THE

APPEAL COURT REPORTS.

EDITED BY

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

PROCTORS.

VOLUME I.

Colombo:

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1907.

JUDGES OF THE SUPREME COURT:

(January—June, 1907.)

Chief Justice:

THE HON'BLE SIR JOSEPH TURNER HUTCHINSON, KT.

Puisne Judges:

THE HON'BLE MR. HENRY LORENSZ WENDT *(on leave).*

" " JOHN PAGE MIDDLETON.

" " ALEXANDER WOOD-RENTON.

" " JOSEPH REGINALD GRENIER. *(Acting)*

LAW OFFICERS OF THE CROWN:

Attorney-General:

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

Solicitor-General:

MR. JAMES CECIL WALTER PEREIRA, K.C.

TABLE OF CASES REPORTED.

THE

APPEAL COURT REPORTS.

BELING *vs.* VETHECAN.

No. 14,869, D. C., KANDY.

Present: LAYARD, C. J., & GRENIER, A. P. J.

26th May, 1903.

Breach of promise of marriage—Sec. 21 of Ordinance No. 2 of 1895 —Written promise.

The plaintiff and the defendant had verbally promised and agreed to marry each other; and in a letter addressed to the plaintiff the defendant wrote:—"I won't tease you till we get married, shall we fix the happy day (D.V.) for the 8th of April, the day after Easter." The plaintiff sued the defendant for breach of promise of marriage.

Held: This letter amounted to a written promise within the meaning of sec. 21 of Ordinance No. 2 of 1895, on the part of the defendant to marry the plaintiff; and the plaintiff's action was maintainable.

The fact that there was a previous verbal proposal and acceptance did not prevent the plaintiff from relying on the written promise contained in the letter.

The material facts are set out in the judgment.

vanLangenberg for appellant.

Dornhorst, K.C. (with *Bawa*) for respondent.

JUDGMENT.

LAYARD, C. J.—The defendant appeals in this case against the judgment of the District Judge decreeing him to pay the plaintiff the sum of Rs. 1,500 as damages for breach of a promise to marry her.

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The defendant contends that the plaintiff cannot maintain this action in the absence of a written promise by him to marry the plaintiff.

It is argued for the appellant that in view of the proviso to sec. 21 of Ordinance No. 2 of 1895, there having been no written promise to marry in this case, the plaintiff's action should have been dismissed. The proviso to that section runs as follows: "No action shall lie for the recovery of damages for breach of promise of marriage unless such promise of marriage shall have been made in writing." He argues that, if the proposal to marry has been made verbally, the production of documentary evidence showing that the defendant admitted that a verbal promise had been made would not be sufficient to entitle the plaintiff to bring an action on the original verbal promise to marry, as the Ordinance only provides for the promise itself being made in writing, and does not provide for the case in which there was merely a verbal promise corroborated by some other material documentary evidence written by the party sought to be bound by the verbal promise. I am inclined to think that his contention is right. It is however not necessary to decide that question in this particular case if there is evidence of any writing signed by the defendant amounting to a promise to marry the plaintiff. Before the coming into operation of the Ordinance No. 2 of 1895, if A, in an action against B for damages for breach of promise of marriage, established that B asked A to marry him and B accepted him, the Courts would undoubtedly have held that mutual promises had passed between A and B and that a contract to marry had been entered into between them which entitled A to sue B for damages of breach of promise of marriage. In this case, on the 15th of February, 1901, the defendant, in a letter addressed to plaintiff, amongst other things wrote: "I won't tease you till we get married—shall we fix the happy day (D.V.) for the 8th of April, the day after Easter." The plaintiff wrote in reply consenting to marry defendant on the 8th of April. No doubt there was a final verbal offer made to the plaintiff to marry the defendant and a verbal acceptance of the same, and the letter was merely written for the purpose of fixing the day on which the ceremony was to take place; but at

the same time it contains an offer on the part of the defendant in writing to marry plaintiff naming a day, and that offer was duly accepted by the plaintiff. The latter offer would be sufficient alone, if accepted by the plaintiff, to sue for a breach of promise of marriage. The fact that there was a previous proposal and acceptance does not in my opinion prevent the plaintiff from relying on the written promise to marry contained in the letter of the 15th February, 1901. After hearing Counsel on the question as to whether there was, in this case, such a promise of marriage as could be relied upon to support plaintiff's action, the question as to the amount of damages to be awarded the plaintiff was reserved for argument until we had decided that question. We have come to the conclusion as expressed above, that the plaintiff has a right to maintain this action. This case has consequently come on today for the purpose of the consideration of the amount of damages to be awarded to the plaintiff. The District Judge has awarded the plaintiff Rs. 1,500, and, as we are not satisfied that the amount awarded to the plaintiff by the District Judge is excessive, we order that the judgment be affirmed and that the appellant do pay the costs of this appeal.

GRENIER, A. P. J.—Agreed.

HADJIAR *vs.* KUNJIE.

No. 24,373, C. R., COLOMBO.

Present: WENDT, J.

11th September, 1903.

Absence of plaintiff—When case is called on—Dismissal for default—Sub-secs. (1) *and* (4) *of sec.* 8 *of Ordinance No.* 12 *of* 1895 *differentiated.*

In an action in the Court of Requests when the case was called on, neither the plaintiff nor his Proctor was present. The defendant was present, as were also his Proctor and Counsel. The Commissioner dismissed the plaintiff's action for default of appearance. Later in the day plaintiff filed an affidavit explaining his non-appearance, and moved to have the order of dismissal set aside and the case tried. The Commissioner disallowed the application. The plaintiff appealed.

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Held: The dismissal of the action was wrong. Sub-sec. (1) of sec. 8 of Ordinance No. 12 of 1895 leaves room for the plaintiff, after he has committed default, to appear and excuse his absence. The excuse may be offered at any time during the day. Judgment cannot, therefore, be entered against plaintiff till the following day.

There is a material difference between sub-sec. (1) and sub-sec. (4) of sec. 8 of Ordinance No. 12 of 1895. In sub-sec. (4) the default contemplated is limited to a definite point of time—"when the case is called on". Sub-sec. (1) provides that a dismissal may take place when there is a default of appearance or absence of sufficient cause "upon the day".

Marikar v. *The Colombo Municipal Council* (2 Br. 240) followed.

The facts are fully set out in the judgment.

Bawa for plaintiff-appellant.

F. J. de Saram for defendant-respondent.

JUDGMENT.

WENDT, J.—This appeal raises a question of practice in Courts of Requests. The learned Commissioner, on the 16th July, 1903, dismissed the action with costs, because, when it was called on for trial, the plaintiff and his Proctor were both absent, the defendant being duly represented by Proctor and Counsel. Later on that day the plaintiff's Proctor, Mr. Perera, filed an affidavit of plaintiff explaining the default in appearance, and moved the Court to set aside the order of dismissal and restore the case to the list. The Commissioner, on 17th July, made the following order, which sets out the facts:—

"I cannot allow this application. The plaintiff is provided with a remedy in the Court of Requests Ordinance, which he might adopt. The case was called up at 11 a.m. sharp, when neither plaintiff nor his Proctor nor his Counsel was present. Mr. Ekanaike then wished to address the Court on behalf of the plaintiff, but I refused to hear him, as he was not the plaintiff's Proctor on the record. I asked him, however, to inform the plaintiff or his Proctor that I would dismiss the case unless one of them appeared. At 11-30, after all the cases for the day had been disposed of except one, which was specially fixed for 2-30, I called up the case again. Neither the plaintiff nor his Proctor

nor his Counsel was present, and I dismissed the case before adjourning.

"This application was submitted to me at 4-30 p.m. The proper remedy of the plaintiff is to apply under sec. 5 of 12 of 1895. This application is disallowed."

Later on the same day, 17th July, plaintiff's Counsel asked the Court to reconsider its order, and cited the case of *Marikar* v. *The Colombo Municipal Council*, 2 Browne 240; but the Court refused to do so. The Commissioner said:—"Mr. Drieberg's contention, if I understand him aright, is that the Court has no power to dismiss a case if the plaintiff and his Proctor are absent when the case is called on; but if upon the day the case is fixed for trial the plaintiff does not appear (sub-sec. 1 of sec. 8) 'the plaintiff's action may be dismissed with costs'. That is to say, under sub-sec. 4 of sec. 8 the plaintiff must be present when the case is called on; but under sub-sec. 1 it is sufficient if the plaintiff is present at any time during the day. I do not understand Mr. Justice Moncrieff to go this length. The logical result of such an interpretation would be that no plaintiff need be present or ready when the cases are called on for the day. He may come in at any time before the closing of the Court and demand that his case be taken up. The Judge would have to wait patiently till such time as the plaintiff chooses to come into Court, because the plaintiff may appear at any hour during the day."

I do not understand the Commissioner's order to imply that he was not satisfied with the explanation of plaintiff's absence. If the matters deposed to in the affidavit are true, there was reasonable excuse for the default.

Defendant's Counsel objected that no appeal lay in view of sub-sec. 6 of sec. 8. I think, however, that that prohibition only applies to judgments entered within the jurisdiction conferred by the earlier sub-sections. As in my opinion the Commissioner had no jurisdiction to dismiss this action on account of plaintiff's not appearing when the case was called in the morning, I think the appeal is competent. If it were otherwise, I should treat the appeal as an application for revision, and deal with the case accordingly.

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The question then is whether the Commissioner's view of the Ordinance was correct. In the first place, I think he ought to have followed the decision of my brother Moncrieff in *Marikar* v. *The Colombo Muuicipal Council*, even if he considered it erroneous, as it was binding on him. But further, I am myself disposed to agree with that decision. There is, my brother pointed out, a material difference of phraseology between sub-secs. 1 and 4. In the latter, the default contemplated is expressly limited to a definite point of time, "when the case is called on", and the direction is imperative—"the Commissioner shall enter judgment dismissing the plaintiff's action" (see *Abdul Cader* v. *Saibo*, 1 Br. 92). In the former sub-section, the words are: "If upon the day.....the plaintiff shall not appear or sufficiently excuse his absence, the plaintiff's action may be dismissed." These words leave room for the plaintiff, after he has committed default, to appear and excuse his absence. The excuse must, of course, be subsequent to the default, and it may be offered any time during the day specified. Judgment cannot, therefore, be entered against plaintiff till the following day. In the present instance, the plaintiff did appear subsequently on the day specified and sufficiently excused his absence. The Commissioner ought, therefore, to have recalled his order dismissing the action, and either proceeded to try the case at once, or fix another day for the purpose.

I would add that the Commissioner misconceives the result of so reading the Ordinance. He thinks it will enable a plaintiff to keep away deliberately when his case is called and to come in at any before the Court rises and demand that his case be taken up. As well may it be said that a plaintiff in a District Court against whom a Decree Nisi for default of appearance has been passed may appear at any time within the next fortnight and "demand" that the decree be set aside. He cannot "demand" any such thing; he can only ask to be permitted "to excuse his absence". If satisfied with the reasonableness of the excuse, the Court will refrain from dismissing the action, and either proceed with the trial or fix another day for so doing. If the Court thought plaintiff had wilfully kept away from the Court when the case was taken up,

with the intention of appearing and preferring a false excuse, that would be a reason for holding that no sufficient excuse was shown and for entering judgment against him.

I set aside the orders appealed against and send the case back for re-trial in due course. There will be no costs of appeal.

LA BROOY *vs.* HANIFFA.

No. 442, P. C., Colombo.

Present: Lascelles, A. C. J.

19th October, 1906.

Ordinance No. 7 of 1887, sec. 198 (3)—Chairman's power—"Punishment" —Penal Code sec. 289.

> Sub-sec. 3 of sec. 198 of Ordinance No. 7 of 1887 provides a "punishment" for the neglect of the duty thereby imposed, therefore such neglect cannot be brought under sec. 289 of the Penal Code.

The defendant, Mohamado Haniffa, erected a line of buildings in Forbes Road, within the Municipality of Colombo, without giving notice of his intention to do so to the Chairman of the Municipal Council as required by sec. 198 (3) of Ordinance No. 7 of 1887. The Chairman in writing required him within seven days to submit plans and specifications of the buildings in terms of the said section of the said Ordinance, which the defendant neglected to do. The defendant was thereupon charged by the Inspector of Buildings, Mr. E. G. La Brooy, with neglecting to perform the duty imposed upon him by sec. 198 (3) of the Ordinance No. 7 of 1887, and with thereby having committed an offence punishable by sec. 289 of the Penal Code. The Police Magistrate acquitted the defendant, holding that the power given the Chairman by sec. 198 (3) of Ordinance No. 7 of 1887 was a punishment, and took the case out of sec. 289 of the Penal Code. The complainant appealed.

de Sampayo, K.C., for appellant: The power given to the Chairman under sec. 198 of Ordinance 7 of 1887 is not

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penal—it does not amount to a "punishment". It does not come within the provisions of sec. 52 of the Penal Code.

Casupathipillai v. *Sabapathipillai* (2 N. L. R. 152)
Walker v. *Palany* (3 N. L. R. 119)
Harman v. *Muttiah* (2 S. C. R. 44)

Bawa for respondent: "Punishment" must be interpreted in the ordinary acceptation of the term. The section provides a penalty for the offence contemplated by it—therefore a prosecution under sec. 289 of the Penal Code does not lie. No. 34,728, P. C., Gampola, S. C. M. *12th September*, 1904.

JUDGMENT.

LASCELLES, A. C. J.—The question on this appeal is whether a person who has failed to submit a plan in accordance with sec. 198 of the Municipal Councils Ordinance 1887, shewing the particulars of a building which he intends to erect has committed an offence punishable under sec. 289 of the Penal Code. Now, sec. 198 of the Municipal Councils Ordinance of 1887 requires persons who intend to erect, or re-erect buildings to give notice in writing of their intention to do so to the Chairman, and to submit, when required by the Chairman, a plan shewing the levels and other particulars of the building. Sub-sec. 3 of the same section provides that if any building "is begun or erected without giving notice or without submitting particulars as aforesaid.....the Chairman may, by notice, require the building to be altered or demolished as he may deem necessary".

Sec. 289 of the Penal Code provides that: "Whoever wilfully neglects or omits to perform any duty imposed upon him, or wilfully disobeys or infringes any provision of any ordinance or statute heretofore or hereafter to be enacted, for which neglect, omission, disobedience, or infringment no punishment is or shall be by this Code or any other ordinance or statute otherwise specially provided, shall be punished with a fine."

The question, therefore, is, whether sec. 198 of the Municipal Councils Ordinance specially provides punish-

ment for the offence of failing to submit particulars of an intended building. Now, reading the section as a whole I have no doubt as to the intention of the legislature. In the earlier part it imposes a duty upon the inhabitants of Municipal towns; by sub-sec. 3 it provides the means of enforcing the duty so imposed, namely, the alteration or demolition of the building. I cannot doubt that an order to alter or demolish a building is a punishment within the meaning of sec. 289 of the Penal Code; it would be, in fact, as appellant's Counsel frankly admitted, a more severe penalty than any fine likely to be imposed under sec. 289. We were told that the Municipal Council thought it would be too harsh to order buildings to be demolished, and that it would be sufficient if the offence were punished with a fine. This seems to me tantamount to an admission that the demolition of a building must, at any rate in some cases, amount to a punishment. I think it is clear that sec. 198 of the Municipal Councils Ordinance sets out the punishment which it was the intention of the legislature to provide for the offence of non-compliance with the earlier part of the section. This being so, sec. 289 of the Penal Code is inapplicable.

I therefore think the Magistrate arrived at a correct conclusion, and accordingly dismiss the appeal.

WIJEYNAYAKE *vs.* DE SILVA.

No. 7,673, D. C., GALLE.

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

29th October, 1906.

Lessor and lessee—Right of lessee to be put in possession of the thing leased by lessor—What is "possession"—Interruption by a third party—Lessor's liability thereon.

A lessee is entitled by law to receive physical and vacant possession of the thing leased at the hands of his lessor.

Delivery of the "deed of lease" is not delivery of the thing leased. There is a considerable difference between the symbolic delivery of possession of the *dominium* and the physical delivery

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of the right of occupation under a lease, which alone enables the lessee to enjoy the right which is conferred on him.

The forcible marking of the trees leased in the presence of contesting claimants does not constitute delivery of the trees leased.

There is an implied term in the contract of lease that a lessee should be put in possession of the thing leased by lessor, and if the lessor fails to do so he is liable in damages for his breach of contract.

That a lessee should be evicted at law or that he should first proceed against the party interrupting is no condition precedent to his action against the lessor for possession.

The defendant leased to the plaintiff several cocoanut lands on a deed of lease. When the plaintiff went with the defendant to one of the lands leased to take possession of it, they were both opposed by some third parties who denied the lessor's right to it. The defendant, in spite of such opposition, marked certain trees on the land. Some time after, when the plaintiff went again to take possession, he was again opposed. The plaintiff thereupon sued the defendant for a cancellation of the lease and for damages. Judgment was given for the plaintiff in the court below, and the defendant appealed.

Walter Pereira, K.C., S.-G., for defendant-appellant: The defendant lessor gave lessee possession, and therefore this action is not maintainable unless the plaintiff was evicted at law in an action to which the defendant was a party. No action lies merely because lessee's right was disturbed by a third party (*Saibo* v. *Appuhamy*, 2 S. C. R. 126). A notarial lease has been held to be a *pro tanto* alienation (*Goonewardene* v. *Rajapakse*, 1 N. L. R. 217). The lessee is really in the position of a vendee, therefore the principles laid down in *Fernando* v. *Jayawardene* (2 N. L. R. 209), and *Abdul* v. *Caderavaloe* (2 C. L. R. 165) apply. Delivery of the deed of lease is delivery of possession (*Appuhamy* v. *Appuhamy*, 3 S. C. C. 61). [MIDDLETON, J.: You must give physical possession—the use of the thing must be given. Delivery of the deed would be good delivery of *dominium*. It is not delivery of *user*.] If the lessee accepts symbolic delivery, he cannot complain thereafter. He might refuse such delivery. You cannot dissociate delivery and possession.

vanLangenberg for plaintiff-respondent: Delivery of deed of lease is not delivery of possession. That is only symbolic delivery, which is binding, only if agreed upon between the parties to a contract. What the lessee wants is to be put in vacant possession of the thing leased. Vacant possession means a possession unmolested by the claims of any other person in possession or occupation (*Berwick's Voet*, p. 172). Lessee's proper remedy is to sue the Lessor (*Ram.* ('77) 117). It is not necessary to join the persons disputing as parties (1 *Lor.* 191). The lessee does not possess *ut dominus*, and cannot proceed against a third party (*Maduwanwela* v. *Eknelligedde*, 3 N. L. R. 213); a lessor can maintain such action (*Allis* v. *Endris*, 3 S. C. R. 87; *Vol.* 2, *Pereira's Laws of Ceylon*, p. 456).

Walter Pereira, *K.C.*, in reply cited—
Perera v. *Soban* (6 S. C. C. 61)
Saibo v. *Appuhamy* (2 S. C. R. 126)
Isaac Perera v. *Baba Appu* (3 N. L. R. 48)

JUDGMENT.

HUTCHINSON, C. J.—This is an appeal by the defendant from a judgment of the District Court of Galle given on 2nd July, 1906.

The defendant by a "deed of lease" dated 26th September, 1904, and attested by a Notary Public leased to the plaintiff a number of cocoanut trees standing on land described in the lease for 4 years from the date thereof for Rs. 100 per annum.

The plaintiff alleges that when he went to take possession he found other persons in possession of the most important lot of trees, and that those persons disputed his right to the trees and the defendant's title to them, and that in consequence he never received possession of any of the trees leased to him. He therefore sued for cancellation of the lease and for return of rent which he had paid in advance, and for damages.

The defence was that the defendant did place the plaintiff in possession, and that the plaintiff had not suffered eviction by process of law and had failed to give defendant due notice to warrant and defend the plaintiff's title.

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The District Court found that the plaintiff never obtained actual possession of any of the trees; and that finding was clearly right upon the evidence.

But it is argued on behalf of the defendant that delivery of the lease was in law delivery of possession of the property leased; that the lessor after delivering the lease was not bound to deliver actual possession and that the lessee cannot maintain such an action as this unless he has been evicted by law in an action of which he has given the lessor notice. That is to say, if I take a lease of a house or land by a document such as this and I find when I go to take possession that Mr. A is in possession who denies the lessor's title so that I am unable to get possession, I cannot make any claim against any lessor until I have sued Mr. A. It may be true that before any lessor delivered me the lease Mr. A was both in law and in fact in possession of the property; but the Solicitor-General, if I understood him right, would contend that the moment any lease was delivered to me Mr. A ceased to be, and I began to be in possession. That is not the law. The law is that the lessor is bound to put the lessee in possession of the property leased; that is an implied term of the contract of lease; and if he fails to do so, he is liable to pay the lessee damages for his breach of the contract.

Appeal dismissed with costs.

MIDDLETON, J.—I agree. It is not necessary for me to recapitulate the facts, but I quite concur with the opinion that the District Judge was right in holding that the defendant has not established that he has enabled the plaintiff to acquire vacant possession of the trees he leased to him (*Berwick's Voet*, p. 172).

It was the defendant's duty to give to the plaintiff, his lessee, such a possession of the trees that he might have the use of them (*Vanderlinden* 1, 15, 2; *Vol.* 2, *Pereira's Laws of Ceylon*).

Here all that was done was a forcible marking of by the defendant's agent in the presence of protesting claimants to the trees. It may well be that the plaintiff thought there was a possibility that he might get possession, and

was content to wait for a period to see if it were physically possible, and tried again; but in my opinion he never had that possession of the trees he was entitled to have conferred on him, viz., a possession such as would enable him to enjoy the fruits of his contract with the defendant.

On the question whether a delivery of the deed of lease to a lessee is a delivery of possession of the property let by the lessor, I am unable to accede to the argument of the learned Solicitor-General. I think, as I stated at the argument, there is a very considerable difference between the symbolic delivery of possession of the *dominium* of a property and the physical delivery of the right of occupation under the lease which alone enables a lessee to enjoy the right which is conferred on him. I think the appeal must be dismissed with costs.

ANDERSON *vs.* MOHIDEEN.

No. 9,143, M. C., Colombo.

Present: Middleton, J.

16th November, 1906.

Ordinance No. 15 *of* 1862, *sec.* 1 (1)—*Suffering premises to be in a filthy condition—When an owner is liable—Notice to owner.*

The notice required to be given to an owner of premises before he can be prosecuted under sub-sec. 1 of sec. 1 of Ordinance No. 15 of 1862 for keeping or suffering the same to be in a filthy or unwholesome state need not be in writing.

To bring an owner not occupying the premises as an offender within the terms of the Ordinance, it must be proved, first, that the premises were in a filthy and unwholesome condition when the Inspector of the Municipality visited, that the Inspector acquainted the owner with that fact, or that the owner knew of that fact, and that, in spite of that knowledge, he had neglected to put the premises in a proper sanitary condition. M. C., Colombo, 7,221 (S. C. Min., 14th September, 1906) explained.

Elliott for accused-appellant: The accused is a lessee, and is in the position of an owner, and notice should have been given him that the premises were in an insanitary condition before a prosecution was taken (M. C., Col., 7,221, S. C. Min., 14th September, 1906). Such notice

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should have been in writing. It must be proved that an owner *suffered* his premises to remain in an insanitary condition (*Blacker* v. *Saibo*, 2 Balasingham 13).

F. J. de Saram for complainant-respondent: The principle that an owner should be informed of the insanitary condition of the premises owned by him before prosecution extends to the case only where the owner is living away from such premises and is not able to have knowledge of such condition. Here the accused visits the house and has knowledge of its state. Verbal notice was given, and that is sufficient notice. If the premises were found to be in a filthy condition on any *one* day, a prosecution would lie under the section.

The facts appear in the judgment.

JUDGMENT.

MIDDLETON, J.—In the present case the accused has been convicted under sub-sec. 1 of sec. 1 of Ordinance No. 15 of 1862, that he being the owner of premises bearing assessment No. 37, Ward Place, within the Municipality of Colombo, did, on the 11th day of September, 1906, keep or suffer the same to be in a filthy and unwholesome state. The accused appeals against that judgment on the ground that he had not received a written notice to the effect that the premises were in a filthy and unwholesome state, as alleged by the Inspector of Nuisances. The appeal is based on a judgment of mine, founded on a ruling of the Supreme Court reported at page 13 of vol. 2 of Balasingham's Report. I am not aware that either in my own judgment or in the judgment of the Supreme Court does there appear any observation which would warrant the inference that a notice, in writing, is considered necessary. The notice in writing would unquestionably be the better means of formally conveying the information to the accused; but so far as my opinion is concerned, I should say that if it were proved that the inspector had brought the matter verbally to the notice of the owner that would be sufficient. In the present case the accused is charged as a lessee or *pro. tanto* owner with keeping or suffering his premises to be in an unwholesome or filthy condition on

the 11th day of September. The evidence on the record only shews that on that date the Inspector found the premises in that condition and told the defendant so, which the defendant denies, and consequently there is only oath against oath on the point of notice. The meaning put by this court on the word "suffer" in the case alluded to shews that it is necessary that evidence should be given that an owner, knowing or having reason to know that his premises were in the alleged state, neglected within reasonable time to put them in a proper sanitary condition. If an Inspector of Nuisances was desirous of bringing an owner not occupying the premises as an offender within the terms of the Ordinance, it seems to me that it will be necessary for him to prove first that the premises were in a filthy and unwholesome condition when he visited, that he acquainted the owner with that fact, or that the owner knew of that fact and that in spite of the knowledge which was so given to or existed in the accused he had neglected to put them on a proper sanitary condition. If the defendant was not aware that his premises were in the state alleged by the Superintendent on September 11th he can hardly be said to have suffered them to be in that condition on that date. This is nothing however to prevent his being prosecuted for an offence under the section on 24th September if there is evidence to warrant it. I regret to say on the face of this record I am unable to find the evidence which would, I think, warrant me in affirming the conviction.

I must therefore set it aside and acquit the accused.

In revising my judgment I have elaborated it slightly for the purpose of making it more useful to the Police Court.

SILVA *vs.* NONA.

No. 4,714, C. R., Kalutara.

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

19*th November*, 1906.

Civil Procedure Code, sec. 247—*Title of judgment-debtor to property seized—Fiscal's conveyance—Ordinance No.* 4 *of* 1867, *sec.* 56.

Silva v. *Nona*

No legal title accrues to a purchaser under a Fiscal's sale in the absence of a formal conveyance by the Fiscal, and until the execution of such conveyance the judgment-debtor remains vested with the title.

The execution of a conveyance by the Fiscal is an essential ingredient of the sale of land.

Per WENDT & MIDDLETON, JJ.—In an action under sec. 247 the right of the creditor as well as of the claimant must be considered as at the date of seizure.

Silva v. *Kirigoris* (7 N. L. R. 195) followed.

Bawa (with him *Akbar* and *V. M. Fernando*) for plaintiff-appellant: Prior to the Civil Procedure Code (Ordinance No. 2 of 1889) there could be a valid sale of land without a conveyance from the Fiscal. The most that can be said is that a conveyance by the Fiscal is the best evidence of the sale: hence the appellant was entitled to judgment when he produced the best evidence on the day of the trial to prove that the title to the land was in Weerasinghe. Sec. 289 of the Civil Procedure Code expressly states that the title of the judgment-debtor is not divested by the sale until confirmation and execution of the Fiscal's conveyance. There is no such provision in the Fiscal's Ordinance of 1867—hence the inference is that under the old law the title of the judgment-debtor passed to the purchaser at the execution sale even without a conveyance from the Fiscal. Moreover, on the execution of the Fiscal's transfer the title of the purchaser related back to the date of the purchase. Sec. 247 of the Civil Procedure Code makes a distinction between the case of a claimant as plaintiff and the case of a judgment-creditor as plaintiff. When the claimant is the plaintiff the question of title is to be determined as at the time that the seizure took place, whereas when the judgment-creditor is the plaintiff we have nothing to do with the rights of the parties at the date of seizure. This is made clear on reference to sec. 283 of the Indian Civil Procedure Code (the section corresponding to sec. 247 of the Ceylon Civil Procedure Code). Cites: No. 6,218, C. R., Ratnapura (S. C. Min., 20th October, 1902).

Wadsworth (with him *Balasingham*) for defendant-respondent: Sec. 247 makes no distinction between the

judgment-creditor and the claimant. In such an action the inquiry is to be directed to the rights of the parties at the date of the seizure (*Silva* v. *Kirigoris*, 7 N. L. R. 195). No title can pass at an execution sale until a Fiscal's conveyance is obtained, whether before the Civil Procedure Code came into operation or after. *Silva* v. *Nona*

Akbar in reply.

The material facts are set out in the judgment of Wendt, J.

JUDGMENT.

MIDDLETON, J.—In this case the question is, whether the judgment-debtor's title to the possession as his own property of the land seized in execution has arisen so as to enable the judgment-creditor to have the property declared liable to be sold in execution in his favour under the seizure he has made.

The defect in the judgment-debtor's title is that the Fiscal's conveyance to his predecessor in title was not granted until after his action under sec. 247 was brought.

Under the Roman Dutch Law (Grotius, Book II. chap. v. sec. 13; VanderLinden 490-492) formality of conveyance of immovable property was essential to give title. By Ordinance No. 9 of 1836, sec. 14, rule 24, the Fiscal had to give a conveyance. Ordinance No 7 of 1840 sec. 20 speaks of certificates of sale by the Fiscal, and Ordinance No. 4 of 1867 sec. 56 contemplates Fiscal's conveyances.

I think, therefore, it is impossible to say that a legal title accrued to a purchaser under a Fiscal's sale in 1885 in the absence of some formal transfer by the Fiscal.

The judgment-debtor had therefore no legal title to the property seized until after the decision in the claim enquiry and after action brought, when in January, 1906, he obtained an order of the Court for a confirmation of the sale and a Fiscal's conveyance.

If this is so, is the Court entitled under the wording of sec. 247 to hold the property liable to be sold in execution on the strength of title accrued to the judgment-debtor pending action?

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This would be contrary to the general principle that a litigant's claims in an action must be governed by his right and the law existing at the date of action brought.

The property was in judgment-debtor's possession as his own property (which is the test under sec. 244 of the Civil Procedure Code at the time of seizure), but the defendants put in a claim of a title to it which was upheld, and no superior title was obtained to it by the judgment-debtor till after action brought. At the date of seizure the judgment-debtor had no title, and the action under sec. 247 was brought in effect to set aside the order declaring his want of title.

I think, therefore, that the action must be decided on the judgment-debtor's rights at the date of seizure, and as he had no title then the Commissioner of Requests was right in dismissing this action, and I would join in dismissing the appeal with costs.

It was argued, however, that the Fiscal's conveyance then granted enured to the benefit of the judgment-debtor as and from the date of the actual sale to his predecessors in title as laid down by Burnside, C. J., in 9 S. C. C. p. 32, and I conceded to that reasoning before referring this case to the fuller argument it has received before this court of three judges.

Having, however, had the advantage of conferring with my Lord and my brother Wendt and hearing further argument, I feel bound to admit that the principle cannot be held to apply in a case like this where a competing title was paramount at the date when the *contestio* began.

WENDT, J.—This case has been reserved for the consideration of three judges upon a question relating to the effect of sales in execution and of the Fiscal's conveyances granted in pursuance of them. The facts material to the question are shortly as follows:—In execution against one Dona Katherina and her son Don Siman, the Fiscal, on 24th September, 1885, sold the right, title, and interest of Dona Katherina in and to one-third of the garden Kiriammawatte, and on 22nd April, 1886, he sold two-thirds of the garden. The purchaser in each case was the execution-

creditor (substituted plaintiff) Don David Weerasinghe, to whom the Fiscal allowed credit for the prices bid at the sale, in reduction of his judgment amount. The District Court of Kalutara, being the Court out of which the writ of execution issued, made order that the substituted plaintiff had a right to a conveyance of the right, title, and interest of the debtor (*sic*) in the property sold, and that "a conveyance ought to issue to him". But no conveyance was in fact executed. The purchaser, however, in 1889, sold and conveyed the land to one Weerakoon, who in 1896 mortgaged it to the present plaintiff. In March, 1905, plaintiff got a decree against Weerakoon for the mortgage debt and caused the Fiscal to seize the land in execution, as also one-third of another land named Mahasekandawatte, which plaintiff alleges was also sold in execution against Dona Katherina and Don Siman and dealt with by the subsequent deeds, but as to which there is as yet no proof. Upon the seizure the present defendants preferred a claim, which after inquiry was upheld by the Court on 19th July, 1905. Thereupon the present action was brought on 1st August, 1905, by plaintiff under the provisions of sec. 247 of the Civil Procedure Code, to have it declared that the property was liable to be sold under his writ of execution. The defendants (who are the children of Siman, one of them being also wife of Weerakoon) in their answer dated 11th October, 1905, admitted the title of Dona Katherina and Don Siman, but denied Weerasinghe's purchase and his transfer to Weerakoon. They also pleaded that they "are the owners of the properties and have always been in possession of them, and that the debtor never had right, title, or possession". At the trial, on 12th April, 1906, plaintiff produced two Fiscal's conveyances dated 23rd January, 1906, in favour of Weerasinghe for the shares of Kiriammawatte. To each of them is attached a copy of an order made by the court on 5th January, 1906, on the footing that the sales had been already confirmed, and allowing Weerasinghe credit for the purchase money and directing the Fiscal to execute the necessary conveyances. The Commissioner held that it was incumbent on plaintiff to shew that at the date of the seizure under the writ the property belonged to his judgment-debtor, and the execution at a later date of the

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Fiscal's conveyances, which related back to the date of Fiscal's sales, might afford ground for a fresh seizure, but could not establish a title in the grantee as at the date of the existing seizure. The plaintiff not being prepared to prove prescriptive title in Weerakoon, the action was dismissed with costs. Plaintiff now appeals.

It was argued for the appellant, first, that the conveyance by the Fiscal is not necessary to constitute a valid sale of land, but is merely evidence of the sale, and that, therefore, the production of the document at the trial is sufficient to shew that the purchaser was vested with title from the date of the action; and, secondly, that assuming the title must be referred to the date of the conveyances, plaintiff was still entitled to judgment, as it was open to him, in this form of action, to show that on the day of trial the land was liable to be sold under his writ, although it might not have been so liable at the date of seizure. The first position, it was admitted, could not have been maintained under the law embodied in the Civil Procedure Code, because sec. 289 expressly enacts that the title of the judgment-debtor is not divested until the confirmation of the sale by the court and the execution of Fiscal's conveyance. The absence of a similar provision in the Fiscal's Ordinance 1867 (under which the present sales took place), while it leaves an opening for Mr. Bawa's argument, does not, in my opinion, indicate any difference in the law. It is within my recollection that the argument was more than once addressed to the court, but in every instance the court refused to accede to it. Certainly no decision recognising the suggested state of the law has been produced, and I do not believe exists. On the contrary there are decisions the other way. In D. C., Matara, No. 34,265 (Civ. Min. 7th September, 1888), where the plaintiff claimed title by purchase at an execution sale against the defendant but no Fiscal's transfer had been executed, the Full Court, consisting of Clarence, A. C. J., Dias & Lawrie, JJ., held that parol evidence of the sale had been rightly rejected, and that plaintiff's title under the alleged sale failed. In C. R., Galagedara, No. 36,818 (Civ. Min. 28th September, 1888) Lawrie, J., refused to assent to the view of the Commissioner, "that the mere fact that the highest bidder at a

Fiscal's sale of land is declared the purchaser vests the property in him", and added : "To create title he must get a transfer."

By the Roman Dutch Law private sales of immovable property were null and void unless made "before the court", and the transfer registered, and duty paid thereon (Grotius Introd. 2, 5, 13 ; 2, Kotze's VanLeeuwen 137), and I gather that sales in execution equally required the written transfer (Juta's Vander Linden, 2nd Ed. 335).

To come to our own legislation, Regulation No. 6 of 1824 sec. 24 (the earliest enactment I can find on the subject), and Regulation No. 13 of 1827, which repealed it, no doubt require that the Fiscal shall, upon being furnished by the purchaser with the necessary stamps, "make out the usual certificates of sale", but no form is prescribed, and nothing stated as to the effect of it. Then comes the Ordinance No. 9 of 1836, which dealt with the duties of Fiscals in greater detail, and which enacted (sec. 24) that when the price had been paid in full, "the Fiscal, on being furnished by the purchaser with stamped paper of the proper amount by law required on conveyances of immovable property, shall make out, execute and deliver to the purchaser a *conveyance* of the property according to the form C hereunto annexed". The form C is substantially that now in use. After reciting the sale and the payment of the price, it witnesses that the Fiscal, in consideration of the sum so paid, "hath sold and assigned and *by these presents doth sell and assign* unto the purchaser, his heirs," etc. the land in question. The Rules of Court of 11th July 1840, (which replaced the Ordinance of 1836, when repealed by Ordinance No. 1 of 1839), and the Ordinance No. 4 of 1867, which in turn replaced the Rules, re-enact the provision almost *verbatim*. Although the Ordinance of Frauds and Perjuries (No. 7 of 1840) sec. 2 apparently refers to Fiscal's conveyance as "certificates", that must be due to inadvertence and forgetfulness of the terms of the Ordinance of 1836. The Ordinance No. 11 of 1847, passed to remove doubts as to the validity of instruments executed by Deputy Fiscals, speaks of them as "*transfers* of immovable property".

For these reasons, I hold that even prior to the enact-

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ment of the Code the execution of a conveyance by the Fiscal was an essential ingredient of the sale of land, and until such execution the judgment-debtor remained vested with the title. It is true that upon the execution of a conveyance the purchaser, by the doctrine of relation back, became vested with the title as from the date of seizure; but that does not help plaintiff in this case.

Appellant's second point depended upon his establishing a distinction between the case of the decree-holder and that of the claimant when plaintiff in an action under sec. 247. He conceded that the right which the claimant-plaintiff has to make out is the same as that which he set up at the claim enquiry, which again was required by sec. 243 to be a right at the date of seizure. But he argued that the scope of the creditor-plaintiff's action was "to have the property declared liable to be sold". Concede for a moment that that does not imply a liability *at the date of seizure*, what is the date to which the inquiry must be directed? Not surely the date of the trial of the sec. 247 action. If it be the date of the institution of the action, that is fatal to the present plaintiff, because at that date the property was not so liable. No reason whatever has been urged why the plaintiff in this form of action should be exempt from the fundamental rule that an action has to be determined according to the rights of the parties as existing at the date of its institution. No exception to that rule is recognised by the Code, which contains no provision for the pleading or determination of matters, which alter the rights of parties pending action. On the contrary, the sequence of the enactments, which culminate in the action under the sec. 247, renders it impossible to avoid the conclusion that the rights of the creditor, as well as of the claimant, must be considered as at the date of seizure. To begin with, sec. 218 limits the power of seizure and sale in execution to "all saleable property belonging to the judgment-debtor or over which he has a disposing power". The creditor must first act within the powers so conferred on him. He may then be met by a claim which may be upheld (consistently with the existence of such an interest in the judgment-debtor) on the ground that the claimant "had some interest in or was possessed of the property seized". Then follows

the action of the creditor. In my opinion it presupposes a liability to seizure, a rightful seizure, and a wrongful claim —using the term "wrongful" in the sense that the claim cannot be maintained as against the judgment-debtor's interest in the property. If one of these elements be negatived, the action must fail. That is the view which I took in *Silva* v. *Kirigoris*, 7 N. L. R. 195, and further consideration has confirmed me in it. The Indian decisions support it. The difference between the wording of our sec. 247 and of sec. 283 of the Indian Code does not to my mind indicate any intention on the part of our legislature to enact a different law on the point, the words "to have the said property declared liable to be sold in execution of the decree in his favour" having apparently been added simply in order to make the meaning clearer in regard to the remedy of the decree-holder.

I think the appeal should be dismissed with costs.

HUTCHINSON, C. J.—This is an appeal by the plaintiff from the judgment of the Kalutara Commissioner of Requests.

The plaint stated that Dona Katherina and her son Don Siman Appu were owners of certain land; that under a writ of execution against Dona Katherina and the heirs of her said son (who are the defendants in this action) the property was duly seized and sold by the Fiscal in 1886, and was bought by Weerasinghe, who sold it to Weerakoon, who mortgaged it to the plaintiff; that the plaintiff sued Weerakoon on the mortgage and obtained a decree against Weerakoon, and thereupon took out execution and caused the property to be seized under the writ of execution; that the defendants then set up a claim to the property, which was upheld by the Court on the 19th July, 1905; and that thereupon the plaintiff brought this action, in which he asks that the defendant's claim to be set aside, and that Weerakoon may be declared entitled to the property, and that it may be sold in execution under the plaintiff's writ in his action against Weerakoon.

The seizure in the action against Weerakoon was in July, 1905. The present action was commenced on 1st August, 1905. Up to that time no Fiscal's conveyance had

been obtained in pursuance of the sale to Weerasinghe in 1886; but in January, 1906, orders were obtained confirming that sale, and a Fiscal's conveyance was executed to Weerasinghe.

The Commissioner held that the only question in this action is, whether at the date of the seizure in the plaintiff's action on his mortgage the property belonged to the judgment-debtor (Weerakoon); and that so far as the documentary title was concerned it clearly did not.

The plaintiff's advocate therefore did not press the other issues which had been raised as to Weerakoon's prescriptive title by possession; and the Commissioner accordingly dismissed the action.

In my opinion the judgment was right. It was argued for the appellant that he had a good title, that is, that Weerasinghe had a good title before the Fiscal's conveyance, and that that conveyance was merely a mode of proving his title; that under the Ordinance 4 of 1867, under which the sale took place, no conveyance was necessary; that the order upholding the defendant's claim may have been right on the evidence then before the court, but that now the plaintiff on producing further evidence of the Fiscal's conveyance is entitled to succeed. He would argue, if I rightly understand him, that the knocking down of the land to the highest bidder has the effect under the Ordinance of 1867 of vesting the property in him. I cannot find that that Ordinance gives such effect to a purchase from the Fiscal; and in the absence of any such provision in the Ordinance, I think a purchase from the Fiscal required to be perfected in the same way as any other purchase (except as regards the special statutory provisions as to ordinary purchases which were declared not to apply to Fiscal's sales). In all cases a formal transfer was necessary to pass the property. This was so under the Roman Dutch Law; and no enactment, so far as I have seen, has dispensed with the requirement in the case of sales by the Fiscal.

It was then argued that in the execution of the Fiscal's conveyance the purchaser's title related back to the date of the purchase. For some purposes that may be so; but

doubt whether it would effect the rights of third parties ho may have intervened in consequence of the purchaser's elay in perfecting the title; and in any case it cannot ffect the question in this case, which is whether Weeraoon had a good title at the date of the seizure. Perhaps the purchaser had done all he had to do in order to omplete his title, and the delay in obtaining the conveynce was merely the fault of the Fiscal, the court might old that that must be taken to have been done which ught to have done, and that the conveyance should date om the sale or at least from the date when the purchaser ad done all he could to obtain it. But this is not so here.

The appellant also contended that the plaintiff in such n action as this (which is under sec. 247 of the Civil Proedure Code,) may claim "to have the property declared able to be sold in execution of the decree in his favour"; nd that at the date of the trial this plaintiff proved that he property was then so liable. The answer to that is, that he judgment can only declare the right which the plaintiff ad at the date of the commencement of the action; and ven assuming that the words "declared liable" mean "delared to be liable at the time when the action is brought", nd not "declared to have been liable at the date of the eizure", this action must fail, because the plaintiff had no itle at the time when the action was brought.

I think, therefore, the appeal must be dismissed with osts.

PERERA *vs.* HENDRICK *et al.*

No. 4,848, C. R., Kalutara.

Present: Middleton, J.

14*th December*, 1906.

ivil Procedure Code, secs. 29 *&* 756—*Notice of tender of security for costs of appeal.*

The service of notice of tender of security for costs of appeal, as required by sec. 756 of the Civil Procedure Code, upon the respondent's Proctor only is sufficient.

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The plaintiff instituted a case against the defendants for malicious prosecution. The plaintiff obtained judgment, and the defendants appealed. The defendants filed their petition of appeal within the prescribed time (14 days), and issued notice of tender of security for costs of appeal on the plaintiff and on the plaintiff's Proctor. On the day appointed for the return of such notice the plaintiff's Proctor admitted receipt of notice, but refused to discuss the security tendered, on the ground that the plaintiff had not been personally served. The Commissioner held that personal service on the plaintiff was necessary, and the prescribed time within which such personal service of notice should be effected having lapsed, the appeal abated. The defendant thereon applied for leave to appeal, notwithstanding lapse of time.

F. H. B. Koch for defendant-appellant: Sec. 756 of the Civil Procedure Code is the particular section laying down the procedure to be followed in the giving of notice of the tender of security for appellant's costs. That section states: "that the petitioner must forthwith give notice to the respondent". It does not say that the notice must be given to the respondent personally, nor does it say that the notice should be served on the respondent and not his Proctor. The use of the word "respondent" is large enough to imply an agency. Sec. 26 of the Code allows processes to be served on the recognized agent of a party to an action or appeal. The notice required under sec. 756 is a process, and a party's Proctor is his recognized agent. Sec. 29 states that a process served on the Proctor of any party relative to an action of appeal, except where the same is for the personal appearance of the party, shall be presumed to be duly communicated and made known to the party whom the Proctor represents. Sec. 756 does not require the personal appearance of the respondent in Court on the day fixed for discussion of the security. It would be injudicious to require personal notice on the respondent, for it is easy to conceive the case of a respondent purposely evading the service of notice within the prescribed time of 14 days (in this case) and thus compelling the appeal to abate.

JUDGMENT.

MIDDLETON, J.—This is an application for leave to appeal notwithstanding lapse of time; and it would appear on the application itself that the appellant when filing the petition of appeal within the time prescribed by the Code made a tender of notice to respondent's Proctor, that he (the appellant) would within 14 days time given by sec. 6 of the Civil Procedure Code tender security as required by that section. The Proctor declined to accept the notice on the ground that such notice should be personally served on his client, and the Commissioner of Requests appears to have upheld that contention of the Proctor. The Commissioner of the Court of Requests had before him sec. 29 of the Civil Procedure Code, and it was in full cogniznace of the wording of that section that he made the order in the case. According to sec. 756 it would appear that on the day specified in the notice respondent "shall be heard to show cause if any against such security being accepted". It does not appear to me that this would imply that respondent in person was required to have notice or to attend to show cause, and I would hold that under sec. 29 the service of notice in question upon respondent's Proctor would be sufficient. If service is personally required on respondent, he might intentionally evade service, and so prevent an appeal. Again, the respondent's Proctor if served can notify his client, and obtain the necessary information as to the security tendered before the day fixed for objection. I therefore order that upon proper security being found and accepted the appeal may be completed. The applicant will have the costs of this application.

PALANIAPPA CHETTY *vs.* FERNANDO *et al.*

No. 29,000, C R, COLOMBO.

Present: GRENIER, A. P. J.

22nd March, 1905.

Ordinance No. 2 of 1899, sec. 3 —Public servant—Tidewaiter.

Palaniappa v. Fernando

A person employed as a Tidewaiter at His Majesty's Customs in Colombo is not a public servant within the meaning of sec. 3 of Ordinance No. 2 of 1899. The fact of his being paid out of Government funds does not make him a public servant.

The plaintiff sued the defendant and another on a promissory note. The 1st defendant after answering to the merits, pleaded that he was a public servant within the meaning of sec. 3 of Ordinance No. 2 of 1899, inasmuch as he was at the time of the making of the note and at the date of the action employed as a Tidewaiter at His Majesty's Customs in Colombo. On his being examined by the Court, the defendant stated: "I am employed as an extra Tidewaiter at the Customs. I am paid according to my work. My employment is not pensionable. I get 37½ cents a day when I work. .....There are no fixed Tidewaiters. I have been at the Customs over 14 years ....." The learned Commissioner of Requests held that he was a public servant within the meaning of Ordinance No. 2 of 1899, and dismissed the plaintiff's action. The plaintiff appealed.

E. W. Perera for plaintiff-appellant.

vanLangenberg for defendant-respondents.

JUDGMENT.

GRENIER, A. P. J.—I cannot regard the defendant in this case as a public servant within the meaning of Ordinance No. 2 of 1899. He holds no fixed appointment under Government, but is a person who does job work as a Tidewaiter at the Customs, for which he is paid a daily wage on such days he chooses to work. The fact of his being paid out of Government funds makes him no more a public servant than it makes any cooly who works for a daily wage on the Railway or any other public work, and his appointment is not pensionable. He gets 37½ cents a day when he works. If he does not choose to work, I suppose he may stay away as long as he likes. I do not think that any public servant is allowed this privilege in any Colony, or has ever claimed it.

The order appealed from must be set aside and the

case sent back for the defendant to plead to the merits and for trial thereafter. The defendant will pay the costs of this appeal.

de Silva v. *Gregoris*

DE SILVA *vs.* GREGORIS.

No. 29,329, P. C., BALAPITIYA.

Present: WOOD-RENTON, J.

8th November, 1906.

Criminal Procedure Code, secs. 197 *&* 198—*Order for compensation and Crown costs—Appeal from.*

An order for the payment of compensation to an accused person under sec. 197 of the Criminal Procedure Code is an appealable order in view of the general provisions of sec. 338 of that Code.

The complainant charged the accused in the Police Court under sec. 11 of Ordinance No. 11 of 1865. The Magistrate, holding the charge was false, dismissed the plaint, and further, acting under the provisions of sec. 197 of the Criminal Procedure Code, ordered the complainant to pay a sum of Rs. 5 by way of Crown costs, and an additional sum of Rs. 10 as compensation to the accused. The complainant appealed.

A. St. V. Jayawardene for accused-respondent: As a preliminary objection, there is no appeal in this case. No appeal lies against an order for Crown costs (sec. 197, Criminal Procedure Code). "Compensation" comes within the definition of "fine" in sec. 3 of the Code. In sec. 197 (2) it is made recoverable "as if it were fine". It must accordingly be treated as a fine; and the amount of compensation awarded in this case being under Rs. 25, the order for compensation is not appealable. Sec. 335 (1) (*g*), Criminal Procedure Code). Cites: *Regina* v. *Silva* (5 N. L. R. 17).

de Zoysa for complainant-appellant: This Court has held that even an order for Crown costs is appealable, under certain circumstances. In the present case, how-

ever, the appeal as against that part of the order cannot be pressed. As regard the order for compensation, this Court has always entertained appeals from such orders. "Compensation" included in the definition of "fine" is "compensation adjudged upon any conviction of any crime or offence". There is no conviction in the present case. The provision in sec. 197 (2) making "compensation" recoverable "as if it were a fine" shows clearly that it is not a "fine". An appeal, therefore, lies under sec. 338 of the Code. Cites: *Kanapasipillai* v. *Vellaiyan* (7 S. C. C. 200).

JUDGMENT.

WOOD-RENTON, J.—This case raises an interesting point of law, and it is also interesting when we come to deal with it on the facts. Petitioner was the complainant in a Police Court case instituted against one Gregoris under sec. 11 of Ordinance No. 11 of 1865, and the charge against him was that he had quitted the complainant's service without leave, or notice, or reasonable or probable cause, in breach of the provisions of that section. At the trial the Magistrate heard evidence on both sides, and he came to the conclusion that the charge against Gregoris was false, and accordingly he not only dismissed the plaint, but, acting under sec. 197 of the Criminal Procedure Code, he sentenced the petitioner to pay a sum of Rs. 5 by way of Crown costs, and another sum of Rs. 10 to the accused by way of compensation. It is admitted by Mr. Zoyza, on behalf of the petitioner, that no appeal lies against that part of the order which directs the payment of Rs. 5 for Crown costs, and the present appeal is taken in regard to the order for the payment of compensation alone. On behalf of the accused Mr. A. St. V. Jayawardene raised the preliminary objection that as compensation awarded under sec. 197 is declared by sub-sec. 2 of that section to be recoverable as if it were a fine, and as the total amount of the compensation awarded in this case is under Rs. 25, any right of appeal is expressly excluded by the terms of sec. 335 sub-sec. 1 (*g*) of the Criminal Procedure Code.

Precisely the same point was raised under the old Criminal Procedure Code sec. 236, which is substantially

identical in terms with sec. 197 of the Code of 1898, in a case reported in 7 S. C. C. p. 200, *Kanapatipillai* v. *Velaiyan*. It was held in that case by Chief Justice Burnside, who stated that Justices Clarence and Dias agreed with his view, that compensation awarded to an accused person under sec. 236 of the old Code, even although it is recoverable as if it were a fine, cannot be regarded as a fine and is accordingly appealable. It appears to me that I ought to give effect to this decision, and that an order for the payment of compensation under sec. 196 of the present Criminal Procedure Code is therefore appealable in view of the general provisions of sec. 338.

I have now disposed of the point of law, and I turn to the question of fact. In the present case the accused was engaged under a written contract of service of which one of the terms was that it was the duty of the complainant, his employer, to provide him with employment at a specific rate of wages throughout the period of his employment. As I said before, the Police Magistrate has accepted the story of the accused as being the truth. I see no reason to interefere with his judgment on that point. The story of the accused is this, that at the time when he quitted his employer's service there was an actual suspension of the kind of work in which he was engaged, and that he and several others of his fellow labourers told the complainant that the work was stopped, took their tools away, and went back to their village and received no information from the complainant that their services were required again or that work had begun until the date when the present charge was launched against him. He alleges that the complainant was in his debt on account of wages, and that the real motive for the present charge was to avoid the settlement of that indebtedness. If I take this story as being true, it clearly disclosed a case which entitled the Police Magistrate to act under sec. 197, and I can only add that after reading the complainant's evidence I am quite as much struck as the Magistrate was with its infirmity and with its contradictions.

In my opinion the present case is quite different from that of *Tidoris* v. *Carolis* in 4 N. L. R. p. 324, in which Mr.

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Justice Browne held that a complainant cannot be said to have no foundation to take proceedings against an accused person if the Magistrate after hearing evidence on both sides dismisses the charge only on a balance of probabilities. Here the Magistrate has specifically found that the charge is false, and that the evidence of the accused is true.

I affirm the order appealed against.

PERERA *vs.* COORAY.

No. 245, C. R., Colombo.

Present: Wood-Renton, J.

14*th June*, 1906.

Deed of lease—Covenant to warrant and defend title—Interruption by a third party—What right arises to lessee thereon.

Where in a deed of lease there was an express covenant that in the event of any dispute arising in respect of the lease the lessor should warrant and defend his title and confirm the lease and give vacant possession thereunder, and where a dispute arose and a third party put himself in possession of a portion of the property leased, keeping out the lessee,

Held: That it was the duty of the lessee under the covenant to take proceedings against the interrupter himself and call upon the lessor to come in and defend his title, as the lessee by express stipulation had given up those convenants which may be implied by our common law.

The defendant leased to the plaintiff a field under a deed of lease. One of the conditions of the lease was that the lessor should put the lessee in possession of the field leased. The deed further stipulated: "In the event of any dispute arising in respect of the lease from any person whatsoever, I, the said lessor, shall warrant and defend my title and confirm the lease and give vacant possession of the said field." After the plaintiff was put in possession of the property leased a dispute arose, a third party claiming and keeping the plaintiff out of possession of a one-third share of the property. The plaintiff thereupon sued the defendant for a cancellation of the lease and for damages, in that the defendant had failed to settle the dispute that had arisen and give him, in accordance with the terms

of the lease, quiet possession of the entirety of the field leased. The learned Commissioner (Mr. J. S. Drieberg) dismissed the plaintiff's action, holding that inasmuch as the plaintiff had been put in possession it was for him, in the first instance, to have proceeded against the interrupter, and that the plaintiff's claim for damages and cancellation of lease would have arisen only if the interrupter had possessed a title superior to that of the plaintiff's lessor. The plaintiff appealed.

Samarawickreme for plaintiff-appellant.

Bawa for defendant-respondent.

JUDGMENT.

WOOD-RENTON, J.—This case has been very clearly argued on both sides; but I have no doubt that the judgment appealed against is sound. It appears to me that practically the whole question turns on the construction of the covenant in the lease which the learned Commissioner has set out at the commencement of his judgment. On the evidence of the plaintiff himself it is clear that he was put into possession, so that no question of any breach of an implied covenant of that character can be arrived. Now, what does the express covenant provide? It provides that in the event of any dispute arising in respect of the lease from any person whatsoever the lessor shall warrant and defend his title and confirm the lease and give vacant possession thereunder.

Here a dispute has arisen. An interrupter put himself in possession of the property. It appears to me that it was clearly the duty of the appellant under the covenant, as it was certainly his right in law, to take proceedings against the interrupter himself and call upon the lessor to come in and defend the title. If he had taken that course, the lessor's obligation under the covenant, not only to defend the title, but to maintain him in possession of the property, would immediately have arisen. In view of the fact that we have here an express stipulation regulating at once warranty of title and quiet possession, I do not think the appellant can rely upon any implied covenant in

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regard to these matters which may exist under our common law.

The appeal is dismissed.

REX *vs.* ROWLANDS.

No. 1,786, D. C. (Cr.), KANDY.

Present: MIDDLETON, J.

ARGUMENT: 14*th December*, 1906.

JUDGMENT: 21*st December*, 1906.

Criminal breach of trust—Misappropriation of money won in a lottery —Penal Code, sec. 388.

Where a person collected certain sums of money from a number of persons on the understanding that a syndicate was to be formed consisting of a specified number of subscribers for the purchase of tickets in a lottery, and that the winnings, if any, were to be divided among the subscribers, and where he failed to divide the full amount won by the syndicate among all the members of the syndicate, but appropriated a portion of the amount to himself,

Held: That the contract to divide and hand over the proceeds won by the syndicate was a legal contract, and that such person in omitting to do so rendered himself liable to be punished for the offence of criminal breach of trust defined in sec. 388 of the Ceylon Penal Code.

Held also: That an indictment for criminal breach of trust is not bad, because it does not state what the trust, in respect of which the breach is alleged to have been committed, was.

The object of an indictment is to give an accused person sufficient notice of the accusation he has to meet.

Obiter. If such a person had stipulated for a commission for his trouble he would have been properly entitled to it, and he might have also charged necessary expenses.

The facts and arguments sufficiently appear in the judgment.

c. a. v.

Bawa (with *H. J. C. Pereira*) for accused-appellant.

Walter Pereira, K.C., S.-G., for complainant-respondent.

JUDGMENT

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MIDDLETON, J.—The accused had been convicted on an indictment charging him with dishonestly misappropriating some Rs. 1,500, part of a sum of Rs. 5,742·78½ entrusted to him on or about 16th July, 1906, and thereby committing criminal breach of trust under sec. 389 of the Ceylon Penal Code, and sentenced to twelve months' imprisonment.

The facts of the case were that the accused obtained Rs. 10·50 each from a number of persons, on the understanding that a syndicate was to be formed consisting of twenty subscribers for the purchase of tickets in the Calcutta Derby Sweep, that the winnings were to be divided amongst the subscribers; the subscriber, however, who drew a winning number, was to get a double share. He distributed to fourteen subscribers Rs. 256 each, and to one subscriber Rs. 512. There was no evidence that any more subscribers contributed or were paid.

In the course of the trial a letter marked "C" was produced by Dr. Huybertz, one of the subscribers, who stated that he had written to the Secretary of the Calcutta Turf Club and received it in reply. The learned District Judge, on the objection of the accused's Counsel, held that the letter was inadmissible. Before me the Solicitor-General contended that the letter was evidence under sec. 32 of the Evidence Ordinance, as being a statement made by a person whose attendance could not be procured without an amount of delay and expense, which under the circumstances would appear unreasonable to the Court, and that the statement was one made by such person in the ordinary course of business.

The letter marked with a cross shown by the accused to Dr. Hay and Mr. Beven shows the name of the Turf Club Secretary as Hutchinson.

In my view, the Solicitor-General is right, and the learned District Judge should have admitted the letter marked "C" in evidence. The learned Judge also excluded the questions and answers objected to by Counsel for the defence. I have carefully gone through those questions

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and I fail to see that there is any objection to any one of them as being beyond the scope of sec. 295 of the Procedure Code.

It seems to me that this is a case in which questions, which might give an opportunity to the accused to explain the evidence against him, ought to have been put. This has been done, and the answers which were read in evidence, as I see from the Judge's notes, ought not to have been excluded from consideration.

If letter "C" and these questions and answers are admitted, there is ample evidence to show that the accused made agreements with the subscribing witnesses called for the prosecution, and received Rs. 10·50 from each of them on the terms they allege, that the accused received from the Secretary of the Calcutta Turf Club Rs. 5,742·78½, that his banking account shows payment to only 15 subscribers, that he declined to give the names of other subscribers, and that he admitted he divided at least some of the money he had received amongst the subscribers, while he was alleging that it had been won by a syndicate other than the syndicate now prosecuting him.

The next question is, whether on these facts he can be made amenable to the Criminal law enacted in secs. 388 and 389 of the Penal Code.

It is argued for the appellant that there was no legal contract enforceable by law by which the accused was bound to pay over the proceeds received (if so received) from the Calcutta Turf Club to the subscribers, nor any direction of law prescribing the mode in which if there was a trust how such trust was to be discharged. Further, that the syndicate was formed for the unlawful purpose of selling tickets in a lottery, that accused was not obliged to dispose of the money in any particular way, and that if he did pay over the money he would be guilty of an offence of abetting a lottery, and Nathan, vol. ii. p. 553, sec. 768, *Regina* v. *Hunt* (8 Car and Payne p. 642) and 194 C. R., Point Pedro, 10,193 (S. C. M., 6th November, 1906) were referred to.

On the other hand the Solicitor-General relied on *Bridger* v. *Savage* (15 Q. B. D. 363).

In that case it was held by the Court of Appeal that when the plaintiff employed the defendant to make bets for him and the defendant made such bets and received money from the losers that the plaintiff, in spite of 8 and 9 Vict. c. 109, sec. 18, which makes all contracts by way of waging void, could maintain an action against the defendant to recover in respect of the amounts which had been paid to him. *Rex v. Rowlands*

Brett, M. R., in his judgment said: "The matter stands thus: The defendant has received money which he contracted with the plaintiff to hand over to him when he received it. That is a perfectly legal contract..... the statute applies only to the original contract made between the persons betting and not to such a contract as was made here between the plaintiff and the defendant." While Bowen L. J. said: "It is to be observed that the original contract of betting is not an illegal one, but only one which is void."

In the present case the accused agreed on receipt of a certain sum of money to buy tickets in a lottery and to obtain, divide, and pay over the winnings if any.

The accused did not take the money as, or for, and on behalf of a lottery-keeper, but he took it as agent to buy tickets for the syndicate charging a small commission, and undertaking that if any of the syndicate's tickets won he would divide the winnings in a certain way between the persons for whom he constituted himself agent. In drawing, or causing to be drawn, or buying tickets in a lottery he may have rendered himself liable to punishment for offences under secs. 3 and 4 of the Lotteries Ordinance No. 8 of 1844, and the subscribers themselves may possibly be liable as abettors, but the contract to divide and hand over the proceeds, if any, when received, was a legal one, and I think, therefore, the appellant in omitting to do so under the circumstances proved has rendered himself liable to be punished for the offence of criminal breach of trust defined in sec. 388 of the Penal Code. Even if there were 20 subscribers the appellant's banking account shows he has misappropriated or converted to his use some portion of the sum he was entrusted by the subscribers to receive for

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them and which he was legally bound by his agreement with them to divide amongst them.

If the accused had stipulated for a commission for his trouble, it seems to me he might have been properly entitled to it, and he might properly, perhaps, charge necessary expenses; but he made no such conditions. The answer to the argument based on *Grant* v. *Collette* (4 Natal Law Reports p. 32) is that the ground of the decision was that the plaintiff had no better title than the defendant, who was not in the position of an agent occupied by the accused in this case.

It was further argued that the indictment was faulty, as there was no indication in it as to what the trust was, and that if the evidence was true, there was an offence disclosed against such subscriber for which a separate indictment would lie, while the Criminal Procedure Code only permitted three offences to be charged under sec. 179. The object of an indictment is to give an accused person sufficient notice of the accusation he has to meet. Under sec. 180 (1) of the Criminal Procedure Code I am of opinion that the indictment, as it stands, fulfils that obligation, and is not objectionable.

For these reasons the appeal must be dismissed and the conviction affirmed.

LA BROOY *vs.* ISMAIL.

No. 3,673, M. C., Colombo.

Present: Middleton, J.

Argument: *29th November*, 1906.

Judgment: *4th December*, 1906.

Buildings—By-laws of the Municipal Council of Colombo, rule 7, chap. 22—Notice to owner—Power of Chairman to issue such notice—Ordinance No. 1 of 1896, sec. 12—Jurisdiction of a Municipal Magistrate in regard to fines—Ordinance No. 7 of 1887, sec. 55; Ordinance No. 8 of 1901, secs. 4 & 6; also rule 2, chap. 25 of the By-laws.

The Chairman of the Municipal Council of Colombo is under sec. 12 of Ordinance No. 1 of 1896 the executive officer of the

Municipal Council, and as such has the power of issuing a notice, signed by him, on the owner of a building erected in contravention of the requirements laid down in rule 7 of chap. 22 of the Municipal By-laws, enacted under sec. 4 of Ordinance No. 8 of 1901, to have such building taken down or altered.

A Municipal Magistrate has power under rule 2 of chap. 25 of the By-laws to inflict a fine of Rs. 10 a day for continuing breaches and disregard of the requirements lawfully made, under the by-law by the Chairman, sec. 4 of Ordinance No. 8 of 1901 notwithstanding.

The accused in this case was charged under rule 7, chap. 22 of the By-laws of the Municipal Council of Colombo, dated 23rd October, 1905, and published in the *Government Gazette* of 20th November, 1905, with having failed, after notice in writing had been issued on him by the Chairman of the Municipal Council, to take down certain buildings erected by him in contravention of the requirements laid down in that by-law, or so to alter them as to bring them into conformity with such requirements.

There were two trials; the first trial having been quashed on the ground that accused's proctor had no instructions to plead guilty on behalf of his client under the particular circumstances of the case, Mr. Justice Middleton sent the case back for re-trial, and the accused was found guilty under rule 2, chap. 25 of the same By-laws and fined Rs. 200. The accused appealed.

Schneider (with him *Akbar*) for accused-appellant: The fine of Rs. 200 is excessive as the accused was only fined Rs. 2 at the first trial. A Police Magistrate can only inflict a fine of not more than Rs. 100. The by-laws in chap. 22 are enacted under sec. 4 of Ordinance No. 8 of 1901, which says that the fine is not to exceed Rs. 20. [MIDDLETON, J. Do I understand you to contend that a fine of Rs. 200 is *ultra vires* of the Municipal Magistrate?] Under sec. 6 of Ordinance No. 8 of 1901 these by-laws, if they obtain the sanction of the Legislative Council, are to have the same effect as the Ordinance itself. So that the by-laws in chap. 22 seem to be independent of sec. 4 of Ordinance No. 8 of 1901. But rule 2 chap. 25 of the by-laws under which the accused is convicted speaks of a fine not exceeding Rs. 20, and in cases of continuing

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offences a further fine of Rs. 10 a day. Rule 2, chap. 25 has to do duty for breaches of all the by-laws, some chapters of which are enacted under one Ordinance, others under some other Ordinances, as will be seen on reference to the first part of the by-laws. As the Magistrate has fined Rs. 200 in a lump sum and as he makes no mention of a continuing offence, it is submitted that he cannot inflict a fine of more than Rs. 20. Moreover, in sec. 4 of Ordinance No. 8 of 1901 there is no mention of continuing offences. The punishment for continuing offences mentioned in rule 2 chap. 25 of the by-laws may well apply to breaches of by-laws enacted under some other Ordinance which particularly deals with continuing offences. Although the by-laws in chap. 22 seem to be independent of sec. 4 of Ordinance No. 8 of 1901, still the fact that the punishment for continuing offences is not mentioned in sec. 4 of Ordinance No. 8 of 1901, clearly proves that the intention of the legislature was that the punishments for continuing offences mentioned in rule 2 chap. 25 of the by-laws was not to apply to the by-laws in chap. 22. Further, the notice served on the accused is signed by the Chairman. The second paragraph from the end of rule 7 chap. 22 of the by-laws speaks only of the "Council", not of the Chairman. The Chairman has no power under the rule to issue the notice, it is the duty of the Council to do so. [MIDDLETON, J. But does not the Chairman represent the Council?] He does only in certain cases. Under sec. 7 of Ordinance No. 7 of 1887, as amended by sec. 12 of Ordinance No. 1 of 1896, the Chairman only represents the Council in its executive capacity. The by-law under which the accused is convicted clearly gives a discretion to the Council. The meaning of the words "it shall be lawful" is clear. The Chairman cannot represent the Council in acts which call for the discreitonary powers of the Council.

F. J. de Saram for respondent: The fine of Rs. 200 is not *ultra vires*. [MIDDLETON, J. I should like to hear you on the other point.] Rule 7 chap. 22 of the by-laws says at the very beginning that it is unlawful for any one to erect a house, etc., unless the house, etc., complies with the particulars required by and mentioned in the rule. It is

admitted by the accused that his tenements do not answer to the particulars mentioned in rule 7. Hence he has committed a breach of the by-law and was properly convicted under rule 2 of chap. 25. [MIDDLETON, J. The charge is "neglecting or failing", after notice in writing had been issued under rule 7 chap. 22 from the Chairman of the Municipal Council, to take down or alter the buildings, etc. Mr. Schneider's contention is that the Chairman had no power to do so, and that accused was within his rights in refusing to obey it.] It is submitted that the Chairman had power to issue the notice. The Council has a discretion in causing the building to be taken down. The issuing of the notice is purely an executive act, and it will be absured to expect the Council to be called merely to issue the notice.

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JUDGMENT.

MIDDLETON, J.—The accused was convicted of failing or neglecting after notice in writing had been issued under rule 7 chap. 22 of the by-laws enacted under sec. 4 of Ordinance No. 8 of 1901, from the Chairman of the Municipal Council of Colombo, and served on him on 26th March, 1906, to take down or alter the buildings, viz., two rows of tiled rooms at No. 107, Jampettah Street, so as to bring them in conformity with the provisions of the by-law aforesaid, to carry out the provisions of the said notice, and thereby rendering himself punishable under rule 2 chap. 25 of the said by-laws, was sentenced to a fine of Rs. 200, in default one month's rigorous imprisonment.

Three objections were taken to the conviction by appellant's Counsel, and I will take first the objection that the notice was a bad one inasmuch as it purports to come from the Chairman of the Municipal Council on his own authority, and not from the Council through its presentative and executive officer.

It is contended that the terms of the by-law 7 of chap. 22 shew that the notice must come from the Council, and not from the Chairman, as the Council only have the power to cause a house contravening it to be taken down at the expense of the owner. In my opinion, however, the con-

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struction put upon it by Counsel for the Municipality is the correct one. The Chairman, under sec. 12 of Ordinance 1 of 1896, is the executive officer of the Council, and as such is charged with the general obligation of seeing the by-laws of the Council enforced and all conditions precedent to their enforcement in the shape of notices duly prepared and served. If the conditions of by-law 7 were contravened, as I read it, written notice to alter or take down would have to be sent to the offending owner, and could only be sent by the executive officer of the Council. If within a month of the notice the owner failed or neglected to alter or take them down, the Council by a resolution might order it to be taken down at the expense of the owner. The drastic remedy of compulsory destruction is left to the Council. I think, therefore, the notice was a good one. The second point is that the punishment awarded was beyond the jurisdiction of the Magistrate. I think not. The Municipal Magistrate dealt with this case, and has power under sec. 55 of the Municical Council's Ordinance 7 of 1887 to hear, try, and determine any offence committed within the Municipality in breach of the Municipal by-laws lawfully enacted and has jurisdiction to award such punishment to the offenders as are authorised by law. As to the first point, the second rule of chap. 25 of the by-laws gives power to impose a fine of Rs. 10 a day for continuing breaches and for continuing disregard of requirements lawfully made under the by-laws by the Chairman; and although sec. 4 of Ordinance 8 of 1901 limits the penalty for contravention of by-laws to Rs. 20, yet by sec. 6 of the Ordinance No. 8 of 1901 the by-laws are as legal, valid, effective and binding as if they had been enacted on the Ordinance. I cannot see therefore that sec. 4 of Ordinance 8 of 1901 has the effect of limiting the penalty here. The offence here is a continuing disregard of the legal requests of the Chairman of the consequence of which the accused had due notice. In the present case at the trial it was clear that the doors and windows and the spaces between the building did not conform to the by-laws, that the accused did not give notice of his intention to build to the Chairman under sec. 29 of Ordinance 1 of 1896, he had taken no steps

to alter the buildings in accordance with the notice, and his only defence was that the buildings were finished in August, 1905, which in my opinion from a perusal of the evidence is not true. He was served with a notice from the Chairman on the 29th March warning him of the consequences of disobedience and of a continuing breach of the by-law. The summons contained a full statement of the offence, with which he was charged, and was explained to him, and it is not necessary in explaining the charge to tell the accused the punishment he is liable to for it. It would have been well for him if he had adopted his proctor's advice and offered to me the plea of guilty which on his objection it was my duty on a former appeal technically to reject, and merely set aside his conviction under which he was fined Rs. 2. The Municipality has wide and ample powers, and if they are wisely and legally exercised it will be for the benefit of the community at large. Such contumacy as the accused has exhibited in this matter is not over-punished by the fine that Magistrate has thought it right to inflict. I affirm the conviction and dismiss the appeal.

WIJEYSIRIWARDENE *vs.* SOYSA. *et al.*

No. 5,621, C. R., Balapitiya

Present: Wood-Renton, J.

Argument: 19*th November*, 1906.

Judgment: 20*th November*, 1906.

Landlord and tenant—Lease—Action for rent on a verbal lease—Ordinance No. 7 of 1840, sec. 2—Admissibility of evidence relating to such lease—Ordinance No. 14 of 1895, sec. 91.

Though a land is let on a verbal lease, an action for use and occupation lies for the recovery of the rental due.

Such an action will not fail because the cause of action discloses an agreement which is required by law to be in writing [sec. 2 of Ordinance No. 7 of 1840].

There is nothing in sec. 91 of the Evidence Ordinance (No. 14 of 1895) to prevent the plaintiff proving in such an action all the facts necessary to enable him to recover compensation as on a *quantum meruit*.

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The plaintiff let to the defendant on a verbal lease a portion of a garden for a year on a rental of Rs. 40 for the year. The defendant possessed and enjoyed the land under the lease, but failed to pay the rent. The plaintiff sued him for the rent. The plaint, *inter alia*, stated:—

"That by consent the defendants took on lease from the plaintiff for a period of one year.....share of a garden.....

"That the defendants agreed to pay to the plaintiff the sum of Rs. 40 for the said year.

"That the defendants plucked the fruits and otherwise enjoyed the produce falling to the said shares during the whole of the said year and they have thereby become liable to pay to the plaintiff the said sum of Rs. 40 which the defendants have failed and neglected to pay."

In the Court below the defendants took the objection that the plaint disclosed a cause of action based on a lease, which was required to be in writing by sec. 2 of Ordinance No. 7 of 1840. The learned Commissioner upheld the objection and dismissed the action. The plaintiff appealed.

F. H. B. Koch for plaintiff-respondent: The learned Commissioner has forgotten that there is such an action as one for "use and occupation". Both the Roman-Dutch and the English Law speak of such an action. [*Walter Pereira's Laws of Ceylon* vol. 2, p. 596; *Perera* v. *Fernando* [Ram. (63—68) 83]; *Dissanayake* v. *Pransisku et al.* (*Tambyah* 23); *Woodfall on Landlord and Tenant*, p. 568; *Martin* v. *Smith* (1874. *L. R.* 9. Ex. 50)]. In *Parker* v. *Taswell*, 1858, 2 De G. and J. 559, the Courts of Chancery, treating the invalid lease as an agreement to grant a valid one and considering entry under it an act of part performance which entitled either party to set it up, regarded the parties from the time of such entry in the same position as if the lease had been valid. It may be that the present action was based on a lease, but there is nothing to prevent an issue on "use and occupation" being framed even if the lease, not being notarially executed according to law, happens to be null and void. In this case such an issue has been framed. Perhaps the plaintiff may

have to prove that the possession of the defendants was under a contract with the plaintiff, and not under a claim of adverse title (*R. M. Perera* v. *Thelenis Peries*, 5 S. C. C. 133); this we were prepared to do in this case if we had been afforded the opportunity. Further, this Court has treated a tenant in possession under an invalid agreement both as a monthly tenant (*Wambeck* v. *LeMesurier*, 3 N. L. R. 105) and as a tenant at will (*The Secretary of State for the War Dept.* v. *Wm. Ward*, 2 Br. 256).

A. St. V. Jayawardene for defendant-respondent: The judgment cannot be supported on the ground on which it is based. Before the Evidence Ordinance (No. 14 of 1895) was passed, it had been decided that an action for use and occu pation could be maintained notwithstanding the provisions of sec. 2 of the Frauds and Perjuries Ordinance (No. 7 of 1840). Can such an action be maintained owing to the very stringent provisions of sec. 91 of the Evidence Ordinance? That section enacts that in all cases in which any matter is required by law to be reduced to the form of a document no evidence shall be given of such matter except the document itself. The lease alleged in the plaint is requir-ed by the Ordinance of Frauds and Perjuries to be in writing; and if no writing is produced no oral evidence can be led. The decision in *Perera* v. *Fernando* (Ram. (63—68) 83) was based on the English cases; and under the English law it was held that even if there was an action for use and occupation a demise not by deed could not be put in evidence, and this difficulty was overcome by a special statute (11 Geo. 2 c. 19 sec. 14). This statute has no application in Ceylon; but on the other hand there is sec. 91 of the Evidence Ordinance, which expressly prohibits oral proof of an agreement required to be in writing. The Indian authorities are not binding, and do not apply. The effect of sec. 91 of the Evidence Ordinance is to prevent oral evidence in cases in which the law requires a document, and it is immaterial whether there has been a partial or entire performance of the contract.

Koch in reply: We do not seek to prove the terms of the contract: all we ask to be allowed to do is to prove the

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defendant's possession under us for a year and enjoyment during that time.

JUDGMENT.

WOOD-RENTON, J.—This case comes before me by way of an appeal from a decision of the learned Commissioner of Requests, Balapitiya, on a preliminary issue of law raised by the pleadings between the parties. The appellant alleges that the respondents "by consent" took on lease from him for a period of one year at a rent of Rs. 40 certain planter's and other shares of a garden of his at Walagedera, "plucked the fruits, and otherwise enjoyed the produce falling to the said shares" during the whole of the term and have failed to pay the rent agreed upon, for which accordingly he has sued them in the Court of Requests. The respondents deny the appellant's allegations of fact, and further contend that, inasmuch as the lease (if any) has not been notarially executed (and it is admitted by the appellant that this is the case) it is void for all purposes under sec. 2 of Ordinance No. 7 of 1840, and that, consequently, the present action is not maintainable. On the argument here Mr. Jayawardene, for the respondents, raised another point—with which I shall deal in a little—viz., that even if the appellant's right of action is not barred by sec. 2 of Ordinance No. 7 of 1840, it is excluded by sec. 91 of the Evidence Ordinance (No. 14 of 1895), which provides that "in all cases in which any matter is required by law to be reduced to the form of a document no evidence shall be given in proof of such matter except the document itself or secondary evidence of its contents"—where that is admissible. For the moment I am considering only the grounds on which the case was argued and decided in the court below—the learned Commissioner of Requests gave effect to the respondents' contention and dismissed the action. In my opinion he was in error in doing so. Although the appellant's plaint avers the lease, it seems to me that the action, almost in form and certainly in substance, is an action for use and occupation. The plaint declares that the respondents entered "by consent"—which is one of the elements of that action—and, "plucked the fruits, and otherwise enjoyed the produce" of the subjects demised during

the full term of the lease. I think that this latter allegation is a sufficient averment of use and occupation; and that it brings the case within the principle of the decision of the Court of Queen's Bench in *Bird* v. *Higginson* [(1835) 2 *Adol. & Ellis* 696] where Lord Denman, C. J., indicated that an action of *assumpsit* on an informal demise might have been maintained as an action for use and occupation, but for the fact that the declaration only alleged "that the defendant entered and became possessed for the term which he might do without a single hour's occupation of the premises".

If am right in regarding the present action as really one for use and occupation, it is clearly maintainable notwithstanding sec. 2 of Ordinance No. 7 of 1840 (see *Perera* v. *Fernando* (1864) Ram. 1863—1868 p. 83); and (I touch on Mr. Jayawardene's fresh point) there is nothing in sec. 91 of the Evidence Ordinance (No. 14 of 1895) to prevent the appellant from proving all the facts necessary to enable him to recover compensation as on a *quantum meruit* in such an action, viz., the entry of the respondents as lessees with the appellant's consent, the use and occupation of the subjects demised in pursuance of the entry, and the amount of reasonable compensation that the circumstances of the case require. On this point I refer to the following Indian authorities: *Kedar Nath Ioardar* v. *Shurfoonnissa Bibee* ((1875) 24 Suth. W. R. 425); Cunningham, Indian Evidence Act, (9th Ed. p. 24): Field, Law of Evidence, (5th Ed. p. 423).

I set aside the decree appealed against and send the case back for trial. The appellant will have in any event all costs incurred up to date in the Court of Requests and here on appeal.

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v.
Naidappu

THE KING *vs.* NAIDAPPU.

No. 1,319, D. C. (Cr.), Kegalle.

Present: Lascelles, A. C. J.

19th October, 1906.

Penal Code, sec. 212—Receiving gratification—Proof that the receiver had not used all means in his power to cause offender to be brought to justice—On whom ties onus—*Evidence Ordinance, sec.* 106.

Where a person is charged under sec. 212 of the Penal Code with receiving a gratification, the burden of proving that such a person had not used all means in his power to bring the offender to justice does not lie on the prosecution.

The fact that the accused had used all such means is especially within his knowledge, and the burden of proof is accordingly cast on him by sec. 106 of the Evidence Ordinance.

The facts appear in the judgment.

E. W. Jayawardene for accused-appellant.

Judgment.

Lascelles, A. C. J.—This is an appeal from the conviction of the first accused on an indictment charging him under sec. 212 of the Penal Code with having taken a gratification from one Ukkurala on account of helping him to recover certain stolen documents without using all means in accused's power to cause the offender to be apprehended and convicted.

The principal ground of appeal is that the prosecution has failed to prove that the appellant had not used all means in his power to cause the offender to be apprehended.

The appellant's Counsel cited an *obiter dictum* of Mr. Justice Wendt in D. C., 136 Cr. of 1905, 105 Puttlam of 10th August, 1905*, as to the necessity of such proof by the prosecution.

Now, in the present case I think that there is evidence upon which a Court or Jury might reasonably find that the

*"I also agree with the appellant's counsel in the contention that it lies upon the prosecution to establish that the receiver of the gratification had failed to use all means in his power."—Wendt, J.

accused had not used all the means in his power or any means whatever to bring the offender to justice. The secrecy with which the property was handed over, and the explanation of his conduct given by the accused to the Korale, together with his statement to the P. M., shew pretty clearly that the accused did not take any steps and did not in the least intend to bring the offender to justice.

I am further of opinion that under sec. 106 of the Evidence Act the burden of proving that he had used all means in his power to bring the offender to justice was on the accused.

The fact, if fact it were, that he had used such means was specially within the knowledge of the accused quite as much so as in the example (*b*) where, on a charge of travelling on a railway without a ticket, the fact that the accused had a ticket.

I agree with the District Judge that the case is a serious one and deserves severe punishment; but I think the justice of the case will be met by awarding the maximum term of imprisonment provided for by sec. 212, namely, two years' rigorous imprisonment without the additional penalty of a fine.

The conviction will be amended by deleting so much of it as awards a fine and imprisonment in lieu of payment.

BAIYA *vs.* NIKULAS *et al.*

No. 22,381, P. C., TANGALLA.

Present: WOOD-RENTON, J.

29*th March*, 1906.

Theft—Sec. 366, *Penal Code—Slaughtering stolen animal—Mischief —Sec.* 412, *Penal Code.*

In the course of a trial for an offence triable summarily by a Police Magistrate, if the evidence adduced discloses a graver offence not triable summarily it is not competent for a Police Magistrate to select the lesser offence for trial.

Sirineris v. *James* (5 N. L. R. p. 93) followed.

The facts sufficiently appear in the judgment.

A. St. V. Jayawardene for 3rd defendant-appellant.

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JUDGMENT.

WOOD-RENTON, J.—I have considerable reluctance in interfering with the conviction of the 1st and 3rd accused in the present case, but it must be set aside.

It is true the charge against the appellant is only a charge of theft; at the same time the evidence that was adduced at the trial before the Police Magistrate clearly shows, and the Police Magistrate has himself found, that these two parties have been guilty as principals of slaughtering the stolen animal. If this conclusion is correct they have then committed the offence of mischief by killing cattle under sec. 412 of the Penal Code, an offence which is not triable in the Police Court; and in accordance of the decision of Moncreiff, J., in *Sirineris* v. *James* (5 N. L. R. p. 93) it is not competent for a Police Magistrate under such circumstances to select the lesser offence for trial when the evidence discloses a greater one. I set aside the conviction and remit the case as regards both accused to the Police Magistrate, to be dealt with a as non-summary case not triable by his Court.

OBIAS *vs.* JUANIS.

No. 8,449, C. R., GALLE.

Present: WENDT, J.

23rd January, 1907.

Trespassing cattle—Action for damages—Contributory negligence.

A sued B, the owner of trespassing cattle, for damages. B pleaded contributory negligence on the part of A in that A had not fenced his land when local custom required a fence.

Held: That the failure to fence was not sufficient to disentitle the plaintiff to recover damages. It was for B to shew that his animals were lawfully in the place from which they entered A's land; if the place was a highway, he had to shew they were lawfully using it; if private land, that he had the right to put them there.

In this case the plaintiff sued for damages caused by the defendant's cow trespassing on plaintiff's vege-

table enclosure. The defendant pleaded that plaintiff was guilty of contributory negligence as his enclosure was not fenced as required by custom. The Commissioner held that it was customary to fence such enclosures, that Village Tribunal rules also required the land to be fenced, that plaintiff's enclosure was not fenced, and that therefore there was contributory negligence on plaintiff's part and that plaintiff was not entitled to recover damages. Plaintiff's action was dismissed.

A. St. V. Jayewardene for plaintiff-appellant: Even if there be a custom to fence enclosures like the plaintiff's, still the fact that plaintiff's land was not fenced does not amount to contributory negligence. The proximate cause of the damage is the defendant's failure to keep his animal under proper control. Where a defendant's negligence is of such a character that he has deprived himself of the powers of avoiding the plaintiff's negligence, that is equivalent to his being able to avoid it and negligently omitting to do so. Smith in "Law of Negligence" (chap. v. p. 226, 2nd Ed.) says: "When the plaintiff has proved, according to his evidence, that the act of the defendant has caused the injury of which he complains, the defendant in his turn may prove that the plaintiff, by his own act, contributed to cause the injury, and that the plaintiff might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence. But such proof is not in itself sufficient to destroy the plaintiff's claim, and the defendant must go further and shew that the plaintiff's negligence was of such a character that the exercise of ordinary care upon the defendant's part would not have prevented the plaintiff's negligent act from causing the injury, and this is the soul of negligence which the law calls contributory negligence." Applying that law to this case, the defendant's negligence in not properly controlling his animal deprived him of the power of avoiding plaintiff's negligence [*Perera* v. *United Planters Company of Ceylon* (4 N. L. R. 140)]. *Lamont* v. *Punchimahatmaya* (2 Br. 238) is no doubt against appellant's contention. But in that case the respondent was not represented. [WENDT, J.: Yes, in that case the judg-

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ment proceeded on the assumption that there was contributory negligence on plaintiff's part.] That case is therefore no authority. Similar principles were laid down in *Davies* v. *Mann*, 10 M. & W. 546.

Samarawickreme for defendant-respondent: The principles underlying the decisions cited do not apply to the present case. Those cases deal with simultaneous acts of negligence. In the present case the negligent acts are successive. The question is, whether in spite of the negligence of the defendant, the damage would have occurred if not for the negligence of the plaintiff (see Pollock on Torts p. 421). The animal might in consequence of the defendant's negligence have come up to the plaintiff's garden, but the damage would still have been avoided if the land had been fenced. The point, moreover, is covered by authority. The case of *Lamont* v. *Punchimahatmaya* (2 Br. 238) is exactly on all fours with the present case.

JUDGMENT.

WENDT, J.—The plaintiff sues to recover damages caused by defendant's trespassing cattle. The Commissioner has dismissed the action on the ground (if I understand him aright) of contributory negligence. This negligence consists in the failure of plaintiff to fence his land when local custom required such fences. In arguing the appeal before me Counsel relied on the principles of the English law, and I decide it by those principles. The failure to fence is not sufficient to disentitle plaintiff to recover. The defendant must shew that his animals were lawfully in the place from which they entered plaintiff's land: if the place was a highway, he must shew they were lawfully using it; if private land, that he had the right to put them there. He cannot shew either here, because the animal had strayed away and was out of his control. I think therefore that plaintiff is entitled to recover.

Set aside—judgment for plaintiff for Rs. 3·09 and costs in both Courts.

ASIATHUMMA *et al* *vs.* ALIMANCHY *et al.*

No. 2,503, D. C., BATTICALOA.

Present: LAYARD, C. J., WENDT, J. & GRENIER, A. P. J.

ARGUMENT: 18*th* & 19*th October*, 1905.

JUDGMENT: 7*th November*, 1905.

Fidei commissum—*Deed of gift—Construction of words in deed.*

A deed of gift contained the following clause:—"And therefore the said S. U. and S. L. P. by virtue of this take charge of the property aforesaid with their belongings after my death and possess according to the will and pleasure of them both. But if the said S. U. who is now without issue continues issueless and dies, the property herein mentioned and belonging to her shall devolve on the said S. L. P. or his heirs."

Held, per Curiam: That this did not create a valid *fidei commissum*, as the persons to be benefited were not clearly designated. Mere prohibition against alienation does not create a valid *fidei commissum*.

If S. U. had children the property vested absolutely in her. The words "property *belonging* to S. U. should pass to S. L. P." shew that the donor intended to pass the property absolutely to S. U. and that the property should only pass to S. L. P. or his heirs if S. U. should die without disposing of her property or childless.

Obiter, per WENDT, J.: That acceptance by the fidei commissary is not necessary. It only renders the gift irrevocable.

The difference between *fidei commissum* created by a will and that created by a deed of gift is that in the former case the testator can revoke at any time during his life-time, while in the latter if the donation is once accepted it cannot be revoked.

de Silva v. *Thonis Appu*, (7 N. L. R. 123) overruled.

The facts sufficiently appear in the judgment of Grenier, A. P. J.

Walter Pereira, K.C., S.-G., for first defendant-appellant.

Dornhorst, K.C., for plaintiff-respondent.

c. a. v.

JUDGMENT.

GRENIER, A. P. J.—The question submitted for decision on this appeal is whether the donation deed No. 4,952,

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imposed a valid *fidei commissum* on the lands in dispute in this case. It was agreed in the Court below that one Segu Ismail Poddi was the original owner of the property, and that he executed the donation deed in favour of Aliyar Lebbe Poddi Similal Umma and Aliyar Lebbe Poddi Sinne Lebbe Poddi, the wife and brother-in-law respectively of the donor, who died a week after the execution of the deed. Sinne Lebbe Poddi died in October, 1898. On the 30th March, 1901, Similal Umma executed a deed of donation in favour of the 1st defendant transferring to him all her interests in the property. The donors died in June, 1903.

The words of the deed material to the question now before me are these:—"And therefore the said A. Similal Umma and A. Sinne Lebbe Poddi by virtue of this take charge of the property aforesaid with their belongings after my death and possess according to the will and pleasure of them both. But if the said Similal Umma, who is now without issue, continues issueless and dies, the property herein mentioned and belonging to her shall devolve on the said A. Sinne Lebbe Poddi or his heirs." The District Judge was of opinion that these words did create a *fidei commissum*, and that Similal Umma had therefore no right to execute the deed No. 854, dated the 30th March, 1901, in favour of the 1st respondent on the footing that she was the absolute owner of the shares conveyed by the Deed of Donation in favour of Similal Umma and Sinne Lebbe Poddi, that the property given to her by the deed should devolve on Sinne Lebbe Poddi or his heirs in the event of her dying issueless, and she having in fact died issueless she had only the right during her lifetime to deal with a life interest in the same. I have come to a different conclusion. I think that the words shew a clear intention on the part of the donor to give a half share in the property absolutely to Similal Umma, and that he never intended to burden it with any trust in favour of Sinne Lebbe Poddi or his heirs. Similal Umma was the wife of the donor, as I have said before, and the words of the deed are very plain that both the donees were to possess according to their will and pleasure, and it was only on a certain contingency taking place, namely,

her dying issueless that "the property herein mentioned and belonging to her shall devolve on Sinne Lebbe Poddi or his heirs". It is impossible to assign any other meaning to the words "belonging to her" than that she was to be considered the absolute owner of the property, that the *dominium* was vested in her, and that she was at liberty during her life-time to deal with the property as she pleased, or, to use the very words of the deed itself, "according to the will and pleasure of them both". This right so to deal with the property was in no way curtailed by anything that I can find in the Deed of Donation, and it was only if she died issueless without having during her life-time dealt with the property in any way she pleased (the right to alienate being one of the incidents of true ownership) that the property was to pass to Sinne Lebbe Poddi or his heirs.

It is evident that the donor contemplated the case of Similal Umma having children, although, as it so happened, he died within a short time of the execution of the Deed of Donation. If she had children then there would have been no question that the property would have descended to them according to the ordinary rules of inheritance and succession which obtain amongst Mohamedans unfettered by any trust, for the donor placed no burden on the same in the event of her leaving children. If children had been born they would have taken a free estate, and so far therefore the position seems to me incontestable that the donor did not constitute his wife, Similal Umma, a fiduciary for them.

If he did not constitute her a fiduciary in relation to them, then it is clear that he would not have constituted her as such for his brother-in-law, Sinne Lebbe Poddi. The words in this connection are significant. They are: "shall devolve on the said A. Sinne Lebbe Poddi or his heirs." There is no rule of the Roman-Dutch Law which is so plain and so universally accepted as the one which requires that persons who are to take a *fidei commissum* on the death of the fiduciary must be clearly and unmistakably designated. Express words of prohibition against alienation are not essentially necessary if the intention to so prohibit can be reasonably gathered from the deed itself.

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Here I find that neither is there any designation of the class or persons or stock to be benefited, nor is there a single word in the deed showing any intention on the part of the donor to place any restraint on the donee Similal Umma, and to prohibit her from dealing with the property as she pleased. The words "A. Sinne Lebbe Poddi *or* his heirs" are so indefinite and vague that it can hardly be said that any class of persons are designated thereby as *fidei commissiari*. To my mind the intention of the donor was as follows:—He gave the shares in the lands in question *absolutely* and with full power of disposal to Similal Umma, who was childless at the time. If she had children, he intended that they should succeed to it by inheritance if she had not disposed of it during her life-time. If she died issueless, A. Sinne Lebbe Poddi was to succeed to it, and in the event of his death the property was to go to his heirs according to the ordinary rules of inheritance. The disjunctive word *or* was made use of designedly, and indicates that the donor intended that on Similal Umma dying issueless the property was to *devolve* on A. Sinne Lebbe Poddi in the sense of a gift over to him, and that he should have the full dominium of the *plena proprietas* in the same manner as the former, but if he died intestate without having disposed of it during his life-time it was to go to his heirs according to the ordinary rules of intestate, succession. The interpretation I have thus placed on the deed appears consistent with the intention of the donor so far as it can be gathered from the words used in the deed, and is I think in accordance with the usual mode of disposition of property by Mohamedans in Ceylon in the circumstances and events contemplated by the donor, and set out in the deed.

The learned Counsel for the appellant cited to us a case reported in Vanderstraaten 1869—1871 pp. 203—208 [D. C., Colombo, 56,846], in which this Court reversed the judgment of the District Court on the ground that the latter had placed a wrong construction on the following words of a joint will :—"The testators declare it to be their will and desire that after the death of both of them, whatever property is left, be divided equally among their four sons and two daughters or their heirs, and be possess-

ed by them as they please." The District Judge held, the husband having died first that the survivor had the right to alienate to the prejudice of the reversionary legatees and natural heirs of the testator and testatrix. He relied on a passage in VanLeeuwen's Commentaries pp. 256—257 and VanderLinden's Institutes p. 137, which fully supported the view he took of the question, The Appeal Court held that the survivor had only a life interest, and that "in the absence of any express power to alienate there were no words in the will sufficiently strong to raise such power by implication". The judgment of this Court is very short, and at first sight would appear to militate against the contention advanced by the appellants' Counsel in the case now before us. But I would distinguish the two cases for the obvious reason that the words supposed to create the trust are not similar in both instruments with the exception of the words "as they please" or words to that effect; there were no such words as "belonging to her" in the will, which was the subject of the case in Vanderstraaten's Reports. There seems to be a radical difference in the phraseology employed; and the conditions and circumstances under which they were executed, as evidenced by the words employed in the instruments themselves, were quite distinct. After all the question is one of intention, and I have already stated my views on the subject.

Another case that was referred to in the course of argument was that of *Lushington vs. Samarasinghe* (2 N. L. R. p. 295). That was the case of the joint will of a husband and wife, which contained the following words: "on the death of both of us, the donors, the above-named seven donees or their heirs etc.....shall possess the two lands thus gifted over, but shall not sell gift or mortgage the same, and on occasion of their necessity to lease the same they shall so lease among themselves the above-named co-owners but not to any outsiders". It was held by Lawrie and Withers, JJ., that the words did not create a *fidei commissum*, chiefly, as I understand the judgments of their Lordships, on the ground that there was no mention of the person or class of persons who were to take on the death of the seven children. Withers, J., said

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that he did not consider the premises impressed with a *fidei commissum* because there was no indication as to the future of the trust. I cannot deduce any principle from this case which I can apply in the present case, as the former was decided upon the presence of certain words in a will which are altogether absent in the latter.

The case of *Ferdinandus v. Fernando* (6 N. L. R. p. 329) which was also cited to us, has little in common with the facts of this case. That was the case of a will the fourth clause of which provided that "the survivor having done as he or she pleased with all our moveable and immoveable property and having possessed the same afterwards on the death of both of us it is our will that whatever remains shall be divided equally among our children" The words are plain and simple enough. The survivor was vested with full power to alienate during his or her lifetime, and whatever remained over became impressed with a *fidei commissum* in favour of the children, or in other words the will created what is techically known as a *fidei commissum residui.* In the present case no trust was impressed on the property either in the shape of a *fidei commissum* on the entire property subsisting at the date of the donation, or on any residue remaining over on the death of the donee. The words used in this will and the deed of donation cannot in any sense be said to be similar or to have a similar meaning and effect.

In the case of *Santiago Pulle v. Chinniah Pulle* (9 S. C. C. p. 33) the Full Court, consisting of Burnside, C. J., and Clarence and Dias, JJ., held that a gift of land to A comprising of a provision that the land "shall be possessed and enjoyed only by A, her children and their children in perpetuity, but shall not be sold, mortgaged or gifted to anyone" created a valid *fidei commissum.* There can be no question that it did. The persons or class to be benefited were designated; and the prohibition against alienation was as clear as the words used by the donor could make it. There are no such words in the donation deed in this case.

For the reasons I have given, I would reverse the judgment of the court below and allow this appeal.

WENDT, J.—I agree with the rest of the Court in holding that the deed of donation in question did not create a *fidei commissum* which prevented the alienation of her moiety by Similal Umma in her lifetime; though doubtless if she had left that moiety undisposed it would have passed to the representatives of her co-donee under the provision for that contingency contained in the donation. This view makes it unnecessary to consider whether non-acceptance of the alleged fidei commissary (the co-donee) in the lifetime of the alleged fiduciary rendered the benefit intended for him void. But the point was argued, and I take the earliest opportunity which offers of saying a few words on the case of *de Silva* v. *Thomis Appu*, 7 N. L. R. 123, which appellant's counsel relied on as establishing the failure of the substituted donee's interest in such a case. That was a decision of my Brother Middleton and myself. A re-consideration of the question and of the further authorities now cited to us convince me that the conclusion at which I arrived in that case was wrong. In particular I misapprehended the effect of the passage in Voet's Commentaries referred to in the judgment, viz., B. 39. 5. 43. That writer does indeed imply that acceptance by the fidei commissary is necessary, but only in order to render the gift to him irrevocable by the donor. He points out a difference between a *fidei commissum* created by a last will and one imposed on a donee, viz., that whereas in the former case the testator has up to his latest breath time to repent of his liberality and revoke the disposition, in the latter case he cannot take away from the substituted donee, if he has once accepted it. the hope of succession to the immediate donee, even though this latter consents to the revocation of the gift. He adds: "*Plane, deficiente acceptione, per fidei commissarium, aut ejus nomine per tabellionem aut alium secundum mores nostros, magis est donantem fidei commissi intuitu adhuc pœnitere posse, prout pœnitentia respectu ipsius donationis inter vivos admissa est .....si necdum per donatarium acceptatio facta sit.* See also 2 Burge 149. In the present case there was no attempt at revocation by the donor, and we need not consider the further question mentioned in the judgment of Clarence, J,

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in *Perera* v. *Marikar*, 6 S. C. C. at p. 139, whether in view of the fact that fidei commissaries were the issue of the immediate donee, the donor had any power to revoke.

LAYARD, C. J.—I agree in thinking that the donor placed no restraint an Similal Umma alienating the property during her lifetime, and would reverse the judgment or the learned D. J. and would allow the appeal.

PERERA *vs.* KRICKENBECK *et al.*

No. 2,792, D. C., KURUNEGALLE.

Present: WENDT & MIDDLETON, JJ.

ARGUMENT: 19*th December*, 1906.

JUDGMENT: 29*th January*, 1907.

Conveyance by executrix—Property not included in inventory—Probate not "duly stamped"—Validity of such transfer—Civil Procedure Code, sec. 547.

The transfer by an executor or administrator to a *bona fide* purchaser of property not included in the inventory is not void and ineffectual.

Sec. 547 of the Civil Procedure Code contemplates an absolute evasion of the law by the entire omission to take out probate or letters of administration on the part of those whose duty it is to obtain such probate or letters of administration, and not the case where there is only a deficiency of stamp duty on probate or letters of administration.

per WENDT, J.: That a purchaser in good faith from an executor or administrator of an asset of a deceased is entitled in law to rely upon his vendor's possession of probate or letters issued by a competent Court and regular on the face of them, and is not bound to enquire as to the regularity of the steps by which such probate or letters were obtained.

per MIDDLETON, J.. That it is not an offence under sec. 547 of the Civil Procedure Code to have paid less duty than the law enjoined.

The property in dispute was originally claimed by Mrs. Payne as belonging to the estate of the late Alfred Payne, who died leaving a last will under which Mrs. Payne was appointed executrix. Mrs. Payne did not obtain

probate herself, but by a power of attorney appointed Messrs. Loos & VanCuylenberg her attorneys jointly and severally. On the strength of that power Mr. Loos obtained letters of administration with the will annexed, and as administrator Mr. Loos conveyed to Mrs. Payne, amongst other property, the property in dispute, to be held by her in trust for her children according to the provisions of the will. Subsequently Mrs. Payne applied for and obtained authority of Court to sell the property, and in pursuance of that authority sold the property to the present plaintiff and conveyed it to him by deed. In the Schedule to the application for letters of administration with the will annexed Mr. Loos did not mention the property in question, nor was it mentioned in the inventory. In this action the plaintiff sought to vindicate his title to the property he purchased from Mrs. Payne. The defendants claimed the property as their own, and also contended that Mrs. Payne had no right to convey the property to the plaintiff, inasmuch as it was not mentioned in the inventory in the testamentary proceedings, and probate duty had not been paid on it. The learned District Judge held against the defendants, and the 1st defendant appealed.

H. A. Jayawardene (*A. St. V. Jayawardene* with him) for 1st defendant-appellant: The conveyance relied on by the plaintiff was void under sec. 547 of the Civil Procedure Code. It has been decided by the Full Court (195 C. R., Galle, 3,846 S. C. M., 26th November, 1906) that an executor or administrator cannot sue for property not inventorised and for which no stamp duty has been paid, on the ground that the probate or letters were not "duly stamped" in such a case (*vide* definition of "duly stamped" in sec. 7 of the Stamp Ordinance, No. 3 of 1890). Under sec. 547 of the Civil Procedure Code an executor or administrator cannot only not sue, but he cannot even transfer property without incurring a penalty unless the letters are "duly stamped". In the present case it is quite clear that at the date of the conveyance in plaintiff's favour the letters of administration were not "duly stamped", and therefore the transferor and transferee both became liable to penalties. Where a penalty is imposed for doing an act the act is

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thereby prohibited and made unlawful, and consequently when the thing in respect of which the penalty is imposed is a contract it is illegal and void. [*Guneratne* v. *Appuhami* (9 N. L. R. 90), *Peris* v. *Fernando* (1 Bal. 199); 160½ D. C. Col., S. C. M. 10th August, 1903; 16 Q. B. D. p 446, L. R. 4 Ch. p. 748; 12 Bow. 423.] The transfer in this case is therefore void, and no title passed on it. It is not necessary to prove that the parties were aware of the fact that such a transfer was void, for in the case of offences created for the protection of the revenue no proof of *mens rea* is necessary (L. R. 1 Q. B. (1895) 921, 922; 13 Cox C. C. 151; L. R. Q. B. D. 207).

H. J. C. Pereira for plaintiff-respondent: The Court cannot go behind the conveyance and enquire if the probate was duly issued. A purchaser of property from an administrator is not bound to enquire whether or not the letters of administration had been duly stamped. Secs. 24, 25 and 26 of the Stamp Ordinance (No. 3 of 1890) only require an affidavit setting out the value of the estate sought to be administered to the best of the applicant's belief, and the probate or letters of administration are stamped on the approximate value of the estate. The stamp duty is calculated on the Schedule to the application for probate or administration, and not on the value as disclosed in the inventory. Sec. 26 shows that an undervaluation of the estate will not affect the legality of probate or letters of administration. The issue of probate is itself proof that it had been "duly stamped". The expression "duly stamped" must be construed with reference to the date of the issue of probate. Sec. 547 of the Civil Procedure Code clearly refers to cases where the heirs of an estate sell property without taking out administration. It does not contemplate the case of an administrator who has been clothed with power, although the instrument giving him that power may not have been "duly stamped". That section makes it lawful for the Crown to recover from the transferor and transferee the value of the stamps required for probate or letters of administration, thus showing that the transfer itself is not rendered valueless. Sec. 540 of the Civil Procedure Code enacts that where no limitation is expressed the

power of administration, which is authenticated by the issue of probate, extends to every portion of the property of the deceased. The judgment of the Full Court cited refers to the case where an administrator sues on the strength of the letters granted him. It cannot be contented that where an administrator conveys property to an innocent third party that that third person must suffer because the administrator has not paid duty according to law.

H. Jayawardene in reply.

G. Koch for 2nd defendant-respondent.

E. W. Jayawadene for added defendant-respondent.

c. a. v.

JUDGMENT.

WENDT, J.—The facts material to this appeal have been fully set out by my brother Middleton, whose judgment I have had the advantage of perusing, and I need not therefore recapitulate them. I agree with my learned brother in thinking that the order of the D. J. should be affirmed. I desire to put my judgment on the broad ground that a purchaser in good faith from an executor or administrator of an asset of the deceased is entitled in law to rely upon his vendor's possession of probate or letters issued by a competent court, and regular on the face of them, and is not bound to inquire (in the absence of special circumstances calculated to arouse his suspicions and put him upon inquiry) as to the regularity of the steps by which such probate or letters were obtained. If the purchaser, before buying, were bound to satisfy himself that all the assets of the testator had been duly inventorised and truly valued and duty paid upon such true value, it would most seriously hamper executors and administrators in the discharge of their duties. It may be said here, as Lord Thurlow said in *Scott* v. *Tylor*, 2 Dick. 725, upon the suggested obligation of the purchaser to see to the due application by the executor of the proceeds sale, that "it is of great consequence that no rule should be laid down which may impede executors in their administration, or render their dispositions of the testator's effects unsafe or

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uncertain to a purchaser. His title is complete by sale and delivery." In the case before us the plaintiff purchased from Mrs. Payne, who held a conveyance from the administrator *cum testamento annexo* of her husband's estate. Assuming he is in the same position as his vendor, all he had to satisfy himself about was: first, the testator's title; next, the terms of the will; and lastly, that the will had been admitted to probate. On this last head it is not denied that Mr. Loos held letters issued by a competent Court authenticating the will, and that such letters *ex facie* were duly stamped by the Commisioner of Stamps as required by the Stamp Ordinance. The law throws upon the Court the duty of seeing that the probate or letters are duly stamped, and the fact of the issue of the instrument is proof that the Court had been satisfied. The law is that an executor, before he has obtained probate, is as fully entitled to alienate his testator's assets as after issue of probate, subject to the qualification that if it is necessary in any proceeding in Court to support his act by shewing that he filled the character of executor, the only proof admissible is the probate. I cannot imagine that the proof would be vitiated by evidence that some asset existed which had not been inventorised and has not paid duty. It may be different if the executor is himself seeking to recover such an asset; and indeed I concurred with some hesitation in holding in *C. R., Galle, No.* 3,846 (Civ. Min. 29th November, 1906) that in such a case his title might be defeated. The present is not such a case.

I agree with the respondent's contention that the expression "duly stamped" must be construed with reference to the date of issue of the instrument. At the time when the Court determines the amount payable as probate duty it has only before it the affidavit required by sec. 24 of the Stamp Ordinance of 1890, to the effect "that the moveable and inmoveable property and estate of the deceased in this island.....are of the value of a certain sum, to be therein specified to the best of the applicant's knowledge, information, and belief, in order that the proper and full stamp duty may be paid." Upon that sum (without at all knowing how it is made up) the Court assesses the duty, the executor pays it into Court, and the

Court sends it together with the probate to the Commissioner of Stamps, "who shall cause such instrument to be *duly stamped*". That is the process the letters of administration went through in this case, and in my opinion they were "duly stamped" when issued to Mr. Loos. This finding disposes of the contention that Mr. Loos' conveyance was void by reason of the provision in sec. 547 of the Code; but I also agree with my brother in holding that the event which the legislature contemplated in that section was the transfer of a deceased's assets without the formality of taking out probate or letters at all. The penalty exigible, viz., the value of the stamps "which would by law have been necessary to be affixed to any such probate or letters of administration" supports this view.

The appeal is dismissed with costs.

MIDDLETON, J.—This is an action claiming that the plaintiff be declared entitled to a certain land called Kandehena, for damages, and ejectment.

The following facts were admitted :—

The plaintiff had purchased the land in question from Mrs. Payne, the executrix of her husband Alfred Payne.

Mrs. Payne being absent from the Island sent a power of attorney to Messrs. Loos & VanCuylenberg, who thereupon applied for and obtained letters of administration with the will annexed in D. C., Colombo, 975.

Mr. Loos, as administrator, conveyed the property in dispute amongst other property to be held by Mrs. Payne in trust according to the provisions of the will.

Mrs. Payne subsequently applied to the Court under Ordinance No. 11 of 1876 for authority to sell the property in question, and the District Court gave authority by its order dated 20th October, 1904.

Thereupon Mrs. Payne sold the property to the present plaintiff and conveyed it to him by deed.

The property in question was not inserted in the schedule to the application for administration with the will annexed. Mr. Loos did not mention the property in question, nor is it mentioned in the inventory.

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The estate was valued at Rs. 70,800 in the schedule, and the stamp duty for letters of administration has been calculated on that value.

It was agreed by the parties that the Court should look into the Testamentary Case D. C., 970, and that case is now in the record before me.

From the diary I gather that the duty was paid to the amount of Rs. 1,062 on or before December 30th, 1897, and that the inventory was sworn to on the 26th April, 1898.

There is no suggestion of any fraud or chicanery on the part of any of the parties or the administrator, and the plaintiff is a *bona fide* purchaser for value.

The 1st defendant and added defendant pleaded that Mrs. Payne had no right to sell the property in dispute to the plaintiff, and denied that he had any title thereto.

Several issues were settled, but the 7th issue—had Margaret Payne any right to convey the property in the plaint to the plaintiff?—was first discussed, and the District Judge held that she had such a right, and thereupon this appeal.

The question is,—would the fact that the administrator had failed to pay the necessary probate duty render the transfer by Mrs. Payne to the plaintiff void and of no effect?

In my opinion it would not.

The point decided in 195 C. R., Galle, 3,848 was that an administrator was not entitled to maintain an action for a debt alleged to form part of his intestate's estate where it was evident that the inventory did not include the debt, and so *prima facie* no duty having been paid on it no action could be maintained under sec. 547 of the Civil Procedure Code to recover the debt by the administrator.

The question was one of revenue for the Crown, as my brother Wendt put it, and a stamp objection which was good without evidence in rebuttal was upheld and the administratrix debarred from bringing her action until she had complied with the law.

In that case the administratrix herself was plaintiff, but in the present case it is a *bona fide* purchaser from the executrix who is suing on a transfer from the executrix.

It is contended that the plaintiff as transferee from an executrix of an estate in which probate duty has been insufficiently paid has committed an offence under sec. 547; and that inasmuch as the transfer involves the commission of an offence it is void in law, and the plaintiff has therefore no title on the authority of *Cope* v. *Rowlands* (2 M. & W. p. 157), *Mellins* v. *Shirely Local Board* (16 Q. B. D. p. 446), and *in re Cork and Youghal Railway Company* (4 Chancery Appeals p. 748).

It is not possible for this Court in these proceedings to determine if probate duty has been paid which will cover the property sold; but it is not unlikely from an examination of Mr. Loos' final account that it might be found in the testamentary proceedings that the duty paid was in fact insufficient to cover the property in question. Secs. 24, 25, and 26 of the Stamp Ordinance No. 5 of 1890 contemplate that letters will not be granted except on an affidavit of approximate value of the estate, and also the possibility of overpayment and underpayment of probate duty on that affidavit and its proper adjustment.

Secs. 29 and 32 penalize the payment of too little duty if it is not paid within six months of the discovery of the mistake or misapprehension.

Sec. 30 further contemplates a conditional rebate of stamp duty upon proof of payments of debts certified to by the District Judge which reduces the value of the estate below the sum on which duty has been paid.

Under sec. 538 of the Civil Procedure Code according to the terms of form 86 the inventory has to be sworn to apparently after the grant of the letters which are dated 30th December, 1897. The duty was paid before that date, the affidavit supporting the inventory being dated 26th April, 1898.

Under sec. 539 of the Civil Procedure Code limited probate or administration may be granted; and sec. 540 enacts if no limitation is expressed that the power of administration which is authenticated by the issue of probate extends to every portion of the deceased's property.

In the present case the letters did not issue until the

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stamp duty was paid, and the stamp duty was certainly paid before the inventory was sworn to.

All these sections of the Stamp Ordinance in my opinion point to the conclusion that the law contemplates the difficulty of an absolutely accurate estimation of a deceased's estate when the duty is first paid, and provides for further payment or return in the cases of over and under payment, only making the latter an offence in the executor or administrator under certain circumstances laid down in secs. 29 and 32.

It must be borne in mind also that the Stamp Ordinance is subsequent in date to the Civil Procedure Code.

We then come to sec. 547, upon the construction of which by the Full Court the appellant mainly bases his case.

Looking at that section in conjunction with those I have referred to, my view is that its scope and object may reasonably be deemed to be aimed at an absolute evasion of the law by the entire omission to take out probate or letters of administration on the part of those whose duty it was to obtain probate or letters of administration.

It is argued, however, that the use of the words "duly stamped" and "such probate and letters of administration" necessarily imply that an offence would be committed if the letters were not fully stamped.

I cannot accede to this as stamping to an approximate value is contemplated by the Stamp Ordinance, and the *reductio ad absurdum* would be that an offence would be committed and an otherwise perfectly valid transfer invalidated if the letters on an estate valued at Rs. 1,000,000 were stamped on a sum Rs. 5 below the right value for which the offender might be fined Rs. 1,000.

The offence contemplated in my opinion is the transfer without probate or administration being taken out, and this view is I think further confirmed by the provision that the Crown is entitled to recover from the transferor and transferee such sum as would have been payable to defray the cost of such stamps as would by law have been necessary to be affixed to any such probate or letters of administration.

This part of the section, like the preceding part, does not seem to consider the case of a deficiency in stamp duty, but rather an absolute omission to pay any duty whatever.

If then it is not an offence under this section to have paid less probate duty than the law enjoins, the contract of sale by the executrix to the plaintiff is not void on the strength of the authorities quoted by the appellant's counsel.

If the contract of sale by the executrix to the plaintiff is good, then the plaintiff is entitled to maintain this action for the recovery of property which does not belong to nor is included in the estate of the deceased.

In the Full Court case relied upon the debt sought to be recovered clearly belonged to or was included in the estate of the deceased.

I think therefore that the judgment of the learned District Judge should be affirmed and the appeal dismissed with costs.

CAROLIS *vs.* FERNANDO *et al.*

No. 19,334, P. C. (Itg.), COLOMBO.

Present: MIDDLETON, J.

19*th Octobeber*, 1906.

Penal Code, sec. 367—*Theft—Cocoanuts valued at* 20 *cents—Jurisdiction of Police Court—Village Communities Ordinance* (*No.* 24 *of* 1889) *secs.* 28 (*Crim.* (2)) *and* 34.

Petty thefts, as defined by sec. 28 (Criminal (2)) of Ordinance No. 24 of 1889, can only be tried by Village Tribunals, if such offences are committed within the local limits of the jurisdiction of any Village Tribunal, and provided that such offences do not come within the exceptions contained in that section.

The accused were charged with the the theft of some cocoanuts of the value of 20 cents, under sec. 367 of the Ceylon Penal Code. The Proctor for the accused took the objection that the Police Court had no jurisdiction to try the offence, as it was a petty theft, and as the village in

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which the offence was committed was within the limits of the jurisdiction of a Village Tribunal.

The learned Police Magistrate (Mr. Peter de Saram) overruled the objection, and on evidence recorded convicted the accused. The accused appealed.

Savundranayagam for the accused-appellant: All the requisites necessary to bring an offence such as this for trial before a Village Tribunal are to be found here—the parties are natives, the offence has been committed in a sub-division within which a Village Tribunal sits, and it is a petty theft. Further, it cannot be contended that a Village Tribunal cannot adequately punish the offender. A petty theft does not cease to be a petty theft because it is from a large estate. Sec. 34 of Ordinance No. 24 of 1889 jealously guards the executive rights of Village Tribunals in cases of this kind.

JUDGMENT.

MIDDLETON, J.—In this case the accused is charged before the Itinerating Magistrate of Colombo with theft of 5 cocoanuts of the value of cents twenty from the Mahahane Estate, the property of Mr. Felix Dias, under sec. 367 of the Ceylon Penal Code, and he has been convicted, apparently under sec. 368, and senteuced to undergo rigorous imprisonment for six weeks and to pay a fine of Rs. 25, and in default of payment to rigorous imprisonment for a further six weeks.

The objection was taken by the Proctor for the accused, at the inception of the case, that the Magistrate had no jurisdiction to try the case as the offence was a petty theft, solely within the jurisdiction of the Village Tribunal at Heneratgoda, and the village Ihalayagoda, where the offence was committed, lies within the jurisdiction of that tribunal.

The Magistrate declined to accede to the objection raised by the Proctor on the ground that the offence came under sec. 368 of the Code, and so rendered the accused liable not only to imprisonment but a fine too, and possibly to a whipping.

It does not appear to me that the ground taken by the

learned Magistrate was one which could support his view. Petty thefts under the Village Communities Ordinance (Ordinance No. 24 of 1889) sec. 28 Criminal (2), which is as follows: "Petty thefts—that is to say where the property stolen does not exceed in value Rs. 20, or where the theft is not preceded or accompanied by violence to the person, and which may adequately be punished by no higher punishment than a fine of Rs. 20 or rigorous imprisonment for two weeks", are placed within the jurisdiction of Village Tribunals.

Sec. 34 of the same Ordinance says: "The jurisdiction, civil and criminal, conferred on the Tribunals hereby created shall, as respects the natives of the sub-divisions in which they are established and subject to the provisions in sec. 28, so long as any sub-division remains subject to the operation of this Ordinance, be exclusive and shall not be exercised by any other tribunal on any plea or pretext whatsoever."

That section it appears to me confers practically exclusive jurisdiction in such a case as the present upon the Village Tribunal. I think that this case is a case which might be adequately punished by a fine of Rs. 20 or by two weeks' rigorous imprisonment, that it does not fall within any of the provisions of sec. 28, and that therefore the Magistrate's Court had no jurisdiction to try it.

I am not aware of, and I have been assured by Counsel, that there is not any legislation which would give concurrent jurisdiction to the Police Magistrate in cases of this description; and I therefore must hold that the Magistrate has acted beyond his jurisdiction.

The proceedings are quashed and the case must be sent by the Magistrate to be tried and determined by the Village Tribunal at Heneratgoda.

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SLEMA LEBBE *vs.* BANDA.

No. 712, D. C., RATNAPURA.

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

28th July, 1898.

Mortgage—Transfer by mortgagor of all interest in property mortgaged previous to action by mortgagee—What action lies to mortgagee as against mortgagor—Seizure in execution of decree against mortgagor—Claim by purchaser at previous sale—Mortgagee's action against purchaser—Action under sec. 247 of the Civil Procedure Code.

An hypothecary action does not lie against a mortgagor who has parted with all his interest in the mortgaged property previous to the action by the mortgagee. A personal action only lies against him for the money.

Where a mortgagee obtains a mortgage decree against his mortgagor after the latter had parted with all his interest in the mortgaged property, and a claim is made by the purchaser on the seizure of the property in execution of the decree in favour of the mortgagee and upheld, an action under sec. 247 of the Civil Procedure Code does not lie to the mortgagee.

The proper remedy for the mortgagee is a personal action against the mortgagor and an hypothecary action against the purchaser who is possession of the mortgaged property.

Moraes Vederala v. *Andris Appu* (2 C. L. R. 191) followed.

The Government Agent v. *Hendrick Hamy* (3 C. L. R. 86) commented upon.

The material facts appear in the judgment of Bonser, C. J.

Wendt (with him *Bawa*) for plaintiff-appellant.

Dornhorst for defendant-respondent.

JUDGMENT.

BONSER, C. J.—The appellant was the plaintiff in an hypothecary action, and his action has been dismissed by the District Judge. He was the assignee of a mortgage, and the respondent, who was the defendant, was the purchaser of the mortgaged property. The mortgage was dated April, 1885, and was made by one Ismail Lebbe Marikar Unoos Lebbe in favour of one Idroos Lebbe

Marikar Hadjiar Slema Lebbe Hadjiar. On the 25th October, 1890, the respondent purchased the property at an execution sale, and the Fiscal's transfer is dated 6th April, 1891. Subsequently to the purchase and transfer the mortgagee brought an action upon his bond against the mortgagor, and obtained judgment. It is said that the judgment contained a declaration that the land was executable and ought to be sold; but it appears to me that that part of the decree was mere surplusage. The mortgagor had parted with all his interest in the property. The only action which could be brought against him at that time was a personal action for the money. An hypothecary action was competent to the mortgagee against the person who had purchased and was in possession of the property. The only action which lay against the mortgagor was, as I have said, a personal action. Then the mortgagee assigned his decree and his mortgage to the present appellant. Following upon the decree in the personal action the mortgaged property was seized by the Fiscal. The purchaser made a claim to it, and his claim was upheld. That was in 1893. Nothing further was done until the present action was commenced in 1896. Now it is said that this action would not lie because the appellant ought to have brought an action under sec. 247 of the Civil Procedure Code within 14 days of the allowance of the defendant's claim, and that contention has been upheld by the District Judge. Sec. 247 says: "The party against whom an order under secs. 244, 245, or 246 is passed, may institute an action within fourteen days from the date of such order.....to have the said property declared liable to be sold in execution of the decree in his favour....." It seems to me that if the appellant had brought an action under sec. 247 that action would have necessarily failed, because the property could never have been sold in execution of the decree obtained against the mortgagor. The decree was merely a personal decree. It did not bind the person in possession. The only action by which the property could be rendered liable was an hypothecary action. In such an action it would be open to the person in possession to establish that some other sum was due than that established

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against the mortgagor in the personal action. Therefore, it seems to me that it is impossible to hold that the property claimed could ever have been liable to be sold in execution of that personal decree.

Further than that, the case is covered by authority. In the case of *Moraes Vederale* v. *Andris Appu*, decided on the 13th day of June, 1893 (2 C. L. R. 191) two Judges of this Court held that an action under sec. 247 was not competent in a case of this kind. Even if I had been of a different opinion, I should be unwilling to disturb a judgment which has been undisputed since 1893, and on which many litigants must have acted. I am, therefore, of opinion that the decision of the District Judge must be reversed, with costs.

As I understand that there is no dispute as to the amount of the mortgage debt, it will save expense to both parties if we now make the usual hypothecary decree in favour of the plaintiff, and the decree will be made accordingly.

LAWRIE, J.—In joining the rest of the Court in setting aside this decree and in giving judgment for the plaintiff for the reasons given by the Chief Justice I desire to add, for the benefit of those who may afterwards refer to this decision, that the plaintiff did not avail himself of the provisions of the 46th chap. of the Civil Procedure Code, that no reference seems to have been made to that chapter in the District Court, and that in the two long discussions in appeal the provisions of sec. 640 *et seq.* were not once referred to. The case was argued on the old law and the old procedure, and the judgment now to be pronounced is (in my opinion) in accordance with both.

WITHERS, J.—I have really nothing to add. My judgment in 3 C. L. R. p. 86, on which the District Judge relied, appears to me not to be in point for two reasons.

One is that that case was decided upon a question of registration. The other is that the mortgaged property had been bought after a valid hypothecary decree against the mortgagor.

In this case the circumstances are quite different. The mortgaged property in this case was bought long antecedent to the action by the mortgagee against the mortgagor for the payment of the debt secured by the mortgage.

PAKEER BAWA *et al* *vs.* HASSEN LEBBE *et al.*

No. 3,324, D. C. (Inty.), KALUTARA.

Present: WENDT & MIDDLETON, JJ.

ARGUMENT: *3rd January*, 1907.

JUDGMENT: *11th February*, 1907.

Mohammedan Law—Intestacy—Division of estate where heirs are a widow, two daughters, a brother, and a sister—Sec. 5 et seq. *of the Minutes of Council of 5th of August*, 1806.

Where a Mohammedan dies leaving surviving him his widow, two daughters, a brother, and a sister,

Held: That the widow was entitled to $\frac{1}{8}$ of the inheritance. The two daugters to $\frac{3}{8}$, and the brother and sister to $\frac{2}{3}$ and $\frac{1}{3}$ of the remainder respectively.

Sec. 5 of the Minutes of Council of 5th August, 1806, does not apply to the case of a persou dying leaviug as his heirs issue as well as other relatives.

In this case one Ibrahim Lebbe died entitled to $\frac{16}{24}$ of a certain property, and leaving surviving him his widow, two daughters, a brother, Segu Mohamado, and a sister, Asia Natchia. The learned District Judge held that under sec. 5 of the Ceylon Mohammedan Code the widow was entitled to $\frac{1}{8}$ of the inheritance and the two daughters to the residue in equal shares, and that the brother and sister obtained nothing. The 1st defendant appealed.

Abdul Cader for appellant:—The only question involved in this case is whether, according to Mohammedan Law, a surviving brother and sister of an intestate are entitled to any share of his estate when he has left no male issue but only two daughters and a widow surviving him. The learned District Judge has held that the widow is entitled to $\frac{1}{8}$ of the inheritance and the two daughters to

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the residue in equal shares following sec. 5 of the "Special Laws concerning Mohammedans". [Minutes of Council, 5th August, 1806.] Sec. 5 is not applicable to the present case. Even if it is applicable, the District Judge has not followed that section in its entirety. According to it only $\frac{2}{3}$ are alloted to the two daughters. After deducting this and the widow's $\frac{1}{8}$ share, the balance, viz., $\frac{5}{24}$ parts, is set apart for the poor. The District Judge does not find who the poor are. It has been held in 2 Bal. 188, following *Sarifa Umma* v. *Mohammed Lebbe* (1 S. C. C. 88), that the Minutes of the 5th August, 1806, "only applies to a series of special cases by no means exhaustive—therein set out, and does not profess to furnish any principle of inheritance capable of being applied generally". Sec. 5 contemplates a case where the only heirs are a widow and two daughters. There is no section in the Minutes applicable to the present case; therefore recourse must be had to the usage of the Mohammedans as obtains in Ceylon, and the general principles of the Mohammedan Law. According to the *Sunni* Sect, to which the Ceylon Mohammedans belong, the heirs are of three kinds: (1) The Sharers, (2) The Agnates or Residuaries, and (3) The Cognates. The Sharers take their specified portions, and the residue is then divided among the Agnates (Ameer Ali's Handbook of Mohammedan Law, p. 13). In the present case the widow and the two daughters are Sharers, and the brother and the sister are Residuaries. The learned District Judge has rightly found that the widow is entitled to $\frac{1}{8}$ part of the inheritance. As regards the two daughters, sec. 5 of the Minutes of 5th August, 1806, correctly allots the $\frac{2}{3}$ to them. Ameer Ali's Handbook, p. 15, says: "Daughter (when only one and no son so as to render her a residuary) $\frac{1}{2}$. Two or more (and no son) $\frac{2}{3}$." This shows that when there is no male issue the daughters do not become Residuaries. The Agnates or Residuaries are divided into three classes: (1) Residuaries in their own right, (2) Residuaries in another's right, and (3) Residuaries together with another. The brother is a Residuary of the first class (Amir Ali, p. 17), and the sister is a Residuary of the second class (*ibid*, pp. 18 & 19). So that the brother and the sister take what is left

after the widow and the daughter have had their shares, that is they get $1-(\frac{1}{8}+\frac{2}{3})$, or $\frac{5}{24}$ of what the intestate died possessed. Between the brother and the sister the former gets twice as much as the latter according to the general principle of the Mohammedan Law, that a male heir always gets double that of a female of the same degree.

Bawa for respondent:—This appeal is ill-advised. The order from which the appellant appeals does not go to the root of the whole action *Suppramani Ayer* v. *Changarapillai* (2 N. L. R. 17). Moreover there is nothing on the record to show whether Asia Nachia has left a husband or any other sharers. In *Perera* v. *Kahan* (2 Bal. 191) Mr. Justice Wendt holds that sons and daughters belong to the class known as Residuaries, and not to the class known as Sharers. The widow is a Sharer; and after she has taken her $\frac{1}{8}$ the remainder goes to the two daughters, to the total exclusion of the brother and sister of the deceased.

Abdul Cader in reply:—There is an appeal from an order such as this (*James Peiris* v. *Charles Perera*, S. C. M. 6th November, 1906). A daughter is always a Sharer, except when there is a son. It is only when a son is alive that the daughter ceases to be a Sharer, and becomes a Residuary.

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JUDGMENT.

WENDT, J.—The facts of the case are fully set out by my brother Middleton, whose judgment I have had the advantage of reading; and I agree to the order which he proposes.

The D. J. appears to have read sec. 5 of the Special Code of 1806 as laying down that in every case where the relative mentioned existed they took the portions of the estate there specified, irrespective of whether other relatives existed. It has been pointed out in numerous cases that that view of the instances of succession given in the Code is erroneous. No doubt where the persons mentioned in any particular case exhaust the next of kin, the Code has the effect of a Legislative enactment, and ought to be followed; *e.g.*, where a man dies leaving a wife and two

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daughters *and no other* relations, then sec. 5 specifies how the estate must be divided.

It is a principle of the Mohammedan Law, both among the *Sunnis* and the *Shiahs*, that the father, mother, son, daughter, husband, or wife who survives the deceased can never be excluded from the inheritance, however much his or her share may vary, and I am not aware of anything in the Code which contradicts this principle. Another principle is that which divides the next of kin into sharers and residuaries. The rules, in the first place, allot certain proportions to the sharers, and after they have been satisfied the residue falls to be divided among the residuaries. There are twelve sharers, four male (the father, the true grandfather, the uterine brother, and the husband) and eight female (the wife, the daughter, the daughter of a son how low soever, the sister of the full blood, the half sister by the same father, the uterine sister, the mother, and the true grandmother) [Nell p. 18]. Of the sharers, those who always participate are the husband, the wife, the father, the mother, and the daughter. The other seven are liable to exclusion. Residuaries are of three classes, viz.:—

(i.) Residuaries in their own right.

(ii.) Residuaries in the right of another.

(iii.) Residuaries with another. The first class comprises every male in whose line of relation to the deceased no female enters. The second class is made up of those females who become residuaries only when they co-exist with certain males, *i.e.*, when there happen to be males of the same degree or who would take as such though of a lower degree. These are four in number, viz., first, daughters (when there are sons); second, son's daughters (with a son's son or a male descendant still further removed in the direct line); third, the full sister (with a full-brother); fourth, the sister by the same father (with her brother). It should be noted how the daughters and the full and half sisters, who have already been stated to be sharers, become residuaries when they co-exist with males of the same degree. The third class "residuaries with another" are sisters with two or more daughters, or daughters of a son how low soever, in which case the

sisters are excluded as sharers and become residuaries with them.

In the present case the widow is a sharer, and her share, where deceased has left issue, is fixed at $\frac{1}{8}$ (see secs. 3 to 8 of the Code). The daughters also are sharers, as they have no brother; and there being two of them, their share is $\frac{2}{3}$ (see secs. 5, 12, 20 of the Code). This disposes of $\frac{16}{24}$ of the inheritance, and the residue is $\frac{5}{24}$. The brother, Segu Mohamadu, is a residuary of the first class, and the sister, Asia Natchia, one of the second class. They are both related to the deceased in the same degree. Dividing the residue between them in the usual proportion of a double share to the male, the brother takes $\frac{2}{3}$ of $\frac{5}{24}$ of the inheritance, and the sister $\frac{1}{3}$ of $\frac{5}{24}$.

The division of the $\frac{16}{24}$ which belonged to the deceased therefore is as follows:—

The widow	$\frac{1}{8}$ of $\frac{16}{24} = \frac{2}{24} = \frac{18}{216}$
The two daughters	$\frac{2}{3}$ of $\frac{16}{24} = \frac{32}{72} = \frac{96}{216}$
The brother	$\frac{2}{3}$ of $\frac{5}{24}$ of $\frac{16}{24} = \frac{20}{216}$
The sister	$\frac{1}{3}$ of $\frac{5}{24}$ of $\frac{16}{24} = \frac{10}{216}$.

How much of his mother's $\frac{10}{216}$ now belongs to the 1st defendant has yet to be determined upon further proof as to the state of her family.

The appeal, at the stage at which it was preferred, was premature and ill-advised, and I therefore agree that each party should bear his own costs of the appeal.

MIDDLETON, J.—One S. L. M. Ibrahim Lebbe died intestate entitled to $\frac{16}{24}$ of Kanakan Tottem, and leaving him surviving his widow, two daughters, and a brother, Segu Mohamado, and a sister, Asia Natchia.

The question was, if the brother and sister of the deceased were entitled to any, and if so what, share in the estate; and the District Judge by an Interlocutory Order held that under sec. 5 of the Ceylon Mohammedan Code the brother and sister obtained nothing.

The 1st defendant, who was one of the sons of the deceased's sister Asia Natchia, also deceased, claimed a share of his mother's estate by inheritance, and the share of his brother Habibu Nina Lebbe Usubu Lebbe in that

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estate by Deed of Transfer dated 24th June, 1904, appealed against the order.

I think it is clear that sec. 5 does not quite apply. It does not include within its purview either brothers or sisters of the deceased.

There does not appear to be any other section of the Code which applies to this particular case, and we are therefore compelled to resort to the general principles of Mohammedan Law as regards inheritance (1 S. C. C. p. 88; 2 Bal. p. 188).

According to Ameer Ali (vol. ii. p. 94) as regards the sharers and the classification of the Zavil-Furuz or Sharers, there is no difference between the Shâfëis, Mâlikîs, and Hanafîs.

When the sharers exhaust the inheritance the Asabâh-agnates or Residuaries by the tie of blood take nothing. When a residue is left after allotment of the shares, the Asabâh take that residue.

According to the rule of the Koran regulating the sharers' rights, the widow takes $\frac{1}{8}$ if the deceased have issue; if the issue be two or more females only, they shall have $\frac{2}{3}$ between them (Ameer Ali vol. ii. p. 50).

This would appear to exhaust the sharers in the present case.

In the class of Residuaries by the tie of blood are also included females who take an interest by virtue of co-existence with a male residuary as full brother with full sister (Ameer Ali vol. ii. p. 53).

The full sisters become residuaries by right of another when they co-exist with a daughter of the deceased..... They can claim a portion as if they were brothers (Ameer Ali vol. ii. p. 96).

The Koran says that a male shall have as much as two females, and an example is given at page 81 (Ameer Ali vol. ii) of a deceased leaving four daughters, a brother, two sisters, and a widow, there being in that case one more sister than in the case before us.

There the $\frac{5}{24}$ which would remain after the sharers are satisfied is appropriated to the brother and two sisters in the proportion of 2 to 1.

I would hold then that here the brother would get $\frac{2}{3}$, and the sister Asia Natchia $\frac{1}{3}$ of the $\frac{5}{24}$ residue.

In my view therefore in the present case :—

The widow gets	$\frac{1}{8}$ of $\frac{16}{24} = \frac{24}{24} = \frac{16}{216}$
The two daughters get	$\frac{2}{3}$ of $\frac{16}{24} = \frac{32}{72} = \frac{96}{216}$
The brother gets	$\frac{2}{3}$ of $\frac{5}{24}$ of $\frac{16}{24} = \frac{20}{216}$
The sister gets	$\frac{1}{3}$ of $\frac{5}{24}$ of $\frac{16}{24} = \frac{10}{216}$.

The 1st defendant will therefore be entitled to such share of $\frac{10}{216}$ as he inherits from his mother coupled with the share inherited by his brother and purchased by him.

The facts on the record do not enable me to say what is the exact share to be allotted to the 1st defendant. It is necessary to know if Asia Natchia left a husband on other shares, or residuaries surviving her.

The appeal must be allowed, but I do not think the appellant should have his costs, as the appeal was not on a point which might have been decisive of the action, but one which might well have been raised after the final determination of the case by the District Court.

BANDA *vs.* HENDRICK *et al.*

No. 11,849, C. R., Chilaw.

Present: Wood-Renton, J.

Argument: 12*th March*, 1907.

Judgment: 15*th March*, 1907.

Possessory suit—Action by usufructuary mortgagee against mortgagor—Possession ut dominus.

A usufructuary mortgagee can maintain a possessory suit against his mortgagor.

His is a sufficient beneficial interest in the property to constitute a possession *ut dominus*.

In this action the plaintiff sought to eject the defendants from a paddy-field, claiming title by prescription. The defendants answered denying the plaintiff's title, and stating that they themselves were in possession of the field and

Banda v. *Hendrick*

had acquired a prescriptive title thereto. After answer had been filed the plaintiff moved that the action, which was one for declaration of title, be treated as a possessory suit, as he found that there was a usufructuary mortgage in favour of his father granted by the 3rd defendant and her brother, and wanted only to be restored to possession. The learned Commissioner of Requests held that the plaintiff was entitled to maintain a possessory suit, whether as usufructuary mortgagee or not, and gave judgment accordingly. The defendants appealed.

H. A. Jayawardene for the appellants :—The Commissioner should not have entered a possessory decree in favour of the plaintiff. If a usufructuary mortgagee is disturbed in his possession by the mortgagor or his heirs, he must sue on the bond (Voet 20.1.23). It may be that as against a third party a usufructnary mortgagee may maintain a possessory suit : the case is different where the dispossessing party is the mortgagor himself. Dispossession by the mortgagor of the mortgagee from the property mortgaged only amounts to non-payment of interest ; and the only remedy is to sue on the bond. Possession by the mortgagee is possession by the mortgagor (1 Lor. 115). That being so, the mortgagee's possession is not *ut dominus* as against the mortgagor.

c. a. v.

JUDGMENT.

WOOD-RENTON, J.—I have come to the conclusion that the learned Commissioner of Requests is right. If the existence of a usufructuary mortgage in favour of the respondent's father by the 3rd appellant and her brother was not clearly established at the trial, *cadit quæstio*. There can be no doubt in that case as to the respondent being entitled in an action for declaration of title to claim a possessory remedy. But even if the respondent was a usufructuary mortgagee under the circumstances alleged, I still think that the decision appealed against is sound. I can find no authority for the appellant's contention that a usufructuary mortgagee cannot maintain a possessory suit against his mortgagor. Voet in the passage cited by Mr. Jayawardene (Lib. 20, tit. i. sec. 23) does not say that the

special remedies there indicated—viz., an hypothecary action, or an an action *in factum*—are the only remedies available to him; and it seems to me that on principle there is every reason for extending to him a right of action described by Bonser, C. J., in *Changrapillai* v. *Chelliah* (1903) 5 N. L. R. 270, as "a most beneficial one", whose operation the Courts should seek to enlarge rather than to narrow. The usufructuary mortgagee has wide powers over the thing mortgaged. According to Voet (20. 1. 23) he may lease or hire it to others instead of taking its fruits directly himself. Surely this is a sufficient beneficial interest in the property to constitute a possession *ut dominus* within the meaning of such cases as *Changrapillai* v. *Chelliah* (*ubi sup*), where it was held that if the manager of a Hindu temple had control of the frabric of the temple and of the property belonging to it his possession is such as would entitle him to maintain a possessory suit. And how curious the result would be if the lessee (see *Perera* v. *Sobana*, 6 S. C. C. 61) of a usufructuary mortgagee could maintain such a suit while the faculty of doing so was denied to his lessor.

I dismiss the appeal with costs.

WIMALATISSA *vs.* PERERA.

No. 11,713, D. C, Colombo.

Present: Bonser, C. J., & Browne, A. P. J.

Argument: *5th March*, 1900

Judgment: *23rd March*, 1900.

Buddhist Temporalities, (Ordinance No. 3 of 1889)—Temple property—Who could sue in respect of such property—Interpretation of sec. 20.

Only a trustee duly appointed under the provisions of sec. 17 of Ordinance No. 3 of 1889 (as amended by sec. 6 of Ordinance No. 7 of 1895) could sue in respect of property belonging to a Buddhist Temple.

Sec. 20 of Ordinance No. 3 of 1889, vests all property belonging to a temple *at and after the passing of the Ordinance* in the trustee.

Wimalatissa v. *Perera*

The facts appear in the judgment.

Dornhorst (with him *Morgan*) for defendant-appellant.

Wendt for plaintiff-respondent.

c. a. v.

JUDGMENT.

BROWNE, A. P. J.—David Perera, who died on the 1st February, 1870, by his will made a devise to effect which his executrix by deed dated 22nd June, 1871, conveyed 'unto Malgaspey Dharmakiriti Mangalabhi Dhana High Priest of the Colombo District residing at Cotta Temple and his successors in office for the use of the Temple "certain premises in the Pettah of Colombo ..... to hold unto him and them for ever subject to the personal life interest of the transferor therein". The plaint alleges that Dharmakirti's High Priest-hood was of the Buddhist Temple at Cotta, and that he was in charge of that temple; that the life rentrix died in 1879, and Dharmakirti in July, 1872, that his successor Attadassi Terunanse let the premises to the defendant in 1879, for Rs. 11 a month and received the rent till his own death in November, 1897; that the plaintiff succeeded him, and is now the chief incumbent of the said Vihare, but that the defendant has disputed his right since January, 1898. Defendant answered denying all averments of fact and claiming title by prescriptive possession. At the trial he deposed that the testator had adopted him and put him and his wife in possession in 1872. It was admitted that he has now been twenty-eight years in possession. The Buddhist Temporalities Ordinance No. 3 of 1889, came into effect on the 15th November, 1889, by proclamation in the *Gazette* of that date as directed by sec. 4, which made the necessary definition of districts.

Thereafter it was the duty of the Chief Headman of each sub-district or such other person as sec. 6 indicated to convene a meeting of those entitled to vote as voters of the sub-district to elect its representative to be a member of the District Committee; and by the latter committee (sec. 17 as amended by sec 6 of Ordinance No. 17 of 1895)

there should be elected one or three trustees for every temple. In him or them the principal Ordinance by sec. 20 directed "shall vest all property moveable or immovable belonging to or in any wise appertaining to or appropriated to the use of any Temple together with all the issues, rents and profits of the same and all non-*pudgalika* offerings, subject however to any leases and other tenancies charges and encumbrances affecting any such immoveable property. The duties of the trustee (3) in respect thereof were fully detailed.

At the trial it was contended for the defence that only such trustees could sue and that plaintiff, therefore, could not maintain this action. It was admitted that up to date no trustee or Committee has ever been appointed in the District.

The learned Additional District Judge held that in such a contingency the Ordinance which (sec. 30) said "It shall be lawful for the trustee" to sue under the name and style of "trustee of (temple)" for the recovery of any property vested in him thereunder", etc., did not say that only he and no one else could sue: and that the plaintiff could maintain the action, the property continuing to be vested under the deed in the beneficiaries named therein until there should be appointed one in whom it vested under the Ordinance.

I cannot assent to this view. Assume that a trustee had been appointed and that on his appointment he found that a year's rent for a period after the 15th November, 1889 was due by this defendant—could the then Incumbent have claimed as against the trustee that he and not the trustee had right to recover it? I read sec. 20 as meaning that "all property *at and after the passing of this Ordinance* belonging, etc." shall vest in the Trustee when appointed, and the provision to resemble that of secs. 70—1 of the Insolvency Ordinance. The only difference between the relative provisions of appointment and vesting to that in the Ordinance under consideration that for vesting precedes those for appointment while *vice versa* in 7 of 1853, that of sec. 66 precedes those of secs. 71—2. Doubtless in making provision for the proper application of Buddhist Temporalities, the Legislature at least contemplated it to

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be probable that the laymen would exercise the rights, privileges and duties given to them, and certainly desired to remove the temporalities from the control of the priesthood; and were I in doubt as to the true construction of the Ordinance I would construe it towards the affecting of that clear intent.

With the possibility hereafter that some trustee will be appointed, who, unfettered by any decision in this action may desire to litigate the rights now in dispute with the defendant, I consider it would be useless to pass any decision on the other issues. I would set aside the decree and dismiss the plaintiff's action with costs.

BONSER, C. J.—I agree.

SAMAHIN *vs.* SARAVANAMUTTU.

No. 2,146, P. C., COLOMBO.

Present: MIDDLETON, J.

ARGUMENT: *8th March*, 1907.

JUDGMENT: *13th March*, 1907.

Penal Code, sec. 283—Public nuisance—Servitude—Jus cloacæ.

The *jus cloacæ*, or the right of making a drain pass through another's property whereby a neighbour is bound to receive the drain of another on his property, and so to allow a hollow channel to exist on his property through which sewage may flow, is a servitude recognised in Ceylon.

A person preventing the exercise of the *jus cloacæ* by obstructing the passage of sewage from adjoining premises, thereby causing stagnation of sewage, is guilty of committing a public nuisance under sec. 283 of the Ceylon Penal Code.

The accused in this case was prosecuted under sec. 283 of the Ceylon Penal Code with committing a public nuisance, in that he, being the owner and occupier of premises No. 15, Kuruwe Street, within the Municipality of Colombo, did block up a drain which carried the storm and waste water from premises Nos. 4—9, 1st Mosque Lane, and thus cause a stagnation of the contents of the drain.

The accused denied that the neighbouring residents had acquired a right of passage of sewage through his land, and contended that no such right could be acquired. The learned Magistrate found that the waste, storm, and filthy water from the adjoining premises had always found an outlet into accused's premises, but, following the case of *Vythilingam* v. *Murugesu* (1. Bal. 157), held that the only servitude which the neighbouring land owners could acquire was the *jus fluminis*, and acquitted the accused. The complainant appealed with the sanction of the Attorney-General.

F. J. de Saram for complainant-appellant :—The right claimed by accused's neighbours is not as the judgment holds a mere *jus fluminis*, but *jus cloacæ*. The case reported in 1. Bal. p. 157 does not apply. The *jus cloacæ* is a recognised servitude (see Voet's Commentaries Bk. viii. tit. 2, sec. 14 and Digest Bk. viii. tit. 1, sec. 7). *Cloaca* is defined in Digest Bk. 43, tit. 23, sec. 1. The findings on the facts in the judgment prove that accused's garden was subject to a *jus cloacæ*, and the acquittal is wrong.

H. J. C. Pereira (*Wadsworth* with him) for accused-respondent : — Admitting that the right claimed is *jus cloacæ*, this is a special right, and can only exist along a built drain or underground sewer (VanLeeuwen Bk. ii. ch. 20, tit. 11). Sewage only flowed through accused's garden when there was sufficient water to carry it along. The right claimed then amounts to a right to discharge filth at pleasure through an inlet. This is not a servitude. Also quotes *Cen. For.* 11.14.

F. J. de Saram (with leave of Court) :—A *locus cavus* is all that is required. This exists with an inlet or outlet. None of the authorities cited show that a built drain or sewer is necessary. A right to discharge filth over the premises of another is also a recognised servitude (Voet 8.2.14).

c. a. v.

JUDGMENT.

MIDDLETON, J.—This was an appeal with the sanction of the Attorney-General against an acquittal of the defend-

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ant on a charge of committing a public nuisance under sec. 283 of the Penal Code, by blocking up a drain running through his premises and so creating a stagnation of its contents, to the injury of the public health and the annoyance of the inhabitants in the vicinity.

The proceedings were taken by the Sanitary Inspector of the Municipal Council of Colombo, and the defendant was the owner and occupier of premises No. 15, Kuruwe Street, within the Municipal limits.

The Magistrate has found: (1) that all waste, storm, and filthy water from Nos. 4 to 9, 1st Mosque Lane, have always found their outlet into the defendant's premises, and could not now go elsewhere, nor could have previously gone elsewhere; (2) that defendant blocked the opening marked on the plan at A, with the result of accumulating some ten barrels of abominably foul sewage at that outlet; (3) that the case for the prosecution is correct in all its details, thereby, I presume, considering that a public nuisance was proved, caused by the action of the defendant.

The learned Magistrate, however, although practically holding that the accused had caused the nuisance by blocking the outlet A, held that he was not legally responsible, inasmuch as it was not shewn that the owner of the adjoining premises had acquired a dominant right over the defendant's land entitling him to pass over it, not only rain and waste water which could pass by the *jus fluminis*, but also sewage and filthy matter, and relying on a case reported in 1. Bal. p. 157 acquitted the defendant.

For the appellant it was contended that an obligation in the nature of a servitude might be imposed upon a land in respect of the passage of sewage matter from an adjoining land over it by long use; and that if it was proved, as it was proved here, that for upwards of ten years the defendant's land had been subject to this obligation, this would establish a right in the adjoining owners to enforce the servitude.

In support, Book viii. tit. 2 sec. 14 of Voet's Commentaries, translated by Hoskyns, was quoted, which says: "There is, moreover, the servitude of making a drain pass through another's property, whereby a neighbour is bound

to receive the drain of another on his property, and so to allow a hollow channel to exist on his property through which the sewage may flow." What says the Prætor at Book 43, tit. 23 sec. 1 of the Corpus Juris Civilis, de Cloacis: "I forbid violence to him who adversely to yourselves seeks to repair or cleanse a sewer which from his house passes through yours. I will order security to be given as to apprehended damages for faulty work," so translated in Ware's Roman Water Law, and in defining a sewer or drain the Digest in the same title says: "*Cloaca autem est locus cavus, per quem colluvies quædam fluat.*"

This interdict of the Prætor concerns private sewers only, because the public sewers were under the charge of the public. The Censura Forensis of VanLeeuwen, Book ii. ch. 14, De Servitutibus says: "*Cloacæ jus est, quo licet sordes et immunditias in aut per alterius ædes derivare.*"

It is argued for the defendant that the Roman Dutch Law does not recognise such a servitude as the one sought to be sustained, and that the right to impose the passage of sewage or noxious matter over the land of another can only exist where it has arisen from some arrangement common to the adjoining owners by which a gutter or drain of an artificial character had been erected at the common expense.

There is in fact, however, an outlet to the plaintiff's land on one side and an outlet on the other, and evidence that the water and sewage matter has always passed that way, at least under pressure of sufficient water to carry it.

There must, therefore, have been a sufficient *locus cavus* to enable the water to flow, and this, I think, is all the Roman Dutch Law would require to carry the water *ex urbano ædificio in proximum agrum*, as the Digest says.

The case quoted from 1. Bal. p. 157 does not apply here: as in that case the lands were not contiguous, and only the ordinary *jus fluminis* was contended for. This appears to be a case of first impression, and no authority from any of the reported cases was quoted to me. I must, therefore, decide on my view of the original authorities.

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In my opinion the right contended for is a right known to the Roman Law, and contemplated and accepted by the Roman Dutch Law, and there is sufficient evidence before me to say that it existed in the owners of the upper soil forming 4 to 9, First Mosque Lane, as against the defendant, the owner of 15, Kuruwe Street, the lower soil.

I hold, therefore, that in stopping up the outlet to his land at A the defendant is proximately the cause of the nuisance at that point, and I set aside the acquittal with costs; and as the facts have been fully ascertained, I send the case back to the Magistrate for the imposition of such a penalty as he may consider right under the circumstances of the case.

My decision will not, in my opinion, bar the defendant from raising the question of his rights in a civil action in the District Court if he feels called upon to do so at a future date (*Mussamut Edun* v. *Mussamut Bechun* (1867) 8 W. R. 175).

KANDASAMY *vs.* THE MUNICIPAL COUNCIL OF COLOMBO.

No. 16,535, D. C., Colombo.

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

Argument: 22*nd February*, 1905.

Judgment: 7*th March*, 1905.

Actio injuriarum—*Liability of a corporation to be sued for injury—English Law—Roman Dutch Law—Municipal Council.*

An action against a corporation for injury is recognised both under the English and Roman Dutch Law, and is maintainable in Ceylon.

The facts and arguments sufficiently appear in the judgment of Moncreiff, J.

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

vanLangenberg for defendant-respondent.

c. a. v.

JUDGMENT.

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LAYARD, C. J.—The question to be decided in the appeal is, whether a corporation can be sued for injury in our Courts. With reference to English Law it appears to have been intimated in the earlier cases that an action would not lie for malicious prosecution against a corporation. Lord Bramwell, as pointed out by my brother in his judgment, expressed in the strongest and most emphatic terms his opinion that such an action would not lie as a corporation was incapable of malice and motive. The later decisions of the English Courts appear clearly to hold that such an action would lie. I myself find it difficult to understand why any of the ordinary attributes of a living person should be absent to the persons embodied in the fiction of a corporation. Had I in this case to administer the English Law I should feel bound by the decision of the Privy Council delivered by Lord Lindley (*Citizen Life Assurance Company Limited* v. *Brown*, 1904, A. C. 423), in which it was held a corporation is not incapable of malice so as to be relieved of liability for malicious libel when published by its servant acting in the course of its employment.

The answer to the question must not however be given under the English Law, but our own law.

Under the Roman Law, it is true, a corporation was deemed incapable of *dolus*, and could therefore not commit injury (Dig. 4. 13. 15. sec. 1).

Voet 47 tit. 10 (*De injuriis et famosis libellis*) does not anywhere discuss the question whether a corporation can be sued in respect of an injury. I am not prepared to hold that a corporation occupies the position of a madman or minor, and as they are not responsible for a *culpa* under our law consequently a corporation is not liable. The authorities from Voet and Grotius *De Jura Belli et Pacis* cited by my brother point to a recognition of the liability of a corporation to be sued in a civil action of injury, and I agree with my brother in holding that this action is maintainable under our law and with the order he proposes making on this appeal.

MONCREIFF, J.—The plaintiff, who was head overseer

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of works under the Municipality of Colombo, seeks to recover damages from the Municipality on the ground that, after preferring certain false charges against him, the Municipal Council publicly discussed the charges on the 13th December, 1901, and wrongfully dismissed him.

The first issue was to the following effect :—

Is it competent for the plaintiff to maintain his claim in law against the defendants in respect of the damages set out in paragraph 5 of the plaint ?

The plaintiff's claim was :—

(1) for Rs. 125, for dismissal without due notice.

(2) for Rs. 458, salary and allowances from 24th August to 13th December, 1901.

(3) for Rs. 7,500, damages for wrongful dismissal.

The Judge dismissed the claim for Rs. 7,500 damages on the ground that it cannot be maintained under the Roman Dutch Law, and the plaintiff appealed.

It was suggested that the English authorities are conflicting upon this point. It is true that individual judges, notably Baron Alderson and Lord Bramwell, strongly repudiated the suggestion that a corporation could be sued for a wrong, especially in an action founded on malice or malicious intention. But there can be no doubt as to the law administered now by the English Courts.

It was held, in an action against a bank for material misrepresentation by its manager, that the principal was answerable for the agent's act done within the scope of his employment and for his employer's benefit; and that there is no sensible distinction between the case of fraud and that of any other wrong (*Barwick* v. *English Joint Stock Bank*, 2 L. R. Ex. 265, Exch. Ch.). The same principle was acted upon in *Mackay* v. *Commercial Bank of New Brunswick*, 5 L. R. P. C. 39; *Swire* v. *Francis*, 3 App. C. 106; *Houldsworth* v. *City of Glasgow Bank*, 5 App. C. 328, and many other cases. In *Nevill* v. *The Fine Art Company*, A. C. (1897) 68, which was an action against the Company for alleged defamation by the Secretary, that point does not appear to have been mentioned. In *Citizen Life Assurance Company* v. *Brown*, A. C. (1904) 423, the House of Lords held that

an action would lie against an Insurance Company for defamation on the part of an officer of the Company to the prejudice of the plaintiff, who having been in the services of the defendants had accepted employment in another Company. It expressed an opinion that the proposition that malice cannot be imputed to a body corporate was contrary to sound legal principles.

It was suggested that these cases went on the question of agency. That is so. But the entire question involved was whether a corporation is liable for wrong committed by those to whom it has delegated the management of its business, when they are acting within the scope of their employment and for the benefit of their employers.

It was, however, held by the District Judge that we must apply to this case the Roman Dutch Law which is in force in Ceylon, and that under that law this action cannot be maintained. I think there has been some misapprehension. I had occasion to state in a recent case (*Karonchihami* v. *Angohami*, 8 N. L. R. 8) that the Roman Dutch Law in force in the Netherlands at the date of the capitulation (1796) is the law which bind us.

We are not bound by later developments of that law; and indeed my colleagues in that case thought, in spite of the loss of the Dutch records, that we are not bound by developments of the Roman Dutch Law arising after the year 1656, unless we find proof that they were expressly introduced in Ceylon.

What was the Roman Dutch Law on this subject in 1796? The District Judge laid great stress upon a passage in de Villiers' *Law of Injuries* p. 60. The author there reminds us that under the Roman Dutch Law a corporation was only a legal person, its personality was a fiction, and it was no more capable of intention or malice than an infant, imbecile, dumb animal, or a person asleep. The Romans had not the facilities we have for testing the principle. Even the Roman Dutch Law did not follow the Roman Law. We learn from de Villiers that the Canonists and Italian Criminalists considered that delicts were imputable to corporations, and that this doctrine was generally received till the end of the 18th century, and also had

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some adherents during the 19th century. Our object is to formulate the law as it prevailed here at the end of the 18th century.

De Villiers says that some of Voet's remarks are consistent with the view that a corporation may be sued in a civil action of injury. I think they go further than that. He says (Pand. 3. 4. 5) that it was thought *supervacuum et inutile* to drag the members of a *universitas* from their business, and that it was the custom to appoint a Syndic "*ad causas universitatis agendas—qui et universitatis actor et defensor appellatur; et procurator universitatis*". He then proceeds to say that the Syndic intervened not only in civil, but also in criminal cases "*quoties universitati crimen infringitur*", because the *universitas* was *ficta persona* and could not defend itself. See also Voet, Pand. 48. 4. 4.

De Villiers also refers to Grotius *De Jure Belli et Pacis* (2. 21. 8 and 18). In the chapter devoted to *Pœnarum Communicatio* Grotius discusses the question—"*an pœna ob delictum universitatis semper exigi potest*" and is of opinion that reparation may be exacted as long as the *universitas* lasts. His commentator (edition 1752) puts the question and answers thus: "*An obligatio reparandi etiam ad successores universitatis transiat? Equidem de repartione damni id indubium est.*"

If then the Roman Dutch Law in 1796 permitted in principle such actions as this, I should not hesitate to say that this action can be maintained now in Ceylon. Whatever the conception that a corporation was a legal person, incapable of intention or *dolus malus*, may have been in the days of the Romans, it is a pure fiction now. The corporation sued in this case is presumed to be possessed of so much purpose and intention that it is clothed with extraordinary powers and entrusted with important duties. It is idle to pretend that a body which is credited with so much purpose and intelligence is incapable of forming all intention. The act complained of may be the act of those who represent a principal; but, if it is done within the scope of employment and for the principal's benefit, I see no reason why the principal should escape liability because it is a corporation.

This action cannot be maintained without proof of *dolus malus* on the part of the defendant Council. If we hold that the Council is capable of *dolus malus*, we shall in no way violate the policy of the Legislature. The Legislature has expressly empowered the Council to compensate, out of the Municipal fund, persons sustaining damage by reason of the exercise of the powers vested in the Council, their officers, or servants, by virtue of the Municipal Council's Ordinance (sec. 279 of No. 7 of 1887). The provision may not be a salutary enactment to the effect that the Council may be sued, but it conveys a broad hint as to its duty.

I think that the order of the District Judge should be set aside, and that the case should be sent back to the District Court for trial.

SURA *et al vs.* FERNANDO.

No. 413, C. R., KALUTARA.

Present: MIDDLETON, J.

ARGUMENT: *7th March*, 1907.

JUDGMENT: *12th March*, 1907.

Co-owners—Action rei vindicatio—*Non-joindure of parties.*

The plaintiff in an action *rei vindicatio* by one co-owner against another is not bound to add all the other co-owners as parties if the matter can be fully decided without endangering or interfering with the rights of the others.

The judgment in such an action is binding only on those who were parties to it.

If the defendant asserts title in himself alone it does not lie in him to take objection to the non-joinder of the other co-owners.

The plaintiffs in this case claimed $\frac{1}{12}$ part of a field, and alleged that the defendant unlawfully, unjustly, and with force entered into their portion of the field and damaged their paddy cultivation. They prayed to be declared entitled to the said share, to be placed in possession thereof, and for damages. The defendant in his answer denied the

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plaintiffs' right to any share in the field, and claimed the whole of it for himself. Judgment was given for the plaintiffs, as prayed for, and the defendant appealed.

Wadsworth for defendant-appellant:—The plaintiffs should have instituted an action for partition instead of one *rei vindicatio* when all the co-owners would necessarily have been parties and the title of all fully investigated into and determined. At any rate, it was incumbent on the plaintiffs to have joined all the co-owners in this action. If it were an action against a mere trespasser it might be competent to one of several co-owners to proceed alone without joining the other co-owners as co-plaintiffs.

Arnolis v. *Dissan* (4 N. L. R. 163).

Uduma Lebbe v. *Mohidin Lebbe* (2 S. C. C. 148).

Parsoe Appuhamy v. *Liana Appu and others* (7 S. C. C. 190).

1 Browne App. C. p. 4.

F. H. B. Koch for plaintiffs-respondents:—The point was taken in the Court below, but seemed to have been dropped as soon as it was discovered that the defendant claimed the entire land. It is submitted that the defendant is concluded by his own statement, that there are no co-owners and that he is sole owner. The principle underlying the decisions of this Court requiring joinder of all co-owners is that it is prejudicial to the interests of a defendant that there should be an investigation that is likely not to be full and complete in the absence of all the other co-owners. But how can the defendant urge this reason where, according to him, there are no co-owners at all? Besides, the rule laid down regarding joinder is not an inflexible one, and entirely depends on the circumstances of each case (*de Silva* v. *de Silva*, 1 Br. 340). In the circumstances this rule should not be followed. The facts of the present case are on all fours with the case of *Ranesinghe* v. *Cooray* (2 Br. 20).

Punchiralla v. *Punchiralla* (2 C. L. R. 84).

Wiraratne v. *Ensohamy* (2 C. L. R. 157).

Wadsworth in reply

c. a. v.

JUDGMENT.

MIDDLETON, J.—The only question raised in this case, which was an action *rei vindicatio*, was, whether the plaintiffs were bound to add as defendants all the other co-owners of the property in accordance with certain judgments to be found reported in 1 Browne Appendix, C, p. 4; 4 N. L. R. p. 163; 2 S. C. C. p. 148; 7 S. C. C. p. 109.

In the present case the defendant, who raises the point, claims as against the plaintiffs the whole land, and it hardly lies in his mouth to require the addition of persons as parties whose title in fact he must from the position he has taken up deny.

On the other side 1 Browne p. 340, 2 C. L. R. pp. 84 & 157, and Koch p. 9 were referred to.

I agree with Browne, A. P. J. (1 Browne p. 341) that there has not yet been laid down any inflexible rule that in every action between two co-sharers all the co-sharers must be joined as parties.

In my judgment this is a case practically on all fours with the case reported in 2 Browne p. 20, and it may be fitly decided, as Bonser, C. J. said there, without interfering with or endangering the rights of any of the other co-owners.

The judgment given in the action is not binding on the other co-owners, but only on those who were parties to it.

I therefore dismiss this appeal with costs.

CHARLES APPUHAMY *vs.* GETCHOHAMY *et al.*

No. 1,890, C. R., COLOMBO.

Present: MIDDLETON, J.

ARGUMENT: 28*th February*, 1907.

JUDGMENT: 4*th March*, 1907.

Contract of sale—Non-delivery of vacant possession of land sold—Action for cancellation of deed of transfer and return of purchase money—Notice to vendor.

Charles Appuhamy v. *Gelchohamy*

In the case of sale of immoveable property, where the vendor fails to give his purchaser vacant possession the purchaser is entitled to sue for a cancellation of the deed of sale and for the return of the purchase money and for damages.

It is not necessary for the purchaser in such an action to give the vendor timeous notice to intervene.

The facts sufficiently appear in the judgment.

de Sampayo, K.C., for plaintiff-appellant.

Dickman for defendants-respondents.

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JUDGMENT.

MIDDLETON, J.—This was an action to recover back the purchase money, and damages for failure to give possession of a $\frac{1}{5}$ share in a piece of land transferred by the defendants to the plaintiff by notarial Deed No. 247, dated 5th September, 1903, and for an order of the Court for cancelling the said deed.

The Commissioner found that the plaintiff was not placed in possession of the property sold by the defendants, but that he was well aware that he could not be put in possession except by decree of Court when he purchased and agreed to await the result of a partition action in which he was invited by his vendors to intervene and in which, as he made no attempt to uphold his title nor called upon the defendants to support him, he failed.

Upon this ground apparently the Commissioner of Requests dismissed the plaintiff's claim, holding that plaintiff's case was devoid of merits and his conduct full of chicanery.

It is objected on appeal that the plaintiff is at least entitled to recover back the purchase money, as the defendants have not accorded to the plaintiff vacant possession as the law requires (Berwick's Voet p. 172).

The defendants' Counsel relied on Voet 21. 2. 20 at p. 26 of Berwick's translation, that timeous notice not having been given to the defendants to enable them to intervene the plaintiff could not maintain this action, and *Baba Sinho* v. *Cassim* (5 N. L. R. p. 34) was relied upon as a case in point.

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In that case the action was *de evictione* by a purchaser of land against his vendor to recover damages in respect of an eviction by the true owner of part of the land, and Bonser, C. J., Browne, A. P. J., agreeing, held that to support such an action the plaintiff was bound to prove that formal notice had been served on the defendant of the suit of eviction.

In the present case the plaintiff has never had vacant possession accorded to him, but was referred by his vendors to intervene in a partition action in which it was declared that the whole land belonged to one Thelenis, the father-in-law of the plaintiff.

It may be that the plaintiff purchased this $\frac{1}{5}$ share of the defendants with a view to harass his father-in-law, with whom at that time he was on bad terms; but, even if he did so, it is not certain that he was perfectly well aware when he purchased that no one else but his father-in-law had a share in the land.

He may have thought that Harmanis had a share capable of vindication and have bought it on speculation partly to annoy his father-in-law.

The action of the plaintiff in regard to his father-in-law does not appear to me to affect his right as against the defendants.

This is not an action *de evictione*, but the plaintiff's remedy is on the contract for specific performance or damages as laid down by Phear, C. J., in *Perera* v. *Amaris Appu* (1 S. C. C. p. 54), quoting *Censura Forensis*, 4. 19. 10.

I think, therefore, it is not necessary for the plaintiff here to have given the defendants timeous notice as he is not calling upon them to warrant and defend his title upon eviction, but to repay the purchase money and to pay him damages for the non-fulfilment of the contract of sale by according vacant possession.

No damages have been proved beyond the consequent loss of interest on his purchase money, payment of which by the plaintiff to the defendants is admitted.

It seems to me that ample time has elapsed since the sale to enable the defendants to give plaintiff vacant possession, and they have failed to do so.

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I think, therefore, that the judgment of the Commissioner of Requests should be set aside and judgment entered for the plaintiff for Rs. 150 with interest at 9 per centum per annum from 5th September, 1903, and that the deed of transfer No. 247 of the 5th September, 1903, should be cancelled, and that the plaintiff should have his costs of appeal and in the Court below.

SILVA *vs.* GOONESAKERA.

No. 82,868, D. C., GALLE.

Present: WENDT & MIDDLETON, JJ.

20th February, 1907.

Civil Procedure Code, sec. 707—Setting aside a decree—Special circumstance—Omission on the part of a proctor.

The failure on the part of a proctor to inform his client of an order of Court to furnish security before defending action is not a "special circumstance" within the meaning of sec. 707 of the Civil Procedure Code.

Notwithstanding his failure to obtain leave to appear and defend, a defendant may take advantage of the provisions of sec. 707 to have a decree set aside.

The facts are set out in the judgment of Wendt, J.

Walter Pereira, S.-G., K.C. (with him *de Sampayo, K.C.*) for defendant-appellant.

vanLangenberg for plaintiff-respondent.

JUDGMENT.

WENDT, J.—This is an appeal preferred by the defendant in the action against the refusal of the District Judge to set aside the decree entered against him under chap. liii. of the Civil Procedure Code. The application was under sec. 707 on the footing that there were special circumstances which rendered it reasonable that the defendant should be permitted to defend. The action was brought upon a promissory note, the making of which the defendant admitted. Within the time limited by the sum-

mons he obtained leave to appear and defend on the condition of his giving security within one week in the amount of the plaintiff's claim. The week expired on the 2nd of October without the security being given, and on the next day the plaintiff moved for judgment. The defendant's proctor then stated that owing to heavy work he had omitted to inform his client of the order for security, and he asked for an extension of time until next day.

That application the District Judge refused, and entered judgment for the plaintiff.

The application out of which the present appeal arises was not made until the 23rd November, 1906, the defendant in the meantime having changed his proctor. A question was raised as to whether that application was in reasonable time; but it becomes unnecessary to decide that question. It has been contended for the plaintiff that when once the defendant had asked for and obtained leave to appear and defend, there could be no room for the application of sec. 707, for the reason that the latter section contemplates a decree entered without the defendant having appeared at all.

We think, however, that that is not the effect of sec. 707, and that cases may occur in which, notwithstanding the defendant's failure to avail himself of leave to defend, he may make out a case under the section for setting the decree aside and obtaining leave to defend.

The most important question, however, in the present instance is as to whether the defendant has made out "special circumstances" which alone entitle him to apply to the Court under this section. We both think that the District Judge was right in deciding that question against appellant.

The only circumstance upon which the defendant relies is the absence of any personal default by himself, inasmuch as he was personally unaware that he had to furnish security ordered by the 2nd October, but his proctor who obtained the order was informed of the circumstances, and it is impossible in this matter to distinguish between the defendant and his proctor. The failure of the proctor to perform the plain duty of informing his

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client of what was required of him was not in our opinion a "special circumstance" in any sense.

The cases which have been brought to our notice by the plaintiff's counsel [*Coles* v. *Ravenshear* (1907) 1 G. B. 1; in *re Helsby* (1894) 1 G. B. 742) satisfy] us on that point. We think, therefore, that the appeal should be dismissed with costs.

MIDDLETON, J.—I entirely agree. I wish only to say that I formed my opinion in a great measure on the ruling of the Lord Chancellor and other Judges in *re Helsby*, 1 G. B. 1894 p. 742, where it was held on an application to extend the time for appealing that the mistake of solicitor's clerk did not form such special circumstances as to entitle the appellant to relief.

Again, in the case reported in the Law Reports, *In the matter of an arbitration between Coles and Ravenshear*, 1 G. B. 1907 p. 1, that case was apparently followed and a mistaken opinion of counsel is held not to be special circumstances which entitle a person to obtain leave to appeal notwithstanding lapse of time.

I agree that the appeal must be dismissed with costs.

SILVA *vs.* ALWIS.

No. 1,407, C. R., GALLE.

Present: WENDT, J.

21*st February*, 1907.

Application for writ—Where application is delayed—Reasonable grounds for delay—Due diligence—Civil Procedure Code, secs. 219, 337, & 347.

A creditor making a first application for execution is bound to show the exercise of due diligence as he would be bound to show if he had already been once granted execution.

If more than one year has elapsed since the date of the decree, the application for execution will not be granted as of course, but the applicant must first satisfy the Court that he had reasonable grounds for the delay.

If it is shown to the satisfaction of the Court that any issue

of execution would have been futile by reason of the fact that the debtor was not possessed of property sufficient to satisfy the demand, the plaintiff has shown reasonable grounds.

An examination of the debtor under sec. 219 of the Civil Procedure Code may be, and under ordinary circumstances is, a means of information which a creditor is obliged to adopt; but if without that means he is able to satisfy the Court that the debtor had no property, he is not debarred from doing so.

Chellappa Chetty v. *Kandyah* (2 Bal. 61) followed.

In this case the plaintiff obtained judgment against the defendant on the 2nd July, 1900, and made no application for execution till the 25th June, 1906. His application was supported by an affidavit in which he deposed that the full amount of the judgment was due him, that he took no steps to recover the amount as the defendant had no property whatever, and that the delay was due solely to the fact that the defendant did not possess property. The defendant resisted the application contending *inter alia* that the plaintiff ought to have examined him under sec. 219 of the Civil Procedure Code, and not having done so he had not shown due diligence. The Commissioner allowed execution to issue. On appeal,

A. St. V. Jayewardene for defendant-appellant:—The Commissioner was wrong in allowing execution to issue as the application was stale, and due diligence had not been exercised since judgment had been obtained about six years ago. [*Palaniappa Chetty* v. *Gomes* (1 N. L. R. 317); *Ephraims* v. *Silva* (6 N. L. R. 301)]. It might be contended that the provisions of sec. 337 of the Civil Procedure Code requiring the exercise of due diligence do not apply to the first application, but only to subsequent applications for writs. It has, however, been held in *Chellappa Chetty* v. *Kandyah* (2 Bal. 61) that those provisions applied to the first application too. The fact that the judgment-creditor believed that the judgment-debtor was not possessed of property does not excuse his failure to issue a notice under sec. 219 of the Code to the judgment-debtor to disclose property or to have the judgment-debtor arrested [*vide* the facts in *Ephraims* v. *Silva* (6 N. L. R. 301), also *Ana Perumal Chetty* v. *Perera* (2 Br. 29)]. The diligence required to be used is not merely reasonable but "due", and a

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person who has not exercised the diligence required by law could not be said to have used "due" diligence.

Batuvantudave for plaintiff-respondent:—Where an application for writ has been delayed the law requires that the Court should be satisfied that there was good reason for the delay. In this case the applicant satisfied the Commissioner that the judgment-debtor was not possessed of property and that any application for execution would have been useless. It is submitted that this a sufficiently reasonable ground for the delay. It is not imperative for a judgment-creditor to have a judgment-debtor examined under sec 219 of the Code. That section says "may". It may be that where a creditor does not examine his debtor under that section the Court will have to be satisfied why it was not done. In the circumstances such an examination was not necessary as the creditor was otherwise thoroughly satisfied that the debtor was possessed of no property. In the cases cited there had been previous applications for execution, but in the present case this is the first application after decree.

JUDGMENT.

WENDT, J.—This is an appeal by the defendant against an order of the Commissioner allowing the plaintiff, to issue execution upon his judgment dated 2nd July, 1900, whereby the defendant was condemned to pay him Rs. 83 and certain interest and costs.

The claim it is said was hotly contested. The plaintiff never previously applied for execution, and his present application made in June, 1906, was supported by affidavit deposing that the full amount of the debt was still due and that he took no steps to recover the amount from the defendant, as the defendant had no property whatever. The affidavit continued that the plaintiff had now learnt that the defendant was possessed of certain property, and it also stated that the delay to issue execution was due solely to the defendant's not possessing property.

As is provided by sec. 347 of the Civil Procedure Code, notice of the application was served upon the defendant, who put in an affidavit stating that about one month

after judgment the amount of it and the costs were duly settled, that the plaintiff's statement as to his property was false, and that at the date of judgment and at the present time the defendant was "possessed of considerable property"; he further deposed that the application was a malicious attempt on the part of the plaintiff to annoy him, because he was recently selected for the office of Vidane Aratchy in preference to certain other candidates whom the plaintiff favoured.

Upon these affidavits the Court set the matter down for enquiry, when the plaintiff was called, and deposed to the debt being still due; he also said that the defendant was living under his parents' roof, and that he, the plaintiff, was sure that defendant had no available property, or he would have issued his writ. In cross-examination he admitted that his application was made after the defendant's appointment as Vidane Aratchy. He stated that the appointment was the reason why he inferred that defendant must now have means.

The defendant, although he alleged a settlement of the decree, took no steps, even after he had received the plaintiff's notice to have the terms of that settlement certified; and the Court therefore rightly treated the case as if no settlement or adjustment were in question.

Counsel on both sides have ably argued the law applicable to the present application.

Although at the commencement of the argument I entertained some doubt as to whether a creditor making a first application for execution was bound to show the exercise of due diligence, as he would be bound to show if he had already been once granted execution, I feel myself bound by the decision in *Chellappa Chetty* v. *Kandyah* (2 Bal. p. 61). This Court there laid down that if more than a year has elapsed since the date of the decree the application for execution will not be granted as of course, but the applicant must first satisfy the Court that he had reasonable grounds for the delay.

The question then remains whether the plaintiff has shown reasonable grounds for his omission to apply for ex-

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ecution during the six years which have elapsed since the decree.

In my opinion if it is shown to the satisfaction of the Court that any issue of execution during the interval would have been futile by reason of the fact that the debtor during that time was not possessed of property sufficient to satisfy the demand, then the plaintiff has shown reasonable grounds.

In the present case the learned Commissioner believes that it would have been futile to issue execution, as the defendant had always been living under his father's roof and the plaintiff knows of no property. It was strongly urged upon me by the appellant's counsel that in this case, as in a case under sec. 337, the creditor could not be said to have exercised due diligence unless he had examined his debtor under sec. 219 with the view of ascertaining whether he had property out of which the debt might be levied.

Such an examination may be, and under ordinary circumstances is, a means of information which a creditor is obliged to adopt; but if without that means he is able to satisfy the Court on the point I have already referred to, I am not prepared to say that he is debarred from doing so.

In the present case the circumstances are such, particularly the fact that the defendant and his wife are not living in any separate establishment, but with his father, as to suggest non-possession of property; and the defendant himself, while in general terms he deposed to the possession of "considerable property", gave no details at all in his affidavit, and did not go into the witness-box at the enquiry.

I think, therefore, that the Commissioner had material for finding that the non-issue of execution at an earlier stage was excused by the fact of the debtor's not having sufficient assets to satisfy the debt.

I therefore dismiss the appeal with costs.

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

No. 5,629, C. R., Balapitiya.

Present: Wendt, J.

Argument: 28*th February*, 1907.

Judgment: 4*th March*, 1907.

Lease—Parol agreement to vary terms of a written document—Waiver—Estoppel—Evidence Ordinance (No. 14 of 1895), sec. 92.

An agreement made orally, and subsequently to a deed of lease to accept a smaller amount as rent than that stipulated in such deed when such rent should fall due in the future, is a distinct variation of the obligation in the lease, and cannot be proved by other evidence than by a notarial instrument.

The plaintiff and the 2nd and 3rd defendants leased to the 1st defendant under a notarial instrument a cinnamon plantation for a period of 11 years, commencing from November, 1896. It was *inter alia* agreed between the parties that the rent for the first three years was to be paid at the execution of the said lease, and the balance rent was to be paid in yearly instalments. The plaintiff in this action, as owner of an undivided ⅓ share of the demised premises, sued the 1st defendant under the lease for his ⅓ share of the rent due for 1905, alleging failure on the part of the defendant to pay the same. The defendant pleaded that an oral agreement was entered into shortly after the execution of the deed of lease whereby the plaintiff undertook to accept a less rent for all the remaining years after 1899 on account of the sterility of the soil.

H. J. C. Pereira (with him *Prins*) for plaintiff-appellant:—The learned Commissioner is clearly wrong in admitting the defendant to lead evidence of an oral agreement to vary the terms of the written lease. The lease concerns a cinnamon plantation, and is clearly an "interest in land", and as such is required by law to be in writing *Lee Hedges & Co.*, v. *James Seville* (8 S. C. C. 21) This being so, no subsequent oral agreement to modify the contract of lease can be entertained.

F. H. B. Koch for defendants-respondents:—It is true

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that under sec. 92 of the Evidence Ordinance we are unable to set up a distinct subsequent oral agreement in contravention of the terms of a written document, but it is certainly open to us to lead evidence of conduct to show that the terms of a written document have been departed from. In this case the plaintiff has accepted reduced rent for the years 1903 and 1904. His conduct is in variance with the terms of the lease. The principle is identical with that laid down in numerous Indian cases whereby it was open to a party to shew that although a document purported to be an out and out sale it was meant to operate as a mortgage. In the case of *Shyama Charah Mandal* v. *Heras Mollah* (I. L. R. 26, Cal. 161) it was held that parol evidence may be given of conduct amounting to a waiver of a right created by a written instrument. Further, the plaintiff is estopped by his own conduct under sec. 115 of the Evidence Ordinance in accepting less rent and thereby inducing the defendants to believe that he would accept a similar rent in the future.

Pereira in reply:—The Calcutta case is not in point. It is inconceivable how the doctrine of waiver can apply to rent not yet due. It is only in case of "unwonted sterility" that a reduction can be claimed (Voet xix. ii. 24).

c. a. v.

JUDGMENT.

WENDT, J.—This is an action to recover the rent for the 10th year in an eleven years' lease, and defendant pleads that owing to the infertility of the land his lessors agreed to accept less than the rent reserved. This agreement is not attested by a notarial instrument and is obnoxious to sec. 92 of the Evidence Ordinance. It cannot be proved by parol. Respondent's Counsel relied on *Shyama Charan Mandal* v. *Heras Mollah* (I. L. R. 26, Cal. 161) to show that parol evidence may be given of conduct amounting to a waiver of a right created by written instrument. The present is not a case of waiver of an accrued right, but of an agreement made in advance to accept a smaller rent when the respective instalments should fall due in the future. It is distinctly a variation of the obligation in the lease, and cannot be proved by other evidence than a

notarial instrument, such as is necessary to create a lease. *Oduma Lebbe v. Sahib*

I reverse the decree dismissing the action, and give judgment for plaintiff as prayed with costs in both Courts.

ODUMA LEBBE *vs.* SAHIB.

LETCHIMAN CHETTY Claimant.

No. 20,573, D. C., Colombo.

Present: Wendt & Wood-Renton, JJ.

22nd February, 1906.

Concurrence—Order to bid—Prohibitory notice—Order confirming sale —Civil Procedure Code, secs. 232, 272 & 352.

Where a plaintiff seized property of his debtor and obtained leave of Court to bid and was allowed credit for the purchase money up to the amount of his decree, and where he obtained credit and confirmed the sale *ex parte* even after prohibitory notice was issued by the Fiscal at the instance of another creditor whose writs were in his hands at the time of the seizure,

Held: That the orders of Court confirming sale and giving plaintiff credit should not have been made without notice to the other creditor in view of the fact that a prohibitory notice had been issued at his instance.

Such a creditor is entitled to concurrence under sec. 352 of the Civil Procedure Code, even apart from any question of seizure by prohibitory notice.

An order giving a decree-holder leave to purchase and to set off the purchase money against his decree is subject to the provisions of sec. 352 of the Civil Procedure Code; and notwithstanding such order the decree-holder may, on the application of another creditor whose writ of execution is actually in the hands of the Fiscal at the date of the sale, be ordered to bring a rateable portion of the purchase money into Court.

Where a Court has after notice to all parties interested and entitled to be heard duly made an order under sec. 272 setting off the purchase money against an equivalent proportion of the decree and entering up satisfaction of the decree *protanto* the purchase money must be regarded as having been finally adjudged to the decree-holder and placed beyond the further control of the Court.

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F. M. de Saram for claimant-appellant.

E. W. Jayawardene for plaintiff-respondent.

c. a. v.

JUDGMENT.

WENDT, J.—The question upon this appeal arises out of the claim of the appellant to share with the plaintiff in the proceeds of defendant's property realised by sale under plaintiff's writ. On the 10th August, 1905, the plaintiff, under sec. 272 of the Civil Procedure Code, obtained the permission of the Court to purchase defendant's property at the pending execution sale, and he was allowed credit for the purchase money up to the amount of his decree. The sale was carried out on the 12th August, when the plaintiff as the highest bidder was declared the purchaser, and allowed credit for the net purchase amount, Rs. 877·00. It appears from the affidavit of the appellant, which is not contradicted, that he had in January last recovered judgment against the defendant, in actions Nos. 20,178 and 20,726, for the sums of Rs. 600·00 and Rs. 450·00 resepctively, that his writs of execution for the recovery of those sums were in the hand of the Fiscal at the date of the sale, and that the property sold had been actually seized on 11th August, 1905, under the writ No. 20,726. On the 18th and 30th August the Court received from the Fiscal prohibitory notices in execution of the appellant's two writs, and entry of such receipt was duly made in the journal of the action. On the 27th September the appellant's Proctors obtained a notice on the plaintiff to show cause why he should not bring into Court for the benefit of the appellant the sum of Rs. 472·50, being the rateable amount claimed by the appellant out of the Rs. 877·00 proceeds of sale. This notice was returnable on the 31st October; but, in the meantime, plaintiff's Proctor, moving *ex parte*, obtained on the 1st October an order confirming the sale, and on the 20th October an order giving him credit for the sum of Rs. 877·00 and directing the Fiscal to execute a conveyance in plaintiff's favour. The appellant's notice was subsequently served. Upon the discussion of it it was conceded that if the money was still under the control of the Court, the appellant was en-

titled to claim concurrence with the plaintiff; but it was contended for the plaintiff that the money had got home to him upon the order of 20th October being made, and that appellant was too late. The Court upheld this view, and disallowed appellant's application, remarking that it might be that, in view of the prohibitory notices, the order of 20th October should not have been made without notice to the appellant; but that the order having been made, the Court could not go behind it, and was not asked to vacate it. The appellant thereupon moved that the order of 20th October be vacated; but the Court disallowed this motion, considering it was not justified in vacating an *ex parte* order which formed the foundation of subsequent orders *inter partes*—meaning, I suppose, the order on appellant's application.

I think there would be no doubt that when a Court has, after notice to all parties interested and entitled to be heard, duly made an order under the 2nd paragraph of sec. 272, setting off the purchase money against an equivalent proportion of the decree, and entering up satisfaction of the decree *pro tanto*, the purchase money must be regarded as having been finally adjudged to the decree-holder and placed beyond the further control of the Court. If the order of 20th October had been such an order, the appellant would have been too late. But the order of 20th October was not duly made. The object of the Code in authorising the Fiscal to serve a prohibitory notice is to secure that the rights of the party on whose behalf the notice is given shall be regarded in distributing the money so seized. It must be remembered that it is a form of seizure in execution, and the direction in the last paragraph of sec. 232 for the entering of the seizure on record is designed to bring home the fact of the seizure to the parties in the action, to the credit of which the money is deposited. We have been informed that the plaintiff's Proctor was in fact ignorant that the prohibitory notice had been served on the Court; but I do not think that he can be heard to say that. At any rate it was obligatory upon the Court to give notice to the appellant and hear him before allocating the money to the plaintiff alone; and when it found that it had by an oversight omitted to give

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such notice, and had made an order which stood in the way of justice being done, as between the plaintiff and the appellant, it was its duty to welcome any procedure for getting rid of the order and restoring parties to the *status quo ante*. Nothing has been said by the respondent which convinces us that it would now be inequitable to require him to pay into Court appellant's proportionate share of the money.

It would appear that, apart from any question of seizure by prohibitory notice, the appellant was entitled to share rateably the proceeds sale by virtue of the provision in sec. 352 of the Code, his writs of execution having been actually in the hands of the Fiscal at the date of the sale. It has been held in India under the corresponding section of the Indian Civil Procedure Code that the order giving a decree-holder leave to purchase and to set of the purchase money against his decree is subject to the provisions of sec. 295 (sec. 352 Ceylon Code), and that notwithstanding such order the decree-holder may, on the application of another creditor in the position of the present appellant be ordered to bring a rateable portion of the purchase money into Court—*Madden* v. *Chappain* (I. L. R. II. Mad. 356). See also the cases reported I. L. R. 6 Bom. 570, and 12 Cal. 499.

The orders of 4th and 11th December, 1905, and also the order of 20th October, 1905, so far as it allows plaintiff credit for Rs. 877·00, are set aside, and it is ordered that plaintiff do forthwith bring into Court the sum of Rs. 472·50 for the use of the appellant. The plaintiff will pay the appellant's costs in both Courts.

WOOD-RENTON, J.—I am of the same opinion for the same reasons.

KARUPPEN CHETTY *vs.* SILVA *et al.*

No. 2,602, D. C., KURUNEGALLE.

Present: WENDT & MIDDLETON, JJ.

ARGUMENT: 10*th* & 11*th December*, 1906.

JUDGMENT: 21*st December*, 1906.

Writ—Sale—Interest in a lease—Civil Procedure Code secs. 224, 229, 230 & 281—*Evidence Ordinance* (*No.* 14 *of* 1895) *sec.* 114.

The fact that a writ was re-issued merely on the motion of a Proctor, and not by an application as required by sec. 224 of the Civil Procedure Code, was a matter which purely affected the judgment-debtor, and an objection to the sale on that ground is too late after the sale has been allowed to take place and completed by transfer.

A sale held by a Fiscal on the strength of a writ re-issued without being stamped afresh is not bad, as the purchaser was entitled to bid for and purchase on the faith of it.

(*Muttappa Chetty* v. *Fernando*, 9 N. L. R. 150, followed.)

In the case of a sale of the lessor's interest in a lease the provision in sec. 281 of the Civil Procedure Code does not apply. Such interest is a debt not secured by a negotiable instrument, and is provided for in sec. 279, and a certificate of sale signed by the Fiscal is sufficient.

In the case of a seizure of a debt due to the judgment-debtor the procedure by garnishee order under sec. 230 is optional, and does not oust the regular procedure by sale.

Walter Pereira, *K.C.*, *S.-G.* (*E. G. Koch* with him) for defendants-appellant.

de Sampayo, *K.C.*, for plaintiff-respondent.

c. a. v.

JUDGMENT.

WENDT, J.—This is an action to recover an instalment of rent which fell due on 30th June, 1904, on a lease for the term of 5 years commencing 1st January, 1902. The plaintiff claims to have acquired at an execution sale the interest of the lessors in the lease, and the appellants are the widow and son of the lessee (the original defendant), who have been substituted in his room after his death. The main defence on the merits was that, before the accrual of the rent in question, the lease had by mutual consent been cancelled and the demised premises surrendered to the lessors. The learned District Judge disbelieved the story of this surrender, considering it a fraudulent device to defeat plaintiff's purchase of the lessors' rights; and I see no reason whatsoever for thinking he was wrong. Also, there is no cause for interfering with the finding that the appellants have made themselves liable to be sued in the place of the deceased lessee. There remains the question whether the plaintiff is the lawful transferree of the lessors' rights.

Karuppen Chetty v. *Silva*

Upon this point the facts are as follows:—Plaintiff produces an instrument entitled "Fiscals' conveyance to purchaser after confirmation of sale by Court" in the form No. 56 scheduled in the Civil Procedure Code, and dated 20th June, 1904. It recites that the plaintiff has paid Rs. 6·10, being part of the purchase money, and been allowed the balance Rs. 163·90 in reduction of the claim, and has produced the orders of Court annexed to the instrument, and it proceeds to "sell and assign to the plaintiff all the right, title and interest of the defendants in and to the lease bond No. 11,342 (being the lease in question) To have and to hold the same with their and every of their appurtenances to the plaintiff for ever". The orders annexed are orders giving plaintiff leave to bid and to take credit for the price as against his judgments. This instrument may not be very artificially expressed, but I think it sufficient to transfer all the lessors' rights to the plaintiff. As to the steps preceding the sale, the instrument recites the issue of a writ, its purport, the seizure, and (after due notice and publication in manner by law prescribed) the sale to the plaintiff as to the highest bidder. Under sec. 114 of the Evidence Ordinance the Court is entitled to presume that the steps necessary to a valid sale were, as recited by the Fiscal's assignment, duly taken. Proof of any alleged irregularity must come from the party impeaching the transfer, viz., the defendants. They accepted the *onus* and proved that the original writ issued on 18th July, 1903, that property was advertised for sale but not sold for want of bidders, that on the motion of the plaintiff's proctor (without any application in the form prescribed by sec. 224 of the Code) the writ was "extended and reissued" without being stamped afresh, and the property was then sold on 7th April, 1904. There was no confirmation by the Court of the sale. It was proved that it was the practice of the Court not to require a new "application" but to allow reissue of a writ on mere motion.

As regards the first irregularity, the absence of a formal application was purely a matter which affected the judgment-debtors. There is no substance whatever in the objection, and it is not alleged that the reissue of the writ was obtained by any misrepresentation to the Court—assum-

ing that such a misrepresentation, if proved, would now avail the appellants. It might have been a ground for recalling the writ. If the debtors were content to let the sale take place, there is an end of the matter. Similarly with regard to the stamp: there being a writ issued by the Court in the hands of the Fiscal, the purchaser was entitled to bid and buy on the faith of it. See the case of *Mutappa Chetty* v. *Fernando*, 9 N. L. R. 150.

The cases relied on by the appellants, in which objections such as the two I have mentioned were upheld, were cases in which the objections were taken in time, the Court being asked to recall the writ or to set aside or refuse to confirm the sale. In the present instance that stage is past, the sale has been completed by transfer, and the objections come too late.

The next objection taken on behalf of the appellants was put in this form. The property sold was immoveable property, but the Fiscal dealt with it as moveable. Being immoveable property, the absence of the Court's confirmation of the sale rendered the transfer void. Assuming it was movable, the property fell under sec. 281, which required a vesting order and the execution of a document by the Court itself. I see no difficulty in holding that sec. 281 does not apply because the property (which I consider movable property) has been provided for in the earlier section, viz., in sec. 279. It is a "debt not secured by a negotiable instrument". On this point I follow the ruling of Lawrie, J., in D. C., Kalutara, 1901, Civil Minutes, 16th January, 1906,* which I referred to at the argument. The

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* ALISANDRY APPU *vs.* MARIAHAMY.

No. 1,091, D. C., Kalutara.

Present: Withers & Lawrie, JJ.

16th January, 1907.

Lawrie, J.—Certainly the interest of the mortgagor in his mortgage bond ought to have been seized in the manner laid down in the sec. 299 of the Civil Procedure Code; I presume that the seizure was so made. There is no evidence to the contrary. After seizure the Fiscal did right to sell the mortgagor's interest and to assign it to the purchaser according to the directions of sec. 279.

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procedure by garnishee order under sec. 230 is optional, and does not oust the regular procedure by sale, which would also necessarily have to be adopted if the garnishee disputed the debt. I am also against the appellants in their contention that the debt was not due. It was certainly due although the date of its payment had not yet arrived.

Respondent's Counsel agreed that the decree should be limited to assets of the deceased first defendant which have come to the hands of the appellants, and the necessary amendment will be made.

Appeal dismissed with costs.

MIDDLETON, J.—I agree.

If the mortgagor either before or after the sale in execution had admitted the debt and had been willing to bring the money into Court, this action against him would have been unnecessary, he would have been entitled to his costs; but it is plain from the answer that the mortgagor denies a debt is due by him. Therefore this action was necessary.

In my opinion the technical objection taken by the defendant must be repelled. The judgment under appeal must be set aside and the action remitted for further proceedings according to law.

WITHERS, J.—I agree with the opinion that this judgment is wrong and that the case should be remitted for trial in due course.

In my opinion the mortgage debt, which is the subject matter of this action, comes within the terms of sec. 229 of the Civil Procedure Code and within the description of a debt not secured by a negotiable instrument. That section provides the mode of seizing a debt of this kind. The 229 sec. provides for the sale of that class of property, and it seems that the prohibition notices to debtor and creditor after a sale of a debt not secured by a negotiable instrument are somewht similar to those which go to constitute a judicial seizure.

The sale of a debt according to sec. 279 is to be by assignment made by a certificate of sale in favour of the purchase and signed by the Fiscal.

It seems to me that this transfer answers the description of what is called a certificate of sale. Assuming that the debt exists, I think that this is a good assignment of the debt to plaintiff in this action.

The appellant will have his costs of appeal.

KIRIMENIKA *et al* *vs.* ASSISTANT GOVERNMENT AGENT, KEGALLE.

(Udapota Sannas Case.)

N D. 1,308, D. C. KEGALLE.

Present: WENDT & WOOD-RENTON, JJ.

ARGUMENT: 28*th June*, 1906.

JUDGMENT: 1*st August*, 1906.

Sannas—*Presumption under the Waste Lands Ordinance—Registration by the Service Tenures Commissioner.*

Presumption in favour of title in the Crown under the Waste Lands Ordinance is rebutted by the production of genuine *sannas*.

Where *sannas* granted *Udapota Nindagankotuwa* without the subject being described either by boundaries or extent,

Held: That the words embraced the whole village, and not the *Nindagama* only.

Registration by the Service Tenures Commissioner in no way binds the Crown on the question of title.

The facts appear in the judgment of Wendt, J.

Fernando, C.C., for defendant-appellant.

Bawa for plaintiffs-respondent.

c. a. v.

JUDGMENT.

WENDT, J.—This is a reference to the District Court by the Assistant Government Agent of Kegalle, under the Waste Lands Ordinance. The land which is the subject of the reference is called Kalugaha Mukalana, described as situated in the village of Udapota, and as containing in extent 28 acres 1 rood 19 poles. It is clear that the land falls within the presumption in favour of title in the Crown; and the only question is, whether that presumption has been rebutted by proof on the plaintiffs' part that it is comprised within the subject granted by the *sannas* which they produce, and the genuineness of which is admitted by the Crown. The *sannas* is dated in the year 1713 of the Saka era (A.D. 1791), and is written upon ola. By careless handling the ola has in many places broken away, and it is impossible for the remains alone to reconstruct the *sannas*.

Kirimenika v. Assistant Govt. Agent, Kegalle

But copies have been made at different times; and with the aid of these and of the testimony of a witness who was familiar with the phraseology of the *sannas* the terms of the grant can be ascertained beyond reasonable doubt. After reciting that Uduwe Ranesinghe Mudaliyar of Patabulatgampota has discharged his duties to the Sovereign with loyalty, the instrument proceeds to grant him a number of paddy fields (specifying their sowing extents), their appurtenant high lands, and the garden in which the Chetty lived, and "*Udapota Kiyana Nindagankotuwa*", which the plaintiffs render "the *nindagama* called Udapota". The subject granted is in no other way described, neither by boundaries nor extent. Plaintiffs say that the whole village was a *Nindagama*, that therefore the whole village was conveyed by the *sannas*, and that the land in claim being admittedly within the village Udapota is likewise comprised within the grant. On the other hand, the Crown, admitting that the *Nindagama* of Udapota was conferred upon the grantee, denies that the *Nindagama* was co-extensive with the village of that name, and contends that plaintiffs have failed to show—as the *onus* lay upon them to show—that the parcel of land in question forms part of the *Nindagama*.

The plaintiffs are paraweny *Nilakarayo* of the *Nindagama*, which contains seven *pangu*. The proprietor of the *Nindagama* is one Punchi Nilame, who although examined as a witness for the plaintiffs was not a party to the proceedings in the Court below. We considered it desirable that he should be made a party, and therefore directed him to be noticed to show cause why his name should not be added to the record. He appeared, and consenting to that course was made an added party, but he took no part in the argument.

The District Judge held that *Udapota Nindagankotuwa* meant the whole of the geographical village of Udapota, and accordingly gave judgment for the plaintiffs. The defendant, representing the Crown, now appeals.

The situation of the field granted by the *sannas*, and described by it as 4 amunams and 5 lahas in extent, has not been ascertained. The Service Tenures Commissioners'

Register shows seven *pangu* belonging to the village of Udapota, and comprising fields, gardens, and cheuas. These fields aggregate 3 pelas and 2 kurunies in extent, and their situation too has not been fixed. There is therefore practically nothing outside the terms of the *sannas* itself which would guide the Court in ascertaining what composed the Udapota *Nindagama*. And, as already pointed out, there is nothing in the grant itself which would serve that purpose, and the question has to be determined by a consideration of the bare words "the Nindagankotuwa called Udapota".

The plaintiffs led evidence to show that *Gankotuwa* (compounded of *gama*, a village, and *kotuwa*, an enclosure) meant no more than *gama;* and that in that part of the country if the *Kapurala* of a *Dewale* was required to make supplication to the Goddess Pattini in times of epidemic disease, his intercession would be offered on behalf of (say) the "*Udapota Gankotuwa*", that is the whole village of that name—*Gankotuwa* being the term used in the ancient formulæ employed on such occasions. The plaintiffs contended, by analogy, that *Udapota Nindagankotuwa* meant the whole of the *Ninda* village Udapota. The defendant, on the other hand, submitted that the expression *Nindagankotuwa* was compounded, not of *Ninda* and *Gankotuwa*, but of *Nindagama* and *Kotuwa*—admittedly, so far as the form of the word went, the one theory was equally admissible philologically with the other—and that the compound term *Ninda Gankotuwa* therefore imported no more than *Nindagama*. Then, in a village there might be not only a *Nindagama* (or *Ninda* "estate") comprising part of its area, but also a *Hewa wasana* and a *Pidanila*, comprising other parts (as in the case of the *Kitulpe Sannas*, District Court, Ratnapura, No. 1,111, Supreme Court Criminal Minutes, 11th November, 1903); and the plaintiff had not shown what particular portion of the village of Udapota composed the *Nindagama* of that name.

I do not think it necessary to enter in detail into the evidence and the arguments adduced on either side of this controversy. Suffice it to say that the case in the Court of first instance happily came before a Judge who was not only himself a Singhalese gentleman, but one well versed

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in the language and antiquities of the country. It has not been proved to us that his conclusion was wrong, viz., that the terms of the Royal grant embraced the whole village of Udapota, being a *Nindagama*. This decision really concludes the matter; but before quitting the case I would refer to one or two minor points.

On behalf of the Crown great stress was laid upon the sketch marked 2B/D which was produced to the Assistant Government Agent, Mr. Ievers, by Mudiyanse Korale, the predecessor in title of the present added party in the proprietorship of the *Nindagama*, on the occasion of what was called a "chena settlement" in the year 1879. The Assistant Government Agent recommended (with the concurrence of the Korale, whose title to the *Nindagama* under the *sannas* was recognised) that 650 acres of high land surrounding the gardens of the village, and to be surveyed and demarcated by the Crown, should be allowed to the claimants, who should relinquish all claim to the remainder of the village; but in consequence of the Government Agent reducing the offer to 390 acres the settlement fell through. The sketch in question is admittedly a very rough one. Across it, on the north, are drawn two parallel lines denominated the Ritigaha Oya, but still further to the north are the words "valuable forests, *landes*, chenas". At the south of the sketch is a rectilinear figure marked "Udapota *Gama* and gardens" and "*Nindagama*". This sketch is relied upon as showing that in 1879 nothing north of the Oya (where the land now in question lies) was claimed by the Korale; but in view of the words "valuable forests", etc., it cannot be said that the Oya was represented as the northern boundary of the area claimed.

As regards the registration by the Service Tenures Commissioners, a previous judgment of this Court upon the defendants' appeal has determined that it in no way binds the Crown on the question of title. The plaintiffs, however, who represented each of the seven sets of holders of the seven *pangu*, have given evidence identifying chenas then registered with the area now in dispute, and this evidence is (as the District Judge points out) uncontradicted. It shows at least that, in the early seventies

that area was claimed as included within the *Nindagama*. In August, 1880 (see p. 188) the Crown caused the greater portion (some 990 acres) of the village Udapota to be surveyed.

Of that part of the village which lay north of the Oya the survey expressly omitted the bulk, but it included a narrow strip (allotment No. 4,374) about 2 acres in extent, which ran between the Oya and an estate road, and which is part of the land now in question. That lot is described in the tenement sheet as "claimed under *sannas*", but there follow the words "excluded from claim". As the survey professes to have been made in accordance with the Government Agent's letter No. 205 of 14th April, 1880 (which has not been put in) the exclusion was probably the act of that officer. But in respect of the land lying immediately to the south of the Oya and opposite to the block forming the subject of these proceedings, the remark is: "Claimed under *sannas*—included in claim." Mr. Ievers, who made the abortive arrangement with the *Pangukarayo* in 1879-1880, is unable to say whether or not he allowed them any land to the north of the Oya.

I think the appeal should be dismissed with costs.

WOOD-RENTON, J.—At the hearing of this appeal I was strongly impressed by Mr. C. M. Fernando's very able argument for the Crown. But, on careful consideration, I do not feel able in such a case as this to differ from the conclusion of the learned District Judge.

I agree to the order proposed by my brother Wendt.

CARO *vs.* CAROLIS.

No. 5,668, C. R., BALAPITIYA.

Present: WOOD-RENTON, J.

ARGUMENT: 19*th March*, 1907.

JUDGMENT: 28*th March*, 1907.

Court of Requests—Jurisdiction—Damages pendente lite—*Ordinance No.* 12 *of* 1895, *sec.* 4.

Caro v. *Carolis*

The plaintiff sued the defendant for having wrongfully closed a plumbago pit belonging to him, and claimed by way of damages Rs. 300 with further damages at the rate of Rs. 50 per day *pendente lite.*

Held: That the plaintiff's action was not within the jurisdiction of the Court of Requests.

The amount demanded, and not the amount awarded, is the test of jurisdiction under sec. 4 of Ordinance No. 12 of 1895.

Obiter: Sec. 34 of the Civil Procedure Code, which enables a plaintiff to relinquish a part of his claim in order to bring the action within the jurisdiction of any Court, cannot apply in the Appeal Court, except by consent, in favour of a litigant who has contested a plea to the jurisdiction in the Court below.

MacLachlan v. *Maitland* (8 S. C. C. 353) and *Cassim* v. *Sanhait* (2 Bal. 20) followed.

The material facts appear in the head-note.

A. St. V. Jayewardene for defendant-appellant :—The subject-matter of the action was not within the jurisdiction of a Court of Requests. The objection was raised in the lower Court, but was overruled. The objection ought to have been upheld, as the plaintiff's "claim" or "demand" exceeded Rs. 300. The plaintiff claimed Rs. 300 damages up to the date of the institution of the action and Rs. 50 additional damages *per diem pendente lite.* The Court was called upon to adjudicate upon a claim clearly exceeding Rs. 300 in value. [WOOD-RENTON, J.: I should like to hear the other side.]

de Zoysa for plaintiff-respondent :—The main claim in the present action is the amount of Rs. 300 which the plaintiff claims as damages he has already sustained, the claim for damages *pendente lite* being a subsiding claim arising from the delay in adjudicating upon the main claim. Jurisdiction must be determined by what a plaintiff alleges he is entitled to recover at the time he comes into Court. Suppose a man claims a small sum, say Rs. 10, as damages and further damages at Rs. 5 per day *pendente lite,* could it be contended that the mere probability of the full amount of damages exceeding Rs. 300 before the action is decided oust the jurisdiction of the Court of Requests? [WOOD-RENTON, J.: Are you not prepared to waive the claim for damages *pendente lite?*] Counsel expressed his readiness to

do so. He cited:—

MacLachlan v. *Maitland* (8 S. C. C. 133).
Cassim v. *Sanhait* (2 Bal. 20).

Jayewardene in reply: The authorities cited do not apply. Assuming they were rightly decided, they merely lay down the principle that where the main claim is within the jurisdiction of the Court of Requests the addition of a subsidiary claim springing from and incidental to the main claim, such as a claim for interest or damages in the nature of interest, will not oust the jurisdiction of the Court of Requests. In the present case the claim for damages is the main claim, and the damages accruing after the institution of the action do not spring from nor are they incidental to the damages claimed up to the date of action brought. It is idle to contend that if the action be decided on the day it is instituted the claim will not exceed Rs. 300. In this case the Court's decision was invited, not only on the question of damages already accrued, but also on that of future damages, which the Court is entitled to adjudicate upon if the claim is otherwise within its jurisdiction. Further, under the Ordinance the test of jurisdiction seems to be the amount claimed or demanded. Here the plaintiff's claim or demand exceeded Rs. 300. (Sec. 4 Ordinance No. 12 of 1895.) The Court will not listen to the plaintiff's proposal to waive a part of his claim at this stage of the proceedings. The plaintiff should have waived the excess before the Commissioner adjudicated on his claim. The Commissioner has acted without jurisdiction, and his proceedings are a nullity. Waiver after adjudication cannot validate what is void.

JUDGMENT.

WOOD-RENTON, J.—The only question that I have to determine is, whether the respondent's action is within the jurisdiction of the Court of Requests. He sued the appellant for having wrongfully closed a plumbago pit belonging to him, and claims by way of damages Rs. 300 "with further damages at the rate of Rs. 50 per day *pendente lite*". If the damages *pendente lite* are to be added to the substantive claim, the case is of course one that the Court of Requests

Caro v. *Carolis*

has no jurisdiction to try. The learned Commissioner has taken the view that damages after action brought are not to be computed for the purpose of ascertaining whether a suit is within the jurisdiction of a Court of Requests. Under the circumstances of the present case I am unable to agree with him. It was held by Dias, J., then Acting Chief Justice, in *MacLachlan* v. *Maitland* [(1888) 8. S. C. C. 133] that a sum due by way of interest accruing after the date of the plaint was not included in the amount to be considered from the point of view of jurisdiction in the Court of Requests; and in *Cassim* v. *Sanhait* [(1906) 2 Bal. 20] I have myself held, with hesitation, that in an action for declaration of title to land the value of the land itself is the test of whether the jurisdiction so conferred is not defeated merely because a plaintiff claims incidental and subsidiary relief in connection with ouster, by way of damages. Neither of these cases, however, in my opinion, helps the present respondent. In *MacLachlan* v. *Maitland* the interest allowed was only compensation to the plaintiff for being kept out of the use of his money: it was an incident of the real subject-matter of the suit, out of which it grew. In *Cassim* v. *Sanhait* my decision (if it was right) rests on two grounds: (1) that sec. 4 of Ordinance No. 12 of 1895—repealing in regard to this matter sec. 77 of the Courts Ordinance 1889—make actions for the recovery of land a heading distinct from actions of debt or damages, and seems to have intended that, in the former case, the value of the land itself should be the test of jurisdiction; and (2) that, where that test has been complied with, there is nothing in the section to prevent a plaintiff from obtaining auxiliary damages on the ground of ouster. Such damages are in the nature of interest for the use of the land recovered. Like interest, they are annexed with, and grow out of, the subject claimed.

Here, in any event, the circumstances are quite different. The respondent does not seek to recover his plumbago pit, or complain of ouster from it. His action sounds in damages alone; and the additional damages claimed *pendente lite* are not in the nature of interest, nor are they referable to the principal demand; they are an independent head of claim. Does the fact that they are claimed after

action brought, or that if the respondent had obtained judgment at the moment of filing his plaint the amount awarded to him would have been within the jurisdiction of the Court of Requests make any difference? I do not think so. Sec. 4 of Ordinance No. 12 of 1895, in cases of this character, makes the amount demanded, and not the amount awarded, the test of jurisdiction. Here the respondent, at the date of his plaint, demanded damage in excess of the jurisdiction of the Court of Requests. I cannot think that it was competent for him to do so. The question was argued before me whether the claim for additional damages could be abandoned on the hearing of the appeal so as to obviate the plea to the jurisdiction. The appellant's counsel expressed his readiness to take this course. But Mr. A. St. V. Jayewardene, for the respondent, naturally objected to its being permitted. In my opinion, the suggested waiver comes too late. Sec. 34 of the Civil Procedure Code, which enables a plaintiff to relinquish a part of his claim in order to bring the action within the jurisdiction of any Court, cannot, I think, apply in the appeal Court, except by consent in favour of a litigant who has contested a plea to the jurisdiction in the Court below. The respondent in this case had the law well in view; for, after estimating his principal damages at Rs. 400, he restricted that part of his claim to Rs. 300 in order to satisfy, as he thought, the provisions of Ordinance 12 of 1895. On the question as to the question of additional damages he stood firm, and he must now abide the event. The appeal is allowed with all the costs here and in the Court of Requests.

THE KING *vs.* CHARLES *et al.*

No. 1,564, D. C. (Cr.), Colombo.

Present: Wood-Renton, J.

Argument: 10*th April*, 1907.

Judgment: 11*th April*, 1907.

Appeal—Questions of fact.

In cases of appeals on questions of fact the Supreme Court should proceed by rule.

The King v. *Charles*

The expression "questions of fact" comprises three distinct issues. In the first place, what facts are proved? In the second place, what are the proper inferences to be drawn from facts, which are either proved or admitted? And, in the last place, what witnesses are to be believed?

In the two first questions no special sanctity attaches to the conclusion of a Court of first instance.

In regard to questions of credibility, it is essential that the Appeal Court should not disturb the finding of a Court of first instance where it is clear that there was evidence on which a judge ought to come to a conclusion in favour of the prosecution on being satisfied of its truth where the story of the witnesses, as disclosed in the record of the case, is not inherently incredible, and where there is no reason to think that he has not duly weighed all the circumstances of the case.

A. L. R. Aserappa for accused-appellant.

Walter Pereira, K.C., S.-G., for complainant-respondent.

c. a. v.

JUDGMENT.

WOOD-RENTON, J.—After a careful consideration and some anxiety, I have come to the conclusion that I ought not to interfere with the convictions or sentences which are appealed against. It is quite true that, if I had to deal with the evidence by the sole guide of the written record of the District Court, I should not be disposed to convict either of the appellants. I am dealing, however, with an appeal from the decision of an able and experienced Judge, who has seen the witnesses, and who shews clearly by the terms of his judgment that he has himself taken account of all the weak points in the evidence for the prosecution. I have to consider also that, if the evidence on behalf of the complainant is to be believed, both the present appellants are guilty of an offence with which they are charged, and it certainly cannot be said that the sentences imposed on them are too severe. It appears to me to be necessary that, in cases of appeals on question of fact, the Supreme Court should proceed by rule, and so I propose to state in a few sentences what in my judgment the rule should be. It is obvious that when we speak of "questions of fact" we are merely using a compendious expression which may comprise three distinct issues. In the first place, what

facts are proved? In the second place, what are the proper inferences to be drawn from facts, which are either proved or admitted? And, in the last place, what witnesses are to be believed? In regard to the two first questions, I do not think that any special sanctity attaches to the decision of a Court of first instance, and, speaking for myself, I should always claim the right of dealing with them with a free hand. If it is necessary to furnish authority for this view, it will be found in the judgments of the House of of Lords, in the case *Montgommerie & Co.* v. *Wallace-James* (1904) App. Cas. p. 73.

In regard, however, to questions of credibility, it appears to me to be essential to the stable administration of criminal justice in this Island that the Appeal Court should follow the course of the decisions in England, and should not disturb the findings of the courts of first instance where it is clear that there was evidence on which the judge ought to come to a conclusion in favour of the prosecution on being satisfied of its truth, where the story of the witnesses, as disclosed in the record, is not inherently incredible, and where there is no reason to think that he has not duly weighed all the circumstances of the case.

It is not possible to overestimate the importance of the opportunities for coming to a right decision which a judge derives from seeing and hearing the witnesses. In Sir Henry Jenkyn's book on "British Rule and Jurisdiction Beyond the Seas", at p. 128 a citation is given from a judgment—which, so far as I am aware, is not reported in any of the English law books, and which must I think have been delivered on circuit—of the late Mr. Justice Coleridge on this subject. It sets forth with great power and beauty the view that I have been expressing. I think that it may fitly enter into the case law of Ceylon. "The most careful note must often fail to convey the evidence fully in some of its important elements—those for which the open oral examination of the witness, in presence of prisoner, judge, and jury, is so justly prized. It cannot give the look or manner of the witness, his hesitation, his doubt or variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the prisoner, when that has been important upon the statement

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of anything of particular moment. Nor could the judge properly take on him to supply any of those defects who, indeed, will not necessarily be the same on both trials. It is, in short, or it may be, the dead body of the evidence, without its spirit, which is supplied, when given openly and orally by the ear and eye of those who receive it."

With these observations, I dismiss the appeal.

In the matter of the

ELECTION OF A MEMBER FOR THE LOCAL BOARD OF JAFFNA.

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

ARGUMENT: *18th & 19th March*, 1907.

JUDGMENT: *22nd April*, 1907.

Writ of quo warranto—*Powers of the Supreme Court—Courts Ordinance No.* 1 *of* 1889, *secs.* 14 *&* 46.

The Supreme Court has no power, either inherent in it or expressly or impliedly given to it by statute, to issue writs of *quo warranto.*

Re Denister Perera (9 N. L. R. 142) and *In the matter of the Election of a Councillor for the Galupiada Ward of the Galle Municipality* (8 N. L. R. 300) overruled.

The Supreme Court, as it now exists, was constituted by Ordinance No. 1 of 1889, and has the powers which are expressly or impliedly given to it by that statute and no other.

This was an application for a writ in the nature of *quo warranto* by an unsuccessful candidate declaring the election of an unofficial member of the Local Board of Jaffna null and void, and for a *mandamus* on the Government Agent to hold a new election. He objected to the election of the successful candidate on the ground that the latter secured a majority by means of unqualified votes. The applicant brought these facts to the notice of the Government Agent under sec. 14 of the Local Boards Ordinance (No. 13 of 1898), and asked for an enquiry, which was refused, the Government Agent considering the successful candidate

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duly elected. The applicant then moved the Supreme Court for a writ of *quo warranto*. The chief grounds of objection were: (1) that unqualified voters had been fraudulently allowed to vote; (2) that the Chairman had wrongly refused to allow voting by proxy; and (3) that voters were not allowed to record all their votes in favour of the same candidate. A rule was granted by Mr. Justice Wood-Renton, and the parties appeared to shew cause.

Walter Pereira, K.C., S.-G. (with *Kanagasabai*) for Government Agent: As a preliminary objection it is submitted that the applicant is not entitled to make the present application as two of the grounds of objection, viz., that the Chairman refused to accept proxies and to allow electors to give all their votes to one candidate, were not taken within fourteen days as required by the Local Boards Ordinance. The only objection taken within fourteen days was that with regard to the qualification of voters, and that question had been judicially decided by the Chairman, and there was therefore no room for a *quo warranto* as decided by the Full Court. [*Reg.* v. *Collins*, 2 Q. B. D. 30; *Abeywardene* v. *Municipal Council, Galle*, 9 N. L. R. 304.]

A. St. V. Jayewardene for applicant: The limit of fourteen days is applicable only to objections raised before the Chairman, and it is open to the applicant to urge before this Court objections which he did not raise before the Chairman. The objections with regard to proxies, and "plumping" and similar objections, may be raised within a reasonable time before the Supreme Court. In rejecting proxies and refusing to allow qualified voters to record all their votes in favour of one candidate the Chairman was acting ministerially. When once the Chairman has decided on the qualifications of voters his judicial functions cease, and his subsequent acts are merely ministerial, and the Full Court has held that ministerial acts may be questioned by a writ of *quo warranto*. [*Abeywardene* v. *Municipal Council, Galle*, 9 N. L. R. 304.]

Their Lordships then desired the Solicitor-General to argue the other points.

The Solicitor-General: The Supreme Court being a

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creature of statute possesses only the powers given to it by statute. The power to issue writs in the nature of *quo warranto* was not given by any law. The Supreme Court has no inherent power to do so. It can only assume powers not expressly conferred when only such powers are necessary for the exercise of powers expressly conferred. It has thus been held that the Supreme Court has power to deal with contempts not committed *ex facie*. But the issue of a *quo warranto* is not necessary as a means to the exercise of powers expressly given. The writ in question moreover is obsolete in England, and it cannot be said to exist in Ceylon.

vanLangenberg for elected member.

Jayawardene: Both by virtue of its inherent powers and by the powers conferred on it by the Courts Ordinance this Court has the power to issue writs in the nature of *quo warranto*. It has been held that the Supreme Court possesses all the powers of the Supreme Courts of Westminster (In *re* Ferguson, 1 N. L. R. p. 181), and this Court issued writs of *habeas corpus* before the charter of 1833 conferred on it the power to do so. [Ram. (1820) p. 84.] The writ of *quo warranto* was merely auxiliary to the writ of *mandamus*, and in these disputed elections the writ of *quo warranto* was issued to clear the way for the more effective and principal writ of *mandamus*. The words of sec. 46 of the Courts Ordinance 1889 are wide enough to include the writ in question. Under sec. 385 the Attorney-General of Ceylon has power to exhibit informations to the Supreme Court in all cases in which the Attorney-General of England may do so. The latter has the power to file informations in the nature of *quo warranto*, so the Attorney-General of Ceylon has the right do so. If the Attorney-General has the power to exhibit such information, it must be presumed that the Supreme Court has been impliedly vested with the power to act on such informations and grant relief. The Supreme Court therefore has the power to issue writs in the nature of *quo warranto*. It is submitted that where foreign institutions are introduced into a country remedies necessary for the proper working of those institutions must be taken to have been impliedly introduced.

c. a. v.

JUDGMENT.

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HUTCHINSON, C. J.—This is an application for a "mandate in the nature of *quo warranto*" declaring the election of Mr. A. Sabapathy as an unofficial member of the Local Board of Jaffna null and void, and for a *mandamus* to the Government Agent of the Northern Province to hold a new election. A Rule was granted by Wood-Renton, J., on this application on the 24th September, 1906, calling on the Chairman of the Local Board (who is the Govenment Agent) to show cause why he should not hold an enquiry into the objections raised by the applicant to the election of Sabapathy, and thereafter, if cause be shown, declare the election null and void; and we have now heard arguments against and in support of the application.

The election was held on the 14th July, 1906, under the provisions of Ordinance 13 of 1898, when Sabapathy was elected by a small majority over the applicant. The applicant then wrote to the Government Agent, on the 19th July, alleging certain irregularities in the election, and requesting him to make enquiries, and if satisfied that the complaints were well-founded, to declare the election void and call a meeting of electors to elect a member in the place of Sabapathy. The Government Agent replied, on the 21st July, that he was satisfied that Sabapathy was duly elected, and declined to accede to the application that Sabapathy's election should be declared void. Thereupon the applicant made this application to the Supreme Court. The irregularities complained of were, in substance, that the Chairman refused to accept proxies, or to allow plumping, that he allowed unqualfied persons to vote, and that he restricted the voting to persons having house property and actually occupying it.

By sec. 9 of the Ordinance the Government Agent is authorised to investigate and determine any claim to be entitled to vote at any election, and his decision on any such claim is to be final. By sec. 10 he is to preside at the election and to determine the mode of voting; and every elector is to have as many votes as there are unofficial members to be elected. By sec. 14 "if by reason of any failure or neglect or any other cause whatever.....a

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member shall not be duly elected.....the Chairman, as soon as convenient after any such event shall have been notified to him, upon been satisfied that.....any member was not duly elected, shall, according to the circumstances of each case, declare the election either void altogether or void as to any particular member, and shall .....call a meeting of the electors for the purpose of electing a new member".

If the Chairman were to refuse or neglect to perform the duty laid on him by the Ordinance, a writ of *mandamus* might be issued directing him to perform it. But the allegation of the applicant is not that the Chairman did not do his duty, or did not act honestly, but that he came to a wrong decision, and the only mode, if there is any, of reviewing that decision is by a writ of *quo warranto*.

The respondents, besides contending that the decision of the Chairman on the alleged irregularities was right, raised the preliminary objection that this Court has no jurisdiction to issue a writ of *quo warranto*. We must deal with that objection first.

The Supreme Court, as it now exists, was constituted by Ordinance No. 1 of 1889, and has the powers, and no others, which are expressly or impliedly given to it by that statute.

Sec. 46 of 1 of 1889 enacts that the Supreme Court shall have power to "grant and issue, according to law, mandates in the nature of writs of *mandamus*, *certiorari*, *procedendo* and prohibition against any District Judge, Commissioner, Magistrate, or other person or tribunal" Neither that Ordinance, nor any other statute or charter, expressly gives power to issue a writ of *quo warranto*.

But the applicant contends that the enumeration in that section is not exhaustive, and that this power is one of those conferred on the Supreme Court by necessary implication. And in support of this argument he showed that although no power to issue a writ of *habeas corpus* was expressly given to the Court by the earlier charters, yet the Court, established under those charters, held that it had power to issue a writ of *habeas corpus*. The answer to that, however, is that the reason why the Court held that it had the

power was because it thought that sec. 82 of the Charter of 1801 impliedly gave it the power. The applicant also contends that the prerogative right of the King to issue writs of *quo warranto* has never been taken away in Ceylon, and that, therefore, it still exists. That may be so, but I think that we must hold that if the King has not delegated the right to his Supreme Court, the Court does not possess it. The only case to which we have been referred in which a writ of *quo warranto* has been issued in Ceylon is the one reported in 8 N. L. R. 300, in which Wood-Renton, J., expressed the opinion that the Court has this power. On the other hand Lascelles, A. C. J., & Middleton, J., in the case reported in 9 N. L. R. 304, said that they doubted whether that opinion was right. I think that the Supreme Court has no jurisdiction to issue a writ of *quo warranto*, and that this Rule should be discharged with costs.

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WENDT, J.—I concur with the rest of the Court in holding that the Supreme Court has not the power to issue a writ in the nature of *quo warranto*. Although the English Court of Queen's Bench at one time possessed that power, it has never been held that the Supreme Court in this Colony was to be presumed to be vested with all the powers of the superior courts in England. On the contrary, our powers were regarded as restricted to such as our charters and ordinances expressly or by necessary implication conferred. The power now in question is one which this Court was never called upon to exercise until within the last year or two, although Municipal institutions providing for the election of representative bodies have been in operation here since 1865. The exhaustive discussion which the subject has now received convinces me that the view which I took in the case of *Denister Perera* (1906), 9 N. L. R. 142, was erroneous, and that we have not the jurisdiction to grant the writ. I agree in the reason which my colleagues give for the conclusion at which they have arrived. At the same time I cannot but express regret that we are obliged to decide as we are doing. The jurisdiction is a most salutary one; and if it be clear that the Supreme Court does not possess it, it is still more clear that no other Court has it. In view of the multiplication

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of Municipalities, Local Boards and similar institutions, it is most desirable that the law should provide some such simple means for determining the validity of a disputed election as the precedure by *quo warranto* would afford, and perhaps this consideration may induce an amendment of the law.

WOOD-RENTON, J.—The result of the full discussion which this question has now received has been to convince me that the view I expressed in the Galle Municipality case, that the Supreme Court has power to grant mandates in the nature of *quo warranto*, is wrong. The gradual manner in which the prerogative writs, enumerated in sec. 46 of the Courts Ordinance, were included in the jurisdiction of the Supreme Court militates against my former conclusion, that the enumeration in question was intended to be illustrative, and not limitative, and I do not think that the point which I raised in the argument on the present rule, that, as *quo warranto* in such cases is merely an auxiliary procedure clearing the way for a *mandamus*, the words "mandate in the nature of a *mandamus*" entitle us to modify the English practice by letting *mandamus* go, whether an office is vacant or full, can be maintained. *Procedendo*, is in a sense, an auxillary writ to *certiorari*, and yet it is specified in sec. 46 by name. I was wrong, too, in holding that the jurisdiction to grant *quo warranto* is inherent in the Supreme Court. The Supreme Court—like other Courts of Record—has an inherent power to punish contempt. The instance unearthed by the industry of Mr. A. St. V. Jayawardene—of the issue of a writ of *habeas corpus* prior to the Charter of 1833—is explained by the clause in the Charter of 1801, which gave the Court general powers of superintendence over inferior criminal courts. But no general power of superintending the operations of Municipal bodies has been conferred upon us. Sir John Bonser, I may add, has held that the Supreme Court had no inherent power to grant injunctions (*Mohamado* v. *Ibrahim*, 1895, 2 N. L. R. 36). In my opinion, the present rule should be discharged with costs.

DEERESEKERE *et al vs.* GOONESAKERE *et al.*

No. 6,947, D. C., GALLE.

Present: LAYARD, C. J., & WENDT, J.

ARGUMENT: 21*st September*, 1903.

JUDGMENT: 13*th October*, 1903.

Majority—Marriage of woman under 21 years of age.

By the common law of Ceylon marriage confers majority upon a woman under 21 years of age by operation of law.

The facts appear in the judgment.

Bawa for defendants-appellant.

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

c. a. v.

JUDGMENT.

WENDT, J.—This is an action by lessees against their lessors to recover damages for breach of a covenant contained in the lease. The demised property originally belonged to one Andrew Dias Ullnwitta, who died intestate, whereupon his widow, 1st defendant, became entitled to a half thereof, and the other half devolved on his four children, viz., 2nd defendant, Johanna, Andre, and Carnelis. By the lease in question the two defendants (entitled in their own right to ½ only) leased the entire premises to the plaintiffs for the period of 37 years in consideration of a sum of Rs. 1,500 paid in advance for the whole term. Johanna, Andrew, and Carnelis were at the time minors; and the lessors by the lease agreed and undertook "to secure to the lessees a lease from each of the said minors within six months from the time he or she attains majority of his or her share for the term as this lease, subject to the same condition as in this lease, thus ratifying this deed which was granted on behalf of the said persons, on the lessees preparing a deed at their own expense for the signature of the said person so attaining majority, and in case any of the said minor children attaining majority declining so to lease out his or her share the lessors pro-

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mise and undertake to pay Rs. 30 a year from the date the said person declines till the expiration of the term of this lease and the lessees are at liberty to recover the same by the course of law". Johanna, the eldest of the minors, is still under 21 years of age; but the plaint alleges that she married one Wijeyratne on 28th May, 1902, and therefore "attained her majority by operation of law", and that the defendants have failed to obtain a lease of her share. The defendants, among other defences, denied that Johanna had attained majority by her marriage. At the trial 12 issues were agreed upon, the first of which was whether the plaint disclosed a cause of action, and the third, whether Johanna attained majority by reason of her marriage. These two issues were discussed as a preliminary matter, and the District Judge ruled upon them both in the affirmative. The defendants have appealed, contending that in Ceylon marriage does not confer majority upon a woman under 21 years of age. Although such appeals in the course of a trial are greatly to be discouraged, we decided to hear the present appeal because it was alleged that if decided in favour of the appellant it would put an end to the action.

The District Judge in a learned judgment has discussed the authorities at length, and we think that his conclusion that by the common law of Ceylon marriage confers majority upon the wife by operation of law is right, and ought to be affirmed. The argument for the appellants is that while it is true that marriage releases the minor wife from the power of her father, she does not thereby become a major, but passes into the similar power of the husband. If the *jus mariti* alone were to prevent the attainment of majority, it would have the same effect even after the wife attained the age of 21 years, and she would thereby never attain majority while her husband lived. It is admitted law that the daughter under age once freed from the power of the father by marriage, which happens to be dissolved by the death of the husband during her minority, does not return under the paternal power. Voet in more than one passage, as the District Judge shows, speaks in general terms of marriage conferring majority. Both Van Leeuwen (Cens. Fors. 1. 9. 9.) and Groenewegen (*ad. Inst.* 1. 9.) declare that by marriage *patria potestas solvitur et vel*

minores sui juris efficiuntur. VanLeeuwen again (*op. cit.* 1. 13. 11.), in giving the reason for his opinion that the consent of her parents is not a requisite for a valid marriage of a widow, says: "for with us matrimony makes a minor *sui juris*, and such is the general custom and is established in Holland by numerous statutes on the subject of guardians and wards".

No local decisions have been cited to us either way; but I think I may say that the generally received opinion has been that marriage confers majority as well on the woman as on the man. I believe that in deciding as I have done I am giving effect to the view of the law which the parties to the contract themselves entertained. The substance of the undertaking by the lessors was that within 6 months of the minors becoming entitled to dispose of their property they, the lessors, procure the execution by them of a lease of their respective shares in confirmation and ratification of the lease granted by the defendants professedly on their behalf. Johanna by her marriage became entitled to dispose, with the consent of her husband, of her property by way of sale or lease (Ordinance No. 15 of 1876, sec. 9), and the 6 months ought to be reckoned from that date.

The appeal will be dismissed with costs, and the case sent back for trial of the remaining issues.

LAYARD, C. J.—I agree.

SALGADO *vs.* SALGADO.

No. 3,363, D. C., KALUTARA.

Present: WENDT & MIDDLETON, JJ.

ARGUMENT: 25*th* & 26*th March*, 1907.

JUDGMENT: 28*th March*, 1907.

Registration—Priority—Valuable consideration—Ordinance No. 14 *of* 1891.

H. F. leased a land to P. H. F. subsequently died, and the administrator of her estate conveyed by deed duly registered all her lands (including the leased land) to her heirs,

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who by a contemporaneous deed (registered) partitioned the lands amongst themselves, and the leased land fell to the share of D., who leased it to two persons, who ousted P. In an action by P. against D.,

Held: That the lease by H. F. to P. though unregistered, was good as against the lease by D., which was registered.

Held, also: That the Registration Ordinance is not intended to interfere with the operation of deeds, the existence and purport of which the person acquiring an interest in the land was aware, and to which, but for the effect of registration, such interest would be subject.

A partition deed is entered into for valuable consideration, the consideration of each person's transfer of his undivided interest in all the lands, but that which is allotted to him in severalty, is his co-heir's transfer to him of his undivided interest in that land.

Siripina v. *Tikiria* (1 S. C. C. 84) referred to.

The facts are set out in the head-note.

V. M. Fernando for defendant-appellant:—The issue framed in the case is wrong. The transfer to the defendant was not by the administrator, but by the heirs. Thus the two deeds in conflict are the unregistered lease in favour of the plaintiff from the intestate and the registered transfer in favour of the defendant from the heirs. Sec. 17 of Registration Ordinance (No. 14 of 1891) declares that every deed not registered "shall be deemed void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent deed..... which shall have been duly registered". Now, the transfer creates an interest adverse to the lease. [*Uduma Lebbe* v. *Sego Mohamadu* (2 C. L. R. 158); *Sinnaiya Chetty* v. *Rupesinghe Appuhamy* (7 S. C. C. 111)]. Adverse interests need not be created by the same person, but by persons who have title. [*Punchirala* v. *Appuhamy*, (7 N. L. R. 102)]. The defendant's deed though a partition deed is for valuable consideration. The defendant gave up his rights in the rest of the intestate's property and accepted this land in lieu of his share. A partition deed was held to be in the light of a purchase (Sampson's Voet p. 384). The defendant is in the position of an innocent purchaser, and a search of the registers would not have disclosed the existence of the encumbrance. The object of the Ordinance is

to protect innocent purchasers. The plaintiff must suffer for his failure to register. Otherwise the defendant will lose because the plaintiff did not comply with the law.

A. Drieberg for plaintiff-respondent:—By allowing the appellant to succeed in this case the heirs of an intestate will be placed in a better position than the intestate himself. The heirs, by an act amongst themselves, cannot increase a right which they have derived from their intestate. It would have been otherwise if the appellant sold his share to an outsider for valuable consideration. At any rate, of the appellant's share, one-fourth is for no consideration, according to the manner in which land is partitioned by deed in Ceylon. But the judgment as it stands is correct, for the only question that was raised in the lower court was whether the registered conveyance from the administrator to the appellant (an heir) avoided the unregistered lease from the intestate to the respondent, and it is admitted that an administrator's conveyance to the heirs of an intestate is one for no consideration.

V. M. Fernando, in reply, cited *Peris* v. *Perera* (10 N. L. R. 33).

c. a. v.

JUDGMENT.

WENDT, J.—This appeal raises a novel question under the Ordinance relating to the registration of titles to land, and it has been very well argued by the Counsel on both sides. According to the statements of Counsel before us, the facts are that one Helena Fernando, being the owner of the parcel of land in question, leased 147 cocoanut trees growing on it by Deed No. 17,213, dated 20th August, 1898, to the plaintiff for the term of 12 years. Plaintiff had possession of the subject leased until 15th May, 1906, when he was ousted as hereinafter stated. Helena Fernando died intestate about 4 years ago, leaving as her only heirs four children, Peter, Davit, Angela, and Charles (the defendant). Letters of Administration to her estate were granted to Fernando (the husband of Angela), who by Deed No. 14,064 of 24th January, 1902 (registered 7th February, 1902) conveyed all the lands forming the estate to the four children,

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as an act of distribution of the estate. By a contemporaneous Deed No. 14,065 the children distributed the land amongst themselves, allotting the land in question to the defendant, who leased it for a term of 16 months to two persons, who entered into possession ousting the plaintiff.

These, however, were not the facts upon which the District Judge decided the case. It appears to have been stated to him that the administrator had conveyed the land in question direct to the defendant, and that the administrator's deed had been registered, and he framed the issue: "Has the defendant, by the prior registration of the transfer in his favour, obtained a title to the land free from encumbrance, created by his mother in favour of the plaintiff?" The administrator's conveyance not being for "valuable consideration" the District Judge was, of course, right in deciding the issue in the negative. But appellant's Counsel contended before us that the conveyance upon which his client based his claim (viz., the conveyance from his co-heirs which was comprised in the partition deed) was for valuable consideration, and that therefore the registration of that deed rendered the prior lease in plaintiff's favour void because unregistered.

To begin with, that contention of the appellant could only apply to the undivided three-fourths which defendaut acquired from his co-heirs; the remaining one-fourth he had, and has, under the gratuitous transfer from the administrator, and it is, therefore, subject to the intestate's lease. Next, it would be grossly inequitable that the intestate's heirs, who admittedly inherited the land subject to the lease, for which their mother received due consideration, should be able, by some transaction amongst themselves, to rid the land of the encumbrance to the manifest prejudice of the lessee. But if the Registration Ordinance, for the furtherance of its object, enacts that the prior registration of the partition deed shall have that effect, we must, of course, decide accordingly. The object of registration, as I understand, is to protect persons, who in good faith and for valuable consideration enter into transactions regarding land, from being prejudiced by already existing deeds, which purport to affect such land, but which it is

impossible for them to discover by any search. In order to secure such protection the Ordinance first directs that all deeds shall be registered, and, next, enacts that an unregistered deed shall be void as against any later registered deed adverse to it if executed for valuable consideration. If this was the object of the Ordinance, *prima facie* it was not intended to interfere with the operation of deeds of the existence and purport of which, although unregistered, the person acquiring an interest in the land was aware, and to which, but for the effect of registration, such interest would be subject. Therefore, it ought not to interefere with plaintiff's lease, of which the defendant and his co-heirs must be deemed to have had notice, because they are successors *ab intestato* to the lessor himself. In saying this I do not forget that in the earlier decisions it was laid down that mere knowledge of the prior deed would not defeat the priority in law which the Ordinance confers—*Siripina* v. *Tikiria* (1878) 1 S. C. C. 84. That decision was, however, in protection of the rights of a third party, while here the rights are those of an heir who in law is the same person as his ancestor.

Next comes the question of valuable consideration, which is a condition precedent to the statutory priority. No doubt in one sense the deed of partition was entered into on valuable consideration, because the consideration for each heir's transfer of his undivided interest in all the lands but that which is allotted to him in severalty is his co heirs' transfer to him of their shares in that land. *Ex concessio*, each of the parties to the deed hold his undivided share subject to the lease; the consideration he received for the transfer of that share was shares in other lands equally subject to the lease. It would be entirely different if an outside party gave money to the heirs as consideration for a transfer to him. There would at once be the innocent third party who is entitled to the protection of the Ordinance. Suppose A owns a land X, and B a land Y, and they together lease both lands to C, who omits to register his lease. A and B then execute a deed whereby A conveys X to B in exchange for Y, which B conveys to A. This deed is registered. Does it prevail over the lease? When sued by the lessee could A plead that land Y in his hands is

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free of the encumbrance, and similarly B in respect of land X? I should say not.

Similarly the land in question is in defendant's hands subject to his mother's lease.

I think, therefore, that, on the facts as agreed upon before us, the District Judge's judgment should be affirmed with costs in both Courts.

MIDDLETON, J., concurred.

ATTYGALLE *vs.* PERERA.

No. 3,747, P. C., COLOMBO.

Present: WOOD-RENTON, J.

ARGUMENT: *7th May*, 1907.

JUDGMENT: *11th May*, 1907.

Publishing proposals relative to a lottery—Penal Code, sec. 288—*Selling tickets for the purposes of a lottery—Ordinance No.* 8 *of* 1844, *sec.* 4.

It is essential to a conviction under sec. 288 of the Penal Code for the publication of proposals relative to a lottery that the lottery in question should have been intended to be held in a special place set aside for that purpose.

The mere holding of a lottery on a single occasion in a place which is not specially appointed for that purpose will not justify a conviction under that section.

In a charge for selling tickets relative to a lottery under sec. 4 of Ordinance No. 8 of 1844 it is not necessary to show that the lottery was to be held in a place "kept" for that purpose within the meaning of sec. 288 of the Penal Code.

The facts appear in the judgment.

Bawa (with him *E. W. Jayawardene* & *Batuwantudawe*) for accused-appellant.

Walter Pereira, K.C., S.-G., for the Crown.

c. a. v.

JUDGMENT.

WOOD-RENTON, J.—In my opinion this appeal must be dismissed. The appellant has been convicted, in the first

place, under sec. 288 of the Penal Code, of having "published proposals to pay money on a contingency relative to a lottery"; and in the second place, under sec. 4 of Ordinance 8 of 1844, of having sold tickets for the purposes of a lottery.

It is proved, and indeed admitted by the appellant himself, that he did publish the proposals, and that he did sell the tickets, in question; and the only points I have to consider on his behalf are certain points of law in relation to the facts.

It was urged by Mr. Bawa, who appeared for him at the argument, that it is essential to a conviction under sec. 288 of the Penal Code for publication of proposals relative to a lottery that the lottery in question should have been intended to be held in a special place set aside for that purpose, and that it is only by proof of this kind that it is possible to satisfy the words "keep" and "such" in the section.

In so far as the law is concerned, I entirely agree with Mr. Bawa's contention: it is supported by decisions of the Supreme Court of this Colony. In this connection I may refer to the cases of *Perera* v. *Silva*, 1 C. L. R. p. 57; and *P. C., Colombo, 1,485, S. C. Minutes of 5th December, 1906.

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* LUDOVICI *vs.* DE SOYSA.

No. 1,485, P. C., Colombo.

5th December, 1906.

JUDGMENT.

HUTCHINSON, C. J.—The appellant was convicted in the Police Court of Colombo that "he did on or about the 26th day of October, 1906, at 128 Dam Street ..... keep a place or office for the drawing of a lottery 'The International Drawing Club'; (2) that during the month preceding that date he published proposals to pay sums on an event or contingency relative to the drawing of the lottery and in particular made such proposal to L. Silva on or about the 26th day of August, and thereby committed an offence punishable under sec. 288 of the Ceylon Penal Code" And he was sentenced "for his said offence" to a fine of Rs. 50.

The conviction states two offences: one (keeping a lottery office) under the first para. of sec. 288, and the other (publishing proposals for a lottery) under the second para. The Magistrate says that he inflicts no penalty on the 2nd count, and the conviction on that count cannot be supported because the consent of the Attorney-General, which is required by sec. 288, was only obtained for the pro-

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It is also in exact accordance with the English decisions under the Gaming Act of 1845 [see *Martin* v. *Benjamin* (1907) 1 K. B. p. 64]. It is settled by these authorities that the mere holding of a lottery on a single occasion in a place which is not specifically appointed for that purpose will not justify a conviction under the enactments in question.

At the same time, when we turn to the facts of the present case they seem to me to be clearly distinguishable from all the authorities I have cited. It appears from the evidence recorded at the trial that the appellant himself showed payments on previous lotteries to Inspector Attygalle, and admitted that this particular sweepstake had been carried on for 5 years; and documents B and B1 show both the name and the local habitation of the Coro-

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secution on the 1st count. We have therefore only to decide whether the conviction on the 1st count was right.

The Magistrate found the following facts: (1) that accused issued books of tickets for the lottery to canvassers for sale; (2) that he sold tickets; (3) that his name appears in those books and in the lottery prospectus; (4) that he occupies the house where the lottery was held; (5) that at the actual holding of the lottery drawing he was present, actively supervising the drawing; (6) that he came forward and gave the Police a circular, which bears his name and invites people to buy tickets or sell them, or pass them on to their friends for sale; (7) that about 2½ weeks before the actual drawing he was in the house in question, and told a Policeman that he intended to hold a lottery there.

The prospectus of the lottery states that "the drawing will take place at the Diamond Jubilee Hall.....or if necessary will be adjourned to some other place, in which case disposers will be duly notified". The place of drawing was changed to 128, Dam Street, where it took place. This house was occupied by the accused, but whether as his residence or only for the temporary purpose of this lottery the evidence does not show. The address printed on the circulars and on the receipts given by the accused is 147, Dam Street, and payments for tickets were made at that address. It was stated that the accused had some time before given notice to the Police of the intended lottery. Numerous lotteries are carried on in Colombo, and there is no reason to suppose that this one was not conducted quite openly and fairly. There was no evidence of any other lottery having been held by the accused.

The Magistrate said that it was an irresistible conclusion from the evidence that the accused kept No. 126 (meaning, I presume, No. 128) as a place for a lottery or a drawing and that he kept it for a space of about 2½ weeks.

The words of sec. 288 are: "Whoever keeps any office or place for the purpose of drawing any lottery." They are evidently taken, either directly or indirectly, from the English Gaming Act of 1802, which makes it an offence "to publicly or privately keep any office or place to exercise, keep open, show or expose to be played, drawn or thrown at or in.....any game or lottery.....not authorized by

nation Sporting Club, of which the appellant is Secretary, and by which the present lottery was organised and the results of previous sweepstakes conducted under its auspices. It appears to me that these facts prove that the lottery was no isolated function, and the conviction is therefore justified under sec. 288 of the Penal Code.

It was finally argued by Mr. Bawa that there could be no conviction of selling tickets under sec. 4 of Ordinance No. 8 of 1844, unless it was shown that the lottery was to be held in a place "kept" for the purpose within the meaning of sec. 288 of the Penal Code. It is clear to my mind that contention is untenable, for sec. 4 of Ordinance No. 8 of 1844 expressly uses the words "carried on", which get rid of the necessity of any proof of "keeping". And, moreover, if it were necessary to show "keeping" for the purpose of a

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Parliament" And the same words in the two enactments ought to be interpreted in the same way.

Stroud's Judicial Dictionary says that "to keep a place for a purpose involves the idea that it is for that purpose on more than one occasion; but how many or how frequent those occasions must be is a question of fact to be determined in each case". This is the sense in which the word has been interpreted in the Gaming Act of 1802 and in other English Acts. For example, by an Act of Geo. 2 any house "kept for public dancing", etc., in London without a licence is declared to be a disorderly house of entertainment; and it has been held that, to be within the enactment, the house cannot be kept for the purpose mentioned, and that there must be something like an habitual keeping it—the mere incidental use of it in that manner would not be enough. And in a case under the Gaming Act which was heard by the High Court of Justice on the 8th ultimo (*Martin* v. *Benjamin*, reported in the *Times* of the 9th ultimo), two men had been charged with keeping a room for the purpose of exercising therein a lottery; and it was proved that they had sold tickets for a lottery and had conducted the lottery in a room temporarily engaged for the purpose. The Magistrate dismissed the charge, but stated a case for the High Court; and that Court held that a man could not be said to "keep" a place for the purpose of exposing a lottery if there was only one lottery. One of the Judges remarked that at the time when the earlier Gaming Acts were passed lotteries were not considered objectionable on moral grounds, the State itself held lotteries and had a monopoly of doing so, and the object of the acts was not to prohibit lotteries, but to prevent persons interfering with the state monopoly.

The opinion expressed by Burnside, C. J., in *Perera* v. *Silva* (1 C. L. R. 57), on the meaning of the word "keep" in sec. 288 is in harmony with the decisions on the English acts to which I have referred.

Upon the facts proved in the case the appellant did not keep any office or place for the purpose mentioned in sec. 288 of the Peual Code.

The conviction is, therefore, set aside.

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conviction under the Ordinance of 1844, that burden is discharged by the facts proved, which I have already enumerated in dealing with the charge under sec. 288 of the Penal Code.

The appeal is dismissed.

DE SILVA *vs.* SAMARASINGHE.

No. 700, P. C., Kandy.

Present: Lawrie, J.

5th August, 1885.

Non-cancellation of stamps—Stamp Ordinance No. 23 of 1871, secs. 9 & 13.

Non-cancellation of stamps as was required by the Stamp Ordinance of 1871 made a person liable to the penalty provided for by sec. 13 of that Ordinance, and was not a criminal offence.

The penalty imposed was a debt to the Crown recoverable by civil process only.

vanLangenberg (with him *Dornhorst*) for accused-appellant.

Fisher, C.C., for complainant-respondent.

Judgment.

Lawrie, J.—The defendant, a proctor, a Kandyan gentleman of respectability, delivered to the Secretary of the District Court of Kandy a proxy to him signed by two clients. Stamps to the amount required by the Ordinance were affixed, but the clients had not cancelled these stamps "by writing or making in ink on or across the stamp their names or initials together with the true date of their so writing or making", as required by the 9th sec. of the Ordinance.

The 13th sec. of the Stamp Ordinance provides that "It shall be the duty of every person issuing or delivering for any purpose any instrument required by this Ordinance to be stamped to see that the stamps are distinctly cancelled before he issues or delivers such instrument. Every

person issuing or delivering any instrument required by this Ordinance to be stamped without the stamp thereon having been previously distinctly cancelled shall be liable to a penalty of Rs. 200."

In delivering the proxy in question Mr. Samarasinghe made himself liable to this penalty.

The question which has to be determined is, whether he committed an offence for which he was liable to be tried by a criminal court, or whether the penalty which the Ordinance imposes is a debt to the Crown which can be recovered by civil process only.

Criminal courts can deal only with *offences*.

The act which Mr. Samarasinghe committed was not in itself a *malum in se*: it was the breach of a provision made to ensure that stamps cannot be used twice.

Secondly, the Ordinance does not declare this breach to be an offence. Unless an act be either in its nature criminal or be declared to be an offence, a criminal court has no power to deal with or punish it.

As an illustration of the law which I have just laid down I refer to a case under the Customs Ordinance, July, 1874, in 3 Grenier (P. C.) p. 41 in which the judgment of the Police Magistrate (Lee) and of this Court correctly distinguished between offences and breaches of revenue laws for which a penalty is exigible.

I therefore quash these proceedings, holding that the prosecution was *ab initio* bad.

I desire to make it clear that the prosecution is quashed, not on a mere technical ground, but for the substantial reason that the defendant did not commit an offence for which he could be tried criminally. The proper amount of stamps was on the proxy; the revenue had not been defrauded; the proxy was handed to an officer of Court; and the stamps could only afterwards be used for any other instrument if the officers of the Court permitted the instrument to be tampered with.

Mr. Samarasinghe made a mistake which most persons who have had to do with stamp instruments have made, and these proceedings leave no stain on his character.

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THE KING *vs.* SILVA.

No. 2,847, D. C. (Cr.), CHILAW.

Present: WOOD-RENTON, J.

ARGUMENT: *2nd May*, 1907.

JUDGMENT: *11th May*, 1907.

Pleader—Right to appear—Criminal Procedure Code, sec. 287.

A Proctor who appeared for an accused person, on being refused a postponement of the case, threw up his brief and retired from the case. The Judge then postponed the case to enable the accused to retain another Proctor; but at the adjourned hearing the same Proctor re-appeared and claimed the right to conduct the defence. The Judge declined to hear him, and tried and convicted the accused, who refused to take any part in the proceedings as he was not represented by the legal adviser he had chosen. On appeal by the accused,

Held: That in the circumstances of the case the accused was not entitled to either an acquittal or a new trial. There was no justification for his Proctor's withdrawal from the case. It was a distinct breach of good advocacy.

The provision in sec. 287 of the Criminal Procedure Code does not got give an accused person a right under all circumstances to be defended by any pleader whom it may please him to select, or that it should he allowed to override the power of the Court to decline to hear any particular pleader on sufficient grounds.

The material facts are set out in the head-note.

H. A. Jayawardene for accused-appellant: The trial is irregular as the accused was not allowed to be represented by a pleader. Under sec. 287 of the Criminal Procedure Code an accused has a legal right to be defended by a pleader. It is submitted that he is entitled to be represented by the Proctor of his own choice, provided such Proctor is entitled to practise in that Court. The mere fact that the Proctor once retired from the case does not prevent him from appearing at a later stage of the case.

Walter Pereira, K.C., S.-G., for complainant-respondent: The accused has no cause to complain. He has not been prejudiced, because he would have been in a worse position if the District Judge had gone on with the trial the

first day. He was expressly ordered to retain some other pleader, and it was obstinancy on his part to persist in being defended by the Proctor who retired from the case. The Proctor acted improperly in retiring from the case and then appearing again without the permission of the Court. The Proctor has not even explained his conduct to the Judge, and the Judge was right in refusing to hear him.

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JUDGMENT.

WOOD-RENTON, J.:—The appellant was charged in the District Court, Chilaw, with having voluntarily caused grievous hurt under sec. 317 of the Ceylon Penal Code. When the case came on for hearing the Proctor who had appeared for the accused in the Police Court applied for a postponement of the trial on the grounds that he had not been able to see his client since his committal to the District Court, and also that a material witness for the defence was absent. The learned District Judge pointed out that the Proctor having already defended the accused in the Police Court was fully conversant with the facts, and that, although the name of the absent witness had been given by the accused in the Police Court, he had not been examined there or bound over to appear before the District Court, and he accordingly refused the application. The Proctor thereupon threw up his brief and retired from the case. The District Judge then postponed the case for a week, in order that the accused might retain another Proctor to defend him. At the adjourned hearing the same Proctor reappeared, and claimed the right to conduct the defence. The learned District Judge, however, declined to hear him, went on with the case, and convicted the appellant, who refused to take any part in the proceedings, as he was not represented by the legal adviser whom he had chosen. It was argued before me on appeal that the line of action pursued by the learned District Judge in this case was a contravention of sec. 287 of the Criminal Procedure Code, which provides that every person accused before any criminal court may of right be defended by a "pleader", a term which [see sec. 3 (1)] includes duly qualified Proctors as well as Advocates. I do not think,

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however, that this provision gives an accused person a right under all circumstances to be defended by any pleader whom it may please him to select, or that it should be allowed to override the power of the Court to decline to hear any particular pleader on sufficient grounds, *e.g.*, in cases of contempt or contumacy. It appears to me that under the specific circumstances of the present case the appellant is not entitled to either an acquittal or a new trial. There was no justification for his Proctor's original withdrawal from the case. It was a distinct breach of the rules of good advocacy. *Boni causarum*, says Voet (3. 1. 12) *patroni non est se litibus justitia subnixis subducere.* The learned District Judge would have been within his rights, although perhaps within a rather strict view of them, if he had proceeded at once with the trial; and, as a mere matter of discipline, I do not think that I ought to allow the postponement which he granted to the accused for the purpose of enabling him to secure fresh legal assistance to be utilised as a means of defeating the formal ruling of the Court on the Proctor's first application. The only result of interfering in such a case as the present with the Judge's discretion would be to deter the District Courts and the Police Courts from granting any postponement under similar circumstances.

I dismiss the appeal.

SILINDU *et al vs.* DURAYA.

No. 383, D. C., KEGALLE.

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

ARGUMENT: 10*th May*, 1907.

JUDGMENT: 16*th May*, 1907.

Restitutio in integrum—*Compromise made under sec.* 500 *of the Civi Procedure Code—Prescription—Ordinance No.* 22 *of* 1871, *sec.* 11.

In order to maintain the validity of a compromise under sec. 500 of the Civil Procedure Code entered into on behalf of a minor, when such compromise is subsequently challenged, it

must be proved that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained.

An application for restitution is embraced in the term "action" in sec. 11 of the Prescription Ordinance (No. 22 of 1871), and is accordingly prescribed within the time limit therein provided.

H. A. Jayewardene for applicant-appellant: The questions that arise in this case are: Is a compromise entered into by a *guardian ad litem* on behalf of a minor binding on the minor? Secondly, can this remedy of *restitutio in integrum* be prescribed; and, if so, after what length of time can it be prescribed? As regards the first question, all the authorities tend to prove that it is not binding on the minor unless the Judge's attention has been called to the fact that a minor's interests are involved and he holds that the compromise is equitable to the minor. [GRENIER, A. J.: But must it not be presumed that this has been done in this case?] The authorities require that this should appear on the record. There is nothing in the record of this case to show that the Judge's attention was called to the fact that a minor's interests were involved. [WOOD-RENTON, J.: We should like to hear you on the question of prescription.] This matter was sent from the Supreme Court with an indication to the District Judge that he was to find whether the facts were as alleged. He had no power to dismiss our application on the ground that it was prescribed. The remedy of *restitutio in integrum* cannot be prescribed. Under the Roman Dutch Law it was an application made to the Sovereign; and now the Supreme Court is the proper authority to be petitioned. It is not an "action" as defined in our Prescription Ordinance [*Guneratne* v. *Dingiri Banda* (4 N. L. R. 250)]. Moreover, prescription can only begin to run from the time that the fraud is noticed (*R. Habibbhoy* v. *Turner*, I. L. R. 17, Bombay, pp. 341 and 347).

The following authorities were cited in reference to the first question argued:

Takkaya Naiker et al v. *M. Chetty* (I. L. R. 3, Madras, p. 103).

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Kalavati v. *Chedi Lal et al* (I. L. R. 17, Allahabad, p. 531.)

Manohar Lal v. *Jadar Nath Singh* (Calcutta Law Journal, vol. 4 p. 8.)

Calcutta Law Journal, vol. 3, pp. 119—129.

The facts appear in the judgment of Grenier, A. J.

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JUDGMENT.

GRENIER, A. J.:—This appeal arises out of an application for *restitutio in integrum*, and the matter has now come before us finally for decision as to whether the remedy, which is an extraordinary one, should be granted or not to the appellant. Two questions were raised and discussed before us, and I shall take them in the order in which they were presented by appellant's Counsel. The first question was, whether the decree in D. C., Kegalle, 383, was void in law so far as the appellant was concerned by reason of its not being in conformity with the provisions of sec. 500 of the Civil Procedure Code. Admittedly the appellant was a minor when that decree was made; and although I was at first inclined to hold that the decree could not be challenged on the broad ground that it must be presumed to have been rightly made, and that all necessary conditions were observed to render it valid and effectual, I was unable to resist the weight of the authorities cited by the appellant's Counsel at a rather late stage of the argument. Those authorities unmistakably lay down, especially the judgment of the Judicial Committee of the Privy Council, delivered by Lord MacNaughten in the case of *Manohar Lal* v. *Jadar Nath Singh* and others, Calcutta Law Journal, vol. iv. p. 8, that in order to maintain the validity of a compromise under sec. 462 of the Indian Code of Civil Procedure, which corresponds to sec. 500 of our Code, entered into on behalf of a minor, when such compromise is subsequently challenged, it must be proved that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown by an order on petition, or in some way not

open to doubt, that the leave of the Court was obtained. In the present case there is certainly an entire absence of proof that the attention of the Court was pointedly drawn to the fact that the settlement agreed to on the 19th October, 1899, affected the interests of the appellant, a minor at the time; and that the leave of the Court was obtained at any time before decree was entered confirming the terms of the settlement. In the course of the judgment Lord MacNaughten said:—"It was argued on behalf of the appellant that the exigencies of that provision (462) had been complied with in this case, inasmuch as it appeared that the minor (the first respondent), who was a party to the compromise in question, was described in the title to the suit as a minor suing "under the guardianship of his mother", and the terms of the compromise was of course before the Court. In the opinion of their Lordships this is not sufficient. The record in the case before us contains the following entry, dated 10th October, 1893:—"Parties present. It is agreed between the parties that judgment be entered up as follows for the plaintiff"; and then follow the terms of the judgment, which were subsequently embodied in the decree. There is nothing to show that the Court was made aware of the fact that the plaintiff was a minor, and that the compromise was one which related to her title in several lands which formed the subject of the action. I need hardly remark that the duty is cast on the Court in all cases where minors are concerned to safeguard and protect their interests to the fullest possible extent, and I can well understand the severity of the rule laid down by Lord Mac Naughten in the case already cited, in which the circumstances under which the compromise was made are not dissimilar to those present in this case. Here too, in the title of the suit, the fact of the plaintiff being a minor clearly appears, because she is suing by her next friend Kiri Ukkuwa; but even assuming that proof *aliunde*, and not open to doubt, may be adduced to show that the Court sanctioned the promise with knowledge of the fact that the plaintiff was a minor, we have been unable to discover any such proof, nor was any attempt made to supply it. I have no hesitation, therefore, in declaring that the decree in D. C., Kegalle, 383, dated the 19th October, 1893, was void

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and inoperative in law as against the appellant. The second question argued was, whether the appellant's application for *restitutio in integrum* was barred by prescription. The appellant was born on the 12th April, 1878, and she is nearly 30 years old now. She attained majority by marriage on the 23rd April, 1895, and by age on the 12th April, 1899. The application for *restitutio in integrum* was made on the 15th July, 1904. It was contended for the appellant, and the contention somewhat startled me, that there was no time limit prescribed by law within which an application for restitution should be made. On a former appeal which came up before my brother Wendt and myself on the 15th February, 1906, in consequence of a ruling of the District Judge that it was not too late to frame an issue in regard to prescription, and of his finding thereafter that the appellant's application was barred by prescription, this Court sent the case back for evidence as to whether or not the appellants had all throughout been in possession of the lands which they claimed, and also for the purpose of ascertaining when the appellant Silindu first became aware of the existence of the judgment in D. C., Kegalle 383. I have no recollection now of any argument having been addressed to us on the question of prescription; but I find that we assumed that sec. 11 of Ordinance 22 of 1871 would apply; and the case was remitted to the District Court to enable the appellants to prove such facts as would take the case out of the operation of the Ordinance. There was, however, no distinct pronouncement on the point, which was therefore open to the argument that was addressed to us. Since the argument I have consulted several Roman Dutch Law authorities, and I have carefully considered the scope and object of sec. 11 of Ordinance 22 of 1871, which was apparently intended to apply to all cases not specially provided for; and the conclusion I have come to is, that whether we apply sec. 11 or the period of limitation prescribed by the Roman Dutch Law for applications of this nature, the remedy sought for is completely barred by effluxion of time. There was undoubtedly much force in the argument that as the remedy was one not provided for by the *Jus Civile*, and was not governed by its rigid and strict principles, but was by an

act of grace of the Sovereign given to a subject on equitable grounds, time did not run against it. But in such a perfect system of jurisprudence as we find in the Roman and Roman Dutch Law it was inconceivable that no provision should be found in regard to the time within which the remedy should be applied for. I was, therefore, not surprised to find on the authority of Voet, Liber, Bk. iv. 1, 19 and Vanderkessel, Bk. iii. 42, 5 that in the case of persons who apply for restitution on the ground that they were minors at the time of the occurrences complained of the application should be made, except on the ground of enormous wrong, within four years of their attaining majority or of their obtaining letters of *venia ætatis* or of their marriage. See also Nathan's C. L. S. Africa, vol. 2, sec. 845. It must be further remembered that although an application for restitution under the Roman Law was technically referred to as the "extraordinary petition" as distinguished from "conditions" which were actions of strict law existing on unilateral obligations (Warn Kœnig's Inst. sec. 1057) the terms "actions and petitions" were indifferently applied to the former. In a case of restitution what was aimed at was the doing of reciprocal and complete justice, and for this purpose *formulæ* or civil forms of actions were dispensed with. (See note to Berwick's Voet p. 115.) So that if we regard an application for restitution as an equitable action, as to all intents and purposes it was, it seems to me, that the words of sec. 11 of Ordinance No. 22 of 1871 are comprehensive and far reaching enough to embrace the present application, and whether, therefore, we apply the period of prescription under the common law or the statute law the application sought for is barred, as Silindu, the first appellant, attained majority both by age and marriage considerably more than four years before she applied for it. I would dismiss the appeal.

WOOD-RENTON, J.:—I agree on the first point discussed by my brother Grenier. I think that the record should show (*a*) that the attention of the Court has been directed to the fact of the minority, and (*b*) that the Court has approved of the proposed compromise. On the second, I think that the term "action" in sec. 11 of the Pres-

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cription Ordinance must be construed as embracing any proceeding by which a legal right to redress is asserted.

KARUWANAYAKE *vs.* PERERA *et al.*

No. 17,234, D. C., Colombo.

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

Argument: *27th July*, 1906.

Judgment: *1st August*, 1906.

Guardian and ward—Purchase of minor's property by guardian—Validity of same—Roman Dutch Law—Civil Procedure Code, sec. 502 *& ch.* 40.

Guardianship *ad litem* and guardianship of property (under chap. xl.) of the Civil Procedure Code terminates with majority.

In the latter it is also subject to the completion of pending matters and settlement of accounts by the guardian until his discharge by the Court.

Both under the Roman Dutch Law and under the English Law purchases by a guardian from his ward are voidable at the option of the ward, although the former may have paid an adequate price and gained no advantage thereby unless the connection between them most satisfactorily appears to have been communicated to the ward.

The facts appear in the judgment.

H. A. Jayewardene for plaintiff-appellant.

Walter Pereira, K.C., S.-G., for 1st defendant-respondent.

vanLangenberg for 2nd defendant-respondent.

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Judgment.

Middleton J.:—The claim in this action was for the cancellation of a Deed of Transfer No. 194 dated 27th February, 1900, by which the plaintiff purported to convey certain property at Slave Island to the 2nd defendant, and that the said premises be restored to the plaintiff on repaying the sum of Rs. 1,500, or in the alternative that the

1st defendant or the 2nd defendant, whichever the Court may find have been the real purchaser of the said premises, may be ordered to pay the plaintiff Rs. 6,000 and interest and costs.

On the issues settled and tried the District Judge has found that plaintiff was not a minor at the execution of the deed of the 27th February, 1900, and that the 2nd defendant had paid the plaintiff the whole of the consideration for the transfer amounting to Rs. 7,500.

Having heard Counsel an both sides, and carefully read over and considered the evidence, I think that the learned District Judge's finding on both these issues were correct.

As regards the issue of minority, the evidence points clearly to the plaintiff being the only child of his parents and as being the person mentioned in the birth certificate put in evidence which shows that he was born on the 30th December, 1878; the oral testimony to the contrary is inconclusive and unsatisfactory.

On the question of payment I had some difficulty at first in believing that the 2nd defendant could have been so negligent of his own interests and return the promissory notes for Rs. 3,000 and Rs. 2,250 to the plaintiff without obtaining receipts; but the acknowledgment by the plaintiff to the Notary who attested the Deed of full satisfaction, coupled with the astuteness of the plaintiff testified to by the learned District Judge, and the irreconcilable nature of plaintiff's evidence with the averments in the plaint, have induced me to think that the finding of the District Judge was correct on the issue involved.

Counsel for the appellant however urges that even if full payment is proved the plaintiff is entitled to have the Deed set aside and the sale cancelled on the ground that the sale was in fact made to the 1st defendant through his nominee the 2nd defendant, and that the 1st defendant having been at the time of the sale or shortly before the guardian and curator of the plaintiff the sale was voidable according to the Roman Dutch and English Law. It was further urged that the burden of proof being on the 1st defendant under sec. 111 of the Evidence Ordinance 1895

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the case must be sent back for the trial of the third issue, whether the 2nd defendant was a mere nominee of the 1st defendant or the real purchaser. According to Voet, Bk. xviii. 1. 9. (Berwick's Translation, p. 15) a tutor may not purchase the property of his principal by the interposition of a third party, and the section goes on to say that the same rule applies to curators, agents, testamentary executors, and other like persons *qui negotia aliena gerunt.*

Guardianship under Roman Dutch Law terminated by majority (Grotius, Introduction to Herbert, p. 45) and I presume as under the Civil Procedure Code in sec. 502 guardianship *ad litem* terminates at majority, so under chap. xv. guardianship of property would terminate at the same period of time subject however to the completion of pending matters and settlement of amounts by the guardian until his discharge by the Court. Until his discharge by the Court I take it that the 1st defendant would have been at the date of the sale in the position of one *qui negotia aliena gerebat* in relation to the plaintiff, and therefore still a guardian within the prohibition laid down by Voet. It is not contended here that the 1st defendant has obtained his discharge from the Court.

The English Law is extremely strict in dealing with gifts or bargains accepted or made from and between guardian and ward and all persons between whom there is a fiduciary relalionship, but only the case of *Liles* v. *Terry*, Law Reports 2, Q. B. p. 679 was cited to us. That was a case of a gift to the wife of the donor's solicitor for antecedent consideration in the shape of professional services which the Court of Appeal held to be voidable and avoided.

No English case was brought to our notice as to the view of the Courts in regard to sales.

The case, however, of *Fox* v. *Mackreth* (1744) [White and Tudor's Leading Cases, pp. 123,156] established the rule recognised, and acted on ever since by courts of equity that a purchase by a trustee for sale from his *cestui que* trust although he may have given an adequate price and gained no advantage shall be set aside at the option of the *cestui que* trust unless the connection between them most satisfactorily appears to have been communicated to his

cestui que trust. The same rule would I take it by parity of reasoning apply to the case of a guardian and ward. The reason for the prohibition against the sale through the interposition of a third party is no doubt the possibility of a secret advantage to the guardian to the prejudice of the ward owing to his having been enabled to acquire special knowledge as to the value of the property which he might not have communicated to the ward. If the 1st defendant had been called on the original trial, it would have been more satisfactory.

I think, therefore, that the case should be sent back for the trial of the third issue. The plaintiff must have his costs of the appeal, but the costs in the District Court will abide the event of the trial of this issue.

LASCELLES, A. C. J.—I agree.

FAKURDEEN & Co. *vs.* SUPPRAMANIAN CHETTY.

No. 2,026, C. R., COLOMBO.

Present: WOOD-RENTON, J.

11th May, 1907.

Civil Procedure Code, secs. 232 & 5—Seizure of property in the custody of a court—Adjudication of claims thereto—Jurisdiction of Potice Courts.

Where money (Rs. 300, deposited as bail) in the hands of a Police Magistrate was seized under a writ issued from the District Court and claimed and the claim disallowed, and where the unsuccessful claimant instituted an action in the Court of Requests with the same object, which was dismissed,

Held: That as the money seized was in the hands of the Police Magistrate, questions of title or priority between a judgment creditor and any other person not being the judgment debtor, and claiming to be interested in such property, should be determined by the Police Magistrate in terms of sec. 232 of the Civil Procedure Code.

Held, also: That the term "includes" in the definition of "judge" in sec. 5 of the Civil Procedure Code does not confine the scope of the definition to the three classes of judges it enumerates.

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The material facts appear in the judgment.

E. W. Jayewardene for plaintiffs-appellant.

vanLangenberg for defendant-respondent.

JUDGMENT.

WOOD-RENTON, J.:—In my opinion this appeal must be dismissed.

The facts shortly are these: In connection with a Police Court case (No. 98271) which was before the Police Magistrate of Colombo, one Mohamado Hadjiar paid into Court in his own name by way of bail of one of the employees of the appellants, who was charged in that case, a sum of Rs. 300, handed to him by the appellants for that purpose. Shortly afterwards the respondent obtained judgment against Mohamado Hadjiar in Case No. 21700 of the District Court of Colombo, and under a writ issued in pursuance of that judgment they caused the sum of Rs. 300 to which I have just referred to be seized. The appellants then claimed the sum in question in the District Court, and the claim was disallowed. They subsequently instituted the present action in the Court of Requests with the same object in view. At the time of the institution of the present proceedings, however, the sum of Rs. 300 had been transferred from the Police Court of Colombo to the District Court, which had already adjudicated on the appellant's claim. It was held by the learned Commissioner of Requests that he had no power to adjudicate on the appellants' claim inasmuch as no proceedings had been taken in the Police Court, in whose custody the sum was at the time of the institution of the proceedings in the District Court; and he accordingly dismissed the action, intimating in the course of his judgment that the District Court itself had no power to adjudicate on the claim, since the property was not in its custody at the time of the appellant's original application.

The case turns upon the construction of sec. 232 of the Civil Procedure Code, which provides that where property seized under a writ is in custody of a "court" questions of title or of priority between a judgment creditor and any

other person—not being the judgment debtor—claiming to be interested in such property "shall be determined by such court". It is quite clear that if the word "court" as used in this proviso extends to Police Courts, the judgment appealed against is correct. It was argued, however, before me on the appeal that it is necessary to exclude Police Courts from the purview of the proviso I have just cited. After careful consideration I am unable to accept this contention. In sec. 5 of the Code "court" is defined as a judge empowered by law to act judicially alone, or a body of judges empowered by law to act judicially as a body, and the term "judge" is immediately afterwards described as including judges of the Supreme Court, District Judges, and Commissioners of Requests. It is obvious that a Police Magistrate is a "judge empowered by law to act judicially alone"; but I cannot interpret the term "includes" in the definition of "judge" as confining the scope of the definition to the three classes of judges whom it specifically enumerates. It is clear law (*Queen* v. *Kershaw*, 6 Ellis & Blackburn, 1007; and *Dilworth* v. *The Commissioners of Stamps* [1899] Appeal Cases, p. 105) that in the absence of any provision which requires a contrary interpretation the word "includes" ought to receive an extensive and not a restrictive meaning. I see no reason for allotting to it a restrictive meaning in the present case.

I dismiss the appeal with costs.

KARUPPEN CHETTY *vs.* PALANIAPPA CHETTY.

No. 2085, C. R., Colombo.

Present: Wood-Renton, J.

10*th June*, 1907.

Promissory Note—Presentment—Bills of Exchange Act (1882) *secs.* 46 & 87 (1).

Where a promisory note by its own terms is made payable at a certain place, it must under the provisions of sec. 87 sub-sec. 1 of the Bills of Exchange Act of 1882 be presented at the place so named, unless there is some excuse for not doing so, within the meaning of sec. 46 of the Act.

Karuppan Chetty v. *Palani-Chetty*

The plaintiff sued the defendant on a promissory note made by the defendant in favour of Messrs. Carson & Co., and endorsed by them to him. The note was made payable at the office of Messrs. Carson & Co. It was discounted by the payees at the National Bank, where it was on the due date. Further, it was not presented for payment at the office of Messrs. Carson & Co. The defendant, *inter alia*, contended that the note was not duly presented. The learned Commissioner of Requests gave judgment for plaintiff. The defendant appealed.

Wadsworth for defendant-appellant: Under sec. 87 (1) of the Bills of Exchange Act, where a note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. The fact that the maker did not go to the place to pay will not excuse presentment [sec. 46 (2)]. Presentment of the note is a condition precedent to render the maker liable. It must be averred and proved that presentment was made (*Spindler* v. *Grellet*, 1 Exchequer, 384; *Sanderson* v. *Bowes*, 14 East's Reports, 500; *Ponnanbalam* v. *Chinnatamby*, 6 S.C.C. 8). The evidence shows that on the due date the note was at the National Bank of India, and was sent to the office of Messrs. Carson & Co. only the next day.

vanLangenberg for plaintiff-respondent: Presentment is necessary. But the evidence shows that according to mercantile usage when notes are discounted at the Bank the maker presents the note there. There is an implied waiver of presentment at the office (sec. 46 of the Act). An issue can be framed on this question of the excuse for presentment. The case could go back for that purpose.

Wadsworth in reply: There is no allegation that there was any excuse for presentment. No issue raised. Parties must be held bound by the issues raised in the Court below.

JUDGMENT.

WOOD-RENTON, J.:—In my opinion this appeal should be allowed. The appellant was sued in the Court of Requests, Colombo, as the maker of a promissory note in favour of Messrs. Carson & Co. It was a note, which by its

own terms was made specially payable at the offices of the payees, and it was therefore their duty, in virtue of sec. 87 sub-sec. 1 of the Bills of Exchange Act, 1882, to present it for payment at the place named in the body of the note, unless there was some excuse for not doing so within the meaning of sec. 46 of the Act of 1882. In the present case, what took place was that the payee discounted the note with the National Bank of India; and it has been held by the learned Judge on the facts that there never was any presentment or demand for payment at the office of Messrs. Carson & Co. at all. It was further held by the Judge that the reason for this non-presentment must be taken to be a fact that the defendant-appellant was not there on the day of the payment, and on that ground he has decided this issue in favour of the respondent. So far as I can discover from the record, there is no evidence that the defendant-appellant was not at Messrs. Carson & Co.'s office on the day in question, and in any event it was the duty of the respondent to prove that the note was in fact presented for payment according to its tenor. It is not suggested by Mr. Waldock, a partner in Messrs. Carson & Co.'s, or by their broker, in their evidence that there was any such default on the part of the appellant. On the other hand, they allege what I must suppose to be a mercantile usage among chetties to meet such notes by payment at the Bank, and not at the places named in the body of the notes themselves. But the evidence falls far short of establishing any usage of this description, and it appears to me that the appeal should be allowed. In the course of Mr. vanLangenberg's argument I was inclined to think that the case ought to be sent back for the framing of a new issue which would determine the question whether there was any excuse for non-presentment under sec. 46 of the Act of 1882. But on re-consideration I think the parties should be held to the issues which they have framed and accepted, and I, therefore, allow this appeal with costs. It may perhaps be desirable that I should give a reference to the cases which have been cited in the argument in support of the construction I have placed on sec. 87 of the Act of 1882. They are as follows:—

Sanderson v. *Bowes* (1811), 4 East's Reports, p. 500;

Obeysekere v. Jayatilleke

Spindler et al v. *Grellet* (1847), Exchequer, 384; and *Kanther Ponnambalam* v. *Chinnatamby Karunathar* (1884), 6 S. C. C. p. 8.

OBEYSEKERE *et al vs.* JAYATILLEKE.

No. 15,784, D. C., Kandy.

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

Argument: *1st & 2nd March*, 1905.

Judgment: *6th April*, 1905.

Agreement—Specific performance—Validity of agreement by an administratrix to convey property of her intestate.

A person by deed promised after she had taken out letters of administration to her deceased husband's estate to convey to her daughter by way of dowry certain specified properties of the estate.

Held: That there was no *justa causa* proceeding from the promise which would make it a valid agreement for the breach of which *id quod* interest or damages might be exacted.

Held, also: That as the administration of her deceased husband's estate was subject to the control and supervision of the Court, she could not be compelled to a specific performance of the agreement.

Bawa for defendant-appellant.

vanLangenberg (with him *Wadsworth*) for plaintiffs-respondent.

c. a. v.

Judgment.

Middleton, J.—This was an action to compel the specific performance of the terms of a document dated 31st January, 1900, signed by the defendant, by which she undertook after she had taken out letters of administration to her deceased husband to convey to the plaintiff by way of dowry certain specified properties of her deceased husband.

The (1) plaintiff is the daughter of the defendant's first husband, and the (2) plaintiff the husband of the (1) plaintiff.

The document on the face of it purports to undertake

to do that which the defendant as administratrix has neither the legal right nor obligation to perform.

The District Court therefore in my opinion had no right to order the respondent to specifically perform an undertaking which as a matter of law she had no power to carry out (*Thompson* v. *Thompson*, 7 Vesey, 470). The administratrix would have no power to convey more thau the (1) plaintiff's share of her father's estate subject to the direction of the Court, under which the defendant is administering the estate. The promise embodied in the document A was made to (1) plaintiff, and the (2) plaintiff was no party to it.

The consideration, or rather *justa causa* in Roman Dutch Law, 8 N. L. R. p. 49, if any, must proceed from the promisee, the (1) plaintiff (Leake on Contracts, p. 430 [latest]). She has not gone into the box to prove that she married the (2) plaintiff, because documeut A was signed by her step-mother.

In my view therefore no *justa causa* proceeding from the promisee has been proved which would make this a valid agreement for the breach of which *id quod* interest or damages might be exacted. The document promises to convey the various properties as dowry by reason of the joyful occasion of the promisee's marriage.

It does not promise that if the promisee will marry the (2) plaintiff or some one else that the properties will be conveyed.

For this reason I am inclined to the view that the defendant cannot be made liable in damages.

The appeal must therefore be allowed, and the judgment of the District Court be set aside and the action dismissed with costs.

GRENIER, A. J.:—This is an action for specific performance of an agreement dated the 31st January, 1900, executed by the defendant, whereby it was alleged she had agreed to transfer to the 1st plaintiff, who is her stepdaughter, lauds to the value of Rs. 1,000, which are fully described in the schedule annexed to the plaint.

There were two translations of this agreement in the

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record; but as the correctness of both of them was questioned, we had a translation made by the Interpreter Mudaliyar of this Court. On a careful consideration of this translation, it would appear that the defendant promised after she had taken out letters of administration to her deceased husband's estate to give to the 1st plaintiff by way of dowry on—to quote the words of the agreement—"the joyful occasion of her marriage" the lands mentioned in the agreement.

The defendant obtained letters of administration, and is still administering the estate of her deceased husband. It is manifest, therefore, that she cannot at present convey any property of the estate to the 1st plaintiff without the authority of Court. She is in the position of a trustee, and the administration of her deceased husband's estate by her is subject to the control and supervision of the Court. On this ground alone the defendant cannot be compelled to a specific performance of the agreement in question.

It was argued that the promise as embodied in the agreement was a *nudum pactum*, and cannot therefore be enforced. It is unnecessary to deal with this large question on this appeal, because I think that the agreement simply amounted to a declaration, and nothing more, that the defendant would at some future time give certain lands to the 1st plaintiff by way of dowry out of property belonging to her deceased father's estate. I am inclined to take the view put forward by counsel for the appellant, that the object with which this document was drawn out was to shew that the 1st plaintiff would not be dowerless, but that after the defendant had duly administered her deceased husband's estate she would convey to the 1st plaintiff certain lands out of that estate. The 2nd plaintiff was no party to this agreement, and it cannot be said that he was induced to marry the 1st plaintiff in the belief that the defendant would convey certain lands to his wife in consideration of his marrying her. At any rate the 1st plaintiff is not entitled to ask for specific performance considering the defendant's representative character as the administratrix of her deceased husband's estate. She cannot, under the circumstances, be ordered and directed to execute a notarial transfer in favour

of the 1st plaintiff of the lands mentioned in the Deed of Agreement, nor can she be condemned to pay the damages claimed by the plaintiffs. I find no stipulation for damages in the agreement, even if the agreement was enforceable. The sum of Rs. 1,000 is simply mentioned in the deed as the value of the lands, and this is the sum that the plaintiff has claimed alternatively as damages.

The judgment of the Court below must be set aside and the plaintiffs' action dismissed with costs.

SOMITTARE *vs.* JASIN.

No. 2,182, C. R., Colombo.

Present: Wood-Renton, J.

Argument: 15*th March*, 1907.

Judgment: 28*th March*, 1907.

Buddhist Temporalities Ordinance No. 8 *of* 1905—*Action for the recovery of property—Sec.* 30—*Proper party to sue—Secs.* 29 *&* 40—*Addition and substitution of parties—Power of Court—Sec.* 13, *Civil Procedure Code.*

The Crown ordered a certain land to be granted to an incumbent of a temple on payment by him of half the improved value of the land. The incumbent gave the money to a sacerdotal pupil of his and sent him to Colombo to obtain the necessary conveyance, but the pupil obtained the grant in his own name. The incumbent sued his pupil, *inter alia*, for a conveyance by him in his favour.

Held: That the incumbent had no right to a grant in his name or in that of the temple, as the land vested in the trustee. Such an action is either an action for "the recovery" of property or an action for a "purpose requisite for carrying into effect" one of the objects of the Ordinance, viz., the vesting of property in the trustee, an action which the trustee alone can institute.

Held, also: That under sec. 13 of the Civil Procedure Code the Court has power either to add or substitute parties for the purpose of securing an effectual adjudication upon the real questions at issue in an action, even though there is some personal bar in the way of the original plaintiff.

The facts fully appear in the judgment.

Bawa (with him *F. H. B. Koch*) for plaintiff-appellant.

R. L. Pereira for defendant-respondent.

c. a. v.

Somittare
v.
Jasin

JUDGMENT.

WOOD-RENTON, J.:—This case raised an interesting question under the Buddhist Temporalities Ordinance, 1905 (No. 8 of 1905). The appellant is incumbent of Imbulgoda Vihara. The Crown advertised for sale as Crown property a certain portion of land which belongs to the Vihara, and of which the appellant, as incumbent, alleges that he was in possession. He claimed it by petition, and he avers in his plaint that a grant was ordered by the Crown to be made to him on payment of half improved value. The appellant is admittedly not a trustee of the Temple. The plaint goes on to state that the appellant employed the respondent—one of his sacerdotal pupils—to proceed to Colombo and obtain the promised grant in his name, giving him Rs. 45 as the purchase money; but that the respondent, although undertaking the trust, fraudulently obtained the grant in his own name. He accordingly claims (i) a declaration that the grant was obtained by the respondent for and on his behalf, (ii) the execution by the respondent of a conveyance in his favour, (iii) Rs. 25 damages. The respondent traverses all the material allegations in the plaint, and alleges that it was he who had improved the land, and who had therefore obtained a grant of it from the Crown on payment of half the improved value.

The main point that I have to consider is, whether the appellant, not being a trustee of the Vihara, can maintain the present action at all. It is clear, as a matter of construction, and on authority also [see S. C. Mins., 5th March, 1900; S. C., 100 D. C., Colombo, No. 11,713*; and *Attadasi* v. *Piyadasi Unanse* (1900) 1 Browne 164] that under sec. 30 of the Buddhist Temporalities Ordinance, 1905, the trustee alone can sue for "the recovery of any property vested" in him by the Ordinance. The question therefore is, whether this is an action for the recovery of property so vested in the trustee. The learned Commissioner of Requests answered the question by implication in the affirmative. I think he was right. Mr. Bawa argued before me, with great ingenuity, that the action was merely one for alleged breach of contract by the respondent, and that a decision

**Vide* 1 A. C. R. p. 83.—Editors.

in his favour would still leave it open for the trustee to sue his client, by way of *rei vindicatio*, for the recovery of the subject matter of the grant. He further cited the case of *Ohlmus* v. *Ohlmus* [(1906) 9 N. L. R. 183] to show that such an action as the present should be regarded, not as one for the recovery of property, but as an action claiming a declaration of trust. I do not think that *Ohlmus* v. *Ohlmus* touches the real difficulty which the present appellant has to meet. Admittedly he sues as incumbent; and, whatever the form of the action may be, its subject matter is property alleged to belong to the Temple. But the appellant had no right to a grant of such property either in his own name or in that of the Temple. It is vested in the trustee by sec. 20 of the Ordinance of 1905. If a third party has fraudulently obtained a grant of it, an action by which it is sought to have him declared a trustee of the property for the Temple and compelled to execute a transfer of it to the Temple in pursuance of the trust is, in my opinion, an action for "the recovery" of the property within the meaning of sec. 30 of the Ordinance. If it is not such an action, it is, in any event, under the same section one for a "purpose requisite for the carrying into effect" of one of the objects of the Ordinance, viz., the vesting of property belonging to the Temple in the trustee. In either case, it is, under sec. 30, an action which trustee alone can institute. The circumstances under which parties "interested" in a Temple—other than as trustee or committee members—may take proceedings on the ground of misfeasance or breach of trust are defined in secs. 39 and 40. But the present case does not come under the category which they indicate. At the hearing itself the question of title to sue does not appear to have been very seriously argued by the appellant. In any case, his proctor moved for leave to add one Elias Appu as co-plaintiff, "he being the trustee appointed under the Buddhist Temporalities Ordinance, as stated by the defendant (respondent) at the first inquiry". The learned Commissioner rejected the motion on the twofold ground (i) that, as the appellant had himself no title to sue, he could not cure the defect by the addition to, or substitution for, his own name of a party who had an independent title; (ii) that there was no proof

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that Elias Appu was a duly appointed trustee of the Temple in question. In the result, I think that this decision is right.

Notwithstanding the case of *Walcott* v. *Lyons* [(1885) 29 Ch. D. 584] cited in 1 Pereira's Institutes, 208, and referred to by the Commissioner of Requests in his judgment, I think that, under sec. 13 of the Civil Procedure Code, the Court has power either to add, or to substitute parties for the purpose of securing an effectual adjudication upon the real questions at issue in an action; and to do this, even although there is some personal bar in the way of the original plaintiff—*Walcott* v. *Lyons* was decided under order 16 of the English R. S. C. r. 11—which dealt only with the striking out or addition of parties—Rule 2 of the same order, however, provides also for the substitution of parties where, owing to a *bona fide* mistake, an action has been commenced in the name of the wrong plaintiff, and, in later English decisions, effect has been given to this rule, both by addition [*Ayscough* v. *Bullar* (1889) 41 Ch. D. 341] and by substitution (*Hughes* v. *Rump House Hotel Co.* (No. 2) [1902] 2 K. B. 485) of parties, in spite of a personal bar affecting the original plaintiff. Sec. 13 of the Civil Procedure Code embodies the substance of Rule 2—not of Rule 11—of Order 16 of the English R. S. C., and I do not think that we ought to interpret it in any more restricted sense. If, for instance, it had been shown in the present case that a trustee of the Temple had been duly appointed, and that, by a *bona fide* mistake as to the requirements of the Buddhist Temporalities Ordinance, the appellant had sued in his own name, I see no reason why the trustee should not have been made a substituted party under sec. 13. But here there is no proof that Elias Appu was ever duly appointed trustee. The appellant in his evidence (record p. 32) says that no trustee had been appointed. It seems that when first the case came on for hearing the respondent's advocate stated that Elias was trustee. But this admission was impliedly withdrawn at the subsequent argument (see record p. 34), for there we find the respondent contending that there is no proof of Elias's appointment. Whether such an admission as I have referred to above would dispense with the necessity

of proof of the trustee's appointment is a matter, therefore, that I need not now consider. In my opinion, the present case has under the circumstances been rightly decided. I dismiss the appeal with costs. *Danchia* v. *Dissanchi*

DANCHIA *vs.* DISSANCHI.

No. 2,970, C. R., Matara.

Present: Wood-Renton, J.

Argument: 16*th May*, 1907.

Judgment: 4*th June*, 1907.

Registration Ordinance (No. 6 of 1866)—Admissibility of unregistered deed in evidence—Sec. 7 of Ordinance No. 6 of 1866.

Under sec. 7 of the Ordinance No. 6 of 1866 an unregistered deed bearing date prior to 1st February, 1840, cannot be received in evidence although both parties rely on it.

A trustee who has been vested with property many years after the conveyance in favour of one of the incumbents cannot take advantage of the first proviso to sec. 7 of the Ordinance No. 6 of 1866, as there is a real privity in representation between him and his predecessor in title.

Siriman v. *Abeygunawardena*, 9 S. C. C. 102, and the *Attorney-General* v. *Kiriya*, 3 N. L. R. 81, explained and distinguished.

The facts and arguments sufficiently appear in the judgment.

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

de Zoysa for defendant-respondent.

c. a. v.

Judgment.

Wood-Renton, J.:—The appellant instituted this action, as trustee of Thorawitta Temple, at Naramvelpitiya, claiming a divided portion of a land as part of the property of the Temple. At the trial three issues were framed: (1) was the land Sangika? (2) if it was so, would 30 years' prescription avail against Sangika property? and (3) who had been in possession for the last 30 years? In support of an

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affirmative answer to the first of these questions, the appellant produced a deed of 14th October, 1839, by which the land in question had been sold to Dama Rama Terunanse, then incumbent of the Temple, and "his descending heirs". By a deed of 15th October, 1871, in which the deed of 1839 is expressly recited, the same land was sold by Rewata Terunanse, a pupil of the Dama Rama Terunanse, to the husband of the respondent, and the respondent's contention was that on the basis of the deed she had acquired a prescriptive title to the property. The learned Commissioner of Requests refused to admit the deed of 1839 in evidence on the ground that it had not been registered under Ordinance No. 6 of 1866, sec. 7. He treated the case, therefore, as one in which the only issue between the parties was that of prescriptive possession; and on the facts he gave judgment in favour of the respondent. If he is right in his view of the law, I am not prepared to disturb his finding on the facts. Mr. Pereira contended, however, that the deed of 1839, on which the proof that the land in question was Sangika property would seem to depend, ought to have been admitted in evidence on the grounds (1) that it was relied upon by the respondent equally with the appellant as a foundation of title; (2) that there was no privity of estate between the appellant and Dama Rama Terunanse, inasmuch as the appellant had only been trustee of the Temple after a few months under the Buddhist Temporalities Ordinance; (3) that in any event the non-registration of the deed was a matter utterly beyond his control, and for which, in virtue of the first proviso to sec. 7 of the Ordinance of 1866, he ought not to be held responsible. The provision in sec. 7 of the Ordinance of 1866, that an unregistered deed bearing date before February 1st, 1840, shall not be "received in evidence", bars its admission even although both parties rely on it. It must be pointed out, moreover, that, in the present case, the respondent uses the deed of 1839 only as the starting point for prescriptive possession. It appears to me also that there is now a statutory privity, if not of estate, at least in representation between the appellant and Dama Rama Terunanse. Mr. Pereira's third point, however, requires more careful consideration. The first proviso of sec. 7 of the Ordinance of

1866 enables an unregistered deed to be received in evidence if it is established to the satisfaction of the Court that the non-registration was owing to "the absence from the Island of the holder thereof", or to "his being under some legal disability", or to "other causes utterly beyond the control" of the person producing it in evidence. Two decisions bearing directly on the construction of this proviso were cited to me in the argument. In *Siriman* v. *Abeygunawardena* [(1890) 9 S. C. C. 102], the defendant in order to prove that certain land was burdened with a *fidei commissum* produced an unregistered deed dated 1833, whereby the land was gifted to his father, subject to a *fidei commissum*, in favour of the donee's heirs. The donee, who had the deed in his possession, died in 1881, leaving the defendant and other children as his heirs. The defendant then got possession of the deed, and shortly after attained his majority. The District Judge held that the deed was inadmissible. The case came up on appeal before the Full Court. According to the head-note it was held both by Bonser, C. J., and Dias, J., that the failure to register the deed was from causes utterly beyond the defendant's control, and that it ought to have been admitted in evidence. It will appear, however, on reference to the judgments themselves, that the head-note goes too far. It was Burnside, C. J., alone who held in terms that the deed ought to have been admitted. Mr. Justice Dias merely said that perhaps the defendant might be able to prove that he was entitled to the benefit of the proviso in sec. 7. The order was to send the case for further hearing from that point of view, and Clarence, J., dissented from the judgment Moreover the *ratio decidendi* was explained by Lawrie, J., in the second of the two cases which I have referred to above —*Attorney-General* v. *Kiriya* [(1897) 3 N. L. R. 81)—in the following terms: "The person producing the deed" (*i.e.* the defendant) "showed that it was for the interest of the holder between 1866 and 1875 to withhold the deed from registration; if he had registered it, his right would have been plainly a limited right under a *fidei commissum*, whereas he pretended to be absolute owner, and as such he executed the mortgage which was the subject of that action. That then was a good cause why the deed was not registered;

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and the defendant's minority was a good reason why he did not force the registration by the procedure of the 6th sec. of Ordinance No. 6 of 1866."

In *Attorney-General* v. *Kiriya*, however, where the defendants sought to account for the non-registration of a *sannas* produced by them in evidence by proof that one Hapuwa, who, before his death, was very old, infirm, and blind for many years, kept secret the fact that he had the *sannas* in his possession until a few days before his death, it was held by Lawrie and Withers, JJ. (Browne, A.J., dissenting) that the cause shown for the non-registration was insufficient. I distinguish the present case from *Siriman* v. *Abeyagunawaradena* on the grounds that here there is a real privity in representation between the appellant and Dama Rama Terunanse, and no question of the existence of any legal disability arises. I think further that the case before me is a stronger one than *Attorney-General* v. *Kiriya*, inasmuch as here no cause of any kind for the original non-registration of the deed is shown. To admit it in evidence would be to reduce the provisions of sec. 7 of Ordinance No. 6 of 1866 in a very large number of cases to an absolute nullity.

I dismiss the appeal with costs.

MUDIYANSE *vs.* SELLANDYAR *et al.*

No. 2,493, D. C., KURUNEGALLE.

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

ARGUMENT: *28th & 29th May*, 1907.

JUDGMENT: *18th June*, 1907.

Improvements—Compensation—Right of lessee.

Where the lessees had effected certain improvements in a property leased and the lessor had transferred his rights to a third party,

Held: That the lessees were entitled to compensation for the improvement effected even as against the third parties.

The rules laid down in *de Silva* v. *Shaik Ali* (1 N. L. R. 228) in awarding damages for improvements followed.

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The plaintiff and the 6th defendant entered into a planting agreement with the 3rd, 4th, and 5th defendants, by which the latter leased their land to the former for 10 years. By this agreement the plaintiff and the 6th defendant were to plant the land with cocoanut trees and to expend all the necessary monies that were to be incurred, and at the end of the 10 years the land was to be divided into two—one-half was to be given over to the lessors, viz., the 3rd, 4th, and 5th defendants, and the other half was to be retained by the plaintiff and the 6th defendant. This lease was not registered. Subsequently the 1st and 2nd defendants bought the same land from the 3rd, 4th, and 5th defendants, registered their deed of sale, and ousted the plaintiff. This action was brought by the plaintiff, claiming for compensation for improvements effected by him to the land. The District Judge allowed the claim, and the 1st and 2nd defendants appealed.

vanLangenberg (with him *Schneider*) for defendants-appellant:—The principle that is followed in considering whether a claim to compensation is to be allowed or not is to regard the nature of the claimant's possession. If the claimant's possession is *bona fide*, then he is entitled, but not if his possession is *mala fide*. *Bona fide* possession is possession in the belief that the ownership is in the possessor, and *mala fide* possession is possession with the knowledge that the ownership is in some one else. Now, can it be said that a lessee like the respondent is a *bona fide* possessor? [WOOD-RENTON, J.: But is it not equitable that you should pay for the improvements?] No; why should we? We are innocent purchasers. We buy the land knowing nothing at all of the planting agreement, which is not registered. If that agreement were registered we should never have bought the land, or we would have paid a lesser sum than we actually did to our vendors. The respondents were negligent in not registering their lease, and it is equitable that they should suffer for their *laches*, and not we, who are innocent purchasers. The Roman Dutch Law is entirely in our favour. Authorities cited:—

Walter Pereira, vol. ii. p. 251.

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Voet 5. 3. 21.; 6. 1. 36.
vanLeeuwen (Kotze's Translation) vol. ii. p. 112, *n.*
Grotius 2. 10. 8, 9. & 11.
Appuhamy v. *Silva* (1 S. C. R. p. 243).

In estimating the compensation to be paid by us the District Judge has not followed the rules laid down in *Silva* v. *Shaik Ali* (1 N. L. R. p. 228).

de Sampayo, K.C., for the plaintiff-respondent :—Whatever the Roman Dutch Law may be as to *bona fide* possessors and *mala fide* possessors, the Ceylon Law looks upon a lessee from a different standpoint to that adopted in the Roman Dutch Law. By our law a lease is a *pro tanto* alienation. The respondent is a *bona fide* possessor, for the very improvements he effected were in conformity with the agreement between him and his lessors.

Muttiah v. *Clements* (4 N. L. R. 158), and *Appuhamy* v. *Silva* (1 S. C. R. 71) are authorities in my favour. The case of *Appuhami* v. *Silva* (1 S. C. R. 243) is a very short judgment, and no authorities seem to have been cited. The Supreme Court has allowed a lessee to maintain a possessory action.

VanderLinden, p. 283.
Perera v. *Sobana* (6 S. C. C. p. 61).
Banda v. *Hendrick* (1 A. C. R. p. 81).
Grotius (Maasdorp's Translation) p. 271.
Morice, pp. 71 & 72.

All these authorities prove that a lessee's possession is not under his lessor—in short he is a *bona fide* posssessor. At any rate we cannot follow the old Roman Dutch Law principle of *bona fide* and *mala fide* possession so far as a lessee is concerned. As regards the method in which the compensation has been calculated, there is ample evidence to support the District Judge's estimation.

vanLangenberg in reply.

JUDGMENT.

GRENIER, A.J. :—The only question argued before us on this appeal was, whether the respondents were entitled to compensation for improvements made by them and the 6th

defendant on the land called Welikandehenyaya, from which they have been ousted by the 1st and 2nd defendants, who claimed title under the 3rd, 4th, and 5th defendants. The District Judge has awarded respondents and the 6th defendant the sum of Rs. 2,000; and it was contended for the appellants that even if the respondents were entitled to compensation, the District Judge had not guided himself by the rules laid down in the case of *de Silva* v. *Shaik Ali* (1 N. L. R. p. 228) in arriving at the amount awarded.

The principle point sought to be made by Mr. vanLangenberg was that the respondents were not entitled to compensation because they had not made the improvements in question as owners, and he cited from Voet 5. 3. 21. and 6. 1. 36. in support of his contention. I think I am right in saying that the Roman Dutch Law as understood and administered in Ceylon does not limit the right to claim compensation to such persons only. The remedy is a purely equitable one, and it has been held by this Court in the case of *Muttiah* v. *Clements* (4 N. L. R. p. 158) that a lessee can, in certain circumstances, claim compensation for improvements. The present case is not exactly the case of lessor and lessee. The respondents are the lessees of the 3rd, 4th, and 5th defendants, and the 1st and 2nd defendants are their assigns, or to be more correct the respondents entered under a planting agreement with the 3rd, 4th, and 5th defendants, which was to run for a term of years, and under which certain reciprocal obligations were contracted. By the mere accident of the respondents not having registered their lease the 1st and 2nd defendants, who have registered their conveyance, have been able to maintain their title to the land as against the respondents, who at the date of the dispossession by the 1st and 2nd defendants were in *bona fide* possession of the same. I would emphasize the nature of their possession because it is an essential ingredient in all claims which the Roman Dutch Law recognises when awarding compensation in respect of *impensæ utiles* as distinguished from *impensæ necessariæ*.

Besides, it has been held by this Court that a lease is a *pro tanto* alienation, and that affords an additional ground in support of the present claim for compensation. It has

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been held by my brother Wood-Renton in the case of *Banda* v. *Hendrick* (Appeal Court Reports, p. 81) that a usufructuary mortgagee can maintain a possessory suit against his mortgagor, and that he has a sufficient beneficial interest in the property to constitute a possession *ut dominus*. It has been decided in the case of *Perera* vs. *Sobana* (6 S. C. C. p. 61) that even the lessee of an usufructuary mortgagee can maintain a possessory suit, and by analogy it is in my opinion competent for a lessee to maintain such an action. His right to do so may properly be based on the ground that he is the owner for the time being, or has such a beneficial interest in the property leased that he can successfully claim to be restored to possession in the event of his being dispossessed by a third party. The case of *Appuhamy* vs. *Silva* and another (1 S. C. R. p. 71) is a strong authority in support of the view I am taking. There Clarence and Dias, JJ., held that the right to retain possession of land until compensation is paid for improvements may be asserted by the party who has effected the improvements, not only as against the owner under whom he entered as a tenant, but as against those claiming title to the land on conveyance from such owner. The only difference between that case and the present one is that here the tenant is not in possession, having been dispossessed by the owners, vendees, or assigns; but that should make no real difference on the question of compensation when there has been a forcible ouster as in this case.

In the case of *Appuhami* vs. *Silva* (1 S. C. R. p. 243) which was decided by Burnside, C. J., and Withers, J., the two learged Judges were of opinion that neither by Kandyan Law nor Roman Dutch Law could a tenant retain leasehold premises against all the world till compensated for the benefit to the owner of the soil from improvements made by the tenant. In neither of the cases I have cited have any authorities from the Roman Dutch Law been referred to, and it goes without saying that the cases are directly in conflict with each other.

The balance of judicial opinion, however, as far as it can be discovered in decisions of the Appellate Court, is, I

think, in favour of the respondent's contention. It certainly seems inequitable to send the respondents away empty and leave the defendants in possession of the fruits of their labours simply because the respondents had not complied with the statutory requirements as to registration.

In cases where the law is doubtful, or is rendered uncertain and obscure by conflicting pronouncements, no better course can be followed than to apply the principles of natural justice and equity about which agreement cannot but be universal. As the District Judge in awarding damages has entirely overlooked the rules laid down in the case of *de Silva* v. *Shaik Ali* (1 N. L. R. p. 228), I would, whilst affirming his decree awarding compensation, send the case back with directions that the District Judge should ascertain, after applying the rules I have referred to, what compensation the plaintiff and the 6th defendant are entitled to and enter judgment for them accordingly. There will be no costs of this appeal. The costs in the Court below will be dealt with by the District Judge after he has determined the amount of compensation.

WOOD-RENTON, J.:—I concur on both points. On the question as to the measure of compenasation, I have nothing to add. But I desire to say something as to the right of compensation itself. It is quite true that there is a strain both of Roman Dutch (c. f. Voet 5. 3. 2., and 6. 1. 36; Kotze's vanLeeuwen ii. 112, *n*) and of Ceylon authority (*Appuhami* v. *Silva* (No.2) (1891) 1 S.C.R. 71) which supports Mr. vanLangenberg's argument that no common law right to compensation could arise in such a case as the present. But the weight of recent decisions here, as my brother Grenier has shown, is on the other side; and I am inclined to think (see Nathan ii. 378,379) that South African authority supports it also. As to the equitable right of the respondents to relief, there can be no question. The view taken by the 3rd, 4th, and 5th appellants of the value of the work that the respondents were doing is evidenced by the fact that under the planting agreement of 1900 it gave the latter a right, not only to the produce while the plantations was going on, but to a definite share of the land when it was completed.

Velupillai v. Sivakamipillai

VELUPILLAI *vs.* SIVAKAMIPILLAI *et al*

No. 488 (Testy.) D. C., Batticaloa.

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

27th June, 1907.

Will—Due attestation—Ordinance No. 7 of 1840, *sec.* 3.

The word "attest" does not necessarily mean that the witness is to write down anything in the document to the effect that he subscribes as a witness; but if it is shown that in fact he did sign and did witness the signature which he is attesting, that would be sufficient due attestation.

In this case the appellant's husband died on the 13th January, 1907, and the respondent (petitioner) produced a paper writing purporting to be the deceased's last will, also dated 13th January, 1907, and applied for probate. The appellant opposed the application on the ground that under clause 3 of Ordinance No. 7 of 1840 a will attested by two witnesses and a Notary the witnesses are required to "attest", and not merely to "subscribe", as in the case of wills executed before five witnesses only, and that therefore some form of alteration was necessary; but that as there was no such attestation by the two witnesses to the will in question it was bad in law. The learned District Judge held that the will was duly attested, and the respondent to the application (*i. e.*, the wife of the deceased) appealed.

Walter Pereira, K.C., S.-G. (with him *Wadsworth*) for appellant.

de Sampayo, K.C. (with him *Balasingham*) for respondent.

Judgment.

Middleton, J.:—This is an appeal by the widow and children of a deceased testator who opposed the grant of probate applied for by the respondent executor here. Probate was duly granted to the executor, and the widow and children, now represented by the Solicitor-General, appeal.

The simple question in the case we are informed is

whether the witnesses, who, although they subscribed to the will as witnesses in the presence of the testator and in presence of each other, should have stated in writing on the will that they did so subscribe, or had it stated therein by any clerk or other person for them that they duly attested the will. It is contended that the attestation must be shown by some form of words in conjunction with their signature, and we have been referred to the definition of the word "attest" and "attestation" given in Stroud's Judicial Dictionary. One definition of "to attest" is "to bear witness to the fact". It does not necessarily mean that the witness is to write down anything in the document to the effect that he subscribes as a witness; but if it is shewn that in fact he did sign and did witness the signature which he is attesting, that would be sufficient due attestation.

In my opinion the appellant would not be entitled to succeed on the ground suggested by the learned Solicitor-General; and as I understand this is the only ground of appeal, I think this appeal should be dismissed with costs.

GRENIER, J.—I agree.

SUPPLEMENT

TO THE

APPEAL COURT REPORTS.

PEIRIS *vs.* WIJETUNGE.

No. 1,924, P. C., Colombo.

8*th January*, 1907.

Criminal Procedure Code, sec. 152 (3) *—Powers of a Police Magistrate who is also Additional District Judge.*

The accused was charged under sec. 391 of the Ceylon Penal Code with criminal breach of trust. The Police Magistrate, who was also Additional District Judge, tried the case summarily in his capacity as District Judge, purporting to act nnder sec. 152 (3) of the Criminal Procedure Code.

Held, per Grenier, A. P. J.:—That the offence with which the accused was charged being one which was triable either by a District Court or a Police Court, the Magistrate could not act under the provisions of sec. 152 (3) of the Criminal Procedure Code, as that section clearly contemplates cases which are triable by the District Court, and not either by the District Court or the Police Court, for it expressly excludes the latter.

MAHALLAM *vs.* APPUHAMY.

No. 3,647, C. R., Galle.

15*th January*, 1907.

Prescription—Ordinance No. 22 *of* 1871 *—Evidence of possession.*

Held, per Wendt, J.:—That where the possession of the mortgagee, which enures to the benefit of the mortgagor and his representatives, is supported by documentary evidence of the payment of paddy tax on the land, such evidence entitles the person proving it to a decree under the Prescription Ordinance.

PERERA *vs.* SILVA.

No, 8,290, P. C., Colombo.

15*th January*, 1907.

Maintenance of wife—Lapse of time.

Where a wife had not preferred a claim against her husband for maintenance for over 20 years,

Held, per Middleton, J.:—That the right of a wife to claim maintenance from her hnsband is not barred by lapse of time.

BLACKER *vs.* ALLIAR.

No. 11,045, M. C., Colombo.

15*th January*, 1907.

Over-crowding in a building - Liability of a lessee—Ordinance No. 3 *of* 1897, *sec.* 7 (1), *and Regulation* 26.

The defendant, who occupied a building on rent, was charged with neglecting to comply with the requirements of a notice issued in terms of Regulation 26 of Ordinance No. 3 of 1897, and ordering the departure from a building of the persons in excess of the nnmber, which, in the opinion of

e proper authority, should be found
relling there, and thereby having
mmitted on offence under sec. 7 of
e said Ordinance. He was found
ilty and sentenced to pay a fine.
appeal,

Held, per MIDDLETON, J.:—Sec. 26 the Regulations enacted under Ordinance No. 3 of 1897 makes the *owner* the building only guilty of the ence in contravention of it.

The word "found" in Regulation 26 plies the meaning of "found to be relling there"; but that if a number different persons each night slept a room in excess of the number emed to be the proper number by e Medical Officer, there would be an fringement of the bye-law by the ner who permitted such act.

KOMALIE *vs.* DURAYA *et al.*

No. 14,198, C. R., KANDY.

23*rd January*, 1907.

ndyan marriage—Diga—*Inheritance.*

Held, per WENDT, J.:—That although a woman going out in *diga* ntracted no legal marriage, it would ork a forfeiture of her paternal inritance.

Kalu v. *Howwa Kiri* (2 C. L. R.,) followed.

RATWATTE *vs.* PERERA.

No. 9,906, D. C. (Inty.), KANDY.

23*rd January*. 1907.

rder of abatement—secs. 402 *&* 403, *Civil Procedure Code.*

Held, per WENDT & MIDDLETON, J.:—That an application to set aside order of abatement passed under c. 402 of the Civil Procedure Code ust be after notice to the adverse rty.

Sec. 403 expressly confers on a judge the power of vacating an order of abatement passed under sec. 402.

RANBANDA *vs.* YATAGAMA *et al.*

No. 2,017, D. C. (Inty.), KEGALLE.

23*rd January*, 1907.

Partition—Ordinance No. 10 *of* 1863, *sec.* 2—*Survey plan.*

Held, per WENDT & MIDDLLETON, JJ.:—That the decision in *Sedohami* v. *Mohamado Ali* (7 N. L. R., 247) is not binding in every case of partition. The judge must use his discretion.

The words "particularly describing the property" in sec. 2 of the Partition Ordinance do not mean that the only way to satisfy the requirements of the section is the description by survey plan.

PILLAI *vs.* GNANAPRAKASAM.

No. 24,183, P. C., MALLAKAM.

24*th January*, 1907.

Criminal Procedure Code, sec. 81—"*Receiving information.*"

Held, per MIDDLETON, J.:—That a Magistrate in course of an investigaf tion into a crime finds that there are circumstances disclosed justifying him in calling on a man to enter into security, that would be a case in which he received information within the meaning of sec. 81 of the Criminal Procedure Code.

Kulanthaivelu v. *Kathirithamby* (4 Tambyah 8) followed.

BANDA *vs.* AROMOGAM *et al.*

No. 1,765, P. C., COLOMBO.

24*th January*, 1907.

Evidence of a co-accused—Evidence Ordinance, sec. 30

Where two persons were jointly

charged for the same offence and the trial as against one of them having been concluded and sentence passed on him, his evidence was then admitted as against the other accused.

Held, per WENDT & MIDDLETON, JJ.:—That such evidence was admissible. Sec. 30 of the Evidence Ordinance applied only to cases where the accused were *being tried* jointly.

IBRAHIM *vs.* KATHIRESU.

No. 4,801, P. C., RATNAPURA.

28*th January*, 1907.

Penal Code, 266—*Supplying noxious food.*

Where a person without disclosing his principal supplied rice which was noxious as food,

Held, per MIDDLETON, J.:—That such a person was guilty of selling noxious food within the meaning of sec. 266 of the Ceylon Penal Code.

MARIKAR *vs.* KIRA.

No. 7,096, C. R., KEGALLE.

31*st January*, 1907.

Prescriptive possession—Nature of—Possession by heirs.

Per WENDT, J.:—Non-possession or rather non-enjoyment by a person having the title, however long continued, will not deprive him of that title, unless some one else affirmatively possesses adversely to him and acquires a prescriptive title.

The possession of heirs, however, would no doubt create a prescriptive right in the estate which they represent (or in the administrator when such is appointed) as against outsiders claiming adversely to the intestate. This is a distinction which must not be lost sight of (see D. C., Colombo, No. 21,793, S. C. M., 5th June, 1906).

PALANIAPPA *vs.* CADERAVALO.

No. 2,092, D. C., KEGALLE.

8*th February*, 1907.

Promissory note—Action by endorsee against maker—Payment by maker to payee—Holder in due course.

Held, per WENDT & MIDDDETON, JJ.:—That every holder of a bill is *prima facie* deemed to be a holder in due course.

An endorsee from a payee cannot sue the maker if he knows that consideration has failed between the maker and the payee.

Even partial failure of consideration is not a defence against a remote party who is a holder for value.

In re the Estate of the late

HERAT MUDIYANSELAGE PUNCHI BANDA, deceased.

No. 2,313, D. C. (Inty.), KANDY.

8*th February*, 1907.

Kandyan Law—Intestacy.

Held, per WENDT & MIDDLETON, JJ.:—That a *diga* married father of an intestate dying without issue is entitled to inherit, before the uterine half sisters and brother of his deceased mother, the property derived from his mother, which she in turn inherited from her father.

In re the Application of A. A. NAGOOR MEERA for a Mandamus on the Chairman of the Municipal Council of Colombo.

12*th February*, 1907.

Courts Ordinance No. 1 of 1889, sec. 46—Secs. 5 & 7, Butcher's Ordinance No. 9 of 1893.

Held, per MIDDLETON, J.:—That sec. 7 of the Butcher's Ordinance No. 9

of 1893 gives the Chairman of the Municipal Council a discretion in issuing a butcher's license, and if he will not act or even consider the matter the Court can compel him to put himself in motion to do so; but it cannot control his discretion.

DEONIS *vs.* GEMERIS.

No. 4,283, P. C., KALUTARA.

15*th February*, 1907.

Criminal Procedure Code, sec. 437—*Order for compensation—Procedure.*

Held, per MIDDLETON, J.:—The Legislature imposes no obligation upon a Magistrate to call upon the person about to be punished under sec. 437 of the Criminal Procedure Code to shew cause against the order about to be made.

Goonesakera v. *Dines Appu* (2 Bal. 69) followed.

Tidoris v. *Carolis* (4 N. L. R., 324) overruled.

DE MEL *vs.* SILVA.

No. 5,131, P. C., RATNAPURA.

18*th February*, 1907.

Criminal Procedure Code, sec. 80—*Mischief—sec.* 408, *Penal Code—Binding over to keep the peace.*

Held, per MIDDLETON, J.:—That entering a house of another and breaking things in it is mischief, and is an offence such as would make others break the peace, and thus involves a breach of the peace; therefore a person convicted of such an offence can be bound over to keep the peace.

MUDIANSE *vs.* MOHIDEEN.

No. 8,082, P. C., KANDY.

18*th February*, 1907.

Theft—Dishonestly possessing oneself of property in the possession of another.

The accused was charged with theft of a ten-rupee note. In defence he stated that he took the note back from the complainant in the *bona fide* belief that it was his property which he overpaid to the complainant.

Held, per MIDDLETON, J.:—That if the property is in the possession of a complainant in such a way that he had a right to hold it against the accused, that is, that the accused could not get it without the consent of the complainant, then it is theft if the accused possessed himself of it with the intention of appropriating it.

PONNIYAH *vs.* RUGU LEBBE *et al.*

No. 17,343, D. C. (INTY.), KANDY.

20*th February*, 1907.

Action for declaration of title to land—Notice on vendor to warrant and defend title—Procedure.

A person sued for a declaration of title to land, and moved for a summons on his vendor, who was not a party to the action, to warrant and defend his title.

Held, per WENDT & MIDDLETON, JJ.:—That a vendor whose title is attacked can call upon his vendor by notice to co-operate in repelling the attack, but there is however no warrant for asking the Court to issue such a notice: it must be done by the plaintiff or his legal advisor.

SUPPLEMENT TO THE APPEAL COURT REPORTS.

KANAPPA CHETTY *vs.* PUNCHI BANDA.

No. 15,718, D. C., KANDY.

14th February, 1907.

Civil Procedure Code, sec. 780—Application for certificate for leave to appeal to the Privy Council.

Held, per WENDT & MIDDLETON, JJ.:—That the period of two calendar months within which an application for a certificate must be made must be reckoned from the date when the judgment on appeal was pronounced, and not from the date the order passes the seal of the Court.

BLISS *vs.* SAUDAIC.

No. 38,416, P. C., GAMPOLA.

28th February, 1907.

Labour Ordinance No. 11 of 1865—Prosecution for desertion—Bar on the ground of "staleness".

The complainant charged the accused with deserting his services. The offence was committed on the 23rd April, 1904, and the prosecution entered on the 12th December, 1906. The Magistrate acquitted the accused on the ground that the prosecution was stale. On appeal,

Held, per WENDT, J.:—That the fact that a complaint was not lodged within what the Court considers a reasonable time of the commission of the offence is no reason why a deserting labourer cannot be punished for an offence of which he is guilty.

Such delay would justify the refusal of a warrant in the first instance, but the same objection would not apply with equal force to a summons.

VYRAVEN CHETTY *vs.* CANNY SAIBO.

No. 22,564, D. C. (INTY.), KANDY.

1st March, 1907.

Sequestration before judgment—Seizure of same by other creditors—Sale—Claim of person who sequestered for upkeep of property—Preference—Secs. 653, 657, 352 & 227 of the Civil Procedure Code.

Where a plaintiff in a case sequestered the property (cattle) of his defendant before judgment and expended money for its maintenence, and where other creditors obtained judgment before him and seized and sold the property,

Held, per WENDT & MIDDLETON, JJ.:—That secs. 227, 352 & 657 of the Civil Procedure Code are so framed as to permit of the expenses of the person who sequestered the property being made a first charge before rateable distribution.

Quaere [WENDT, J.]:—Whether the expenses could have been avoided by sale "at once" as provided in sec. 227.

That section seems to refer to cases of property seized in execution.

LERENSU APPUHAMY *vs.* WAAS *et al.*

No. 6,464, D. C., NEGOMBO.

6th March, 1907.

Partition—Purchaser at Fiscal's sale under a mortgage decree—Validity of mortgage and decree thereunder.

In a partition action instituted by the purchaser of a share of a property at a Fiscal's sale held under a mortgage decree the defendants pleaded that the plaintiff had no title, inasmuch as the mortgage was bad even though

the sale had been confirmed by Court and Fiscal's conveyance had been obtained.

Held, *per* HUTCHINSON, C. J., & WENDT, J.:—That it was not competent for the defendant in the present case to impeach the mortgage decree and the steps by which the Court conferred the transfer of the property to the plaintiff, nor is it competent to the District Court to decide that the previous decrees and orders in the plaintiff's action against the defendants were bad.

PALANIAPPA CHETTY *vs.* PLESS POL.

No. 23,189, D. C., COLOMBO.

7th March, 1907.

Warrant of arrest—Re-arrest after release—Secs. 298 *&* 837, *Civil Procedure Code.*

Held, *per* HUTCHINSON, C. J., & WENDT, J.:—That a person released from prison on special circumstances being shewn under sec. 837 of the Civil Procedure Code may be re-arrested on the creditor showing that the special cause for the release no longer exists. It is not necessary to shew cause for the arrest under sec. 298 of the Code.

The imprisonment must be considered as if it had not been interrupted.

DE SILVA *vs.* ABEYSEKARE.

No. 8,396, C. R., GALLE.

11th March, 1907.

Refund of deposit money—Failure to shew title—Liability of seller.

Held, *per* HUTCHINSON, C. J.:—That the failure of the seller to shew title is a good ground to ask for refund of deposit money.

VALUPILLAI *vs.* SINNA TAMBY.

No. 41,890, P. C., JAFFNA.

18th March, 1907.

Action by a lessee of stalls in a public market—Ordinance No. 19 *of* 1891, *secs.* 12 *&* 17.

The complainant as a lessee of the stalls in a public market complained that the defendant committed an offence under sec. 12 of Ordinance No. 19 of 1891, by occupying space in the market other than the space specified in sec. 4 without a permit. It was objected that the complainant had no status under sec. 17.

Held, *per* HUTCHINSON, C. J.:—That sec. 17 does not say or mean that no legal proceedings under the Ordinance shall be brought except by the committee through its Chairman; all it says is that any legal proceedings by the committee shall be in the name of the Chairman.

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* RABOT *vs.* DE SILVA *et al.*

[IN REVIEW]

No. 14,923, D. C., COLOMBO.

18th March, 1907.

Effect of a judgment of three judges—Secs. 41 *&* 42 *of the Courts Ordinance—Marriage between persons who have lived in adultery—Can they take under each other's wilt—Evidence of paternity of a child of a married woman—Sec.* 112 *of Evidence Ordinance.*

Held, *per* HUTCHINSON, C. J., WENDT & MIDDLETON, JJ.:—That the Supreme Court, whether hearing an original appeal or sitting in review, should consider itself bound by a decision upon a question of law of a

* See 8 N. L. R. 82.

three-judge bench, whether pronounced before or after the Ordinance of 1901 became operative and whether upon an original appeal or sitting in review, provided it appears that the law and the existing decisions of the Court have been duly considered before the three judges arrived at their decision. If, however, it were made clear that the decision in question was founded on manifest mistake or oversight, that would be an exception to the rule.

Three judges sitting together are invested with the highest function of the Court, viz., the hearing in review and the full bench of four judges should not be considered as possessing the power of overruling the decision of three judges in any matter.

Sec. 112 of the Evidence Ordinance does not prevent evidence being led to shew that the husband had no access to his wife.

In *Sopi Nona v. Marisyan* (6 N. L. R. 379) all that was meant was that it must be shewn affirmatively that it was impossible for the man to have access to the woman consistently with the facts proved, and not merely inferred as a probability. Under our Evidence Ordinance the evidence of the husband and wife can be admitted on the question of non-access.

A man who has lived in adultery with a woman during the lifetime of his wife may marry such a woman after the death of his wife.

(*Karonchihamy* v. *Angohamy* 8 N. L. R., 1 followed).

Such parties may take under each other's wills or *ab intestato.*

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* *re* ESTATE OF SUNDARA decd.

[In Review.]

No. 2,016, D. C. (Testy.), Kandy.

18th March, 1907.

Kandyan Law—acquired property of intestate—Right of illegitimate children thereto.

A Kandyan died intestate possessed of "acquired" landed property, and he was survived by a widow, a sister, and two illegitimate children, borne him by a woman during the subsistence of his marriage with his lawful wife.

Held, per Hutchinson, C. J., & Wendt J. (Middleton, J., *dissentiente*): That the illegitimate children are entitled to inherit the acquired property of the father subject to the widow's life interest, to the exclusion of the sister.

Where a man leaves both legitimate and illegitimate children, his acquired property is shared between them, each branch taking a moiety.

Held, per Middleton, J.:—That the right of illegitimate children to succeed to their father's acquired property depends (1) on the caste of their mother, and (2) on the circumstances attendant on the relationship between the mother and the father.

If the mother, acknowledged and maintained as a concubine, was of equal caste, such concubinage was taken to be a marriage, and the offspring had the privilege of legitimate children.

If the woman, though of inferior caste, was taken into the man's house and treated like and acted as a wife, then, if there were no widow and legitimate children, her children succeeded to the acquired landed property of the father.

A legal widow would in either case bar the vesting of the *dominium* until her death.

But if the woman was of inferior caste and was not taken into the man's house nor acknowledged but simply visited elsewhere as mistress, her offspring would not succeed to the acquired landed property of the father.

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* See 7 N. L. R. p. 364.

SUPPLEMENT TO THE APPEAL COURT REPORTS.

LIPTON *vs.* BUCHANAN and FRAZER.

No. 14,621, D. C., Colombo.

28th March, 1907.

Agreement not to sue—Partnership debt—Payment of portion of debt by one debtor—Right of creditor to sue both debtors for batance moiety—Causa—*Consideration.*

In the case of a debt due by a partnership business, where the creditor agreed in writing, in consideration of having been paid one-half of the debt due, not to sue one of the debtors for the balance till every possible means of recovery against the other was exhausted, and where an action was instituted against both debtors for balance moiety,

Held, per Hutchinson, C.J., Wendt & Middleton, JJ.:—That the question whether such an agreement was valid in law was to be decided by the Roman Dutch Law.

According to the Roman Dutch Law the agreement was supported by sufficient *causa*, and was binding.

The word *causa* is not synonymous with the word "consideration" in the English Law, but has a wider significance.

MARIKAR *vs.* AMARIS APPU.

No. 2,179, C. R., Colombo.

25th March, 1907.

Tenancy—Action for use and occupation.

Per Wood-Renton, J.:—An action for use and occupation will not be good unless there has been a contractual relationship, either express or—as in the case of a tenancy by sufferance—implied between the parties.

SINGHO APPU *vs.* WIJEYSINHE.

P. C. Avisawella.

26th March, 1907.

Criminal trespass—Penal Code, sec. 437.

Held, per Hutchinson, C. J.:—It is not a criminal offence under sec. 437 of the Penal Code merely to enter into possession of land in occupation of another. It must be proved that the entrance was with intent to intimidate or insult or annoy the person in occupation.

1 S. C. R. 77 followed.

ALAGAMA *vs.* LAMA ETENA *et al.*

No. 5,087, C. R., Avisawella.

26th March, 1907.

Jurisdiction—When should plea to jurisdiction be taken—Action for declaration of title—Value of land in question—Civ. Pr. Code sec. 93.

Held, per Wood-Renton, J.:—That in cases where there is a conflict as to title to land the jurisdictional value is the value of the land in dispute.

Held, also, that an objection to jurisdiction though not taken in the answer can be allowed at the trial under sec. 93 of the Civil Procedure Code.

NAIDE *vs.* PERERA.

No. 12,101, C. R., Chilaw.

6th April, 1907.

Contract—Damages for breach—Return of purchase money—Arrhæ.

Where part of the purchase money was paid on a parol agreement for the purchase of certain land, and where the agreement failed on a dispute as to the terms,

Held, per Wood-Renton, J.:—That the intending purchaser was entitled to recover the deposit made by him.

Gregoris v. *Tillekeratne*, 2 C. L. R. 191, followed.

SUPPLEMENT TO THE APPEAL COURT REPORTS.

GOONETILEKE *vs.* PUNCHI SINNO *et al.*

No. 29,835, P. C., BALAPITIYA.

28th March, 1907.

Keeping a house for gaming—Jurisdiction - Ordinance No. 17 *of* 1889, *sec.* 5(*a*)—*Ordinance No.* 4 *of* 1889, *sec.* 24.

Held, per HUTCHINSON, C. J. :—That the act of an owner or occupier using his house as a gaming house is not an offence triable by a Village Tribunal.

GOONETILEKE *vs.* SARAMMA.

No. 29,828, P. C., BALAPITIYA.

6th April, 1907.

Gaming—Jurisdiction—Ordinance No. 4 *of* 1889, *secs.* 53(*a*), 28 & 34—*Ordinance No.* 17 *of* 1889, *sec.* 4.

Held, per WOOD-RENTON, J. :—That the offence of unlawful gaming is an offence over which Village Tribunals have exclusive jurisdiction.

Sec. 34 of the Village Tribunals Ordinance (No. 17 of 1889) does not make the residence of the parties the test of exclusive jurisdiction.

The first proviso to sec. 28 makes the *locus delecti* the test of ordinary jurisdiction in criminal cases.

TILLEKERATNE *vs.* de SILVA.

No. 3,804, D. C., MATARA.

10th April, 1907.

Fidei Commissum.

A joint last will, which was in Singhalese, gave the survivor of the spouses a usufruct in the whole estate, and contained the following clause :—

"And we have hereby determined that at the death of each survivor, whilst possessing only the issues, rents, and profits of this estate, all the said properties and his debts and credits, if any (the Singhalese words are : *ekakara kotaswasayen ayitikaradena hetiyata niyama karanta yaduna,*) shall equally devolve on all the children that we now have and those we may hereafter get or any such of them who may then be living, and that the said children cannot either sell, gift, or mortgage the properties which they shall so receive, and that the same shall devolve on their children and grand-children unto generations."

Held, per WENDT & MIDDLETON, JJ. :—That the devise to the children was subject to a single *fidei commissum* of the entire estate to the devisees jointly, with benefit of survivorship and substitution of their decendants.

MENDIS *vs.* DE MEL.

No. 7,585, C. R., PANADURE.

11th April. 1907.

Contract by a married woman—Husband's liability.

Held, per WENDT, J. :—That a husband is liable to be condemned with his wife for the value of jewellery borrowed by her if she has made the contract with his authority, either express or implied.

PLESS POL & SHATTOCK *vs.* DE SOYSA.

No. 17,549, D. C., KANDY.

24th April, 1907.

Assignment of an action—Substitution of assignee—Sec. 404, *Civil Procedure Code—Roman-Dutch Law*—Litis contestatio.

Where a person sued another for

damages due to a breach of contract and the plaintiff assigned his interest in the action, pending the action, to a third party, who moved to be substituted as plaintiff,

Held, per HUTCHINSON, C. J., & GRENIER, A. P. J.:—That sec. 404 of the Civil Procedure Code overrides the Roman-Dutch Law, and gives the Court power to allow the assignee to be added or substituted as a party at any time pending the action, and the Court ought to do so when it appears convenient and possible without prejudice to the other party,

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CORNELIS *vs.* ENDORIS.

No. 5,674, C.R., BALAPITIYA.

22nd April, 1907.

Impensæ utiles—Mala fide *possessor.*

Held, per MIDDLETON, J.:—That a *mala fide* possessor is not entitled to compensation for *impensæ utiles.* [*General Ceylon Tea Estates Co., Ltd.* v. *Pulle* (9 N. L. R. 98) followed.]

Nathan (Vol. 1 page 378) lays it down that after demand the *mala fide* possessor cannot remove the materials, and can then only claim the amount expended by him for necessary improvements. This appears to have been ruled in *De Beers Consolidated Mines* v. *London and South African Exploration Co.* (3 C. T. R. 438; 11 C. L. D. 41; 10 S. C. 359, quoted at page 379 of Nathan).

This ruling seems consistent with right reasoning and justice, and would be followed on proof of demand made or action brought before the materials were put on the land *mala fide* possessed.

If a *mala fide* possessor deliberately proceeds to affix or place materials on a land after a demand made to him by a person claiming to be the rightful owner, he ought not to complain if his materials should enrich the real owner of the property at his expense.

SAUNDERS *vs.* BEVEN.

No. 26,615, P. C., CHILAW.

3rd May, 1907.

Gun license—Firearms Ordinance (No. 14 of 1906) sec. 4.

Held, per WOOD-RENTON, J.:—The transferee of a gun for which a license had already been obtained is bound to take out a fresh license for it himself.

This duty clearly results from the provision in sec. 4 of the Ordinance of 1906, that no person "shall possess or use any gun without first having obtained a license therefor".

FERNANDO *vs.* SILVA.

No. 4,413, P. C., KALUTARA.

3rd May, 1907.

Labourer—Ordinance Nos. 13 of 1889 and 7 of 1890.

Held, per GRENIER, A. P. J.:—The provisions of Ordinances Nos. 13 of 1889 and 7 of 1890 do not apply to a Singhalese labourer.

To bring Singhalese labourers under the law which makes them liable to punishment if they quit service without giving notice, it is necessary for the employer to enter into a distinct verbal or written contract with each man, who, in consideration of work to be given and of wages to be paid, contracts to serve month after month, until he terminated his service by due notice.

P. C., Matale, 9,111, S. C. Minutes, 25th March, 1890, followed.

SUPPLEMENT TO THE APPEAL COURT REPORTS.

KANAPATHI PILLAY *vs.* ALIYAR SALY.

No. 24,718, D. C., Batticaloa.

3rd May, 1907.

Theft—Attempting to kill stolen animal—Penal Code, secs. 280, 412 & 490.

The accused was charged with the theft of a bull under sec. 368 of the Penal Code, and convicted. In the course of the trial facts were disclosed which pointed to the accused having also committed an offence under secs. 412 and 490 of the Penal Code in attempting to kill the bull.

Held, per Wood-Renton, J.:—That as the evidence disclosed an offence not triable summarily, the Magistrate should not have tried the accused for the lesser offence of theft, but should have taken non-summary proceedings against him.

Sereneris v. *James* (5 N. L. R. 93) and *Baiya* v. *Nikulas* (1 A. C. R. 50) followed.

PERERA *vs.* ABEYSEKERE *et al.*

No. 3,451, P. C., Colombo.

3rd May, 1907.

Security for keeping the peace—Criminal Procedure Code, secs. 80, 81, 82 & 83.

The four accused in this case were charged with causing hurt to the complainant. Two of them were acquitted by the Magistrate at the close of the case for the prosecution; but subsequently, when the Magistrate sentenced the other accused whom he found guilty, he bound over the men acquitted to keep the peace for a period of six months.

Held, per Grenier, A. P. J.:—The acquittal of the two men meant that they were law-abiding subjects, and that they were innocent of the charge preferred against them. The provisions contained in secs. 80, 81, 82, and 83 of the Criminal Procedure Code cannot possibly be made to apply to the present case.

Although no appeal lies from an order such as this, as it is not final in its nature and effect, it is competent for the Supreme Court to deal with it by way of revision.

FAKURDEEN & Co. *vs.* SUPPRAMANIAN CHETTY.

No. 2,026, C. R., Colombo.

4th May, 1907.

Civil Procedure Code, sec. 232—*Seizure of property in custody of a Court—Adjudication of claims.*

Where money (Rs. 300 deposited as bail) in the hands of a Police Magistrate was seized under writ issued from the District Court and claimed, and the claim disallowed, and where the unsuccesful claimant instituted an action in the Court of Requests with the same object,

Held, per Wood-Renton, J.:—That as the money seized was in the hands of the Police Magistrate, questions of title or priority between a judgment-creditor and any other person not being the judgment-debtor, and claiming to be interested in such property, should be determined by the Police Magistrate in terms of sec. 232 of the Civil Procedure Code.

The word "Court" in sec. 232 of the Civil Procedure Code includes a Police Court.

APPUHAMY *et al vs.* PUNCHIRALA *et al.*

No. 9,093, P. C., Badulla—Halduмulla.

6th May, 1907.

Evidence—Admissibility of proceedings in a case as evidence in another case

Held, per Wood-Renton, J.:—That

evidence given in a distinct although practically contemporaneous case cannot, even if the accused assented, be incorporated into the proceedings of another case as evidence against him.

Queen v. *Juse Tissera* (1 N. L. R. 108), *Elan Karte* v. *Valupulle et al*, P. C., Jaffna, 504 (Leembruggen's Supreme Court Decisions, p. 59) followed.

RANASOORIYA *vs.* DE SILVA.

No. 7,718, D. C., GALLE.

8th May, 1907.

Evidence - Identification of documents —Evidence Ordinance, sec. 63, *cl.* 5.

Held, per WOOD-RENTON, J., & GRENIER, A. J. :—That it is perfectly competent for a witness to identify a document and give its contents if he had seen it and heard its contents disclosed.

If it is clear that if he has not read the document himself there will be ample room for comment as to the weight of his testimony, but it does not affect the admissibility of the evidence.

NOURI *vs.* SAMSEDEEN *et al.*

No. 1,507, D. C. (Cr.), COLOMBO.

9th May, 1907.

Witnesses – Duty of the prosecution.

Held, per WOOD-RENTON, J.:—That the prosecution does not necessarily discharge the burden imposed upon it merely by tendering witnesses to the Court. It is incumbent on it to put before the Court all the material evidence at its disposal, and this duty is particularly insistent when there is any room for the suggestion that the witnesses who are not called would contradict the testimony of those who are called.

A judge is entitled to draw an inference adverse to the prosecution from the fact that witnesses called at the Court of first instance were not examined at the trial.

PERERA *vs.* PERERA.

No. 13,431, C. R., NEGOMBO.

11th May, 1907.

Decisory oath—Failure to take—Procedure—Ordinance No. 9 *of* 1895.

Held, per WOOD-RENTON, J.:—That under the Oaths Ordinance (of 1895) a judge has no power on a party's failiure to take the oath to enter judgment in favour of the other party; but it is his duty under sec. 9 (4) of the Ordinance to record the fact of the default and then to put the other party to proof of their claim in the usual way, unless he has been estopped from doing so by his conduct.

Sinnetamby v. *Vallinatchy* (10 N. L. R. p. 62); *Lyanohamy* v. *Cardlio Appu* (4 N. L. R. 78); *Banda* v. *Banda* (1 Tamb. 35) followed.

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

No. 5,639, C. R., BALAPITIYA.

14th May, 1907.

Delivery of possession of immovable property—Delivery of deed of transfer.

Held, per GRENIER, J.:—That the law is that the delivery of a deed of transfer of immovable property is delivery of possession. It is only a symbolical delivery, but neverthless as effectual in law as actual delivery by placing the vendee in physical possession.

SUPPLEMENT TO THE APPEAL COURT REPORTS.

AMARIS *et al vs.* ANDRIS.

No. 3,331, C. R., PASYALA.

7th May, 1907.

Misjoinder of parties—Civil Procedure Code, sec. 22.

Held, per GRENIER, A. J.:—That the misjoinder of parties is not an objection that should be allowed to be taken in a special appeal, but that it should be taken at the earliest possible opportunity and before the first hearing.

WOLFF *vs.* RAMASAMY *et al.*

No. 7,185, P. C., KAYTS.

14th May, 1907.

Stolen property—Confiscation.

The accused was charged with dishonestly retaining a stolen currency note of the value of Rs. 50 knowing or having reason to believe the same to be stolen. The Magistrate acquitted the accused, but ordered the note to be confiscated on the ground that the accused's Counsel admitted that the note was a stolen one.

Held, per GRENIER, A. J.:—That the Magistrate had no power to order the confiscation of the currency note in view of the fact that he had acquitted on the charge preferred against him.

CUMBERLAND *vs.* FERNANDO.

No. 339 (Special) D. C., COLOMBO.

15th May, 1907.

Surveyor's licence—Petition for cancellation—"Aggrieved person"—Ordinance No. 15 *of* 1889, *sec.* 8.

Held, per WOOD-RENTON, J., & GRENIER, A. J.:—That a petition under sec. 8 of the Ordinance No. 15 of 1889 should show that a complainant is an "aggrieved person" in the sense that he has some substantial or official interest in the subject matter of his complaint.

BINDU *vs.* MUDIANSE.

No. 5,766, P. C., KANDY.

23rd May, 1907.

Maintenance of wife—Liability of husband where wife refuses to live with him.

Held, per WOOD-RENTON, J.:—Even if the wife refuses to go and live with her husband, without just grounds, she is still entitled to maintenance in support of the infant child which she states she is nursing.

Perera v. *Perera* (7 N. L. R. 166) followed.

SILVA *vs.* SILVA.

No. 8,071, D. C., GALLE.

4th June, 1907.

Contract—Supply of firewood—Interest in land—Points of law raised in appeal not taken in the Court below or in the petition of appeal.

Held, per WOOD-RENTON & GRENIER, JJ.:—That a contract for the supply of firewood only is distinguishable from a contract of cutting firewood, and is not one which can give rise to any question as to an interest in land being involved in the contract.

Held also: That the Supreme Court should take into account points of law, though they are not taken either in the Court below or in the petition of appeal, if all the materials necessary for a decision thereon are before the Court.

In the matter of the Intestate Estate of WICKRAMASINGHE deceased.

No. 2,360, D. C. (Testy.) KANDY.

4th June, 1907.

Kandyan Law—Inheritance—Intestacy —Daughter adopted out of her father's family.

Where a Kandyan died intestate leaving two daughters, one fully adopted out of her father's family during his life and provided for after his death, and both are married out in *diga*,

Held, per WOOD-RENTON, J.:—That the adopted daughter had forfeited all right of sharing in the succession of her father's estate.

WIJEYRATNE *vs.* DE SILVA.

No. 8,049, D. C., GALLE.

4th June, 1907.

Withdrawal of action—Subsequent proceedings—Estoppel- Civil Procedure Code, sec. 406.

The plaintiff in this case, in a previous case between the same parties, preferred a counter-claim on a promissory note. The parties having settled matters amicably, the defendant in these proceedings withdrew the case, each party bearing his own costs. In this action the plaintiff sued the defendant on the same promissory note.

Held, per WOOD-RENTON, J.:—That it must have been the intention of both sides to dispose of the whole subject matter of the litigation between them, and on that ground the plaintiff is now estopped from suing on the promissory note which formed the counter-claim in the previous action.

The plea of *res judicata* does not apply to the present case, inasmuch as no decree was made by the Court which would satisfy the provisions of sec. 406 of the Civil Procedure Code.

NICKAPPU *vs.* BASTIAN.

No. 6,580, P. C., KEGALLE.

5th June, 1907.

Right of private defence - Penal Code, sec. 92.

The facts in this case were that the complainant had entered the land of the accused in search of a strayed bull, and that being there he had remained possibly for the purpose of committing theft, but that no theft had in fact been committed, and that he was making off from the land when the accused shot.

Held, per WOOD-RENTON, J.:—That the accused was not entitled to the benefit of sec. 92 of the Penal Code, which authorises, subject to the restrictions contained in that section, even the voluntary causing to the wrong-doer of any harm other than death in the case, *inter alia*, of criminal trespass.

That the reasonable interpretation of the provision of sec. 92 of the Penal Code is that the right of private defence is confined in each case to the requirement of the actual situation in which the accused finds himself, and that he is entitled to take such steps only as are necessary for the purpose of defending his property and of securing the punishment of the offender. Even if it were that the complainant in this case had at the time of his flight stolen property in his possession, it would still be necessary for the accused to show that he had no other means at his disposal of securing the recovery of the property and the punishment of the offender.

SUPPLEMENT TO THE APPEAL COURT REPORTS.

THE KING *vs.* DAVITH.

No. 543, D. C. (Cr.) KEGALLE.

6th June, 1907.

Confession—Secs. 17 (2) *&* 25, *Evidence Ordinance.*

Semble, per WOOD-RENTON, J.:—That an admission by an accused person that he has committed an offence lesser than the one he is charged with does not seem obnoxious to sec. 25 of the Evidence Ordinance.

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

No. 8,108, D. C., GALLE.

7th June, 1907.

Causes of action—Husband's liability for wife's tort—Onus *of plaintiff to prove* dolus malus.

Held, per WOOD-RENTON, J., & GRENIER, A. J.:—

(i.) That objections to joinder of several causes of action should be taken in the Court of first instance. In such cases the Court should follow the case of *Appuhami* v. *Marthelis Rosa* (9 N. L. R. 68), which followed that of *Sader Great Western Railway Co.*, A. C., 450.

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

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

Moss v. *Wilson*, 8 N. L. R. 368.

Corea v. *Pieris*, 9 N. L. R. 276 followed.

MUTTIAH CHETTY *vs.* MARIKAR *et al.*

No. 1,513, D. C., PUTTLAM.

12th June, 1907.

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

The original plaintiff in this action obtained a judgment on a money bond against two defendants jointly and severally, the 2nd defendant being a surety on the bond for the 1st defendant. The 2nd defendant paid the plaintiff the whole amount due and obtained an assignment of the decree in his favour from the plaintiff. The 2nd defendant then with notice to the 1st defendant obtained an order of the Court substituting himself as plaintiff, issued a writ, and seized certain property of the 1st defendant, which was sold and the proceeds paid into Court, but the sale was not confirmed by the Court. The 1st defendant then moved to set aside the sale on the ground of material irregularity under sec. 282 of the Civil Procedure Code, and on the further ground that the sale was void under the 2nd proviso to sec. 339 of the Civil Procedure Code.

The District Judge held that there was no material irregularity under sec. 282, but set aside the sale on the ground that the writ having being illegally issued the sale was void.

The 2nd defendant appealed against this order on the ground that the proviso to sec. 339 lays down the procedure to be followed, and does not exact substantive law, and that the order substituting 2nd defendant as plaintiff having been made *inter partes* without appeal by the 1st defendant shews that he waived his rights under the proviso to sec. 339.

Held, per MIDDLETON, J., & GRENIER, A.J.:—That the proviso to sec. 339 is an enactment of substantive law, and being such it could not be waived.

A proviso even though it may be included in what was intended as a

Code of Procedure which imperatively directs that where a decree against several person has been transferred to one of them it shall not be executed against the others is a substantive enactment defining the rights of co-obligors under the judgment, and not a rule which fixes the manner and form of administering the law.

MANUEL *vs.* ANTHONI.

No. $\frac{219}{116}$ (Testy.) D. C., PUTTLAM.

18th June, 1907.

Debt due to administrator—Mortgage bond—Procedure.

Held, per WOOD-RENTON, J., & GRENIER, A. J.:—That an administrator who has also a claim against the estate of his intestate on a mortgage bond is not entitled to obtain an order for the sale of any portion of the intestate's property in satisfaction of the debt unless he shows that the mortgage money is actually due at the date of his application.

It is not necessary for an administrator who desires to sell property of his intestate for the payment of debts to make application to the Court for the purpose by way of summary procedure. It is sufficient to base the application upon an affidavit shewing the necessity for the sale with notice to the heirs.

THAMPIPILLAI *vs.* SIVAKAMIPILLAI.

No. 5,190, C. R., JAFFNA.

18th June, 1907.

Servitude—Water-course—Alteration—Right of owner of servient tenement.

Held, per WOOD-RENTON, J.:—That the owners of a servient tenement (a channel) can only object to a alteration if it increases the burden of he servient tenement.

SIMON *et al vs.* HANIFFA.

No. 4,842, P. C., COLOMBO.

20th June, 1907.

Evidence of an accomplice—Corroboration.

Held, per WOOD-RENTON, J.:—That in point of strict law it is not necessary that the evidence of an accomplice should be corroborated at all. At the same time it has been a uniform practice in England, and sec. 114 of the Evidence Ordinance approves of that practice in Ceylon, to avoid convicting accused persons on the incorroborated testimony of an accomplice.

All that the law requires either in England or Ceylon is that the testimony of an accomplice should be corroborated on some point which render the main part of the story true.

TRINGHAM *vs.* THEWAR.

No. 6,629, P. C., KEGALLE.

28th June, 1907.

Contract of service- Ordinance No. 13 *of* 1889.

Held, per WOOD-RENTON, J.:—That under sec. 5 of Ordinance 13 of 1889 the entry of the name of a cooly employed on an estate on the check roll and the advances of rice create by implication a verbal contract of service from month to month which cannot be determined without a month's previous notice.

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