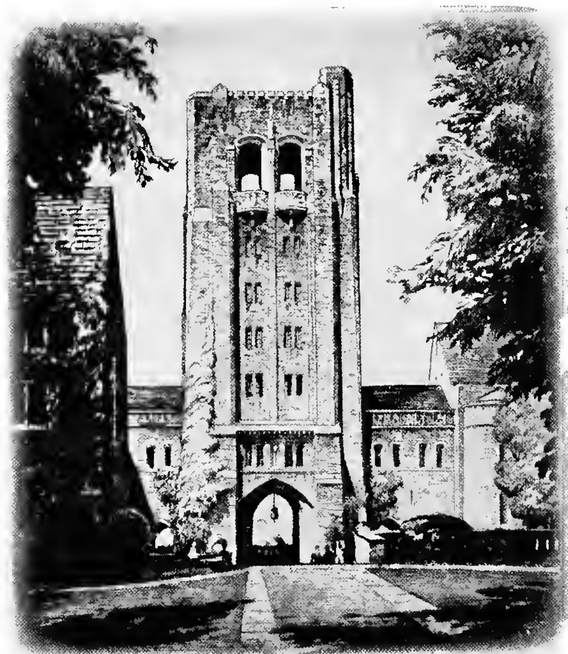

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THE APPEAL REPORTS FOR 1872,

BEING

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF CEYLON

SITTING IN APPEAL.

EDITED BY

S. GRENIER, Esq.,

ADVOCATE.

PART I.

CONTAINING

THE REPORTS OF POLICE COURT CASES.

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THE APPEAL REPORTS FOR 1872,

(INCLUDING THE ARGUMENTS OF COUNSEL IN ALL THE IMPORTANT CASES DECIDED BY THE COLLECTIVE COURT.)

Edited by S. GRENIER, *Advocate.*

Part I.—Police Courts. Part II.—Courts of Requests. Part III.—District Courts.

Part I, with a full and complete Index, will be ready for delivery to subscribers on the 10th of January, 1873.

Parts II & III will be published shortly after.

The Appeal Reports will be continued to be published annually in 3 volumes similar to those for 1872.

[Having resolved somewhat late in the year to publish these reports in their present form, I have had to contend with the disadvantage and delay attendant upon procuring from outstation courts copies of a large proportion of cases the facts of which were not recited in the Supreme Court judgments or included in my own notes. I hope, however, to be able to avoid this inconvenience in future, by consulting the original records before they are dispatched from the Registry. I have undertaken this work with a sincere wish to serve the Profession ; and no effort will be wanting on my part to make the Appeal Reports for 1873 more full and complete than those for the current year.—S. G.]

Colombo, December 31st, 1872.

THE APPEAL REPORTS.

1872.

POLICE COURTS.

January 10.

Present CREASY, C. J.

P. C. Colombo, 32513. The defendant was charged with having slaughtered a bullock, within the police limits of Mulhiriyawa, without a license as required by the Ordinance No. 14 of 1852. He appeared, however, to have acted bona fide under a license, which he believed to be sufficient, from the Police Vidahn of Buttegamme, and the Magistrate thereupon acquitted him. *In appeal*, the judgment was affirmed.

License to slaughter cattle.

P. C. Matara, 69556. Held that a Diver was not a servant within the meaning of the Ordinance No. 11 of 1865.

A Diver not a "Servant."

January 17.

Present CREASY, C. J.

P. C. Kurunegala, 17032. The defendant was charged with having prevented the Deputy Coroner (the complainant) from holding an inquest, by locking up the building in which the dead body was hanging and by refusing to allow the Deputy Coroner and jury to have access to it. The evidence in the case was conflicting, but the Magistrate having recorded a verdict of guilty, his decision on a question of fact was held to be irreversible.

Obstructing a Coroner. (Payne's case.)

January 24.

Present CREASY, C. J.

P. C. Colombo, 33018. The defendant had been convicted, under clause 166 of the Ordinance No. 11 of 1868, of having wilfully given false information to a police officer with intent to support a false accusation. It appeared that the defendant untruly told the police officer (complainant,) that he had been robbed of three boxes. He did not mention any one as the thief, nor did he name any one as suspected by him; and it also appeared that no person had been charged with the theft by any one whatsoever. *In appeal*, the Chief Justice set aside the conviction in the following terms: "I have discussed the case with my colleague, Mr. Justice TEMPLE, and his opinion agrees with mine. I think that in a case where no one has

False information.

been or is accused, there is no accusation at all, and this conviction for supporting a false accusation must consequently be set aside."

Receiving stolen property.

P. C. Colombo, 33383. The plaint charged the 1st defendant with having stolen certain property, and the 2nd and 3rd defendants with having received the same with guilty knowledge. The Magistrate found that there was no evidence against the first defendant and discharged him. The 2nd and 3rd defendants were found guilty and sentenced to one month's imprisonment at hard labor. *In appeal*, the judgment was affirmed; and per Creasy, C. J.—"The appellants' guilt consists in having knowingly received stolen property, not in having received property which had been stolen by some particular person."

Plea.

License to possess firearms.

P. C. Galagedara, 17753. Held that it was irregular to take a plea of guilty in a Police Court case, subject to the opinion of the Supreme Court; and that the exemption in the first proviso in section 2 of Ordinance 22 of 1848 should be taken to extend to the defendant, who had been proved to be a licensed "manufacturer of or dealer in arms," for as such the word "armourer" used in the record must be understood.

Jurisdiction.

P. C. Galle, 79709. Held that where, according to the evidence, a "severe wound with a knife" had been inflicted, the case ought to have been sent before the District Court.

January 30.

Present Creasy, C. J.

Maintenance.

P. C. Mallakam, 21442. Held that it would be a good defence, in a case of maintenance, for the defendant to prove that his wife had left him and was living in adultery. See R. v. Flintan, 1 B. & A, 227.

February 6.

Present Creasy, C. J.

Maintenance. Effect of admission by deft.

P. C. Matara, 69858. The defendant, in a maintenance case, in Court and in the presence and hearing of the Magistrate, added to his plea of not guilty a statement that he had transferred property for the support of the child. This statement was regarded as evidence against him, and as an admission that the child was his and that he was legally bound to support it. A conviction in this view, after a regular trial, was, *in appeal*, affirmed.

Gambling.

P. C. Galagedara, 17336. There was no cross-examination to show that a witness, whose sole evidence supported the charge (gambling,) spoke only from hearsay, when he said in his examination in chief "I knew that shed was used for gambling and I have previously complained about it to the Police." A conviction on such evidence was, therefore, upheld.

Theft.

P. C. Colombo, 33677. Where a defendant was charged with having stolen a certain number of bricks, the property of the complainant, and the Magistrate, having heard only the complainant's evidence, acquitted the defendant, holding that no theft was disclosed, the Supreme Court set aside the judgment and sent the case back for further hearing, pointing out that the complainant had a right to have his witnesses examined, especially if he could prove, as he offered to do in his petition of appeal, that the defendant had sold the bricks as his (the defendant's) own and appropriated the money.

Resisting a Fiscal's officer.

P. C. Colombo, 31707. The defendant was charged, under clause 23 of Ordinance 4 of 1867, with having resisted and obstructed the complainant in the execution of his duty as an officer of the Fiscal, by forcibly removing five pieces of jackwood, which had been seized and sequestered under writ 53512 of the District Court of Colombo. The evidence for the prosecution disclosed that the jackwood had been entrusted by a Vidahn Arachchy (who had originally effected the sequestration at the instance of the Fiscal) to complainant, who in turn had given it for safe keeping to a third party who stated that he had left the timber on the ground where it had been seized and that he had not seen the defendant removing it. The defendant, subsequently, admitted the removal by himself but questioned the right of the Fiscal to have sequestered. The Magistrate found the defendant guilty, and sentenced him to pay a fine of Rs. 20 and to be imprisoned for one day. *In appeal*, the judgment was set aside; and per Creasy, C. J.—"The defendant may be punishable for having received goods which were in the custody of the law, but it would be a dangerous straining of a penal statute to hold that the defendant's conduct in this case amounted to "making or inciting resistance or obstruction" under the 23rd section of the Fiscal's Ordinance."

February 13.

Present Creasy, C. J.

Forcible entry.

P. C. Kegalla, 33512. Held that charges of forcible entry were not affected by section 119 of Ordinance 11 of 1868.

Plea.

P. C. Matara, 69894. The defendant was charged with having left some gunny bags on the road, in breach of section 4, clause 53 of the Police Ordinance. He pleaded not guilty, but added that the bags were his and that they were on the *drain*. The Magistrate thereupon held as follows: "the drain is a part of the road, so this (the plea of not guilty) must be recorded as a plea of guilty, and defendant is fined Rs. 10." *In appeal*, the judgment was set aside and case sent back for trial; and per Creasy, C. J.—"No Judge has any right to order a defendant's plea of not guilty to be recorded as

a plea of guilty, against the defendant's will. What the defendant said may be evidence against him, but the Police Magistrate ought to try the case regularly, and hear such witnesses as may be brought forward on both sides."

Toll.

P. C. Colombo, 329. Defendant having admitted that he had demanded and received halt a rupee as toll on complainant's bicycle, the Magistrate held him guilty of an unauthorised act in the following judgment :—" The defendant considers he was entitled to demand toll for the bicycle, as coming under the description 'every vehicle not enumerated above' given in the 4th clause of the Toll Ordinance. I was certainly at first inclined to take this view, as it seemed to be borne out both by the definition given in the 3rd clause of 'vehicle for passengers,' and by the fact that no *species* of vehicle is particularised in the 4th clause, the only limitation or qualifying words being according as the conveyance was drawn by horses, oxen or elephants. But on referring to the Chilaw Police Court case No. 7788 (quoted by complainant's counsel,) I find it laid down by the Supreme Court that the words "vehicles not enumerated above," in the Ordinance No. 14 of 1867, must be construed with reference to the use of the words in the former part of the Ordinance, and taken to apply only to vehicles drawn by horses, oxen, elephants or other beasts of burden. Following that construction, therefore, defendant was not entitled to demand any toll in the present instance. He is accordingly found guilty and adjudged to pay a fine of fifty cents." *In appeal*, per CREASY, C. J.—" The Magistrate was quite right in his interpretation of the Ordinance. According to the appellant's construction, a man might be made to pay toll for passing along on a pair of crutches."

Trading on Sundays.

P. C. Galle, 79864. The defendant, who was a licensed wine-seller, was charged, under the 88th clause of the Police Ordinance, with having publicly pursued his trade on a certain Sunday, and with having received into his shop some drunken sailors who created a disturbance during the hour of divine service in an adjoining church. He was convicted and fined Rs. 20, the Magistrate holding that " the defendant was carrying on his business within hearing of a place of worship during service." *In appeal*, the judgment was set aside ; and per CREASY, C. J.—" There is no evidence whatever that the defendant, or any one acting under his orders, was present. All that is proved may have taken place without his knowledge and against his will."

Defective plaint.

P. C. Colombo, 270. Where a plaint was defective on the face of it and could not be amended, consistently with the facts, so as to bring it within the Ordinance under which it was laid, the Supreme

Court set aside the Magistrate's conviction and directed that a judgment of acquittal be entered up. Held, also, that "an open lane" was not such a place as the 6th section of clause 4 of Ordinance 4 of 1841 applied to.

P. C. Gàlle, 78929. This was a charge by a wife against the husband for maintenance. The evidence for the prosecution shewed that the wife had left the defendant's house, because she had been "ill-treated," and further that the defendant had a mistress. The Magistrate found as follows: "It appears that complainant left defendant (her husband,) subsequent to which he took to himself a mistress. This mistress defendant is ready to give up, if his wife will return. She refuses to do so. Defendant is discharged." *In appeal*, the judgment was set aside and case sent back for further hearing; and per CREASY, C. J.—"There is no evidence to show that the defendant had offered, before the period of desertion for which this charge was brought, to put away his mistress and take back his wife. The witnesses should be closely questioned, as to the real extent and nature of the ill usage which made the wife leave the house."

Maintenance.

P. C. Galle, 72263.—The following judgment of the Chief Justice fully sets out the facts of the case. "That the judgment of the 12th day of January, 1872, be set aside, and the case sent back for further hearing. The Supreme Court observes with regret that this Police Court case has been pending since April 1870, that is for nearly 2 years. It has come on for trial three times in the Police Court. On the first occasion, the defendant was convicted but no plea was recorded and no witnesses were heard. On the second occasion, the complainant only was heard; and even the whole of her evidence was not recorded, as appeared from a letter of the Police Magistrate in answer to inquiries made by this Court. The decisions of the Police Magistrates on both of those occasions were appealed against, and on both occasions this Court sent the case back. It came on, for the third time, on the 12th of January last, and the Police Magistrate, instead of regularly trying the case, only re-examined the complainant as to some evidence given by her on the former trial; and then, because she failed to explain it, he refused to hear her witnesses and acquitted the defendant. A third appeal was the inevitable result, and the case must now go back a third time. I have no doubt but that all the three Magistrates, who have thus hastily and imperfectly dealt with this case at various times in the Galle Court, were actuated by a laudable wish to save public time; but such "compendia" are almost always "dispendia," and the surest way to administer speedy as well as true justice is to try cases regularly, and to hear the witnesses on both sides fully and patiently. In sending this case back for a fourth trial, I shall endeavour to add such directions as may ensure the fourth trial being a final one. The complaint is brought under Ordinance 4 of 1841,

Maintenance.

clause 3, by the mother of an illegitimate child, charging the defendant, as the father, with leaving the child without maintenance, so that it requires to be supported by others. It is necessary that the Police Magistrate should, before he convicts the defendant, be satisfied as to the paternity, and also as to the child requiring the support of others, that is to say of its being unable to support itself. It appears from the record that when the case first came on for trial, the defendant, on being called on to plead, stated in open court that the child was his, but that as she was grown up the Ordinance did not apply. It further appears from the record, that the girl was produced and that the complainant stated in open court that the child was fourteen years old and full grown. Neither of these statements is to be taken as conclusive against the party making it. To do so would be to try a criminal case upon admissions, a course which this Court has frequently censured as improper. But proof of what the parties to the case said, respectively against their respective interests, is evidence against them; and as these things were said in open court before the Judge and judicially recorded, judicial notice may be taken of the parties having said them, without calling witnesses to prove that they heard them said. It would at first sight appear, then, that there was good evidence against the defendant as to the paternity ; but when the case came on for trial the second time, the register of the child's birth (as then understood) was put in evidence, with intent, I presume, to shew the child's real age, and so to bear upon the question whether the child was able to support itself. That register describes the child as the child not of defendant but of one Adrian, and the complainant then said that when she registered this child (that is defendant's alleged child,) she gave the name of another man as its father. This seems naturally enough to have surprised the Police Magistrate who then was trying the case, but unfortunately, instead of taking down the whole of complainant's attempted explanation, or hearing any more witnesses, he at once acquitted the defendant. On the third trial, the complainant asserted that defendant's child was not the child registered as Adrian's child. As the case stands at present, on the question of paternity, there is, on the one side, the defendant's own recorded statement that the child is his, and, on the other side, there is the recorded conduct of the complainant about the register which, coupled with the contradictions in her stories, is calculated to throw suspicion on her case. It seems (after the defendant's statement) difficult to believe that he had not a child by the complainant, but there may be some question whether his child is the one in respect of which complainant now charges him. It is possible that the defendant may not have seen the child for several years, before he saw a child said to be his in the Police Court, and though he must have known the sex of his child he may have been mistaken as to the identity of the girl then produced. It is possible (I say nothing about probabilities) that the complainant may have a motive in passing off Adrian's child as defendant's child.

Defendant's child may be dead or may be earning its living, and she may be seeking to get money out of defendant by saying that Adrian's child is the defendant's. The Police Magistrate is requested to hear and consider the proofs on this subject which are already recorded, and also all further evidence that may be adduced by both parties on this question of paternity, and to state by his judgment what he believes to be the fact. Next, as to the question whether the child requires to be supported by others. It seems certain that it is not a young child, but it would appear not to have attained majority; though, if the register produced at the second trial really applies to it, it must have been at least eighteen years old when this case was brought, and it may be useful to observe that we have to consider what was the said child's condition in April 1870, and not what it is at the present time. No absolute rule can be laid down as to the liability of a father, under this Ordinance, in respect of a child that has attained puberty but is still under 21. I think, on mature consideration and in accordance with the opinion previously intimated by this Court, that in the eye of the law a child continues to be a child until it attains majority, so far as regards the relationship of parent and child under this Ordinance. But in proportion as a child's age increases, the probability increases that it supports itself or that it could do so, if proper means were taken to obtain employment. And if a child, whether girl or boy, works indoors or outdoors for its mother at home and renders services commensurate with the cost of its keep, I should be disposed to consider that it earned its keep and was self-supporting. On this principle, in the Matara case in 1860, where a man was convicted for neglecting to support several of his children, this Court set aside the conviction and the fine so far as regarded the elder children who appeared to be able to support themselves. This question, as to a child being able to support itself or really requiring the support of others, is one which must be determined in each case according to the circumstances of the case. Considerable regard must be had to age; but regard must also be had to sex, health, strength, locality and the numerous other matters which will occur to the good sense and observation of the Magistrate as he tries the case. He is requested to hear fully all the evidence that may be adduced on both sides, in addition to the materials already supplied by the record; and the Supreme Court feels no doubt but that his judgment, on both the questions of fact which arise here, will be satisfactory and conclusive."

February 20.

Present Creasy, C. J.

Headman's schedule to sell land.

P. C. Jaffna, 33. Held, under the provisions of the Ordinance 1 of 1842, that if the defendant (a headman) had any reason for not granting the Schedule therein referred to, he should have given a written statement of his reasons.

Secondary evidence.

P. C. Jaffna, 23212. Before any secondary evidence of a license could be legally admissible, the party possessing it should have had notice to produce the original and proof should be given of the service of such notice.

Arrack Ordinance.

Balapitimodara,—Held that a person might "dispose of" arrack in many ways without there being any sale, and might so bring himself within the operation of the Arrack Ordinance 10 of 1844.

Labor Ordinance.

P. C. Nawalapitiya, 17357. The plaint in this case was as follows: "that the defendants, being servants and canganies, did without reasonable cause neglect and refuse to attend, on the 1st of April, 1871, at Chrystler's-farm Estate, when and where they had contracted to attend in commencing work, in breach of the 11th clause of the Ordinance No. 11 of 1865." Mr. Martin, who was the complainant, stated that the defendants had come seeking to be employed under him and had engaged themselves to work from the first of April. He added "they were to receive wages from me which are usual in the district (Dimbulla) and were to have weeding contracts." The Magistrate acquitted the defendants in the following terms: "In this case defendants are canganies who, according to the statement of complainant, promised to leave the estate on which they were working and go with a fixed number of coolies to work on complainant's estate, and failed to act up to their promise. They are charged under clause 11 of Ordinance No. 11 of 1865. Defendants received no advances. Complainant's case discloses the most irregular and shadowy agreement with defendants. Such a contract was essentially one to be reduced to writing. Defendants were never servants of complainant, so as to be liable to the punishment laid down in the clause under which they are charged. Defendants are found not guilty and are accordingly acquitted." *In appeal*, the Supreme Court set aside the judgment and sent the case back for further hearing and consideration; and per Creasy, C. J.—"The accused appear to be Canganies by occupation, and as such to be servants within the meaning of the Ordinance. It is not necessary that at the time of the contract made, or at the time of the breach, they should have already become actually working servants of the complainant. To hold that would be to nullify the parts of the 11th section, which impose a fine on a servant who neglects to attend when and where he has contracted to attend in "commencing" work. But part of the consideration, for which these accused were to come to work for the complainant, was that they were to have weeding contracts. The agreement for the weeding formed an essential part of the agreement to come and work on the estate. If the weeding was to go on for more than a month (either according to express arrangement or according to usage and the customary nature of such work,) the contract between the parties

was a contract which, according to the 7th section of the Ordinance, ought to have been in writing, so as to make the accused liable under the 11th section. The Police Magistrate is requested to investigate the matter. The plaint ought to be amended by describing the accused as servants and canganies."

Theft.

P. C. Colombo, 429. The defendant was found to have been in possession of an umbrella belonging to the complainant, within four months after its loss. There was evidence of an addition having been made to it, since the loss, which would partially alter its appearance. This was held to be proof that the finder (supposing the umbrella to have been merely lost and found,) took it and dealt with it with a dishonest purpose, so as to constitute a theft. The Magistrate having further believed that the defendant had set up a lying story to account for his possession, the conviction, *in appeal*, was affirmed.

February 28.

Present Creasy, C. J.

Nuisance.

The B. M. Colombo, 7644. Held that the Fort Canal did not come within the meaning of the terms "stream, tank, reservoir, well, cistern, conduit or aqueduct," specified in clause 1, section 7 of the Nuisances Ordinance, 1862; but that any one who created a public nuisance, by polluting the water of the Canal, was liable to be indicted for a criminal offence at common law.

Desertion. Future alimony.

P. C. Kalpitiya, 3838. Held, under a charge for maintenance, that if a husband beat his wife and brought an adulteress under his roof, it would be legally equivalent to an act of desertion; that the wife, however, in such cases, was not a legal witness against the husband; and, further, that the Magistrate had no power to decree future alimony.

Police Court judgments.

P. C. Panadure, 19190. Held that the Supreme Court would not interfere with Police Magistrates' judgments, either on mere questions of value of evidence, or on account of the sentence, if the sentence were authorized by law.

March 7.

Present Temple, J.

A Dhoby is a "Servant."

P. C. Negombo,—Held that, under the 1st clause of Ordinance 11 of 1865, the word "servant" had a very extensive meaning, and included a Dhoby employed to wash for a family.

March 15.

Present Temple, J.

Evidence.

P. C. Putlam, 5606. Where, apart from certain evidence which had been illegally received, there was sufficient proof before the Magistrate to justify a conviction, the Supreme Court, *in appeal*, declined to interfere with his finding.

March 27.

Present TEMPLE, J.

Postponement. *P. C. Matara*, 70075. Held that there was no appeal against a Magistrate's order allowing a postponement, and that the Supreme Court would not interfere in such cases to issue a Mandamus unless on good cause shewn.

Autre fois. acquit. *P. C. Matara*, 70091. Held that the plea of autre fois acquit in the case (one of maintenance) had been improperly received; and per TEMPLE, J.—"A charge against a man for deserting his wife or child is a continuing offence and he cannot plead a former acquittal."

Toll certificate. *P. C. Gampola*, 22656. Held that a certificate from an "overseer," instead of from the "superintending officer," is insufficient in a defence to a prosecution under clause 7 of the Toll Ordinance 14 of 1867.

April 13.

Present CREASY, C. J.

Evidence of title. *P. C. Galle*, 79499. Held, in a prosecution under the Malicious Injuries Ordinance, that something more than the bare assertion of the defendant was necessary to justify the Magistrate treating the case as one of bona fide disputed title.

Refusing process. *P. C. Colombo, A.* Held that a delay of fourteen days, in preferring a complaint, might be a reason for watching the evidence with special vigilance, but did not justify the rejection of the case without a hearing.

Refusing process. *P. C. Avisawella*, 15652. A charge of assault had not been entertained, because the complainants could suggest no reason for the offence. *In appeal*, the order was set aside and the case sent back for trial, the Chief Justice remarking that to hold as the Magistrate did, would be to give impunity to wanton and unprovoked insolence and brutality.

April 29.

Present CREASY, C. J.

Irregularity in Plaint. *P. C. Galagedara*, 17965 The charge in this case was "that the defendants did, on the 18th of March, 1872, at the Galagedara Court-house compound, arrest complainant on a warrant No. 11086 (Kandy,) and remove him to Kadugannawa, without producing him before the Justice of the Peace at Galagedara, where he was arrested, in breach of clauses 155, 156 and 163, and did detain him in custody beyond 24 hours in breach of clause 167, of Ordinance No. 11 of 1868." The complainant appeared to have been in attendance at Galagedara as a

witness in a civil suit and also for the purpose of opening up a judgment which had been entered against him by default. The Magistrate held as follows:—"In this case defendants had arrested complainant in this Court-house. They then hurried him off, with indecent haste, without producing him before the Justice of the Peace at Galagedara in terms of the 155th clause, and very unnecessarily handcuffed him. They did not take him to Kandy, as they should have done, but took him to his village and then to Kadugannawa, where they used great unnecessary violence, by putting him in the stocks, which was in no way called for. They have actually not detained him quite the 24 hours, though had they been left to themselves they doubtless would have, as there only remained one and a half hours to go nine miles in. The disgraceful disregard of the intention of the 155th clause, which it is clear they only avoided as they wished to prevent complainant's giving the bail taken by the J. P. in 4003 yesterday; the gross contempt of the ordinary respect due to a court of justice and the presiding Justice of the Peace; the violence used, and the unnecessary delay in going to Kadugannawa instead of to Kandy directly; all lead me to consider it a case requiring a severe penalty. I believe they only went by Kadugannawa to evade being called back, thinking their route would not be traced. The first and second defendants, as Fiscal's officers serving warrant 11086, and third defendant, as their assistant, are found guilty of a breach of the 155th, 156th and 163rd clauses, and acquitted of a breach of the 167th clause, of Ordinance No. 11 of 1868. I allow them the benefit of the doubt in the case of the 167th clause. The defendants are severally sentenced to six weeks' imprisonment with hard labor." *In appeal*, it was urged that the Kandy Justice who had issued the warrant (Mr. Stewart), had jurisdiction over Galagedara, and that the requirements of the 155th clause of the Ordinance would have been met by the complainant being produced before him as "the Justice of the District within whose jurisdiction the arrest was made." The judgment of the Police Court, however, was affirmed; and per CREASY, C. J.—"This conviction is substantially right, though the charge against the 3rd defendant"—(a private person and not a Fiscal's officer)—"ought to have been laid under the 155th, 156th and 161st clauses of the Ordinance; but this irregularity has not prejudiced the substantial rights of the party, and it is therefore the duty of the Supreme Court not to alter the sentence on that account. (See 20th clause of Ordinance 11 of 1868.) The objection about the summons is frivolous. The record shows that the parties appeared and were ready for trial."

Jurisdiction.

P. C. Matara, 70286. Held that "cases of assault where the knife was used, but no dangerous wound inflicted, might be properly sent to the District Court, but were beyond the jurisdiction of a Police Court."

Refusing process.

P. C. Colombo—An order of the Magistrate refusing process was set aside in the following terms: "It might be very useful if Police Magistrates had power to refuse process in cases that appeared to be frivolous, but the Legislature has not given such power. Here the plaint and the preliminary examination of the complainant both disclose an offence recognizable by the Police Court, and the Police Magistrate was therefore bound to entertain the charge."

May 17.

Present STEWART, J.

Conviction not consistent with charge.

P. C. Galle, 80403. Held that a person charged only with theft could not be convicted of receiving stolen property with guilty knowledge.

Postponement.

P. C. Colombo, 1618. Held that where complainant desired a postponement, he should apply to the Magistrate on an affidavit.

Wife presumed to have acted under authority of husband.

P. C. Panadure, 19471. Where a husband and wife had both been convicted on a charge under the Ordinance 10 of 1844, the Supreme Court set aside the finding as to the wife in the following terms: "the second defendant must be presumed to have acted (unless the contrary be made clearly to appear upon the evidence,) under the influence and coercion of her husband, the first defendant; the arrack having been sold in his presence and apparently under his authority. See Russell on Crimes, vol, 1, p. 33."

May 22.

Present STEWART, J.

A party bound over may be prosecuted in respect of same offence.

P. C. Jaffna, 308. Held that a defendant having been bound over to keep the peace upon an affidavit touching an assault on complainant, was no bar to a charge in respect of the same offence being subsequently tried in the Police Court. "Should the accused," added STEWART J., "be found guilty, the fact of security for the peace having already been given will be a proper circumstance to consider, and make allowance for, in determining the punishment."

Admission by deft.

P. C. Panadure, 19,453. A frivolous objection to the reception of Mr. Fonseka Modliar's evidence in the case having been upheld by the Court below, the Supreme Court set aside the judgment and remanded the case for further hearing, pointing out "that, even if Mr. Fonseka held an office of magisterial authority, any admission to him by the defendant would be admissible in evidence, if made freely and voluntarily."

P. C. Colombo,—Held that the Ordinance No. 18 of 1871 did not empower a Police Magistrate to refuse process merely because he thought the case frivolous, and that to justify such refusal it was necessary that the plaint, or the examination of the complainant, should disclose that no legal crime or offence or one not cognizable by a Police Court had been committed.

Refusing process.

P. C. Matara, 70243. Held that the Ordinance No. 18 of 1871 did not make it necessary, where the Police Magistrate took down the plaint himself (as was done in this case,) that it should be signed by the complainant.

Plaint.

P. C. Matale, 672. Held that husbands and wives were legal witnesses against each other in prosecutions for bodily injury inflicted by one upon the other.

Evidence.

P. C. Gampola, 23123. An order of the Magistrate, requiring the defendant to give security for his good behaviour, was set aside as illegal; and per STEWART, J.—"The 104th section of the Ordinance 11 of 1868 authorizes a Police Magistrate in certain cases to bind over parties to keep the peace; but no such power is given to a Police Magistrate as to good behaviour."

P. M. cannot demand bail for good behaviour.

May 31.

Present STEWART, J.

P. C. Galagedara, 17892. Held, in a prosecution under the 14th and 26th clauses of Ordinance No. 10 of 1844, that the offence was single and the penalty should accordingly be single. See B & V, I, 189. Reg. v. Clark, 2 Cowp., 612.

Offence and punishment single.

P. C. Panadure, 19177. Where it did not appear, in a prosecution for trespass under the Ordinance No. 2 of 1835, that the assessment of damages had been made by the "principal resident headman of the village," and that three respectable persons had assisted at the assessment, as contemplated in the 3rd clause by which the attendance of such persons, if procurable, was made necessary, the Supreme Court remanded the case for further hearing.

Damages for trespass.

June 4.

Present CREASY, C. J. and TEMPLE and STEWART, J. J.

P. C. Matara, 70406. The defendants were charged with having unlawfully cut and removed timber from a crown chena. Their proctor, on the case for the prosecution being closed, declined to call any evidence, relying on the fact that the complainant had omitted to

Timber on crown land.

prove that the chena was crown property. The Magistrate, however, found the defendants guilty, and fined them in the sum of Rs. 50 each. *In appeal*, by the 3rd defendant, the judgment was affirmed; and per CURIAM.—"The burden of proof is thrown on the defendant, as to the land being or not being crown property. See Ordinance No. 24 of 1848, section 12. There was legal evidence that the appellant took part in the removal of the tree."

June 6.

Present CREASY, C. J. and TEMPLE and STEWART, J. J.

Jurisdiction.

P. C. Colombo, 1587. This was a charge against the defendant, for not maintaining his illegitimate child. The complainant was clearly proved to be a resident of Wattepittewelle, a place out of the jurisdiction of the Colombo Police Court. According to her own account, she "went to live at Pettiagodde in order to bring this case in the Colombo Court;" but there was evidence to show that she had always been seen in her village after each postponement. The defendant was a resident of Hacgalle. It was evident, therefore, in the absence of any evidence that the child was ever at Pettiagodde, that the desertion, if any, took place at Wattepittewelle, within the jurisdiction of the Pasyala Court. The Magistrate, however, found the defendant guilty, but expressed his doubts as to his jurisdiction. *In appeal*, the judgment was set aside.

June 12.

Present CREASY, C. J. and TEMPLE and STEWART, J. J.

Contempt.

P. C. Matara, A. In this case the defendant had been found guilty of contempt, and sentenced to fourteen days' imprisonment, for having addressed the following letter to the Magistrate:

"Tangalla, 15th March, 1872, 5 P. M.

"SIR, - I herewith give you notice that I'll sue you for 290 Rupees for damage sustained by me in consequence of your having assaulted and falsely imprisoned and caused to be so on the 13th ultimo for the space of 15 minutes. I further beg leave to suggest for an amicable settlement on payment of above amount within 48 hours from date and time hereof, in default of so doing I'll take legal steps to recover same.

I beg leave to remain Sir, your obdt. servant,

(Signed in Singhalese.)"

In appeal, the judgment was set aside; and per CURIAM.—"In this case the appellant, who seems to be a foolish and ignorant man, sent the Police Magistrate, by post, a letter which is in the nature of a notice of action. We do not think that the Police Magistrate was warranted in dealing with it as a contempt of Court."

P. C. Matale, 690. The defendants had been convicted of gambling, in breach of section 4, clause 4 of Ordinance 4 of 1841. The offence, as disclosed by the complainant's evidence, was that the 1st and 2nd defendants were playing a game of "breaking cocoanuts and betting rupees," and that the others were sitting in a ring playing at a game called "Zyplese," and betting on the game. *In appeal*, the judgment was set aside and case remanded for further hearing, "in order that evidence may be taken, as to the kind and nature of the games that were being played, to see whether they fall within the Ordinance."

Gambling

P. C. Kalutara, 47275. Held that the full toll of six pence was leviable on a relieving horse passing a toll bar unharnessed to any vehicle, and that such animal did not come within the description of "every additional horse used in drawing such vehicle and attached thereto," contained in the schedule appended to clause 4 of Ordinance 14 of 1867.

Toll Ordinance.

June 26.

Present, CREASY, C. J. and TEMPLE and STEWART, J. J.

P. C. Mullaittivu, 7851. Where, under an agreement, the defendant was to be compensated for his labor by a share in the proceeds of a certain fishery, and it was specially stipulated that for any negligence on his part "the proprietor might bring an action in the Court," it was held that no criminal prosecution could be maintained against him under the penal provisions of Ordinance 11 of 1865.

Labor Ordinance.

P. C. Kandy, 90534. Where, in a prosecution for crimping, under the 19th clause of Ordinance 11 of 1865, the offence disclosed on the evidence was that of forcible abduction and rape, the Supreme Court held that the Labor Ordinance did not apply.

Labor Ordinance

July 3.

Present CREASY, C. J. and TEMPLE and STEWART, J. J.

P. C. Nuwarakalawiya, 7534. The judgment of the Magistrate on a question of fact was affirmed; and per CREASY, C. J.—"The Police Magistrate's letter shows that the assertions in the petition of appeal are false which complain of the defendant's having not been allowed sufficient time and opportunity for defence. Let the petition-drawer be informed that, if he draws up any more such false and scandalous documents for presentation to the Supreme Court, he will make himself liable to be punished by that Court for contempt."

Petition Drawers.

P. C. Balapitimodara, 43072. Held that "giving false evidence as a witness" did not come within clause 166 of the Administration of

False information

Justice Ordinance, but that "giving false information, whether by affidavit or not, whereon to found a charge", did come within the clause ; also, that to try two defendants together on one plaint, but for distinct charges, was "a very irregular and inconvenient proceeding."

Maintenance. *P. C. Galle*, 72263. The defendant in this maintenance case (which is fully reported in page 5,) was acquitted at the fourth trial in the Police Court. *In appeal*, the judgment was affirmed ; and per CREASY, C. J.—"The complainant was bound to make out a case of adulterine bastardy and has entirely failed to do so. The Police Magistrate's judgment on fact is conclusive, but, as there has been so much litigation between these parties, it may be useful for the Supreme Court to state that we fully agree with the Police Magistrate in believing the child to be Adrian's child and not the defendant's child."

Jurisdiction. *P. C. Galle*, 80405. This was an appeal, against a conviction for assault, on the ground of jurisdiction. The finding of the Magistrate, however, was affirmed ; and per CREASY, C. J.—"A defendant who wishes to object to the jurisdiction of a Police Magistrate, on account of the aggravated character of an assault, should make the objection in that Court, and before the Police Magistrate has given his decision as to guilty or not guilty. In very extreme cases, and where the defendants had no professional adviser when before the Police Magistrate, the Supreme Court may allow and may even itself take and maintain the objection arising out of the aggravated character of the assault. But this is not a case of this kind."

Evidence. *P. C. Kegalla*, 34279. Held that, under clause 7 of Ordinance 6 of 1868, unregistered sannases were not inadmissible in *criminal* proceedings, even though the criminal judge should be incidentally obliged to enquire into title.

Defective plaint. *P. C. Matale*, 845. The charge was laid in the following plaint: "that the defendant did, on the 10th of April last and during several days previously, grossly misconduct himself, whilst in the employ of the defendant, in breach of the 11th clause of Ordinance 11 of 1865." The defendant having been found guilty, an objection was taken, *in appeal*, that the plaint had been too vague to allow of a proper defence being prepared. The Magistrate's judgment, however, was affirmed ; and per CURIAM.—"The objection as to the vagueness with which the charge is laid in the plaint (if the objection be a good one) should have been taken before conviction."

July 9.

Present CREASY, C. J. and TEMPLE and STEWART, J. J.

Nuisance. (Newman's case.)

P. C. Colombo, 2120. The plaint in this case was as follows: "that the defendant did, on the 24th January, 1872, at the Fort, Colombo, suffer a large quantity of sour and offensive beer to be emptied into a drain leading into the Fort Canal, whereby the water in the said Canal was fouled in a manner prejudicial to public health." The Magistrate found the charge proved, but held that the fact pleaded in defence—that the accused was ignorant that the drain in question emptied itself into the Canal,—might go in mitigation of the sentence The defendant was accordingly fined only 50 cents. *In appeal*, the judgment was affirmed; and per CURIAM.—"The Supreme Court thinks this conviction right. It is difficult to suppose that the defendant did not know that his drain communicated with the Canal; and even if such ignorance existed, it must have been the result of such *crassa negligentia*, in not ascertaining the course of the drain before he poured the offensive matter into it, as would make the defendant legally liable for the consequence. With respect to the supposed necessity of a *mens rea*, we refer to our decision in P. C. Panwilla, 13999,* where we pointed out that, in prosecutions for nuisances, it is no defence to shew that the accused had no design to break the law."

July 23.

Present TEMPLE, J.

Maintenance.

P. C. Galle, 76783. Held that a husband, although legally divorced from his wife, was bound to maintain his children by her.

July 30.

Present TEMPLE, J.

Division Officer.

P. C. Panadure, 19806, Where a Division Officer had been convicted under section 3, clause 46 of the Thoroughfares Ordinance of 1861, without a Queen's Advocate's certificate authorising the trial, the proceedings, *in appeal*, were quashed.

Security to keep the peace.

P. C. Kalutara, 46237. An order of the Magistrate, requiring security to keep the peace, was set aside in the following terms: "the defendants having been acquitted, no sufficient reason appears for binding them over to keep the peace."

August 6.

Present TEMPLE, J.

Security to keep the peace.

J. P. Kalpitiya, 490. This was an appeal against an order of the Justice of the Peace, binding over two defendants, under a charge of

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* Vide Civil Minutes, 3rd October, 1871.

riot and assault, to keep the peace for twelve months. It was argued for the appellants that the evidence showed that the complainants and the accused were equally to blame, and that the Justice had no right to demand security only from the defendants, contrary to the direction of the Deputy Queen's Advocate (to whom the proceedings had been duly referred,) that both the parties to the case should be bound over. For the respondents, it was contended that appeals of this kind were restricted, by the 229th clause of Ordinance 11 of 1868, to orders "requiring" or "refusing" security, and were made subject to the rules and regulations relating to appeals from Police Courts. It was for the Supreme Court, therefore, to say whether the present order should stand or fall by itself, totally irrespective of the complainants, and whether the finding of the Justice on a matter of fact could be legally interfered with. Sed per TEMPLE, J.—"It is considered and adjudged that the order of the Justice of the Peace be amended, by the Justice of the Peace being directed to bind over both parties to keep the peace."

Autre fois acquit.

P. C. Avisawella, 15853. Held that the plea of autre fois acquit was not available where the previous proceedings had been quashed, the quashing of an indictment having the same effect as if the case had been abandoned.

August 16.

Present TEMPLE, J.

Wrong Dismissal.

P. C. Panadure, 19448. Where, without sufficient evidence to show that the charge was not one of theft, the parties had been prematurely referred to a civil action, the Supreme Court set aside a verdict of acquittal and sent the case back for further hearing.

August 20.

Present TEMPLE, J.

Nuisance.

P. C. Batticaloa, 5087. The plaint was to the following effect: (1) "that the defendant did, on the 29th of June and three following days, store in the premises of the Customs at Puliyantivoe, being in the neighbourhood of private habitations, without the permit of the Chairman of the Board of Health of the Eastern Province, offensive matter, to wit salt fish, in breach of clause 17 of the Bye-laws of the Board of Health; (2) that the defendant did, for 24 hours after receiving a written notice, from the Chairman of the said Board of Health, calling upon him to remove the said offensive matter, to wit, the salt fish stored as aforesaid, neglect to remove the same, in breach of clause 8 of Ordinance No. 15 of 1862." A verdict of guilty was found by the Magistrate, on both counts, and the defendant sentenced to pay a fine of Rs. 30. *In appeal*, it was urged that the words "other

offensive matters" occurring in the bye-law, should be controlled by the specific words which preceded them, viz. "manures," and "bones," and that the salt fish in question which, according to the medical evidence for the prosecution, "was not rotten and was not unfit for food," did not fall within matters *ejusdem generis*. (The Wanstead Local Board of Health v. Hill, 41 L. J. (M. C.) 135.) Sed per TEMPLE, J.—Affirmed.

P. C. Colombo, 2874. Held that the fact of a defendant being reported not to be found was no reason for dismissing a case.

Wrong Dismissal.

P. C. Galle, 81955. Where a Magistrate had fined a defendant, under the 18th clause of Ordinance 17 of 1867, the Supreme Court, *in appeal*, altered the sentence to one of imprisonment for fourteen days, the Ordinance not allowing the imposition of a fine.

Illegal Sentence.

August 27.

Present TEMPLE, J.

P. C. Galle, 81566. In a prosecution under the 118th clause of Ordinance 17 of 1869, it was held that proof of payment of Customs duties, in respect of the goods seized, rested with the defendant, and that the complainant was not bound to lead evidence as to non-payment.

Customs Duties.

P. C. Colombo, 2582. The defendant was charged with not having maintained his wife and child. The following entry was made by the Magistrate on the day of trial: "the defendant states he is ready to support his wife and child. Complainant states she cannot live with him. Defendant is fined Rs. 10. He is ordered to make monthly payments into Court,—in default one month's hard labour in jail." *In appeal*, the order was set aside and case sent back for hearing; and per TEMPLE, J.—"The complainant must give evidence of her inability to live with her husband. The Ordinance 4 of 1841 does not empower the Police Court to award future maintenance."

Maintenance.

P. C. Panadure, 19804. Where a Magistrate had convicted a defendant under the 11th clause of Ordinance 7 of 1848, in the absence of proof that the vehicle in question was a hired one, the Supreme Court set aside the judgment and quashed the proceedings.

Carriage Ordinance.

September 4.

Present CREASY, C. J. and TEMPLE and STEWART, J. J.

P. C. Kandy, 90663. In a prosecution under the 4th clause of Ordinance 24 of 1848, the Magistrate acquitted the defendants on the ground that he was not convinced that the land in question was crown property. *In appeal*, the judgment was set aside and case sent

Timber Ordinance.

back for further hearing ; and per CURIAM.—"Ordinance 24 of 1848, section 12, makes it necessary for the defendants to prove that the land is not crown land. This certainly has not been done in the present case. If the burden of proof lay on the Crown, we should not interfere with the Police Magistrate's decision as to the insufficiency of the evidence for the Crown ; but, by the Ordinance, the defendants cannot succeed unless they prove positively, either by cross-examination or by fresh evidence, that the land is other than crown land."

September 5.

Present CREASY, C. J. and TEMPLE and STEWART, J. J.

Obstructing a thoroughfare.

P. C. Panadure, 19464. The defendants had been charged with having obstructed a public thoroughfare, in breach of the 94th clause of Ordinance 10 of 1861. The Magistrate having acquitted them, without assigning sufficient grounds for his judgment, the case had been sent back on the following order made by the Chief Justice:—"Request the Police Magistrate to state the reasons for his judgment. It does not appear at present whether he thinks that in point of fact there has been no obstruction, or whether he thinks this not to be a thoroughfare within the meaning of the Ordinance. The evidence for the prosecution on both points seems to be very full and conclusive." The Magistrate's reply having this day been read, the judgment of the Supreme Court was recorded as follows.—"The letter of the Police Magistrate shews that he finds, as a point of fact, the path to be a private path and not a public one. We cannot review his decision on facts. If it is really important to have the long continued dispute as to the path authoritatively settled, it would be best to take proceedings in the District Court. Our affirmation of this case would be no bar to such proceedings."

September 11.

Present CREASY, C. J. and TEMPLE and STEWART, J. J.

Toll.

P. C. Kegalla, 4692. Held that when the Governor, by proclamation, appointed a particular place at which toll was to be taken, the toll-keeper had no right to take toll at another place. "When he does so, he comes under the 15th clause of the Toll Ordinance of 1867, by taking toll in a case in which toll is not payable under the provisions of the Ordinance."

Maintenance.

P. C. Galle, 81719. Held that it was competent for the complainant, in a maintenance case, to prove that the amount offered by defendant was insufficient for the maintenance of her two children and that he was liable to pay a larger sum.

September 18.

Present CREASY, C. J. and STEWART, J.

Gambling.

P. C. Matale, 987. Where the evidence shewed that the defendants had gambled amongst some coffee trees in a garden belonging to

one of them, and there was no proof that the place was kept or used for the purpose of common or promiscuous gaming, or that it was such a public place as contemplated in the 4th section, 4th clause of Ordinance 4 of 1841, it was held that the defendants could not be convicted.

September 27.

Present CREASY, C. J. and STEWART, J.

Wrong sentence.

P. C. Trincomalie, 23377. Where the defendant had been sentenced to pay a fine of Rs. 50 and, in default, to be imprisoned for a certain period, the Supreme Court amended the order by striking off the alternative of imprisonment. "If the accused does not pay the fine, imprisonment will follow as provided for by Ordinance 6 of 1855."

Fiscal's Ordinance.

P. C. Galagedara, 18005. The defendants were convicted, under clause 23 of Ordinance 4 of 1867, of having resisted the complainant in the discharge of his duty as a Fiscal's officer, while engaged in watching a granary under sequestration. *In appeal*, the conviction and proceedings were quashed ; and per CURIAM.—"The Police Court had no jurisdiction to try the charge without the election of the Queen's Advocate. See 119th section of Ordinance 11 of 1868. Besides, the writ of sequestration should have been produced."

Sentence altered.

P. C. Panadure, 19965. Where no discretion as to the amount of fine was allowed by Ordinance, the Supreme Court would alter the Magistrate's sentence and award the full penalty prescribed by law.

Malicious injury.

P. C. Jaffna, 912. Held, in a prosecution under the Malicious Injuries Ordinance, that the defendant was not to be convicted if it appeared that he did the act complained of under a bona fide, though possibly mistaken, claim of right to do it, and that the whole matter in such a case should be determined by a civil tribunal.

Refusing process.

P. C. Colombo.—Held that the fact of there being a counter charge against the complainant was no ground for refusing process, though it might afford good reason for hearing both the cases on the same day.

October 2.

Present CREASY, C. J. and STEWART, J.

Searching without a warrant.

P. C. Colombo, 3417. The plaint charged the defendant (a Police Serjeant) with having, on the 26th July, 1872, at Maharagama, knowingly and wilfully and with evil intent, exceeded his powers as a Police officer, by entering complainant's house and searching it without a search warrant, in breach of clause 70 of Ordinance 16 of 1865. On the case for the prosecution being closed, the defendant

called, as his only witness, the party at whose instance he had made the search, and who deposed as follows: "on the 26th July last my maid servant ran away with two strings of gold necklace and a gold ring belonging to me. I enquired at the Slave Island station. I went to defendant and I complained to him. We went to complainant's house and had it searched. The woman was not there. I saw her comboy there,—the same that she wore at our house. Defendant asked me for a warrant. I said I could not get one." The Magistrate's judgment was to the following effect.—"It is quite clear that defendant acted bona fide in this case. I consider he acted quite right in proceeding as he did under the circumstances. Besides, he was justified under clause 7 of Ordinance 4 of 1841. He is accordingly acquitted." *In appeal*, the finding was affirmed.

Dismissal.

P. C. Colombo, 3615. The defendant had been charged with disorderly conduct, but on the returnable day of the summons, the complainant being absent, the case was struck off. *In appeal*, it was urged that the complainant had been prevented from attending in consequence of the recent floods having interrupted railway communication with Colombo, and that this fact had been duly represented by petition to the Magistrate. The order, however, was affirmed.

Notoriously bad livelihood.

J. P. Jaffna, 10773. The defendants (five in number) were charged, on an affidavit by the Inspector of Police, with being by repute of notoriously bad livelihood. The complainant, who had been not more than six or seven months at Jaffna, deposed that he knew the accused by repute, as "violent men" and "robbers," and that frequent complaints had been made against them, although he could not say by whom. He called only one witness, the District Court Mudaliyar, who stated:—"I know 3rd, 4th and 5th accused, the 3rd and 4th are by repute bad men. The 3rd accused was concerned in a disturbance at a comedy once, according to my information. From what I heard, the 3rd and 4th accused are men of bad livelihood, who fight and disturb their neighbours. I know nothing about the 1st and 2nd accused. I heard that 2nd accused is a man of bad character. I know nothing about him personally. The 2nd accused was convicted of assault by Mr. Campbell. I heard that 4th accused was concerned in robberies. I know nothing against the 5th. I know nothing personally. I only talk of repute." The Justice having required security from all the accused for their good behaviour for six months, they appealed to the Supreme Court. And per CURIAM.—"Affirmed as to the 3rd and 4th appellants, but set aside as regards the 1st, 2nd and 5th appellants, against whom there is not sufficient evidence to bring them within the operation of the 233rd section of Ordinance No. 11 of 1868."

Malicious injury.

P. C. Galagedara, 18123. A conviction in a case brought under the Malicious Injuries Ordinance was set aside, in appeal, and a further

hearing ordered in the following terms. "From the evidence of one of the witnesses of the complainant, it would appear that there is a dispute about the boundary. To justify the conviction of the defendants, the Magistrates should be satisfied beyond reasonable doubt that the act complained of was malicious, within the meaning of Ordinance 6 of 1846, section 17. If the fence was cut bona-fide, under an honest though it may be a mistaken claim of right, the defendants will not be liable. Enquiry should be made regarding the civil case in the Court of Requests referred to in the petition of appeal."

Plaint.

P. C. Galle, 81464. Held that where a plaint was technically incorrect but the defendant had not been prejudiced in any substantial way, the Supreme Court would not interfere with the Magistrate's finding of guilty.

Division Officer.

P. C. Panadure, 19937. The defendant was charged with a breach of the 3rd section of the 46th clause of Ordinance 10 of 1861, in having fraudulently, and in the execution of his office as a Division Officer, forwarded, on the 4th day of July 1872, to the District Committee, the name of the complainant as a defaulter, in respect of the commutation rate due for 1870, whereas the defendant had received such rate from the complainant on the 10th of April, 1871. The evidence disclosed that the defendant, who was a Division Officer of one of the divisions of Panadure, furnished the Kalutara District Road Committee, in June 1870, with his first list of commutation defaulters, including the name of complainant. Warrants issued through the Police Court, and the complainant was obliged to pay the road tax to defendant in April 1871; but notwithstanding such payment, the complainant's name was again inserted in the final list, supplied in June 1871, to the Committee, and, consequently, in the final warrants, under which complainant was arrested and had to pay the tax a second time to the Deputy Fiscal. The Magistrate (who had the Queen's Advocate's authority to try the case) held as follows. "By defendant's act of omission, complainant was illegally arrested and had to make a payment to the Deputy Fiscal, in default of which he would have been forthwith imprisoned. Whether defendant entered complainant's name as a defaulter, in the list furnished in June, 1871, designedly or no, the Court is not in a position to say, but it has no difficulty in finding that defendant has, in his capacity of Division Officer, been guilty of a criminal neglect of duty removed but few degrees from fraud. The defendant is found guilty and sentenced to pay a fine of Rs. 25." *In appeal*, the finding was set aside and a judgment of acquittal entered and per CURIAM.—"The Police Magistrate has very properly held that the officer's misconduct did not amount to fraud. It follows that the officer could not be legally convicted on the charge."

October 9.

Present Creasy, C. J. and Temple and Stewart, J. J.

Witnesses.

P. C. Tangalla, 34349. The defendant, who was a Toll-keeper, was charged with having levied excessive toll, in breach of clause 15 of Ordinance No. 14 of 1867. Two witnesses were called for the defence, but the Magistrate refused to receive their evidence, as they "had not been out of Court," and fined the defendant in the sum of Rs. 50. *In appeal*, the judgment was set aside and the case remanded for further hearing; and per Creasy, C. J.—"The Police Magistrate should have heard the evidence of the witness called by the accused. No order was made for the witness to withdraw, and even after such an order—(though the question was not without some doubt before)—if the witness remains in Court, it seems to be now settled that the judge has no right to reject the witness on this ground, however much his wilful disobedience of the order may lessen the value of his evidence. See Chadler v. Home, 2 M. & R. 423. Cobbett v Hudson, 22 L. J. (Q.B.) 13."

Assault.

P. C. Panadure, 20007. A Peace Officer and another were charged with assault. It appeared that the complainant was taken up on a warrant which had been directed to the Police Serjeant at Morottoo tor execution, and that he was hand-cuffed and beaten. The Magistrate, however, found the defendants not guilty. *In appeal*, the judgment was set aside and case remanded for further hearing; and per Curiam.—"The assault being proved, the onus was on the defendants to establish that they were justified in arresting the complainant and that they used no more violence than was necessary. The first defendant should show how he came to act, and under whose directions he executed the warrant. It will be open to him at the further hearing to call the Police Serjeant to whom the warrant was addressed. See 9th clause of General Rules for Police Courts."

October 16.

Present Creasy, C. J. and Stewart, J.

Contempt.

P. C. Colombo, 3885. The Magistrate acquitted the defendants, who were charged with theft, after hearing only the evidence of the complainant, whom he immediately fined Rs 10 for bringing a false case. *In appeal*, the finding as to the contempt was set aside, the defendant not having been called upon to shew cause and allowed an opportunity to defend himself before being convicted.

October 29.

Present Creasy, C. J. and Temple and Stewart, J. J.

Judgment under a mistake.

P. C. Panadure, 19964. The Magistrate, in giving the judgment appealed from, having apparently been under the impression (which

the dates on the records showed to be incorrect) that the alleged assault, of which the appellant was found guilty, had been committed subsequent to the acquittal of the respondent in another Police Court case between the same parties, the Supreme Court set aside the sentence and remanded the case for further hearing and consideration and judgment de novo.

November 5.

Present Creasy, C. J. and Temple and Stewart, J. J.

Nuisance. (Dogs.)

P. C. Colombo, 3901. The plaint charged the defendant with having "on the night of the 14th September, at Colpetty, allowed his dog to bark and howl during the night, and thereby disturb the repose of the public." The Magistrate held that he considered defendant responsible "for the nuisance and disturbance caused nightly by his dog," and fined him in the sum of Rs. 10. *In appeal,* the judgment was set aside and the case remanded for further hearing; and per Creasy, C. J.—"This is a charge of public nuisance. The plaint alleges that the howling of the defendant's dog disturbed the repose of the public, but the proof adduced establishes that the inmates of one house only were disturbed, and consequently is insufficient to support the conviction. To constitute the offence of a public nuisance, or what is the same thing an indicatable nuisance, as distinguishable from a private nuisance for which no criminal proceedings lie except under special ordinance, it is necessary that the nuisance should be such as to annoy the neighbouring community generally, and not merely some particular person. So it has been determined that the existence of a public nuisance depends upon the number of persons annoyed, and is a matter of fact to be judged by the jury. R. v. White, 1 Burr. 337. See also R. v. Lloyd, 4 Esp. 200, which was a case where a tinman was indicted for the noise made by him in carrying on his trade, and it appeared that the noise only affected the inhabitants of three sets of chambers in Clifford's Inn. Lord Ellenborough ruled that the indictment could not be sustained, as the annoyance, if anything, was a private nuisance. The complainant had better before the further hearing be allowed to amend his plaint, by adding that the defendant *kept* the dog, and that the animal barked, howled, and made great noises, to the great discomfort and annoyance of the public in the neighbourhood and the deprivation of their natural rest and sleep during the night. It would also be well that a count should be added for breach of Ordinance No. 15 of 1862, sec. 1, clause 4, charging the defendant with keeping the dog (setting out the barking, &c.) so as to be a nuisance to the person or persons (naming him or them) who may be aggrieved. Under this clause, proof of a nuisance to one family or person is enough, but it ought to be proved to be a grievous nuisance, and to be a permanent or a very frequently recurring nuisance. It has often been said by the Bench

in England, as to complaints of this kind, that people must both bear and forbear. A man has a right to keep a fierce dog for the protection of his property (see Sarch v. Blackburn, M. & M. 505 ;) and in a town so infested by burglars as Colombo is, it would be very hard to deprive him of that protection because the neighbours were sometimes woke up by the house dogs barking or even howling, A man may keep dogs as he may keep cats or parrots or other creatures, merely because he likes to do so, and he is not to be punished for it, merely because an occasional growl, squeal or yell breaks in upon the tranquillity of the district. But if he gratifies his fancies so as to cause serious and permanent annoyance to his neighbours' substantial comforts, and not merely to their whims and tastes, the law can and will interfere to stop him. If it can be proved that he keeps the objectionable animal for the express purpose of vexing his neighbour, proof of even moderate actual annoyance would be enough. No arbitrary rule can be laid down. A precedent may be found in Chitty's forms of criminal proceedings, vol. 3, p. 647, under which parties have been indicted for keeping dogs to their neighbour's annoyance. On the other hand, there is the case of Street v Tugwell, Selwyn's N. P., 1070, where in an action on the case against the defendant, for keeping dogs so near plaintiff's dwelling house that he was disturbed in the enjoyment thereof, it appeared in evidence that defendant kept six or seven pointers so near plaintiff's dwelling house that his family were prevented from sleeping during the night, and were very much disturbed in the day time. No evidence was given on the part of the defendant, notwithstanding which the jury found for the defendant. On a motion for a new trial, Lord Kenyon, C. J. said, "I know it is very disagreeable to have such neighbours, but we cannot grant a new trial. Cases certainly of this nature have been made the subject of investigation in Courts of Justice, &c., &c. If the defendant continues the nuisance, and you think it advisable, you may bring a new action. Rule refused." It is remarked in Roscoe, N. P., page 655, with respect to this ruling, that the Court would no doubt have upheld a verdict the other way, if the Jury had found it to be a nuisance. Every case must be considered with reference to its own circumstances, and by the light of common sense and of common fairness in respect of the interests of both parties. Accordingly, it will be for the Magistrate, having regard to the points above indicated, to determine whether the defendant is or is not liable to conviction."

Illegal sentence.

P. C. Panwilla, 14,076. The defendant, who had been complainant's servant and who had given due notice to quit, was charged with having stolen certain articles on the day he left his master's house. The Magistrate found him guilty and delivered the following judgment: "defendant is sentenced to three months' imprisonment at hard labor and to a fine of £4 ; in default of payment to go to prison for ten additional weeks at hard labor. The property must be returned to com-

plainant. The wages due to accused will be forfeited." *In appeal,* so much of the judgment as directed that, in default of payment of the fine, the defendant should be imprisoned for ten weeks, and that he should forfeit the wages due to him, was set aside; and per CURIAM.—"If the fine be not paid, the Court should proceed in the manner directed by the Ordinance No. 6 of 1855. It must be taken that the fine ought to have been paid forthwith, no time being specified when the sentence was passed. The accused, not having been prosecuted for a breach of the 11th clause of Ordinance No. 11 of 1865, could not be punished thereunder."

November 12.

Present CREASY, C. J. and TEMPLE and STEWART, J. J.

Police Ordinance.

P. C. Galle, 82267. The defendants who were Policemen, were charged with abuse of power, under the 70th clause of Ordinance 16 of 1865. The Magistrate having convicted them, awarded a sentence which was undoubtedly within his jurisdiction. *In appeal,* it was urged that the Magistrate had no right, in view of the requirements of the 98th clause, to try the case without a certificate from the Queen's Advocate, as the penalty prescribed for the offence included a fine not exceeding three months' pay, which might be £5 or over £50. Per CURIAM.—"Affirmed, but it would be more proper in such cases to take evidence as to the amount of wages."

Malicious injury.

P. C. Kegalla, 34940. The defendants were charged with having wilfully, unlawfully and maliciously cut down and rooted up 45 plantain trees, 15 cocoanut plants and about 300 coffee plants, and destroyed the fence, on complainant's land. The Magistrate, after hearing evidence on both sides, held as follows. "It is clear that the dispute is about a piece of ground which had not been cultivated for years, and which is situate between the lands of complainant and first defendant's wife. The complainant planted it, and defendants rooted up the trees he had planted. This they had no right to do. The evidence on both sides shews the complainant did plant the land. The last witness alone said there was no planting, no quarrel; and I do not believe him in that or any other portion of his evidence. I don't believe there was anything like the number of trees that complainant would have us believe. First and second defendants are fined ten rupees each, and third defendant, a young boy, five rupees." *In appeal,* the judgment was set aside in the following terms. "It is clear that the defendants acted under a bona-fide claim of right, and where that is the case the Malicious Injuries Ordinance does not apply, even though the claim may turn out to be a mistaken one."

Fiscal's Ordinance.

P. C. Kalutara, 48013. The charge was that the defendants had, on the 2nd of September, resisted and obstructed the complainant

(a Fiscal's officer,) while he was placing a third party in possession of a certain land under an order of the District Court of Kalutara. The Magistrate held as follows: "The 64th clause of the Ordinance, under which these defendants are charged, requires that if, in the execution of a decree for land, the Fiscal' officer shall be resisted by the defendant, the person in whose favor such decree was made, or the Fiscal, may apply to the Court to enquire into the matter; that thereupon the Court shall fix a day for investigating the complaint, and shall summon the party against whom the complaint is made to answer the same. In this case no application was made to the Court, and therefore the preliminary enquiry contemplated by the Ordinance was not made. I think, therefore, that the present proceedings are irregular, and that the defendants should be acquitted. They are charged under a penal clause, and it must be strictly construed. The defendants are acquitted and discharged." *In appeal*, the judgment was affirmed; and per CURIAM.—" The appellant wished the Police Magistrate to convict the defendants, under the 64th clause of the Fiscal's Ordinance, 1867, and the Police Magistrate very properly held that he had no power to do so. If there had been any actual violence or assault by the defendants, the Supreme Court might have sanctioned a further hearing on an amended plaint, but the appellant's own evidence shews that nothing of the kind occurred."

November 19.

Present CREASY, C. J. and TEMPLE and STEWART, J.J.

Riotous and forcible entry.

J. P. Panadure, 5218. The defendant (with several others) had been charged with having riotously and forcibly entered a certain land which he claimed equally with the complainant, and with having rooted up several cocoanut plants therein. The Justice, under the direction of the Queen's Advocate, discharged all the accused, save the appellant who was ordered to find security to keep the peace for three months. *In appeal*, the order was affirmed; and per CURIAM.— " The affidavit of the complainant gave the Justice of the Peace jurisdiction under the 221st section of Ordinance 11 of 1868. The violence on the part of the appellant, which has been proved, fully justified the order."

Forcible entry.

P. C. Galagedara, 18243 A conviction under the Proclamation of 5th August, 1819, was affirmed, *in appeal*, in the following terms: " There is evidence enough to establish that violence was threatened and that there was a tumult and a breach of the peace. The question of title is immaterial. The defendants are punished not for having entered land to which they had no title, but for having entered it forcibly and in breach of the peace."

Malicious injury.

P. C. Colombo, 4447. The plaint stated " that the defendant did on the 27th November, at Modera, wilfully and maliciously break and injure a carriage, in breach of the 18th clause of Ordinance No. 6 of

1846." The carriage appeared to have been left on the public road, and the defendant was charged with having removed some stones which supported it on a declivity, whereby it rolled into a cabook pit and was much damaged. The Magistrate stopped the case for the prosecution, after hearing the evidence of only one amongst several witnesses who were in attendance, and referred the complainant to a civil action. *In appeal*, the order was affirmed, the Chief Justice remarking that it was competent for the defendant to remove an obstruction on a public thoroughfare, such as the carriage undoubtedly was, and that it would be an improper straining of the Ordinance to bring him within its operation.

Reinstituting a case.

P. C. Colombo,——. Held that no case could be reinstituted in the Police Court without the special leave of the Magistrate. See Ordinance 18 of 1871, section 5.

November 20.

Present Creasy, C. J. and Temple and Stewart, J. J.

Negligently leading a cart.

P. C. Galle, 83088. The plaint alleged "that the defendants did, on the 12th November, outside the Main-gate, wilfully and negligently, lead a certain wheeled carriage, to wit a hand-cart, on the wrong side of the road, in breach of the 85th clause of Ordinance 16 of 1865. The defendants were found guilty and sentenced each to pay a fine of fifty cents. *In appeal*, the judgment was affirmed; and per Curiam:—" We had at first some doubt whether this case comes within the 85th section of Ordinance No. 16 of 1865, but on consideration we are all of opinion that the words of the Ordinance are sufficient to embrace it, and it certainly is a case of mischievous nuisance such as the Ordinance was intended to repress."

November 26.

Present Creasy, C. J. and Temple and Stewart, J. J.

Disorderly conduct.

P. C. Panadure, 20109. The defendants were charged with disorderly conduct and with indecent exposure of their person, in breach of the 4th clause of Ordinance 4 of 1841. The charge was substantially proved, but the Magistrate held that the ends of justice would be satisfied with the defendants being bound over to keep the peace for three months, with collateral and personal security for Rs. 300 each. *In appeal*, the judgment was affirmed.

Labor Ordinance.

P. C Ratnapura, 13289. The defendant, who was an overseer in the Public Works department, was charged with having wilfully and knowingly taken into his employ four coolies, who had absented themselves without leave from the service of the complainant, to whom they had bound themselves as monthly coolies, in breach of the 19th clause of Ordinance 11 of 1865. The accused, under warn-

ing, stated—"The coolies first went and told the Arachchy that they were leaving complainant; they also told the Policeman at Balangodde, and then came to Court and said so. After that I gave them employment." The names of the coolies appeared to have been entered in a check roll signed by Mr. Murray, the superintending officer; and it was urged by defendant's proctor that the complainant, who was himself a monthly servant, could not be regarded as their employer. The Magistrate held as follows: "Mr. Murray is not present to prove that the coolies were employed by him. I could wait for his evidence before deciding, but that I think the accused acted bona fide in the matter, and he is accordingly discharged." *In appeal*, the judgment was affirmed.

Maintenance. *P. C. Batticaloa*, 5384. This was a charge against defendant for not maintaining his illegitimate children, in breach of clause 3 of Ordinance 4 of 1841. The Magistrate, after hearing evidence on both sides, held the defendant guilty and fined him Rs. 10, but stated in his judgment—"the defendant's case has completely broken down, but even were it not so, the Court was prepared to have convicted him." *In appeal*, it was contended that the Magistrate had evidently prejudged the case, and that, therefore, the defendant was entitled to a new hearing. Sed per CURIAM.—Affirmed.

December 3.

Present CREASY, C. J. and TEMPLE and STEWART, J. J.

Maintenance. *P. C. Galle*, 81974. This was a charge against defendant for not maintaining his illegitimate child. The complainant was a Moorish woman, whose husband was alive but from whom, it was stated by her father, she had been separated five years ago "in presence of a Lebbe." The Lebbe was not called, nor was there any document recording the alleged separation produced. The Magistrate, however, held as follows. "There is proof of the cancellation of the marriage with Sego (the husband) and separation from him five years ago. Now the very appearance of the child is evidence enough that the child could not have been born during cohabitation, the child being but a few weeks old. The defendant is found guilty and fined Rs. 6, 4 to complainant." *In appeal*, the judgment was affirmed.

Nuisance. *P. C. Panadure*, 20207. The charge was laid in the following plaint: "that the defendant did, on the 20th October, collect filth and dirt into a heap, opposite to his boutique on the drain of the high road at Pattia, and burn them, without removing the same as required by Ordinance, to the great nuisance of the complainant who oc-

cupies the adjoining boutique, in breach of the 94th clause of Ordinance 16 of 1865." The Magistrate found the defendant guilty and fined him Rs. 2. *In appeal*, the judgment was set aside ; and per CURIAM.—"The burning of rubbish is not an offence under the 94th clause of Ordinance 16 of 1865."

Timber Ordinance.

P. C. Nuwara Eliya, 8612. The defendants were charged with having cut 115 trees from a certain Crown forest at Sita Eliya, without a proper license, in breach of clause 5 of Ordinance 24 of 1848. The Magistrate gave judgment as follows : "This case is dismissed. There is nothing to shew that the defendants had anything to do with the felling of the timber. Let the timber be seized and sold." The defendants appealed to be allowed to remove the timber. Per CURIAM.—"Appeal dismissed. The order in question appears to be surplusage, but as the defendants have been acquitted, on the sole ground that they had nothing to do with the timber, they cannot be prejudiced by such order."

Assault.

P. C. Gampola, 23839. The defendants were charged with having assaulted, and with having incited others to assault, complainant. The 2nd defendant having gone to survey a land for the 1st, was opposed by complainant and his wife. An angry altercation ensued, and the complainant was very severely beaten and would probably have been further assaulted but for the coach, with the Magistrate as a passenger, passing the place at the time. The Magistrate having found the 1st and 2nd defendants guilty—the others being acquitted—proceeded to pass sentence as follows . "And whereas what I personally saw is not evidence, and cannot criminate defendants, but legally may and equitably should influence me in awarding penalty or sentence, I place on record, as further explaining cause of severe penalty, that I found 1st defendant white and trembling with passion, apparently directing a number of coolies who were dragging from a house on to the road, with brutal violence, the complainant, who was much injured and tied with rough cords which I removed from his legs and either his neck or shoulders. * * * 2nd defendant was a little way off, some five yards or so, and, when I saw him, watching the approach of the coach but making no effort to intercede. The 1st and 2nd defendants are severally sentenced to ten days' imprisonment." *In appeal*, it was urged that when the defendants had attended the Police Court on the 19th of November on a J. P. summons, a P. C. plaint for assault had been entered and the case tried on the same day without any further process ; that they were refused a postponement, although granted the indulgence of summoning their witnesses for the following day when evidence for the defence was received ; that these were irregularities which could not but have

prejudiced the defence ; and that the Magistrate was not justified in importing into the case his own evidence. The Supreme Court, however, affirmed the Magistrate's finding and sentence in the following terms : "The defendants had full opportunity to prepare their defence. The Magistrate decided the issue of guilty or not guilty on strictly legal evidence. He had a right, when apportioning the punishment, to avail himself of his own personal knowledge."

December 10.

Present Creasy, C. J. and Stewart, J.

Gambling.

P. C. Colombo, 5109. The defendants were charged with having "gambled, by betting at a cock-pit in a public place, in breach of Ordinance 4 of 1841, clause 4th." The Magistrate found them guilty, and sentenced the 1st, 3rd and 4th to pay a fine of Rs. 10 each, and the 2nd to be imprisoned at hard labor for one month. To the judgment, however, was appended the following order,—"the game cocks produced to be forfeited and sold." *In appeal*, it was urged that Inspector Andree's evidence, as to the character of the 2nd accused, in connection with previous cases of gambling, had been improperly received before conviction, and that the forfeiture of the cocks was illegal. Per Curiam.—"Affirmed. The Supreme Court has to point out that enquiry as to the bad character of the accused, or whether he is an old offender, should not be made until judgment of guilty has been pronounced. The order for the forfeiture and sale of the game cocks was beyond the power of the Magistrate, and must be regarded as surplusage, no such power being given by the Ordinance."

December 17.

Present Creasy, C. J. and Stewart, J.

Judgment of "not guilty."

P. C. Galle, 82865. Where, under a charge for assault, the complainant had adduced sufficient evidence, if believed, to prove the offence, but the Magistrate's judgment on the record was merely "not guilty," the Supreme Court set aside the finding and remanded the case for further hearing ; and per Creasy, C. J.—"As the record now stands, there is evidence of an assault, and there is no statement by the Police Magistrate that he disbelieves that evidence. No justification is at present proved."

Costs.

P. C. Matara, 71124. The defendant was charged with having unlawfully received a quantity of kitul fibre, knowing the same to have been stolen. After hearing complainant's evidence, the Magistrate gave judgment as follows: "Defendant is acquitted with costs." *In appeal*, per Stewart, J.—"Affirmed, save as to costs, which part of the judgment is set aside. The complainant may have been mistaken in supposing the fibre in question to be his, but there is nothing to shew that he did not bona fide believe that it belonged to him."

Eye-witnesses.

P. C. Panadure, 20182. The defendant was charged with having maliciously thrown stones into complainant's house and broken his furniture, in breach of the 19th clause of Ordinance 6 of 1846. An admission made by him to an Aratchy was duly deposed to by that officer at the trial, but the Magistrate declined to be bound by it in the absence of the evidence of certain alleged eye witnesses whom the complainant failed to call. *In appeal.* the judgment was set aside and case sent back for further hearing and consideration ; and per Creasy, C. J.—" A the record stands, the defendant's admission was legal evidence ; but, as it would be very more satisfactory to hear the evidence of the alleged eye-witnesses, the case is sent back for further hearing. It will be the duty of the complainant to call them."

Opportunity for defence.

P. C. Panwilla, 14151. This was a charge against certain canganies and coolies, for refusing to work and for behaving insolently to their employer, in breach of the 11th clause of Ordinance 11 of 1865. The defendants were convicted, but all of them, save the present two appellants, elected to go back to their estate *after sentence*, and were allowed to do so ; the Magistrate taking upon himself to cancel his own judgment so far as it affected them. *In appeal*, it was urged (independently of the merits of the case which were not gone into by counsel,) that the appellants having been taken up on a warrant were brought into Court and tried on the same day, although a postponement had been specially applied for, to secure the attendance of a witness named, but had been refused ; and that, in view of the heavy punishment which had been awarded, and the want of facilities generally for immigrants who were arrested on Coffee estates to secure prompt legal advice, the equities of the case demanded that an opportunity should be given to the defendants to call evidence. Per Curiam.—" These appellants had a professional adviser acting for them ; and strictly speaking when he claimed a postponement (which ought to have been claimed when the case was first called on,) he ought to have satisfied the Police Magistrate, by affidavit or other sufficient means, that there were witnesses in existence who could prove facts material to the defence in the present case, and that no reasonable means of securing the attendance of these witnesses in the first instance had been neglected. But we are always anxious to guard against the possibility of any man being convicted of a criminal offence without having had full means of making and proving his defence, if such means exist. We, therefore, send the case back for further hearing and consideration, so far as regards these appellants. And in so doing, we draw the Police Magistrate's attention to clause 4 of Ordinance 18 of 1871, which will authorize him, if he ultimately convict, to make the defendants pay the expenses of the complainant and the complainant's witnesses."

Municipal Magistrates.

B. M. Kandy, 5873. The defendant in this case, having been found guilty of a breach of clause 8, chapter 19 of the Bye-laws of the Municipal Council of Kandy, appealed on the ground that only two Magistrates had presided at the hearing of the case, and that, therefore, the judgment was void in view of the requirements of section 32 of Ordinance 17 of 1865. Per CURIAM.—" Quashed. The conviction shews that only two councillors were present at the hearing. By the 32nd section of the Ordinance No. 17 of 1865, three or more councillors are necessary to form a Bench of Magistrates."*

Security to keep the peace.

P. C. Colombo, 1649. The complainant having sworn an affidavit charging the defendants with constantly abusing and annoying him and threatening to do him bodily harm, the Magistrate, without hearing any evidence, made the following order: " both parties are bound over to keep the peace for six months in Rs. 100 each." *In appeal*, by the complainant, so much of the judgment as required him to give security was set aside; and per CURIAM.—" The case discloses nothing to require or justify such an order. So much of the order as binds over the other parties to keep the peace is affirmed."

December 23.

Present STEWART, J.

Gambling.

P. C. Panadure, 20085. The defendants were charged with gambling on a land called Galawattemoderawatte. In the course of the evidence, it transpired that the gambling had taken place in a ditch on the sea beach; and the Magistrate thereupon held that the offence came within the meaning of clause 4 of Ordinance 4 of 1841. *In appeal*, however, the judgment was set aside; and per STEWART, J.—" The plaint is defective, in that it is not alleged that the defendants were gaming in any street or other open or public place. According to the evidence, the gaming took place in a ditch; but whether it was an open one, and in an open or public place, it does not clearly appear."

Autre fois acquit.

P. C. Kegalla, 35127. The defendants, having been convicted of assault, appealed chiefly on the following grounds: (3) " the case is one which should properly come under the Village Communities Ordinance. Respondent cut down an old boundary dam between his field and that of the 1st appellant and brought the present case

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* In *B. M. Colombo*, 4991, the defendant. who had pleaded guilty, under a charge of Nuisance, and been fined £2, appealed on the ground that the penalty had been imposed by a Bench consisting of only two Magistrates, and that the signature of the third Councillor appearing on the record had been obtained " long afterwards." This statement was duly supported by affidavit, but the Supreme Court *affirmed* the judgment.—Vide Civil Minutes, 20th July, 1869.

against appellants; (4) under the directions of the Assistant Government Agent a "Gansabahawe," presided over by the Rattamahatmeya, was held touching the matter, and a verdict returned in favor of the appellants; (5) appellants humbly prayed the Court below for a reference to the report in which the verdict is embodied, but the prayer was refused." The petition to the Magistrate, referred to in paragraph 5, was of record, with the mere endorsement by him —"file in case." Per STEWART, J.—"Affirmed. There is nothing to shew that the charge was enquired into and adjudicated upon by the Gansabahawe."

Cruelty to animals.

P. C. Urugalla, 4147. The plaint was as follows: "that the defendants did, on or about the 12th day of November, cruelly ill-treat, abuse or torture, or cause or procure to be cruelly ill-treated, abused or tortured, a bullock belonging to him, in breach of 1st clause of Ordinance 7 of 1862." On the evidence for the prosecution being closed, the defendant stated in defence—"the bullock is mine. The medical men gave orders that it should be branded, as it was sick. I can prove it is usual for animals to be so branded. Its sickness was cold fits." The Magistrate held as follows: "This animal was produced before the Court at the time, and the poor brute was in a horrible state from branding. Flourishes, rings and ornamentations of every kind were described all over its body, and the opinion of the Court is that the branding was excessive and unnecessarily severe in the meaning of the Ordinance. If the defendant is such a pig-headed idiot as to imagine that by treating a creature in such a way he can do its health good, he must be taught better sense by the punishment of a fine. Defendant is fined Rs. 10 and warned." *In appeal*, it was urged that defendant should be allowed an opportunity (which apparently had been denied him at the trial) to prove that he had acted bona fide and under medical advice as alleged. The judgment, however, was affirmed, STEWART, J. remarking that he would send the case back for further hearing, to enable the defendant to call his witnesses, if not that he was of opinion, in view of the nature of the branding deposed to, that the question of intention could not affect the verdict.

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GAMBLING.—(*Ordinance* 4 *of* 1841.)

The unsupported evidence of a witness, who said "I knew that shed was used for gambling and I have previously complained about it to the Police," considered sufficient to warrant a conviction 2

An open lane is not such a place as is contemplated in section 6, clause 4 of the Vagrant Ordinance 5

In the absence of evidence as to the kind and nature of the gambling complained of, the Supreme Court directed a further hearing ... 15

Gambling in a private garden is no offence 20

A Magistrate cannot order the forfeiture and sale of game cocks ... 32

Gambling in a "ditch" is not punishable, in the absence of evidence to show whether such ditch was an open one and in an open or public place 34

HUSBAND AND WIFE.

In an action for maintenance by the wife, the husband may prove in defence that she left him and is living in adultery 2

If a husband beat his wife and bring an adulteress under his roof, it is legally equivalent to an act of desertion 9

A wife is not a legal witness against her husband in cases of maintenance 9

A wife must be presumed to have acted under the influence and coercion of her husband, unless the contrary be clearly shewn ... 12

Husbands and wives may be witnesses against each other in prosecutions for bodily injury inflicted by one upon the other 13

Where a wife seeks to justify her having left her husband's house on the ground of having been ill-treated, she should adduce evidence as to the real extent and nature of the ill-usage 5

A husband though divorced from his wife is bound to maintain his children by her 17

Where a wife pleads "inability" to live with her husband, she should satisfactorily prove it before she can secure maintenance ... 19

JURISDICTION.

Where a "severe wound with a knife" is inflicted, the case ought to be tried by the District Court 2

Cases of assault where the knife is used but no dangerous wound inflicted may be properly sent to the District Court, but are beyond the jurisdiction of a Police Court 11

A Magistrate cannot demand bail for good behaviour 13

Where a complainant changes her place of residence with the avowed object of carrying her case from one Court to another, the Supreme Court will discourage the proceeding as vexatious 14

The plea of jurisdiction, on account of the aggravated character of an assault, should be taken in the Police Court and before the Magistrate has found a verdict 16

A Police Court has no power to try a charge of resistance under the 64th clause of the Fiscals' Ordinance 27

LABOR ORDINANCE.—(*No.* 11 *of* 1865.) PAGE.

A Diver is not a servant 1

A prosecution for breach of contract in neglecting to attend in *commencing* work can be maintained, under the 11th clause, against persons who by occupation are servants within the meaning of the law, although such persons may not have already become actually working servants of the complainant 8

Where weeding contracts form part of the consideration for which a Cangany binds himself to work, and the weeding is to go on for more than a month, the engagement should be in writing 8, 9

A Dhoby employed to wash for a family is a servant 9

A party who was to be rewarded for his labor by a share in the proceeds of a fishery, was held not liable to be prosecuted as a servant... 15

Where in a prosecution for crimping, the offence disclosed on the evidence was that of forcible abduction and rape, the Ordinance was held not to apply 15

A servant who is convicted under a charge of theft cannot be mulcted in his wages 27

A bona fide employer of coolies who are bound to another cannot be convicted under the 19th clause... 29

LICENSES.

Where a party using an insufficient license to slaughter cattle acts bona fide, he is not liable to be convicted 1

A licensed "armourer" need not obtain a separate license to possess fire-arms 2

MAINTENANCE.—(*Ordinance* 4 *of* 1841.)

In an action by the wife, the husband may prove in defence that she left him and is living in adultery 2

Legal effect of statement by defendant that he has transferred property for the support of his child 2

Where a wife seeks to justify her having left her husband's house on the ground of having been ill-treated, she should adduce evidence as to the real extent and nature of the ill-usage 5

A parent is liable to support his child until it attains majority ... 7

What circumstances should be considered in determining whether a child is able to support itself or requires the support of others ... 7

If a husband beat his wife and bring an adulteress under his roof, it is legally equivalent to an act of desertion 9

A Magistrate has no power to decree future alimony 9

Desertion is a continuing offence, and the defendant cannot plead a former acquittal 10

A husband though divorced from his wife is bound to maintain his children by her 17

Where a wife pleads "inability" to live with her husband, she should satisfactorily prove it before she can secure maintenance ... 19

Complainant may prove that a sum offered by defendant is insufficient and that he is liable to pay more 20

Maintenance awarded to a married woman against the father of her illegitimate child 30

MALICIOUS INJURY.—(*Ordinance* 6 *of* 1846.)

The bare assertion of title is an insufficient defence 10

Where the act complained of is done under a bona-fide though mistaken claim of right, the defendant cannot be convicted 21 22 27

Where the complainant contributes to the injury by his own unlawful act, he has no right to prosecute.. 28

NUISANCE.—(*Ordinance* 15 *of* 1862.) PAGE.

Polluting the water of the Colombo Fort Canal, so as to create a public nuisanee, is an offenee at common law, although not indictable under the Ordinanee 9 17

In prosecutions for nuisances, it is no defence to shew that the accused had no intention to act unlawfully 17

Nuisanee caused by the storage of salt fish 18

The Dog case 25

The burning of rubbish is not an offence under the 94th clause of the Police Ordinance 30

POLICE ORDINANCE.—(No 16 of 1865.)

A licensed wine seller cannot be convieted, under the 88th elause, of trading on sundays to the disturbance of a ehristian congregation, if there be no evidence that he or any one acting under his orders was present at the shop in question 4

A Police officer acting bona fide is justified in searching a house without a warrant 21

Police officers may be tried under the 70th clause, for illegally exeeeding their powers, without a certificate from the Queen's Advocate ... 27

Negligently leading a hand-eart on the road is an offence under the 85th clause 29

The burning of rubbish on the road-side is not indictable under the 94th clause 30

PRACTICE.

It is irregular to take a plea of guilty subject to the opinion of the Supreme Court 2

No Magistrate has a right to record a plea of not guilty as guilty, even although the defendant while pleading should make a statement impliedly admitting the charge 3

To try a criminal case upon admissions only is improper 6

A delay of 14 days in entering a charge is no reason for refusing process 10

The apparent absenee of a motive will not justify a Magistrate in declining to entertain a plaint 10

Where the plaint and preliminary examination of the complainant disclose an offence cognizable by the Police Court, the Police Magistrate is bound to issue process 12, 13

A postponement should be applied for on due affidavit 12

A party having given security to keep the peace may be prosecuted in respect of the offence on account of which he has been bound over . 12

Where the Police Magistrate takes down the charge himself, the complainant need not sign the plaint 13

A Magistrate has no power to demand bail for good behaviour ... 13

To try two defendants on one plaint but for distinct eharges, is very irregular 16

Where the plaint is too vague to allow of a proper defenee being prepared, the objection should be taken before conviction 16

Defendant being reported not to be found is no reason for dismissing a case 19

A Magistrate cannot award imprisonment as an alternative for non-payment of a fine 21, 27

It is desirable to enquire into eounter-charges on the same day ... 21

A complainant's absence, though accounted for in a petition which is unsupported by any affidavit, may justify his case being struck off... 22

No case can be reinstituted without special leave 29

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A Magistrate has a right, when apportioning punishment, to avail himself of his own personal knowledge 32

QUEEN'S ADVOCATE'S CERTIFICATE.

A certificate is not required in charges for forcible entry 3
A division officer cannot be tried for a fraudulent act, under the Thoroughfares Ordinance, without a certificate. 17
A charge under the 23rd clause of the Fiscals' Ordinance cannot be entertained without a certificate from the Queen's Advocate ... 21
Police officers may be tried under the 70th clause of the Police Ordinance without a certificate 27

RECEIVING STOLEN PROPERTY.

A person may be convicted of this offence, although a co-defendant charged with the theft itself is found not guilty 2
Under a charge of theft, a defendant cannot be convicted of receiving stolen property 12

SECURITY TO KEEP THE PEACE.

Where the defendants are acquitted, they cannot be bound over ... 17
On an appeal by defendants against a J. P. order requiring them to furnish security, the Supreme Court directed that complainant should also be bound over 17, 18
A party having given security may be prosecuted in respect of the same offence 12
When a Justice may bind over persons of notoriously had livelihood ... 22
A Justice has power to bind over an accused who is charged on oath with riotous and forcible entry 28
A Magistrate may simply bind over parties charged with disorderly conduct 29
A complainant cannot be bound over on his own affidavit 34

THEFT.

A Magistrate is not justified in entering a verdict of not guilty after hearing only the evidence of the complainant, if there be proof offered that the defendant sold complainant's property as his own and appropriated the money 3
A finder of lost goods, who deals with them with a dishonest purpose and who sets up a lying story to account for his possession, is guilty of theft 9
A person charged with theft cannot be convicted of receiving stolen property... 12

THOMBO EXTRACTS.

Where a headman declines to grant a schedule, he should furnish his reasons in writing to the applicant 7

THOROUGHFARES ORDINANCE.—(*No.* 10 *of* 1861.)

A division officer cannot be tried for a fraudulent act, under the Thoroughfares Ordinance, without a certificate from the Queen's Advocate 17
The affirmation, in appeal, of a finding that a path is a private and not a public one, pronounced no bar to a civil suit to try the question ... 20
A division officer whose misconduct does not amount to fraud cannot be convicted of a breach of sec. 3, cl. 46 23

TIMBER ORDINANCE.—(*No* 24 *of* 1848.) PAGE.

The burden of proof is always on the defendant to shew that the land on which the timber was cut is not crown property ... 13, 19

A Magistrate has no power to order the seizure and sale of timber ... 31

TOLL.—(*Ordinance* 14 *of* 1867.)

A bicycle is not liable to payment of toll 4

A certificate from an "overseer" is insufficient to entitle a party to claim exemption under the 7th clause 10

The full toll of six pence is leviable on every relieving horse passing a toll-bar unattached to any vehicle 15

It is illegal to receive toll at any place other than that fixed by proclamation 20

TRESPASS.—(*Ordinance* 2 *of* 1835.)

Damages should be assessed by the principal resident headman of the village, aided, if practicable, by a jury of three or more respectable persons 13

GRENIER'S APPEAL REPORTS.

VOLUME II

FROM JANUARY TO DECEMBER 1873.

ERRATA.

Part I.

Page.

In *P. C. Galle*, 82759, read "*their* employment" for "*whose* employment" in the 14th line from bottom ... ... 12.

In *P. C. Matale*, 3172, read "*two hours*" for "*tied and bound*" in the 6th line from top ... ... 33.

Part II.

In *C. R. Panadure*, 14635, read "*defendant*" for "*plaintiff*" in the 7th line, and "*for*" instead of "*against*" in the 2nd line from bottom ... ... 1.

Part III.

In *D. C. Kandy*, 54761, read "I do *not* think" for "I do think" in the 7th line from bottom ... ... 102.

In *D. C. Galle*, 32979, read "*privity* of contract" for "*priority* of contract" throughout the judgment of the Supreme Court ... ... 145.

THE APPEAL REPORTS.

1873.

PART I.—POLICE COURTS.

January 3.

Present CREASY, C. J. and STEWART, J.

Police Assessment tax.

P. C. Kalutara, 47352. The facts of the case were briefly as follows. The Government had, by a Proclamation dated the 28th January, 1869, * established at Bentota, in the Southern Province, a Police Force, the cost of which was met by levying an assessment tax from the inhabitants thereof. In 1871, the Government Agent, W.P., having discovered that the boundaries detailed in the Proclamation took in a little village called Alutgamme, situated in the Western Province, commenced to levy an assessment tax which the villagers refused to pay. Distress warrants were issued to the Modliar of Kalutara who, on proceeding to distrain, was opposed by defendants; and hence the present charge against them, of resisting and obstructing the complainant (the Modliar) in the execution of his duty, in breach of the 77th clause of Ordinance 16 of 1865. The evidence at the trial disclosed, that the Police station was at Bentota, on the southern side of the Bentota Ganga, which ran between Bentota and Alutgamme, and that the Modliar had to send across the river for two policemen to aid him in distraining. It further transpired that several of the inhabitants had petitioned the Government Agent, against the impropriety of recovering the tax, but that no reply had been granted, although the Modliar had reported on the matter. The resistance complained of was initiated by the 1st accused who, having objected to pay, saying "he was not liable to pay for Police of Bentota," shut the door of his house against the Vidahn Aratchy who, by order of the Modliar, was about to enter it to seize some furniture. On the

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* "Whereas it is expedient that a Police Force should be established at Bentota in the Southern Province:

"It is therefore hereby proclaimed that, from and after the first day of April next, a Police Force shall be established in the town of Bentota in the said Province, for the effectual protection of person and property, and that the limits of the said town shall be, on the north by the Kalawel Ganga and Madda Ela, on the east by the new Canal and the Bentota Lake, on the south by the Northern boundary of Bandarawatta, and on the west by the sea."

Police arriving, the other accused, with a large crowd, got on the verandah and stood three deep, preventing any access to the house. The Magistrate found all the accused who were identified guilty, and fined the 1st defendant, as the ringleader, in the sum of Rs. 50.

In appeal, the case had been argued on the 11th of September, 1872, by *Grenier*, for the appellant.—The intention, as distinctly expressed in the reciting and the enacting parts of the Proclamation, was to establish a Police force at Bentota in the Southern Province; and the Government Agent of the Western Province had no power to act. The Ordinance most carefully guarded against a clashing of jurisdiction as between one Government Agent and another, (see clause 41;) and a Proclamation specially affecting the *Southern Province* could only be taken to authorise the Government Agent of that province, in view of the sense in which the term "Government Agent" was used throughout the Ordinance. [If the village in question falls within the limits defined as required by the 13th clause, the Proclamation must be regarded as giving both the Government Agents jurisdiction.—C. J.] Accepting that view, there remained the fatal objection that no rate for paying the cost of the Police had been proclaimed with the sanction of the Governor and Executive Council. [Do you contend that two Proclamations were necessary before the tax could be levied?—C. J.] Two distinct Proclamations were required: one to establish the Police, another to define the per centage on assessment (Quotes the 34th clause.) The latter Proclamation was not produced at the trial, nor did it appear to have ever issued.

The *Queen's Advocate*, for the respondent, urged that the objection, if valid, ought to have been taken in the Court below; and that it was too late now to raise it. The clause quoted by his learned friend might be construed to mean that the minimum of six pence per quarter could be levied (as he believed was attempted to be done in the present case) under the authority of the Ordinance, without the intervention of a Proclamation. [I don't think so. It is clear that a Proclamation to fix the percentage is as necessary as one to establish a Police Force. Was such Proclamation ever issued? C. J.] He could not say, but would enquire. [Per CREASY C. J.—Let the case stand over to allow the Queen's Advocate an opportunity to produce the required Proclamation.]

Ferdinands, D. Q. A., on behalf of the Queen's Advocate, having intimated that the Proclamation called for did not exist, judgment was this day pronounced, by STEWART, J., as follows: "Set aside and defendants acquitted. This case has stood over, from time to time, for the Queen's Advocate to produce the Proclamation, if any was ever issued, under the 34th section of Ordinance 16 of 1865, fixing the amount of percentage, on the annual value of houses, to be levied for the maintenance of the Police. The Proclamation produced in evidence by the complainant, only relates to the establishment of a

Police Force within the limits therein mentioned. But to sustain this prosecution, there ought also to have issued a Proclamation fixing the rates to be levied, as required by the 34th section. The Queen's Advocate not being able to refer us to any such Proclamation, and, as far as we are aware, no such Proclamation having ever issued, the conviction must be set aside."

Forcible entry.

P. C. Ratnapura, 13493. This was a charge of forcible entry, under the Proclamation of 1819. The Magistrate convicted the defendants, holding that the complainant had been in possession of the land in question, and that "the defendants had taken away the crop without fighting, simply because no one fought with them." *In appeal*, *Ferdinands* for the appellant was not called upon. And per CREASY, C. J.—"Set aside. There is no proof here that violence was used or that violence was threatened. The Police Magistrate is quite right in holding that, in order to bring a case within the law against forcible entry, it is not necessary that there should have been an actual fight. If the peaceable possessor yields to the threat of physical force, and thereby avoids it, the case is still one of forcible entry, such as the law will punish. Such a threat need not be by words. It may be by the production or by the brandishing of weapons, or by mere bodily gesture, or by bringing a band of ruffians to the place obviously organised for conflict; but there must be either an actual employment, or an actual menace, of physical violence, before the wrong doers can be properly convicted of forcible entry. And this must be proved. It is not enough to suspect that force or menace would have been used, if the complainant and his friends had been more disposed to cling to their property. In the present case, the complainant certainly says that the accused took his crop forcibly, but that may merely mean that they took it against his will. The word "force" like the latin word "vis," in cases of trespass to land, applies to any act whereby the ideal fence which the law places round each man's property is broken. But in order to punish criminally, there must be proof that the criminal used force equivalent to the *atrox vis* of the Roman Law, which might occur by the threat, as well as by the actual infliction, of physical violence. None of the complainant's witnesses in this case, proves any specific act which can be construed into a threat of the kind. In the case referred to in the Police Magistrate's judgment, as affirmed by the Supreme Court, Ratnapura 10922, there was express proof of threatening with a stick. In order to guard against misapplication of this judgment in future cases, it may be well to add that there may be cases of forcible entry in which no violence is used or threatened to the possessor or his people, but in which there is so much outrage in breaking down walls, fences and the like, or in which so much alarm is caused to the neighbourhood, as to make the wrong doers liable to conviction.. But the present case does not come within either of these classes."

Cruelty to animals.

P. C. Galle, 82377. The defendant was charged, under clause 1 of Ordinance 7 of 1862, with having beaten, ill-treated and killed a cow. The complainant having admitted that the animal had trespassed in the defendant's enclosure, the Magistrate held that no criminal indictment would lie, and dismissed the case. *In appeal*, the judgment was set aside, and a further hearing ordered; and per STEWART, J.—"The Magistrate should not on the mere statement of the complainant, that the animal was trespassing at the time in the defendant's enclosure, have stopped the case without enquiring into the circumstances connected with the alleged cruel ill-treatment of the cow. It will be seen that the Ordinance No. 7 of 1862, under which the charge is laid, unlike the Ordinance No. 6 of 1846, does not make it necessary that the act should be malicious. The fact of the tresspass will, however, no doubt, be a circumstance which it will be proper duty to consider, together with the mode and extent of the ill-usage, in determining whether or not the defendants cruelly ill-treated the animal, in contravention of the Ordinance. We have also to point out, that the case having come on for trial, the complainant should have been examined on oath or affirmation. The examination authorised by the 2nd section of the Ordinance No. 18 of 1871 has reference to a prior stage of the case, before the issue of process to the defendant."

Hearsay evidence.

P. C. Galle, 83447. The defendant was convicted of having stolen a rupee from the almirah of complainant's wife, who however did not give evidence, the husband deposing to facts which she ought to have personally proved. *In appeal*, (*Grenier* for appellant,) the judgment was set aside, and a further hearing ordered, "because some of the most material facts of the case appear in the record to be supported by hearsay evidence only."

Maintenance.

P. C. Matara, 71159. The defendant, who was sued for maintenance on behalf of his illegitimate child, had, after the filing of the plaint, but before the issuing of the summons, tendered to the complainant a rupee. The Magistrate considered this sum sufficient, and entered a verdict of not guilty. *In appeal*, (*Grenier* for respondent,) the judgment was set aside; and per CREASY, C. J.—" Judgment of guilty to be entered with a fine of 12½ cents, and the defendant to pay the complainant the costs of entering the plaint. The offence was complete at the time when the suit was instituted. The subsequent tender of sufficient maintenance money cannot annul the guilt, though it may properly reduce the punishment."

Servants.

P. C. Mannar, 3873. Held that tappal runners, employed under a contract, were servants within the meaning of the Labor Ordinance.

Defective plaint.

P. C. Matara, 71073. The defendant, who was complainant's horsekeeper, was charged with having fraudulently demanded, received and appropriated Rs. 11, which was due to complainant from a third party as carriage hire. The Magistrate dismissed the case, holding that the plaint disclosed no offence which he had jurisdiction to try. *In appeal*, the finding was affirmed.

Timb r Ordinance.

P. C. Panadure, 20037. The defendant was charged, under clause 8 of Ordinance 24 of 1848, with having removed two carts-load of Lunomedelle planks, without a permit. The Magistrate, having relied on the authority quoted for the defence from Thompson, p. 78, as shewing that the timber in question did not fall within the Ordinance, acquitted the defendant. *In appeal*, (*Brito* for the respondent,) the judgment was set aside and case remanded for further hearing and consideration; and per STEWART, J.—"The case cited in Mr. Justice Thompson's book, in page 78, is inaccurately quoted. In that case, the Supreme Court held that large timber cut for such marketable purposes as staves, etc., does not fall within the exception in the 15th clause of the Ordinance 24 of 1848. An accurate copy of this judgment is hereto appended.* At the further hearing, fuller enquiry should be made as to the size, quality and uses of the Lunomedelle tree, so as to enable the Court to determine whether this tree can properly be deemed a valuable description of timber tree within the meaning of the Ordinance."

January 9.

Present CREASY, C. J. and STEWART, J.

Arrack Ordinance.

P. C. Gampola, 23842. This was a charge, under the 26th clause of the Arrack Ordinance, for selling less than a gallon of arrack at Rs. 4, the authorized price for a gallon being only Rs. 2·56. The defendant, who was a retail arrack dealer, delivered five quart bottles which he represented as containing a gallon; but on the arrival of the Police at the shop, he tendered another bottle and the balance money to complainant. Magistrate (*Neville*) fined the defendant Rs. 20, and ordered that the arrack should be confiscated. *In appeal*,

* *P. C Avishawella*, 4642. Per CURIAM—"That the judgment of the said Police Court of the 19th November, 1852, should be set aside, and the same is hereby set aside accordingly; and the case is remanded for re-hearing, and to give judgment de novo. The Assessors state that trees of the description mentioned in the charge would, if large, not be cut down for firewood, and that they are used for temporary buildings, coffins and coffee casks. As there is a great demand for staves for coffee casks, they were probably cut for the latter, and the Court does not consider that large timber cut for such marketable purposes could be considered to fall under the exception in the 5th clause of the Ordinance No. 24 of 1848."
—Civil Minutes, 18th December, 1852.

per Stewart, J.—"The judgment is altered, in so far as respects the confiscation of the arrack, which part of the judgment is set aside; in other respects it is affirmed. The Ordinance No. 10 of 1844 does not authorize the confiscation of the arrack, under the circumstances stated in the charge."

Brothel-keepers.

P. C. Galle, 83550. The plaint was as follows: "that the defendant did, between the 18th and 31st December, and on divers other times and seasons, between that and this day, in Talbot town in Galle, have and occupy and keep and maintain a common, ill-governed and disorderly house; and in the said house, for the lucre and gain of him the said defendant, did cause and procure certain persons, male and female, of ill-fame and dishonest conversation, there to meet, frequent and come together; and the said persons, in the said house, at unlawful times, as well at night as in the day, to remain tippling, whoring and misbehaving themselves, did permit, to the great damage and common nuisance of all the liege subjects of our Lady the Queen there inhabiting, and against the peace of our Lady the Queen, her Crown and dignity." It appeared that the defendant had attended Court as a witness, and, on being asked, while giving evidence, what his occupation was, stated (before the Magistrate could give him any warning) that he was the keeper of a bawdy house. He was thereupon immediately prosecuted by an Inspector of Police, who happened to be present; and, having pleaded guilty to the charge, without applying for a postponement in the absence of a summons, he was sentenced to three months' imprisonment at hard labor. *In appeal*, the defendant by petition urged "that the charge preferred against him was not cognizable by the Police Court, and did not disclose an offence under any statute or common law in the Colony."

Grenier, for the appellant, would not question the law of the case, but relied for a reversal on the ground of jurisdiction. The old Vagrant Ordinance, 3 of 1840, had specially provided a sentence of 6 months' hard labor and a fine of £5 on the first conviction, and double that punishment on the second conviction, of every keeper of a brothel or disorderly house. The Ordinance 4 of 1841, which repealed 3 of 1840, did not re-enact that provision, and hence the charge being laid under the common law; but, in view of what had once been the recognised penalties for the offence, the prosecution should have been conducted in a superior Court. Besides, as this was a public nuisance, the Queen's Advocate ought to have taken the initiative as had been done in *Newman's* case.

Sed per Curiam.—Affirmed.

January 14.

Present Creasy, C. J.

Servants.

P. C. Galle, 83566. This was a charge against a servant, under clause 11 of Ordinance 11 of 1865, for quitting complainant's service,

without reasonable cause and without having given due notice. The defendant, who was an Ayah, appeared to have obtained leave to visit a former mistress: she went, but never returned. In defence, she stated that she had gone because her child was ill. The Magistrate found her guilty, and sentenced her to seven days' imprisonment. *In appeal*, the judgment was affirmed; and per *Creasy*, C. J.—" The appellant, at the trial, told a story inconsistent with the story by means of which she obtained temporary leave of absence from her employer. Neither story is proved. The fact that she had previously sent away her clothes, shows that she intended to desert the service entirely. A complete desertion cannot be justified, in law or in common sense, by a permission for temporary absence, especially where that permission has been fraudulently obtained."

Timber Ordinance.

P. C. Urugalla, 3919. The defendant was charged with having cut timber, on a Crown Forest, without a licence, in breach of the 5th clause of Ordinance 24 of 1848 and 2nd clause of Ordinance 4 of 1864. The Magistrate, having declared himself dissatisfied with the evidence, as to the land not being private property, entered a verdict of not guilty, and referred complainant to a civil action. *In appeal*, per Creasy, C. J.—" Set aside. Judgment of guilty to be entered, and defendant to be sentenced to pay a fine of Rs. 40. The Police Magistrate has wholly overlooked the provisions in clause 12 of Ordinance 24 of 1848, which throw on the defendant the burden of proof as to the land not being Crown land."

Gambling.

P. C. Matale, 2668. Defendants were charged with having gambled with dice " at Konakoloyoda in a jungle." The magistrate held that " there was no proof that the offence had been committed in a public or open place which could be seen from the road," and acquitted the defendants. *In appeal*, per Creasy, C. J.—" Set aside, and case sent back for the Police Magistrate to pass sentence on the 1st, 5th, and 6th defendants, who have pleaded guilty, and for further hearing as to the others. The complainant should adduce further evidence, if he has any, of previous gambling by any parties in or near to the same place. See the statement in 1st witness' evidence, that people gamble in that jungle and that they go from place to place in the same jungle. If no such evidence is forthcoming, the acquittal of the prisoners who have pleaded not guilty will be right."

Servants.

P. C. Batticaloa, 5476. The plaint, as filed on the 30th November, 1872, was " that the defendants did, during the months of June and October, namely the 1st, 2nd, 3rd, 4th and 6th in October, and the 5th in June, 1872, wilfully refuse and neglect to work under the

complainant, in Rockwood Estate, after agreeing to do so, against the 11th clause of Ordinance 11 of 1865." On the 6th of December, the defendants being absent, the complainant obtained a warrant against the 1st and 4th, withdrawing the charge as against the others. On the 19th of December, (to which day the case had been postponed) the following order was made by the Magistrate: "Warrant not taken out by complainant. He asks for time to do so. Struck off. Complainant referred to a civil action." *In appeal*, per CREASY, C. J. —"Appeal dismissed, except so far as regards the order referring the complainant to a civil action, which is declared to be null and void. After the delay of complainant in taking out the warrant, the Police Magistrate was justified in not repeating his order for a warrant. His order referring the complainant to a civil case was an assumption of authority not possessed by him. It may be observed, that the present plaint is substantially defective."

January 23.

Present CREASY, C. J.

Prostitutes.

P. C. Colombo, 5292. On the information of Mr. Sutton, Inspector of Police, that the defendants were common prostitutes at Wolfendahl Street, the usual notice for attendance, prescribed by the Contagious Diseases Ordinance of 1867, issued from the Police Court. On the day of trial, the accused appeared by a Proctor and pleaded not guilty. They were, however, convicted, and an order was made subjecting them to a periodical medical examination by a visiting Surgeon. *In appeal*, *Coomaraswamy*, for the defendants, contended that the due service of the notice on the accused, who were absent at the investigation, not having been verified on oath, as required by the 7th clause of the Ordinance, the order of the Magistrate was irregular. But the judgment was affirmed, the Chief Justice remarking that the accused, having been represented by a Proctor, were bound by the adjudication.

Jurisdiction.

P. C. Galle, 83102. The defendant was charged with having assaulted and wounded the complainant with a club. The evidence disclosed that the complainant had been struck on the head, that she had fallen senseless, had bled much, and had been in hospital for several days under medical treatment. The assault appeared to have been committed in the course of a dispute as to some plantain trees, growing on a land the title to which was in question between the parties. The defendant was acquitted. *In appeal*, the judgment was set aside, and the case sent back for proceedings to be taken before the Justice of the Peace, under clause 103 of Ordinance

11 of 1868. And per CREASY, C. J.—"The case was beyond the Police Magistrate's jurisdiction. The Supreme Court does not either generally take or sustain that objection on behalf of defendants, unless it has been made at the hearing before the Police Magistrate; and it is an objection not usually to be listened to on behalf of a complainant. But this may properly be regarded as an exceptional case. The appellant is evidently a woman in humble station, without professional advice. The delay and difficulty in getting the 1st defendant before the Police Magistrate are suspicious, and unless there is a further investigation of this case, we may be suffering a serious offence to be passed over without any effectual trial."

January 28.

Present CREASY, C. J. and STEWART, J.

Forcible removal.

P. C. Colombo, A. The charge in this case was "that the defendant did, on the 13th of January, at Morotuwa, unlawfully enter into the cinnamon garden of Juse Silva, in charge of complainant, and forcibly take away a bullock which had been seized and detained there for trespass." The Magistrate rejected the plaint, holding that it disclosed no offence. *In appeal*, the order was affirmed; and per CREASY, C. J.—"No criminal offence is sufficiently stated. The word 'forcibly' may mean no more than the breach of the ideal fence, which the law assumes to protect all property. Neither is it made to appear that the defendant rescued goods from the actual custody of the law. See R. v. Bradshaw, 7 C & P, 233."

February 4.

Present CREASY, C. J. and STEWART, J.

Cruelty to animals.

P. C. Matale, 71183. The defendants were charged, under clause 1 of Ordinance 7 of 1862, with having cut and injured a cow, the property of the complainant. The eye-witness in the case stated, "I know the cow. I saw 1st defendant cut it. This was two months ago. The animal was in the defendant's land. I could not make out whether the land was planted." The complainant, who was the heardsman, deposed that the cow had a cut on the hind leg near the hip, and that it had cost him ten rupees to have the animal doctored. The Magistrate held as follows: "This is a matter for a civil remedy, if true. Accused are discharged." *In appeal*, the judgment was affirmed; and per STEWART, J.—"No cruelty was proved within the meaning of the Ordinance referred to in the plaint."

Proceedings quashed.

P. C. Galle, 83681. The plaint in this case was identical with the one in No. 83447, reported in page 4, excepting that the complainant on the record was the wife instead of the husband. The Magistrate, having found the defendant guilty, recorded the same sentence as before, of six weeks' hard labor. *In appeal*, (*Grenier* for appellant,) the proceedings were quashed for irregularity ; and per STEWART, J.—" The charge in this case is for the identical offence of which the defendant was accused in the case 83447. The conviction was set aside by the Supreme Court, and the case sent back for further hearing. That case is consequently still pending, and ought to be proceeded with. The case was sent back, not for a new plaint to be prepared, but for the same charge to be further heard ; and the Supreme Court desires that that may be done accordingly."

Butcher's Ordinance.

P. C. Panadure, 20498. The defendant was charged with having slaughtered a bullock at Morotomulle, within the Police limits of Morotto, without a license, in breach of clause 13 of Ordinance 14 of 1859. The defendant appeared to have obtained a license from the headman of an adjoining village, but in doing so, the Magistrate expressly held, he had not acted bona-fide, and he was accordingly convicted. *In appeal*, the finding was affirmed; and per STEWART, J.—" The defendant is expressly found not to have acted bona-fide. This case is therefore different from the Colombo Police Court case referred to." (No. 32513, I *Grenier*, p. 1.)

Assault and Theft.

P. C. Galle, 83604. Two defendants were charged, in one plaint, with assault and theft. The Magistrate having found only the 1st guilty, sentenced him to six weeks' hard labor. *In appeal*, per CREASY, C. J.—" Affirmed, so far as regards the judgment of guilty of assault, but not as to the charge of theft. The acquittal of the 2nd accused shews that the Magistrate must have disbelieved the charge of theft. There was no evidence whatever to fix the crime of theft on the appellant, except his supposed complicity with the 2nd accused and an act of theft by the 2nd accused, which alleged act the Magistrate evidently disbelieved. The punishment given in this case is the ordinary punishment for assault, and there is no need to interfere with the case further on account of it. But it is not a matter of indifference, whether this record stands as a conviction of assault only, or as a conviction of assault and theft. The character of a convicted thief is much more damaged than that of a man who has been merely found guilty of assault."

Timber Ordinance.

P. C. Kandy, 90663. On this case (which is reported in page 19 of Part I, 1872) being reheard in the Police Court, both the defendants and complainant led evidence ; and the Magistrate held by his

former finding of "not guilty." *In appeal*, per Stewart, J.—"Affirmed. There is more evidence on the part of the defendants; and the appeal being on a matter of fact, the Supreme Court is precluded from considering whether the Magistrate came to a right or wrong conclusion on the evidence. The question of title to the land is still open for adjudication in a Civil Court."

False information.

P. C. Galle, 83198. This was a charge, under the 166th clause of Ordinance 11 of 1868, that defendant had falsely accused complainant, on his solemn affirmation before a Justice of the Peace, with cattle stealing. The Magistrate held that the information was false, but expressed some doubt as to whether defendant had acted with malice. He further held that defendant, having made enquiry before preferring the charge, had arrived at such a knowledge of the circumstances as should have led him, being a reasonable man, not to prefer it; and that, therefore, the defendant should be taken as having made the false charge wilfully, knowing it to be false. A verdict of guilty was accordingly recorded. *In appeal*, (*Grenier* for appellant.) the judgment was affirmed; and per Creasy, C. J.—"The evidence shows that the charge was false, and that it must have been false within the knowledge of the appellant. The appellant, in making his affidavit against the complainant, must have done so with intent to support a false accusation against the complainant. This satisfies the Ordinance under which appellant has been convicted."

February 11.

Present Creasy, C. J. and Stewart, J.

Furious driving.

P. C. Matara, 71399. This was a charge laid under the 1st section, 53rd clause of Ordinance 16 of 1865, for furiously driving a hackery. *In appeal*, against a conviction, the judgment was affirmed; and per Stewart, J.—"Affirmed, but the charge ought to have been under the 83rd clause."

Dhoby case.

P. C. Galle, 82759. The defendant, who was a Dhoby, was charged with gross neglect of duty, under the 11th clause of the Labour Ordinance. He was found guilty, and sentenced to a forfeiture of wages and to imprisonment, without hard labour, for ten days. *In appeal*, ***Ferdinands***, for appellant, submitted that the Negombo decision referred to by the Magistrate could not be taken to apply, as it did not appear that the Dhoby who was thereby convicted had worked for more than one employer, as in this case. The words "other like servants" should be construed to mean servants ejusdem generis as "menial" or "domestic" servants, amongst whom it would

be unreasonable to include a Dhoby, who wasbed outside his employer's premises and who was the servant of several masters at one and the same time. The judgment, however, was affirmed; and per Creasy, C. J.—" In this case, the matter for consideration was whether an ordinary Dhoby, employed to do the washing of a household at so much a month, is within the meaning of the Ordinance No. 11 of 1865 respecting servants and labourers. There is a decision of this Court, (Police Court, Negombo—reported at page 9 of Mr. Grenier's Reports), that the Ordinance does apply to such a person. It was stated in the judgment of the Court below, in the present case, that the Negombo decision was in direct opposition to a previous decision of this Court in a Jaffna Police Court case, No. 4273. The Supreme Court thought it desirable to send for the record of the Jaffna case, which has occasioned some delay. It appears that the Jaffna record is not to be found; but we have been furnished with an extract from the Jaffna Police Court calendar, by which it is shown that the decision in that case was a decision on the old Ordinance No. 5 of 1841, the words of which differ materially from the words of the Ordinance now in question. The 7th clause of the Ordinance of 1841, which imposed certain penalties for misconduct, thus describes the parties liable to be charged under it, 'any menial or domestic servant or laborer or journeyman artificer.' But the Ordinance No. 11 of 1865, by its first clause, describes the persons to be embraced by the word 'servant' as follows:—'The word servant shall, unless otherwise expressly qualified, extend to and include menial, domestic *and other like* servants.' It is the addition of these words 'and other like' which makes all the difference. These words, like all other words in a statute, must not be treated as meaningless, if a reasonable meaning can be assigned to them; but to hold that no servant can come under the Ordinance, unless he be in all respects a menial or domestic servant, would be to treat those words as meaningless surplusage. We consider them to reasonably mean such servants as, with regard to the nature and mode of whose employment and services, generally resemble menial or domestic servants, but with some circumstances or circumstance of variance, such circumstances or circumstance of variance not being important enough to efface the effect of the general similitude. The regular Dhoby of a household, employed and paid, not for a piece work, but by the month, appears to us to be a person generally resembling the domestic servant of the household. He who collects and washes the dirty linen of the household, and has to bring it back and count it out clean, is employed about the regular and necessary business of the household, just as much as the Appu, who spreads part of the linen, when cleaned, on the table, or the body servant or Ayah, who puts away in the almirahs other linen which the Dhoby has washed. And decidedly the Dhoby's services are not of a higher order than their's are. Having established the general similitude, we

must next look for the features of difference. It may be suggested, that the Dhoby does the main part of his work off the premises. But this seems to us to be a very unimportant matter. The same might be said of an errand boy, habitually sent off the premises. The really differential circumstance appears to be this. An ordinary Dhoby does the washing of several households. But the effect of this variance does not, to our minds, obliterate the effect of the general similitude ; and we hold accordingly, both on the reason of the thing and on the authority of the previous decision of this Court in the Negombo case, that a Dhoby, employed as this appellant was, comes within the words 'menial, domestic or other like servants.' It follows that the penalties of the 11th clause apply to him, if guilty of any misconduct which that clause specifies ; and this Dhoby has decidedly been so guilty."

Labor Ordinance.

P. C. Galle, 82758. The defendant was convicted of having left complainant's service, without giving due notice, in breach of the 11th clause of Ordinance 11 of 1865. The complainant, in his evidence, stated "defendant was employed by me in the office as lithographing boy. He was paid by the month—Rs. 15 per mensem. He only did the lithographing work." *In appeal*, (*Dias* for appellant) per Creasy, C. J.—"Set aside. The complainant describes the duties of this appellant as follows: 'He was employed by me in the office as lithographing boy.' It seems to the Supreme Court, that it would be a perversion of language to say that a person so employed was a 'menial, domestic or other like servant, or a pioneer, kangany or other labourer.' See the Interpretation clause of Ordinance No. 11 of 1865. To lithograph even letters, requires the exercise of some intellectual ability, as well as of special manual skill. It resembles the duties of a copying Clerk, whom no one would think of punishing under the Servants' and Labourers' Ordinance."

Coolies.

P. C. Gampola, 23847. The plaint was "that the defendants, being servants and kanganies in the employ of Mr. James Ryan of St. Clair Estate, on the 14th day of November, 1872, at Orwell Estate, without reasonable cause, did neglect and refuse to attend at St. Clair Estate, where they had contracted to attend in commencing and carrying on work ; wilfully disobeyed the lawful and reasonable orders of their said employer ; grossly neglected their duty ; and otherwise misconducted themselves in the service of their said employer ; in breach of the 11th clause of the Ordinance No. 11 of 1865." The Magistrate (*Neville*) held as follows :

"In this case, complainant, on behalf of his employer Mr. Ryan, sues two kanganies employed under him. Mr. Ryan has two estates, Orwell and St. Clair, in Gampola and Dimbula, res-

pectively. It is contended that defendants being ordered to proceed from the estate in Gampola to that in Dimbulla, and having refused, have subjected themselves to penal consequences for disobeying their employer's reasonable order without cause. The facts to be decided upon become—1. Were defendants generally bound, by the general law of Master and Servant, to transfer their services from Gampola to Dimbulla? 2. Were they generally bound by any special agreement so to transfer their services? If defendants were generally bound to transfer services, question next arises—3. Was this special order reasonable? 4. If otherwise reasonable, did the withholding of their pay justify refusal. The Court holds on the first count. 1. That when one proprietor holds land in two districts, such as Gampola and Dimbula, a labourer engaged for the one, without express stipulation, is not liable to serve on the other. The grounds for this opinion are. 1. It is clear the 25th clause of the Ordinance intends to provide that Estate Coolies are bound to serve the Estate, and the temporary Superintendent or Proprietor is not the owner of their services independently of his office, though the provisions of the Ordinance as to written contracts of service for one year are generally uncomplied with—and service is therefore monthly only;—yet there is no doubt the intention of this Ordinance, under which defendants are prosecuted, was that the service of coolies regularly employed on an Estate should be to the Estate and not to the Superintendent. If defendants were bound to an Estate, it was Orwell in Gampola. 2. Though the defendants are, in absence of a written contract, by literal law bound to the Superintendent, (in this case the Conductor, complainant) for their month's service, yet there can be no doubt they are not bound to perform any duty they had not in a general sense in view when they took service. Thus a man engaging as butler in a city, could not be expected to act in that capacity in the country, against his inclination and merely to suit his master. Neither can a kangany hiring his services for Gampola be held bound to serve in Dimbula, where climate, food, health, society and perhaps perquisites (such as contracts, &c.) are naturally different,—nor could a person, with a family dependent on him, be expected reasonably to leave that family and continue his services elsewhere, when at the time of hiring such separation could not be contemplated. No. 5023 P C. Badulla (Beling and Vanderstraaten's Reports, p. 123) treats of an entirely different case, when estates were only six miles apart, and when a good servant with his master's interest at heart, if he had no special reason for refusal, was clearly in equity bound to further his employer's interes ; since it may be *primá facie* presumed, none of the reasonable views with which he took service were likely to be infringed. On the second count, the P. C. holds 2. Though complainant and his witnesses endeavour to prove two special agreements between complainant's proprietor and defendants, yet they fail wholly

to prove either to my satisfaction. 1st and 3rd witnesses refer to an understanding and agreement to this special service, from the time of defendants' engagement, but other of complainant's witnesses deny it, and I feel satisfied defendants did not so consent. And as regards the second alleged agreement in November last, the evidence is very weak and contradictory, and I do not believe defendants engaged their services for Dimbula as alleged. On the contrary, much in this evidence leads me to believe they steadily opposed the proposal, and that the coolies whom they did send, when first applied to, were sent under compulsion, since they deserted instantly and without any cause shown or known. Defendants' subsequent conduct also, I think, shows this. They did not desert, but remained on Orwell till after they had been refused any further work there. On the third count, it is held: considering difference of food, climate and society, it was not reasonable to order laborers engaged for work at Gampola to proceed against their will to Dimbula, any more than it would be fair to force house-servants against their will from Colombo to Newera Eliya. Further, besides this reason, in this special case after defendants had forced twenty-four men to go to Dimbula to aid Mr. Ryan, and those men had deserted, it was not reasonable to expect the kanganies, who depend on their gang for a living, to transfer the rest of their men, unless good cause was given why the previous consignment had deserted. 4. By referring to the check roll and pay list, I find it unfortunately kept with pencilled columns of cash advances, totals, &c., allowing of extensive fraud by any dishonest conductor possessed of a piece of Indian-rubber. Further, it appears not only to defendants but to their gangs were due a sum of money exceeding the average of one month's earnings, after deducting advances; and that no settlement was made after 31st July last. The alleged debt bond is not produced, but as regards defendants I hold the withholding the pay of the coolies of a kangany is enough to justify his leaving *with* them, even though his own wages were paid, because he receives a capitation allowance for each of his men, and his livelihood is lost if he loses them. Further, it seems to this Court that the debt bond, even had it been produced, could not have been set off against arrears of wages in this case, unless it is so stipulated in the deed itself. A written deed has certain advantages in civil suits, which once assumed place the debt in an independent position, and on its own merits alone. So that more than a month's pay being due to defendants, they were entitled to leave after 48 hour's notice, which, however, Mr. Ryan's previous order to refuse them work rendered superfluous. For these reasons defendants are acquitted."

In appeal, the judgment was affirmed; and per STEWART, J— "There is not sufficient evidence of general hiring as to scene of work."

February 14.

Present CREASY, C. J.

"Juvenile Offenders."

P. C. Matara, 71121. The defendants having been found guilty of theft, the Court sentenced them, as being "juvenile offenders," to receive twenty strokes with a rattan. From the record, it appeared that the punishment was inflicted in the presence of the Magistrate. *In appeal*, by one of the accused, who pleaded that he was not a "child," and that he had been improperly flogged, the Chief Justice sent the case back, with the following order: "Request the Police Magistrate to look to the petition of appeal and inform the Court whether this offender was a child, and, if so, of about what age. The record at present only states that he was a 'juvenile offender,' which is not necessarily the same thing as a child. Request the Police Magistrate also to inform the Court what jurisdiction he considers himself to have had, beyond that (if any) given by the Ordinance 11 of 1868, see section 108, to order summary punishment to be inflicted on a child on the present charge." The Magistrate's reply having been read this day, the judgment of the Court below was affirmed, and the appeal dismissed, in the following terms. "This defendant has appealed on the grounds of want of evidence, and want of right in the complainant to prosecute him. These grounds are frivolous. The evidence of defendant having been one of the thieves is ample; and the complainant was a legal prosecutor. The defendant further appeals, on the ground that he is not a child, so as to be liable to summary moderate punishment, under clause 108 of Ordinance 11 of 1868. He asserts that he is of the age of 20. He also asserts that the punishment was not moderate, but was inflicted with the greatest severity. The Supreme Court has made careful enquiry into these matters; and the Supreme Court is satisfied that the Police Magistrate had reason to believe *super visum corporis*, that the appellant was a boy of about 14, and that upon enquiry made (very properly) of the boy's father, who was in Court, the father reported him to be only 12 years old. Under these circumstances, the Police Magistrate was naturally unwilling to send a mere lad to prison; and we consider that the infliction of a fine would be no punishment to the lad, and would fall in reality on his father. The Police Magistrate caused him to receive 20 strokes of a rattan, which were inflicted in the Magistrate's presence, over two cloths which the prisoner was wearing. We are convinced that the punishment was moderate. Under these circumstances, all the grounds taken in appeal having proved frivolous or unture, the Supreme Court does not feel called on in this case to base its judgment on other objections to the proceedings, of which no complaint has been made. The appeal is dismissed. But, as a caution in future cases, we point out to the Police Magistrate, that the provision at the end of section 108 of Ordinance 11 of 1868 does not apply to all cases of summary convictions of children, but to cases where the children are convicted under

Ordinances, which, like the Malicious Injuries Ordinance, clause 30, and the Police Force Ordinance, 16 of 1865, clause 99, specially empower the Police Magistrate, before whom any child is convicted under such Ordinance, to order the moderate chastisement of such child, instead of subjecting him to any fine or imprisonment."

Gambling.

P. C. Kandy, 92987. The plaint, as copied verbatim from the record, was "that the defendants were, on the 20th day of December, 1872, at Kandy, parties to playing, betting or gaming at a game on the bagatelle table, in a house kept for the retail of spirits or other liquors, in breach of the 16th clause of Ordinance No. 4 of 1841." The Magistrate (*Stewart*) delivered judgment as follows:

"The question as to whether Bagatelle playing is a game of chance, appears to have been settled in the affirmative by the Supreme Court in a Gampola case,* and it is therefore unnecessary for the Court to go into it. On the other question, the Court is inclined to doubt very much whether the 16th clause refers to gamblers. Gambling in general, as well as gambling at liquor shops or taverns, is made an offence and punishable by the 4th clause, section 4; and it could not therefore have been intended to provide again for gamblers by the 16th clause, which is specially directed against persons permitting or countenancing gambling: the only words in it that by any possibility could be extended to gamblers, are the words 'and every person who shall be a party to such playing,' &c. But in construing this clause, or to arrive at the true import or correct application of these words, we must not only look to the object of the clause itself, but must also have in view the 4th clause which, by previously providing for gambling at liquor shops or taverns, takes away the only ground for such possibility. Nor can it be supposed that the framers of the Ordinance would have twice provided for gamblers in the same enactment and for the same offence. Besides the words 'party to' do not always refer to those immediately concerned in any matter or thing, as for instance the expression 'party to a murder' does not imply or necessarily include the actual perpetrator of the deed. The words must be taken in connection with the whole Ordinance, and especially with reference to the context or object of the 16th clause; and we cannot then but come to the only and reasonable conclusion, that they simply and only refer to the context of that clause, namely to persons countenancing or permitting gambling. Further, it could never have been intended to punish gambling at taverns or liquor shops with less severity (the 16th clause making the offence only punishable by a fine) than gambling general-

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* P. C. Gampola, 15071. Vide Civil Minutes of 19th January, 1865.

ly, for which the 4th clause imposes imprisonment, when we all know that gambling at taverns is the worst kind of gambling in this country and the more serious offence, taverns being generally the resort of the most worthless. The Court thinks, therefore, that the 16th clause is not intended to meet the case of gamblers, and in support of that opinion, if any doubt remain on the subject, it would refer to a decision of the Supreme Court in Mills' Reports, page 21 (dated 27th April, 1860) in which that Court considered that the case of keepers of taverns, shops, places for the retail of spirits or other liquors, houses and other places, open or enclosed, is provided for in the 16th, 17th and 19th clauses, as contra-distinguished from the case of persons who game or play in the abovementioned places, which is provided for in the 4th clause, section 4. The defendants are found not guilty."

In appeal, by the complainant, the judgment was set aside, and the defendants found guilty and fined Rs. 5 each; and per CREASY, C. J.—"This was a charge, under Ordinance No. 4 of 1841, section 16, against defendants, as parties to gaming at a game on a Bagatelle table in a tavern. As to the question whether Bagatelle playing is within the meaning of the clause of the Vagrant Ordinance, (No. 4 of 1841) against gaming, the Police Magistrate rightly followed the decision of this Court in the Gampola case referred to. The Police Magistrate acquitted the defendants on another objection taken, namely, that the defendants were not proved to have been tavern-keepers "permitting or countenancing gambling," but to have been the actual gamblers. It was urged that these defendants were therefore not punishable under the 16th clause, though they might have been under the 4th clause. But it is no uncommon thing for an offence to be punishable under more than one clause of an Ordinance or Statute. The prosecutor, in such cases, may proceed under which clause he pleases. The words of the 16th clause are as follows: 'and it is further enacted, 'that all keepers of taverns or other shops or places for the retail of 'spirits or other liquors, who shall wilfully permit or countenance in 'or about the same, or in any shed or other building, compound, 'garden or land, adjoining or near thereto, and occupied by or belonging to the keeper of such tavern, shop or place, any playing, 'betting, or gaming at cock-fighting or with any table, dice, 'cards or other instruments for gaming at any game or pretended 'game of chance, and every person who shall be a party to any such 'playing, betting or gaming or in any way in transgressing or neglecting the provisions of this clause, shall, on the *first* conviction 'thereof, forfeit and pay any sum not exceeding the sum of £2.' Now, common sense and the ordinary understanding of words clearly point the actual gamblers as 'parties to the game,' and these defendants are manifestly liable under this clause. A decision of this Court on the 19th clause has been cited; but there is an essential difference between that clause and the 16th. The 19th clause does not contain

the all important words 'every person who shall be a party to any such playing, betting or gaming.'"

P. C. Galle, 83440. This was a prosecution, under Ordinances 24 of 1848, and 4 of 1864, for felling timber on crown land without a license. The defendant, having been convicted, was sentenced to three weeks' hard labor. *In appeal*, *Morgan*, for the appellant, contended that the Magistrate had no power under the first mentioned Ordinance to impose any punishment other than a fine; and that he had no authority to try the case under the Ordinance of 1864, in the absence of a certificate from the Queen's Advocate, the prescribed penalty being "such punishment by fine or imprisonment, with or without hard labor, as it shall be competent for the Court before which such conviction shall be obtained to award." The judgment, however, was affirmed; the Chief Justice remarking that the objection as to jurisdiction should have been taken in the Court below.

Timber Ordinance.

February 21.

Present CREASY, C. J.

P. C. Balapitimodara, 43682. The charge was "that the defendants did, on the 18th January, at Gompenuwella, forcibly take 40 Gorke planks of the complainant." The 1st defendant (who was a police headman) and another, appeared to have seized the planks, as not answering to the description of timber mentioned in a permit produced by complainant. The Magistrate discharged the accused, on the ground that the permit was not in complainant's name. *In appeal*, the judgment was affirmed; and per CREASY, C. J.—"No legal charge is set out in the plaint."

Irregular plaint.

P. C. Jaffna, 1484. Two of the defendants in this case having been absent on the day of trial, the Magistrate (*Livera*) found them guilty of contempt, and sentenced each to fourteen days' imprisonment. No opportunity to shew cause seemed to have been given to the accused, who urged, in their petition, that they had not attended Court in consequence of a promise made by complainant, before a number of witnesses, that he would withdraw the charge. *In appeal*, the order was set aside; and per CREASY, C. J.—"A Police Magistrate can only punish for contempts committed in the face of or within the precincts of his Court, and not out of Court. See Thompson's Institutes, vol. 1, page 470. The first part of clause 107 of Ordinance 11 of 1868, empowers a Police Magistrate to punish a party who does not attend the Court after due notice or summons, but these defendants have not been sentenced under this part of the Ordinance. And even when Police Magistrates think it their duty to act upon this part of the Ordinance, they should always give the party charged

Contempt.

an adjournment until the following day, so that he may have a fair chance of proving that the default for which he is blamed was not wilful and disrespectful. The letter of the concluding part of clause 107 of Ordinance 11 of 1868 may not require this, but it is required by fairness and equity."

Felling timber without license.

P. C. Badulla, 16343. The plaint charged the defendant with having felled and removed, without license, certain trees from crown land, in breach of clauses 5 and 15 of Ordinance 4 of 1848. The Magistrate (*Gibson*) held that the action was prescribed by the 14th clause of the Ordinance, as the charge had not been preferred within 3 months of the commission of the offence, and discharged the defendant. *In appeal*, it was urged that, by the Ordinance No. 1 of 1865 which should be read together with 4 of 1848, the time limited for the institution of the action was 2 years. The judgment was, however, *affirmed*; and per CREASY, C. J.—"I cannot say that the Magistrate was wrong in dismissing a charge which purported to be founded only on an Ordinance, 4 of 1848, about Port-Dues, which has long been repealed; and when the Ordinance 24 of 1848, to which the parties appear to have referred at the trial, was against the complainant. The Ordiunanance 4 of 1864 (called erroneously in the petition of appeal 1 of 1865) was not mentioned in the plaint; and even if it had been, the complainant does not appear to have had proof ready that the Queen's Advocate had elected to proceed in the Police Court. See Ordinance 11 of 1868, section 119."

Nuisance.

P. C. Mannar, 3826. In this case, the Magistrate held that washing dirty linen in a public tank, which was proved to have been used for bathing purposes, was an offence within the meaning of section 7, clause 1 of Ordinance 15 of 1862. *In appeal*, (*Dias* for appellant) affirmed.

Toll.

P. C. Badulla, 16391. The defendant, who was a toll-keeper, was charged with having "knowingly and wilfully refused to allow a cart to pass over the bridge at Badulla, in breach of the 7th and 15th clauses of the Ordinance No. 14 of 1867." The facts of the case are fully given in the following judgment of the Magistrate (*Gibson.*) "This case is brought by the officer of the Public Works Department against the Renter of Badulla, for stopping, on the 6th of January, a Government cart laden with tools and rice, the driver of which was duly furnished with a pass, in breach of the 15th clause of the Ordinance 14 of 1867. The whole of the facts stated by complainant's witnesses are corroborated by the accused's witnesses, that the pass was duly produced but that accused would not accept of the same or let it pass until money had been paid, the defendant stating that carts

laden with rice are not entitled to be exempt. The Court is of opinion that the fact that the cart was loaded with rice would not prevent it from being entitled to come under the exemption given in clause 7, which exempts all vehicles, etc, employed in the construction or repair of any road, etc; for as vehicles themselves cannot work, it means clearly those vehicles which convey tools and provisions required by the persons constructing the said road; and this cart is proved to have been laden with both rice and tools. Again, it was urged by defendant's counsel that, because the cart was going for a distance of more than 10 miles from the Badulla toll, the complainant's pass would not exempt it; but the Court is of opinion, that the Ordinance means that a certificate may pass any vehicle, etc, through any toll-bar which is within the distance of ten miles from the head quarters of the Officer superintending the work. Here the toll station is close to the Public Works Department's Offices, and therefore within the prescribed distance. On these grounds, I don't consider that accused had any right to demand payment for the carts, and consequently he has been guilty of a breach of the Ordinance, though I would believe not wilfully. The accused is found guilty and sentenced to pay a fine of Rs. 10. *In appeal*, (*Grenier* for respondent) affirmed.

Arrack Ordinance.

P. C. Batticaloa, 5554. The plaint was as follows: "that the defendant did, on the 9th January, draw toddy from a palmyrah tree standing in the garden of Santiago Kaitan, without license of complainant, the Renter, in breach of the 39th clause of Ordinance 10 of 1844." The Magistrate held that no licensed retail dealer *for the district* having been appointed, the sub-dealer (who was the tavern-keeper) had authority to license the defendant, who was accordingly acquitted. *In appeal*, *Grenier*, for the appellent, contended that, in the absence of a district retail dealer, the Ordinance provided that the license should be obtained from the Government Agent or any person duly authorised by him in writing. [But what right has the complainant to issue a permit?—C. J.] Clearly none whatever; but that did not justify the defendant breaking the law. [He is charged with not having obtained your license.—C. J.] *Ferdinands*, for the respondent, was not called upon. Per CREASY, C. J.—Affirmed.

February 28.

Present CREASY, C. J.

Maintenance.

P. C. Colombo, 5008. Under a charge for maintenance, the Magistrate discharged the defendant, on the ground that he had previously been acquitted on the specific ground that the paternity of the child had not been established. *In appeal*, the finding was affirmed; and per CREASY, C. J.—"The question of paternity has been twice

distinctly raised, and has received two distinct adjudications. It is not like the question of a fresh desertion."

Fiscal's Ordinance.

P. C. Panadure, 20384. The defendants (eight in number) were charged, under clause 23 of Ordinance 4 of 1867, with having resisted and obstructed the complainant in the execution of his duty, as a Fiscal's officer, while executing a J. P. warrant. The Magistrate held as follows: "I don't believe there has been actual resistance and obstruction to the complainant in the execution of his duty;" and the accused were accordingly acquitted. *In appeal*, the judgment was set aside and case sent back for further hearing, except as to the last defendant whose acquittal was affirmed. And per Creasy, C. J.—"It is not necessary that actual physical force should be used in order to constitute 'resistance or obstruction,' under the Fiscal's Ordinance, clause 23rd. If the Police Magistrate believes that the defendants prevented the officer from doing his duty, by meanaces and show of violence, (of which there appears to be abundant proof,) he ought to find them guilty."

Toll.

B. M. Colombo, 8445. The Wellawatte toll-keeper charged the defendant with having caused a box 4 × 2 feet, a bag containing goods and two bundles of clothes to be removed from a backery on one side of the toll-bar and loaded in another hackery on the opposite side, without paying toll, in breach of the 19th clause of Ordinance 14 of 1867. The Bench convicted the accused, holding that it was "a clear case of evasion of toll," and fined him Rs. 20. *In appeal*, (*Kelly* for the appellant,) the judgment was affirmed; and per Creasy, C. J.—"The appellant did not offer to pay the toll as for a loaded vehicle, and it is therefore not open to him to raise the point now suggested upon the wording of the 19th clause, as to payment of toll as for a loaded vehicle. The Supreme Court is strongly of opinion that this case might have been dealt with under the concluding part of the 17th clause, which, after specifying certain acts of evasion of toll, directs that 'if any person shall do any other act whatsoever, in order to evade or reduce the payment of any toll, and whereby the same shall be evaded or reduced, every such person shall be guilty of an offence, and shall be liable on conviction to a fine not exceeding five pounds.'"

False information.

P. C. Badulla, 16348. The charge in this case was "that the defendant did, on the 16th day of December, at Badulla, wilfully give false information to H. L. Moysey, Esquire, J. P. for Badulla, with intent to support a false accusation against complainant and four others, in breach of the 166th clause of Ordinance 11 of 1868." *In appeal*, against a conviction, *Grenier*, for appellant, contended that

the plaint was essentially defective in not setting forth the nature of the information alleged to be false. The Appellate Court had, he believed, repeatedly ruled that defendant should have full notice of what the false information was.* The judgment, however, was affirmed ; the Chief Justice remarking that, as the objection had not been taken in the Court below, the defendant no doubt understood the nature of the charge against him, and the irregularity could not be regarded as having prejudiced any of his substantial rights.

Gambling.

P. C. Colombo, 5400. The plaint was "that the defendant did, on the 29th of December, at Talangame, keep, hold or occupy a house for the purpose of common or promiscuous gaming, in breach of the 19th clause of Ordinance 4 of 1841." The Magistrate *(Fisher)* held as follows: "I do not think the evidence in this case is strong enough to warrant a conviction. I think it is necessary to support the charge, that more than one specific instance of gaming should be proved, to make the accused amenable to the clause of the Ordinance under which he is prosecuted. The very essence of the offence consists in the oft repeated acts of gaming in which the public are allowed to take part. In place of this evidence, the prosecutor tenders the rumour which is prevalent in the village and witnesses who speak to having heard the voices of people while gambling in the accused's house. One specific instance of gaming is alone proved." *In appeal*, per CREASY, C. J.—"The judgment and all the proceedings in this case are set aside, as the Police Court had no jurisdiction to try such a charge. This was a prosecution under clause 19 of the Vagrant Ordinance (No. 4 of 1841,) which clause is as follows: 'And it is further enacted, that all persons who shall keep, hold, occupy or use any house or other place, open or enclosed, for the purpose of common or promiscuous gaming, playing, or betting at cockfighting, or with any table, dice, cards, or other instrument for gaming, at any game or pretended game of chance, shall, upon the first conviction thereof, suffer imprisonment at hard labor for a period of six months, and shall forfeit and pay the sum of five pounds, and shall, upon the second and every subsequent conviction, suffer imprisonment at hard labor for a period of twelve months, and shall forfeit and pay the sum of ten pounds.' The Court that convicts under this clause (even for a first offence) must sentence the offender to imprisonment at hard labor for six months and also to a fine of five pounds. No other sentence would be legal. The Court has no discretion as to the term of imprisonment or as to the amount of fine, and it has no discretion as to imposing one only of these modes of punishment. A sentence of imprisonment for six months is beyond the power, of the Police Court to inflict, and the case does not come within clause 96 of Ordinance

* See judgments in P. C. Galagedara, 14253, 3rd March, 1870; P. C. Panadure, 16374, and P. C. Colombo, 11689, 30th August, 1870.

No. 11 of 1868, inasmuch as the Vagrant Ordinance, clause 19, does not leave to the discretion of the Court the infliction of both or either of the punishments, nor does it make one punishment contingent on the non-fulfilment of the other. Under these circumstances, I cannot reverse the judgment and order the sentence appointed by law to be pronounced by the Police Court, which I certainly should have done had it not been for the difficulty about the jurisdiction. The Police Magistrate was right in considering, that the same kind of evidence, as to the place being used for common or promiscuous gaming, is necessary under clause 19 as under clause 4, section 4. It may, however, be useful to repeat in this judgment, what has often been stated from the Bench of the Supreme Court, that, though generally necessary, it is not invariably necessary, to prove gambling more than one time. The gambling on the occasion of the seizure may have been such as of itself to prove that the place where it was going on was a place 'used for the purpose of common or promiscuous gaming.' The instance has been more than once suggested, of a man coming to a race-course with a booth and a roulette table, to which any body and every body on the course has free access and ready welcome, for the purpose of gambling. It is self-evident that this would be common and promiscuous gaming. The Police would do their duty by pouncing on the parties at once; the gambling booth-keeper would be liable to be convicted under the 19th clause, and the players would be liable under the 4th clause, section 4 of the Vagrant Ordinance. But the reason why I should in this case have reversed the judgment (had it not been for the jurisdiction difficulty) is, that the Police Magistrate, in giving his judgment, totally overlooked the evidence of Abraham Perera, which is clear and distinct to his having seen gambling on previous occasions, and which evidence was not in the least modified or impaired on cross-examination. If it appeared that the Police Magistrate had disbelieved this evidence, I should of course have not interfered with his decision on a matter of fact; but where a Police Magistrate forms a judgment in manifest forgetfulness of a material part, and a not discredited part, of the evidence, an error in law is committed, which the Supreme Court may properly correct. There would be fewer failures in prosecutions of tavern keepers, who encourage gambling, and of gamblers at taverns or in their appurtenances, if proceedings were more frequently taken under the 16th clause of the Vagrant Ordinance, which imposes a fine of two pounds for the first offence. In prosecutions under the 16th clause, it is enough to prove gambling on the occasion for which the prosecution is instituted. This Court has recently decided in Police Court, Kandy, No. 92987 (judgment given in Supreme Court on 14th February, 1873) that the 16th clause applies to the persons who are playing, betting and gaming, as well as to the keeper of the tavern and those acting under him. The great thing to guard

against, in enforcing the clauses against gambling in the Vagrant Ordinance, is the unfairness of using this Ordinance to punish a party of friends and acquaintances in humble life, who, for once in a way, may have a game, into which chance enters, for moderate stakes, in a place not specially prohibited by the Ordinance. They are no more to be punished, under the Vagrant law, than a party of persons in higher station would be, who have a game at vingt-un or loo in the bungalow of one of the party. But gambling, such and under such circumstances as the Vagrant law clearly forbids, is a very serious offence both in itself and on account of the numerous crimes of which it is the cause. It is an offence lamentably common in the Island ; and when clear proof can be obtained, it ought to be promptly prosecuted and sharply corrected."

Contempt.

P. C. Avisawella, 16368. The complainant, on the first day this case came on for trial (February 18,) stated that he was not ready, as his subpœnas had not issued. On an immediate enquiry by the Magistrate, it was found that the necessary stamps had not been supplied by the complainant, who, on being questioned, replied that he had meant to say he had no money to supply stamps. He was thereupon ordered to give bail, to appear two days after, to shew cause why he should not be punished for contempt in having endeavoured to mislead the Court. The complainant duly appeared on the 20th, and, although all his witnesses, save one, were in attendance, he declined to go to trial, alleging that he did not wish the case to be tried by the present Magistrate (*Jumeaux*) against whom he had recently given evidence before a Commission of Enquiry. The Magistrate allowed a month's time, to enable the complainant to apply to the Supreme Court for a transfer of his case to some other district, and proceeded to adjudicate on the charge for contempt. The complainant having denied that he made the statements on which the contempt was founded, the evidence of the Court Interpreter and of a Proctor (*Marshall*) was received, confirming the record in the case-book ; and he was found guilty and sentenced to fourteen days' imprisonment. *In appeal, (Kelly* for appellant*)* the order was affirmed ; and per CREASY, C. J.—" I think that in this case a contempt of Court was committed in the face of the Court, which the Police Magistrate had jurisdiction to punish by sentence of imprisonment."

Police Ordinance.

P. C. Galle, 83983. The plaint in this case was as follows: "that the defendants did, on the night of the 11th February, at Galle esplanade, have or use music, so as to disturb the repose of inhabitants, in breach of the 90th clause of the Ordinance No. 16 of 1865." The Magistrate convicted the defendants and fined

them each Rs. 10. *In appeal*, the judgment was set aside and charge dismissed; and per CREASY, C. J.—"The plaint is informal, as not following the words of the Ordinance; but the serious objection is, that the evidence itself does not establish the commission of any offence within the 90th clause of the Ordinance No. 16 of 1865. It does not appear that the defendants 'had or used music calculated to frighten horses' (see the words of the clause) or that they 'made any noise in the night so as to disturb the repose of the inhabitants.' The averment that the disturbing noise was made 'in the night,' is very material in such a charge."

March 7.

Present CREASY, C. J.

Receiving stolen property.

P. C. Panadure, 20573. The plaint was as follows: "that the defendant had on this day (20th February) two earrings, the property of the complainant, in his possession, knowing the same to be stolen." The defendant was acquitted, but it was ordered that the earrings be given over to complainant. *In appeal*, *Morgan*, for appellant, contended that there was sufficient evidence in the case to fix the accused with guilty knowledge. The defendant had taken the jewels, the very day after the theft, to a goldsmith (who was called as a witness) and had asked him to convert them into studs. This circumstance, coupled with the fact that the defendant had not led any evidence to show how he had come by the earrings, ought to be taken as conclusive of his guilt. Per CREASY, C. J.—Affirmed. There was no need on this plaint to prove that the defendant was the thief. He is not properly charged as receiver; but I should not have set aside the proceedings on a mere technicality, if the Police Magistrate had convicted the defendant on this evidence. But the sufficiency of this evidence, in point of fact, was for the Police Magistrate's judgment, and it is not for me to interfere with it."

March 14.

Present CREASY, C. J.

Toll.

P. C. Tangalla, 34349. Defendant, who was a toll-keeper, was charged, under the 15th clause of the Toll Ordinance, with having improperly demanded and received 12½ cents, on account of an "unloaded bullock which passed the toll station of Sinimodera." The Magistrate convicted him, holding that the defendant "would have been justified in making the increased demand, had the animal been yoked to the cart and lent its strength to the draught." *In appeal*, it was urged by defendant, in his petition, that the established practice

had been "that every addititional bull attached to a cart, whether it were properly yoked to the shaft or tied behind the cart or led behind it, was liable to the payment of 12½ cents." Per Creasy, C. J.— "Affirmed. The bullock was not 'additional' to the pair drawing the cart which were paid for, inasmuch as it contributed no additional drawing power. There is not even satisfactory proof that it was in any way attached to the cart."

New trial.

P. C. Balepitimodara, 43719. This was a charge of assault. The Magistrate discharged the accused, holding that the evidence was not "satisfactory." *In appeal*, the judgment was set aside and case sent back for further proceedings; and per Creasy, C. J.—"There is clear proof of an assault; there are no material variances in the evidence given by the witnesses; and nothing appears against their character. The Police Magistrate gives judgment in these words: 'The evidence is unsatisfactory, accused discharged.' This may merely mean that the Police Magistrate is not satisfied as to the ownership of the land, about which many questions have been asked. But that does not touch the question of assault, unless indeed the defendant proves clearly that the land and trees are his, and that, after due request to the complainant not to trespass, he moved the complainant away, using no unnecessary violence. No evidence whatever on the part of the defendant has been taken. Unless he adduce such evidence as materially shakes the complainant's case, he ought to be convicted."

Vagrant Ordinance.

P. C. Colombo, 6229. The defendants, who were described at the trial as "hawkers," "out-door proctors," "brokers to proctors," etc., were found guilty, and fined Rs. 10 each, on the following plaint: "that the defendants did, on the 18th of February, 1873, at Colombo, loaf about the Police Court premises, without any ostensible means of subsistence, in breach of clause 3, section 4 of Ordinance 4 of 1841. *In appeal*, (*Brito* for appellants,) per Creasy, C. J.—"Set aside and proceedings declared null and void. The plaint does not, in terms of the Ordinance 4 of 1841, clause 3, section 4, charge the defendants with 'wandering abroad, or with lodging in any verandah &c.'; but it charges them with 'loafing about the Police Court premises.' We consider this substitution of American slang for the English of the Ordinance to be extremely improper; and the term 'loafing,' so far as we understand it, is by no means synonymous with either 'wandering abroad' or 'lodging.' Moreover, the evidence in this case does not show that these defendants were persons 'wandering abroad,' and it does not show that they were 'lodging' in any 'verandah' or other place mentioned in the Ordinance."

Coffee stealing.

P. C. Kandy, 93141. The defendants were convicted of theft and of having received stolen property with guilty knowledge, and sentenced each to three months' hard labor. *In appeal*, (*Beven* for appellants) the judgment was affirmed; and per Creasy, C. J.— "The appellants in this case were charged with stealing a bag of coffee, the property of H. Thompson. They were also charged with having received the same with guilty knowledge. The appeal is on the evidence; and, unless it appears that there was no evidence at all, such as should have been left to the jury if the case had been tried before judge and jury, no error of law has been committed, and the conviction must be affirmed. The appellants were proved to have been taken after dark, on the road near the Peradeniya station, carrying this bag of coffee and another bag. They told the person who took them that it was purchased coffee. Afterwards, they told the Police Serjeant 'that they had purchased the coffee from traders, and when asked to point out the sellers, they said they were not near at hand. They gave the names of some Moormen. They said that they got the coffee from Moormen but the bags from cartmen.' The witness adds, 'they told me this when I asked how they got the bags, seeing they were branded with names. I asked them to point out the cartmen from whom they got the bags; they said they would not.' This happened on the night of 10th January last. It was further proved by Mr. H. Thompson that, about the 22nd December, he had sent 47 bags of coffee to go by rail to Colombo, the coffee being plantation coffee like the coffee produced, and that the bag found on the prisoners bore marks showing to whom it belonged, and also that it formed part of that particular consignment. He stated, on cross-examination, that he had received a receipt from Colombo, stating that the consignment was correct, and that the bags in which the consignment went down had been returned in bulk. This is treated, in the petition of appeal, as absolute proof that all the coffee and all the bags sent by Mr. Thompson had got safe to Colombo. It is not to be considered as amounting to anything of the kind. In the first place, it is all hearsay evidence; and, even if that blot be over-looked, it amounts to nothing more than that no deficiency or substitution had been detected, which is a very different thing from proof that all the very coffee which Mr. Thompson consigned, and all the very bags which he sent, had come safely to the proper hands. As Mr. Thompson stated in his evidence, 'it is quite possible, that at the Railway store or at our store in Peradeniya, the coolies might have exchanged a bag of good coffee for rubbish or indifferent coffee.' There was, therefore, in this case not only evidence, but very strong evidence, such as would have been left to a jury."

Coolies. Misjoinder of defendants.

P. C. Matara, 71470. The defendants (59 in number) were charged as follows: "(1) that the defendants did, on the 1st of February,

at the coffee estate called Cravén Estate, without reasonable cause, neglect and refuse to work on the said estate at the usual time, and wilfully disobey the orders of complainant, their employer, and grossly neglect their duty, contrary to the 11th clause of Ordinance 11 of 1865; (2) that the defendants did, on the said 1st of February, at the place aforesaid, quit the service of the complainant, without leave or previous warning of one month, contrary to the 3rd and 11th clauses of the said Ordinance." The complainant, (*Lecocq*) while being cross-examined, said, "the defendants have been paid their wages in part, not in full. They have received their rice weekly. The total amount due to them is Rs. 884. This is the balance due after debiting them with the rice given. They never asked me for their wages. At the request of the kangany, I did not pay them * * The amount of Rs. 884 is the wages of the defendants for five months; not their full wages, but part of their wages." The Magistrate delivered the following judgment: "The defendants left the service of the complainant on the 1st of February. The complainant states upon oath that no notice was given to him as required by the Ordinance. * * The evidence does not prove that any application was made for payment of the wages due. The complainant supplied the defendants with rice weekly, and was ready at any time to pay them what was due, but retained the wages at the request of their kangany, and they tacitly acquiesced in this arrangement. I have no reason to doubt the truthfulness of complainant's statement. The defendants are found guilty, and sentenced to be imprisoned at hard labor for two months and to have their wages due for one month forfeited."

Dias, for appellant, would not trouble the Court on the question of notice, the Magistrate having found as a matter of fact that no notice had been given. But he would draw attention to the passage in the petition of appeal, in which it was stated that one plaint had been submitted against all the accused, including some 30 men, 12 boys, and 10 women, (some with infants) with the view of preventing one accused from giving evidence for another. There was clearly a misjoinder of defendants; and as each could only be held responsible for his or her individual acts, it was extremely irregular to have lumped them up together, to answer jointly to four distinct charges laid in one plaint. But apart from the legal objection, he contended that the coolies were justified, under the 21st clause of the Ordinance, in leaving, as several months' wages were in arrear, and the only excuse for this pleaded by complainant was that the kangany had asked him not to pay.

Ferdinands, for respondent.—The legal objection should have been taken before plea. In cases before the Supreme Court, objections of this nature were required to be taken before the jury were sworn. (Ordinance 12 of 1852, clause 19.) No substantial injustice had been done, and the Court would not therefore interfere. If the Magistrate

had gone on with the trial, after the accused had intimated their wish to call some of the defendants as witnesses, the proceedings would have been irregular. This was a case in which the argumentum ab inconvenienti clearly applied.

Per CREASY, C. J.—"In this case 59 defendants have been charged and convicted together under the Labor Ordinance. The first count of the plaint, charges them all with neglecting and refusing to work: the 2nd count charges them all with desertion. There are no other counts. The defendants pleaded not guilty. At the end of the complainant's case, but not before, their Proctor took an objection about misjoinder, not alleging that some of the defendants required the evidence of others, but saying that 'there ought to be 59 plaints, one against each cooly.' Evidence was then called for the first defendant, about an alleged conversation with the complainant, during which the first defendant, a kangany, gave notice. It did not appear that any of the other defendants were present, or took part in this. The complainant had positively denied this notice. The Police Magistrate gave judgment in favor of the complainant, and convicted all the defendants, sentencing them all to the same imprisonment and stoppage of wages. The Police Magistrate's finding against the 1st defendant's evidence, and in favor of the complainant's evidence about the notice, is of course conclusive. No other notice was attempted to be proved. There had been no demand of wages, so as to let in the defence of wages being in arrear; and there is nothing in the case in favor of the defendants (who have all appealed) except the enormous and certainly inconvenient number of accused parties who have been lumped together in this single prosecution. Our present Ordinances about Police Court proceedings contain nothing, and the older Police Court Ordinances and Rules contained nothing, about joinder and misjoinder in Police Court prosecutions. If we are to follow the analogy of the English Law as to indictments, the present would be held a clear case of misjoinder; for here several persons are jointly charged with breach of duty, the duty as to each individual arising out of his own separate contract with the employer, and not from anything agreed to by them jointly and in each other's behalf. See Jervis' Archbold's Practice, 16th edition, p. 63, citing 2 Hawk. c. 25 s. 89, and other authorities. See also the late Mr. Justice Talfourd's edition of Dickinson's Quarter Sessions, page 169. As to how advantage of this defect is to be taken, the English authorities draw distinctions scarcely applicable here; but they all agree that, even where a number of offences or of offenders are joined in one indictment, so as to make the collective trial of them highly inconvenient and probably unfair, the Court has power to quash the indictment. The objection of misjoinder taken in this case, though not very formally at the trial, and more fully in the petition of appeal, is, I believe, new in our Courts. It is also, I believe, a novelty to find more than

alf a hundred accused persons put to trial together on one such harge. But it is certain that ever since Police Courts have existed this Island, that is since 1843, it has been usual to try several defendants together for a joint offence, when they have, by the same ransaction and acting in concert with each other, broken duties of he same kind, the breach of which is criminally punishable, even hough the duty as to each offender originated in something personal o himself. I feel bound to regard this constant usage of 30 years, as stablishing a consuetudinary law allowing such joinder ; subject nevertheless to the power of the Court to interpose and to amend or quash the proceedings, when it is manifest from the inordinate number who are jointly accused, or from other circumstances, that to ry them in a heap will be inconvenient: and the inconvenience which the law regards in these matters, is not as to the interest of the prosecution in obtaining a wholesale conviction, or of the officials in getting the work soon over, but it is as to the interest which each prisoner has in securing a full and careful investigation of the case, as it affects himself individually ; and in not being deprived of any probable means of defending himself. It is stated in the 1st volume of Thomson's Institutes, when speaking of Police Courts, that 'if an improper number of persons are made defendants, in order to exclude them as witnesses, the Magistrate should exclude [that is strike out of the plaint] those so made, and allow them to be called as witnesses.' A reference is given to Beling and Vanderstraaten's Police Court cases, p. 126. In the present case, the petition of appeal urges that the defendants lost the advantage of each other's evidence. But no distinct application to strike out names from the plaint, so that specified parties might give evidence for specified other accused, was made at the trial. Such application ought to be distinctly made and ought to be supported by affidavit. Still, the Police Magistrate's attention was to some extent drawn to the objection of misjoinder ; and it is obvious that there must be always a great risk of shutting out evidence, where a multitude are put on their trial at once. There are other inconveniences in such a practice. Here a whole gang of coolies is charged and tried together. According to the usual state of things, there must be among them married women whom the law [illegible] consider as acting under marital control, and who therefore ought to be acquitted. There would also be children, who must naturally be taken to have trusted their parents about proper notice having been given, and who ought to be held innocent, as a matter of common sense as well as a matter of law. But no discrimination has been exercised ; nor can effective discrimination be possible, if fifties and sixties of coolies are thus to be tried in a lump. I shall not define the exact number that may be joined in one charge. Whatever number might be fixed on, the old quibbling objection of the Sorites would follow ;—the next highest number would be mentioned ; and

it would be asked, where was the magical differenee between that and the number permitted. But I will say that, in my opinion, more than ten such accused should seldom be tried together, and more than twenty should never be. I shall not set aside the proceedings as to the 1st defendant, the kangany. His case has been fully investigated; and it is clear that none of the other defendants had anything to do with the notice alleged by him. With regard to the others, I shall quash the proceedings. Judgment affirmed with respect to the 1st defendant. As to the others, the conviction is set aside, and the proceedings are delared null and void."

March 19.

Present CREASY, C. J.

Vagrant Ordinance.

P. C. Galle, 83608. The defendant, who had been legally divorced from his wife, was convicted, for the third time, of not maintaining his children by her, and sentenced, under the 5th clause of Ordinance 4 of 1841, to be imprisoned at hard labor for four months and to receive fifteen lashes on the buttocks. *In appeal, (Dias, Grenier* with him, for appellant) per CREASY, C. J.—"Case sent back for the Police Magistrate to re-consider the legality of the sentence, and to alter and amend the sentence at his discretion. The Police Magistrate has sentenced this man to be imprisoned at hard labor for four months (which is lawful under the Vagrant Ordinance 4 of 1841, clause 5, and Ordinance 11 of 1868, clause 97;) and he has also sentenced the man to receive fifteen lashes on the buttocks. The usual way of flogging convicted prisoners in this Island, is by inflicting the lashes on the back; and I strongly incline to think, that to inflict the lashes on the buttocks (especially on a full grown man) would be a cruel and unusual 'punishment,' such as our Courts, acting in the spirit enjoined by the Bill of Rights, never ought to order. If the Police Magistrate, on reflection, adheres to his sentence, I will not set it aside without first consulting my colleagues; but I strongly advise him to think it carefully over; and as the whole question of the punishment will be open to him on this review, it may be well for him to consider whether the demerits of the case may not be better dealt with by ordering the term of hard labor and imprisonment already imposed, and by adding to it not lashes, but a requirement to give security for good behaviour for a year, under clause 6 of the Vagrant Ordinance 4 of 1841. Such a recognizance will be forfeited, if the man fails to supply proper maintenance for the children during the year."

March 26.

Present CREASY, C. J.

Toll.

P. C. Galle, 84931. The defendant, who was a toll-keeper, was charged, under the 15th clause of Ordinance 14 of 1867, with having illegally demanded and received toll on a hackery from an Overseer of the Public Works Department. The Magistrate found the accused not guilty in the following judgment: "A novel point has arisen in this case, which turns altogether on the construction to be placed on the 7th clause of the Toll Ordinance. By that clause 'all persons, vehicles, animals or boats employed in the construction or repair of any road, etc. shall pass without payment of toll on production of a certificate of such employment from the officer superintending the work.' Here it is questioned whether the vehicle of the complainant, such vehicle being used for the convenience of the complainant and not in the construction of the road, is exempted. I am clear that it is not, unless a construction other than that the words naturally bear is to be placed on them. If complainant were passing a ferry, the certificate of employment produced by him would exempt him from the ferry toll; but as he was not liable to toll for passing this road toll, no exemption is conferred on him. Turning then to the certificate filed, it is to be observed that that certificate covers D. C. Jayasurya, but does not cover the cart employed in conveying him. It cannot be said to be employed in construction, etc. when it simply conveys a workman and is neither going nor returning with materials. The vehicle then, not having been employed in the construction or repair of any road, is not exempt from tolls." *In appeal*, per CREASY, C. J.—"Judgment of guilty to be entered and defendant to be sentenced to pay a fine of Rs. 10. Persons employed in repairs of roads, etc. as mentioned in the 7th clause of the Ordinance, are exempted from the toll in respect of the animals and vehicles that take them to such work, though the animals and vehicles are not used in the work itself."

Assault.

P. C. Matale, 3172. The defendant (Mr. Anton) was charged with having, at Appollagolla Estate, on the 21st February, assaulted and beaten the complainant and falsely imprisoned him. The following is a record of the proceedings at the trial: "Defendant pleads guilty of having pushed the complainant into his stable and kept him there tied and bound, because he would not hand over a gun belonging to Mr. Gray (who died on an estate of which Mr. Anton had charge.) The gun was afterwards handed over to the Police, the complainant promising to give it over to Mr. Anton if he would let him go. Mr. Anton had letters from Murray, Robertson and Co., asking him to look after Mr. Gray's property, and simply detained complainant with the object of getting hold of Mr. Gray's gun. I think the slight detention justifiable, and I cannot fine defendant. Doubtless if he

had not taken active measures, complainant would have appropriated the gun. The case is dismissed.' *In appeal*, (*Beven* for appellant) per Creasy, C. J.—"There are no grounds for criminal proceedings against the defendant."

Toll.

P. C. Kandy, 93455. The judgment of the Magistrate explains the facts: "In this case the complainant, the proprietor of the Matale coach, charges the defendant with having, on the 29th January last, at Katugastota, demanded and received toll from a passenger vehicle, (the Matale coach) the said coach having previously paid toll on the morning of the same day on its way from Matale to Kandy, in breach of the 15th clause of the Ordinance No. 14 of 1867. In view of the fact that the coach had new passengers in it when it passed the toll-bar the second time, the Court was inclined to think that the taking of the toll might be justified, as complainant benefited by such passengers. But on further consideration, it is felt this should not affect the question ; and seeing that the great object in all legislation of this kind is the levying of what is equivalent for the wear and tear of the road by the plying of carts or vehicles for the conveyance of goods (which the coach in question is not) rendered destructive to roads by the heavy loads they generally carry, the Court cannot help doubting whether the toll was properly levied. By the 9th clause, it is only the vehicle that has a different load in it when it passes the toll bar a second time on the same day that is required to pay toll again, and by the 3rd clause a load is defined as including all description of goods, but not passengers who are not required to pay toll at all but go free. So that passengers could form no load, and therefore whether the coach had any passengers in it or not would be quite immaterial. Again, the express mention of a different load in the 9th clause and the non-allusion to passengers therein, is significant of the fact that passengers do not count. With regard to what was elicited from complainant in his examination as to luggage and parcels of passengers, the Court would quote a passage from Mr. Justice Thomson's work, page 60. * * The above clearly shows that the carrying of luggage or parcels does not necessarily convert a vehicle for passengers (which the coach is) into a vehicle for goods ; nor does the circumstance that the coach is (in the words of the interpretation clause) 'capable of carrying goods and commonly used for such purposes' render it, as was contended for, liable to the impost. The defendant is found guilty and fined Ten Rupees." *In appeal*, the judgment was affirmed ; and per Creasy, C. J.—"The Supreme Court agrees with the Police Magistrate in the construction of this Ordinance."

April 2.

Present CREASY, C. J.

Theft.

P. C. Colombo, 6790. The 1st defendant was charged with theft and the 2nd with having knowingly received the stolen property. The 1st pleaded guilty and was sentenced to three months' hard labor. The 2nd accused's house appeared to have been searched and some paddy and planks were found. He said he had got the planks from one Carolis Appoo, who on being called and examined by the Court denied having given them to him. No evidence, however, having been led to shew that the paddy and planks had been stolen from the alleged owner, the Magistrate acquitted the 2nd defendant in the following terms: "I cannot convict him before it is proved that a theft has been committed." *In appeal*, by the complainant, (*Ferdinands* for appellant,) per CREASY C. J.—" Affirmed. The confession and the conviction of the thief are not legal evidence against the receiver. I cannot take it on myself to overrule the Police Magistrate's decision that the other evidence of theft was insufficient, though I might myself have come to a different conclusion."

Resisting the Police.

P. C. Matara, 71564. The defendant was charged, under the 75th clause of Ordinance 16 of 1865, with having assaulted, resisted and obstructed the complainants (two Police constables) in the execution of their duty. The Magistrate (*Templer*) found the defendant guilty and fined him Rs. 100. *In appeal*, (*Dias* for appellant,) the judgment of guilty was affirmed, but the fine reduced to Rs. 50.*

Felling Timber.

P. C. Hambantota, 6292. The defendants were charged, under clause 5 of Ordinance 24 of 1848, with having felled seven Kohambe trees on Crown land, whereas the license authorized the felling of only five. The defence was that the accused had acted under the direction of the holder of the license, (a priest) who however was not called but whose version of the story was deposed to by the Modliar who was the complainant. The Magistrate (*Steele*) found the defendants guilty and fined them Rs. 10 each. *In appeal*, (*Grenier* for appellant) per CREASY C. J.—" Set aside and proceedings declared null and void. The Ordinance 24 of 1848, clause 5, has been repealed by Ordinance 4 of 1864; and the combined effect of clause 2 of this last mentioned Ordinance and Ordinance 11 of 1868, clause 119, takes the case out of the jurisdiction of the Police Court, unless the

* It was held in P. C. Nuwara Eliya, 8475, that the words " Magisterial Officer" in the 75th clause of the Police Ordinance applied to a Police Magistrate. See Civ. Min., September 5th, 1872.

Queen's Advocate's certificate had been obtained. I should have probably sent back the case, and given an opportunity for these informalities to be set right, but I have grave doubts about the merits. Instead of calling the priest to prove that the defendants (his servants) did not fell extra trees by his authority, the prosecutor gave mere hearsay evidence on the subject."

April 8.

Present Creasy, C. J.

Labor Ordinance.

P. C. Pusselawa, 9219. The defendant (a cangany) was charged, under the 19th clause of Ordinance 11 of 1865, with having seduced a cooly who was bound to work under the complainant. The gist of the complaint was that the cooly in question had been arrested at New Forest Estate, of which complainant *(Armstrong)* was the Superintendent, on a false charge preferred by defendant that the cooly had deserted from West Delta. The Magistrate *(Neville)* held as follows: "The issuing of a warrant for a cooly, without any right whatever to cause him to be arrested, is not seduction in itself, strictly speaking; but it is clearly an attempt to seduce, and renders the person applying for the warrant mala fide, in order under a simulance of law to misappropriate the services of a man bound to another employer, subject to the penalties prescribed. Defendant is found guilty and fined Rs. 30. Defendant to pay complainant's expenses at maximum rate in force." *In appeal*, the judgment was set aside and a verdict of acquittal entered; and per Creasy, C. J.—"Taking a man up under warrant without reasonable or probable cause is a highly culpable proceeding, but it is neither an act of seduction nor an attempt to seduce."

Restoring property.

P. C. Matale, 2750. The defendants were charged with having stolen some jewelry and clothes belonging to complainant and also with having received the same with guilty knowledge. The Magistrate (*Temple*) entered a verdict of acquittal but, believing that the property in question belonged to complainant, ordered that it be restored to him. *In appeal*, per Creasy, C. J.—"The order to give the property to the complainant is declared null and void. It is only the Supreme Court that possesses such power in cases of acquittal. See Ordinance 11 of 1868, clauses 49 and 50."

Evidence.

P. C. Maturata, 7222. Four defendants were charged with assault. The case went to trial on the 23rd December, 1872, against the 1st defendant who was found guilty. On the 25th of March, 1873, the

4th defendant was brought up on a warrant, and the Magistrate (*Hartshorne*) proceeded to try him by reading over, in the presence of the witnesses, the evidence which had previously been recorded and giving him an opportunity of cross-examining them. *In appeal*, by the 4th accused, the judgment was set aside, and case sent back for evidence to be regularly taken and for a proper trial; and per Creasy C. J.—"The course taken here of reading over the old notes, instead of taking the evidence of the witnesses over again in a criminal trial, is precisely that which is strongly censured as improper and illegal in the very valuable judgment of the Privy Council in Reg. v. Bertrand, Moore's Privy Council Cases, N. S., iv, 380. It is to be remembered that the present is a case of actual trial, and not of preliminary proceedings before a Justice of the Peace to which these remarks would not apply."

Contempt.

P. C. Matara, 23126. This was an appeal against a conviction for Contempt. Per Creasy, C. J.—"The order of committal against this appellant is set aside. This appellant, in giving his evidence, stated that he was not present when the cut was actually inflicted. For him, when recalled and asked who cut, to answer 'I do not know,' was in my opinion no contempt of Court, and it was no refusal to give evidence. The circumstance of another witness having stated that this appellant was present when the cut was given, ought not to be taken as conclusive against the appellant, so as to fix him with contempt of Court. I observe also that this appellant was not called on to show cause why he should not be committed, which always ought to be done, except in extreme cases such as an attempt to assault the Judge, or the like."

Corporal punishment.

P. C. Galle, 83608. The judgment in this case (which is reported in page 32) having been reconsidered by the Magistrate, the following order was recorded, under date the 29th March, 1873. "This case has been sent back to me 'to alter and amend the sentence' at my discretion. The Hon'ble the Supreme Court is disposed to recommend me not to impose lashes at all, but to pursue the course prescribed in clause 6. That recommendation, emanating from the highest judicial authority in the Island, would receive from me the utmost deference, if it were not that the 5th clause of the Ordinance renders the convict liable to imprisonment '*and* to corporal punishment, etc.' 'And' being used and not 'or' renders the imposition of corporal punishment imperative. I must therefore sentence to corporal punishment, but, having a discretion as to the number of lashes, I shall only impose *one lash*. My Lords also incline to the opinion that a sentence imposing lashes *on the buttocks*, and not on the back, is illegal, as not being in the spirit enjoined by the Bill of

Rights. A sentence to a like effect has recently been affirmed (vide P. C. Galle, No. 84277 ;) and in my experience as an executive officer, I have frequently known lashes inflicted *on the buttocks*, the object being, as it was the object of the Court in this case, not to place the scars where they were always visible. Acting, however, in strict obedience to the wishes of the Appellate Court, the sentence in this case will be modified and amended accordingly. The accused is sentenced to be imprisoned at hard labor for four months, and to receive one lash on the back; and he is required, at the expiry of the aforesaid four months, to find security in the sum of Rs. 1500 for his good behaviour for one year. The record will now be forwarded, in accordance with the minute of the Executive Government as to corporal punishment, to His Excellency the Governor, with a recommendation that the corporal punishment imposed be remitted, in view of the opinion of the Hon'ble the Supreme Court."

In appeal, (*Grenier* for apellant) the judgment was affirmed, but the sentence was amended by omitting so much of it as ordered the defendant to receive one lash ; and per Creasy C. J.—"The Police Magistrate states that he ordered this lash under the impression that it was compulsory on him to inflict corporal punishment as well as imprisonment. But the Supreme Court does not think that such compulsion exists. The clause (5 of Ordinance 4 of 1841) directs that a person convicted under it shall be liable to imprisonment at hard labor *and* to corporal punishment. The clause does not say positively that the convicted person 'shall suffer imprisonment and shall suffer corporal punishment.' The Ordinance does use this positive language in clause 19, where it evidently meant to leave the Court no discretion as to inflicting both kinds of punishment. But in the clause which we are dealing with, the Ordinance merely says that the offender shall be liable to imprisonment and to corporal punishment. I think that the word 'liable' may be taken distributively, and that it is in the discretion of the Court to enforce that liability as to one of the punishments or as to both of them. If the words had been 'imprisonment *or* corporal punishment,' the Court could not have inflicted both. But as the clause stands, the Court may inflict both or either. The judgment and sentence in this case are in all other respects correct, and are fully warranted by the facts, and also by the law which is to be found in Ordinance 4 of 1841, clauses 3, 4, 5 and 6, and in Ordinance 11 of 1868, clauses 96 and 97."

April 22.

Present Creasy, C. J.

Shooting dogs.

F. C. Matale, 29?5. The defendant was charged with having unlawfully and maliciously shot and killed the complainant's dog, in breach of clause 19 of Ordinance 6 of 1846. The dog appeared to

have been shot while trespassing in the garden of the defendant, on whose part, however, no malice was proved. The Magistrate (*Temple*), found the defendant guilty and fined him Rs. 3. *In appeal*, per CREASY, C. J.—" Set aside. Express malice against the owner is not essential ; see clause 26. But I do not think this Ordinance was meant for the ease of a man who shoots a pariah dog, which annoys him by infesting his premises. Observe also the 20th clause. No wanton cruelty was practised here."

Jurisdiction

P. C. Galle, 84167. This was a prosecution for a breach of the 32nd clause of Ordinance 10 of 1844, for illegally keeping and possessing 2 gallons and 2 quarts of arrack. The defendant was found guilty and fined Rs. 100. *In appeal*, the judgment was set aside ; and per CREASY, C. J.—" These proceedings are null and void, being beyond the Police Magistrate's jurisdiction."

Pelting stones.

P. C. Puttalam, 6166. The charge was " that the defendant did, on the night of the 30th March, 1873, at Puttalam, pelt stones at the complainant's house." The Magistrate (*Power*) rejected the plaint, holding that " it was not a common law offence, nor could it be brought under any Ordinance," and referred the complainant, if he had suffered any damage, to a civil action. *In appeal*, the judgment was affirmed; and per CREASY, C.J.—"If the defendant's conduct amounted to any criminal offence, it should have been properly stated in the plaint."

Toll.

P. C. Colombo, 6429. The charge was that the defendants did, on the 28th day of February, 1873, pass the Hendala canal toll station with two loaded pada boats, without paying toll, in breach of clause 17 of Ordinance 14 of 1867. The 1st defendant was a contractor employed by the Public Works Provincial Assistant to effect certain repairs to the retaining wall of the Hendala canal, and was provided with a pass from Mr. Byrne to secure exemption from toll. He had entered into a sub-contract with the 2nd defendant who, in conveying materials for the work, claimed exemption from toll by virtue of the pass he had obtained from the contractor. The Magistrate (*Fisher*) held that " despite the sub-contract, the materials being admittedly for the repairs of the canal, the accused have not been guilty of any improper and unauthorised conduct in passing the toll without payment." A verdict of acquittal was thereupon recorded, and the complainant was condemned to pay the defendants Rs. 10 as reasonable expenses. *In appeal* (*Kelly* for appellant) per CREASY, C. J.— " Affirmed. The decision of the Police Magistrate was right, and it was reasonable to order the expenses of the defendants to be paid by the person who wrongfully summoned them."

Resisting the Police.

P. C. Kandy, 93777. The charge was laid under the 60th clause of Ordinance 10 of 1844, in that the defendant did obstruct, resist and molest complainant in the execution of his duty as a Police officer. The complainant stated in his evidence that he had not his uniform on when he went to seize the arrack in respect of which the resistance was made, and that he had concealed the fact that he was an officer of the Police. The Magistrate (*Stewart*) dismissed the case, holding that to constitute resistance to a Police officer he should show himself as such at the time of resistance, and that, in this instance, the complainant should have disclosed his official character when the seizure was made. *In appeal*, per CREASY, C. J.—" Affirmed. The complainant's own words, in which he says ' we purposely concealed the fact that we belonged to the Police,' make it impossible to convict the defendants of obstructing an officer of Police or Peace officer in the execution of a duty imposed on him by Ordinance 10 of 1844. The defendants could not possibly have the *mens rea* to commit this offence, in the absence of all knowledge or means of knowledge that the person whom he interfered with was a policeman in the execution of his duty. This is not to be regarded as a decision that a policeman is not under the protection of clause 60 of the Ordinance unless he is in uniform. It would be enough if the defendant had notice, in any shape and by any means, of the official character and function of the person whom he obstructed. It would, for instance, be enough if the officer told him at the time who and what he (the officer) was and what he (the officer) was about to do. But here the officer, according to his own statement, altogether concealed his official character."

Labor Ordinance.

P. C. Haldummulla, 2125. This was a charge, under the Labor Ordinance, against certain coolies for desertion. The Magistrate (*Reid*) held as follows:—" I have read over the evidence of the complainant to him, after taking it down, so that there may be no mistake in my notes, as the system described by him seems unusual and oppressive. The accused is charged with deserting from the service of Mr. Pineo on Berogalla Estate, without giving notice or without reasonable cause; but the only witness called swears distinctly that Mr. Pineo does not accept notice from the coolies on this estate. This seems a very serious state of affairs and very unreasonable conduct, as Mr. Pineo must have been aware of this when complainant (Davidson) swore the affidavit before himself, charging these coolies with this offence against himself, and complainant knowing he did not accept notice. Mr. Pineo is not present. Again, in the absence of a written contract, notice should be accepted at any time. Under these circumstances, I think it must be a serious matter for coolies to obtain leave from the Berogalla Estate. If this accused was in Mr. Pineo's service, as stated in the plaint

and in the affidavit, I cannot understand his not receiving notice from him. Clause 3 of Ordinance 11 of 1865 requires notice from either party. I do not see sufficient ground for convicting accused of leaving the Estate without notice or reasonable cause, and he is therefore discharged. This accused and others were brought on a warrant from Nuwara Eliya. As I understand there are many deserters, and that there is difficulty in procuring coolies, I do not decree accused any compensation, though he is entitled to it. It might have a serious effect on others. Complainant, through his Proctor Mr. Keyt, gives notice of appeal, so the accused is detained in custody. Mr. Keyt, for complainant, submits that accused's statement 'I did leave the Estate to see my brother and was arrested coming back' is not taken down. It is quite true that accused made this statement, after the case for prosecution was closed, but I did not think it necessary to take it down."

In appeal, (*Brown* for appellant) the judgment was affirmed :—and per Creasy, C. J.—"This was a charge, under the Labour Ordinance 11 of 1865, against the defendant for leaving the service of R. E. Pineo, Esq. on Berogalla Coffee Estate, without notice or reasonable cause. I consider the Police Magistrate to have found that the fact of the defendant having left the Estate without notice has not been sufficiently proved: and I might at once affirm the judgment on this ground only, as being a decision on a question of fact, but I think it desirable to go more fully into the case, inasmuch as the Police Magistrate's words as to finding on mere fact are not absolutely unambiguous, and also because there are some strange circumstances in the case. I may remark also that the petition of appeal is drawn in an unusual style of vehemence, and it is my duty to notice and censure the grossly improper and illegal course which has been taken of publishing through the press, while the appeal was pending, a letter written in a tone of violent partisanship against the judgment of the Police Magistrate. The sole witness in the case was the complainant and appellant, Mr. Davidson, the Superintendent of the Estate. I will read his evidence.

'I am Superintendent of Berogalla Estate. The defendant was employed on that Estate as a cooly, and he left in February last. I produce my Check Roll, from which it appears this man, Mardun, left in February. When a man wants to leave the Estate, he must come himself and give his name at the beginning of a month, if he wants to leave at the end of the month. We accept notice only at the end of the month. The coolies know this. If a cooly comes about the middle of a month, say the 15th of a month, and gives notice that he wants to leave within a month from that date, such notice is not accepted until the beginning of the following month. This is the rule so long as I have been on that Estate. It was the rule made by Mr. Pineo, I think. It is the rule Mr. Pineo insists on. If a cooly wants to leave the Berogalla Estate, he must give notice to me and not to Mr. Pineo. This man gave me no notice, or else it would be put down in the Check Roll.'

Cross-examined by Police Magistrate.—'I can swear that accused did not give me notice. I understand Tamil tolerably well. I have been in this country over 15 months. Accused is in my service. I am in charge of Berogalla Estate and accused is a Berogalla cooly, so I think he is in my service. I never pay the coolies on that Estate. Mr. Pineo pays them. I am under Mr. Pineo: he is my Peria Dora. I swore this affidavit before Mr. Pineo himself as J. P., charging these coolies with leaving his service. Mr. Pineo pays his coolies once in two months or so. Mr. Pineo goes to the Estate, sometimes once a week, and sometimes once a month Mr. Pineo does not receive notice from the coolies on the Estate. He tells them to come and tell me.'

Cross-examined by accused. No question; says 'I am willing to return to the Estate.' Complainant adds, 'This cooly met with an accident and was sent to Dr. Moss and paid and provided for until he got better, and as he is ungrateful I do not wish him to come back to the Estate but want him punished.'

"Mr. Davidson, in his appeal, asserts that the Police Magistrate was in error in making allusion to the 3rd clause of the Ordinance 11 of 1865 in his judgment, 'for that had no bearing on the case.' On the contrary, the 3rd clause is all in all important for the correct decision of the case. The 3rd clause, especially when read in connexion with the 4th, shews clearly that a cooly can, at any time and on any day of his monthly service, give a valid notice of his intention to leave 'at the expiry of a month from the day of giving such notice.' If he does not leave before the end of that term of warning, he is not punishable under the 11th section as a deserter. Mr. Davidson says that it is a rule on Berogalla Estate to accept no notice from coolies which is not given at the beginning of a month. He also states that Mr. Pineo does not accept notices from coolies on this Estate, but that notice must be given to him, Mr. Davidson, the Superintendent,—although the prisoner is described in these proceedings as being in the service of Mr. Pineo, who pays the coolies, who comes to the Estate sometimes once a week, and sometimes once a month, and of whom Mr. Davidson says,' I am under Mr. Pineo, he is my Peria Dora.' The obvious answer to all this code of Berogalla rules is, that Mr. Pineo and Mr. Davidson have no authority to alter the law of the land. A notice given to either of them by a cooly, at any period of the month, is a good notice, whether Mr. Pineo or Mr. Davidson think fit to receive such notice or not. The Police Magistrate had to determine, not what Mr. Pineo or Mr. Davidson thought fit to accept, but whether it was sufficiently proved before him that the cooly went away without having given a month's notice to either Mr. Pineo or Mr. Davidson. In default of Mr. Pineo appearing to give evidence on the subject, though Mr. Pineo was evidently in the neighbourhood, and though he was evidently aware of the proceedings inasmuch as he had (very improperly) signed the warrant for his own servant's, this cooly's, apprehension, the Police Magistrate was quite right in holding the evidence insufficient. The complainant, in his peti-

tion of appeal, endeavours to make up for the defects in the evidence against the prisoner by supposed admissions of the prisoner during trial. During the proceedings, the prisoner said 'I am willing to return to the Estate.' The appellant somewhat oddly asserts that this statement was a *tacit* admission of guilt. I do not think that it was anything of the kind. Finally, the appellant asserts that 'when defendant was called on to make a statement, he admitted that he left the Estate without notice or reasonable cause." To support this assertion nothing appears on the record, except an entry that the accused made this statement 'I did leave the Estate to see my brother and was arrested coming back.' There is not a syllable here about leaving without notice. The appellant concludes his petition with remarks about the importance of upholding the Laborers' Ordinance. Unquestionably it ought to be upheld. It is a very salutary enactment, and was framed with great care and consideration. But it is a very different matter to uphold alterations and additions which individual proprietors may think fit to introduce for their own convenience. This it is which the Police Magistrate has refused to do in the present case, and in so refusing he has acted quite rightly."

Toll.

P. C. Tangalla, 34965. The defendant was charged with having evaded payment of toll, by driving in a hackery from Tangalla to Sinimodera, crossing the toll-station at the latter place on foot, and using another hackery on the other side. *In appeal*, against a conviction, *Grenier* for appellant quoted the judgment of the Appellate Court in P. C. Balepitimodera, 28,118,* and invited attention to the evidence (not expressly disbelieved by the Magistrate) of one of the witnesses for the defence, who proved that he had offered a seat in his own hackery to the accused, who was journeying homewards on foot, and that the offer had been accepted. Per Creasy C. J.—"Set aside. The Police Magistrate does not state that he disbelieves Dines Hamy's evideoce, which completely negatives the idea of an intent to evade the toll."

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* Per Curiam —"The defendant is charged with evading the payment of Toll, in breach of the 17th clause of the Ordinance No. 22 of 1861. The evidence shows that the defendant, who is a clerk in the Ballepitty Court, drove his Hackery up to about 10 or 15 fathoms from the toll-bar; that there he got down, without paying toll, walked over the bridge to the Court House which is close by ; and in the afternoon that he re-crossed the bridge to the spot where he had left his vehicle and drove home. The Magistrate was of opinion that the charge was not maintainable, and we think the dismissal correct. The tolls imposed by the Ordinance are expressly declared, by the 4th clause, 'to be levied in respect of the roads, bridges, ferries and canals specified in the schedules A, B, C and D.' The bridge at Ballepitty is included in schedule B. But it is admitted that the vehicle passed neither bridge nor toll bar. The first portion of the 17th clause is inapplicable. The latter part, within the operation of which it is sought to bring this charge, enacts 'that if any person shall do any other act whatsoever in order to evade the payment of any toll,

False and frivolous charge.

P. C. Galle, 84118. Held that a Magistrate was competent to punish a complainant at the close of the trial for having brought a false and frivolous charge, and was not bound to adjourn the adjudication unless special application for time were made. The finding and sentence would be sufficiently regular, if the party were formally called upon to shew cause.

May 2.

Present Stewart, J.

P. C. Navalapitia, 17943. In this case a Toll Renter had been convicted of levying toll on certain Carts conveying muriate of potash. *In appeal* (*Grenier* for appellant) the Magistrate's judgment was affirmed; and per Stewart, J.—"The muriate of potash was being conveyed to be used as manure for land, and as such is exempt from toll. This substance is obtained from burning vegetables, and though it contains saline properties, cannot be deemed salt in the popular and general signification of that word within the meaning of the Ordinance."

Appeal rejected.

P. C. Galle, 83630. The appeal lodged in this case was rejected in the following terms. "There is no provision in the Rules for the Police Courts for allowing an appeal which has been lodged after the time prescribed. There is, besides, in the present case a delay of more than six weeks."

May 6.

Present Stewart, J.

Labor Ordinance.

P. C. Panwilla, 14322. The defendants were charged with having wilfully and knowingly seduced from the service of complainant (*Macartney*) certain coolies who were bound by contract to serve him. *In appeal* against a conviction, (*Brown* for appellants) Stewart, J. delivered the following judgment which fully sets out the facts of the case.—"Affirmed. The defendants are charged with seducing from the service of the complainant certain labourers, who were bound by contract to serve the complainant, in breach of the 19th clause of the Ordinance No. 11 of 1865. According to the evidence, the labourers

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and whereby the same shall be evaded, shall be guilty of an offence.' The above provision is similar to that in sec. 41 of 3 Geo 4, c. 126. In the Statute, however, in addition to the restrictions contained in the preceding portion of the 17th clause, there is the following passage, 'or shall leave upon the said road any horse, cattle, beast or carriage whatsoever, by reason whereof the payment of any tolls or duties shall be avoided or lessened'—words not occurring in our Ordinance. Further, the 19th clause prohibits goods brought upon any animal or vehicle to any bridge, &c., to be transferred from one side thereof to the opposite. There is no provision, however, affecting such an act as the one now complained of, and consequently it may fairly be held that the present is a case in which the rule of construction, *expressio unius est exclusio alterius*, should be allowed to prevail." *Civ. Min.*, April 4, 1865.

referred to had not actually entered the service of the complainant but were on their way to his estate from Kornegalle, when they were met by the defendants (who were at the time employed on the complainant's estate) a short distance from their destination and induced by them, on false pretences, to take service on another estate in the neighbourhood. It appears that on the 29th January two men, Sangalingem and Caderwalo, came to the complainant to 'offer labour,' *i e.* they offered to bring coolies to the complainant's estate, and asked the complainant an advance of Rs. 120 for that purpose. A cheque for that amount was given by the complainant, and a receipt granted by the men in exchange. But shortly after, it occurring to the complainant that there might be some difficulty about his eventually getting the coolies, the cheque was returned to him, he however being allowed to retain the receipt. The arrangement did not end here, the Kanacapulle (2nd witness) being directed by the complainant to pay the two men Rs. 30, the complainant promising to return the money afterwards. It is proved that this money was paid to the two men through the 3rd defendant. Accordingly, the former proceeded to Kornegalle, obtained the coolies, gave them advances out of the Rs. 30, engaging them to go to Leangolla, complainant's estate. On the above facts, it has been urged, on behalf of the appellants, that there was no binding agreement between the coolies and the complainant, that the return of the cheque shows that the complainant withdrew from the agreement, and further, even allowing that he still continued a party to it, that the contract was incomplete being only executory. It appears to the Supreme Court that, though the complainant received back the cheque, he did so merely in prudence, and that this does not materially alter the aspect of the case. That there could have been no intention to abandon the agreement is evidenced, not only by the complainant's being allowed by the two men to retain their receipt, but also by Rs. 30 having been advanced to them on complainant's account and for the same purpose, payments out of which money are proved to have been made to the coolies for their expenses to carry them to Leangolla. The Ordinance contemplates two kinds of contracts—a verbal contract of service under the 3rd clause, and, secondly, written contracts under the 7th and 8th clauses. There was no written contract in the case ; but, as a verbal contract entered into by the coolies with the complainant's agents, it was a good contract for a monthly service within the meaning of the 3rd clause, rendering the coolies who entered into it bound to serve the complainant."

May 16.

Present Stewart, J.

Arrack Ordinance.

P. C. Batticaloa, 5822. The defendant (who had previously been acquitted in case No. 5554, reported in page 21) was charged "with having unlawfully drawn toddy, without having first obtained the permit

required by law, which is an offence punishable by clauses 39 and 40 of Ordinance No. 10 of 1844." The Magistrate (*Worthington*) held as follows: "The Court cannot hold that the license referred to (from the tavern-keeper) was sufficient, since the grantor was neither the Government Agent, nor 'some person authorized in writing under his hand to grant such permit,' nor 'the licensed retail dealer in toddy for the (whole) district'; and, therefore, since there is trustworthy evidence to prove the drawing of toddy by defendant, a conviction must follow. But on considering what punishment is to be imposed, the Court is also bound to take into account the fact, also brought out to its satisfaction, viz., that practically the local retailers of arrack and toddy have been recognized, for several years past at least, as the persons entitled to issue licenses for drawing toddy, and that defendant evidently acted bonâ-fide considering he had a right to draw under such a license. Defendant found guilty and fined R 1. *In appeal*, per STEWART, J.—"Set aside. The 'licensed retail dealer in toddy for the district within with such palm shall be situated,' referred to in the 39th section of the Ordinance 10 of 1844, must, under the circumstances, be taken to be the person licensed to retail toddy under the 38th section. Unless this is the retail dealer meant, there is no other person connected with the practical working of the Ordinance to whom the above quoted words would apply. The license produced, marked C, is in the form prescribed by the 38th section; and it would also appear that the trees from which toddy was drawn are situated in the district and village where the witness Gabriel Santiagopulle has a license to keep a tavern as therein stated and to retail toddy. The permit D, under which the defendant drew the toddy, is admitted to have been issued by the licensed retail dealer Gabriel Santiagopulle."

False information.

P. C. Galle, 84032. The defendant was charged with having given false information to a Justice of the Peace, with intent to support a false accusation. Defendant had instituted a case 15475, J. P. Galle, against the complainant and others, for cattle stealing, but had subsequently withdrawn it. He was convicted. *In appeal*, *Dias*, for appellant, submitted that the defendant's knowledge of the falsity of the accusation should have been clearly shewn, and that complainant should not have merely relied on the fact of the withdrawal as proving such knowledge. Per STEWART, J.—"Affirmed."

Counter cases.

P. C. Panadure, 20919. The defendant was charged with assault. The Magistrate (*Morgan*) held as follows: "This is a case of assault brought against the Police Serjeant, who, complainant alleges, pushed him first into the Police Station and then into the room. On reference to the case No. 20918 of this Court, it will be seen why complainant was pushed into the Station house. Defendant is acquitted and

discharged." *Ferdinands*, for appellant, submitted that the effect of the proceedings in the Police Court had been to give the accused the advantage of his own examination on oath, and that it was irregular to have put in evidence under the present charge the depositions in the counter case.* But STEWART, J. affirmed the judgment, remarking that the complainant could not raise such an objection as, when he was defendant in the counter case, he had full opportunity of cross-examining his adversary's witnesses.

Toll.

P. C. Tangalla, 35239. The question in this case was whether, under the Toll Ordinance of 1867, bullocks which were tied behind a cart could be charged for as "additional oxen attached thereto." The Magistrate (*Campbell*) held as follows: "The accused (toll-renter) is adjudged guilty and fined Rs. 50. It is clear that the toll-keeper was wrong in making the increased demand, because although it is admitted that the animals were tied behind they were not additional and did not contribute to the drawing power through the toll. The defendant could only have been justified in making the demand, had the four bullocks been yoked to the cart at the time of passing through." *In appeal*, (*Grenier* for appellant) per STEWART, J. –" Affirmed, for the reasons given by the Magistrate."

Arrack Ordinance.

P. C. Batticaloa, 5866. The defendant was charged under Ordinances 10 of 1844 and 8 of 1869 with having (1) sold arrack without a license and (2) sold less than one gallon of arrack for Rs. 1,34, contrary to the tenor of the license held by two retail-dealers, who were his employers. The license itself was not produced at the trial, but the Magistrate held that the evidence established that the quantity sold was short by one gill, and sentenced the accused to three months' hard labor. *In appeal*, (*Dias* and *Grenier* for appellant, *Clarence* for respondent,) the judgment was set aside and case remanded for further hearing; and per STEWART, J.—"There has been no distinct finding upon either of the two counts in the plaint, though it would appear from the terms of the judgment that the intention of the Magistrate was to find the defendant guilty upon the second count. To sustain, however, a conviction upon the second count, viz: that the defendant sold arrack contrary to the tenor of his license, the license itself should have been produced or its absence duly accounted for."

May 23.

Present CREASY, C. J. and STEWART, J.

Commutation Rate.

P. C. Newera Eliya, 8825. The plaint was "that the defendants did not pay poll-tax for the year 1872, in breach of the 63rd clause of the Ordinance No. 10 of 1861." The Magistrate (*Hartshorne*)

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* A counter charge by defendant against complainant for being drunk and disorderly.

found the accused guilty and sentenced them to six days' imprisonment at hard labor. *In appeal*, (*Grenier* for appellant) the conviction was set aside and case dismissed ; and per Creasy, C. J.—" The plaint does not set out any offence under the 63rd or 64th clause of the Ordinance referred to, nor is there evidence of any offence."

Maintenance.

P. C. Batticaloa, 5768. The defendant was charged with not maintaining his family. He pleaded a divorce, under the Mohamedan law, in respect of his alleged liability to support his wife, and led evidence ; but the Magistrate (*Worthington*) held the plea not proved and convicted him. *In appeal* (*Grenier* for appellant) per Stewart, J.—" The judgment of the 31st day of March, 1873, is set aside, and altered as to so much thereof as finds the defendant guilty of not maintaining the complainant. The sentence is affirmed as regards the charge against the defendant for not maintaining the child. The appeal is only as regards the conviction of the defendant for not maintaining the complainant. The Police Magistrate seems to have considered that the alleged divorce was not made out, inasmuch as there was 'an absence of proof of either of the delivery of the 3 tollocks to complainant, as required by the Regulation of 1806, clause 87, or of the knowledge of complainant that the 3 tollocks had been written.' The evidence establishes that 3 tollocks were written and issued at the intervals required by the Mohamedan Code. One of these notices is not forthcoming, but this is immaterial, there being proof of that notice as well as of its subsequent loss. Though there was no actual delivery of the tollocks into the hands of the complainant, the evidence shews that the Priest went to the complainant's house, and that when he began to read out the document the complainant ran away. It is manifest that she was aware of the proceedings that were being taken, and that it was owing to herself that the Priest did not more formally communicate the divorce to her. Another witness says on this point that the complainant 'concealed herself.' The Magistrate remarks 'it may be true, doubtless is so, that the complainant may have become aware of the divorce.' Under the circumstances appearing in the evidence, the Supreme Court thinks the complainant was legally divorced by the defendant."

May 30.

Present Creasy, C. J. and Stewart, J.

Fine reduced.

P. C. Galle, 84654. The defendant was charged with having resisted and obstructed the complainant (the Deputy Fiscal) in the execution of his duty, in breach of clause 239 of Ordinance 4 of 1867. The Magistrate (*Lee*) held the defendant guilty merely of assault and fined him Rs. 10. *In appeal*, per Creasy, C. J.—" Affirmed as to judgment of guilty of assault but fine reduced to 50 cents. The Police Magistrate seems to us to have rightly held both that the com-

plainant was not acting in the execution of his duty, and that there was an assault, inasmuch as the defendant was clearly not acting in defence of his property. But the assault is a mere nominal one, and the fine ought therefore to be nominal and not substantial."

Prisons Ordinance.

P. C. Galle, 84824. The plaint was as follows: "that the defendants, being officers of the Galle prison, did, on the 13th May, fail to exercise a proper vigilance over the prisoners committed to their charge, in breach of Ordinance 18 of 1844, clause 20; and that the defendants, being officers employed as aforesaid, did wilfully neglect the rules of such prison in that they did absent themselves from a working party of prisoners entrusted to them for custody, on the day aforesaid, in breach of the clause of the Ordinance aforesaid." The defendants were found guilty, under the first count, and sentenced each to one month's hard labor. *In appeal,* the judgment was affirmed; and per Stewart, J.—"Though there were other peons, the defendants had no right to leave without permission duly obtained."

Appeal postponed on affidavits.

P. C. Kalutara, 48342. A Mohamedan husband was charged with not maintaining his wife, a Singhalese woman. The defendant denied the alleged marriage; but he was convicted and sentenced to fourteen days' hard labor. *In appeal, Kelly,* (*Grenier* with him,) for appellant, submitted two affidavits,—one from the defendant impugning the Kadutam produced at the trial as a forged document, and another from his Proctor (*Hepponstall*) to the effect that the Magistrate had, subsequent to his judgment, declined to entertain a charge of forgery preferred by the defendant; that he (the Proctor) had examined the defendant's witnesses; and that, to the best of his knowledge and belief, his client had a good case. On these affidavits, Counsel requested that the Appellate Court might not deal with the finding until the result of the proposed J. P. investigation was known. *Ferdinands,* for respondent, urged that the course suggested was unusual; and that, if the defendant had really been taken by surprise, the Supreme Court might perhaps have been induced to give him a further hearing. But the record shewed that the case had been once postponed, in consequence of the non-production of the Kadutam in question, and that a warrant had issued to the priest in charge of the document. [The evidence being legally sufficient, if true, I doubt whether the Supreme Court has the power to remand the case.—C. J.] To allow the defendant to institute proceedings for forgery against complainant and her witnesses, would be giving a convicted defendant an advantage over a complainant who had proved her case. Per Creasy, C. J.—Let the case stand over for three weeks. The appellant should either prove the charge of forgery or stand his trial before the Supreme Court for perjury. In the event of his proving his case, we shall affirm the Magistrate's finding on facts, as we are bound to do, but the Governor may be induced to grant a free pardon.

June 6.

Present Creasy, C. J. and Stewart, J.

Cattle trespass.

P. C. Panwilla, 14330. This was a charge of cattle trespass under the 3rd clause of Ordinance No. 2 of 1835, the complainant claiming damages to the amount of Rs. 100. The Magistrate, (*Smart*) after hearing the evidence for the prosecution, struck off the case, holding that he had no jurisdiction. *In appeal*, (*Kelly* for appellant) the judgment was set aside, and defendant adjudged to pay complainant Rs. 95 as damages; and per Stewart, J.—"The Ordinance No. 5 of 1849 authorized Police Courts to award any damages and impose any fines as fully and effectually to all intents and purposes as the District Courts could or might have had; and this Ordinance further enacts that 'the several District Courts shall cease to have and exercise the powers, jurisdiction and authority vested in them by the said Ordinance No. 2 of 1835.' The Police Court has therefore jurisdiction to deal with the case. The ownership of the goats is established by the complainant, as well as by the Aratchy who proves that the defendant claimed the goats. The Rs. 5 paid to Mr. Wylie is deducted from the Rs. 100 claimed as damages."

Gambling.

P. C. Kalutara, 48654. The plaint, as filed on the 28th of February, 1872, charged the defendant with having gambled on the 20th November, 1872, in breach of the Vagrant Ordinance. It appeared that a previous case had been instituted in time against the defendant, but that the prosecution had lapsed for some reason or another; and this circumstance had apparently been considered by the complainant as having interrupted Prescription, which was pleaded by the accused for the first time in his petition of appeal. *In appeal*, against a conviction, the judgment of the Magistrate (*Jayetileke*) was set aside, and per Creasy, C. J.—"This plaint is bad on the face of it as not instituted in proper time."

June 17.

Present Creasy, C. J. and Stewart, J.

Theft.

P. C. Galle, 85020. The defendant was charged with having stolen a sum of Rs. 25, from the drawer of the Head Clerk's table at the Galle Police Station. It was proved that the accused was an office orderly; that he had access to the Clerk's room; and that, after the detection of the theft, a key was found in his haversack which opened and shut the drawer in question. The Magistrate (*Lee*) held as follows: "the possession of the key in my opinion fixes the guilt of the accused." *In appeal*, (*Grenier* for appellant) per Creasy, C. J.—"Set aside and judgment of not guilty to be entered. There is such a want of evidence in this case, that a judge would not have left it to a jury; and it is therefore competent to the Supreme Court to reverse the Police Magistrate's finding."

June 24.

Present Creasy, C. J. and Stewart, J.

Bail for good behaviour.

P. C. Colombo, 7263. The defendant was charged with assault. The Magistrate *(Fisher)* held as follows. "The accused is acquitted. I disbelieve the case. Both parties to give bail, in Rs. 50 each, to be of good behaviour for three months." *In appeal*, by the complainant, the order as to bail was set aside; and per Creasy, C. J.—"The 104th clause of Ordinance 11 of 1868 gives Police Magistrates a discretionary power to bind over to keep the peace 'where he shall be satisfied that the ends of justice will be sufficiently met' by such a course. That is to say, he may, if he thinks fit, do so in cases where he finds that no law has been broken, or that there is reason to apprehend a breach of the law; and he should find expressly that such is the case before he proceeds to bind over. But in a matter like the present, where he adjudicates that he wholly disbelieves the case brought before him, and does not find that there are circumstances which make it proper to bind the parties or either of them over to keep the peace, he has no authority in his capacity of Police Magistrate to do so."

June 27.

Present Creasy, C. J. and Stewart, J.

Maintenance.

P. C. Kalutura, 48342. On this case (which is reported in page 49) being called this day, the Chief Justice delivered the following judgment. "Affirmed. This case, as it came before us, was simply an appeal as to facts, and in the regular course the judgment of the Police Magistrate would at once have been affirmed by us, as being one which we have no authority to set aside. But the facts were peculiar. The Police Magistrate had sentenced the appellant to imprisonment with hard labor for 14 days. The defendant had been allowed to stand out on bail pending the appeal, and consequently the execution of the sentence was deferred until we should have affirmed it. When the case came before us, the appellant put in a positive affidavit of his own, supported by another affidavit, that a document, on which the case against him was to a great extent based, was a forgery, and that the case against him was got up by means of conspiracy and forgery. He prayed us to pause, so as to give him time to institute criminal proceedings against his guilty accusers. Had the sentence been one of fine, we should have proceeded to affirm the conviction; inasmuch as compensation can be obtained for having had to pay a fine wrongfully. But the actual undergoing of imprisonment and hard labor may be, especially to a man in the defendant's rank of life, a permanent stigma and injury, such as no money payment can compensate a man for, in the event of his innocence being demonstrated by his obtaining a conviction of his accusers for forgery

perjury and conspiracy. We therefore directed this Police Court appeal to stand over, so as to give the appellant an opportunity of bringing before a Justice of the Peace his charges against his accusers, so as to put them on trial if the Justice of the Peace or the Queen's Advocate should think it fitting. His charge has been pressed,—his witnesses have been heard before a Justice of the Peace,- and the proceedings have been laid before the Crown Officers. It is now reported officially to us that the Justice of the Peace disbelieves the appellant and his witnesses, and has refused to commit the parties charged by the appellant ; and also that the Queen's Advocate sees no cause to interfere with the decision at which the Justice of the Peace has arrived. Under these circumstances, it is our bounden duty to dispose at once of the appeal, which we do by affirming the judgment of the Police Magistrate as based on full legal evidence."

July 1.

Present CREASY, C. J. and STEWART, J.

Gambling.

P. C. Panadure, 21181. The defendant was charged, under the 19th clause of Ordinance No. 4 of 1841, with keeping a house for the purpose of common and promiscuous gaming. The Magistrate (*Morgan*,) who had the authority of the Queen's Advocate to try the case, found the defendant guilty and sentenced him to six weeks' imprisonment at hard labor. *In appeal*, by complainant, *Dias*, for appellant, contended that the Magistrate was bound to inflict the full penalty prescribed for the offence, as had been held in P. C. Colombo, 5400, Grenier's Reports, 1873, p. 23. Per CREASY, C. J.—" Affirmed. Clause 99 of Ordinance 11 of 1868 is to be read in conjunction with clause 95."

Labor Ordinance.

P. C. Kandy, 94293. The defendant was charged, under clause 11 of Ordinance 11 of 1865, with having left the service of the complainant, to whom he was bound under a written contract stipulating service for twelve months. The Magistrate (*Stewart*) held as follows: " By the Ordinance every contract or engagement, when the service is for a longer period than one month, should not only be in writing but should also be signed before a Police Magistrate or Justice of the Peace. This contract was not so signed. Defendant is found not guilty." *In appeal*, per CREASY, C. J.—" Affirmed. The 7th clause of the Ordinance distinctly exempts such a servant from the operation of the 11th clause."

Labor Ordinance.

P. C. Matara, 72024. The plaint was " that the said defendant did, on the 7th June, at Ellewelle within the jurisdiction of this Court, without any reasonable cause, grossly neglect his duty and quit the service of the complainant without leave, in breach of the 11th clause

of Ordinance 11 of 1865." The Magistrate (*Jumeaux*) found the accused guilty and sentenced him to one month's hard labor. *In appeal*, per CREASY, C. J.—"Judgment set aside and judgment of not guilty to be entered. The real charge intended in this case is a charge of a servant under the Laborer's Ordinance quitting service without leave or reasonable cause, and without a proper term of notice to quit having expired. The plaint does not state the defendant to have been a servant; and it says nothing about the want of notice to quit. If the evidence had shown a clear case against the defendant on the merits, we would not have reversed the judgment for errors of law which might have been amended. But to our mind, the evidence shows a case of great suspicion and hardship, in which we shall not interpose to cure the complainant's legal blunders. It is desirable for us to explain that we cannot admit the objection founded on the defendant's minority,* though the fact of his being a mere boy is to be considered in other matters. Nothwithstanding the vague assertions of two of the witnesses that the defendant knew of the bargain between the complainant and the old cangany, the distinct facts seem to show at least a strong probability that the old cangany sold the boy's services to the complainant for the benefit of the old cangany and the complainant only. The complainant's claim to detain the boy on account of the money paid to the old cangany is monstrous. We consider that we are at full liberty to review the facts of the case, in order to see if it is one in which we should have sanctioned an amendment of the plaint. We should not have sanctioned an amendment in the present case, and without an amendment the plaint does not warrant the judgment."

False information.

P. C. Colombo, 4861. This was a charge, under the 166th clause of Ordinance 11 of 1865, of having given false information to a Justice of the Peace. The sole evidence in the case was that of the complainants. The Magistrate (*Fisher*) acquitted the defendant in the following terms: "I am inclined to believe that the information given to the Justice of the Peace was false, but in the absence of any corroborative evidence of the statements of the complainants I acquit the accused." *In appeal*, (*Grenier* for appellant) per CREASY, C. J.—"Set aside and case sent back for further consideration and also for further hearing and evidence, if they are thought by the Police Magistrate to be desirable. The Police Magistrate seems to think that evidence corroborative of the complainants' is necessary in point of law. No such legal necessity for it exists, but the absence of it may be a fair matter for the Police Magistrate to bear in mind when he is considering the case as a question of fact. It seems doubtful from the record whether the defence has been gone into. If this has not been

* It was contended in the Court below that the accused was a mere boy and as such could not enter into a contract under the Labor Ordinance.

done, the defendant must of course have an opportunity of being heard and of his witnesses being examined before any judgment is entered against him."

Maintenance.

P. C. Tangalla, 35397. This was a charge against defendant for not maintaining his illegitimate child. On the sole evidence of the complainant, (the mother) who was believed by the Magistrate, the accused was found guilty and fined Rs. 10. *In appeal*, *Grenier*, for appellant, contended that there was insufficient evidence to go to a jury, and that it would be a dangerous precedent to allow a complainant to father her child on any accused party without some corroborative proof of her statements. Sed per Stewart, J.—"Affirmed. The evidence of the complainant was legally admissible, she not being the lawful wife of the accused."

July 8.

Present Creasy, C. J. and Stewart, J.

Cattle trespass.

P. C. Gampola, 24577. The defendant was charged, under clause 4 of Ordinance 2 of 1835, with having allowed two head of cattle belonging to him to trespass on a Coffee Estate in charge of complainant. The cattle had not been seized but merely identified; and there appeared to have been no assessment of damages as contemplated in the Ordinance. The Magistrate (*Penney*) found the accused guilty and fined him Rs. 10. *In appeal*, *Cooke*, for the appellant, quoted the judgment of the Appellate Court in P. C. Matale, 23709, 2 B, 74, which was to the following effect: "the requirements of the Ordinance not having been strictly complied with, inasmuch as no notice was given to the principal headman of the village or district, and no report made as required by the 3rd clause of the Ordinance No. 2 of 1835, the dismissal must be affirmed, but the complainant has his civil remedy for damages." This was a similar case, and the conviction must therefore be set aside. [But under the clause specified in the plaint, a criminal prosecution for trespass may be maintained 'whether any damage shall be proved to have been sustained or not.' Stewart J.] There was besides no proof that the estate was fenced or that by any local custom it did not require to be fenced. [You will find a case reported in Lorenz, * in which we held that Coffee Estates need not be fenced to entitle the owner to the benefit of the Cattle Trespass Ordinance.—C. J.] Per Stewart, J.—Affirmed.

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* *P. C. Matale*, 11998. Per Curiam—"The Supreme Court is of opinion that the evidence already adduced on this point" (as to how far Coffee Estates are required to be fenced by local custom with reference to clause 2 of Ordinance 2 of 1835) "tends to show that Coffee Estates do not fall within the class of lands alluded to by the witnesses under the term 'cultivated lands,' which seems to designate a class of lands other than Coffee Estates, and shows that according to existing custom Coffee Estates are not fenced as ordinary ground." III Lor., 21; Civ, Min., Feb. 19, 1858.

July 15.

Present STEWART, J.

Thorough-fares Ordinance.

P. C. Mallakam, 1440. The plaint was as follows: "that the defendants did unlawfully, wilfully and maliciously prevent, obstruct and hinder the complainant from digging up and removing coral stones from the Crown land called "Tannyerincham", for the public use, at the direction of the Government Engineer, in breach of Ordinance 10 of 1861, clauses 72 and 83." The complainant was a mason in the employ of the public works department, and was engaged in building a house for the sub-collector of Kangasantorre. On his proceeding with a number of coolies to quarry coral in a certain land which had been pointed out to him as Crown property by an Udear, the defendants resisted him claiming the land as their own. The Magistrate (*Murray*) having convicted the defendants fined them each Rs. 30. *In appeal*, per STEWART, J.—"Set aside. The 72nd and 73rd sections of the Ordinance 10 of 1861, under which the defendants are charged, have reference to materials, etc. taken for making or repairing thoroughfares or buildings, etc. required in connection with making and repairing thoroughfares. According to the evidence of the complainant, the coral stones in question were required for no such purpose, but for the erection of a house for the Sub-Collector of Kangasantorre."

July 17.

Present STEWART, J.

Licensing Ordinance.

P. C. Kandy, 94852. The defendant was charged with having sold or exposed for sale, by retail, arrack in his tavern, contrary to the provisions of the 37th clause of Ordinance 7 of 1873. The Magistrate (*Stewart*) held as follows:—"Defendant's Proctor does not deny the fact of sale, but only contends that arrack is not comprehended in the words 'intoxicating liquor' used in the Ordinance. The Court thinks it is and defendant is fined Rs. 10." *In appeal*, (*Ferdinands* for appellant) per STEWART, J.—"The accused is charged with selling arrack at his tavern after eight o'clock, in breach of the 37th clause of the Ordinance 7 of 1873, which enacts that 'all premises, 'excepting bona fide hotels, in which intoxicating liquor is sold or 'exposed for sale by retail, shall be closed after the hour of eight 'at night, &c." By the interpretation clause of the Ordinance, arrack 'the produce of the cocoanut palm, is excluded from the meaning given to the expression 'intoxicating liquor.' It will also be seen, on reference to the 12th, 14th, 15th and several other clauses, that where it is intended that arrack shall be comprised in any prohibition, the words 'including such produce as aforesaid' are expressly inserted. These words do not occur in the 37th clause under which the charge is laid."

July 22.

Present STEWART, J.

Bribing the Police.

P. C. Colombo, 6942. The plaint was as follows: "that the defendant did, on the 2nd day of April, 1873, at Colombo, tender a bribe of Rs. 35 and one silver chain, of the value of Rs. 50, to suppress a criminal charge." It appeared from the evidence that the complainant (a Police Serjeant) had taken up two persons on suspicion that they had stolen some coffee and had put them in stocks at the Galkisse Police Station. The present accused thereafter had tendered the money and chain referred to in the charge; and such tender had been regarded as a direct attempt to bribe. For the defence, it was submitted that the intention of the accused was merely to secure the release of the prisoners, and that there was no proof whatever that the Serjeant had been asked to drop the proposed prosecution. The Magistrate held that he would take such intention for granted and refused to hear evidence to prove it. The defendant was nevertheless convicted.

In appeal, Grenier for appellant. [You are not going to support the contention in the petition of appeal that bribing a police officer is not a common law offence.—STEWART, J.] The Supreme Court had long ago distinctly ruled that it was.—P. C. Urugala, 2387, Dec. 1, 1870. In the present case, however, the charge (between which and the finding there was a fatal variance) could not be sustained. The money and chain had been offered as security for the discharge of the suspected thieves; and as the complainant had the power under the Ordinance to accept bail, the offer had been perfectly legitimate. [But the Magistrate holds that a present was intended.—STEWART, J.] He incorrectly assumed that that was our object and refused to hear our evidence. It was a matter of frequent occurrence in the Fiscal's office that deposits of jewelry and other articles were made as security for the payment of fines and penalties; and such depositors could no more be charged with bribery than the defendant could be in this case. [I should like to have an affidavit to shew that you had evidence at the trial to indicate that defendant intended to offer security and not to tempt the complainant with a gift.—STEWART, J.]

On reading the affidavit called for, Justice STEWART delivered judgment as follows: "Set aside and case remanded for further hearing. The Magistrate's decision is quite right on the facts before him. But having regard to the affidavit adduced by the appellant, the case is remanded for further hearing in order that the defendant's witnesses should be heard. As a general rule the evidence tendered by the accused, though in the opinion of the Magistrate not likely to be of any avail, should be heard."

Evidence.

P. C. Kalutara, 48993. The defendant was charged with having sold arrack by retail without a license, in breach of the 26th section

of Ordinance 10 of 1844. The Magistrate (*Baumgartner*) held as follows: "Though the evidence is not very satisfactory, especially that of complainant's second witness, I believe that accused did sell the arrack in question. He does not deny that he sold it, nor does he make any mention of having a license. He has made no attempt to defend himself by summoning witnesses. Accused is found guilty and sentenced to pay a fine of five pounds." *In appeal* (*Cooke* for appellant) per Stewart, J.—"Set aside and remanded for further hearing and consideration. Having regard to the affidavit filed by the defendant"—(which was to the effect that the summons had been served too late to allow of his securing the attendance of his witnesses) "and to the opinion of the Magistrate that the evidence is not very satisfactory, the case is remanded for further enquiry, when the accused will have another opportunity of adducing his evidence. If the Magistrate is not satisfied with the evidence for the prosecution, the accused should have the benefit of any reasonable doubt."

Plaint.

P. C. Balapitimodara, 44055. The complainant, who was a process server, complained "that the defendants did, on the 2nd instant at Totagamuwa, beat, assault, resist and obstruct the complainant, whilst he was in the execution of his duty under the warrant No. 6565, in breach of the 83rd clause of Ordinance 10 of 1861." The Magistrate (*Halliley*) found the accused guilty of assault under the common law and sentenced each of them to 3 months' hard labor. *In appeal*, per Stewart, J.—"Affirmed. The plaint might have been amended so as to contain a distinct charge of assault. As however the plaint expressly charges an assault, the defect is not such as could have prejudiced the substantial rights of the defendant."

Toll.

P. C. Panwila, 14349. The following judgment of the Magistrate (*Power*) explains the issue in the case. "The question in this case is, was the defendant as the Toll-keeper at Madawella entitled to demand Toll from complainant on his way from Teldeniya to Panwila. The Toll at Madawella is for the road from Katugastotta to Kalibokka, and there is another Toll from the same road beyond Panwila between the 16th and 17th mile posts (see Schedule B of Ordinance). Now the Teldenia Road falls into the Panwila Road on the Panwila side of the Toll Station by some few yards. Persons or carts therefore do not pass the Bar at Madawella: if coming to Panwila they would have to pay Toll doubtless if they proceeded to Kandy. Navellepittia, No. 1373, B. & V, page 89, is very much to the point. There it was held that as the defendant had turned off a road before he came to the Toll-Bar at Ginegettena and had not passed the Bar, he was not liable to pay Toll; here the complainant has not so much as used any portion of the Panwila Road when he is asked for Toll. There is a

Toll at Teldeniya for the upkeep of that road, and there is a Toll at the 16th mile post for that portion of Panwila Road between it and Madawella. As the complainant then did not pass any Toll-Bar, I am of opinion he is not bound to pay the Toll; and the defendant, in demanding it, has acted wrongly. He is only entitled to levy Toll on carts &c. travelling on the Katugastotta and Kalibokka road and passing through his Bar. The accused is found guilty and fined one Rupee." *In appeal*, per STEWART, J.—Affirmed.

July 29.

Present STEWART, J.

Arrack Ordinance.

P. C. Negombo, 28636. The defendant was charged, under clause 26 of Ordinance 10 of 1834, with having established a tavern at Andiambalama, whereas his license authorised him to establish one at Walpola. The Magistrate (*Dawson*) acquitted the accused, on the ground that "he had not acted with any guilty intent, but in simple error," and condemned the complainant to pay the expenses of the defendant and his witnesses. *In appeal* (*Brito* for appellant,) per STEWART J.—"Set aside and judgment of guilty to be entered: and it is further ordered that the defendant do pay a fine of 5 cents. The evidence establishes that the defendant sold arrack at a place not authorized by his license; and accordingly, it being proved that he infringed the provisions of the clause of the Ordinance under which the plaint is laid, he should have been convicted; but under the circumstances only a nominal fine need have been imposed. This case is distinguishable from the case No. 16940 in Beling and Vanderstraaten, page 160, which was that of 'an innocent and unconscious possession' on the part of the person charged. In the present case, which is very different, it was the special duty of the defendant to take care that he acted in conformity with the requirements of his license. The order adjudging the complainant and appellant to pay the expenses of the defendant* and witnesses is set aside."

Obstructing thoroughfares.

P. C. Galle, 85082. The defendants were charged with having encroached upon a Thoroughfare, by making ditches across the same, in breach of the 9th section, 94th clause of Ordinance 10 of 1861. The Magistrate (*Lee*) held as follows: "I find that defendants cut ditches across a footpath; that such ditches cause no inconvenience to foot passengers, though they do to carts; and that the thoroughfare is now a cart road but has not been so for more than 16 years.

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* Held in P. C. Panadure, 16539, that "the Ordinance only authorises the Magistrate to award the reasonable expenses of the defendant, and where these exceed a small amount, to be awarded for his charges in going and returning to his village, evidence should be taken as to their nature and amount." *Civ Min.*, Nov. 3, 1870.

Holding, however, that it is essential, prior to conviction, for the prosecution to prove in this case inconvenience to the public in the use of this footway, I find the defendants not guilty. *In appeal*, per STEWART, J.—" Affirmed. There is not sufficient evidence to establish that the road in question can be regarded otherwise than as a footpath. Viewing it as a footpath, no obstruction has been proved."

Labor Ordinance.

P. C. Kurunegala, 19778. The defendant was charged with a breach of the 3rd, 4th and 14th clauses of Ordinance 11 of 1865. The Magistrate *(Livera)* held as follows: " The complainant states he was discharged without receiving any notice as required by the 3rd clause, and without being paid an extra month's wages as required by the 4th clause. The two witnesses called by complainant distinctly state that no demand was made for the extra month's wages. One of them further states ' I was satisfied with what I got, and went away.' The petition marked B contains no complaint as to want of notice, etc. I am of opinion, therefore, that complainant and his coolies left the estate perfectly satisfied with the payment of balance wages due to them; that they did not demand at the time the extra month's wages, nor did they complain of want of notice. The defendant is adjudged to be not guilty." *In appeal*, per STEWART J.— " Affirmed. According to the evidence, as adduced by both parties, it would appear that the complainant left the defendant's service by mutual consent."*

August 5.

Present CAYLEY, J.

Labor Ordinance.

P. C. Newera Eliya, 8588. The defendant (a cangany) was charged, under the 19th clause of Ordinance 11 of 1865, with having seduced certain coolies from the employ of the prosecutor (*Harper*.) It appeared that on the complaint of the defendant,—that the coolies while under advances to him had been crimped by one of the complainant's canganies, (*Mardasamy*)—his employer (*Anderson*) who was superintendent of a neighbouring estate on which the coolies in ques-

* The rule as to the exemption of coolies from punishment for desertion, on the ground of non-payment of wages, is " to ascertain what was the " exact amount due to each cooly for the number of days during which he " worked for the last month before his desertion, and then to ascertain if " the amount due, after all deductions, was in excess of this sum. The bal- " ance then remaining represented wages due to him before the com- " mencement of the month. If such balance exists, the cooly has wages " due to him for a period longer than a month, and his case falls within " the exemption provided by the 21st clause of Ordinance 11 of 1865."— P. C. Nawalapitiya, 16236. *Civ. Min.*, July 5, 1870.

tion were under promise to work, wrote to *Harper* representing matters; but the letter was not duly delivered as explained in the following evidence of *Anderson*: "I sent the letter produced on the 17th August by my cangany, the defendant. He came back with the coolies, and said that Mardasamy had told him to take the coolies and not show the letter to Mr. Harper. I subsequently sent the letter by Mardasamy cangany to Mr. Harper, after the coolies had come to me." The Magistrate (*Hartshorne*) acquitted the accused on the ground that he had acted bona fide.

In appeal (*Dias* for appellant) per CAYLEY, J.—"Affirmed. The Police Magistrate has found that the defendant acted under the bona fide belief, which was not without foundation, that he was entitled to the services of the coolies. With this finding the Supreme Court has no power to interfere; and in this view of the case, it is clear that the defendant cannot be found guilty of wilfully and knowingly seducing the coolies from the service of their alleged employer in terms of the 19th clause of the Labor Ordinance."

Timber Ordinance.

P. C. Kegalla, 35917. The plaint was "that the defendants did, in the month of April 1873, clear the forest land called Korahette Hena in Wallyampatthe, (which is presumed to be crown property, the same not having been cultivated for the last 50 or 60 years) by cutting down a number of trees varying from 4 to 14 feet in circumference, in breach of the 2nd and 5th clauses of Ordinance 24 of 1848." The defendant had no sannas or grant, but it appeared from the evidence that the land had been cultivated once in 1855, and that the defendants held a tax receipt for that year. The Magistrate (*Mainwaring*) held that the proof of the land being private property was insufficient and convicted the accused, each of whom he fined Rs. 50.

In appeal, Ferdinands for appellant.—The fact of past cultivation and payment of tax rebutted the presumption that the property belonged to the Crown and met the requirements of clause 6 of Ordinance 12 of 1840. The land, which was a Chena, could only be cultivated at very long intervals, and the District Judge had no authority to hold that the words "within 20 years" meant within 20 years prior to the date of the Ordinance.* [But supposing that construction to be incorrect, would any Civil Court give you judgment on such evidence as there was before the Magistrate. The onus was on you to prove title.—CAYLEY, J.]

Per CAYLEY, J.—"Affirmed. By the 12th clause of Ordinance 24 of 1848, the burden of proving that the land on which the timber was cut was private property was thrown upon the defendants, and it ap-

* But see judgment in appeal in C. R. Kurunegala, 83. *Civ. Min.*, Aug. 18, 1853. *Nell*, p. 213.

pears to the Supreme Court that the Police Magistrate was right in finding that the defendants failed to prove this."

Inconsistent finding.

P. C. Matara, 71721.* A conviction in this case by the Magistrate (*Swettenham*) was set aside as inconsistent with the plaint, and a verdict of not guilty was entered in the following terms: "The defendant is charged with stealing and unlawfully receiving a looking glass and a piece of soap, the property of the Rev. D. D. Perera, and is expressly found guilty of unlawfully receiving a stolen spoon, which appears by the evidence to have belonged to Mr. de Silva Werekoon."

August 12.

Present CAYLEY, J.

Plaint rejected.

P. C. Matara, B. The charge was "that the defendants did, on the night of the 30th July, 1873, at Kohonoegamowa, unlawfully and maliciously throw two pots of human excrement, whilst the complainant and his family were engaged with some of their friends in taking their meals, contrary to the 19th clause of Ordinance 6 of 1846." The plaint having been rejected, the complainant appealed. *In appeal*, per CAYLEY, J.—"Affirmed. The plaint does not allege that the defendants did commit injury or spoil to any real or personal property, so as to bring the case within the 19th clause of the Ordinance No. 6 of 1846. If, as stated in the petition of appeal, the excrement was maliciously thrown at or upon the complainant, the defendants should be charged with assault."

Restitution of property.

P. C. Galle, 85009. The defendants were charged with assault and theft. The Magistrate (*Lee*) acquitted the accused, on the ground that he did not believe the case against them, and ordered that the property alleged to have been stolen be returned to defendants. *In appeal*, per CAYLEY, J.—"Affirmed, except as to the order for the restitution of the property. The Police Magistrate has no power to make any order as to the restitution of property."

False pretences.

P. C. Matale, 4444. The Magistrate (*Temple*) convicted the defendant (a Kangany) on the following plaint: "that the defendant did, on the—February last, take Rs. 20 from complainant on false pretences." *In appeal*, (*Grenier* for appellent) per CAYLEY, J.—"Set aside and verdict of acquittal entered. The defendant is charged with taking Rs. 20 from complainant on false pretences. The

* See this case reported *post*, p. 64.

plaint is bad as not stating what the alleged false pretences were.* The evidence shows that the defendant was a kangany on complainant's estate, and that he received the Rs. 20 as an advance to procure coolies, and that he failed to procure the coolies. This is not a case of obtaining money by false pretences, nor is the evidence sufficient to establish a case of fraud at common law. If the case is to be treated as one under the 22nd clause of the Ordinance 11 of 1865, it is beyond the jurisdiction of the Police Court."

Registration of deaths.

P. C. Matara, 72054. The defendants were convicted, by the Magistrate (*Jumeaux*) under the 18th clause of Ordinance 18 of 1867, of having "wilfully and unlawfully neglected and failed to give the complainant (a Registrar of births, deaths, etc,) information of the deaths of their children so as to be registered." *In appeal*, per Cayley, J.—"Set aside and case sent back for further hearing and adjudication. Defendants are found guilty of not registering the deaths of their children, in breach of the 18th clause of Ordinance 18 of 1867. No death is proved, nor is there any thing in the evidence to show any legal liability on the part of the defendants to give information of the alleged death to the District Registrar. Strict legal proof must he adduced of the requirements set out in the 18th clause of the Ordinance in question hefore the defendants can be found guilty."

Cruelty to animals.

P. C. Panwila, 14454. This was an appeal against a conviction by the Magistrate (*Power*) under the 1st clause of Ordinance 7 of 1862. Per Cayley, J.—"Set aside and verdict of acquittal entered. The defendant has been found guilty of torturing a bullock. It appears that the animal was trespassing on defendant's chena, when in order to drive it off he shot it and wounded it. This is not such a case as is contemplated by the Ordinance for the prevention of cruelty to animals."†

August 19.

Present Cayley, J.

Cattle trespass.

P. C. Matale, 4025. The defendant was charged, under the 3rd clause of Ordinance 2 of 1835, with having allowed 5 head of cattle

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* In P. C. Matale, 41495, the proceedings were quashed in appeal, on the ground that the plaint was bad and defective in that the false pretences complained of were not stated. *Civ Min.*, Sept. 15, 1870.

† Held that "the general words in Ordinance No. 7 of 1862, section 1, "are restrained by the particular words in the same section, and must be "taken to mean only such acts of cruelty as are ejusdem generis with the "specified acts." P. C. Negombo, 22140 *Civ. Min.*, December 29, 1870.

to trespass in the garden of the complainant, to his damage of Rs 25. The verdict of the Magistrate (*Temple*) was recorded as follows: "Guilty. To pay damages Rs. 25." *In appeal*, per Cayley, J.—"Set aside and a verdict of acquittal entered. Complainant has not proved that, within 48 hours from the time of seizure or trespass, he gave notice to the nearest constable, police vidahn or local headman; nor has he proved that the damages were assessed in the manner required by the 3rd clause of the Ordinance No. 2 of 1835; nor has he proved either that the garden was fenced or that the local custom did not prescribe any fence. Before a defendant can be convicted under the Ordinance in question, the requirements of that Ordinance must be strictly complied with."

False information.

P. C. Matara, 72067. The plaint was "that the defendant did, on the 18th October, 1872, at Matara, before W. J. S. Boake, Esq. J. P., wilfully give false information, with intent to support a false accusation against the complainant and others, in the case No. 22906, J. P., contrary to the 166th clause of the Ordinance No. 11 of 1868." The Magistrate (*Jumeaux*) refused to issue process, holding that the charge did not come within the clause quoted, and referred complainant to a civil action if he had sustained any damage. *In appeal*, per Cayley, J.—"Affirmed. The plaint is defective by reason of its not stating the nature of the false information. If the plaint had been properly framed, the Police Magistrate ought to have entertained it, and not to have referred complainant to a civil action."

Gambling.

P. C. Colombo, 5498. Forty defendants were charged, in one plaint, under the Ordinance 4 of 1841, in that they did "game, play and bet at cockfighting in a garden kept by the 2nd accused for the purpose of common and promiscuous gaming." *In appeal*, by the 26th and 29th accused, against a conviction, (*Brown* for the appellants) per Cayley, J.—"Set aside and verdict of acquittal entered. There is no proof that the place where the gambling was going on was a public place or one kept or used for the purpose of promiscuous gambling. The evidence taken at the trial of the other defendants, at which the appellants were not present, cannot be taken as evidence against these defendants."

Licensing Ordinance.

P. C. Colombo, 8911. This was an appeal against the conviction of the defendants for having behaved in a riotous and disorderly manner in a tavern, in breach of clause 21 of Ordinance 7 of 1873. Per Cayley, J.—"Set aside and verdict of acquittal entered. The appellant is charged with behaving in a riotous and disorderly manner

in a tavern, in breach of the 21st clause of Ordinance 7 of 1873. In order to convict a defendant of an offence under this clause, it is necessary to allege and prove that he was drunk. In the present case, there in no evidence that the def ndant was drunk, nor is he charged in the plaint with being so."

A decree *improvide emanavit* cancelled. Substitution of complainant.

P. C. Matara, 71720. On this case, which is reported in page 61, being called, the following judgment was delivered by Mr. Justice Cayley.—" In this case the Supreme Court set aside the conviction, on the ground that the charge laid in the plaint was not proved by the evidence, and that the Police Magistrate had expressly found the defendant guilty of a different charge from that laid in the plaint. Before, however, the judgment of the Supreme Court was carried into effect, by the discharge of the prisoner, it was brought to the notice of this Court that the officers of the Court below had by mistake bound up with these proceedings a plaint which belonged to a different charge, also brought against the same defendant and numbered 71721, and h d bound up with the record of the latter case the plaint which ought to have been forwarded with this case. The mistake in question was partly due to the appellant himself, who attached the No. 71721 to his petition of appeal, instead of the number of the present case. Under these circumstances, I think that the proceedings of the Supreme Court at the first hearing of the appeal must be treated as null and void, there being no charge before the Court upon which any valid judgment could be pronounced. The decree moreover *improvide emanavit*, and the case, therefore, is open to reconsideration. (See Thompson's Institutes, 1, p 199.) There is, however, in my opinion a substantial fault in the proceedings of the Court below, in consequence of which I think that the conviction should be quashed. The original complainant having left Matara, another complainant was substituted in his place, on a motion dated 21st June, 1873, of which there is no record that defendant had any notice or any opportunity of opposing, until the day of trial when his Proctor took the objection and moved that the case should be struck off in consequence of the absence of the original complainant, in whose name the plaint was instituted. The Police Magistrate decided that this substitution was legal, on the authority of the case No. 1882, Jaffna, (reported in Beling and Vanderstraaten's Digest, page 178.) In that case the Chief Justice expressed great doubts as to the power of the Police Magistrate to amend a plaint by the substitution of a new prosecutor, and his Lordship pointed out how substantially important it is for a defendant to know at once who his adversary is; and that the Rules require that the summons, which in the first

instance is served on defendant, should contain the name and residence of the complainant, and that it is useless to give him this information if, when he comes before the Magistrate, another complainant is to be substituted. The Chief Justice thought that these errors were not cured by the defendant pleading to the amended plaint, and considered for these and other reasons that the conviction in the Jaffna case should be quashed. The majority of this Court, however, while admitting the irregularities referred to by the Chief Justice, thought that they were cured by the defendant's pleading to the charge without objection. For my own part, I fully concur with the observations of the Chief Justice relating to the irregularity of substituting one complainant for another; but I should have felt bound to decide the present case according to the opinion expressed by the majority of the Court in the Jaffna case, if the two cases had been in all respects parallel. But there is this important difference between them. In the present case, before any evidence was gone into, the defendant's Proctor took the objection that the original complainant was absent, and that the case, therefore, ought to be struck off. The defendant cannot then be said to have waived the objection relating to the substitution of a new complainant, as was done in the Jaffna case. And it must be remembered that it was in consequence of such waiver that the irregularities of the Jaffna case were held by a majority of this Court to have been cured. Conviction quashed "

August 22.

Present Cayley, J.

Carriers' Ordinance.

P. C. Matara, 72229. The defendant was convicted by the Magistrate (*Jumeaux*) and fined Rs. 25, for having used an unlicensed hackery for taking passengers for hire, contrary to the terms of the 16th clause of Ordinance 14 of 1865. The complainant deposed that the defendant had carried passengers in his hackery for hire without a license; while one of the witnesses stated that he had seen part of the hire paid, and that defendant had on former occasions carried passengers for hire without a license. *In appeal*, per Cayley, J.—"Set aside and verdict of acquittal entered. It is not alleged in the plaint, or proved by the evidence, that the hackery in question was a public conveyance, in terms of the 5th and 6th clauses of the Ordinance 14 of 1865."

Appeal rejected.

P. C. Jaffna, 2429. The defendants were charged on the 20th May, 1863, under clause 17 of Ordinance 6 of 1846, with having on the 27th of the previous month unlawfully and maliciously cut and destroyed a dam on complainant's field. On the returnable day of the

summons, the following order was recorded by the Magistrate (*Murray*)—"The parties agree to settle this case. Issue orders to the Police Vidahn and the Odear to restore the dam and to make their report." A subsequent order (without a date) appeared on record to the following effect: "Vidahn present. He states that complainant failed to accompany him. Complainant is referred to a civil action." *In appeal*, by the complainant against what he termed "the order of the 24th June," per Cayley, J.—"Appeal rejected. There is no order of the Police Magistrate of the 24th June dismissing the charge. The charge had been settled on the 4th June by agreement of the parties before the Police Magistrate. It must be treated as withdrawn. If the appeal is against the order of the 4th June, it is out of time."

Irregular appeal.

P. C. Jaffna, 11002. The complainant had obtained a search warrant, on an affidavit charging the defendants with fraud and theft, and had caused a certain waggon to be seized in their possession. The J. P. case was subsequently dismissed, as also a Police Court charge by the same prosecutor against the same accused; but the complainant was allowed to remove the waggon (having given proper security) and referred to a civil action. A reasonable time having elapsed and the complainant having failed to take any steps in the matter, the defendants filed an affidavit reciting all the facts and praying that the waggon in question might be ordered to be restored to them. The Justice of the Peace having refused to make such order, the defendants appealed. Per Cayley, J.—"Affirmed. No appeal lies from an order of the Justice of the Peace such as the one complained of."

August 26.

Present Cayley, J.

Jurisdiction.

P. C. Balapitimodara, 44163. The defendants were charged with having beaten and assaulted the complainant on the minor road at Kurudawatte and robbed her of a bank note of Rs. 10. The Magistrate (*Halliley*) disbelieved the case and acquitted the defendants. *In appeal*, the proceedings were quashed on the ground that the charge of Robbery was beyond the jurisdiction of the Police Magistrate.

Evidence.

P. C. Kalutara, 49266. The plaint was "that the defendant did, on the 21st day of July, 1873, assault and beat the complainant with hands, and the 2nd defendant tied the complainant by her hands, and then the 1st defendant loosened her cloth and took it away with

her, leaving the complainant naked." The charge appeared to have been proved, but the Police Magistrate (*Baumgartner*) acquitted the defendants in the following terms: "There seems to have been a general quarrel and confusion, and I cannot believe that one party is more to blame than another."

In appeal, per Cayley, J.—"Set aside and case sent back for further adjudication. There is ample evidence of the assault complained of, and this evidence does not appear to have been disbelieved by the Police Magistrate. He has, however, acquitted the defendants, because he considers that both parties were equally to blame. There is no evidence that the assault was committed in self defence; nor indeed, considering the nature of the outrage, is this view of the case possible. The provocation which the defendants are alleged to have received may be possibly taken into consideration in awarding the punishment; but the Police Magistrate should also take into consideration the public breach of the peace, committed by all the parties concerned in the disturbance of which the assault formed a part."

September 5.

Present Cayley, J.

Conviction without plaint quashed.

P. C. Matale, 2587. This was a charge under the 3rd clause of Ordinance 2 of 1835. At the trial, one of the witnesses called for the prosecution having admitted that one of the bullocks that had trespassed belonged to him, the Magistrate (*Temple*) recorded the following order: "this witness to be made a defendant. Plea guilty. Sentenced to pay damage Rs. 6.

In appeal, per Cayley, J.—"Set aside and proceedings declared null and void so far as regards the appellant. Two persons were charged under the Ordinance 2 of 1835, and at the trial the appellant was examined as a witness. Having admitted in his evidence that the animals which committed the trespass belonged to him, he was at once made a defendant and called upon to plead. He pleaded guilty and was sentenced to pay Rs. 6. Now, although a plea of guilty must be taken in most cases as a waiver of all irregularities of the proceedings, in the present case the Police Magistrate was not justified in calling upon the appellant to plead at all. There was no plaint against him on which any plea could be recorded, nor does it appear from the record on what charge he pleaded guilty. A plaint is neeessary in every prosecution, and here there was none against the appellant, the one filed being against two other persons. It should be observed that in any case it is very irregular to turn

a witness summarily into a defendant, because of some admissions made by him when giving evidence. In Police Court cases, the proper mode is to proceed by summons."

Conviction in absence of complainant.

P. C. Kalpitiya, 4157. This was an appeal, against a conviction for assault, on the ground that the case had been tried by the Magistrate (*Smart*) in the absence of the complainant. Per Cayley, J.—"Affirmed. No objection was taken in the Court below as to the absence of the complainant at the trial, notwithstanding that the defendants were represented by a Proctor. Nor is it shewn that the irregularity complained of, which was set up for the first time in the petition of appeal, has in any way prejudiced the substantial rights of the parties. The Supreme Court thinks, on the authority of the case No. 1882, P. C. Jaffna (Beling and Vanderstraaten's Reports, p. 178) that the irregularity complained of was waived by the defendants pleading to the charge without objection."

Jurisdiction.

P. C. Avishawella, 16769. The defendant was convicted by the Magistrate (*Byrde*) of having burst open the door of complainant's house and attempted to remove a box containing some clothes. *In appeal* (*Grenier* for appellant) per Cayley, J.—"Set aside and proceedings quashed. The case is sent back for the Police Magistrate to proceed against the defendant in the manner prescribed by the 103rd clause of Ordinance 11 of 1868. The evidence discloses a charge of Burglary which is beyond the jurisdiction of the Police Court."

Cattle trespass

P. C. Matale, 4092. This was a charge of cattle trespass under Ordinance 2 of 1835. The complainant proved the damages as assessed by the local headman, but failed to prove that his land, which was described as a "coffee garden," was fenced or did not require to be so. *In appeal*, (*Grenier* for appellant) per Cayley, J.—"Set aside and verdict of acquittal entered. There is no proof that the land on which the cattle trespassed was protected by such a fence, if any, as the local custom prescribed."

Timber Ordinance.

P. C. Matara, 71746. The charge, as made on the 17th April, 1873, was that the defendant had, in the month of November, 1872, cut timber on crown land without a permit, in breach of the 2nd

clause of Ordinance 24 of 1848. The Magistrate (*Jumeaux*) dismissed the case, holding that the prosecution was too late, more than three months having elapsed since the date of the alleged offence. *In appeal*, per Cayley, J.—"Set aside and proceedings declared null and void. Under the Ordinance No. 4 of 1864, any person cutting timber on Crown land without a license is liable on conviction to such punishment by fine or imprisonment as it shall be competent for the Court, before which such conviction shall be obtained, to award; and under the 119th clause of Ordinance 11 of 1868, the election of the Queen's Advocate is required in order to give the Police Court jurisdiction to try offences so punishable. In the present case there is no evidence of such election. Under clause 3 of Ordinance 4 of 1864, the offence is not prescribed until two years have elapsed from the time of its commission."

Evidence.

P. C. Balapitimodera, 44260. A conviction by the Magistrate (*Halliley*) on a charge of assault was affirmed in the following terms: "The Supreme Court has no power to interfere with the finding of the Police Magistrate upon the truth of the evidence, although a perusal of the evidence would lead the Court to a different conclusion from that arrived at by the Police Magistrate."

Security to keep the peace.

J. P. Negombo, 8698. This was an appeal against the refusal of the Justice of the Peace (*Ellis*) to bind over the defendants under the provisions of clause 221 of Ordinance 11 of 1868. The facts of the case are set forth in the Supreme Court judgment. (*Ferdinands* for appellant, *Grenier* for respondent.) Per Cayley, J.—"Set aside and case sent back for the Justice of the Peace to require the defendants to enter into recognizances to keep the peace, in the manner prescribed by the 223rd clause of Ordinance 11 of 1868,—1st defendant to enter into a recognizance for six months in the sum of Rs. 500, with two sureties in the sum of Rs. 250 each, and the 2nd and 3rd defendants to enter into recognizances for the same period in the sum of Rs. 300, with two sureties in the sum of Rs. 150 each. It appears from the evidence, which is uncontradicted and which does not appear to be disbelieved by the Justice of the Peace, that the defendants with a crowd of about a hundred persons, many of whom had bill-hooks and mamoties in their hands, and some masquerading in female attire, went with tom-toms beating to complainant's estate and cut a path through one of his fences and, having passed through a portion of the estate, cut another gap in the fence higher up. When remonstrated with, the first defendant said 'if any one tries to prevent us we will

strike him.' Had it not been for the prudent directions given by complainant to his servants not to interfere by force, it is extremely probable that a serious breach of the peace would have ensued. The Justice of the Peace has discharged the defendants, on the ground that they acted from a desire to assert a right of way; that they did not use any unnecessary violence; that they refrained from molesting any of complainant's servants; that they did not come armed or in any way prepared for committing a breach of the peace; that, although they came in numbers, it was probably in order to secure themselves from assaults; and that they were prepared to resist but, as the event proved, in no way inclined to provoke a breach of the peace. The Justice of the Peace adds, that they merely asserted a legal right in a legal manner. Now there is no evidence whatever of the right of way claimed; and it appears to the Supreme Court that, whatever right the defendants may have had, they asserted it in a most illegal manner. They went in numbers sufficient to overcome or overpower any resistance that would be likely to be offered; and by their threats, both before and during the occurrence, it is clear that they were prepared to resist by force any interference in their illegal proceedings. There is also ample evidence, that many of the party carried with them bill-hooks and mamoties. The circumstances of the case indeed disclose all the elements of a Riot, which is defined to be a tumultuous disturbance of the peace by three persons or more, by assembling together of their own authority with an intent mutually to assist one another against any one who shall oppose them in the execution of any enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner to the terror of the people, whether the act intended were of itself lawful or unlawful. It is difficult to conceive any act more likely to occasion a breach of the peace than that committed by these defendants; and in view of their conduct, both before, during and after the occurrence, the complainant is quite justified in anticipating a repetition of the outrage."

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Contempt. Bawa's case.

P. C. Galle, 85757. Mr. Ahamado Bawa, Proctor, was after due notice called upon to answer to the following charges of Contempt of Court: "(1) for having, on the 26th day of July, 1873, unlawfully, knowingly and wilfully filed a fictitious and false plaint, charging certain persons, to wit, Charles Ondatjie and others, with theft, and obtained an order for summons on such fictitious and false plaint, in contempt of Court and in breach of Ordinance No. 11 of 1868, clause 107; (2) for having, on the day aforesaid, taken the said plaint into his posses-

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sion and kept it, so as to prevent the issue of summons and thereby impede the due administration of justice and obstruct and prevent the due execution of the orders of this Court, in contempt of this Court and in breach of Ordinanee No. 11 of 1868, clause 107."

The facts of the case are fully recited in the following affidavit which was submitted by appellant's Counsel at the hearing of the appeal: —

I Ahamado Bawa, Proctor of the Supreme Court of Ceylon, residing at Galle, now at Colombo, make oath and say, that on Saturday, the twenty-fifth day of July last, whilst the Police Magistrate of Galle was still on the Bench, the Police Court Bar was occupied by myself, Messrs. Advocate Ondatjie, Proctors J. W. Ludovici, W. M. Austin, James Karoonaratna, W. H. Dias, G. L. Jayesekera, and others. A client of mine paid me a fee, part of which consisted of a new Five Rupee Note of the Chartered Mercantile Bank, Kandy. Mr. Charles Ondatjie, who was seated near me, took it up and handed it to Mr. W. H. Dias, who sat next to me. He passed it to Mr. Karoonaratna, who in his turn handed it to Mr. Jayesekere, who put it into his pocket, all in jest. In the same spirit, I took up a sheet of paper, and wrote a plaint charging the above-named gentlemen with theft, and after shewing the paper to some of them handed the same to Mr. R. L. Van Buren, another Proctor, saying in the most jocular manner "I appoint you my Proctor." This gentleman, without my consent or knowledge, handed the document to the Court Peon, who later submitted it to the Magistrate along with other plaints of the day. The learned Magistrate, without enquiring from any of the parties named in the plaint, either from complainant or accused, all of whom were at the time in the Court, ordered summons to issue. When the plaint was brought out from the Magistrate's chambers by the Peon, Mr. R. L. Van Buren himself took it, and in the midst of the confusion and consternation thus created by his mistake, I took it from him and, declaring my astonishment and regret, intended to explain the matter to the Magistrate at once. At first I thought of submitting a written motion, but not wishing to treat the matter so seriously wished to speak to the Magistrate personally in his chambers as the most proper and appropriate course. Before my doing so, however, the Magistrate left the Court for the day. I did not at the time attach much importance to the mistake, in the hope that the Magistrate himself would be satisfied that it all originated in a joke and the rest was a mistake, and I contented myself with hoping to explain the matter on Monday in chambers. For this reason, and not being in familiar terms with the Magistrate, I did not wish to detain him in the street, where I had met him in the same afternoon, as I should otherwise have done, if I had known then that the Magistrate would not attend Court on Monday. Unfortunately on Monday, the Court was taken up for repairs by the Public Works Department, and the Magistrate did not attend again till the following Saturday (the 2nd August) and I allowed the document to remain in the Court itself, with my other papers contained in an unlocked box left in the Court in charge of one of its officers, and had no access to it till Saturday next. On this day I attended the Court earlier than the Magistrate, and taking out the paper from the box was waiting to see the Magistrate when that gentleman arrived, and without questioning me at all—though he knew I was in the Court—commenced to take depositions against me in his chambers, and issued a Search Warrant to his clerk to search my box. Having done so, he came out and in an authoritative manner ordered me to bring my box and papers into his room. I did so, and was

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about to address him on the subject of the plaint which I held in my hand, when the Magistrate did not want to hear me and warned me against the consequences of any statement, and for the first time informed me that he charged me with "stealing and abstracting a Record" Though I was certainly astounded at the gravity of the charge, involving as it does no less a penalty than seven years' transportation or imprisonment at hard labour and corporal punishment not exceeding a hundred lashes, yet calmly and temperately, with the expression of a sincere regret for the accident, I explained all about it and offered to prove my statements by the gentlemen concerned. Mr. R. L. VanBuren was then called and materially corroborated my statements as to how he got and returned the plaint to me. The Magistrate then ordered me to find bail for a thousand Rupees, and would not accept my personal Recognizance till I made affidavit of being possessed of property to that amount. Requesting me not to leave the Court, the Magistrate took the proceedings to the Deputy Queen's Advocate, and after consultation returned in a couple of hours, and for the first time in the course of the proceedings asked me if I intended to cross-examine the witnesses examined by him behind my back. I merely questioned his Interpreter Modliar, to shew by my conduct how astonished and grieved I was at the unfortunate mistake and to see that the plaint had been endorsed by the Magistrate and summons ordered by him. At this stage the Magistrate told me that I was then charged with not stealing and abstracting the Record as before, but with concealing it, but under the same enactment and subject to the same penalty, and took my formal statement. On the following Monday or Tuesday I was asked to give in a list of my witnesses, and I did so. Of the names contained in my list I had only called two, Mr. Ondatjie and Mr. Karoonaratna, (the 1st and 3rd accused) when the Justice of the Peace declared that he did not think further evidence on my part necessary, and dispensing with it forwarded the proceedings to the Deputy Queen's Advocate. My two witnesses proved, as the rest would have, that the plaint was a joke, and that I had not concealed it at all. On the 16th August, the Magistrate called upon me to answer certain charges of contempt preferred by him (1) for wilfully and knowingly filing a false and fictitious plaint, and (2) with taking possession of it, and ordered my attendance before him on the 18th August, when I explained the matter as appears on the face of the Record in this case No. 85757, Police Court, Galle.

Sworn to, at Colombo, this 23rd day of August, 1873.

Before me

(Signed) S. Grenier, J. P. (Signed) Ahamado Bawa.

The Magistrate (*Lee*) after hearing the accused's explanation, which was in effect the same as disclosed above, held as follows:—"The Court is willing to accept Mr. Bawa's explanation of the circumstances under which the document was first presented to the Court, and is not disinclined to consider that this unhappy affair commenced in a joke, most improper and indecent, but still a joke. The Court is willing to suppose that Mr. L. Van Buren made a mistake, a reprehensible mistake, when he presented the record for the order of the Magistrate. The case, however, assumes a very different complexion when the retention of the record is considered. Whether the record was or was not intentionally presented to the Magistrate, after it had

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received the Magistrate's orders and been signed by him, it became a record of the Court, the property of the Court and a solemn proceeding. Mr. Bawa states that he expressed himself sorry, and was so astounded that he could not at the first decide what steps to take; but it is clear, from his own admission, that he knew that he should speak to the Magistrate, and that from a want of courage, if for no other reason, he did not do so, either at the time or when he met the Magistrate in the street; and he did not come to see him or write to him. He retained the document in his custody till enquiry was made. Had no enquiry been made, the detention of this Court record might have continued till now. It is clear from Mr. Bawa's own admissions that he kept this case book to prevent the issue of Summons, to prevent, that is, the due and legitimate execution of the orders of the Magistrate, who would have rendered him liable to punishment for bringing a false and frivolous case. An offence so grave must of necessity be visited with punishment proportionate to such gravity; and however willingly I would spare myself, however willingly I would spare his brethren, however willingly I would spare the offender himself from the effect of conduct so reprehensible and disgraceful, I have a duty cast upon me, the duty of upholding the majesty of the law and the dignity of the bench. From this duty I would willingly shrink if it were possible. Ahamado Bawa is found guilty of contempt of Court and sentenced to be imprisoned for seven days. Departmentally, Ahamado Bawa will be precluded and prohibited from access to the records for three months."

In appeal, *Kelly*, for appellant. The Police Court could onl punish for contempts committed *in facie curiæ*, for the words "to the Court" in Ordinance 11 of 1868 had been held not to confer a larger jurisdiction than the words "before the Court" in the old Ordinance 8 of 1846. (Grenier's Reports, 1873, p. 19.) The Magistrate having accepted Bawa's explanation as to the filing of the fictitious plaint, *the detention of the document*, so far from having been disrespectful to the judge, had been in vindication of justice, by the prevention of innocent parties being illegally summoned; while no judicial rule or departmental order in respect to such documents was proved to have been thereby contravened. The learned Counsel then went into the facts as disclosed in the affidavit and the record, to show that no contempt had really been intended.

Clarence, D. Q. A., for respondent. The fact appeared to be that Bawa himself removed the document from the file of the Court and kept it. Whether or no it was his intention that the plaint should be presented to the Magistrate, having in point of fact been placed on the file of the Court it was thenceforth a record of Court, and no practitioner had any right *mero motu suo* to abstract it. Bawa should

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have applied to the Magistrate: he had ample opportunity of doing so. A very dangerous precedent would be established, were this Court to hold that a practitioner was at liberty, without the sanction of the judge, to remove or detain a document filed of record. The new Ordinance employing the phrase "contempt to the Court" appeared expressly to contemplate a wider jurisdiction than that under the old enactment, which restricted the jurisdiction, by the phrase "*before* the Court," to contempts committed *in facie curiæ*. In the decision cited by his learned friend, the expression employed was within "the precincts of the Court." The Record Room was within "the precincts of the Court" and a most important portion of what lay within those precincts.

Per Cayley, J.—"The proceedings in this case having been read, it is considered and adjudged that the order of the Police Court of Galle of the 18th August, 1873, sentencing the appellant to imprisonment, be set aside. In this case the appellant, who is a Proctor of the Supreme Court practising at Galle, has been found guilty of contempt of Court by the Police Magistrate of that station and has been sentenced to imprisonment for seven days. Two charges of contempt were preferred against him, one for having wilfully filed a fictitious and false plaint against certain persons, the other for having taken the said plaint into his possession and having kept it so as to prevent the issue of summons and thereby impede the administration of justice and obstruct and prevent the due execution of the orders of the Court. No evidence was taken at the hearing of the charge, except the defendant's own statement, which seems to have been accepted by the Police Magistrate as substantially true. Justice of the Peace proceedings had, however, been previously taken against Mr. Bawa; and as they were referred to in the argument before this Court as well as in an affidavit filed by the appellant, I sent for them and have read them in connection with this case. It will not be necessary to enter fully into the first charge of contempt, viz., that of filing a false and fictitious plaint, for the Police Magistrate has in effect acquitted the appellant on that charge, expressing himself willing to consider that the plaint in question was drawn up as a joke, and that it was by a mistake that it was presented for the order of the Court. The substantial charge, on which the appellant has been sentenced, is the charge of having detained the plaint, after it had received the order of the Magistrate, with the object of preventing the issue of a summons. The facts of the case, as gathered from the proceedings before me and the affidavit of the appellant, are substantially these. On Saturday, the 26th July, the appellant was in the Police Court with several other practitioners. A five rupee note which had been paid to the appellant was in jest taken from the table

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and handed about from one Proctor to another, until it came to the hands of Mr. Jayesekere, who in jest put it into his pocket. The appellant then in jest drew up a plaint charging Mr. Jayesekere, two other Proctors and an Advocate with theft of the note. The plaint was then handed to Mr. R. L. Van Buren, who gave it to the Court peon, and it was in the usual course presented to the Magistrate. The appellant in his affidavit states that he said to Mr. Van Buren in the most jocular manner 'I appoint you my proctor.' It appears, however, from Mr. Van Buren's evidence in the J. P. proceedings, that he treated the matter seriously. However this may be, the Police Magistrate is apparently satisfied that it was never intended by the appellant that the plaint should be presented for the order of the Court. Upon the plaint being presented, the Police Magistrate, without making any enquiry from the parties concerned, ordered a summons to issue. The plaint then appears to have been placed with several papers on the Singhalese Interpreter's table, from which it was taken up by Mr. Van Buren, from whom it was taken by the appellant, who put it into his box which he keeps at the Court. There appears to have been no secresy about this. The Interpreter, as appears from his evidence in the J. P. proceedings, was aware that the appellant had taken the paper, and he requested the appellant to give it to the Clerk. The appellant, as the Interpreter states, appeared very sorry and told him (as he thinks) that it was a joke and that he would speak to the Magistrate about it. Unfortunately the appellant did not take immediate steps to inform the Police Magistrate. The Magistrate thinks that he failed to mention the matter from want of courage. It appears from the appellant's affidavit and statement, that he was so bewildered at the probable result of his foolish joke, that he had not made up his mind what course to pursue, until the Magistrate had left the Court, which occurred early, the day being Saturday. The plaint accordingly remained in the appellant's box, which was kept in Court, and, as the appellant states, in charge of a Court peon. Unfortunately the Court was closed for repair until the following Saturday, (2nd August) and as the appellant states he had no access to his box during the interval. On the morning of the 2nd August, the Police Magistrate came to his Chambers and there proceeded to take J. P. proceedings against the appellant, on a charge of abstracting a public record in breach of Ordinance 6 of 1846. From the appellant's affidavit, it would appear that he came to Court early on the 2nd with the intention of bringing the matter to the notice of the Police Magistrate, but that, before he had an opportunity of doing so, the Police Magistrate had already commenced to take depositions against him in Chambers. These J. P. proceedings were resumed on 8th August, after which the criminal

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charge appears to have been abandoned, though there is no record that it has been dismissed. On the 18th August the proceedings for contempt were instituted. Now, there is an irregularity here which should be noticed. It does not appear that the criminal charge had been dismissed before the appellant was called upon to explain his contempt. The criminal charge and the charge of contempt were in effect founded upon precisely the same act; and until the criminal charge had been formally dismissed and that dismissal formally recorded, the appellant should not have been called upon to make any statement whatever relating to the case, except in the due course of the J. P. proceedings. The question, however, which this Court has to determine is this, did the act of the appellant in putting the plaint into his box, in order to prevent the issue of a summons, and keeping it there for a week while the Court was closed, without bringing the matter to the notice of the Police Magistrate, amount to a contempt of Court under the provisions of the 107th clause of Ordinance 11 of 1868. The Supreme Court thinks that, although in many cases the unauthorised detention of a record would amount to a contempt, under the peculiar circumstances of the present case, it did not. In the first place, it is clear that no contempt was intended. A foolish joke had been perpetrated by the appellant and in consequence of the mistake of Mr. Van Buren, (which the Police Magistrate rightly characterises as a reprehensible mistake) the joke was likely to be followed by serious consequences which were never intended; and though he acted improperly as well as foolishly in not at once mentioning the matter to the Police Magistrate, he can hardly be considered as guilty of contempt of Court in endeavouring to prevent what might otherwise have led to a more serious contempt, namely the putting in motion of the process of the Court and carrying on a prosecution upon an entirely fictitious plaint, which had been prepared as a jest and presented to the Court by a mistake. Having failed to bring the matter before the Police Magistrate at once, he ought, no doubt, to have taken the first opportunity of writing to that officer, although the Court was not sitting; and, by neglecting to do this, he has, in my opinion, laid himself open to much blame. This Court does not think, however, that his failure to write or call upon the Magistrate at his house, notwithstanding that such was the appellant's duty, can be construed into a contempt of Court. The Police Magistrate states that appellant retained the document in his custody till enquiry was made, and that no enquiry being made the detention of the Court record might have been continued to the present time. This, however, appears to the Supreme Court to be by no means certain; for the appellant had no opportunity of bringing the matter to the notice of the Police Magistrate at the Court, after the first day, until the

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J. P. proceedings were commenced, for during the interval the Magistrate did not sit, and these J. P. proceedings were commenced by him in Chambers before he took his seat on the Bench, on the first day that the Court was reopened for business. The appellant himself in his affidavit swears that he attended the Court earlier that day than the Magistrate, and that, having taken the papers in question from his box, he was waiting to see the Magistrate, when the latter commenced taking depositions against him in Chambers. The fact that the Interpreter was aware that Mr. Bawa had taken the plaint, and the fact that he had been informed by Mr. Bawa that the affair was a joke, and that Mr. Bawa had declared to him his intention of speaking to the Police Magistrate, lead this Court to give credit to the appellant's affidavit, that it was his intention to bring the matter to the notice of the Magistrate, as soon as the Court resumed its sitting. Under all the circumstances of the case, this Court does not think that a contempt of Court, such as is punishable under the 107th clause of Ordinance 11 of 1868, has been committed. Under that clause, a Police Magistrate has no power to punish for contempt, unless the person charged shall fail by his answers, when called upon for his explanation, to satisfy the Court that no contempt was intended; and in this case this Court thinks that none was intended. The original joke, which gave rise to the unfortunate proceedings, was a foolish one and one unbecoming the professional character of the parties concerned; and the mistake of Mr. Van Buren, in causing the fictitious plaint to be presented to the Magistrate, was certainly reprehensible. Indeed, it is difficult to understand how he could have thought the appellant to have been in earnest. This Court thinks, however, that the Police Magistrate would have displayed a wise discretion, if before issuing summons on the plaint he had, in pursuance of the course authorized by the 3rd clause of the Ordinance 18 of 1871 briefly examined the complainant. The plaint purported to be a charge of theft preferred by a Proctor of this Court against an Advocate and three other Proctors, all of whom were in Court at the time. In the case of a charge of this extraordinary kind, it would certainly have been expedient, before it was acted upon, that some brief enquiry should be made. Had this been done, none of these proceedings would have ensued. It should be observed that when a contempt of Court has been committed through ignorance, inadvertance or mistaken motives, and has been promptly acknowledged, the dignity and authority of the Court is generally sufficiently vindicated by an admonition. It is only in extreme cases of manifest disrespect or disobedience that it should be visited with so severe a punishment as that to which the appel-

lant has been sentenced; for to send a Proctor of 15 years' standing in the profession to jail, even for seven days, is a very severe punishment. The Supreme Court wishes to observe that this judgment is not to be taken as any authority that the unauthorized removal or detention of a record may not be a contempt of Court. This Court thinks that in many instances it might be a very grave contempt indeed. The present case is decided upon its own peculiar circumstances, and the facts disclosed do not appear to the Supreme Court to establish such an intentional contempt of Court as is punishable under the Ordinance in question."

September 12.

Present Cayley, J.

Labor Ordinance.

P. C. Matale, 3862. Seventeen coolies were charged on the following plaint: "that the defendants did, on the night of the 15th instant, leave the complainant's (*Keane's*) service without notice, in breach of the 11th clause of Ordinance 11 of 1865." The accused appeared to have left complainant's estate on the 15th May, after having given the following written notice to him on the 12th: "we give you notice that we will leave your service on the 15th instant, as you have not paid us for the last three months." The receipt of this notice was admitted, as also the fact that arrears of wages were due; but it was explained by the manager (*Wilkinson*) that when he sent *Keane* in May to pay February's wages, the defendants refused to receive the money on the ground that their Kangany had been discharged. On the day of trial, twelve of the defendants were present; and on their behalf Mr. Proctor Tillekeratne submitted a motion "that the 2nd and 4th defendants be admitted as witnesses for the defence, their evidence being material." The motion, however, having been disallowed, the Magistrate (*Temple*) after hearing evidence found the defendants guilty and sentenced them to one month's hard labor each. *In appeal*, per Cayley, J.—"Affirmed. The defendants made no demand for their wages, as required by the 21st clause of the Ordinance 11 of 1865, so that the non-payment of such wages did not excuse them from the necessity of giving one month's notice to quit service. It is inexpedient, as a general rule, to put more than 10 persons on their trial at the same time in cases of this kind. But it does not appear that the evidence of the 2nd and 4th defendants would have in any way exculpated the others. What they had to prove was not mentioned in the Court below, nor is there any affidavit filed with the petition of appeal."

September 19.

Present Stewart, J.

False information.

P. C. Matara, 71598. This was a charge of false information under the 166th clause of Ordinance 11 of 1868. Without entering into evidence, the Magistrate (*Jumeaux*) made the following order: "This case is beyond the jurisdiction of the Police Court. Complainant and her witnesses were duly sworn or affirmed, and gave their evidence before the Justice of the Peace in favor of the accused. If any charge lies, it is certainly one of perjury." *In appeal*, per Stewart, J.—"Set aside and case remanded for hearing. If the defendants did no more than give evidence as witnesses, they would not be liable under 166th clause of Ordinance 11 of 1868. But if they or any of them gave false information, whether by affidavit or otherwise, with intent to support a false accusation, such defendants would come within this charge. See Grenier's Reports, part I. P. C. Balapitiya, 43072, July 3rd, 1873. Kurunegala, P. C. 6828, per Supreme Court, November 28, 1869."

Refusal of process.

P. C. Colombo, B. The Magistrate (*Fisher*) refused to order summons on a charge of theft in the following terms: "Referred to a civil action. The accused was complainant's kept mistress and the articles referred to are wearing apparel." *In appeal*, per Stewart, J. —"Set aside and case remanded for further hearing. The Magistrate should record the examination of the complainant. The answers given by the complainant have not been taken down, the Magistrate only noting the conclusion arrived at by him."

Timber Ordinance.

P. C. Galle, 85583. This was a charge of removing timber without a permit, in breach of the 2nd and 5th clauses of Ordinance 4 of 1864. The Magistrate (*Lee*) held as follows: "The evidence shews a removal after the time specified in the permit, but it is proved that there was a permit. The plaint is defective and the accused is acquitted. It is competent to complainant to prosecute on an amended plaint." *In appeal*, per Stewart, J.—"Set aside and case remanded for further hearing. Instead of filing a fresh plaint, it appears to the Supreme Court that the complainant should have been allowed to amend his plaint, by adding a count charging the defendant with the removal of the timber after the time specified in his permit, in breach of the clauses of the Ordinance referred to. The case is remanded accordingly."

Dismissal.

P. C. Colombo, 7843. The Magistrate (*Fisher*) dismissed the charge (which was one of assault) in the following terms: "The accused in this case is not forthcoming. The case has been repeatedly postponed and cannot be allowed to pend any longer. The case is therefore dismissed." *In appeal*, per STEWART, J.—"Set aside. According to the Fiscal's report, made on the day the case was dismissed, the defendant ran away on seeing the process-server. Under these circumstances, to confirm the order dismissing the case would in effect be to allow the defendant to benefit by his having hitherto successfully evaded arrest. Warrant should re-issue and every effort be made to arrest the accused."

Maintenance.

P. C. Kalutara, 49264. This was a case of maintenance against the father of several illegitimate children. The complainant (the mother) led ample evidence to prove the charge, but the Magistrate (*Baumgartner*) acquitted the defendant in the following judgment. "Complainant has failed to show by whom the children now require to be supported. Beyond her own statement, that defendant does nothing to support them, the evidence on this point is all presumption. I take it that this is a fact which must be proved specially, and that it cannot be taken on presumption. It is unnecessary to express an opinion as to the paternity. *In appeal*, (*Grenier* for appellant) per STEWART, J.—"Set aside and case remanded for further hearing. It is not suggested that the defendant supports the children or that they have means of their own for their maintenance. It would therefore almost seem to follow that they require to be supported by others. Even if it be the fact that the children are maintained by the complainant, this will make no difference, she being included in the word 'others.' At the further hearing it will be open to the complainant to give further evidence as to how the children are supported."

Labor Ordinance.

P. C. Gampola, 24771. The charge was "that the defendant, being a servant employed under complainant, was, on the 12th July, 1873, at Maskelya in Dickoya, insolent towards the complainant, and that the defendant also misconducted himself, in breach of the 11th clause of Ordinance 11 of 1865." The complainant (*Gray*) deposed as follows:

"I own and manage Bunyan Estate. The accused was my Kangany. On July 12th, I found fault with him about a contract badly executed. I told him the contract was discontinued, and he gesticulated and

made much noise in the store where I lived. He said the Doray was a (Tamil) vagabond. Mrs. Gray was in the store and approaching her confinement."

Cross-examined. The Tamil word used means in the Dictionary "a wrangler, a mischievous fellow, etc" The contract was monthly. The accused was to be paid R. 1 per acre, to be paid monthly.

Re-examined He was a monthly servant, besides being a contractor. The abusive epithet was used both to my face in the store and when I was upstairs"

The Magistrate (*Penney*) found the accused guilty and sentenced him to forfeiture of wages and one month's hard labor. *In appeal, Grenier* for appellant.—The defendant's misconduct, if any, was in his capacity as contractor, and he could only be civilly liable. [He was a Kangany, and as such was a servant under the Ordinance.—Stewart, J.] But his conduct was independently of his duties as Kangany, and it was with reference to the contract that there was a dispute. The complainant's own words were—"he was a monthly servant besides being a contractor." Supposing an Appoo contracted to build a house for his master, could the former be criminally indicted for negligence or disobedience of orders in connection with the work? [But here the man was paid by the month and was therefore a monthly servant.—Stewart, J.] It made no difference whether he was paid by the week or by the month. The weeding contract was in its very nature such as would extend over a month, and should have been in writing, as required by the 7th clause of the Ordinance, to render the defendant liable to the penalties prescribed by the 11th clause. Besides, the conduct of the defendant did not amount to an offence. The Ordinance should be strictly construed, and where a contractor-servant called his employer a "*perelecaren,*" (that was the word used) meaning "a quarrelsome person," he could hardly, in fairness and justice, be convicted of "insolence." *Ferdinands*, for respondent. It was impossible to dissever the character of contractor from that of servant in this case. The circumstances under which the language complained of was used, apart from the language itself, rendered the defendant liable to punishment for insolence. Per Stewart, J.—"Affirmed."

September 23.

Present Stewart, J.

Licensing Ordinance.

P. C. Panadure, 21657. The plaint was "that the defendants did, on the 31st ultimo, at their shop at Morotto, sell intoxicating liquors, contrary to their license, in breach of the 10th clause of

Ordinance 7 of 1873." The evidence went to show that the accused, although only authorised to sell liquor by the bottle, had sold by the glass. The license itself was not produced, and the Proctor for the defence took the objection that there was no evidence to show what the defendants were licensed to do and that the plaint charged them with *selling* and not *retailing* liquor. The Magistrate (*Morgan*) however convicted one of the defendants and sentenced him to pay a fine of Rs. 20. *In appeal*, the judgment was affirmed.

Maintenance.

P. C. Galle, 85710. The defendant was charged with not having maintained the complainant, his wife. The Magistrate (*Lee*) having acquitted the accused, on the ground that the complainant had been legally divorced before the institution of the case, the judgment was affirmed.

Licensing Ordinance.

P. C. Galle, 85902. The charge was that "the defendant, being the keeper of a tavern, did, on the 18th instant, in the Fort tavern No. 1, allow people to sit and loiter therein, in breach of Ordinance No. 7 of 1873, clause 18th." The Magistrate (*Lee*) convicted him in the following terms: "I do not consider that it was intended by the Legislature to make the mere sitting in a tavern an offence. I apprehend that the word 'sit' is in some degree governed by the subsequent word 'loiter,' and that to constitute an offence there must be either a "sitting and loitering' or a *loitering* alone. It is quite clear that the defendant, being a tavern keeper, has on this occasion allowed persons to loiter, and to sit and loiter, in the tavern." *In appeal* (*Kelly* for appellant) per Stewart, J.—"Affirmed."

Cruelty to animals.

P. C. Panadure, 21311. The defendant was charged with having shot the complainant's dog, in breach of the 19th clause of Ordinance 6 of 1846. It appeared that the dog had been tied to a jack tree near complainant's kitchen, and that defendant, on the pretence that the animal had killed one of his pigs, deliberately shot at it and killed it. The witnesses for the prosecution admitted that the dog had been of a ferocious nature. *In appeal*, against a conviction, per Stewart, J.—"Affirmed. According to the evidence, the pig had been killed fifteen days before the shooting of the dog. The shooting appears to have been both wilful and malicious."

Theft by the Police.

P. C. Colombo, 9101. The charge was "that the defendants did, on the 22nd July, at Slave Island, unlawfully enter the opium shop of the complainant, who was a licensed dealer, and did steal, take and

carry away a handful of money from the drawer of complainant's table. The facts of the case are set forth in the judgment of the Magistrate (*Fisher.*)—"I believe the case against the accused. It does not appear that the accused went into the complainant's shop with any deliberate intention to rob him. They asked for money to be lent to them, and the complainant's servant refused to gratify them, upon which the money was taken, apparently only a few coppers amounting to about six pence. The offence would not be a very henious one, if the actors had not been Constables in uniform, but they being Constables must be punished with comparative severity. From Inspector Buckley's account, it would appear that a complaint was made to him of the money in question having been taken; but in face of one of the complainant's party being locked up at the time, he deemed it a frivolous one, and sent the complainant about his business. The worst point of the proceedings to my mind was the arrest and confinement of Veeracuttie, whom, whatever Serjeant Rodrigo may say to the contrary, I believe to have gone to the station to ask for assistance. It is evident from Inspector Buckley's action as regards him, that he was locked up on some frivolous complaint. The 1st accused is an acting Sergeant. The other two Constables were at the time under his command. He must therefore be punished most severely, and he is sentenced to be imprisoned with hard labor for two months. The 2nd accused is sentenced to pay a fine of Rs. 30 or to be imprisoned for one month with hard labor. The 3rd accused appears only to have taken a passive part in the proceedings, and I shall leave him to be dealt with by his own officers. *In appeal*, (*Ferdinands* for appellant) per STEWART, J.—"Affirmed."

Defective plaint.

P. C. Balapitimodara, 44307. The plaint, as filed by a Police Officer on the 25th August, was as follows: "That the defendant did on this day at the Court House of Balapiti escape from custody." The Magistrate (*Halliley*) having heard complainant's evidence fined defendant Rs. 5. *In appeal*, per STEWART, J.—"Set aside. The plaint is defective. It does not allege, nor does it clearly appear from the evidence, that the defendant had been legally arrested and was in lawful custody."

September 26.

Present STEWART, J.

Labor Ordinance.

P. C. Haldamulla, 2206. The charge was "that the defendant did, on or about the 28th day of May last, at Lemastota, wilfully and knowingly seduce and take away two coolies, named Ratnapulle

and Kanagamutti, who were engaged to come and carry on work on Macaldenia Estate under the complainant, while they were *en route* to that estate, in breach of the 19th clause of Ordinance 11 of 1865." The complainant (*Murray*) deposed that he had on the coast, as his agent for supplying coolies, one Muttyan Kangany, who had once been employed on Meeriabedde Estate but who held a discharge in full from the Superintendent thereof (*Liston* ;) that the coolies in question had bound themselves in writing in India to work on Macaldenia ; but that they had been seduced away to Meeriabadde by the accused, who was Liston's head Kangany. He charged on information received from two other coolies, who proved that the accused had induced the men to desert by telling them that there was severe sickness at Macaldenia. It was also proved that neither Ratnapulle nor Kanagamutti, who had previously worked for *Liston*, were bound to his estate by advances or otherwise. The writings obligatory alleged to have been executed by them in India, in favor of complainant's agent, were

1. (B.) A "debt bond" by Kanagamutti, which was as follows:— "The sum I received this day from you is Rs. 10, for which sum of rupees ten I will get coolies to be taken to Macaldenia in Haldamulla, Ceylon, where I and my coolies will work under you, not less than a year, and on your demand I shall repay the sum of rupees ten and redeem this bond; and if I and the coolies fail to go, I will pay one half for one, or half more added to the principal. To that effect, I have agreed and granted this debt bond."

2 A "debt bond" by Ratnapulle as follows: "On account of necessity I do borrow and receive this day the sum of Rs. 84, for which sum of rupees eighty four I will pay interest of one per cent. and will redeem the bond on or before the 30th January, 1874, after paying in full the principal and interest."

It was shown at the trial that a copy of the first document had been duly given to Kanagamutti, immediately after the execution thereof. The Magistrate (*Reid*) convicted the defendant and sentenced him to three months' hard labor.

In appeal, *Browne*, for appellant, contended that one of the coolies, Ratnapulle, was clearly not bound, as he had not entered into a written contract to serve or received a copy of any such contract, as required by the Ordinance, section 9 ; and that as to the other cooly, who had been subpœned by complainant but not examined, the evidence as to delivery to him of the copy-contract was insufficient. (*Ferdinands* for respondent was not called upon.) Per STEWART, J. —"Affirmed. If the defendant considered the evidence of Ratnapulle and Kanagamutti would have been in his favor, there was nothing to

prevent his calling them as his witnesses. In respect of the cooly Kanagamutti, the document B places it beyond all doubt that he was under engagement to proceed to Macaldenia, complainant's estate."

September 26.

Present STEWART, J.

Master and Servant.

P. C. Panwila, 14568. This was a charge against a servant for leaving his master's service without notice and without reasonable cause. The evidence disclosed that the accused had been struck and told "to go" by the complainant who, however, pleaded his servant's insolence in justification of the assault. The Magistrate (*Power*) convicted the defendant, holding that what the master intended by his language was that the servant should leave his immediate presence but not his service. *In appeal*, (*Grenier* for respondent) per STEWART, J.—" Set aside. The defendant, it would appear, was not only assaulted by his master, but also told to go. Under these circumstances, the charge against defendant, for leaving his service without notice, cannot be maintained. In what the impertinence consisted which, it is alleged, provoked the assault is not stated, so as to allow any opinion being formed as to whether it was, under the circumstances, such as would justify the defendant leaving complainant's service."

September 30.

Present STEWART, J.

Cruelty to animals.

P. C. Galle, 85328. The plaint was "that the defendant did, on the 3rd July, at Mipe, beat, ill-treat, cut and torture a cow of the complainant, in breach of the 1st clause of the Ordinance 7 of 1862." The Magistrate (*Lee*) held as follows: "The defendant is proved to have slashed at this animal with a knife, and to have cut it while trespassing on his enclosed plantation. The acts inflicted pain on the animal and were unnecessary. Hence there has been a clear infraction of the Ordinance. Guilty. Sentenced to pay a fine of Rs. 30." *In appeal*, the judgment was set aside; and per STEWART, J.—"The cow, according to the evidence, was trespassing in the defendant's cultivated enclosure, and appears to have been wounded by the defendant on the impulse of the moment whilst driving it off. No cruelty or torture, as contemplated by the Ordinance, has been proved. See Matale, P. C., No. 71183, per Supreme Court, February 4, 1873, Grenier's Reports, p. 9; and per Supreme Court, Panwila, P. C. 14454, August 12, 1873."

Grave digging.

P. C. Panadure, 21315. The defendants were charged with having, on the 17th June, 1873, at Remum, "wickedly and maliciously damaged, injured and spoilt a grave, wherein the complainant's mother had been buried, in breach of the 19th clause of Ordinance No. 6 of 1846." At the trial, the defendant's Proctor raised the objection that the plaint did not disclose an offence under the Ordinance, as the grave was not the actual property of the complainant. But the Magistrate (*Morgan*) held that "the digging of a grave wherein it has been shown to the satisfaction of the Court that a corpse had been interred, where the defendants had no cause or excuse for digging it, is an offence under the 19th clause of Ordinance 6 of 1846," and accordingly convicted the defendants. *In appeal*, affirmed.

Security to keep the peace.

P. C. Colombo, 8995. The plaint was "that the defendants did, on the 14th day of June, 1873, at Mahara, assault and beat complainant. The Magistrate (*Fisher*) held as follows: "The first and second accused are found guilty. As it is impossible to discover who commenced the assault, it is ordered that the 1st and 2nd accused give bail in Rs. 50, and one surety in Rs. 50, to be of good behaviour for three months. Third and fourth accused are acquitted." *In appeal*, per STEWART, J.—"Altered by the 1st and 2nd accused being ordered to find security to keep the peace in the sum and for the period required by the Magistrate, instead of for their good behaviour. The 104th section of the Ordinance 11 of 1868 authorises a Police Magistrate to bind parties as therein pointed out to keep the peace, but no provision is made for a Magistrate binding over for good behaviour."

October 2.

Present STEWART and CAYLEY, J. J.

Wrong dismissal.

P. C. Panwila, 14566. This was an appeal against the following order by the Police Magistrate (*Power*)—"15th September, 1873. Parties present and not ready. Postponed to 15th October, 1873. Complainant now absent. Case struck off." Per STEWART, J.—"Set aside and remanded for further hearing. The first portion of the entry, under date 15th September, shows that the case was postponed to the 15th October. This possibly may have led to the appellant's subsequent absence on that day."

Fiscal's Ordinance.

P. C. Panadure, 21472. The charge was "that the defendants abovenamed did, on the 20th instant, at Rawelawatta, resist and obstruct the complainant in the execution of the warrant No. 20829,

directed to him by the defendant, Fiscal of Panadure, in breach of the 23rd clause of Ordinance 4 of 1867." For the defence it was contended in the Court below, that the plaint was defective in that the complainant was not described as a Fiscal's officer. *In appeal*, against a conviction, per Stewart, J.—"Affirmed. The complainant was for the time being employed as an officer by the Fiscal."

October, 7.

Present Stewart and Cayley, J. J.

Vagrant Ordinance.

P. C. Matale, 4808. The charge was "that the defendant was, on the 14th instant, found on the Spring Mount Estate for an unlawful purpose and not being able to give a satisfactory account of himself, in breach of Ordinance 4 of 1841, clause 4, section 6." For the defence a witness (Muttoosamy) was called, who deposed as follows:—"I know defendant. He goes about charming people, and curing people of devils. * * * I have seen the devils come out of a man.' The Magistrate (*Temple*) convicted the accused and sentenced him to one month's hard labor, in the following terms: "defendant, from his own admission, has remained on the estate after having been told to leave on several occasions, and the fact of his going about curing people is not to be tolerated, as Tamil Coolies believe in it, and I have known many cases of serious illness being brought on from fright owing to these foolish charms." *In appeal*, per Stewart, J.—"Set aside. The practice of administering charms in order to effect cure, though very absurd, cannot be regarded as unlawful."

Licensing Ordinance.

P. C. Gampola, 24910. The defendant was charged, under the 37th clause of Ordinance 7 of 1873, with having kept open his shop, in which intoxicating liquors were sold, at 9. 50. p. m. *In appeal*, against a conviction, *Kelly*, for appellant, submitted the argument contained in the petition of appeal, which was to the effect "that all that the Ordinance required was that the shop should be closed *after* the hour of eight at night and *before the hour of five in the morning*." If these words were strictly construed, as they ought to be, occurring as they did in a penal statute, the plaint disclosed no offence. Per Cayley, J.—"Affirmed. The words 'shall be closed after the hour of eight at night and before the hour of five in the morning' are ambiguous; being capable of two constructions. They may either be taken as representing a single act, or as representing a continuous state; that is, they may either refer to the act of closing or to the state of being shut up: and as the latter meaning, though not grammatically the most obvious, is clearly the one contemplated by the

Legislature, this Court is bound to adopt it under the general rule that the words of the Ordinance ought, if possible, to be construed in such a manner as will not lead to any manifest absurdity. The words thus taken would mean that arrack shops, etc., shall be kept shut (i. e. shall not be kept open) after 8 o'clock at night and before 5 in the morning."

Disorderly conduct.

P. C. Panwila, 14645. The charge was "that the defendants did, on the 25th September, at Panwila, in the public street, behave in a riotous and disorderly manner, in breach of the 6th section of the 53rd clause of Ordinance 16 of 1865." The 1st defendant while pleading sought to justify the disorderly conduct complained of (which consisted of a fight in the public road) by alleging provocation on the part of the 2nd defendant, who was represented as having "put his hands to his back and then turned round to 1st defendant's shop and put his fingers to his nose." *In appeal*, against a conviction, it was submitted by appellant, in his petition of appeal, that the plaint should have been laid under the 2nd clause of Ordinance 4 of 1841, and not under the Police Ordinance of 1865. Per Cayley, J.— "Affirmed. The appellant has pleaded 'guilty under provocation.' No provocation would justify riotous and disorderly behaviour in the public street, and the plea must be taken as one of guilty absolutely. This plea has cured the defect in the plaint, which is referred to in the petition of appeal."

Labor Ordinance.

P. C. Nawalapitiya, 18156. Nine coolies were charged on the following plaint: "that defendants did, on the 18th August, 1873, leave complainant's service without notice or reasonable cause, in breach of clause 11 of Ordinance 11 of 1865." It transpired in evidence that Mr. Black, the present superintendent of Wannarajah Estate and the virtual complainant in the case, had succeeded Mr. Kelly from whom he had received a cheque for Rs. 1850 in payment of certain advances which had been made to one Mari Cangany, who had procured the accused coolies for the Estate. The defence appeared to be that the cheque in question had been given and accepted for the discharge of both Mari Cangany and his coolies, and that therefore the defendants were not liable to be prosecuted. The Magistrate (*Penney*) held as follows:—"The Court is of opinion that as Mari Cangany is allowed to have received the Rs. 1850 and to have had that entered as a debt against him, even although the coolies' names were entered on the check roll, he (Mari Cangany) was in reality the proprietor, so to speak, of the coolies brought both by him and his agents, his sub-canganies. He had to wipe off the debt by means of the coolies he

Labor Ordinance.

brought. Mr. Black in receiving the cheque from Mr. Kelly, in the opinion of the Court, declared Mari Cangany free to go; and as it is absurd to suppose that ~~Rs~~ 1850 would be paid for the sole purpose of obtaining one man, the natural conclusion is that that sum when paid freed both him and those employed by him. Mr. Black gave no intimation that certain coolies intended to stay, and the payer of the cheque naturally concluded he would get all the men obtained by Mari Cangany by means of a sum equal in amount to his cheque. The accused are acquitted, and the complainant is adjudged to pay their costs."

In appeal, Ferdinands, for appellant, submitted the following affidavit from Mr. Kelly:

I do hereby make oath and swear that on the 18th of August last, I sent to the Superintendent of "Wanne Rajah" Estate the sum of rupees eighteen hundred and fifty, being the full amount due by Marie Cangany *and all his under Canganies* to the "Wanne Rajah" Estate. In the letter enclosing the cheque, I stated that I sent that amount in settlement of the accounts of Marie Cangany and his under Canganies. My cheque was accepted, and no communication was ever made to me that any Canganies or Coolies would not be paid off: my letter dated August 18th was put in in evidence and should be attached to the case. The Coolies in question belong to under Canganies who all belong to Marie Head Cangany. These under Canganies have all had their accounts settled, I having paid their debts in the round sum of Rs. 1850 sent in August 18th. To my letter enclosing the cheque and stating that it was in settlement of all accounts of Mari Head Cangany, and his under Canganies, I never received any reply, and that cheque for payment in full being accepted without any reply or comment, I swear that I considered myself entitled to Mari Head Cangany, his under Canganies and all their people willing to come: the sum of Rs. 1850 being the full amount of everything due by them and having liquidated the debts of the Coolies now in question.

(Signed) L. H. Kelly.

Grenier, for respondent, stated that he would not object to a rehearing.

Cur. adv. vult.

Per Stewart, J.—(October 14th)—"Set aside and case remanded for further hearing on both sides, and judgment de novo. From the evidence it would appear that the names of all the accused were entered in the Check Roll of the Wanna Rajah Estate, and that the defendants were actually employed on that estate immediately preceding the date of their alleged desertion. The circumstance of the defendants having been brought to the estate by Mari Cangany or his Agents cannot affect the liability of the defendants and their obligation to serve their employer, they having once entered his service. The cangany and the coolies of his gang are alike servants within the meaning of the Ordinance, bound to serve the prescribed time; neither

the one nor the other being at liberty to quit the service of his employer without due notice or leave, or reasonable cause. It is evident that the defendants, at any rate the 1st, 2nd and 3rd, were aware of the necessity for giving notice. These three defendants had, along with several other coolies, given notice of their intention to leave the estate. The other coolies who had joined in the notice were duly paid off on the 18th August, except these defendants who had sometime before withdrawn their notice, and consequently were regarded as if they had given no notice. The remaining defendants do not appear to have given any notice at all. On the above facts the Supreme Court would have no difficulty in coming to a decision, but for the other question raised on behalf of the defendants, whether when the Superintendent (Mr. Black) received the cheque for Rs. 1850, which was on the same day as that on which the defendants are charged with leaving complainant's service, he either expressly or by reasonable and necessary implication released the defendants from further service on Wanna Rajah. On this point fuller evidence than what is now before the Court is requisite, to allow of any satisfactory conclusion being found. Mr. Black says, 'Mr. Kelly sent me a cheque for Rs. 1850 to pay off Mari Cangany's debt.' Was any money then due by the defendants or any of them? And, if so, was such sum comprised in Mr. Kelly's cheque? Or was the cheque only received in liquidation of Mari Cangany's individual debt? Was this payment made and received with the knowledge of the defendants? And did anything pass between them, Mr. Kelly and Mr. Black with reference to this money? How came Mr. Kelly to give the money? All that transpired between the several parties should be ascertained as fully and clearly as may be possible, with the view of determining whether either Mr. Black or Mr. Dunbar in any way assented to the defendants leaving the estate. The letter referred to in Mr. Kelly's affidavit should be produced."

October 14.

Present STEWART, J.

Master Attendant's Ordinance.

J. P. C. Colombo, 83. The plaint was "that the defendants did, in the roadstead of Colombo, on the night of the 27th September, 1873, in the canoe No. 38, go alongside of the barque 'Coniscliffe' before she was visited by the Health Officer of the port, in disobedience of the Master Attendant's order dated 11th September, 1873, and in breach of the 24th clause of Ordinance 6 of 1865." The order referred to, as filed in the case, was as follows.

I hereby give notice that from this date no boat or canoe shall communicate or go alongside of any vessel arriving in the port of Colombo, until after she anchors in a proper berth and has been visited by the Health Officer of the port, and the vessel reported by him to be free from infection. The tindal and boatmen of any boat disobeying these orders shall be liable to the penalty prescribed by law.

(Signed.) James Donnan,
Master Attendant.

Master Attendant's Office,
Colombo, 11th September, 1873.

In appeal, against a conviction by the Magistrate *(Donnan) Grenier*, for the appellants, contended that the port-rule in question was illegal, as not having reference to any acts ejusdem generis with those specified in the 24th clause of the Ordinance. The power to make such a regulation as that of which a breach was alleged, was vested in the Government alone, under the 6th clause which required a proclamation in due form one month at least before the regulation could take effect. Indeed, an order identical with that of the Master Attendant had been enacted by the Government and published in the Gazette of the 27th September, thus impliedly shewing that Captain Donnan had no authority to act in the matter. But even supposing that the rule alleged to have been infringed was legal, there was not an iota of evidence to shew that the Health Officer had not visited the ship before the defendants went alongside of her.

Per Stewart, J.—"Set aside and case remanded for further hearing. The words in the early part of the 24th clause of the Ordinance No. 6 of 1865 seem sufficiently wide to embrace such an infraction of the order of the Master Attendant as that charged; but there should be some evidence to prove that the defendant came alongside of the vessel before she was visited by the Health Officer."

Malicious Injuries Ordinance.

P. C. Mullaittivu, 8301. The plaint was "that the defendant (a road overseer) did on the 30th of July, at Kanakararen Coolem, unlawfully and maliciously cut and destroy the palmirah olas and fruits of the complainant's garden, in breach of the 14th clause of Ordinance 6 of 1846." The Magistrate *(Smythe)* held as follows: "Defendant had no business to cut olahs without complainant's permission. There is a bad feeling between the parties. Complainant has very much exaggerated matters, and I think a fine of Rs. 5, which is hereby inflicted on defendant, will meet the ends of justice." *In appeal, Grenier*, for appellant.—The Magistrate in his judgment found that the defendant had cut only olahs, which according to the evidence for the defence (not disbelieved) had been used for patching up

water baskets used on road work. The 72nd clause of the Thoroughfares Ordinance authorized road officers to remove materials from adjacent lands. [But would olahs come within the meaning of the term materials?—Stewart, J.] The cutting of timber was expressly sanctioned, and if a tree could be cut surely the leaves thereof might be removed. The complainant was applied to for permission to cut, but it appeared that he neither granted nor withheld such permission. There was certainly no malicious injury proved. Per Stewart, J.—"Set aside. The Magistrate does not find that the act was malicious, nor is there sufficient evidence that the act was so; the contrary rather appears from the finding of the Magistrate."

Toll.

P. C. Matara, 72131. The plaint was "that the defendant (a toll-renter of Akuresse) did, on the 31st March, unlawfully demand and take toll from the complainant after previous payment was made at Talliggawille for the same bandy, contrary to the clauses 9, 17 and 18 of Ordinance 14 of 1867." The Magistrate (*Swettenham*) held as follows: "The toll at Talliggawille appears to be one of those authorized by Ordinance 14 of 1872, although no proclamation has been made to declare collection at that place. I have searched in vain for any provision that paying toll at Talliggawille should clear Akuressa or vice versa. There is nothing to render defendant's conduct illegal, or even morally wrong. Defendant is acquitted." *In appeal*, per Stewart, J.—Affirmed.

October 21.

Present Stewart, J.

Maintenance.

P. C. Galle, 85580. The accused was charged, under the Vagrant Ordinance, with not maintaining his wife and child. The defence was that the husband and wife, who had married in 1868, had shortly after the birth of their first child separated by mutual consent, when under a notarial deed sufficient provision, it was alleged, had been made for the support of the wife. The complainant's father deposed as follows: "The parties lived together about two years and separated five or six years ago. Complainant's mother is alive. Defendant is possessed of property, and so is complainant. There was a deed written between the complainant and defendant prior to the separation. Since that deed was written complainant has lived with me. She did not bring back any property. The child was 6 or 7 months old at the time of separation. Defendant went to Anuradhapoora and Colombo." This was the only evidence in the case, the Magis-

trate (*Lee*) recording that "the facts were not contradicted and that the deed was admitted by complainant."

In appeal, against a conviction, (*Layard* for appellant, *Grenier* for respondent) per STEWART, J.—"Set aside and the case remanded for further hearing. The Supreme Court concurs with the Police Magistrate in holding the deed void. But as by that document the complainant agreed to retain her own property (from the evidence it would appear she has property) separate from her husband, and to forego her right as well as that of her child to maintenance from the defendant, who may therefore have supposed that his wife and child were being supported from the property thus set aside, the Supreme Court considers, under the circumstances, that this case should go back for further enquiry generally, and also as to whether any demand was made for maintenance from the defendant, and whether he was aware that his wife and child were being maintained by others. The value of complainant's property referred to by the 1st witness (father of complainant) is not stated. No doubt in general a demand for maintenance is not necessary, the offence consisting in the party leaving his wife or child without support whereby they become chargeable to others. If, however, the husband or father has in fact made sufficient provision for his wife or child, and bona fide was under the belief that they were being supported as had been arranged, the case would both in law and reason stand on a different footing, there being neither the mens rea nor mens conscia necessary to render a party criminally liable. It will be seen that there is no difference in reality between the judgments of the Supreme Court in the Panwila cases referred to. In 4890 (II *Bel.* 93) the ordinary rule was laid down. The other case (4577, *Ibid* 87) was of a special character, the wife having left her husband no less than ten years before, taking her child with her."

Disorderly conduct.

P. C. Puttalam, 6440. The charge was "that the defendant did, on the 3rd October, 1873, at Puttalam high road, behave in a riotous and disorderly manner, in breach of the 2nd clause of Ordinance 4 of 1841." The order of the Magistrate, (*Pole*) refusing a summons on the plaint, was as follows: "Complainant states—defendant scolded me with filthy words. Nothing else. Case dismissed." *In appeal*, per STEWART, J.—"Set aside and case remanded for hearing. The plaint discloses a legal offence. The examination of the complainant is so scanty that it affords no sufficient facts to allow of any safe conclusion being drawn. It will be seen that the 2nd section of the Ordinance No. 4 of 1841 is in the disjunctive, providing for the punishment not only of persons behaving in a riotous manner, but also

for the punishment of persons behaving in a disorderly manner in the public street. Whether the conduct of the accused, having regard to the language used, his tone, demeanour and acts, amounted to disorderly behaviour in the public street, can only be safely determined upon a consideration of all the circumstances as they may be proved in evidence."

October 28.

Present Stewart, J.

Gambling.

P. C. Chilaw, 9467. The charge was "that the defendants"—(nine in number)—"did on the night of the 7th October, at the house of the 1st defendant in Vattically, which is used as a promiscuous gaming house, engage at a game of chance with dice, in breach of the 4th section, 4th clause of Ordinance 4 of 1841." The Magistrate (*Wragg*) found the accused guilty and sentenced them to a fortnight's imprisonment each, excepting the 1st who was sentenced to pay a fine of Rs 50 and to be imprisoned at hard labor for six months. *In appeal*, (*Grenier* for appellant) per Stewart, J.—"Affirmed, save as to the sentence upon the 1st defendant, which is altered into the same as that passed upon the other defendants. The defendants were all charged with a breach of the 4th clause of the 4th section of Ordinance No. 4 of1841. No charge was laid under the 19th section, nor does the plaint distinctly allege in the words of this section that the 1st defendant kept or used the house for the purpose of common or promiscuous gaming, etc."

Labor Ordinance.

P. C. Matara, 72220. The defendant, who was described in the plaint as "a monthly paid servant under complainant as Toddy-drawer," was charged, under the 11th clause of Ordinance 11 of 1865, with having left his employer's service without notice. The complainant in his evidence stated:—"the defendant was employed under me as a monthly servant as Toddy-drawer. I used to pay defendant Rs 3 a month and $\frac{3}{8}$ of a penny for every gallon of toddy extracted." *In appeal* against a conviction by the Magistrate (*Jumeaux*), *Ferdinands*, for appellant, contended that the defendant in his capacity as a toddy-drawer would not come within the operation of the Servants' Ordinance. Sed per Stewart, J.—Affirmed.

Paddy-tax.

P. C. Balapitimodera, 44456. The defendants were charged by a Government Paddy Renter, under the 14th clause of Ordinance 14 of 1840, with having cut, threshed and removed the paddy crop of a certain field, without giving notice or contributing the 1-10th share

due to Government. The complainant in his evidence having stated that he had appointed one Andris, though not in writing, as his Agent to collect the rent, the Magistrate (*Gibson*) acquitted the defendants, holding that the complainant had forfeited his right to prosecute under the provisions of the 13th clause of the Ordinance. *In appeal*, per Stewart, J.—"Set aside and case remanded for further hearing. It does not clearly appear from the examination of the complainant, whether Andris' appointment as Agent was notified by the renter to the principal headman of the division as required by the Ordinance. The prosecution, however, in this case has been instituted not by Andris but by the renter himself. The evidence should be heard. How the informal appointment (if such it be) of Andris as agent bears on the case is not shown in the present proceedings. If the renter had no duly qualified agent or the renter himself was absent, notice should have been given to the nearest headman. See 10th section of Ordinance 14 of 1840."

Resisting Police Headman.

P. C. Batticaloa, 6248. The defendant was charged with having resisted the complainant in the execution of his duty as a Police Headman, in breach of the 165th clause of Ordinance 11 of 1868. The Magistrate (*Worthington*) held as follows: "The evidence established the fact that defendant did resist complainant in the lawful execution of his duty, but looking to the acts of complainant prior to the descent of defendants from the house they were thatching, to the illegality of the arrest of Armogam in the absence of a warrant, etc, I consider that the imposition of a fine will meet the requirements of the case. The question irresistibly presents itself also to my mind, would the complainant have been so zealous had the position been reversed, viz, Setukada people, complainants, v. Valeyurava people. Defendants are fined Rs 10 each." *In appeal*, per Stewart J.—"Set aside. This is a charge for resisting the complainant in the execution of his duty in breach of the Ordinance 11 of 1868, section 165, according to which it is necessary that the resistance take place in the execution of some duty imposed by that Ordinance. The arrest of Armogam was not authorized by any of the provisions of the Ordinance referred to. The charge against him was only one of assault. No offence was committed by him in the presence of the complainant, nor did complainant find him manifesting any intention to commit a crime or a breach of the peace. See section 144. The evidence accordingly fails to show that the complainant was obstructed in the execution of any duty imposed upon him by the Ordinance 11 of 1868. It should be noted that the plaint is not laid under the Ordinance 4 of 1841, sections 7 and 12."

November 4.

Present CREASY, C. J., STEWART and CAYLEY, J. J.

Municipal Bye-laws. Previous conviction pleaded.

B. M. Galle, 2914. The defendant was charged under clause 2 of Bye-laws chapter 22, with having failed to construct a new drain through the premises No. 315, although he was required to do so in writing on the 9th September last. For the defence it was contended that a previous conviction in case No. 2846 was a bar to the present prosecution. *In appeal*, against a conviction, per STEWART, J.—"Affirmed. The original order was produced, and is now in the proceedings. The offence now charged is for not constructing a drain as required by notice in writing served on 9th September. The case No. 2846 was in respect of a distinct charge under notice served on the 5th May.

Paddy Ordinance.

P. C. Kalutara, 49425. The defendants were charged, under the 2nd and 6th sections of Ordinance 14 of 1844 with having cut and threshed their paddy crop without notice. The Magistrate (*Power*) acquitted the defendants, on the ground that the wrong clause of the Ordinance had been quoted and the amount of the tax had not been stated, adding "that in the absence of the latter the Court cannot punish, as the punishment must be regulated by the amount due." *In appeal*, per STEWART, J.—"Set aside and case remanded for further hearing, with liberty to the complainant to move to be allowed to amend his plaint by substituting the correct section and Ordinance infringed. The offence charged consists in defendants having cut and threshed his crop without giving due notice. The extent of the crop and the value of the Government share, are only necessary to be ascertained for the purpose of punishment and need not in strictness be stated in the plaint."

November 5.

Present CREASY, C. J. and STEWART and CAYLEY, J. J.

Preservation of Game Ordinance.

P. C. Puttalam, 6413. The plaint was "that the defendant did on the 14th day of September, 1873, at Aramuthuwavakille, kill game without a license and possess meat of game which they could not account for satisfactorily, in breach of the 3rd and 6th sections of the 11th clause of Ordinance 6 of 1872." The Magistrate (*Smart*) held as follows: "The Ordinance in the 5th clause is thus worded: no person shall kill game out of the division of the Korale Vidahne Arachchi or Udaiyar in which he resides without a license. So that, so far as I can understand, by this villainously worded Ordinance any one may kill game without license within the division of the Koralle,

&c., in which he resides. Now this elk was shot by 3rd defendant, Eramuthuwewa, within the Wadawutchia Palata (in which 3rd defendant lives) and consequently within the jurisdiction of the Koralle of the Talawanne Pattoo ; so that it would seem that defendant has not committed a breach of the Ordinance. The Ordinance is framed apparently with a view to the mode of division of the Western and Central Provinces, for there is no such officer as the Koralle, Vidahne Arachchi or Udaiyar in this part ; but if the true intent of the Ordinance is followed, I conclude that one who kills deer within the jurisdiction of the Koralleship in which he resides commits no breach of the Ordinance. It is difficult to conceive the use of the enactment, if this be the meaning of the Ordinance, for natives never travel far from their villages for shooting, and now that they have such liberty granted to them by the Ordinance the preservation of game will not be in the least assisted in the non-close season. Defendants are found 'not guilty' and are acquitted. I hope an appeal will be taken to settle the point." *In appeal*, per Cayley, J.—" Affirmed. It is not alleged in the plaint, nor proved by the evidence, that the elk was killed out of the division of the Korale, Vidahn Arachchi, or Udaiyar in which the 3rd defendant resided. Under the 5th section of the Ordinance No. 6 of 1872, persons are prohibited from killing buffaloes, without a special license, either within or without such division; but elk and deer may be killed in the open season without any license, if killed within the division of the Korale, Vidahn Arachchi or Udaiyar, in which the killer resides. It appears that there is no officer with the title of Koralle, Vidahn Arachchi or Udaiyar, in the district within which these defendants reside ; but the Supreme Court thinks that the words Korale, Vidahn Arachchi or Udaiyar may be considered distributively ; and in the present case it was proved that the elk in question was shot within the division of the Korale in which the 3rd defendant, the killer, resided."

November 11.

Present Creasy, C. J., Stewart and Cayley, J. J.

Costs.

P. C. Galle, 85877. Five defendants were charged with assault. The Magistrate (*Lee*) having disbelieved the evidence entered a verdict of acquittal and condemned the complainant to pay each of the accused 50 cents. *In appeal*, per Creasy, C. J.—" Affirmed. The acquittal was clearly right. As to the order on the complainant to pay the defendants 50 cents each, the appeal urges that there was no proof of the defendants having been put to any actual cost, but the loss of a man's time and the trouble which he is put to by having to attend the Police Court come fairly within the term 'reasonable expenses' in the Police Ordinance 18 of 1871, clause 4."

Informer's share.

P. C. Matara, 72602. This was a charge for a breach of the 5th clause of the Ordinance No. 2 of 1836. The Magistrate (*Jumeaux*) having found the defendant guilty, in that he had used short measures, sentenced him to pay a fine of Rs. 20, of which Rs. 5 was ordered to be paid into the Police Fund, the complainant being a Police Inspector. *In appeal,* per STEWART, J.—" Affirmed, but so much of the judgment as directs that Rs. 5 of the fine be paid to the Police Fund is set aside. The Ordinance does not authorise any portion of the fine being paid to the informer."

Case struck off.

P. C. Jaffna, 2985. This was an appeal against the order of the Magistrate (*Murray*) striking off the case. Per CREASY, C. J.— " Affirmed. The complainant, through his counsel, agreed to give up the case."

Labor Ordinance.

P. C. Gampola, 25024. The plaint was as follows: " that the defendant, being a journeyman artificer bound (by a written contract executed in the manner prescribed in the 7th section of the Ordinance No. 11 of 1865, and hereunto annexed, marked A) to serve the complainant, did on the 10th day of October, 1873, quit the service of the complainant, without leave or reasonable cause, before the end of his term of service, and without working off or paying off the advances mentioned in the said contract, in breach of the 11th clause of the said Ordinance." The contract, which had been signed by the parties in the presence of Mr. PENNEY, Police Magistrate, was to the following effect: that the defendant, acknowledging the receipt from complainant of Rs. 83, bound himself to work off the advance by serving in the capacity of boot and shoemaker at one rupee and fifty cents weekly or six rupees per month ; that the defendant agreed to accompany the complainant, whenever required, to Kandy, Pussilawa or Navalapitiya on being paid his expenses ; and that the defendant should have the right of claiming his discharge at any time on paying up the amount due to his employer. The complainant in his evidence stated, "defendant was employed under me to make boots, as I am a bootmaker. He left my service without giving me notice. He was bound under me on the written contract I have filed. I had only recovered from defendant Rs. 15 of his advance. *Cross-examined.*—On the 8th ultimo, (8th September) he told me he would leave my service, but did not pay me his advance as agreed before leaving." The Magistrate (*Neville*) found the defendant guilty and sentenced him to 3 months' hard labor. *In appeal,* per CREASY, C. J.—" Affirmed. This case clearly came within the Ordinance."

Arrack Ordinance.

P. C. Pussilawa, 9314. This was an appeal against a conviction and sentence under the 29th clause of Ordinance 10 of 1844, the defendants having been charged with retailing arrack, for the purpose of being consumed on the premises within which the same was sold, without a license from the Government Agent of the Central Province. Per Stewart, J.—" Affirmed. The charge should have been laid under the 26th and not under the 29th section of the Ordinance. The error, however, is not one that could have in any way prejudiced the substantial rights of the defendants."

Security to keep the peace

J. P. Jaffna, 11074. This was an appeal against an order of the Justice of the Peace requiring heavy security from the accused to keep the peace, under the provisions of clause 223 of Ordinance 11 of 1868. Per Cayley, J.—" Affirmed. The defendants, four in number, after a previous assertion of their intention, came at night on two occasions and twice removed a stile which the complainant had put up to protect his field during the crop season. The stile, after its first demolition by the defendants, had been restored with the sanction and under the directions of the Police authorities. The fact that the defendants claim a right of way over the place where the stile is erected, will not excuse this violent assertion of their supposed right; and it is difficult to conceive any act more likely to occasion a breach of the peace than those committed by these defendants. The Justice of the Peace was accordingly fully justified in binding over the defendants to keep the peace."

November 14.

Present Creasy, C. J., Stewart and Cayley, J. J.

Licensing Ordinance.

P. C. Newera Eliya, 8904. The plaint was "that the defendant did, on the 2nd day of September, 1873, at Odupussilawa, sell a bottle of intoxicating liquor on credit or trust, in breach of the 25th clause of Ordinance 7 of 1873."* It appeared from the evidence that the accused had supplied Mr. John Findlay with a bottle of brandy on a written order which, however, was not produced. Findlay's evidence was to the following effect. "I had dealings with Armugam Chetty, the master of defendant, in general stores, etc. I did not pay for the bottle of brandy, or send the money. I sent for it on my account. The defendant's principal was away at the coast at the time and I do

* The defendant had previously been charged in case No. 8899, under the 10th clause of the Licensing Ordinance, for selling the bottle of brandy in question without a license and had been acquitted.

not know how our accounts stood. I had sold 275 bushels of Coffee of this season to defendant's principal. He had partly paid in cash for the Coffee. He left the Island on a sudden, and did not settle accounts with me, and I received goods from him from time to time of which account was to be taken afterwards. I have no dealings with defendant, and have no accounts with him, and look upon him as the shopman of Armogam Chetty. I cannot say how my accounts stand with him. There may be a few rupees due on either side." The Magistrate (*Hartshorne*) convicted the defendant, and fined him Rs. 50.

In appeal, *Grenier*, for appellant.—There was no credit asked for or given in this case, as it appeared that there were monies in the hands of the defendant or his principal due to Findlay who, according to his own evidence, had agreed to receive goods from time to time in liquidation of the debt. But apart from this, the 25th clause could not be taken to apply to the defendant, who was neither a licensed dealer nor a tavern keeper. Per Stewart, J.—"This is a charge laid under the Ordinance 7 of 1873, section 25, which enacts that 'if any licensed person or any keeper of a tavern shall sell any intoxicating liquors on credit,' etc. The plaint, however, does not allege, nor is there a word in the evidence to prove, that the defendant was either a licensed person or a keeper of a tavern."

Appeal.

J. P. Negombo, 8793. The defendant had been charged on an affidavit with cattle stealing. The Justice of the Peace (*Ellis*) after hearing the evidence of the complainant and his witnesses discharged the accused, holding that he believed the case to have been entirely got up by the peace officer of the village. *In appeal*, by the complainant, per Creasy, C. J.—"No appeal lies in a case like this."

Appeal.

P. C. Galle, 85315. This was an appeal against the following order of the Magistrate (*Lee*) "Complainant not ready. Struck off. The case has been postponed time without end, and I will give no further postponement for any cause whatever." Per Creasy, C. J.—"It is ordered that the appeal lodged in this case on the 6th November, 1873, be dismissed."

November 18.

Present Creasy, C. J. and Stewart and Cayley, J. J.

Ordinance preventing destruction of fish.

P. C. Point Pedro, 13194. The plaint was "that the defendant did, on the 21st September, at Vallevuttethurrie on the North-eastern side of Parrethurrie, within the jurisdiction of the Court and within a

league from the shore, use a net in the sea commonly called "veele valey" in catching fish, in breach of the 2nd clause of Ordinance 19 of 1866 and the Proclamation of 30th October, 1869." The Magistrate (*Drieberg*) held as follows: "The offence with which the defendants are charged is one exceedingly difficult of proof, as is evidenced by the fact that there has been as yet no conviction under this Ordinance. All the facts in the case are clear, and the only point on which there is a conflict of evidence is as to whether defendants were picked up within 3 miles of the shore or beyond 3 miles of the shore. The evidence on the point that the defendants were picked up within a mile of the shore, coupled with all the circumstances of the case, is conclusive to my mind as to the guilt of the defendants. The offence in question is one which acts very prejudicially on the fishing trade, and the defendants must be severely punished. The defendants are accordingly adjudged to be guilty and are sentenced to pay a fine of Rs. 30 each." *In appeal*, per STEWART, J.—Affirmed.

Timber Ordinance. Jurisdiction.

P. C. Matara, E. The defendant was charged, under clause 2 of Ordinance 24 of 1848, with having unlawfully cut timber on Crown land without a license or permit. The Magistrate (*Jumeaux*) refused to entertain the charge in the following order. "The Ordinance requires that the Deputy Queen's Advocate should grant a certificate that he elects to try the case in the Police Court. There is no certificate from the Deputy Queen's Advocate, but only one from the Assistant Government Agent. See No. 71,746, P. C. Matara, in appeal, dated September 5, 1873." *In appeal*, per CREASY, C. J.—"Set aside and case sent back for hearing. In the case in Grenier's Reports, which has been referred to, there was no certificate by any one at all. In the present case there is a certificate by the Assistant Government Agent, which is quite sufficient under the terms of Ordinance 11 of 1868, clause 99, in a matter which affects the revenue."

November 26.

Present CREASY, C. J. and STEWART and CAYLEY, J. J.

Cattle trespass.

P. C. Avishawella, 16993. The defendant was charged, under the 4th clause of Ordinance 2 of 1835, with having allowed two head of cattle to trespass at night in the Police Magistrate's premises. The Magistrate (*Byrde*) held as follows. "In this case the defence set up is that the prosecution should prove that a fence protected the land or that the land by local custom required no fence. It is obvious that

at the present time there is no fence on two sides of the Magistrate's premises; but inasmuch as the previous Magistrates put up and kept a fence to protect their flower garden (it seems that the fences were put up by prisoners at the Magistrates' discretion for the convenience and pleasure of the Magistrate then residing) and since the withdrawal of the prisoners from labouring on Government grounds, it cannot be maintained that the public have a right to send their cattle to graze on Government premises, disturbing the rest and peace of the resident Magistrate." The defendant was accordingly found guilty and sentenced to pay a fine of Rs. 5. *In appeal*, (*Ferdinands* for appellant) per CAYLEY, J.—"Set aside and verdict of acquittal entered. Before persons can be criminally convicted under the Ordinance No. 2 of 1835, the requirements of that Ordinance must be strictly complied with; and no person can be fined for cattle trespass, unless it is proved that the land trespassed on is protected by such a fence, if any, as the local custom may prescribe. In the present case the land is not fenced, and there is no proof that the local custom dispensed with any fence. Indeed, it appears from the evidence called by the defendants and from the letter of the Police Magistrate that the land formerly used to be fenced. The Police Magistrate appears from his letter to suppose that, if the owners of trespassing cattle cannot be convicted under the Ordinance, there is no redress for the evil complained of. But any person who has been injured or annoyed by cattle trespass has his civil remedy, including the right of distraining the cattle damage feasant; for the Ordinance 2 of 1835 has not taken away any civil remedy which the original party may have at common law, (5468, C. R. Batticaloa, S.C. Min. 31 May, 1866) but has merely provided a more summary mode of procedure."

Labor Ordinance.

P. C. Matale, 5291. The defendant, a cangany, was charged, under the 19th clause of Ordinance 11 of 1865, with having seduced away from complainant's service a cooly named Adappen, who appeared to be a boy of about 12 or 15 years of age. The Magistrate (*Penney*) found as follows. "The Counsel for the defence having stated that the witnesses he proposed to call are to give evidence only to the fact of Adappen having volunteered to accompany the accused, the Court considers that their evidence need not be taken. Considering the facts of the case, the Court does not attach much importance to the statement made by Adappan, that the accused offered him money and other things to accompany him, as this was very probably put forward by Adappen as an excuse for his own fault of desertion. The fact, however, remains that the accused was found with the boy Adappan

in his company in the middle of the night away from that boy's estate, and it is a most reasonable supposition to presume that some encouragement or at least consent must have been given by the accused to Adappen before he left his master's estate with him. The accused must have been well aware that Adappen had no permission to leave the Estate, and the Court is of opinion that his act came within the operation of the 19th clause of Ordinance 11 of 1865. The accused is convicted and fined Rs. 50 and to pay the expenses of complainant." *In appeal*, (*Grenier* for appellant) per CAYLEY, J.—" Set aside and sent back in order that the proposed evidence for the defence may be heard. If after hearing the evidence the Police Magistrate is satisfied that the accused in any way induced the boy Adappen to leave his master's service, the accused should be convicted. But mere assent on the part of the accused to allow the boy to accompany him, is not sufficient to render him criminally liable under the 19th clause of the Labor Ordinance."

December 2.

Present STEWART, and CAYLEY, J. J.

Costs.

P. C. Panadure, 21911. A charge of assault was dismissed by the Magistrate (*Morgan*) who, believing the case to be a false and frivolous one, made order as follows: " defendants are acquitted and discharged, and complainant is fined Rs. 15 to be given over to the defendants." *In appeal*, per CAYLEY, J.—" Affirmed. The complainant is not fined under the 106th clause of Ordinanee 11 of 1868, but he is ordered to pay Rs. 15 to the defendants which the Police Magistrate no doubt considered to be the amount of their reasonable expenses. It is competent to a Police Magistrate to award such expenses at the trial of the case under the 4th clause of Ordinance 18 of 1871."

Implied substitution of Complainant.

P. C. Galle, 85539. The defendants were charged, on the 24th July, 1873, with assault. After several postponements, the following order was made by the Magistrate (*Lee*) on the 20th August.

Complainant present Defendants reported to be in concealment. Extended to 17th September.

I have since understood that the complainant is dead. Some one has answered to her name when the case was called in the morning. Let warrant of arrest issue to defendants, and let complainant's brother prosecute.

The case came on for trial on the 22nd November, when after the evidence for the prosecution had been closed the defendants' Proctor took the objection that the proceedings were irregular, and that, in the absence of the complainant on the record, the case should have

been struck off. The Magistrate, however, convicted the accused, who were each sentenced to three months' hard labor and to pay a fine of Rs. 50.

In appeal, Grenier, for appellant.—There had been in point of fact no substitution on the record of a new complainant ; and the legal objection had been taken at the trial. The irregularity could not be held as cured by the defendants having pleaded, for even where one prosecutor had been substituted for another, the Chief Justice was of opinion (*Worthington's Case*) that the proceedings should be quashed as illegal. That opinion, though not adopted by a majority of the Court at the time, had recently been cited with approval by Mr. Justice Cayley in P. C. Matara, 71720 (August 19th); and it was open to the Supreme Court to reconsider the point.

Sed per Stewart, J,—" Affirmed. The order of August 20, 1873, must be taken as equivalent to an amendment of the plaint."

December 9.

Present Stewart and Cayley, J. J.

Maintenance.

P. C. Galle, 85580. This case, which is reported in page 92, having been sent back for rehearing, the Magistrate (*Lee*) after recording further evidence gave judgment as follows. " The evidence in this case is very simple, but the points of law which have arisen are of considerable interest. The defendant is indicted, under section 2 of the 3rd clause of Ordinance 4 of 1841, for deserting his wife and child. By a deed of agreement, dated the 8th January, 1868, the parties agreed to separate. By the 1st clause of that deed, it was agreed that each party should receive back the dowry presents which are expressly termed jewelry and moveables. No further provision was made by the husband. There is a provision for the dissolution of the community of property and an undertaking on the part of the wife not to prosecute for maintenance of herself and child. In the decision given by me on the 25th September, I stated at length my reasons for holding this deed void in law, and on that point the Appellate Court approves my ruling. It is proved that the defendant has not since the date of this separation made any provision for his wife and child. The Supreme Court reversed my former finding, as I apprehend, on the ground that there was no evidence of *mens rea*, and that there was evidence that the wife had property of her own and that defendant might reasonably have supposed that his wife and child were maintained out of the proceeds of that property. I have re-examined the wife's father, and it is explained that he has property but that his daughter has nothing but the dowry property she brought back with her,

valued at Rs. 450. It is clear that this property was not enough to maintain the wife and child for more than five years. Supposing it to have been enough, it is still questionable whether the indictment would not have been sufficiently supported by the evidence as regards at least the child, the wife being one of the "others" in the section under which defendant is indicted. This is a point of some importance which still awaits authoritative settlement. The Supreme Court expressly reversed the decision in a Matara Case, while holding that a mistress was comprehended in the word "others." It is further to be remarked that this dowry property was part of the wife's paraphernalia —part of the luxury to which her station entitled her—and I am not prepared to hold that it is competent for a husband to throw his wife on her own resources and subject her to menial service for her maintenance, when his means and her position entitled her to exemption from that service It is true that the words of the Ordinance are "without maintenance," but I take it that "maintenance" signifies maintenance in the station to which she is entitled, and that where the husband has the means he is bound to furnish his wife with those means and not make her chargeable to others for what are to a delicately nurtured woman *necessaries*. In this connection I have referred to Lord Penzance's judgment in Kelly v. Kelly (L. T. R. xxi, N. S. 561), and I think my views in this matter are supported by that high authority. This being so, I am unable to perceive any grounds for attributing to the defendant a bona fide belief that his wife was not supported by others. He must have known her circumstances. It was his duty to enquire into them, and if he did not enquire his previous knowledge of her as well as a process of calculation as to the proceeds of the dowry property would have shown him that his wife and child could not but be chargeable to others. It has been stated by the learned Counsel who has ably set before me every argument in favor of the defendant that she has her recourse in the District Court for alimony. Truly she has ; but why should she be driven to use the cumbrous and tardy machinery of that Court, when she has a speedy method of bringing her husband to his senses ? I do not forget the danger of this Court being made the scene for a preliminary trial of a suit for the restitution of conjugal rights, but where an offence has been committed, it is clearly my duty to punish the offender. I may add that I find that complainant had no property of her own beyond the jewelry rendered back to her by her husband ; and that I disbelieve so much of Janis' evidence as goes to show a demand for maintenance. I find the defendant guilty. He is sentenced to pay a fine

of Rs. 5, Rs. 4 of which I allot to complainant. I further order that the defendant do pay to the complainant her reasonable expenses."

In appeal, (*Layard* for appellant, *Grenier* for respondent) per CAYLEY, J.—"Affirmed. The Police Magistrate has found as a fact that the complainant's property was not sufficient for maintenance of herself and her child, regard being had to the condition in life of the parties (see 8713, P. C. Harrispattu, S. C. Minutes, 8th November, 1866); and it is also clear that the defendant must have known this, knowing as he did the amount of the wife's property."

December 16.

Present STEWART and CAYLEY, J. J.

Conviction inconsistent with plaint.

P. C. Galle, 86821. The defendant, who was the driver of a carriage, was charged under clause 8, chapter 23, of the Municipal Bye-laws with having refused to let his vehicle on hire to complainant. The Magistrate (*Lee*) gave judgment as follows: "I find defendant guilty of assault. It is clear that Mr. Scott gave the accused a severe beating after he (accused) had attacked him; and hence I do not punish him as severely as I otherwise should. Fined Rs. 10." *In appeal*, (*Grenier* for appellant) per STEWART, J.—"Set aside. The defendant is charged in the plaint with refusing to let his vehicle on hire to the complainant, in breach of a Municipal bye-law. The defendant, however, has expressly been found guilty of assault, an offence not charged nor even alluded to in the plaint. The conviction is accordingly set aside. The proceedings are also irregular, in that the plaint does not bear the requisite stamp."

Theft.

P. C. Newera Eliya, 8894. The plaint was "that the defendants (three in number) did, on the 28th day of February, at Nuwera Eliya, steal one table cloth of the value of Rs. 20, the property of the complainant; also that the 1st defendant did have and receive the said property, knowing the same to have been stolen." It appeared from the evidence that the complainant (*Hawkins*) had given the cloth in question to his dhoby, the 2nd defendant, to be washed; that subsequently, the 2nd and 3rd defendants were seen selling the same to the Rambodde rest-housekeeper, the 1st defendant. In the course of the investigation, the complainant's Proctor moved to withdraw the charge against the 3rd defendant and make him a witness in the case. The Magistrate (*Hartshorne*) however refused the motion, and, having found the 2nd and 3rd accused guilty, sentenced each of them to

twenty-one days' hard labour. *In appeal*, (*Grenier* for 3rd appellant) per Stewart, J.—" Affirmed as to the 2nd defendant ; set aside as to the 3rd defendant. The charge against the 3rd defendant is not for receiving, but only for theft. There is no evidence to show that this defendant stole the table cloth. The evidence points to the 2nd defendant as the actual thief."

Forcible entry.

P. C. Kandy; 96119. The question in this case was whether the Agent of a Receiver appointed by the District Court of Kandy was justified, while taking possession of a Coffee Estate, in using force to the extent of breaking open the door of the Estate bungalow and threatening to kick out the complainant if he did not leave. The plaint, as filed of record, was as follows :

"That the 1st defendant, aided and abetted by the 2nd, 3rd, 4th and 5th defendants, did on the 21st instant take forcible possession of certain moveable property belonging to Mr. H. E A. Young, Senior, and also of the Bungalow on the Keremettia Estate, of which the complainant then had the possession and occupation as the Agent of Dr. Dodsworth, who is the proprietor of the said Estate, in breach of the Proclamation of the 5th August, 1819.

On the case for the prosecution being closed, the defendant's Proctor addressed the Court, justifying the conduct of the accused, and contending that the plaint was defective in that the words " without the authority of a competent Magistrate " and " to avenge themselves for an injury," were omitted. The complainant's Proctor, who was heard in reply, moved to be allowed to amend the plaint ; but this was disallowed by the Magistrate (*Stewart*) who held as follows : " It is not denied that the first defendant was employed by Mr. Duncan, a Receiver appointed by the District Court, to take charge of the crops, and of the Keremattia estate, and that to carry out the functions of a Receiver, the 1st defendant on the day in question proceeded to the Estate in company with the 2nd defeudant, the former Superintendent, and the 3rd defendant, the agent of Messrs Mackwood and Co., the mortgagees of the Estate. Besides the question of amendment lastly raised, a question of law more important, and which is connected with the one of fact, has also been raised in this case, namely, whether a Receiver has the right also of possession. The Court will first consider this question, as in the consideration of it, it will be necessary to see how far possession, alleged to have been forcible, was necessary or incidental to the exercise of the functions of a Receiver, that office implying competent authority, the absence of which,

it is important to remark, creating the offence. For its exercise, it cannot be denied that possession was necessary, and if not expressed it must be implied, as incidental powers need not be expressed. It could not have been expected or intended that the Receiver should receive the crops and without having a place to go to to occupy the estate. Nothing could be more inconsistent with the power conferred. Possession therefore was not inconsistent but necessary in the exercise of the power; and this brings the Court to the consideration of the question how far the evidence under the circumstances supports the charge. It is evident that the defendants acted bona fide, with only apparently an honest determination of simply doing their duty in as harmless and inoffensive a manner as possible: one and all seem to have been actuated by the same forbearance. There is nothing to warrant the conclusion that they committed or even meant violence, and intimidation was neither attempted nor effected. On the contrary, it would appear that complainant was anything but intimidated; for, acting under the advice of his friend, he sought to be ousted, returned to have that formally effected, and actually courted it; but even then, when a different action might have been excusable, first defendant led him out, according to complainant himself, simply holding him by the arm, and that too after the authority had been produced and read. Such forbearance was certainly not consistent with force. It was more consistent with what appears to be the fact, that they were acting in accordance with the law than at variance with it. That should be the reasonable inference under the circumstances, especially in view of the forbearance that has been proved by complainant's own evidence; the law presuming, where an authority exists, as in this instance, to take possession, that such authority was legally and properly exercised till the contrary has been satisfactorily shewn. It is not like the case without any authority, and it is where parties act without even the semblance of one that the proclamation was intended to apply. The only witnesses called are complainant and his friend, Mr. Edema. They contradict each other in more than one important point, and the contradiction in regard to the key is as important as it is significant. It negatives the statement that force was used in opening the door. It would also appear that 2nd defendant had property of his in the bungalow. The Court will now consider the question of amendment under the existing rules. It is aware that amendment may be permitted at any stage of a case; but this rule, it does not think, was meant to operate in a case like the present, where any number of amendments could not help the complainant, could not alter or mend

facts, his own, nor make that an offence which nothing in the case, either in law or fact, could convert it into. As already indicated, the charge of forcible possession is without the least foundation. The rule was intended to prevent a failure of justice where an offence was clear, and hence the wisdom of, and the necessity for, the rule. But in this case, to permit the amendment would be to defeat the object of the rule and to favour oppressive and frivolous litigation. The defendants are found not guilty."

In appeal, *Grenier*, for appellant.—The plaint was no doubt defective, but the motion to amend having been made before judgment, the Magistrate should have allowed it. The 1st defendant (*Maitland*) had no authority from the District Court, and only pretended to act as the Agent of the Receiver (*Duncan*) of whose appointment, however, no record whatever had been produced at the trial or formally put in evidence; not even Maitland's alleged agency had been legally established. The complainant had proved the use of such force on the part of the accused as would justify a conviction under the Proclamation. The Fiscal, as the ministerial officer of the District Court, was the proper party to have placed the Receiver in possession; and any resistance then by the complainant or others would properly have been punished as contempt of Court.

Sed per Cayley, J.—"Affirmed. The Supreme Court has repeatedly held that a charge under the Proclamation in question must allege that the entry was made "without the authority of a competent Magistrate." See 4374, P. C. Ratnapura, Beling and Vanderstraaten, p. 73. The plaint in the present case is defective in this respect. No amendment was applied for until the case for the prosecution was closed, and the counsel for the defendants had addressed the Court; and, in view of the special circumstances of this case, and particularly of the fact that the defendants acted under the bona-fide belief that they had the authority of the District Court, the Supreme Court does not think that the discretion of the Police Magistrate in refusing the amendment at so late a stage should be interfered with."

Defective plaint.

P. C. Matara, 72795. The charge was "that the defendant did, on the 3rd day of December, 1873, at Matara Carawe, keep or suffer to be kept a land or garden in a filthy state or overgrown with rank or noisome vegetation, so as to be a nuisance to, or injurious to the health of, the persons in the neighbourhood, in breach of the 1st clause of Ordinance 15 of 1862." The Magistrate (*Jumeaux*) held as follows: "The evidence already adduced, together with defendant's second

plea," (of guilty) "put the matter beyond all doubt. The Assistant Government Agent interceded on behalf of all the parties cited to-day under similar charges, and I consented to let them all off with nominal fines on condition they pleaded guilty, so that should the thing recur again they could have no excuse. Defendant however refused to plead guilty, and wished to fight out the matter. He is found guilty (beyond all doubt), and sentenced to pay a fine of Rs. 10."

In appeal, per Stewart, J.—"Set aside, and case remanded for further hearing. That the defendant is the owner or occupier of the land in question is sufficiently to be inferred from his being charged in the plaint with keeping the land in a filthy state, in breach of the clause of the Ordinance referred to. The evidence adduced establishes the fact: such an objection is too late after conviction. It does not, however, appear from the proceedings that the land is in or near any road or public thoroughfare. This is a circumstance that should be established, and the case is accordingly remanded for that purpose, as well as for further evidence generally. Dr. Keith should himself be examined, instead of his opinion being taken second hand, as seemingly has been done. The plaint should be amended by its being added (if such be the fact) that the land is in or near a road, street or public thoroughfare, (in terms of the Ordinance.) We have further to point out that it is the duty of the Magistrate to try causes laid before him and to adjudicate upon the evidence, and it is no part of his duty, and it is altogether irregular for him, to consent "to let parties off with nominal fines on condition that they pleaded guilty." Accused parties should be quite unfettered, and left to plead guilty or not of their own free will, uninfluenced by any promise or expectation of clemency."

December 23.

Present Stewart and Cayley, J. J.

Forcible entry.

P. C. Galagedera, 19338. A conviction, on a charge of forcible entry under the Proclamation of August 5th, 1819, was set aside by Mr. Justice Stewart in the following terms: "The plaint is defective, in that it does not state that the land was in the occupation of the complainant. The evidence also on the plaint is of a very uncertain character. The defendant, it would appear, lives on a portion of the land, and it is not shewn that the complainant occupies or resides on any part. Besides, according to the last witness for the prosecution, the six lahas (where the 1st defendant resides) was the portion where the defendant picked coffee." (*Ferdinands* for appellant.)

Wrong dismissal.

P. C. Puttalam, 6559. This was a charge of assault and cocoanut stealing. On the morning of the day fixed for the trial, the complainant happening to be absent when the parties' names were called the case was dismissed. Shortly after (on the same day) he tendered an affidavit, explaining that he had been unavoidably delayed ten minutes, having had to come to Court from a great distance, but the Magistrate (*Pole*) refused to interfere in the following order: "complainant brings an affidavit which is torn up. He was absent when the case was called. The case has been dismissed." *In appeal*, per Cayley, J.—"Set aside and sent back for trial. Assuming the complainant's affidavit to be true, we think that he sufficiently accounted for his absence when the case was called on. He appears from his affidavit to have been only 10 minutes late. The absence of the original affidavit having been accounted for, we have assumed the copy filed to be correct."

Timber Ordinance.

P. C. Kalutara, 49704. Four defendants were convicted under the 5th section of Ordinance 24 of 1848, and were each sentenced by the Magistrate (*Power*) to pay a fine of Rs. 50. *In appeal*, per Cayley, J.—" Altered by the amount of fine being reduced to Rs. 50, as one fine for one offence, and it is adjudged that the defendants do pay the said sum. Affirmed in other respects. The offence charged is felling a tree on Crown land without a license, and is in its nature single, and the penalty imposed by the Ordinance must accordingly be taken to be single. See B. and V., per S. C. Balepitimodera, P. C. 23132, citing Rex v. Clark, 2 Cowp. 612."

Disorderly conduct.

P.C. Kalutara, 49991. This was a charge of "riotous and disorderly conduct" under the 6th clause of Ordinance 16 of 1865. The Magistrate (*Power*) having proceeded to try the defendant then and there without summons, convicted him in the following judgment. "The accused, who is still drunk and has disturbed the Court for the greater part of the day, is found guilty and sentenced to 3 months' hard labor." *In appeal*, per Cayley, J.—"Set aside and conviction quashed. In this case a new plaint correctly worded should be entered and regularly proceeded with after summons to the defendant. The charge is laid under the 6th clause of Ordinance 16 of 1865, but this clause has no application to the offence complained of. It is, no doubt, a mistake for the 6th article of the 53rd clause. This article, however, has been expressly repealed by Ordinance 7 of 1873, and a

different punishment prescribed for the offence in question. It is however irregular to bring a man to Court for being drunk and disorderly and to try him then and there, while he is still drunk, as the Police Magistrate states was the case in the present instance, and consequently unable properly to conduct his defence, if he has any."

Preservation of Fish.

P. C. Point Pedro, 13321. The plaint was "that the defendants did, on the 20th instant, at Katcovalam on the north-eastern side of Pallalethurey within a league from the shore, use a net in the sea commonly called "valie valey," in catching fish, in breach of the 2nd clause of Ordinance 19 of 1866, and the Proclamation dated 20th October, 1869." The Magistrate (*Drieberg*) acquitted the accused in the following judgment: "By the Proclamation of October 1869, (see Gazette of November 6, 1869,) the use of the net in question is "prohibited within one league of the shore to the East of Pallalethurey on the N. W. coast of the peninsula of Jaffna." In this case the defendants are charged with having used the net called "valie valey" at Katcovalam, on the N. E. of Pallalethurey within one league of the shore. According to the Map of Ceylon published by Smith and Son, Charing Cross, the extreme Eastern limit of Pallalethurey is Point Pedro, or the point locally known as 'Devil's Point,' (see Tamil map of Ceylon, published at Madras by S. John, 1872,) and Katcovalam is South East of this point. As I interpret the Proclamation, it appears to me that Katcovalam does not come within its operation." *In appeal*, per STEWART, J.—"Set aside and remanded for hearing. If the net was used within a league of the shore to the East of any part of Pallalethurey, it appears to us that the accused would be liable under the Proclamation. We also think that if the place where the net was used was not more to the North than to the East of the Pallalethurey shore, the case would still be within the Ordinance."

December 31.

Present CREASY, C. J., STEWART and CAYLEY, J J.

Maintenance. Jurisdiction.

P. C. Negombo, 29055. The defendant was charged, under the Vagarant Ordinance, with not maintaining his wife and child. The only witness in the case was the brother of the complainant, and he deposed as follows: "The defendant's permanent residence has been Colombo. The complainant used to live there with the defendant, but the defendant struck her. The complainant then went to live

with her parents at Udugampolla in this district. I am sure Colombo is the head-quarters of the defendant and that he never lived with the complainant in this district. He has deserted her for several years, and lives with a mistress." The Magistrate *(Leisching)* held as follows: "According to the evidence of the only witness called, the alleged offence did not take place within the jurisdiction of this Court, and the fact that previous cases were tried in this Court is no bar to defendant's taking the plea of jurisdiction. The defendant takes the objection and pleads want of jurisdiction on the part of this Court. Objection upheld. Defendant discharged."

Maintenance. Jurisdiction.

In appeal, by complainant, per Stewart, J.—"Set aside and remanded for further hearing. The complainant, it would appear, has since her separation, several years ago, from her husband (the defendant) resided in the district of Negombo, though she had lived before in Colombo with the defendant who still lives there. It is not suggested however, nor is there any ground for supposing, that the complainant merely changed her residence to the village where she now lives for the purpose of instituting this prosecution in the Police Court of Negombo with the view of harassing the defendant. The Ordinance under which the plaint is laid makes it an offence for any person, who is able to support his family, to leave his wife or child without maintenance, whereby they shall become chargeable to others. No particular place is specified. We must conclude, therefore, that in whatever place the wife or child of a person is left destitute, such person would render himself liable under the Ordinance and be committing an offence in the place where he leaves his wife or child without maintenance. The plea of jurisdiction is accordingly over-ruled, and the trial will proceed in due course. As respects the merits of the case, the Magistrate's attention is requested to the judgment of the Supreme Court in Pantura P. C. 4620, December 3rd, 1863, reported in Beling's Handy Book, Part 2, page 40."

P. C. Galle, 85468. Twenty-five defendants, who were liable to pay the poll-tax and who had not elected to commute, were charged, under the 54th clause of Ordinance 10 of 1861, "with having failed to attend to perform labor at the time and place appointed for that purpose." *In appeal*, by the 4th defendant who had been fined Rs 4, the judgment was set aside; and per Creasy, C. J.—"This man has been convicted without any evidence having been taken and without a plea of guilty. The joinder of this large number of defendants in one charge was seriously improper, there being no proof that they were acting in concert with each other."

Commutation Rate. Irregular conviction and misjoinder of defendants.

THE APPEAL REPORTS.

1873.

PART II.—COURTS OF REQUESTS.

January 14.

Present CREASY, C. J.

Claim to crown land, without parol evidence of possession.

C. R. Panadure, 14635. The plaintiff claimed a land called Dewawatunewatte, by right of purchase from the Crown, as against the first and second defendants, who pleaded that it was their ancestral property which they had possessed for more than 50 years. The 3rd defendant (the Queen's Advocate) was made a party to the suit, to warrant and defend plaintiff's title or cause the purchase amount to be refunded. No parol evidence was adduced on behalf of the 1st and 2nd defendants, who relied on a thombo extract, a government grant, a planting voucher and a certain deed of agreement, which they contended estopped both the plaintiff and the Crown from questioning their title. The Commissioner, however, gave judgment for plaintiff for the land, absolving the 3rd defendant from the instance with costs. *In appeal*, per CREASY, C. J.—" Affirmed. The burden of proof, as to the land not being crown land, was thrown by Ordinance on the plaintiff. He has not sufficiently proved it to be private property. Some of the documentary evidence put in by him is entitled to consideration, and has received it. But none of that evidence amounts to an estoppel ; and as it is left wholly unsupported by the parol evidence of possession and occupation, which is naturally expected in such cases, the verdict against the plaintiff must stand."

Action for wages not contracted for.

C. R. Trincomalie, 28305. Plaintiff sought to recover a sum of Rs. 36, being wages, for nine months, as defendant's cook. The defendant denied the contract, and alleged that his uncle had engaged the plaintiff to cook for him while he was at school in India ; and that he himself had been no party to any agreement to pay wages. The Commissioner (*Green*) held that defendant, having benefited by plaintiff's services, without the latter receiving any compensation therefor, was liable to pay the amount claimed, and

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accordingly gave judgment as prayed for in the libel. *In appeal*, (*Dias* for appellant) per CREASY, C. J.—"Set aside, and judgment of non-suit to be entered with costs. It is quite clear that the defendant was never a party to the contract with plaintiff, either expressly or by implication."

January 21.

Present CREASY, C. J.

Promissory Note: nonsuit without costs.

C. R. Kandy, 47883. The plaintiff sued, on a promissory note, to recover from the defendant, who was the maker thereof, a sum of £8. The defendant, admitting the document, pleaded want of consideration, in that it had been granted for a balance due by him in respect of a land which he had purchased from the plaintiff, under a deed bearing the same date as the note, but which land the plaintiff had failed to put him entirely in possession of, in consequenee of a judgment of the District Court interfering with his right to do so. The note was a promise to pay £8, "being balance due for the purchase of a certain land, to be paid without any interest soon after the land is clearly freed from dispute and plaintiff puts me (defendant) in possession thereof." The plaintiff, in his examination, stated that he had received the £8, "to carry on the case which was then pending about the land." The defendant's proctor having called no evidence, but merely put in the case above referred to, the Commissioner gave judgment for plaintiff with costs. *In appeal*, the judgment was set aside and a judgment of non-suit entered; and per CREASY, C. J.—"The document on which alone the plaintiff sues, taken with the admitted fact of the dispute as to the title, puts the plaintiff out of Court. The defendant has not contradicted the plaintiff's statements; and, if they are taken as true, they show very discreditable conduct on the part of the defendant. The non-suit will therefore be without costs."

Irregular trial.

C. R. Galle, 20. Plaintiff claimed five kurunies of a certain field on a bill of sale dated 28th December, 1867, as against the 1st and 2nd defendants; the 3rd defendant, (the vendor, who was an administrator,) being joined to warrant and defend plaintiff's title. The 1st defendant pleaded he was entitled to 5-24ths of the field in question, which portion he had leased to 2nd defendant. The 3rd defendant supported plaintiff's title, justifying the sale on the ground that the property belonged to his intestate. On the day of trial, the 3rd defendant alone being present, the proceedings as recorded by the Commissioner *(Lee)* were as follows: "3rd defendant examined. This land belonged to the estate. I sold it to plaintiff. The 1st and 2nd defendants have no right to what I thus sold. 3rd defendant has no witnesses present.

Judgment as prayed against 3rd defendant. Costs to be paid by him personally, not out of the estate. Deed to be cancelled." *In appeal*, the judgment was set aside, and case sent back for further hearing; and per CREASY, C. J.—"For all that has hitherto been proved, the plaintiff may still be in possession of the land. The 1st and 2nd defendants only claim title to 5-24ths of the land in question."

Crown grant. Res judicata.

C. R. Colombo, 86215. The facts of the case are sufficiently set forth in the judgment of the Commissioner: "The plaintiffs in this case sue for one half of Kuttombagahakumbere, which they claim by virtue of a decree in their favor, pronounced in District Court, Colombo, 23556, and by prescriptive possession. The defendants claim it under a Crown grant, dated 29th July, 1870. The judgment in case 23556 would be a bar to the claim of the defendants, were it not that they now produce a grant in their favor, dated subsequent to the judgment in case 23556. The question in the present action is, whether the Crown had any right to sell this land. By the Ordinance 12 of 1840, sec. 6, "all forest, waste, unoccupied or uncultivated lands, shall be presumed to be the property of the Crown, until the contrary thereof be proved." The evidence adduced in this case, taken in connection with that given in case 23556, does not rebut this presumption. The 1st plaintiff's husband died in 1850 or 1851, and from that time up to the decision of the District Court case in 1859, the plaintiffs had nothing to do with this field. (See 1st plaintiff's examination in District Court case.) In 1863, when Mr. Leitch surveyed this property, it was waste land. The witnesses who now swear that the plaintiffs have been cultivating the field for the last 30 years, cannot therefore be believed, and the Crown grant in 1st defendant's favor must necessarily be upheld."

In appeal, *Dias*, for the appellant, contended that the District Court judgment of 1859 *inter partes* was *res judicata*, and that the present plaintiffs having then based their title on a deed, the maker of which had himself obtained a Government grant in 1829, it was for the defendants to show that the Crown, having once parted with its title, had recovered it, so as to be able to sell a second time in 1870.

Morgan, for the respondent, relied on the evidence of the Government Surveyor and its legal effect under the provisions of Ordinance 12 of 1840.

Per CREASY, C. J.—"Set aside and judgment entered for appellants as prayed, except as to damages. It appears that the old judgment in 1859, between these parties, decided that these plaintiffs were owners of the land. This is *res judicata*. It outweighs, as against these defendants, the presumption created by the Ordinance 12 of 1840, that this land was Crown land. In the absence of proof that the plaintiffs had parted with the land after the judgment in 1859, that judgment is still conclusive as against these defendants."

Notarial mortgage.

C. R. Matale, 27994. Plaintiff sued for the recovery of Rs. 49, being value of the produce of a garden, which said produce defendant had, by a notarial deed, specially mortgaged to plaintiff in lieu of interest due on a debt. Defendant denied the execution of the document, and pleaded minority. The deed was duly proved, but the Commissioner *(Temple)* non-suited the plaintiff with costs, holding "that the evidence as to damage was too weak to place any reliance upon, and the deeds were, at least, suspicious."

In appeal, Morgan, for the appellant, urged that no reason having been assigned by the judge for considering the deed suspicious, the evidence of the notary and witnesses, who were examined at the trial, should be deemed conclusive. If such solemn documents could be so arbitrarily rejected, of what use were notarial attestations?

Dias, for the respondent, was not heard.

Per Creasy, C. J.—Affirmed.

February 14.

Present Creasy, C. J.

Award under an arbitration.

C. R. Avishawella, 8481. This was an action to recover the value of 2 hal trees, alleged to have been unlawfully cut by defendant on plaintiff's land. The defendant pleaded that the trees had stood on his own land, and that he had a perfect right to cut them. By consent of parties, the case was referred to arbitration; and, on the delivery of the award into Court, the Commisioner made the following order: "The award of the arbitrators is filed. Mr. Marshall raises the objection that the wording of the award, 'I consider that the defendant should pay Rs. 35, being value of 2 hal trees, etc,' is not a final award. This sentence when read in connection with the one immediately preceding, proves the meaning and intent of the award. I therefore hold the award final, and make the same an order of Court." *In appeal,* the defendant, in his petition, urged that the award was void, inasmuch as neither the original document not its translation was stamped; and that, as the question of title involved in the case had not been settled, the circumstance of the plaintiff's and defendant's lands being contiguous to each other, with the boundaries undefined, would give rise to further litigation. The order was, however, affirmed; and per Creasy, C. J.—"Appeal dismissed. If the appellant had any valid objection to make to the award, he should have done so by application to the Commissioner of the Court of Requests, either to refer back the award under the 26th section,

or to set it aside under the 27th section, of the Ordinance. Neither of these courses was taken. An objection raised, though informally, was properly considered by the Commissioner to be invalid. A new string of objections cannot be brought before the Supreme Court, as now attempted."

Depositum.

C. R. Galagedere, 30091. The plaintiff in this case sued for the recovery of certain articles, of the value of Rs. 97. 50, which he alleged to have delivered over to defendant for safe custody. The evidence disclosed that the deposit had been made with defendant's father-in-law, one Menikralle, some years previously. He having died, and the defendant having succeeded to his property, plaintiff now sought to enforce his claim against her. The Commissioner held that the delivery of the articles by plaintiff to the father-in-law had been satisfactorily proved; but that, as the present action had been instituted after the death of Menikralle, from whom no receipt was produced and who might have lost the goods or returned them to the plaintiff, the present defendant could not be held liable. *In appeal*, the judgment was affirmed; and per Creasy, C. J.—"Non-suit affirmed; not for the reasons given in the Commissioner's judgment, but because the plaintiff has failed on the real and sole issue raised in the case, namely, as to the delivery of the goods to the defendant. Plaintiff has proved a delivery not to her but to one Menikralle, her father-in-law; and it does not even appear that she is Menikralle's legal representative. As to the loss by "dolus" or "culpa lata," for which alone a depositary, who did not ask for the deposit, is responsible, see Thompson's Institutes, vol. 2, page 350; Herbert's Grotius, page 316, Voet ad Pandectas, XVI, 3, 7, and Poste's Gaius, page 396."

February 21.

Present Creasy, C. J.

Abatement of damages.

C. R. Galle, $\frac{44059}{44895}$. Plaintiff sued to recover Rs. 50, as damages consequent on the cloth of his billiard table having been cut by defendant. Judgment in the first instance went by default, but it was subsequently opened up on affidavits. Plaintiff in his evidence stated.—"I produce table of rules which was on the wall. The first cut is Rs. 50. At the Oriental Hotel, it is Rs. 100. I said I would take Rs. 20, if paid

at the end of the month. Defendant was a customer, and this was the first cut. I asked for the Rs. 20, but my servant always brought back an impertinent answer. After judgment by default, defendant wrote and offered me Rs. 35." The Commissioner gave judgment as follows:—"Plaintiff having offered to abate a part of the charge, it would be equitable to decree defendant to pay plaintiff Rs. 35 with costs. *In appeal*, affirmed.

February 28.

Present CREASY, C. J.

Registration. Priority of deeds.

C. R. Galle, 151. The law and the facts of the case are fully set forth in the following judgment of the Chief Justice.— "Set aside, and plaintiff's claim dismissed with costs. This is a dispute as to priority between conflicting mortgages. The plaintiff's deed is dated 29th December, 1866, but it was not registered until 18th July, 1871. The defendant's deed is dated May 1871, and was registered on the 7th of June 1871, that is, while the plaintiff's deed was yet unregistered. The plaintiff appears to have issued a writ and to have pointed out this property for seizure, and the defendant claimed it on April 15th, 1872. The defendant now contends, that his priority of registration entitles him to pre-payment. The plaintiff contended, and the Commissioner has ruled, that, inasmuch as the plaintiff's deed was registered prior to the making of the defendant's adverse claim before the Fiscal, the requirements of the Registration Ordinance have been satisfied, so far as this deed is concerned, and that the plaintiff is entitled to avail himself of his deed's priority in point of date. The 39th clause of the Ordinance is as follows: 'Every deed, judgment, order, or other 'instrument as aforesaid, unless so registered, shall be deemed 'void as against all parties claiming an adverse interest thereto 'on valuable consideration, by virtue of any subsequent deed, 'judgment, order or other instrument, which shall have been 'duly registered as aforesaid. Provided, however, that fraud 'or collusion in obtaining such last mentioned deed, judgment, 'order, or other instrument, or in securing such prior registra'tion, shall defeat the priority of the person claiming there'under; and that nothing herein contained shall be deemed to 'give any greater effect or different construction to any deed, 'judgment, order, or other instrument registered in pursuance 'hereof, save the priority hereby conferred on it.' It appears to me that, according to this Ordinance, when the defendant registered his deed on the 7th of June, 1871, the plaintiff's deed, being

then unregistered, was a nullity, as against the defendant's registered deed. I think also, that no subsequent registration by the plaintiff could give plaintiff's deed validity, except subject to the priority which the defendant had already obtained. Such appears to me to be the most natural meaning of this somewhat confused and ill-worded clause; and this opinion is much strengthened by a consideration of the purpose of the Legislature in this matter, and by considering which interpretation will effectuate that purpose, and which would thwart it. The clear object of the Legislature was to protect honest purchasers and creditors. A man, when asked to advance money to another, looks naturally to ascertain what are the borrower's means of payment. If he finds that the borrower is the ostensible owner of any landed property, he naturally searches the register to see what, if any, encumbrances there are on it. If the register shows no encumbrances, he advances his money on a deed which he carefully registers, and thinks himself safe, as he ought to be, and as he will be, according to the construction which I put on the Ordinance. But if some other man has got a stale old deed of encumbrance in his pocket, which the register does not reveal, and this stale old incumbrance is only suddenly registered when the debtor is about to be sold up, and if this stale deed were then to be allowed to over-ride the deed registered before it, the whole system of Registration would be turned from a security into a mockery and a snare; and encouragement would be given to frauds which the law specially desired to prevent."

Account stated.

C. R. Jaffna, 736. Plaintiff sued to recover Rs. 22, being balance due on an account stated. Defendant denied the debt. Plaintiff, in his examination, stated "my account is headed N. M. Cader Saibo, which is defendant's brother's name. Some of the things included in his brother's account were given to defendant. He came and purchased himself on some occasions." The Commissioner held that the evidence in the case was "strong against the defendant," and gave judgment for plaintiff. *In appeal*, the judgment was set aside, and a non-suit entered with costs. And per Creasy, C. J.—"The fact that the plaintiff in his books entered the defendant's brother and not the defendant as his debtor, is so very strong that it requires much more to get over it than the plaintiff's assertion that he entered the defendant's accounts in his brother's account. He gives no reason whatever for such an unbusiness-like proceeding. The payment spoken to by the witnesses may well have been made by the defendant on his brother's behalf."

Loan. *C. R. Jaffna*, 727. Plaintiff sued to recover Rs. 35, being money lent to defendant, who denied having borrowed. The Commissioner non-suited the plaintiff, holding that "so large a sum of money as Rs. 35 being lent without a written acknowledgement from defendant, is more than the Court can believe." *In appeal*, the judgment was set aside, and case sent back for further hearing; and per CREASY, C. J.—"There is no law requiring a writing in the case of a loan of Rs. 35; nor does it seem reasonable to reject respectable parol evidence of such a loan. But as the Commissioner reports that the evidence has not left a favorable impression on his mind, the case is merely sent back for further hearing. Let the plaintiff be called upon to produce his memorandum of the loan and the list of his dealings, spoken of in his examination. Plaintiff could not put such documents in evidence on his own behalf, but the Judge may very properly examine them, and see if they corroborate or contradict what he has stated."

March 7.

Present CREASY, C. J.

Money lent. *C. R. Jaffna*, 764. The plaintiffs, alleging that they had, on the 15th of June last, paid and satisfied the amount of a debt bond which they had previously executed in favor of the defendant for Rs. 80, brought the present action to compel them to grant a valid receipt or refund the money with interest thereon at the rate of 9 per cent per annum from the alleged date of payment. The defendant denied the payment, but the Commissioner held the same duly proved, and gave judgment for plaintiff as prayed for. *In appeal*, per CREASY, C. J.—"Set aside and judgment of non-suit to be entered. There is no authority for maintaining such an action. The plaintiff ought to tender a stamped receipt, and if the defendant refuses to sign it, he should proceed as directed by the Stamp Ordinance, section 22, Ordinance 23 of 1871."

Damages. *C. R. Kegalla*, 13162. This was an action to recover Rs. 55, being value of a bullock unlawfully shot and killed by defendant. In addition to the evidence of the witness who was disbelieved at the trial, the plaintiff called the Ratamahatmeya's peon, who stated that he saw complainant's bullock lying shot in a ditch below defendant's garden, where he found blood marks indicating that the animal had been dragged across the ground. The

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Commissioner gave judgment as follows: "I do not consider the case is satisfactorily proved. The evidence of the last witness amounts to nothing. The evidence of complainant as to the shooting is only supported by his first witness, a gentleman whose evidence can scarcely be thought worth much. There remains the peon's evidence, which only proves an animal was killed in defendant's garden. I dare say plaintiff's animal may have been shot by defendant, but I don't believe any one saw him do it. *In appeal*, (*Grenier* for appellant) per CREASY, C. J.—"Set aside, and judgment entered for plaintiff for Rs. 45 and costs. It is not safe to take an owner's valuation of his own property to the full amount. The Commissioner, in the conclusion of his judgment, states, 'I dare say plaintiff's amimal may have been shot by defendant, but I don't believe any one saw him do it.' But not even in criminal cases is it necessary to produce a witness who actually saw the accused person do the deed which is complained of. There is evidence here that the plaintiff's bullock was shot; that almost immediately after the report of the shot, the animal was seen lying in defendant's garden; and that the defendant was seen walking away towards his house holding a gun. On the other side, there is no evidence at all, not even that of the defendant. I cannot see enough in the Commissioner's remarks about the plaintiff and his first witness, or in any part of the case, to make me think their evidence untrustworthy."

Crown land.

C. R. Colombo, 86788. The plaintiff in this case claimed a certain land under a bill of sale from Government, dated 17th February, 1866. The defendants supported their title by documentary evidence, supplemented by proof of long possession which apparently was not disbelieved by the Commissioner, who however gave judgment for plaintiff as follows: "This land was surveyed in 1860, by the Government Surveyor, as Crown property. No steps were then taken by any one claiming the land, to put forward his claim. In February 1861, it appears to have been surveyed by a private surveyor as the property of Hendadrigey Bastian Perera. In 1866 this land was sold by Government and purchased by plaintiff, and there can be no doubt he possessed what he purchased. As no claim was made by any one to this land when it was sold by Government, it is hard to suppose that at that time it belonged to any one but Government." It was urged in the petition of appeal (1) that the circumstance of the defendants having preferred no claim was satisfactorily explained by the 1st defendant in his examination,

in the course of which he said "this land was surveyed by Government about 10 or 12 years ago. I was not present at the survey, but after the survey I produced my deed to the surveyor." The land sales usually took place at the Cutcherry in Colombo, and the defendants were not bound to attend, nor was there any evidence to show that they knew that any portion of their own land had been advertised for sale; (2) that the land claimed by plaintiff and sold to him by Government appeared to have been an old Portugese military trench, lying between the properties of the 1st and 2nd defendants; and the evidence of the Surveyor who was appointed by the Court, with the consent of both parties, went to show that "the two strips of land on either side of the ditch now claimed by plaintiff, were alike in cultivation and on one flat with the defendants' properties." (Vide Surveyor's Report of November 21.) *In appeal,* (*Grenier* for appellant, *Ferdinands* for respondent,) per CREASY, C. J.—"Affirmed. The fact that this land consists of the bed of an old Portuguese military trench and of the strips of ground running along the sides of the ditch, is very strong proof that it was Government property."

Goods sold.

C. R. Kegalla, 13049. The plaintiff sought to recover Rs. 47. 25, as balance due on account of goods supplied. The claim was fully proved, by parol evidence and by the production of an account book; but the Commissioner (*Mainwaring*) held as follows: "This is an action for balance found to be due for goods sold to defendant by plaintiff in 1871 and 1872. In a case of this sort, it is extremely difficult for a Court to do otherwise than give for a plaintiff, as the witnesses are always well coached in their parts, and it is extremely difficult for a defendant or his counsel to break them down. In this case, the usual evidence has been produced, and the witnesses have on the whole stood the cross-examination well. I am nevertheless not satisfied that the case is a true one, and fancy that defendant gave in his examination the true reason for the case being brought, viz, a quarrel between himself and plaintiff's brother-in-law. Plaintiff's case is dismissed with costs" *In appeal,* (*Grenier* for appellant) per CREASY, C. J.—"Set aside and judgment entered for the plaintiff with costs, as prayed. This is a claim for goods sold, which has been clearly proved. The Commissioner states that the plaintiff's witnesses were not shaken on cross-examination, and nothing appears against their respectability. On the other side, there is no evidence at all, not even the defendant's own testimony. To refuse a judgment to a tradesman under

such circumstances would be a denial of justice, and a strong encouragement to dishonest debtors. The imaginary quarrel to which the Commissioner alludes, was denied by the plaintiff when giving evidence, and was merely alleged by the defendant in his examination as a party."

Rival claims to proceeds of Fiscal's sale.

C. R. Jaffna, 39413. This was an appeal affecting rival claims to certain proceeds of a land, which had originally belonged to one of three dowried sisters named Muttopulle, and which had been mortgaged by her to plaintiff and judgment creditor in D. C. Jaffna, No. 3912. Muttopulle having died without issue, her sister Sinnapulle (1st claimant) and the son and only child of the second sister Teywanepulle (who had predeceased Muttopulle,) each inherited one half of the land. The plaintiff in this case, having obtained judgment against the son, caused *his* one-half to be sold in execution; and the amount of the writ having been satisfied, there remained in deposit a balance which was seized by a subsequent creditor of the son (2nd claimant) under C. R. writ 712. Sometime after the sale under 39413, the plaintiff in 3912, who had previously sold several other lands mortgaged to him by Muttopulle, caused to be sold the remaining one-half of the property in question, as belonging to the estate of his late debtor, and received the proceeds in satisfaction of the balance due to him. The 1st claimant, having thus lost her right to that half, now moved to be allowed to draw the money in deposit, claiming preference over the 2nd claimant. The Commissioner (*Livera*) having allowed the 1st claimant's motion, the 2nd appealed on the ground that the portion of land in question having been sold as Teywanepulle's son's share, the 1st claimant could have no right to any part of the proceeds, without having the Fiscal's sale first set aside. *In appeal, (Grenier* for appellant, *Ferdinands* for respondent) per CREASY, C. J.—"Set aside, and motion refused. The claimant ought first to get, (if she can,) the Fiscal's sale set aside."

March 7.

Present CREASY, C. J.

Locatio conductio.

C. R. Galle, 44570. The law and facts of the case are fully set forth in the following judgment of the Chief Justice:

"Set aside and judgment to be entered for plaintiff for Rs. 20 and costs. This is a case curious in its facts, and in which a point of law of some interest has arisen. The parties are Mahomedans residing at Galle; the defendant appears to be a teacher of children

In July 1871, the defendant, in consideration of Rs. 20 paid down by plaintiff, undertook to teach the plaintiff's grand-daughter to read 30 chapters of the Koran in six months, or in default to refund the twenty rupees. The parties had a formal notarial agreement drawn up and signed. Its text is as follows: 'Know all men by these presents, on this 5th day of July, 1871, before me Ossen Lebbe Abdul Kader, Notary Public, of Galle district, personally came and appeared Sinne Kakier Tamby of Kumbalwelle of one part, and Pakier Tamby Mahomado Sahib of Kumbalwelle of the other part, and declared that the said appearer of the 2nd part do hereby declare to have duly received, in advance for his trouble, the sum of £2 from the appearer of the 1st part, undertaking to teach Marian Manuel, grand-daughter of the appearer of the 1st part, 30 chapters of Koran, and according to the said agreement, after being taught the 30 chapters of Koran within six months, and after her reading the said 30 chapters in the presence of the said appearer of the 1st part, to be discharged: in default then of so doing, the appearer of the 2nd part to forego all his trouble and to return the said £2 to the said appearer of the 1st part. Thus agreeing, this agreement is caused to be written, signed, sealed and perfected, on the above date, in the presence of the two subscribing witnesses, Sego Ismail Lebbe Mohandiran Ally and Wappuchie Markar Mohamado Raya, both of Gallupiadde in Galle.' It is to be observed, that the agreement does not say a word about the child being a clever child, or a child of average ability, or a stupid child; nor does it appear, that any representations were made by the plaintiff about the child's ability, or that the defendant made any enquiry about it. The child attended the defendant regularly, for the purpose of being taught; no difficulty was placed in his way by the plaintiff, or by any one else. As to the pains taken by defendant in teaching, there is some evidence that he neglected the child after a little time; but the Commissioner does not seem to have regarded this evidence as a foundation for a judgment, nor shall we do so. We shall take the case as one in which the teacher is certainly not proved to have taken more than average pains with his pupil, but as one in which he is not proved to have made default in taking average pains. At the end of the specified time, the child could not read more than ten chapters. As to the facility or difficulty of learning to read the whole 30 chapters in the time, one witness says—'There are cases in which children can, and 'in which children cannot, read 30 chapters in six months. If 'the child is very intelligent she might do so.' Another witness says—'She is not clever. If she had been, she would have 'known the 30 chapters before now.' Acting, as it seems, on this last evidence, the Commissioner has non-suited the plaintiff.

He says that 'the performance of this contract was subject to 'an implied condition, that the pupil herself possessed the ne- 'cessary amount of natural ability, and the plaintiff on his part 'gave an implied warranty to that effect.' The Commissioner has referred to the English cases of Robinson v. Davison, 24 L. T. N. S. page 755; and Taylor v. Caldwell, 8 L. T. Rep. N. S. page 350. In one case, a professional player on the piano was disabled by illness from performing at a concert according to contract. The manager of the concert, who had contracted for her performance, brought an action for the breach of contract; but it was held by the Court of Exchequer, that she was excused from performance by reason of the illness which had incapacitated her. This would have been an authority in the present case, if the teaching of the child had been prevented by the illness of either teacher or pupil; though, even then, the defendant would probably have been bound to return part at least of the consideration money. But it does not touch this case at all. The other English authority cited, Taylor v. Caldwell, was a judgment of the Court of Queen's Bench delivered by Mr. Justice Blackburn. In that case, there had been an agreement to let a music-hall for a series of concerts; and before the day arrived, the music-hall was burned down. In that judgment, Mr. Justice Blackburn says, 'There seems no doubt that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it, or pay damages for not doing it; although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible.' He then goes on to say, 'But this rule is only applicable, when the contract is positive and absolute, and not subject to any condition, either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must, from the beginning, have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

"But this case of Taylor v. Caldwell does not touch our present case, any more than did Robinson v. Davison. If the teacher's capacity to teach, or the pupil's capacity to learn,

which existed at the date of the contract, had perished without fault of the parties, before the time fixed for the completion of the contract, there might, according to Taylor v. Caldwell, have been a good answer to a complaint for non-performance of the contract. But nothing of the kind happened here. The child does not appear to have lost any of her wits during the six months; and the attempted analogy between her and the burnt music-hall, fails as completely as the other attempted analogy between her and the sick musician. We by no means say, that in contracts like the present there can be no implied warranty as to the pupil's aptitude for learning. Supposing that the child in this case had been in a very great degree below the average, and greatly deficient in power of apprehension, or of memory, or of both, so as to make it extremely difficult, if not impossible, to teach her, we think the instructor ought to have been made aware of such defects in the child before he made the bargain; and we think that the child's grand-father, who hired the defendant's services to teach the child, may be considered to have given an implied warranty of the child's freedom from such defects, but not a warranty of intelligence to any greater extent.

"It is well known, that by Roman Law the vendor, in a contract of purchase and sale, is held to give an implied warranty of the article being free from serious defects, of which the purchaser had no notice at the time of the purchase. It is enough to cite for this Grotius' Introduction, Book iii, ch. xv, sec. vii. Now, the present contract is a contract *locationis conductionis*; the thing hired being the teacher's labor and skill. The Institutes and the Digest pronounce that 'the contract 'of letting to hire approaches very nearly to that of sale, and is 'governed by the same rules of law;' 3 Inst. xxiv, 1. The Digest says the same; and there is a dictum in it as to the contract of letting and hiring being a contract founded on the law of nature, which is not immaterial with reference to an authority which I shall cite presently. The Digest xix, title 2, par 1 and 2, says, 'Locatio et conductio, cum naturalis sit et omnium 'gentium, non verbis sed consensu contrahitur: sicut emptio et 'venditio. Locatio et conductio proxima est emptioni et 'venditioni: iisdem que juris regulis consistit.'

"There is a remarkable passage in the third book, 17th section of Cicero de Officiis, (and this work is a high authority on questions of principle,) which shows distinctly that the best jurists of old Rome regarded this contract of *locatio conductio* as being one of the classes of contracts in which the most full and frank good faith should be observed between the parties, and in which neither party should be allowed to gain an advantage

by reason of the other party's ignorance of any material fact. Cicero quotes a dictum of the ancient Roman Jurist, Quintus Scævola, that there was very great importance in all those 'judicial proceedings, in which the formula directed the judge 'to decide according to the requirements of good faith, *ex fide 'bonâ.* And he used to think that this expression, *ex fide bona,* 'was of most extensive operation, and that it was practically 'applicable in cases of Guardian and Ward, of Partnership, of 'Trusts, of Commissions, of Purchase and Sale, of Hiring and 'Letting, which make up the ordinary system of social life.' 'Quintus Scævola summam vim esse dicebat in omnibus iis 'arbitriis in quibus adderetur, ex fide bona; fideique bonæ 'nomen existimabat manare latissime, idque versari in tutelis, 'societatibus, fiduciis, mandatis, rebus emptis venditis, con- 'ductis locatis, quibus vitæ societas contineretur.' A little further on Cicero pronounces that 'since the law of nature is the 'fountain of law and justice, it is a rule, in accordance with the 'law of nature, that no one shall act in such a manner as to filch 'benefit out of another man's ignorance.' 'Quoniam juris 'natura fons sit, hoc secundum naturam esse, neminem id agere, 'ut ex alterius prædetur inscitia.'

"Considering, therefore, the contract *locationis conductionis* to be under the same rules, as to warranty and implied condition of fitness, which govern contracts *emptionis venditionis,* let us see how far such warranty extends,—merely to a warranty against latent defects, such as make the subject-matter of the contract unfit to a serious degree for the purpose for which it is intended. The warranty goes no further. The vendor of a house, when nothing is expressed in the contract about the quality of the house, is not taken to warrant that it is superior in structure, salubrity or convenience to average houses of the class: he is merely held to warrant that there is no defect in it, which makes it impossible to occupy it without serious detriment to health and comfort. The seller of a machine is not taken to give a warranty that it is superior to the common run of such machines; he merely warrants that it is free from such defects as would decidedly deprive it of average utility. So in a contract for the hire of work to be done on an article belonging to the hirer, where nothing is said about the quality of the article which is to be worked on, the owner of the article cannot be held to warrant that it is of special aptitude for the operation. He cannot be considered to warrant more than that the article is free from such defects, as would render it especially difficult to be worked on.

"Applying these principles to the present case, we can find no warranty or condition on the part of the plaintiff, about this child's intellect, which has been broken. As we stated at the

beginning of this judgment, the utmost that has been proved against the child's capacity, is that she is not a clever child. But in common language, when we call children clever, we mean that they are decidedly above the average; as we call children stupid, who are decidedly below the average as to aptitude for receiving instruction. The great majority of children are of average, or of nearly average, aptitude. They are neither stupid nor clever. The young student of the Koran in this case appears to have been a child of this average standard. Certainly she is not proved to be below it. The result is that the defendant has failed to prove the breach of any condition or warranty on the part of the plaintiff, and the plaintiff is entitled to have his money back according to the stipulation in the contract."

March 14.

Present CREASY, C. J.

Use and occupation.

C. R. Batticaloa, 3318. This was an action to recover 12 amonams of paddy, as the muttatu share of the produce of a certain paddy field sub-rented by plaintiff to defendant, who however denied having ever rented, occupied or cultivated the land in question. On the day of trial, the defendant's Proctor having taken the objection that the contract, if any, not being in writing, was void under the Statute of Frauds, the Commissioner dismissed the case. *In appeal*, the judgment was set aside and case sent back for further proceedings and for trial; and per CREASY, C. J.—" The Supreme Court has repeatedly pointed out that in cases relating to land, where the plaintiff cannot enforce his original contract because not in writing and notarially executed, still, if the defendant has had beneficial use and occupation, he is bound to compensate the plaintiff for the same, by the contract which, in such cases, arises *ex re*."*

Damages on a Lease.

C. R. Kegalla, 13,185. The plaintiff sought to recover Rs. 98, as damages consequent on not having been placed in possession of three out of seven lands, which defendant had rented to him, for nine years, on a notarial lease dated 12th October, 1865. The defendant denied the alleged non-possssion by plaintiff, and pleaded prescription. The Commissioner held as follows: "The evidence is very conflicting, and I have been considerably puzzled in ar-

* The law on this subject is fully explained in the Supreme Court judgment in C. R. Kalutara, 17112. See Civ. Min., Jan. 12, 1864.

Damages on a Lease.

riving at a decision, but have come to the conclusion that, taking all the circumstances of the case into consideration, the probability is that plaintiffs have been in possession of the lands. It is impossible that, had they not been, they could have allowed seven years to elapse before coming to Court. Plaintiff's case is dismissed with costs." *In appeal, Dias,* for appellant. [Your claim is clearly prescribed.—C. J.] Only perhaps to a limited extent. The lease should be taken as a continuing contract, and we are entitled to recover damages for, at least, within two years of the date of action. Such has been the rule as to mesne profits. *Grenier*, for respondent, was not called upon. Per Creasy, C.J, "Affirmed. The claim is prescribed."

Prescription.*

C. R. Mullaittivu, 9815. The plaintiff, as guardian of two minors, claimed a certain land on a deed, more than 30 years old, which had been executed in favor of their grandfather, by the father of 1st defendant. The 1st defendant, without traversing the alleged sale, disputed the boundaries given in the plaint as incorrect, and pleaded that "the garden in dispute was the hereditary property of his late father and mother, and after their death he possessed the same." The Commissioner (*Withers*) gave judgment for defendants, holding that they had proved long possession, which had not been interrupted by such payment of rent or contribution of produce as would affect their prescriptive title. *In appeal*, per Creasy, C. J.—" Set aside and plaintiff, on behalf of the minors, to be placed in possession of the garden mentioned in the plaint, on the plaintiff (as such guardian) making compensation to the 1st defendant for the materials and building of two of the houses in the said garden, which are proved to have been built by 1st defendant's father: the amount of such compensation (unless the parties can agree to the same) to be settled by the Commissioner of the Court of Requests, either on his own view, or after hearing such evidence as the parties may adduce on this point. The old law of Prescription by a quarter of a

* Held that the whole of the Common Law with respect to prescription and the limitation of actions and suits has been abrogated and that Ord. 8 of 1834 contains all that is in force on these subjects. D. C. Kurunegala, 21698. Civ. Min., June 20, 1871.

Held that possession of ¼ of a century will confer a prescriptive title against the Crown. D. C. Colombo, 1245. Civ. Min., September 13, 1870.

Held that an adverse possession of 10 years is sufficient to prescribe against a co-parcener or co-tenant. C. R. Batticaloa, 9653. Civ. Min., April 21, 1870.

century's possession was abolished in this Island by Regulation 13 of 1822, the effect of which in this respect was continued by Ordinance 8 of 1834,—(See the end of clause 1.), and by Ordinance No. 22 of 1871, and Ordinance No. 1 of 1852, clause 3. The only rules of prescription that apply to land cases in Ceylon are those that are laid down by Ordinance No. 22 of 1871, clauses 3, 14, 15, and 16. It may be taken as a fact, that in this case the 1st defendant and his father have had *natural* possession (I use the epithet advisedly) of this garden, or of part of it, for much more than ten years before 1865, when the rights of the minors accrued, in behalf of whom this action is brought. But it also seems to me clear as a fact, that the 1st defendant within those ten years had paid rent for this garden, and that he had done so for as many as at least ten years between 1850 and 1870. This affects the period of thirty years mentioned at the end of the 14th clause of the Ordinance, as well as the period of ten years mentioned in the 3rd clause. I consider the fact of these payments sufficiently proved by the plaintiff's general evidence and the more specific evidence of his witness Sinne Velen. It is the defendant's case, not the plaintiff's, which deserves to be regarded with suspicion, inasmuch as the defendants endeavoured to set up what the Commissioner has rightly termed a tricky defence by alleging false boundaries. Indeed, the defence of prescription is hardly raised in the answer at all. The Commissioner has treated the evidence of payment of rent as null and void, because the rent was not paid on a notarial lease. But the Prescription Ordinance nowhere requires that the payment of rent, which will bar the effect of possession, shall be payment of rent under such a lease as might be enforced in a Court of law. Indeed, the plaintiff's father might have enforced payment of rent, not under the lease, but by an action for use and occupation, after the tenant had used and occupied the garden. It becomes unnecessary for me to go into the more general and important question, whether a mere tenant on sufferance can ever acquire a right under our Ordinance of Prescription against the owner who has permitted him to occupy. Certainly under Roman law he who thus obtained and held *possessionem precario*, had no *possessionem civilem* sufficient to enable him to acquire a title by *Usucapio* against the *Dominus* from whom he had begged permission to occupy. But I believe that some difference of opinion exists as to the effect of our Ordinances on this subject; and therefore sitting alone I will not adjudicate on it, unless the nature of the issue compels me."

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March 19.

Present CREASY, C. J.

C. R. Balapitimodera, 21902. A judgment of non-suit by the Commissioner *(Halliley)* was set aside, and judgment entered for plaintiff, in respect of a house claimed by him, in the following terms: "The plaintiff has brought forward a body of evidence, the general effect of which is to satisfy the Supreme Court that he is by prescriptive title the lawful owner of the house in question. This evidence is not counteracted by any brought forward on the other side. The Commissioner states that the plaintiff's evidence 'is very unsatisfactory' and non-suits him. This summary way of disposing of cases is very unsatisfactory; no reasons are given for it, and the Supreme Court cannot discover the grounds for any." (*Ferdinands* for appellant.)

Evidence.

April 22.

Present CREASY, C. J.

C. R. Galle, 45817. A Police Officer, who was a witness in this case, was found guilty of Contempt and sentenced to seven days' imprisonment for not having appeared on the day of trial, as required by a subpœna which had been duly served on him. The defendant justified his absence on the ground that there was severe sickness in his family and that one of his relatives had small pox. The Commissioner (*Lee*) did not appear to discredit this story, but held that "that was no excuse for not sending in a report." *In appeal*, per CREASY, C. J.—"Order amended by directing the appellant to pay a fine of Rs. 5 and by striking out the sentence of imprisonment. The Commissioner states his belief in the appellant's statement about the sickness in his (the appellant's) family. Under such circumstances, a neglect to attend Court ought not to be severely punished. It is a great stigma on a person in this appellant's condition of life to be sent to jail; and it would be absolute cruelty to imprison a man who has committed no actual crime, at a time when his near relatives are dangerously ill and require his personal attendance."

Contempt.

June 3.

Present CREASY, C. J. and STEWART, J.

C. R. Batticaloa, 3178. Plaintiff sued to recover Rs.55, which he alleged the defendants had received from his son for the purpose of retaining Counsel to defend the plaintiff, who at the time was in jail as accused in a J. P. case, but which sum, it was stated, the defendants had misappropriated to themselves. The

Contract.

Contract.

defendants pleaded "not indebted." At the trial, the 2nd defendant was absolved from the instance, while judgment was entered against 1st defendant with costs. *In appeal,* (*Grenier* for appellant,) per CREASY, C. J.—" Set aside and judgment of non-suit entered. There is no evidence of any contract between plaintiff and appellant; and there is no legal evidence of failure of consideration. No costs. The 1st defendant's conduct is very discreditable. If he had employed Counsel, he would have been eager to prove it in defence of his character. If the son was really acting as the father's agent in employing the defendant, and the father in any way directed or ratified the son's acts, a fresh action may be brought in the present plaintiff's name and further evidence may be supplied. If the boy acted independently in employing the defendant, he (the boy) can sue by guardian. In either case, some proof should be given that no Counsel appeared for the father."

June 11.

Present CREASY, C. J. and STEWART, J.

Damages.

C. R. Kegalla, 13282. This was an action to recover the value of a cow which plaintiff alleged had been strangled to death by means of a noose set by the defendants, who however denied having set any noose at all. The Commissioner, having believed plaintiff's story, gave judgment for him for Rs. 35 and costs. *In appeal,* per CREASY, C. J.—" Affirmed. It is very difficult to make out from the evidence at what place the noose was actually set, but it does not appear to have been within the defendant's own land; indeed, the defendant in his petition of appeal asserts that it was not. The case, therefore, does not come within the principle of the law as laid down by Gibbs, C. J. in *Deane* v. *Clayton,* 7 Taunt., 489, a judgment which was ratified by the Court of Exchequer in *Jordin* v. *Crump,* 8 M. and W., 782."

June 20.

Present CREASY, C. J. and STEWART, J.

Moorish Custom.

C. R. Colombo, 89417. The judgment of the Commissioner (*J. H. de Saram*) explains the facts of the case. "The plaintiff seeks to recover the sum of Rupees 8, being his share of the fee paid to the defendant, a priest of the Marandahn Mosque, on the occasion of a certain wedding. The usual fee on such occasions is Rupees 3. 75, and it is admitted by defendant that in such cases the fee is divided in the

Moorish Custom.

following proportion, 2-5ths to the priest, 2-5ths to the barber and 1-5th to the sexton, but he adds that this division is adopted only when the fee is Rupees 3. 75 or any sum below that, and that when it exceeds that sum the excess is taken entirely by the priest and only Rupees 3. 75 divided as already mentioned. The plaintiff, on the other hand, contends that the fee, whether over or under Rupees 3. 75, is divided between the priest, barber and sexton in the proportion stated, and that he is therefore entitled to Rupees 8. 0 being 2-5ths of the Rupees 20 paid on the occasion in question. The defendant denied having received any portion of the fee and adduced evidence to prove that the whole sum was handed to the senior priest who paid him his share. From the plaintiff's evidence it appears only a part of the fee was paid to defendant, Rupees 10. The witness Sekadie Markar Idros Lebbe Markar swears he handed the money to defendant. He can have no object, as far as the Court can see, in stating this, if he did not hand him the money, for if it was handed to the senior priest the plaintiff would have sued him. As only Rupees 10 were paid to defendant, the question is whether the plaintiff is to get 2-5ths of that or of only Rs. 3. 75. The plaintiff is entitled to 2-5ths of the ordinary fee, and unless there is something to show that he is restricted to that and nothing more, he is clearly entitled to 2-5ths of any sum that is paid. According to the defendant's statement (but which is not borne out by the senior priest or Assen Lebbe Markar—and I lay stress on it as being a statement made by the defendant) the plaintiff has to accept a smaller amount as his share when the fee is below Rupees 3. 75. If this be so, it is surely nothing but fair that he should receive a higher amount when the fee is above Rupees 3. 75. The fee is paid with one object, and that is to be divided between the priests, barber and sexton. The Head Moorman has stated how the fee is divided, and he bears out the plaintiff's contention. The defendant and his witnesses each give a different account as to the manner in which the fee when below Rupees 3. 75 is divided. I do not therefore feel disposed to place any reliance on their statements. Judgment for plaintiff for Rupees 4, being 2-5ths of Rupees 10, and costs."

In appeal, Brito for appellant.—Even accepting the evidence for plaintiff, the custom pleaded was not proved to be one which had existed from time immemorial. On a question like this, the testimony of the Turkish Consul, who was called for the defence, might well outweigh that of the Head Moorman. *Grenier,* for respondent, was not called upon. Per STEWART, J.—" Affirmed. The Supreme Court sees no reason to discredit the evidence of

Sekadie Markar, (the uncle of the bridegroom,) who distinctly affirms that he paid Rs. 10 to the defendant, and who was believed by the Commissioner. On a question of custom, such as the present, the evidence of the Headman is entitled to great weight."

June 25.

Present CREASY, C. J. and STEWART, J.

Action ex delicto.

C. R. Panwila, 3597. The judgment of the Commissioner *(Smart)* sets forth the issues adjudicated upon. "In this case the plaintiff sues for value of buffaloes delivered to defendant, and for consideration due for their hire. A receipt or writing setting forth the conditions of the transaction is filed in the case. The defendant's Proctor objects that the writing is invalid, inasmuch as it is not on a stamp, and therefore is not receivable in evidence, even though the penalty, as proposed by plaintiff's Proctor, should be paid on it. I consider the objection good and valid and therefore reject the document in evidence. At the same time, it is perfectly allowable for plaintiff to prove by parol evidence the delivery of the animals, even were there no writing whatever; and it just amounts to a question of whether the Court believes the animals were actually delivered to defendant or not; if they *were* delivered, it is for defendant to shew that they were returned or to prove that there was some set-off against them. The Court is satisfied that the animals *were actually delivered*, the evidence of the fact being good and satisfactory. Plaintiff calls, besides other witnesses, the Aratchy, who affirms to having written the *pass*—permit, and having given it to defendant, and also a man of defendant's own village, who affirms to having seen defendant using the same buffaloes; and this evidence the Court *considers very conclusive*. There seems no reason to doubt the animals were worth £9, and therefore judgment is entered for plaintiff to the extent of Rs. 90 and costs of suit."

In appeal, (*Dias* for respondent) per CREASY, C. J.—"Affirmed. The substantial part of the plaintiff's claim is for the value of his buffaloes, which defendant has illegally converted and appropriated. This is a cause of action ex delicto, and is unaffected by the writing about the hire to which the stamp objection has been raised. Even if the Stamp Ordinance applied, the document might have been admitted under the provisions of the 46th clause of the Stamp Ordinance No. 11 of 1861, as to allowing unstamped or insufficiently stamped documents in evidence on taking the proper precaution of payment of the duty and penalty.

Moreover, we greatly question the propriety of our reversing proceedings on objections about stamps, when substantial justice has manifestly been done by the Court below: see the 20th clause of the Administration of Justice Ordinance, No. 11 of 1868."

June 27.

Present Creasy, C. J.

Notice to quit.

C. R. Colombo, 87694. The plaintiff, as landlord, had given notice, on the 10th July, 1872, to the defendant, who was a monthly tenant, requiring him to quit on the 10th of the following month. The issue in the case was, whether such notice was sufficient in law. The Commissioner (*de Saram*) held as follows: "I consider the notice to quit within one month from the 10th July bad, as the defendant was a tenant paying rent from the 1st to the end of every month, and the notice should have been to quit at the end of one month, such time to expire at the end of any given month."

In appeal, the case had been argued, on the 21st February, by *Grenier*, for the appellant.—All that a tenant, equally with a landlord, was entitled to was reasonable notice, and such notice had been given in this case. *Huffel* v. *Armislead*, 7 C. and P., 57. The Commissioner's ruling was clearly wrong, as by the Ordinance 7 of 1840 no lease for any period exceeding one month could be valid except it were in writing. To require therefore one month's notice to expire at the end of a current month, was to enable either landlord or tenant to enforce a tenancy of more than a month, in contravention of our Ordinance of Frauds. The English Statute of Frauds was different in this respect, as it sanctioned a parol lease for any period within three years. [I should like to hear you Mr. Dias on this point.—C. J.] *Dias*, for respondent.—The word "month" in the 2nd clause of the Ordinance could only mean a month commencing from the 1st and ending on the last day of the month. The contention on the other side, that the month was to be made up of fractions of two consecutive months, was clearly opposed to the monthly tenancy contemplated in the Ordinance, and would practically have the effect of throwing a property on the hands of the landlord in the middle of a month and depriving him of a fortnight's rent. The established local custom in the matter was in accordance with the Commissioner's view.

The Chief Justice, having directed this day that the case be called, delivered the following judgment which His Lordship said should be accepted as only that of a single Judge. "We must read the Nisi Prius case of *Huffel* v. *Armistead*, in

Notice to quit. connection with the subsequent case of *Jones* v. *Mills*, which came before the Conrt of Common Pleas in Banc, and which is reported in 31 L. J., (C. P.) 66. I should have been glad of more express authority on the subject, but as at present advised I think with Mr. Justice Williams, that the notice must be one commensurate with the term for which the letting was, that is a month for a month ; and I also think that it must be a notice expiring at the expiration of a current month after the date of the notice. Evidence of custom might be given in these cases, and might have the effect of varying the presumption arising from the mere nature of the tenancy."

July 8.

Present CREASY, C. J. and STEWART, J.

Agency. *C. R. Kandy*, 52092. The plaintiff (*D'Esterre*) sued defendant (*Wait*) to recover Rs.41·5, " being amount due as per annexed particulars,"—which were cost of repairs of a gold watch Rs. 31·50, postage Rs. 4·67, London Agent's charges Rs.1·50, plaintiff's commission Rs. 3·38. The defendant, in his answer, alleged that he had been always ready and willing to pay items 2, 3 and 4, and disputed the correctness of item 1. Plaintiff in his evidence said that he had regarded himself as defendant's agent, having been requested to have the watch repaired by Messrs. Sarl and Sons, from whom he produced a bill with that part of it, however, containing the amount of the charges cut off. He explained that he had cut off the amount himself, as he wished no one to know what the repairs had actually cost him in London. The Commissioner (*Stewart*) held as follows: " There is no evidence of the cost of the repairs, nor is there any thing to shew that the plaintiff was to charge for them irrespective of what the cost really was. He could not have been expected nor was he asked to do more than to get the watch repaired, seeing that he is not a watchmaker, and therefore also not competent to make the charge. He has, however, it must be inferred, charged more than the watchmakers in England whom defendant requested him to employ, and hence apparently this cutting away or destroying by him of that part of their bill shewing their charges, on the alleged ground that he was not bound to disclose the contents of his invoice, &c. He has charged besides commission, which clearly shews that he was employed only to get the work done and nothing more. Judgment therefore for plaintiff for only the items admitted with costs in that class." *In appeal*, (*Ferdinands* for appellant, *Grenier* for respondent) per STEWART, J.—Affirmed.

August 12.

Present Cayley, J.

C. R. Panadure, 15312. One Thomis Pieris, being the owner of a land called Delgahawatte, mortgaged the same, in February 1865, to Harmanis Dias. In May 1870, Pieris' brothers and sisters (his sole heirs) sold the property to the Plaintiff. In January 1872, another creditor of Pieris, who however held no special mortgage, having obtained judgment on a bond dated November 1865, issued writs and caused this land to be sold, when the 6th defendant became the purchaser. The Commissioner *(Morgan)* having given judgment for plaintiff, the 6th defendant appealed.

Mortgage paid off by heirs, without administration.

In appeal, Dias, for appellant.—The heirs could not sell their ancestor's property without paying his debts, whether secured or unsecured. It was alleged by the heirs, that they sold the land to pay off a debt secured by a mortgage on it. But they had to prove this. It was true a mortgage bond was filed in the case, but it did not follow that the proceeds of the sale had gone to pay off the mortgage debt. To allow private sales by heirs would be to allow them to defeat the creditors of the deceased, by conveying his property to third parties.

Ferdinands, for respondent.—The payment of the mortgage debt was not denied by the contesting defendant, and the bond itself was produced to prove that the debt existed. Even the petition of appeal did not question the existence and payment of the debt. In *Namasevayam's* case, the Supreme Court held that a sale by the heirs to pay off a special mortgage would be valid, although administration had not been taken out.

Per Cayley, J.—"Set aside and case sent back for further hearing. If the first five defendants sold the $\frac{3}{8}$ belonging to Thomis Pieris, for the purpose of paying off the special mortgage held by Harmanis Dias, and did with the proceeds of the sale satisfy that mortgage, their sale should be upheld and the plaintiff declared entitled to judgment. Evidence of this payment should be adduced."

C. R. Gampola, 28531. The plaintiff, by purchase from the Crown, was the owner of a land, in the district of Udapalata, in the Central Province, bounded on all sides by the Mahavila Ganga, and as such owner claimed the right "to take and appropriate the firewood and other things thrown on the said land by the action of the water of the said Mahavila Ganga." The grievance now complained of was "that the defendant, on or about the 12th October, 1872,

Jurisdiction.

unlawfully took and deprived the plaintiff of a quantity of firewood which was then on the said land, so thrown thereon by the water as aforesaid, to the plaintiff's damage of rupees 100." The defendant, who was the Ratamahatmeya, denied the plaintiff's right to appropriate the firewood in question, which he admitted having sold, as the property of the Crown, under instructions from the Government Agent. The answer further raised the plea of jurisdiction, on the ground "that the rights involved were of greater value than rupees 100." On the 17th of March, the Commissioner (*Neville*) made the following order: "plea of jurisdiction being taken as to the value of the rights involved, plaintiff's Proctor contends that the Court cannot entertain the question of the value of the rights involved which are future, but can only try the actual trespass. Laid over for ten days, for plaintiff to institute an action to have his title to the disputed right of jetsam established." On the 28th of March, the plaintiff was non-suited in the following terms. "The right to alluvion, accretion or jetsam being in dispute, and plaintiff claiming only special damages and not having, as ordered, instituted action to establish his right to the said alluvion, accretion or jetsam—which may be regarded as *usucapio* and as immoveable property,—the right being alleged as attached to the land and part and parcel thereof (equally with trees growing on it, etc.)—this Court is not competent to award damages, the title being in dispute and being beyond the jurisdiction of this Court, as is clear from one act of trespass alone causing damages rupees 100."

In appeal, Dias, for appellant.—The question of jurisdiction should be determined by the value of the thing actually in dispute, and not with reference to any collateral matter which might incidentally be drawn into the discussion. The property in dispute in the case was valued at £10 and came within the jurisdiction of the Court below, but the enquiry into the right in respect of which the £10 was claimed, was merely a collateral enquiry, and no decision thereon could operate as *res judicata*. Per Cayley, J.—"Affirmed. The right to take the wood washed up by the river is claimed as appurtenant to the plaintiff's land, and this right is put in issue by the defendant's answer, and is the real question in dispute between the parties. The value of this right is far more than rupees 100; and the Supreme Court thinks that the learned Commissioner has properly held the case to be beyond the jurisdiction of the Court of Requests."

Damages. Horse-breaking.

C. R. Colombo, 90032. Plaintiff (*Walles*) sued for the recovery of rupees 13·16, being charges for repairing harness and shoeing a

horse belonging to defendant, (*Weinman*) who, admitting the debt, claimed rupees 100 in reconvention, as part damage caused to a mare belonging to him, which, by plaintiff's careless and unskilful treatment in training, had depreciated in value. It appeared from the evidence that the animal in question had originally been trained by *Pate*; that afterwards she had foaled and had not been used for 2½ or 3 months. At the end of that period the mare was sent to plaintiff, who, after lunging her regularly for some days on the Galle Face, drove her in his brake. Subsequently, however, he attempted to harness her opposite his house in the Pettah, and what then occurred was deposed to by the horsekeeper as follows: "I told him not to, but to take the animal to Galle Face. He however put her in after strapping her leg first. He then wanted to get into the trap. The mare plunged and fell. Its leg was then strapped. Its knees were injured as well as its side and hind leg. Plaintiff undid the strap, and took the mare opposite the Gas Works, and lunged it and whipped it very much. The mare got timid after that, and did not go as usual. It stopped now and then." *Pate* stated to the Court that, having heard the horsekeeper's story, he was of opinion that "the mare was very likely to get very stubborn after such treatment;" that the mare was, when he knew her, good tempered and free from vice in harness; and that after the accident he had sold her, at the request of plaintiff, for rupees 300, whereas she had previously been worth rupees 500 or rupees 600. The Commissioner (*de Saram*) dismissed plaintiff's case, and entered judgment for defendant for rupees 100, holding that "in restricting his claim to rupees 100, the defendant had given up a good portion of the loss sustained by him."

In appeal, (*Ferdinands* for appellant, *Grenier* for respondent) per Cayley, J.—"Affirmed. The damages reduced to eighty six rupees and eighty four cents, (Rs. 86·84) as the defendant admits the plaintiff's claim for Rs. 13·16."

Irregular non-suit.

C. R. Colombo, 89922. At the first trial of this case, it was agreed that Mr. Schwallie should make a survey, plaintiff paying for it in the first instance, but the expense to be ultimately made costs in the suit; and a postponement was thereupon allowed. At the adjourned trial, the plaintiff was non-suited in the following terms: "when the case was instituted, the plaintiff should have taken care to file a survey, if he required one, with the plaint. He was however allowed a postponement on the last occasion the case came on, to get a survey made; and now the Surveyor reports that, in consequence

of some neglect on the part of the plaintiff, he was not able to survey the land. The Surveyor also reports that the plaintiff did not produce the former survey of the land—not filed in the case." *In appeal*, (*Grenier* for appellant) per Cayley, J.—" Set aside and case sent back for hearing. No sworn report of the Surveyor is filed, and there is nothing in the record to shew that the delay in making the survey was due to plaintiff."

Costs.

C. R. Mallakam, 201. This was an appeal against an order refusing to recall writs for costs against plaintiff, who had voluntarily withdrawn his case. A string of objections had been taken in the Court below, all of which however had been overruled. *In appeal*, *Grenier*, for appellant, submitted that the requirements of the 35th section of the Rules and Orders had not been properly complied with. There was no note of the taxation of costs on the record by the Clerk of the Court, and the writs had therefore been irregularly issued. The objection, he observed, had not been taken in the petition of appeal, but it was desirable that the minor Courts, which were inclined to be lax in their practice, should be required to strictly carry out the law. [The costs allowed were reasonable, and the omission you refer to may easily be supplied by the case being sent back.—Cayley, J.] The objection, however, not being pressed by Counsel, the order was affirmed.

Re-opening judgment.

C. R. Colombo, 90285. The plaintiff claimed rupees 97, as damages caused by the defendant having his canoe maliciously seized under a J. P. warrant. The defendant justified the seizure, on the ground that he acted under "sufficient and probable cause." On the day of trial, (31st March) the defendant being absent and his Counsel stating that he had received no instructions, judgment was entered for plaintiff with costs. Subsequently the defendant moved to have the judgment re-opened on an affidavit which, *inter alia*, recited that he had been obliged to go to Galle on the 22nd March on private business as dubash to supply ships; that he had intended to return in time for the trial, but had been delayed by reason of his accounts not having been settled by some ship masters; and that he had a good and honest defence on the merits. The Court below, however, declined to entertain the motion in the following order: "Re-opening of judgment disallowed, as the defendant left no instructions with his Counsel and might have telegraphed from Galle if he really could not attend."

In appeal, *Kelly*, for appellant.—The discretion vested in the Commissioner under the 18th section of the Rules and Orders (Ordinance 9 of 1859) was not to be exercised arbitrarily; and there was sufficient reason assigned in the affidavit to open up the judgment. Sed per Cayley, J.—"Affirmed. The affidavit does not show that the defendant was prevented from appearing by accident or misfortune, or by not having received sufficient information."

Damages. Privileged communication.

C. R. Colombo, 90011. The plaintiff sought to recover the sum of rupees 12·50, as damages consequent on having had to attend at an investigation, held by the Modliar of the Corle, by command of His Excellency the Governor, into a charge preferred by defendants and several others in a petition complaining that the plaintiff, who was a division officer, had blocked up a certain road. The Commissioner (*Livera*) non-suited the plaintiff in the following terms: "I hardly think the defendants are responsible for the expense undergone by the plaintiff. The Modliar was requested to report on the petition, and if in deference to him the plaintiff took the trouble to obey the orders sent, he must bear the consequence himself."

In appeal, (*Ferdinands* for appellant, *Grenier* for respondent) per Cayley, J.—"Affirmed, but not for the reasons given by the learned Commissioner. If the plaintiff had proved that the defendants joined in maliciously signing and presenting to the Governor a petition which they knew to be false and which contained criminatory matters against the plaintiff, the plaintiff would have been entitled to damages, and the amount claimed would have been by no means excessive. The petition, however, is not proved, nor is secondary evidence of its contents given, as could have been done if its non-production had been sufficiently accounted for. It is impossible, therefore, to determine how far the statements contained in it were actionable. The petition moreover, being one to the Governor against a public officer in a matter in which the petitioners had an interest, is in its nature privileged; and before the plaintiff could recover damages for any defamatory statements contained in it, he would have to give some evidence of express malice."

August 19.

Present Cayley, J.

Construction of a will.

C. R. Ratnapura, 7618. Plaintiff, as widow of Don Simon, sued defendants for the recovery of an undivided one half share of the

land mentioned in the libel as part of her late husband's estate. The first three defendants disclaimed title, while the 4th alleged that, as daughter of Don Simon, she held the property in question for the maintenance of herself and the minor daughter of her full sister Sovitchi Hamy, in terms of her father's last will, the 5th clause of which was verbatim as follows:

"All the remainder of the moveable and immoveable property, etc. after the deduction of the above bequests, was assigned to my wife Punchy Manike and my own children Appoohamy, Sobitchyhamy and Muttoo Manike, to be divided and given equally between them, provided however that the property to the worth of £30 or that amount in money be given credit to the estate of her the aforesaid Sobitchyhamy's share on account of the expenses incurred for the hand and neck jewels and ornaments, etc. furnished her at the time of her marriage: nevertheless these provisions are to take their course in this manner having referrence to the assistance rendered or caused to be rendered to my wife Punchy Manike during her natural life by my aforesaid children Appoohamy, Sobitchyhamy and Muttoo Manike, and unless the said Punchy Manike made over as to her own pleasure while she was as yet alive or after her demise the said shares or anything else agreeable to her pleasure, the children whose names appear in this clause cannot use any violence or force by laying to their shares or right of inheritance save and accept the means of livelihood."

In appeal, (*Ferdinands* for appellant, *Dias* for respoudent) per Cayley, J.—"Set aside and judgment entered for plaintiff for the land claimed in the plaint but without damages. The 5th clause of Don Simon's will is not very intelligibly worded, but the Supreme Court thinks that the intention of the testator, as gathered from the entire clause, was that the enjoyment by the children of their shares should be postponed until the determination of the widow's life-interest. The 4th defendant is entitled to means of livelihood out of the estate, but this will not give her any right to a specific share of the estate, much less to any particular land."

Effect of recitals in a deed.

C. R. Point Pedro, 784. Plaintiff claimed ¼ of certain lands by right of inheritance from his mother, and complained that defendant (his brother) had unlawfully removed his paddy crop. The defendant denied plaintiff's right, and set up title in himself by purchase from plaintiff's mother and co-proprietor. The Commissioner (*Drieberg*) after plaintiff's examination dismissed the case, holding that the defendant's deed was expressly recited in a partition deed affecting the parent's estate, to which both plaintiff and defendant were parties. *In appeal*, per Cayley, J.—"Set aside and case sent back for new trial. The present action not being founded on the partition deed, the recitals of that deed, though evidence against the

plaintiff, do not operate as an estoppel, and the plaintiff should have an opportunity of proving his case."

Loan.

C. R. Balapitimodera, 22129. The plaintiff sought to recover rupees 10·32, which he alleged had been borrowed and received by defendant, who however denied the debt. The plaintiff called two witnesses and the defendant none. The Commissioner (*Halliley*) held as follows: "In transactions of these kinds, there should always be a promissory note or a receipt passed. Nothing is easier. Now among the witnesses that generally come before me, I always find that plaintiff's witnesses are for plaintiff, and the plaintiff could not state the case better than they, and defendant's ditto. So that I can hardly ever believe witnesses who come before me. Plaintiff, having failed to get a promissory note or receipt from defendant, is non-suited with costs. *In appeal*, (*Ferdinands* for appellant) per Cayley, J.—"Set aside and judgment for plaintiff for rupees 10·32, with interest thereon at 9 per cent. from date of action brought, and costs of suit. Neither a promissory note nor a receipt was necessary to enable the plaintiff to recover the amount advanced by him. He has proved his case, and the defendant has called no evidence to rebut it."

Burden of proof.

C. R. Balapitimodera, 22063. This was an action on a bond against the heirs and representatives of a deceased debtor. The defendants pleaded that the debt had been paid and the bond obtained by the debtor during his life time, but called no evidence at the trial. The Commissioner (*Halliley*) non-suited the plaintiff with costs. *In appeal*, per Cayley, J.—"Set aside and judgment for plaintiff as prayed with costs. The Commissioner has not given any reasons for non-suiting the plaintiff. The burden of proof is thrown on the defendants, and they have called no witnesses."

Non-suit.

C. R. Negombo, 21634. Plaintiff sought to recover the amount of a mortgage bond from defendants as being in possession of the debtor's estate, but having failed to prove such possession, the Commissioner (*Dawson*) entered a judgment of non-suit. *In appeal* per Cayley, J.—"Affirmed.

Effect of judgment for land.

C. R. Mullaittivu, 9930. This was an action for damages against the defendant, who was charged with having unlawfully reaped, threshed and appropriated a portion of the paddy crop which had been cultivated by plaintiff. Defendant justified himself on the ground that he had previously obtained judgment in the District Court for an undivided ¼ of the field in question. It appeared that when defendant, as holder of a writ of possession, proceeded to have his right enforced, a crop of paddy which had been cultivated at plaintiff's sole expense and labor was standing on the field, though not ripe for cutting. The Commissioner (*Withers*) gave judgment for plaintiff in a lengthy judgment, in the course of which he held as follows: "Now it was and is the Court's opinion, that with a judgment for land passed any plantation growing on the land, and by that is meant all the produce of the land which has not resulted from the labor of man—trees and natural grasses for instance as distinguished from corn." *In appeal*, per Cayley, J.—"Set aside and plaintiff's claim dismissed with costs. The judgment in the case No. 115, being a judgment for an undivided ¼ of the land without any reservation, carried with it a right to ¼ of the crop growing at the time on the land. It is not clear hat the appellant has appropriated more than ¼ of the crop, and to this he was entitled."

Crown claim to royalty on Plumbago.

C. R. Kurunegala, 28350. The following judgment of the Commissioner (*J. H. de Saram*) explains the case: "The facts of this case are as follows. The land referred to in the plaint was purchased by the plaintiff from a third party, who alleged he had a right to it. The plaintiff commenced digging for plumbago when a claim was put in on behalf of the Crown to the land, and it was put up for sale by the Government Agent of this Province on the 4th August, 1871. The plaintiff relinquished all right he had to the land under his first transfer, and purchased it from the Crown. The copy of the conditions of sale put in evidence by the plaintiff, is admitted to be a copy of those on which plaintiff purchased the land. There is no mention made in those conditions that the purchaser would have to pay royalty on plumbago dug on the land; and as the Government Agent has demanded payment of royalty, this action has been instituted to have the question of the plaintiff's liability or non-liability settled. For the plaintiff it was contended, (1) that the land was sold on the understanding that plaintiff would not have to pay royalty; (2) that plaintiff is not bound by any clause in the transfer which is not consistent with the conditions of sale; (3) that the rights of the Crown which were reserved by the 4th clause of the

conditions are those referred to in the Minute of 1st August, 1861, and by which no right is reserved on minerals, but only on precious metals; (4) that it is not proved that there is any regulation or proclamation in existence, authorizing the demand of royalty. On behalf of the Crown, it was urged that, inasmuch as the plaintiff accepted a Grant from the Crown, he is bound by that Grant, and as there is a special clause in it, by which the right to all the minerals in the land is reserved, the demand for payment of royalty is valid. This contention appears to me to be well founded. The present action is not one to set aside the Grant given by the Crown, and to compel it to hand plaintiff one in terms of the conditions of sale, but it is one requiring the Court to hold that plaintiff is not liable to pay royalty. It is beyond the power of the Court to do this, as the very deed on which the plaintiff rests his title contains a clause reserving the right of the Crown to all minerals in the land. Had the action been one to set aside the present transfer, the Court would have been in a position to take notice of any difference that exists between the conditions of sale and the wording of the transfer. For these reasons, it is decreed that the plaintiff's case be, and the same is hereby, dismissed with costs."

In appeal, (Ferdinands for appellant) per Cayley, J.—"Affirmed. Plaintiff has admitted the original right of the Crown to the land by purchasing it from the Crown, and the transfer under which he now holds it expressly reserves the minerals. He complains that the transfer is not drawn in accordance with the conditions of sale under which the property was sold to him, no reservation of the minerals having been mentioned in these conditions. How far this might be a good ground for instituting a suit for specific performance of the original contract of sale, or for procuring a new or amended transfer, it is not necessary to determine; but so long as the plaintiff holds the land under his present conveyance, which expressly reserves the right of the Crown to the minerals, it is not competent for him to dispute that right."

Action on a Bond.

C. R. Panwila, 4120. This was an action to recover Rs. 100 on a bond, the original of which had been lost but a certified copy of which was filed with the plaint. The defendants, admitting the document, pleaded part payment, and strangely enough concluded their answer with a prayer that each party might be condemned to pay his own costs. The Commissioner (*Smart*) held as follows: "The original deed being lost, plaintiff to hold up his claim at all should have called the notary and witnesses to give evidence as to the genuineness of the copy. But even with this there is a strong pre-

sumption that part of it has been satisfied, by the evidence for defendants. Defendants admitted their liability to plaintiff for Rs 15; therefore judgment is given for plaintiff for Rs 15, but plaintiff will bear all costs." *In appeal*, (*Grenier* for appellant) per Cayley, J.—"Set aside and case sent back for further hearing. The Commissioner in effect holds that the original bond having been lost, plaintiff cannot maintain his claim without calling the notary and witnesses. The defendants, however, admit the bond in their answer; and consequently no proof at all is required of the instrument on the part of the plaintiff. The onus of proof is entirely thrown upon the defendants; and, unless they have proved the payment to the satisfaction of the Commissioner (which from his judgment is not quite clear) plaintiff is entitled to judgment. Even if the defendants prove the payment of part of the money due, the balance not having been paid into Court, plaintiff should not be condemned to pay defendants' costs."

Contract affecting land.

C. R. Panwila, 3713. Plaintiff sought to recover Rs 20 alleged to have been advanced as part value of a land which he had agreed to purchase from defendant, who however denied the transaction. Evidence was adduced to prove the advance, but the Commissioner (*Smart*) nonsuited the plaintiff, on the ground that the agreement pleaded was not in writing as required by the Ordinance 7 of 1840. *In appeal*, per Cayley, J.—"Set aside and judgment entered for plaintiff as prayed. It was decided in 1871, D. C. Walligame (Morgan's Digest, p. 82) and again in 34472, D. C. Colombo, Civ. Minutes, November 10, 1863, that money paid in pursuance of a contract which is void under the Ordinance of Frauds and which is not performed is recoverable."

Effect of settling and withdrawing a case.

C. R. Chavakacheri, 17273. The plaintiff had deposited the sum of Rs 75 with defendant in December 1871, as security for the performance of certain work the former had undertaken to perform. The money was to be returned to plaintiff in December 1872, if no loss or damage were caused by him to defendant in the interval. In August 1872, the defendant dispensed with plaintiff's services, without however returning the deposit, to recover which the present action was brought. Three previous suits in respect of this very claim had been instituted and subsequently withdrawn. Plaintiff admitted at the trial, that he had signed the settlement filed in the last case, No. 17215, but insisted that defendant had failed to carry out the terms thereof. The Commissioner (*Drieberg*) dismissed the claim with

costs, holding that plaintiff's remedy under the circumstances was by an action to enforce the settlement.

In appeal, (*Ferdinands* for appellant) the judgment was set aside and case sent back for hearing; and per Cayley, J.—"The mere fact that the plaintiff withdrew the former case will not prevent him from reinstituting it. If, however, the Commissioner is satisfied, after hearing evidence, that the previons withdrawal was part of a final settlement which was duly carried out, the plaintiff's claim should be dismissed, as having been reinstituted in fraud of such settlement."

Inconsistent judgment.

C. R. Mallakam, 210. This was a case of encroachment. The Commissioner, (*Murray*) after hearing evidence of both parties, gave judgment for defendant for the land in dispute, and nonsuited the plaintiff. *In appeal*, *Grenier*, for the appellant, pressing only for a nonsuit, the judgment was modified accordingly.

Bond.

C. R. Kurunegala, 28566. Plaintiff claimed Rs 96 as value of 12 amunams of paddy, being the share of a certain field which had been cultivated by defendant. In defence, it was pleaded that the paddy had been given by plaintiff in part payment of interest due by her late husband on a bond granted by him to defendant's brother, of whom defendant was the sole heir. The bond itself was not produced, but evidence was led to prove acknowledgment by plaintiff of the alleged debt and her delivery of the paddy in part satisfaction thereof. The Commissioner, (*de Saram*) having believed defendant's witnesses, dismissed plaintiff's claim with costs. *In appeal*, (*Grenier* for appellent, *Ferdinands* for respondent) per Cayley, J.—"Set aside and case sent back for further hearing. The bond alleged to have been given by plaintiff's deceased husband to Kirihami should have been produced, and proved in corroboration of the evidence given by the defendant, or the non-production of this instrument should have been properly accounted for."

August 26.

Present Cayley, J.

Contempt.

C. R. Nuwera Eliya, 3168. The plaintiffs in this case had been nonsuited in respect of their claim to a certain land. Having subsequently plucked coffee from the property in dispute, the Commissioner (*Hartshorne*) proceeded to try them for Contempt of Court and fined each Rs 10, holding that "a nonsuit in an action for ejectment operated as a dismissal." *In appeal*,—(*Ferdinands* for appellant

was not heard)—per Cayley, J.—"Order set aside. The plaintiffs were not bound to give up possession of the land to the defendants, who have no judgment in their favor, because they, the plaintiffs, had been nonsuited in an action brought by them to try their title; nor can the plaintiffs be punished for Contempt of Court for retaining possession."

Jurisdiction. Damages.

C. R. Puttalam, 6888. Plaintiff alleged that he had manufactured 5000 bricks from clay dug out of a portion of land belonging to 1st and 2nd defendants; that thereafter the other defendants had maliciously destroyed the bricks, falsely laying claim to the said land, to his damage of Rs 30. The 1st and 2nd defendants admitted they were the owners of the land; that the other defendants were their lessees; and that with the full knowledge and consent of such lessees they had licensed plaintiff to make bricks. The 3rd, 4th, 5th, and 6th defendants pleaded they were not lessees, but proprietors of the land, and denied the grievance complained of and the right of the plaintiff to sue in the absence of any notarial authority from the 1st and 2nd defendants to occupy the land in question. The Commissioner (*Pole*) gave judgment for plaintiff for Rs 12½; holding that "this is a simple case of damage, although by the pleadings it is attempted to magnify the case into one of title to land."

In appeal, *Dias* for appellant.—The question of title was undoubtedly raised on the pleadings, and the right of the plaintiff's lessors to the land was in issue.

Per Cayley, J.—"Affirmed. The plaintiff has proved that the 3rd 4th, 5th and 6th defendants destroyed the bricks which he had made; and these defendants have failed to prove any justification for this act. No evidence as to the title to the land was called by either side; and the issues upon which the case was tried and decided are within the jurisdiction of the Court of Requests."

Action on Bond. Husband and wife.

C. R. Kandy, 52126. The plaintiff sought to recover Rs. 65 and interest on a bond, which defendant admitted having executed but the consideration of which she denied having received. The plaintiff, being affirmed, stated "the defendant, I admit, did not receive the consideration, but the husband received it. She (defendant) gave me the bond." The Commissioner (*Stewart*) held as follows: "Plaintiff admitting that defendant did not receive the consideration, case is dismissed with costs." *In appeal*, per Cayley, J.—"Set aside and judgment entered for plaintiff as prayed. The action is one on a bond, and the only defence is want of consideration. The burden of

proof is upon the defendant, and she has called no evidence. The Commissioner has non-suited the plaintiff, in consequence of his admission that the defendant's husband, who appears to have since died, and not the defendant, received the consideration. But the fact that the plaintiff gave good consideration for the instrument, whether to the defendant or to her husband, is sufficient to entitle him to maintain an action against the party who signed the bond in his favor. The plea of coverture has not been taken."

Non-suit. Set-off.

C. R. Colombo, 90445. Plaintiff was nonsuited, on the ground that his present claim had been adjudicated upon in a previous suit, in which he had endeavoured to set off the same amount against the defendant. *In appeal*, per CAYLEY, J.—" Affirmed. The Commissioner is right in holding that the plaintiff, having pleaded the amount now claimed by him as a set-off in a previous action brought against him by the present defendant, and the issue thereon having been found against him, is estopped from suing the former plaintiff for the demand specified in the plea of set-off. See Eastmure v. Laws, 5 Bingham, 444."

September 5.

Present CAYLEY, J.

Way of necessity. Effect of Ordinance 2 of 1863.

C. R. Panadure, 14980. The Government had taken up in 1871, under the provisions of Ordinance 2 of 1863, a certain land for the purpose of enlarging the Panadure burial ground, and had fenced in a road that the defendant (who lived to the south) was using. The defendant (Proctor *Jayesinghe*) having broken down a portion of the fence over the road on the day it was put up, the Modliar, as representative of the Government Agent, instituted this action for trespass and damages. The defendant pleaded that the road in question was a way of necessity, and deposited in Court Rs 50, being the value of the encroachment as assessed in the libel. It appeared from the evidence that, when defendant purchased his property in 1870, there was a foot-path (which he subsequently enlarged into a cart-road) running across what was now the burial ground on to the high-road; that thereafter, certain excavations in the burial ground having interfered with that cart-road, Soyza Modliar, acting under the Government, opened the road now in question for the defendant's use; and that about a fortnight after the defendant had gravelled it, on the plaintiff fencing in the whole of the Government property, the defendant removed the obstruction to his right of way. The Commissioner (*Morgan*) held as follows. "The defendant came to his

present residence in 1870, so that he could have gained no prescriptive right to the road, nor has any been shown as on the part of those under whom he claims. In fact, his application is one, as the plaintiff's Proctor described it, *ad misericordiam*. He admits that he converted a foot road into a cart road, and he asks the Court to compel the plaintiff to receive Rs 50, which he tenders, and allow him the use of the cart road. But this the Court has no right to do. The defendant's proper course is to apply to the Government under the Ordinance 2 of 1863. He has further means of securing access to his residence, if he has none at present. Defendant was wrong in breaking the fence, and he is decreed to pay one Rupee as damages. As the case seems a hard one for him, I will not cast him in further damages. Judgment for plaintiff with costs."

Ferdinands, for appellant.—This was a way of necessity, and the defendant was entitled to it. Holmes v. Goring, 2 Bing., 76. [But there the owner had originally held the land himself in parcels—Cayley, J.] The principle was the same in both cases, that where there was no other way which a party could use, it was no trespass to make a way of necessity. The Crown having itself allowed the road in lieu of the one destroyed, defendant could not be charged with trespass. [It is denied that there was an easement. Defendant's purchase was only in 1870.— Cayley, J.] He did not claim by prescription, but on the ground that there was no road by which he could have access to his land without trespassing on the lands of other persons. [The evidence on this subject is not sufficiently full.—Cayley, J.]

The Queen's Advocate, for respondent.—The defendant had other means of access and could not complain. [It appears across 10 or 15 lands—Cayley, J.] But the area was very small, and from his own personal knowledge of the place, he could say that defendant would suffer no inconvenience whatever. Besides, the plea of necessity could not avail, as there was a statutory remedy prescribed by Ordinance 2 of 1863, cl. 9, and that was the only remedy now available to an aggrieved party. The land in question had been taken possession of by Government for the purposes of a burial ground under the Ordinance, and the defendant's right, if any, was extinguished by the enactment in the 4th clause, which vested the land in the Crown free of all mortgages and incumbrances and to the exclusion of "all persons whomsoever, whatever right or title they may have or claim to have in the property."

Ferdinands, in reply.—The Ordinance did not destroy the common law right of the defendant to a way of necessity, nor could it affect the rights of third parties who had neither sold the land nor shared in the compensation paid by the Crown.

Per Cayley, J.—"Affirmed. This is, in effect, an action by the Crown to set aside a claim made by the defendant of a right of way over a piece of land taken by the Government for the purpose of a public burial ground. It was admitted, at the hearing before this Court, that the land was regularly taken under the provisions of the Ordinance 2 of 1863. The right of way is claimed by necessity only. Now even though such a plea were tenable, (and, in view ot the certificate of possession issued under the 4 th clause of the Ordinance, I think it would not be,) the defendant has failed to prove this necessity; and this issue has been expressly found against him by the learned Commissioner. It appears, from the rough sketch filed with the proceedings as well as from the defendant's evidence, that although the burial ground supplies the nearest and most convenient means of access to the minor road from the defendant's property, there are other means of access easily available. If the defendant cannot otherwise obtain free and sufficient access to his property, he should, as suggested by the Commissioner, apply to the Government for a road under the provisions of the 9th clause of the above mentioned Ordinance."

Mortgage.

C. R. Balapitimodara, 22135. Plaintiff, who was a special mortgagee, was prevented by defendant from selling the mortgaged property, the latter claiming it by right of purchase at a Fiscal's sale held six months previously. The Commissioner (*Halliley*) held as follows: "There is no bill of sale as mentioned in the mortgage bond in evidence. I can't therefore say the extent of the land. Plaintiff is nonsuited with costs." *In appeal*, per Cayley J.—"Set aside and judgment entered for plaintiff as prayed with costs of suit. By a deed of mortgage dated 29th September, 1868, Kaluvahakuru Siman mortgaged with plaintiff all his right in the land in question. The defendant claims the property by purchase at a Fiscal's sale held in 1872, under a writ against this Siman issued for costs. Plaintiff's mortgage must have priority over defendant's purchase; and, as all Siman's right in the land was mortgaged, the precise extent of property is quite immaterial."

Costs.

C. R. Galle, 46118. This was an appeal against costs which plaintiff was condemned to pay in an action brought by him to redeem a mortgage bond, which defendant admitted having refused to deliver over. When the case was called, the Commissioner (*Lee*) made the following order: "the mortgage bond is handed to plaintiff. The defendant to take the money deposited and to have costs." Per Cayley, J.—"Set aside, so far as relates to that part of the judgment

which condemns plaintiff to pay defendant's costs, and amended by ordering defendant to pay plaintiff's costs. Defendant admits in his answer that he refused to allow plaintiff to redeem the mortgage, and has called no evidence to justify such refusal. Plaintiff has been unnecessarily put to the expense of bringing this action to redeem the bond, and he ought to have his costs. Moreover, it does not appear that any notice was given to the defendant before the trial, that plaintiff had deposited in Court the Rs. 20 on the 15th of May, 1873."

Arbitration.

C. R. Gampola, 28234. The dispute in this case, which affected title to land, was, on the joint motion of the parties and their Proctors, referred to the sole arbitration of Abraham Mohandiram, whose award was as follows: "I having received the letter in case No. 28234 which was addressed to my name, the plaintiff, defendant and several other respected people proceeded to the disputed land and enquired, but for the following reasons it is difficult to make out to whom the disputed land belongs. On our enquiring we did not find a deed to the said land, nor was the Koralle of the said district, who separated the said land formerly, present. But having enquired from the neighbouring headman, it is given to understand that the said disputed land is the property of the defendant but not of the plaintiff." On this award being filed, the Commissioner *(Neville)* dismissed plaintiff's claim and decreed the land in question to defendant.

In appeal, (*Kelly* for appellant) per Cayley, J.—"Set aside and case sent back for a new trial. Appellant to have his costs in appeal, but the costs in the Court below to abide the final adjudication. The reference to arbitration having been voluntary, no appeal would lie from any judgment which had been given according to the award; but it appears to the Supreme Court, that in the present case the judgment has not been given according to the award. In the award, the arbitrator states that it is difficult to make out to whom the disputed land belongs, but that, having made enquiry from neighbouring headman, he is given to understand that it is the property of the defendant. There is no express finding that the land belongs to the defendant, and nothing more than the statement of the opinion of certain headmen. Such an award will not entitle the defendant to judgment in his favor, nor indeed could any definite judgment be based upon it."

Indefinite judgment. Prescription.

C. R. Galagedera, 30393. This was an appeal against a judgment of the Commissioner, (*Capt. Williams*) decreeing, under the Kandyan law, one half of a certain land to plaintiff, as one of two sisters, by right of inheritance from her father. *In appeal*, per Cayley, J.—

"Set aside and case sent back for further hearing and consideration. Plaintiff claims by inheritance from her father Kiri Banda an undivided ¼ share of a certain garden called Naranghamulle Cattuwa. The learned Commissioner has given judgment for the plaintiff for half share of the portion of land inherited by Kiri Banda, but he proceeds to observe that it is not clear from the evidence what this portion of land is, but that it must be ⅛th share of that which descended to his children excluding the portion of land given to the widow. Now the principal issue in the case is not whether the plaintiff is entitled to a share of Kiri Banda's land (for the fact of her being his daughter is not seriously contested), but whether the land claimed in the plaint was inherited or possessed by Kiri Banda. On this issue there is no finding, and it is impossible to ascertain from the judgment what precise share of what precise land is decreed to the plaintiff. No effectual writ of possession could issue upon a judgment thus framed. The learned Commissioner has observed that prescription cannot avail in the case, because the plaintiff is apparently about twenty two years of age only. The age of the plaintiff is, however, by no means conclusive on the question of prescription. It is possible that a prescriptive title may have been acquired by the defendant as against Kiri Banda before the plaintiff's right of action accrued, or prescription may have commenced to run against Kiri Banda before his death, in which case the disability of the plaintiff could not prevent such prescription from being completed by the adverse possession of the defendant for the term of ten years."

Jurisdiction. Test of value of land.

C. R. Gampola, 28680. The title to a certain land of about two seers' sowing extent was in dispute between the parties. The Commissioner (*Penney*) nonsuited the plaintiff on the following ground:— "the land is worth 12 or 15 rupees a year, and at 10 years' valuation is worth more than Rs. 100." *In appeal*, per Cayley, J.—"Set aside and remanded for further hearing and consideration. The case has been dismissed by the learned Commissioner on the ground that, as the value of the yearly produce of the land in dispute is 12 or 15 rupees and on the assumption that the value of the land is equivalent to the value of 10 years' produce, the case is beyond his jurisdiction. There is however no evidence for this assumption, and it is also to be observed that, in estimating the value of the annual produce as a criterion of the value of the land, the expenses of cultivation should be taken into account. When land is cultivated in *ande*, half share of the produce usually goes to the andekariya. The amount for which the land would rent, or the amount for which it would be given out in *ande*, would be a more accurate measure of its value."

Damages on contract affecting land.

C. R. Kandy, 52134. This was an appeal against a judgment of the Commissioner (*Stewart*) awarding Rs. 5 to plaintiff as damages consequent on the breach of an alleged agreement, by which defendant had bound himself to lease a certain land to plaintiff who in good faith had improved the property. *In appeal*, per Cayley, J.—"Set aside and plaintiff non-suited with costs. This is an action to recover Rs. 40 damages for breach of an alleged contract, by which plaintiff agreed to improve and cultivate a piece of land in consideration of an alleged promise by defendant to give him a lease of the land for five years. Plaintiff also claims the Rs. 40 under the common counts for work and labor done and money paid on account of defendant at his request. Plaintiff has called witnesses to prove that he carried out certain work on the land, but there is no evidence of the contract declared upon in the first count of the plaint, the terms of which are disputed and which would have required notarial execution. Nor is there any evidence that the alleged work was done and money expended at the defendant's request, express or implied. See 32746, C. R. Kandy, Solomons' Reports, part 1, page 23."

Stamp objection.

C. R. Colombo, 91967. Plaintiff sued upon a document, which he described in his libel as a promissory note, for the recovery of Rs. 47, being amount of principal aud interest due thereon. The defendant pleaded payment. On the day of trial, the defendant's Proctor relied on the legal objection that the alleged promissory note was a bond and therefore insufficiently stamped, and declined to call evidence in support of the plea in the answer. The Commissioner (*Livera*) entered judgment for plaintiff as prayed for.

In appeal, *Grenier*, for appellant, pressed for a rehearing to prove payment. Per Cayley, J.— "Set aside and case sent back under the conditions hereinafter stated. In this case, the instrument having been expressly admitted in the answer, and a plea of payment being the only defence, it was not competent for the defendant to raise an objection at the trial as to whether or not the document was properly stamped. (See Israel v. Benjamin, 3. Camp., 40.) The defendant is allowed, as an indulgence, an opportunity of proving his plea of payment; but he must pay all the costs of the day in the Court below and of this appeal, within seven days after a taxed bill has been presented, and must deposit in Court, within seven days of the case being sent back to the Court of Requests, the amount claimed in the plaint, to abide the final adjudication. Upon his failure to comply with any of the above conditions, the judgement appealed against is to be treated as affirmed."

Contract.

C. R. Colombo, 90405. This was an action to recover half the value of fish caught by defendant with the aid of plaintiff, who led evidence to show that the defendant, having cast his net into the sea to the south, called upon the plaintiff, whose boat was to the north, to enclose the fish and drive it into his (the defendant's) net, promising to reward him with half the fish that might be caught. The defendant denied the alleged agreement in his answer, but the Commissioner (*Livera*) having believed the plaintiff's evidence gave judgment for him to the full amount claimed, Rs. 61.

In appeal (*Ferdinands* for appellant, *Grenier* for respondent) per CAYLEY, J.— "Affirmed."

September 9.

Present CAYLEY, J.

Burden of proof.

C. R. Galle, 46376. This was an action for goods sold and delivered and for money lost in consequence of an alleged assault by defendant, who pleaded not indebted and not guilty. On the day of trial, both parties being present, the Commissioner (*Lee*) made order as follows. "Plaintiff ready, defendant not ready. Judgment for plaintiff with costs." *In appeal*, per CAYLEY, J.— "Set aside and case sent back for hearing. The defendant appeared on the day of trial, so that the case is not one of default. The onus of proof being on the plaintiff, he was bound to prove his case before judgment could be given in his favour."

Execution against person.

C. R. Galle, 46474. The plaintiff, who had been fireman on board the steamer *Leith*, sued the defendant (the Captain) for the recovery of Rs 9, being wages for overtime. The Commissioner (*Lee*) having heard plaintiff's evidence gave judgment for him on the 5th July. On the 8th July, plaintiff's bill of costs was taxed at Rs. 1. 70 cents, and writ against person was allowed and issued. *In appeal*, per CAYLEY, J.—"The judgment of the 5th July, 1873, is affirmed, but the order of the 8th July, so far as relates to the writ against person, is set aside. Each party is to bear his own costs of appeal, if any. It appears from the proceedings and the letter of the learned Commissioner, that the only issue raised at the trial was, whether the plaintiff performed the work for which he has claimed extra wages; and the plaintiff's evidence on this point being uncontradicted, judgment was properly entered in his favor. With regard to the writ against the person of the defendant, the Supreme Court thinks that it was not competent for the Court of Requests to issue such writ. By the 47th clause of the Ordinance 7 of 1863, a seaman is empow-

ered to sue for wages in a Court of Requests, notwithstanding that the amount claimed exceeds £ 10; and it is enacted that the order of the Court may be enforced by writ against person as well as against property, notwithstanding any former law or Ordinance to the contrary. The question must here, however, be governed by the Ordinance 11 of 1868, by the 87th clause of which it is enacted that a judgment pronounced by the Commissioner of any Court of Requests, shall, in all cases, be enforced by execution against the property or (under the provisions of the 165th section of the Ordinance 7 of 1853) against the property and person of the party condemned therein. So that, since the passing of this Ordinance, execution against person in all Courts of Requests cases, is subject to the provisions of the 165th clause of Ordinance 7 of 1853, by which imprisonment for debt not exceeding £10 is expressly confined to cases of fraud only."

Landlord and tenant.

C. R. Colombo, 91943. Plaintiff sued the defendant as his tenant for rent alleged to be due for the months of March and April, 1873. The defendant in his answer pleaded payment to one Teagappah, under a judgment of this Court in No. 91575, and disputed plaintiff's right as landlord. It appeared that Teagappah had entered into an agreement in 1861 to convey the premises in question to plaintiff, but had failed to do so. A District Court suit, No. 59,203, had subsequently been instituted by plaintiff for specific performance, but he had been nonsuited on a technical objection raised against the libel. In that suit, Teagappah in his answer had admitted that he had let the plaintiff into possession and had expressed his willingness to grant a conveyance. Defendant in the present case had paid rent to plaintiff from 1861, till the date of the nonsuit which was in 1873, but it was contended that such payment of rent had been made at the request of Teagappah. The Commissioner (*Livera*) having given judgment for plaintiff, the defendant appealed.

Grenier, for respondent, on being called upon, submitted that the admissions contained in the answer in the District Court case disclosed an equitable title in plaintiff, which defendant had acknowledged for more than 10 years by payment of rent. Besides, plaintiff having admittedly been placed in possession of the house had acquired a bona fide right by prescription as against Teagappah, in whose favor the defendant had collusively allowed judgment to go by default in 91575 for the amount now claimed by plaintiff.

Kelly, for appellant, in reply.—Plaintiff had clearly no legal title to shew, for if he had he would not have instituted the District Court case referred to. Defendant had not entered under plaintiff, but

under the original owner under whom Teagappah claimed, and the payment of rent to plaintiff had been at the instance of Teagappah.

Per CAYLEY, J.— " Set aside and plaintiff nonsuited with costs. It appears to the Supreme Court that the plaintiff has failed to prove her right to recover from the defendant the rent claimed. The defendant entered into possession of the house as tenant of one Segapatchy. Upon Segapatchy's death, defendant paid rent for some time to her grandson Teagappah ; who, as appears from the present plaintiff's libel in case No. 59,203, D. C. Colombo, inherited the premises from Segapatchy. Subsequently, at the request of Teagappah, defendant paid rent to the plaintiff. After the decision of the District Court case which plaintiff brought against Teagappah for specific performance of an agreement to convey this property, and in which plaintiff was nonsuited, Teagappah withdrew his request by suing the defendant for the rent then due. Defendant allowed judgment to go by default. Plaintiff now sues for the rent which defendant has paid to Teagappah. Plaintiff has, however, failed to prove her title to the house; and, whatever equitable rights she may have to a conveyance of the property under the deed of the 28th September, 1861, upon which the District Court case was brought, she cannot, until she has enforced these rights, sue the defendant, who did not enter as her tenant and only paid her rent at the request of the admitted legal owner which request was subsequently withdrawn."

Unauthorised payment of a Bond

C. R. Urugalla, 1802. The defendant had executed a bond, in June 1870, in favor of Kalu Banda, the father of the minor child on whose behalf plaintiff sought to recover the amount due theron. Defendant having pleaded payment to Kalu Banda's mother, Rang Menika, the Commissioner (*Power*) nonsuited the plaintiff in the following terms : " It does not appear that defendant was aware of the existence of the child, or that any demand on its behalf by plaintiff was made to defendant on Kalu Banda's death. He is not supposed to know there was a child, and therefore has paid the money to deceased's mother against whom I think plaintiff should proceed." *In appeal*, (*Ferdinands*, for appellant, *Dias* for respondent) per CAYLEY, J.—" Set aside and judgment entered for the minor plaintiff for Rs. 100 and costs of suit. Kalu Banda's mother, not having taken out letters of Administration to her son's estate, was not authorized to receive a debt due to her son, the latter having left a child, who under the Kandyan law would be entitled to inherit his personal property. The Rs100 must be paid into Court and deposited in the Loan Board for the benefit of the minor."

Landlord and tenant.

C. R. Trincomalie, 28758. The facts of the case are set forth in the following judgment of the Commissioner (*Templer*)—"The defendant occupied the plaintiff's house, paying a rent of Rs 12·50 per mensem. On the 7th October, the plaintiff (*Buttery*) wrote to defendant (*Hunter*) the letter marked A, stating that he wanted a rent of Rs 22.50 per mensem, and telling defendant that, in case he should refuse to take the house at that rent, he must leave it on the 1st November. Defendant sent the reply marked B, dated 16th October, asking the plaintiff to allow him the occupation of the house until the 1st December at the then rate Rs 12.50 and taxes, and saying that he could not pay the higher rent. To this the defendant replies, by letter C on 11th November, telling the defendant to vacate his house on 1st December or pay rent at Rs. 30.50. I take this last letter to be a fresh lease granted by the plaintiff at the old rate, but stipulating for the vacation of the house on the 1st December. There is no other explanation of the letter. The defendant made a request to be allowed to occupy the house at the old rate until the 1st December, and the plaintiff tells him he may occupy it until then ; says nothing, it is true, about the terms ; but this avoidance of any reference to terms was, I consider, a tacit admission or acceptance of those proposed by Hunter. I hold that the plaintiff is not entitled to any increased rent, but is only entitled to what was tendered to him by defendant and refused. Judgment for plaintiff for the sum of Rs. 26·50, but the plaintiff to pay all the costs of this case." *In appeal*, (*Grenier* for respondent) per CAYLEY, J.—"Affirmed. The Supreme Court thinks that the construction put upon the letters B and C by the Commissioner is correct."

Mesne profits. Prescription.

C. R. Pasyala, 1886. The following judgment of the Commissioner (*Byrde*) explains the facts of the case: "the plaintiff in this case sues for the recovery of £9 18s., being alleged mesne profits of the land called Kebellegaha Cumbura during the years 1868 and 1869. It appears from the evidence adduced in the Colombo District Court case No. 53866, that Andris' father, the owner of the lands in dispute in that case, apportioned his property between Andris and his elder sister, the mother of the defendants, i. e., between Andris and Punchy Hamy, the 1st defendant in this present case. The decision of the District Judge in case No. 53866 places the land Kebellegaha Cumbura definitely in the possession of the plaintiff, Loko Ettena; and from the evidence of the defendants themselves they possessed and enjoyed the fruits of Kebellegaha Cumbura for 2 years, i. e., during the pendency of the District Court case. From 1st July, 1868, to 5th December, 1870, there appear to have been only two harvests, that

is, the harvest prior to 4th June, 1869, and that prior to 5th December, 1870. The witness Baronchy states that the crop of the year in which the District Court case was instituted was 40 bushels, and that of the year previous 50 bushels. This is of material value to establish the average crop of the Kebellegaha Cumbura, of which the plaintiff claims the mesne profits. Baronchy states, in District Court case No. 53866, that the ground share is about 25 bushels a year at 3s. per bushel, and I do not think this evidence, adduced to prove the value of the land in dispute, can in any way bar the plaintiff from instituting this case for mesne profits for the two years during which she was ousted from her lawful possession by the defendants, who, after the plaintiff had commenced the cultivation, took the continuation out of her hands, forcibly retaining possession, and enjoyed the fruits of the land which are adjudged to be hers, and which she inherited, but which the defendants cultivated and claimed as theirs by right. I am therefore of opinion that the crop of the Kebellegaha Cumbura was about an average of 35 bushels, and that the Government share was about 9 bushels. Of the balance 26 bushels, I consider the cultivator is entitled, by virtue of risk and labor, to one-half or 13 bushels per annum. I therefore find the defendants liable to the plaintiff for the average value of the ground share for 2 years at 13 bushels per annum or 26 bushels at 3s. per bushel or Rs. 39. Costs of suit to be divided."

In appeal, per Cayley, J.—" Affirmed but amended as herein after stated. In this case, the plaintiff has recovered mesne profits in consequence of defendants having held possession from the 1st of July, 1868, to the 5th of December, 1870, of certain land decreed to the plaintiff in case No. 53866, D. C. Colombo. During this time there were only two harvests, one ending the 4th of June, 1869, and the other the 5th of December, 1870. The plaintiff brought her action for the land in question with several other lands, on the 4th of June, 1869, and claimed mesne profits accruing both before action brought and *pendente lite*. She obtained judgment for the land in question, but, as to the rest of her claim, was expressly nonsuited. Having been nonsuited as to her claim for mesne profits in the previous action, there is nothing to prevent her from instituting a new action to recover them; but the question arises how far her claim is prescribed, the present action having been brought on the 20th of July, 1871. It was decided in the case No. 1108, D. C. Kurunegala, (Supreme Court Minutes, 7th July, 1871) under the Ordinance 8 of 1834, (by which Ordinance the present case must be determined) that mesne profits are in the nature of damages, and are prescribed in two years; but that, if an action has been brought to try title to the land, without a claim for mesne profits being made, and, after the decision of that

action, a new action is instituted for their recovery, the two years will be counted, not from the commencement of the action to recover mesne profits, but from the commencement of the former action, which was brought to try the title. The ground upon which this decision is based is that the delay, arising during the pendency of the former suit, is the delay of the Court and that *actus curiæ nemini facit injuriam.* In the present case, however, the mesne profits having been claimed in the first action, the delay is not due to the Court; but to the default of the plaintiff, who failed to establish her claim to the satisfaction of the Judge; so that the principle laid down in the case 13080, D. C. Caltura (Supreme Court Minutes, 18th August, 1 855) would seem to be applicable. In that case it was decided that where an action had been brought upon a bond within 10 years from its date and had been subsequently struck off for want of prosecution, and a second action had been afterwards brought upon the same instrument, after 10 years had elapsed from the date of the bond, but within ten years from the date of the previous action having been struck off, the second action is prescribed. And referring to the language of the Ordinance 8 of 1834 no distinction can be drawn, so far as relates to this question, between actions on bonds and actions for mesne profits. The claim for the produce taken up to the 4th June, 1869, will accordingly be prescribed; and the amount of the judgment will be reduced by one half. In other respects, the judgment will be affirmed. Each party will have to bear his own costs of appeal."

September 12.

Present Cayley, J.

Paddy tax.

C. R. Panadure, 15395. Plaintiff, who was a Government paddy renter, claimed Rs. 40, being the value of 40 bushels of paddy which he alleged were due to him as half share. The defendants pleaded that the field in question was subject to only one-fourth and not one-half duty. The plaintiff, after leading evidence to prove cultivation by defendant, filed an assessment wattoo for 1872 and closed his case. For the defence, it was contended that the action could not be maintained until it was decided what share of the produce the Government was entitled to. The Commissioner (*Morgan*) held that the onus was on the defendant (who called no evidence) and entered judgment for plaintiff as prayed for. *In appeal*, per Cayley, J.—"Set aside and case sent back for further hearing. It is incumbent upon the plaintiff to prove his claim, and for this purpose it is necessary that he should prove to what share he is, as Government paddy renter, entitled, and should also give some evidence as to the amount and value of the crop taken by the defendant."

September 19.

Present Stewart, J.

Owner of an animal liable for injury caused by it.

C. R. Kurunegala, 29285. The plaintiff sued for the recovery of Rs. 30, "being value of a bullock, belonging to plaintiff, gored and killed by a bullock belonging to defendant, on the 17th day of June, 1873." On the plaintiff closing his case, the Commissioner (*de Saram*) held as follows: "It is not proved that the defendant's bullock is of such a fierce nature as to render it unsafe to let it graze about without being secured. The plaintiff is non-suited with costs." *In appeal*, (*Ferdinands* for appellant) per Stewart, J.—"Set aside and judgment to be entered for plaintiff for Rs. 30 and costs. There was no occasion to prove that the defendant's bullock was of a fierce nature. According to the general rule of the Roman Dutch law, the owner of a brute animal is liable for the injury it has caused. See judgment of Supreme Court, October 29th, 1860, in Jaffna, C. R. 25869, Beven and Mills, part 10, page 53. See also as to Kandyan law, Austin, page 51."

Lease.

C. R. Galle, 43083. This was an action by a landlord on a lease to recover rent due thereon. The defendants pleaded that they had not been let into possession, by the interference of third parties who claimed title to the land in question. On the day of trial, the Commissioner, (*Lee*) without entering into evidence, entered judgment for plaintiff as prayed for in the following terms: "The defendants admit the entry into possession, and the fact of the defendants having been interrupted, if they were so, is no defence, though it entitles them to an action against the interrupters." *In appeal*, per Stewart, J.—"Set aside and case remanded for hearing. The defendants should have been allowed an opportunity of adducing their evidence and proving that the plaintiffs promised to make an amicable settlement of the District Court case, the issue in which would seem, according to the defendants, to comprise the dispute in the present case."

September 23.

Present Stewart, J.

Costs.

C. R. Colombo, 92553. The plaintiff sued on the 25th June, 1873, to recover Rs. 59, as balance due on shop bills. The defendant brought that sum into Court, denying his liability to pay costs on the ground that there had been no previous demand. The defendant stated on his oath that he had made a part payment in March, that when the bill was subsequently presented in June he had asked

plaintiff to wait till the end of that month; and that the plaintiff thereupon went away perfectly satisfied. In cross examination the defendant admitted that the bill had been presented in January and March. The Commissioner (*Livera*) gave judgment for plaintiff, but cast him in the entire costs of the suit. *In appeal*, (*Ondaatjie* for appellant, *Grenier* for respondent) per STEWART, J.—" Affirmed. According to the evidence of the defendant, not only was there no demand for immediate payment, but he was led by the plaintiff to believe that plaintiff would wait till the end of June. Under these circumstances, the suit having been instituted on the 25th June, before the expiration of the time agreed upon, the plaintiff was properly cast in costs."

Proctor and client.

C. R. Urugala, 1,940. The facts of the case are fully set forth in the following judgment of the Commissioner (*Power*).—" The plaintiffs in this case seek to recover the sum of fifty rupees (Rs 50) being money paid to the defendant, their proctor (*Bartholomeusz*) in case No. 1499, C. R. Urugala, for the purpose of employing an Advocate in appeal. Three witnesses have sworn to having seen this money paid to the defendant,—that this was on the 9th November, and that the defendant told his clients to come on the 13th to sign—what they do not seem to know. But it appears, however, that both of them did come to the Court on the 13th November, and on that day signed the security bond in appeal, which is in the defendant's hand writing and witnessed by him. This constitutes the case for the plaintiffs. The defendant in the first part of his examination states he cannot say if an Advocate appeared in appeal, as he has lost his books and has not them to refer to. He afterwards admits having received in all from the plaintiffs £3 3s., being £1 1s. his fee for conducting the case, and which was paid him at the time his services were engaged, and £2 2s. paid him at the time he wrote the petition of appeal. That of this money £1 1s. was his fee for writing the appeal petition, and £1 1s. the Advocate's fee. That he further paid a pleading drawer 5s. for making a copy of the case to be sent to the Advocate, and that the balance being insufficient for the Advocate's fee, he directed his client to bring him 6s. more and he would engage the services of an Advocate. That this money not having been paid him, he engaged no Advocate. The Court considers that the charge of £1 1s. for writing the petition of appeal is exorbitant. The £1 1s., first paid and accepted, was for conducting the case to its final issue. I cannot believe that £5 was paid as plaintiffs say, for they must have known that it was very much more than was necessary. But at the same

time, I consider that the defendant has retained money which he should have paid to an Advocate, and which was paid him for the purpose of engaging one. I allow the five shillings paid to the pleading drawer, though I think it is high, and enter judgment for plaintiffs for the balance of £2 2s., paid at the time of drawing the appeal petition. Judgment is entered for plaintiffs for £1 17s., or Rs. 18·50 and costs of suit." *In appeal*, per Stewart, J.—Affirmed.

September 26.

Present Stewart, J.

Damages on an agreement to marry.

C. R. Matara, 27836. This was an action instituted in June, 1873, to recover liquidated damages for breach of a notarial agreement entered into by defendant in 1864 to marry plaintiff's sister. Judgment by default having been entered, the defendant subsequently moved to re-open judgment on an affidavit which set forth that he had been unable to attend at the trial on account of ill-health, and that he had a true and honest defence on the merits. The Commissioner (*Jumeaux*) having rejected the motion, the defendant appealed. *Grenier*, for appellant.—The agreement was on the face of it of an immoral character, and could not be legally enforced, it having been stipulated that plaintiff's sister should live with defendant for six months, and that thereafter banns were to be published and the marriage was to be consummated. [That is the usual practice amongst natives of that class—Stewart, J.] But no custom could make that moral which the law distinctly declared to be immoral. Apart from this, the laches of the plaintiff, in delaying the action for nine years, should be viewed with suspicion, and it was open to the Supreme Court to afford equitable relief under the 18th clause of the Rules and Orders by allowing the defendant to enter into his defence. [I should have been inclined to do this, if defendant had explained in his affidavit the reason why he had failed to carry out his agreement. —Stewart, J.] Affirmed.

Damages.

C. R. Colombo, 92153. The plaintiff claimed Rs. 75, as value of a boundary wall which he alleged defendant had destroyed. The defendant denied the plaintiff's right to the wall, but admitted having pulled down the same and rebuilt a more substantial one. The Surveyor who had examined the premises with reference to the deeds of both parties, stated that the wall in question stood entirely within plaintiff's land. The Commissioner (*de Livera*) held as follows: "The plaintiff claims the value of his wall which was broken down by

the defendant. It appears that the wall raised in its stead is a more durable and substantial one. I therefore think it would be better for both parties to allow the wall to remain as it now stands. The case is dismissed, each party bearing his own costs." *In appeal*, (*Grenier* for appellant, *Browne* for respondent) per Stewart, J.—" Set aside and judgment entered for plaintiff for the land on which the wall stands and one rupee damages and costs. It will be seen from the answer that the defendant claimed the old wall as his property. According to the evidence of the Surveyor, the ground on which the new wall stands (the locality is the same) is the property of the plaintiff. The defendant had no right to remove the old wall, which did not stand on his property, or to build a new wall in its place without the consent of the plaintiff, the owner."

September 30.

Present Stewart, J.

Tort. Damages.

C. R. Negombo, 21958. Plaintiff sued for the recovery of certain Timber, alleged to have been illegally seized and detained by the defendant, and for damages consequent thereon. The answer justified the detention, on the ground that the plaintiff had had a jack tree cut down in so careless and negligent a manner that its fall had damaged two cocoanut trees and a large number of coffee plants on a land of which defendant was the lessee, whereby defendant had suffered a loss of Rs 48, which he claimed in reconvention. On these pleadings the case went to trial, when the Commissioner (*Dawson*) held as follows. " It is not proved that plaintiff sustained damages such as the Court can estimate, nor is it proved that plaintiff is the person liable for damage caused by the fall of the tree ; nor is it proved that defendant is the person entitled to recover such damages. The claims then for damages on both sides disappear. The defendant contends that he was justified in detaining the timber, and that he had a lien on it until his damages were paid. In the first place, he has not shown that he is the person who should hold such lien, supposing such lien existed in law. I invited defendant's Proctor to find me an authority. He has not done so. Judgment is entered for the jackwood timber described in the plaint, (its value is not proved) and costs of suit."

In appeal, Grenier, for appellant. Plaintiff, in his examination, admitted that he had purchased the tree in question *before* it was felled, and as such owner he was liable to the damage caused by the person engaged by him to fell the same, whether such person was the original owner of the tree, or any other party so employed. As to the question of law involved, the defendant, as lessee, was fully entitled to

claim in reconvention any damage suffered by him, the rule being that the actual occupier of land was the proper party to maintain an action for wrongful acts interfering with the beneficial use and enjoyment of the property, and diminishing the value of the possessory interest; owners or reversioners suing only where the injury to the property was of a permanent character, which however was not the case here. The detention of the timber was bona fide, and one of the witnesses swore that in his presence, "the defendants called on plaintiff to pay damages and remove the tree." But even assuming that the detention was improper, the Commissioner rightly held that plaintiff had proved no damage as resulting from such detention. The following cases were cited by Counsel in the course of the argument: Dobson *v.* Blackman, 9 Q. B. 991; Hosking *v.* Philips, 3 Exch: 168; Bedingfield *v.* Onslow, 3 Lev. 209; Addison, 10, 158.

Per STEWART, J.—"Set aside. The evidence already shows that considerable damage was occasioned by the falling of the tree claimed by the plaintiff upon the trees standing in the land leased by defendant. For this loss the defendant, although only a lessee, is entitled to recover. (See Addison on Wrongs, page 10.) "The actual occupier of the land is in general the proper party to maintain an action for wrongful acts of a temporary character, interfering with the beneficial use and enjoyment of the property, and diminishing the value of his possessory interest." See also 3 Lorenz, p. 209. The tree in dispute having caused damage to the property of defendant, it appears to the Supreme Court that defendant is warranted in detaining the tree, on the same principle that the proprietor of land is justified in detaining trespassing cattle until the damage they have committed has been paid. Considering the general evidence of damage, as well as the fact that only one year of defendant's lease for eight years has expired, it is decreed that judgment be entered for the plaintiff for the timber in question on the defendant being paid Rs. 35. Plaintiff to pay the costs of the defendant."

Contempt.

C. R. Point Pedro, 6370. This was an appeal against a conviction for Contempt. The defendant appeared to have been impertinent and to have questioned the justice of a decision which the Commissioner (*Drieberg*) had pronounced against him. Per STEWART, J. —"Set aside. The appellant should not have been punished forthwith. See provisions of the 107th section, Ordinance 11 of 1868, which expressly requires that a party charged with contempt shall be bailed (or in default of bail committed) until the following day."

October 21.

Present Stewart, J.

Malicious prosecution. Damages.

C. R. Colombo, 92757. The plaintiff claimed Rs. 95·75 as damages consequent on a malicious prosecution of him by the defendant on a charge of theft, which said charge after a J. P. investigation had been dismissed under instructions from the Queen's Advocate. The defendant disclaimed malice, and denied his liability to pay the amount sued for, which included sums alleged to have been paid as Proctor's fees and for refreshments for witnesses. On the day of trial, the plaintiff besides giving evidence himself called Messrs. Swan and Heyzer to prove that they had received four guineas for professional services rendered by them, and had on different occasions been provided with a carriage to attend the investigation which took place at the Customs premises before Captain Donnan. The Commissioner (*Livera*) held as follows: "In the opinion of the Court the plaintiff is not entitled to any portion of the money claimed by him. He is non-suited with costs." *In appeal*, per Stewart, J.—"Affirmed. There is no evidence at all of want of probable cause. The plaintiff in his evidence does not even distinctly state the charge against him was false."

House-rent Prescription.

C. R. Jaffna, 1280. Plaintiff, as widow, sued for the recovery of Rs. 47·25, being one-half of the rent due by defendant for nine years' use and occupation of a certain land which had belonged to her late husband. The Commissioner (*Murray*) having given judgment as prayed for in the libel, the defendant appealed. Per Stewart, J.—"Altered by the amount of judgment being reduced to Rs. 18. The plaintiff cannot recover for more than three years' use and occupation before action brought. See 8th and 11th sections of Ordinance 22 of 1871. According to the evidence, the sum agreed upon as the annual value of the produce was Rs. 7. The defendant did not possess after January 1873. Plaintiff can therefore only recover for a period of about 2 years and seven months. Parties to bear their own costs."

October 28.

Present Stewart, J.

Toll.

C. R. Matale, 29775. The judgment of the Commissioner (*Temple*) in favor of plaintiff, explains the facts of the case. "This is a case brought by the Natande Toll-keeper against the defendant, (*Fuller*) as Road-officer of Matale District, for toll claimed on transport of Government bricks, rice &c., for the road department. The question is, are these carts free from toll on the passes filed, as the goods were transported over 10 miles, i. e., 14 to Dimbulla, from the Natande

toll-station. The 19th clause of Ordinance 14 of 1867 limits the distance to 10 miles from a toll station." The defendant, in his examination, had stated as follows: "I am Road-officer of Matale district. In course of business I have had to send road materials, such as bricks, lime, tools and rice, for the support of my coolies to Dimbulla. For these carts passes were given for Natande toll, a distance of 14 miles. The papers are signed by my clerk. They are correct. The amount claimed in them is Rs. 8·42. I used formerly to pay the tolls on vouchers drawn or made out from these orders. But about 2 years ago, I was ordered to issue passes within 10 miles of my district and not to pay them at all." *In appeal*, per Stewart, J.—"Affirmed. There is no exemption in the Toll Ordinance of the nature contended for by the appellant. Vehicles employed in the construction of roads, are only exempted from toll within 10 miles of the toll station, no production of a certificate from the Superintending officer."

Damages. Boundary wall and adjacent roofs.

C. R. Colombo, 90194. The plaintiff, as owner and occupier of a house in Washers' quarters, complained that the defendant, who was residing in the adjoining premises, had three months ago, in the absence of the plaintiff at Kandy, cut a portion of plaintiff's roof and had placed a new roof on the boundary wall which separated the two houses. The prayer was that defendant be ordered to remove the said roof and pay Rs. 30 as damages with costs. The defendant answered that his roof had been supported by plaintiff's wall for 10 years and upwards, and denied that he had caused any damage as alleged. The evidence, however, went to show that defendant's roof had rested for nearly 20 years, and until the committing of the grievance complained of, on posts erected a few inches from the foundation of the wall in question over which the plaintiff's roof had overlapped. Judgment was given for plaintiff by the Commissioner (*Livera*) as follows: "there can be no doubt that defendant's roof never rested on the wall which separates the plaintiff's house from the defendant's premises, but on posts erected near its foundation. I am satisfied that defendant took advantage of plaintiff's absence and committed the damage alleged. Judgment is hereby entered up in favor of the plaintiff with costs, and the grievance complained of to be removed." Subsequently, it having been represented to the Court that the defendant had not fully carried out its decree, although he had replaced his roof on posts, the Commissioner after a personal inspection of the place made order as follows: "Defendant should lower his roof a foot and a half: if the plaintiff's rafters had not been cut by defendant, the roof could never rest so high as it does now."

In appeal, *Browne*, for appellant.—The judgment of the Court below had been satisfied by the payment of damages on account of the plaintiff's roof which had been cut, and by the removal of defendant's roof from plaintiff's wall. Defendant could do as he pleased on his own land, and the Commissioner was not justified in conceding more than had been asked for in the libel, which contained no prayer for general relief.

Grenier, for respondent.—The effect of the judgment was to place the parties in statu quo, and the defendant by raising his roof was preventing the plaintiff from replacing the cut rafters.

Per Stewart, J.—"Affirmed. The appellant is evidently seeking to take advantage of his own wrong."

Loan to wife: liability of husband.

C. R. Colombo, 93220. This was an action to recover Rs. 35·50, being value of a silk cloth and certain jewelry alleged to have been lent by plaintiff's wife to defendant's wife. The loan was denied altogether in the answer, but the Commissioner (*Livera*) held the same proved, and gave judgment for plaintiff as prayed for.

In appeal, *Brito*, for appellant. The action was not maintainable, as the articles sued for were not necessaries supplied to defendant's wife.

Grenier, for respondent. But the evidence disclosed a promise by defendant to return the goods and he was therefore liable.

Per Stewart, J.—"Affirmed. There is evidence that the defendant promised to return the articles."

December 9.

Present Stewart and Cayley, J. J.

Action for money paid. Proctor discouraging a good appeal.

C. R. Newera Eliya, 3852. The plaintiff sued the defendant for the recovery of Rs. 21, "being money paid on defendant's account and at his request on the 15th March, 1873." The case came on for trial on the 13th May, (plaintiff being represented by Mr. Proctor *E. de Waas*) when defendant, on being examined, admitted that the plaintiff had paid Mr. Proctor Bartholomeusz Rs. 21 on his (the defendant's) account in C. R. case 3646. The latter record not being forthcoming, the hearing was adjoined till the following day, when the case book was produced, and Mr. Bartholomeusz deposed as follows: "I received from plaintiff two gunieas on account of defendant with reference to a case in which I had appeared for defendant. I cannot remember the date upon which I received it." The Commissioner (*Hartshorne*) however non-suited the plaintiff, on the ground that it had not been proved that defendant had authorised or requested the plaintiff to make any payment on his account. *In appeal*, per Cayley, J.

Action for money paid. Proctor discouraging a good appeal.

—"Set aside and judgment given for plaintiff as prayed. Defendant admits that plaintiff paid Mr. Bartholomeusz twenty-one rupees (Rs. 21) on his, defendant's, account, but states that he repaid the money to plaintiff. This the defendant has failed to prove. The Supreme Court has read with surprise a letter filed in the case and written by the plaintiff's own Proctor to the Commissioner, in which the writer states that to the best of his knowledge and belief his client has no grounds for appeal. This letter (which the Proctor has been requested to explain but of which he has offered no explanation) was apparently written with the object of prejudicing the writer's own client. The Commissioner has written across the letter the remark.—"If he wishes to appeal let him do so." It should, however, be clearly understood that, if an appeal is filed in time, it requires no consent on the part of the Court below, or any recommendation on the part of the appellant's Proctor or any one else. It is filed as a matter of right, and becomes a proceeding before the Supreme Court with which the Court below has nothing further to do except to forward it in due course. The Supreme Court can only suppose that the object of the appellant's Proctor in endeavouring to stop the appeal for which his client had such good grounds, was to prevent the Supreme Court from reading the very proper remarks of the Commissioner about the removal of the connected record, for which one or other of the two parties engaged in the case appears to have been responsible."

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PART III.—DISTRICT COURTS.

January 9.

Present CREASY, C. J. and STEWART, J.

Extortion.

D. C. Kegalla, 144. The defendants (none of whom were officers of any kind) were charged with having "wilfully and corruptly demanded and received from the complainant a sum of Rs. 5, by falsely accusing him of cattle-stealing." The facts of the case are set forth in the following judgment of the District Judge (*Mainwaring*): "The accused are charged with extortion. Complainant, it appears, was seized and charged with having a stolen buffaloe in his possession ; and it is alleged that he was tied, and that the defendants extorted from his father a sum of Rs. 5 in order to get him untied. I consider that the evidence does not implicate any of the accused except the 1st. As regards the 1st, I am satisfied that he did ask for and receive money. I do not say he received Rs. 5, for I think it quite possible that the story of the extra rupee being borrowed by complainant's wife is an invention added to strengthen the case. The defence is that no complaint was made, either to the Arachchy or his son, of any money having been asked for and paid. I do not think much of this, as, in the first place, such a practice as that of extorting money from persons under arrest is notoriously a common one, and it probably never entered into any one's head to complain of it to the Arachchy ; and, in the next place, the complainant has given a very plausible reason for not doing so, viz:, that the 1st accused had promised to arrange matters." The 1st accused was accordingly found guilty and sentenced to six months' hard labor and to pay a fine of Rs. 250. *In appeal*, affirmed.

January 28.

Present CREASY, C. J. and STEWART, J.

Abuse of power

D. C. Jaffna, 589. This was a criminal prosecution, under clause 164 of Ordinance 11 of 1868, against a Police Vidahn, in that he had used the power, authority and privilege of his office to conceal an offence of cutting and wounding in J. P. case No. 583. The evidence disclosed that the accused had gone into the witness' shed, on the

day of the trial of the criminal case, and had addressed the following language to some of the complainant's witnesses: "Conceal some way in the evidence as regards the persons and the knives, and say as regards persons that you saw some persons like them, and as regards the knives that they carried something, you can't say cudgels or knives. You should say you only saw the prisoners' backs." And when one witness represented he might get into trouble by giving contradictory evidence, he was told by the Vidahn "I will be responsible." The District Judge (*Roosmalecocq*) held as follows:—

"The Court is of opinion that the clause 164 of the Administration of Justice Ordinance will hardly bear out the charge under which the prisoner is indicted. The Court believes that the construction to be put on the words of the said clause, has reference to acts done by any headman, in regard to charges to be investigated by Justices of the Peace, on affidavits made before them; and the words 'conceal any offence' apply peculiarly to such cases, and not to cases that have already been fully investigated by a J. P., and wherein parties have been already committed for trial, such as the present case; for the act complained of is the improper conduct of the prisoner, as headman, endeavouring to lead witnesses for the prosecution to give a different kind of evidence to that given by them before the J. P., which, according to the evidence, discloses almost subornation of perjury, if not altogether so.* * Therefore the Court rules that the 'concealment of an offence' under the 164th clause, is a bona fide concealment altogether of the offence, so that it should not see light if possible and be brought forward for investigation by any Justice of the Peace; and does not and cannot apply to a case like the present, where the offence has been already brought to light, fully investigated and the parties charged brought to trial. What the prisoner has done, according to the evidence, is that he tampered with evidence, so as to frustrate the ends of justice, which, in the opinion of the Court, cannot be cognizable under the 164th clause of the Administration of Justice Ordinance."

In appeal, (*Dias* for respondent) the judgment was set aside and case sent back for further hearing; and per CREASY, C. J.—"After reading the District Judge's Letter of 18th December last,* the Supreme Court is of opinion that this case comes within the clause 164 of Ordinance 11 of 1868. The objection, as taken at the trial, that the clause only applies in regard of charges to be investigated by a Justice of the Peace, is utterly untenable. But the Supreme Court had some doubt whether the defendant was proved to have used his official position in order to induce the witnesses in case 583 to conceal

* The letter was in reply to a reference made by the Supreme Court, and was to the effect that the District Judge was of opinion that the witnesses had garbled their statements in J. P. case 583, having been induced thereto by the Vidahn.

the fact of the accused parties in that case being the real criminals; but it is now evident that the witnesses were induced to garble their evidence in consequence of the influence exercised on them by the knowledge of this defendant's official position and power. The defendant was aware that they knew his official position, and he must be taken to have intended the natural consequence of his conduct. The proceeding at the trial, of moving to strike off the case, was extremely irregular. The proper course was to claim a verdict of acquittal; and the Judge should, after hearing all the evidence, have determined that matter. As it is, we shall allow the case to go back for the witnesses for the defence, if any, to be heard, and the case to be duly proceeded with."

Prescription.

D. C. Jaffna, 2450. Judgment had been entered up in 1847, in favor of plaintiff, for a sum of £8 12s. 6d., being value of a ring which defendant had borrowed from him in 1844. In 1851, writs against person and property of the debtor issued; but shortly afterwards, the plaintiff having died, they were recalled. After a delay of nearly 13 years, during which time a series of motions and notices were made and issued in the case, for the purpose of enforcing the decree, the plaintiff's widow, in February 1864, moved for and obtained a Rule Nisi on the defendant to shew cause why judgment should not be revived and writs reissued. In September 1864, the defendant attended and pleaded payment to the original creditor, whereupon he was ordered to adduce proof, but did not. No further steps were taken till 1869, when a fresh Rule issued, to which the Fiscal made a return that defendant had left the country. In November 1872, a third Rule issued, at the instance of the plaintiff's widow and heirs, which was argued in December last and made absolute with costs. *In appeal*, against this interlocutory order, *Grenier*, for the respondent, on being called upon, urged that the different Rules which had issued from time to time had saved the judgment from being prescribed. Under the 5th clause of Ordinance 22 of 1871, it would be sufficient to bar prescription if, in the event of the judgment not having been duly revived, any writ, warrant or other process of law had been issued to enforce the same. A Rule was the only other process, besides a warrant or writ, that could possibly be issued from their Courts, and that process had been availed of. SED PER CURIAM.—" Set aside. There has been no actual issue of any 'writ, warrant or process of law' to enforce the judgment, such as is required by Ordinance 22 of 1871, clause 5."

Postponement.

D. C. Trincomalie, 20831 Held that the absence of defendant's Proctor was *per se* no sufficient ground for a postponement.

Evidence.

D. C. Jaffna, 585. The defendants, who were charged with cutting and wounding, were acquitted by the District Judge, in the following terms: "The evidence as against the prisoners being, in the mind of the Court, insufficient to satisfy the Court to convict them on the charge, it behoves the Court to give the prisoners the benefit of any doubts, such doubts being reasonable; and only on such grounds are the prisoners acquitted, but not on the evidence adduced by the prisoners." *In appeal*, the judgment was set aside; and per CREASY, C. J.—"We are not satisfied with the decision in this case; and we set aside the judgment accordingly. We further, as empowered by Ordinance No. 11 of 1868, clause 22, order this prosecution to be transferred to the Supreme Court. The case can very well be tried at the Jaffna sessions which will begin in the present week. It is better that it should come on as far as possible as a *res nova*; and we therefore abstain from any comment."

Presumption of payment

D. C. Manaar, 6543. The plaintiffs, as executors, sued to recover Rs. 310, being the amount of a bond, dated 1863, in favor of their testator. The defendant produced the bond, pleading payment, without however any endorsement of cancellation or payment on the document. The District Judge *(Bailey)* held that, in the absence of any evidence on the part of the plaintiffs of non-payment, there was nothing to rebut the presumption that the debt had been discharged. *In appeal*, (*Grenier* for appellant,) the judgment was set aside and case sent back for further hearing; and per STEWART, J.—"The plaintiffs sue in this case as executors. It appears to us that the creditor being dead, it will be more satisfactory that the defendant should produce some evidence as to the payment. There is nothing at present beyond the mere examination of the defendant, which does not appear on the first or second occasion to have been taken on oath. Costs to stand over."

Absolved from the instance.

D. C. Kalutara, 25031. Plaintiff complained of an encroachment by defendant. The portion of land in dispute appeared to have formed the subject of a suit between the same parties in 1851, when, after evidence heard on both sides, the defendant had been absolved from the instance with costs. In the present case, the Judge (*Adams*) held that, "having regard to the ill-will which the then District Judge refers to in his judgment, the Court would require the strongest evidence to prove that defendant had given up his right to the land, and there is no such evidence before the Court." Plaintiff was consequently non-suited. *In appeal*, *(Dias* for appellant, *Brito* for respondent*)* per CURIAM.—"Affirmed. This is an attempt to reverse a decision of the District Court, confirmed by a decision of

the Supreme Court more than twenty years ago. It is true that the former result of the case of 1851 was judgment not expressly for defendant, but a judgment that defendant be absolved from the instance. Such judgments have sometimes been regarded as mere non-suits, where both sides had not been heard, or where, on the second trial, new and important evidence is produced. But the defendant in this case did nothing more than impugn the old judgment, and the Supreme Court thinks that the second decision against him was quite right."

January 30.

Present Creasy, C. J. and Stewart, J.

Uusufruct.

D. C. Colombo, 60341. The plaintiff claimed, by inheritance and long possession, a certain Owitte as against the defendants, who pleaded that the same was a part of an adjoining field belonging to them. After hearing much conflicting evidence on both sides, the District Judge held as follows. "I can only hold that neither party has established an exclusive and definite title to the intermediate land in this case, and can only give judgment to any party to the extent of the proof of the uses he has been in the habit of exercising on it. With respect to the plaintiff, it is proved beyond question (not that I much credit his witness) that he has been in the habit of planting beds of yams and other vegetables on the land. Agonis himself proved this; and, on the other hand, it is not proved that for doing so he gave defendants or the owners of the field any ground share or made other acknowledgment of their superior right, for the Court does not believe Agonis on the matter of payment of ground share. As respects the defendants, it is proved that the owners of the field have been in the habit of threshing their paddy on it at pleasure. It will be decreed that this Owitte is an appurtenance of the adjoining field, for the use of the owners thereof to thresh and to stack the paddy thereof thereon, and for other ordinary agricultural uses in connection with the cultivation of the said field, but subject to the right of the plaintiffs, acquired by long user, to plant beds of yams and other vegetables thereon, such plantation not being to the prejudice or hindrance of the ordinary agricultural uses above referred to by the owners of the field. Parties will bear their own costs; and if any further dispute arises as to the joint possession, they are strongly recommended to refer it to the decision of their Village Gansabe. The present suit must have cost at least three probably four times the value in cash of the land."

In appeal, the defendants urged, in their petition, that the Owitte being taken as an appurtenance of their field, plaintiff could not acquire any title by merely occasionally planting vegetables thereon; and that such planting was not an easement or other incorporeal right for

which one might prescribe as against another's land. SED PER CURIAM.—"Affirmed."

Provisional judgment.

D. C. Jaffna, 850. Held that where the Fiscal's return only shewed the service of the summons on the defendant, and there was no proof that he had been served with copies of the documents sued upon, the plaintiff was not entitled to provisional judgment.

February 4.

Present CREASY, C. J. and STEWART, J.

Prescription.

D. C. Manaar, 6592. This was an action to recover damages consequent on an alleged tort which plaintiff, in his examination, admitted defendant had been guilty of so far back as 1867. The District Judge, on the motion of defendant's Proctor, dismissed plaintiff's claim on the ground of prescription, which, however, had not been formally pleaded in the Answer. *In appeal*, (*Grenier* for respondent) per STEWART, J.—"Affirmed. The term of prescription is stated in the Answer. But in strictness, prescription should have been specifically pleaded in bar. The Supreme Court would send the case back for the plea to be formally pleaded, but that it is obvious, from the plaintiff's examination, that he is not in a position to set up any valid and binding promise to take the case out of the Prescriptive Ordinance."

Award.

D. C. Colombo, 59213. The matters in dispute between the parties, affecting the right to a certain land, were with their consent referred by the District Judge, on the 30th October, 1871, to the final arbitation of Abeyesekere Modliar whose award was to be made on or before the 1st of December following. The award, as tendered to the Court, was dated the 16th April, 1872; and on the plaintiff, in whose favor the arbitrator had decided, moving that the award be made a rule of Court, the defendant's Proctor objected to the reception of the document, on the grounds that the award was not on stamp and that it had been made long after the fixed date. The Judge, however, ruled that the dating and filing of the award as committed to writing had nothing to do, necessarily, with the date of making and publication, which might have been previously by oral delivery in the hearing of the parties; and that, in the absence of any evidence, the Court would not presume that the arbitrator had failed in his duty. The want of stamp was held not to affect the validity of the award; and "it was a complete answer to the defect that the winning party sued as a pauper."

In appeal, (*Grenier* for appellant) per STEWART, J.—"Set aside, and the motion of the plaintiff, that the award be made a rule of Court, disallowed. The award at the foot bears date 16th April, and is accompanied by a letter of the same date. There is no suggestion whatever in the proceedings that the award was made before the 1st December. It appears to the Supreme Court that it would be applying a very forced construction to hold that it was made months before its date. Costs to stand over."

February 6.

Present CREASY, C. J. and STEWART, J.

Breaking bulk.

D. C. Batticaloa, $\frac{69}{16907}$.—This was a suit, at the instance of the Crown, to recover a sum of Rs. 500, being the penalty awarded, by the Collector of Customs for the Eastern Province, against the defendant for a breach of clause 20 of Ordinance 17 of 1869. The answer put in issue the legality of the fine; but it having been proved at the trial, that the defendant had landed 12 cases of brandy at night, without the usual authority from the Customs officials, the Court below gave judgment for plaintiff. *In appeal, Dias,* for the appellant, contended that a distinction was very clearly drawn, in the 20th clause of the Ordinance, between "unloading" and "breaking bulk," the penalty for the former being a forfeiture of the goods and for the latter the imposition of a fine not exceeding £100. In this case, even accepting the evidence as reliable, there had been only an unloading, and the fine of £50 could not be recovered. It would have been different, if the defendant had opened the cases and brought only part of the brandy to shore. The judgment was, however, *affirmed,* the Supreme Court holding that the act complained of came within the meaning of the term "breaking bulk."

Prescription.

D. C. Trincomalie, 20826. The plaintiff, as executor of the estate of her late husband, claimed a certain house and land, on a bill of sale dated 19th April, 1859, in favor of the testator. The defendant relied mainly on possession and questioned plaintiff's title. Defendant in her examination stated: "M and K occupied the out-houses. I do not get the rent. Plaintiff would not let them pay the rent to me, and she took it. That was 4 years ago." It was proved that, ever since plaintiff's husband's purchase in 1859, he had permitted the defendant to occupy the premises without payment of rent, probably intending to make over the property ultimately to him; and that there had been no dispute till within a year ago. The District Judge (*Moir*) held that defendant was entitled to judgment, by reason of his adverse and prescriptive possession, and accordingly dismissed plaintiff's claim with costs. *In appeal,* (the *Queen's Advocate, Grenier*

with him, for appellant, and *Dias* for respondent,) per Creasy, C. J. —"Set aside, and judgment to be given to the plaintiff for possession of the premises mentioned in the libel. We are very unwilling to interfere with the judgment of District Courts on questions of facts, but it appears to us that the learned District Judge has overlooked the defendant's admission, that the plaintiff interfered and took the rents four years before the trial, i. e., in 1868. That clearly prevented the completion of the defendant's prescriptive title ; even supposing that any title by usucapio was then growing up in his favor ; and even this seems to us to be at least very doubtful."

Coals.

D. C. Galle, 33269. This was an action by Delmege, Reid and Co. against Thompson, Vinay and Co. and another, to recover a sum of Rs. 1400, being the value of a certain quantity of coal which had been collected by the third defendant, on the sea beach adjoining his land, and sold by him to the co-defendants, who were about to remove the same when they were prevented by an Injunction. The coal in question was admitted to be such as had fallen overboard when being unladen from the ship or the lighters, and had been wasked on shore or gathered at sea ; but the evidence left some doubt as to whether the entire quantity was the property of the plaintiffs or formed the accumulation of pickings partly belonging to them and partly to other mercantile and shipping importers at Galle. The District Judge (*De Saram*) held that he was satisfied the coal belonged to plaintiffs, as the bulk of it was North Country coal which plaintiffs had been landing within a month or so of the date of the Injunction ; and that, as they had not abandoned, although they had lost, their property, they were entitled to judgment.

In appeal, *Dias*, (*Ferdinands* with him) for appellants, argued at some length on the question of identity, laying particular stress on the following admission by one of the plaintiffs : "all the coal *visible* (they were in heaps) with the exception of perhaps one or two lumps, were undoubtedly our's." Plaintiffs being declared entitled to the whole, was no reason to prevent the P. and O. Company or any other coal importers at Galle suing the 3rd defendant, over and over again, in respect of portions of the same quantity and recovering a proportionate value, the same kind of presumption as to ownership being available to them as had been admitted in favor of plaintiffs. The *Queen's Advocate*, for respondent, was not called upon in reply. Per Creasy, C. J.—"Affirmed. There is no pretence for thinking that the owner of coals loses his property in them by their accidental fall into the water; and by other persons picking them up and trying to appropriate them. The only difficulty in the case lay in the identification of the coal as plaintiffs' coal, but the Supreme Court thinks that, under all the circumstances of the case, and according to

the maxim that *omnia contra spoliatorem præsumuntur*, there is sufficient evidence to sustain the verdict."

Construction of a Will.

D. C. Colombo, 61207. Philipoe Rodrigo Pedroepulle and his wife Maria Johanna, by a Joint Will, dated 24th August, 1839, which was duly proved and admitted to probate in December 1839, in D. C. Colombo, 27979, among other things, provided :—

(8.)—" They further declared to bequeath to their aforesaid son Pedro Francisco Rodrigopulle, the Bankshall situated at Bankshall Street."

(9.)—" To their aforesaid son Andre Rodrigopulle, the large house at Sea Street."

(10.)—To their aforesaid son Soose Rodrigopulle, the house at Sea Street adjoining the one above stated."

(11.)—" To the aforesaid Andre Rodrigopulle the two in one annexed houses in which the Testator and Testatrix reside, and situated at Checkoe Street, with this express condition that the said lands shall not be liable to be sold, mortgaged or otherwise alienated by their said sons, but that the survivor shall enjoy the profits arising from the said lands during his or her life, defraying therefrom the expenses for the repairs of the said premises and for the maintenance of the three children: and that after his or her death, the said premises shall be taken possession of by their children respectively and after them by their descendants."

The husband died in November 1839, and the present defendant purchased in 1854 the two houses described in clauses 9 and 10 from Soose and the representative of Andre who had previously died unmarried and intestate ; the widow, as executrix under the Will, joining in both conveyances. It was admitted at the trial that Maria Rodrigo, on whose behalf as the sole surviving heir of Andre and Soose the plaintiff, as guardian, sued, was the sole daughter of Soose ; and that defendant had remained in uninterrupted possession of the houses since the date of his purchase. The point in the case was, whether the *Fidei Commissum* created in the 11th clause was intended to apply only to the premises specially devised therein or also to those devised by the 9th and 10th clauses. The Court below, in an able judgment, held " that, although at first glance the entail would appear to be attached only to the property specially mentioned in the 11th clause, this was not the intention of the will, and that it was intended to entail *all* the landed property." Judgment was accordingly entered for plaintiff for the two houses in question with costs of suit, and an order was made that defendant should file an account of the rents and profits received by him since the date of his purchase.

In appeal, Kelly for appellant.—The decree directs an account of the rents and profits to be furnished by the defendant from the date of the purchase, 18 years ago. But under any view of the case, the infant

plaintiff's title could not commence in possession before the death of the surviving testatrix, which was only two years ago. The testatrix joined in both sales to the defendant: her interest, therefore, as tenant for life was bound, and the account should only be directed from her death. Assuming the *fidei commissum* to cover the property in dispute, the language used is that (after the death of the surviving testator) "the said premises shall be taken possession of by their aforesaid children *respectively*, and after them by their descendants." There is no joint gift to the three sons and their descendants, nothing that would entitle the survivors and survivor of the three sons to the enjoyment of a deceased brother's share. The word *respectively* means the first described property to the son mentioned in connection with it and his descendants after him, the secondly described property to the second son and his descendants, and so forth. In other words, three separate entails. A contrary construction would lead to absurd results. Suppose that after the death of the two testators, one son, Andre, died without descendants, leaving him surviving another son Pedro, who had no descendants living, and the third son Soose having one child living. What would become of Andre's property? There are no words to give Pedru or Soose any interest in it. Is it then to shift over to the child of Soose at once, although Soose's own share would not come to that child till Soose's death? Again, suppose that Pedro died leaving one child, Andre died leaving two children, and Soose died leaving three children. Was Pedro's child to take his father's property or one sixth of the joint properties? Surely the proper construction must be, that the children respectively are to take what their parents took before them. In short, the word *respectively* governs the whole clause, and there are three separate gifts. So that, when Andre died without descendants (for a neice is not the descendant of her uncle) the property given to him fell into the general residue, and passed by the residuary devise to the widow, who joined in the conveyance to the defendant. Hence, even if the *fidei commissum* be not restricted, the defendant has a good title to Andre's property. A Joint Will is an inaccurate though convenient expression. A Will cannot take effect as a *Will* during the lifetime of the testator. He may no doubt make a Will and *contract* not to revoke it. But in sound legal principle, the so-called Joint Will is in effect two separate Wills. The Will of the testator who dies first takes effect as his Will from the time of his death. When that happens, the other testator who survives is put to his election, either to abide by the dispositions contained in the Will of the deceased and accept the benefits conferred on him by it, or to reject it altogether. If he accepts, he impliedly agrees to abide by the dispositions of property contained in the Will of the 1st. testator. In other words, he *contracts* not to revoke his own Will, which is the same document. But a Will, coupled with a contract not to revoke

it, cannot transfer property during the testator's life. It can operate during such period as a *contract* only, not as a *conveyance*. Hence the breach of it must give rise to an action for damages against the 2nd testator or his estate, not a remedy by ejectment against an innocent purchaser who has paid his money. It is a right *in personam* not a right *in rem*. Consequently, supposing the *fidei commissum* to cover all the property, still the defendant has a right to retain the widow's half, and the plaintiff's right must be limited to the 1st testator's half of the property given to Soose, leaving her remedy as to the widow's half against the property of the widow. But the *fidei commissum* is limited to the 11th clause, and does not extend to the gifts contained in the 8th, 9th and 10th clauses; because these entails are burdens which are not to be imposed on property unless most clearly intended. Burge's Foreign and Col. Law, vol. II, p. 92. It must be presumed that the Notary knew what he was about. The arrangement of clauses is part of the Will, and in form he has confined the *fidei commissum* to the property comprised in the 11th clause. It is customary to entail the residential property, and reasonable also to preserve the family associations connected with it, without tying up the other property for four generations.

Dias, for the respondent, was heard only as to whether the *fidei commissum* created by the 11th clause of the Will did not apply to the three previous clauses. He submitted that all the four clauses should be read as one clause, as that was the manifest intention of the testators. [The words "they further declared to bequeath" occur only in the 8th clause, and are not repeated in the 9th, 10th, and 11th clauses, which only designate the persons to take and the thing to be taken.—C. J.] In all the other devising clauses the words were repeated, clearly showing that those clauses were intended to be complete in themselves, without being qualified by anything which went before or after them. If the Notary correctly understood his work, he would have dealt with the four clauses as one; but the intention of the testators being clear, the Court was bound so to construe the Will as to give effect to that intention. In support of the argument of intention, he would refer to the 11th clause of the Will which gave the survivor the rents and profits of the lands for a life interest, and required him to repair the premises and maintain the children who were to take possession after the death of the survivor. According to the appellant's construction of the 11th clause, the survivor's life interest would only apply to the property bequeathed by that clause, and the repairs and maintenance of the children would also fall on that property; but there was no reason why the devisees under the 8th, 9th and 10 clauses should be supported from the rents of the property devised by the 11th clause, any more than the survivor's life interest should be confined to it. The concluding words of the 11th clause, which directed that "the said premises shall be taken possession of

by their children," would, according to the appellant's contention, be meaningless. The words "premises" and "children" clearly meant the several properties devised by all the four clauses, and the devisees referred to in those clauses. There was abundant evidence to be gathered from other parts of the Will as to the intention of the testators, who seemed to have determined to put all their real property under the bond of *fidei commissum.* The only other devise in the Will, though it was in favor of a stranger, was also subjected to the same restriction.

Per Creasy, C. J.—" Affirmed. The so-called 11th clause is meaningless, unless the Supreme Court goes back to the beginning of the so-called 8th clause to get the verb that gives it meaning. The word 'bequeath' in the 8th clause governs all the subsequent portion to the end of the subject matter of the so-called 11th clause. They must be all read together as really one clause, and then the words of limitation at the end must be taken to affect all the properties. The calculation of profits must be taken only from the date of the widow's death."

February 11.

Present Creasy, C. J. and Stewart, J.

Coffee contract.

D. C. Colombo, 60744. The Libel was to the effect that the defendant, on the 11th of October, 1871, contracted to sell to plaintiffs 3000 bushels of Wallarambe Estate first parchment coffee, according to sample, at the rate of Rs. 6·25 per bushel, and to deliver the full quantity in good marketable condition at the stores of the plaintiffs, on or before the 31st of December ; that the defendant delivered only 838¾ bushels, and failed to supply the balance 2161¼ bushels to plaintiffs' damage of Rs 810.46. The defendant, in his Answer, alleged 'that he agreed to sell to the plaintiffs 3000 bushels of Wallarambe parchment coffee, which was then considered by both parties as the probable crop of the said estate for the said season ; that the whole crop of the said season, however, did not exceed 1300 bushels, which he tendered to the plaintiffs who only accepted 838¾ bushels and rejected the rest on the ground that it was not agreeable to sample ; and that, under the circumstances above stated, he was not liable in damages.' The Replication stated 'that the agreement was that the defendant should sell and plaintiffs purchase a defined quantity of coffee, irrespective of the out-turn of any particular crop ; that the plaintiffs deny that the crop was estimated at 3000 bushels or that it did not exceed 1300 bushels, or that the defendants tendered more than 838¾ bushels in terms of his contract.' On these pleadings, the case came on for trial ; and the learned District Judge (*Berwick*) delivered the following judgment.

"This is an action for non-fulfilment of a contract, the only clear and undisputed terms of which are those in the Libel, viz: 'to sell to the plaintiff 3,000 bushels of Wallarambe Estate first parchment coffee, according to sample, at the rate of 12s. 6d. per bushel.' At the time the contract was made in October 1871, no human being could tell whether the then growing crop of that estate would yield either that quantity or that quality of coffee. The crop was still on the trees and immature, subject to all the vicissitudes which actually resulted (according to the evidence) in the coffee crops of that year throughout the country being 'generally short.' That the parties had in contemplation the *then growing crop of that estate only*, is evident from the terms of document B, and the date fixed for delivery, viz: '31st December next.' The Court finds that there is no evidence, and no reason to believe, that the out-turn of that crop exceeded 1,300 bushels, nor that there were more than 838¾ bushels equal to the so-called sample; and clearly the defendant cannot be compelled to sell that which never has had, and never can have, any existence. Then, can he be compelled to pay damages when none have been expressly agreed upon, for not carrying out his contract to sell, when the article contracted to be sold is proved not to have been in existence, though *in posse*, at the time of the contract, and to have been impossible of being subsequently brought into existence? The answer to this question (supposing that the engagement of the defendant reasonably construed was clearly to sell full 3,000 bushels of Wallarambe coffee, and not merely so much as Wallarambe should produce up to that quantity) might depend on whether the contracting purchaser was in any degree misled by the contracting seller making any erroneous representation, either wilfully or innocently, that the article to that quantity was already in existence, or could and would be certainly produced. If there were an erroneous statement, and if nevertheless the former was not and could not by any possibility be deceived about it, and if there was no intention to deceive, and both parties knew perfectly well that the production of the article to the certain quantity and of the certain quality contracted to be sold, the growth of a particular estate only, depended entirely on the chance of the weather maturing it during the succeeding two months, and was entirely beyond all human control, it is difficult to fix on any principle upon which the contracting purchaser could be said to suffer, or to be entitled to damages for non-delivery of what he himself knew not to be in existence as "3,000 bushels of first parchment coffee" at the time of the agreement, and knew there were only certain chances of being in existence as such at the time of maturity —chances he knew to be entirely beyond the seller's good faith or power of control. Such a claim would stand on quite a different footing from a claim founded on an express bond by the contracting seller to pay a certain *fixed* sum as *liquidated* damages for any short-

coming in the quantity or quality of the article he undertook to supply, which uncertain circumstances in the contemplation of both parties might make it impossible for him to produce, manufacture, or purchase:—the *express* agreement to pay such damages shewing that the contract was expressly based on the possible contingency of its principal execution becoming difficult or impossible, and that they were to be paid notwithstanding. It is of importance, then, to determine whether the plaintiff was in any respect misled by the defendant, either accidentally or designedly, before deciding whether a claim for damages which have not been previously stipulated for can be maintained. And it is necessary to determine, whether it was within the intention of the contract that the contracting seller should pay damages if the Wallarambe Estate should fail to produce 3,000 bushels of a certain quality and whether the Estate did produce more of that quality than was tendered, and the defendant, therefore, broke his promise to the plaintiffs. The Court holds that there is no reason to suppose that the defendant has, in any respect, acted otherwise than with good faith. It has been already found that the crop produced only 1,300 bushels, and only 838¾ up to sample. It has not been suggested that he sold any of the out-turn at a better price to any body else than plaintiffs, to do which would be the only advantage he could possibly get by not letting the plaintiffs have it, if it really was produced; and it has not been suggested that he deceived them by a wilfully exaggerated estimate of the probable produce of the Estate. Neither the plaintiffs nor any one on their behalf took the trouble to test the reasonableness of his estimate by inspection, and the defendant himself had no interest whatever to over-estimate it, for he was to get no advances on it from the plaintiffs, and only got the value of his coffee at the agreed on price, from time to time, as he delivered it. It cannot be said that the defendant's estimate in October was a bad or exaggerated estimate, for there is no evidence that the crop which would represent that estimate was not on the trees at the time he made it. Nor does the Court think that there was any representation in fact that the Estate would produce '3,000 bushels first parchment coffee.' Of course if a man undertakes to sell the two chestnut horses now in such and such a stable, he virtually represents that such horses are in such a stable; but the case of a future crop, the quality and quantity of which are necessarily undetermined, is of quite a different nature, and the purchaser of the crop knows as well as the seller, that the quality and quantity are really indeterminate. The Court, therefore, cannot look on it as a statement of fact, or in any other light than a statement of estimate, and no doubt it was so intended on both sides. If there was no representation still less was there a guarantee. The question principally argued was, whether it was the intention of the parties that the contracting seller

should guarantee 3,000 bushels of a certain quality to be yielded by the Wallarambe Estate: and the defence particularly relied on was, that the quantity of three thousand bushels was not intended to be guaranteed, but only mentioned as the then probable yield of the estate, and that the so-called sample was only shewn as an example of the ordinary production of the estate. There is nothing whatever in the evidence, either documentary or oral, opposed to this view; and to take any other would be to presume that both parties were silly enough to depend, not speculatively, but as a matter of certainty, on circumstances utterly beyond human control. If there was any consideration to the defendant for such a rash guarantee, it must be found in the supposition that the price per bushel (12*s.* 6*d.*) was considered high, and so high as to be worth the risk of the guarantee; but this involves the idea that the plaintiffs had run some reciprocal risk in agreeing to pay so high a price, and some corresponding speculation founded on the October estimate, without the common precaution of satisfying themselves of the reasonableness of that estimate. Before, therefore, the plaintiff's case can be adopted, we must either presume an unreasonable contract, in which the defendant for no additional consideration or advantage whatever—that is to say for no higher price per bushel than he could have got elsewhere without it,—gave a wild promise and unreciprocal claim to the plaintiffs; or that they incurred some corresponding risk, or chance of disadvantage, of which not a hint has transpired, and this on the mere faith of the defendant's unchecked estimate. Surely neither of these is very probable. In the absence, then, of the plainest proof that the meaning of parties was that the defendant should covenant for what he could not possibly foretell or influence, namely that the *Wallarambe* estate should produce 3,000 bushels of a certain quality (for it is perfectly clear that he was not to deliver nor the plaintiffs bound to accept any other than Wallarambe Estate coffee) the only reasonable conclusion is that there was no such intention. Such a covenant would have provided in express terms that if the estate failed to produce a certain quantity and quality of coffee that season, defendant would pay the plaintiff a certain sum of money calculated according to the deficiency, or otherwise, as the parties chose to determine. There was nothing of this kind, and in its absence the Court cannot presume such an unreasonable, unlikely, and one-sided, not to say gratuitously foolish, contract as plaintiffs contend for to have been really in the intention of the parties. The defendant has fulfilled the terms of the contract so far as these are proved, both to the extent of his ability and to the extent of its intention. Plaintiffs will be nonsuited with costs."

"One will consult with advantage in a case of this kind Pothier's Traité de Contrat de Vente, Premiere Partie, Art iv.—T. B."

In appeal, *Dias*, for the respondent, on being called upon to support the judgment, contended that the contract in question should be so construed as to give effect to the intention of the parties. The defen-

dant was the proprietor of a coffee estate called Wallarambe. He entered into the contruct with respect to the coffee of that estate and of no other. To deliver the coffee of any other estate would be a breach of the contract. It was true that a certain quantity was stipulated for by him, but it could not be supposed that he stipulated for anything beyond that which the estate would yield. The plaintiffs must be taken to have known that crops often fell short of the estimate. They were large dealers in coffee, and if they wished that defendant should pay damages for any deficiency the contract should have been so worded. It was not even suggested in this case, that the defendant had misappropriated the crop of the season in question. The limitation as to the time of delivery clearly shewed that the crop of a particular season was the subject matter of the contract; and the District Judge, both legally and equitably, found that the defendant, having acted bona fide, was not bound to do an impossibility, viz., deliver coffee which his estate had not yielded.

Ferdinands, for appellant, was not heard.

Per CREASY, C. J.—" Set aside and judgment to be entered for plaintiffs for Rs. 810·46 and costs. We do not differ from the learned District Judge as to his opinion of the legal consequences of such a contract as he considers to have existed between the plaintiff and the defendant. But we differ from him as to the nature of the contract. He considers the contract to have applied to the crop growing on the Wallarambe Estate at the date of the contract and to that growing crop only. If that were so, the defendant would certainly not be liable for short delivery caused by the failure to a great extent of the crop, in consequence of an unusual rainfall, between the date of the contract and the time for picking the crop. This would come within the principle of the case put by Pothier. (Pothier on Contracts, vol. 1, p. 76, Evans' translation, of which we cite so much as applies to the case.) 'If I should oblige myself to deliver to a wine merchant all the wine that I shall grow the ensuing year, but my wines are frozen so that no wine can be got from them, the obligation fails for want of an object.' The maxim *actus Dei nemini facit injuriam* would apply, according to which it was held in 1. Report 97 that where a lessee covenants to leave a wood in as good plight as the wood was in at the time of making the lease, and afterwards the trees are blown down by tempest, he is discharged from his covenant. Where the covenant is limited to a particular growing crop, if the purchaser desires the vendor to be responsible for non-delivery of a specified number of bushels, he should require a covenant like that of the old Roman Law. *Venditorem præstiturum si quid vi vel tempestate factum esset.* See Voet ad Pandectas, xviii, tit. 1, 13. But we must examine carefully the real contract between the parties in the present case. It is to be found in the written document dated 11th December, 1871, made and signed by Mr. John, acting for the defendant. This note

when first tendered in evidence was rejected, for want of proof of Mr. John's authority from defendant; but subsequently, on proof being given that the defendant adopted and acted on it, it became good evidence against him, and it is rightly treated as evidence in the judgment of the District Court. That note is as follows:—

Contract No. 4,110.

Colombo, October 11, 1871.

Messrs. Mackwoods and Co., Colombo.

Dear Sirs,—I beg to confirm sale to you for account O. L. Marikar and—de Silva, Esquires, of 3000 (three thousand) bushels Wallarambe Estate first Parchment Coffee, at 12s 6d. (twelve shillings and six pence) per bushel, as per sample handed to you. For delivery, in good merchantable condition, at your Stores, by 31st December next.

Yours faithfully,

(Signed) G. John.'

"That memorandum certainly says nothing about the coffee contracted for being the coffee then growing on the Wallarambe Estate. If the defendant (or those acting for him) meant so to limit his obligation, it would have been very easy to insert words to that effect. But that has not been done, and '*contra eum, qui legem dicere potuit, apertius est facienda interpretatio*.' The learned District Judge thinks that the restriction to the then growing crop is proved by the time fixed for delivery, i. e., 31st December 1871, and by the parol proof that the period between the date of the contract and the last mentioned date, is the period during which the then growing crop would, in the natural course of things, have ripened, and would have been gathered. We cannot agree with this. Defendant may very naturally have expected to fulfil his contract, mainly or entirely, by means of the then growing crop; but the question is not what he expected or hoped for, but 'what must his words have naturally led the other party to expect?' It seems clear to us that the natural effect of his words must have been to create an expectation of a delivery of the specified quantity of Wallarambe coffee, without such delivery being dependent on the yield of the trees during the then current season. The stipulations as to the quality of the coffee, do not touch the point in issue. The contract would have been fulfilled by the delivery of the specified amount of Wallarambe coffee of the specified quality, whether that coffee, or any portion of it, was or was not part of the crop of a preceding year. Not only has the defendant failed to shew the impossibility of obtaining and supplying such Wallarambe coffee (as to the effect of which proof, if given, it is not necessary for us here to pronounce an opinion,) but there is evidence which leads to the belief that Wallarambe coffee was an article known in the market and procurable in the market, independently of the yield of that particular year. We allude to the defendant's answer to a question by the Court, in which he says 'there was no more

Wallarambe coffee on the Estate when I wrote that letter (i. e the letter of 26th December, 1871,) neither in the store nor on the trees, but there may have been either in Kandy or in Colombo.' And in another answer to the Court, he says—'when the agreement was made, I did shew a sample to the plaintiffs, but it was only shewn as a sample of the ordinary production of the Estate.' It is exactly out of this, out of *the ordinary production of the Estate*, that the plaintiffs had a right to look for their supply, and not out of the yield of one crop only. It is no answer in such a case to suggest, or even to prove, that the article which the vendee demands was in the dominion of a third person. Grotius, book iii, c. i, sect. xxxix, points out the law that 'an obligation can arise from all matters and acts, and extends even over things of which the dominion is vested in a third person, because these things are attainable." Pothier, vol. 1, p. 78, is still more explicit. 'Even things which do not belong to the debtor but to another person may be the object of an obligation, as he is thereby obliged to purchase or otherwise procure them, in order to fulfill his engagement; and if the real owner will not part with them, the debtor cannot insist that he is discharged from his obligation under pretext that no man can be obliged to perform an impossibility. For this excuse is only valid in case of an absolute impossibility: but where the thing is possible in itself, the obligation subsists notwithstanding that it is beyond the means of the person obliged to accomplish it; and he is answerable for the damage occasioned by the non-performance of his engagement. The thing being possible in its nature, is sufficient to induce the creditor to rely upon the performance of the promise. The fault is imputable to the debtor, for not having duly examined whether it was in his power to accomplish what he promised or not.'"

Arbitration.

D. C. Colombo, 54428. This case, which involved a question of title to several lands, had been referred, by an order of Court dated 4th September, 1871, to the final arbitration of Abraham de Alwis Mohandram. On plaintiff's proctor filing the award and moving that judgment be entered up in terms thereof, the defendant's proctor applied that the arbitrator be noticed to file the notes of evidence taken by him, preparatory to cause being shewn against the motion. The application was rejected in the following terms: "It is not shewn nor suggested that the arbitrator has done anything wrong, and the object of the defendant is evidently to fish for something wrong. The Court cannot encourage such fisheries." The award was thereupon adopted and made a rule of Court." *In appeal*, the *Queen's Advocate*, for appellant, contended that the arbitrator was bound, under the provisions of the 23rd clause of Ordinance 15 of 1866, to send in with his award all the 'proceedings, depositions and exhibits' which had come into his possession. The application of

the appellant had, therefore, been reasonable and should have been granted. The judgment of the Court below was, however, affirmed; the Chief Justice remarking that, in the absence of any suggestion as to fraud or misrepresentation on the part of the arbitrator, such as might prejudice the defendants, the appeal should be regarded as frivolous and vexatious.

Priority of claims.

D. C. Galle, 32341. This was an appeal on an interlocutory order having reference to a question of priority between two claimants to the proceeds of an execution sale. Verappa Chetty, the appellant, claimed on a special mortgage bond of the 4th August 1871, on which he obtained judgment on the 6th June, 1872; and Bell, the other claimant, held a judgment of 16th February, 1872, on a promissory note dated 20th November, 1871. The bond was impugned as fraudulent and void for want of consideration; and the Judge, (*Gillman*) having gone into evidence adduced in support of the document, held Verappa Chetty's claim good only to a limited extent and cast him in costs. *In appeal*, (*Queen's Advocate* for appellant, *Kelly* for respondent) the order was set aside; and per Stewart, J.—"Having regard to the nature of the contest between the two claimants, as to whether the mortgage bond in favor of the appellant was given fraudulently and without consideration, it appears to us that the question should not have been summarily disposed of. The party impeaching the bond should be referred to his action, reasonable time being given for instituting proceedings. Costs to stand over."

March 19.

Present Creasy, C. J.

Conflicting evidence.

D. C. Kalutara, 7952. The defendants had been convicted by the District Judge (*Jayetileke*) on a charge of Riot and Assault. In appeal, (*Kelly* for appellants) the conviction and sentence were affirmed in the following terms: "This is a case of conflicting evidence which has been plainly investigated and adjudicated on with care and attention by a District Judge of much experience and ability."

April 2.

Present Creasy, C. J.

Prosecution transferred.

D. C. Kegalla, 150. This was an appeal against the acquittal by the District Judge (*Mainwaring*) of two defendants who were charged with cattle stealing. Per Creasy, C. J.—"Set aside and case sent back for a new trial. Three witnesses for the prosecution, who have not been in any way contradicted, prove that the prisoners, near about the time when the loss of the animal was discovered, were seen driving it away. They said that they had purchased it. No proof

of that assertion has been produced. The District Judge appears to have acquitted these prisoners on a suggestion by their Proctor, that the charge had been got up at the instigation of the 1st witness. To give effect to suggestions of this kind, made by the Proctors of the accused persons, without any support from the evidence, would be to offer impunity to criminals. On the application of the Deputy Queen's Advocate, (who certified that there was reasonable ground of appeal) this prosecution is transferred to the District Court of Kurunegala."

April 22.

Present CREASY, C. J.

Opinion of Assessors upheld in appeal.

D. C. Batticaloa, 1615. The District Judge (*Worthington*) had convicted all three defendants on a criminal charge, although the Assessors associated with him at the trial had declared it to be their opinion that the evidence was not conclusive against the 3rd accused. *In appeal*, the judgment was affirmed as to the 1st and 2nd defendants and set aside as to the 3rd; and per CREASY, C. J.—"I have read all these papers, including the proceedings before the Justice of the Peace. I feel satisfied that there has been an enormous mass of lying and exaggeration on the part of the complainant and complainant's witnesses. I agree with the three Assessors in thinking the circumstance very suspicious that this defendant's name was not mentioned to the Vanyar. The District Judge says that the Vanyar was assisting the assaulting party. I cannot find proof of this. Undoubtedly it very often happens in this Island that criminal charges, with a solid substratum of truth, are overlaid by the accusers with a monstrous heap of lies: and it is the duty of Courts, if they can clearly find their way to such truth, to convict on it and not to reject lies and truth in the lump. But I cannot see clearly the truth of any part of the complainant's charge so far as regards this appellant, bearing in mind the very important fact that he is proved to be a man of good character. Under all the circumstances, I agree with the three Assessors in thinking the case against him too doubtful for a conviction."

May 2.

Present STEWART, J.

Contempt.

D. C. Batticaloa, 17263. A witness in this case had been found guilty of Contempt for giving false evidence. *In appeal*, the conviction and sentence were set aside; and per STEWART, J.—"The contradictions between the appellant's evidence and the statements of the defendant are insufficient to establish that the testimony of the appellant was false. No other witness was examined: consequently there was no proof to negative the testimony of the appellant; the

defendant having only been examined as a party and not as a witness on oath. It is not alleged, nor does it appear, that the appellant prevaricated in giving evidence so as to render him liable to be punished for Contempt. The Supreme Court would also point out that, even admitting the appellant's evidence to be untrue, the supposed falsity scarcely was of so flagrant and audacious a character as to call for summary proceedings. See judgment of the Supreme Court in C. R. Colombo, 43832, September 17, 1867. If the evidence be false, the proper course to follow is to prosecute in the usual way for Perjury."

June 3.

Present Creasy, C. J. and Stewart, J.

Demurrer.

D. C. Batticaloa, 17230. The libel set forth that the plaintiff had cultivated certain paddy fields at a large expense of labor and capital, had raised a crop, and had thrashed and stored it; that thereafter defendant had, as Administrator, removed the same by an order of Court illegally obtained. The defendant demurred on the ground that plaintiff neither disclosed the nature of his right and title nor specified the date of the alleged trespass. The Court ruled that the libel was "sufficient to shew plaintiff's claim as a cultivator only, and not as lord of the soil," and that the demurrer was unnecessary "in that explanation of the libel, if required, could have been equally well secured by a viva voce examination of the plaintiff." *In appeal*, (*Grenier* for respondent) the judgment was affirmed.

Demurrer.

D. C. Batticaloa, 17206. This was an action founded on the breach of a written agreement which recited that defendant, having undertaken to pay a balance debt due to plaintiffs by a third party on a writ of execution, acknowledged himself indebted to them in Rs. 450, for which sum he stipulated to deliver to the plaintiffs three elephants within three months. The defendant demurred to the libel, on the ground that the agreement sued upon disclosed no valid consideration. The Judge held that the document in question was nothing more than a mere promise to pay, for which no consideration was required to be set out, and rejected the demurrer. *In appeal*, (*Dias* for appellant, *Ferdinands* for respondent) per Creasy, C. J.—"The Supreme Court thinks that the pleadings on the face of them import sufficient consideration."

Caveat against marriage.

D. C. Galle, 124. A Marriage Registrar had applied to the District Court, under the 13th clause of Ordinance 13 of 1863, to adjudicate on a caveat which had been entered against a proposed marriage, on the ground that the bridegroom had previously promised to marry

opponent and had a child by her whom he refused to maintain. The Judge (*Gillman*) made the following order: "Nono (the opponent) is referred to her action for the breach of promise and for specific performance. The libel to be filed within a week from this date. The proposed marriage not to be registered by the Registrar till decision of the said action." *In appeal, Dias* for appellant.—The breach of a promise to marry, though it might entitle the aggrieved party to damages, could be no bar to a subsequent marriage. The Ordinance specified the different grounds of objection on which a certificate could be opposed, none of which, however, were set forth in the caveat. The learned Judge had clearly misapprehended the present state of the law on marriage contracts, the Roman Dutch law* as to suits compelling marriages having been specially repealed by Ordinance 6 of 1847. Per Stewart, J.—"Set aside, and it is ordered that the caveat be set aside and that the certificate required do issue. Suits to compel marriages are expressly done away with by the 30th clause of Ordinance 6 of 1847."

June 10.

Present Creasy, C. J. and Stewart, J.

Rights of a mortgagee.

D. C. Kalutara, 24582. This was an action by a purchaser at a Fiscal's sale to have a subsequent seizure of the purchased property by a mortgagee set aside. The defendant pleaded that he was not bound by the previous sale, to which he had objected. The District Judge (*Jayetileke*) held that the defendant (mortgagee) should have claimed the proceeds, and decreed that, if the defendant reimbursed to the plaintiff the purchase money and costs within six weeks, the property might be resold, otherwise that judgment would be entered for plaintiff. *In appeal, Dias* for appellant.—The mortgagee objected to the sale and had a right to follow the mortgaged property *Ferdinands* for respondent.—Every creditor had a right to bring his debtor's property to a judicial sale ; and a mortgagee with notice would be bound by it, and only entitled to claim the proceeds. To hold otherwise would be to enable a fraudulent debtor to evade the sale of his property by mortgaging it to a friendly creditor. It was

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* Even under the operation of the Roman Dutch law, the Supreme Court (Sir H. Giffard and Sir R. Ottley) elected in the case of *Dormiux* v. *Kriekenbeek*, which was decided in appeal on the 26th April, 1821, not to decree that the defendant, who was sued for breach of promise of marriage, should carry out his contract by a marriage celebrated in foro ecclesia on or before a fixed date under the penalty of imprisonment for disobedience, but to award damages to the plaintiff, to the extent of one thousand Rixdollars, with a stay of execution until the 1st of July following, before which time the defendant was allowed to fulfil his contract, if so disposed. Vide Appeal Minutes, vol. for 1820-21.

the mortgagee's duty to have stopped the proceeds before they passed over to the judgment creditor, and not having done so he was not entitled to the equitable relief he claimed. Per CREASY, C. J.—"Set aside and judgment entered for 1st defendant, and the land in question declared liable to be sold in satisfaction of 1st defendant's writ in case No. 23713. Plaintiff to pay 1st defendant's costs. It is not denied that 1st defendant is the bona fide assignee of a valid special mortgage of the land in question. To deprive him, therefore, of his preferent right, it was incumbent on the plaintiff to prove either direct fraud against the 1st defendant, or that he acted in such a manner as to make his conduct amount to what is termed constructive fraud. It appears to us that the evidence altogether fails to establish fraud, either direct or constructive. The 1st defendant was not present at the sale in execution on the 26th May, 1869, nor is there any evidence to show that the 2nd defendant was authorized to act as the agent of the 1st defendant. But even supposing that the 2nd defendant was acting as agent, he in no way acquiesced in the sale, but only gave notice of the mortgage, and as he says, 'I opposed the sale.' Moreover, as remarked by the District Judge, 'the plaintiff cannot be said to be a purchaser without notice, for he distinctly admits that he heard the 2nd defendant tell the Fiscal's officer that he had a mortgage over the property, and that he had assigned it to the 1st defendant.' The District Judge seems to think that the 1st defendant should have claimed the proceeds of the sale. But he was not bound to do so, the sale having taken place without his sanction, and the amount realised being less than what was due on his mortgage. Neither does it appear that the 1st defendant was in any way remiss: he proves that, a day after he heard of the sale, he went to the Deputy Fiscal with a letter from his Proctor and asked the Deputy Fiscal not to grant plaintiff a conveyance as he held a special mortgage of the land."

Registration.

D. C. Kandy, 56860. Plaintiff claimed a field under a lease from 3rd defendant, who had been declared entitled to a life interest in it in an action against 2nd defendant, the heir at law of her deceased husband. The first defendant (appellant) claimed under a purchase from 2nd defendant which was registered, contending that he was entitled to preference over the unregistered judgment of 3rd defendant. The District Judge (*Morgan*) held that the registration gave no preferential right. *Dias* for appellant.—The 1st defendant's purchase was from the admitted heir-at-law, and the previous judgment not having been registered, the 1st defendant had a preferent right under the 39th clause of the Ordinance No. 8 of 1863. *Ferdinands* for respondent.—Prior registration would avail if parties claimed under one and the same proprietor, but the appellant did not claim from the life renter. Per CREASY, C. J.—"Affirmed."

Costs. *D. C. Kandy*. 56814. In this case judgment was entered for plaintiff (appellant) in £3-1*s* as mesne profits, but he was made to pay defendant's costs on the ground that he might have sued in the Court of Requests or recovered the amount in the previous action for the land. *Ferdinands* for appellant.—The defendant denied that any damages were due, and put plaintiff to the expense of proving it Plaintiff was therefore entitled to his costs. At all events, he should not have been made to pay defendant's costs. Per STEWART J.— "Affirmed, but modified as to costs. Each party will bear his own costs. According to the evidence of the last witness, the defendant prevented the plaintiff's getting possession of the garden. Besides, the plaintiff now recovers damages subsequent to the adjudication in No. 50434."

Copy decree. *D. C.. Matara*, 26128. This was an action to recover a land which the plaintiff had got judgment for against the defendant in a previous suit the record of which was lost. The plaintiff now proceeded on a copy decree, which did not, however, set out the boundaries of the land in question. The District Judge (*Templer*) considered the decree too indefinite in the absence of the libel and non-suited the plaintiff. *In appeal*, *Ferdinands* for appellant.—The defendant in his examination supplied the boundaries, and in a connected District Court criminal case 22671, there was a writ of possession filed, which had evidently been overlooked in the Court below, setting out the boundaries as given in the lost case. Per STEWART J.—"Set aside and the case remanded for further hearing and consideration. Attention does not seem to have been directed to the writ of possession in case No. 22671. Appellant to pay costs of appeal."

Partition. *D. C. Matara*, 26496. This action arose out of a previous partition suit between the parties. The libel stated that the land then in dispute had been sold, under an order of Court, and purchased by plaintiff (appellant) who now sued the defendant for an encroachment. The defendant denied the sale of the alleged encroachment. The District Judge (*Templer*) held that the "features" of the disputed portion were against the appellant's contention that it was part of the land purchased by him, and that Commissioner *Kemp's* evidence was too indefinite as to what he had sold. Plaintiff's case was therefore dismissed with costs. *Dias* for appellant.—The evidence showed that the Commissioner sold all that he had previously appraised, which included the disputed portion; and, by the 9th clause of Ordinance 10 of 1863, the respondent was estopped from claiming the land thus sold. [But the respondent disputed all along the right to appraise or sell the disputed portion under the partition decree. STEWART J.] *Ferdinands*, for respondent, was not called upon. Per STEWART J.—"Affirmed."

Rights of a Kandyan widow.

D. C. Kandy, 56750. The question in this case was the right of a childless widow to claim both life interest and maintenance from the acquired and parveni property, respectively, of her deceased husband. The District Judge (*Morgan*) put the widow to her election, on the ground that she could not claim both. *In appeal*, there was no appearance for appellant. *Ferdinands*, for respondent.—The District Judge's ruling was supported by a clear authority from *Armour*, p. 18, that the widow could not claim both maintenance and life interest, and there was no appellate decision that he knew to the contrary. The point was a new one, but Armour was a safe authority on such questions. Per CREASY, C. J.—" Affirmed. The defendant has not thought fit to appear to support her appeal. On hearing the Counsel for respondent and on examination of the case, it seems to us that the District Judge did right in following the authority of Armour. The Ratnapura case reported in Legal Miscellany, decisions of 1866, p. 33, differs in its facts from the present case."

June 11.

Present CREASY, C. J. and STEWART, J.

Service Tenure's Ordinance.

D. C. Kandy, 56528. In this case the District Judge (*Morgan*) awarded the plaintiff, as incumbent of the Malwatte Viharre, damages for three years against defendant, a temple tenant who had failed to perform services. The defendant appealed, chiefly on the ground that under the provisions of the Service Tenure's Ordinance 4 of 1870, clause 24, he was only liable to be cast in the value of one year's services, and was entitled to his costs. *Ferdinands*, for respondent, conceded that, under the Ordinance which had apparently been lost sight of in the Court below, the value of only one year's services could be claimed; but the action had been pending another year, so that the damages would have to be reduced only by 1s. 3d. He maintained that the judgment was correct in other respects. Per STEWART J.—" Amended by Judgment being reduced to Rs. 43 and 50 cents. Under the 24th section of Ordinance No. 4 of 1870, plaintiff cannot recover for arrears of service beyond a year. The judgment must therefore be amended accordingly, and will stand at the amount stated, viz. for one year before action brought, and for what has become subsequently due. As to costs, we see no sufficient reason to interfere with the judgment in this respect. Though the plaintiff was in error praying for eviction of the defendant, yet he could not anticipate the defence the defendant might set up, involving possibly the question of jurisdiction and title if he had proceeded in the Court of Requests. The 76th clause of Ordinance 11 of 1868, leaves it to the Judge to make such order as justice may

require in suits brought in the District Courts that may have been brought in the Court of Requests. In the present case we see no reason to differ from the District Judge."

June 17.

Present CREASY, C. J. and STEWART, J.

Deed of Gift.

D. C. Badulla, 467. The appellant applied for administration (with the will annexed) of her father's estate, and was resisted by the widow (respondent) who questioned the validity of the will. The document produced was termed a "gantalpot," signed by the grantor before 5 witnesses; and the disposition was in these terms: "all these I have given to Punchy Menica, my begotten daughter by my deceased first wife Dingen Menica, to possess by her in parveny." Possession had been given with the document, and the grantor had survived eight months. The District Judge (*Gibson*) held that the document was a deed of gift and could not be admitted to probate, and granted administration to the widow. *The Queen's Advocate* for appellant.—The document was to all intents and purposes a will. The testator was on the point of death, and the paper was signed before five witnesses who proved that it was meant to operate as a will. Extrinsic evidence was admissible to prove the intention of the testator. Even Bills of Exchange had been admitted to probate, where the intention was clear. *Jones* v. *Nicolay*, 2 Rob. 288; 14 Jur. 675 [Is not the fact of your having possessed during the eight months of the donor's survivorship conclusive against you?—C. J.] *Ferdinands* for respondent was not called upon. The judgment was affirmed.

Government defaulter.

D. C. Badulla, 19003. In this case plaintiff having obtained judgment against the defendant (*Vanderwall*) on a mortgage bond dated November 1, 1870, for Rs. 860, seized and caused to be sold the mortgaged property, and was about to draw the proceeds when the Crown intervened and claimed them as a preferent creditor. The District Judge (*Gibson*) upheld the claim and hence the appeal. It appeared that the plaintiff had originally sold the mortgaged land to the defendant, received part of the purchase money and taken the bond in question for the balance. Both the bond and conveyance had been executed on the same day. The Crown claim was based on the 4th clause of Ordinance 14 of 1843, the defendant having been appointed a revenue officer in 1868 and continued as such to 1871, when the said claim accrued in respect of certain monies found to be due by him to Government.

Dias, for appellant.—The bond and conveyance in favor of plaintiff having been executed on the same day, there was not such an uncon-

ditional title in the defendant as to subject the property to the hypothec of the Crown. As soon as the conveyance was executed, the plaintiff's legal hypothec for the balance purchase money attached to the land; and, in view of there having been no interval between the purchase and the mortgage, the property had not so vested in the defendant as to give the Crown a right to discuss it. *The Queen's Advocate*, for respondent, submitted that the vendor's lien for the balance purchase money had been destroyed by the mortgage; and as the transfer to defendant had been absolute and had vested a good title in him, the Crown had a preferential right under Ordinance 14 of 1843.

Per CREASY, C. J.—"Affirmed. The words of the 4th clause of Ordinance No. 14 of 1843 are so very strong and explicit, that it is impossible to withdraw this case from their operation by reason of the 61st clause. The first branch of that clause (which alone can apply here) refers to mortgages of a prior date to the claim of the Crown; but the 4th clause makes the claim of the Crown date from the day of the defaulting officer's first appointment. That was anterior to the day of the creditor's mortgage."

"Half improved value" of Crown lands.

D. C. Kandy, 42211. In 1847, one Jayetilike Mohandiram had agreed to pay half the improved value of a certain garden, which he was then in possession of, and to obtain a grant from the Crown. He failed to do this and so did his heirs, until the property was sold for Rs. 6000 in 1872, under the writ of a mortgagee, subject however to the claim of the Crown. The District Judge (*Morgan*) having, on the motion of the Government Proctor, allowed Rs. 3000, being half of the proceeds of the sale, to be drawn, a second creditor, who held an assignment of a secondary mortgage over the land, objected.

In appeal, Dias for appellant.—The party in possession having become entitled to the land, under clause 8 of Ordinance 12 of 1840, so far back as 1847, the value at that date should be taken as the amount of which the squatter should pay one-half. The Crown claim for one-half of the present value was not only inadmissible upon a true construction of the Ordinance, but there was evidence in the case that the land had been actually appraised in 1847 for £50 and that Government had received £3 in part payment. If there had been default in the payment of the balance £22, the Government should have recovered it with interest. Besides, the present contest was not with the original squatter but with innocent purchasers and mortgagees; and independently of the construction of the Ordinance and the act of the Government in 1847, the Crown was barred by its own laches in having allowed Jayetilike and those claiming under him to deal with the land as their own and thus impose upon innocent creditors. *The Queen's Advocate*, for respondent, was not called upon.

Per CREASY, C. J.—"If the claimants or those whom they represent had tendered the sum originally fixed as half value, and the Government Agent had accepted it, the case might have been different. But the payment has not yet been made, and the Ordinance contemplates the right of the Crown to payment of half value at the time of payment, and not at the date of some petition, probably many years before. It does not appear to the Supreme Court that the payment of the sum of £3, which has been relied on as a part payment of the old valuation, is anything of the kind. The entry respecting it is merely the expression of a Government Officer's opinion about a matter which had occurred many years previously. It is far more probable that the £3 was paid to cover the expense of the valuation. The Government would not, in the common order of things, have had the valuation made unless the petitioner had supplied the money.",

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June 18.

Present CREASY, C. J. and STEWART, J.

Fidei Commissum amongst Moors.

D. C. Colombo, 59578. One Ahamadoe Lebbe Constable Sinne Lebbe Marikar, by a deed dated 12th November, 1853, gifted to his brother, Aydroos Lebbe Marikar, an allotment of Crown land in the Marandahn Cinnamon Gardens, subject however to a restriction against alienation. The defendant having seized the property under a writ against Aydroos, the plaintiffs (the widow, children and son-in-law of the debtor) brought the present action to maintain their title and to have the Fiscal's seizure set aside. The defendant pleaded that the said land absolutely vested in Aydroos, and that the restriction contained in the deed of gift was illegal, void and inoperative.* The learned District Judge (*Berwick*) held as follows:

"This is a question of the law to be applied among Moors. The case was argued solely on the validity of a clause of entail or quasi-entail, and the effect of it: though another point is also raised on the pleadings. The clause in question occurs in a deed *inter vivos*, whereby the grantor transferred certain landed property to his brother Aydroos Lebbe in these words, 'as a gift absolute and irrevocable unto the 'said Aydroos Lebbe, his heirs, executors, and administrators'; and the

* Where a widow had accepted as her portion a certain house allotted to her by the Executor of her husband's estate, it was held that she took the property incumbered with the restrictions against alienation provided in the codicil to the will. Held, also, that the evidence (corroborated by MACNAGHTEN) disclosed that a restriction similar in principle to the law of legitima portio of the Civil Law existed in the Mohammedan Code, and that a testator could only divert from his legal heirs or incumber with restrictions $\frac{1}{3}$ of the whole estate left by him, the heirs being entitled absolutely to the remaining $\frac{2}{3}$. Per LAWSON, D. J., in D. C. Colombo, 52418. Affirmed in appeal on the 24th June, 1869.

habendum clause is as follows: 'To have and hold, &c. unto the said 'Aydroos Lebbe, his heirs, executors, administrators and assigns for 'ever, subject however to the conditions and restrictions following, that 'is to say that the said Aydroos Lebbe shall not sell, mortgage or other- 'wise alienate the said premises hereby conveyed to him, or any portion 'thereof, but that the same shall be held and possessed by him during 'his natural life: and after his death, the same shall devolve on his 'heirs in perpetuity, who shall likewise hold the same under the like 'restrictions as aforesaid.' The defendant has seized the property on a writ of execution against Aydroos, whose heirs claim as plaintiffs against the defendant, his judgment creditor. Defendant contends that the restriction against alienation [wrongly styled condition] is illegal, void and inoperative, and rests his proposition on the Mohammedan Law. It is argued for the plaintiffs, that this question, being one affecting real property, must be governed not by Mohammedan Law but by the Lex Loci: and for the defendants, that in this instance the Mohammedan Law is the Lex Loci. Both contentions are just. The latter was irrevocably guaranteed by the Charter of 1801, which provided that 'inheritance and succession to lands, rents and goods and all matters of contract and dealing between party and party should be determined in the case of Mussulmen by the laws and usages of Mussulmen'; meaning, of course, their laws and usages in this part of the world. True that after enduring for many years that Charter was in general terms repealed, when a new and purely "judicial" Charter, for the establishment of new Courts, was granted; but no new provision or alteration was ever made as to the laws to be administered to the people. That provision, therefore, even if it has ceased to have force as by virtue of the Charter of 1801 which contained it, (which I doubt) has at all events force as consuetudinary law, the origin of which can be traced up to that Charter at least, if not further. But while it is true, in a sense, that Mohammedan law is part of the common law of this country, it is not to be supposed that the whole immense body of Mohammedan jurisprudence is law here; or that the dealings of Moormen in Ceylon are solely or even principally regulated by it. Only such parts of that system are law here as have been specially introduced into the Island, either by express legislation or by ancient, continuous and inveterate custom or usage, which is all the Charter of 1801 meant. It is in (nearly) the same position, in this respect, as the common and statute law of England here, and equally with purely English law must give place to the ordinary law of the country (which in the last resort is the Roman-Dutch) whenever there is no inveterate and established practice to the contrary, applicable to the particular case. Now the question raised in this case concerns that part of the Mohammedan jurisprudence which is called by the name of *Wukf*; being analogous, in some degree, with fidei commissa and entails of private property, as

well as with trusts for charitable, religious and public purposes. This branch of Mohammedan jurisprudence named *Wukf*, in respect at least to its analogies with fidei commissa for private uses, has not been introduced into Ceylon, and neither has the connected branch of 'usufructuary wills.' They form no parts of constant and 'perpetually recurring practice of the inhabitants,' (which is one of the proper characters of a custom as stated by the Civil Law writers to be necessary to give it the force of law;) and are therefore not known to the Courts of law here nor recognizable as law. Even if occasional examples could be brought forward, such will not constitute nor prove a custom: for *nec ex aetuum frequentia consuetudo fluit.* Voet, at 1, 3, 29, has collected in one sentence some of the numerous descriptive epithets given in the Digest and Code to a custom having the force of law, among which are not only *longævi usus* but *inveteratæ consuetudinis, diuturnæ, inveterato usu stabilitæ,* and *servatæ tenaciter;* none of which can apply to *Wukf*, in respect to entails for private uses, nor to the Mohammedan law of usufructuary wills. The clause in question would be valid by the ordinary law of Ceylon, and must therefore be held valid in this case, however the Mohammedan law may vary in this regard in distant parts of the world. So also as to the old contended question, on which there is so much variance in different systems of jurisprudence, viz. whether a void condition voids the transfer or the condition only lapses,—(as to which the Roman Law, for instance, applies an opposite rule to testamentary bequests from what it does to deeds *inter vivos*,)—for the same reason the rules of construction and validity and effect of such conditions, as also indeed the construction, etc. of deeds and wills (*generally*) including entails and fidei commissa must be governed by the ordinary law of the country, because this part of the Mohammedan system of jurisprudence (viz. the construction of wills, etc. and the effect of void conditions) has never become part of the law of Ceylon. An exception may be found in the case of *pure donations*, as to which see the decisions in Colombo, D. C. 55746 and 29129; but the case in question is not one of *pure donation*, but of *fidei commissum*. By the ordinary law of trusts or fidei commissa, the owner had a right to dispose of his property and to annex to a grant of the use for life a prohibition against alienation, which restriction is valid, and the real sense of which is that the grantee was only to have a life use and was to be a fidei commissary for his heirs. As the property did not vest in the first grantee absolutely, but only as a fidei commissary, it cannot be taken in execution for his personal debt. Although the Mohammedan law has in no degree proved to be the basis of this decision, it is satisfactory to note that, as far at least as my acquaintance with that law extends, (and I do not pretend to a very accurate acquaintance with it) it appears to be substantially similar to the Roman Dutch Law on

the question to which the latter has been just applied. See Baillie's Digest of Mohammedan Laws, the whole of Books ix, x and xi, and particularly sections second and third of Book ix. It may be added that, even if the Court had been compelled to find that the condition, or rather restriction and prohibition of alienation, was void, it would have been very sorry if it had found itself compelled to hold also that, if a Moorman intends to create a *trust* which fails, the intended trustee is to take the intended trust property absolutely to his private use, instead of its lapsing to the grantor himself, or at his death to his heirs. In this case, the fidei commissary was only one of four heirs of the grantor. Judgment will be entered for the plaintiff in terms of the prayer of the libel, save as to damages."

In appeal, *Ferdinands*, for appellant, contended that the law applicable to the case was the Mohammedan law, which did not recognise restrictions against alienation. 3 Hedaya, 309; Baillie, 507-8, 557, 570. *The Queen's Advocate*, (*Dias* and *Kelly* with him) for respondent, was not called upon.

Per CURIAM.—"Affirmed for the reasons given by the District Judge. The Supreme Court has before held that the Mohammedan law of India or other places does not necessarily obtain in Ceylon. The laws of the Mohammedan inhabitants of Ceylon, when not regulated by enactment, must be determined by usage and their laws as existing here."

June 20.

Present CREASY, C. J. and STEWART, J.

Composition with creditors.

D. C. Colombo, 60701. The plaintiff (*Wickremesekere*) joined certain creditors of the defendant (*Tatham*) and accepted a composition of five shillings in the pound, and, unknown to the other creditors, took a letter from the defendant, that he would pay plaintiff in full in the event of his paying in full any other creditor. The defendant subsequently paid certain creditors (who were not parties to the composition) in full; whereupon plaintiff instituted this action to recover the difference due to him. The District Judge (*Berwick*) entered judgment for the plaintiff, on the ground that there was no consideration to forego a part of the debt.

In appeal, *Ferdinands*, for defendant and appellant, relied on the case of *Norman* v. *Thompson*, 4 Exch., 759, in which it was held that consideration was not necessary. (He was stopped by the Chief Justice who wished to hear the respondent.)

Kelly, for respondent.—The appellant entered into a conditional arrangement with respondent, and the condition having been broken he had a right to be placed in his former position. He was one of the first to sign the composition and the letter was a contemporaneous document which threw light upon the real meaning of the parties,

namely that all the creditors must join or it should not be binding on those who did. As some had refused to join and had been paid in full, the condition upon which the plaintiff joined had not been observed, and he was remitted to his original rights. It might be conceded that no consideration was necessary to release a claim, any more than to make a gift, but in either case the act must be unconditional or the condition must be fulfilled.

Per Creasy, C. J.—"Set aside and judgment entered for defendant with costs. In this case the defendant, being in pecuniary difficulties, compounded with the greater part of his creditors for five shillings in the pound on or about the 16th of August, 1871. The exact date of the Memorandum of Agreement, and of the plaintiff's assent thereto, has not been proved, though very material. But from the plaintiff's receipt for his share of the composition being dated the 16th of August, 1871, and from that being the date of the letter by defendant to plaintiff, (which will be presently cited,) it seems probable that the assent to the composition deed, the writing of the said letter by defendant, and the plaintiff's acceptance of the composition money, were contemporaneous acts. The agreement to accept the composition is headed as follows: "We the undersigned creditors of Tatham and Company do hereby agree to accept five shillings in the pound on the amount of our claims, and to give Mr. Tatham a discharge in full of all claims: this dividend to be paid within three months." Here follow the signatures of a number of creditors, including that of the plaintiff. The letter referred to is as follows:

Colombo, 16th August, 1871.

P. N. Wickremesckere Aratchy.

Dear Sir,—It is understood that should I pay eventually to any of the creditors of Tatham and Company more than 5 shillings in the pound, you are to be placed in the same footing as regards time and money.

Your's faithfully,

Christr. Tatham.

It was proved (by admission) that the defendant paid two creditors in full, neither of such creditors being among those who signed the composition: but the very important fact was not proved, whether those payments in full were before or after the date of the composition agreement. It was argued in the Court below, that the composition agreement was in itself bad in law for want of consideration. The short answer to this under Roman Dutch law would be, that there was no need for any consideration. A creditor may make a release of the whole of his debt without consideration; and the release will be operative, unless obtained by foul means. Vanderlinden, page 269, and Grotius, page 461, might be sufficient authorities for this proposition. If it be desired to trace the growth of the Roman law on this subject, this may be done by referring to Justinian's Institutes, Book iii, title xxix, 2, where will be found the form of the "accepti-

latio" of the legal ficton introduced, in the interests of equity and common sense, by Cicero's friend Gallus Aquilius, by which without any writing or consideration a release from any kind of obligation whatsoever could be given. Next the Prætors held that a "pactum nudum liberatorium," though no action could be founded on it, gave a good defence against an action to enforce the claim which the creditors had agreed to forego. See the Digest, book 2, title xiv, and Voet's comments. If a creditor can make a valid gratuitous release of the whole of his debt, *a fortiori* he may do so for part. Indeed the Roman law is express on the subject. See the Institutes, lib. iii, xxix, sect. 1. Now in the case before us, the creditor had consideration for the release so far as five shillings in the pound. We will suppose it to be have been gratuitous as to the residue, though, for reasons to be cited presently, such was not the fact. But for the sake of the argument as to this part of the case, we will assume that the release as to fifteen shillings in the pound was gratuitous. Still the release was not the less effective on that account, unless the transaction was tainted by illegality. It may, however, be thought that, inasmuch as the plaintiff claimed on an overdue promissory note, we must (nnder Ordinance 5 of 1852, sec. 2) look to English law and not to Roman Dutch law in this case. Many English cases were quoted and relied on in the Court below, as invalidating this composition, none of them being very recent ones, and all hanging on the case of Cumber v. Wane, reported in 1 Strange, 426, and also in 1 Smith's Leading Cases, where it is ably commented on by the late Mr. Justice Willes (one of the greatest legal authorities whose loss this age has to deplore) and Mr. Justice Keating. They say of Cnmber v. Wane that 'its doctrine is founded on vicious reasoning and false views of the office of a court of law, and that it has in modern times been subjected to modification in several instances.' They state that 'there is authority for saying that a liquidated demand founded on a bill of exchange or a promissory note, even though overdue, may be forgiven by word of mouth; and, if this be law, such a demand might, with consent of the creditor, be discharged by payment of a less amount than that secured by the note. See Foster v. Dawber, 6 Exch., 839.' We have referred to Lord Wensleydale's (then Baron Parke's) judgment in that case, and we find it to be clear and explicit. Baron Parke (p. 851) treats as unquestionable the rule that the obligation on a bill of exchange or note may be discharged by express waiver, and he states that in this respect the contract on a bill or note stands on a different footing to simple contracts in general; inasmuch as (by English Law) an executed contract cannot be discharged except by release under seal, or by performance of the obligation, or by payment, where the obligation is to be performed by payment. He points out (p. 852) that the probable reason for the anomaly is that when the Law Merchant as to bills of exchange was introduced into

England, at the same time was introduced, so far as regards bills of exchange, the rule quoted from civilian writers as prevailing in Europe generally, namely, that there may be a release and discharge from a debt by express words, although unaccompanied by satisfaction or any solemn instrument. We see, therefore, that as to the plaintiff's claim on the promissory note, the defence set up is good both by English and by Roman law. If he desires to sue on the original cause of action for goods supplied, the answer to this is, that that cause of action is not affected by the Ordinance of 1852, but must be governed by Roman Dutch law: and under Roman Dutch Law, as already demonstrated, the present defence of release is valid. But further, this case would fall within the well-known class of exceptions to the doctrine of Cumber v. Wane, which decide that the contract or other act of a third party introducing a new consideration may operate in discharge. See the same note to Cumber v. Wane, and see the comparatively recent case of Norman v. Thompson, 4 Exch. 759, where in the judgment of Chief Baron Pollock are found these words, which the learned District Judge has cited and which he properly regards as 'very weighty.' 'The question is simply whether an agreement between less than the whole number of the body of creditors, to accept a composition, is binding upon those parties who enter into that agreement. I do not think that there is any ground for doubting that such an agreement is binding. It is a good consideration for one to give up part of his claim that another should do the same.' So decided Chief Justice Baron Pollock, one of the most experienced and able Judges in commercial matters that Guildhall and Westminster have seen during the present century. As for requiring formal evidence of a meeting, of a deliberation, and of a solemn compact of the creditors one with another to take this composition, we look on such proof as by no means indispensable. The memorandum of agreement is proof enough. The words at the commencement, 'we the undersigned creditors do hereby agree to accept five shillings in the pound,' show unmistakeably that each creditor knew that he was co-operating and agreeing with the other creditors, and that other creditors were co-operating and agreeing with him. There remains for consideration the far more serious objection, that the defendant has nullified the composition agreement by paying two of his creditors in full. Unquestionably, if a debtor induces a number of his creditors to take a composition, by a promise, either express or implied, that there shall be no preference shown, but that all of them shall share alike, and he afterwards violates that promise by paying one of those creditors more than the rest, he plays the part of a deceiver,—his fraud vitiates the agreement, and the creditors' right to sue him in full revives. But what are the facts here? The gross amount of the debts due to the creditors who signed the agree-

ment is over four thousand pounds. The two accounts paid in full are one for £18 and one for £15. Neither of the creditors so paid in full had anything to do with the composition agreement: and there is not even proof that the payment of either of them was subsequent to that agreement. If we thought that the plaintiff could on the whole succeed if he had supplied this proof, we should now merely non-suit him, so that he might have an opportunity of mending his case in this respect, if possible. But even if it is to be taken that these payments were made after the agreement, we still think that the defendant is not liable to this action. Whenever there is to be a composition, it is always well known that there will be one or two stubborn claimants, usually for small sums, each of whom is sure to insist on twenty shillings in the pound. Baron Parke, in the case of Norman v. Thompson, already referred to, observes: 'It is every day's practice that all the creditors should enter into a composition, except those whose demands are small.' The main creditors look to each other, and to joint action with each other. There is no proof whatever in this case of the existence of any creditors, except those who signed the agreement, and the two small claimants who were paid in full. The gross amount due to the signatories exceeded £4000; the total debts due to the two payees in full are precisely £33. Notwithstanding the generality of the wording of the letter of the 16th December, we think that it contemplated the four thousand pounds worth of creditors who signed the composition, and not either the £15 outsider or the £18 outsider. And it seems clear to us, that the agreement has been substantially performed by the defendant, and that he is entitled to judgment."

Surviving parent's right to charge for maintenance of children.

D. C. Colombo, 59987. The plaintiff claimed certain premises at Cotanchina, as devisee under the will of the Rev. Solomon David The defendants, who were the children of the testator by his first marriage, questioned the validity of the bequest as to an undivided half share, which they claimed by inheritance from their mother, who had been entitled thereto under the community of property. The plaintiff replied that the testator had taken out administration to his deceased wife's estate, had filed his final account in 1853, and had retained the property in question for himself, having paid the debts of the community. He also pleaded prescription since 1853. The defendants rejoined that the accounts were fraudulent and not binding on them, and that the same had not been accepted and passed by the Court, though sworn to. They also denied that prescription applied, the third defendant having been a minor and the testator having continued as administrator in possession. The District Judge (*Berwick*) gave judgment for the defendants, holding that the accounts were false, and that no prescription applied. He also reserved to the parties the right

to move, within one month, for the appointment of an administrator de bonis non to the estate of defendant's mother and of a receiver to the joint matrimonial estate.

The Queen's Advocate, (*Dias* with him) for plaintiff and appellant. The accounts having been sworn to must be considered as passed under the Rules, and it was not competent to question them twenty years after. Two of the defendants were then of age, and prescription would run against them. The proceedings were in accordance with the established practice of the Courts.

Ferdinands, for the 1st and 2nd defendants, (respondents) went into details of the accounts and contended that these were false, and that an administrator in possession could not himself alter the character of his possession and plead prescription against the heirs.

Kelly, for third defendant, (respondent) urged, in addition to the position contended for by *Ferdinands*, that the third defendant was admittedly a minor and could not be bound either by the accounts or by prescription.

[Counsel all agreed that the latter portion of the District Court judgment, as to the appointment of a fresh administrator and of a receiver, was unnecessary, and might lead to further complications.]

Per Creasy, C. J.—" Affirmed so far as regards that part of the judgment which declares each of the defendants to be entitled to one-sixth of the property in the Libel mentioned: set aside in other respects. This judgment to be final and to have immediate effect. The plaintiff to pay the defendants' costs of the action, each party to bear their own costs of appeal. In this case the plaintiff is the son-in-law of the late Revd. Mr. David; the plaintiff's wife being that gentleman's daughter by his second marriage. The defendants were that gentleman's children by his first marriage. The plaintiff claims under a will in his wife's favor by her father. The defendants claim to be entitled each to a sixth share of the property mentioned in the libel, as having formed part of the matrimonial estate of Mr. David and his first wife. The first wife died in 1850. Mr. David took out administration to her in September 1852. On 28th January, 1853, Mr. David filed and swore to a final account, which purports to be an account of the whole joint estate. Besides the landed property which is the subject matter of this litigation and another small portion of landed property, that account admitted the existence of personal assets to the amount of £165 13*s*. 1½*d*. It gave £81 as the value of the landed property. The account took credit for payments and disbursements amounting to £248 15*s*. 7½*d*. Among them was a sum of £70 14*s*. entered as money paid "for the maintenance of the children." This item requires and will receive particular attention. Altogether the account brought in a balance against the joint estate of £2 2*s*. 6*d*. If this were correct, the wife's half was insolvent. On the 23rd August, 1853, Mr. David applied to the District Judge for an order to sell the

immoveable property. This order was refused. The District Judge's endorsement on the order is as follows. 'The final account appears 'incorrect. The administrator has retained all the property himself, 'stating that he would take the debts upon himself, not making any 'mention of the co-heirs, his minor children.' He does not appear to have made any further application to the Court. In the October of that year, he sold a small portion of the landed property (not included in this action) for the sum of £15. It has been contended, on the part of the defendants, that the valuation in the account of the landed property was grossly below the true amount. Conflicting evidence has been heard on this point. We think that the landed property was under-valued, though not to the extent alleged by the defendants; but, according to the view taken by us as to the charge of £70 for maintenance, and as to other matters of law to be spoken of presently, it is unnecessary to go into details on this matter. On the surviving parent's and administrator's own showing, he had personal assets enough to pay off all debts and disbursements without resorting to the landed estate to make up more than a deficiency of £13 odd; supposing the charge for the children's maintenance not to be allowable. The said little deficiency of £13 was more than covered by the £15 which he received in October 1853 for the piece of land then sold by him. If therefore the charge of £70 14*s*. for the children's maintenance is not allowable, the plaintiff has, on his testator's own shewing, no right to set up any claim derived through that testator to treat the children's share in the landed property now sued for, as property which Mr. David had any right, moral or legal, to appropriate. It was stated in argument that the father is entitled, in an account of this kind, to deduct, as against the children, sums paid by him for their maintenance; and in support of this, the learned Counsel for the appellant cited Burge, vol. 4, p. 679. But the passage in Burge does not in the least shew that the father is entitled to deduct and appropriate any part of the capital of what would otherwise be the children's portion. It only proves that by the law of Holland the father, in settling with the child, was entitled to deduct from the usufruct, that is from the yearly profits of the child's portion which had accrued during the child's minority, so much as he, the father, had expended for the child's maintenance. The passage in Burge is as follows:—'By the Civil law, the father is entitled to the usufruct of the property of the child. He enjoyed it until the child ceased to be under his authority. But by the law of Holland he had no such right. He was only permitted to deduct what he had expended in the maintenance and education of the latter, and was accountable for the surplus to the child.' All the Roman Dutch authorities which we have examined agree with this view. Van Leeuwen, p. 61 of his Commentaries, says.—"No parents can enjoy the usufruct of their children's property which they (i. e. the chil-

dren) obtain from others, but they ought to cause the same to increase for the children; but with this single exception, that it may be appropriated to defray the expenses of their education ; for which purpose the same may be disbursed':—still dealing with the usufruct only, and in no way authorising the parent to break in upon the children's capital. So, at page 63, he writes.—'To the obedience which children owe their parents correspond the education and maintenance which parents owe to their children, according to their station in life and their circumstances, and which may legally be demanded from them; unless the children can maintain themselves by any art or handicraft, or unless they have succeeded to or obtained any property from others, *the fruits or produce whereof may be laid out for their maintenance, but not otherwise.*' In Van Leeuwen's Censura Forensis, lib. 1, c. ix, sect. 7, the same law is laid down. Grotius (at page 31 of Herbert's translation) says generally that 'the father has not any usufruct in his children's property.' But this must be read in connexion with what we find at page 43, where he is expressly speaking of what is to be done in the case of the death of one of the two parents. He says, 'the surviving parent must maintain the sons until their eighteenth 'year and the females until that of fifteen, *only out of the fruits of the 'property established on the division of property to belong to the same 'children*, unless for some special reason it should be otherwise direct- 'ed by the Judge or the Weeskamer.' Grotius proceeds in the next section to define how the surplus of the yearly income of the children's portion, over and above their maintenance, ought to be from time to time invested for the children's benefit. We may trace clearly from these passages the liabilities and rights of the surviving parent, the father in the present case. As father, he was under a manifest legal liability to maintain and educate the children. His position, as administrator to his wife, did not relieve him of this liability; nor did it shift the obligation from his paternal character to his administrative character. But, inasmuch as the children had now acquired some property, the Roman Dutch law allowed him to appropriate to the children's maintenance and education so much and no more of the profits of that property as were necessary for their maintenance and education. If for any good and sufficient cause, such as his own extreme poverty and the insufficiency of the profits for the due maintenance and education of the children, it was clearly for their advantage that some part of the children's capital should be expended in maintaining and educating them while minors, he should have applied to the Court for special directions and authority in that behalf. Without such special authority, he had no right to appropriate or in any way to alienate a penny of the principal of the children's portion. This will be found strongly confirmed by what Vanderlinden (p. 103) lays down as the duty of the surviving parent, if about to enter into a second marriage, (as actually occurred in this case) and how when the

proper measures have been taken of appointing a guardian, of preparing and of strictly scrutinising an inventory of the children's rights, the children's property usually remains in the possession of the parent until the children shall have attained their majority, *to maintain them during this period from the usufruct or interest thereof.* It follows, that in this case the father's arbitrary deduction of £70, on account of the children's maintenance, was illegal. Without such deduction the personalty would, on the father's own showing, have been enough to pay off all debts and expenses (within a few pounds) without converting any of the landed property: and the £15 realized by him by the land sale in October 1858, made it wholly unnecessary to convert any of the property now sued for. This is of itself enough to make us consider that the father's attempt to convert and appropriate the whole of the landed property was an act of illegality and spoliation, by which the children are not to be prejudiced. There is the further fatal blot in the plaintiff's case, that the supposed transfer by the administrator to himself was without order of Court. Moreover the law forbids an administrator to purchase from himself. Much more must it forbid him from quietly transferring the property to himself, without the competition of any other bidders, and at a price fixed by his own appraisers. With respect to the claim set up by plaintiff, that his testator, the father, had gained a title by prescription, it is enough for us to say that, taking all the circumstances of the case into consideration, we do not think that the father had exercised such an adverse possession as the Prescriptive Ordinance required. We think it better, for the interests of all parties, not to invite a general opening up of these old accounts. We have therefore adopted that part only of the District Court judgment which establishes the defendant's rights to their shares in these lands."

Specific performance.

D. C. Kandy, 55940. This was an action to compel specific performance of an agreement, which, as recited in the libel, was as follows. A certain land mortgaged to a deceased creditor having been seized in execution at the instance of a third party, three of the heirs of the mortgagee (the plaintiffs) arranged with the defendant (the husband of a co-heir) that he should "bid" for the property, on behalf of all the heirs, up to the amount of the mortgage. The Fiscal, however, having declined to give credit to the heirs of the mortgagee, the purchase amount, of which the plaintiffs contributed seven-tenths, was ultimately paid by defendant, who obtained a transfer in his own name. The plaintiffs now complained that defendant refused either to re-convey the shares to which they were entitled or to give up possession of the same. The defendant, in his answer, denied the alleged agreement and contribution by plaintiffs, and claimed the property as exclusively his own on the strength of the Fiscal's

deed. The District Judge (*Morgan*) found the issues of fact in favor of plaintiffs, overruling, on the ground of defendant's fraud, the objection taken for the defence, that parol evidence was inadmissible to prove an agreement which, as creating an interest in land, should have been in writing under the Ordinance 7 of 1840.

In appeal, Ferdinands, for appellant.—There was a fatal variance between the plaintiffs' declaration and proof. The libel stated that the breach of agreement consisted in appellant's taking a transfer in his own name, after purchasing for the heirs, whereas the evidence shewed that he was duly authorized to purchase and obtain such transfer, and that he was thereafter to reconvey. Under the 56th clause of the Fiscal's Ordinance, a deed might be executed in favor of a third party, if the person who bid at the sale disclosed the name of such party as that of the real purchaser. [I doubt it. The clause you quote says that the conveyance shall be to the purchaser, but it does not say to him or any one nominated by him.—C. J.] The great question however was, whether parol evidence could have been admitted to prove the agreement, which created an interest in land. The provisions of our Ordinance (7 of 1840) were far more stringent than those of the English Statute of Frauds, from the operation of which all "resulting trusts," as recognized by English equity law, were specially exempted. (2 *Taylor*, 868.) In the Chancery case of *Sichel* v. *Raphael*, (34 L. J. 106, 3 N. R. 662,) Lord WESTBURY held that what was a valid assignment of a mortgage by the English law, was not so under our Statute of Frauds, which required the instrument to be duty attested by a notary and witnesses. Appellant's Counsel also referred to the following local cases: *Croos* v. *Croos*, D. C. Negombo, 1945; Jayewardene's case, D. C. Colombo, 4821, 19th December, 1851; Lee v. Ederemanesingam, D. C. Colombo, No. 29669; and Pride v. Hadden, D. C. Kandy, 55765, as shewing that our Courts discouraged all attempts to loosen the stringency of the local Ordinance by the introduction of English equity law. *Dias*, for respondent.—The judgment was correct. Fraud having been expressly found against the defendant, he could not shield himself under an Ordinance the very object of which was to prevent frauds. D. C. Negombo, 23754, 28th January, 1860. Besides, the right which plaintiffs sought to enforce was one arising, not out of a conventional contract, but by operation of law, and as such was no more affected by our Ordinance than was the legal hypothec over a guardian's property although involving an interest in land.

Per CURIAM.—"Affirmed. On examining the answer in this case, we find that the defence under the Ordinance of Frauds was not raised on the pleadings. Even if it had been, we should have given judgment for the plaintiffs on the principle followed in the case No. 23754, D. C. Negombo, decided by the Supreme Court on 28th January, 1860."

June 25.

Present Creasy, C. J. and Stewart, J.

Award.*

D. C. Colombo, 58335. Issue having been joined and the case set down for trial, the plaintiff and defendant jointly moved, on the 7th July, 1871, that the case be referred to the arbitration and award of the Hon'ble R. F. Morgan, Queen's Advocate, and that his award be made a rule of Court by either party after notice to the other. The District Judge thereupon made the following order: "referred to the arbitration of the Queen's Advocate and case postponed till Monday." It appeared that the parties and their witnesses were examined by Mr. Morgan on the 7th July, but never afterwards; that no award was made on the Monday following; but that on three special applications made by him, (without notice however to the parties) he was allowed an extension of time till the 4th January, 1872, on which date the award was filed. The first of the three applications was made on the 6th October, and was minuted as follows: "not having been able to make an award in this case, and the three months being about to expire, Mr. Morgan moves for an extension of a month. Allowed." On the plaintiff, in whose favor the arbitrator had found, proceeding to have the award made a rule of Court, it was contended, on behalf of the defendant, that the document was void and not available in law, because (1) it was not duly stamped as required by Ordinance 23 of 1871, (the adhesive stamp used not having been cancelled at the time of filing and the date of cancellation not being in the arbitrator's manual writing); and (2) because the enlargement of time, without the knowledge and consent of the parties, had been grossly irregular. But the District Judge upheld the award.

In appeal, *Kelly*, for appellant.—The Court was bound, under the 18th section of Ordinance 15 of 1866, to fix the time for making the award. Either there was no time specified, or Mon-

* In *Jayewardene* v. *Perera*, D. C. Colombo, 47,248, several objections to an award which were founded on alleged irregularities, as to enlargement of time and date of filing, were over-ruled; and the Supreme Court held, inter alia, "that the appearance of the defendant before the arbitrator must be taken as an acknowledgment that his character as arbitrator was still subsisting"; and "that the time of signature, and not the time of the completion of the stamping, must be taken as the date of the making of the award under the terms of reference." Civ. Min., September 9, 1869; Dec. 6, 1869; and June 21, 1870.

In *O'Halloran* v. *Stouter*, D. C. Colombo, 58,532, it was held that where, under a voluntary reference, the parties by motion had enlarged the time for making the award, it was competent to the District Judge, under the 15th section of the Arbitration Ordinance, before that enlarged time expired, to grant a further enlargement on the mere application of the Arbitrator. Civ. Min., Sept. 12, 1872.

day, the 10th July, was the date fixed. That the latter was intended is evident from the District Judge's subsequent remarks on record : "it is clear, from the minute recorded under date July 7th, that it was intended and announced that the award was to be made on the following Monday, and that the case was not struck off the trial roll but postponed till that day, for the purpose of receiving the award, and in order that judgment might at once be entered up." To have recognised, therefore, in the order of 6th October, that the Arbitrator had three months' time given him was clearly a mistake ; while, under the 22nd section of the Ordinance, awards could be made in three months, only under deeds of submission or compulsory orders of reference, which was not the case here. [See the wording of the joint motion. There is no limit as to time.—STEWART, J.] But the Judge's order is explicit, and the reference should be taken as subject to its terms. [Where a judgment is founded on an award resulting from a voluntary reference, as in this case, there can be no appeal. See 28th section—C. J.] But he (Mr. Kelly) contended that there was no valid award by reason of the irregularities pointed out, and that, therefore, the judgment was bad. [The Ordinance estops you from appealing.—C. J.]

Per CURIAM.—"Affirmed."

Slander.

D. C. Colombo, 61205. This was an action for Slander, the plaintiff claiming Rs. 500 as damages, in consequence of the defendant having used the following language towards him: "you are a pimp and the son of a whore and a pariah's slave." The learned District Judge held that defendant "was guilty of disorderly conduct near a public thoroughfare, for which, if guilty, she would have been properly prosecuted in the Police Court and fined *5s.*; and that it was proved that she did not wilfully and maliciously slander plaintiff by the use of language which, filthy as it was, was no more than the ordinary explosion and ejaculation of anger among people of their class, and was language which no bystander would understand in its literal meaning." Plaintiff's claim was therefore dismissed with costs.

In appeal, (*Dias* for appellant, *Grenier* for respondent) per CREASY C. J.—"Set aside and judgment to be entered for plaintiff with four cents damages and no costs. We regret we cannot co-operate with the learned District Judge in dismissing this ill-founded and pettifogging action. The authority of Sir Charles Marshall, (see p. 412 of his Reports,) and of the cases cited by him, and the subsequent practice of our Courts, is too strong for us. The best way to meet an action of this kind, is for the defendant to pay a nominal sum of money into Court in satisfaction of plaintiff's cause of action. If the plaintiff after that goes on and claims higher damages, he does it at his peril."

D. C. Galle, 30319. Plaintiffs, as mortgagees and judgment creditors, brought the present action to have defendant's claim, by purchase, to the mortgaged property set aside. The mortgage was dated 1862, while defendant appeared to have purchased in 1869 at a public sale, at which one of the plaintiffs was present. The mortgage bond was put in suit a day after the defendant had obtained a deed of conveyance. The District Judge (*Gillman*) dismissed the case, on the ground that the plaintiffs had been silent at the sale, and that he believed they had consented to it in the hope of being paid their debt with the proceeds.

Mortgage.

In appeal, (*Kelly* for appellant) per CREASY C. J.—"Set aside and judgment to be entered for plaintiff as prayed. When the genuineness or the legality of a mortgage is in question, it is a very fair topic, in favour of those who impeach it, to show that the mortgagee was silent about his rights on an occasion when it was natural for him to assert them. But such a circumstance cannot set aside a confessedly genuine and valid instrument; nor can the mere silence of a mortgagee make a title-deed for a vendee. It is not so if he had actively induced the vendee to make the purchase, by asserting that the estate was unincumbered. In that case, an estoppel in pais might be created. But even that could not affect other parties to the mortgage, who took no share in the misrepresentation. See No. 1261, D. C. Negombo, decided by the Supreme Court, July 22nd, 1835, and reported in Morgan's Digest, page 54."

June 27.

Present CREASY, C. J. and STEWART, J.

D. C. Kandy, 37801. This was an appeal against the following judgment of the District Judge (*Gillman*) who, by order of the Supreme Court, had carried out the instructions contained in the concluding part of the judgment of the Judicial Committee of the Privy Council.*

The Dodangalla case.

Hadden v. *Gavin.*

*A Bond and Mortgage made in pursuance of an Order of Court by one Executor of his Testator's real estate in Ceylon, for the necessary expenses for the cultivation of the estate, and a Fiscal's Sale in execution of a decree in consequence of the default in payment by such Mortgagor, upheld; notwithstanding an attempt to repudiate the Mortgage and set aside the sale by a co-Executor and Devisee in trust under the Will of the Testator on an allegation of collusion with the Purchaser, and that such co-Executor was not a party to the Mortgage.

The Supreme Court at Ceylon being a Court of Law and Equity, it is in accordance with the practice of that Court that for moneys

The Dodangalla case.

"This case, well-known as the Dodangalla Estate Case, was remitted to this Court from the Honorable the Supreme Court, for the purpose 'that the order of Her Majesty in Council of the 28th July, 1871, may be carried into effect.' This directed, *inter alia*, that an account should be taken 'of the profits of the estate received by the respondent' (James Farquhar Hadden, the plaintiff) 'and of the amount of compensation, if any, for any damage which the property has sustained during the respondent's possession, which are to be paid by the respondent to the appellant' (John Gavin, first defendant) to whom the estate was finally adjudged by the Privy Council judgment abovementioned. The question of damage is not pursued by the parties; but, on the 31st October, 1871, the plaintiff's agents, through his proctor, filed an account of the profits of, and expenditure on, the estate during plaintiff's possesion of it, and subsequently, namely on the 19th February, 1872, a supplementary account. Certain items in those accounts are objected to by the first defendant, the objections being set forth in the papers marked X and Y respectively, and an answer has been filed, (paper Z) on behalf of the plaintiff, to these objections. The taxation of the parties' costs, also, by the Secretary of this Court, is questioned is respect of several particulars. As the accounts, filed by the plaintiff, are of a complicated and mercantile character, this Court intimated, on the 25th April last, that it was prepared to exercise the power conferred on it by the Ordinance No. 15 of 1866, and direct a reference to arbitrators (and even to make such reference compulsory, if the parties could not agree to select their own arbitrators) with reservation of any points of law that might arise in the course of the examination of accounts. Afterwards, however, the parties agreed to accept all the accounts (subject to errors) with the exception of certain ten or eleven items, the right to charge some of which is wholly denied by the first defendant; the amount of the others being objected to as exorbitant. Before recording my opinion, in detail, on each of the disputed items, I shall note briefly the principles of our law which have guided me in my determinations on them. In the

bona fide advanced to an Executor or Administrator for the purposes of the estate which he represents, a suit may be sustained against him in his representative character, and judgment and execution had against the Testator's or Intestate's estate; if however the Executor or Administrator deals with such estate in breach of his duty, a person who is party to such dealings, or takes any property of the Testator with knowledge of a breach of trust, will not be allowed to retain any benefit therefrom.

An Executor by the Law in force in Ceylon has the same powers as an English Executor, with the addition that it extends to immoveable as well as moveable property.

See *VIII Moore's Privy Council Cases, (N. S.) p.* 90.

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first place, the onus lies on the plaintiff to support, by competent and satisfactory evidence, his claim to make the several charges in question Secondly, in regard to those items the right to charge which is altogether objected to, and in regard to the excess in the other items, I have had to consider what kinds of expenditure our Common Law, the Roman Dutch, allows a person (such as plaintiff has been) in possession of property, to charge against the rightful owner. It appears clearly from the authorities that our rules go very much farther than that followed under the same head of equity in English Courts, and that they sanction different expenses according as the possessor is one *bona fide* or *mala fide*, that is according as he is in possession *bona fide* and without notice of any adverse title, or *mala fide* and with such notice. In the present case plaintiff is, it is true, a wrong-doer, inasmuch as he believed himself to be entitled to the estate and acted accordingly, whereas the final judgment decides that he was not so entitled; but it is to be remembered that the present was a case of conflict of what seemed doubtful claims to land, and that the plaintiff was put into possession by order of the Supreme Court after a most careful judgment by that learned body; and that he had, therefore, much justification in believing that it was not likely that he should be again ejected from the possession so given to him. In this view plaintiff may be regarded as a *bona fide* possessor. The general rule then, thus deducible from the authorities to be presently referred to, is to the effect that a possessor whether *bona* or *mala fide* is entitled to the *impensæ necessariæ* and the *impensæ in fructuum perceptionem factæ*, and the *bona fide* possessor to the *impensæ utiles*, also, in so far as these have enhanced the value of the property, and beyond what the possessor has been reimbursed by the profits. The authorities may be found in our text-books as follows:—*Johannes Voet Comment. ad Pandectas, lib.* v, *tit.* 3, § 21, where he discusses the difference in this respect between a case *de hæreditatis petitione*, and a real action by an owner claiming property, *i. e.*, the suit *rei vindicatio* of our law. And again, *lib.* v, *tit.* 3, § 22, where he gives the reasons why a *mala fide* possessor may deduct the *impensæ in fructuum perceptionem factæ*, viz., because *naturali ratione fructus non intelliguntur, nisi deductis impensis fructuum quærendorum, cogendorum, conservandorumque causa factis, &c.* And again *Digest, lib.* 20, *tit.* 1, § 29, as to *impensæ utiles quatenus pretiosior res facta est*; and *Digest, lib.* 6, *tit.* 1, § 48 as to their allowance beyond what the possessor has been reimbursed by rents and profits. Compare also *Burge's Conflict of laws*, iii. p, 371; *Grotius, lib.* 2, *cap.* 10, § 7

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& 8; *Inst.*, *lib.* 2, *tit.* 1, § 30, 32. These authorities support the proposition I have stated above. Finally, in regard to those charges the amount only of which is objected to, I have been referred by the first defendant's counsel to the fact that these charges as made by the plaintiff and his agents in Ceylon, Messrs. Wall & Co., are higher than were made by the first defendant and his agents in Ceylon, Messrs. Keir, Dundas and Co., for similar services before the first defendant was dispossessed by order of the Supreme Court. On this I think that, where there is no decisive evidence one way or another, as to any particular item, the expenses incurred by the first defendant when he had possession may be looked to by this Court as a guide to what the estate required, and on the principle that, if no good cause to the contrary be shewn, neither plaintiff nor his agents in Ceylon should profit unduly at the defendant's expense, the maxim being *nemo debet locupletari ex alterius incommodo.* Under the guidance of these principles, I now proceed to consider the various items in the order in which they have been objected to at the trial.

"1. *Cartage*—This is charged by the plaintiff's Agents, Messrs. Wall and Co., for conveying coffee of the estate between the railway terminus and their store. It is objected to as being unusual; and it is urged that the charge of 1½d per bushel for 'storage' should cover it. The only evidence on the subject before the Court is, that Messrs. Wall and Co. always charge the item in addition to storage, and that Messrs. Keir, Dundas and Co., defendant's agents, did not. There is no evidence of any custom in support of the item; though there is a scintilla of evidence the other way (see witness Mr. MacGregor's statements.) I think that this item should be disallowed, as it is not shown to be usual according to the custom of coffee—store owners in this colony, or an *impensa necessaria* or *utilis*, and as it would tend, without due reason, to enrich plaintiff's agents at defendant's expense.

"2. *Agency and Commission.*—These also are charges made by Messrs. Wall and Co., during the five years they managed the estate as agents for the plaintiff. They are objected to because similar charges were disallowed by the Supreme Court to the first defendant's agents, when he was ordered to hand over the estate to the plaintiff. And it is urged that that order was made because the defendant was then presumed to be a wrongdoer, the plaintiff being now, legally speaking, in the same position. But the real reason why that charge was disallowed by the Supreme Court appears to have been because the first defendant was supposed by that Court to be (though it now appears that

he was not) a member of the firm of Agents who made the charge. No such reason can apply in the present case; the charge was actually incurred and was necessary, being one *in fructuum perceptionem facta.* It is therefore allowed.

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"3. *Sombreorum.*—This is the name of a certain manure or artificial mixture, apparently of certain mineral substances, originated by one of the witnesses, Mr. R. B. Tytler. The plaintiff applied it over nearly the whole estate in 1868-69 at a cost of above £1100. It is objected that this expenditure was unjustifiable, as the manure was then but little known or appreciated, that it was a mere costly experiment, and proved eminently unsuccessful. It is not denied that the plaintiff applied it in perfect good faith and with the sole intention of benefiting the estate; but it is admitted, also on plaintiff's side, that he sent the manure from England to his agents here depending solely on his own belief in it; and even against the remonstrances of one of the partners in his agent's firm. Much evidence is adduced on both sides as to the value of this manure; it is of the *most* contradictory character; for instance, Mr. Tytler, the originator of the mixture, informs the Court that it suits all Ceylon soils, while another gentleman, who has evidently studied the important subject of manures well, believes it is a simple waste of money to apply it alone to any Ceylon soil. From the other testimony it would appear that the truth lies between these opposing beliefs, and that the manure suits some soils in certain climates and at certain elevations; but that the Dodangalla Estate does not meet any one of these conditions. Indeed the evidence of Mr. Shipton, the visitor employed by Messrs. Wall and Co., to inspect Estates under their agency, besides showing his own disbelief generally in the efficacy of the mixture as a manure, proves that its application to Dodangalla was wholly without effect, for he states that 'some parts of the estate were advisedly omitted from the manuring with Sombreorum, so as to watch its effect,' and he adds 'I cannot say that I saw the least difference between the manured and unmanured portions, and the crops on both parts matured equally well.' No other witness is more competent than he to speak concerning the result of the application of this manure to Dodangalla. It may be, as Mr. Shipton asserts, that it was necessary at the time to apply some artificial manure to the estate, as the ordinary cattle manure was failing; though it would appear from the evidence on the other side, that there was no practical difficulty in extending the cattle establishment; but, without dwelling further on this point, I regard it as conclusively proved that the Sombreorum did no

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good to this particular estate, and that it was, therefore, not a necessary or a useful expenditure, or one required for the gathering or furthering of the crops, such as may be allowed to either a *bona fide* or a *mala fide* possessor according to the authorities before quoted. This item must therefore be disallowed.

"4. *Postage.*—The charges made under this head are objected to as being *extravagant*, being from £4-4 to £7-7 annually, while it is urged that during the time the estate was in the first defendant's hands, the item never exceeded £2 or £3. It is stated in the evidence for the plaintiff, that the sums charged were actually expended, but the amounts of the items (always a certain number of guineas) would tend to show that they are rather the result of some average—say of the total postage spent on account of several estates—and no reason is assigned and no custom of merchants is shewn to explain why they should be so much higher with plaintiff and his agents, than with first defendant and his agents. The excess is certainly not shown to be an *impensa necessaria or utilis*, and therefore disallowed.

"5. *Brokerage.*—This is a charge of one per centum on the sale of the crops in the London market. It is objected to on the same grounds as the preceding item, the charge of defendants' agents being but half per cent. The excess is disallowed for the same reasons as those mentioned in regard to the last item.

"6 and 7. *Vegetables and Rain-gauge*—The charges under these heads are small and the objections to them were not pressed at the trial. They are therefore allowed.

"8. *Interest.*—This is one of the charges of plaintiff's agents, Messrs. Wall and Company, and explained in the evidence to be made by them 'when out of money, a charge on the balance of account as they went on; they allowed interest when they had money in hand.' It is objected to however on the grounds that, as the estate was worked by money raised by bills drawn on England, the agents here, Messrs. Wall and Co., should have taken care that they kept themselves in funds by that means, and that they had no right to advance money themselves, the interest on which is double the amount payable on that raised by the Bills on England. It is in fact contended that, according to the custom in such cases, there should not enter into such accounts as are now under consideration, any item for interest in Ceylon, and that it could only creep in because of the laches of the Ceylon Agents in keeping themselves in funds. These objections seem to me to be well founded, and there does not appear to be any valid reason why the

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item should appear in the accounts, and it is therefore disallowed.

"9. *Salary of an Assistant Superintendent for two years.*—This is objected to on the ground that there was no necessity for the employment of an Assistant to the Manager; that the first defendant had worked the estate without such aid; and that plaintiff's agents, Messrs. Wall and Company, engaged the Assistant at a time when the estate was yielding small crops. It is urged, contra, that an Assistant is always needed on an estate like Dodangalla, and that in this case the expenditure was the more required because draining, a very important matter, was attended to under the supervision of this Assistant; and that his pay was saved as weeding was more effectually looked after; and it appears to be admitted in the evidence that the estate, always a weedy one, was less so when plaintiff's agents gave it over to Gavin. It is not shewn that the Superintendent could not have done the work without an Assistant (unless there be some truth in the suggestion that the time of the former was occupied with an unusual excess of letter writing) and the extent of the estate is not so large as of itself to indicate any necessity for such aid. Indeed the present manager is stated in the evidence to superintend not merely the Dodangalla Estate, but another also in addition; and it is not denied that the former property had been regularly weeded once a month before plaintiff obtained possession of it. On the whole looking to the *onus probandi*, I do not think that the necessity for this charge is made out, and it does not therefore come under any of the various kinds of *impensæ* which our law would allow to the plaintiff, in whichever way his position is viewed. It is therefore disallowed

"10. *London Agent's Commission* (£183 odd)—It was not explained at the trial what the nature of this charge was; and the decision of the Court in the present enquiry was postponed in order to allow plaintiff's agents, Messrs. Wall and Company, an opportunity of affording the explanation. It is now stated that it is 'a commission of the London Agents for remitting net proceeds of the crops to Ceylon' (see memo. marked M.) On this explanation the first defendant's counsel do not object to the item, provided that the plaintiff be not allowed to charge also (as claimed in the next item) at the rate of 3½ per cent for cost of transmission of specie to Ceylon. In view of the decision in the next item this one is allowed.

"11. *Cost of transmission to Ceylon of* £17,301 *at* 3½ *per cent.*—I find it hard to understand why this item is introduced into the

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account by the plaintiff or his agents. It is stated in evidence by a member of the Firm of Messrs. Wall and Company, that 'the charge was not one actually incurred, but' (he adds) 'not entering into the question of exchange, we charged what the Supreme Court allowed before, that is to first defendant when his accounts were under scrutiny. The state of facts, however, is widely different in the two cases; in that of the first defendant's accounts it was held that, as exchange was very high (over six per cent) during the period over which his accounts extended, he could be allowed only the cost of transmission of specie then reckoned at an average of 3¾ per cent; the principle being that the least expensive mode of remitting the proceeds to Ceylon should be followed. But during the period over which plaintiff's accounts extend, the rates of exchange and cost of transmission of specie are, relatively, the reverse of those in the former period, the average exchange from 1867 to 1871, being hardly one per cent discount. On the principle, therefore, followed by the Supreme Court, i. e., that the least expensive mode of remitting should be adopted, no more can be allowed to plaintiff under this head than the amount of the exchange at current rates from 1867 to 1871, that is to say the cost of exchange actually incurred by him.

" The above are all the items objected to by the first defendant. The amount of the net proceeds, as estimated by the plaintiff, was lodged in Court on the 22nd March last by the plaintiff's Proctor for the use of the first defendant. The money so deposited was drawn next day by the first defendant, who, however, reserved his right to question certain items and also his claim to interest. This latter is, at the trial, explained by his counsel to be legal interest on the money in the hands of plaintiff's Agents after sales of crops and until the money came into first defendant's hands: this claim was not objected to at the trial and it is therefore allowed. It will be ordered that the accounts be referred to such auditors, or an auditor, as the parties can agree on, or failing such agreement, to an auditor or auditors to be named by the Court, for the calculation of the balance of account between the plaintiff and the first defendant after the modifications arising from the foregoing decisions shall have been introduced into the accounts. The first defendant having succeeded in the great majority of the objections raised by him in the present enquiry, is entitled to the costs of this contention, and these will therefore be decreed to him.

" There remains the question of taxation of costs of this suit up to the conclusion of it by the judgment of the Privy Council.

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The bill presented by the first defendant's proctor was in the usual course taxed by the Secretary of this Court; and the decision of this officer is in part appealed from to the Court under sec. 1, par. 40 of the Rules and Orders (civil jurisdiction), the particular instances where the taxation is objected to being detailed in paper marked W. In all others the Secretary's annullations are accepted, even those numerous ones where he has assigned the items as chargeable "against client" and not against the plaintiff.

"*Item* 7. The Secretary allows in this (and other instances not objected to) half fee only, and not whole fee to the first defendant's second advocate. He reports that this is the usual practice of this and other Courts, and refers to Bill in case No. 45,329 as a precedent. The items are however allowed as not being contrary to the rules, and as this case was a very complicated one, and as no sufficient practice to the contrary is satisfactorily shewn to the Court.

"Items 9 to 16 and 20 to 21 are properly taxed as against client, as being connected with the amendment of first defendant's answer and for which, therefore, he only should pay. See Rules and Orders, p. 113 No. 9, § 5, 1. Thompson, p. 4734. Item 40 is allowed as against plaintiff.

"Items 47, 48 and 66 and 67 :—The Secretary's mode of reckoning the charge for drawing up briefs viz., at 1s, 6d. per folio up to 120, and 9d. for every succeeding folio, is according to the usual practice sanctioned in the Rajawella case.

"Item 112, fee to Mr. Adam for valuing the estate, is not properly chargeable against the plaintiff, as the valuation was not made upon any order of the Court.

Item 116 (£369 odd) is for first defendant's expenses in coming to Ceylon to attend the trial. The plaintiff should not be asked to pay this. The first summons was served on first defendant while he was still in Ceylon; and if he deemed his attendance necessary, he might have remained in Ceylon. Moreover it is not usual to allow, even in Ceylon, the expenses of a party whose name is not in the list of witnesses. The defendant might have beeen examined on Commission in England.

"Item 117. £672 expenses of Commission to England as per bill. This Court has no means of judging of the correctness of this charge and no guide by which to tax it. It is suggested that it be left to the arbitration of two Barristers, one to be named by each of the parties.

"The Secretary will now close his taxation subject to the above orders, omitting for the present the item last mentioned.

In appeal, (*the Queen's Advocate* for appellant, *Ferdinands* for respondent,) PER CURIAM.—"Affirmed, except so far as regards the plaintiff's claim to be allowed £140 for salary of an Assistant Superintendent for two years. We think this claim is to be allowed, and the judgment of the District Court is to be amended accordingly. It appears that the drainage of the estate required attention at this period; that this is a very important matter; and that the services of a very intelligent and active Assistant Superintendent, (such as was the European gentleman employed), were indispensable. The money thus expended seems to be an outlay decidedly requisite, and decidedly "utilis," to the estate. With regard to the other subject matters of the appeal, we find the reasons of the learned District Judge, given in his judgment, so clear and full, that it is unnecessary for us to do more than to express our concurrence with them. There were certain objections to the taxation. So far as they related to matters of principle, we have ourselves considered them; so far as they related to mere matters of detail of charge, we have referred them, as usual, to the Registrar of our Court. The result is that the real judgment of the District Court is in all respects affirmed, except as to the claim for the Assistant Superintendent's expenses already mentioned. Each party is to bear his own costs of this appeal. The other costs are to be borne by the plaintiff as directed by the District Court."

Administration.

D. C. Colombo, 61760. Plaintiff, as administrator, sued to eject the mother and sister of his intestate from portions of certain lands belonging to the estate. The defendants pleaded that they and their co-heirs, including the plaintiff, had been and were still in possession, and that a sale was unnecessary. The case came on for argument on a demurrer, that the answer did not disclose a sufficient defence in law, when the District Judge, having specially found that the administrator had failed in his duty, ruled as follows: "An order will therefore be made in the testamentary case, requiring all the major heirs to attend and state whether they desire or do not desire that they should be temporarily turned out of their cottages pending the winding up of the estate; and, if the majority desire it, then all of them, if any, and not the defendants alone, will take care that the plaintiff be evicted with the others, and the administrator required to give out the lands and cottages on lease. In the meanwhile, this case will lay over until those steps have been taken in the testamentary suit. The question of costs in this action will likewise lay over, and will form the subject of consideration in the audit of the final account as well as in the judgment ultimately to be pronounced herein."

In appeal, per Creasy, C. J.—"Affirmed. We have carefully examined the proceedings in this case, and we agree in thinking that the administrator has abused his trust. The District Judge points out in his judgment, that he originally refused to grant letters of administration in this case, but that he was overruled by the Supreme Court. We regret the misuse that has been made of those letters; but we cannot see that, in the judgment then given by us, we acted otherwise than we were bound to act by the law of the land. In the case of Lewis v. Adrian, decided by us in November, 1871, and reported in the Colonial Gazette of 2nd December, 1871, we set out fully our reasons for holding that the English law as to executors and administrators is in full operation in this island, and has been so since, at least, the Charter of 1833.* When an intestate's estate is of very trifling value, we might, in accordance with custom, forbear to enforce the law which requires the taking out of administration. But we could not follow such a course in cases like the present, where the assets were substantial, amounting to £150. We have no right to set aside the clear law of the land, for the purpose of favoring what we may deem the interest of the heirs in a particular case, and we have no right to deprive the Crown of any part of its revenue. But, though in such a case administration must, (at least if applied for,) be granted, the administrator is always under the supervision of the District Court. He is always to be looked on as a trustee, and he is liable to be controlled and made responsible like any other trustee, if he thwarts and violates the purposes of his trust. In the very case referred to of Lewis v. Adrian, while we carefully and explicitly declared the law as to administrators, we treated the then defendant as a trustee thwarting the purposes of the trust, and we, therefore, refused to give her the reversal of the judgment against her to which she would have otherwise been entitled. We follow a similar course on the present occasion."

Administration.

D. C. Colombo, 3322. This was an appeal against the following order by the District Judge, on an application made by an administrator to be authorised to sell certain immoveable property belonging to the estate. "Sale allowed, but to be held by the Secretary as auctioneer at the Court house, and to be for cash which is to be deposited in Court."

Grenier, for appellant.—The Administrator had given security for the due administration of the estate, and nothing in his past conduct justified the implied reflection on his honesty. Besides, to prescribe a cash sale was to ensure the property being sold at a sacrifice.

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* See also *Staples* v. *De Saram*, D. C. Colombo, 43213. Civ. Min. July 17, 1867.

Per CREASY, C. J.—"Affirmed. While we hold that the law is compulsory on District Judges to grant letters of administration to intestate estates, except where the value of the estate is absolutely trifling, we think that we are at the same time bound to support, as far as fairly possible, the District Judge's power of controlling the conduct of the administrators. We should not interfere with their discretionary exercise of that power, except when it was evident that a District Judge had acted out of mistake, and also that the course directed by him was calculated to injure the estate. We do not regard the present as a case of the kind. One administrator of this estate has misconducted himself, and absconded. The letters of administration granted to him have been cancelled, and the present appellant has been appointed administrator as attorney for the heirs who are absent from the island. The Court may well be vigilant in behalf of the heirs. The sale being by the Secretary of the Court will ensure a bona fide public sale. Otherwise, as auctioneers are no longer required to take out licenses, any cooly may be made auctioneer for the occasion, and the assets may be jobbed away in a hole and corner sham sale. As for the order that the sale must be for cash, it appears to us that the property is house property in Colombo, estimated at two thousand rupees; and there is no likelihood of there being a want of cash purchasers for such property at or about such an amount."

July 1.

Present CREASY, C. J. and STEWART, J.

Community of property.

D. C. Matara, 26343. In this case the plaintiff claimed 6 buffaloes and 12 calves, by right of her husband who had died about three years before the date of action, leaving behind a son since deceased. The defendants (mother and sister of the plaintiff's husband) admitted their possession of 5 head of cattle bearing the marks described in the libel, but denied that they were the property of the intestate. They further denied that the plaintiff was wife of the deceased, and that he had any issue by her. After evidence heard for plaintiff, judgment was entered for her. for 4 buffaloes and 4 calves which the 2nd defendant in examination had admitted were in her possession. *In appeal, Beven,* for appellant, contended that, even if the evidence was held to be sufficient to establish the right of the plaintiff's husband to the cattle, it failed to establish the plaintiff's right to all her husband's property. No evidence had been led to show that the plaintiff had any issue by her deceased husband; and, failing

issue, the defendants (the mother and sister of the intestate) were entitled to half the property. Per Creasy, C. J.—" Affirmed as to one half in value of the buffaloes mentioned in the judgment of the District Court: the District Judge must settle the question of value. The plaintiff has not thought fit to support the judgment given in the District Court. After hearing the appellant and examining the evidence, the Supreme Court thinks that plaintiff, as wife, was entitled to only one half the property, and the heirs to the other half. There is no evidence that the child, who is joined as co-plaintiff, is the child of Dingi Appoo and the first plaintiff."

Legal age of majority.

D. C. Matara, 26376. This was an action to set aside a Fiscal's seizure, the plaintiff claiming the land in question on a bill of sale dated 1846, and by uninterrupted possession since; and the defendant asserting that it was the property of his judgment debtor acquired by inheritance. The debtor's age was proved to be 30 years, and it was contended that, although under the Mohammedan law he was a major in 1859, yet, by operation of Ordinance 7 of 1865, he did not attain the legal age of majority till 1864, and that therefore prescription had run against him for only 9 years. The Judge (*Templer*) held that the Ordinance had no retrospective effect, and gave judgment for plaintiff. *In appeal, Dias*, for appellant, contended that the wording of the Ordinance distinctly favored the defendant's contention. [Such a construction as you seek to put would lead to a manifest absurdity, however grammatically correct it might be.—C. J.] *Ferdinands*, for respondent, was not called upon. Per Creasy, C. J.—" Affirmed. The Ordinance cannot be looked upon as retrospective."

Compensation.

D. C. Kandy, 52439. The plaintiff claimed one-half of a land and house at Gampola under the Will of one Appua, while defendant claimed the whole by purchase from Appua's daughter. The house in question had been built by defendant subsequent to his purchase. The District Judge (*Gillman*) gave judgment for plaintiff as prayed for, holding that defendant, as a mala fide possessor, was not entitled to any compensation for the house.

In appeal, Dias, for appellant, restricted his claim to compensation, contending that there was no evidence of mala fide possession on the part of defendant. *Ferdinands*, for respondent.—Plaintiff was a minor when the house was built: she could not object, and therefore should not be prejudiced in any way. If defendant were entitled to compensation for the house, the rents he had received should be set off against the cost of the building.

Per CREASY, C. J.—"Affirmed, but the case is sent back to be amended as hereinafter mentioned. The Supreme Court thinks it by no means proved that the house was built by a mala fide possessor. It is, therefore, unnecessary to go into the somewhat obscure question as to what, if any, compensation the defendant would be entitled for expenses if the possession had been mala fide. We might on this have had to refer to Voet, lib. vi, tit 1, 36; Grotius, p. 106; Warnkœning, p. 93, and his note thereon, and many other authorities. The plaintiff is entitled to recover one-half of the house, but she must pay compensation for the value of that half. Per contra in reckoning damages the worth of the land with the buildings must be regarded. It is very desirable that the parties should agree to some amount to be paid, but if they will not, the District Judge must acertain it."

July 2.

Present CREASY, C. J. and STEWART, J.

Crown land.

D. C. Colombo, 58733. The question in this case was the right of the Crown to sell in 1869 to the defendant a piece of ground which plaintiff claimed by inheritance from his father, who had originally applied for it to Government in 1821 and made certain payments in respect thereof in 1845, but who had failed to obtain a grant. Judgment having been entered for plaintiff, the defendant, who had purchased from the Crown, appealed.

In appeal, *Dias*, for respondent, on being called upon, contended that the Crown having received from plaintiff's father 5 shillings per acre under the Minute of 1844, had acknowledged his title to the land and its own obligation to issue a grant. If no grant had issued, it was not the plaintiff's fault. As to the conditions prescribed in the Minute, it might fairly be presumed, after the great lapse of time since 1844, that they had all been duly fulfilled, particularly in view of the fact that plaintiff and his father had possessed since 1821 and had not been disturbed till 1870, after the second sale by the Crown to the defendant.

The Queen's Advocate, for appellant, in reply.—The land in question was waste, uncultivated and unoccupied at the time the action was brought, and as such was to be regarded as Crown property, under Ordinance 12 of 1840. The fact of plaintiff's father having applied in 1821 and made certain money deposits in 1845, was insufficient to create a title, although it might possibly give a right to compensation as against the Crown. Under the Minute of 1844, the Crown could not be compelled to confer title on every holder of a conditional grant * or

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* As to the effect of conditional grants and the right of the Crown to summarily resume possession of lands which have never been brought under cultivation, see the judgment of the Supreme Court in C. R. Panadure, 13969, Civ. Min., Sept. 11, 1872.

ticket of application; and in this particular case, the evidence showed that the original applicant and those claiming under him, so far from entitling themselves to an absolute transfer, had by non-cultivation defeated the very object of Government in the matter of these grants, which was to secure a corresponding increase of revenue by an increase of cultivation.

Per CREASY, C. J.—" Set aside and judgment to be entered for defendant with costs. This has been treated in the Court below as a clear case of unconditional purchase and sale of the land between the plaintiff's father and the Crown in 1845, accompanied by payment of the purchase money ; though, through the culpable neglect of the officers of the Crown, (as supposed by the District Judge,) no formal grant was executed. On examining the facts, the Supreme Court thinks that the case is one of a very different character. There was never any purchase and sale at all, but the plaintiff's father, who had made application in 1821, appears in 1845 to have again applied to the Crown, under the minute of the 8th of August 1844. That minute is as follows :—

Whereas prior to the advertisement of 11th July, 1833 grants of land were made on condition of paying 1-10th of the produce, and subject to forfeiture in case of non-cultivation, and whereas such titles are imperfect and incomplete, notice is hereby given that the holders of such grants who may be desirous to obtain a complete title, will be allowed to purchase the same, (subject to a pepper corn rent,) at a fixed price of five shillings the acre, on giving up their conditional grant, provided however that no such title will be given to paddy lands. And whereas that many lands are now held under tickets of application dated prior to 1833, but for which grants have not been issued. It is further notified that holders of land under such tickets will be allowed to purchase so much land as they have actually cultivated, and to the alientіon of which there is no objection at a fixed rate of five shillings an acre, to be held also under the conditions now in force. Any persons desirous to obtain such title are required to lodge their application with the Government Agent, and to pay into his hands the purchase money and regulated fees from this date.

By His Excellency's Command,
P. ANSTRUTHER,
Colonial Secretary.

Colonial Secretary's Office,
Colombo, August 8th, 1844.

" Under this minute the plaintiff's father, in order to obtain a grant, was bound not only to bring in a certain sum per acre, but also to prove how much he had 'actually cultivated,' for which amount only he was to have a grant. Even that grant was not be made, if the Crown had any objection to the aliena-

tion of the land; and the grant, if made, was to be made subject to a condition for forfeiture in case of non-cultivation. It does not appear that the plaintiff's father ever satisfied the Crown as to his 'actual cultivation' of this land. It appears indeed impossible that he should have done so. According to the evidence, the land was never cleared of jungle, and the proof of planting is meagre in the extreme, even after making due allowance for the effect of lapse of time in removing possible witnesses. Certainly the land, if ever cultivated, was allowed to relapse into a jungle state; and this circumstance would have of itself invalidated any grant that could have been previously made under the minute of 1844. The learned District Judge quotes a case as 4459, D. C. Uttuankande, Morgan's Digest, p. 155, of which he says that 'it has been decided by the full Court in appeal, that the mere application for land raises a strong presumption of possession.' On searching for that case in the Court Minutes, we find that it does not in any way relate to our present subject. There is probably an error of the press in Morgan's Digest, and the reference ought to have been No. 2249, D. C. Negombo, decided on the same day. That case is a decision of a single Judge. It determines nothing as to the rights of the Crown, but it merely declares that when two private persons are disputing with each other about the ancient possession of land which had been originally Crown land, the party makes out a strong case of possession who proves an application in his own name for the land, a survey of the land made in consequence of the application, the clearing away of the jungle by his cropping part of the land, and payments by him of the Government renter's share of the crops. Another case cited in the Court below is one reported in Morgan's Digest, p. 85, as No. 83, D. C. Kurunegala. The learned District Judge, in his present judgment, alludes to that case as a carefully considered judgment of the Collective Court, which establishes that the 'condition of the land at the date of the passing of the Ordinance No. 12, of 1840,' is to be considered as determining whether the case falls within the enactments of that Ordinance, as to the presumption about waste and uncultivated lands being Crown property. We cannot find that case or any case resembling it in the Court Minutes of that period, 18th August, 1853. According to the Report in Morgan's Digest, it was a decision of two Judges only, not of the Collective Court. It was a decision about Chena lands, and as reported is not very intelligible. In any point of view, it would not affect our judgment in the present case, but we mention it lest we should be thought to assent to the doctrine about the Ordinance No. 12, of 1840, which has been pronounced in the Court below."

July 8.

Present Creasy, C. J. and Stewart, J.

The Mortmain case.

D. C. Colombo, 3627. The facts and law of the case as found by the District Judge (*Berwick*) are fully set forth in his learned judgment which is published *in extenso* in the Appendix to these Reports. The important questions, however, in respect of which the present appeal was taken were—

"The validity of Bequests of Land or of the Revenues of Land for the annual celebration *in perpetuum* of Roman Catholic Solemnities and Festivals; and of other similar Bequests more strictly for Charitable purposes;—and, if intrinsically valid without a Mortmain license,—then the proper application of the Funds when this has been insufficiently defined;—and the mode of executing the Testator's intentions, when either through the omission of the Testator, or any other cause, due provision for this purpose fails."

The District Judge, having decided that the Dutch Mortmain Laws were in force in the Island, declared the Bequests for *religious* uses invalid, but upheld those for *charitable* purposes and made order for the due administration of the funds arising therefrom.

In appeal, the *Queen's Advocate* (*Grenier* with him) for the appellant, who was the Roman Catholic Bishop; *Dias* for the heirs benefitted by the judgment; and *Brito* for the Executor.

[The Chief Justice desired to hear respondent's Counsel first.]

Dias, for the respondent.—The Dutch law of Mortmain was in full force in the Island, and it was unnecessary to add to the authorities cited by the learned District Judge to show that in the Province of Holland Mortmain laws were in full force at the time this Colony was ceded by the Dutch to the English. [There is no occasion for authorities on that point. The question is whether the Dutch ever brought their Mortmain laws to Ceylon,—C. J.] The law of the Maritime Provinces of Ceylon was the law of Holland, and the onus was on the other side to show that any particular part of that law was not imported into Ceylon by the Dutch. It was well known that the administration of the possessions of the Dutch in the East was marked by one uniform system, and the learned District Judge referred to several Batavian Placaats which conclusively proved that the laws of the Province of Holland with regard to Roman Catholics were observed in her East Indian Colonies. There was nothing to indicate that Ceylon had been an exception to the rule. On the contrary, the early Proclamations of the English Government clearly shewed the state of the law during the preceding Dutch Government. The Proclamation of the 23rd September, 1799, after allowing liberty of conscience and the free exercise of religious worship to all persons in the Maritime settlements, limited that freedom by stating that "no new places of religious worship be established without our license or authority first had and obtained." The reservation of the right of the Crown was quite in

Mortmain case.

accordance with the Roman Dutch law, (Voet, 28, 5, 3.) and clearly proved that the English Government adhered to the law of Holland against alienation in mortmain without the license of the supreme power. There was nothing in the Proclamation to show that the English had only revived a practice which had fallen into disuse during the Dutch Government: it simply repeated the previous law to prevent any possible misunderstanding of the first portion of it which conceded liberty of conscience. Next in order of time came the Regulation of 27th May, 1806. It was intended "for taking off the restraints which were imposed upon the Roman Catholics of this Island by the late Dutch Government." It distinctly affirmed that the Roman Catholics were, by several laws passed under the late Dutch Government, rigorously excluded from many important privileges and capacities, and that though they were not acted upon by the English Government in *all* cases, they were yet unrepealed. This Regulation was of importance as it shewed (1) that the laws of Holland against Roman Catholics had found their way into Ceylon and were in force during the Dutch Government, and (2) that they had not altogether fallen into disuse during the English Government. The first clause of the Regulation was a mere repetition of what had already been conceded by the Proclamation of 1799; the second clause admitted Roman Catholics to all civil privileges and capacities; the third legalised marriages which had taken place according to the rites of the Roman Catholic religion; and the fifth repealed all laws which contradicted the provisions of the Regulation, which, it should be remembered, only dealt with the Roman Catholic laity and had nothing to do with religious establishments or their rights and obligations. That part of the Proclamation of 1799 which enacted that no new place of religious worship should be established without the license of the Crown, was not touched by the Regulation; and the word "capacities" used in the second clause was clearly insufficient to warrant the contention of the Roman Catholic Bishop, that it was competent for any one of the Churches within his diocese to take and hold real property without the license of the Crown. The obvious intention of that clause was to remove civil disabilities from Roman Catholic laymen, and enable them to hold offices of trust or profit which probably they were incompetent to do under the Dutch Government. Then followed the Regulation No. 5 of the 23rd November, 1829, which introduced the Catholic Emancipation Act (10 Geo. 4, c. 5) into this Island, but did not profess to deal with Churches or Priests. It had been argued for the Bishop in the Court below, that the Dutch Mortmain laws had fallen into disuse in Ceylon during the English Government; and the Ordinace No. 2 of 1840 had been referred to as evidence in support of the contention. That Ordinance, however, had several objects in view, viz. (1) preventing alienation in

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mortmain ; (2) authorising religious communities to hold land for a limited term without the Governor's license ; (3) authorising them to alienate lands already vested in them ; and(4) subjecting such lands to taxation under certain circumstances. It was a comprehensive measure, embracing partly the already existing law and partly several new enactments and modifications of old ones ; and it could not fairly be argued that the mere recital of a law under such circumstances was evidence that that law had not previously existed. The next point made for the Roman Catholic Bishop was founded on the decision of the Supreme Court in Murray's Reports, p. 63. The learned District Judge had conclusively shewn the inapplicability of that judgment to the present case. The question there was a purchase: here, a bequest. Besides, the Judges in that case referred to the Regulation No. 4 of 1806 in support of the statement that the Dutch laws restricting donations, &c., did not appear to have been acted upon by the English, while nothing in the Regulation warranted such an assumption.

The Queen's Advocate was not called upon to reply, but stated, in answer to a question put by the Chief Justice, that the Crown had never any intention of disputing the validity of the Bequests which the District Judge had held to be illegal.

Brito, for the Executor, would support the contention on behalf of the Roman Catholic Bishop as to the validity of the Bequests in question. He was chiefly interested in securing a reversal of the District Court order interfering with the rights of the Executor to administer the trust funds.

The Chief Justice delivered the following elaborate judgment this day.

"In this case the learned Judge of the District Court of Colombo has himself caused questions to be raised as to the validity of certain Bequests in favor of certain Roman Catholic Churches in this Colony, and of certain other Bequests for religious and charitable purposes, all more or less connected with the Roman Catholic religion or ritual. The most important matter thus brought forward by the learned District Judge for consideration, is whether the Dutch Mortmain laws are in force in this Colony or not. And, as there is an express decision of the Collective Supreme Court on the subject, we should have considered ourselves justified in dealing very briefly with the present ruling of the District Judge of Colombo in opposition to that Supreme Court judgment, if it were not that he endeavours to distinguish between the two cases. In order to shew that the same principle, which must govern the present case, was determined by our predecessors, we must discuss some of the numerous topics, which the learned District Judge has introduced and commented on so copiously in his judgment. We must see what the Dutch Mortmain laws were, and also, to some extent, what they were not. Almost throughout the

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judgment of the Court below, the Mortmain laws of Holland are mixed up with the Penal laws against (supposed) false religions, which the Dutch enacted both in Holland and in their Colonies. The two classes are entirely distinct. The main source of the Mortmain laws in Mediæval Holland, as in the rest of Mediæval Europe, was Feudalism: they were originally enacted chiefly by reason of the desire of Feudal Lords to keep the lucrative perquisites of their seigniories undiminished, and by reason of the desire of Feudal sovereigns to keep the feudal military power of their realms unimpaired. The Mortmain laws are essentially measures of State Policy. The Penal laws are essentially measures of supposed religious duty, of the duty, which rulers considered to be incumbent on them, to repress and to extirpate, if possible, all false creeds and all heresies, and to maintain, by the strong arm of the secular Magistrate, what those rulers deemed to be the one true creed, and the only orthodox ritual. Besides erroneously blending the Mortmain and the Penal laws, the learned District Judge, almost equally erroneously, mixes up the Mortmain laws with the old Roman laws on the subject of Associations, "*Collegia*." Now we take it to be perfectly certain, that the origin and the governing principle of the old Roman laws about "*Collegia*" came from the jealous dislike with which the Aristocrats and the Emperors of Rome regarded all combinations of any number of the lower classes, as likely to become Political clubs (Hetæriæ) and nurseries of democratic faction. Moreover, there is explicit and abundant proof that Justinian, and other Christian Emperors before him, expressly gave full power to the Church and all charitable institutions to receive and hold property; and thus exempted ecclesiastical and charitable institutions from the law which forbade the acquisition of property by associations, if unlawful associations, "*illicita collegia*." The doctrine of the learned District Judge on this subject will be found at page 4, column 1 of his printed judgment. He says, respecting the ancient statutes of Mortmain, that "they were founded on the Justinian Code 'Collegium, si nullo privilegio subnixum sit, hereditatem capere non posse, dubium non est:' a law of Hadrian as old as the 2nd century. Code, Lib 6, tit 24, sec. 8; and the doctrine of prohibited colleges is laid down in the Digest, 47, 22, 1. Mortmain was therefore an essential part of the Common Law of Holland." Such are the words of the learned District Judge: and as this matter of the old *collegia*, and their capacity or incapacity to take by bequest or otherwise, come first in chronological order of the subjects which we have to deal with, we will proceed at once to consider it. The origin, which we have already mentioned, of the old Roman laws about *collegia*, namely, the jealousy with which the ruling powers regarded all combinations among the lower orders, is pointed out by almost every historian who has dealt with the subject of Imperial Rome. Gibbon, vol. 2, note to p. 226; Arnold, in his Essay on the later Roman His-

tory, vol. 2, p. 441; Merivale, in his History of the Romans under the Empire, vol. vii, p. 263; all refer to it. Perhaps an authority more congenial to a legal atmosphere will be that of Matthæus de Criminibus, title xv, "De Collegiis et Corporibus," c. i. The "Prerogative" instance of this jealousy, is the conduct of the Emperor Trajan in refusing to allow the institution of a self-organised company of volunteer firemen at Nicomedia in Bithynia, a city which had suffered much by conflagrations. The Emperor objected on the express ground that he did not like the principle of association, as it was sure to lead to political clubs. His words are "Quodcumque nomen ex quacunque causa dederimus iis, qui in idem contracti fuerint, Hetæriæ, quamvis breves fient." It was Trajan's friend and successor Hadrian that issued the edict cited by the learned District Judge, that a *collegium* could not take by will, uuless it was aided by some special privilege. Hadrian's successors tempered materially the rigour of this prohibition. They declared that a "collegium" might take by bequest, unless it was an unlawful association. See the Digest, book xxxiv, tit. v, sec. 20. "Cum Senatus temporibus Divi Marci permiserit collegiis legare, nulla dubitatio est quod si corpori, cui licet coire, legatum sit, debeatur: cui autem non licet, si legetur, non valebit, nisi singulis legetur." The Christian Emperor Marcian, by his Institute cited in the Digest, book xlvii, tit. xxii, sec. 1, authorized religious "collegia." "Religionis causa coire non prohibentur: dum tamen per hoc non fiat contra Senatus-consultum, quo illicita collegia arcentur." Matthæus follows Bynkershoek in understanding the special Senatus-consultum mentioned in this law, to be that which was passed in the time of the Commonwealth against the societies of the Bacchanalians which outraged all public decency and morality. The Emperor Constantine the Great authorized all people to bequeath property "sanctissimo Catholico venerabilique concilio." See the Code, book 1, title 2, sec. 1. Peckius, in his treatise "de Amortizatione Bonorum," c. v, points out that this means any "Ecclesiasticum Collegium." The Emperor Justinian is still more explicit. By the 46th section of the 3rd title of the same book of the Code, he compels heirs to execute the bequests of testators who have made any pious dispositions of their property. Subsequent passages of the same section show that Justinian comprised under the term "Pia Dispositio," legacies for church repairs, legacies in favor of monasteries, almshouses, hostels for wayfarers, hospitals for the sick, children's hospitals, and generally that he meant to include all dispositions for the good of pious societies, at any rate for those that were not such associations of the lower orders as the law prohibits, "cœtibus piis, aut omnino non prohibitis ex plebe collegiis." Finally, there is the seventh Novella of the same Emperor, collatio 2, title 1, which most solemnly confirms ecclesiastical bodies in their possessions, and forbids the alienation of such possessions. It includes in its provisions not only bishops, but the

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heads and managers of charitable institutions of all kinds (apparently) then known. It denounces every breaker of its provisions, whether "xenodochum, aut ptochotrophum, aut nosocomum, aut orphanotrophum, aut brephotrophum, aut gerontocomum, aut monasterii virorum, vel mulierum abbatem vel abbatissam, aut quemlibet omnino præsidentem venerabilibus collegiis." After reading these portions of the "Corpus Juris" (and others to the same effect might be cited) it seems impossible to believe that the Roman law, such as the people of Holland and other European countries received it, treated gifts or bequests to religious or charitable bodies as illegal. Unquestionably historical proof may be found that some of the Byzantine Emperors endeavoured to repress the increase of the riches of the Clergy; but their edicts for this purpose were not adopted or embodied in the great system of Roman Jurisprudence, as arranged and settled by Justinian: and it is this, the Roman law as settled in Justinian's time, which we have to look to in ascertaining the elements and the foundations of Roman Dutch law of after ages. We must go on to many centuries after the formation of the states of Mediæval Europe out of the ruins of the old Roman dominions, before we come to regular Mortmain laws. In the 12th and 13th centuries, Sovereigns began to show practically by legislation their jealousy of the vast acquisitions of landed property, which the ecclesiastics had been gradually forming. In England, Magna Charta first restrained them. The Mortmain Acts of Edward the first were more explicit and rigorous. The meaning of the word "Mortemain", which we find under the variations of "Manus Morta," "Amortissement," "Mortification," and the like in the mediæval Jurisprudence of Western Christendom, is thus explained by Lord Coke. "The lands were said to come to dead hands, as to the lords, for that, by alienation in Mortmain, they (the lords) lost wholly their escheats, and in effect their knights' services for the defence of the realm, wards, marriages, reliefs and the like; and therefore it was called a dead hand, for that a dead hand yieldeth no service." We will add to this the modern authority of Lord Brougham, who says in Giblett v. Hobson, 3 Mylne and Keen, 517, that the object of the Mortmain Acts was to prevent land from being placed *extra commercium*, upon the feudal principle of protecting the lords against having tenants who never died. We believe also that there is great force in the reasoning of Dean Milman (Hist. Lat. Christianity, vol. 5, p. 182) that "one of the objects sought by the Mortmain law must have been that the Crown should be less dependent on ecclesiastical retainers in the time of War." Certainly other motives co-operated with those which have been just mentioned, in causing and in extending the operation of Mortmain laws. There was a desire to prevent ecclesiastics from prevailing on dying landholders to will away the family properties. Duke Philip of Burgundy's rescript of the year 1446, (cited by Voet, page 249) is a striking proof of

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this. And laymen in general, though orthodox Roman Catholics, regarded with growing dislike the vast and constantly increasing territorial opulence of the clergy. But the feudal feelings which have been described, were the main, the primary principles on which Mortmain laws were founded. We are accustomed to think of the Dutch, as they appear in modern history, as an eminently commercial nation, justly renowned for maritime enterprise, but by no means conspicuous for martial or chivalric characteristics. But we must remember that long before the Dutch were independent, Feudalism had grown up in the Netherlands as in the rest of Western Christendom. The Dukes of Burgundy of the house of Valois, and the Austrian Archdukes of the house of Hapsburg, who became for some centuries the rulers of those provinces, were genuine feudalists in dominion and in spirit. Above all, the Emperor Charles the Fifth certainly valued military power, knightly ascendancy, and royal privileges, as highly as did any of our Plantagenets: and the Emperor Charles the Fifth was the lawgiver who enacted the principal Mortmain Statute of Holland. It is set out in Voet, book 28, title 5, section 3. It forbade the acquisition by monasteries or other ecclesiastical bodies of immoveable property, or rents, or the like, in any manner, by means of wills, or donations or contracts. "Cautum ne ullo modo, ex testamentis, donationibus, contractibus, monasteria aliaque corpora ecclesiastica acquirant immobilia aut reditus aliaque similia, quæ immobilibus accensentur." The subsequent Dutch legislation of 1592 and 1655, was a mere developement of this primary Ordinance. The developement was far from immaterial, inasmuch as it brought moveable as well as immoveable property within the scope of the Mortmain law. But Voet describes the legislation of 1592 and 1655 as not entering on any new path, but as keeping in the footsteps of the Emperor Charles. "His Caroli Quinti vestigiis inhærentes." Indeed on this point the learned District Judge says, (page 4 of his printed judgment) that "the Edicts of 1655, though specially directed against Roman Catholics, were a mere special developement of the old statutes of Mortmain, enacted by the Dukes of Burgundy and the Emperor Charles V of Holland, long previously." The case is now ripe for us to consider, whether the decision of this Court in District Court, Batticaloa, 9523, is a decision bearing on the present case, so far at least as the question of Mortmain law is concerned, and whether, as such, it ought to have been acknowledged as a binding authority by the Court below. We answer these questions in the affirmative. In that case a landowner had sold and transferred, for a sum of money mentioned in the Deed, a piece of land to the Church of St. de Croos of Batticaloa. The plaintiff was the Presiding Roman Catholic Missionary at Batticaloa and Manager of this Church and property

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thereof. His title was disputed ; and the objection mainly urged was that there was no Trustee named in the Deed. But the whole question of the validity of the contract came before the Court ; and in the considered judgment of the Collective Supreme Court are the following passages. "The Supreme Court is of opinion that, according to the prevailing law and usage in this Colony, deeds in this form *ad pios usus* are valid." "The statutes of Mortmain do not extend to the Colonies of Great Britain ; and the Dutch Laws restraining donations of this description do not appear to have been acted on or enforced by the English Government in this Island." The learned District Judge of Colombo says, that the Batticaloa case is different from the present one, because in that case the Church took by purchase, whereas here the claim is by bequest. But the Ordinance of the Emperor Charles V which is, as we have seen, the pith and substance of the Dutch Mortmain law, forbids ecclesiastical bodies to take by bequest, by donation, by contract or by any other method. The subject of the Dutch Mortmain law's applicability to this Colony was fairly before the Supreme Court in the Batticaloa case ; it was carefully considered, and received a full adjudication. We ourselves should hesitate long before we over-ruled a considered and collective judgment of our predecessors: and we should be at least equally disinclined to sanction its reversal by an inferior tribunal. We have been led so far into the consideration of the present case, that we shall now complete it. We have dealt in chronological order with the old Roman Laws about *Collegia*, and with the Mortmain laws, properly so called. Thirdly come the class of laws which we have called "Penal laws," enacted in Holland during and after the war caused by the Reformation ; and by which the reformed Hollanders strove to extirpate Popery from their territories, even as Philip II, Alva, and other Roman Catholic statesmen and soldiers had previously striven to extirpate Protestantism. Toleration was almost unknown in those ages. If hinted at, it was regarded as a criminal feeling, which showed the man who indulged in it to be at heart an infidel. The Dutch had embraced the tenets of Calvin, and with them his fierce hatred of Roman Catholics, whose ritual it was thought as sinful to tolerate in a truly Christian land, as it was sinful in the Israelites of old to tolerate the practices of Canaanitish idolatry. To use the words of Froude, "Fury encountered fury, fanaticism fanaticism,—and wherever Calvin's spirit penetrated, the Christian world was divided into two armies who abhorred each other with a bitterness exceeding the utmost malignity of mere human hatred." Hence, and not from any motive connected with feudalism or political economy, came the penal legislation in Holland itself against the Roman Catholics, and also the separate penal legislation here in Dutch Ceylon against the exercise of the Roman Catholic religion, against har-

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bouring Roman Catholic Priests, and other matters mentioned in the District Court judgment. It has been argued before us, that those local penal laws are to be regarded as confirming and extending here the old Dutch Mortmain laws. We do not think this. On the contrary, the very fact of this special legislation against Roman Catholics in Ceylon, shows that the ecclesiastical laws of the old country were not considered to be in operation here. But unquestionably these laws of the Dutch in Ceylon, whatever may have called them into existence, would, so long as they existed, make illegal all bequests, donations and transfers, by contract or otherwise, in favor of Roman Catholic establishments. The analogy of the disabilities of the old "Illicita Collegia" would apply here, though the matter may be rested on the broad general principle that dispositions in favor of what the law has prohibited are in themselves illegal. But we consider that all these Dutch Penal laws against the Roman Catholics have been repealed under the English Rule here. Soon after the English obtained possession of the lately Dutch territories appeared the Proclamation of 1799, which in its clauses respecting religious liberty breathed the full spirit of the justly praised Cornwallis Regulations, established five years previously in British India. The words of the Proclamation of 1799 that bear on our present subject are as follows: "And we do hereby allow liberty of conscience and the free exercise of Religious worship to all persons who inhabit and frequent the said settlements of the Island of Ceylon, provided always that they quietly and peaceably enjoy the same without offence or scandal to Government; but we command and ordain that no new place of Religious Worship be established without our license or authority first had and obtained." The pledge here given to allow liberty of conscience and free exercise of religious worship to all persons quietly and peaceably enjoying the same, was solemnly repeated by the Ordinance of 1835. The Roman Catholics have also special guarantees that, under British rule here, they are subjected to no penal liabilities and to no civil disabilities on account of their religion. They have these guarantees in the Regulation 5 of 1829, expressly declaring that the Act of 29 G. IV, c 7, (commonly called the Catholic Emancipation Act) extends to Ceylon. They have such guarantees more amply set forth in the Regulation 4 of 1806, which was by no means nullified by the Regulation 5 of 1829, and which retains its beneficial effects so far as regards its creation of rights and its abrogation of old penal laws, notwithstanding its being included in the recent Ordinance 5 of 1869. See especially section 1. The Regulation 4 of 1806 deserves to be cited *in extenso*. It is as follows:

A Regulation for taking off the restraints which were imposed upon the Roman Catholics of this Island by the late Dutch Government. Passed by the Governor in Ceylon, on the 27th of May, 1806.

It being His Majesty's most gracious intention, that all Persons, who in-

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habit the British Settlements on this Island, shall be permitted liberty of conscience and the free exercise of Religious worship, provided they can be contented with a quiet and peaceable enjoyment of the same, without giving offence to Government.—And it appearing, that the Roman Catholics, who are a numerous and peaceable body of His Majesty's Subjects, are, by several laws passed under the late Dutch Government, rigorously excluded from many important privileges and Capacities. And that, altho' these Laws have not been acted upon in all cases by His Majesty's Government, yet, that they are still unrepealed, and a cause of anxiety to those who profess the Catholic Religion,

The Governor in Council enacts as follows.

First. The Roman Catholics shall be allowed the unmolested profession and exercise of their Religion in every part of the British Settlements on the Island of Ceylon.

Second. They shall be admitted to all Civil privileges and capacities.

Third. All Marriages between Roman Catholics, which have taken place within the said Settlements since the 26th of August, 1795 according to the rites of the Roman Catholic Church, shall be deemed valid in Law, altho' the forms appointed by the late Dutch Governmennt have not been observed.

Fourth. This Regulation shall take effect on the fourth day of June next, that day being His Majesty's Birth Day.

Fifth. Every part of any Law, Proclamation or Order which contradicts this Regulation is hereby repealed.

The second and the fifth clauses of this Regulation are the most important. That part of the second clause which admits the Roman Catholics to all "capacities" appears to us to be decisive of the question. A "capacity" for taking and holding property is a "capacity" according to both law and common sense. If this Regulation only meant to exempt the Roman Catholics from penalties for exercising their religion here, the second clause must be looked on as superfluous. The first clause had already accomplished that object. Indeed, in that view, the whole Regulation is a superfluity, as doing what had already been done by the Proclamation of 1799. We now come back to the Mortmain Acts proper, disentangled from the old laws about "Collegia illicita," and the comparatively modern Penal laws. We have now to deal with the general question "did the Dutch colonists of Ceylon, who established themselves here between 1638 and 1658, while they brought with them, as they undoubtedly did, the general Roman Dutch Law then prevalent in Holland, bring with them this portion also,—the Dutch Mortmain law of the Emperor Charles V, and its developements by the Edicts of 1655? The recent case of *Thurburn v Stewart* before the Privy Council, reported in Vol. VII, Moore's P. C. C., (N. S.) p. 333, shews that there may be a question in our Courts as to what parts of the Roman Dutch Law were introduced by the Dutch settlers in a Colony; and also that the question is to be considered in the same manner in which similar questions have often been dealt with with regard to British colonists and with regard to questions of English Law. In *Thurburn v Stewart*, the question was whether the Placaat of the Emperor Charles V of October 1540, by which the claims of wives under marriage settlements

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were postponed to the claims of creditors, is or is not in force at the Cape. The Judicial Committee held that this Placaat had been introduced and was in force at the Cape: and they held this, having regard to the facts that the law in question affected commercial matters, that the Dutch were a commercial nation, and that their settlement at the Cape was mainly for commercial purposes. (See p. 380.) Their Lordships found also that the assertions made before them, that this Placaat had not been observed practically in the Colony, were wholly unsupported by evidence They had also proof that the Supreme Court at the Cape had, in a case decided in 1856, expressly adjudged the Placaat to be in force in the Colony, and that from that judgment there had been no appeal. How different are the circumstances of the present case; except that the Colonists at the Cape and at Ceylon are of the same commercial stock. The law in question here, the Mortmain Law, is one hardly, if at all, connected with commercial matters. If it be said to be natural for traders to wish that land should not be placed *extra commercium*, the answer is that the locking up of land in an old European country where the territorial area is small relatively to the amount of population, and is continually becoming smaller, is a very different matter from locking up portions of land in a new Colony, where land is abundant and is really the cheapest thing in the market. We cannot see that in this respect the case of Dutch Colonists differs at all from the case of English Colonists; and it has been repeatedly held that the English Mortmain Acts do not extend to any of our Colonies, whether settled or ceded; and this because, in the words of Sir William Grant, "the object of the statute of Mortmain was wholly political. It grew out of local circumstances, and was meant to have merely a local operation." These words are taken from Sir William Grant's judgment in the *Attorney General* v. *Stewart*, 2 Merivale, 143. An attempt was made, in the late case of ***Whicker*** v. ***Hume***, House of Lords Reports, vol. 7, p. 124, to procure the overruling of this case; but the House of Lords distinctly adopted and upheld it. See also on this subject the judgment of the Privy Council delivered by Lord Brougham in ***Mayor of Lyons*** v. ***East India Company***, 1 Moore's P. C. C., p. 175. If we look to the special facts of the two cases, we find here just the converse of the evidence which induced the Court to regard the Placaat of Charles V as in force at the Cape. There, a judgment of the Cape Supreme Court in favor of the validity of the Placaat was cited; and there was nothing to weigh against it. Here, the sole decision of our Supreme Court, that in the Batticaloa case, is express, that no Mortmain laws exist here. Above all, we have the irrefragable proof given by the Ordinance 2 of 1840 of habitual, long-continued, positive and intentional acts, by great numbers of the community, which would have been direct violation of the Mortmain laws, supposing such laws to have existed. The recital of the Ordinance 2 of 1840 says, *inter alia* "whereas very extensive tracts of land through-

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out this Island are in the possession, by succession, purchase or gift of Religious communities." It is idle to discuss how or wherefore this Ordinance lost vitality, for want of Royal recognition within the appointed time; or what particular statesmen thought about it. The sole fact is all important, that it did once come into legislative existence, and that it contained the recital by the legislature which has just been read. Not a single instance has been produced, nor do we believe that any instance could be produced, of any human being in this Colony being proceeded against, civilly or criminally, for the breach of Mortmain laws. Not a single specimen of license of amortization granted by the Crown is forthcoming. Nay, though in this very case the Crown Officers have been noticed to defend the rights of the Crown, they take no action: the Crown disclaims its supposed privileges of licensing, it ignores this imaginary branch of its Prerogative. We think also, that we have a right to take in aid our own knowledge of the affairs of the land which we live in. Certainly we may take judicial notice of facts which may be ascertained from our own records. We know judicially that there have been disputes and cases, almost infinite, as to rights of rival parties under grants and bequests to religious institutions: but we never before the present case heard the general validity of such grants and bequests called in question save in the Batticaloa case, which resulted in a judgment affirming the validity of such transfers. We have no hesitation in deciding that neither the Dutch nor the English Mortmain laws ever came into force in Ceylon: and we have already decided that the Dutch Colonial Penal Laws against Roman Catholics here have been repealed. It follows, that the whole of this order of the learned District Judge of Colombo is to be set aside, except so far as it adjudicates against the claims of certain heirs under the intended entail by Clara Fernando's parents in the Will of 1832. On this matter, and on the questions of prescription connected with it, we agree with the learned District Judge. We adjudicate, generally, that the bequests to the Churches, and the other dispositions of property for religious and charitable purposes mentioned in the case, are substantially legal and valid. Some of them may be at present practically defective for want of Trustees or of proper schemes of Trusteeship. We think that we had better make no order on these matters, without hearing the express wishes ot the parties interested. We make it, therefore, part of this judgment, that any party interested is to have the right to apply further to this Court, and to suggest the names of Trustees and schemes of Trusteeship. Any order made on such application is to be treated as part of the present judgment. We also reserve liberty to the Executor to make application to a Judge of this Court, under section 11 of the Property and Trustees Ordinance, 1871. None of the parties is to be blamed for the stirring of this question: none therefore will bear more than his own costs."

July 8.

Present CREASY, C. J. and STEWART, J.

D. C. Colombo, 58520.—The facts of this case and the questions of law decided in the Coort below, are fully explained in the following judgment of the learned District Judge (*Berwick*).

The Wolfendahl Church case.

This case is so complicated that it is not easy to state it concisely; and for distinctness it will be necessary to divide it with respect both to the parcels of land and the several defences, after a very brief summary of the origin and nature of the plaintiff's claim. One Abraham de Silva died in February 1850, after having executed a Last Will in the following terms: "After the death of me and my lawful wife, Anna Christina Corea, all the moveable and immoveable property with which the Lord has blessed me shall devolve on my son Johannes de Silva, and when the issue of my son becomes extinct any property that is in my name shall belong to the Wolfendahl Church." The whole of the lands in question belonged to the joint Matrimonial Estate of this Testator, Abraham, and his wife. His son Johannes died leaving a widow, but no issue, on 14th May, 1866. Abraham's widow died on 29th November, 1868, after having mortgaged her interest (which would be a moiety of the Matrimonial Estate) to the 1st defendant, Mathes, with certain provisions for payment to "the Charity Fund of the Wolfendahl Church" of the balance of the proceeds of the sale or appraised value of the mortgaged property, after discharge of the mortgage debt. The plaintiffs sue as the Representatives of the Wolfendahl Church, and the ultimate object of their action is 1st to establish their title to one moiety of the lands, being what Abraham had power to dispose of by Will;—his son having died without issue: and 2nd, to obtain for the said Charity Fund the benefit of the clause in the mortgage deed by his widow. We now come to the necessary splitting of the parcels of land and of the defences; and the parcels will be described by the descriptive letters on the Plan filed with the 1st defendant's answer. On each parcel and claim a separate judgment must be given.

1*st*. *As to the claim of the* 1st *defendant Mathes to the parcel marked A* 1. His title to this is founded on a sale by Parate Execution in 1853 of the whole of A, [A 1 and A 2] for a debt of the Testator Abraham to the Loan Board. At this sale, which was after the Testator's death, and after Administration to his Estate had been obtained by his son Johannes, the said son be-

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came the purchaser, and within three months sold the parcel A 1, to this defendant. The points raised for decision are:—1st. The validity of the proceedings on the Parate Execution at which Johannes purchased,—which are impugned as both fraudulent and void in respect to essential form; 2nd, the defendant's title by Prescription; 3rd, the validity of a Bequest of Land to a Church. Two of these points are so novel and at the same time of such importance, that I shall be compelled to consider them at considerable length.

1st. *The validity of the purchase under the Parate Execution.*—The precise question to be first determined on this part of the case is this:—Are proceedings under an order of Court allowing Parate Execution competent, when, before they are instituted and executed, the nominal defendant has been dead. Parate or Summary Execution is a Civil Law remedy for recovery of debts due to the Public Treasury, which was authorized to the Loan Board by Reg: 9 of 1824; and it proceeds on a warrant for execution which issues from a competent Court of Justice without any previous suit or judgment:—in the words of the *Censura* (Part 2, Lib. I, c. 33, § 32) *nulla praecedente judicis sententia*; and as Voet expresses it, *sic ut nullo modo opus sit lite praevia, sed simpliciter executio fiat.* It is as nearly as possible identical, both in its nature and incidents, with the summary judicial process by which in Scotland debts due on Bills of Exchange are recovered by summary execution without previous judgment or action, but has no counter part in the English Law; for Cognovits or Warrants of Attorney to confess judgment, which approach most nearly to it in their effect, pre-suppose a suit and a judgment for the debt, and correspond to the Voluntary Condemnation of the Dutch and Scotch Laws. It necessarily follows from this description of the Process, that there is no citation of the debtor before the Writ of Execution issues against his person and property, but if he has reason to complain that it has issued unjustly or illegally, he is not remediless; for by both the systems of Law in which it exists—the Scotch and Dutch—he is entitled to a "Summons" (*Sommatie* is the Dutch word) before execution is executed, and he has then the right and opportunity to move to have it cancelled or withdrawn, precisely as in the case of ordinary Writs of Execution. In the present case the Loan Board obtained from the District Court of Colombo an order for Parate Execution against the property and person of Abraham de Silva, and on this Writ the property in question was seized and sold by the Fiscal and purchased by the vendor to defendant. At the

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time the order was applied for, the debtor was dead, and had been so for nealy three years. The Church contends that the order and all that followed on it were therefore nullities. There can be no doubt of the general principle that a suit brought against a dead man would be a mere nullity in ordinary cases, and would in no way bind his Estate or Representatives, unless they by some act on their part had homologated or ratified it, and thus disentitled themselves to take advantage of the defect. But the learned Counsel for the defendant contended that proceedings by Parate Execution are necessarily and from their inherent nature an exception to this Rule, and urged that there need not and cannot be any citation to the debtor before the order for execution is made, and that by consequence it matters not whether he is or is not in existence at the time. The argument is specious, but does not hit the right point. It is true that in such cases the law, *up to a certain point*, accords certain privileges to a certain class of public claims, and dispenses with citation of the debtor and with any formal judgment against him before it AWARDS execution. But at that point, when execution has been *awarded*, the privilege of summary process ceases, and the proceedings in Execution proceed substantially as in ordinary cases. The real question is, therefore, can proceedings *in execution* go on when the debtor is dead and unrepresented? And in answering this, it must be remembered that there is no difference, except in detail, between the procedure under this execution and any other. In ordinary cases, a formal judgment has been pronounced; in Parate cases, the judgment is dispensed with and taken as pronounced. From that point all substantial difference of principle or procedure ceases;—and the question may therefore be still further narrowed to this,—can execution in *ordinary* cases proceed when the defendant is dead or unrepresented. The question, perceived in this light, admits, in my opinion, of no difficulty. It is odious enough to the general spirit of justice, that any one should be condemned without any form of citation,—but no civilised law that I know of has gone further and held that Execution is ever to be executed in Civil cases without the defendant, or those who represent him if he be dead, having had some opportunity (either before or after judgment) of being heard and remedied. Consequently, in Ceylon, the daily practice, when a defendant dies after judgment, is to make his representatives parties to the suit and rule them to shew cause why execution should not be executed against the estate of the deceased: and this is in accordance with what is stated in *Van Leeuwen's* Commentaries. "And likewise, accord-

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ing to practice new letters of execution ought to be applied for, against the heirs of the persons condemned who die before the execution" (English translation, p. 656 ;) and see also *Vanderlinden*, p. 425. In England, the rule seems to be the same with a difference. For although Baron Parke, in his judgment in *Ellis v. Griffith*, 16 M. and W. 109, and 10 Jurist, p. 1015 says, "it is clear that, when a defendant dies after a writ of fi. fa. has been issued, the mandatory part of which directs the Sheriff to seize the goods and chattels of the defendant, whatever goods and chattels he had at the time of the *teste* of the writ [when he was alive] may be seized in the hands of his executors, except so far as the Statute of Frauds has effected an alteration in favor of purchasers" ;—he afterwards shews that the rule is just the reverse when the teste of the writ was *after his death*, and cites for this *Thoroughgood's* case. The Dutch Law required in ALL cases that the defendant should be *personally* charged, to satisfy the judgment within a certain time or to point out goods to satisfy it, before execution could be *executed* against either person or property. "The first step in execution, (says *Vander Linden*,) is *Sommation*, i. e. a summons in writing served by the Marshall on the defendant, calling on him to comply with the sentence within 24 hours." (*Henry's Vander Linden*, p. 484.) See also *VanLeeuwen's Commentaries*, English translation, p. 652, and *Lorenz's Civil Practice*, p. 43 § 1. Similarly, our local rules in force at the time in question required that "*in every case* of execution against property" the Fiscal should *require the debtor* to pay the amount of the writ or to point out and surrender sufficient unclaimed property." The only difference (which was not one substantially in principle, but only in detail) between ordinary and Parate execution under Dutch practice was, that in the former case *two* notices had to be served on the defendant after award of execution and before actual execution, calling on him to satisfy the amount of the judgment and costs, called respectively *Sommatie* and *Renovatie* (see Mr. Lorenz's valuable little book on Civil Practice, p. 45 and the original authorities there cited;) while in the latter case, only the first notice, viz. the *Sommatie* (Summons) is required. This appears from the *censura Forensis*, part 2nd, I. 33. 32, which affords direct authority for what has just been stated, and gives clear evidence that an essential condition of the Dutch process of Parate Execution is, that the defendant should be noticed of it *before it is executed*, and thus establishes that it could not be executed when the only defendant on the record is dead. It is there stated that imposts, &c., "are recovered from debtors delaying payment, by Parate Execution

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without previous judgment, *hoc modo* that in the first place publication be made warning the debtors to pay within 24 hours, and after this term for appearance in *gyzeling* is expired, the person and goods are arrested in conformity with the regulation of 31st March, 1588." Van Leeuwen in his Commentaries (Eng. trans. 688) repeats the same thing in different words, indicating the necessity of a *demand* of 24 hours, and then details the process by which any one, who finds himself aggrieved by such Parate Execution, may appear and oppose the same, and may not only impeach the *mode of execution* but may also independently thereof, (no judgment having preceded in the said case) defend [assert, orig. *beweren*] the legality or illegality of the whole case with respect to the debt itself. These extracts abundantly prove, that the Dutch Law was neither so unjust as to deprive a defendant of an opportunity of being heard at some stage before execution executed, nor so absurd as to imagine a suit against a dead man, and an execution against the effects of a being who had ceased to be possessed of worldly goods. And I therefore hold that in process of Parate Execution, citation (*Sommation*) to the defendant is necessary, but that the time for such notice being given, instead of being before, or rather both before and after execution is *awarded*, is only before the process is *actually executed*. Notice or Sommation being necessary, it follows that there must be some one alive to serve it upon; and consequently, if the party concerned is dead, the order must either lapse, or if caried out the procedings on it are grossly irregular, if not null. I do not think that the *order of the District Court* in the case was *ex facie* void, for the Court was not informed (at least there is nothing on the record to show it) that the party against whom it issued its order was then dead; but I hold that the *proceedings of the Fiscal* under the order,—in default of notice to the debtor if alive or to his representatives if he were dead,—were void, or at least voidable at the instance of any party injuriously affected by them *where they have not been validly ratified subsequently*, and that it was the duty of the plaintiff in the case (the Loan Board) to have made the deceased debtor's representatives parties to the proceedings in his room. Such an irregularity is not cured by the presumption *omnia præsumuntur rite*, for the Sommation or citing of a defendant in parate execution is not a mere intermediate legal formality but is essential and indispensable, and the presumption is in this case expressly rebutted by the proof. See *Taylor on Evid*: 76. But the very exception of the case of a subsequent *Ratification*, which I have mentioned, unfortunately starts

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up to complicate the decision in this case, for it is a question whether the only party who had the right to be substituted as defendant, or to be made the original defendant, viz. the son and administrator of Abraham's Estate, did not ratify the irregular proceedings by his purchase under them. The whole legal estate had vested by our law entirely in him as the person who long before these proceedings were initiated, had been duly appointed administrator *cum testamento annexo*, and he was therefore the sole legal Representative of the deceased against whom the Process of Parate Execution should or could have been directed. He however was affected with notice of the proceeding, and not merely stood by and allowed them to proceed without objection, but himself in his *individual* (not in his representative) capacity became the purchaser of the property now in question at the Fiscal's sale, and as the vendor to the defendant is the person from whom the latter derives title. That he thus ratified them as far as he could in his personal capacity, can hardly be doubted, and his vendee is entitled to the benefit of such ratification so far as it extends. Did his acts have also the effect of a ratification in his *representative* capacity, in which as administrator was centred not only his own personal interest but those of the plaintiffs, as devisees under the deceased's will, of a contingent reversion? For, on this must depend whether the plaintiffs are barred from now setting up the invalidity of the sale in execution. I think it did not. As administrator he had no power expressly to waive the defect in question, and his negligence or laches to the prejudice of the estate could have no greater effect. But in truth there is conclusive proof that he did not act in his representative capacity at all, but only in his private interest, and in fraud of his duties as Administrator; for he purchased the land for his personal use, and not for the use of the Estate,—he got the conveyance executed in his *own name*, and with the connivance of the Loan Board's Proctor he moved for and obtained credit, to which he had no right whatever, for the purchase money, which went into his own pocket, or rather remained unexpended by him, as appears from the record; and, although the Loan Board debt must have been in fact discharged by him or by some one, it is clear that it was not discharged out of the levy in execution, but from other resources, *partly before* and partly *long after* his purchase, and apparently, in part at least, from the proceeds of another sale which he made under the authority of the Court as Administrator. (See Documents D and E.) As a private purchaser, it was his interest that the property should sell for as low a price

as possible: as Administrator, it was his duty that it should fetch as high a price as possible. For under the obvious meaning of his father's will, all the property which the latter left was to be possessed by his widow during her life, and if the fee did vest in the son, it was subject to the condition that, in the event of the failure of his descendants, what remained should then go to the Wolfendahl Church —now represented by the plaintiffs. By becoming purchaser at an inadequate price of any part of the property, the son would clearly both defraud his mother of the benefit of her usufruct *pro tanto*, and would anticipate the time at which he could lawfully deal with the Estate or diminish the quantity of the plaintiff's contingent interest in the event of his dying without issue, —a contingency which actually happened: besides defeating wholly the reversionary rights of the Church, by becoming the fee simple and absolute owner, with the result that it is now claimed as belonging to his heirs in absolute property. That is, taking the most favorable construction of the Will for him: but possibly the testator's intent was that the *whole* property should go *undiminished in quantity* to the Church, and the son and his descendants have only a *fidei commissum* in any part of it. In either view, his purchase for an inadequate price would be a clear prejudice to the beneficiaries under the Will—that is to say to the persons whose interests it was his duty as Administrator to protect: and thus his private interest as purchaser so conflicted with his duty as Administrator, as to make his purchase fall within that class of cases which the law calls Constructive Frauds, and in which it presumes an actual prejudice to others, unless, at least, it be plainly negatived. But in this case, the irregularity in the Parate proceedings;—the omission to have the name of any living man—(the Administrator's it should have been) placed on the record as defendant and debtor;—and his own concealment from the Court, that the nominal defendant on the record was dead and that he was Administrator of his Estate—so plainly enabled him to commit an actual fraud on the Estate for his private benefit, that it would be very difficult to believe that he was not himself the instigator of the Parate Proceedings in collusion with the Proctor of the plaintiff in the Parate case; and taken in connection with the latter having consented to. his *receiving credit for the purchase money*, which ought in due course of business to have gone direct to the Loan Board for its legitimate purpose of defraying the debt for which the Execution nominally issued, strongly points to the whole business from first to last having

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been a 'plant' to benefit him at the expense of the other parties interested in the estate, and to enable him to defeat the will by a judicial mummery. The Loan Board of course suffered no prejudice, for its claim was discharged from other sources, *not* the proceeds sale of this property. But the contingent interests of the Charity were deliberately and intentionally sacrificed; and that indeed was the object of the whole device. Under these circumstances, the fraud involved in the administrator's ratification of the irregularities in the process of Parate Execution, rebuts the argument advanced for the defendant, that his conduct had the effect of a ratification in his *representative* capacity; and the original vital defect in these proceedings, in the non-*sommation* of the debtor or his legal representative *before executing* the order for Parate Execution, remains unratified and uncured, and these proceedings and all that followed on them, though done under the (unwitting) sanction of the Court, are void as against the plaintiffs who would otherwise be prejudiced by them.

2nd. As to the defendant's claim by Prescription, which was strongly pressed in his favour, I think his possession cannot avail him: for the term of prescription only begins to run against persons claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession, which in this case was not till the death of Abraham's widow in 1868. Mr. Dias' argument, as I understood it, against the application of this rule was, that his client claimed independently of the Will of Abraham, the creator of plaintiff's reversionary right, and that by the purchase from the Fiscal (whether fraudulently or not does not matter) the property had ceased to be part of Abraham's Estate, and the legacy had lapsed by failure of the subject of the devise before the date when the devise was to take effect. This seems to me to come to reasoning in a circle, for the argument simply takes us back to the question already decided, whether the Fiscal's sale did deprive Abraham's Estate of the property. But a fatal objection to it is, that it would lead to this, that in every case, if a life-renter or a *fidei commissary* under an entail chooses to sell the trust property, and afterwards happens to live for 10 years, the purchaser from him would then prescribe against a reversioner whose right accrued on the *fidei commissary's* death: a view I think plainly opposed to the meaning of the words of the Ordinance.

3. I now come to the last very important and somewhat recondite question as to the *Validity of a Bequest of Land to a*

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Church, and have endeavoured to bring to it the consideration and caution in judgment which is demanded by a question which seemed at first to affect such a variety of creeds and temples, Christian and un-Christian, as exists in this community. Counsel have been twice heard on it in the present case, and the question has been fully argued in another suit affecting the Roman Catholic Community. I have found however that the case of the plaintiffs, being that of a Church or Congregation adhering to the doctrines of the Reformed Presbyterian Church of Holland, is in a position very different from that which will make a decision in the pending cases of the Roman Catholic Bequests, and of any others to religious bodies known to the Dutch Law as *Illicita Collegia*—(of which so many exist here)—considerably more complicated. This judgment will therefore not really decide the broadly stated question of the validity of a bequest of land to a Church, but the narrower question of the validity of such a bequest to a *Reformed Presbyterian Church. Van Leeuwen* discusses the subject in the *Censura*, Part 1, Lib. 3, c. 4, and after having shewn at § 37 that under the Ordinance of Holland of 4th May, 1655, no inheritance or testamentary disposition can devolve on Illicit Colleges, among which are included all sects and congregations not of the Reformed Church or not specially approved, recurs to the subject at § 44, where he specifies a series of Placaats from 1446 to 1531, under which it was formerly forbidden to bequeath immoveable property to Ecclesiastical persons and Colleges, and then adds "which prohibition however [i. e. that contained in these *older* Placaats prior to 1655] is gone into disuse especially among the Reformed Nations;" by which however he does not mean that such legacies have become admissible; because he goes on to give what is at once a reason and an explanation of his meaning, to wit that among the countries which had adopted the principles of the Reformation, "*no Ecclesiastical Colleges existed or are permitted*, besides Hospitals for the Sick, Strangers' Homes, Orphan Asylums and other *public* colleges for the support of the Poor, to which have been transferred all the property formerly intended for such superstitious uses (thought pious in those times) as Masses, Invocations of Saints, and the like." In Chapter VIII on Legacies, he considers how a legacy left generally to the *poor* (*quo nihil frequentius apud nos*) is to be disposed of, concluding that since (*nostris moribus*) there are charitable institutions existing by special names, such a legacy will not go to any of these or other institutions of the same class but to the general

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community of Poor. *Voet* is more ample and more explicit, and at the risk of trenching on points only indirectly connected with the question immediately before me, it will be convenient to give the substance of what he says. In Lib. 28, c. 5, after stating the Civil Law (which does not immediately concern us) he proceeds at § 3 to enunciate the law of Holland to be (briefly) that Bequests of *Immoveable* property to *Churches* and *Monasteries* are prohibited, except there be a special license from the Sovereign :— Following the policy of the Edicts of Charles V, of 1524 and 1531, the Ordinances of Holland of 4th May and 14th October, 1655, provided that neither openly, nor covertly by interposition of third parties, should any thing either *moveable* or *immoveable* be bequeathed *monasteriis, ecclesiis pontificiis, monachis, monialibus, devotis virginibus, ollis sacris Romanensibus alliisque similibus*, and (besides certain penalties) that such bequests should devolve on those who would have succeeded to them by the law of intestate succession." On referring to the text of the Ordinances of 1655 given both in Dutch and Latin in the *Censura* (3. 4. 37.) it will be seen that they equally extended to all donations and colourable contracts for that purpose. These Ordinances, it is evident, were mainly directed against the Roman Catholics, but Voet proceeds to say " But other sectarian Colleges are also incapable among us of taking an inheritance or legacy when not especially privileged but only tolerated" ;—and then comes a passage of great importance in its bearing on the present question. He applies the last remark to an inheritance bequeathed to the poor of the Anabaptist sect (in doing which I may remark *en passant* that Van Leeuwen differs from him) (*a*) and he justifies this on the strength of the preamble to the Ordinances of 1655 which " prohibited that any property by any title *or colour whatever should come into mortmain, unless it is administered and governed by public authority.*" It will become necessary presently to apply this passage to the plaintiffs as the Consistory of the Wolfendahl Church. The last words touch the point on which the decision of this part of the case turns. Voet proceeds § 4 to say " Nevertheless, among us and other Protestants, property whether moveable or immoveable may be lawfully left to the Orphan Asylums, *Gerontocomiis* (? Almshouses) and to the poor without obtaining an express

(*a*) *Censura*, part 1. I. 3. 4. § 37 and Notes : *Ibid*, part 2. I. 10 § 14 and Notes. From these authorities it seems that the Colleges or Communities of the *Anabaptists* and *Lutherans* were not included among Illicita Collegia. and were not so much considered *tolerated* as allowed by Public Authority and a consent expressly given.

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license, both because such property is not, among us, thereby relieved from taxes and fiscal burdens, *and also because property belonging to the Orphan Asylums and similar institutions and to the poor is under the supreme care of the Magistrates themselves, although the [immediate] Administration may be entrusted by them to others.* The Ordinances of Holland and the Belgian Confederation clearly indicate this when they forbid that any goods by any title or colour should pass into Mortmain *unless they be governed and administered by public authority.* And, among us, if property be left to Christ, OR TO A CHURCH, or to the Archangel or Martyr to whom the Church had been originally dedicated, the bequest *does not fall to the managers of the Church, but rather to the Deacons for the use of the poor.*" He proceeds, with reference to legacies to the poor, to say that they will "not go to the Orphan House and similar institutions *but in specie* to the poor *over whom the Deacons and other persons with similar functions* among us have the controul. And if the poor generally are instituted [as heirs] it is considered to mean the poor of the place where the testator had his domicile, or was born and educated and mostly had his relatives, if he appear to have had no fixed domicile." To these authorities I will adhibit an important passage from Groenewegen (de leg. abrog.) Code I. 11. C. 15 § 4 "*Attamen siquis in testamento aliquid in prohibitos usus reliquerit, non omnino corruit legatum, sed licitos usus ex benigna interpretatione sustentatur et relicitum in similes, sed licitos usus convertitur. Ratio est quia in testamentis plenius volentates testantium interpretantur.*" i. e. If anything be bequeathed by testament to prohibited uses, the legacy does not fail but by a favourable interpretation is sustained and the legacy is diverted *to the like* but lawful uses. From these and other authorities which will be found in Groenewegen's treatise under the first 12 titles of the 1st Book of the Code, I conclude the Law of Holland *in Holland* to be I. That dispositions of land in mortmain are unlawful except under special license from the Sovereign. II. But that this Rule does not affect gifts or legacies to charitable Institutions, provided that the *Institution to which the legacy or gift is made be a Public Institution governed and administered by some Public Authority.* III. That no property, moveable or immoveable, can be bequeathed or otherwise alienated to any prohibited, unlawful or merely tolerated sect or community (in which category the Wolfendahl Church certainly is not). IV. Nor for what are known to persons of the Reformed Christian faith as *Superstitious Uses.* V. That if a legacy be left to a particular 'Church' (as in this case the

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words are to 'the Wolfendal Church') it is intended to mean a legacy to the *poor* connected with or sustained by the Deacons or similar officers of such Church, and cannot be applied to the solemnities, repairs, salaries or augmentations of salaries or Clergymen's stipends, *(cum moribus nostris pastores non ex rebus ecclesiæ donatis aut legatis sed aliunde alantvr. Groenew.: Cod.* 1.31.42 § 2 *n* 4.) Whatever local modifications may have been engrafted or grown up in Ceylon on the Dutch Law as just stated, either by custom or as the effect of the enactments by the English Government in 1799, 1806 and 1829,—there is no room to consider that such modifications are *less* favorable now and here to the fulfilment of a testator's or donor's obvious intentions, than what I have just concluded to have been the *Law of Holland in Holland.* Questions may possibly arise as to whether here and now a legacy 'to a Church' would be construed necessarily as one to the 'Poor' only, so as to exclude Ministers' or Catechists' salary and Church repairs, &c., but it does not arise in the present case where the point for decision is the *validity of the bequest* and *not the manner of its appropriation.* The only question which the local differences of government, policy, and administration, leave room for is whether the funds of the Wolfendahl Church—(using the word church in the sense of congregation)—can be said to *be governed and administered by public authority* in the sense of the Dutch Law? for if not, then and and then only would it become necessary to consider whether that element *in Holland* to the validity of the bequest, was or is also a necessary element *here.* What is a Public Authority? What is a Public Institution? questions which should be approached rather with a regard to the wide spirit, than the restricted application to the local circumstances, of the Roman Dutch Law in Europe. Of Public Institutions unquestionably managed by 'public authority,' namely by overseers under the local Municipal Government, we have examples in the Poor Houses and Orphan asylums, &c., of Holland—and we know that there were similarly governed institutions in its Colonies, as appears from the legislation on the subject in the Statutes of Batavia, as well as from our local knowledge of the Orphan hospital, Leper hospital, and Poor's fund of the Gravets of this place, administered in the time of the Dutch by the Court of Deaconie, and afterwards by a Committee of Supervision appointed by the English Government. The Court is not aware whether in Holland there was any similar *direct* controul exercised by the Civil Government over the temporal affairs of the Established Reformed Churches such as will presently be shewn to

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have been exercised by it *here*, although probably a visible connexion with and supreme allegiance to the State was maintained, as is done in the Sister Church of Scotland by the presence of the Queen's High Commissioner and Representative in its Assemblies: but there can be no doubt whatever that the Deacons of these Churches were in Holland considered sufficiently in the light of Public Officers, having the care of the Poor, to make a legacy to them valid. Thus Groenewegen says (p. 11 Code) "*apud nos pauperum cura ad Diaconos praecipue spectat*—and at page 14 *rerumque Ecclesiasticarum gubernatio et cura non penes pastores sed diaconos sit ut ex iis* (*donatis aut legatis*) *pauperibus alimenta praestant.*" Then the manner of their election as described at the top of the same page shews that they were not appointed by the *Civil* or Municipal authority:—nor did they render accounts to the Civil authority, in which respect they remarkably differed from the overseers of the Orphan Asylums and other managers of public Charitable Institutions. *Si hoc ad mores nostros referas, Diaconi presbyterio singulis annis rationes reddunt; Orphanatrophi autem coeterique piorum locorum œconomi, a quo creantur et cui subjacent, Magistratui, &c. Ibid, p.* 12 (*l* 23.) See also *Ibid*, p. 11 l. 28 § 2. I can hardly doubt therefore that in Holland (and there is no reason to think that the case was different under the Dutch Government in this island), the 'Deacons,' to whom the care of the poor were largely relegated, not only were the Deacons attached to the congregations of the Reformed Church, but that they were moreover considered (doubtless in consequence of that being the Established and State Church) to be vested with that official and public character which has been referred to. Whether the Deacons or corresponding officers of *other Churches*, whether prohibited, tolerated or existing by connivance only, were recognised as holding the same public position either in Holland or in Ceylon, calls for no opinion in *this case*, but it is certain that the Dutch Government recognised no other Church in its East Indian Colonies than the 'Reformed Dutch Church', and did maintain an intimate connexion both official and administrative with it, and with the Wolfendahl Church here in particular, which must ever make its rights in the acquisition of property stand on a basis remarkably distinguished, at least historically, and perhaps also legally, from that of any other Church or religious Community whatever. In the Statutes of Batavia, and in both the old and new collections of these, enacted respectively in A. D. 1642, and 1746, the chapter entitled *Gods Deinst en Kerkelyke Zaken* which

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means Divine Service and Church affairs), the first enactment is as follows "Within these territories there shall be no other Religion or Divine Worship practised—much less taught or propagated—either secretly or openly, than that of the Reformed Church of the Christian Religion as taught in the (*b*) public Churches of the United Netherlands. And whoever shall be found at an Assembly or Conventicle made or held by either Christians, Heathens, or Moors, shall suffer forfeiture of all his or her goods and shall moreover be put in chains and banished or severely corporally punished, according to the circumstances of each case." (*c*) Recently under the English Government, in what must be considered as having the authority of a State paper of considerable importance, dated 2nd March, 1847, communicating to certain Memorialists the decision of Government on certain claims of Episcopalians to the Wolfendahl Church, the Colonial Secretary, by command of the Governor Sir Colin Campbell, writes as follows: "under the Dutch Government, the *established* form of Christianity and the *only* form of Protestantism prevailing in Ceylon was the Dutch Reformed Church." His Excellency then proceeds to give the following interpretation by his Government of the Capitulations, an interpretation which, though not judicial, commands all the authority of a state declaration. "The *functions of these Corporations* (the Consistories) *were guaranteed by treaty* at the successive capitulations of Jaffna, Manaar, Colombo, Matura and Galle; and their powers and authority have not only remained unal-

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(*b*) See Note *A* as to Lutherans and Anabaptists.

(*c*) The Dutch text which I have translated as above is subjoined. *Binnen deze jurisdictie zullen geen andere Gods-diensten ofte Religien g'œffend—veel min geleered ofte voortgeplant werden 't zy in het heymelyke of openbaar als de Protestantsche Christlyke religien gelyke die in de publicke kerke van de vereenigde Nederlanden geleerd worden : en zo wie bevonden zal worden eenige byzondere by-een komsten ofte conventiculeen gemaakt ofte gehouden tehebben 't zij Christen Heyden ofte Moor, zal boven vebeurte van alle zyne goederin in de ketting geklonken uyt den lande gebannen ofte wel aan lijve ofte lijven gestraft worden na gelegendheid van zaken.*" There is no doubt that the Batavian Statutes did have both judicial and political authority in Ceylon, though the precise nature and extent of that authority is (as yet) somewhat obscure. Their legislative force in this Island (which was under the administration of the Governor General and Council of Netherlands India at Batavia) is tolerably manifest from the fact that in the Index to the Legislative Acts of the Dutch Government, appended to the first volume of the edition of our Ordinances published in 1853, will be found a Notification repealing the 16th article of the Statutes of Batavia in a matter respecting the Sale of Slaves for debt to non-Christians.

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tered by any act of the British Government, but have been *formally recognised* in official intercourse from that time to the present. By the articles of those Capitulations entered into between the English Commanders and the Dutch Governors of the various Forts, and subsequently confirmed by the Supreme Authority, the British nation guaranteed to the inhabitants the free exercise of the reformed religion *as practised in the Dutch Church*; promised the continuance of the Clergy and other ecclesiastical servants in their functions; granted the Churches for the usual Divine Service, and *took upon itself the payment to them of the same pay and emoluments as they had from the Dutch East India Company*: conditions which have been faithfully observed to the present day, the Consistories of Galle, Matura and Jaffna being equally respected with those of Colombo." I now proceed to enumerate several proofs of *direct controul* exercised by the Civil Government over the affairs of the Consistory of the Wolfendahl Church, such direct controul, even in its internal affairs, as seems to me to bring that body completely within the exception stated by Voet, when he says in the passages already cited and italicised, that the Ordinances of Holland forbid dispositions in mortmain to any institutions *unless they are governed* and *administered by public authority* although the administration be entrusted (deputed) to others. (1) The Wolfendahl Church is inscribed on its portals with the cipher of the late Dutch Government °V^c, standing for "Voor Oest Compagnie." (2) The Civil Government was represented in the Consistory by its own Commissioner *(d)* (styled Commissarius Politicus) a functionary analogous doubtless to the Queen's High Commissioner who represents the State in the Sister Church of Scotland; an appointment which was continued under the English Government down to at least the year 1817. In a letter from the Chief Secretary to Government dated 21st January, 1817, the President of the Consistory is informed by directions

(*d*) In the Dutch times, we have instances of this functionary being mentioned in 1683, 1752, and 1789 (see Appendix XVIII, p. 33 of Papers presented to Parliament respecting the Wolfendahl Church). In the English times we have examples of appointments of a Government Commissioner to the Consistory in the cases of Mr. Sawers, appointed by the Governor "Commissary Politic" on 4th August, 1807 (Ibid p. 34): the Honorable and Revd. Archdeacon Twistleton in 1817 (Ibid p. 13, and 24) and subsequently Mr. Armour and Mr. Bisset in the same year. The letters of the Secretary of Government to the President of the Consistory, intimating that the Governor had made these last appointments, are respectively dated 13th January and 12th April, 1817, and are printed in the same Parliamentary Papers, p. 13.

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of the Governor "that the proceedings of the Dutch Consistory are to be recorded in the English language, in order that a copy may be furnished for the information of Government through *its Political Agent.*" (e) (3) The Consistory reported its affairs annually to the Government of the Dutch East India Company at Amsterdam; two examples of which reports, dated respectively 1750 and 1758, are given in the papers presented to Parliament respecting the Wolfendahl Church (f). (4) The names of the elected members of the Consistory, Elders and Deacons, were submitted for the approval of the Government before their ordination or appointment, both under the Dutch and subsequently under the English rule; (g) and it is stated by the Consistory in their communication to Government of 26th March, 1849, that this practice "is voluntarily observed up to this day," (h) though they there endeavour to give the practice a colour quite inconsistent with the sense of the evidence already cited. (i) (5) Government appointed the Minister and President of the Consistory (j); and sanctioned the ordination of Clergymen (k); gave permission for the erection of escutcheons in the Church (l); paid the salaries of the Church servants and other Church expenditure (m); and defrayed the expenditure and *controuled the disposal of the moneys collected at Divine Services and for interments, &c.* (n). These facts, resting on official copies of documents the accuracy of which cannot seriously be questioned, show how searching and minute was the superior controul exercised by Government—the Public Authority—over the affairs of the Wolfendahl Church even in English times; and it only remains to cite similar evidence, which, while it accumulates proof to the same effect, is now especially noticed in connection with the public and official functions of the Consistory

(e) Ibid, p. 15.

(f) Ibid p. 41 and 30.

(g) Letter from the Consistory, 3rd September, 1804. Ibid p. 67. Minutes of Meeting of the Consistory, 24th September, 1787, and 10th January, 1799 (Ibid p. 36.) Letters from Secretary of Government to Consistory, 28th February, 1803. (Ibid p. 32.)

(h) Ibid p. 25.

(i) Ibid p. 67 (3rd September, 1804.)

(j) Ibid p. 69 (Copy Commission under the seal of the Colony dated 1812.)

(k) Ibid p. 67 (March 1805.)

(l) Colonial Secretary's letter, 16th May, 1805, Ibid p. 68.

(m) Sir Colin Campbell's Despatch already cited. Ibid p. 74. Minute of Consistory Meeting, 20th June, 1776. (Ibid p. 31.)

(n) Letter to Chief Secretary to Government and his reply, 23rd and 28th February, 1803. Ibid p. 31 and 32.

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as Administrator of the *Public Poor Fund* or 'Deaconie,' also however subject to the controul of Government. In 1758 the Consistory address the Dutch Governor, suggesting means for the improvement of that fund and request His Excellency's instructions. The Governor replies and, *inter alia*, fixes the payments and conditions on which corpses may be interred within the Church : the payments are to be for the benefit of the 'Deaconie' ; the conditions are special permission to be asked and granted in each case by the Governor ;—and similar provisions were made in 1795 by a Resolution of the Council of Ceylon for the benefit of the Deaconie fund (o). In January 1803, by the desire of the English Government, the funds of the Deaconie (Poor Fund) and the Leper Hospital with the books and papers relating thereto were delivered over to a body called the "Committee of Supervision" (*p*). Previously the [Church] collections and burial charges went to the General Poor Fund of the Gravets, which were administered by a Court (now by the Cutcherry) composed of the Deacons of the Consistory (*q*). Unquestionably at the present day the interference of the Civil Government with the internal affairs of the Wolfendahl Church and the Colombo Consistory has slackened or become only nominal, if it exists at all : and unquestionably also the affairs of the General Poor of the City are not now administered by it, (nor for that matter by the Government either) but it seems to me that in point of law there is nothing in these facts which has had the effect of either formally or by legal implication destroying the public character and status of that Corporation which have been so abundantly illustrated : and it does still possess a fund from which the poor, if not of the City generally, at least of the Congregation, are maintained or assisted, and that fund must be considered in the light, to some extent, of a continuance of the fund which ever since the establishment of the Consistory has been administered by its Deacons. Whether or not, either by the operation of a tacit law of Disuetude, or of recognition by the State of other Church Communities, and chiefly in virtue of the legislative enactments of 23rd September, 1799, 4 of 1806, and 5 of 1829 this may or may not have ceased to

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(o) Ibid p. 35.

(p) Minutes of Consistory Meeting, 4th February, 1803. Ibid p. 32. Letter from President of Consistory to Government, 18th May, 1821. Ibid p. 12, 13.

(q) Ibid p. 24.

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bear the character of an exclusively established Church (that is to say established by law) it is unnecessary for the Court to say in its present judgment; but I consider that no answer which could be given to that question would derogate from the legal rights of the Dutch Reformed Church in Ceylon or of the Colombo Consistory in the acquisition of property, rights once acquired and never either abdicated by themselves nor formally withdrawn by the Legislature. Finally it may be observed that as by the Civil Establishments Ordinance 1 of 1871 the salary of the Minister of the Wolfendahl Church is paid by the Civil Government, he is therefore a Public Servant and his Church a Public Institution, recognised and sanctioned and *pro tanto* maintained by the Legislature under a very recent Act :—a circumstance additional to the recognition, sanction and maintenance guaranteed by the Dutch Legislation, by the Treaties of Capitulation, and by the acts of intimate controul and government exercised by the Supreme Public Authority under the English rule. Its peculiar and intimate relations with the Civil Power and with the State *before, at and since* the British accession make its legal rights stand (I repeat) on a basis remarkably distinct from those of any other religious Community in the maritime provinces, and are the special grounds of the present decision : but I make this observation without the least purpose of prejudging the legal rights and capacities of other religious Communities, whether Christian or Unchristian, which must be decided as they arise, and which may probably require to be decided on different and more general grounds. What has been said makes it needless to discuss the argument of Counsel for the plaintiffs, that the legislation of Holland on this subject was only local in its nature; or, if otherwise, that it had by long Disuetude ceased to be law here. The plaintiffs, the Consistory of the Wolfendahl Church, are, or at least include, the *Deacons* of it, the officers specially charged with the care and support of the poor immediately connected with the administration of this *Public* Institution, and are therefore rightly the suitors for this bequest : which bequest is now declared valid, being a bequest to an Institution which for the reasons given is, I think, one '*administered by public authority*' in the sense in which that expression is used by the Dutch Lawyers in such a case. The opinion in the last paragraph further disposes of the objection taken by the defendants' Counsel at the further hearing on

18th April, founded on the alleged want of title in the plaintiffs to represent the 'Wolfendahl Church' in the present suit (r).

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II.—As to the Parcel A 2 and the claim of 3rd defendant.

The other portion of A, marked A 2, is in its turn attempted to be split into two, whereof the 3rd defendant claims the one undivided moiety as Attorney of Sophia Dias, the widow of Johannes, and ascribes title in the other moiety to Johannes' mother as his heir, or rather to the 2nd defendant as the administrator of her Estate. The latter has been sued but has not pleaded. This claim depends on the validity of the purchase of the whole parcel A by Johannes under the proceeding in Parate execution. It having been held that those proceedings were invalid, both for fraud and for inherent defect in essential form, and that Johannes therefore took no title under them, it follows that his widow and mother could take no title under him, and in this and all other respects A 2 must follow the judgment as to A 1. It will therefore be decreed that the whole of the Testator's interest in the parcels A 1 and A 2, that is to say an undivided moiety of the whole of A, is the property of the plaintiffs, as representing the Wolfendahl Church, who are entitled thereto under the Will of Abraham de Silva :—the other undivided moiety of A being the property of his widow at the time of his decease by virtue of the matrimonial *Communio Bonorum.* The claim of the 3rd defendant, personally or as attorney of Johanna Sophia Dias, to any part of the lands in litigation in this suit will be dismissed.

III.—As to Parcel B, claimed by 1st defendant. This is claimed by the 1st defendant by purchase in execution on a judgment obtained by him against Anna, the Testator's Widow, on a Bond and mortgage executed by her in his favor on 6th June, 1867, by which she mortgaged this particular parcel with certain special clauses in the deed providing for payment of the surplus value of the land to the 'Charity Fund' of the Wolfendahl Church : after discharge of the Bond debt the land to be appraised by 6 persons and sold for this purpose, with right of pre-emption to the creditor at the appraised value. Now, the first point to be

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(r) The plaintiffs on the record were "The President and Members of the Consistory and the Trustees of the Dutch Wolfendahl Church, generally known as the WolfendahlChurch."

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remarked on as to this parcel is that Abraham's Widow had no title to more than an undivided moiety of it (which she had by virtue of the *Communio Bonorum*) and the mortgage and sale in execution is void for the excess, which for the reasons already given belongs to the plaintiffs as devisees under Abraham's Will, and will be decreed to them accordingly, and the 1st defendant's claim thereto dismissed. The sale under the Writ in case 54961 will be cancelled *pro tanto*. The next point that requires observation is that, although the 2nd defendant in his answer professes to accept an offer of the plaintiffs for appraisement of Lot B and to pay them the value thereof minus the amount of the widow's debt to him,—the plaintiffs in fact have made no such offer. They prayed in their libel for appraisement not of B only, but of the whole of the widow's moiety in all the lands, which is quite another thing, and therefore the Court is not able to arrive at the summary settlement which would have saved it so much trouble in unravelling the rights of parties. Again, the plaintiffs, when so praying, evidently considered they were only praying for implement of the clause in their favour contained in the widow's bond to 1st defendant:—but the bond being now before the Court *and also the survey*, inspection of the two together shew that the plaintiffs were mistaken in this supposition,—for the Bond only affects the parcel B and not the whole land. The Court *must* therefore proceed to determine the legal rights of parties. These would have been very simple had they not been complicated by the acts of the parties and the omission to execute the terms of the Bond at the proper time. The Bond, (which is a curious medley of Bond and Last Will) contained what amounts to a covenant with the creditor, that if the debt should not be discharged during the debtor's lifetime, the land was to be appraised and taken over at the appraised value by the creditor, who was to pay the same to the charity fund of the Wolfendahl Church under deduction of the amount of the debt, namely £250: then come the following testamentary words 'should this not take place so during my lifetime, then my heirs, executors or administrators shall fulfill the same,' the rational and plain meaning of which (though the object is expressed in hazy language) is that, if the debtor shall not during her lifetime have redeemed the mortgage and given the surplus value of the land to the charity fund, then her Executors, &c., are to do so. It has been said that the creditor by having,—after the debtor's death, and in connivance with

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the administrator of her estate, the present 2nd defendant, who has wilfully abstained from pleading,—wilfully omitted to carry out the oovenant with him, and in departure therefrom taken judgment and execution on the Bond in case 54961 and managed to purchase the property himself at a nominal value at a Fiscal's sale, under writ in that case, has thus defrauded the charity fund. I entirely take this view, and consider the proceedings in 54961 a fraud on that fund, carried out by oollusion between the plaintiff and defendant in that case, who were respectively the creditor and the administrator of the debtor's estate. I have already decided that the sale in Execution must be set aside to the extent of an undivided moiety for want of title in the execution debtor. I now decide that the whole sale must be set aside for collusive fraud on the charity fund which was not honestly represented by the Administrator, who to-day keeps back from entering an appearance in the present action. The 1st defendant's right to a mortgage or charge on the same for £250 will be protected, and provision made for carrying out the covenant in the Bond. I may note that another collusive fraud in this part of the business was judgment being taken and suffered for Interest where none was dne.

The result of the examination the whole case has now undergone, has been to shew a deliberate, protracted, and complicated conspiracy for 21 years by every person who by any possibility could lend a hand in it, to defraud and cheat the Charity represented by the plaintiffs, and to defeat the charitable dispositions made first by Abraham and afterwards by his wife;—that conspiracy being for the benefit of persons who are neither kith nor kin to either of them. The result of the conclusions I have arrived at on the various parts of the case and now to be brought together into one comprehensive decree is as follows. Judgment to be entered for the plaintiffs for an undivided moiety of the whole land in litigation oomprised in the Parcels A 1, A 2, and B on the Figure of Survey filed with the 1st defendant's answer; their title thereto being under the will of Abraham. As respects the other undivided moieties of the *parcels A 1 and A 2* (which were not claimed by the plaintiffs) claimed respectively by the 1st defendant on his own behalf, and by the 3rd defendant as Attorney of Sophia Johanna Dias, the widow of Johannes de Silva, it is clear that they belong to the Intestate Estate of Anna Christina, Abraham's widow, and the said claims

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of the 1st and 3rd defendants are therefore dismissed. As respects the remaining moiety of the *parcel B* (the whole of which was claimed by the 1st defendant) it also belongs to the Estate of the deceased Widow of Abraham de Silva, and it will be decreed to belong to it, subject to the provisions of the Bond and Agreement dated 6th June, 1867 : and the claim thereto of the 1st defendant will be dismissed. And in order to carry the provisions of the said Bond and Agreement into effect, it will be further ordered that such moiety be appraised by six competent persons (to be appointed by the Court) ; and on payment by the 1st defendant to the plaintiffs of the excess, if any, of such appraised value, over the sum of £250, the 2nd defendant is to execute a conveyance thereof to the 1st defendant. Should the excess (if any) of such appraised value not be paid to the plaintiffs by 1st defendant within one month after notice of the appraisement being filed in this case, his right to a conveyance is to cease and determine, and the same is to be administered and sold in ordinary course by the 2nd defendant as Administrator of the said Intestate Estate, subject however to a first charge in favour of the 1st defendant for £250, and to the claim of the plaintiffs to the balance of the proceeds sale. The sale in Parate Execution in Case No. 17323 and the sale in Execution in case 54961 of this Court are set aside and cancelled. The claim of the plaintiffs to mesne profits, damages, and interest is reserved. As respects the costs of this suit, the 2nd defendant, having failed to plead and in so doing failed to discharge his duty as Administrator, will pay his own costs (if any) personally and not out of the Estate he administers. The 1st and 3rd defendants, having either wholly or substantially failed, will also pay their own costs. The costs of the plaintiffs will be paid by the 2nd defendant (personally) and the 1st and 3rd defendants jointly and severally, and any deficiency will be paid out of the Estate administered by the 2nd defendant.

In appeal, the Queen's Advocate, (*Dias* with him), appeared for 1st defendant and appellant, and *Ferdinands* for respondents.

PER STEWART, J.—"The Supreme Court is of opinion that the conclusion arrived at by the learned District Judge is correct, and that the decree should be affirmed. As respects the question of mortmain, it is unnecessary to enter upon that point in the present case, the general question, including that

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involved in this suit, being fully considered in the judgment delivered by the Supreme Court this day in the testamentary case, D. C. Colombo, 3627. (s) In confirming this decision the Supreme Court desires to state that, though holding the sale under the proceedings in the parate execution case to be invalid, the Supreme Court does not think there is sufficient ground for concluding that the purchaser, the administrator and only child of the deceased owner, when he bought the property in 1853, (apparently with the assent of his mother) intended to act dishonestly and fraudulently; much less that there was any such intention on the part of the Proctor who obtained the parate execution, and who, for anything that appears to the contrary, was not aware of the provisions in Abraham's will. The District Judge is in error in stating that the sale to the 1st defendant was effected within three months of the purchase by the administrator. That purchase was in 1853. The sale to the 1st defendant, a much more questionable proceeding, did not take place for ten years after, until 1863. It is scarcely necessary to remark that, if the vendor to the 1st defendant had had issue, a result which might have naturally been expected in 1853, the right of the Wolfendahl Church would not have accrued. Moreover, it is difficult to conceive that the idea of defrauding such distant and contingent reversioners could have entered the purchaser's mind. It was contended on behalf of the 1st defendant, that he has acquired a prescriptive title, the purchase by his vendor, (the administrator) dating so far back as 1853. The obvious and a sufficient answer to this argument is afforded by the fact that, notwithstanding that the administrator divested himself of the character of administrator and then commenced a personal and independent possession, by the provision in Abraham's Will, creating a contingent right of reversion in the Wolfendahl Church, the possessor must be deemed to have held subject to such reversion. Abraham's son did not die until 1863; the widow, who had a life interest, not until 1868,—from the death of neither of whom have ten years expired to the institution of suit."

July 29.

Present STEWART, J.

Contempt.

D. C. Kandy, 58553. This was an action for goods sold and delivered. Defendant pleaded not indebted, and in his exami-

(s) See ante, p 59.

nation denied that he had ever purchased any goods from plaintiff. In the conrse of the trial, the Court adjourned for half an hour, at the request of defendant's Counsel, to enable his Proctor to examine plaintiff's books. On the case being again called, Counsel stated that he had no defence to offer. Whereupon the learned District Judge held as follows: "The defendant has been guilty of a most impudent attempt to evade a just debt by setting up a false defence. His statement as a party is false, and I accordingly, by virtue of the power given to me by the 29th section of the Rules and Orders, * forthwith sentence him to imprisonment at hard labour for a period of two calendar months for making a false statement when under examination as a party to a suit. Judgment for plaintiff as prayed with costs."

In appeal, per Stewart, J.—" Set aside as to the sentence passed upon the defendant and appellant. The appellant should have had an opportunity of showing cause. The Supreme Court has held that in the District Court as well as in the Police Court a party should have an opportunity of showing cause before he is punished. The provision in the District Court Rules that 'the Court shall and may forthwith sentence such party, etc,' must be taken to mean subject to giving him opportunity to exculpate himself. See judgment of the Supreme Court in District Court, Negombo, 5648, May 30, 1873."

August 5.

Present Cayley, J.

Receiving stolen Cattle.

D. C. Kegalla, 165. A conviction and sentence of twelve months' hard labor and 20 lashes by the District Judge (*Mainwaring*) against one of three defendants charged with Cattle stealing, were set aside in the following terms:—" Set aside and 3rd defendant found not guilty. He is charged with unlaw-

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* "If such party shall in his answers to such questions, or to any questions which may be put to him, either at the commencsment or in the progress of a suit, state that which the Court shall be satisfied by other evidence is false, or if he shall by evasive, contradictory or prevaricating answers, attempt to deceive or mislead the Court, and the Judge and two of the Assessors be satisfied that such was his intention, the Court shall and may forthwith sentence such party to such punishment as shall be considered adequate to the nature of the offence, taking into consideration always that there has been no violation of the sanctity of an oath and mitigating such punishment accordingly."—*Rules and Orders*, Part 1, (Civil Jurisdiction) p. 68.

DC Mátara 27012 (11 Feb. 1875). Def made false statements. Held to Bail till next day. Fined 250 Rs appearing...

fully receiving a stolen buffalo, and has been found guilty and sentenced to twelve months' imprisonment and 20 lashes. It appears by the evidence that the 1st and 2nd prisoners, who have been found guilty of the theft, were seen driving the animal away, and that subsequently all three prisoners were seen standing near the animal, which was tied to a tree with the brand-marks newly altered. When the complainant and his party came up, the prisoners ran away, or, as one of the witnesses states, went in different directions, This is the only evidence against the third prisoner, the appellant. The Supreme Court thinks that it would not be safe to convict him of unlawfully receiving on this evidence."

July 8.

Present Creasy C. J. and Stewart and Cayley, J. J.

Proxy signed in India to be used in Ceylon.

D. C. Jaffna, 954. The plaintiff, who was a resident of Madras, had instructed a Proctor at Jaffna to prosecute his case in the District Court. A proxy, stamped in accordance with the provisions of the Ceylon Stamp Act, had accordingly been prepared by the Proctor and forwarded to India for plaintiff's signature. On this document being returned duly signed, it was filed with the libel and summons issued. The defendant's Proctor thereupon moved that the proceedings be quashed, on the ground that the proxy was invalid in that it had not been stamped according to the Indian stamp laws. The motion having been disallowed by the District Judge (*de Saram,*) the defendant appealed. Per Stewart, J.—" Affirmed. The proxy was signed with the intention of its being made use of in Ceylon. Its validity was therefore properly determined according to the laws in force where it was to be used. See Story on Conflict of Laws, page 376."

October 2.

Present Stewart and Cayley, J. J.

Jurisdiction. Assault to commit Rape.

D. C. Batticaloa, 1635. The indictment in this case was to the effect that " the defendants did, on the night of the 15th January, 1873, in and upon the complainant violently and unlawfully make an assault, with intent her the said complainant then violently and against her will unlawfully to ravish and carnally know." The District Judge (*Worthington)* having upheld the plea of jurisdiction raised by the Counsel for the defence and declined to try the charge, the Queen's Advocate appealed. *In appeal*, (*Clarence*, D. Q. A., for appellant, *Grenier* for respondent) per Stewart, J.—" The charge in

this case is for an assault with intent to commit a rape, an offence which hitherto has invariably been tried only before the Supreme Court,—an offence moreover which is usually punishable by a severer sentence than a District Court is empowered to award. The objection to the jurisdiction, having been taken before plea, was properly upheld. It is ordered that the plaint be quashed."

Sale cancelled, as vendor could not convey more than one-half of the land sold.

D. C. Galle, 32542. Plaintiff had purchased a certain land from 1st defendant, who was subsequently found to have a bad title to one-half of it. The District Court having refused to cancel the entire sale, the vendee appealed. Per Stewart, J.—"The first defendant being able to give a good title for only a half of the land sold, it appears to the Supreme Court that the plaintiff is entitled to have the sale cancelled. It is accordingly decreed that the sale to the plaintiff be declared cancelled, and that the plaintiff do recover from the first defendant the amount of purchase together with interest thereon at nine per cent from the date of conveyance: 1st defendant to pay all costs."

Right to re-arrest in execution.

D. C. Kandy, 56085. This was an appeal from the following interlocutory order of the District Court:

"In this, and the connected case, No. 55,556, the defendant was arrested in the Galle District, by virtue of a writ of execution against person, issued by this Court, but which was not endorsed, either by the District Judge of Kandy, or the District Judge of Galle. The defendant accordingly, when he was brought up before this Court for commitment, was discharged. The plaintiffs upon this moved for a a new writ against person, and the question is, whether the defendant, having once been arrested and discharged, can be re-arrested for the same debt. This case does not fall under the 5th sub-section, of the 59th clause of Ordinance 4 of 1867. That sub-section, as it appears to me, refers to the discharge of a defendant by the Court of the District in which he was arrested, and not to a discharge by the Court which originally issued the writ. No English or Kandyan authorities can be made applicable to the case, for it is expressly enacted, by the last clause of the Ordinance 4 of 1867, that all questions arising in respect of this Ordinance are to be determined by the Roman Dutch law. Now, I can find no Roman Dutch Law authority that an arrest, which is in itself a nullity, and has not been followed by any commitment to prison, operates in any way as a satisfaction or extinguishment of the debt for which the prisoner was arrested. The arrest in this case was wholly illegal and void, the Fiscal having no authority from

any competent Court to effect it; and this Court treated it as a nullity, by refusing to commit the prisoner, when his person was brought before it. I do not think that the debt was in any way discharged by this arrest, and the Rule will be made absolute with costs."

In appeal, (*Ferdinands* for respondent) per STEWART, J.—" Affirmed for the reasons given by the District Judge."

October 7.

Present STEWART and CAYLEY, J. J.

Contracts of Sale and Agency.

D. C. Galle, 33529. The following judgment of the District Judge (*Gillman*) explains the case. " The only evidence adduced is that of the plaintiff; and the facts proved thereby are these:—plantiff bought from the defendant some Sapphires, paying him, as part of the purchase money, Rs. 300. Plaintiff however on examining the stones found that they were not worth the money agreed on (14 or 15 rupees a carat,) and expressed his dissatisfaction to the defendant when he came, a week afterwards, to get the balance of the purchase amount. Defendant thereupon said that he was sure the stones would realize in London more than the rate agreed on; and on this plaintiff suggested, and defendant consented, that they should be sent home for sale there on the defendant's account. The contract of sale was thus rescinded, and a new one of mandatum entered into. The consideration for this charge moving from defendant to the plaintiff is not stated in the evidence; but the facts proved show that it was the letting plaintiff off his purchase. It was also agreed that defendant should return the Rs. 300, to be settled when the account sales should arrive. The stones sold at a loss as plaintiff expected: and plaintiff now sues for the difference between the net proceeds and the Rs. 300, and for interest. The defence is purely technical, resting on the argument that plaintiff, having declared only on some of the common counts in assumpsit, cannot recover on the evidence adduced. But apart from the fact that neither party can have been taken by surprise, as each must have well known the facts of the case, I think the objection is not valid. The Rs. 300, after the rescission of the sale by consent, became clearly a loan to the defendant, and the count of money lent is declared on. The evidence supports also the count of account stated, defendant having admitted a net sum of money due from him (Chitty on Contracts, p. 605, edition 8th, citing Arthur v. Dartch, 8 Jur. 118.) The claim for interest is duly made. It is further objected that the only evidence of the sale account of the stones is a letter from the London salesman to the plaintiff. But copy of the account was furnished to the defendant on the

20th June last, and the evidence shows that defendant repeatedly promised to pay the claim. Let judgment be entered for plaintiff as claimed with costs."

In appeal, (*the Queen's Advocate* for respondent) per Cayley, J.—"Affirmed, but the amount of the judgment to be entered for plaintiff is Rs. 166·92, with interest at 9 per cent per annum from 3rd October, 1872, until payment. There is no evidence of any agreement that interest at the rate of 10 per cent should be paid on the advance; and the claim for interest upon interest is clearly inadmissible. Under the circumstances of this case, the Supreme Court thinks that interest accruing previously to the demand made by the plaintiff should not be decreed, and the only evidence of the date of any demand is the return to the summons, which appears to have been served on 3rd October, 1872. With regard to the principal issue in this case, the Supreme Court thinks that the new contract of Agency, by which the plaintiff undertook to send the stones to England to be sold for defendant's benefit, was accepted as an accord and satisfaction for any breach of the original contract of Sale; and that the original contract having been mutually abandoned by the substitution of the new one, any money paid under the former would be recoverable under the count for money had and received. There is moreover evidence of accounting between the parties, and of a promise to pay on the part of the defendant, which is believed by the learned District Judge. This evidence would support a finding for the plaintiff on the count for money payable on an account stated."

Notice of trial.

D. C. Colombo, 60775. Judgment having been entered for defendant in this case, the plaintiff appealed on the ground of insufficient notice of trial, which he had duly pleaded in the Court below. Per Stewart, J.—"Set aside. According to the affidavit filed in the proceedings, notice of trial for the 13th March was served on the plaintiff on the 5th March, only eight days before the day fixed for the trial. This case not having been fixed for trial under the 5th section of the Rules of June 17th, 1844, the plaintiff was entitled to 14 days' notice at the least, as required by the 9th section of the Rules of July 2nd, 1842."

October 21.

Present Stewart, J.

Assignee appointed after a certificate had issued to Insolvent.

D. C. Kandy, 520. The insolvent in this case (*Mais*) having duly obtained a first class certificate on the 20th June, 1873, a motion was submitted, on the 15th of August, on behalf of Messrs. Green and

Company,—(one of the creditors who had proved)—for the appointment of Mr. J. P. Green as Assignee. The motion was disallowed by the learned District Judge, (*VanLangenberg*) in the following terms: "This is a meeting specially summoned at the instance of Messrs. Green and Company, proved creditors of the insolvent, for the appointment of an Assignee. The 66th clause of the Ordinance provides for the appointment of assignees at the first public sitting or at any adjournment thereof, and I do not think that such appointment can be made at any subsequent stage of the proceedings, as in this case, *after* the allowance of certificate." *In appeal*, (*Ferdinands* for appellant) per STEWART, J.—"Set aside, and it is ordered that the motion of Mr. de Saram be allowed, and that Mr. J. P. Green be appointed assignee of the insolvent estate of F. W. Mais. It appears to the Supreme Court, that the provision of the 66th section of the Ordinance 7 of 1853 for the appointment of assignees is merely directory;—and that, having regard to the tenor and requirements of the enactment, there is nothing to prevent assignees being chosen and appointed at any other time as may be necessary at a meeting duly called by the Court for that purpose, before the final settlement of the insolvency proceedings. The above view is confirmed by a reference to the 64th section, which allows of the appointment of provisional assignees at any time after the adjudication of insolvency. On inquiry, the Supreme Court finds that the practice in the District Court of Colombo is in conformity with this decision. The fact of the insolvent having obtained his certificate cannot affect the question, if the interests of the creditors require that an assignee should be appointed."

Error in D. C. judgment not appealed against rectified.

D. C. Galle, 27558. This was an appeal from an interlocutory order of the District Judge, Mr. Rosemalecocq, (dated 1st August, 1873) refusing to allow judgment to be re-opened. Mr. Justice STEWART, while reading the case, having detected a clerical error in the final judgment as delivered by Mr. Gillman on the 6th December, 1872, directed that the judgment be amended by the substitution of "one fourteenth" for "one-fortieth" part of the land in dispute. The interlocutory order was affirmed.

October 28.

Present STEWART, J.

Administration.

D. C. Negombo, 125. An order granting administration to the intestate's widow was affirmed; and per STEWART, J.—"In the absence

of any special reason rendering it undesirable to appoint the widow, she is entitled to letters of administration in preference to all others."

Re-opening judgment.

D. C. Trincomalie, 20983. This was an action for goods sold and delivered against the Captain (*Scaffino*) of the barque *Maria Louisa*. The District Judge (*Temple*) having refused to allow the answer to be filed out of time and having entered judgment by default, the defendant appealed.

The Queen's Advocate, for appellant.—The summons to appear at the Trincomalie Court on the 25th June had been served on the defendant at Galle on the 24th June, and the Rule which was returnable on the 21st July had been served on the 11th July. There was clearly no time, under the circumstances detailed in his affidavit, for the Captain to have engaged Counsel to represent him or to have arranged for his defence. The affidavit recited, *inter alia*, "that at the time the deponent received the said process, he was undergoing much anxiety of mind, as his vessel was, owing to the boisterous state of the weather, in distress; that after he got over his difficulties he consulted a Proctor at Galle and had his defence drawn up and sent to Trincomalie, but before the same could reach his Proctor, plaintiff had moved for and issued a rule." The proceedings on the part of the plaintiff had certainly not been in accordance with the Rules and Orders.

Ferdinands, for respondent.—The Captain had set up two contradictory defences to the action, and in view of his telegram to the plaintiff promising payment, the Judge was justified in not giving him an opportunity of further delaying his creditor.

Per STEWART, J.—"Set aside. It being stated by the appellant's Counsel that the full amount has been recovered by execution, the judgment of the District Court is hereby set aside, and the case remanded in order that the defendant's answer may be received. The money to remain in deposit pending the determination of the case. In the event of the defendant not filing answer within fourteen days of this case being received in the District Court of Trincomalie, the judgment appealed from to stand affirmed with costs."

November 4.

Present CREASY, C. J. and STEWART and CAYLEY, J. J.

Right of defendant's Counsel in criminal cases to inspect J. P. proceedings.

D. C. Batticaloa, 1643. This was a prosecution under the 5th clause of Ordinance 24 of 1848. There were two orders appealed

from in the case, one refusing the application of defendant's Advocate for a view of the J. P. proceedings, the other allowing the defendant to have certified copies of the depositions before the J. P.

In appeal, (the *Queen's Advocate* for complainant and appellant, *Grenier* for defendant and appellant) the first order was affirmed and the second set aside ; and per CREASY, C. J.—

"The 2nd section of the Ordinance No. 3 of 1846 enacts that all such evidence should be admissible in the Courts of this Colony as would be admissible in Her Majesty's Courts of Record at Westminster. Accordingly in Ceylon depositions before Justices of the Peace, when they are legally admissible in the Courts of Westminster, would be admissible in our Ceylon Courts. Whether an accused party committed for trial is entitled to inspection of the depositions against him, is not a question of evidence, but of general law and practice, and as such to be regulated by local laws. We have no local law or rule of Court allowing a prisoner a view of the depositions, nor is there any law or rule requiring that he should be furnished with attested copies thereof. As a matter of right, therefore, neither the prisoner nor his counsel is entitled to a view of the depositions. But there is a discretion vested in the Judges who, in the exercise of the general authority placed in a Court of Justice, will take care, where he considers justice requires it (as is the practice of the Supreme Court in the course of a trial) to recommend that the prisoner's counsel be allowed reference to either the whole or portions of the depositions as may be deemed right. The case of Murder is dealt with as an exceptional case, in which the prisoner's counsel are always allowed full reference before trial to all the proceedings."

Insolvency. Certificate R.

D. C. Colombo, 817. An order issuing a certificate, in the form R in the schedule annexed to Ordinance 7 of 1853, against an insolvent, was set aside by the Supreme Court in the following terms: "The power of granting certificate "R" is in effect the power of imprisoning a man for a year, and it ought not to be excercised until all legal conditions enforced for its employment have been strictly complied with. The learned District Judge records that there has been no refusal of further protection, and he also records that there has been no refusal or suspension of certificate. Consequently, as it seems to us, the certificate "R" could not be granted.

November 5.

Present CREASY, C. J. and STEWART and CAYLEY, J. J.

Priority of claims in execution.

D. C. Kandy, 54761. The following judgment of the learned District Judge (*Cayley*) explains the case.

This is a special case to determine the several claims made upon the proceeds of the sale in execution of the Heenagalle Estate, the property of the late Thomas Jackson. These claims are

(1) The claims of the plaintiff, under whose writ the Estate was sold, for the amount due on two special mortgages of the property, dated respectively the 1st July, 1863 and the 23rd September, 1864;

(2) A claim of A. Fernando for the value of certain rice supplied by him to the Estate;

(3.) A claim of Mr. VonDadelzen, the Superintendent of the Estate, for arrears of his salary, and of the pay due to the coolies, and also for cost of rice supplied to the Estate;

(4.) A claim of the Executors' Proctors for costs of the Testamentary proccedings, in which the defendants took out Probate to the Will of the late Thomas Jackson;

(5.) A claim of the Executors of Jackson's Estate for their Commission.

It is admitted that, if preference is allowed to the claim of the plaintiff, the mortgagee, his claim will exhaust the proceeds of the sale. It is also admitted that all the liabilities of the Estate, in respect of which the other claims are made, accrued after 1864, the date of the plaintiff's last mortgage. With regard to the claim for preference made by the Superintendent for his salary and by A. Fernando for the value of the rice, it appears to me that the judgment of the Supreme Court in the leading case of *Lee* vs. *Ederemanesingam* (S. C. Minutes, 10th August, 1862) is decisive against the claimants. It was decided in that case that monies spent in the cultivation and upkeep of a Coffee Estate enjoy no tacit hypothec upon the property, certainly no tacit hypothec with *preference* over a prior special conventional mortgage. The claim made in that case was for the regular expenditure, as appearing in the Estate accounts; and including, no doubt, superintendent's pay, coolies' wages, cost of rice, &c.; and I do not see how any distinction can be drawn in this respect between the claim of a person who supplies the money for the superintendent's pay or for the rice, (as in the case referred to), and the claim of the superintendent himself or of the rice vendor himself. Even supposing the superintendent had a tacit hypothec upon the property for the arrears of his salary (which I do think is the case,) it would still have to be shewn that such a hypothec was privileged, so as to have a preference over a prior conventional mortgage, in contravention of the general rule that, in a conflict between legal and special conventional mortgages, priority of time gives priority of right. Next, with regard to the claims made by the Executors' Proctors for their costs incurred in the Testamentary case. These

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Priority of claims in execution.

claims may, I think, be treated as if made by the Executors themselves. It was argued by Mr. *Beven* that, if the Executors had not taken out Probate, the plaintiff would have been put to the expense of Letters of Administration, before he could have realized his mortgage, and the Probate was, therefore, in effect taken out for the benefit of the plaintiff. Whatever benefit accrued to the plaintiff from the Probate taken out by the defendant, I should require some express authority before holding that, when a mortgagor dies, the testamentary expenses of his estate are to be defrayed from the property specially mortgaged. No such authority was cited, and I know of none. The mortgagee took no part in these testamentary proceedings and had no control over them, and the Executors were not compelled to take out Probate. It does not appear whether there were or were not any assets besides the mortgaged property. If there were, the Executors must be presumed to have taken out Probate for their own benefit or that of the Estate; if there were not, there was no use increasing these testamentary expenses at all, and the Executors should have thrown upon the plaintiff the burden of administering as a creditor. This, however, they have not done, and to allow them to set off these expenses now, would be in effect to alter the judgment which the plaintiff has obtained against the Estate for the full amount claimed by him, and which declares the property in question specially bound and executable for the payment of this amount. Next with regard to Commission. The right of Executors and Administrators to commission is governed by the 10th rule of the Rules and Orders, sec. iv. By this rule they are allowed to charge a commission of 5 per cent., on property retained by the heirs and on property sold by such Executors or Administrators, and 2½ per cent on cash found in the house of the deceased. In the present case, the property in respect of which commission is claimed is neither property retained by the heirs nor property sold by the Executors nor cash found in the house, but it is property sold by the Fiscal. It appears to me that this claim cannot be upheld. The only claim left for consideration, as conflicting with the plaintiff's claim, is that of the coolies for their wages. This claim is governed by the 18th section of the Ordinance 11 of 1865, which enacts that "all wages due on any contract of hire and service and all liabilities arising therefrom, as respects the employer, shall be a first charge against the Estate and property, in which the servant under such contract shall have been employed and shall be recoverable by suit against the party for the time being in possession of the said Estate or property." With regard to this claim it was argued by Mr. *VanLangenberg* (1) that the charge thereby created cannot operate to the prejudice of a mortgage effected be-

fore the Ordinance came into force; and (2) that the wages in question must be recoverd *not* from the proceeds of the sale of the Estate, but from the purchaser now in possession of the property. With regard to the first point, I cannot concur with the plaintiff's Counsel. The words of the Ordinance are plain, and taken in their literal sense mean that these wages are to be a first charge upon the Estate for all intents and purposes, and not merely a charge subject to any prior incumbrances effected before the Ordinance came into operation. If the latter signification had been intended, it would have been expressed. The second point appears to me also untenable. The coolies who are entitled to this charge, appear to me to be in the same position as any other hypothecary creditors, and to be entitled, when the Estate is sold by judicial sale, to come forward and claim the proceeds in the same manner as the other incumbrances. It is also to be observed that they came forward before the Estate had legally changed hands, for their claim was made before the sale was confirmed and the property conveyed to the purchaser; indeed, before the greater part of the purchase money was deposited. It will be accordingly ordered that, from the proceeds of the sale, the coolies will be entitled to receive, in preference of all other claims, all arrears of wages due to them for a period not exceeding three months. If Mr *VonDadelzen* has paid any of their wages, he will be entitled to stand *pro tanto* in the place of the coolies. Plaintiff will be declared entitled to recover from the balance the full amount of his judgment. As this exhausts the fund, it is not necessary to determine the respective priorities of the other claimants. The costs of the coolies and of Mr. *VonDadelzen*, incurred on their behalf, must be paid by the other claimants, who will also bear their own costs respectively.

In appeal, (*Ferdinands* for appellant) per STEWART, J.—"Affirmed for the reasons given by the District Judge in the Court below."

Rice Contract. Failure of consideration.

D. C. Colombo, 62066. On the 21st October, 1872, the defendant (*Arunasalem Chetty*) entered into the following contract with the plaintiffs (*Britton, Aitken and Co.*) who acted as agents or brokers of Messrs. Armitage Brothers, and who subsequently confirmed the sale in writing on the 7th of November.

"I the undersigned (defendant) hereby contract to purchase from Britton, Aitken and Co. and receive delivery of a cargo of Solai rice, to be laden in the   from Calcutta, consisting of about 5000 bags of fair sample and in the usual gunny bags, delivery to be taken at the wharf; and I agree to pay for the same at the rate of rupees seven cents twelve currency (Rs. 7·12 currency) per bag of 164 lbs nett by cash nett or by bill at 4 months with interest added at the rate of twelve per cent per annum. The foregoing is subject to confirmation by B. A. and Co.'"

The rice in question formed part of a cargo of some 21,000 bags, which arrived by two steamers, (the *Yeddo* and *Timsah*), and the landing of which, according to one of the witnesses, (*Newman*) "must have spread over from about the 11th of November to about the 11th of December." The defendant having paid for, and removed only 3000 bags, the plaintiffs wrote to him on the 3rd of December requesting "an immediate settlement for, and removal of the balance ex *Yeddo*, which has been lying at the Custom house at your (the defendant's) risk." On the 10th of December, the defendant granted, in respect of the balance 2000 bags, a promissory note for Rs 4328, and obtained a delivery order from the plaintiffs on Messrs. Armitage Brothers, who, however, declined to give up the rice, "excepting on condition that the defendant should pay warehouse rent from the beginning of November." The plaintiffs were now sued on the promissory note, the libel containing also the usual money counts. The defendant admitted the note, but pleaded failure of consideration. The plaintiffs replied that they had duly fulfilled their part of the contract, and were entitled to recover. At the trial, Messrs. B. Gaindrod, W. D. Schultze and C. Todd acted as Assessors, and unanimously concurred with the Judge in the following opinions: (1) "that the words 'delivery to be taken at the wharf,' import that the defendant was to pay all reasonable and necessary charges for warehouse rent, actually proved to have been incurred between the date of landing and the date of removal; (2) that the defendant was not liable for warehouse rent on the 2000 bags in question which accrued previous to the date of the plaintiffs' letter of 3rd December; (3) nor for warehouse rent (if any) which accrued between that date, and the date of the promissory note and delivery order of 10th December; (4) that there is no satisfactory evidence that the 2000 bags (the balance of a transaction of 5000 bags, which again was part of an importation of 21,000 bags) may not have been the very last bags which were landed, the bags landed on different dates not having been kept separate or distinguished, and, if so, no warehouse rent was due on them on 11th December,—further no definite sum is shewn to have been demanded as due on these 2000 bags; (5) that the plaintiffs' claim should be dismissed with costs."

In appeal, (*Kelly* for appellants, the *Queen's Advocate*, *Ferdinands* with him, for respondent) per Cayley, J.—"Affirmed. The plaintiffs excuse their non-delivery of the rice, for which the promissory note was given, on the ground of the non-payment by the defendant of certain warehouse rent. It is clear, however, that more rent was claimed than was actually due in respect of the rice in question: and

the defendant was not bound, after the refusal to deliver any of the rice, to accept the plaintiffs' subsequent offer of taking a part of the rice leaving the question of the amount of rent to be settled afterwards. The consideration for the note has entirely failed, and the plaintiffs' claim was properly dismissed."

November 7.

Present CREASY, C. J. and STEWART and CAYLEY, J. J.

Ex-parte Judgment on Proclamation.

D. C. Colombo, 52589. The question in this case was the effect of proceedings by sequestration against an absent defendant. It appeared that ex-parte judgment had been entered against him on the 9th April, 1869, and that some moveable property belonging to him had shortly after been sold in execution. On the plaintiff moving in 1873 to have the judgment revived, the learned District Judge rejected the motion, and allowed the decree against the defendant to be opened up for the following reasons.

The Rules require that, before the Court proceeds ex-parte, proclamations be made on "two several days in open Court, at such intervals "as the Court in its discretion shall consider fit and just towards all "parties, calling on the defendant to appear." The object of the proclamations clearly is, that some members of the public, either hearing them or hearing of them, may communicate the fact to a defendant who is believed to be abroad or out of the jurisdiction, so that he may come forward and enter an appearance in the cause. These proclamations are simply in lieu of personal service of summons, and I consider that everything must proceed after them precisely as would have been done if personal service had been effected. The course of proceeding in such case is, first, that the summons specifies a future date for the defendant's appearance; and next that the defendant is allowed four clear days, after that fixed by the summons, to enter appearance, and until that period has elapsed the Court cannot proceed to ex-parte trial or judgment. So also the proclamations are meant to fix a future (and reasonable) date for appearance. In the present case, the Court ordered that the proclamations be issued, returnable on the 25th March and 9th April, 1869, and that a day be fixed for ex-parte hearing. As the proclamations are to be made in open Court, and by the Court, I am not clear that I understand the sense in which the word "returnable" was used in this order. The proclamations ought to have been made in open Court on these days, and they ought to have specified a future day certain for appearance on pain of proceeding ex-parte. It is plain that the nature and object of this system of proceeding by proclamation has not been understood. The Rules require two distinct modes of call-

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ing on the defendant to appear: 1st, written notices are to be affixed at the Court House and elsewhere "calling on the defendant to appear;" 2nd, proclamation is also to be made in Court on two several days at fit and just intervals also calling on the defendant to appear. Both these courses must be followed. Now with respect to the first, there is a notice filed in the Record in these terms: "Take notice that "if the defendants do not appear in the said suit and abide the order of "Court, that the Court will on the 25th day of March, 1869 proceed with "the 1st proclamation, and on the 9th day of April will proceed to hear "and decide the case ex-parte. Colombo, 18th March, 1869. By order of Court. (signed) G. H. Anthonisz, Secretary." Now in the first place such a notice that the Court will "proceed to proclamation" is something quite unknown to the Rules. In the next place, although the endorsement on the back of the notice proves it to be a copy of what was intended to be the notice which the Rules require to be affixed to the walls of the Court House, it does not follow the terms of these; for it does not call on the defendant to appear on any day; but treating it, by favorable construction (though a strict construction of the Rules would be more correct) as a notice calling on the defendant to appear on the 9th April, it allowed only 3 weeks for this purpose, a period which cannot be considered either fit or just (to use the language of the Rules) in view of the fact that the defendant is described in the libel as of a certain village, in the District of Tinnevelly, which is well known to be a place in the Presidency of Madras; and there was the strongest reason to believe that the defendant, whom the Fiscal had reported "not to be found," was residing there, or, after the custom of the natives of India, had (if he was ever here) "returned to his country." It was almost impossible (in 1869) that news of the public intimation could reach him in so short a time, or, if it did, that he could either come to or communicate with Ceylon in time to prevent judgment ex-parte. I have, however, to deal more particularly with the 2nd and concurrent mode of intimation, viz. the required proclamations. I find it stated on the record that the first proclamation was made on the 25th March. Assuming it to have been one calling on defendant to appear on the 9th of April, the time allowed was neither fit nor just. It appears, however, from the statement of the person who made it that it is his invariable practice, on what is called the 1st proclamation day, simply to call the names of the parties and to do nothing more; and he has no doubt that was all which was done in the present cases. Consequently, no proclamation to appear on a day certain was made on that occasion. Passing to the 2nd proclamation fixed for the 9th April, there is no record in the proper place that any ever was made, but a

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paper has been found in the file in the following terms: "The plaintiff "moves that the 2nd proclamation may be made in open Court this "day, and the case be heard ex-parte," to which is subjoined as follows, "April 9th, the 2nd proclamation in this case has this day "been made by me in Court. (Signed) A. Santiago." On the same day the trial proceeded ex-parte and judgment was entered. I have already shewn that at all events the first proclamation must, like a summons, be intended to be a notice to appear on some future day and defend the action ; and it is palpably unreasonable and unjust that a proclamation to appear, which (to be more than a farce) should be made long enough before judgment to give a defendant in India reasonable time to hear of it and appear and defend the action, should be made, on the very day the judgment is given. If he had been personally served with a summons, he would have had at least 4 days after a future day certain, stated in the summons, on which to appear. I should have no great difficulty in so construing the concluding words of the 17th rule as to apply to the 2nd proclamation the same reasoning I have applied to the 1st, were it necessary to do so. But it is unnecessary, as the officer's affidavit shows that the so called 2nd proclamation as actually made was not a proclamation calling on the defendant in direct terms to appear and defend the suit on pain of the Court proceeding ex-parte, but was simply in these terms, "this case proceeds ex-parte." Moreover, whatever argument founded on the concluding words of the 17th Rule may be urged with respect to the validity of the 2nd proclamation, can in no degree affect the irregularities I have pointed out with respect to the 1st proclamation which of themselves justify the judgment which will be given on the matter before the Court. I quite understand how these irregularities have crept into practice. Because procedure of this nature very often or most frequently proves in effect to be a mere form unattended with any practical benefit, unreflecting officers are apt to forget that it can ever be anything else, or have any real meaning or use in the interests of justice. In fact they do not reflect what the meaning and purpose and nature of the process is. They forget that if it were really in all cases a solemn farce, the legislature would not have taken the trouble to enact and require it; and that cases where the parties interested are absent, more than any others, are those in which the law most particularly desires that all the forms which it provides for their protection should be most particularly observed both in letter and in spirit. The Court holds that the proclamations have not been duly made, and that therefore the proceedings of 9th April, 1869 were irregular and must, with the subsequent proceedings and down to and

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including those of 16th September, 1872, be set aside and the judgment re-opened.

In appeal, (*Alwis* for appellant, *Grenier* for respondents) per STEWART, J.—Set aside, and it is ordered that the judgment and proceedings of the 9th April, 1869 do remain in force, and that the said judgment be revived. This case was instituted on the 14th December, 1868, and exparte judgment obtained on the 9th April, 1869. It is not disputed that every form and proceeding usually adopted under the 15th, 16th and 17th sections of the Rules and Orders was observed preparatory to judgment being entered. It further appears that, on the 28th April following, writs of execution against person and property were issued, and property of the defendants to the amount of £5 13*s* 4*d.* was seized and sold by the Fiscal. Nothing seems to have been done after the levy until February 6th, 1872, when the plaintiff by motion applied for a rule on the defendants to show cause why judgment should not be revived and execution re-issue. On 16th September, judgment was revived, "liberty being reserved to the plaintiff to move for writs, and to the "defendant to move to open up the judgment." Motions as above permitted were subsequently submitted, and the learned Judge on the 3rd July, 1873, after full and close scrutiny of the rules referred to, held that the requisite Proclamations had not been duly made, "and that, therefore, the proceedings of 9th April, 1869, were irregular, and must be set aside." It may be stated as a general proposition, that it is not competent for a District Court to alter or set aside its own judgments. This rule, it may be conceded, is not without its exceptions: but these are few and confined to narrow limits. Suffice it to say that in a case of the nature like the present, unless it could be proved that the judgment was obtained by fraud or gross irregularity amounting to substantial injustice, no such power could be exercised by a District Court. See III Lorenz, p. 229. Fraud is not mentioned in any part of the elaborate judgment of the learned District Judge. His finding is entirely based on alleged irregularities. It would appear that sequestration had been duly obtained and issued; and that the notices were affixed at the Court House and other places as required. The error, (if error it be,) on which the District Judge proceeds is mainly as to the time and mode in which the two Proclamations were made. The notice is dated 18th March. It recites that Summons and Writ of Sequestration were duly issued; that property of the defendants was sequestered on the 26th February; and concludes by notifying, "that if the defendants do "not appear in the said suit and abide the order of this Court, that

Ex-parte judgment on Proclamation.

"the Court will, on the 25th day of March, 1869, proceed with the "1st Proclamation, and on the 19th day of April next proceed with "the 2nd Proclamation, and on the last mentioned day proceed to "hear and decide the case exparte." It is remarked in the judgment, now appealed from, "that such a notice that the Court will "proceed to Proclamation is something "quite unknown to the Rules." But, even if this be so, the notice being superfluous in part cannot invalidate the rest of the proceedings. Again, it is stated that, "it (the notice) does not call on the defendants to appear on any day." The notice expressly intimates "that if the defendants do not appear "in the said suit, the Court will on the last mentioned day (9th April) "proceed to hear and decide the "case exparte." This surely is quite equivalent to calling upon the defendants to appear on any day up to the 9th April inclusive. It is further observed that only three weeks were allowed for the defendants to appear: but it should be borne in mind that the property had been sequestered three weeks earlier. This, however, is a matter which was in the discretion of the District Judge who fixed the time; and we do not think it was within the province of the present Judge to re-open the judgment on such a ground. The defendants may have had, probably had, agents in Colombo, and it may be that the then District Judge was satisfied that the defendants, if so disposed, had sufficient opportunity offered them of appearing, if not personally, by attorney, within the appointed time. As respects the mode in which the Proclamations were made, it appears to us that we must assume that the two learned Judges who respectively presided in the District Court on the 25th March (Mr. Lawson), and on the 29th April (Mr. Lorenz), took care that the Proclamations were duly made. It is indisputable that the names of the defendants were called on both days. In thus expressing ourselves, we desire, however, not to be understood as being of opinion that it will not be desirable in future, in cases such as the present, (having regard to the place where the defendant is supposed to be) not to give ample time for appearance. The time allowed should be so large as to obviate the possibility of any question being raised as to its sufficiency. In view also of the latter part of the 16th section of the Rules and Orders, which requires that Proclamation shall be made two several days in open Court, at such "intervals" (plural) as the Court in its discretion shall consider fit, &c., we incline to the opinion that an interval should be allowed between the 2nd Proclamation and the trial. The judgment of the learned District Judge has proceeded on a careful, technical and closely reasoned analysis of the 15th, 16th and 17th Rules. But so far as concerns the question before us, all that we

have to determine is, were the proceedings preparatory to the ex-parte judgment a nullity. Can it be stated of proceedings that have been in accordance with the usage of the Court since its existence, sanctioned by a succession of learned Judges, adopted in this case by the late Mr. Justice Lawson, who had for years presided in that Court, and by the late Mr. Lorenz, as experienced and eminent an Advocate as practised before that tribunal, that they were of the character above described. We are decidedly of opinion that they were not; that they do not even remotely fall within such a category; and accordingly that the judgment of the District Court should be reversed.

Ex parte judgment on Proclamation.

November 11, 1873.

Present CREASY, C. J., STEWART and CAYLEY, J. J.

Mortgage.

D. C. Kandy, 47560. A Rule to revive judgment was made absolute by the learned District Judge (*VanLangenberg*) in the following terms :—"This is a rule obtained by the plaintiff upon the 2nd and 3rd defendants, husband and wife, to shew cause why the judgment should not be revived, and writs against person and property issue for the amount due thereunder. The 1st defendant is dead, and his estate not represented since judgment. The 2nd defendant was adjudged an Insolvent and has obtained his certificate. The debt, as one provable under the Insolvency, is thus, as against the 2nd defendant, discharged; and the only question to determine is the liability of the 3rd defendant. The judgment was recorded in July 1867. The original proceedings are not forthcoming—copies have been filed—but parties are agreed as to the terms of the judgment and that at the date of the sale (September 24, 1867) of the mortgaged property there was due upon the judgment by the defendants jointly the sum of £291 19. The mortgaged property, it is admitted, was sold for £154, but the 3rd defendant maintains that she and her husband are entitled to credit for the whole amount as against the shares payable by them upon the judgment. (See memo: A.) In this view I cannot concur. The property was held by the 2nd and 3rd defendants under a revocable deed from the late 1st defendant, and was mortgaged as security for the debt. The value of such security, as realized, should be applied towards satisfying the judgment, and for the balance the defendants would be liable *pro rata*. Upon this principle, the balance due will be calculated. Rule will be made absolute as against the 3rd defendant with

Mortgage.

costs, and writs will issue for amount balance due upon the judgment, to be determined as above stated. The 3rd defendant is a married woman. Writs against property only will be allowed. Rule as against 2nd defendant will be discharged with costs.

In appeal, (*Grenier* for respondent) per CAYLEY, J.—"Affirmed. All three defendants joined in mortgaging the property, treating it as if they were all equally interested in it. The mortgaged property was first properly resorted to, and that having been exhausted the balance of the debt became recoverable from the defendants equally."

Sequestration at Common Law.

D. C. Kalutara, 27597. The plaintiff sold his horse and waggon to one Sinne Lebbe, the defendant's father, upon the bill of sale (A) dated 16th August, 1873. Sinne Lebbe paid only part consideration, and on the same day executed a Bond (B) pledging the said horse and waggon with plaintiff for the security of the balance purchase money. The Bond, inter alia, recited "and I do *deposit* with the said creditor by way of mortgage and hypothecation the said horse and waggon." The day after the sale, the defendant came with a message from his father and removed the horse and waggon, promising to return them the next day, which he never did. Upon this plaintiff instituted the present action on the 22nd August and obtained sequestration. It appeared that the defendant's father was a pauper, and that this was within the personal knowledge of the District Judge, who had only a few days previously granted him permission to sue in *formâ pauperis*. On the 25th August, plaintiff's Proctor moved that the horse and waggon, seized under the sequestration, might be given over to the plaintiff on his giving good and sufficient security. The motion having been allowed, the defendant noticed the plaintiff to shew cause why the sequestration should not be set aside and the order of the 25th August cancelled. The after proceedings, as recorded, were as follows :

August 27th, 1873.

Mr. Thomasz for defendant moves that the sequestration be set aside: (1) because the affidavit is insufficient, inasmuch as it is not stated that plaintiff has no adequate security; (2) because it is not stated in the affidavit that defendant is fraudulently alienating his property; (3) because the Bond referred to in the libel has not yet become payable, and the action is premature.

All the objections appear to me to be frivolous. *The affidavits clearly state that the defendant is possessed of no property* and with a view to defraud the plaintiff he is about to sell the horse and waggon.

Sequestration at Common Law.

As regards the 3rd objection, it is hardly necessary to say that the plaintiff does not bring his action on the Bond. He does not put the Bond in suit, but he sues the defendant for a wrongful conversion of property mortgaged to plaintiff on the Bond by a third party. 1 Thomson, 381. Rule discharged with costs.

(Signed). FRED. JAYETILEKE.

Mr. Thomasz moves that the horse and waggon be delivered over to the defendant on his giving security.

Mr. Van Cuylenberg produces Deeds marked A. and B.

Motion disallowed. This is an action for wrongful conversion of property, and the Ordinance 15 of 1856, Rule iv does not apply to a case of this kind. Moreover there is no affidavit by the defendant and he has not even filed answer. There is already a *prima facie* case for the plaintiff. The deeds produced go to shew that the horse and waggon do not belong to the defendant.

(Signed). FRED. JAYETILEKE.

In appeal, Ferdinands, for the appellant, contended that the affidavits filed by the plaintiff were insufficient under the provisions of Ordinance 15 of 1856, under the 4th section of which the defendant was entitled to have the sequestration dissolved on giving the necessary security. *Grenier*, for the respondent.—The proceedings were not under the Ordinance but at Common Law.

Per CAYLEY, J.—" Affirmed. This is a case of sequestration at common law. The proceedings by which the property was handed over to the plaintiff may not have been altogether regular, but this Court does not think that any substantial wrong has been thereby done to the appellant. This Court also thinks that, as the defendant produced no affidavit of any kind before the District Judge, he was not entitled to obtain possession of the articles which had already been handed to the plaintiff, who had made out a strong prima facie right to their possession and had given proper security."

Objection to Assessment for Police.

D. C. Negombo, 5645. This was an objection to the assessment for the maintenance of the Police at Kanowane, under the provisions of Ordinances 16 of 1865 and 5 of 1867. The plaintiff *(Piachaud)*, acting on behalf of Messrs. Arbuthnot and Co., the proprietors of the " Ekelle Cinnamon Estate," had in the first instance unsuccessfully appealed to the Government Agent for redress on the following grounds :

1. That the assessment, if legal, is excessive in amount.

Objection to Assessment for Police.

2. That the Police Force in Kanowane has not been quartered or established under the provisions of the Ordinance No. 16 of 1865.

3. That the limits within which such Force is quartered have not been fixed in accordance with the provisions of the said Ordinance.

4. That the consent of two-thirds of the proprietors representing the acreage of the alleged limits within which such Force has been quartered has not been obtained.

3. That you have not assessed the proportion in which the cost of the alleged Police established at Kanowane is to be paid by the inhabitants according to their respective means,—the landed property at Kanowane not being subject to be assessed in respect of the said Police.

At the trial, the plaintiff relied solely on the objection that the total amount levied on account of the Police was in excess of the actual cost defrayed by Government and that this was illegal under the 34th clause of Ordinance 16 of 1865. The District Judge (*Dawson*) however nonsuited the plaintiff, holding that the Government Agent had had no notice of the specific ground on which plaintiff's objection was founded.

In appeal, (*Grenier* for appellant, *the Queen's Advocate* for respondent) per CREASY, C. J.—" Affirmed. Sufficient notice of the nature of the objection was not given."

November 14.

Present CREASY, C. J., STEWART and CAYLEY, J. J.

Demanding reward to recover stolen cattle.

D. C. Jaffna, 605. This was a criminal charge under the 2nd Clause of Ordinance 6 of 1850; and the indictment, as presented by the Queen's Advocate, was to the following effect: " That the defendants did, on the second day of July, 1873, unlawfully and corruptly demand from one Venasy Valen a certain sum of money, to wit the sum of fifteen rupees, under pretence of helping the said Venasy Valen to recover a certain bullock, the property of the said Venasy Valen, before then stolen, taken and carried away, without having before then procured the apprehension and trial of the offender, against the form of the Ordinance in such case made and provided." The District Judge (*De Saram*) held as follows. " The facts of the case appear to be these. The first witness loses his bullock on the 30th April, 1873, and makes search for the animal, but without success. It is clear, I think, the animal was stolen from the field where it was kept tied. After the lapse of about two months, the second witness accidentally meets 1st prisoner at Chavagacherry, informs him

of the loss of 1st witness' bullock, and offers him a reward for the finding of the animal. No particular amount seems to have been mentioned. The first witness, on being afterwards informed of this, readily assents to the second witness' proposal, and such assent is accordingly communicated to the first prisoner. Then it appears that, about ten days afterwards, the first prisoner comes forward, evidently in pursuance of the reward offered, and promises to find the bullock and restore it to the first witness on being paid the sum of Rs15. It is for making this demand he is charged. It does not appear that the first prisoner, when first spoken to at Chavagacherry, was aware of the loss of the animal or its whereabouts; and if he were bent on making money by the alleged illegal proceeding, he would certainly have done so at once and not waited for two months. Under these circumstances, I doubt very much whether the charge comes under the provisions of the second clause of the Ordinance quoted. The accused is accordingly adjudged to be not guilty, and is discharged."

Demanding reward to recover stolen cattle.

In appeal, (*Clarence* for appellant, *Ferdinands* for respondent), per CREASY, C. J.—" Set aside so far as regards 1st accused. Verdict of guilty to be entered against 1st accused, and he is sentenced to pay a fine of Rs. 200. There is a great difference between being rewarded for taking trouble in finding whose a bullock is, which has been missed, and between taking or demanding a reward for procuring the restoration of a stolen bullock. The demanding of the reward for procuring such restoration is clearly proved in this case."

D. C. Kurunegala, 19107. The original owner of the lands in dispute in this case was Menihettirale, who died intestate, leaving three daughters and one son. The plaintiff was one of the daughters and the defendant was the widow of the son. The plaintiff's sisters had been married in deega, and the plaintiff, alleging that she had been married in beena, claimed an undivided half of her father's property. Defendant, in her examination, admitted that plaintiff had returned with her deega-married husband to the family property, Migahamulawatte, but added " plaintiff lives in the *same garden* but in a *different house*." The learned District Judge (*de Saram*) held the plaintiff's deega marriage proved and proceeded to give judgment as follows:

Beena rights revived in Deega-married daughter.

The Court must now consider the next point in the case, and that is whether the plaintiff has not, by having returned from her Deega village and

Beena rights revived in Deega-married daughter.

lived on one of her father's lands for several years, recovered paraweni rights and acquired the rights of a Beena married sister. It is proved that the plaintiff returned to her father's house after her marriage in Deega, that she was then allowed exclusive possession of ½ of one of the lands in dispute on which she built a house and in which she has lived ever since. The circumstances under which a Deega daughter acquires Beena rights are stated in Armour, p. 64-68, and none of them apply to the plaintiff. The plaintiff will be entitled to only a life interest in half the garden, (Armour, p. 67; Austin, p. 22, D. C. Kandy, No. 5137,) unless it was intended that the gift of that garden was to be an absolute one: she will then acquire a prescriptive title to it (Austin, p. 82, D. C. Kandy, No. 16679). The plaintiff has had exclusive possession of half the garden Migahamulawatta for 15 or 16 years at the least, and as the Prescriptive Ord. so strictly defines what adverse possession means, I hold that in the absence of any written agreement regarding the mode of possession intended when half the garden was given to plaintiff, and considering the length of time that has elapsed, the gift to have been an absolute one. Let judgment be entered that the plaintiff be declared entitled to the Northern half of the garden Migahamulawatta described in the Libel, and that her claim to the rest of the lands be dismissed with costs. The defendant to be declared entitled to all the lands in dispute, except the portions of Migahamulawatta adjudged to be plaintiff's property.

In appeal, (*Grenier* for appellant, *Ferdinands* for respondent) per CAYLEY, J.—" Set aside and judgment entered for plaintiff for an undivided moiety of the lands described in the Libel, but without damages. It appears to the Supreme Court that the case is substantially one in which a deega-married daughter returns with her husband to the father's house, and in which the father assigns to them a part of his house and puts them in possession of a specific share of his lands. In cases of this kind a deega-married daughter regains her beena rights. See Perera's Armour, p. 64."

November 18.

Present CREASY, C. J., STEWART and CAYLEY, J. J.

Restamping of documents.

D. C. Galle, No. 33761. Plaintiff sued on the following document (which was described in the libel as a "paper-writing)" to recover the sum of Rs. 75, with interest at the stipulated rate from 9th January, 1869.

" I (defendant) have borrowed a sum of £7 10s. from Perian Chetty, (plaintiff) on condition to pay the same before the 9th day of January next without interest, and in failure of so doing to pay the same with interest at the rate of 6d per £ per mensem for the time that shall expire from such date."

Restamping of documents.

The defendant pleaded "never indebted" and denied his alleged signature. On the day of trial, his Proctor objected to the document being received in evidence, on the ground that it was insufficiently stamped either as a bond or as a promissory note: if it were treated as a bond, a stamp of six pence would be required, if as a note, a stamp of two pence, whereas in point of fact there was only a stamp of one penny impressed on it. The plaintiff's Proctor thereupon undertook to pay the deficiency in stamp duty and the prescribed penalty, if the Court held it to be a promissory note. The District Judge (*Roosmalecocq*), holding that the document in question was a promissory note and not a bond, made order as follows:—"The Court rules it can be so received. Mr De Vos tenders the deficiency in stamp duty and the penalty required by the 39th and 40th clauses of Ordinance 23 of 1871. Promissory note admitted." The defendant's Proctor having elected to call no evidence but to rely on the legal objection he had raised, judgment was entered for plaintiff with costs. The plaintiff now appealed against the order condemning him to pay penalty, &c., on the ground that the document in question was sufficiently stamped, it being a note payable on demand and as such requiring a stamp of only one penny, and that his right to sue thereon was in no way limited, the restriction as to time affecting only the liability of defendant to pay or not to pay interest.

Per Creasy, C. J.—"Affirmed. This is a most impudent appeal."

Adoption under the Kandyan Law.

D. C. Kandy, 53309. The following judgment of the learned District Judge (*Cayley*) explains the case:—

The only question in this case is, whether the 1st defendant had proved that she was adopted by the deceased Basnaike Nillemey, through whom both parties claim the property in dispute. I have no reason to doubt the evidence of Nuguwella Ratemahatmeya, corroborated as it is to a certain extent by the Dewe Nillemey; but the question still remains whether this evidence is sufficient to prove a Legal adoption. It is proved that the Basnaike Nillemey had no children of his own, that the 1st defendant his niece, lived with him from childhood, that he procured both her first and second husbands for her, and that when her hand was solicited by Nuguwella for his son, the Basnaike Nillemey stated that he had adopted her, that he wished her to inherit his lands, and that accordingly he objected to her being married in Deega. It is also stated that the 1st defendant was always recognised by the family as the adopted daughter of the Basnaike Nillemey. The requisites of a valid adoption appear to me to be correctly summarized

Adoption under the Kandyan Law.

in Mr. Solomons' "Manual of Kandyan law," (*p*. 6), and it appears from authorities there cited, that to constitute a valid adoption, no particular formalities or ceremonies are prescribed, but it is necessary that the person adopting, and the child adopted, should be of the same caste, and that the adoption should be public and formally and openly declared and acknowledged. The adoption here was openly declared and acknowledged, but the question is whether the declaration was sufficiently formal and public. In 15,769, D. C, Kandy, (Austin p. 74) it was laid down, that the adoption should be openly avowed: and that it should be clearly understood that the child was adopted on purpose to inherit the adoptive parent's property. This seems to have been the case in the present instance. But the judgment of the Court below in the case, 15,769, held, that there was no evidence of any "public declaration or acknowledgment—no calling together of any Headmen, nor even relations or neighbours, but merely of vague expressions made use of in the presence of two or three casual visitors"; and on this ground it was held that the adoption was not proved. This decision does not go so far as to determine that there must be evidence of a calling together of Headmen, or of relations and neighbours in order to prove a valid adoption. This would be opposed to the established principle that no special formalities are prescribed. It merely shows that some kind of public declaration and acknowledgment is required and instances a calling together of Headmen or relations as a suitable mode of effecting such publicity. In the present case, there were no mere vague expressions made use of by the adopting parent in the presence of two or three casual visitors as in the case 15,769; but, when the hand of the 1st defendant was formally sought in marriage from the Basnaike Nillemey, he declined the alliance on the ground that he had adopted her, that he wished her to live with him and inherit his property, and consequently that he objected to any Deega marriage for his niece. This was certainly a formal declaration of the adoption, though it is not proved that it was made after a calling together of Headmen or relations (though probably it was made in the presence of many of the latter), for the 1st defendant was always recognized by the family as the Basnaike Nillemey's adopted daughter. There being no special formalities to constitute a valid adoption prescribed by the law; some kind of public declaration only being required ; and as it appears that the Basnaike Nillemey himself always considered the 1st defendant to have been adopted by him, and stated such to be the case at an important family discussion, and that the relatives always recognized the 1st defendant as his adopted daughter: I think that it may be presumed that the adoption was sufficiently declared and made public to satisfy the requirements of the Kandyan Law, with which these people must be supposed to have been acquainted. It is also to be observed that the adoption was in every way natural and suitable. The 1st defendant was niece of the Basnaike Nillemey, was brought up by him in his house, was twice given in marriage by him; and the Basnaike Nillemey himself was childless. Judgment will be given for the 1st defendant with costs. The Kornegalle case for the production of which this

judgment was postponed, is not forthcoming.

Adoption under the Kandyan Law.

In appeal, (*Kelly* for appellant, *Ferdinands* for respondent) per CREASY, C. J.—" Affirmed for the reasons given in the judgment by the Court below."

Rice Contract. *Armitage Bros.* v. *Veleyan Chetty*

D. C. Colombo, 62070. The law and facts of the case are fully set forth in the following judgment of the Supreme Court.

In appeal, (*the Queen's Advocate*, *Grenier* with him, for appellants, *Kelly* and *Ferdinands*, for respondent) per CAYLEY, C. J.—

"Affirmed. By contract of 8th October, 1872, the defendant with six other persons jointly and severally contracted with plaintiffs to take from them ten thousand bags of rice, at seven rupees per bag, the rice to be imported by plaintiffs from Calcutta. A list of quantities, (making up the total of 10,000 bags) was written opposite to the defendant's and his co-contractors' signatures to the contract. Plaintiffs agreed to these terms, (see Mr. Newman's evidence when cross-examined for the plaintiffs,) and accordingly became bound by a contract to supply the defendant and his co-contractors with 10,000 bags of rice at Rs.7 per bag. In about a week afterwards, and before any breach of the contract by either party, the plaintiffs informed the defendant and his co-contractors for purchase that they (the plaintiffs) could not carry out the contract, and desired them, (i. e. the defendant and his co-contractors for purchase,) to enter into a new contract, by which the price of the rice was to be rupees seven and 12½ cents per bag. We state here what we consider to be the effect of Mr. Newman's (one of the plaintiffs) evidence as to his conversation with Meyappa Chetty, whom he treated with as the organ of communication on behalf of the contracting purchasers generally. The plaintiffs required the contracting parties to sign a document by which they were to agree to pay this advanced price. Five of the originally contracting purchasers signed the document (marked C, and dated 17th October, 1872). The defendant and one other of the original contractors did not sign it ; and there was no proof of defendant having in any way authorised or assented to it. There was, moreover, no proof that the defendant in any way declared any intention of insisting on the fulfilment of the original agreement of October 8th. On the 11th November, the cargo of rice ordered by the plaintiffs from Calcutta having arrived, the plaintiffs gave a written notice to the defendant, (directing it to him by name and to six others) announcing the arrival of the rice, and requiring the defendant to take the rice at Rs. 7 and 12½ cents per bag : that is to

Rice Contract. *Armitage Bros.* v. *Veleyan Chetty*

say, requiring him to take the rice, not under the terms of the document of October 8th, but at the advanced price mentioned in the document of 17th October. We think that there is in the case abundant proof of an unqualified refusal by the plaintiffs to fulfil their part of the contract,—that is, to supply the rice at Rs. 7 per bag, the only contract which the defendant had entered into, and on which the plaintiffs are now suing. We think that this refusal on the part of the plaintiffs, (which was not only unretracted when the rice arrived, and when the time first came for the defendant to perform his part of the obligation, but was confirmed by the plaintiffs' letter of 11th November) justified the defendant in treating the contract of 8th October as rescinded, and in therefore omitting to perform it when the plaintiffs, on the 29th of November following, endeavoured to revert to it, as they did by their letter of that date, and their subsequent letters. (See Ripley v. M'Clure, 4 Exch. 345; Lines v. Rees, 1 Jurist, p. 593.) We do not feel it necessary to give any decision as to how far the plaintiffs' right as against the defendant was affected by his giving a release by novation to the five original contracting purchasers who entered into the new contract of October 17th. As this defendant had made himself jointly and severally liable, it may be questionable whether he is entitled to the privileges of a surety, as relied on in the District Court. (See Galle, D. C., 23664, decided in the Supreme Court, June 1, 1871. See too Vanderlinden's Institutes, p. 270; and VanLeeuwen's Commentaries, iv, 4. 8.)"

November 21.

Present CREASY, C. J., STEWART and CAYLEY, J. J.

Practice. Non-suit.

D. C. Colombo, No. 61785. On the day fixed for the trial of this case, (which involved a dispute as to certain lands,) the plaintiff's Counsel offered no evidence and moved for a non-suit. The motion, however, having being disallowed, the defendant's Counsel examined the plaintiff and put in evidence case No. 57,163, District Court, Colombo, the decree in which, as *res judicata*, completely estopped the plaintiff's claim. The learned District Judge (*Berwick*) thereupon gave judgment for defendant, holding that "when both parties have come on the day of trial ready to have their case tried, either may insist on a full trial and final judgment to prevent his being harassed with further action."

Practice. Non-suit.

In appeal, (*Ferdinands* for appellant, *Alwis* for respondent) per STEWART, J.—"Set aside. The Supreme Court has carefully considered the point of practice involved in this appeal, and has also referred to the authorities to which its attention has been called in the note with which the learned District Judge has favored it. The passages in the *Censura Forensis,* part 2, lib. 25, sect. 6, 11, 12, relate entirely to practice and modes of procedure which have not been adopted in our Courts. Besides, we are of opinion that the Rules and Orders for the District Courts are not inapplicable to the present enquiry. It is necessary to premise that the cause was for the first time on the trial roll, and had not come on for hearing before. The 8th section of the Rules and Orders of June 17th, 1844, enacts as follows:—"When the cause has been once withdrawn by the plaintiff from the trial-roll and re-entered, and the plaintiff *shall fail to proceed to trial duly after such re-entry,* or shall a second time withdraw the cause from the trial roll, the Court shall, upon motion of the defendant, give judgment against the plaintiff as in case of a non-suit, unless good and sufficient cause be shown to the contrary." This rule, it will be perceived, contemplates the withdrawal of a cause from the trial roll and a re-entry of it; and further provides that not more than a non-suit shall be the penalty if "the plaintiff shall fail to proceed to trial duly after such re-entry, or shall a second time withdraw the cause from the trial roll." In the face of such a provision, to hold that, on the plaintiff's first default to proceed to trial, the defendant can insist on going on and obtaining judgment, would be alike incongruous and opposed to the spirit and obvious intention of the rule. Whether the plaintiff has the right of electing to be non-suited, after he has a second time withdrawn his cause from the trial roll, does not arise for determination. The privilege of a plaintiff, by English law, to elect to be non-suited any time before the jury have actually delivered their verdict, appears to admit of no doubt. See Archbold's Q. B. Practice, vol. 1, p. 313. We have also to point out that the defendant has not in the pleadings asked for judgment. His prayer is that the claim of the plaintiff may be dismissed, which is not identical with or equivalent to asking to be declared the owner of the lands in dispute. It is accordingly decreed that judgment of non-suit be entered. The plaintiff to pay costs in the District Court. Each party to bear his own costs in appeal."

November 21.

DistrictCourts. Criminal Jurisdiction.

D. C. Negombo, 221. The defendant in this case had been convicted, by the District Judge *(Dawson)* and three Assessors, on a charge of uttering a forged receipt, and sentenced to pay a fine of Rs. 250 and to be imprisoned at hard labor for twelve months.

In appeal, (*Grenier* for appellant, *Clarence D. Q. A.* for respondent) per Creasy, C. J.—" The proceedings in this case having been read, it is considered and adjudged that the judgment of the District Court of Negombo of the 2nd day of July, 1873, be affirmed and the appeal lodged on the 5th July, 1873, be dismissed. In this case the appellant prisoner was tried and convicted before the District Judge of Negombo for knowingly uttering a forged document purporting to be a receipt for money paid. No objection to the jurisdiction was made by either side before the District Court; but the convicted accused now urges in appeal that the case was beyond the jurisdiction of the District Court. Generally speaking the crime of forgery (under which we are to understand as included uttering) is supposed to mean a crime of a heinous nature; being heinous on account of the greatness of the injury which the specific act in the case causes, if successful; or on account of the general mischief to society, which offences of such a class would cause, if they were either passed over with impunity, or if they were visited with slight punishment only. Under this latter head, come such cases as forgeries of Bills of Exchange, or Promissory Notes, or Bank Notes for small amounts. In such cases, as the amount is small, the injury to the defrauded party is not great, but the general mischief which would result, if such practices were generally tolerated, would be enormous: it would amount to shaking the general credit of commercial paper money. These instances are given as instances only: others will be found in the 8th chapter of Paley's Moral Philosophy. Without our assuming to give on this occasion an exhaustive list of such forgeries as by reason of their heinousness ought never to be tried before a Court which, like our District Courts, cannot inflict very severe punishment for them, we consider that none of the undermentioned forgeries ought to come before a District Court; and we further think that a District Court has no jurisdiction to try them under clause 66 of the Ordinance No. 11 of 1868, on which the criminal jurisdiction of the District Courts is now founded. Of the effect of clause 78 we will speak presently. The follow-

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ing are the Documents, or some of the Documents, the forgery of which is, in our opinion, an offence beyond the jurisdiction of the District Court. Bonds, Bills of Exchange, Promissory Notes, Cheques, Bankers' Notes, Bills of Lading, Deed or other Document, gifting, transferring, encumbering, dividing, leasing or creating an interest in any immoveable property, or in any way surrendering or extinguishing the same, Partnership deeds, Wills and Codicils, Powers of Attorney, Entries on public Registries, and Certificates of same, any Process of any Court, Marriage Settlements, Ante-Nuptial Contracts, Deeds of Adoption, and any other document similar in character and importance to any of those abovementioned. But there is a very large class of cases of forgery, in which the immediate importance of the document forged is small, and in which there is little risk of general mischief being created if the offence is visited by a sentence not very severe. A forged order for delivery of goods of very trifling amount is a familiar instance. Such an offence, if not aggravated by special circumstances, is essentially a case of obtaining money by false pretences, though in form it may be promoted to the bad eminence of forgery. It would be absurd to hold that such a case cannot be adequately punished by a year's imprisonment, with lashes not more than fifty, or a small fine superadded, if thought necessary. Consequently, it would be absurd to deny the District Court jurisdiction over such a matter. It would be easy to suggest numerous other cases of the same kind, that is, cases where the offence is not heinous in either of the senses above explained, although the formidable title of forgery is, in the language of the law, applied to it. The charge on the Record now before us is one for forging and uttering a receipt for the payment of £10. We think that the District Court was fully competent to inflict adequate and usual punishment for it, and that the District Court was consequently fully competent to try it. In the course of the hearing of this case, there was much discussion both by Bench and Bar as to the effect of the 78th clause of the Administration of Justice Ordinance of 1868. That clause is as follows :—"Whenever any defendant or accused party shall have pleaded in any cause, suit or action, or in any prosecution brought in any District Court, without pleading to the jurisdiction of such District Court, neither party shall be afterwards entitled to object to the jurisdiction of such Court, but such Court shall be taken and held to have jurisdiction over the same. Provided that where it shall appear in the course of the pro-

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ceedings, that the suit, action or prosecution was brought in a Court having no jurisdiction by the mutual consent or connivance of the parties, and with previous knowledge of the want of jurisdiction of such Court, the Judge shall be entitled at his discretion to refuse to proceed further with the same and to declare the proceedings null and void." It was urged on behalf of the respondent that the effect of the clause is to give full jurisdiction to the District Court over any criminal charge brought before it, if neither party raises *in limine* an objection to the jurisdiction, and if the Court does not find in the course of the trial that the case has been brought before it by the collusive action of the complainant and the defendant, such as might occur when both parties desired the defendant to escape the heavy punishment which the Supreme Court might inflict by incurring liability to the minor terrors of the District Court. The appellant denied that the effect of the 78th clause was such as suggested ; and it was asked by way of *reductio ad absurdum* what would be done with the judgment of the District Court on a charge of Murder, if there had been no objection to the jurisdiction raised in the District Court itself ? We think that a rational and substantial effect may be given to the 78th clause without incurring any absurdity such as suggested, and we still regard the 66th clause as the foundation of the District Court criminal jurisdiction. It seems to us that the effect of the 78th clause is as follows; neither the complainant who has brought a defendant before a District Court on a criminal charge, nor the defendant who has pleaded in the District Court to such a charge without disputing the jurisdiction, shall afterwards be allowed, either by appeal or otherwise, to dispute the validity of the District Court proceedings. As against any objections raised by either party under such circumstances, the words of clause 78 apply, and the District Court 'shall be taken and held to have jurisdiction in the matter.' The clause goes no further. If the charge was one which the District Court under clause 66 had no jurisdiction to try, the proceedings are bad, though it does not lie in the mouth of either of the parties to call them in question. We consider that in such a case it would be in the power, and it would be the duty, of the Supreme Court to quash the District Court proceedings and to declare them null and void for want of jurisdiction. This power is clearly given to the Supreme Court by the 22nd section of the Administration of Justice Ordinance of 1868 : and it is independent of the powers given by clause 19. Clause 19 gives the Supreme

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Court an appellate jurisdiction. In addition to this, clause 22nd enacts that 'the Supreme Court, or any Judge thereof, shall have full power and authority to inspect and examine the records of the Original Courts, and to grant and issue according to law Mandates in the nature of writs of Mandamus, Certiorari, Procedendo and Prohibition.' The writ of Certiorari is one well known to the English Law, and it cannot be doubted that when this clause bids us issue these writs of Mandamus, Certiorari, Procedendo and Prohibition 'according to law,' it bids us to issue these writs according to English Law; and it gives these writs validity according to English Law, the only law to which such writs were known. As to the power to issue these writs, we are in a position similar to that of the Court of Queen's Bench in England and of the Judges of that Court. By Certiorari the superior Court can (among other things) bring before it the proceedings of any inferior Court, can quash them if substantially wrong, and can order in its discretion what course shall be taken as to their subject matter. In any grave case of improper criminal trial by a District Court, (such as the suggested case of Murder) the Queen's Advocate, as the chief legal officer of the Crown, would doubtless bring the matter formally before us. Lest what we now say should encourage a host of private litigants to try to call judicial proceedings in question before us by Certiorari, we will remark that the Court, as a matter of judicial discretion, refuses Certioraris in cases in which an appeal has been given by law. The result of these considerations is that the present appeal must be dismissed, both because the case was within the jurisdiction of the District Court under clause 66 of the Ordinance No. 11 of 1868, and because this accused had under clause 78 lost his right of appeal by pleading in the District Court without objecting to the jurisdiction."

November 25.

Present CREASY, C. J., STEWART and CAYLEY, J. J.

Promissory Note.

D. C. Colombo, 59406. The plaintiff (as payee) sued on a Promissory Note, without however inserting in the Libel the usual money counts. The defendant pleaded "never indebted" and that it was an Accommodation Note. The plaintiff had discounted the Note at the Bank of Madras, and on its falling due had retired it himself, the defendant having failed to pay

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up. The Note bore the following endorsements :

Pay the Bank of Madras or order
p. p. A. Coos Mohamado (Plaintiff)
J. F. Muller.
Received payment for the Bank of Madras
C. E. Mirus,
Acting Agent at Colombo.

The District Judge (*Berwick*) held that the note, having been originally endorsed by the payee to the Bank of Madras *or order*, could not pass back to him by mere delivery; that the memorandum endorsed by the Bank was a mere receipt for payment and not an endorsement in blank; and that the plaintiff, therefore, had no title to sue. Plaintiff was accordingly non-suited.

In appeal, (*Browne* for appellant, *Kelly* for respondent) per Creasy, C. J.—" Set aside and case sent back for further hearing. The plaintiff's right, as payee of the note, to sue the maker was not taken away by the plaintiff having discounted and afterwards taken up the note, as appears to have been the case. The plaintiff was the holder of the note when he sued on it. In order to make the transfer by the plaintiff to the Bank of Madras a valid defence, the defendant should have been able to aver and prove that the note at the time of action brought was outstanding in the hands of a third party, who had then a right to sue the defendant on it. The fact of the temporary transfer to the Bank having been by full endorsement and not by blank endorsement, is immaterial so far as regards the defendant's liability as maker to the plaintiff as payee. See Smith's Mercantile Law, 8th edition, page 257; Kent's Commentaries, vol. 3. p. 117 and note, edition of 1858; Fraser v. Welch, 8 M and W, 629; Pearson's edition of Chitty's Pleading, p, 284, and note; Woodward v. Pell, 38 Law Journal, Q. B. 30. The pleadings in this case are irregular on both sides and have caused us serious embarrassment. The plaintiff does not state in what capacity he sues. His libel does no more than say that the defendant is somehow indebted to him on the annexed note. On the other hand, the defendant's plea of 'never indebted' is, in general, a bad plea to a count on a bill or note, and none of the special pleas raises the defence which we now are called on to consider. But we think that we may apply this plea of 'never indebted' to the plaintiff's averment that the defendant was indebted to him; and if we are to look to the annexed note in order to give sense to the defective libel, we may do the same in order to give sense to the defec-

tive plea. But this faulty and confused kind of pleading is very objectionable; and as both parties are to blame, we think that each party ought to pay his own costs of appeal; and that the costs of the day in the Court below should be costs in the cause."

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D. C. Colombo, Nos. 1752, 1515, 2239, 1466, and 1418. All these were appeals, on the part of the Queen's Advocate, against refusals by the District Judge of Colombo to try criminal cases which had been brought before him, his reason for refusing to try them being alleged want of jurisdiction.

The judgment of the Supreme Court was delivered by the Chief Justice as follows: "The clause of the Administration of Justice Ordinance, 11 of 1868, on which the Criminal Jurisdiction of District Courts depends, is the 66th clause. Its words are as follows: 'Each of the said Courts shall have full power and authority, and is hereby required to hear, try, and determine all crimes and offences committed wholly or in part within the district to which such Court may belong, which by any law in force in this Colony are or shall have been made cognisable by a District Court, and also all crimes or offences so committed as aforesaid for which no express punishment is or shall have been provided by such law, and which are not usually punishable by death, transportation or banishment, or by any severer punishment than those hereinafter mentioned; and also all crimes and offences so committed as aforesaid which shall by such law be punishable by no higher punishment than those hereinafter mentioned, that is to say imprisonment for a period of one year, fine or forfeiture to the amount of one hundred pounds, and corporal punishment to the extent of fifty lashes.' No. 1515, No. 1752 and No. 2239, are Cattle-stealing cases. District Courts have jurisdiction expressly given to them by Ordinance 6 of 1850 to try cattle stealing cases; and therefore these cases come precisely within the words of the 66th clause of Ordinance 11 of 1868, which not merely authorise but require District Courts to try all crimes and offences committed within their Districts, which by any law in force within this Colony are or shall have been made cognisable in a District Court. The test laid down by the Supreme Court, about ascertaining jurisdiction from the probably adequate amount of punishment, refers to cases of assault, stabbing, and other cases where the jurisdiction of the District Court attaches solely be-

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cause the offence is one which the District Court can adequately punish. It does not apply to cases where an Ordinance has expressly given the District Court jurisdiction over this offence. In case No. 2239, the indictment charged cattle stealing only, and the District Court was bound by law to try the case. The true effect of clause 78 in Ordinance 11 of 1868 has been explained in the recent decision of this Court in the Negombo District Court case No. 221. The extra charges in the indictment in case 1752 about breaking into a stable and stealing carts as well as cattle, could not elevate that case above the jurisdiction of the District Court. In these three cases, therefore, the judgments of the District Court are set aside, and the cases are to be sent back for trial in the District Court. Nos. 1466 and 1418 are Stabbing cases to which the abovementioned test applies, of ascertaining the proper amount of punishment according to the case as it appears on the depositions, and of holding the case to be within, or not within, the jurisdiction of the District Court, according as the amount of punishment which a District Court can inflict, appears to be adequate or inadequate to the case, if proved according to the depositions. There are extreme cases either way, which it is very easy to determine. A knife may have been almost thoughtlessly drawn, and used in a hasty brawl, and the injury done may have been extremely slight. No District Court would consider itself incompetent to deal with such an offence. On the other hand, there may be a stabbing case, so serious, and attended with circumstances of so much malignity and brutality, that no District Court would think of trying it. But there must be a large middle class of cases as to which opinions may fairly differ: and we never would lightly interfere with a District Judge's discretion. The two cases now before us come from this kind of debateable ground. If the learned District Judge had tried them, we should not have set the trials aside, or blamed him. But it does not follow that we should enforce their trial before him. We are by no means convinced that they were clear cases for his jurisdiction; on the contrary, we are disposed to agree with him in holding, that the District Court's capacity for inflicting punishment is not commensurate with their heinousness, supposing the depositions to be true. We therefore in No. 1466 and No. 1418 affirm the District Court decision."

November 26.

Present Creasy, C. J., Stewart and Cayley, J. J.

The Plumbago case.

D. C. Colombo, No. 60,664. The 1st plaintiff, as proprietor of a certain land in Dedigomuwa, in the Hewagam Corle, under and by virtue of a Crown grant dated 12th October, 1835, and the other plaintiffs, as lessees under him, complained that the Government Agent of the Western Province had unlawfully detained eighty tons of plumbago which had been dug out of the said land, claiming a royalty thereon of Rs. 10 per ton, which the plaintiffs refused to pay, denying the right of the Crown to levy such royalty on private lands. The defendant (*the Queen's Advocate*) in his Answer alleged that the Crown by its prerogative had the right to levy the royalty in question. On the issue thus raised the case went to trial, and the learned District Judge (*Berwick*) held as follows :

14th March, 1873.

The question at stake in this case is the right of the Crown to exact a royalty on Plumbago dug from private lands. The great increase in the commercial value of this mineral in this country, renders the question one of great importance. The first ground on which the claim of the Crown is put forward is special to the particular case before the Court; and depends on the terms of the Crown grant by which the Plaintiff has his title to the land : but I am of opinion that the claim on this ground is not tenable. The condition of the grant on which the Crown depended is in these words—" that the said (grantee) shall from and after the (date of the grant) pay or cause to be duly paid to the use of His Majesty *one full tenth* (1-10th) part and no more *of the produce thereof* as the Government share or rent thereof (viz. of the land), subject nevertheless to such general regulations as Government shall hereafter establish." This grant bears date 12th October, 1835, and it does not contain that clause of reservation of mines and minerals which is inserted in recent Crown grants : though, if it did, it would still have remained a question what minerals are comprehended under the general reservation; for example, whether it extends to *stone* or *cabook* quarries, *kirimittie* or porcelain clay, (which exists abundantly in the Island and will probably some day become of commercial value)—coal, should it ever be found, &c. The words of this grant, " one-tenth of the produce" of the land, must be interpreted in connexion with the rest of the document. Now, the document states the motive for the grant to have been the desire of His Majesty's representative, by whom it was made, " to encourage the *cultivation* of lands,"

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and it seems to me clear that the reservation to the Crown of one-tenth of the produce meant one tenth of the produce of *such cultivation*, namely agricultural cultivation. Further, the real intention receives light from the laws which at the time regulated the interest of the Crown in the "produce" of land, or in other words which regulated the Government Revenue from lands. These laws were the Proclamations of 3rd May, 1800 ; 3rd September, 1801 ; 22nd April, 1803 ; 14th January, 1826 ; which (firstly) have never, either by judicial decision or revenue usage, been applied to any other than agricultural or arboricultural produce ; and which (secondly) are all founded on the ancient tenure of land in Ceylon, which never embraced anything beyond the rendering of such produce and of personal services. On the subject of the Government tithes of produce of land, reference may be also made to Grotius' Introd. 2, 45, 4 (Herbert's translation, p. 254). I come now to the other and wider ground on which the claim to royalty is founded, namely the Crown prerogative, and which affects not merely this but all private lands, whether held under grant from the Crown or otherwise. It was virtually admitted at the Bar that such a prerogative could not be maintained in England ; (see the case of *Saltpeter* in 12 Coke's Reports) ; but even if the English law did confer it, it would not matter, as the prerogative of the Crown in matters not essential to the maintenance of political sovereignty, and especially in what are called the "minor regalia," does not extend beyond the realm. See Lord Brougham's judgment in Mayor of Lyons vs. East India Company in 1 Moore's Privy Council Reports, p. 283. We have, therefore, to consider whether it exists as part of the law of the United Provinces, commonly called the law of Holland. Now, at the outset, we meet with a remarkable discrepancy between the English law and the Civil law. Under the English law, it is stated to be "quite clear that by his prerogative the King is entitled to all mines of gold or silver which may be discovered, not only in his own, but even in a subject's lands within his dominions."* Chitty on the Prerogative, p. 145. But the Civil law appears to differ (1st) in not limiting the King's interest (whatever be its amount) to mines of the precious metals : thus Voet, 49,14,3, says, ARGENTARIÆ, *id est, argenti fodinae ; sed specie posita pro genere, sic ut omnis generis metalli fodinae contineantur* ; (2) in limiting the quantity of his interest to a certain definite portion, as a

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* But not mines of other metals and minerals. The expression "dominions" is probably too large. See the Privy Council case already cited. The reference in Chitty to the 5th Vol. of Bacon's Abridgment is erroneous : it should be Vol. VI, B. 8.

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fifth or a tenth, &c, of the metals dug from private lands. Voet ad Pand. 49,14,3. At least, Voet supports this as the more correct opinion. But Voet only speaks of *metals*,—and plumbago is not a metal, but almost entirely a form of pure carbon with very little admixture (and that not a chemical mixture) of iron. But the principle of the Civil law appears to extend beyond metals properly so-called to minerals generally. Thus we find the following passage in the Code, under the title, *De metallariis et metallis.* "*Cuncti qui per privatorum loca saxorum venam laboriosis effossionibus persequuntur decimas fisco, decimas etiam domino repræsentent: caetero modo propriis suis desideriis vindicando.*" Code, 11,6,3. And in another law, under the same title *de metallariis et metallis*, marble is included, 11,6,6. Now it is true that I find that Groenewegen, in commenting on this passage, says that this title of the Code has become obsolete, but then he immediately gives the reason, namely *quia apud nos non sunt metalli fodinae*; wherefore where this reason fails, as where metals or minerals of commercial value are found to exist, for example in the Dutch Colonies, as in Borneo, Sumatra, &c. (and the Malay Archipelago abounds with tin), where the Dutch law does not expressly provide for the case, there can be no doubt that we must be governed by the imperial Civil law; and according to it, if I put the right construction on this title of the Code, the Crown is entitled to a tenth share not only of metals but of what comes under the same legal (though not chemical) class, namely minerals of special commercial value dug on private lands. I therefore think that I must support the claim of the Crown as one of its minor regalia in this Colony, and will dismiss the claim of the plaintiff: but as the question was a fair one to try at law, and as the whole question of the Crown's rights is by no means free of difficulty and doubt, parties will bear their own costs. I may add that I would strongly recommend that the opinion of the Appellate Court should be taken, and would very much regret if a point of so much difficulty and importance were left on my own single opinion.

31st October, 1873,

I have happened to light on a passage in Voet which throws some light on the subject of the decision in the above case, now in appeal, viz., the prerogative right claimed by the Dutch Government in their Colonies, with respect to minerals, and which contains the Dutch text of a Regulation or Ordinance on the subject. I therefore append this Note, containing a reference to the passage and my translation of the Dutch text, in order to assist the Supreme Court in their decision.

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of the case. In Lib. xli, tit. 1, § 13, (Com. ad Pand.) Voet,—dealing, not with the question of *Royalty*, which is the subject of this suit, but of the ownership of minerals,—first states that mines of metal, gems newly found or dug, and the like, belonged by the Civil Law to the owner of the ground in which they were found, and passed to purchasers and usufructuaries, and then adds that now they are in many places claimed by the Fisc, but that it would not be altogether safe to assert that this would be done in the States of the Belgian Federation, if it should ever happen that such things—hitherto unknown there—should be discovered, seeing (he says) that the distinctions made by the Civil law in respect to treasure trove are generally considered as still approved as law among us, and especially considering that clay adapted for pottery and even sandpits pertain to the owners of the fields containing them; and—passing over stone quarries and fictile clays (fit for making bricks?)—that it does not appear that in the neighbouring Government of Utrecht the Fisc claims the diamonds occasionally found in the hills of Amersfurt, though indeed (this may be owing to the fact that) they are of trifling value compared to those imported from abroad. But as regards mines of metal and gempits discovered by the subjects of the Belgic Confederation in *India*, the right to these is claimed by *Government*, and it is, *inter alia*, enacted in the order for the Government of the West Indies of the 13th October, 1629, art, 24, 25, 26, (vol. 2 of the Ordinances of Holland, p. 130) as follows:—(Here follows the Dutch text which I proceed to translate literally):—"that all recently found minerals and mines that may hereafter be discovered, whether of gold, silver, copper or any other metal, as also of precious stones, diamonds, rubies, and the like, together with the pearl-fisheries and amber collections, shall only be worked by or on behalf of the Company and for their profit. But if any of the inhabitants or of the garrisons or colonists or others of whatever race or condition shall happen to find any of the foresaids, they, their heirs or representatives shall have, as recompense and reward, one twentieth part of the clear (suyver) proceeds of the said gems, mines or pearl-fisheries, and that for the period of the first five years, reckoning from the day when the Company has undertaken their working, and also the twentieth share of amber, &c." It appears from the above that, in its Colonial possessions, the Dutch Government claimed more than a Royalty, viz., the actual property of (1st) *all* metals, and (2) of *precious* minerals and certain other rare and precious commodities: that the law as to the title of any that might be found in Holland itself was open to question, owing to their absence from the soil of that country, so far as known, having prevented the question

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arising; but that stone quarries and useful clays, &c. in Holland belonged entirely to the owner of the soil, without mention of royalty. On the other hand, all mines and minerals appertain by the Civil law to the owner of the soil, subject however to a Royalty in favor of the Fisc of one-tenth from all (whether of the *precious* class or not) which are regularly worked *by labour*—as appears from the passage in the Code on which the judgment is based.

In appeal, Fitzroy Kelly, for the plaintiff and appellant:—The first question is by what law this matter is to be determined? The British Sovereign claims no such right in her realm of England as that here set up. This is in fact admitted on the part of the Crown. Then what is there in Ceylon to give the British Sovereign a larger right? What is the prerogative law in regard to dominions obtained by cession? From the following authorities, Chitty on the Prerogative, p.p. 25, 26, 32, Blanchard v. Galdy, 2 Salkeld, p. 411, the statement in 2 Peere Williams, p. 75, and the case of the Mayor of Lyons v. East, India Company, 1 Moore's P. C. C., p. p. 274, 283, it seems that in the circumstances mentioned the Crown succeeds to the rights of the ceding ruler, but that English prerogative rights are not *ipso facto* introduced into the new dominion. Many of them would be wholly unsuited to the character and circumstances of the ceded country. Of course they can be introduced by positive enactment. But then they take effect by the statute law, not by the prerogative as part of the common law. In the case cited from Moore, it was argued that the prohibition against aliens to hold land in England, which is considered to be an incident of the English prerogative, applied to Bengal. But Lord Brougham, in delivering the judgment of the Privy Council, rejected this view altogether, holding that the prerogative rights of the Crown would not necessarily attach to a country acquired by conquest, but required to be expressly introduced; excepting, of course, such prerogative rights as are essential to the sovereignty of the governing power, which are not affected by the present question, as the minor rights, varying much in different countries, are alone being considered. But it does not follow that the point is to be determined, and the rights of the Crown to be measured, by the Dutch Law. Ceylon never formed part of Holland any more than Bengal formed part of England; both were acquired, so far as they were acquired, by conquest; and the Dutch East India Company held about as precarious a tenure in this Island, as the British East India Company in the early days held on the continent of India. The same principle that forbad the introduction of the English prerogative, otherwise than by positive legislation, into Bengal, would forbid the introduction of the Dutch prerogative, otherwise than by posi-

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tive legislation, into Ceylon. Now there is no proof of any such legislation having taken place here,—no proclamation, placaat, or ordinance, to that effect. In the absence of any such enactment, the natives of this country, during the Dutch occupation, must, on the principles that have been stated, have remained subject only to such prerogative burdens, as they had sustained under their own Sinhalese Sovereigns. The fact, if it be a fact, that land in Holland was subject to this fiscal imposition, would not render Sinhalese estates in Ceylon liable to it, as a necessary consequence of their being under the Government of a Dutch Trading Company. The appellant, however, does not admit that such a prerogative right ever existed in the seven United Provinces of the Dutch Republic. They were governed by their own laws and customs, and the Roman law was never bodily incorporated with this local jurisprudence, or substituted for it. The Courts were permitted to refer to it when the local law was silent, and as the respect for it increased, it became usual to apply it to cases for which no provision had been made by the local law. It was introduced, as the Jurists tell us, *in subsidium.*, (see Van Leeuwen's Introd., p p. 5. to 9; Vander Keessel, Thes. Sel., xix to xxii.); and it was never admitted when at variance with the analogy of the local law, or depending on a different system of government. There could be no analogy between the Dutch free system of Government and the despotism of the Roman Empire. The introduction by implication of prerogative claims and fiscal burdens which had been borne by the slavish subjects of Constantinople or Rome, would not have been very cordially welcomed by a people who especially required their Counts to establish no new taxes or impositions without the consent of the States. Grotius, in his introduction, Cap. XIV, sec. 2, tells us that the *jus decimarum*, or right of the Counts of Holland to the tenth of fruits, was granted to them for the support of their station, by virtue of the old German Law which was older than Christendom. It is not likely that a nation who announced that "King Philip, in consequence of his having violated the laws of the country, had conformably to the laws truly forfeited his principality" would have patiently submitted to fiscal confiscations unknown to their fathers. The jealousy with which they viewed the governing power may be seen from the restrictions imposed on the Prince of Orange when chosen to be "the protector of the liberty of the Netherlands." (See Motley's Rise of the Dutch Republic, III, p. 418.) Is it likely that they would have viewed with equanimity a claim on his part to prerogative exactions, traced to the Roman Despots, which would have tended to make him independent of

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the supplies under the control of the States? Groenewegen in his treatise de Legibus Abrogatis, p. 798, referring to the Code, Lib. XI, tit. 6, expressly says that this right of the Emperor to a royalty of a-tenth on the produce of mines, &c, is not in force in Holland. He suggests a reason, viz, that there are no mines for it to operate upon. We may accept the fact without regarding the reason as the only one that could be given. Whether, if there had been mines in Holland, the Dutch would have allowed the claim, may be open to conjecture; but at any rate, one thing is certain, that *the claim was not in force*. How then can the Dutch conquests in Ceylon have imposed on their Sinhalese subjects a law which was unknown in both countries, a law which was an historical curiosity, interesting to students like Groenewegen and Voet, when commenting on a system of jurisprudence which had been in a great measure introduced *in subsidium* into their own, but which had no significance to the practical world around them? In the passage referred to by the learned District Judge, Voet ad Pand., XLIX, 14, 3, the author seems to be mentioning the Regalia that anciently belonged to the Emperor rather than positively declaring that they were enjoyed by the Stadtholder. It is for the Counsel for the Crown to produce any positive enactment of the law of Holland on the subject, if such there be. In the absence of any, it is submitted that the principle which construes penal laws and fiscal regulations in favour of the subject, should reject the implication of a right to confiscate a portion of the subject's property never in force in Holland, whatever it may have been in the Roman dominions. It may be admitted that there are passages in the Roman law books which favour the supposition that some such burden was imposed under the Empire. But these are few, and not altogether clear or consistent; and it seems to be doubtful whether the Roman Emperors claimed the whole or a portion of the minerals, and if a portion only, what reference it bore to the whole. The statement of Van Leeuwen, that "metallorum nomine *saxum* etiam intelligitur" gives the claim such a remarkably wide extent, that the circumstance of its never having been enforced in Holland or Ceylon derives an additional argument against the existence of the right. It is submitted that Sinhalese estates are not liable to all the burdens and fiscal regulations of the old Roman Empire.

The Queen's Advocate, contra.—There was no doubt that, under the old Roman Law, the Crown was entitled to a royalty of 1-10th on all mines and minerals. This was clearly laid down in the *Corpus Juris Civilis, Code*, 11, 6, 3. and the learned Editors of the edition he was quoting from—Van Leeuwen and Gothefred, both

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eminent Dutch Lawyers,—in their marginal comments, instead of showing that this rule was not adopted by the Roman Dutch Law, rather amplified the purport of the passage—" *Metallorum nomine saxa etiam intelliguntur.*" Admitting, therefore, that this right was recognized by the Civil Law, the question remained was it adopted in the Roman Dutch Law? He contended that it was for his learned friend to show that it was not, rather than for him, (the Queen's Advocate) to show affirmatively that it was. What was the Roman Dutch Law? Van Leeuwen (Commentaries, p. 2) points out that the Roman Law was, in his time, observed as the Common Law of Nations and adopted in all cases in which the special laws of any state made no provision; that even in such cases the special laws were to be so far restrained " that the Roman Law might be injured as little as possible,"—adding " it is so used and observed in our Netherlands, as is testified by Grotius, Merula and other writers." So Vanderkeessel in his Theses Selectæ, p. 6.—" Laws and local customs, whether general or particular, entirely failing, we ought to recur to the Roman Law and seek a decision thence. Nor could it properly be required that the use or adoption of the Roman Law on that particular point should have been confirmed by some decision." So Vanderlinden (p. 57) on failure of any general law or local ordinance or custom, " the Roman Law, as a model of wisdom and justice, is called in to supply the *casus omissus.*" A host of authorities might be quoted to the same effect. There being no special law in Holland respecting mines and minerals, the Roman Law therefore applied;—and, if so, it was for his opponent to show that it afterwards ceased to be in force. Groenewegen was the only authority cited to this effect, and his reason for saying that it was not in force was that there were no metals in Holland—not that it was repealed or that it was opposed to any law or custom in Holland. The learned writer seemed only to have meant that, as no mines had been discovered, the law had not been put in force. Voet, who always pointed out where the Roman Law did not apply *moribus nostris,* was silent on this point when he spoke of Regalia. The next question was, admitting that this branch of the law was in force in the United Provinces, was it introduced into Ceylon? The old rule was well established that, in countries obtained by cession, the ancient laws continued in force until they were altered by the conqueror. But so far from those laws being altered, their validity and efficacy were confirmed by the local Proclamation of September 1799 and the Ordinance No. 5 of 1835. There was no authority for the distinction drawn by his learned friend between prerogative and other laws,

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All the laws and institutions of the United Provinces came into force, unless it was made clear that any branch of them was not introduced or introduced only in a modified form. Herein was the great distinction between the present case and that of the Mayor of Lyons, vs. East India Company, reported in Moore. In that case the question was, whether that branch of the English law which incapacitated aliens from holding real property for their own use, and transmitting it by descent and devise, had ever been introduced into the East Indies? The East Indies was a country which had a government of its own, and the English, like other nations, were permitted to effect a settlement by permission of the government, and were therefore not originally in a position to carry this branch of their law with them. The settlement gradually gained dimensions, and rights of sovereignty were not assumed till long after. But in several Acts passed by the English, reference was made to the subjects of other countries whose rights were reserved. It was clear, therefore, that the English did not carry or mean to carry with them this branch of the law, which after all was only a rule of municipal law and not a right incident to sovereignty. Nothing of the kind could be predicated as respects plumbago. The right of the Crown could not be asserted until the existence of mines was known, and it was only within recent years that such was the case. The Crown had done nothing before to give up its right, and, if it were a right of sovereignty, it was not now too late to declare the law and enforce the right. He would lastly refer to Thurburn v. Stewart (6 Moore) in which the Privy Council held that the Placaat of Charles V, of 1540, which was not acted upon at the Cape, did nevertheless not lose its force there—a principle which to come nearer home this Court had held lately in the Mortmain case. Into the arguments as to how far the free government of the United Provinces was likely to borrow the prerogative and fiscal laws of ancient Rome, he, (the Queen's Advocate,) did not think it necessary to enter, as they did not affect the legal merits of the question before the Court.

The following is the judgment of the Supreme Court as delivered by the Chief Justice.

Judgment affirmed.—In this case the Government, as represented by the Queen's Advocate, contends that it has a right to levy a tithe or a royalty of 1-10th on the produce of Plumbago mines in private lands.

The plaintiffs deny the existence of such a right. No other point was made the matter of substantial discussion by either party before us. It is a single question that we have to consider; but that question is a very serious one; inasmuch as Plumbago, though till lately little noticed or sought for in Ceylon, is now becoming an article of great commercial value; and

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mining operations in order to obtain it have been commenced in many parts of the island.

Agreeing with the learned District Judge as to the question being a very important one, we wish, in consequence of some expressions in the early part of his judgment, to guard ourselves against being supposed to adjudicate on this occasion on Crown rights generally to a royalty over all products of the earth (other than living vegetable products), which may be dug or otherwise extracted from the soil. Cases as to many of them (should such cases arise) might have, and probably would have their own special circumstances, which would require special consideration.

The facts of the present case are very simple indeed. It is only necessary to observe of the grant of the land in question from the Crown (under which grant the plaintiffs claim to dig and appropriate the plumbago without yielding tithe or royalty) that the grant contains no reservation to the Crown of mines and minerals ; and that, on the other hand, the grant contains no words which could divest the Crown of its right to a royalty or tithe on minerals, supposing such a right to exist.

The first thing to be ascertained in this case is, whether the question is to be determined according to English Law, or according to Roman-Dutch Law. It is conceded on the part of the Crown, that, if English Law is to rule, the Crown cannot maintain its present claim. But it is contended that the case must be judged according to Roman-Dutch Law ; and we think this contention is right.

Ceylon became a Crown Colony of the British by conquest and cession. The usual rule is that the ancient laws of a Colony in such a case continue, until they are altered by the conqueror. (See the 5th proposition affirmed by Lord Mansfield in the great case of Campbell *v.* Hall, Cowper's Reports, vol. 1, p. 209). Unquestionably the old laws and institutions of Holland, more correctly termed the laws and institutions of the Seven United Provinces, were the old laws which the English found in existence here, when the Colony passed from the Dutch to the English. (As the land in question is not within the Kandyan Territories, there is no need to encumber the case with Kandyan law.) Moreover by Royal Proclamation, when the English took possession of Ceylon, it was ordered that the temporary administration of Justice and Police should, as nearly as circumstances would permit, be exercised in conformity to the laws and institutions that subsisted under the ancient Government of the United Provinces ; and in 1835, by Ordinance No. 5 of that year (confirmed by the Crown), it was declared that " the laws and institutions, which subsisted under the ancient Government of the United Provinces, shall *continue to be administered*, subject nevertheless to such alterations as have been or shall be hereafter by lawful authority ordained."

Taking it then as clear that this case is to be adjudicated on according to the laws and institutions of Holland as they subsisted and subsist here, we look to the Advocate for the Crown for proof that a claim to the

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royalty in question is maintainable here according to those laws and institutions.

To do this, there must be satisfactory reason shewn for believing,

1st. That the old Roman Law recognised the existence of such a right as is now claimed ;

2ndly. That such part of the old Roman law had been recognised and adopted in Holland ; and

3rdly, supposing these two first points be allowed, that such part of the Roman-Dutch law was portion of the laws and institutions which subsisted under the Dutch Government in Ceylon.

The learned Counsel for the plaintiff has, very fairly, insisted on all these three points being established before the judgment against his client can be affirmed. His chief contention was as to the 2nd and 3rd points.

There was not much dispute about the old Roman law itself sanctioning such a claim. In the 50th Book of the Digest, tit. xvi. sec. 17, Ulpian, as there quoted, ranks among the property of the State the duties, tolls or tithes which are levied for the benefit of the public treasury. And he gives, among other instances, the tithe which was levied for the public treasury on minerals. "*Publica vectigalia intelligere debemus ex quibus vectigal fiscus capit: quale est vectigal portus, vel venalium rerum: item salinarum et metallorum et piscariarum.*"

We will pause here merely to express our agreement with the learned District Judge in considering that such a substance as Plumbago is clearly a mineral, a Metallum, within the meaning of the Roman law. It is indeed but doing justice to the Advocate for the plaintiff to say that no time was taken up in disputing this matter. Unquestionably in the scientific language of modern Chemistry Plumbago (technically called Graphite) is not a metal, being a carbon compound; but that it is a mineral, such as would come under the latin word "Metallum," may be seen by looking out the word in Facciolati's Lexicon, and observing the meanings which it embraces, and for each of which good authority is there given. It means not only substances such as gold and silver, lead and iron, but generally *materia illa dura quæ ex terræ visceribus effoditur.* Marble and many other things are shown to be "Metalla." The instance of Sulphur, which is one of the recognized "Metalla" in Latin, bears the closest analogy to the particular substance which we are dealing with.

We return now to the authorities in the *Corpus Juris* for the State having a right of tithe, a "Vectigal" in the form of a "Decuma" over minerals.

Besides the passage in the Digest already cited, there is the Code, book XI, tit. VI, which by paragraph 3 orders that "*cuncti qui per privatorum loca saxorum venam laboriosis effossionibus persequuntur, decimas fisco, decimas etiam domino repræsentent.*" Van Leeuwen in his much valued Commentary says of this passage that "*Metallorum nomine saxum etiam intelligitur.*" The wording of this title in the Code is "*De Metallariis et Metallis et procuratoribus metallorum.*"

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There is also a passage in the 2nd book *De Feudis*, tit. 56, "*Quæ sint Regalia*," which Voet in his commentary on book 49 of the Digest, tit. 14, sec 3, treats as bearing on this subject, and as proving the State's right to a royalty on minerals. The authority of the Liber Feudorum as part of the *Corpus Juris*, that is as part of the Body of Roman Law received and recognised by mediæval and modern Jurists, has been impugned by some commentators : but it has been acknowledged by the great majority of Dutch Jurists, as may be seen in the prefatory remarks on these "Feudorum Consuetudines" in *Groenewegen de Legibus Abrogatis*, page 901. Above all, its authority and the authority of this particular part of it are sufficiently vouched by the fact of its being quoted and relied on by Voet.

The Liber Feudorum in its second book, title 56, contains a list of Regalia, among which are enumerated "Argentariæ." Voet, in his commentary on the 49th book of the Digest, tit xiv, § 3, cites and explains this passage in the Liber Feudorum. His opinion is that when *Argentariæ*, that is to say silver mines, are mentioned in it, we are to regard the word as used for all mines of minerals, the *species* being placed for the *genus*. "*Proponuntur argentariæ, id est, argenti fodinæ, sed specie positâ pro genere, sic ut omnis generis metalli fodinæ contineantur.*" He goes on to say that he differs from those who claim all minerals, though found in private ground, as Regalia ; and he thinks that the passage either refers to the produce of mines in state-lands only, or that the passage does not mean the mines themselves, but the certain portion, as a fifth or a tenth, or some other portion which is rendered to the Sovereign Emperor and other Lords of *Regalia* from mines, in whatever part of his territory they are found and established. He adds that this last mentioned sense, that is the Sovereign's or State's right to tithe or royalty in minerals, wherever found, is the true sense of the passage in the Digest, book 50, tit. 17 (which we have already referred to) as to a right to tithe of minerals being part of the State's proprietary rights. He refers also to the passage in the Code already cited), book xi, tit. vi, *De Metallariis et Metallis*. His words as to the passage in book 50 of the Digest, are *Eaque sensu videntur inter fiscalia jura referri vectigalia metallorum. Lex "Inter Publica"* 17, *Titulus De verborum significatione.*

Considering then this position in the argument to be proved, that the right in question would exist according to ancient Roman Law, we come to the next step; and we have to examine whether this part of the ancient Roman Law was in force in Holland. The learned Counsel for the appellants denies this, and says that there is no proof of any edict or ordinance or proclamation, by which the Counts or the Commonwealth of Holland ever introduced this law. But we do not think that any such proof is necessary in order to make us believe that the Dutch jurists and rulers acknowledged any particular branch of Roman law. They acknowledged the Roman law generally, except such articles in it, as clashed with the principles of their constitution, and provided also that it was not overruled by any express law of Holland on the subject, or any custom having the

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force of law. We cannot as to this follow a safer director than Vanderlinden; whose guidance is peculiarly valuable, because he lived and wrote during the very last period of the existence of the old Dutch judicial institutions; and we therefore learn from him what those "laws and institutions of the Seven United Provinces" were at the very time when Ceylon passed by conquest and cession from Dutch into British Sovereignty. Vanderlinden says (see p. 57 of English Translation) "When we are to answer the question what is the law in the case? we must first inquire whether there is any general law of the land respecting it, or any local ordinance or regulation, which has the force of law, or any established custom. On failure of these, the Roman law, as a model of wisdom and justice, is called in to supply the *casus omissus.*" Undoubtedly the learned Counsel for the appellants had a weighty passage of Groenewegen to cite in favour of his contention that the Roman Law as to the State-tithe on minerals was not in force in Holland. Groenewegen in his Treatise "*De Legibus abrogatis et inusitatis in Hollandia*" says at page 798 respecting title vi of the xith book of the Code, (being the title already referred to) "*De Metallariis et Metallis et Procuratoribus eorum.*"—"*Hic titulus exolevit; quia apud nos non sunt metalli fadinæ.*" But (as the learned District Judge has remarked) Groenewegen has given a special reason why this part of the Roman law was inoperative in Holland; namely the reason that no mines or minerals existed there. It by no means follows that in the event of something, on which such a law could operate, being found within the dominion of Dutch law, Groenewegen would have refused to allow the Roman law to exhibit operative vitality. It is moreover remarkable that Gronewegen in this same treatise, though he cites or comments on the 50th book of the Digest, title 16, § 17 "Inter Publica," as to other matters, does not say or even hint that the part of this law, which declares the State to have a right to a tithe of the produce of mines, was obsolete in Holland. And this law "Inter Publica" in the 50th book of the Digest is a far broader, surer, and more manifest authority for the right in question, than is the passage in the XIth book of the Code. So also as to the passage cited from the Liber Feudorum, Book 2, title 56. Groenewegen comments on it in the same treatise; but he says nothing as to the law about "Argentariæ" being among Regalia having become obsolete.

But, whatever weight ought to be assigned to Groenewegen's remark in the passage in the XIth book of the Code, such weight is far overborne by the fact that Voet in his Commentary already quoted cites this passage of the Code, and the passage of the 50th book of the Digest, and also the passage in the 2nd book of the Liber Feudorum; and that he regards them all not only as existing Roman Law, but as existing Roman-Dutch law. That he did so regard them is proved by his adding no warning that the law, which he has been illustrating as Roman Law, is not also the law of Holland. Wherever such a difference existed, Voet was careful to inform his readers of it. To do so was one of the main objects of his great work. He

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tells us in his preface that his purpose was to expound both Roman and actually existing law. *Sociandam censui Romanæ jurisprudentiæ explanationem cum hodierni juris tractatione.* Here again we cannot do better than follow the advice of Vanderlinden, who says in his Introduction (p. 17), "The study of the Commentary on the Pandects by Professor Voet, which particularly shows how far the Roman law is yet binding and in force, and the authority of which is with reason very great in our country, cannot be too much recommended."

There yet remains for consideration the third matter, which the Queen's Advocate was bound to establish, namely that this Roman-Dutch Law as to the "Vectigal Metallorum" existed in Ceylon under the Dutch Government of the Island. We are convinced that this point also is made good; and this completes the Crown's right to a decision in its favour in the present action. That the law of Holland in general became the law of Ceylon when occupied by the Dutch settlers is admitted by all; and we may here again usefully draw attention to the Royal Proclamation, when the English conquered the Island, which has been already referred to and to the Ordinance of 1835, already cited, which enacts and declares that "the laws and institutions which subsisted under the ancient Government of the United Provinces shall continue to be administered." Undoubtedly, if it can be shown that any particular portion of the Roman-Dutch law, as prevalent in Holland, was essentially a local law of the mother-country and entirely unsuited for the position of Dutch Colonists here, the presumption would follow that such particular portion of Dutch Law was not introduced in Ceylon; especially if proof could also be given of judicial decisions in the Colonial Courts against the existence here of that law, and of large classes of the community here having notoriously habitually acted in a manner wholly inconsistent with such a law. without receiving any punishment or animadversion from the tribunals or administrators of justice for so doing. None of these things has been proved in the present case. They were all proved in the recent Mortmain case, decided here on 8th July last (D. C. Colombo 3627), and we accordingly held that the Mortmain law of Holland was not introduced by the Dutch in Ceylon. We fully adhere to the principles laid down in that judgment. We again, as in that case, follow the example given by the Judicial Committee of the Privy Council in the case of Thurburn v. Stewart, which is reported in vol. VII of Moore's P. C. C. (N.S.) p. 333, in looking to the nature of the law in question, to the character of the Dutch Colonists, and to the objects of their colonization, so as to guide us in determining whether law about minerals was law, that must have appeared to be suited to the requirements of the Dutch Colonists here, and which therefore was not likely to have been omitted from the laws of their old country, which they brought here with them. Now, if there be a fact peculiarly certain about the motives for European colonization in the East Indies as well as in the Western world, during the 16th and 17th centuries, it is the fact that

the hope of finding mines of precious substances was one of the most powerful stimulants of the adventurers; and the Dutch were (to say the least) as susceptible to such influences, as were other European nations. Law about rights over the mineral wealth which was ever desired and hoped for (though in Ceylon, as in many other settlements, such hopes were long deferred) formed a part of the law which would naturally be wanted here, and which we must regard as not omitted from that general body of Roman-Dutch institutions which certainly prevailed here, while the Dutch were tenants of that dominion in Ceylon, which now has vested in the Majesty of Great Britain.

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Right of children to deceased parent's share of the joint estate.

D. C. Matara, 25965. This was an action by the plaintiff against his father-in-law, to recover specific portions of 14 lands, as the share due to plaintiff's wife from her deceased mother's estate. A Chetty intervened and claimed a mortgage by the defendant over certain of the lands. The District Judge (*Swettenham*) non-suited the plaintiff, on the ground that he could not claim any particular land, his right amounting only to a hypothec giving him preference over all subsequent creditors or purchasers for the value of the mother's share of the community at her death. The Judge relied on Justice Jeremie's decision in Putlam 1923 and Colombo North 2983, Morgan's Dig., 189.

In appeal, Ferdinands for appellant.—The judgment relied upon by the District Judge was over-ruled by the Supreme Court in two Colombo cases: D. C. 54929 and D. C. 60403.

Per Stewart, J.—" Set aside, and judgment entered for the plaintiff and his minor daughter for an undivided half of so much of the lands and premises specified and mentioned in the libel and which belonged to the joint estate of the defendant and his deceased wife. The claim of the intervenient is dismissed, so far as it affects the moiety above adjudicated to the plaintiff; but the said claim to be held good as respects lands or premises or shares thereof not hereby awarded to the plaintiffs. The District Judge will, if necessary, make further enquiry and enter up judgment as above directed. The old case reported in Morgan's Digest, p. 189, and referred to by the District Judge, has been over-ruled by recent collective judgments of the Supreme Court. See Colombo D. C. No. 54929, Novr. 3rd, 1871; and D. C. Colombo, No. 60403, November 22nd, 1872, in which it was expressly held that the children of a deceased parent succeed at the death of such parent to a moiety of the joint estate of their parents;—and consequently to a moiety of the several lands of which the joint estate may have consisted, subject to the right of the surviving parent to alienate or encumber for debts or expenses contracted during the commu-

nity as pointed out in those judgments. In the present case there is no evidence, nor is it even suggested, that there were any debts or liabilities of the joint estate which made alienation necessary. It will be seen that the lands, a moiety whereof is now awarded to plaintiff, only comprise such immoveable property mentioned in the libel as the defendant and his wife were possessed of at the time of the death of the latter. The judgment in favor of the plaintiff is not to include any property acquired by the defendant subsequent to the death of his wife. The costs of both plaintiff and intervenient to be paid by the defendant."

Construction of a Will.

D. C. Matara, 26039. The plaintiff, on behalf of himself and his infant child, sued his mother-in-law, the defendant, for the recovery of certain moveable and immoveable property which had been specially bequeathed to his late wife by her father, who by the 5th clause of his Will had declared as follows :

"That my said eldest daughter Emily shall forfeit the right to all, and each item of, the property thus left to her, virtually and entirely, in case she contracts a marriage against the wishes of Mr. George Edward Ernst, Mrs. Emily Sophia Ernst, and Mrs. Emily Felicia Buultjens, (my father, wife, and sister). It is to be distinctly understood that at any time the opinion of any two of them is to be received for or against—where all the three cannot agree. If she contracts a marriage according to my above expressed desire, or if she chooses to remain single, the property shall be unconditionally hers, at the age of one and twenty."

The testator died in 1864. In 1869, the daughter (who was then 17 years of age) married the plaintiff, with the full consent of the abovenamed persons; and she died in 1871. The defendant now contended that, under her husband's will, the property was not to vest in plaintiff's wife until she attained the age of 21 years, whether she married or not before that time. The District Judge *(Swettenham)* however entered judgment for plaintiff for one-half of the property claimed in the libel, reserving the minor's rights.

In appeal (*Grenier* for appellant, *Ferdinands* for respondent) per Cayley, J.—Affirmed.

Corporal punishment.

D. C. Anuradhapura, 123. The defendant, an Arachi, was convicted, under the 2nd clause of Ordinance 6 of 1850, of having "corruptly demanded and taken a sum of Rs. 10 for helping to recover certain stolen cattle, the property of the complainant," and was sentenced, on the 5th of November, by the District Judge

(*Dickson*) " to receive 50 lashes, 25 to be inflicted in the Bazaar at Anuradhapura on the morning of the 17th instant, and 25 lashes to be inflicted within 45 days thereafter at the whipping post in Kallankiga on such day as the Fiscal may appoint : the defendant to give approved security in Rs. 500 to surrender at the above places on the appointed days." *In appeal*, (*Ferdinands* for appellant) per CAYLEY. J.—" In view of the remarks of the District Judge as to the prevalence of this crime in the District referred to and of the fact of the defendant being a headman at the time when he committed the offence, the Supreme Court sees no reason to interfere with the decision of the District Judge as to the infliction of corporal punishment. This Court has, however, in a previous case held, and still thinks, that a defendant should not be punished by two floggings, though such a punishment would not be against the strict letter of the law. The judgment is accordingly affirmed with the modification that the corporal punishment be reduced to 25 lashes."

November 28.

Present CREASY, C. J., STEWART and CAYLEY, J. J.

Administration. Security Bond prescribed.

D. C. Matara, No. 26483. This was an action instituted in July 1872, by the plaintiff, upon an assignment of a security bond which had been executed in January 1848, by John Wetzalius Perera, Secretary of the District Court of Matara, as the official administrator of the estate of the plaintiff's parents, who had died in 1845-6. The defendants were the sureties of the deceased administrator and his widow, and were sued for the default of the administrator in not paying to the plaintiff Rs. 1300, the share of the estate due to him. Only the two sureties (the 2nd and 3rd defendants) answered, pleading prescription. It appeared at the trial that the plaintiff was born in December 1843; that the bond, on the assignment of which the action was founded, was in favor of " Charles Daniel Ludovici, the Head Clerk of the Court, and of the Secretary of the Court for the time being;" that the bond required the administrator to pay over the residue of the estate to the heirs; that the plaintiff was the sole heir of the intestate; and that the administrator had done nothing beyond filing a provisional account on the 5th August, 1848. The plaintiff having waived the widow (the 1st defendant), the learned District Judge (*Williams*) held, that the plaintiff having attained his majority in 1865, his right of action had been prescribed by the operation of the 3rd clause of Ordinance No. 8, of 1834; and that there was

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such laches on his part as would not justify the Court in interfering in point of equity.

In appeal, *Alwis*, for appellant, submitted that the right of the heir to sue accrued only when he became a major; that he attained his majority in 1865; and that prescription could run only from that date, which had not been ten years before action. The plaintiff had no action until there was a breach of the bond, that was until he was denied his share of the estate when he had come of age and was entitled to demand it. Ordinance No. 22 of 1871, and not No. 8 of 1834, was applicable to the case.

Per CAYLEY, J.—"Affirmed. The Supreme Court thinks that the administration bond sued upon, so far as relates to the liability of the sureties, the 2nd and 3rd defendants, was prescribed before it was assigned to the plaintiff. The Bond, which was in favor of the Secretary of the Court, was executed in 1848, and was not assigned to the plaintiff until 1872. The case must be governed by the Ordinance 8 of 1834, by the 3rd section of which it is enacted, that no action shall be maintainable upon any bond conditioned for the performance of any trust, unless such action shall be brought within 10 years from the date of such instrument, or the last payment of interest thereupon: that is to say, under that Ordinance, prescription began to run, not from the date of breach of the condition, but from the date of the instrument, or the last payment of interest on it. Under the new Ordinance of Prescription (No. 22 of 1871 §6), the breach of the condition in a bond is expressly made one of the points from which prescription begins to run. How far the estate of the deceased administrator is liable for his mal-administration, it is not necessary to enquire, the claim against his representative, the 1st defendant, having been waived by the plaintiff at the trial."

Road Reservations. *Carter* v. *M. C. Kandy.*

D. C. Kandy, 55764. This was an action by the Trustee of the Baptist Missionary Society against the Municipal Council of Kandy, to restrain the latter from erecting a wall on a Road Reservation in front of the Baptist Chapel and in front of an adjoining house which had been originally built for the accommodation and residence of the Baptist Missionaries, but which had for some years past been occupied by tenants under the said Society. The learned District Judge (*Cayley*) held as follows:

"The first question which arises for determination appears to me to be this:—Have the Mission Society acquired a prescriptive title to the ground in front of their house and Chapel, which is to be taken

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for widening the road ; or, if not, have they acquired a prescriptive title to the easements of light, air, ingress and egress which they have hitherto enjoyed? As against the Crown they have, it appears to me, acquired a prescriptive title to neither the one nor the other. The prescriptive period of one-third of a century has not elapsed (*see* 1245, *D. C. Colombo, S. C. Minutes*, 13*th September*, 1870); and so far as relates to the ground, the title of the Crown has been acknowledged by the plaintiff applying for and accepting an occupancy ticket from the Government, and agreeing to pay a rent of one shilling per annum for it. And, although the Municipal Council (assuming the ground to be now vested in them) cannot as grantees of the Crown, claim the privilege of the Crown in respect of the *præscriptio longissimi temporis (see Chitty Prerog.* 399); still as the Deed of grant, under which the Society claim their premises, by reference to the Survey attached, expressly reserves this ground for public purposes, I do not think that they can, when propounding the Deed, which makes this reservation, at the same time set up, in contravention of the terms of their grant, a prescriptive right to prevent the reasonable use of the land for these purposes by any person duly authorized in that behalf. Assuming, then, that the Society have not acquired a prescriptive right either to the land or to the easements claimed, we come to the question :—Have these Road Reservations become vested in the Municipal Council? Or, have they acquired right to enter upon them for the purpose of widening the roads or streets to the injury of the occupiers of the adjoining tenements? This is a question of some difficulty and great importance. It was argued by the defendants' Counsel, that when the roads and streets within the gravets became vested in the Municipal Council, the reservations passed with them ; that they are in fact a part of the roads and streets for which they were reserved. In point of fact, however, these reservations are not part of the roads and streets. In the present case, for instance, the reservation is some feet below the road ; one portion of it is a garden and the other (that in front of the chapel) was enclosed with a rail and gate for a number of years ; and, according to street lines marked in the plan Z, upon some portions of the reservation the fronts of several substantial houses have been built. The question must be determined by reference to the Municipal Councils Ordinance (17 of 1865). By the 87th clause of that Ordinance, it is enacted that all public streets and bridges within each Municipality (except such as have been specially exempted by the Governor,) and the pavements, stones and other materials thereof, and also all erections, materials, implements and other things provided for such streets shall be vested

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in the Municipal Council for the purposes of the Ordinance. Now the expression "*other things provided for such streets*" must, I think, be construed to mean other things of a similar kind with erections, materials and implements, and cannot be held to include road reservations. To turn now to the Interpretation Clause, the word Street is there declared to mean any road, street, square, court, alley, or passage, whether a thoroughfare or not, over which the public have a right of way, and also the roadway over any bridge or causeway within the town. This clause does not appear to me to include these road reservations. For although they may be liable to be converted into thoroughfares at present, many of them have not been so converted; as for instance the one in question, nor have the public as yet necessarily acquired a right of way over them. Again, it is not probable that it would often, if ever, become necessary to widen any road beyond the reservation, and if the reservations were vested in the Council, or if the Council had full and unrestricted power to use them, there would be no necessity for that part of the 88th clause which refers to widening streets and by which the Council is authorized, with the sanction of the Governor and Executive Council, to widen any street making due compensation to the owners and *occupiers* of the land required for that purpose. At all events, an exception would would have been made so far as it relates to widening the streets to the extent of the reservations. It is also to be observed that parts of these reservations consist of waste land, and under the 61st clause of the Municipal Councils Ordinance, waste ground or land within a Municipality does not vest in the Council until it has been handed over with the sanction of the Governor. Again, comparing the Interpretation Clause of the Municipal Councils Ordinance with that of the Road Ordinance (No. 10 of 1861) which is *in pari materia* with it so far as relates to this subject, it will be seen that the word Road in the latter Ordinance is expressly declared to include such waste land adjoining any Road as may have been reserved for its protection and benefit. If it had been the intention of the Legislature to include these reservations under the words Street or Road in both Ordinances, it is difficult to see why it should be expressly so stated in the one and left to inference only in the other. There is moreover, I think, a good reason why the Legislature should have placed these Reservations under the operation of the Road Ordinance, and yet not intend them to be vested in the Municipal Councils. Complete control over the roads is left in the Government by the Road Ordinance; whereas by the Municipal Councils Ordinance the Government have merely relinquished all control over the property handed over

to the Councils. If the Legislature had intended to give to the Councils such unlimited power over the reservations as this, I think that such intention would have been clearly expressed, and not left to doubtful inference only. The Missionary Society are in *occupation* by themselves, or their tenants, of the land proposed to be taken by the defendants, and in the enjoyment of the easements of light, air, ingress and egress referred to, whether with a good title or not; and they have been in such occupation and enjoyment for nearly thirty years. It is true that they recently, and probably in anticipation of this dispute, obtained an occupation ticket from Government, which was afterwards withdrawn, for the ground in front of their House and Chapel; but the Crown has not resumed possession of this land, nor intervened in these proceedings. It accordingly appears to me that, it the Council wish to take this land for widening the road, they must proceed under the provisions of the 88th clause of the Municipal Councils Ordinance, which authorizes them to widen steets, but only with the sanction of the Governor and Executive Council, and on the condition of making due compensation, not only to the owners, but to the occupiers also of any land that may be required for the purpose. In the present case neither of these conditions has been fulfilled. It was pleaded and contended at the trial, that the work in question is a necessary work for the public convenience and for the due preservation and improvement of the road of which the Council are undoubtedly the conservators. It is true that the road would be improved by widening, and the convenience of foot passengers increased if a footway were allowed them. But necessary the work cannot be considered. I accordingly think that the plaintiff is entitled to decree restraining the defendants from further prosecution of the work. The plaintiff's prayer is in the alternative—either for an injunction or for £2,000 by way of compensation or damages. There is no claim for the damages already sustained; and I do not think that I can award any, under the prayer for further relief. Any right to recover such damages must be reserved. The decree will be that the defendants be restrained from further building the wall which they have commenced in front of the Baptist Mission premises, and that they be ordered to remove, at their own cost and within one month of this date, so much of the wall as is already erected. Defendants will pay plaintiff's costs of suit."

In appeal (*Kelly* for appellants, *the Queen's Advocate* for respondent) per CREASY, C. J.—"Affirmed. The Supreme Court is of opinion that the Municipal Councils Ordinance has not vested in the Councils land which forms no part of a road; and that it has given no power

to them to build by their own authority on such land, though for the purpose of improving a road."

December 2.

Present Stewart and Cayley, J. J.

Practice. Effect of striking off cases.

D. C. Trincomalie, 20811. This case, which had been instituted on the 23rd October, 1871, after repeated postponements, had been withdrawn from the Trial Roll on the 29th July, 1872, by order of Court; the parties having failed to issue a commission to the arbitrators to whom they had previously agreed to refer the matters in dispute between them. On the 30th July, 1873, the defendant's Proctor moved for a rule on the plaintiff to shew cause why the case should not be struck off and plaintiff nonsuited with costs, a year and a day having elapsed since plaintiff had last taken any steps to prosecute his suit. * The District Judge (*Templer*) made the following order: "Struck off. No rule necessary." The defendant appealed, urging that the object of his motion had been to recover his costs, the plaintiff having put him to the expense of defending an action which had since been abandoned altogether. Per Stewart, J.—"Set aside. The proper course for the defendant to adopt is to proceed to have the cause set down for trial."

December 5.

Present Stewart and Cayley, J. J.

Sequestration of a Ship.

D. C. Galle, 35342. This was an action by the Casa Marittima Company of Genoa against the Master of the Italian ship,

* The rule as to striking off cases on account of a year and a day's laches was laid down in appeal in D. C. Negombo, 69, in the following terms: "This Court does not agree with that portion of the judgment which seems to lay down that it is necessary for a plaintiff to institute a fresh action, if his original case has been struck off on account of a year and a day's laches. The Supreme Court thinks it desirable, on account of doubts that have been expressed on the subject, to record its opinion that the power of the Courts to strike cases off the roll when no steps have been taken for a year and a day is in full existence and is not affected by the Rule of Court of 1842. The nature of this power and the mode in which it should be exercised, namely, by an order of the Judge, are fully shown in the *Isag.* of *Grotius*, p. 301, note; and in *Groenewegen de judiciis*, p. 74. The same authorities show that it is competent for the party to procure the restoration of his cause, by shewing tolerably fair excuse for his delay. This ought not however to be a new motion of course on an *ex parte* proceeding. Notice of the intended application should be given or else only a rule to shew cause should in the first instance be granted." See Civ. Min., June 26, 1863.

Sequestration of a Ship.

Maria Luisa, to recover Rs. 42,235 for breach of a charter-party, in that the defendant, in place of proceeding without deviation to Falmouth or Cork (the port of destination in terms of the charter-party), had taken a clearance for Chittagong. The District Court of Galle, on affidavits to that effect, granted a sequestration of the vessel.

In appeal, by the defendant, the *Queen's Advocate* for appellant.—(1) This is a proceeding against the ship, and recourse should have been had to the Vice Admiralty Court. The District Court of Galle had no jurisdiction. The Rhadamanthe, 1 Dods. 201; The Atlas, 2. Hagg, 48. In England, a Common Law Court has jurisdiction in such matters, only where fraud can be proved. Maude and Pollock, p. p. 444,445. (2) There was no breach of the bond: an intention to deviate does not amount to a deviation. (3) The proceedings are further irregular in that Messrs. Fowlie, Richmond signed the Proxy as Agents of the plaintiff, while having no Power of Attorney to represent them.

Ferdinands, for respondent.—(1) The vessel being in the Galle harbour, the District Court had jurisdiction over it. Merchant Shipping Act, 1854, sect ~~521~~; Armitage Brothers v. P and O Company, 46627, D. C. Colombo, Supreme Court Minutes, 7th January, 1868. (2) The intention to deviate was sufficient to justify sequestration, 22,858, D. C. Colombo, Lorenz's Reports, part 2, page 62. If completion of the voyage is prevented by act of master, payment may at once be enforced. The Armadillo, 2 Rob. 255. (3) Fowlie, Richmond's agency is admitted by defendant in the bond, and he cannot now question it.

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Per CAYLEY, J.—"Set aside, and the sequestration issued be dissolved. As we are not sitting collectively, and as we think that the sequestration should be set aside on other grounds, we shall give no decision on the question of jurisdiction, which is one of importance, and which (in view of the special circumstances of this case), is open to discussion. The bond upon which the action is brought, is conditional for the performance of a voyage to Falmouth or Cork for orders, without deviation, and for the payment of a certain sum of money within thirty days after arrival at the port of destination. There has been no breach of the bond as yet, and consequently no cause of action; for the allegation in the libel, that the defendant is about to sail to Chittagong, and has obtained a clearance for that port, does not disclose any present breach, though it may aver an intention on the part of the defendant to commit a breach. But, on the other hand, the sequestration which has been granted, if upheld, will render it impossible for the

Sequestration of a Ship.

defendant to fulfil the conditions of the bond. We do not mean to say that cases might not arise in which the sequestration of a mortgaged ship would be upheld, even though the amount due on the mortgage had not become due, where it was clearly and satisfactorily shewn that, if the ship were allowed to sail, the security of the mortgage would be materially endangered. But, as observed by Rowe, C. J., in the case No. 22,858, D. C., Colombo, (2 Lorenz's Reports, page 69). the process of sequestration is an unusual and extraordinary remedy, which ought not to be resorted to, unless there be good and valid reasons shewn for its adoption; and a Court, before granting such an extraordinary remedy, must be first convinced of its necessity. We are not convinced of such necessity in the present case; and a very strong case indeed would have to be made out before we should uphold a seqestration, which would place it out of the power of the defendant to fulfil the conditions of the very bond in respect of which the sequestration was applied for."

December 9.

Present Stewart and Cayley, J. J.

Coffee Contract *Vengadasalem* v. *Horsfall.*

D. C. Colombo, 62187. The plaintiff sued defendant for the recovery of Rs. 1909·54, being balance due on 1571¼ bushels of parchment coffee sold and delivered. The defendant, admitting the balance on the quantity delivered, pleaded that the 1571¼ bushels formed part of 5000 bushels agreed to be supplied by plaintiff, and claimed Rs. 3428.75 as damages in reconvention for non-delivery of the total quantity contracted for. The plaintiff admitted the contract for 5000 bushels and replied that the parcels were to be paid for as delivered, and that the defendant having refused full payment for the quantity actually delivered had committed a prior breach of agreement. The words of the written contract were as follows:

I the undersigned Koona Mana Chuna Vengadasalem Chetty hereby contract to deliver to C. W. Horsfall five thousand bushels parchment coffee, as per sample deposited with him, within twenty days from this date, it being understood that the coffee is not to contain more than six per cent. of inferior (light pulper cut cherry, &c). The said five thousand bushels are to be delivered in Colombo at such place as the purchaser may direct, on receiving payment at the rate of Rs. 6 and Cts. 62½ per bushel.

[Signed in Tamil by Plaintiff.]

The learned District Judge *(Berwick)* held as follows :—

Plaintiff is entitled to judgment for the unpaid balance of the value of the 1571¼ bushels delivered. With respect to the claim in reconvention, which is founded on an apparent breach of contract in not delivering the whole quantity

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contracted for within the specified time, it appears from the evidence that the plaintiff did not break his part of the contract until the defendant had broken what the evidence shows to have been an implied part of his contract according to the usage of trade, namely to pay the value of each instalment of coffee on delivery. Certainly, the Court would never find such an implied understanding in the wording of the contract itself: but this is just one of those cases in which it must view the terms of the contract and the intentions of the parties as a whole, and if it is to do justice must act as a tribunal of commerce would act and must annex to the actual terms of an informal written contract those unwritten but well-understood terms which, being in the ordinary course of trade, must in good faith be presumed to be as much part of the mercantile contract taken as a whole as if they had been expressly inserted in it; and which in all probability are only not specially inserted because they are so much in ordinary course as not to be considered as requiring special covenant. The usage is conclusively proved to be to pay for each parcel on delivery, and the Court cannot for a moment allow that the force or fact or obligation of a mercantile usage is to be permitted to depend on the arbitrary will of one party not communicated to the other at the time the contract is made: nor on his doubts of his customer's solvency or ability. If a well-understood usage of trade is to be departed from, it can only be by express and joint consent, and not at the pleasure of one party only, and still less after performance of the contract has been fairly entered on by the person against whom the other party desires to vary the established custom; unless upon such cause as the law and not he in his private judgment may deem sufficient ground for requiring some material guarantee for performance of the rest of the contract. The claim in reconvention must therefore be dismissed. Judgment for plaintiff as prayed for.

The evidence as to usage had been given by Mr. James Robinson, Merchant, who deposed as follows:

I am in the Coffee trade and have a number of Contracts similar to the one in suit. [The Contract is read by the Witness.] Interpreting this document by the usage of trade, the Coffee should be paid for on delivery of each parcel; and payment for any parcel should not be detained until the whole 5000 bushels contracted for are delivered. Such is the usage of trade with hardly any exception in practice: such exceptions being when sufficient confidence cannot be placed in the person we are dealing with.

In appeal, by the defendant, *Kelly*, for appellant.—The usage of trade cannot over-ride an express agreement if any such usage exists, which is denied. Payment was only due on full delivery, under the terms of the contract. The usage proved was subject to the condition that it did not apply where sufficient confidence could not be placed in the seller, and the evidence brought this case within the exception.

Ferdinands, for respondent.—Usage when established cannot be departed from by mental reservation of one of the parties on a question of confidence; and usage was proved. The express words "receiving payment" shewed that the payment was to be simultaneous with each delivery, and the judgment was in accordance with this interpretation. The prior breach of contract was with the defendant.

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Per STEWART, J.—"Affirmed. The plaintiff sues to recover Rs. 1909·54, balance due for Coffee sold and delivered to the defendant upon the contract filed in the case. The defendant admits the receipt of the coffee, but pleads that by the contract the plaintiff was bound to deliver 5000 bushels within twenty days from the date of the agreement, that the plaintiff only delivered 1571½ bushels, leaving the residue undelivered at the termination of the stipulated period, whereby the plaintiff became liable to pay the defendant Rs. 3428·75, as damages for such default. The defendant claims in reconvention Rs 1529 as damages, giving the plaintiff credit for the amount claimed in the libel. Two questions arise for consideration: 1st, as to the effect of the evidence of usage given in the District Court; 2nd, as to the true import of the contract in itself. 1st, the Supreme Court does not think that the usage relied upon by the learned District Judge has been proved to be so certain and so generally acquiesced in as to be taken as engrafting upon every written contract of the kind in question terms of payment not expressly provided for by the instrument itself. Mr. Robinson, 1st witness for plaintiff, certainly states 'interpreting this document by the usage of trade, the coffee should be paid for on delivery of each parcel, and payment for any parcel should not be detained until the whole 5000 bushels contracted for are delivered.' This, so far, is very precise. But the witness goes on to add, 'such is the usage of trade with hardly any exception; such exceptions being where sufficient confidence cannot be placed in the person we are dealing with.' Now this is the very exception that is relied upon and urged on behalf of the defendant for keeping back the value of part of the deliveries of Coffee. The defendant states as to usage, 'there is a usage but not an invariable usage in the trade, that Coffee is paid for on delivery of the several parcels to the full value of the parcel delivered.' Upon the above evidence, it appears to the Supreme Court that it cannot be maintained that the alleged custom or usage was of such a uniform and binding nature as to have the force of law. Possibly it may be that the exceptions referred to by Mr. Robinson are in reality not exceptions at all impairing or affecting the usage he alludes to, but merely solitary instances where the purchaser unjustifiably and illegally in the particular case sets at defiance the established custom. In this view we should probably have felt it our duty to remand the suit for further inquiry, if not for the opinion we have formed on the construction to be put upon the contract itself. The Supreme Court considers, 2ndly, that the terms of the agreement itself contemplate that the Coffee should be paid for as it was delivered. The words 'receiving payment at the rate of Rs. 6·62½ per bushel' seem to us

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to imply more than the mere fixing of the price at which the Coffee was sold. If nothing more than this had been intended by the contract, we should have expected it to have simply stipulated for the delivery of the coffee at so much per bushel, or, as the quantity is fixed, for a certain lump sum. There is nothing in the contract to prevent the delivery being made in instalments, provided it was completed within the time stipulated; it is not disputed that the seller was at liberty to do so; and the words at the end of the agreement, by which in effect the seller stipulates to receive payment at the rate of so much per bushel, seem to have been used advisedly, so as to entitle him to payment for each instalment as it was delivered. The construction of this contract may not be free from doubt, but such is the impression which a full consideration of it has left upon our minds. If the seller was at liberty to deliver by instalments, (indeed his not delivering earlier and more frequently is put forward among the reasons which justified the defendant in withholding full payment) it would be consonant neither with reason nor equity to receive the equivalent in money for Coffee actually delivered to and received by the purchaser. There would in fact be a want of mutuality in the one party receiving produce which he could at once turn to account, whilst the other was deprived of payment and possibly of the means whereby alone he would be enabled to carry out his engagement. If the defendant had merely failed to pay for any particular parcel, that of itself might not have been a sufficient excuse for the plaintiff delivering no more Coffee; but the defendant, as appears by his own admission, twice distinctly refused full payment when demanded. There is also the letter A by which immediate payment was required for the quantities already delivered. Accordingly, we think that the plaintiff, after these repeated refusals of defendant, cannot be held liable for ceasing to perform the remaining part of the agreement. See Withers v. Reynolds, 2 B. and Ad. 882."

Thesawaleme.
Rights of half brothers and sisters.

D. C. Jaffna, 1046. The following judgment of the learned District Judge (*de Saram*) explains the case. "This is an action on a Promissory Note brought against the defendant as the representative of the Estate of the late Cartegaser Ayer Suppyer. The defendant is designated in the libel as the brother of the deceased Suppyer; but the examination of parties shews that he is only half brother and the intervenients are half sisters of Suppyer. The defendant has in due course filed his answer. Two parties have since intervened, claiming to be heirs of the deceased jointly with defendant. To this intervention, the plaintiff has demurred, on the ground that the intervenients, the

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half sisters of the deceased, are not his heirs at law, but that the defendant, the half brother, is his only heir, according to the Thesawaleme. The question thus brought before me for adjudication is, whether the intervenients are to be allowed to come into the case as heirs at law of the deceased. The Thesawaleme has been carefully looked over, both by myself as well as the Counsel appearing in the case, and we are unable to find any decision on the point. There is nothing to shew that a half brother or a half sister is entitled to succeed to his or her half brother's Estate, but there is a decree upholding a half sister's right to succeed to a half sister's dowry property. Thes: p. 27, No. 5005. The point being one of importance, I felt it my duty, when the case first came on for argument, to postpone it, so as to allow the parties an opportunity of calling witnesses to prove the custom of the country. The intervenients alone have availed themselves of it, and called their witnesses: one a gentleman of great experience and practising at this bar, the other also a gentleman of great experience and employed as head clerk of the Kachcherri. Both these witnesses are of opinion that the property of the deceased Suppyer, as he has left neither issue nor full brothers and sisters, should revert to his parents, if alive, and failing them to their next of kin. They further add that the property inherited from the father goes back to the father's family, and the property inherited from the mother reverts in like manner to the mother's family; the acquired property being shared by both families, share and share alike. In the case now under consideration, the deceased's parents being dead, the defendant and intervenients, through their common mother, Sethea Letchemy (who was a sister of Subamma) are entitled to succeed to the deceased's property as his next of kin. This, of course, if the intervenients have not been dowried. Mr. Sinnetamby states that he is aware they have not been dowried, and it is not attempted to be denied. It is clear from the Thesewaleme that parents are heirs to their children's property, those children leaving no brothers and sisters. The argument, however, put forward by the plaintiff is, that the defendant, a half brother, is alone entitled to succeed to the Estate of his half brother on the principle adopted by the Thesawaleme, that a male inherits from a male and a female inherits from a female. I am of opinion, however, that as the Thesawalēme makes no mention of half brothers and half sisters as being entitled to succeed to their half brother's property, and as parents only are specially mentioned as heirs to their children's Estate, the defendant as well as intervenients in this case must be considered the heirs at law of the deceased Suppyer. I further think, that if it were intended that half

brothers should succeed, special mention would have been made of them. It is admitted that the deceased's Estate consisted of hereditary, dowry and acquired property, but it is unnecessary in this case to say what each is entitled to of the several kinds of property left. The demurrer is accordingly set aside, and plaintiff must pay all the costs consequent thereon."

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In appeal, (*Ferdinands* for appellant, *Grenier* for respondents), per CAYLEY, J.—"Affirmed. There is no evidence of the alleged custom set up by the defendant. On the other hand, the evidence called by the intervenients appears to us satisfactorily to establish the position that,according to Tamil law, when a person dies intestate and without wife or issue or any full brothers or sisters, the property which such person inherited from his father devolves upon the children of the father's other marriage equally, whether males or females, provided that the latter have not been dowered."

D. C. Kalutara, 20650. The rights of the Crown, as Intervenient, to certain portions of a land having been upheld by the District Judge (*Jayetilike*) as against those claiming under a Dutch Grant dated 1736, the defendants appealed.

Dutch Grant. Evidence as to cultivation.

In appeal, (*Kelly and Ferdinands* for appellant, the *Queen's Advocate* for respondent) per CAYLEY, J.—

"Affirmed. The former judgment of the District Court was set aside by this Court, as between the defendants and the intervenient, and the case was sent back to the District Court for inquiry as to what portion or portions of the land claimed (if any) besides a certain portion of two amunams' extent to which the defendants were entitled had been brought into cultivation by the defendants or their predecessors. The Supreme Court further held that the Crown was entitled to all that was claimed in the Petition of Intervention, except a certain garden and field, and except also such other cultivated portion or portions of the said lands in the petition mentioned as the defendants or their predecessors had brought into cultivation. To these last mentioned portions the defendants were declared entitled on payment of *ottu* to the Crown. Against this judgment, which was given in 1867, there has been no appeal; and the only question for consideration in the case as it now comes before us is which of the portions of land claimed in the Petition of Intervention have been brought into cultivation by the defendants or their predecessors. With regard to this question no sufficient reason has been submitted to us for interfering with the finding of the learned District Judge, who himself inspected the land and whose opinion in a matter of this

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kind, from his intimate knowledge of the country and extensive judicial experience, is entitled to the very greatest weight. We agree with the learned District Judge that the expression 'bringing into cultivation', which is employed in the former judgment of this Court, cannot be made applicable to what is called chena cultivation, which is a temporary cultivation of waste land for a single crop of some fine grain at intervals of several years, the land being allowed to relapse in the meantime to its pristine condition of jungle. Such cultivation so far from improving is an injury to the land sown, and cannot be the kind of cultivation and improvement contemplated by the Grant from the Dutch Government. We think that the learned District Judge is correct in his interpretation of this expression 'bringing into cultivation;' and with respect to the evidence we see no reason for coming to any different conclusion from that arrived at by him. The appearance which the land presented when visited and inspected by him confirms the evidence given by the witnesses for the Crown, while it negatives that adduced on the part of the defendants; and the recent transplantation of some old cocoanut trees, in order to give the land an appearance of having been brought into cultivation long ago, throws the greatest suspicion on the defendants' case if it does not render that case altogether unworthy of credit."

December 12.

Present Stewart and Cayley, J. J.

Deed of gift. Registration.

D. C. Matara, 26320. Plaintiff claimed, under a bill of sale dated 4th October, 1868, eight coorunies of a certain field. 1st defendant proved a deed of gift from plaintiff's vendor, executed in 1850, in favor of himself and another for four coorunies, while the other defendants failed to establish any right to the property in question. The District Judge (*Swettenham*) held that plaintiff's conveyance having been registered was entitled to priority over the unregistered deed of gift, which he held was an absolute gift and not a *donatio mortis causa*, and which was as follows:

Whereas I (donor) having been seriously wounded and dangerously ill, and whereas Loku Appo and Wuttuhami (donees) who are closely related to me render me help and assistance for my illness; and whereas I think it proper to give them some gift on that account, I do hereby gift over to them with my full consent and pleasure 4 coorunies extent from my ancestral paraveny when my immortal soul is separated from my mortal body; and I hereby renounce and cancel all the powers and rights which I, the donor, have or any my heirs have with respect to them, etc. And with reference to this gift no dispute or objection could be raised or caused to be raised hereafter either by me or by my heirs, and as an everlasting proof of these powers so granted, the deed of gift was caused to be written, etc.

Deed of gift. Registration.

In appeal, per CAYLEY, J.—"Set aside and judgment to be entered for plaintiff for 1 and 3-5th kurunies only of the land in dispute. The Supreme Court concurs with the learned District Judge in holding that the deed of gift marked A and produced by the 1st defendant must be taken as an absolute gift and not as a *donatio mortis causa.* The recital that the donor was dangerously ill with a wound and the fact that the possession of the donees is to be postponed until the donor's death, are not of themselves sufficient to render the gift a *donatio mortis causa* (see Voet, xxxix, 4, 4,); and the language of the subsequent part of the instrument is quite inconsistent with any intention that the gift should be revocable or should not operate in the event of the donor's recovery. (See the translation made by the Interpreter of the Supreme Court.) The learned District Judge has however given preference to the plaintiff's conveyance of 1868 over the deed of gift, on the ground that the former has been registered whereas the latter has not. But the deed of gift was executed in 1850, and the 39th clause of Ordinance 8 of 1863 is applicable to such instruments only as have been executed after that Ordinance came into operation, i. e. after the 1st January, 1864. (See sections 38 and 53). The learned District Judge has found that Lianege Nicholas, through whom all parties claim, was entitled to 5 and 3-5th kurunies ; deducting from this the 4 kurunies comprised in the deed of gift, plaintiff will be entitled to 1 and 3-5th kurunies only. Plaintiff must pay 1st defendant's costs, both in appeal and in the Court below."

December 23rd.

Present STEWART and CAYLEY, J. J.

Warranty under a Lease.

D. C. Galle, 32979. The plaintiffs sued as assignees of a lease of land from Nicholas Dias, who had originally leased the land in question from 1st defendant. The action was to compel the 1st defendant to warrant title, and against 2nd and 3rd defendants for ejectment. The District Judge held (inter alia) that 1st defendant was not bound to warrant, and dismissed plaintiff's case.

In appeal, the Queen's Advocate, for plaintiffs and appellants.—There is an implied warranty between lessor and lessee ; and plaintiffs, as assignees, were in the same position as the original lessee, who was dead.

Ferdinands, for respondent.—This is but a sub-lease to plaintiffs from Nicholas Dias, and the 1st defendant is not bound to warrant title. The representatives of Dias should have been first cited, who in their turn should have called upon the defendant.

Warranty under a Lease.

It is not competent for plaintiff to skip over Dias and resort to Dias' lessor. 2 Burge, 561, 565; Voet, lib. 21, tit. 2, sec. 21.

The Queen's Advocate, in reply.—The passages cited are only directory, and do not release the lessor from the original warranty.

Per STEWART, J.—' Affirmed. The claim of the plaintiffs is based on a lease from the late Mr. Nicholas Dias, Mudaliyar, who was the original lessee of the garden in question from the 1st defendant, under an indenture dated August 17th, 1867, for a period of four years, ending on December 31st, 1874. The plaintiffs allege that, in January 1872, during the continuance of their lease, they were ejected by the 2nd and 3rd defendants, and they pray that the 1st defendant may be cited to warrant and defend the lease. The 1st and 2nd defendants are joint owners of the land, and, according to Deed Lr. C., entitled to possess the property in alternate years, the 2nd defendant (under whom the 3rd defendant justifies) during the year 1872. The question now before us for adjudication, which has been argued at the Bar is, have the plaintiffs established any right of action for breach of warranty against the 1st defendant? We may in the first place point out, that the deed in favor of the plaintiffs is erroneously called an assignment in the proceedings. It is simply a sub-lease for a part of the term comprised in the original indenture. No authority has been cited to us in support of the position, that the implied warranty arising from the relation of lessor and lessee extends to the benefit of a sub-lessee, so as to enable the latter to sue the original lessor for damages sustained by reason of his (the sub-lessee's) eviction. We can find no such authority; and, as there is neither priority of contract, nor priority of estate, between the proprietor and the sub-lessee, it is difficult to see upon what principle such an action can be maintainable. In the case of sale and purchase, when the property sold has passed through several hands, it would appear that such remedy would not be available at the suit of the last purchaser against the original vendor, unless there had been a cession of action. See Voet lib. xxi, tit. 2, sec. 21, (" et si res eadem sæpius vendita per plures, &c., &c.") where it is laid down that the proper course is for the last purchaser to call upon his immediate vendor to defend his title, and for the latter, in his turn, to call upon the party from whom he purchased, until the original proprietor is so reached. There being no priority of estate or contract between an original lessee and an under-lessee, the same principle would seem to apply to a case like the present."

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