that they could not be allowed to stop operations which their vendors had acquiesced in for eighteen months. But considering the rights of co-owners, as explained *in Silva Appuhamy v. Adria*[1] , and also the difficulty in establishing the quantity and value of the gems that may be found and removed, I think it is proper to stop further operations until the final determination of the rights of the parties.

The order appealed from is set aside and the interim injunction is ordered to be issued.

The 1st defendant will pay the costs of the plaintiffs in both courts.

Pereira J.—I agree

Set aside.

Proctor for appellants—*D. E. Jayetilleke.*

Proctor for 1st defendant-respondent—*N. E. Dharmaratne.*

1. 2 S. C. C. 166.

——:o:——

MOHAMMADO *v.* RAWTHER

No. 29763, C. R. Colombo.

Present: **Pereira J.**

2nd June, 1913.

Promissory note—position of signature—mark on the stamp affixed to the top right hand corner of the note—cancellation of stamp.

When a promissory note was signed with what purported to be a mark made by the defendant on a stamp affixed at the top right hand corner of the note with the defendant's name in full written across the stamp,

Held, the note was not duly signed by the defendant.

Semble, Looked at in the light of the stamp Ordinance (Sect 11) which applies to the case it would appear that the signature was intended for the cancellation of the stamp and nothing more.

Semble, Had the stamp been at the foot of the document the single act of signing across it may be tantamount to the execution of the document and the cancellation of the stamp.

H. A. Jayawardene (with *F. H. B. Koch,*) for the appellant.—The mark on the stamp affixed to the right hand corner of the stamp is not a sufficient signature. *(Maythin v. Davith Sinno.*[1] *)* Section 11 of the stamp Ordinance requires the stamp to be cancelled before the note is signed. Here the mark on the stamp, if it was actually made, amounts only to a cancellation, and the mere cancellation of the stamp is not sufficient. There must be a separate signature also after the cancellation. A drawer's signature is essential for the validity of a bill *(Byles on Bills, p. 110.)* *Caton v. Caton* [2], on which the Commissioner relies, is in my favour. In that case it was held that the signature should be so introduced as to govern or authenticate every material and operative part of the instrument. Here the mark on the stamp does not govern the whole instrument.

Counsel also argued the case on the facts.

1. *(1907) 4 Bal 141.*
2. *(1867) L. R. 2 Eng. and Ir. Cases. 127.*

Moham-madu v. Rawther

Pereira J.

A. St. V. Jayewardene, for the respondent.—It is true that the signature of the maker is usually subscribed on the right hand corner but it is sufficient if written in any other part. *(Byles on Bills, p. 110.)* Where the maker of a promissory note wrote it in his own hand it was held sufficient if his name occurred in any part of it as "I, A. B, promise to pay etc." *(Taylor v. Dobbins.*[1] *)* [*Pereira J.* But according to the stamp Ordinance the cancellation must be before the signature.] § 11 of the Ordinance was never given a construction like this and was never rigidly observed. *Maythin v. Davith Sinno* [2] has been explained away in *Domingu Appuhamy v. Epetagedera Vidane.* [3]

c. a. v.

Pereira J. The 1st question in this case is whether the promissory note sued upon has been duly executed by the defendant. The note has not been signed at the foot of it, but there is what purports to be a mark made by the defendant on a stamp affixed at the top right hand corner of the note with the defendant's name in full written across the stamp. Now, if the decision in the case of *Maythin v. Davith Singho*[2] is to be followed, clearly the note has not been duly signed. The Bills of Exchange Act 1882 does not require a promissory note to be signed at any particular place on the paper on which it is written. All that it requires is that the note should be signed by the maker. In the same way the Statute of Frauds which requires certain documents to be signed by the party executing them does not enact that the signature should be placed on any particular part of the document; but it was held in *Caton v. Caton* [4] that the signature should be so placed as to govern or authenticate every material and operative part of the instrument. The signature on the promissory note sued upon can hardly be said to be so placed. The signature does not appear

1. *(1720) 1 Strange 399.* 2. *(1907) 4 Bal. 141.*
3. *(1899) 1 Tamb. 7.* 4 *(1867) L.R. Eng. & Ir. Ap. Cas. 127.*

Moham-madu v. Rawther

Pereira J.

to have reference to any part of the writing on the paper. It occurs at an unusual place, and there is no indication by means of a connection with brackets enclosing the writing or some such device that it is intended to govern the writing. On the other hand looked at in the light of the stamp Ordinance of 1890 which applies to the case, it would appear that the signature was intended for the cancellation of the stamp and nothing more. Under the stamp Ordinance [Section 11] it is the duty of every person signing as party any instrument required by the Ordinance to be stamped to see that the stamp affixed thereon is distinctly cancelled before he signs the instrument. Of course, cancellation of the stamp after the instrument is signed by the party executing it does not render the cancellation any the less effectual [See Section 8]; but the duty is cast upon the party signing an instrument to see that the stamp is cancelled before he signs the document. That being so, the mark on the stamp in this case may well be deemed to be the preliminary act of cancelling the stamp. Had the stamp been at the foot of the document the single act of signing across it may be tantamount to the execution of the document and the cancellation of the stamp. But that can hardly be said to be the effect of the cancellation of the stamp in the present case.

I am, moreover, not inclined to think that the plaintiff has proved that the defendant placed the mark on the stamp. The witness Sinnatamby does not support the plaintiff and the note has not been identified by the witness Abdula. On the whole, the balance of testimony appears to be on the side of the defendant. I set aside the judgment, and dismiss the plaintiff's claim with costs.

Set aside.

Proctor for appellant— *Prins and Swan.*

Proctor for respondent—*J. P. Rodrigo.*

SILVA *v.* SILVA.

No. 6194 C. R. Kalutara.

Present; **Lascelles C. J.**

6th March 1913.

Prescription—deed of sale by wife without husband's authority, when set aside—action for refund of consideration—when accrues.

Where money has been paid as consideration for an invalid deed of sale under which the purchaser has obtained possession and where steps are taken to have the deed set aside and the purchaser ejected, the purchaser is entitled to claim the re-payment of the purchase money and prescription will begin to run against him from the time when such steps are taken and not from the date when the consideration was paid.

Marthelis Appu v. Jayewardene[1] distinguished.

The facts appear as follows in the judgment of Lascelles C. J:—

This appeal raises a question with regard to the law of prescription under the following circumstances.

In 1902, one Dosanhamy, who was the wife, married in community, of the 1st plaintiff and the mother of the 2nd and 3rd plaintiffs, conveyed her interest in a certain land to the defendant. Dosanhamy's interest in the land is alleged by the defendant to have been sold to him to provide the means for the maintenance of Dosanhamy and her children.

The claim in the present action is to eject the defendant from this land; and in the course of the trial it was admitted that this claim must succeed inasmuch as the 1st plaintifff. Dosanhamy's husband, was not a party to the deed transferring the property to the defendant. The dispute is with regard to the defendant's claim in re-convention for Rs. 120, the consideration for the sale, which sum the defendant states was utilised for the plaintiff's benefit.

1. *(1908) 11 N. L. R. 272*

Silva v. Silva

The plaintiffs contend that this claim is prescribed and the learned commissioner has upheld this contention. The defendant appealed.

A. St. V. Jayewardene, for the defendant-appellant.—The defendant's claim to have the money returned is not prescribed. The action may be instituted within 3 years after the cause of action arose. In this case the cause of action arose when the deed of sale in favour of the defendant was set aside. Until then the defendant had no grievance because he was in possession. The principle here contended for was recognised in *Cowper v. Godmond*,[1] where the defendant had granted a life-annuity to two persons and the plaintiffs were the executors of the estate of the surviving grantee. Six years later the defendant had the annuity declared void on account of a defect in the memorial of the annuity. Two years after the plaintiff sued to recover the balance of the consideration money paid for the annuity. The defendant pleaded that the claim was barred but it was held that the claim was maintainable as the cause of action arose not when the consideration for the annuity was paid but when the annuity was avoided. Similarly, in this case, the cause of action arose not when the money was paid but when the plaintiffs had the deed of sale set aside.

E. W. Jayewardene, for the plaintiffs-respondents.—The point is concluded by the decision in *Marthelis Appu v. Jayewardene*[2] where it was held that in respect of a claim to recover money paid on an informal agreement to convey land of which possession had been given to the vendee, prescription commenced to run from the date of payment of the money and not from the date when the vendee was dispossessed. The English decision cited does not apply as there the annuity could not have been declared void except at the option of the person pleading prescription, but in the

1. *9 Bing 741.* 2. *(1908) 11* N. *L. R. 272.*

Silva v. Silva

Lascelles C. J.

present case the deed of sale was not valid at all as it was executed by a married woman without her husband's consent.

A. St. V. Jayewardene in reply. *Marthelis Appu v. Jayewardene* [1] has often been questioned. Even if considered an authority, it can be distinguished as there the agreement to convey was oral and there was no agreement which had to be set aside, before the plaintiff could claim his money.

c. a. v.

Lascelles, C. J. (after stating the facts as above continued thus;—)

The crucial question is with regard to the point of time at which the cause of action arose. The plaintiffs' case, as presented to us on appeal, is that the cause of action arose in 1902 when the defendant's deed was executed. The defendant's case is that he had a cause of action for the refund of the purchase money when the plaintiffs took steps to eject him from his share in the land.

The defendant's counsel referred me to *Cowper v. Godmond* [2]. In that case the defendant, had granted a life-annuity to two persons and the plaintiffs were the executors of the estate of the surviving grantee. Six years later the defendant succeeded in setting aside the annuity on account of a defect in the memorial of the annuity. Two years after that the plaintiffs sued to recover the balance of the consideration money paid for the annuity. The question then arose whether the claim was barred by the statute of limitations. The point on which the decision turned was whether the cause of action arose when the consideration for the annuity was paid or when the defendant avoided the annuity. The Court of Common Pleas held for reasons which appear to me quite applicable to the present case that the cause of action arose only when the annuity was avoided.

1 (1908) 11 N. L. R. 272. 2. 9 Bing. 748.

Tindal C. J. observed that if the decision were otherwise the grantor of a defective annuity might in every case defraud the annuitant by paying the annuity for six years, and then having set aside the securities, by pleading the statute of limitations.

Park J. held that the grantee could not have sued until the grantor had set aside the annuity and until he could, the cause of action was not complete. Alderson J., in language which seems to me particularly apposite to the present case, observed "it may be conceded that the consideration money "was money had and received by the grantor at the time of "payment; but it was not had and received by the grantor, "to the use of the grantee, until the grantor elected to treat "the annuity as void." This reasoning appears to me to be precisely applicable to the circumstances of the present case. It is obvious that if the cause of action is held to have accrued at the date of the deed a door would be opened wide for fraud. The grantor of a non-notarial conveyance would only have to wait for three years to enable him to avoid the conveyance without being made responsible for the refund of the purchase money. Further it did not lie with the defendant to set aside the deed which he had presumably accepted in the belief that it was valid; he was in possession; he had got what he bargained for; and it was only when the plaintiffs took steps to eject him that he had any ground of complaint or cause of action against the plaintiffs. In my opinion it is quite clear that the cause of action arose only when the plaintiffs began to disturb the defendant in his possession and that the defendants claim in reconvention is not prescribed.

Counsel for the plaintiff-respondent pressed me with the decision in *Marthelis Appu v. Jayawardene* [1] which it was contended was conclusive of the present case. This is not a proper occasion to consider, whether in the light of the English authority to which I have referred, this decision would be followed by a Court which had jurisdiction to re-

1. (1908) 11 N. L. R. 272.

Silva v. Silva

Lascelles C. J.

view the decision. It is enough to point out the material difference which exists between the facts of the two cases. In *Marthelis Appu v. Jayawardene*[1] the plaintiff took action to enforce a verbal agreement by the 1st defendant to sell him a piece of land for Rs. 800; he averred that he had paid Rs. 720 of this sum and claimed that the 1st defendant should be called on to execute a transfer and in the alternative to refund the Rs. 720. The decision was based on the ground that the cause of action arose when the money could have been recovered i. e. immediately on payment. However that may have been in that case, it cannot be contended in the present case that the defendant had a cause of action immediately on the execution of the transfer; at a time when he had been placed in possession of the land and had apparently got all that he had bargained for.

For the above reasons I hold that the defendant's claim for a refund of the consideration paid for the land is not prescribed. The judgment is set aside and the case remitted to the Commissioner for adjudication on the footing that the defendant's claim is not prescribed. With regard to costs the defendant-appellant is entitled to the costs of the appeal. The order made by the Commissioner as to the costs of the trial is set aside and at the conclusion of the trial the Commissioner will make such order as regards the costs of the trial as he may think just.

Case remitted.

Proctor for appellant.—*W. D. Martin.*

Proctor for respondent.—*A. de Abrew.*

1. *(1908.) 11 N. L. R. 272.*

GOONERATNE *v.* FERNANDO *et al.*

No. 3254 D. C. Kurunegalle.

Present: **Lascelles C J. & Pereira J.**

Action for declaration of title—ouster—defendant acquiring title after the institution of the action—title in a third party at the time of the institution—Jus tertii—how Crown land can be alienated.

In an action for declaration of title to land a party defendant is not entitled to rely on a deed obtained after the date of the institution of the action, in support of a prayer for the dismissal of the plaintiff's action, on the ground of superior title, nor is he entitled to set up the title of a third party as against the plaintiff's claim.

Silva v. Silva,[1] *Ponnamma v. Weerasooriya*,[2] and *Silva v. Nona Hamine*[3] held not in point as the documents the effect of which has been considered in these are Fiscal's conveyances which confer title that relate back to the actual sales in execution. A formal Grant under the public seal of the Colony which is the only means by which the Governor is empowered to alienate land belonging to the Crown has not that effect.

Silva v. Fernando[4] followed.

Per Pereira J. The defendants cannot succeed in their prayer for a dismissal of the plaintiff' claim unless they show that they did not oust the plaintiff or they are in a position to justify the ouster by proof that at the date of the ouster they had a superior title or were acting under the authority of somebody having a superior title. The mere fact that some third person had a title superior to that of the plaintiff is no justification at all for the ouster by the defendants. So that neither the fact that at the date of ouster pleaded, the Crown had title nor the fact that since the commencement of the action the defendants have acquired title is relevant on the question whether, the ouster was justified.

The plaintiffs alleging ouster by the defendants sued them on the 11th September, 1907, for a declaration of title and ejectment. The defendants set up title in themselves to the lands in dispute. On the 30th September, 1902, they were allowed to amend their answer by averring therein that the lands in claim "were the property of the Crown...... ....and that the defendants purchased the same from the Crown"; and on the 31st January, 1913, they were allowed to further amend their answer by adding the words, "and have obtained Crown grants Nos. 4785 & 4786 both dated 4th January 1913."

1. *2 C. A. C. 88.*
2. *1 S. C. D. 67.*
3. *(1907) 10 N. L. R. 44.*
4. *(1912) 15 N. L. R. 499,*

Gooneratne v. Fernando et al.

At the trial the following issues were framed among others, viz.

(3) Can the defendants set up under the Crown a title quired by them after the institution of the action?

(4) Was the land in dispute the property of the Crown?

(5) Did the Crown convey it to the defendants?

(6) Are the lands in dispute identical with the land conveyed by the Crown to the defendants?

The plaintiff objected to these issues and the District Judge overruled his objection. The plaintiff appealed.

F. M. de Saram for the appellant.—The order allowing the issues is wrong. The rights of the parties must be determined as at the date of the action (see *Silva v. Fernando*;[1] *Silva v. Nona Hamine*;[2] *Ponnamma v. Weerasuriya*).[3] This principle applies to a party defendant also, except in a partition action. The plaintiff and the defendants claim the land through Hetu Etana and Dingiri Etana and the defendant's plea of title from the Crown is inconsistent with the admitted ownership of the land.

F. de Zoysa, for the defendants-respondents.—The principle enunciated in the cases cited by counsel for the appellant does not apply to the case of a party defendant (see *Silva v. Silva*).[4] The defendants do not pray for a declaration of title but merely for a dismissal of the plaintiff's action and therefore they are entitled to rely on the Crown Grant although it has been issued *pendente lite.* There was no objection taken to the amendment of the answer and to the inclusion of the claim under the Crown Grant and the plaintiff must be considered to have acquiesced in it. There can be no objection to the defendant's claiming under two different sets of parties. The action is an action for the land and the defendants are bound to put forward every claim which they have, otherwise they will be barred (see § *207 Civil Procedure Code*).

1. (1912) 15 N. L. R. 499
2. (1907) 10 N. L. R. 44
3. 1 S. C. D. 67
4. 2 C. A. C. 88

Gooneratne v. Fernando *et al.*

Pereira J.

F. M. de Saram in reply. The case of *Silva v. Silva* [1] does not apply to the present case inasmuch as the document, the effect of which was considered in that case, was a Fiscal's conveyance. The title conferred by a Fiscal's conveyance relates back to the actual date of the sale in execution. A Crown Grant has not that effect. There can be no question of acquiescence because the plaintiff objected to the amendment.

c. a. v.

Pereira J.

In this action which was instituted on the 19th September, 1907, the plaintiff claimed certain allotments of land, and complaining of an ouster by the defendants on the 26th February, 1906, he prayed for a declaration title, ejectment of the defendant and damages. The defendants by their answer claimed title in themselves to the allotments of land in dispute on certain old deeds. On the 13th September 1912, the defendants were allowed to amend their answer by averring therein that the lands in claim were the property of the Crown and that the Crown advertised the same for sale in the Government Gazette of October 28th 1910, and the defendants purchased the same from the Crown, and paid the Crown the purchase amount for the same ; and on the 31st January, 1913, they were allowed to amend further their answer by adding the words—"and have obtained Crown Grants Nos. 4785 add 4786, both dated the 4th January 1913." On those averments the District Judge framed four issues which are classified in the proceedings as the 3rd, 4th, 5th, and 6th issues respectively, and they are as follows—(3) Can the defendants set up a title acquired by them after the institution of this action ? (4) Was the land in dispute the property of the Crown ? (5) Did the Crown convey it to the defendants ? and (6) Are the lands in dispute or any of them identical with the land conveyed by the Crown to the defendants ? The present appeal is from an order of the District Judge overruling the plaintiff's objection

1. *2 C. A. C. 88*

Gooneratne v. Fernando et al.

Pereira J.

to these issues. Clearly these issues do not arise in this action. Before proceeding further I should like to observe that, at the argument of the appeal, I was under the impression that the defendants, in addition to praying for a dismissal of the plaintiff's claim, had prayed for a declaration of claim in themselves.

If they had done so, they would, with reference to that prayer, be in no better position than the plaintiff with reference to his prayer in his plaint for a declaration of title and as has been recently held by the Privy Council in the case of *Silva v. Fernando*[1] in an action *rem vindicare*, the plaintiff cannot succeed on the strength of a title acquired after the commencement of the action, though possibly, (I may add) when a plaintiff, having title at the commencement of the suit, loses it during its pogress the defendant is entitled to be absolved. (see *Voet 6-1-4*). However, as observed already, the defendants contented themselves with praying for a dismissal of the plaintiff's claim. There is, in fact, another prayer, namely, for compensation for improvements which need not be noticed in connection with this appeal. Now, the defendants cannot succeed in their prayer for the dismissal of the plaintiff's claim unless they show that they did not oust the plaintiff or they are in a position to justify the ouster by proof, that at the date of the ouster they had a superior title or were acting under the authority of somebody having a superior title. The mere fact that some third person had a title superior to that of the plaintiff is no justification at all of the ouster by the defendant. So that neither the fact that at the date of ouster pleaded, the Crown had title to the property in claim nor the fact that, since the commencement of the action the defendants have acquired title, is relevant on the question whether the ouster was justified.

In the course of the argument in appeal the case of *Silva v. Silva*[2] was cited to us behalf of the respondents and

1. (1912) 15 N. L. R. 499. *2. 2 C. A. C. 88.*

the cases of *Ponnamma v. Weerasuriya* [1] and *Silva v. Nona Hamine* [2] were cited on behalf of the appellant; but the documents of which the effect has been considered in these cases are Fiscal's conveyances which confer title that relate back to the actual sales in execution. A formal Grant under the public sale of the Colony which is the only means by which the Governor is empowered to alienate land belonging to the Crown has not that effect.

For the reasons given above I would allow the appeal with costs.

Lascelles C. J.—I agree

Appeal allowed.

Proctor for appellant—*C. P. Markus.*

Proctor for respondents—*E. G. Goonewardene.*

——:o:——

PATHURUPILLAI *v.* KANDAPPEN *et al.*

No. 15605 C. R. Batticaloa.

Present: **Pereira J.**

12th May 1913.

Writ re-issue of—no fresh seizure—death of judgment-debtor before seizure—failure to substitute heirs—sale invalid—Civil Procedure Code No. 2 of 1889, § 224, 225, 341, 344.

There must be a fresh seizure in the case of a re-issue of writ to justify a sale thereunder.

Semble, the re-issue of a writ after the death of a judgment-debtor and without substitution of his representatives is illegal.

Omer v. Fernando [3] followed.

This was an action on a mortgage bond. Decree was entered against the defendants and writ was issued on the 1st June 1911, returnable on the 1st December 1911. The

1. *1 S. C. D. 67.* 2. *(1907) 10 N. L. R. 44.*
3. *(1913) 2. C. A. C. 129.*

Pathurupillai v. Kandappen et al.

Pereira J.

properties in question were seized in July 1911. In the month of October 1911 the 1st defendant died but no steps were taken to substitute his heirs as defendants. The writ was returned to court and was issued for the second time in January 1911 without notice to the heirs. In June 1911 the lands were sold and purchased by one Sathasivam who only paid ¼ of the purchase but failed to pay the balance ¾ ths. Thereupon a writ was issued in August 1911 for the third time and the properties were re-sold in October 1912. There was no seizure under the last writ. The 2nd defendant moved that the sale be set aside on the grounds that (1) there was no valid seizure at the time of the sale (2) that the 1st defendant's representatives were not substituted on the record as defendants. The learned Commissioner of Requests (*T. W. Roberts Esq:*) disallowed the application and against this order the 2nd defendant appealed.

Balasingam for the appellant.—The sale is bad for two reasons. There should have been a new seizure every time the writ was re-issued. This was not done and therefore when the property was sold, there was no seizure upon it. The seizure under the first issue of writ was withdrawn immediately the writ was returned to Court. The sale is therefore bad. Secondly, at the time when writ was issued in August 1912 the 1st defendant was dead and his heirs should have been substituted as defendants, before the writ was re-issued (see § *341 of the Civil Procedure Code* also *Omer v. Fernando*[1] ; *Sheo Pasad v. Hira Lar.*[2]) This not having been done the writ must be considered to be illegal and the sale null and void.

c. a. v.

Pereira J. In this case application was made by the appellant to cancel a sale in execution of her property, not on the ground as the District Judge appears to have understood, of irregularity in the conducting of the sale,

1. *(1913) 2. C. A. C. 129.* 2. *I. L. R. 12 All. 441.*

Pathurupillai v. Kandappen *et al.*

Pereira J.

but on the ground of illegality in the procedure adopted. The application, I take it, was made under § 344 of the Civil Procedure Code. The question involved is whether a seizure of land on a writ of execution can be availed of for the purposes of the sale of the same land on the same writ when since the seizure it has been re-issued after the return to the Court. Now, it is clear that our Civil Procedure Code makes no provision whatever for the re-issue of a writ or indeed of any other process. Application for execution is made under § 224 and in making this application it is provided that the applicant should state the result of previous applications, if any, made for execution, and the amount of previous levies, if any, clearly indicating that the application for execution is to be made as provided for by § 224, not only where a writ is applied for in the first instance but, when a writ has once been issued and the amount of the judgment partially recovered. But, where the application under § 224 is allowed there is no provision for the re-issue of an old writ, but the provision is for the issue of a writ in form No. 43 (see § 225, paragraph 3). The Legislature, without proper appreciation apparently, of the fact that there is no provision in the code for the re-issue of writs, and that, therefore, each time that executio n is allowed the necessary stamp duty should be paid by the applicant by duly stamping each writ taken out, and that there was hence no necessity for safe-guarding the revenue in the matter of the re-issue of writs, provided in the Stamp Ordinance of 1890 that no writ should be re-issued without, as the provision has been construed by Wendt J in the case of *Palaniappa v. Samsudeen,*[1] payment afresh of the stamp duty required for a new writ. The same mistake has unfortunately been repeated in the Stamp ordinance of 1909; and while Layard C. J. was of opinion in the case already cited (*Palaniappa v. Samsudeen*) that a writ once returned to court could not not be re-issued except in the circumstances mentioned in the Stamp Ordinance, I take it that in the case of *Muttapa Chetty v. Fernando*[2] the Judges

1. 8. N. L. R. 325. *2. 10. N. L. R. 180.*

A. S. P. Matara v. Gunesekere.

constituting the court were of opinion that a writ might in other circumstances as well be re-issued provided the stamp duty was paid afresh; but I understand them to mean that the re-issue of writ was, in any case, to have the same effect as the issue of a fresh writ. In view of the provisions of the Civil Procedure Code which allow no re-issue of writs, there can be no doubt that, that must be so. The only extension of those provisions resulting trom the judgments in the case of *Muttapa v. Fernando*[1] is that the process may differ in form, but its effect is left untouched. That being so, there must be a fresh seizure in case of the re-issue of a writ to justify a sale there-under. In view, therefore, of § 341 of the Civil Procedure Code and the judgment of this Court in *Omer v. Fernando*,[2] I allow the appeal with costs.

Appeal allowed.

Proctor for appellant—*J. A. Kadiramer*

——:o:——

ASSISTANT SUPERINTENDENT OF POLICE, MATARA *v.* GUNESEKERE

No. 4637, P. C. Matara.

Present: **Wood Renton, J.**

11th April, 1913.

Confession made to police officer at departmental inquiry—inadmissible when person making it is subsequently charged—giving false information to public officer—whether informant should be allowed to bring criminal case before proceedings are taken against him—Evidence ordinance No. 14 of 1895, § 17—Penal code No. 2 of 1883 § 180.

The accused presented a petition to the Assistant Superintendent of Police, charging one of his subordinates a Station House Officer with having obtained an illegal gratification. The Assistant Superintendent, thereupon, held a departmental inquiry at wbich the accused admitted his guilt and begged for pardon.

Thereafter the accused was charged in the Police Court with having given false information to a public officer under § 180 of the Ceylon Penal Code.

1. 10 N. L. R. 180. 2. C. A. C. 129.

A. S. P. Matara v. Gunesekere.

Held that the statements made by the accused to the Police Officer at the departmental inquiry, admitting his guilt and asking for pardon were not admissible in evidence.

Regina v. Andris[1] and *Nugohamy v. Pabilis Perera*[2] followed.

Where an accused gives false information to a Public Officer it is not necessary that he should be given an opportunity of bringing a criminal case against the person informed against before he is prosecuted under § 180 of the Penal Code.

Empress v. Jamni[3] and *Kindersley v. David* [4] distinguished.

In this case the accused gave a petition to the Assistant Superintendent of Police at Matara charging the Station House Officer of Hakmana with having obtained an illegal gratification from him. On the receipt of the petition the Assistant Superintendent of Police requested the accused to appear before him at a departmental inquiry into the allegations in the petition. The accused appeared and begged for pardon. After inquiry the Assistant Superintendent of Police found the charges to be groundless and charged the accused in the Police Court of Matara with having given false information to a public servant with intent to cause the public servant to use his lawful power to the injury of another person, an offence punishable under § 180 of the Ceylon Penal Code. In the course of his evidence the Assistant Superintendent of Police stated that at the inquiry the accused, when called upon to substantiate the allegations in his petition, begged for pardon and admitted his guilt; he also stated that he examined the witnesses whom the accused had named and found that they did not bear out his statements. These witnesses were not called at the trial in the Police Court.

One of the witnesses at the trial characterised the accused as a "habitual petitioner" and as having the reputation of being a village proctor. The accused was convicted by the Police Magistrate and sentenced to 6 months rigorous imprisonment.

1. *2 Tamb. 31.*
2. *7 Tamb. 25.*
3. *(1883) 1. L. R. 5 All 387.*
4. *(1908) 11. N. L. R. 371.*

A. S. P. Matara v. Gunesekere

Wood Renton, J.

The accused appealed.

A. St. V. Jayewardene for the appellant.—The proceedings are wholly irregular. A good portion of the evidence recorded is inadmissible. The Assistant Superintendent of Police in his evidence says that the accused admitted his guilt at the departmental inquiry and asked for pardon. This is a confession to a police officer and is not admissible. (*Regina v. Andris*[1] ; *Nugohamy v. Pabilis Perera*[2] .)Evidence to the effect that the accused is a habitual petitioner and is a village proctor being evidence of bad character has been wrongly admitted. The proceedings against the appellant are premature. He should be given an opportunity of making good his accusation against the Station House Officer in a Court of law before he is proceeded against under § 180. (*Kindersley v. David*[3] following *Empress v. Jamni.*[4])

Garvin A. S. G. for respondent.—It is submitted that even apart from the evidence objected to, there is evidence enough to support the conviction. The case of *Empress v. Jamni*[4] does not apply here. In that case the accused not merely complained to the Police but instituted a criminal case also. It is therefore but reasonable that no proceedings should be taken against her before her criminal case was disposed of.

c. a. v.

Wood Renton J.—The learned Police Magistrate has written a very careful and forcible judgment in this case. But there is so much inadmissible evidence on the record that, as I stated at the close of the argument, I have come to the conclusion that there ought to be a new trial before another Judge. The case is a serious one, and, if it is proved,

1. *(1900) 2. Tamb 31.*
2. *(1908) 7. Tamb 25,*
3. *11 N. L. R. 371.*
4. *(1883) I. L. R. 5. All 387.*

A. S. P. Matara v. Gunesekere

Wood Renton, J.

the appellant deserves the punishment which he has received. But the very seriousness of the charge makes it incumbent upon us to see that no evidence has been admitted which could have really prejudiced the appellant's case. We find the Assistant Superintendent of Police repeating in his evidence at the trial statements made to him at his departmental inquiry by persons who were not called as witnesses before the Police Magistrate. He tells the Court that the appellant on his appearance before him admitted his guilt and asked for pardon—a statement clearly inadmissible in view of the provisions of § 17 of the Evidence Ordinance according to its interpretation in such cases, as *Reg. v. Andris*[1] and *Nugohamy v. Pabilis Perera*[2] —and the Police Magistrate has received evidence to the effect that the appellant is a "habitual petitioner" and has the reputation of being a village proctor.

Two of the points urged in support of the appeal are clearly untenable. The evidence given by the Assistant Superintendent of Police as to his powers of punishment over subordinate officers is sufficient, as Mr. A. St. Valentine Jayawardene, the appellant's counsel, admitted, to make him a "public officer" within the meaning of § 180 of the Penal Code, and I am not prepared to hold, on the authority of *Kindersley v. David*,[3] that proceedings could not be taken against the appellant under § 180 until he had been required to institute a criminal prosecution against the Station House Officer under § 211. The case of *Empress v. Jamni*,[4] on which Grenier J. relied, in *Kindersley v. David*,[3] is, I venture to think, distinguishable. In that case, the accused not merely complained to the Police, but instituted a criminal case against a person whom she falsely charged. It was reasonable, therefore, for the Court to hold that she should not be prosecuted under § 182 of the Indian Penal Code till the criminal charge had been disposed of. I do not think that the *ratio decidendi* of *Empress v. Jamni*[4] applies in

1. (1900) 2 Tamb. 31.
2. (1908) 7 Tamb. 25.
3. (1908) 11 N. L. R. 371.
4. (1883) I. L. R. 5 All 387.

Samitchy Appu v. Pieris.

a case like the present where the appellant contented himself with petitioning for a departmental inquiry.

Apart, however, from these points of law, the conviction is unsafe in view of the inadmissible evidence that has been received into the case. I set aside the conviction and sentence and send the case back for a new trial before another Judge.

Set aside and sent back.

Proctor for appellant.—*Allan de Zilva.*

———:o:———

FULL BENCH

SAMITCHY APPU *v.* PIERIS.

No. 21328 D. C. Kandy.

Present: **Lascelles C. J., Wood Renton & Pereira J. J.**

19th March 1913.

Res judicata—identity of form and subject matter not essential—no appeal from order under § 232 C. P. C.—English Law of res judicata—judgment of consent, effect of—Civil Procedure Code § § 34, 207, 232, 241, 252.

The plaintiff obtained judgment against the defendant and seized money due to him in the hands of the P. C. M. O. who sent a sum of Rs. 570-05, to the Court in obedience to the writ. A claim was preferred to the said sum by the appellant under a deed by which the defendant had assigned to the appellant his rights under the contract with the P. C. M. O. On the day of inquiry the plaintiff consented to the claim being upheld and the seizure being released.

On a subsequent date the P. C. M. O. remitted to the Court a further sum of Rs. 553-38 that became due to the defendant in the case. The appellant claimed it once more under his assignment. The plaintiff alleged, however, that he had consented to the claim being upheld in ignorance of the fact that the assignment in favour of the appellant was invalid inasmuch as it was made in breach of an express prohibition contained in the contract itself. The appellant contended that the matter was *res judicata* and could not be re-opened so long as the consent order upholding the claim was in force. The District Judge disallowed the claim overruling the plea of *res judicata* and permitted the plaintiff to draw the money. The claimant appealed.

Held, (*Lascelles C. J.* and *Wood Renton and Pereira J. J.*) that the order was not appealable and that the claimant should have brought an action under § 247 of the Civil Procedure Code to have the order on the claim set aside.

Samitchy Appu v. Pieris.

Held, further (*Lascelles C. J.* and *Wood Renton J*, *Pereira J.* dissenting) that assuming that an appeal lay, the plea of *res judicata* should be upheld.

Lascelles C. J. and *Wood Renton J.* A judgment by consent has the full effect of a *res judicata*.

In re South American and Mexican Co.[1] followed.

Sections 34, 207 and 406 of the Civil Procedure Code do not contain the whole law of *res judicata* in Ceylon.

Per Lascelles C. J.—There is no distinction between the Law of England and the Law of Ceylon on the question of *res judicata*. It is not essential that the subject-matter of the litigation should be identical with the subject-matter of the previous suit and the true test is the identity of the matter in controversy.

Per Wood Renton J.—All that is required for the purpose of constituting *res judicata* or estoppel by judgment is that the issue in question should have been distinctly raised between the same parties appearing respectively in the same capacity and should have been directly and necessarily determined in the former proceedings. It is of no consequence that the matter is not dealt with in the decree itself or that the form or subject matter of the later proceedings is different from the form or subject-matter of the earlier.

Per Pereira J. Our law as to *res judicata* is to be found in § 207 of the Civil Procedure Code. The provisions of that section may be supplemented by the English Law, but the English Law cannot be brought in to qualify those provisions so as to supersede any portion of § 207 or to restrict or expand its operation.

A decree would be *res judicata* only where another action is attempted on the same cause of action.

The facts appear as follows in the judgment of Wood Renton J:—

The facts material to this appeal are these. Thomas de Silva the appellant, the defendant Abraham Pieris, and Adrian Fonseka entered into a contract with the Principal Civil Medical Officer on 27th June, 1911, to supply to the Government Hospital at Dambulla certain articles of

1. *(1895) 1. Ch 37.*

Samitchy Appu v. Pieris.

food from 1st July, 1911, to 30th June, 1912. By deed No. 1424 of 12th September, 1911, Pieris and Fonseka assigned to the appellant their rights under the contract. This assignment was effected in breach of a condition of the contract that it should not be assigned without the previous written consent of the Principal Civil Medical Officer. The plaintiff-respondent Samitchi Appu obtained judgment against Pieris in this case and—I am taking the facts as they are now placed before us in the learned District Judge's reply, dated 27th February, to a letter sent to him by direction of my brother Pereira and myself at the close of the first argument—seized, under § 232 of the Civil Procedure Code, what was then the unascertained sum due to Pieris under the contract referred to in the hands of the Principal Civil Medical Officer. The Principal Civil Medical Officer paid the money into the Court of Requests, Colombo. The appellant claimed it by virtue of his assignment. The matter came on for investigation in the District Court of Colombo, and the respondent there formally consented to the appellant's claim being upheld. Subsequently a further sum of Rs. 553 38 cts. accrued due to Pieris under the contract with the Principal Civil Medical Officer, and the latter paid it into the District Court of Kandy. The appellant claimed it once more under his assignment, fortified as that assignment had been by the respondent's consent to the claim being upheld in the previous proceedings in the District Court of Colombo. The respondent alleged, however, that he had consented to the claim being upheld in ignorance of the fact that the assignment by Pieris and Adrian Fonseka of their rights in favour of the appellant had been made in breach of an express prohibition contained in the contract itself. The appellant contended, on the other hand, that the matter was *res judicata* and could not be re-opened so long as the consent order upholding the claim was enforced. The District Judge declined to accept this contention and allowed the motion by the respondent that the sum in question should be paid over to him. The present appeal is brought from that order.

Samitchy Appu v. Pieris.

This case was referred to a Full Bench by Wood Renton and Pereira J. J.

H. A. Jayewardene for the appellant.—The learned District Judge was wrong in overruling the plea of *res judicata.* The same matter was in dispute in the previous claim inquiry in the District Court of Colombo between the same parties. The question in issue was whether the appellant was entitled to the moneys accruing under the contract. The mere fact that the sum claimed in the previous case was not identical with the sum claimed in the present case is immaterial. The matter in controversy in both cases being identical, the plea of *res judicata* should be upheld (see *Endris v. Adrian Appu*[1] *Dingiri Menika v. Punchi Mahatmaya*[2]). A judgment by consent has the full effect of a *res judicata* between the parties *(In re South American and Mexican Company*[3] *):* and its effect, for this purpose, is not weakened by any allegation that it has been entered into under a mistake of fact. Counsel also cited *Mohamed Cassim v. Sinne Lebbe Marikar*[4] *; Palaniappa Chetty v. Saminathan Chetty*[5] .

De Zoysa (with him *A. St. V. Jayewardene*) for the respondent.—There is no appeal against the order of the District Judge. It is an order under § 245 of the Civil Procedure Code and no appeal lies from such an order, the remedy of the party aggrieved being an action under § 247. Section 232 merely indicates the mode of seizure and although the proviso to that section says that all questions of title or priority shall be determined by the Court from which execution issued, such questions must be brought before that Court for determination in the manner indicated in § § 241 *et seq* (see *Tikum Singh v. Sheo Ram Singh*[6]).

1. *(1905) 11. N. L. R. 62*
2. *(1910) 13. N. L. R. 59*
3. *(1895) 1 Ch. 37*
4. *(1909) 12 N. L. R. 184 at p. 186.*
5. *(1912) 15 N. L. R. 161.*
6. *(1895) I. L. R. 19 286.*

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The decree in the previous case is not *res judicata* inasmuch as the respondent consented to the claim being upheld in ignorance of the fact that the assignment in favour of the pellant was invalid. Besides, the subject matter of the present litigation is not identical with the subject matter of the previous proceedings. Our law as to *res judicata* is to be found in § 207 of the Civil Procedure Code and according to that section the particular subject-matter claimed must be identical (see *Palaniappa v. Gomis; 137—138 D. C. Kalutara 4709.*)

H. A. Jayewardene in reply.

c. a. v.

Lascelles C. J.

This is an appeal against an order of the District Judge of Colombo which has been referred to the collective Court on a point of law to which I will refer later. The order appealed against is dated the 25th October 1912. The facts on which it was given are set out in the affidavit of Thomas de Silva. It appears that the defendant in the action, Thomas de Silva, and one Adrian Fonseka had jointly entered into a contract dated 27th June 1911, with the Principal Civil Medical Officer to provide food for the Government Hospital at Dambulla. By deed dated 12th September 1911, two of the joint contractors namely Adrian Fonseka and the defendant assigned all their interest in the contract to the claimant Thomas de Silva.

A sum of Rs. 553.38, representing money due to the defendant under the contract, was seized in the hands of the Principal Civil Medical Officer in execution of the writ in the action. Then Thomas de Silva preferred his claim and, on 25th September 1912, moved that his claim be investigated under section 232 of the Civil Procedure Code. The appeal is from the dismissal of this claim by the District Judge on the ground that the assignment by the disfendant and Adrian Fonseka is invalid inasmuch as it was

1. 4 Bal. 21. 2. S. C. M. 25th October, 1912.

made in contravention of a clause in the contract prohibiting assignment without the previous sanction of the Principal Civil Medical Officer. The appellant urges that the validity of his claim is *res adjudicata* by reason of an order made by the District Judge of Colombo in the same action on a similar claim preferred by the claimant.

That claim was made on 2nd March, 1912. The seizure is described as having been made on the 22nd December, 1911 and the 15th February, 1912. The property seized is described as (1) "any sum of money due to the defendant as contract money or otherwise for supplying provisions to the Uda Pussellawa Government Hospital and Lady Havelock Hospital, Colombo (2) any sum of money due to the defendant on account of the contract for supplying provisions to the Government Civil Hospital at Dambulla".

It is with a sum of money seized under the latter head that we have to do. It appears from the letter of the Principal Civil Medical Officer dated 11th April, 1912 that at the date of seizure Rs. 570.05 was the only sum due to the defendant and that this sum was forwarded to the Commissioner of Requests, Colombo.

An inquiry into the claim was held by the District Judge of Colombo at the conclusion of which an order was made by consent of the parties that the claim should be upheld without costs and that the seizure should be released

The question is whether by reason of this order the claim now under consideration is *res adjudicata*. During the argument the point was raised which I understand was taken in the previous argument that an order under section 232 of the Civil Procedure Code was not appealable.

On this point we were referred to the Indian case of *Tikum Singh v. Sheo Ram Singh* [1]. This decision is not binding on us but it contains an exposition of the scope of the Indian section corresponding to our section 232, which I think should be accepted as correct. Section 232 is one of a group of sections which, under the heading "mode

1. *(1891) 19 Cal. 286.*

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of seizure" provides for the seizure of property of different categories. The first part of section 232 describes the mode of seizing property deposited in Court. Then the proviso goes on to provide that "any question of title or priority arising between the judgment-creditor and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such court".

This, I think, merely indicates the *forum* in which the inquiry is to be made, and does not mean that the procedure for the investigation of claims for this particular description of property is different from that which is prescribed for the investigation of claims in the case of all other descriptions of property when seized in execution.

The section headed "claims to property seized" (sections 241-252) relate to all descriptions of property, and orders made on the investigation of claims are final, subject to the result of an action, if any, instituted under section 247. I am, therefore, of opinion that the appeal fails on this ground and must be dismissed with costs.

The question, however, with regard to *res judicata* is important and, after the very full argument which we have heard, I am reluctant to leave it without recording the conclusion at which I have arrived.

The point may be stated thus. A claim for a certain sum, under a deed of assignment had been allowed by consent ; a claim for a further sum is now made under the same deed. The question is whether the latter claim is barred by the order in the former claim. The parties being the same in both proceedings. It was conceded that an order made by consent of parties is, for purposes of estoppel by *res judicata*, not less conclusive than an order made after a contest. It was further conceded that by the law of England and by the law of India it is not essential that the subject matter of the litigation should be identical with the subject matter of the previous proceedings and that the true test is the identity of the matter in controversy. But it is

contended that under section 207 of the Civil Procedure Code, or rather under the explanation to that section the application of the operation of the rule in Ceylon is more restricted.

The current of judicial decision in Ceylon strongly supports the view that on this point there is no distinction between the law of Ceylon and that of England. (*Endris v. Adrian Appu*[1]; *Kantaiyer v. Ramu*[2]; *Dingiri Menika v. Punchi Mahatmaya*[3]).

I see no reason for accepting the contention that the whole of our law of *res judicata* is to be found in sections 34, 207 and 406 of the Civil Procedure Code. The law of *res judicata* has its foundation in the Civil Law and was part of the common law of Ceylon long before Civil Procedure Codes were dreamt of. But even if these sections contain an exhaustive statement of the law on this point, I cannot see that there is anything in them which is inconsistent with the principles which have been followed in the English, Indian and American Courts. It is said in relation to the facts of the present case that the "cause of action" in the former proceedings was the judgment-creditor's denial of the claimant's right to a certain number of rupees, and that the "cause of action" in the present case is his denial of the claimant's right to a different sum of rupees, and that the causes of action in the two proceedings are therefore different.

The expression "cause of action" has different meanings as is shown by the not very helpful definitions in the Code. But I do not think that, when a question of *res judicata* arises, the term means merely the denial of a claim. The "action" was the claimant's claim to the money, It is surely no answer to the question "what was the 'cause' of the action?" to say "the judgment-creditor's denial of this

1. *(1905) 11. N. L. R. 62.* 2. *(1910) 13 N. L. R. 161.*

3. *(1910) 13. N. L. R. 59.*

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claim." This carries the matter no further. It merely amounts to a statement that the claim was disputed. The true "cause of action" it seems to me is the right in virtue of which this claim is made; the foundation of the claim which, in this case, is the right claimed under the assignment. This was the true cause on which the action was founded. On this construction no difficulty arises under the explanation to section 207.

Lord Watson in *Chand Kaur v. Partap Singh*[1] stated with regard to this expression:—

"The cause of action has no relation whatever to the "defence which may be set up, nor does it depend upon "the character of the relief prayed for by the plaintiff. "It refers entirely to the grounds set forth in the plaint "as the cause of action, or in other words, to the *media* upon "which the plaintiff asks the Court to arrive at a conclu-"sion in his favour."

If the term "cause of action" be understood in this sense, section 207 presents no difficulty and does not present the law of *res adjudicata* being applied in Ceylon in the same manner as in England and India. The cause of action, in my opinion, was the right which the claimant asserted in virtue of the assignment in his favour and was one and the same in both proceedings. If the order had been appealable I should have decided in favour of the appellant.

As it is I would dismiss the appeal with costs on the ground that the order is not appealable.

Wood Renton, J.—(after stating the facts as above, continued as follows:—)

The argument of the case has pursued a somewhat curious course. When it was first heard before my brother Pereira and myself, although Mr. St. Valentine Jayewardene informs us, I have no doubt correctly, that the point that the

1. *Hukm Chand on "Res Judicata" p. 11.*

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order was not appealable was taken by him, the main question pressed upon us was whether or not the District Judge was right in holding that the respondent was not estopped from disputing the appellant's title by the consent order in the claim proceedings. It was with a view to clearing the ground for a determination of that issue that we sent the case back for a statement by the District Judge as to the exact relation between the two sums of money that were in issue respectively in the proceedings in the District Court of Colombo and in the present proceedings.

At the re-argument, however, before three Judges, Mr. Zoysa brought up again the question whether or not the case is one in which an appeal would lie. He put his argument in this way § 232 of the Civil Procedure Code merely prescribes the mode of seizure in such a case as this, and although the proviso to the section says that questions of title or priority arising between the judgment-creditor and any other person in regard to property deposited in Court or seized in the hands of a public officer shall be determined by the Court from which execution issued, such questions must be brought before that Court for determination in the manner indicated in § § 241 *et seq.* This construction of § 232 is supported by the decision of the High Court of Calcutta in *Tikum Singh v. Sheo Ram Singh* [1] under the corresponding section 272 of the old Indian Code of Civil Procedure, and on full consideration I think that it is sound.

This finding is in itself sufficient to dispose of the present appeal, but as the case was sent back to the District Court of Kandy for the purpose of enabling the question of *res judicata* to be argued and that question has now been elaborately argued before us, I think that we ought to express an opinion upon it. The facts may be hypothetically put as follows. The judgment-creditor seized a sum that has accrued due to his debtor under a contract. A third party claims it as the assignee of all the debtor's rights under

1. *(1891) I. L. R. 19 Cal. 286.*

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that contract. The fact in the present case that the assignment had been executed in contravention of a provision of the contract is immaterial since the party for whose benefit that prohibition existed had not sought to take advantage of it, and it could not have the effect of avoiding the assignment in favour of third parties. The judgment-creditor consents to the claim being upheld and the money is released from seizure. A further sum of money accrues to the same debtor under the same contract later on. It is seized by the same judgment-creditor. The same claimant sets up title under the same assignment. Can the execution-creditor challenge in the subsequent proceedings the claimant's title? To this question there can be, in my opinion, only one answer: he cannot. It is clear law that a judgment by consent has the full effect of a *res judicata* between the parties *(In Re South American and Mexican Co.* [1]*)* Its effect for this purpose is not weakened by any allegation that it has been entered into under a mistake of fact. If mistake is alleged, proceedings may be taken to set the judgment aside. In the absence of such proceedings it stands. All that the law of England or of India (*Hukm Chand Res Judicata pp. 43 et seq* and see *Lemn v. Mitchell*[2]) or of Ceylon requires for the purpose of constituting *res judicata* or estoppel by judgment is that the issue in question should have been distinctly raised between the same parties appearing respectively in the same capacity and should have been directly and necessarily determined by the former proceedings. It is of no consequence that the matter is dealt with in the decree itself or that the form or the subject matter of the latter proceedings is different from the form or the subject matter of the earlier. In my judgment in *D. C. Inty. Kalutara No. 4838,*[3] I have dealt fully with the English and the local authorities on this question and have endea-

1. (1895) 1. Ch. 37' *2. (1912) App. Cas. 400.*

3. S. C. M. 17th February 1912.

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voured to show that the case of *Barrs v. Jackson* [1] as decided by Lord Lyndhurst L. C. in appeal, supports the view of the law which I have just stated. The case of *Regina v. Hutchings* [2] is no authority to the contrary. That decision is explained by the House of Lords in *Whitfield Corporation v. Cooke* [3] and offers an admirable illustration of what is meant in the law of *res judicata* by an incidental issue to the determination of which the effect of *res judicata* will not attach. The only question that the Magistrates had to determine was whether or not certain expenses amounting to £400 had, in fact, been incurred in the repair of a road and were due by an individual to the Corporation. The Magistrates went out of their way to inquire into, and to express an opinion upon, a question which they had no jurisdiction to entertain, namely whether the road in question was a public street or not. Their views of this point were properly held on appeal to relate to an incidental issue alone and not to have the effect of *res judicata* in subsequent proceedings in which the same question was raised. It is obvious, however, that totally different considerations arise where, as in *Barrs v. Jackson* [1] or in the present case, we are dealing with issues which, although they may not be directly touched upon by the decree, constitute the very ground on which a litigant claims, and on which alone he can obtain, judgment.

It is suggested that the principles of English and Indian law as to *res judicata* are excluded by § 207 of the Civil Procedure Code. I see no reason to alter the opinion which I have already expressed in various other cases that § 207 and similar sections of the Civil Procedure Code do not embody the whole law as to *res judicata* in Ceylon. But even if we are restricted to § 207 of the Code, I am quite unable to interpret the expression "cause of action" contained in the explanation to that section as being restricted to

1. *(1842-1845) 1 Y. and C. C. C. 585 and 1. Ph. 582*

2. *(1881) 6 Q. B. D. 300.* 3. *(1904) App. Cas. 31.*

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the particular subject-matter claimed. The cause of action must be held to include the denial of the right to the relief which a litigant claims and, inferentially, a denial of the title by which he claims it. To permit, in a country like this, such issues as legitimacy, descent, and title under identical deeds of transfer, or rights arising under identical written contracts, to be reagitated between the same parties appearing in the same capacity in any number of independent actions so long as the form or the subject-matter of each of these actions was different, would be to involve the work of the Courts of first instance and of the Supreme Court in almost inextricable confusion and to create most undesirable facilities for converting the administration of the law into an engine of oppression.

I would dismiss the appeal with costs.

Pereira J.

I regret that I am obliged to write this judgment while on circuit with only a few of my note books to refer to. The appeal is from an order of the District Judge disallowing a claim to a sum of Rs. 553.38 seized in execution of a writ. This sum was seized, at the instance of the plaintiff, in the hands of the Principal Civil Medical Officer as money due by him to the defendant (execution-debtor) on a contract for the supply of provisions to the Dambulla Hospital. The claimant (appellant) claimed this sum under and by virtue of an assignment (C1) whereby the defendant had assigned to him all monies then due and thereafter to become due to him from the Principal Civil Medical Officer on the contract referred to above. The District Judge disallowed the claim on the ground that the assigment was invalid inasmuch as it contravened a certain provision of the original contract. It appears from a letter written to us by the District Judge in reply to a question put to him that on a writ issued at the instance of the plaintiff by the District Court of Colombo a totally different sum of money, but a sum that had also become due on the same contract had been seized, and that the same had been claimed by the claimant

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on the same assignment (C1), and that at the inquiry before the District Court of Colombo the plaintiff in the present case had consented to the claimant's claim being upheld, and that it had accordingly been upheld.

In the present appeal, it was argued, on the one side, that the order of the District Court of Colombo was a *res adjudicata* which did not permit of the question of the validity of the assignment C1 being debated in the present case, and, on the other side, that the claimant had no right of appeal from the order in this case. On both these contentions I agree with the Counsel for the plaintiff (respondent) in the views pressed by him. The order of the District Judge must, in my opinion, be regarded as an order under § 245 of the Civil Procedure Code, and it is well established that no appeal lies from such an order, the remedy of the party aggrieved being an action under § 247 of the Code. There is, no doubt, an irregularity in the present case, namely, the claim does not appear to have been made before, and referred to Court by the Fiscal in terms of § 241. If that irregularity is to be taken serious notice of, the claimant is bound to fail on that alone in this appeal; but assuming the claim to have been duly made, the inquiry should have proceeded as an inquiry under § 242 to 245 of the Code. True, the mode of seizure in a case like the present is indicated in § 232, and the Court that has jurisdiction to make the inquiry in certain cases is also indicated in that section, but there is nothing in it to shew that the inquiry itself is not to be the usual inquiry, into a claim to property taken in execution, under § § 242 to 245. The case cited, by the respondent's counsel from the Indian Law Reports (*19 Calc. 286*) appears to be quite in point.

On the question of *res judicata* I may say that, as I have had occasion to observe in a case or two before this, omitting, as unnecessary, reference to § 41 of the Evidence Ordinance which deals with judgments of Courts in the exercise of probate and certain other special jurisdictions, the only reference in that Ordinance to the law of estoppel by judgment generally is in § 40. That section enacts that

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the existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial. This is identical with the provision of the Indian Evidence Act on the subject. The question is where "the law" referred to here as preventing "any Court from taking cognizance of a suit" is to be looked for. It is not in the Evidence Ordinance or the Indian Evidence Act. Ameer Ali and Woodroffe in their work on the law of Evidence applicable to British India says (*page 291, 1st Ed.*) that English text writers deal with the subject of *res judicata* under the head of evidence as it is a branch of the law of estoppel, but the authors of the Indian Codes have regarded it as belonging more properly to the head of Procedure; and, in India, the law referred to above as preventing a Court from taking cognizance of a suit is to be found in sufficient fulness in § 13 of the Indian Code of Civil Procedure. Apparently, the intention of the authors of our Code was exactly the same. The law referred to above is not set forth in the Evidence Ordinance. It is only to be found in § 207 of the Civil Procedure Code, and, in saying so I concur in the view taken by this Court in the case of *Palaniappa v. Gomes* [1]. There, Wendt J. said—"Our law as to *res* "*judicata* is to be found in § 207 of the Civil "Procedure Code .... The law enacted by the Indian "Civil Procedure Code is not the same .... The pro- "visions as to *res judicata* embodied in § 13 are esentially "different from our § 207." This being so, the Indian authorities cited in the course of the argument have no application at all to the question involved in the present appeal. I am prepared to concede that possibly our whole law as to *res judicata* is not to be found in § 207 of the Civil Procedure Code. It may be that, under the authority of § 100 of the Evidence Ordinance, this provision may be supplemented by the English law, but there is the authority

1. *4 Bal 21.*

of that very section of the Evidence Ordinance for saying that the English law cannot be brought in to qualify the provision of § 207 of the Civil Procedure Code, or to supersede any portion of it, or to restrict or expand its scope and operation. What § 207 of the Civil Procedure Code enacts is that, primarily, all decrees shall be final between the parties. This is the substantive enactment in the section, meaning that whatever is laid down, as held or ordered, within the four corners of a decree cannot be debated again in a subsequent action between the same parties. Then comes the explanation which says that every right of property or to relief of any kind which can be claimed or put in issue between the parties to an action upon the cause of action for which the action is brought cannot afterwards be made the subject of action between the same parties for the same cause. These concluding words are important, and they must be given a meaning, and their only meaning appears to be that as regards the incidental and collateral matters mentioned in the explanation, the decree would be *res judicata* only where another action is attempted on the same cause of action. This, I take it, is in strict accordance with what was laid down by Knight Bruce V. C. in the case of *Barrs v. Jackson* [1] where it was held that a finding of fact in a suit in the Ecclesiastical Court for a grant of letters of administration, necessary to the decision and appearing on the face of the order, was not conclusive in proceedings between the same parties in a Court of equity for distribution. The judgment in the case was, it may be mentioned, set aside in appeal, but, as observed by Lord Selborne L. C. in *The Queen v. Hutchings* [2] "on a ground not at all touching the principles contained in it." It may be that these principles were given by later judicial decisions a somewhat wider operation than was originally intended, but apparently the intention in the mind of the framer of our Civil Procedure Code was to adhere to them

1. (1842-45) 1. Y. and C. C. C. 585 and 1. Ph. 582.

2. (1881) 6. Q. B. D. 300, 304.

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as far as practicable, and, if anything, to restrict their application. Such a course may have been necessary in view of our rules of procedure and the constitution and jurisdictions of the different Courts of the Island.

In the present case the cause of action in the proceeding before the District Court of Colombo was essentially different from the cause of action in the proceeding before the District Court of Kandy. I may say that I did not understand the appellant's counsel to contend that was not so. In the former case what may be called the cause of action was the seizure by the plaintiff on a writ issued at his instance by the District Court of Colombo of a certain sum of money. This gave the right to the claimant to come to Court and make his claim. In the latter proceeding the cause of action was the seizure by the plaintiff on a writ issued at his instance by the District Court of Kandy of a certain other sum of money. True, both the sums were claimed by the defendant on the footing of one and the same document (assignment C1), but the causes of action being esentially different, while by reason of the substantive provision of § 207 of the Civil Procedure Code the order or decree in the former case was *res judicata* with reference to the particular sum of money dealt with by it, the terms of the "explanation" appended to § 207 would not permit of its being pleaded as *res judicata* in the latter case with reference to the other matters taken cognizance of by the Court in the former.

For the above reasons I would dismiss the appeal with costs.

Appeal dismissed.

Proctor for appellant—*Wilfred de Silva.*

Proctor for respondent—*Dunbar Jonklaas.*

——:o:——

THE ATTORNEY-GENERAL *v.* KALIYAMUTTU.

No. 4657 D. C. Badulla.

Present: **Wood Renton A. C. J. & Ennis J.**

1st July, 1913.

Right of appeal—orders made under Ordinance No. 12 of 1840 appealable—civil in nature—Courts Ordinance No. 2 of 1889 § § 21 & 39.

An appeal lies from an order made under § 1 of Ordinance No. 12 of 1840. Such an appeal is civil in its nature and should be prosecuted in accordance with the provisions of the Civil Procedure Code

Henry v. Aluwihare[1] followed.

The appellant was charged under § 1 of Ordinance No. 12 of 1840 with having encroached on certain Crown land. The learned District Judge ordered him to deliver over possession of the portion encroached upon to the Crown and to pay the costs of the proceedings. Against this order the present appeal was taken.

Garvin A. S. G. for the Crown took a preliminary objection.—There is no appeal from an order made under § 1 of Ordinance 12 of 1840. The only remedy open to the party aggrieved is to proceed by the ordinary course of law to recover possession of such lands, as is indicated in § 2. The Ordinance nowhere confers a right of appeal from orders made under its provisions. Even if there is a right of appeal, the procedure adopted in this case is not correct. It has been held that proceedings under Ordinance 12 of 1840 are civil in their nature. Therefore this appeal should have been prosecuted in accordance with the provisions of the Civil Procedure Code and not of the Criminal Procedure Code.

A. St. V. Jayewardene for the appellant.—It is now too late to contend that there is no appeal from an order under § 1 of Ordinance 12 of 1840. Such appeals have been allowed (See *The Queen v. Habibu Mohamado*[2] *; 1. Bel. and Vand 109*). Under the Courts Ordinance No. 1 of 1889

1. (1907) 10 N. L. R. 353. 2. Ram (1843-45) p. 129.

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which was enacted after Ordinance No. 12 of 1840, the appellant has a clear right of appeal (See § § 21 & 39). These sections were construed in this way in the case of *Henry v. Aluwihare*. No doubt, in the old cases above referred to it was held by this Court that the proceedings under § 1 of Ordinance No. 12 of 1840 are Civil in their nature, but in this case it is not open to the Crown to raise that objection inasmuch as the Crown has itself treated these proceedings as Criminal.

Wood Renton, A. C. J.—The accused appellant was charged, on an information by the Attorney General under § 1 of Ordinance 12 of 1840, with having encroached on certain Crown land. The learned District Judge has given judgment in favour of the Crown, and has ordered the appellant to deliver up possession of the land, and to pay the costs of the proceedings. He appeals against that order. The Solicitor-General takes a two-fold preliminary objection on behalf of the Crown; in the first place, that no appeal lies, and, in the second place, that, even if an appeal does lie, the proceedings under Ordinance 12 of 1840 are civil and not criminal in character, and appeals from orders made under that enactment must, therefore, be prosecuted—a course which has not been taken here—in accordance with the provisions of the Civil Procedure Code. I am clearly of opinion that a right of appeal does exist in such cases as these, although it is not expressly conferred by Ordinance 12 of 1840. The fact that § 2 of that Ordinance enables a person, against whom and order has been made under § 1, to take proceedings for the recovery of land from which he has been dispossessed in favour of the Crown, does not to my mind at all show that no right of appeal under the section should be recognised. Apart altogether from statutory provisions to which I will refer in a moment, it would be hard upon persons, in the possession of land claimed by the Crown, if they were to be held liable to be dispossessed by the summary procedure created by § 1, without any op-

(1907) 10 N. L. R. 353.

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portunity of contending in the Supreme Court that the materials necessary for the justification of an order under that section were not present. In addition to considerations of convenience, we have the facts that appeals from orders under Ordinance 12 of 1840 have been recognised in a series of cases going as far back as 1843. But the matter is, in my opinion, set at rest by the provisions of § § 21 and 39 of the Courts Ordinance, which give to the Supreme Court an appellate jurisdiction for the correction of all errors in fact or in law committed by Courts of first instance. It was held by Sir Joseph Hutchinson, C. J. in the case of *Henry v. Aluwihare*[1] that, by virtue of these sections, an appeal lies, from an order awarding damages for cattle trespass under the provisions of Ordinance No. 9 of 1876. The language of § § 21 and 39 of the Courts Ordinance, and the reasoning of the learned Chief Justice in the case of *Henry v. Aluwihare*[1] are amply sufficient to cover the case before us. I would hold that an appeal lies, and that this branch of the Solicitor-General's preliminary objection fails. In regard, however, to the second branch of that preliminary objection, I think that he is entitled to succeed to a certain extent. It has been held by decisions of the Supreme Court, sitting in its collective capacity, that proceedings under Ordinance 12 of 1840 are civil in their nature. Appeals from orders made under that section are, therefore, civil also and the present appeal should have been prosecuted in accordance with the provisions of the Civil Procedure Code. I do not think that it would be right, however, in view of the fact that there is no recent case in which this question has been expressly raised, that we should treat the portion of the preliminary objection that I am dealing with just now as altogether fatal to the appeal. I would direct that the record should be sent back to the District Court of Badulla, and that the appellant should have leave, notwithstanding lapse of time, to prosecute his appeal from the order of which he complains as a civil appeal to the Supreme Court.

1. *(1907) 10 N. L. R. 353.*

Ennis J.—I am of the same opinion, and would make the same order.

Sent back.

Proctor for appellant.—*A. P. Bartholomeusz.*

——:o:——

SILVA *v* FERNANDO

No. 9103. D. C. Negombo.

Present: **Pereira & Ennis J. J.**

27th August 1913.

Mortgage action—whether purchaser at Fiscal's sale who has not obtained Fiscal's conveyance can be joined—observations as to who may be joined.

A hypothecary action can be brought against a person, who has purchased the property mortgaged at a Fiscal's sale held in execution of a writ against the mortgagee, but who has not yet obtained a Fiscal's conveyance in his favour.

Per Pereira J.—Voet (20. 4. 2) mentions certain persons against whom the action may be brought, but the test is by no means exhaustive. The object of the action is to bind, by an order for the sale of the property for the satisfaction of the amount advanced to the debtor, all those who have or claim to have an interest in the property acquired. Of course, a person having or claiming to have no such interest may not be sued in such an action, but the question of interest is not to be too narrowly scrutinized because the defendant is in no way prejudiced by the action so long as no costs are claimed against him except in the event of an unreasonable contest by him of the plaintiff's claim.

This is an appeal from a judgment of the District Judge of Negombo *(H. E. Beven Esq.)*

H. A. Jayawardene, for plaintiff-appellant.

E. W. Jayawardene, for 2nd defendant-respondent.

Pereira J.—In this case the simple question is whether an hypothecary action can be brought against a person who has purchased the property mortgaged at a Fiscal's sale held in execution of a writ against the mortgagor, but who has not yet obtained the usual Fiscal's conveyance in his favour. An *actio hypothecaria* (also called *actio quasi Serviana*) under the Roman-Dutch Law is no more than an action whereby a creditor follows up the pledge or hypothec bound to him expressly or by implication of law, when satisfaction is not made to him by the debtor or any other party interested in the property pledged or mortgaged. *Voet* in *20. 4. 2.* mentions certain persons against whom the action may be brought, but the list is by no means exhaustive. The object of the action is to bind by an order for the sale of the property for the satisfaction the amount advanced to the debtor, all those who have or claim to have an interest in the property acquired through the debtor. Of course, a person who having or claiming to have no such interest may not be sued in such an action, but the question of interest is not to be too narrowly scrutinised, because the defendant is in no way prejudiced by the action so long as no costs are claimed against him except in the event of an unreasonable contest by him of the plaintiff's claim.

In the present case, although 2nd defendant cannot be said to have title to the property mortgaged by the first, the provisions of our Code of Civil Procedure vest him with such an interest in the property as to give the mortgagee a right to require him to shew cause, if any, why the property should not be declared bound and executable for the recovery of the debt due to him by the mortgagor. The property has been sold by the Fiscal to the 2nd defendant; the sale has been duly confirmed by the court, and the 2nd defendant may at any moment by applying and obtaining the usual Fiscal's conveyance make himself the owner of the property as from the date of the actual sale to him by the Fiscal. To say the least, it is, in such a case, in the highest degree expedient to allow the mortgagee to have the 2nd de-

fendants' objections, if any, to his prayer adjudicated upon at the earliest opportunity.

I would set aside the judgment appealed from with costs and remit the case for further proceedings

Ennis J.—I agree.

Set aside.

Proctors for appellant.—*de Zoysa and Perera.*

Proctor for respondent.—*T. K. Carron.*

——:o:——

WICKREMESEKERE *v.* WIJETUNGE *et al.*

No. 21829. D. C. Kandy.

Present: **Pereira & Ennis J. J.**

28th August 1913.

Donation—delivery of deed not necessary—when donation may be accepted—acts of acceptance—whether acceptance should be by deed.

The delivery of a deed is not essential for its validity under our law.

A donation may be accepted at any time during the life time of the donor, and, where its fulfilment is postponed until after the donor's death, it may even be accepted after the donor's death.

Wellappu v. Mudalihami[1] followed.
Silva v. Silva[2] dissented from.

The delivery of the deed of donation to the donee and the subsement sale by the donee of some of the lands gifted are both acts of acceptance of the donation.

Per Pereira J.—The acceptance of a donation of land must be notarially executed as much as the making of such a donation, and the acceptance must be by the donee himself or some person competent in law to represent the donee for the purpose of entering into contracts. But it has been held in a long series of decisions that, in the case of a donation of land, while the donor's part of the contract should be executed as required by Ordinance No 7 of 1840, the execution of the donee's part of the contract may follow the Roman-Dutch Law, in other words, that the acceptance of a gift by the donee may be effected in any one of the many ways laid down in the works on the Roman-Dutch law. The decisions, I think have led to some confusion and uncertainty in the law but I think it would be inexpedient to question their correctness at this time of day and that they should as far as practicable be followed.

1, 6 N. L. R. 233, 236. 2, 11 N. L. R. 161.

The plaintiff sued his daughter, the 1st defendant and her husband, the 2nd defendant, for a declaration of title to a land called Kirivanagodahena, for ejectment and for the cancellation of deed of gift No. 1303, dated 13th March 1869, executed by him in favour of the 1st defendant. He alleged that although the said deed of gift was signed by him it was not completed by delivery and acceptance and that all the lands donated by it were always in his possession. His grievance was that in March, 1912, the defendants forcibly took possession of Kirivanagodahena. The 1st defendant traversed the above allegations and stated that on her wedding day the plaintiff delivered over the deed to her and that she accepted and kept it in an almirah in the parental house wherefrom the plaintiff abstracted it in or about the year 1910. The learned District Judge of Kandy (*F. R Dias Esq* :) held that the said deed of gift was duly accepted by the 1st defendant and dismissed the plaintiff's action. The plaintiff appealed.

F. M. de Saram for the appellant.—The deed of donation is invalid as it was not accepted by the donee at the date of its execution. Acceptance must be present and immediate and not at some future indefinite time (*Voet 39. 5. 2., Sampayo's translation p. 6* §*3* ; *Silva v. Silva*).[1] [*Pereira J.* Should not acceptance be by deed ?] A donation of land being a contract affecting land (*Wellappu v. Mudalihamy*),[2] acceptance should be by deed. It is only when a donation is perfected by delivery that *dominion* passes (*Voet 39. 5 19.*) In this case there is no evidence of of delivery of the deed, or of possession.

J. W. de Silva for the respondent.—It is not essential nor necessary that acceptance must be present and immediate. A minor may accept a donation made to him on attaining majority (*2 Nathan p. 1024* §*1087* ; *Voet 39. 5. 13 Sampayo's translation p. 17* ; *Affefudeen v. Periyatamby* ;[3] *Tissera v. Tissera*).[4] None of the decisions say that acceptance must be by deed. [*Pereira J.*—The effect of Ordinance

1. 11 N. L. R. 161. *3. 12 N. L. R. 313.*
2. 6 N. L. R. 233, 236. *2. S. C. D. 36.*

Wickremesekere v. Wijetunge

Pereira J.

7 of 1840 does not seem to have been considered in those decisions]. In *Tillekeratne v. Tennekoon*[1] it was held that Ordinance 7 of 1834, which is substantially re-enacted in Ordinance 7 of 1840 with regard to contracts affecting land, did not require the acceptance of a donation of land to appear on the face of the deed. In this case the donee has possessed the property and, in fact, dealt with a portion of it, and it is submitted that these are sufficient tokens of acceptance (see *G. A. S. P. v. Carolis*.)[2]

F. M. de Saram in reply.

c. a. v.

Pereira J.—The main issue in this case is the 2nd, namely, whether the execution of the document dated the 13th March, 1869, purporting to be a donation by the plaintiff to the 1st defendant was completed by delivery, and whether the donation was accepted by the donee. As regards delivery of the deed, I am not prepared to say that is essential under our law. As explained by Morice in his work on English and Roman-Dutch Law (*2nd Ed., p. 83,*) while a deed, in its English meaning, acquires validity by being sealed and delivered to the party benefited by it, the deed of Roman-Dutch Law, generally called a notarial deed, required no delivery for its validity. So that, the only question involved in this case practically is whether the donation referred to above was duly accepted by the donee. I may at the very onset say that, in my own opinion, the acceptance of a donation of land must be notarially attested as much as the making of such a donation, and the acceptance must be by the donee himself or some person competent in law to represent the donee for the purpose of entering into contracts. In *Wellappu v. Mudalihami*[3] Layard C. J. citing *Voet 39. 5. 12. 13* observed—"The rule of law which requires acceptance by a competent person of a gift is based on "the principle that a donation is a contract, and there must "be two parties to every contract." *Maasdorp* in his *Institutes of Cape Law* (*Vol III. pp. 89, 92*) says :—"A donation "is an agreement whereby a person wthout being under any

1. *Ram. (1843-45) p. 155.* 2. *N. L. R. 72.*
3. *6, N. L. R. 233, 236.*

"obligation to do so, gives something to another without re-
"ceiving or stipulating anything in return . . . .
"Acceptance by the donee or by some one duly authorised
"on his behalf is an essential ingredient in the constitution
"of a valid donation, the consent of both parties being re-
quired in donation as in all other contracts." If then, donation is a contract entered into by two parties, it is essential that the execution of the contract by both the parties should be effected in the manner required by the law for the time being. Whatever form acceptance of a donation by the donee might have taken under the Roman-Dutch Law our Ordinance No. 7 of 1840 provides (§2) that a contract for the transfer of land shall be in writing and signed by the party (or parties) making the same in the presence of a licensed Notary, and two or more witnesses: and so, it is clear that a donation of land, to be valid under our law, must be executed by both the parties to the contract in the manner indicated above. But it has been held in a long series of decisions that, in the case of a donation of land, while the donor's part of the contract should be executed as reqnired by Ordinance No. 7 of 1840, the execution of the donee's part of the contrac may follow the Roman-Dutch Law, in other words, that the acceptance of a gift by the donee may be effected in any one of the many ways laid down in the works on the Roman-Dutch Law. The decisions I think, have led to some confusion and uncertainty in the law, but I think that it would be inexpedient to question their correctness at this time of day, and that they should as far as practicable be followed.

Counsel for the appellant has cited the case of *Silva v. Silva*[1] in support of his contention that even, under the Roman-Dutch Law, in the case of a donation to a minor, there should be a present acceptance of the gift by the natural or legal guardian of the minor and not an acceptance at some future indefinite time by the minor himself after he has attained majority. The substantive decision in the case

1. *11 N. L. R. 161.*

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Ennis J.

is that an uncle of a minor is not a competent party to act for him in accepting a donation, and the *dictum* relied on by the appellants counsel is no more than mere *obiter*, and I confess I have failed to find any authority in support of it. In the case cited above of *Wellappa v. Mudalihami*[1] Layard C. J. observed; "To perfect a deed of gift in favour of a "minor there must be an acceptance by some one capable of "accepting on behalf of the minor or by the minor upon "attaining the age of majority." And it is, I think, clear from what appears in *Voet 39-5-13*, *Grotius 3-2-12* and *Maasdorp's Institutes Vol. III. p. 99* that, under the Roman-Dutch Law, a donation may be accepted at any time during the lifetime of the donor, and where its "fulfilment is postponed until after the donor's death," it may even be accepted after the donor's death.

In the present case, the evidence shews that there were at least two distinct acts of acceptance by the 1st defendant of the donation in question. It appears that on the wedding day of the 1st defendant the plaintiff delivered over to her the deed of donation, and that she then accepted the same. Although, as I have observed, the delivery of the deed was not essential to complete the transaction, it has significance here as a token of acceptance of the gift. Moreover the 1st defendant sold a half of three of the lands gifted to her husband before the commencement of the present action. That also was clearly an act of acceptance of the donation. For these reasons I see no grounds for interfering with the judgment appealed from, and I would affirm it with costs.

Ennis J.—I agree. I am however not prepared without further consideration to assent to the opinion that section 2 of Ordinance No. 7 of 1840 requires both parties to sign a deed of gift.

Affirmed.

Proctor for appellant.—*C. Vanderwall.*

Proctor for respondents.—*Goonewardene and Wijegunewardene.*

1. *6 N. L. R. 233, 236.*

FERNANDO *v.* BUYZER.

No. 34370 C. R. Colombo.

Present: **Pereira J.**

16th September, 1913.

Promissory note—consideration—compounding compoundable offence.

A promissory note granted for compounding a criminal prosecution that is compoundable in law cannot be said to be a note for illegal consideration.

Saibo v. Carpen Chetty[1] followed.

This is an appeal from a judgment of the commissioner of Requests, Colombo (*P. E. Pieris Esq:*)

de Jong for the appellant.—The consideration for the note was the withdrawal of a criminal prosecution. The note cannot therefore be sued upon (see *Ismail v. Carolis Appu*).[1] [*Pereira J.* That decision applies only to the compounding of a non-compoundable case.] A promise made for the purpose of stifling any criminal prosecution is unenforceable (see *Silva v. Dias*).[2]

W. H. Perera for the respondent was not called upon.

c. a. v.

Pereira J.—In this case the question is whether a promisory note granted to the plaintiff for compounding a criminal prosecution that was compoundable in law can be said to be a note for illegal consideration. The Commissioner says that there are conflicting local authorities, and following the opinion of Middleton J. in a case reported in the *Leader Law Reports (Vol. 5 p. 117.)* he holds that the consideration is not illegal. I am quite at one with the commissioner in the decision that he has arrived at. As a general rule the proposition that it is illegal to compound a criminal charge is, no doubt, correct, and some of the locally reported cases are cases involving offences that are not compoundable in law or cases instituted before the passing of the Criminal Procedure Code whereby certain petty offences were expressly

1. *5 Leader 117.* 2. *5 Bal. 3.*

Fernando v. Buyzer

Pereira J.

made compoundable. The offence of voluntarily causing hurt, an offence punishable under § 314 of the Penal Code, with which we are now concerned, is expressly made compoundable by the Criminal Procedure Code.

"To compound a felony," says Webster, is to accept of "a consideration for forbearing to prosecute." The meanings given by Stroud in his Law Dictionary are very much to the same effect. If then a sum of money may be received for compounding a compoundable offence, I fail to see why the acceptance of a promissory note for the same purpose can be said to be illegal. No question of public policy is involved here. Considering the trifling nature of certain offences the Legislature has legalized the acceptance by the party injured of some consideration for forbearance to prosecute.

I affirm the judgment appealed from with costs.

Affirmed.

Proctor for appellant—*S. Ratnaswamy.*

Proctor for respondent.—*J. Leopold Perera.*

——:o:——

ADAKAPPA CHETTY *v.* RAMBUKPOTHA

No. 2624 D. C. Badulla.

Present: **Pereira & de Sampayo J. J.**

13th June 1913.

Judges, duty of—observations as to impropriety of allowing personal knowledge of character of litigants to interfere with judgments.

Judges should not allow opinions formed as to the character of persons who frequently appear before them as litigants, to interfere with their judgment in proceedings having no connection whatever with those in which the opinions were formed.

A. St. V. Jayewardene (with *E. G. P. Jayetileke*) for the appellant.

J. W. de Silva for the respondent.

c. a. v.

Pereira J.—The District Judge in his judgment says.—"I have had considerable experience of him (meaning the plaintiff) in this court. He has brought at least three actions before me, in every one of which I have been convinced of his dishonesty." For this and certain other reasons he proceeds to say.—"I have no hesitation at all in declaring that I consider him to be a thorough-paced rogue and swindler." These latter are, indeed, to say the least, strong words to be used against any person seeking an adjudication on rights claimed by him before a court of justice, and they are words such as, in my opinion, should not be allowed to disfigure a record unless they are wholly and solely justified by the evidence led in the particular judicial proceeding in which they are used, that is to say, by the evidence of witnesses whom the party attacked has had an opportunity of cross-examining in that proceeding. Later on in his judgment the District Judge says that he views the promissory note sued upon with grave suspicion and adds.—"This suspicion is increased to certainty by my experience of plaintiff's character and methods to which I have already referred." Objection has been taken by the appellant's

Adakappa Chetty v. Rambukpotha

de Sampayo J.

counsel that the learned judge has imported into this case opinions formed by him of his client in other proceedings and that, therefore, his client has not had the advantage of an unfettered judgment on the facts of this case. Of course it often happens that judges are led into forming strong opinions of the character of persons who frequently appear before them as litigants, but at the same time judges are, as a rule, able to resist the temptations to allow opinions so formed to interfere with their judgment in proceedings having no connection whatever with those in which the opinions were formed. In the present case, the learned District Judge has not only not been able to resist this temptation, but he has deliberately allowed his judgment to be warped by his knowledge of the plaintiff acquired by means other than the evidence led in the case. I would quash the proceedings from the commencement of the trial to judgment and remit the case to the court below for a new trial. All costs should, I think, abide the event. There is no necessity for the transfer of the case to another court as I understand that the court to which the case belongs is now presided over by another judge.

de Sampayo J.—I agree.

Proceedings quashed.

Proctors for appellant—*H. J. Pinto and*
A. C. W. Samarakoon.
Proctor for respondent.—*F. Taldena.*

——:o:——

In the Matter of the Intestate Estate of the late Viravy Thampiah.

VAIRAVY KARTHIGESU—*added respondents-appellants.*

v.

MUREGAR SELLAPPAH—*administrator-respondent.*

No. 2461. D. C. Jaffna.

Present: **Pereira & de Sampayo J. J.**

22nd September 1913.

Appealable order—inquiry into objections to items in account filed by administrator—order made with reference to some objections—adjournment of inquiry—whether appeal lies from the order already made.

The District Judge commenced an inquiry into objections taken to certain items in an account filed by the respondent as administrator and made his order with reference to some objections and adjourned the inquiry pending the filing by the administrator of a certain account necessary to enable him to adjudicate upon certain other objections.

Held, that an appeal from the decisions recorded by the District Judge on the objections already dealt with by him is premature.

de Costa v. Silva[1] followed.

The administrator filed an affidavit stating the liabilities of the estate and applied for the leave of Court to sell one of the lands mentioned in the inventory. The appellants, who are heirs of the deceased, filed a statement of objections to the said affidavit denying that most of the items disclosed therein were due from the estate and stating that the administrator had not accounted for the produce of the lands mentioned in the inventory. An inquiry was held and the learned District Judge (*M. S. Pinto Esq:*) on the 3rd July, 1913 made an order allowing certain of the items mentioned as due from the estate and declaring that the administrator is not liable to render an account of the produce of the first land mentioned in the inventory as the said land was held by the deceased merely as a trustee for one Vairavy; he adjourned the enquiry with reference to the other objections till the 17th July, 1913 so that the administrator might produce a statement showing what income had

1. *1 C. A. C. 128.*

In re Vairavy Thampiah

Pereira J.

been derived from another land. The present appeal was taken against the decisions of the District Judge on the objections dealt with by him.

E. G. P. Jayetileke for the administrator-respondent took a preliminary objection.—The appeal in this case is premature. The District Judge made no order as regards the application for leave to sell one of the lands. He expressed his decision on some of the objections and adjourned the enquiry for another date. In fact, he has not entered any appealable order as yet. His decision may pave the way for an order in the future, and until a formal order is made no appeal lies. The case of *de Costa v. Silva*[1] is on all fours.

A. St. V. Jayewardene (with *Talaivasingham*) for the appellants.—The Judge has held that one of the lands mentioned in the inventory does not form part of the estate of the deceased, and that the deed in respect of that land in favour of the deceased is a deed of trust. We are entitled to appeal against this finding. If no appeal lies at this stage, the proper course would be not to dismiss the appeal but to allow it to stand over until the District Judge gives his decision on the other objections.

Pereira J.—I do not think that this appeal should be entertained. The District Judge commenced an inquiry into objections taken to certain items in an account filed by the respondent as administrator of the estate of the deceased Vairavy Thampiah and he made his order with reference to some objections and adjourned the inquiry pending the filing by the administrator of a certain account necessary to enable the District Judge to adjudicate upon certain other objections. The appeal is from the decisions recorded by the District Judge on the objections already dealt with by him. The appeal is premature. It will be inconvenient and inexpedient to dispose of a case piecemeal in the man-

1. *C. A. C. 128.*

ner suggested by the appellant. The observations of the Chief Justice against the expediency of the appeal in the case of *de Costa v. Silva*[1] apply with great force to the present appeal. I would dismiss the appeal with costs.

de Sampayo J.—I agree.

Appeal dismissed.

Proctor for appellant—*K. Sivaprakasam.*

Proctor for respondent—*T. S. Cooke.*

——:o:——

ADAKAPPA CHETTY *v.* FERNANDO *et al.*

No. 11159 C. R. Negombo.

Present: **Ennis J.**

13th March 1913,

Application to certify payment—discretion of court—question of fact —no appeal lies without leave of court of Requests.

The question whether not an application under § 349 of the Civil Procedure Code to cause payment to be certified should be entertained or rejected being one in the discretion of the Court on the facts in each particular case, no question of law is involved and no appeal lies without the permission of the Commissioner of Requests.

Sandrasegra for the appellant
de Zoysa for the respondent.

c. a. v.

Ennis J.—This was an appeal from an order directing satisfaction of judgment to be certified and it was contended that on the authority of the case cited in (*2 Browne 269*) the application should have been refused.

Counsel for the respondents cited another case (*2 Browne 273*).

Considering both these cases I am of opinion that the question as to whether or not an application under § 349 of the Civil Procedure Code to cause judgment to be certified

1. *1 C. A. C. 128.*

should be entertained or rejected is one in the discretion of the court on the facts in each particular case.

This being so, no question of law is involved in this case and no appeal lies witout the permission of the Court of Requests. The appeal is dismissed with costs.

Appeal dismissed.

Proctor for appellant—*C. J. Edirisinhe.*

Proctor for respondent—*H. A. Jayetileke.*

——:o:——

LIVERA *v.* GONSALVES

No. 20,357 C. R. Negombo.

Present: **Wood Renton, A. C. J.**

8th August 1913.

Marriage brokerage contract—whether enforceable by action.

The plaintiff sought to recover a sum of Rs. 300 from the defendant on an agreement in writing by the latter to pay him that amount if he succeeded in bringing about a marriage between him and a certain lady who was named in the agreement with a dowry of Rs. 5000.

Held that the contract which formed the subject of the suit was a marriage brokerage contract and that an action could not be maintained upon it.

E. W. Jayewardene for the plaintiff-appellant. An action for marriage brokerage can be maintained under Roman-Dutch Law. A reward promised for the purpose of bringing about a marriage cannot be said to be founded on immoral cause or consideration (*V. d. K. 482*). In Ceylon it is quite a common custom to employ brokers for the purpose of arranging marriages and to pay them.

de Zoysa (with *E. T. de Silva*) for the defendant-respondent.—The absence of any decisions shews that the Roman-Dutch-Law on this point has not been adopted in Ceylon. According to English Law a marriage brokerage

contract is void as being contrary to public policy (*See Hermann v. Charlesworth*[1]). What is against public policy in English Law is against public policy under our law. The principle of absolute privilege in English Law of statements made by a witness in the box has been recognised by us, and there is every reason for us to adopt the English Law on this point too.

E. W. Jayawardene in reply.

c. a. v.

A. R. H. Canekeratne as *amicus curiae* referred his Lordship to *King v. Grey.*[2]

Wood Renton A. C. J.—The plaintiff in this case seeks to recover a sum of Rs. 300 from the defendant on an agreement in writing by the latter to pay him that amount if he succeeded in bringing about a marriage between him and a certain lady, who is named in the agrement, with a dowry of Rs. 5000. The plaintiff was successful in bringing about the marriage. He now seeks to recover the stipulated consideration. The learned Commissioner has dismissed the action, holding that, because the original written agreement was not properly stamped and is lost, the claim must be considered as one on an unwritten promise, and that it is now barred by prescription. I do not consider it necessary to express an opinion on this point, because I think that the appeal must fail upon another ground. The contract which forms the subject of the suit is clearly one that would be described in English law as a marriage brokerage contract, and in England no action of this kind could be successfully maintained—see the case of *Hermann v. Charlesworth*[1]. The defendant raised in his answer the plea that the action was not maintainable in Ceylon. But the Commissioner of Requests has overruled that contention on the strength of a statement by *Van der Keesel* on the authority of (*Bynkershoek Quaestiones Juris Publici*, 2 and 6) to the effect that an agreement with a matrimonial agent for the payment of a reward upon the completion of a marriage brought about by his agent may be enforced by an action

1. (1905) 1 K. B. D. 24. 2. 7 Tamb. 263. (*Law Review.*)

at law. There is no reported case in which that principle has been accepted in Ceylon, and there are *dicta* in the recent case of *Abdul Hameed v, Peer Cando*, [1] which point strongly in the contrary direction. After the conclusion of the argument my attention was called by Mr. Canekeratne as *amicus curiae*, and I am indebted to the kindness of Mr. E. W. Jayewardene for the same reference, to the case of *King v. Grey* [2] in which the whole question is discussed, and the conclusion arrived at is that such an action, as *Vanderkeessel* and *Bynkershook* contemplated, could not be maintained in the courts of Cape Colony. In view of the absence of any direct authority to the contrary here in Ceylon, of the dicta of Sir Alfred Lascelles and Sir John-Middleton in the case of *Abdul Hameed v. Peer Cando*,[1] and of the decision in *King v. Grey*[2] . I think that we cannot do better than bring the law of Ceylon into line with that of South Africa on this important question. I hold that the action is not maintainable, and the decision of the Commissioner of Requests must be affirmed with costs.

Appeal dismissed.

Proctor for appellant—*de Zoysa and Perera.*
Proctor for respondent—*de Silva and Perera.*

——:o:——

MEPI NONA *v.* SILVA.

No. 11512 D. C. Galle.

Present: **Wood Renton, A. C. J. & Pereira J.**

7th October 1913.

Costs—matrimonial actions—discretion of Court—Civil Procedure Code § 211.

Section 211 of the Civil Procedure Code gives a discretionary power to the Court in matrimonial as well as in other actions. The old rule that in an action for divorce a vinculo matrimonii the husband is, as a general rule, liable to pay his wife's costs should be kept in view by Courts of justice in the exercise of the discretion conferred by § 211 of the Civil Procedure Code.

1. *(1911.) 14 N. L. R. 91.* 2. *7 Tamb. 263. (Law Review.)*

Appuhami v, Menikahami[1] and *Silva v. Silva*[2] followed..

Arulanandan for the plaintiff-appellant.—The order condemning the wife in costs is clearly wrong. As a general rule the husband is liable to pay the wife's costs in matrimonial cases (see *Silva v.* and *Silva*;[2] *Appuhami v. Menikahami*[1]).. This rule has apparently not been brought to the notice of the Court in this particular case. Counsel also argued the case on the merits.

Gooneratne for the defendant-respondent.—The action is altogether a vexatious and frivolous one and the learned Judge has very properly exercised his discretion in condemning the plaintiff in costs. The rule referred to applies only to actions brought *bona fide* and on reasonable grounds.

Arulanandan in reply.

Wood Renton A.C.J.

Wood Renton, A. C. J.—This is an action by a wife for divorce on the ground of alleged cruelty and malicious desertion of her by her husband. The learned District Judge has dismissed the action with costs. The plaintiff appeals. The dismissal of the action is, I think, right. The evidence shows that there had been some quarrel between the plaintiff and her husband, the defendant, or perhaps only the mother and the sisters of the defendant, in regard to the wife's jewellery. The plaintiff alleges that her mother-in-law and sisters-in-law beat her, and that their conduct towards her was such that she had no alternative except to leave the house where she was then living with her husband and go back to the house of her own father. The plaintiff, however, at the time when she complained of having been assaulted, showed no marks of injury, and, although the matter was mentioned to a peace officer, she did not obtain a report nor did she go to Court to complain of the assault. It cannot have been very serious. Indeed the learned District Judge is inclined to believe that it never took place at all, and that it has been added by the plaintiff to the quarrel about the jewellery. Even if there was an assault, there is nothing to show that the defendant instigated it. He is said to have been present on the occasion when it took place,

1. *8 N. L. R. 280.* 2. *15 N. L. R. 100.*

Mepi Nona v. Silva

Wood Renton A.C.J.

but on that point there is very little corroborative evidence of the plaintiff's story. The view of the District Judge is that there had been a quarrel about the jewellery, that the plaintiff's father wished her to go and live with him, but that her husband, the defendant, naturally desired to have the society of his wife, and that he never intended to desert her at all. The latter finding is supported by proof that, after the plaintiff's confinement, the defendant visited her and registered the birth of the child. The defendant says in his evidence that he is prepared to find a house for his wife if she will come back and live with him, and that it is the influence of his father-in-law alone that prevents her from coming. In these circumstances, I entirely agree with the District Judge that no case for such a remedy as dissolution of marriage has been made out.

The only remaining question is as regards costs although the learned District Judge has given judgment in favour of the defendant with costs, he has stated no reasons in supported of this part of his order. It is settled now—see the case of *Appuhamy v. Menika Hami*[1]—that section 211 of the Civil Procedure Code gives a discretionary power to the Court in matrimonial as well as in other actions. But in that case Sir John Middleton pointed out, and there is nothing to the contrary in the language of Sir Alfred Lascelles C. J. that although this is the effect of section 211, the old rule, affirmed by my brother Pereira in a judgment, assented to by Sir Charles Layard, in *Silva v. Silva*[2] that in an action for divorce *a vinculo matrimonii*, the husband is as a general rule, liable to pay his wife's costs should be kept in view by Courts of justice in the exercise of the discretion conferred by section 211 of the Civil Procedure Code. I am by no means satisfied that the learned District Judge had his attention called to the question of costs at all or that he did not make the order under the impression that here, as elsewhere, costs follows the event. Apart from that, I do not think that, in the special circumstances of this case, there was anything so frivolous or vexatious in the conduct of the

1. 8 N. L. R. 280. 2. 15 N. L. R. 100.

wife as to deprive her of the benefit of the principle embodied in the old rule. While dismissing the appeal I would order that each side should bear its own costs of the action and of the appeal. Perhaps this order may have the effect of inducing the spouses to settle their differences and live happily together again.

Pereira J.—I agree.

Appeal dismissed; Costs divided.

Proctor for respondent—*C. E. Abeyewardene.*

——:o:——

GUNERATNE *v.* ANDRADI *et. al.*

No. 5161 D. C. Kalutara.

Present: **Wood Renton, A.C.J. & Pereira, J.**

9th October 1913.

Appeal—undertaking to abide by decision of Judge—arbitration in partition actions.

The plaintiff sued the defendants for the partition of a land. The defendants denied that the plaintiff had any interest in the eastern portion of the said land and sought to have it excluded from the partition. In the course of the trial the plaintiff's proctor gave the following undertaking viz, that he was prepared to abide by the decision of the Court on the question of the interpretation of the documents. The documents referred to were not formally put in evidence but the District Judge considered them and made his order holding that the eastern portion of the land must be excluded from the partition.

Held—that under ordinary circumstances no appeal lies from an order made in pursuance of such an undertaking as was given by the plaintiff's proctor.

Peiris v. Peiris;[1] *Babunhamy v. Andris Appu*[2] followed.

Held further, that the principle of *Mather v. Thamotherampillai*[3] does not apply to such a case as the present where the plaintiff agreed to accept the decision of the Court itself as binding, and when the matter on which the decision of the Court was to be so accepted was only the question whether on not the plaintiff had any interest in a particular portion of the land in dispute.

Mather v. Thamotharampillai[3] distinguished.

1. *(1900) 1 Br. 420.* 2. *5 Bal. 89.*
3. *(1903) 6. N. L. R. 246,*

Guneratne v. Andradi et al.

Wood Renton A.C.J.

This is an appeal from an order of the District Judge of Kalutara, *T. B.* (*Russell Esq.*)

E. G. P. Jayetileke, for the 8th added-defendant-respondent took a preliminary objection.—There is no appeal from the order of the District Judge. The plaintiff agreed to abide by the decision of the Judge on the question of the interpretation of the documents and he thereby waived his right of appeal. The learned Judge has referred to several documents in his order which were not formally tendered in evidence and which he would not have considered but for the plaintiff's undertaking. In giving his decision he was not acting judicially but was acting as a quasi-arbitrator. *Peris v. Peris*[1] *and Babunhami v. Andris Appu*[2] are in point.

A. St. V. Jayewardene for the appellant.—The Proctor had no special authority from his client to enter into such an agreement. A Proctor must have a special authority in writing otherwise the client will not be bound (see § 676 Civil Procedure Code). In the cases cited the parties themselves agreed to be bound. Moreover, this is a partition action and the Court has no power to sanction the reference of such an action to arbitration (see *Mather v. Thamotherampillai*[3]).

Batuwantudave, for the 1st defendant-respondent.

Sansoni, for the 5th and 6th defendant-respondent.

Wood Renton, A. C. J.—This is an action for partition. The question involved in the present appeal is whether or not the plaintiff had any interest in the eastern half of the land in dispute or whether that portion should be excluded from the partition altogether. When the case came on for trial, the plaintiff was called and examined in support of his case, and after the examination of another witness, the plaintiff's proctor gave the following undertaking, namely, that he was prepared to abide by the decision of the Court on the question of the interpretation of the documents. A few further questions were put to the plaintiff for the purpose of the elucidation of his title, and then the whole

1. *(1900) 1 Br. 420.* 2. *5 Bal. 89.*
3. *(1903) 6 N. L. R. 246.*

matter was left to the decision of the learned District Judge. The documents referred to were not formally put in evidence. The District Judge considered them, and then made the order appealed against, holding that the eastern portion of the land must be excluded from the partition. There can be no question but that under ordinary circumstances no appeal would lie from an order made in pursuance of such an undertaking as was given by the plaintiff's proctor in the present action—see *Peris v. Peris*,[1] *Babunhami v. Andris appu*[2] and the more recent case decided by Sir Alfred Lascelles C.J. and myself, *32 D. C. (Interlocutory) Kalutara 3902*[3]. It is argued, however, that the fact that this is a partition action makes a difference, and that the case falls within the *ratio decidendi* of the decision of Sir Charles Layard, C.J., Mr Justice Wendt. and Mr. Justice Grenier in the case of *Mather v. Thamotharam Pillai*[4]. It was held in that case that the Court has no power either to order compulsorily the reference, or by necessary implication, to sanction the reference at the instance of parties, of a partition action to arbitration. The order of reference in that case appointed the arbitrator to determine "all the said matters and differences between the parties." It was a reference of the entire subject matter of the suit. I do not think that the principle of that decision in any way applies to such a case as the present where the plaintiff agreed to accept the decision of the Court itself as binding, and where the matter on which the decision of the Court was to be so accepted was only the question whether or not the plaintiff had any interest in a particular portion of the land in dispute. I think that the preliminary objection taken by the respondent's counsel to the hearing of this appeal should be upheld, and that the appeal should be dismissed with costs.

Pereira J.—I agree

Appeal dismissed.

Proctor for appellant—*J. A. Fernando.*

Proctor for 1st deft-respondent—*R. H. Wijemanne.*

Proctor for 5th & 6th respondent—*E. S. Edirisinghe.*

Proctor for 8th added-deft. respt.—*O. G. de Alwis.*

1. *(1900) 1. Br. 420.*
2. *(1910) 5. Bal. 89.*
3. *S. C. M. 17th April, 1913.*
4. *(1903) 6. N. L. R. 246.*

GOVERNMENT AGENT, WESTERN PROVINCE *v.* HIS GRACE THE ARCHBISHOP OF COLOMBO.

No. 8905 D. C. Negombo.

Present: **Pereira & Ennis, J.J.**

29th August 1913

Land acquisition Ordinance No. 3 of 1876—issue to be tried by Court—matters to be considered in awarding compensation—§ 21 not exhaustive—proper course for assessing compensation.

The issue that has to be tried by the Court in a proceeding under the land acquisition Ordinance is what amount of compensation the defendant is entitled to receive for the portion of his land taken over by the Government.

§ 21 of the land acquisition Ordinance is not exhaustive of all the matters to be taken into consideration in awarding compensation.

When the matters mentioned in § 21 of the Ordinance do not afford a safe guide for assessing compensation for a portion of land acquired by Government the proper course would be to find the market value of the entire land and then to estimate the value of the portion of the land taken at that rate.

A. St. V. Jayawardene for appellant.—The case has proceeded on a wrong issue. The proper issue is, what is the amount of compensation that should be awarded to the defendant-appellant. The market value is only one of the matters which should be considered under § 21 in assessing compensation. But here the learned District Judge has calculated the market value of only the portion of the land taken. It is submitted that this is erroneous. In this case the market value of the portion taken cannot be said to represent the actual amount of compensation due to the appellant. The portion cut off has fallen considerably in value on account of its smallness of size and the shape given to it. The proper method of assessing compensation is to take the value of the whole land and upon that to calculate the value of the portion taken. *Government Agent Kandy v, Marikar Saibo.*[1]

1. *6 S. C. D. 36.*

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Pereira J.

Garvin A.S.G. for respondent.—The portion of land taken had no market value. It is so small in size that if offered for sale in the market nobody would buy. Therefore the issue as to the market value of the land has been correctly framed. It is submitted that the learned District Judge was right in calculating the value of the portion taken irrespective of the value of the whole land.

c.a.v.

Pereira J.—This is a proceeding on a libel of reference under the land Acquistion Ordinance. What the District Judge had to decide is clearly indicated in section 17 of the Ordinance. That section enacts "As soon as the assessors have been appointed the District Judge and assessors shall proceed to determine the amount of compensation," meaning, ofcourse, the sum payable as compensation to the party whose land has been acquired under the Ordinance. It was hardly necessary to frame any issue, although, of course, it was open to the parties to agree to any issue or issues being tried. After the minute as to the assessors having taken their oaths, there is the record of an issue in the proceedings which is as follows:—"What is the fair market value of the land to be acquired"? It does not appear in what circumstances this issue was framed. Was it agreed on by the parties or did the Court frame it in terms of the latter alternative mentioned in section 146 of the Civil Procedure Code? It does not appear that the parties agreed to this issue, and if it was framed by the Court, I need only say that this was not the issue that had to be tried by the Court. The issue as clearly indicated in the Ordinance was what amount of compensation the defendant was, entitled to receive for the portion of his land taken over by Government. Now, section 21 of the Ordinance specifies certain matters to be taken into consideration in awarding compensation, but clearly, it is not intended that the list there given should be taken as exhaustive, and it is manifest that in the case of some of the matters mentioned, there may be, in special cases, considerations (not mentioned in

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the Ordinance) that may go a great way to minimise their importance. The first matter mentioned in the Ordinance is the market value of the portion of land acquired. Now, a portion of land may be situated in a most favourable position; it may be a portion of an extent of land of very great value; but, in view of the size of the portion and the shape given to it by Government in slicing it off from the rest of the land for the purposes of acquisition, its market value may be *nil*. In such a case it would be safer to follow the principles laid down by this Court in the case of *the Government Agent v. Saibo*[1] in assessing the amount of compensation to be awarded. There, Middleton J. in a judgment acquiesced in by the Chief Justice says—"The proper course is to find the market value as near as it can be ascertained of the entire land and then to estimate the value of the portion of land taken at that rate." The test adopted by the District Judge of ascertaining the market value of the particular portion of land acquired in this case regardless of the rest of the land is fallacious. Of course, it may be that a portion of a large extent of land may be so situated that its real value may not be a proportionate share of the value of the entire land, but that cannot be said of the particular portion of land that has to be dealt with in this case. There is in my opinion very satisfactory evidence in the case that the market value of the entire land is fifteen thonsand rupees an acre. At that rate the value of the portion acquired ($2\frac{1}{2}$ perches) would be Rs. 234-37. I would set aside the judgment appealed from and enter judgment for the defendant for Rs. 234-37 and Rs. 60 as damages to the parapet wall [total Rs. 294-37.] The defendant should, I think, have his costs in both courts.

Ennis J.—I agree. The reference to the District Court was to ascertain the compensation to be paid for $2\frac{1}{2}$ perches of land compulsorily acquired. For some unexplained reason the only issue framed was "What is a fair market value of the land to be acquired? and it was argued on appeal that the evidence showed that the land he acqnired was so small that nobody would buy it, if offered in the market, and that therefore the land to be acquired had no market value. It

1. *6 S. C. D. 36.*

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is clear, however, that the land had some value or the Government would not have offered Rs. 93-12 as its "market value." In the circumstances it seems to me that the only point to be considered is whether the value has been appraised on a fair basis irrespective of whether it is to be regarded strictly as "compensation" or as "market value." The rule laid down by Mr. Justice Middleton in *The Government Agent v. Saibo*[1] appears to me to be the proper guide for the ascertainment of compensation in such a case as this and that the value should be ascertained by taking a proportionate part of the market value of the whole land of which it is a part. Considered in this way I fail to see why the land should not be regarded as a building site.

The Government assessor valued the entire land as a building site at from Rs. 8000 to Rs. 9000 per acre, but admitted that in doing so he did not consider the value of neighbouring lands or the prices realized by such lands at recent sales. Mr. Soysa gave evidence that he paid at the rate of Rs. 18000 per acre for similar land close by but thought he had paid at the rate of Rs. 1000 more than its market value. He considered that the land, part of which is now to be acquired, was worth Rs. 15000 per acre. Mr. Fernando also valued the land at Rs. 15000 per acre while the District Mudaliyar thought that Rs. 10000 per acre would be the value as a building site. I see no reason to send the case back for the finding of the District Court as to the value of the entire land as a building site. The evidence in my opinion shows that Rs. 5000 per acre, the rate claimed, is a fair valuation.

Varied.

Proctor for appellant—*D. L. E. Amarasinghe.*
Proctor for respondant—*T. K. Carron.*

1. 6 S. C. D. 36.

FERNANDO *v.* PERERA.

No. 739. P. C. Matale.

Present : **Wood Renton, A. C. J.**

30th October 1913.

Criminal Procedure Code § 296 (1)—accused undefended—duty to Police Magistrate to explain main points against him and his right to give evidence.

Where an accused is not represented by a pleader there must be something on the face of the record to show that the provisions of § 296 (1) of the Criminal Procedure Code, entitling an accused person to be expressly informed of his right to give evidence on his own be half and as to what are the main points against him were complied with.

The facts appear in the judgment.

Wadsworth for the accused-appellant.—When an accused is undefended, § 296 (1) of the Criminal Procedure Code says that the Court shall inform him of his right to give evi dence and shall call his attention to the principle points in the evidence. The record does not show that this has been done in this case and the accused alleges in his petition of appeal that he was prejudiced by the omission on the part of the Magistrate to do so. The accused is entitled to an acquittal.

Vernon Grenier for the respondent.—The accused admits that he was asked by the Police Magistrate whether he had anything to add to his original statement. It is clear that he had the opportunity of giving evidence even if he was unaware of his right. The accused cannot say he was prejudiced because he called some witnesses to prove his innocence. The absence of any entry in the record that the provisions of § 296 (1) were complied with is an omission which is cured by § 425 of the Criminal Procedure Code. In any event, the accused is not entitled to an acquittal as the evidence discloses a *prima facie* case against him.

Wood Renton, A. C. J.—The accused appellant has been charged under section 11 of Ordinance No. 11 of 1865

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first, with having refused to work without leave or reasonable cause, and, in the next place, with having prevented coolies from working on the estate. The Police Magistrate, who heard the case, convicted him, and sentenced him to six weeks rigorous inprisoment on each count. The sentences were directed to run consecutively. The evidence, a it stands, discloses a *prima facie* case against the accused But he allèges in his petition of appeal that he was not defended by a proctor at the trial, that he was unaware of his right to give evidence, and that, if he had had the opportunity of placing his version of the circumstances before the Court the result would or might have been very different. The accused himself admits that he was asked by the Police Magistrate whether he had anything to add to his original statement when charged There is nothing on the face of the record to show whether the provisions of section 296 (1) of the Criminal Procedure Code, entitling an accused person to be expressly informed of his right to give evidence on his own behalf and as to what are the main points against him, were complied with.

In the circumstances, I think that the accused is entitled to a new trial. I set aside the conviction and the sentence, and send the case back for this purpose. The trial will, I understand, have to take place before another Judge, as the original Judge of first instance is no longer in Matale. There can however, be no objection to the evidence already recorded standing so far as it goes, if both parties consent to that course being adopted. It will, of course, be open to either side to recall any witness for further examination or cross-examination, and to adduce such further evidence as may be desired.

Set aside and sent back.

Proctor for appellant.—*C. Aryanayagam..*

Proctor for respondent.—*W. Pompeus.*

——:o:——

BACKO APPUHAMY *v.* PUNCHA.

No. 4476 C. R. Nuwara Eliya.

Present : **Ennis J.**

12th September 1913.

Right of appeal—order in review of taxation—final judgment or order having the effect of final judgment—Courts Ordinance No. 1 of 1889 § 80—*Civil Procedure Code* § § *214 and 831.*

An appeal lies under § 314 of the Civil Procedure Code from the decision of a Commissioner of Requests in review of taxation of a bill of costs.

An order in review of taxation is not a final judgment or order having the effect of a final judgment so as to come within the operation of § 13 of ordinance No. 12 of 1895.

Drieberg for respondent.—There is no appeal in this case. This is an order of the Court of Requests and appeals from Courts of Requests are governed by § 80 of the Courts ordinance and § 13 of the Courts of Requests ordinance No. 12 of 1895. An order in review of taxation is a final order within the meaning of § 80 of the Courts ordinance and therefore no appeal lies except on a point of law or with the leave of the commissioner.

J. W. de Silva for appellant.—Section 214 expressly gives an appeal from an order in review of taxation. The reference to the chief clerk in the section makes it clear that the section applies to Courts of Requests also. An order under § 214 is not a final order under § 80 of the Courts Ordinance. A final order is one which finally disposes of the case.

c. a. v.

Ennis J.—This is an appeal under section 314 of the Civil Procedure Code on the decision of the Commissioner of Requests in review of taxation of the bill of costs. Objection was taken that no appeal could be maintained. The Courts Ordinance—section 80—gives an appeal from a final judgment. The next ordinance passed the same year (the Civil Procedure Code) expressly gives an appeal in

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section 314 on questions relating to the taxation of costs and by reference to the chief clerk in the section, the section must be held to apply to Courts of Requests. Ordinance No 12 of 1895 limited the appeals given under section 80 of the Courts Ordinance in a certain way, and it was urged here that the order appealed from is an order having the effect of a final judgment under that section. Exactly what the meaning of the term "an order having the effect of a final judgment" may be is not clear, but I think the words mean something in the nature of a decree defined in the Civil Procedure Code, and have reference to an adjudication which disposes of the case. An order on taxation of costs is not final in this sense and I ruled that the appeal should be heard.

On hearing the appeal objection was taken to 5 out of 9 decisions of the commissioner of Requests. Objection to the 1st, 3rd, 6th, decisions were not pressed. Objection on the 7th decision was not seriously pressed, but I was requested to say whether in my opinion Rs, 1-50 is the rate for each witness each time he was present. I think it is. Objection to decision 8 with regard to costs of second survey, I find on page 39 of the Record when the question of the second survey was being considered that the commissioner of Requests made an order that the costs of the survey would eventually be costs in the cause, and having made that order it would seem that the second survey was necessary, and the order should not have been varied when the question of taxation of costs came up. I think the costs of both surveys should have been allowed. Each side must pay his own costs of the appeal.

Varied.

Proctor for appellant—*G. F. Bartholomeusz.*
Proctor for respondant—*C. N. D. Jonklass.*

——:o:——

HENDRICK v. SUDRITARATNE.

No 10794 D. C. Galle.

Present: **Lascelles, C.J. & Wood Renton, J**

28th November 1912.

Donation to minor—acceptance may be by minor or agent—future husband of minor an agent—delivery of deed—presumption in favour of acceptance.

Under the Roman-Dutch Law no particular form is required for the acceptance of the gift. It is in every case a question of fact whether or not there are sufficient indications of the acceptance by the donee.

A deed of gift to a minor may be accepted by the minor himself or through any agent recognised by him for that purpose. The future husband of a minor daughter is entitled to act as an agent in that behalf.

Where a deed of gift was delivered to the future husband of the donee on the occasion of the marriage along with other presents.

Held, the inference is irresistible that the donee accepted the deed.

Per Lascelles C. J, There is, I think, a natural presumption in all these cases that the deed is accepted. Every instinct of human nature is in favour of that presumption, and I think when a valuable gift has been offered and it is alleged it has not been accepted, some reason should be shown for the alleged non-acceptance of the deed

Bawa for the appellant.

A. St. V. Jayewardene for the respondent.

Lascelles, C. J.—This is a case in which a transaction, which is in itself perfectly honest, natural and straightforward, is impugned on a highly technical ground. The transaction in question is a deed of gift dated the 27th Dec 1900, by which one Johanes gifted to his daughter Elmina a half share of certain property on the occasion of her marriage to the 8th defendant. Some years after the marriage Elmina died, and her only son also died; so that, on the footing that the deed of gift conveyed title, the property vested in the 8th defendant, the husband of Elmina. The effect of this, of course, is that the property has passed

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Lascelles, C.J.

entirely out of the hands of the family of the 1st defendant and her husband; and this is probably the reason why the 1st defendant is now impeaching the validity of the deed. The deed is attacked on the ground that there was no acceptance on the part of the donee Elmina. Now, before going into the evidence on the record, there are two points which, I think, ought not to be passed over. There is I think, a natural presumption in all these cases that the deed is accepted. Every instinct of human nature is in favour of that presumption, and I think that, where a valuable gift has been offered, and it is alleged that it has not been accepted, some reason should be shewn for the alleged non-acceptance of the gift. It should also be observed that, under the Roman-Dutch law, no particular form is required for the acceptance of the gift. It is in every case a question of fact whether or not there are sufficient indications of the acceptance by the donee. Now, in the present case, there is evidence, which I see no reason to disbelieve, that, at the marriage, there was an exchange of presents as is usual in such cases. The bridegroom received a deed, a ring and a sovereign. There is also evidence that the bride received from the bridegroom a chain and a ring. The evidence of Hendrick, of Sudritharatne and of Gurusinghe is to this effect. There is also evidence that the deed was handed over to the defendant. Now, if it be true that the deed was in fact handed over to the defendant in the circumstances which I have mentioned, the inference is irresistible that the donee accepted the deed. The case for the respondent mainly rests on the fact that the deed by some means or other came into the hands of the first defendant. In my opinion her evidence as to how she obtained possession of this gift is far from satisfactory. It fails on the most important point. She offers no explanation of her theory that the deed was not accepted. The deed was undoubtedly drawn for the purpose of the marriage. If it was not accepted I should have expected some reason for the non-acceptance of the gift. But on that point the 1st defendant is

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Wood Renton, J.

entirely silent. She says that the deed had always been in her possession. Then she goes on to say that she discovered it recently amongst her husband's papers, and that she found the deed in her almirah about three months ago, and she thinks her husband had placed it there. This evidence seems to me to be highly unsatisfactory. The case of the appellant is that the deed had been taken recently by the 1st defendant for the purpose of ascertaining some boundaries. This, I think, is far more probable than the somewhat lame explanation given by the 1st defendant. It seems to me that the evidence is ample to prove the acceptance of the gift by Elmina, and I would set aside the judgment of the Court below, so far as it relates to this issue, and direct decree to be entered on the footing that the deed of gift to Elmina passed a valid title to the property comprised therein. The appellant I think is entitled to the costs of this appeal, and also to the costs of the contest in the Court below.

Wood Renton J.—I entirely agree, and I will add a very few words. The deed of gift was for the minor's benefit. It was, therefore, competent for her, under the Roman-Dutch law, to accept it either herself or through any agent recognised by her for that purpose. To my mind the evidence shows beyond all reasonable doubt that this deed was in fact accepted by Elmina either herself or through her future husband, the 8th defendant-appellant, who was perfectly entitled to act as her agent in that behalf. Under these circumstances the case comes directly within the scope of the decision in *Babihamy v. Marcinahamy*[1]. The principle of the decision has repeatedly been applied in later cases. The District Judge referred, in support of his conclusion that there was no valid acceptance of this deed on the part of the minor to the case of *Silva v. Silva*[2]. The facts of that case are not stated in detail. But it appears from the head-note that it was one where there was a future acceptance. In the case before us the acceptance was not

1. *(1908) 11 N. L. R. 232.* 2. *(1908) 11 N. L. R. 161.*

future. Although under the deed the donor retained a life interest, there was no room in law, and there took place in fact, a present acceptance of the dominium which the deed conferred subject to the life interest. I may further point out that, even in the case of *Silva v. Silva*[1], it was recognised that an acceptance by a person, who was neither the natural nor the legal guardian of the minor, would be rendered valid where the subject of the donation came into the possession either of the donee or of his self-constituted guardian.

Set aside

Proctor for appellant—*D. G. Goonewardene.*

Proctor for respondent—*A. D. Jayasundere.*

——:0:——

SENARATNE *v.* JANE NONA.

No. 5698. D. C. Matara.

Present: **Lascelles, C.J. & Wood Renton, J**

15th April 1913.

Property purchased in trust—action for conveyance—cause of action—prescription—plaintiff in possession of property.

Plaintiff's deceased brother bought a piece of land with the plaintiff's money and on his behalf. The deed of transfer was however executed in the plaintiff's brother's name. On the strength of this purchase the plaintiff entered into possession of the land in 1895 and possessed it till 1912. In the latter year, on the death of the plaintiff's brother the defendant as his administratrix included the said land in the inventory of his estate. Plaintiff thereupon alleging that the property was purchased by the deceased in trust for him sued the defendant for a conveyance. The defendant *inter alia* pleaded that the plaintiff's cause of action was barred by prescription inasmuch as the action was not brought within three years of the date of purchase.

1. *11 N. L. R. 161.*

Senaratne v. Jane Nona.

Lasselles, C.J.

Held that the cause of action arose when the property was included in the inventory and that the action was not barred.

Cowper v. Godmond[1] followed.

Marthelis Appu v. Jayewardene[2] over-ruled.

Per Lascelles, C.J.—The plaintiff entered into possession without any interference by his brother or his representative. He had obtained all that he bargained for. He was in the enjoyment of the right to which he was entitled under the arrangement effected between him and his brother. It cannot I think be said that any cause of action accrued until something occurred which interfered with or placed in jeopardy his rights under that deed and it is not contended that anything of that nature occurred before the property in question was included in the inventory.

de Sampayo, K.C. (with *de Zoysa*) for the defendant-appellant.—The plaintiff's action is prescribed. The cause of action arose whenever the plaintiff might have called upon the deceased to execute a conveyance of the land in his favour. This he might have done in 1895 when he advanced the money and the claim is prescribed after three years. (See *Marthelis Appu v. Jayewardene*[2].)

A. St. V, Jayewardene for the respondent.—The plaintiff's cause of action arose only when the land was included in the inventory. Till then the plaintiff was in possession of the land and improved it without his rights being disputed or challenged by anybody. As long as he had all that he bargained for under the agreement with the deceased he had no complaint to make against anybody, hence no cause of action. When the land was included in the inventory the plaintiff's rights were jeopardised and a cause of action arose. (See *Silva v. Silva*[3] *and Cowper v. Godmond*[2].) The plaintiff has established title by prescription also. He has possessed the land from 1895 to 1912.

de Sampayo, K. C. in reply.

Lascelles, C. J.—In this case there is no dispute with regard to the findings of the learned District Judge on the facts. But it is contended by the appellant that the

1. *9 Bingham 748.* 2. *(1908) 11 N. L. R. 272.*
3. *1 C. A. C. 14.*

1.——— 2.——— 3.———

Senaratne v. Jane Nona.

Lascelles, C.J.

learned District Judge was wrong in holding that the plaintiff's action was not prescribed. On the other hand the respondent contends that the learned District Judge ought to have held that the plaintiff had obtained a title to the land in dispute by prescription. As to the latter point I do not consider it necessary to definitely decide it. I will only say that, on the findings of the learned District Judge, I do not see why the plaintiff should not have been held to have obtained a prescriptive title. He entered into possession of the land in 1895. He improved the land, and he remained in possession without any dispute or without his right being in any way questioned until the year 1912, when the property was included in the inventory of the deceased's estate. In these circumstances it is hard to see why the plaintiff should not be held to have prescribed. As to the finding of the learned District Judge that the plaintiff's right of action is not prescribed, the question turns on the time when the cause of action accrued. The plaintiff entered into possession as I have said in 1895/1902, and as long as he remained in possession without any interference on the part of his brother or his representatives he had obtained all that he had bargained for. He was in the enjoyment of the right to which he was entitled under the arrangement effected between him and his brother. It cannot I think be said that any cause of action accrued until something occurred which interferred with or placed in jeopardy his rights under that deed, and it is not contended that anything of that nature occurred before the property in question was included in the inventory. The English case of *Cowper v. Godmond*[1] shows clearly the principle which is applicable in such cases. The point of time when the right to bring the action accrues is at the time when the party has been interfered with in the enjoyment of his rights. So long as he receives all that he considers himself to the entitled to, he cannot be expected to take action, and the legal cause of action cannot be said to have

1. *9 Bingham 748.*

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arisen. I think that the ruling of the learned District Judge on this question is right, and as it is conclusive of the action on the findings of fact which are not disputed, I would dismiss the appeal with costs.

Wood Renton, J.—I am of the same opinion. The learned District Judge has held that the plaintiff-respondent in 1895, on the strength of the purchase by Benjamin Senarat with his money and on his behalf, entered into possession of the land in question, and held it without dispute till it became apparent that the defendant-appellant proposed to set up a claim of title on behalf of Benjamin Senarat's estate. That finding is of importance from two points of view. In the first place, it would, in my opinion have justified a decision of the present case in respondent's favour on the ground of prescription, in the second place, it throws an important light on the question of the point of time at which the respondent's cause of action arose. He was in undisturbed possession of the land. He was improving it. There was no pretence of any counter-claim of title on Benjamin Senarat's behalf. For compensation was paid to him on the basis that title was in the respondent. In that state of the facts, it cannot, apart from authority, be fairly said that the respondent's cause of action arose till the appellant sought to disturb the *status quo* by including the land in suit in the inventory of Benjamin Senarat's estate. The only decision that could have been cited on the other side is that of the Supreme Court in *Marthelis Appu v. Jayewardene*[1]. It was a decision by Sir Joseph Hutchinson and myself. The facts were somewhat different, but there is no doubt that we there held that the cause of action for the refund of money advanced on a consideration which had failed arose immediately upon payment. That case has subsequently come before me on several occasions, and I have always entertained some doubt whether the decision on that point was right. Now that my attention has been called to the case of *Cowper v. Godmond*[2] and to the reasoning of the Court of Common

1. *(1908) 11 N. L. R. 272.* 2. *9 Bingham 748.*

Pleas in that case I do not think that it ought to be followed on the point with which I am dealing. I have taken this opportunity of making this observation seeing that I was myself one of the Judges who decided the case.

Appeal dismissed.

Proctors for appellant—*Keuneman & Keuneman.*

Proctor for respondent—*D. Samaraweera.*

DINGIRI APPUHAMY *v.* APPUHAMY.

No. 11509 C. R. Kegalle.

Present: **de Sampayo, J.**

19th September 1913.

Jurisdiction of Court of Requests—action for damages depending on proof of title to land—possessory action—test of jurisdiction value of land.

The plaintiff averred title to 2/3rd share of a certain field and alleged that the defendant had ousted him and appropriated the crop of the field and claimed Rs. 35 as damages. The defendant denied the plaintiff's title and the alleged ouster and stated that he was a lessee under the trustee of the Dalada Maligawa, who was subsequently added as a party, and set up the title of the temple. At the trial the plaintiff's proctor stated that the action was intended to be a possessory action and that the prayer for possession was omitted by an oversight. The land was admitted to be worth over Rs. 300.

Held, that in view of the pleadings the claim for damages depends on proof of title to the land and that the Court of Requests has no jurisdiction to try the case.

Held also, that even if this can be regarded as a possessory suit the question as to the value of the action remains the same. *Balahami v. Subehami*[1]. distinguished.

A. St. V. Jayewardene for the plaintiff-appellant.—The plaintiff's claim is well within the jurisdiction of the Court of Requests. In view of the admission made by

1. *3 Bal. 244.*

Dingiri Appuhamy v. Appuhamy.

de Sampayo, J.

counsel for the added-party that the plaintiff had got back posse sion, the only question that had to be decided was the claim for damages and that being under Rs. 300, the commissioner was wrong in dismissing the action (see *Balahami v. Subehami*[1]). The added-party's prayer to be declared entitled to the field cannot oust the jurisdiction of the Court of Requests because the plaintiff's claim is within the jurisdiction of the Court of Requests. The jurisdiction of a Court must be determined by the value of the plaintiff's claim (see *Catherina v. Silva*[2]).

J. W. de Silva for the respondents.—The plaint recites that the defendant wrongfully and unlawfully entered that said field with force of arms and reaped and removed the entire crops without giving the ground share. It is clear from the said recitals that the defendant disputed the title of the plaintiff and therefore it is submitted that the plaintiff's claim for damages must depend on proof of title to the land (see *Silva v. Fernando*[3]). The statement made by Counsel for the added-party is not an admission of title in the plaintiff and it cannot bind the defendant as to title. The case of *Balahami v. Subehami*[1] has no application, as there the defendant admitted the title of plaintiff. If title is not disputed, what is the position of the added-defendant? Why was he allowed to come into the case at all and file answer? The plaintiff did not object to the added-defendant being made a party. It was the added-defendant alone who contested title. Besides, the plaintiff applied to convert the action into a possessory action. The action must fail for that reason too, because in a possessory action the value of the interest is the value of the land.

A. St. V. Jayewardene in reply.

c. a. v.

1 *3 Bal. 244.* 2. *10 N. L. R. 260.* 3. *11 N. L. R. 375,*

Dingiri Appuhamy v. Appuhamy

de Sampayo J.

de Sampayo, J.—The plaintiff averred title to 2/3rd share of a certain field and alleged that the defendant had ousted him and appropriated the crop of the field, and claimed Rs. 35 as damages. The defendant denied the plaintiff's title and the alleged ouster and stated that he was a lessee under the trustee of the Dalada Maligawa. who was subsequently added as a party and set up the title of the temple.

At the trial, after some discussion, the Commissioner decided that the question of title had to be gone into and as the plaintiff admitted the land to be worth over Rs. 300 he dismissed the action for want of jurisdiction.

It was stated in the Court below on behalf of the plaintiff that the action was intended to be a possessory action only, though the prayer for possession was omitted by an oversight. I find it also stated, I do not know by whom, that the plaintiff had got back possession. In these circumstances it was argued in appeal that the case only involved a claim for damages and that the Court had jurisdiction. It seems to me in view of the pleadings that the claim for damages depends on proof of title to the land, and that, even if this can be regarded as a possessory suit, the question as to the value of the action remains the same. The case of *Balahami v. Subehami*[1] was cited to me, but there the plaintiff's title was admitted by the defendant and there remained only the question of damages. The case of *Catherina v. Silva*[2] was also cited, but I do not see that it has any bearing on the present case. I think the order appealed from is right and I dismiss the appeal with costs.

Appeal dismissed.

Proctor for appellant—*A. A. Wickremesinghe.*

Proctors for respondents—*G. S. Suraweera and A. F. R. Goonawardene.*

1. *3 Bal. 244.*
2. *10 N. L. R. 260.*

SINNETAMBY *v.* KAMALAMUTTU.

No. 4566 D. C. Chilaw.

Present: **Pereira & Ennis J. J.**

10th September 1913.

Money recovered by judgment-creditor in excess of amount due under decree—whether recoverable in same action—does the order certifying satisfaction of decree close the proceedings—Civil Procedure Code §§ 344,349.

The defendant moved under § 344 of the Civil Procedure Code for a notice on the plaintiff to show cause why he should not refund to the defendant a sum of R691·07 recovered by him in excess of the amount due to him under the decree. On the day fixed for the discussion of the matter on the motion of the plaintiff's proctor, consented to by the defendant's proctor, payment of the decree was certified under § 349 of the Civil Procedure Code. Thereafter the plaintiff's proctor contended that the "case was closed" and nothing further could be done in it on the defendant's motion for an order on the plaintiff to refund the amount paid to him in excess of the sum actually due to him.

Held, (1) That the defendants' application, when it was made was quite in order as an application under § 344 of the Civil Procedure Code.

(2) That the intention of the parties—at any rate of the defendant—was not to "close the proceedings" by certifying satisfaction of the decree and that in the circumstances of the case the order on the plaintiff's motion to certify payment of the decree amounted to no more than the placing on record of the fact that the defendant has paid the plaintiff at least the amount of the decree.

Joseph Grenier K. C., for the defendant-appellant.

Sansoni, for the plaintiff-respondent.

The following authorities were cited in the course of the argument in appeal *Juggut Chunder v. Shib Chunder*;[1] *Fakaruddin v. Official Trustee*;[2] *Ramanaden Chetty v. Kanappa Chetty.*[3]

1. *16 W. R. 269.* 2 *10 Cal 536.*

3. *6 Mad. H. C. R. 304.*

Sinuetamby v. Kamalamuttu

Pereira J.

Pereira J.—In this case it appears that the defendant paid the plaintiff a certain sum of money in satisfaction of the decree. He subsequently di covered that he had paid the plaintiff in exce-s of the amount actually due to him on the decree, and on the 7th May 1913 he (the defendant) moved for a notice on the plaintiff to shew cause why he should not refund R691.07 "recovered by him in excess of the amount due to him under the decree." It is said that this sum R691.07 is not the correct amount paid in excess, and that it was so understood by all parties at the hearing of defendants' application. Be that as it may, clearly the motion of the defendant was, at the stage of the proceedings in which it was made, a motion that fell well within the scope of the provision of § 344 of the Civil Procedure Code. It involved questions relating to the "execution of the decree." The notice asked for was allowed and served on the plaintiff, and the 11th July, 1913 was fixed for the discussion of the matter. On that day as a preliminary step apparently, on the motion of the plaintiff's proctor consented to by the defendant's proctor, payment of the decree was certified under § 349 of the Civil Procedure Code. The moment this was done, the plaintiff's proctor contended that the "case was closed," and nothing further could be done in it on the defendant's motion for an order on the plaintiff to refund the amount paid to him, in excess of the sum actually due to him, and the District Judge relying on certain decisions of the Indian Courts cited to him disallowed the defendant's motion. The same decisions have been cited to us, and on a careful examination of them it seems to me that they have no application to the peculiar circumstances of the present case. As observed already, the defendant's application, when it was made, was quite in order as an application under § 344 of the Civil Procedure Code. What the Court had to decide was how much was actually paid by the defendant to the plaintiff in

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satisfaction of the decree. In the course of the inquiry, the plaintiff's proctor as a preliminary step, moved to certify satisfaction of the decree. In the circumstances in which this motion was made, the order on it amounted to no more than the placing on record of the fact that the defendant had paid the plaintiff at least the amount of the decree. How much more was paid had yet to be ascertained. Clearly the intention of the parties—of the defendant at any rate—was not to close the proceedings by certifying satisfaction of the decree. The object of the motion and the effect of the order on it are as I have explained above.

I would set aside the order appealed from and remit the case to the Court below to ascertain how much was paid by the defendant to the plaintiff in excess of the exact amount due to him on the decree and for an order on the Plaintiff to refund the excess if any. I think that the defendant should have her costs of appeal and that costs in the Court below should abide the event.

Ennis J.—I agree.

Case remitted.

Proctor for appellant—*C. E. Corea.*

Proctors for respondent—*Martin and Sansoni.*

PUNCHI MENIKA v. DINGIRI MENIKA.

No. 4760 D. C. Kurunegalle.

Present: **Wood Renton A.C.J.**

& de Sampayo J.

7th November 1913.

Action to set aside deed—who can bring—fraud—what must be proved.

Under the Roman-Dutch Law an action to set aside a deed on the ground of fraud is granted only in favour of a creditor to whose prejudice the alienation had been effected, or to the heirs of such a creditor, and is maintainable only on proof of the intention of the insolvent-alienor to defraud his creditiors and of the fact that at least one creditor had been so defrauded.

Allan Drieberg for the appellant.

No appearance for the respondent.

c.a.v.

Wood Renton A. C. J.—The plaintiffs-respondents have instituted this action, alleging that one Appuhamy sold to them the land in dispute by deed dated 9th Jannary 1912, and praying that a prior deed, dated 16th December 1910, by the same vendor transferring the same land to his wife, the 1st defendant, should be declared void on the ground of fraud. The learned District Judge has given judgment in the plaintiff's favour. The 1st defendant, in her personal capacity and as guardian ad-litem of her minor children, appeals.

It appears to me that this appeal must succeed. Under the Roman-Dutch Law, as I understand it, an action to set aside a deed on the ground of fraud is granted only in favour of a creditor to whose prejudice the alienation had been effected, or to the heirs of such a creditor (see *de Vos'* translation of *Voet, book 48.8.3.)*, and is maintainable only on proof of the intention of the insolvent-alienor to defraud his creditors, and of the fact that at least one creditor had been so defranded (see *Baba Etana v. Dasse Terunanse* [1]). Here all these elements are absent. The

1, *(1896) 2 Br. 355,*

plaintiffs are not creditors of Appuhamy. There is no evidence worthy of the name that he was insolvent at the date of the execution of his deed in the 1st defendant' favour. Such vague statements as those of the 1st plaintiff Punchi Menika, and Punchi Appuhamy Vidane, that Appuhamy was in debt, that he had previously mortgaged the land he sold to the plaintiffs to raise money, that he owed money to some Moor boutique keepers, and to Mendis a boutique keeper in Kurunegalle, and that his debts were paid after the deed of transfer in the 1st defendant's favour fall far short of establishing insolvency. The relation in which Appuhamy stood to the 1st defendant deprives most of the points, on which the learned District Judge relies as establishing frandulent intention, of probative value, and there is nothing to show that Appuhamy's creditor's generally, or any of his creditors in particular, have or has been prevented from obtaining payment. of any debt due by him in consequence of the impeached alienation.

On these grounds, I would set aside the decree under appeal and direct decree to be entered dismissing the plaintiff's action with the costs of the action and of the appeal.

De Sampayo J.—I agree.

Set aside.

Proctor for appellant—*F. N. Daniels.*

SOMASUNDERAM *v.* SINNATAMBY.

No. 31896 D. C. Colombo.

Present : **Wood Renton, A. C. J. Ennis J.**

3rd October 1913.

Civil Procedure Code § 34—splitting of claims—dissolution of partnership till dissolution—subsequent action for account of business after dissolution—former action brought after cause of action in latter action accrued—subsequent action does not lie.

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Wood Renton A. C. J.

Plaintiff's father S. & 1st defendant traded as partners. S. died on the 10th of March 1907 and the partnership came to an end. On 23rd July 1908 the executor of S. sued 1st defendant for account of partnership business till death of S. In that action judgment was entered in favour of S's estate for R5116-45. Plaintiff brought the present action on the 30th December 1910 for an account of the income and expenditure of the said business between 10th April 1907 and 31st December 1907.

The defendant pleaded the judgment and decree in the former action as res judicata.

Held, that the plea of res judicata was bad as there was no adjudication in the former action on the matter at issue in the present action namely the liability of the defendant to account for the profits derived from the use of the partnership assets after S's death.

Held, also that the second action is barred by § 34 of the Civil Procedure Code. The cause of action in both cases is one and the same namely the refusal or failure of the defendant to account to S's estate for the share of the profits due to it by the partnership.

Elliott for appellant.

F. M. de Saram (with *H. A. Jayewardene*) for respondent.

Wood Renton A. C. J.— Formal judgment dissmissing the appeal with costs was given in this case at the close of the argument on Friday, 3rd instant. It only remains now to state shortly the grounds of our decision. The point for determination is whether the plaintiffs-appellants are precluded by S. 34 of the Civil Procedure Code from maintaining this action, by reason of their failure to include the claim, for the enforcement of which it is brought, in a previous action—D. C. Colombo No. 17168 instituted by the executor of their father against the first defendant, the respondent. The learned District Judge has answered this question in the affirmative, and I think that he has done so rightly. The facts material for this decision are these. The plaintiff's father Sinniah Pulle and the 1st defendant traded in partnership as opium renters. Sinniah Pulle died on 10th April 1907, and by his death the partnership in the ordinary sense of the term came to an end. On 23rd July 1908, his executor instituted case D. C. Colombo No. 27168,

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claiming from the 1st defendant an account of the partnership up to the date of its dissolution by Sinniah Pulle's death. That case went to trial and judgment was entered in favour of Sinniah Pulle's estate for the sum of R5116-45. The claim in the present action, which was instituted on 30th December 1910, is for "an account of the income and expenditure of the said business" between 10th April 1907 and 31st December 1907, or, in the alternative, for the payment of the estimated share of profits due to Sinniah Pulle's estate by virtue of the alleged continuance of the business of the partnership by the 1st defendant between those dates after its formal dissolution on Sinniah Pulle's death. Under S. 42 of the partnership act, 1890, (1) the estate of an outgoing partner is entitled, where the partnership has been dissolved but there has been no final settlement of accounts between the firm and the out going to partner or his estate, either to such a share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the assets, or to interest at the rate of five per cent per annum on the amount of his share therein. In the present case the plaintiffs are pursuing these alternative remedies. They could admittedly have claimed the relief which they now seek in the previous case, and if their "cause of action" in D. C. Colombo No. 27168 is the same as their "cause of action" now, the provisions of S. 34 of the Civil Procedure apply and the action with which we are here concerned is not maintainable.

The 1st defendant in his answer pleaded the judgment and decree in D. C. Colombo 27168 as *res judicata*, and the District Judge upheld that plea. The Supreme Court (Lascelles C. J. and Grenier J.) on appeal, however, overruled this decision on the ground that in D. C. Colombo 27168 there was no adjudication on the matter at issue now, namely the liability of the 1st defendant to account for the profits derived from the use of the partnership assets after Sinniah

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Pulle's death. But they sent the case back to the District Court for further inquiry and adjudication on the question whether the present action is not barred by § 34 of the Code of Civil Procedure, and it is on that point that we have to deal with it now. In my opinion, the "cause of action" in both cases is one and the same, namely the refusal or the failure of the 1st defendant to account to Sinniah Pulle's estate for the share of the profits due to it by the partnership. Although the partnership was no doubt formally dissolved by Sinniah Pulle's death, it still continued to exist for the purposes of § 42 of tht partnership act 1890 so long as no final account had been rendered and Sinniah Pulle's money remained, and was being used, in the business. It is on these grounds that I came to the conclusion at the close of the argument last week that the appeal should be dismissed with costs.

The effect of the dismissal of the appeal is that the plaintiff's action itself must be dismissed with the costs of the action and of the appeal under the decree of the Supreme Court of 23rd February 1913. The trial of the other issues was to be proceeded with only in the event of the plaintiff's succeeding on the issue as to whether § 34 of the Code of Civil Procedure was applicable.

Ennis J.—I entirely agree. The cause of action in this case, as in D. C. Colombo 27168, was the failure of the surviving partner to fulfil his obligation to account for the profits of the deceased's partner's share in the assets of the partnership. The obligation to account for profits or to pay interest being expressly continued by section 42 of the partnership Act 1890, after the death of a partner as attaching to the deceased's partner's share of the partnership assets.

Appeal dismissed.

Proctor for plaintiff—*J. A. Perera.*

Proctor for defendant—*L. B. Fernando.*

ONDRIS *v.* BABY NONA *et al.*

No 11641 D. C. Galle.

Present: **Ennis and de Sampayo J. J.**

13th November 1913.

Civil Procedure Code § 15—misjoinder of parties and of causes of action.

The defendants were the heirs of a deceased person whose estate was being administered by the Secretary of the District Court. For the purpose of defraying the testamentary expenses certain property of the estate was ordered to be sold by the administrator and in order to save the property from being sold the 1st defendant on behalf of herself and her then minor daughter the 2nd defendant, requested the plaintiff to pay the amount required, namely R400, promising that the amount would be settled by the payment of R200 by the 1st defendant and R200 by the 2nd defendant. The plaintiff stayed the sale of the property by the payment of R400 and sued the defendants in one action for the recovery of the amount.

Held, that the transaction must be construed as one contract upon which the two defendants were severally liable and that they were rightly joined in one action.

Vernon Grenier for the plaintiff-appellant.—Section 14 of the Civil Procedure Code permits the plaintiff to join the defendants in one action for they are liable "in respect of" his payment on their behalf. In any event, the joinder is good under section 15, for the contract between the parties was clearly one, since a payment of R200 would not save even a half share of the properties.

E. W. Jayewardene for the defendants-respondents.—The causes of action are entirely separate. Each defendant had a distinct contract with the plaintiff and for breach of each contract a separate action lies. The principle of the House of Lords decision in *Sadler v. The Great Western Railway Co.*,[1] is identical. The case of the improper joinder of plaintiffs is similar (*Simon Appuhami v. Rosa*[2] ; *Smirth-*

1. *(1896) A. C. 450.* 2. *9 N. L. R. 68.*

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Enni & de Sampayo J.J.

waite v. Hannay.)[1] The cause of action, that is the breach of contract, is distinct in the case of each defendant (*Fernando v. Mel.)*[2]

Ennis J.—In this case the plaintiff, at the request of the 1st and 2nd defendants, undertook to stay a sale, and the 1st and 2nd defendants undertook each to pay him R200. The plaintiff stayed the sale of the property by the payment of R400, and sued the defendants in one action for the recovery of the amount. The District Court held that as each of the defendants was liable to pay only R200 there was a misjoinder of parties and causes of action, and dismissed the plaintiff's claim with costs. I am of opinion that under section 15 of the Civil Procedure Code the plaintiff rightly joined the defendants in one action as they were severally liable on one contract which contract was the undertaking to stay the sale. On the other findings in the judgment I consider that decree should be entered for the plaintiff for the payment of R200 by each of the defendants. I therefore set aside the decree of the District Court, and order accordingly, with costs.

De Sampayo J.—I am of the same opinion. The 1st defendant is the mother of the 2nd defendant and both of them would appear to be the heirs of a deceased person whose estate was being administered by the Secretary of the District Court, and for the purpose of defraying the testamentary expenses certain property of the estate was ordered to be sold by the administrator. The plaintiff's case is that in order to save the property from being sold the 1st defendant on behalf of herself and on behalf of her then minor daughter, the 2nd defendant, requested the plaintiff to pay the amount required, namely, R400 promising that the amount would be settled by the payment of R200 by the 1st defendant and R200 by the 2nd defendant. This is in substance the evidence, as I gather of the plaintiff who was

1. *(1894) A. C. 494.* 2. *3 Bal. 295.*

examined in Court. The 2nd defendant has since attained majority by marriage and consented to judgment against her for her share of the debt, and has otherwise ratified the agreement. In my opinion the transaction must be construed as one contract upon which the two defendants are severally liable. This is the exact kind of case contemplated in section 15 of the Civil Procedure Code, and I think that the two defendants were rightly joined, in one action and judgment should have been entered against them.

I agree to the order proposed by my brother.

Set aside.

Proctor for appellant—*R. A. H. De Vos.*

Proctor for respondent—*A. D. Jayasundara.*

——:o:——

MAMMALE MARIKAR *v.* JUNSIDO *et al.*

No. 11427 D. C. Galle.

Present: **Pereira & Ennis, J.J.**

7th August 1913.

Proof of execution of deed—signing by cross—person executing holding pen whilst another puts the cross—whether fact of the writing and authority proved—§ 159, Civil Procedure Code.

Where the question was whether a certain deed was duly executed by P. and the evidence showed that P. held the pen while another put the cross, but there was no evidence to prove the fact of the writing and the authority of the writer to write the name on the document as a signature, as referred to in § 159 of the Civil Procedure Code.

Held, that the deed was duly executed by P.

Section 159 of the Civil Procedure Code refers to a case where the signature is written by the one person without any interference by or help from the other.

A. St. V. Jayawardene for plaintiff-appellant.

H A Jayawardene (and *Gooneratne*) for 10th and 12th defendants-respondents.

Pereira J.—In this appeal the question is whether deed No. 5167 dated the 7th March 1902 (D1) was duly executed in favour of the 10th defendant by Davadu Markar and Pathu Muthu. The two witnesses to the deed were called. One of them (Ahamadu Carim) stated that he saw the parties sign and there was no cross-examination with reference to this statement, and the other (Ahamadu Casim Bawa) said that he saw Davadu sign the deed and Pathu Muthu put her mark. As regards the latter statement he was cross-examined and he said.—" I do not know who put the cross. She touched the pen." Manifestly, what the witness meant was that he saw somebody putting the cross when Pathu Muthu touched the pen. On this latter statement appellant's Counsel contended that, as a result of the provision of section 159 of the Civil Procedure Code, it could not be said that the deed was executed by Pathu Muthu. The section enacts that the signature of a person which is written by the pen of another is not proved until both the fact of the writing and the authority of the writer to write the name on the document as a signature are proved. In the present instance, it cannot be said that the signature or rather mark of Pathu Muthu was written by the pen of another. Clearly, the section refers to a case in which the signature is written by the one person without any interference by or help from the other. Here, Pathu Muthu, by actually holding the pen, made herself a party to the writing, and it cannot be said that the mark was wholly written by another. But, even in the latter view, it is clear from the fact that Pathu Muthu held the pen that the actual writer had her authority to write.

It has also been pressed that the 10th defendant had no possession of the land conveyed after the alleged execution of the deed and that in a petition given by Davadu after the date of the deed he complained that he had no

possession of the land, the argument, of course, being that Davadu would not have made the complaint if he had already conveyed the land to another, and the 10th defendant himself would not have omitted to bestir himself to obtain possession had deed D1 been actually executed in his favour. The land was inherited by Davadu and Pathu Muthu from one Abdul Latiff. After his death the administrator of his estate had possession of the land and leased it to a third party and although Davadu parted with his rights, it was for him to obtain possession of the land and place his vendee in possession. These facts, I think, explain Davadu's petition and the fact that the 10th defendant had no possession.

I would affirm the judgment appealed from with costs.

Ennis J.—I agree.

Affirmed.

Proctor for defendants-respondents—*J. A. Sethukavaler.*

MUTHUKARUPPEN CHETTY *v.* HABIBHOY.

No. 33725 D. C. Colombo.

Present : **Pereira & Ennis J.J.**

6th August 1913.

Contract to deliver goods at future time—Delivery in monthly parcels—Breach before the time for complete performance—action for damages for delivery of goods for two months—no bar to subsequent action with regard to succeeding months—Civil Procedure Code §§ 34 & 207—measure of damages—difference between the contract and market price each month-resjudicata.

The defendants on the 25th August 1910 agreed to supply the plaintiff with 360 bales of sarees and dhooties within one year from the 1st of September 1910 to the 31st August 1911 at the rate of 30 bales a month. The defendant made default in supplying the arees and dhooties in the months of October and November 1910.

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Plaintiffs on 7th January 1911 instituted action D. C. Colombo 31911 for recovery of R15000 as damages and obtained judgment. In that action the defendant pleaded that the contract was not duly entered into, in that one Thomas Marsdent who had signed the contract on behalf of the defendants had no authority to do so. At the trial of that case the defendants Counsel stated that "he did not intend to press the matter."

The present action was brought to recover a sum of R8700 as damages for a period subsequent to the month of November 1910.

The defendant pleaded that (1) the contract entered into having been signed by Thomas Marsdent was void (2) in view of §§ 34 and 207 the action was barred (3) that the plaintiffs are not entitled to damages for each separate default.

Held (1) that the judgment in D. C. Colombo 31911 operated as *resjudicata* on the 1st objection.

An order made of consent in a case operates as much as an estoppel as an order made after adjudication on evidence.

Held (2) that the action was not barred by reason of §§ 34 and 207 of the Civil Procedure Code.

The plaintiffs had the option of treating the whole contract as at an end and claiming damages in respect of a breach of the whole contract or of treating the contract as subsisting and claiming damages for each default thereunder committed.

Held (3) that the measure of damages is calculated by the difference between the contract price and the market price not at the time of the breach of the contract, but at the time or times when the defendant made default in supplying the goods.

This is an appeal from a judgment of the Additional District Judge of Colombo (L. Maartensz Esq.)

R. L. Pereira for the defendant-appellant.—

The appellant had repudiated the whole of the contract sued on at the time when action No. 31911 was instituted. In that action the plaintiffs had the right to sue for continuing damages but failed to take advantage of that right. They are clearly barred from bringing a separate action in respect of those damages (see §§ *34 & 207 C. P. C*; *Kirihamy v. Dingiri Amma*).

Thomas Marsden who signed the contract on the defendant's behalf had no authority to do so. It is true that in the first case this point was not pressed but that does not preclude the defendants from raising the objection now.

As regards the amount of damages, it is submitted that the plaintiffs are not entitled to damages in respect of each separate default. At any rate, they are not entitled to the

1. *Bal. 146.*

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damages they claim. No effort has been made by them to reduce the damages. Goods similar to those in question were available at Darley Butter & Co. and, in India at the Carnatic Mills and Buckingham Mills, yet the plaintiffs did not try to procure them from those places.

H. J. C. Pereira (with him *F. M. de Saram*) for the plaintiffs-respondents.—The action is not barred by §§ 34 & 207 of the Civil Procedure Code. The plaintiffs had the option of treating the whole contract as at an end, and claiming damages in respect of a breach of the whole contract, or of treating the contract as subsisting and claiming damages for each default committed by the defendant. It is open to the plaintiff to maintain an action in respect of each separate default (see *Roper v. Johnson*[1]).

The defendant is not entitled to plead Marsden's want of authority in this case. The question was raised as an issue in the 1st case but defendant's Counsel stated that he "did not intend to press the matter." An order made of consent in a case operates as much as an estoppel made after adjudication on evidence. (See *Samitchy Appu v. Pieris*[2]).

There was no available market in Ceylon in which the plaintiffs could have bought the goods. What Marsden means that Darley Butler & Co., were selling sarees and dhooties is that they were supplying on contract.

R. L. Pereira in reply.

c. a. v.

Pereira J.—In this case the plaintiffs sued the defendant for the recovery of the sum of R8700 being damages alleged to have been sustained by the plaintiffs by reason of a breach by the defendant of a contract entered into between the parties for the supply by the defendant to the plaintiffs of certain sarees and dhooties. The contract was entered into on the 25th August 1910, and by it the defendant agreed to supply the plaintiffs with three hundred and

1. *L. R. 8 C. P. 167.* 2. *C. A. C. 30.*

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sixty bales of sarees and dhooties within one year, that is to say, from the 1st September 1910 to the 31st August 1911 at the rate of thirty bales a month. The defendant made default in supplying the sarees and dhooties in the months of October and November 1910, and thereupon the plaintiffs instituted action No. 31911 in the District Court of Colombo for the recovery of R1500 as damages. That action was instituted on the 7th January 1911, and, in appeal, judgment was entered in it in the plaintiff's favour for the amount claimed. In that action the defendant, in his answer raised the question whether the contract referred to above was duly entered into, that is to say, whether one Thomas Marsden, who had signed the contract on the dedefendant's behalf, had the authority of the defendant to do so. At the trial, however, the defendant's Counsel stated that he "did not intend to press the matter." In other words, he assented to the case proceeding on the footing that Marsden had the authority of the defendant to enter into the contract on behalf of the defendant. The same objection was raised in this case, and in that connection the question arose whether, with reference to it, the judgment in the older case could not be pleaded as an estoppel by way of *res judicata*. An order made of consent in a case operates as much as an estoppel as an order made after adjudication on evidence, and the question involved in the present case is quite covered by the authority of the decision of the majority of the court in case No. 21328 of the District Court of Kandy decided by this Court early this year, and I think that the defendant is estopped from pleading in this case that Marsden had no authority to enter into the contract sued on.

Another question raised in this case is whether the plaintiff's claim is not barred by the decree in case No. 31911 by reason of the provisions of sections 34 and 207 of the Civil Procedure Code. Under the former section, every action should include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action pleaded : and under section 207 [see explanation]

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every right to relief of any kind which can be claimed in an action upon the cause for which it is brought becomes a *res judicata* which cannot afterwards be made the subject of action for the same cause between the same parties. Now it is said that the defendant repudiated the contract in question before action No. 3191I was brought, and that therefore the contract was then at an end, and that the plaintiffs should in that action have sued for damages in respect of a breach of the whole contract, and that having sued for damages for two months only, they must be deemed to have been barred from instituting the present action by reason of the sections of the Code cited above. Assuming that there was a repudiation of the contract before the institution of action No. 31911, it must be remembered that [and here the English Law applies] the plaintiffs had the option of treating the whole contract as at an end, and claiming damages in respect of a breach of the whole contract or of treating the contract as subsisting and claiming damages for each default thereunder committed by the defendant. In *Muller v. Brown* [*L. R. 7 Ex. 319, 323*] Kelly C. B.. with reference to a repudiation similar to that with which we are here concerned observed—" The plaintiff might, if he had so elected, have treated the contract as at an end when the defendant announced his intention to break it. That is a matter of election on the plaintiff's part." And in *Roper v. Johnson* [*L. R. 8 C. P. 169*] Keating J. in similar circumstances, observed—"The promisee if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed and then hold the other party responsible for all the consequences of non-performance but in that case he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee

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may, if he thinks proper, treat the repudiation of the other party as a wrongful putting and end to the contract, and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time."

In the present case the plaintiffs wonld appear to have elected to treat the contract as subsisting and to sue for damages on the occasion of each default. That being so sections 34 and 207 of the Civil Procedure Code have no application to this case.

Now, as regards the amount of damages, it has been said that the plaintiffs are not entitled to damages in respect of each separate default. But in the case of *Muller v. Brown*, cited above, the plaintiff bought of the defendant five hundred tons of iron to be delivered in about equal proportions in September, October and November 1871 and it was held that the proper measure of damages was the sum of the difference between the contract and market prices of one-third of five hundred tons on the 30th of September, the 31st of October and the 30th of November, respectively. And in *Roper v. Johnson*, a case in which the plaintiff has elected to treat the contract as at an end—Brett J. observed [*P, 180.*]—"Although the plaintiff may treat the refusal of the defendant to accept or to deliver the goods before the day for performance as a breach, it by no means follows that the damages are to be the difference between the contract price and the market price on the day of the breach. It appears to me that what is laid down by Cockburn C. J. in *Frost v. Knight* in the Exchequer Chamber [*7 Ex. 111*] involves the very distinction which I am endeavouring to lay down, viz, that the election to take advantage of the repudiation of the contract goes only to the question of damages, and that, when you come to estimate the damages, it must be by the difference between the contract price and the market price at the day or days appointed for performance, and not the time of breach,"

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Now as to the measure of damages—section 49 of Ordinance No. 11 of 1896 enacts (1) the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract (2) where there is an available market for the goods' the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market price of the goods at the time or times when they ought to have been delivered. These provisions are identical with the corresponding provisions of the English Act and in this connection I may say that in the case of *Roper v. Johnson* cited above. Grove J. observed as follows [*P. 182.*] "The "plaintiffs having made out a *prima facie* case of damages "actual and prospective, to a given amount, the defendant "should have given evidence to show how and to what extent that claim ought to be mitigated." In the present case, the attitude taken up by the plaintiffs apparently was that the measure of damages applicable was that mentioned in sub-section 2 of section 49 of the Ordinance, and the defendant has in my opinion failed to shew that sub-section 3 applied, and that under it there was reason to mitigate the claim made by the plaintiffs. The plaintiffs by the evidence led by them have shewn that the damage claimed by them is the loss directly and naturally resulting in the ordinary course of events from the defendant's breach of contract. In the older case.—No. 31911—it appears to have been admitted that there was no available market for goods similar to those forming the subject of the present contract. The Chief Justice in his judgment in that case observed. "It "is admitted that in the ordinary sense of the expression "there was no available market for goods of this particular type" and he effectually disposed of the contention that the plaintiffs should have applied to the defendant himself for these goods on terms more favourable to the latter and damages were allowed to the plaintiffs in the older case on the footing that they were entitled to the loss that had directly resulted from the defendant's breach of con-

tract regardless of the market price, if any, of goods similar to those in question. In the present case, as regards available markets the defendants' witness, Mr. Marsden, says no more than that Darley Butler & Co., were selling sarees and dhooties, "exactly similar to those contracted for, in 1908," that in 1912, Findlay & Co., were selling similar sarees and dhooties in Ceylon, and that similar sarees and dhooties were being made in India by the Carnatic Mills and Buckingham Mill in 1910 and 1911, and he gives no information as to the prices and has sworn to no facts that would justify a mitigation of the claim made by the plaintiffs. The 2nd plaintiff, on the other hand, swears that these sarees and dhooties are only manufactured by the defendant and while he admits that Nagappa was selling sarees and dhooties at certain prices, it is clear that Nagappa was a mere retail dealer who himself obtained his sarees and dhooties on a contract with the defendant. In the circumstances, I do not think that there is any reason to reduce the amount claimed by the plaintiffs as damages. I would affirm the judgment appealed from with costs.

Ennis J.—I agree. The measure of damages in an action on contract of non-delivery of goods is the difference between the contract price and the price at which goods of a similar kind could be bought in the market at the time delivery was due. In this case there is some slight evidence of a market for the goods but no evidence of the price at which such goods could be bought. The plaintiff has given evidence that he made no enquiries whether similar goods could be purchased. He bases his claim on a possible profit he could have made had he sold by retail the goods contracted for.

I think that the onus of proof of circumstances in mitigation of the damage was on the defendant, and in the circumstances and in view of the previous case I would not interfere,

Affirmed.

FULL BENCH.

JAINS *v.* SUPPA UMMA.

No. 21941 D. C. Kandy.

Present: **Wood Renton A. C. J., Ennis & de Sampayo J.J.**

14th November 1913.

Contract of sale—obligations between vendors and purchasers—Roman Dutch Law—vacant possession—vendor warrants against eviction and not the title of the thing sold—when do actiones redhibitoria and quanti minoris lie.

The Law governing the obligations between vendors and purchasers of immovable property in Ceylon is the Roman-Dutch Law

Per Curiam, Wood Renton A. C. J. and de Sampayo J, Ennis J dissentiente. In the absence of express agreement the vendor does not warrant the title of the thing sold but only warrants against eviction.

In the absence of fraud or of an express warranty of title the only primary obligations resting on the vendor of immovable property are to give the purchaser "vacant possession," that is to say possession unmolested by the claim of any other person in possession of the property sold and to warrant and defend the title which he conveys after the purchaser once placed in possession has been evicted. The purchaser cannot in such circumstances decline to accept vacant possession on the ground that his vendor's title is defective.

The *actio redhibitoria* and the *actio quanti minoris* are competent only where there is a defect in the thing sold itself. They are not remedies for defect of title.

Ennis J. It is however one thing to say that by a contract of purchase and sale a purchaser is under an obligation to accept delivery of property which did not belong to the vendor, and a totally different thing to find that the Roman-Dutch Law did not allow an action to set aside the sale when a vendor is in a position to give possession of property which does not belong to him. The obligation doubtless existed so long as the contract of sale existed. The passages cited show that *after the purchaser has accepted delivery of property* which did not belong to his vendor, no action was available until he was evicted provided his vendor sold *bonafide* believing the property to be his.

Ennis J. No provision of the Roman-Dutch Law has been cited to us, and I have been unable to find any, which definitely says that a purchaser could not get a rescission of the contract when the title is found before delivery to be either bad or doubtful. It is an argument we are asked to hold by drawing an inference from the passages I have cited, passages which appear to me to apply more particularly to the position of the parties after delivery has been taken by the purchaser.

Ennis J. The authorities cited agree that:—

1. A person who unknowingly accepted a fraudulent transfer could take action before eviction.

2. A person who knowingly accepted a fraudulent transfer could not take action before eviction.

3. A person who knowingly accepted a *bonafide* transfer which subsequently turns out to be bad must wait till he is evicted before he can bring action.

4. A person who accepts a *bonafide* transfer knowing it to be bad could not take action before eviction.

But no auth rity has been cited for the proposition that where the proposed transfer is bad or doubtful the purchaser has no alternative but to accept it and wait for eviction.

de Sampayo J. Under the Ceylon Law it is not the duty of the vendors to make out a good title in order to entitle him to performance by the purchaser of his agreement to purchase. Under the English Law before the purchase is completed by a conveyance tbe vendor is required to satisfy the purchaser on tbe question of title.

The following are the facts of the case as stated by de Sampayo J. in his judgment:

On the 23rd November 1912 the first defendant who is the wife of the 2nd defendant caused a certain land and premises to be put up for sale by public acution and the plaintiff as the highest bidder became the purchaser of the property for a sum of R3750 and signed notarial conditions of sale whereby he agreed to complete the purchase according to the conditions. The plaintiff accordingly paid to the auctioneer a sum of R922/50 being a deposit of one fourth of

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the purchase money and a further sum of R299/50 as the auctioneer's charges and agreed to pay the balance purchase money within one month of the sale. The conditions of sale provided that should the purchaser fail to comply with the conditions, the money deposited and the charges paid should thereupon be forfeited to the vendor who was to be at liberty to enforce the sale or resell the property and recover from the purchaser any deficiency. The plaintiff stated in his plaint that after the sale he had the defendant's title to the property examined by his lawyers and that "the said title was found to be defective and not a valid and marketable title and that its validity was found to depend on doubtful questions of law" and he claimed in this action a refund of the sum of R299/50 paid as auctioneer's charges and a further sum of R75/- as expenses incurred by him in investigating the title. . . . . .

It appears that the 1st defendant holds an absolute grant of the premises dated 28th October 1911, from one Alvaroo whose title was based on a deed of gift dated 3rd February 1897, from his brother Veloo. By this deed of gift Veloo conveyed the property to Alvaroo "his heirs executors administrators and asigns for ever" and with the usual covenant for title. The habendum was followed by a proviso in these terms "that he the said Alvaroo, his heirs, executors or assigns shall not have the power to sell or mortgage or lease for a period exceeding two years the said several lands and premises . . . . . for a period of thirty years commencing from the date hereof and to be fully completed and ended. That if my said brother the said Alvaroo shall die before the expiration of the said period of thirty years without leaving any legitimate issue, then and in such case the said several lands. . . . . . shall devolve upon and become the absolute property of my said children Muniamma and Ayanperumal." According to the plaintiff, Alvaroo is still alive and is unmarried and Muniamma (who joined in the deed of sale to the 1st defendant) is now dead and Ayanperumal is alive and is still a minor. At the trial

no evidence was called, but both parties were content to have the case decided on the legal questions, whether in the circumstances above stated the first defendant was bound to disclose good title for the purpose of holding the plaintiff to his agreement and if so whether the 1st defendant's title was (as the plaint put it) "a valid and marketable title." The District Judge decided both these points in favour of the 1st defendant and the plaintiff has appealed.

Bawa K. C. (with *E. W. Jayawardene* and *L. H. de Alwis*) for plaintiff-appellant:—The defendant has not given to the plaintiff-appellant all the information she possessed as to her title to the property. She has been guilty of fraud or at least of misrepresentation and the contract is void. The defendant purported to sell a property. The obvious meaning is that the whole preperty was to be sold and not a limited interest [*de Sampayo J.* But this is an auction sale and the plaintiff could have ascertained the nature of the rights he was buying]. Yes, but why should the purchaser spend money in ascertaining a title which may be no title at all ? This being an auction sale the case is governed by the English law. (*Marshall's judgments p. 46*). Under the English law the vendor must satisfy the purchaser that he has a good title before he can compel the purchaser to accept a conveyance [*de Sampayo J.* Is there anything in the Roman-Dutch Law which would enable a would-be purchaser to withdraw from the contract on the ground of defect in the title of the vendor ?] The *actio redhibitoria* and the actio *quanti minoris* are available. [*de Sampayo J.* Those actions apply only to latent defects in the thing sold itself but would not apply to questions of title.] A defective title is a latent defect. Every defect is latent which cannot be discovered except by careful investigation by a man accustomed to do it. (*3 Maasdorp 167 et seq*; *Morice 135* ; *2 Nathan 761, 757* ; *Grotius p. 566.*) [*Wood Renton A. C. J.* Does not the vendor discharge his primary obligation when he gives vacant possession ?] Yes, but the question is what is vacant possession. A vendor is understood to deliver vacant possession when he makes such

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delivery of the things sold that it cannot be reclaimed by another person. (*Voet. Bk. XIX. Tit. 1 § 10 ; 25 Halsbury §§ 510, 573.*) Here such possession cannot be given by the defendant to the plaintiff. Counsel also cited *Ratwatte v. Dullewe*;[1] *Alagiawanne Gurunanse v. Don Hendrick*[2] ; *Carlish v. Salt*;[3] *In-re Haedicke and Lipski's contract*;[4] *In-re Gloag and Miller's contract*,[5] *Ellis v. Rogers*.[6]

A. St. V. Jayawardene for the respondent.—Obligations of vendors and purchasers of immovable property are governed by the Roman-Dutch Law. The position of a vendor under a private sale is the same as under an auction. The obligation of the vendor is only to give vacant possession to the purchaser. (*2 Burge 540*; *Voet Bk. XIX Tit. 1. § 11*; *Ratwatte v. Dullewe*;[1] *Alagiawanne Gurunanse v. Hendrick*,[2] *Kuruneru v. De Silva*.[7]) There are two kinds of warranty ; warranty of title and warranty of defect. The purchasers can call upon the vendor to warrant and defend title only after eviction. As long as the vendor can give vacant possession the purchaser must accept such possession and when he is evicted he may have his remedy against the vendor [*Wood Renton A. C. J.* Here we are not concerned with eviction, the purchaser has not gone into possession.] The purchaser's claim against us is premature. As long as we were ready to give vacant possession the purchaser should have been ready to accept it. He would never have been disturbed in his possession.

Bawa K. C. in reply.

c. a. v.

Wood Renton A.C.J.—

The plaintiff, the appellant, sues in this action to re-

1. *(1909) 10 N. L. R. 304.* 2. *(1910) 13 N. L. R. 225.*
3. *(1906) 1 Chan. 335.* 4. *(1901) 2 Chan. 666.*
5. *(1883) L. R. 23 Chan. 320.*
6. *(1884) L. R. 29 Chan. 661.* 7. *(1894) 3 A. C. R. 155.*

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cover from the defendants, the respondents, the auctioneer's charges and other expenses incurred by him in connection with the purchase of a property put up by the 1st defendant-respondent for sale by public auction. The 2nd defendant-respondent is the husband of the 1st. The ground on which the plaintiff's action is based is an alleged defect in the title of the 1st defendant to the property in question. The land originally belong to one *Velloo*. *Velloo*, by deed dated 3rd February 1897, donated it to his brother. "*Alvaroo*, his heirs, executors, administrators, and "assigns as a gift irrevocable, to have and to hold the said "premises unto him the said *Alvaroo* his heirs, executors, "administrators and assigns for ever" and covenanted always "to warrant and defend the same unto him and them against any person whomsoever." The gift was, however, subject to a proviso that, during the next thirty years, the donee *Alvaroo* should not mortgage or sell the property, or lease it for any period beyond two years, and that if he died without legitimate issue before the thirty years elapsed, the property should pass absolutely to his children Muniamma and Aiyanperumal. By deed dated 28th October 1911, Alvaroo and Muniamma sold the property to the 1st defendant. Muniamma has died childless since the date of her deed, but Alvaroo and her brother Aiyanperumal are still alive. The latter is still a minor. There is nothing in the pleadings, or in the record of the proceedings in the District Court, to show that the 1st defendant, in putting up the property for sale, acted otherwise than in good faith. It was contended however, that the deed of 1897 by Veloo created a *fidei commissum* in favour of Muniamma and Aiyanperumal and that Alvaroo had no right to sell the land. The learned District Judge overruled that contention, held that the deed conferred on Alvaroo an absolute title, and dismissed the plaintiff's action with costs, reserving the right of the defendants to recover the unclaimed purchase money in a separate action, if the necessity for doing so arose.

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Wood Renton, A.C.J.

It is, I think, neither necessary nor desirable that we should express in the present case any opinion as to the nature of Alvaroo's interest under the deed. It is conceded, as I have already indicated, for the purposes of these proceedings, that the 1st defendant acted in good faith. There is nothing to show bad faith on the part of Alvaroo and Muniamma, neither is there anything in the deed of 1897 to prevent them from conferring on the first defendant, or the 1st defendant from giving to the plaintiff, a possession of the property free from all adverse claims, during Alvaroo's lifetime. The question that we have to decide is whether in these circumstances, the plaintiff is entitled to decline to proceed further with his bargain, and to claim a refund of the expenses incurred by him in connection with it, including his deposit of a quarter of the purchase money. This question must, in my opinion, be answered in the negative. The point is clearly governed by Roman-Dutch and not by English Law. Whether the rules of Roman-Dutch Law on the subject are reasonable or not is matter with which we have here no concern. If they are unreasonable, the Legislature can alter them. The duty of the Court is merely to ascertain what they are. Under the Roman-Dutch Law, a contract for the sale of immovable property is, in my opinion, fundamentally different from a similar contract under the law of England. The *actio redhibitoria* and the *actio quanti minoris* are competent only where there is a defect in the thing sold itself. They are not remedies for defect of title. In the absence of fraud or of an express warranty of title, the only primary obligations resting on the vendor of immovable property are to give the purchaser "vacant possession" unmolested by the claim of any other person in possession of the property sold, and to warrant and defend the title which he conveys, after the purchaser. once placed in possession, has been judicially evicted. (See *Ratwatte v. Dullewe*[1] and *Alagiawanne v. Don Hendrick*[2]). The purchaser cannot, in

1. *(1907) 10. N. L. R. 304.*
2. *(1910) 13. N. L. R. 225,*

such circumstances as exist in the present case, decline to accept vacant possession on the ground that his vendor's title is defective. The defect, if it exists, may be cured by time. If the purchaser is ousted, he has his remedy (*see Burge, 1st ed. Vol. 2, pages 540, 574 ; Berwick's Voet., p. 173 ; Nathan Vol. 2, § 880 and page 669.*) I can find no groundfor holding that a purchaser stands under Roman-Dutch Law in a better position before the execution of a conveyance in his favour than he does after it. If he declined to accept such a conveyance on the ground that the vendor's title was defective, the vendor could meet his objection at once by saying, "I am able to give you vacant possession, and I will defend the title conveyed when it has been successfully attacked." The conditions of sale in the present case confer upon the purchaser no express rights, and contain no statement of the vendor's interest in the property sold. In these circumstances, both parties must be regarded as having contracted under the provisions of the common law. I have already stated what I believe the common law to be.

I assent to the order proposed by my brother de Sampayo.

Ennis J.—This case raises the question of the respective obligations of vendor and purchaser and the legal remedies available for relief. The question is governed, I consider, by Roman-Dutch Law. It appears that the property is (or may be) burdened with a fidei commissum. The deed of gift, which forms the basis of the title offered, contains a prohibition on alienation for 30 years. The period has not yet expired, and one of the persons to be benefited, a minor, named in the deed, is admittedly still alive and did not join in the conveyance to the 1st defendant. It was urged for the defendants that this fidei commissum clause was void on a true construction of the deed taken as a whole. It may or may not be so, it is a doubtful question of law and turns on the construction of the terms of the deed. It would not I con-

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Ennis J.

consider, be proper to decide such a question as incidental to this action to which the person interested is not a party. It is necessary to consider its effect on the contract. If the *fidei commissum* is good there can be no doubt it would affect the vendibility of the thing sold. *Voet 18-1. 15 (Berwick p. 20).* The prohibition is annexed to and inherent in the thing sold, by virtue of the deed of gift, and renders it unsaleable (*Burge Bk: 2 p. 440*) except with the concurrence of all the persons who take any interest under it (*Walter Pereira p. 570.*)

The contract of sale in this case merely specified certain lands in Kandy as the subject of the sale, and this must be construed to mean the full ownership, (*Bower v. Cooper,*[1] *Hughes v. Parker*[2] and *Maasdorp Vol. III. p: 72*) and not the life interest only to which the vendors would be entitled if the *fidei commissum* is good.

It has been urged that in the absence of express agreement the vendor does not warrant the title of the thing sold but only warrants against eviction, and that the purchaser may be compelled to accept delivery even though the property belongs to another. This proposition is based on the following passages in text books on Roman-Dutch Law:—

Referring to the obligations of a purchaser, Maarsdorp says (*Bk: II. p. 182*) "he is bound to accept the thing, if tendered to him in accordance with the contract, even though the property may belong to a third party." This statement is made on the authority of *Voet. 19. 1. 18* and *Grotius 3. 25. 1.-Burge* (*Bk: 2 p. 540*) says, "according to "the Civil law, the vendor, by the contract of sale, in-"curred the obligation to deliver the property, but not to "make the purchaser the proprietor, so as to entitle the "latter to insist that the title shall be made clear before he "paid the price. . . . . . . The doctrine, therefore, seems to have been, although this inference is controverted

1. *2 Hare 108.* 2. *8 M. & W. 244.*

by Callet in his commentary on the title *ex evictionibus*, that, if the vendor sold the property *bona fide*, believng it to be his own, the purchaser was not at liberty, if he discovered a defect in the title, to refuse payment of or recover back the purchase money, unless he had been actually evicted."

As to the obligations of the Vendor:—Pothier says (in the passage cited in *Burge Vol. 2 p. 541*) which I translate as follows:—

> "The contract of sale is a contract by which one of the contracting parties, the vendor, binds himself to cause the other freely to hold a thing under a proprietory title in consideration of a sum of money which the buyer binds himself reciprocally to pay.

I have said "*de lui faire avoir a titre proprietaire*." "These terms which correspond to *praestare emptori rem habere licere* embody the obligation to deliver the thing to the buyer, and an undertaking to defend it, after it has been delivered to him from all disturbance by which people could prevent him from possessing the thing and from holding it as the proprietor ; but they do not embody a definite obligation to transfer the ownership ; for a vendor who sells a thing of which he believes in good faith himself to be the owner, although he may not be so, does not bind himself definitely to transfer the ownership. That is why, though the buyer finds that the vendor was not the owner of the thing which has sold, and consequently has not trans ferred the ownership to him, the buyer, so long as he is not disturbed in his possession, cannot for that reason, set up that the vendor has not fulfilled his obligation."

Voet 19. 1. 10 (*Berwick p. 172*) says "the things sold are to be transferred. . . . . to the purchaser that he shall acquire vacant possession of them whether it has been expressly agreed or not." And further on he says (*Berwick p. 173*) "a vendor is understood to deliver vacant pos-

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session when he makes such delivery of the things sold that it cannot be reclaimed by another person, and when therefore the purchaser would be successful in a suit for possession."

It appears from these passages that if the vendor was in a position to give a possession which could not be disturbed by a possessory suit the purchaser was under an obligation to accept the possession. This proposition was considered in coming to a decision in the cases *Aliagiawansa Gurunanse. v. Don Hendrick*[1] and *Ratwatte v. Dullewe.*[2] In the one case it was held that a lessee who had been given vacant possession had no cause of action until eviction, and in the other it was held hat a vendor was not in a position to give vacant possession when a third party was actually in possession.

It is however one thing to say that by a contract of purchase and sale a purchaser is under an obligation to accept delivery of property which did not belong to the vendor and a totally different thing to find that the Roman-Dutch Law did not allow an action to set aside the sale when a vendor is in a position to give possession of property which does not belong to him. The obligation doubtless existed so long as the contract of sale existed. The passages cited show that *after the purchaser has accepted delivery* of property which did not belong to his vendor no action was available until he was evicted provided his vendor sold *bona fide* believing the property to be his. Do they go any further than this? I think not. A series of actions were available in Roman-Dutch Law to a purchaser by which he could obtain a rescission of a contract *Maarsdorp Vol: 3 pp. 57 et seq:* and *p. 196.* They were the same on a contract of sale as on any other contract.

No provision of the Roman-Dutch Law has been cited to us, and I have been unable to have find any, which defi-

1. *13 N. L. R. 225.* 2. *10 N. L. R. 304.*

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nitely says that a purchaser could not get a rescission of the contract where the title is found *before delivery* to be either bad or doubtful. It is an argument we are asked to hold by drawing an inference from the passages I have cited, passages which appear to me to apply more particularly to the position of the parties *after* delivery has been taken by the purchaser.

No fraud is alleged in this case, but the circumstances themselves have been urged as indicating a want of mutuality. The vendors must be deemed to have know of the existence of the prohibition on alienation contained in the deed of gift the source of their title, and notwithstanding that they may have had a *bona fide* belief it was invalid, there was not a fair disclosure of the position before the action. The vendors were offering the full ownership of the property burdened with the strong possibility of a law suit. It has been urged that the purchaser might have found it out before bidding. It cost him R75 to find it out afterwards. Is it reasonable to say that every person bidding at an auction should incur such an expense before bidding in order to make sure he is not buying prospective actions at law ? I think that he was entitled to rely on the averments in the conditions of sale prior to the property being knocked down to him. The opportunity to examine the title was available after the contract of sale and before delivery of the property.

It would, it seems to me, be unsafe to adopt an inference which may have far reaching and dangerous consequences, and the argument of the respondents should not be accepted unless it is clearly shown to be a doctrine of Roman-Dutch Law by which we are bound. I find in a note in Maarsdorp (*Vol. 3 p. 6*) that contracts of purchase and sale were regarded by the Roman-Dutch *Jurists* as equitable or *bonae fidei* contracts and that they gave rise to *bonae fidei* actions. The note says "*Bonae fidei* contracts were so called from the fact that, it being very difficult because of the infinite variety of circumstances to lay

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down all the terms of agreement so accurately in transactions binding to both sides, that something might not be omitted, it was thought only right that what was omitted from the express terms of a contract should be supplemented by the equity of the Court in agreement with what was fair and in accordance with good faith."

In Roman-Dutch Law it would seem therefore that the degree of good faith by vendors and purchasers was a question of equity for the Court, adjustable to changing circumstances. The contract of purchase and sale contained reciprocal obligations, on the vendor to deliver, and on the purchaser to receive, the things sold, and, presumably, the measures of relief were also reciprocal. By the Civil Law it was a controverted question (*Burge 2 p. 542*) whether a Vendor who has been adjudged by sentence to deliver the property sold could be compelled to obey the sentence. It would seen that the Civil Law authorised a purchaser to sue before eviction when the vendor sold what *he knew* did not belong to him (*ibid*) and Pothier's explanation which I have cited clearly applies to a case where a vendor has *bona fide* sold ; *i. e*, when he did not know the thing did not belong to him, and where the defect was discovered *after* transfer. In the present case I doubt whether it is possible to hold that the vendors sold *bona fide* as they must be deemed to have been aware of the *prima facie* bad, and by construction doubtful, state of the title, and even if the sale by them could be deemed *bona fide*, Pothier would seen by implication to be an authority for the proposition that the sale could be rescinded before delivery, the real obligation of the vendor to his purchaser being "*de lui faire avoir librement a titre de proprietaire.*

This obligation is not merely to warrant the purchaser against eviction. It is primarily an obligation to transfer the ownership. The guarantee against eviction operates after transfer has been effected. With reference to the transfer of ownership Maasdorp (*Bk : 2 p. 59*) says that to effect a valid transfer it is essential that the transferor be

the owner of the thing, and referring to this essential he adds (*p. 60*).—

"It is almost unnessary to remark that a delivery made by a person who is not the owner, nor authorised by express mandate or authority to act for the owner, is void."

Further on (*p. 64*) he says:—"If there be any difference of opinion as to the thing which is being delivered the contract will be *void* for the want of the necessary consensus."

Again (*p. 75*) he says :—"As regards the general requisities of the trarsfer of ownership . . . . it may be stated that under our system of registration of land a transfer of immoveable property by any other than the owner, except by means of forgery or fraud which would make a transfer void, is impossible."

Speaking of the Cape system of registration of land he says (*p. 71*):—"Our law with respect to the registration and transfer of immoveable property is derived, not from the Roman Law, which drew no great distinction between the delivery of moveable and the transfer of immoveable property, but from the customs of the Netherlands."

The Ceylon Law requires deeds of transfer of land to be registered but it does not make unregistered deeds altogether void (Ordinance 14 of 1891, section 17) so it may be that in Ceylon the transfer of land by a person who is not the owner is not impossible in the absence of forgery or fraud.

In my opinion equity must decree relief against an obligation to take a void transfer, void on account of the vendor not being the owner or void for the absence of the necessary consensus consequent upon the difference of opinion as to the thing which is being delivered. There is no good reason to assume that Roman-Dutch Law would not decree a rescission of the contract in such a case before deli-

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very of possession. There is on the contrary reason to believe that it could and would so decree.

The customs of Netherlands relaxed the strictness of the Roman-Dutch Law and allowed contracts to be supplemented by the equity of the Court. These customs required something more than delivery of possession to effect a valid transfer of ownership, there was a "solemn cession" in the presence of a Judge, and it may well be that if the Judge kept a record of these transactions, the transfer of land by any other than the owner except by forgery or fraud, was in the Netherlands, as in the Cape, an impossibility.

In Ceylon also the delivery of possession only does not operate as a valid transfer, for by Ordinance No. 7 of 1840 not only must the contract of sale be in writing notarially, executed but the transfer also must be in writing notarially executed before it has any force or avail in law. The deed transferring title aud not the naked delivery of possession is now the essential act of transfer under a contract for the sale of land.

A passage in *Voet. 18. 1. 5.* dealing with the effect of a mortgage of brass as gold, in my opinion indicates the position taken by the Roman-Dutch Jurists viz: that contracts void for want of the requisite consent acquired validity only when they were ratified. Voet. says (*Berwick p. 10*).—

"For it must be considered that although the mortgage of brass as gold is, if we have regard to its inception, void for want of the requisite consent, it acquires validity when, on the fraud or mistake being discovered, the creditor nevertheless ratifies it, reckoning it better to have at least that rather than no security at all: very much in the same way as a purchase which once has been brought about by fraud, although null *ab initio*, way nevertheless be confirmed by the person who was fraudulently induced to to enter into the contract if he considers it an advantageous one for himself in spite of the fraud."

Voet. 18. 1. 24 (Berwick p. 20) again says:—" The sale is complete as soon as the parties have agreed to the commodity and the price . . . . . and it cannot then be receded from unless . . . . . there still remains something to be done.

In this case a notarially executed transfer remained to be done and prior to that the sale can apparently be receded from.

The authorities cited agree that:—

1. A. person who unknowingly accepted a fraudulent transfer could take action before eviction.

2. A person who knowingly accepted a fraudulent transfer could not take action before eviction.

3. A person who knowingly accepted a *bona fide* transfer, which subsequently turns out to be bad must wait till he is evicted before he can bring action.

4. A person who accepts a *bona fi de* transfer, knowing it to be bad could not take action befor e eviction.

But no authority has been cited for the proposition where that where the proposed transfer is bad or doubtful a person has no alternative but to accept it and wait for eviction.

My view of the case is that the circumstances are such that it is only fair and in accordance with good faith that the appellants should have the relief they seek, no conclusive authority having been shown that such relief was not open to them under Roman-Dutch Law.

I would allow the appeal.

De Sampayo J.—His Lordship having set out the facts as above continued:—

Mr. Bawa for the appellant first of all addressed to us an argument to the effect that the 1st defendant was guilty of fraud or misrepresentation in that she had not given to

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plaintiff all the information she possessed as to her title to the property, and that his agreement was on that ground avoided. Even the English Law, which was relied on, does not seem to go that length. It is summarised in the "Laws of England " Vol. 25 section 502 as follows: " A contract for the sale of land is not a contract *uberrimae fidei*, in which there is an absolute duty upon each party to make full disclosure to the other of all material facts of which he has knowledge, but the contract may be avoided on the ground of misrepresentation fraud or mistake in the same way as any other contract." Now in this case no such fraud or misrepresentation was pleaded in the plaint or formulated in the issues nor was any evidence put before the Court on that point. As a matter of fact the 1st defendant had an absolute conveyance for the property in her favour, though this conveyance referred to the deed of gift in favour of her vendor. The vendor's deed of gift, even if she were in fact aware of its terms would not necessarily inform her of the title being other than valid. She caused the property to be advertized for sale by public auction thus giving would-be purchasers every opportunity to make due inquiry as to the title. It was obvious in these circumstances that the appeal could not reasonably be sustained so far as the suggestion of fraud or misrepresentation was concerned, and Counsel for the appellant, secondly took up the position that, apart from fraud and misrepresentation it was the duty of the Ist defendant as vendor to make out a good title in order to entitle her to performance by the plaintiff of his agreement to purchase.

I need not examine the English authorities relied on by appellants' Counsel. It may be assumed that under the English Law, in the case of a sale of real property, the vendor should deduce good title before the contract can be enforced, and for that purpose should furnish an abstract of title and do other things which are well-known in the law of conveyancing. But these requirements are relevant to a system of law, which in regard to the mutual obligations

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of vendor and purchaser of immoveable property and the consequences of the completion of a sale is quite different from the Roman-Dutch Law by which we are governed. Under the English Law "after completion of the contract the transaction is at an end as between vendor and purchaser and as a general rule no action, either at law or in equity, can be maintained by either party against the other for damages or compensation on account of errors as to quantity or quality of the property sold, unless such error amounts to a breach of some contract or warranty contained in the conveyance itself." (Laws of England Vol. 25 section 845) This appears to me to furnish the reason why under the English Law, before the purchase is completed by a conveyance, the vendor is required to satisfy the purchaser on the question of title.

Further, it seems to me that the Englsih Law is expressly excluded by the proviso to section 1 of the ordinance No. 22 of 1866. That Ordinance introduces the English Law with respect to certain subjects but it is provided *inter alias* that nothing therein contained should be taken to introduce into this Colony any part of the law of England relating to the conveyance or assurance of any land or other immoveable property. It is clear that this refers not to mere forms of conveyance as was argued but to the obligations of the vendor and purchaser of real property. Under the Roman-Dutch Law there is in every sale an implied covenant to warrant and defend the title, and the nature of the remedies available to the purchaser is in accordance with the peculiar obligations of the vendor even after the sale is completed by conveyance. The first obligation of the vendor is to afford vacant possession to the purchaser, and in default the purchaser has an immediate right of action *ex empto* against the vendor for rescission of the sale. The second obligation is to warrant and defend the title against any trespasser, and if the purchaser is legally evicted in the *rei vindicatio* action he can sue his vendor for compensation in the action *de evictione* provided he

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has given him timely notice, Subject to these obligations of the vendor and the remedies of the purchaser, a person, may even sell what does not belong to himself. Voet. 18. 1-14 says "it matters little whether what is sold is the property of the vendor or not, in as much as he is bound to purchase the same thing elsewhere and fulfil his contract unless he prefers to be condemned in damages if he knowingly sold another's property. For if he acted in good faith he is no further bound than for the delivery of vacant possession and is only liable in damages for the *id quod interest* in the case of judicial eviction" (Berwick's Translation p. 19.). Maasdorp in his Institutes Vol. 2 pp. 133 and 134 says.—"The thing sold need not necessarily be the property of the vendor, as there may be a valid sale of the property of a third party, provided it is made *bona fide.* The duty of the vendor in such a case, if he has made delivery to the purchaser, is to guarantee the latter against eviction, and if he has not yet given delivery, he is bound either to acquire the thing and deliver it to the purchaser or, in default, to pay the latter compensation in damages. " Maasdorp in this passage adds"—If the vendor knowingly sells property which does not belong to him to a buyer who is ignorant of the fact, so as wilfully to expose the latter to the danger of eviction, the vendor's conduct will be regarded as fraudulent and the buyer will in such a case be entitled to bring an action of damages against him even before he is himself evicted. The commentary in 2 Nathan 699 is to the same effect. In this case as I have already observed want of *bona fides* on the part of the 1st defendant was neither alleged nor proved, and the circumstances negative it. In my view the plaintiff's only remedy will be an action for damages in case of default of delivery of possession or in case of eviction after such delivery, and in either case he must in the first instance fulfil his own agreement. His present action seems to me to be premature. These principles of the Roman-Dutch law are explained and excepted in *Alagiawansa Gurunanse v. Don Hendrick* [1] and *Babaihamy*

1. (1910) 13. N. L. R. 225.

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v. Danchihamy.[1] See also Voet. 19-I-11 and 2 Burge 540 and 541. This passage in Burge is important, because it appears from it that even if the purchaser discovers a defect in the title after the sale and before the execution of the conveyance he is still bound to pay the purchase money and accept the conveyance. The case of *Ratwatte v. Dulleve*,[2] cited to us in this connection, when examined, will de found not to be contrary to the principles above stated. For, there, a third party was in possession claiming title under the vendor's predecessor in title and resisted the purchaser, and this Court held that, the vendor manifestly not being in a position to deliver vacant possession, the purchaser who had paid the full purchase money and thus was entitled to receive the agreed consideration viz : free possession of the property, was not bound to accept a conveyance and embark upon a litigation with the party in possession but could resort at once to an action for rescission of the sale. In the present case it is not alleged, and the circumstances do not show, that any third party is in possession of the property or that the 1st defendant is not in a position to make delivery. I do not lose sight of the fact that by "vacant possession" is meant such possession as may be legally maintained against the claims of third parties. The plaintiff in this case does not deny that the 1st defendant is in actual possession and is able to deliver possession to him in pursuance of the sale. The 1st defendant's vendor Alvaroo is still alive and cannot dispute his own sale to 1st defendant. He may live for 30 years from the date of the gift to him, or he may die leaving legitimate children, and in either case the 1st defendant's possession can be maintained. The plaintiff cannot be allowed to proceed upon a speculative fear of a possible loss of possession upon contingencies which may never happen. Of course, if he be ultimately evicted at some time or other by some party claiming to be

1. *1913 16. N. L. R. 245.*
2. *1907 10. N. L. R. 304.*

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entitled after Alvaroo's death, he would still have his remedy by the action *de evictione* against the 1st defendant founded on the covenant to warrant and defend. The Roman Dutch law being much as I have here stated it: it will be seen that there is not the same necessity as in the English law for the vendor to make out a good title at the outset unless he has expressly agreed to do so. With regard to the *actio redhibitoria* and *actio quanti minoris* which are available to purchasers under the Roman-Dutch Law and with which it was sought to identify this case I need only remark that they relate to claim for latent defects of the thing sold and not to defects in the vendor's title. Mr. Bawa, however referred us to Marshall's Judgment page 46, where it is stated that "in matters of dispute between auctioneers and their employers, whether buyers or sellers, recourse may generally speaking, be had for the guidance of litigants, to the English or Civil Law indifferently, and he thereupon argued that this case might well be decided by the principles of the English Law. I do not think this passage in Marshall is of assistance in this matter. The passage occurs in a chapter on the law relating to auctioneers and discusses the rights and liabilities of auctioneers under the old regulation No. 12 of 1825, and the learned author in that connection refers to a decision in a case where the defendant as auctioneer had sold a land and called upon the plaintiff to pay the purchase money to the vendor, promising that he the auctioneer would get the titles for the plaintiff in a month, and where the Court held that, as it turned out that the vendor had no right to the land the defendant was personally liable to the plaintiff for what had been paid on the strength of the defendant's promise. The ruling of the Court turned upon the special circumstances of that case, and while the the English Law might be applied to a case between principal and agent as indeed the later Ordinance of 1866 expressly provides, it is not applicable to a case between vendor and purchaser of land as such. For these reasons I am of opinion that the 1st defendant is not bound to satisfy the plaintiff in regard

to her title to the land before the plaintiff performs his agreement to purchase. It might, of course, be different if the conditions of sale had stipulated to convey good title but they do not.

The above judgment was written after the argument in appeal before me and my brother Ennis and I would also have been prepared to deal with the question, which was argued before us, whether, assuming that the first defendant was bound to make out good title, her vendor's title was in fact defective by reason of its being burdened with a *fideicommissum.* But the argument before the Full Court was confined to the first point, inasmuch as if that was held against the plaintiff, it would dispose of plaintiff's whole case. It is, moreover, undesirable that the question of *fideicommissum* should be decided incidently in this case in the absence of the parties claiming under the *fideicommissum* It is therefore unnecessary for me to go into the question of the validity of the 1st defendant's title.

In my opinion the judgment appealed against is right and this appeal cannot succeed on its merits. But Mr. Bawa, for the appellant desired that in the event of the Court being against him on this appeal his client should at least be given relief against a for feiture of the money paid by him and be allowed now to complete his purchase. In all the circumstances of the case I think it is fair to grant this relief. The order therefore will be that on payment by the plaintiff of the balance purchase money within such time as the District Judge may fix the 1st defendant should grant a conveyance of the property in favour of the plaintiff in terms of the conditions of sale, and that in failure of payment the decree appealed against should stand. In any event the plaintiff should pay the costs of the action and of this appeal.

Proctors for appellant.—*Weerasooriya* and *Wijenaike.*

Proctors for respondent.—*Goonewardene* and *Wijegoonewardene,*

WELAIDAN CHETTY v. PIYARATNE UNANSE.

No. 21750 D. C. Kandy.

Present: **Wood Renton, A. C. J. & Pereira J.**

7th October 1913.

Jus Retentionis—right of a tenant to retain possession—inchoate right —cannot be assigned nor seized in execution.

The right of a tenant under the Roman-Dutch Law to retain possession is an inchoate right and is neither assignable nor capable of being seized and sold at a Fiscal's sale under a writ against the tenant.

Humbold v. Andiyappa Chetty[1] followed.

Per Pereira J.—In my opinion a *jus retentionis* is a real right which may be alienated by the person who is entitled to it or sold by the Fiscal by process of execution against him. . . . . . It is in my opinion as much a real right as the right of a unfructuary mortgagee over the property mortgaged. When however the *jus retentionis* alone, that is to say the right independently of the debt which gives rise to it is sold either by the person entitled to it or in execution against him, what the purchaser becomes entitled to is the right to retain the property that is subject to the right until the debt is paid to the seller or execution debtor. But when the debt also is sold then the purchaser is placed in exactly the same position as the seller or execution debtor and he may retain the property until the debt is paid to himself. This appears to me to be the only difference between a sale of only a *jus retentionis* and a sale of a *jus retentionis* together with the debt on which it depends.

H. J. C. Pereira for appellant.

H. A. Jayewardene for respondent.

Wood Renton A,C.J.—The material facts in this case are stated by the learned District Judge, and I do not propose to repeat them. He has disposed of the plaintiff-appellant's action on the first issue, namely, whether the plaint discloses a cause of action against the defendants. The District Judge holds that the present case is governed by the decision of the Full Court in *Humbold v. Nana Pana Lana Andiyappa Chetty.*[1] It was held in that case by Chief

1. *8 S. C. C. 61.*

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Justice Burnside that the right of a tenant under the Roman-Dutch Law to retain possession is at most an inchoate right in the tenant himself, and is neither assignable nor capable of being seized and sold at a Fiscal's sale under a writ against the tenant. Mr. Justice Clarence, while he did not use such a clear and confident language as that employed by the Chief Justice, said that, as then advised, he was not prepared to say that a right of such a character was one capable of being seized, sold and assigned ; and added that in any case, it could not be dealt with in that manner unless there had been a transfer, in the nature of an assignment, of the right itself. Mr. Justice Dias thought that a right to compensation according to the Roman-Dutch Law was a saleable interest. But he too associated himself with the view of Mr. Justice Clarence that the interest must be sold by the Fiscal if it is to pass by a Fiscal's sale. It is obvious from the facts as stated by the learned District. that we are here in presence of circumstances substantially identical with those on which the decision in *Humbold v. Nana Pana Lana Andiyappa Chetty*[1] depended, and I agree with the District Judge that we are bound by the authority of that case.

I would dismiss the appeal with costs.

Pereira J.—I agree to the order proposed by my Lord the Acting Chief Justice as I think it is necessary that we shold follow the decision of the Full Court in the case of *Humbold v. Nana Pana Lana Andiyappa Chetty.*[1] I should, however, like to observe that in my opinion a *jus retentionis* is a real right which may be alienated by the person who is entitled to it or sold by the Fiscal by process of execution against him. It has, in effect, been held by Bonser, C. J. in the case of *de Silva v. Shaik Ali*[2] that the right is alienable. It is, in my opinion, as much a real right as the right of a usufructuary mortgage over the property mortgaged. When however, the *jus retentionis* alone, that

1. (1887) 8 S. C. C. 61, *2. (1895) 1 N. L. R. 228.*

is to say, the right independently of the debt which gives rise to it is sold either by the person entitled to it or in execution against him, what the purchaser becomes entitled to is the right to retain the property that is subject to the right until the debt is paid to the seller or execution debtor. But when the debt also is sold, then the purchaser is placed in exactly the same position as the seller or execution debtor, and he may retain the property until the debt is paid to himself. This appears to me to be the only difference between a sale of only a *jus retentionis* and a sale of a *jus retentionis* together with the debt on which it depends.

——:o:——

ARUNASALEM *v.* RAMASAMY NAYAKER.

No. 36453 D. C. Colombo.

Present : **Lascelles C. J. & de Sampayo J.**

12th January 1914.

Prescription—action for wages—part payment—acknowledgment of indebtedness and promise to pay balance—rebuttal of acknowledgment by special circumstances—burden of proof.

A payment on account, of a debt, whether such debt at the time of payment is already statute-barred or not is necessarily an acknowledgment of the debt, and the law in the absence of anything to the contrary implies from the acknowledgment a promise to pay the balance.

The implication of such promise may be rebutted by any special circumstances attending the payment and the burden of proving such circumstances is upon the defendant.

J. Joseph for the defendant-appellant.—The action was instituted on the 29th May 1913, therefore the plaintiff's claim for wages prior to 20th May 1912 is prescribed. The only payment which the plaintiff pleads as taking the case out of prescription was made in September 1912, The occurrence of one single item of payment within a year

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de Sampayo J.

before action brought will not take the claim out of prescription. *Usuf Saib v. Punchimenika.*[1] Further the pay ment must be made under circumstances implying an acknowledgment of indebtedness on the part of the defendant and a promise to pay the balance. *Silva v. Don Lewis.*[2] The mere fact of payment will not bar prescription unless these circumstances are proved. *Murugupillai v. Muttelingam.*[3] The burden of proving such circumstances is upon the plaintiff.

Arulanandan for the plaintiff-respondent.—The case of *Usuf Saib v. Punchimenika*[1] has no application here. That was a case of goods sold and delivered and the facts are quite different. Part payment of a debt is an acknowledgment of the debt and the inference from such payment is that the debtor promises to pay the balance unless there are special circumstances which disprove such inference. The burden of proving such circumstances is upon the debtor.

c. a. v.

De Sampayo J.—The plaintiff who was employed as a dairyman under the defendant sues the defendant for a sum of R350-50 as balance of wages due to him from 1st July 1910 to 20 May 1913. The payments for which credit has been given were made to the plaintiff in September 1912. The action was instituted on 19th May 1913, and the defendant pleads that the plaintiff's claim for wages prior to 39th May 1912 is barred by prescription. The point for consideration on this appeal is whether the payments in September 1912 take the case out of prescription. The district Judge relying on *Moorthiapillai v. Sivakaminathapillai*[4] has decided the question in the affirmative; I think his decision is right. Counsel for defendant; however cited *Silva v. Don Luis*[2] and contended

1. (1904) 1 Bal 36.
2. (1897) 7 Tamb 74.
3. (1894) 3 C. L. R. 92.
4. (1910) 14 N. L. R. 30.

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that it should have been proved by evidence that the payments were made under circumstances implying an acknowledgment of indebtedness and a promise to pay the balance. This contention, so far as it means that it was for the plaintiff to prove anything more than the fact of an absolute payment on account is not well founded. Neither in the English Statute of Limitations nor in our Ordinance of Prescription is there any express provision regulating the effect of a part payment; all that Lord Tenterden's act and our Ordinance No. 22 of 1871 do is to provide that the enacments requiring an acknowledgment to be in writing shall not alter, take away, or lessen the effect of any payment of any principal or interest."

The reason for the absence of such express provision is obvious. A payment on account is necessarily an acknowledgment of the debt, and the law in the absence of anything to the contrary implies from the acknowledgment of the debt a promise to payt he balance. *Fordham v. Wallis.*[1] This implied promise creates a new obligation and takes the debt out of the operation of the statute, and this is so even though, at the date of payment the debt may have been already statute-barred. Of course the implication of a promise may be rebutted by any special circumstances attending the payment as where the payment is not on account but purports to be in satisfaction of the entire demand. (*Taylor v. Hollard*[2]) or where the debtor says he will not pay the balance (*Wainman v. Kynman*[3]) or where the payment is compulsory under some legal proceeding (*Morgan v. Rowlands*[4]) *such as are* I think the circumstances alluded to in the case cited from *7 Tamb 74* but in the present case there is an entire absence of such qualifying circumstances. The evidence shows that the payments made in September 1912 were so made by the defendant without any reservation on

1. (1859) *10 Hare 225.* 2. (1902) *1 K. B. 676.*
3. (1847) *Ex. 118.* 4. (1872) *7 Q. B. 493.*

account of the accumulated arrears of salary due to plaintiff at that date. If anything further took place between the parties sufficient to " alter or take away or lessen the effect" of the payments, it was for the defendant to satisfy the Court on that point, and in the absence of such evidence, the defendant by his payments not only acknowledged the existence of the debt but must be taken in law to have promised to pay the balance. In my opinion the payments took the case out of the operation of the Ordinance, and the defendant's plea of prescription cannot be sustained.

I would dismiss the appeal with costs.

Lascelles C. J.—I entirely agree.

Appeal dismissed.

Proctor for appellant—*Rajaratnam & Vandergert.*

Proctor for respondent—*J. H. R. Joseph.*

VYTIANATHAN CHETTY *v.* MEENATCHI *et al*

No. 33647 D. C. Colombo.

Present: **Pereira & Ennis J J.**

10th September 1913.

Hotchpot—collation—Roman-Dutch Law not applicable—Ordinance 15 of 1876 § 39—amendment of decree—decree in accordance with judgment—remedy—appeal—Civil Procedure Code § 189.

The Roman-Dutch Law as to collation was superseded by § 39 of Ordinance No. 15 of 1876. Under that section collation takes place only when a parent gives property to his children either on the occasion of their marriage or to advance or establish them in life.

A decree can only be amended in terms of § 189 of the Civil Procedure Code.

When there is no inadvertant omission in the judgment an application to amend the decree does not fall within the scope of § 189 and the remedy is to appeal from the decree or judgment.

Vytianathan Chetty v. Meenatchi *et al*

Pereira J.

E. W. Jayewardene (with *F. H. B. Koch*) for appellant in appeal 240 A.

H. A. Jayewardene for appellant in appeal 240 B.

Morgan de Saram for appellant in appeal 240 C.

Morgan de Saram for respondents in appeals 240 A. and 240 B.

Wadsworth for respondent in appeal 240 C.

Pereira J.—Appeal No. 240 A. by the 1st defendant and appeal No. 240 B. by the 3rd defendant involve practically the same points. The two points pressed before us were (1) that the plaintiff should have brought into hotchpot or collation the lands 177 and 178 Ley Street given by Selvanayagam to his son-in-law Kandappa Chetty on the occasion of his marriage with Selvanayagam's daughter and (2) that Meenatchi had prescriptive possession of the property in claim in this action. As regards the 1st, a great deal of Roman-Dutch authority was cited, bnt, clearly. the Roman-Dutch Law as to collation was superseded by section 39 of Ordinance No. 15 of 1876. Under that section, collation takes place only when a parent gives property to his children either on the occasion of their marriage or to advance or establish them in life. In the present case, property was given by Selvanayagam not to his daughter but to his son-in-law. If he intended the property to go to his daughter there was nothing easier than to execute the conveyance in her favour. It is in vain to speculate as to the motives that induced Selvanayagam to make a gift to his son-in-law, suffice it to say that motives are conceivable which preclude the idea that it was intended that the daughter should not, in due time, get her fair share of the remaining property of the estate of Selvanaygam.

On the 2nd point pressed it is clear that prescription could not run against the plaintiff as she was a minor. It was argued that Meenatchi's possession began in the life time of her father but of this there is in my opinion no satisfactory

evidence. I would dismiss appeals 240 A. and 240 B. with costs.

In appeal 240 C. the appellant [plaintiff] appeals from an order of the District Judge dated the 21st May 1913 refusing to amend the decree already entered up in the case. A decree can only be amended by the District Judge in terms of § 189 of the Civil Procedure Code but the appellant's application did not fall within the scope of that section. It was based on the assumption that there was an inadvertant omission in the judgment by the District Judge but the order appealed from clearly shows that the District Judge was not prepared to recognise that there was any such omission. That being so, the present order is right. The appellant's remedy was to appeal from the decree or judgment. I would dismiss the appeal with costs.

Ennis J.—I agree.

Appeal dismissed.

Proctor for appellants—*S. N. Asirvathen.*

Proctor for respondents—*G. E. G. Weeresinghe.*

WIJESINGHE *v.* DINGIRI APPUHAMY.

No. 4414 D. C. Kurunegala.

Present : **Pereira & de Sampayo J.J.**

17th June 1913.

Mortgage—sale of mortgaged lands to third party—concealment of sale—transfer in favour of mortgagee—discharge of mortgage debt—mortgagee's deed of transfer ineffectual—revival of mortgage—where several lands mortgaged—Court has power to direct sale in any order—Civil Procedure Code No. 2 of 1889 § 201.

The 1st and 4th defendants mortgaged two fields to the plaintiff on 29th August 1909 by deed A registered on 3rd September 1910, and by another deed B of 9th September 1910 the 1st defendant mortgaged

Wijesinghe v Dingiri Appuhamy

de Sampayo J.J

a share of another field. On 13th September 1910 the 1st defendant sold his share of the fields to the 2nd defendant by deed C registered on 22nd September 1910. On 13th December 1910 the 1st defendant concealing the fact that he had parted with his rights in these fields transferred them to the plaintiff by deed D and obtained a discharge of half the debt due on A andthe entirety of the debt due on B. The 2nd defendant transferred all his rights in the fields to the 3rd defendant by deed AD5 dated 29th February 1912.

Held, that if the deeds C & AD5 are to be deemed to have the effect of rendering ineffectual deed D. in the plaintiff's favour the plaintiff's rights on the mortgage bonds A & B must be taken to have revived.

Silva v. Silva[1]; *Elaris Appuhamy v. Moises Fernando*[2] followed.

Held also, that under § 201 of the Civil Procedure Code it is competent to the Court to give directions as to the order in which mortgaged properties should be sold.

H. A. Jayewardene for the plaintiff-appellant.—Where a mortgagee purchases property mortgaged by private sale and where such purchase is invalidated by the act of the mortgagor himself, the mortgage debt revives (see *Silva v. Silva*[1]; *Elaris Appuhamy v. Moises Fernando*[2]; *Voet. 20. 5. 10. Berwick's Translation p. 436.*) The *bona fides* of the 3rd defendant on which the learned Judge has placed so much stress in his judgment does not affect the plaintiff's rights. The plaintiff's deed of transfer being declared invalid, his rights on the mortgage bonds A. and B. revive.

F. M. de Saram for the respondent,—The cases cited have no application. In *Silva v. Silva*[1] the deed in favour of the mortgagee was void from its inception inasmuch as it was executed pending a seizure. In the present case the deed in favour of the plaintiff only became void by reason of the 2nd defendant's diligence subsequent to the execution of deed in favour of the plaintiff. On the execution of deed D the mortgage bonds A and B became extinguished and they cannot be revived except by fresh document (see Ordinance No. 7 of 1840).

1. *13 N. L. R. 33.* 2. *Times Law Reports (17. 2. 1905.)*

Wijesinghe v Dingiri Appuhamy

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Even if the debt revives the mortgagee cannot discuss the properties in any order he pleases. There are some lands unaffected by the conveyances in favour of the 2nd and 3rd defendants, and the mortgagee should be ordered to discuss those before the others. Section 201 of the Civil Procedure Code empowers the Court to give such directions (see also *Wickremasinghe v. Punchi Banda*[1]).

H. A. Jayewardene in reply,—A mortgagee in execution cannot be restricted to discuss any particular part of the mortgaged property before the other (see *Gooneseke re v. De Silva*[2] ; *Voet. 20. 4. 4*).

c. a. v.

Pereira J.—In this case I think that the District Judge is right in his decisions on the questions of fact involved If, however, the deeds C and AD[5] are to be deemed to have the effect of rendering ineffectual deed D. (of the 13th December 1910) in the plaintiff's favour, then, clearly. the plaintiff's rights on the mortgage bonds (A and B) granted by the 1st and 4th defendants must be taken to have revived. This view is well supported by the decision in the case of *Silva v. Silva*[3] see also *Elaris Appuhamy v. Moises Fernando*[4] and also by the principle underlying the law enunciated by Voet in *20. 5. 10* and *20. 6. 1* of his commentaries which do not appear to have been cited in the argument in *Silva v. Silva.* No doubt that in that case, the conveyance to the mortgagee was rendered ineffectual by reason of a prior registered seizure of the property conveyed, but I do not, on that account, see that the *ratio decidendi* of that case does not apply to this. I think that the plaintiff is entitled to judgment in terms of the 2nd alternative prayer in his plaint but I would remit the case to the Court below to define the exact terms of the judgment which should be entered in his favour. It appears that in the prosecution of

1. *2 C. A. C. 43.* 2. *S. C. R. 195.*
3. *13 N. L. R 33.* 4. *Times Law Reports 17. 2, 1905.*

Wijesinghe v Dingiri Appuhamy

de Sampayo J.

the 1st defendant for fraud the plaintiff was allowed, presumably under section 432 of the Criminal Procedure Code, a certain sum, as compensation, out of the fine imposed on the 1st defendant. It is also stated that it would be to the benefit of all parties concerned that the Court should give certain directions as to the order in which one or more of the lands mortgaged should be sold in view of the fact that there are some lands unaffected by the conveyances in favour of the 2nd and 3rd defendants. I think it is quite competent to the Court to give such directions under section 201 of the Civil Procedure Code. That section gives authority to the Court to give such directions as it may think fit as to the conduct of the sale, and I think that the words used are wide enough to include [where there are several distinct properties made executable for satisfaction of the decree] directions as to the order in which such properties should be sold so that a party may not be prejudiced by their sale in an order that is manifestly unfair and unreasonable and ill-calculated to secure the most satisfactory results. I would set aside the judgment appealed from and remit the case to the Court below to enter up judgment as indicated above subject to such directions as the District Judge, after hearing both parties, may think fit to give as to deducting, in terms of section 432 (3) of the Criminal Procedure Code, from the amount claimed the whole or any part, if at all, of the compensation received by the plaintiff as stated above, and as to the order, if any, in which the District Judge may deem it desirable that the properties mortgaged should be sold.

I think that the appellant should have his costs of appeal.

De Sampayo J.—I agree.

Set aside.

Proctor for appellant—*E. G. Goonewardene.*

Proctor for respondent—*Fred Daniels,*

AYANOHAMY v. SILVA.

No. 9394 C. R. Balapitiya.

Present: **Pereira J.**

1st December 1913,

Appeal agreement to abide by decision of Court must be acquiesced in by opposite party—prescription—possession of another's land in bona fide though mistaken belief it is his own—what must be proved in possessory action—adverse possession, what is.

The defendant, who claimed title to a land by prescription, stated in reply to a question put by the Court in the course of his examination, "If I have even by mistake gone and planted that land I am prepared to abide by the order of the Court." In spite of the defendant's undertaking his Counsel pressed the plea of prescription and that plea the commissioner upheld in his judgment but at the same time condemned the defendant to pay the plaintiff R25. Each party appealed against the part of the decree that was adverse to himself.

Held, that the defendant's undertaking did not prevent him from appealing against the judgment of the Court.

Pereira J.—(1) An undertaking of this nature to have a binding effect, should, in my opinion, be given in a more formal and solemn manner than in the shape of a casual answer to a question put by the Court in the course of the examination of a party as a witness.

(2) In the next place such an undertaking as that mentioned above can be of no avail unless the opposite party is prepared to accept the decision of the Judge.

Babunhamy v. Andris Appu[1]; *Gunaratne v. Andradi*[2] differentiated

A person who possesses property in the *bona fide* (albeit mistaken) belief that the property is his own and belongs to nobody else has clearly the *detentio animo domini* and such possession is "adverse possession" within the meaning of § 3 of Ordinance No. 22 of 1871. *Daniel v. Marikar*[3]; *Carrim v. Dholl*[4] referred to.

Pereira J.—We have nothing to do with the definition in English Law of either the term "possession" or the term "adverse possession. . . . . . . Possession under the Roman-Dutch Law is either Possessio Civilis or Possessio Naturalis. Possessio Civilis is *detentio animo domini*. It is this possession that is necessary to be proved where a person seeks either any of the possessory remedies or to establish a title by prescription.

1. *5. Bal. 89.* 2. *3 C. A. C. 69.*
3. *Ram 1843-58 p. 9.* 4. *2 C. L. R. 18.*

Ayanohamy v Silva

Pereira J.

This is an appeal against a judgment of the commissioner of Requests of Balapitiya (*H. J. V. Ekanayake Esq.*) The plaintiff sued the defendant for the recovery of a price of land. The defendant pleaded prescription. The learned Commissioner decreed the land in favour of the defendant but ordered him to pay the plaintiff R25 as compensation. The defendant appealed against the order to pay compensation and the plaintiff against the order declaring the defendant entitled to the land.

A St. V. Jayewardene for the plaintiff-respondent.—The defendant is not entitled to appeal. He undertook to abide by the decision of the Court (see *Babun hamy v. Andris Appu*[1]). (*Pereira J.* In that case both parties agreed to be bound by the decision of the Judge, whereas in this case only one party did so). That is immaterial (see *Gooneratne v. Andradi*[2]). The defendant cannot plead prescription as he entered into possession under a mistake. He had not the *animus* necessary for prescriptive possession (see *Fernando v. Menika*[3] ; *Angell on Limitations p 399*).

E. W. Jayewardene for the defendant-appellant.—The preliminary objection fails as no formal undertaking was given by the defendant to abide by the Judge's order. It was merely an answer to a question put by the Court. Besides it is manifestly unfair that the defendant should be bound by such an undertaking. It is clear that the plaintiff was not prepared to accept the decision of the Judge. The cases cited are different. In *Guneratne v. Andradi*[2] though the undertaking was by the plaintiff alone, the defendant had acquiesced in it.

The passage cited from *Angell on Limitations* does not apply. There the intention to claim title is absent. If a mistake is persisted in and possession for 10 years follows, then prescriptive title is obtained. Adverse possession is

1. 5 Bal. 39.
2. 3. C A. C. 69.
3. (1906) 3 Bal. 115.

possession unaccompanied by payment of rent or produce or performance of service or duty. (See § *3 of Ord. 22 of 1871* also *Daniel v. Marikar*[1] ; *Carim v. Dholl.*[2]) The Roman-Dutch Law is different from the English Law. The Roman-Dutch Law requires *occupatio et animus.* Those two requirements are present here.

A. St. V. Jayewardene in reply.

c. a. v.

Pereira, J.—There are cross-appeals in this case. The Commissioner declared the defendant entitled to lot A. on figure of survey No. 141 and condemned him to pay the plaintiff R25. Each party has appealed against the part of the decree that is adverse to himself, and I shall deal with both the appeals in one judgment. The Commissioner has held that the defendant has had possession of the portion of land in claim for over the prescriptive period. I have read the evidence carefully, and on this point I need only say that the balance of testimony appears to me to support the Commissioner's finding. Two points have been urged by the plaintiff's Counsel. (1) That the defendant had no right to appeal in-as-much as he had consented to abide by the order of the Court on the question as to possession ; (2) That the defendant could not be said to have had adverse possession of the land in claim in-as-much as he possessed the land by mistake, that is to say, in ignorance of the fact that it belonged to the plaintiff. It has been sought to support the first contention by a reference to the defendant's evidence where he says: If I have even by "mistake gone and planted that land I am prepared to abide by the order of the Court." In the first place, an undertaking of this nature to have a binding effect, should, in my opinion, be given in a more formal and solemn manner than in the shape of a casual answer to a question put by the Court in the course of the examination of a party as a witness. In

1. *(1906) 3 Bal 116.* 2. *2 C. L. R. 18.*

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Pereira J.

this connection I may observe that the Commissioner in his judgment says that in spite of the defendant's undertaking his Counsel urged the plea of prescription, and that plea the Commissioner has, in effect upheld. In the next place, such an undertaking as that mentioned above can be of no avail unless the opposite party is prepared to accept the decision of the Judge. The plaintiff, in the present instance, did not acquiesce in the decision. The above two conditions appear to have been fulfilled in the cases cited as authorities in support of the contention. As regards the 2nd point pressed, it seems to me that the fact that the defendant was not, at the time of his possession of the land in claim, aware that it belonged to the plaintiff rather strengthens his claim based upon prescription. He was a *bona fide* possessor, and while a *mala fide* possessor might, just as well as a *bona fide* possessor maintain a claim by prescription, it is clearer, if anything, in the case of the latter, that the possession was a possession on his own account. It has been argued that the possession of a person possessing in the belief that the thing possessed is not the property of another is not adverse possession, and English authorities have been cited. We have nothing to do with the definition in English Law of either the term "Possession" or the term "adverse possession." Both these terms are fully discussed in the Encyclopaedia of Laws Vol. I. p. 160, and Vol. 13, p, 228. (1st edition) and it will be found that there are points of essential difference in what is laid down there and our own conception of the terms. Possession under the Roman-Dutch Law is either Possessio civilis or Possessio naturalis. Possessio civilis is *detentio animo domini*. It is this possession that is necessary to be proved where a person seeks either any of the Possessory Remedies or to establish a claim by prescription. Where a person is in occupation of property in the *bona fide* (albeit mistaken) belief that the property is his own and belongs to nobody else, clearly he has the *detentio animo domini*. The next question is whether his possession is adverse. As to that, we have to look for guidance within the four corners of our own Ordi-

nance relating to prescription of actions. The words in Section 3. "A possession unaccompanied by payment of rent or produce or performance of service or duty or by any other act by the possessor from which an acknowledgement of a right existing in another person would fairly and naturally be inferred" have been held by this Court to contain not an illustration but a definition of "adverse possession" (see *Daniel v. Markar*[1] ; *Carrim v. Dholl*[2]). The possession by the defendant in the present case manifestly answers to the description given in the definition mentioned above.

I set aside the judgment appealed from, dismiss the plaintiff's claim, and enter judgment for the defendant for lot A.

The defendant will have his costs in both courts.

Set aside.

Proctor for appellant—*W. de Silva.*

Proctor for respondent—*N. de Alwis.*

——:o:——

MOHAMMADO SALI *v.* AYESHA UMMA

No. 3766 D. C. Batticaloa.

Present: **Lascelles C.J. & Sampayo J.**

23rd January 1914.

Deed of donation—donation by grandmother to minor grand-children—acceptance by grand-uncle—revocation of deed and sale by donor to grand-uncle—prior registration of deed of sale—knowledge of prior deed—Ordinance No. 14 of 1891 § 17.

The first defendant executed a deed of donation of certain lands in favour of the plaintiffs, her minor grand children, in 1905. The donation was accepted by the 2nd defendant, brother of the 1st and

1. (1906) 3 Bal 115, 2. 2 C. L. R. 18,

Mohammado Sali v Ayesha Umma

grand-uncle of the minors. In 1908 the 1st defendant revoked the deed of donation and sold the lands to the 2nd defendant. The deed of sale was registered before the deed of donation.

Held, That the deed of sale prevailed by virtue of prior registration, over the deed of donation.

The mere notice of the deed of donation will not deprive the 2nd defendant of the benefit of his registration.

Aserappa v. Weeretunge[1]

Obiter, *Lacelles C.J.*—The words "fraud or collusion in securing such prior registration" are limited to cases where the fraud or collusion has occured in the act of securing the registration so that the registration itself is vitiated thereby.

E. W. Jayewardene for defendants appellants.

The deed of sale in favour of the 2nd defendant is registered before the deed of the plaintiff. Therefore it gains priority over the plaintiff's deed. (*Aserappa v. Muthucaruppen Chetty*[2] ; *Kirihamy v. Kiribanda*[3] *Tikiribanda v. Lokubanda.*[4])

The plaintiffs are estopped from questioning the validity of the transfer in favour of the 2nd defendant. They acquiesced in the revocation of their own deed and they further accepted the life interest over the other land which was renewed by the 1st defendant in her original deed of donation.

A St. V. Jayewardene (with *J. Joseph*) for respondents.

The prior registration of the 2nd defendant's deed will not give him the benefit of the Registration Ordinance. He has perpetrated a fraud on the plaintiffs. He originally accepted the donation on behalf of the minor plaintiffs. Then getting a transfer of the land in his favour he seeks to avoid the plaintiffs deed by prior registration. This is fraud as contemplated by § 17 of the Registration Ordinance and the defendant cannot be allowed to take advantage of it.

c. a. v.

1. *(1911) 14 N. L. R. 284.*
2. *(1911) 14 N. L. R. 413.*
3. *(1911) 14 N. L. R. 417.*
4. *(1912) 15 N. L. R. 63.*

Mohammado Sali v Ayesha Umma

Lascelles, C.J.

Lascelles C.J.—The material facts of the case have been fully set out in the careful judgment of the learned District Judge and it is only necessary to refer to them so far as they bear on the single point on which this appeal turns.

The first Defendant in 1905 executed a deed of donation in favour of her grand children, the 1st and 2nd plaintiffs for two lands named respectively Puttu Tottam and Illup-padikandam reserving a life interest to herself and her daughter the mother of the two donees. This donation is stated to have been made in furtherance of a wish expressed by the 1st defendant's late husband that the properties in question should go to their descendants.

At the time of this donation both the plaintiffs were considered to be minors and the donation was accepted in their behalf by the 2nd defendant the brother of the 1st Defendant and the great uncle of the plaintiffs.

In 1908 the 1st Defendant being then in want of money purported to revoke the deed of donation and sold the more valuable of the properties Illupadikandam to the 2nd defendant.

Subsequently the 1st Defendant released her life interest in the other land Puttu Tottam to the plaintiffs and also conveyed to them the greater part of her husband's estate.

The plaintiff now seeks the cancellation of the deed of revocation and of the deed of conveyance to the 2nd and defendant have obtained a decree to that effect in the District Court.

On appeal the appellants Counsel rested his case on one ground only the effect of registration. He raised but did not press the contention that the plaintiffs were estopped, by conduct, from disputing the validity of the revocation of the donation and the conveyance to the plaintiffs.

The case for defendants appellant is that inasmuch as the conveyance by the 1st Defendant to the 2nd defendant is registered the previous unregistered donation to the

Mohammado Sali v Ayesha Umma

Lascelles, C.J.

plaintiffs respondent on the other hand contend and their the contention has been accepted by the learned District Judge that the registration of the conveyance to the 2nd defendant was obtained by fraud and is so within the exception to section 17 of the land registration Ordinance 1891.

I am anable to concur in this view. It is well settled that mere notice of the deed of donation will not deprive the 2nd defendant of the benefit of his registration (*Aserappa v. Weeratunge*[1]) How then can fraud in obtaining the registration be imputed to the 2nd defendant.

The view of the learned District Judge is best expressed "in his own language "it appears to one that defendant's "conduct in ommiting to register the gift to minors com- "pared with the celerity with which he registered his own "amounted to a fraud. He was aware of the wisdom or "necessity of registration. He was aware of thedonation to "the plaintiff. He himself accepted that deed for them. He "did for himself what he did not do for them. He registered "his own deed and left out theirs. For him to be allowed to "take advantage to himself of his own failure to do what he "ought, in honesty, to his grand nephews, to have done, on "their behalf, would be to suffer him to perpetrate a fraud on infants for whom he was agent.

But the circumstances on which the learned Judge relies do not point to any fraudulent intention on the part of the 2nd defendant. Assuming for the purpose ofargument that the 2nd defendant was the agent or natural guardian of the two plaintiffs (which I think is not proved to be the case), it cannot be supposed that he deliberately refrained from registering the deed of donation with a view to his own profit. For how could he have foreseen that 1st defendant would fall into difficulties and offer the property for sale ?

At a later date it is equally impossible to convict him of fraudulent intention. The common belief in the District of

1. (1911) 14 N. L. R. 284.

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de Sampayo J.

Batticaloa as the learned District Judge has told us, is that deeds of donation such as that in favour of the plaintiffs are revocable. I see no reason to doubt that when the 2nd defendant bought the property for good consideration he did so believing that the 1st and 2nd plaintiff's interest in it had been determined.

The fact that he registered his deeds some months after its execution cannot be urged in proof of fraud. It is I think impossible on the evidence to hold that the registration of the 2nd defendant's deed was obtained by fraud.

I am disposed to think though it is not necessary in this case to give a ruling on the point that the words "fraud or collusion . . . . in securing such prior registration are limited to cases where the fraud or collusion has occurred in the act of securing the registration so that the registration itself is vitiated thereby.

The 2nd defendant in my opinion cannot be deprived of the benefit of his registration and I would set aside the judgment and dismiss the action with costs here and in the Court below.

De Sampayo J.—I am of the same opinion.

Proctor for appellants—*J. A. Sethukavaler.*

Proctor for respondents—*I. T. Tambirajah.*

IN THE MATTER OF THE INTESTATE ESTATE OF THE LATE MARIA PERERA DECEASED.

PAULIS PERERA (*Administrator*)—*et al.*

v.

DON DAVITH APPUHAMY.

No. 3863 D. C. Colombo.

Present: **Lascelles C.J. & de Sampayo J.**

39th January 1914.

Forfeiture of an inheritance—renunciation of an inheritance—son being given some property by deed for and on account of the share of the maternal inheritance due to him—testamentary action—collation or hotchpot—issue must be raised—point of time at which party can be asked to collate. is when the shares of the heirs are settled.

The respondent is a son of the deceased Maria Perera by her 1st marriage. Prior to her marriage with the 1st appellant, Maria Perera entered into a notarial agreement R2 with one Abraham Perera the grandfather of the respondent who was then a minor, whereby she agreed to give to the respondent and his sister when they attain the age of majority (1) one half share of a land of the value of R500 "as their share of their father and mother" (2) a sum of R1000 which had been lent by her to Andris Perera by bond. . . . "as from their mother," In pursuance of the said agreement the said Maria Perera by deed R1 conveyed to the respondent a land worth R750 and the said deed contained *inter alia* the following recitals:— "As I the said D. Maria Perera am bound by deed of agreement " . . . . R2 on promise of paying nnto my minor son P. Don "Davith Appuhamy when he attains the age of majority for and on "account of the share of maternal inheritance due to him the said "P. Don Davith Appuhamy to be inherited by him. I the s idD. Maria "Perera do hereby declare that I give and deliver unto the said P. "Don Davith Appuhamy, for and onaccount of the said sum of 750, "all that undivided one half part of Kongahawatte. . . . . "And I the said P. Don Davith Appuhamy do hereby accept the said portion of land for and on account of the sum of R750 which was di- "rected to be given by my mother."

Maria Perera died intestate and her estate was being administered in the above action. In the course of the proceedings the question was raised whether the respondent by virtue of the deeds R1 and R2

and anything he had received thereunder had forfeited his rights to a share in the inheritance.

Held, that on any construction of these two deeds the respondent cannot be held to have forfeited or renounced his claim to a share in the inheritance.

Per Lascelles C.J.—The question of collation has been argued before us and it is said that the respondent is obliged to bring into collation anything that he has received in these deeds. It is impossible for us now to give a decision on this point. It is not an issue in the case and it is an issue that cannot be determined. In order to decide the liability of the respondent to bring the property which he has received into collation, it must first of all be ascertained whether that property formed part of his mother's estate, a matter which is by no means clear on the deeds and can only be decided after hearing the oral evidence. It has been contended that it was the duty of the respondent to offer to bring into collation the property which he has received and that it is now too late to raise the question· I can see no reason why the qestion of collation should not be determined at the time when the shares of the heirs are settled.

A St. V. Jayewardene for the appellant.—The construction placed on the deeds by the learned District Judge is erroneous. The deeds R1 and R2 show, beyond doubt, that the respondent has renounced his right to his share of his mother's estate. By R1 he has been given a land worth R750 for and on account of the share of maternal inheritancr due to him. This deed was accepted by him and he is bound by its terms. At any rate he must elect whether he will approbate the deed as a whole taking what was given to him and relinquishing his interest in the mother's estate, or reprobate it as a whole foregoing the benefit of the donation and retaining his interest in the estate. He should have brought what he received into collation. He has neither brought it into collation nor offered to do so.

E. G. P. Jayatileke for the respondent.—The various recitals in the deeds R1 and R2 sufficiently indicate that what was conveyed to the respondent was his share of his father's estate. Even if the property formed part of his mother's estate, the respondent cannot be held to have

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Lascelles, C.J.

forfeited or renounced his claim to a share in the inheritance. The deed is a pure deed of donation. There is no express renunciation of his rights by the respondent. After Ordinance No. 7 of 1840 no waiver or renunciation of rights can be recognised in the case of immovable property in the absence of a deed. Besides, a person cannot renounce future rights. The doctrine of election does not apply to this case. Our claim is not inconsistent with the deed in our favour. We claim something in addition to what we have already received. The Roman-Dutch Law as to collation has been superseded by § 39 of Ordinance 15 of 1876, and now collation takes place when a parent gives property to his children either on the occasion of their marriage or to advance or establish them in life (see *Vaitianathen v. Meenatchi*[1]). Here the property was not given for any of those purposes. But, it is not necessary to decide that question as no issue has been raised in the lower Court, and as the obligation to collate arises not at this stage but only on a division of the estate. (see *Kulanthevelu v. Kandeperumal*[2]).

A. St. V. Jayewardene in reply.

Lascelles C.J.—The question at issue in these proceedings is whether the respondent by virtue of the deeds R[1] and R_2 and anything he had received thereunder, has forfeited his rights to a share in the inheritance. This was the only matter at issue in the District Court and it is the matter on which the appeal has been taken. I am clearly of opinion that as regards this point the order of the learned District Judge is right. For I do do not think that, on any construction of these two deeds the respondent can be held to have forfeited or renounced his claim to a share in the inheritance. Then the question of collation has been argued before us, and it is said that the respondent is obliged to bring into collation anything that he has received in these deeds. It is impossible for us now to give a decision on that point. It is not an issue in

1. 17 N L R 26.

2. 9 N. L. R. 353.

the case, and it is an issue that cannot be determined. In order to decide that liability of the respondent to bring the property which he has received into collation it must first of all be ascertained whether that property formed part of his mother's estate, a matter which is by no means clear on the deeds, and can only be decided after hearing the oral evidence. It has been contended that it was the duty of the respondent to offer to bring into collation the property which he has received, and that it is now too late to raise the question. I can see no reason why the question of collation should not be determined at the time when the shares of the heirs are settled, and although I would not interfere with the judgment of the Court below on the question of forfeiture, I do not think that the judgment should be understood as having any reference to the question of collation which I think can well be raised and disposed of hereafter. The appeal I think ought to be dismissed with costs.

de Sampayo J.—I agree.

Appeal dismissed.

Proctor for appellant—*C. E. A. Samarakody.*

Proctor for respondent—*G. E. De Livera.*

FULL BENCH.

JAMES APPU *v.* CAROLIS APPU.

No. 8896 D. C. Negombo.

Present: **Lascelles C.J. Pereira & de Sampayo J.J.**

10th February 1914.

Registration—gift by original owner—prior registration of latter deed, effect of—Ordinance No. 14 of 1891, § 14.

Sanchiappu and his wife Unguhamy who were married in community of property were the original owners of certain parcels of land. After Sanchiappu's death Unguhamy q⁄ deed D8 dated 25th November,

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1898 conveyed a half share of the lands to the 4th defendant and the wife of the 3rd defendant. After the death of Unguhamy, Sirimalhamy one of the four children of Sanchiappu and Unguhamy conveyed by deed P1 dated the 18th January, 1912, a fourth share of the lands to the plaintiffs. Deed P1 was registered on the 22nd January 1912 while deed D8 was registered on the 7th August. 1912. The 3rd and 4th defendants contended that though P1 was registered before D8 the former cannot take priority over the latter in so far as the two deeds cannot be said to be derived from the same source (Unguhamy). It was contended that Sirimalhamy cannot be regarded as the heiress of her mother as the latter by deed D8 had alienated her share in the estate.

Held, that the plaintiff's deed is entitled to priority over the defendant's deed.

Punchirale v. Appuhamy;[1] *Silva v. Silva*[2] followed.

This is an appeal from a judgment of the District Judge of Negombo (*H. E. Beven Esq*).

B. W. Bawa K. C. (with *de Zoysa*) for the appellants.—The plaintiff's deed cannot get priority over the defendant's deed. They cannot come into competition inasmuch as they do not come from the same source. *Punchirale v Appuhamy*[1] which has been relied on was rightly decided as there some thing passed to the heirs. [*Pereira J.* But the mortgage executed by the intestate was wiped out in that case.] We are not concerned with what burdens are attached to the land. The heirs clearly had the dominium. The heir can execute a deed only where there is a link of title between him and the intestate. But here the intestate disposed of the whole of the property so that nothing passed to the heir. The heir cannot sell anything more than he inherits [*Pereira J.* If that is so, the mortgage should not have been wiped out in *Punchirale v. Appuhamy*]. A person cannot inherit a burden. The heir was the representative of the man who gave the mortgage. The rights of an in testate are conferred by law upon an administrator. No such rights pass to the heir. [*Pereira J.* Nothing passes to the administrator which does not pass to the heir]. The

1. 7 N. L. R. 102.

2. 7 N. L. R. 234.

reason why a deed from the administrator is supported is that the law considers that there is a link between himself and the intestate as if he were a purchaser from the intestate. The heir does not by operation of law become entitled to the same rights. [*Lascelles C. J.* The public will not know that the intestate has disposed of the property]. The public are protected. They should not buy from a person who calls himself the heir. They thould insist on administration being taken out.

E. W. Jayewardene (with *E. G. P. Jayetileke*) for the respondent.—*Punchirale v. Appuhamy*[1] is directly in point. On the death of a person, his heir succeeds to the estate. There can be no difference in the position of an heir and an administrator in this case, as the estate is under R1000. Even if the estate were over R1000 there would be no difference (see the judgment of Bonser C. J. and Lawrie J. in *Punchirale v. Appuhamy*[1]). Bonser C. J. says that the Registration Ordinance should not be made a mere trap for purchasers. This reasoning is also found in *Warburton v. Loveland*[2] a case which is decisive of the present case. The rights of an heir are greater than those of an administrator. The heir represents the intestate; the dominium of the estate vests in him; he is entitled to deal with the property without the assistance of the administrator (see *Silva v. Silva*[3]). In such circumstances it is idle to contend that the deeds do not come from the same source. An heir can do what a person's representative can do (see *Hoggs on the registration of deeds in Australasia p 121*). If a deed by a personal representative obtains priority (as in *Punchirale v. Appuhamy*) it follows that a deed by the heir also obtains priority. In *Kondiba v. Nana*[4] it was held that where an instrument which was not registered was executed by one person and another relating to the same property was executed by his heir after the former's death by another party, it could not be said that there was no competition between the two instruments for the reason that they were executed

1. *7 N. L. R. 102.*
2. *2 Dow. & Cl. 480.*
3. *10 N. L. R. 234.*
4. *27 Bom 408.*

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by different persons. The cases referred to in Narstam's Indian Registration Act. p. 113 are in point.

Lascelles, C.J.

Bawa K. C. in reply.

c.a.v.

Lascelles C.J.—Tnis appeal has been reserved for the opinion of the Collective Court on one only of the several points involved namely the respective priority of the plaintiff's deed P 1 and the deed of donation D8 in favour of the 4th defendant and Nonohamy.

For this purpose the facts of the case will be sufficiently stated as follow:—Sanchiappu and his wife Unguhamy were the original owners of the disputed property. They were married in community. Sanchiappu predeceased his wife who died about twelve years ago leaving four children Sirimalhamy one of these children by deed Pl dated the 18th January 1912 and registered the 22nd January 1912 conveyed her one fourth share to the plaintiffs.

The plaintiffs title to $\frac{1}{8}$th namely the $\frac{1}{8}$th which devolved on Sirimalhamy from her mother is disputed on the ground that the latter by deed D8 dated the 28th November 1898 and registered the 7th August 1912 had conveyed her half of the estate to the 5th defendant and Nonohamy. It is not disputed that ordinarily the deed Pl would be preferred on the ground of priority of registration.

But it has been doubted whether Pl and D8 can be registered as two conflicting deeds derived from the same source. It has been argued that Sirimalhamy as an heir of Unguhamy did not fully represent her mother so as to carry on an unbroken line of title.

Counsel for the respondents referred us to an elaborate exposition of the general principles underlying the Irish registry act (*6 Anne ch 2*) in *Warburton v. Loveland*[1] .

Making due allowance for the difference between the two systems as regards the effect or notice of the prior un-

1. *2 Dow & Cl. 480.*

registered deed these principles are generally applicable to the Ceylon Registration Ordinance.

The Irish act has for its principal aim and object the protection of the purchaser for valuable consideration.

If an intending purchaser finds on the register no adverse deed affecting the property he is placed in the same position as regards his title to the land as if no such deed in fact existed. On the other hand the grantee under the prior unregistered deed is penalised for his failure to put his deed on the register. He is taken to have given out to the world at large that his deed did not exist and is prohibited from setting it up against the registered deed of the subsequent purchaser for valuable consideration.

It was contended by defendant-appellant's Counsel, though I do not think that he placed much reliance on the point, that Sirimalhamy cannot be regarded as the heiress of her mother as the latter by deed D8 had alienated her share in the estate. But the fallacy of this reasoning is obvious. It assumes the validity of the deed D8 which section 14 of the land registration ordinance No. 14 of 1891 declares shall be deemed invalid as against the plaintiffs deed.

I confess to some difficulty in appreciating the argument that because the plaintiff purchased from an heir of the *proposit*, his title is not derived from the *proposit*. It is said that the heir does not fully represent the intestate and that descent from an heir constitutes a break in the chain of title. If there were any question as to the competence of an heir to alienate immovable property without the consent or concurrence of the administrator there would have been some ground for the contention. But all questions on this point have been set at rest by the decision of the full bench of this Court in *Silva v. Silva*[1]. If as is unquestionably the case a deed by an heir to a purchaser transmits to the pur-

1. 10 N. L. R. 234.

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chaser the title which the heir derived from his intestate it follows that the deed is a sound link in the chain of title. It is not less effective for the purpose of transmitting title than a deed from one purchaser to another purchaser. In *Punchirala v. Appuhamy*[1] this Court overruled the contention that when there is a conveyance from an intestate and a subsequent conveyance from his administrator these two conveyances do not proceed from the same source and that therefore the registration ordinance does not apply. It was there held that an administrator represents the intestate and his estate is in law identical with that of his intestate.

Now that it is settled that the heir can pass title without the concurrence of the administrator, I think it follows that the estate of the heir must be regarded as that of his intestate.

For the above reasons I am of opinion that the plaintiff's deed P1 is entitled to priority over the defendants deed D8.

I understand that the members of the Court which originally heard the appeal were agreed that appeal No. 365B should be dismissed. As the decision of appeal 365B turns on the point discussed in this judgment I would dismiss both appeals with costs.

Pereira J.—In this case two questions arose for decision (1) whether the 3rd and 4th defendants had prescriptive possession of the parcels of land numbered 2, 5, and 6 in the plaint and (2) whether the deed P1 in favour of the plaintiff prevailed over deed D8 in favour of the 4th defendant and the wife of the third defendant by reason of prior registration. It is only the second question that we are now concerned with. The parcels of land dealt with by the two deeds referred to above are those numbered 1, 3 and 4, in the plaint. These lands belonged to Sanchiappu and his wife Ungu. After Sanchiappu's death, Ungu by deed D8 dated

1. *7 N. L. R. 102.*

dated the 25th November 1898 conveyed a half share of the lands to the 4th defendant and the wife of the 3rd defendant and after the death of Ungu, Sirimal one of the four children of Sanchiappu and Ungu conveyed by deed P1, dated the 18th January 1912 a fourth share of the lands to the plaintiffs. Deed P1 was registered on the 22 January 1912 while deed D8 was registered on the 7th August 1912 It has been argued that P1 could not take priority over D8 because as a consequence of the execution of D8 by Ungo her share did not devolve on her heirs, and Sirimal had therefore nothing to convey, but this argument, if sound, would nullify altogether the operation of the registration Ordinance.

The policy and the effect of the law of registration are such that the mere fact that a person who has conveyed property had not title to it, is insufficient to deprive the conveyance of priority by reason of prior registration. Of course the ordinary illustration is the case of a person who having already conveyed to one person certain property purports to convey the same property by means of another deed to another person but a more apposite illustration may be stated as follows.—A conveys a parcel of land to B and then executes a deed purporting to convey the same land to C. C, who at this stage has no title whatever to the land executes a conveyance of it in favour of D. The deed in favour of D surely by registration would have priority over that in favour of B. Sirimal in the present case was exactly in the same position as C in the above illustration ; but for the deed by Ungu he would have had title to the property in claim just as much as C would have had title to the property referred to in the illustration but for the deed executed by A in favour of B and if a conveyance by C could by prior registration gain priority over the conveyance by A in favour of B. I see no reason why a conveyance by Sirimal, who but for the conveyance by Ungu would have become entitled to the property, should not similarly by prior registration have priority over the deed by Ungu. The case

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appears to be covered by authority. In the case of *Punchirale v. Appuhamy.*[1] Lawrie, J—observed. "If a person by a subsequent deed duly registered could defeat a prior unregistered "deed granted by himself, surely his heir or administrators "could defeat a prior deed executed by the deceased." It was not contested that it was well settled law that an administrator's conveyance might by reason of prior registration defeat a conveyance by the intestate. Now the administrator is only the intermediary to convey the property of the intestate to his heirs. It is only such property as is heritable that vests in him and it is therefore reasonable to suppose that an heir might deal with such property, subject of course to the exigencies of administration, in any manner that the administrator might deal with it specially as it is accepted as settled law that a conveyance of property by the heirs of a deceased person without the concurrence or assent of the administrator is valid subject to the right of the administrator to deal with the property for purposes of administration (see *Silva v. Silva*[2]). The principles enunciated in the case of *Warburton v. Loveland*[3] cited by the appellants Counsel appear to me to support the view I have expressed above. In my opinion deed P1 has priority over deed D8.

de Sampayo J.—There are two appeals in this case. The appeal numbered 365A is taken by the plaintiffs in respect of the lands Nos. 1, 5 and 6, with regard to which the District Judge has held that the third and 4th defendant's have become entitled by prescriptive possession to the exclusion of their co-heir Sirimalhamy who sold ¼ share to the plaintiffs. The District Judge so far as the question of prescription is concerned is clearly right and I think that the appeal No. 365A should be dismissed with costs.

The other appeal No. 365B is taken by the 2rd defendant Carolis and his wife Nonohamy with regard to the lands No 1, 3and 4 of which the District Judge has declared

1. *7 N. L. R. 102.* 2. *10 N. L. R. 233.*
3. *2 Dow. & Cl. 480.*

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de Sampayo J.

the plaintiffs to be entitled to a $\frac{1}{4}$ share. The contention between the parties to that appeal arises under the following circumstances. Sanchiappu and his wife Unguhamy were in community of property entitled to the said lands. They died intestate leaving 4 children viz. 1st defendant, 3rd defendant, 4th defendant, and one Sirimalhamy. The plaintiffs purchased from Sirimalhamy upon deed dated 18th January 1912 and registered on 22nd January 1912 a $\frac{1}{4}$ share of the said lands as belonging to her by right of inheritance from her parents. But Unguhamy after the death of her husband gifted her $\frac{1}{8}$ share to the 4th defendant and Nonohamy wife of the 3rd defendant by deed dated 25th November 1898 but registered only on 7th August 1912, and these defendants accordingly claim that half share by virtue of the deed of gift thus allowing to the plaintiff by right of purchase from Sirimalhamy only an $\frac{1}{8}$ share and not $\frac{1}{4}$ share as claimed by them. The District Judge upheld the claim of the plaintiffs on the ground of prior registration of their deed. The appeal heaving come before Wood Renton A.C.J., and myself the question as to the effect of prior registration of the deed from Sirimalhamy was referred to a Bench of three Judges. There is no question that under the law relating to registration the competing deeds must proceed from the same source, nor on the other hand is there any question that they need not be granted by the same person. The only point on which I entertained a doubt was whether when the owner has disposed of his entire interest in a land during his life time a purchaser from an heir as distinguished from an admistrator or executor can create any title by the process of registration. An administraror or executor is for this purpose the same person as the deceased. But a so-called heir is in the same position only in respect of the property left by the deceased at his death and is not his representative to any larger extent. It was sought at the argument of this appeal to meet the point by the suggestion that a person who disposes of his property has still the right or power which would descend to his heirs to create a new title by a subsequent deed duly registered.

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The truth is that such title is created not because any right or power is still left in the previous owner but because the law intervenes and protects an innocent purchaser who has paid consideration. Then the question is whether just as the owner who has ceased to be owner may enable an innocent purchaser to maintain his position against a claimant upon an unregistered deed, an heir may do the same though he has not inherited the particular land. As I have already stated, the difficulty I felt was not as to the heir having no title to convey but as to his being an heir at all in respect of property which has been alienated by his ancestor. It is not necessary for me to examine all the authorities on the subject of all registration. The scope and object of all registration laws are well-known and are practically the same in all countries. It is sufficent to say that so far as I know in all the cases in which an heir's deed has been allowed to prevail, the disposal by the ancester has been not of his full ownership but of some limited interest such as a mortgage or a lease so that in these cases the heirs did in fact inherit in respect of the particular land. But I think the real answer to the question involved is to be found in the view suggested by the house of Lords in *Warburton v. Loveland*[1] cited to us that is to say in the matter of registration the transfer of what *would have been* the right and title of the person granting the second conveyance but for the prior unregistered deed prevails. In that case there was an unregistered settlement by which a wife had settled upon her children her life interest in a certain term for a year. But for this settlement the life interest would have vested in the husband by matrimonial right. The husband subsequently sold this life interest to a third party who registered this conveyance. The House of Lords after pointing out the nature and meaning of the kind of right conveyed by a second deed as above indicated dealt with the point thus:—
"It has been further argued that the effect of the marriage "settlement was to prevent the husband from having any

1. *(1831) 1 Dow. & Cl. 480.*

"right to grant the lease of 1800 at the time it was made for "the wife's right was effectually conveyed as between her "husband and herself by the deed of 1879, that she had no "interest in her at the time she married, that she could there- "fore pass no interest to her husband by the marriage and "the husband consequently never had any right and therefore "could convey none to the lessee. Now it may be admitted "also, that he could not of right exercise any power over the "property inconsistent with that deed but as by non-regist- "ration of that deed the grantees suffered him as to the world "at large to have the appearance of right, neither they nor "any claiming under them are at liberty to set up the deed in "opposition to the persons who have been deluded by the "appearance of right in the husband. This argument there- "fore which would be against the husband himself cannot be "heard from the parties claiming under settlement against his grantee for valuable consideration."

Looking at the case of an heir from the point of view suggested in the above decision it is not necessary for us to consider the argument that in the case of a small estate such as this the heirs are in all respects in the same position as an administrator, for according to that view, the heir would be acting not as representatives of the deceased at all but in their own right and would be selling what would in fact have come to them but for the deceased's unregistered deed of which the person dealing with them has no notice. Accordingly, I agree that in this case the conveyance by Sirimalhamy to the plaintiffs prevails over the deed of gift of Unguhamy in favour of the appellants. The appeal No. 365B therefore also fails and should be dismissed with costs.

Appeal dismissed.

Proctor for appellants—*de Silva & Perera.*

Proctor for respondents—*de Zoysa & Perera.*

JAYAWICKRAME *v.* AMARASOORIYA.

No. 11862 D. C. Galle.

Present: **Pereira & Ennis J.J.**

12th January 1914.

Stamp duty—pleadings insufficiently stamped—when once accepted cannot be returned—Attorney General may sue to recover deficiency of stamp duty.

When a judge, having considered the question of the sufficiency of stamp duty on a plaint and answer, has accepted it, the presumption is that he has adjudicated upon the sufficiency of stamp duty and he cannot thereafter return the plaint or answer to be properly stamped, if as a matter of fact it was originally insufficiently stamped.

But if the plaint or answer is accepted *per incuriam* that is to say as a result of an inadvertent omission on the part of the Court to consider the question of the sufficiency of the stamp thereon, it may be that before any step in the regular course of the procedure is taken by the opposite party, the Court may return the pleading to be pro perly stamped.

If there is any remedy for it, it must be by an action by the Attorney General as representing the Crown.

The sufficiency of the stamp on a plaint cannot be called in question as a matter of defence in an answer.

Per Ennis J.—A plaint is an *instrument* within the meaning o section 4 of the stamp ordinance No. 22 of 1909 and under section 37 of the Ordinance an *instrument* once admitted in evidence shall not except as provided in the section be called in question at any stage of the same suit or proceeding on the ground that it is not duly stamped.

Per Pereira J.—section 37 of the stamp ordinance, I do not think, applies to pleadings in cases. It refers to *instruments tendered in evidence* and clearly a plaint does not answer to that description of document.

Bawa K. C, for the appellant.

H. J. C. Pereira, for appellant.

c.a.v.

Ennis J.—I agree with regard to the question of stamps. It is to be observed that the Ceylon Stamps Ordinance is based on the Indian Stamp Act but with the additions in the schedule of duties on law proceedings. For these proceedings to be liable to duty under the Ordinance they must be regarded as "instruments" under section 4. Section 37 enunciates the principle that once "an instrument has been admitted in evidence" it shall not, except as provided in the section, be called in question at any stage of the same suit or proceeding on the ground that it is not duly stamped.

The latest Ordinance No. 22 of 1909, does not, however contain any section similar in terms to section 34 of the repealed Ordinance No. 30 of 1890. I see no reason why an order admitting a plaint should not be regarded as an order admitting an instrument in evidence. The plaint is to use the words of the Evidence Ordinance, a document produced for the inspection of the Court. It contains an admission and is a means by which a matter of fact may be proved as against the party making the admission. It must, it seems to me, be regarded as evidence and the order accepting it can be reviewed only as laid down in section 37 of the Stamp Ordinance.

Pereira J.—In this case the defendant appeals from two orders made by the District Judge (1) an order directing that this action do proceed on the plaintiffs supplying a deficiency of stamp duty on the plaint and (2) and order rejecting the 2nd. 3rd, 4th, 5th. 6th, and 7th issues suggested by the defendant's Counsel. As regards the 1st order the appellant's contention is that having found that there was a deficiency of stamp duty on the plaint the District Judge should have dismissed plaintiffs claim altogether. The only provision of the law now in force relating to stamps on plaints appears to be the provision of section 46 of the Civil Procedure Code. Section 38 of Ordinance No. 23 of 1871 and section 34 of Ordinance No. 3 of 1890 gave the power to Judges to require an insufficiently stamped pleading to be duly stamped and when that was done, to proceed with the

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Pereira J.

action as if the pleading had been originally duly stamped; but these ordinances were repealed by ordinance No. 22 of 1909 which contained no such provision as that mentioned above. Section 37 of the Ordinance, I do not think, applies to pleadings in cases. It refers to "instruments tendered in evidence," and clearly a plaint does not answer to that description of document. So that when in the case of a plaint under section 46 of the Code and in the case of an answer under section 77 the judge does not reject the pleading but accept it, the presumption is that he has adjudicated in favour of the party who has tendered the document the question of the sufficiency of the stamp thereon, and I doubt that the adjudication in such a case can be interfered with by anybody. In the case however, of a plaint or answer being accepted *per incuriam*, that is to say, as the result of an inadvertent ommission on the part of the Court to consider the question of the sufficiency of the stamp thereon, it may be that before any step in the regular course of procedure is taken by the opposite party the Court may return the pleading to be property stamped but this question need not be considered on this appeal because we have no information from the District judge that the plaint in this case was accepted by him *per incuriam* and that the order returning the plaint was in fact made before the filing of the answer. When a judge having considered the question of the sufficiency of stamp duty has accepted it, having inadvertently omitted to consider the question, the remedy, if indeed anyexists can only be by means of such action as the Attorney General as representing the Crown to which all stamps duties are a debt may be deemed to be entitled to take. It will be embarassing to both the parties to any action and lead to disastrous results if for instance at a very late stage of the action, a pleading can be thrown out for default of either party to make good any deficiency in stamp duty. Any way the sufficiency of the stamp on a plaint cannot be called in question as a matter of defence in answer any more than the fact that the plaint has not been distinctly written on good and suitable paper as required by section 40 of the Code. The answer can only

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Pereira J.

contain the matter set forth in sub-sections (a) to (e) of section 75. It has been argued that if that was so, an adjudication by the judge that the plaint discloses a good cause of action cannot also be called in question when the plaint is once accepted. But it will be seen that by sub-section (d) of section 75 the defendant is in effect allowed to set forth any matter of law upon which he may rely for his defence.

In the reasons that I have given above it seems to me that the defendant had no right to claim that the action be dismissed or even that the plaintiff's be required to supply deficiency if any, in stamp duty, but as the plaintiff has acquiesced in the order made I would do no more than dismiss the appeal. As regards the other order appealed from, it seems to me that it is not quite correct to say that the District Judge has rejected the 2nd, 3rd, 4th, 5th, 6th and 7th issues suggested by the defendant. These issues with the exception of the 7th appear to me to be practically involved in the 2nd issue framed by the District Judge. The latter part of that issue is, "were the promise and agreement made for the reasons and consideration stated in the 5th and 6th paragraphs of the plaint." Now the 5th paragraph expressly refers to the trust and agreement set forth in the preceding paragraphs. So that the proof of the trust and agreement will be necessary to discharge the burden on the plaintiffs. On the latter part of the second issue framed by the District Judge I think that the defendant's anxiety really is to question the plaintiff's right to prove the trust and agreement referred to, except by means of notarial documents. This clearly he may do without the issue suggested by him I understood the attitude of the plaintiffs to be that the agreement set up in the earlier paragraphs of the plaint merely constitute a *justa causa* to support the promise pleaded in paragraph 6, and that as held by the Court in *Lipton v. Frazer*[1] *justa causa* is all that is necessary to support a promise under our law and that being so, the oral evidence that the plaintiffs intend calling to set

1. *8 N. L. R. 49.*

up a *justa causa* or moral obligation as an inducement for the promise mentioned above and not to establish an interest in land. But however that may be it will clearly be open to the defendant to object to any evidence when tendered in spite of the absence of such an issue as that suggested by him.

The objection to the rejection of the 7th issue was not pressed. Any way the date given in the plaint of the agreement sued upon, is the 31st July 1912 and it is manifest that the right of action is not prescribed.

I would dismiss the appeal with costs.

Appeal dismissed.

Proctor for appellant—*A. D. Jayasundere.*

Proctor foı respondent—*J. A. Perera.*

—— :o:——

DR. ANTHONY COUDERT *v.* DON ELIAS APPUHAMY.

No. 36298 D. C. Colombo.

Present: **Pereira & Ennis J.J.**

23rd February 1914.

Fidei Commissum—words creating fidei—commissum—assigns—plena proprietas cum onere fidei commissi—acceptance—assigns.

The following words in a deed were held to have created a *fidei commissum.*

"I have given, granted, assigned, transferred and set over unto Johannes and Brezina their heirs executors administrators and assigns as a donation absolute and irrevocable but subject to the conditions and provisions herein after stated and mentioned, all that (description of the property donated) - . . . to have and to hold the said premises unto them the said Johannes and Brezina their heirs, executors administrators and assigns for ever. Provided always that the said garden and buildings shall not at any time be sold mortgaged or in

any other manner alienated but shall be only held possessed and enjoyed by them and their heirs and descendants in perpetuity under the bond of *fidei commissum* and the rents issues and profits thereof shall not be liable to be att ched seized or sold by others for the debts of the said Johannes and Brezina or of their heirs and descendants and provided also that on failure or extinction of heirs the said garden and buildings shall revert to and become the property of the Roman Catholic Church of St. Lucia - . . . and I the said Johana for myself my executors and administrators do covenant promise and agree to and with the said Johannes and Brezina their heirs executors administrators that I the said Johana have not at any time made done or committed any act whereby the hereby granted premises may be impeached in title."

In Roman-Dutch Law there is such a thing as *plena proprietas cum onere fidei commissi*.

Observations of Pereira J. regarding the acceptance of a *fidei commissary* gift.

A. St. V. Jayawardene for defendant-appellant.—The word "assigns" refers to any one in the world. In this case the grantees are Johannes and Brezina and their "assigns." That means that Johannes and Brezina can sell the property. The Supreme Court in a series of decisions has held that a grant to a person his heirs executors administrators and assigns is an absolute grant and there is no *fidei commissum*. *Hormusjee v. Cassim*[1] ; *Aysaumma v. Noordeen*[2] ; *Dasanaika v. Dasanaika.*[3] In this case the defendant bought the property on Counsel's advice that according to the decision of this Court there is no *fidei commissum* attached to the property.

There must be acceptance by the *fidei commissary*. *de Silva v. Thomisappu*[4] .)

Here there was no acceptance by the plaintiff or by

1. (1898) 2. N. L. R. 190.
2. (1902) 6 N. L. R. 173.
3. (1906) 8. N. L. R. 361.
4. (1903) 7 N. L. R. 123.

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anyone in his behalf. The fiduciaries sold the property before the deed could be accepted; thereby there was a revocation of the grant in favour of the church.

Samarawickreme (*Bawa K. C.*, *H. J. C. Pereira* and *Canakaratne* with him). In the cases cited for the appellant, the Supreme Court held that the intention of the testator or donor was not clear and therefore the Court gave effect to the doubts by holding that there was no *fidei commissum*. In this case there can be no doubt as to the intention of the donor. The words "to be held by them in perpetuity under the bond of *fidei commissum*" qualified the effect to be given to the word *assigns* (D. C. Colombo, S. C. Min. 14th June 1906.)

Acceptance by *fidei commissary* is not necessary to render the donation valid *Asiathumma v. Ahma Natchia*[1] ; *2 Burge 149*. However in this case the bringing of the action by us with regard to the land constitutes a sufficient acceptance.

A. St. V. Jayawardene in reply.

c.a.v.

Pereira J—The first question argued in appeal was whether deed No. 7522 dated the 20th September 1853 created a valid *fidei commissun* in respect of the property now in claim. The grantor of the deed was one Johana Perera and the immediate grantees were her son and daughter Johannes and Brezina. The material portion of the deed is as follows:—"I have given, granted, assigned, transfer- "red and set over unto Johannes and Brezina their heirs "executors administrators and assigns as a donation absolute "and irrevocable but subject to the provisions and conditions hereinafter stated and mentioned all that [description of the property donated] . . . . to have and to hold the said premises unto them the said Johannes and Brezina their heirs executors administrators and assigns for ever. Provided always that the said garden and buildings shall not at any time

1. (1905) 1 A. C. R. 53.

be sold mortgaged or in any other manner alienated but shall be only held possessed and enjoyed by them and their heirs and descendants in perpetuity under the bond of *fidei commissum* and that the rents issues and profits thereof shall not be liable to be attached seized or sold by others for the debts of the said Johannes and Brezina or of their heirs and descendants and provided also that on failure or extinction of heirs the said garden and buildings shall revert to and become the property of the Roman Catholic Church of St. Lucia . . . . and I the said Johana for myself my executors and administrators do covenant promise and agree to and with the said Johannes and Brezina, their heirs executors and administrators that I the said Johannes have not at any time made done or committed any act whereby the granted premises may be impeached in title &c." In support of the contention that no *fidei commissun* is created by this deed certain judgments of this Court were cited but in my opinion they have no application whatever to the present case. In *Hormusjee v. Cassim*[1] the gift was a gift absolute and irrevocable to his heirs executors administrators and assigns subject to the condition that he should not be at liberty to sell, mortgage or otherwise alienate the property gifted but possessed the same during his life and out of these words it was sought to evolve a *fidei commissun* but it is clear that the parties to benefit were not clearly designated in the deed. Similarly in the case of *Aysaumma v. Noordeen*[2] the words used in the deed were. "I have given granted assigned transferred and set over unto A and B their heirs executors administrators and assigns as a gift absolute and irrevocable all that portion of house &c, to have and to hold "the said premises unto the said A and B their heirs executors, administrators and assigns and their children and "grand children, and the children and great grand children "of their heirs and assigns shall not sell mortgage or encumber "the said premises at any time but hold and possess the same

1. *N. L.R. 190.* 2. *6 N. L. R. 173.*

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"and the rents produce and income thereof shall not be held "liable to be attached seized or sold for any of their debts but they shall be able to give and grant the said premises or "any part thereof in dowry for their female children also "subject to the aforesaid conditions and restrictions. Here too the words used import no more than a prohibition against alienation by the parties to whom the property is parted namely A and B their heirs executors administrators and assigns and there is no clear indication of any party to benefit by the prohibition, nor are there other words to indicate that the creation of a *fidei commissun* was intended. In the case of *Dasanaike v. Dasanaike*[1] the material words of the deed in question were.—"We have given granted assigned and set over as we do hereby give grant assign transfer and set over as gift absolute and irrevocable unto, his heirs executors administratort and assigns the following:—. . . . to have and to hold the said premises unto the said L. his heirs executors administrators and assigns for ever, subjeot nevertheless to the following condition that he the said L. and his generation shall possess the said lands for ever but he or his heirs and shall not sell nor mortgage or alienate the same in any manner whatsoever." The same remarks as those made on the case last cited apply. In the case with which we are now concerned however it is manifest that the word "them" in the provision that the garden and buildings shall be only held possessed and enjoyed by them and their heirs and descendants in perpetuity under the bond of *fidei commissun* refers only to the original institutes namely Johannes and Brezina and that the words "in perpetuity under the bond of *fidei commsision*" and also the provision that in case of failure or extinction of heirs the property of the Roman Catholic Church of St. Lucia" indicate an intention to create a *fidei commissum*. In the case of *Serembram v. Perumal*[2] where similar words were used my brother Wood Renton observed. "The words in perpetuity and under the bond of *fidei com-*

1. *8 N. L. R. 361.* 2. *16 N. L. R. 6.*

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missum leave no doubt in my mind that the testator intended to create a *fidei commissum*" and it is noteworthy that in the present case there is an omission of the word "assigns" in the warranty clause while Wendt J. makes a point of the presence of that word in the corresponding clause in the deed in question in the case of *Da anaika v. Dasanaike*[1] while if the facts of the cases cited were such as to make them applicable to the present case I should unhesitatingly follow the decisions I should like to observe that I cannot help thinking that too much importance has been attached to the use of the word assigns in these cases. It has really no more force than "executors or administrators." Property subject to a *fidei commissum* does not go to "executors or administrators any more than it vests in "assigns" and why the word "assigns" should be singled out for condemnation I cannot quite understand. It is said that the word "assigns" means any person to whom the donee may be pleased to assign the property but similarly it may be said with reference to the word "executors" that it implies that the donee might will away th- property to any person he liked and with reference to the word "administrators" that the property vested in the legae representatives of the deceased donee as property that bel longed to him absolutely. A grant to A B without qualifi_ cation is exactly the same as a grant to A B his heirs executors administrators, and assigns and the fact that words are used to vest in the first instance absolute *dominium* in the fiduciary is by no means repugnant to the creation of a *fidei commissum*. Unlike a mere usufructuary a fiduciary has title and *dominium*. So much so that an alienation by him of the property which is subject of the *fidei commi sum* by will or deed would be operative if there be a failure of the *fidei commissary*. *Voet.* puts the position thus (*Voet 7. 1. 13.*) "where a bare usufruct appears given the ownership immediately on the death of the testator is considered as acquired by those who at the time were the next of kin of the deceased or whom he in his last will declared

1. *8. N. L. R. 361.*

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his universal successors at law so that even if they die during the existence of the usufruct nevertheless they transmit their ownership and their hopes of becoming full owners to their heirs which is not the case when full ownership with the burden of *fidei commissun* (*plena proprietas cum onere fidei commissi*) or of making restitution after the death of the fiduciary is understood to have been left for the *fidei commissary* who dies during the life time of the fiduciarius does not transmit his chance of obtaining the *fidei commissum* to his heirs but restitution is made to those who are alive at the death of the fiduciary, and if none such survive to whom restitution should be made the fiduciary is taken to be released from the burden of *fid-i commissun* not finding anyone to whom to restore it and he can then alienate the property as if unburdened or transmit the full right of ownership to his next heirs. So that it will be seen that under the Roman-Dutch law there is such a thing as "*plena proprietas cum onere fidei commissi.*" The *plena proprietas* may be first conferred by some such words as "I grant to A" or "I grant to A his heirs executors administrators and assigns and then the burden engrafted on it. The only question is whether the words used sufficiently indicate a clear intention to burden the *plena proprietas*. In the present case it is inconceivable that the words in perpetuity under the bond of *fidei commissun* were used for any purpose other than that of creating a *fidei commissum*. The application to this case of the test that I have laid down in *Wijetunge Wijetunga*[1] would give only one result and that is that the deed in question created a valid *fidei commissum*.

The next question argued was whether it has been shown that the heirs of Johannesa nd Brezina are extinct. On this point I am not prepared to question the verdict of the District Judge on the evidence.

The third question is whether the gift has been duly accepted by the plaintiff. In *de Silva v. Thomis Appu*[2] it

1. 15 N. L. R. 493. *2. 7 N. L. R. 123.*

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was held that a gift shonld be accepted by a *fidei commissary* but in the case of *Asiathumma v. Alima Natchy*[1] Wendt J. who was one of the two Judges who so held stated that the conclusion that he had arrived at in the case of *de Silva v Thomis*[2] was erroneous and that after reconsideration of the points his opinion was that the acceptance of a gift by the *fidei commissary* was necessary only in order to render the gift to him irrevocable by the donor. It is, I think, clear law that if the donor himself died before the period had arrived when the property was to be delivered to the *fidei commissary* the power of revocation was at an end and could not be exercised by the heirs of the donor (see *2 Burge 149*). Any way in the present case it is clear the donor's heirs did not exercise or purport to exercise any power of revocation. The property vested in them (Johannes and Brezina,) and the conveyance in favour of Seneviratne the defendant's vendor executed by them but by the heirs of Johannes the conveyance itself is not tantamount to a revocation by Johannes and Rosa Maria *qua* heirs of Johannes. Even if they were such the respondent's Counsel argued that there was, in any case an acceptance of the gifts by the plaintiffs in that they had brought the present action to recover the subject of the donation and that act of theirs was by itself an acceptance of the gift. Now where a gift really takes effect after the death of the donor it may be accep ed even after that. *Cens For 14. 12. 16.* In the present case when the gift to the Roman Catholic Church of St. Lucia took effect the property gifted was already in the possession of the defendant who would not allow the plaintiffs to take possession of it. How were the pl intiffs to accept the gift except by means of an attempt to take possession of the property. This action is such an attempt and I am inclined to agree with the respondent's Counsel that in the circumstances of a case like this an action to gain possession of the

1. *1 A. C. R. 53.* 2. *7 N. L. R. 123.*

property donated would be tantamount to a manifestation of the acceptance by the donee of the gift. For the reasons given above I would affirm the judgment appealed from with costs.

Ennis J.—I agree.

Appeal dismissed.

Proctor for appellant— *A. C. Abeyewardene.*

Proctor for respondent—*J. A. Perera.*

Order for regulating the mode of prosecuting Civil Appeals in the Supreme Court, made by the Judges under Section 53 of "The Courts Ordinances, 1889 to 1909."

CIVIL APPELLATE RULES, 1913.

We, the Honourable Mr. Alexander Wood Renton, Acting Chief Justice of the Island of Ceylon, and the Honourable Mr. James Cecil Walter Pereira, King's Counsel, Puisne Justice of the Supreme Court of the Island of Ceylon, and the Honourable Mr. George Francis Macdaniel Ennis, Puisne Justice of the said Court, do hereby, in pursuance and execution of the powers given to us by the Courts Ordinances, 1889 and 1901, and all other powers and authorities enabling us in this behalf, order and direct in manner following:—

1. The Civil Appellate Rules of 1908 are hereby annulled.

2. (1) In every civil appeal preferred after February 28, 1914, the appellant shall provide, in the manner hereinafter prescribed, for the use of each of the Judges who shall sit on the hearing the appeal, a typewritten copy of so much of the record of the case as may be necessary for the decision of the appeal.

(2) For the purposes of sub-rule (1) an appeal shall be deemed to be preferred on the date of the presentation of the petition of appeal in the Court of first instance.

3. (1) The appellant shall apply in writing to the Registrar of the Supreme Court, either direct within seven days (inclusive of Sundays and public holidays) from the date of the receipt of the petition of appeal in the Registry, or through the District Judge or the Commissioner of Requests, as the case may be, when transmitting the record to the Supreme Court, for typewritten copies of the record, stating in such application whether copies of the whole or of portions only, and if so, of what portions, of the record are necessary for the decision of the appeal.

(2) On receipt of such application, and subject to the

provisions of this sub-rule and of sub-rules (3), (4), and (5), the Registrar shall furnish the appellant, as soon as possible with the typewritten copies applied for.

(3) Payments for such copies shall be made by stamps affixed to the application, and every such application shall state the value of the subject matter and the nature of the action or proceeding in which the appeal is preferred.

(4) Where owing to the volume of the record, or the number of typewritten copies applied for, he shall think fit to do so, the Registrar may require payment for the copies, or the additional copies, for which application is made, at a higher scale, not exceeding by more than one-half the rate prescribed in the schedule hereto.

(5) Exclusive of the typewritten copies for the use of the Judges, (*a*) one typewritten copy only shall be furnished to the appellant, unless he shall have stated in his application under sub-rule (1) that additional copies will be required; (*b*) not more than two copies in all shall be so furnished unless the Registrar shall think fit in exceptional cases, to direct that an additional copy or copies shall be prepared.

4. The fees paid in respect of all typewritten copies furnished under these rules shall be costs in the appeal.

5. Where the appellant fails to make application for typewritten copies in accordance with the requirements of these rules, the appeal shall, subject to the provisions of "The Civil Procedure Code, 1889," be dismissed forthwith unless it appears to the Court to be reasonable that further time should be allowed.

6. The provisions of these rules, shall, as far as is practicable, apply to any respondent to any appeal. But no delay or default on the part of a respondent in applying typewritten copies shall prevent the appeal from coming on for hearing in accordance with the provisions of "The Civil Procedure Code, 1889," or for dismissal under rule 5.

7. These rules may be cited as "The Civil Appellate Rules, 1913.

SCHEDULE OF FEES.

Final Appeals From the District Court.

	1st Class.	2nd Class.	3rd Class.	4th Class.	5th Class.	6th Class.
Where the action or proceeding involves property or rights of the value. ...	Rs. 500 and under.	Over Rs. 500 and under Rs. 1,000.	Rs. 1,000 and under Rs. 5,000.	Rs. 5,000 and under Rs. 10,000.	Rs. 10,000 and under Rs. 20,000.	Rs. 20,000 and above.
	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.
Payable by appellant for one copy (including two copies for the Judges) ...	4	5	6	8	10	15
Payable by respondent for one copy.	4	5	6	8	10	15

Appeals in partition actions, whatever the value of the land, shall be charged as in Class III.; in matrimonial cases, as in Class IV.; in actions relating to public charities under Chapter XLV. of the Civil Procedure Code, as in. Class IV.; in actions under the Inventions Ordinance, 1906, as in Class V.

Interlocutory Appeals From District Courts.

	In Partitions Actions. Rs.		In all other interlocutory Appeals Rs.
Payable by the appellant for one copy (including two copies for the Judges) ...	6	...	4
Payable by the respondent for one copy	6	...	4

Appeals From Courts of Requests.

Payable by the appellant for one copy (including one copy for the Judge) ...	—	...	3
Payable by the respondent for one copy	—	...	3

Dated at Colombo, this 11th day of August, 1913.

A. WOOD RENTON, Acting Chief Justice.
WALTER PEREIRA, Puisne Justice.
G. F. M. ENNIS. Puisne Justice.

I certify that this is a true copy of the rules made by the Judges of the Supreme Court under the provisions of section 53 of the Courts Ordinances, 1889 and 1901.

A. WOOD RENTON,
Acting Chief Justice.

August 11, 1913.

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(i) An appeal lies from an order made under § 1 of Ordinance No. 12 of 1840. Such an appeal is civil in its nature and should be prosecuted in accordance with the provisions of the Civil Procedure Code.

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(ii) *Appealable order—inquiry into objections to items in account filed by administrator—order made with reference to some objections—adjournment of inquiry—whether appeal lies from the order already made.*

The District Judge commenced an inquiry into objections taken to certain items in an account filed by the respondent as administrator and made his order with reference to some objections and adjourned the inquiry pending the filing by the administrator of a certain account necessary to enable him to adjudicate upon certain other objections.

Held, that an appeal from the decisions recorded by the District Judge on the objections already dealt with by him is premature.

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(iii) *Application to certify payment—discretion of court—question of fact—no appeal lies without leave of Court of Requests.*

The question whether or not an application under § 349 of the Civil Procedure Code to cause payment to be certified should be entertained or rejected being one in the discretion of the Court on the facts in each particular case, no question of law is involved and no appeal lies without the permission of the Commissioner of Requests.

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(iv) *Appeal—undertaking to abide by decision of Judge—arbitration in partition actions.*

The plaintiff sued the defendants for the partition of the land. The defendants denied that the plaintiff had any interest in the eastern portion of the said land and sought to have it excluded from the partition. In the course of the trial the plaintiff's proctor gave the following undertaking viz, that he was prepared to abide by the decision of the Court on the question of the interpretation of the documents. The documents referred to were not formally put in evidence but the District Judge considered them and made his order holding that the eastern portion of the land must be excluded from the partition.

Held—that under ordinary circumstances no appeal lies from an order made in pursuance of such an undertaking as was given by the plaintiff's proctor.

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(v) *Right of appeal—order in review of taxation—final judgment or order having the effect of final judgment—Courts Ordinance No. 1 of 1889 § 80—Civil Procedure Code § § 214 and 831.*

An appeal lies under § 314 of the Civil Procedure Code from the decision of a Commissioner of Requests in review of taxation of a bill of costs.

An order in review of taxation is not a final judgment or order having the effect of a final judgment so as to come within the operation of § 13 of ordinance No. 12 of 1895.

Backo Appuhamy *v.* Puncha, No. 4476, C. R. Nuwara Eliya 78

(vi) *Appeal-agreement to abide by decision of Court must be acquiesced in by opposite party.*

The defendant, who claimed title to a land by prescription, stated in reply to a question put by the Court in the course of his examination, " If I have even by mistake gone and planted that land I am prepared to abide by the order of the Court." In spite of the defendant's undertaking his Counsel pressed the plea of prescription and that plea the Commissioner upheld in his judgment but at the same time condemned the defendant to pay the plaintiff R25. Each party appealed against the part of the decree that was adverse to himself.

Held, that the defendant's undertaking did not prevent him from appealing against the judgment of the Court.

Pereira J.—(1) An undertaking of this nature to have a binding effect, should, in my opinion, be given in a more formal and solemn manner than in the shape of a casual answer to a question put by the Court in the course of the examination of a party as a witness.

(2) In the next place such an undertaking as that mentioned above can be of no avail unless the opposite party is prepared to accept the decision of the Judge.

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(v) *Proof of execution of deed—signing by cross—person executing holding pen whilst another puts the cross—whether fact of the writing and anthority proved—§ 159 Civil Procedure Code.*

Where the question was whether a certain deed was duly executed by P. and the evidence showed that P. held the pen while another put the cross, but there was no evidence to prove the fact of the writing and the authority of the writer to write the name on the document as a signature, as referred to in § 159 of the Civil Procedure Code.

Held, that the deed was duly executed by P.

Section 159 of the Civil Procedure Code refers to a case where the signature is written by the one person without any interference by or help from the other.

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(vi) § 189—*See* " Collation," " Decree " 137

(vii) § 201—*See* " Mortgage" 139

(viii) § 211—Costs in matrimonial actions, *See* " Costs " 66

(ix) §§ 214, 831—*See* "Appeal (v)" 78

(x) §§ 224, 225, 341, 344 *See* "Writ" 23

(x) *Money recovered by judgment-creditor in excess of amount due underecree—whether recoverable in same action—does the order certifying satisfaction of decree close the proceedings—Civil Procedure Code §§ 344, 349.*

The defendant moved under § 344 the of Civil Procedure Code for a notice on the plaintiff to show cause why should not refund to the defendant a sum of R691·07 recovered by him in excess of the amount due to him under the decree. On the day fixed for the discussion of the matter on the motion of the plaintiff's proctor, consented to by the defendant's proctor, payment of the decree was certified under § 349 of the Civil Procedure Code. Thereafter the plaintiff's proctor contended that the "case was closed" and nothing further could be done in it on the defen dant's motion for an order on the plaintiff to refund the amount paid to him in excess of the sum actually due to him.

Held, (1) That the defendants' application, when it was made was quite in order as an application under § 344 of the Civil Procedure Code.

(2) That the intention of the parties—at any rate of the defendant—was not to "close the proceedings" by certifying satisfaction of the decree and that in the circumstances of the case the order on the plaintiff's motion to certify payment of the decree amounted to no more than the placing on record of the fact that the defendant has paid the plaintiff at least the amount of the decree.

Sinnetamby *v*. Kamalamuttu, No. 4566, D. C. Chilaw 90

(xii) § *349—Certifying payment—See* Appeal (iii) 63

Certifying Payment—

See "Appeal (iii)" 63

See "Civil Procedure Code (xi)" 90

Collation—

(i) *Hotchpot—collation—Roman-Dutch-Law not applicable—Ordinance 15 of 1876 § 39—amendment of decree—decree in accordance with judgment— remedy—appeal—Civil Procedure Code § 189,*

The Roman-Dutch Law as to collation was superseded by § 39 of Ordinance No. 15 of 1876. Under that section collation takes place only when a parent gives property to his children either on the occasion of their marriage or to advance or establish them in life.

A decree can only be amended in terms of § 189 of the Civil Procedure Code.

When there is no inadvertant omission in the judgment an application to amend the decree does not fall within the scope of § 189 and the remedy is to appeal from the decree of judgment.

Vytianathan Chetty *v*. Meenatchi, No. 33647 D. C. Colombo 137

(ii) *See* "Deed" 152

Compensation—

See "Land Acquisition" 72

Compounding prosecution—

See "Promissory Note" 57

Confession

Confession made to police officer at departmental inquiry—inadmissible when person making it is subsequently charged—giving false information to public officer—whether informant should be allowed to bring criminal case before proceedings are taken against him—Evidence ordinance No. 14 of 1895, § 17—Penal Code No. 2 of 1883 § 180.

The accused presented a petition to the Assistant Superintendent of Police, charging one of his subordinates, a Station House Officer, with having obtained an illegal gratification. The Assistant Superintendent, thereupon, held a departmental inquiry at which the accused admitted his guilt and begged for pardon.

Thereafter the accused was charged in the Police Court with having given false information to a public officer under § 180 of the Ceylon Penal Code.

Held, that the statements made by the accused to the Police Officer at the departmental inquiry, admitting his guilt and asking for pardon were not admissible in evidence.

Where an accused gives false information to a Public officer it is not necessary that he should be given an opportunity of bringing a criminal case against the person informed against before he is prosecuted under § 180 of the Penal Code.

A. S. P. Matara *v*. Gunesekere, No. 4637, P. C. Matara 26

Consideration—

See "Promissory Note" 57

Contract—

(i) *Marriage brokerage contract—whether enforceable by action.*

The plaintiff sought to recover a sum of Rs. 300 from the defendant on an agreement in writing by the latter to pay him that amount if he succeeded in bringing about a marriage between him and a certain lady who was named in the agreement with a dowry of Rs. 5000.

Held, that the contract which formed the subject of the suit was a marriage brokerage contract and that an action could not be maintained upon it.

Livera *v*. Gonsalves, No 20357 C. R. Negombo. 4

(ii) *Contract to deliver goods at future time—Delivery in monthly parcels—Breach before the time for complete performance—action for damages for delivery of goods for two months—no bar to subsequent action with regard to succeeding months—Civil Procedure Code §§ 34 & 207—measure of damages—difference between the contract and market price each month-resjudicata.*

The defendant on the 25th August 1910 agreed to supply the plaintiff with 360 bales of sarees and dhooties within one year from the 1st of September 1910 to the 31st August 1911 at the rate of 30 bales a month. The defendant made default in supplying the sarees and dhooties in the months of October and November 1910. Plaintiffs on 7th January 1911 instituted action D. C. Colombo 31911 for recovery of R 15000 as damages and obtained judgment. In that action the defendant pleaded that the contract was not duly entered into, in that one Thomas Marsden who had signed the contract on behalf of the defendants had no authority to do so. At the trial of that case the defendants Counsel stated that " he did not intend to press the matter."

The present action was brought to recover a sum of R8700 as damages for a period subsequent to the month of November 1910.

The defendant pleaded that (1) the contract entered into having been signed by Thomas Marsden was void (1) in view of §§ 34 and 207 the action was barred (3) that the plaintiffs are not entitled to damages for each separate default.

Held (1) that the judgment in D. C. Colombo 31911 operated as *resjudicata* on the 1st objection.

An order made of consent in a case operates as much as an estoppel as an order made after adjudication on evidence.

Held (2) that the action was not barred by reaeon of § § 34 and 207 of the Civil Procedure Code.

The plaintiffs had the option of treating the whole contract as at an end and claiming damages in respect of a breach of the whole contract or of treating the contract as subsisting and claiming damages for each default thereunder committed.

Held (3) that the measure of damages is calculated by the difference between the contract price and the market price not at the time of the breach of the contract, but at the time or times when the defendant made default in supplying the goods.

Muthukaruppen Chetty *v*. Habibhoy, No. 33725, D. C. Colombo — 102

(iii) See " Vendor and purchaser " — 110

Co-owners.—

Co-owners—one co-owner gemming on the whole land—action by person claiming to be co-owner for declaration of title and injunction—whether injunction should be allowed pending trial of action.

The plaintiffs asserting title to a half share of a field complained that the 1st defendant who claimed title under the other defendants who were entitled to the other half share of the land, were carrying on gemming operations on the land and appropriating the gems found therein and prayed for a declaration of title, possession, damages and an injunction.

Held, considering the rights of co-owners as explained in *Silva Appuhamy v Adria* and also the difficulty in establishing the quantity and value of the gems that may be found and removed, the plaintiffs were entitled to an injunction pending the final determination of the rights of the parties.

Mohammado *v* Rawther, No. 29763 C. R. Colombo. — 8

Costs—

(i) *Costs—matrimonial actions—discretion of Court—Civil Procedure Code § 211*,

Section 211 of the Civil Procedure Code gives a discretionary power to the Code in matrimonial as well as in other actions. The old rule that in an action for divorce a *vinculo matrimonii* the husband is, as a general rule, liable to pay his wife's costs should he kept in view by Courts of Justice in the exercise of the discretion conferred by § 211 of the Civil Procedure Code.

Mepi Nona *v* Silva, No. 11512, D. C. Galle — 66

(ii) *Order in reievw of taxation.* See " Appeal (v) "

Court.—

(i) *Power to direct sale of property in any order.* See "Mortgage" — 139

(ii) *Undertaking to abide by order of Court.* See " Appeal " — 69, 143

(iii) *Application to certify payment—discretion of Court.* See " Appeal (iii)" — 63

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Court of Requests—

(i) See "Appeal (iii)" 63

(ii) *Jurisdiction of Court of Requests—action for damages depending—on proof of title to land—possessory action—test of jurisdiction value of land*

The plaintiff averred title to 2/3rd share of a certain field and alleged that the defendant had ousted him and appropriated the crop of the field and claimed Rs. 35 as damages. The defendant denied the plaintiff's title and the alleged ouster stated that he was a lessee under the trustee of the Dalada Maligawa, who was subsequently added as a party, and set up the title of the temple. At the trial the plaintiff's Proctor stated that the action was intended to be a possessory action and that the prayer for possession was omitted by an oversight. The land was admitted to be worth over Rs. 300.

Held, that in view of the pleadings the claim for damages depends on proof of title to the land and that the Court of Requests has no jurisdiction to try the case.

Held also, that even if this can be regarded as a possessory suit the question as to the value of the action remains the same.

Dingiri Appuhamy *v.* Appuhamy, No. 11509, C. R. Kegalle 87

Criminal Procedure Code—

Criminal Procedure Code § 296 (1)—accused undefended—duty of Police Magistrate to explain main points against him and his right to give evidence.

Where an accused is not represented by a pleader there must be something on the face of the record to show that the provisions of § 296 (1) of the Criminal Procedure Code, entitling an accused person to be expressly informed of his right to give evidence on his own behalf and as to what are the main points against him were complied with.

Fernando *v.* Perera, No. 739, P. C. Matale. 76

Damages—

See "Contract" 102

Dceree—

Amendment—§ 189 Civil Procedure Code. See "Collation" 137

Deed—

(i) See "Donation" 52, 147

(ii) *Proof of execution.* See "Civil Procedure Code (v)", 100

(iii) *Forfeiture of an inheritance—renunciation of an inheritance—son being given some property by deed for and on account of the share of the maternal inheritance due to him—construction of deed—testamentary action—collation or hotchpot—issue must be raised—point of time at which party can be asked to collate is when the shares of the heirs are settled.*

In *re* estate of Maria Perera, deceased, No. 3863, D.C. Colombo 132

Defendant—

Mortgage action—who may be joined. See "Mortgage" 50

Donation—

(i) *Donation—delivery of deed not necessary—when donation may be accepted—acts of acceptance—whether acceptance should be by deed.*

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The delivery of a deed is not essential for its validity under our law.

A donation may be accepted at any time during the life time of the donor, and where its fulfilment is postponed until after the donor's death, it may even be accepted after the donor's death.

The delivery of the deed of donation to the donee and the sut sale by the donee of some of the lands gifted are both acts of acceptance of the donation.

Wickremesekere *v* Wijetunge, No. 21829, D. C. Kandy 52

(ii) *Donation to minor—acceptance may be by minor or agent—future husband of minor an agent—delivery of deed—presumption in favour of acceptance.*

Under the Roman-Duch-Law no particular form is required for the acceptance of the gift. It is in every case a question of fact whether or not there are sufficient indications of the acceptance by the donee.

A deed of gift to a minor msy be accepted by the minor himself or through any agent recognised by him for that purpose. The future husband of a minor daughter is entitled to act as an agent in that behalf.

Where a deed of gift was delivered to the future husband of the donee on the occasion of the marriage along with other present.

Held, the inference is irresistible, that the donee accepted the deed

Per Lascelles **C.** *J.* There is, I think, a natural presumption in all these cases that the deed is accepted. Every instinct of human nature is in favour of that presumption, and I think when a valuable gift has been offered and it is alleged it has not been accepted, some reason should be shown for the alleged non-acceptance of the deed.

Hendrick *v*. Sudritaratne, No. 10794, D. C. Galle. 80

(iii) *Deed of donation—donation by grandmother to minor grand—children—acceptance by grand-uncle—revocation of deed and sale by donor to grand uncle—prior registration of deed of sale—knowledge of prior deed—Ordinance No. 14 of 1891 § 17.*

The first defendant executed a deed of donation of certain lands in favour of the plaintiffs, her minor grand children, in 1905. The donation was accepted by the 2nd defendant, brother of the 1st and grand-uncle of the minors. In 1908 the 1st defendant revoked the deed of donation and sold the lands to the 2nd defendant. The deed of sale was registered before the deed of donation.

Held, That the deed of sale prevailed by virtue of prior registration, over the deed of donation.

The mere notice of the deed of donation will not deprive the 2nd defendant of the benefit of his registration.

Obiter, *Lacelles C. J.*—The words "fraud or collusion in securing such prior registration" are limited to cases where the fraud or collusion has occured in the act of securing the registration so that the registration itself is vitiated thereby.

Mohamado Sali *v*. Ayesha Umma, No. 3766, D. C. Batticaloa 147

Estoppel—

See " Res Judicata " 30

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Evidence—

See "Confession" 26

False Information—

See " Confession" 26

Fidei-commissum

(i) *Fidei Commissum—Jus Accrescendi—Ordinance No. 21 of 1844, Section 20.*

Simon Moraes and his wife Justina Perera executed a last will dated 7th July, 1894, which contained the following clause:— " We do hereby give and bequeath to Lucia Perera (1st defendant,) Ana Perera (2nd defendant) and Maria Perera of Colombo (sisters of the textatrix) one just half of our property whatsoever belonging to us and the other one half to Philippa Moraes and Helena Moraes (sisters of the textator) who shall after our death hold and possess the same without mortgaging, selling, granting or otherwise alienating the same or any part thereof but shall only enjoy the rents and profits thereof and after their deaths the said share shall devolve on their lawful issue without any restriction whatsoever."

Maria Perera died without issue leaving a last will by which she appointed her husband (3rd defendant) her executor.

It was common ground that the will of Simon Perera created a *Fidei-Commissum*-and the question was whether upon the death of Maria Perera without issue her share passed to her executor or under the *Jus accrescendi* devolved on her co-devisees.

Held, that, as the intention of the testators was not to preserve the property intact but to divide it equally between the two groups, the sisters of the husband and the sisters of the wife surviving at the death of the testator, on the death of Maria without issue her share in the property was freed from the *Fidei-Commissum*, and the *Jus accrescendi* did not apply.

Perera *v.* de Silva, No. 4708 D. C. Chilaw 1

(ii) *Fidei Commissum—words creating fidei—commissum—assigns—plena proprietas cum onere fidei commissi—acceptance—assigns.*

The following words in a deed were held to have created a *fidei commissum.*

" I have given, granted, assigned, transferred and set over unto Johannes and Brezina their heirs executors administrators and assigns as a donation absolute and irrevocable but subject to the conditions and provisions herein after stated and mentioned, all that (description of the property donated)..........................to have and to hold the said premises unto them the said Johannes and Brezina their heirs, executors administrators and assigns for ever. Provided always that the said garden and buildings shall not at any time be sold mortgaged or in any other manner alienated but shall be only held possessed and enjoyed by them and their heirs and descendants in perpetuity under the bond of *fidei commissum* and the rents issues and profits thereof shall not be liable to be attached seized or sold by others for the debts of the said Johannes and Brezina or of their heirs and descendants and provided also that on failure or extinction of heirs the said garden and buildings shall revert to and become the property of the Roman Catholic Church of St. Lucia.......... ....and I the said Johanna for myself my executors and administrators do convenant promise and agree to and with the said Johannes and Brezina their heirs executors administrators that I the said

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Johanna have not at any time made done or committed any act whereby the hereby granted premises may be impeached in title."
In Roman-Dutch Law there is such a thing as *plena proprietas cum onere fidei commissi.*

Dr. Coudert v. Elias Appuhamy, No. 36298 D. C. Colombo, 170

Fiscal's Sale.—

(i) *See* "Mortgage" 50
(ii) *See* " Jus Retentionis 132

Fraud—

See " Registration " 147

Husband & Wife.—

(i) *See* " Prescription " 14
(ii) *See* " Contract " 64
(iii) *See* " Costs " 66

Hypothecary action—

See " Mortgage " 50

Injunction—

See " Co-owners " 8

Jus accrescendi—

See " Fideicommissum " 1

Jus retentionis—

Jus retentionis—right of a tenant to retain possession—inchoate right—cannote bassigned not seized in execution.

The right of a tenant under the Roman Dutch Law to retain possession is an inchoate right and is neither assignable nor capable of being seized and sold at a Fiscal's sale under a writ against the tenant.

Welaidan Chetty v Piyaratne, No. 21750 D. C. Kandy 132

Judges—

Judges, duty of—observations as to impropriety of allowing personal knowledge of character of litigants to interfere with judgments.

Adakeppa Chetty v Rambukpota, No. 2624 D. C. Badulla 59

Jurisdiction.—

See " Court of Requests " 87

Land Acquisition

Land acquisition Ordinance No. 3 of 1876—issue to be tried by Court—matters to be considered in awarding compensation—§ 21 not exhaustive—proper course for assessing compensation.

The issue that has to be tried by the Court in a proceeding under the land acquisition Ordinance is what amount of compensation the defendant is entitled to receive for the portion of his land taken over by the Government.

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§ 21 of the land acquisition Ordinance is not exhaustive of all the matters to be taken into consideration in awarding compensation.

When the matters mentioned in § 21 of the Ordinance do not afford a safe guide for assessing compensation for a portion of land acquired by Government the proper course would be to find the market value of the entire land and then to estimate the value of the portion of the land taken at that rate.

G. A., W. P. v. Archbishop of Colombo, No. 8905 D. C. Negombo 72

Mortgage—

(i) *Mortgage action—whether purchaser of Fiscal's sale who has not obtained Fiscal's conveyance can be joined—observations as to who may be joined.*

A hypothecary action can be brought against a person, who has purchased the property mortgaged at a Fiscal's sale held in execution of a writ against the mortgagee, but who has not yet obtained a Fiscal's conveyance in his favour.

Per Pereira J.—Voet (20. 4. 2.) mentions certain persons against whom the action may be brought, but the test is by no means exhaustive. The object of the action is to bind, by an order for the sale of the property for the satisfaction of the amount advanced to the debtor, all those who have or claim to have an interest in the property acquired. Of course, a person having or claiming to have no such interest may not be sued in such an action, but the question of interest is not to be too narrowly scrutinized because the defendant is in no way prejudiced by the action so long as no costs are claimed against him except in the event of an unreasonable contest by him of the plaintiff's claim.

Silva v. Fernando, No. 9103, D. C. Negombo. 50

(ii) *Mortgage—sale of mortgage lands to third party—concealment of sale—transfer in favour of mortgagee—discharge of mortgage debt—mortgagee's deed of transfer ineffectual—revival of mortgage—where several lands mortgaged—Court has power to direct sale in any order—Civil Procedure Code No 2 of 1889 § 201.*

The 1st and 4th defendants mortgaged two fields to the plaintiff on 29th August 1909 by deed A registered on 3rd September 1910, and by another deed B of 9th September 1910 the 1st defendant mortgaged a share of another field. On 13th September 1910 the 1st defendant sold his share of the fields to the 2nd defendant by deed C registered on 22nd September 1910. On 13th December 1910 the 1st defendant concealing the fact that he had parted with his rights in these fields transferred them to the plaintiff by deed D and obtained a discharge of half the debt due on A and the entirety of the debt due on B. The 2nd defendant transferred all his rights in the fields to the 3rd defendant by deed A D 5 dated 29th February 1912.

Held, that if the deeds C & A D 5 are to be deemed to have the effect of rendering ineffectual deed D. in the plaintiff's favour the plaintiff's rights on the mortgage bonds A & B must be taken to have revived.

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Held also, that under § 201 of the Civil Procedure Code it is competent to the Court to give directions as to the order in which mortgaged properties should be sold.

Wijesinghe *v* Dingiri Appuhamy, No. 4414 D. C., Kurunegala — 139

Market Value—

See "Land Acquisition" — 72

Marriage brocage—

See "Contract" — 61

Minor—

See "Donation" — 52,80

Misjoinder—

See "Civil Procedure Code (ii)" — 98

Ordinances—

(i)	No. 12 of 1840	*See*	"Appeal"	41
(ii)	No. 21 of 1844, §20	*See*	"Fidei-Commissum"	1
(iii)	No. 3 of 1876	*See*	"Land Acquisition"	72
(iv)	No. 15 of 1876 §39	*See*	"Collation"	137
(v)	No. 1 of 1889 §80	*See*	"Appeal"	78
(vi)	No. 2 of 1889 §§21 & 39	*See*	"Appeal"	47
(vii)	No. 14 of 1891 §§14 & 17	*See*	"Registration"	147, 155
(viii)	No. 22 of 1909 § 11	*See*	"Promissory Note"	11
(ix)	No. 22 of 1909 §§ 4 & 37	*See*	"Stamp Duty"	166

Payment—

See "Prescription" — 134
See "Appeal (iii)" and Civil P. C. (xi)" — 63,90

Partition—

See "Appeal (iv)" — 69

Partnership—

Civil Procedure Code § 34—splitting of claims—dissolution of partnership till dissolution—subsequent action for account of business after dissolution—former action brought after cause of action in latter action accrued—subsequent action does not lie.

Plaintiff's father S. & 1st defendant traded as partners. S. died on the 10th of March 1907 and the partnership came to an end. On 23rd July 1908 the executor of S. sued 1st defendant for account of partnership business till death of S. In that action judgment was entered in favour of S's estate for Rs. 5116-45. Plaintiff brought the present action on the 30th December 1910 for an account of the income and expenditure of the said business between 10th April 1907 and 31st December 1907.

The defendant pleaded the judgment and decree in the former action as res judicata.

Held, that the plea of res judicata was bad as there was no adjudication in the former action on the matter at issue in the present action namely the liability of the defendant to account for the profits derived from the use of the partnership assets after S's death.

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Held, also that the second action is barred by § 34 of the Civil Procedure Code. The cause of action in both cases is one and the same namely the refusal or failure of the defendant to account to S's estate for the share of the profits due to it by the partnership.

Somasunderam *v* Sinnatamby, No. 31896, D.C. Colombo. 94

Paulian Action—

Action to set aside deed—who can bring—fraud—what must be proved.

Under the Roman Dutch Law an action to set aside a deed on the ground of fraud is granted only in favour of a creditor to whose prejudice the alienation had been effected, or to the heirs of such a creditor, and is maintainable only on proof of the intention of the insolvent-alienor to defraud his creditors and of the fact that at least one creditor had been so defrauded.

Punchi Menika *v*. Dingiri Menika, No. 4760 D.C. Kurunegalle 93

Penal Code §—180

See " Confession " 26

Plaint—

See " Stamp Duty " 166

Possessory action—

See " Court of Requests, " Prescription " 87,143

Prescription—

(i) *Prescription—deed of sale by wife without husband's authority, when set aside—action for refund of consideration—when accrues.*

Where money has been paid as consideration for an invalid deed of sale under which the purchassr has obtained possession and where steps are taken to have the deed set aside and the purchaser ejected, the purchaser is entitled to claim the re-payment of the purchase money and prescription will begin to run against him from the time when such steps are taken and not from the date when the consideration was paid.

Silva *v* Silva, No. 6194, C. R. Kalutara. 14

(ii) *Property purchased in trust—action for conveyance—cause of action—prescription—plaintiff in possession of property.*
Plaintiff's deceased brother bought a piece of land with the plaintiff s money and on his behalf. The deed of transfer was however executed in the plaintiff's brother's name. On the strength of this purchase the plaintiff entered into possession of the land in 1895 and possessed it till 1912. In the latter year, on the death f the plaintiff's brother the defendant as his administratrix included the said land in the inventory of his estate. Plaintiff thereupon alleging that the property was purchased by the deceased in trust for him sued the defendant for a conveyance. The defendant *inter alia* pleaded that the plaintiff's cause of action was barred by prescription in as much as the action was not brought within three years of the date of purchase.

Held that the cause of action arose when the property was included in the inventory and that the action was not barred.

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Senaratne v. Jane Nona, No. 5698, D.C. Matara 83

(iii) *Prescription—action for wages—part payment—acknowledgment of indebtedness and promise to pay balance—rebuttal of acknowledgment by special circumstances—burden of proof.*

A payment on account, of a debt. whether such debt at the time of payment is already statute-barred or not is necessarily an acknowledgment of the debt, and the law in the absence of anything to the contrary implies from the acknowledgment a promise to pay the balance.

The implication of such promise may be rebutted by any special circumstances attending the payment and the burden of proving such circumstances is upon the defendant.

Arunasalem v. Ramasamy, No. 36453 D. C. Colombo 134

(iv) A person who possesses property in the *bona fide* (albeit mistaken) belief that the property is his own and be longs to nobody else has clearly the *detentio animo domini* and such possession is " adverse possession" within the meaning of § 3 of ordinance No. 22 of 1871

Pereira J.—We have nothing to do with the definition in English of either the term " possession " or the term " adverse possession." . . . . . . Possession under the Roman-Dutch Law is either Possessio Civilis or Possessio Naturalis. Possessio Civilis is *detentio animo domini*. It is this possession that is necessary to be proved where a person seeks either any of the possessory remedies or to establish a title by prescription.

Ayano Hamy v Silva, No. 9394, C. R. Balapitiya 143

Promissory Note—

(i) *Promissory note—position of signature—mark on the stamp affixed to the top right hand corner of the note—cancellation of stamp,*

When a promissory note was signed with what purported to be a mark made by the defendant on a stamp affixed at the top right hand corner of the note with the defendant's name in full written across the stamp.

Held, the note was not duly signed by the defendant.

Semble, Looked at in the light on the stamp Ordinance (Sect 11) which applies to the case it would appear that the signature was intended for the cancellation of the stamp and nothing more.

Semble, Had the stamp been at the foot of the document the single act of signing across it may be tantamount to the execution of the document and the cancellation of the stamp.

Mohammado v. Rawther, No. 29763 C. R. Colombo 11

(ii) *Promissory note—consideration—compounding compoundable offence.*

(ii) A promissory note granted for compounding a criminal prosecution that is compoundable in law cannot be saidto be a note for illegal consideration.

Fernando v. Buyzer, No. 34370, C.R. Colombo 57

Rei Vindiactio cation—

Action for declaration of title—ouster—defendant acquiring title after the institution of the action—title in a third party at the time of the institution—Jus tertii—how Crown land can be alienated.

In an action for declaration of title to land a party defendant is not entitled to rely on a deed obtained after the date of the institution of the action, in support of a prayer for the dismissal of the plaintiff's action, on the ground of superior title, nor is he entitled to set up the title of a third party as against the plaintiff's claim.

Silva v. Silva. Ponnamma v. Weerasooriya, and *Silva v. Nona Hamine* held not in point as the documents the effect of which has been considered in these are Fiscal's conveyances which confer title that relate back to the actual sales in execution. A formal Grant under the public seal of the Colony which is the only means by which the Governor is empowered to alienate land belonging to the Crown has not that effect.

Per Pereira J. The defendants cannot succeed in their prayer for a dismissal of the plaintiff' claim unless they show that they did not oust the plaintiff or they are in a position to justify the ouster by proof that at the date of the ouster they had a superior title or were acting under the authority of somebody having a superior title. The mere fact that some third person had a title superior to that of the plaintiff is no justification at all for the ouster by the defendants. So that neither the fact that at the date of ouster pleaded, the Crown had title nor the fact that since the commencement of the action the defendants have acquired title is relevant on the question whether. the ouster was justified.

Gooneratne v. Fernando, No. 3254 D. C. Kurunegalle. 9

Registration' Frior—

(i) *See* " Donation " (iii) 147

(ii) *Registration—gift by the original owner—prior registration of latter deed, effect of—ordinance No. 14 of 1891, § 14.*

Sanchiappu and his wife Unguhamy who were married in community of property were the original owners of certain parcels of land. After Sanchiappu's death Unguhamy by deed D 8 dated 25th November, 1898 conveyed a half share of the lands to the 4th defendant and the wife of the 3rd defendant. After the death of Unguhamy, Sirimalhamy one of the four children of Sanchiappu and Unguhamy conveyed by deed P 1 dated the 18th January, 1912, a fourth share of the lands to the plaintiffs. Deed P1 was registered on the 22nd January 1912 while deed D8 was registered on the 7th August, 1912. The 3rd and 4th defendants contended that though P1 was registered before D8 the former cannot take priority over the latter in so far as the two deeds cannot be said to be derived from the same source (Unguhamy.) It was contended that Sirimalhamy cannot be regarded as the heiress of her mother as the latter by deed D8 had alienated her share in the estate.

Held, that the plaintiff's deed is entitled to priority over the defendant's deed.

James Appu v. Carolis, No. 8896 D. C. Negombo 155

Res Judicata—

(i) *Res judicata—identity of form and subject matter not essential—no appeal from order under § 232 C.P.C.—English Law of res judicata—judgment of consent, effect of—Civil Procedure Code §§ 34, 207, 232, 241, 252.*

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The plaintiff obtained judgment against the defendant and seized money due to him in the hands of the P. C. M. O., who sent a sum of Rs. 570-05, to the Court in obedience to the writ. A claim was preferred to the said sum by the appellant under a deed by which the defendant had assigned to the appellant his rights under the contract with the P. C. M. O. On the day of inquiry the plaintiff consented to the claim being upheld and the seizure being released.

On a subsequent date the P. C. M. O. remitted to the Court a further sum of Rs. 553-38 that became due to the defendant in the case. The appellant claimed it once more under his assignment. The plaintiff alleged, however, that he had consented to the claim being upheld in ignorance of the fact that the assignment in favour of the appellant was invalid inasmuch as it was made in breach of an express prohibition contained in the contract itself. The appellant contended that the matter was *res judicata* and could not be re-opened so long as the consent order upholding the claim was in force. The District Judge disallowed the claim over ruling the plea of *res judicata* and permitted the plaintiff to draw the money. The claimant appealed.

Held, (*Lascelles C.J. and Wood Renton and Pereira J.J.*) that the order was not appealable and that the claimant should have brought an action under § 247 of the Civil Procedure Code to have the order on the claim set aside.

Held, further (*Lascelles C.J.* and *Wood Renton J. Pereira J.* dissenting) that assuming that an appeal lay, the plea of *res judicata* should be upheld.

Lascelles C.J. and *Wood Renton J.* A judgment by consent has the full effect of a *res judicata*.

Sections 34, 207 and 406 of the Civil Procedure Code do not contain the whole law of *res judicata* in Ceylon.

Samitchy Appu *v.* Pieris, No. 21328 D. C. Kandy. 30

(ii) *See* "Contract (ii)" 102

(iii) *See* " Partnership " 94

Sale—

See " Vendor and Purchaser " 110

Stamp Duty—

Stamp duty—pleadings insufficiently stamped—when once accepted cannot be returned—Attorney General May sue to recover deficiency of stamp duty.

When a judge, having considered the question of the sufficiency of stamp duty on a plaint and answer, has accepted it, the presumption is that he has adjudicated upon the sufficiency of stamp duty and he cannot thereafter return the plaint or answer to be properly stamped, if as a matter of fact it was originally insufficiently stamped.

But if the plaint or answer is accepted *per incuriam* that is to say as a result of an inadvertent omission on the part of the Court to consider the question of the sufficiency on the stamp thereon, it may be that before any step in the regular course of the procedure is taken by the opposite party, the Court may return the pleading to be properly stamped.

If there is any remedy for it, it must be by an action by the Attorney-General as representing the Crown.

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The sufficiency of the stamp on a plaint cannot be called in question as a master of defence in an answer.

Per Ennis J.—A plaint is an *instrument* within the meaning of section 4 of the stamp ordinance No. 22 of 1909 and under section 37 of the Ordinance an *instrument* once admitted in evidence shall not except as provided in the section be called in question at any stage of the same suit or proceeding on the ground that it is not duly stamped.

Per Pereria J.—section 37 of the stamp Ordinance, I do not think applies to pleadings in cases. It refers to *instruments tendered in evidence* and clearly a plaint does not answer to that description of document.

Jayawickreme *v.* Amarasooriya, No. 11862 D. C. Galle — 166

Signature.—

See "Promissory Note" — 11

See "Civil Procedure Code (v)" — 100

Seizure—

See "Writ" — 23

Testamentary action—

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Trust—

See "Prescription (ii)" — 83

Vendor and Purchaser—

Contract of sale—obligations between vendors and purchasers—Roman Dutch Law—vacant possession—vendor warrants against eviction and not the title of the thing sold—when do actiones redhibitoria and quanti minoris lie.

The Law governing the obligations between vendors and purchasers of immovable property in Ceylon is the Roman Dutch Law.

Per Curiam, Wood Renton A. C. J. and *de Sampayo J, Ennis J dissentiente* In the absence of express agreement the vendor does not warrant the title of the thing sold but only warrants against eviction.

In the absence of fraud or of an express warranty of title the only primary obligations resting on the vendor of immovable property are to give the purchaser "vacant possession," that is to say possession unmolested by the claim of any other person in possession of the property sold and to warrant and defend the title which he conveys after the purchaser once placed in possession has been evicted. The purchaser cannot in such circumstances decline to accept vacant possession on the ground that his vendor's title is defective.

The *actio rehibitoria* and the *actio quanti minoris* are competent only where there is a defect in the thing sold itself. They are not remedies for defect of title.

Jamis *v.* Suppa Umma, No. 21941 D C. Kandy — 110