The Ceylon Law Weekly

containing Cases decided by the Court of Criminal Appeal, the Supreme Court of Ceylon, and Her Majesty the Queen in the Privy Council on appeal from the Supreme Court of Ceylon, and Foreign Judgments of local interest.

DIGEST

VOLUME LVII

Hon'ble Mr. HEMA H. BASNAYAKE, Q.C.
Chief Justice
(Consulting Editor)

G. P. J. KURUKULASURIYA
Advocate of the Supreme Court
(Editor)

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F. C. PERERA, LL.B. (CEYLON)
Advocates of the Supreme Court
(Asst. Editors)

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INDEX OF NAMES

Appeal

Appeal—Abatement—Petition of Appeal and Notice of Security filed on the same day—Cash security deposited in Court before returnable date of notice—Acceptance of security in court on notice returnable date by Proctor of plaintiff-respondent—Bond hypothecating security filed same day—Bond perfected before returnable date of notice—Bond executed in the presence of Justice of the Peace—Validity of security—Civil Procedure Code, Section 757.

The defendant-appellant filed on 14/12/1956 a petition of appeal and a notice on the plaintiff-respondent tendering him a security of Rs. 250/-. The Court ordered the issue of notice of security and made it returnable on 4/1/1957. A sum of Rs. 250/- was deposited in Court on 12/12/1956.

On 4/1/1957 the proctor for plaintiff-respondent accepted the security tendered in Court, whereupon a bond hypothecating a sum of Rs. 250/- was filed and the Court ordered the issue of the notice of appeal. The bond in question had been executed on 31st December, 1956, a date anterior to the notice returnable date, and in the presence of a Justice of the Peace.

The plaintiff-respondent sought to abate the appeal on the ground :—

(*a*) that the bond had been perfected before the security had been accepted by the Court, and therefore was not valid.

(*b*) that the bond was not a valid hypothecation as it did not conform to the provisions of section 757 of the Civil Procedure Code. Section 757 requires that hypothecation of immovable property or money as security for costs should be executed before the Judge, or the Secretary or the Chief Clerk of the Court. It does not provide for the execution of such bonds before a Justice of the Peace.

Held : That the trial judge was correct in allowing the application for abatement of the appeal on both the grounds.

COSTA *vs.* WIJEMANNE 52

Autrefois Acquit

Autrefois Acquit—*Plea of charge under wrong Act—Discovery of error after close of prosecution and cross-examination of accused—Discharge of accused—Fresh charge under correct Act—Conviction —Can plea of* autrefois acquit *be maintained.*

The accused was charged under section 27 (1) of the Explosives Act No. 21 of 1957. After the close of the prosecution case, the accused gave evidence and was cross-examined. At this stage the learned Magistrate discovered that the correct Act was the Explosives Act of 1956 and not of 1957. Thereupon he made order discharging the accused.

The accused was convicted after a second trial held on a new charge under the correct Act.

Held : (1) That, the order of discharge made in the 1st trial amounted to an order of acquittal as there is no provision in the Criminal Procedure Code which enables a Magistrate to make an order of discharge after the evidence for the prosecution is taken.

(2) That the plea of *autrefois acquit* is entitled to succeed.

PREMADASA *vs.* ASSEN 12

Autrefois Acquit—*Accused charged with Excise offences—After close of prosecution case, accused called upon for defence—Defence counsel stating that he was not calling evidence and legal submission made that proceedings were illegal as charge defective—Order made acquitting accused—Second prosecution for same offences—Plea of* autrefois acquit—*Is it available—Criminal Procedure Code, sections* 187 (1), 190, 191, 194 *and* 195.

After the prosecution had closed its case the accused was called upon his defence. Counsel for the accused stated that he was not adducing evidence and submitted that the proceedings at the trial were illegal by reason of the fact that the Magistrate had omitted to conduct the examination as required by section 187 (1) of the Criminal Procedure Code.

The learned Magistrate upheld this objection and acquitted the accused. The order of acquittal did not show that he considered the evidence.

Thereafter, in respect of the same offence, a second prosecution was launched against the accused, who raised plea of *autrefois acquit.* This plea was rejected and the accused appealed to the Supreme Court to revise this order.

Held : (1) That the only provisions in the Criminal Procedure Code for a discharge of an accused person in a summary trial is section 191 and that section clearly contemplates a stage prior to the close of the case for the prosecution and the defence.

(2) That the proceedings in the 1st case had advanced beyond that stage when the Magistrate decided, although without considering the evidence, that the proceedings should be terminated on the ground of the defect in the charge. It was not open to the Magistrate to make any other order than the order of acquittal.

(3) That the plea of *autrefois acquit* was available to the accused in the circumstances.

FERNANDO *vs.* EXCISE INSPECTOR, WENNAPPUWA 19

Plea of autrefois acquit—*Accused discharged as prosecution not ready—Fresh charge for same*

offence—Plea of autrefois acquit *upheld by Magistrate—Appeal by prosecution—Criminal Procedure Code, sections* 190, 191, 194, 195 *and* 330.

The two accused, husband and wife were charged in an earlier case with having in their possession parts of the hemp plant. After several postponements the Magistrate made order discharging them as the prosecution was not ready to go to trial.

Thereafter, the present case was filed against them on the same charge and the Magistrate upheld a plea of *autrefois acquit.*

The prosecution appealed.

Held : That in view of the decision in *R. vs. William* 44 N.L.R. 73 the effect of the order made by the Magistrate in the earlier case was not an order made on the merits of the case and for that reason the plea of *autrefois acquit* cannot be sustained.

ATTORNEY GENERAL *vs.* M. KIRIBANDA

Bail

Accused not brought to trial in due time—Application under Section 31 of the Courts Ordinance.

Breach of Promise

Marriage Registration Ordinance

Breach of Promise—Writing required by Section 19.

Bribery Act, No. 11 of 1954

Bribery Act, No. 11 *of* 1954, *Sections* 14, 15—*Charges under Section* 14 (*a*) *and* 14 (*b*)—*Offering gratification to a member of the House of Representatives as an inducement for doing an act in his capacity as such member—Meaning of the words "in his capacity as such member"—Effect of a proviso on the preceding provisions—What should be borne in mind in construing statutes.*

The 1st and 2nd accused were tried on an indictment framed under Sections 14 (*a*) and 14 (*b*) of the Bribery Act, No. 11 of 1954. The 1st accused was charged on counts 1 and 3 with having, on the 19th and 22nd December 1958, respectively, committed an offence punishable under Section 14 (*a*) of the said Act in that he offered a gratification of Rs. 5,000/- to one Mr. W. J. C. Munasinghe, a member of the House of Representatives, as an inducement or reward for doing an act in his capacity as such member, to wit, addressing a letter to the Minister of Lands and Land Development requesting him to abandon the proposal for the acquisition of Vincent Estate, Chilaw.

The 2nd accused was charged with aiding and abetting the offences.

In addition, the 1st and 2nd accused were charged with having on 22/12/58 abetted the acceptance by the said Mr. W. J. C. Munasinghe of a gratification of Rs. 5,000/- as an inducement or reward for his doing the aforesaid act, an offence punishable under Section 14 (*b*) read with Section 25 (2) thereof.

Both accused were convicted and sentenced to terms of imprisonment and they appealed.

Briefly the facts not challenged in appeal are as follows :—Mr. M. was the member of the House of Representatives for the Chilaw Constituency. He by letter P 1 represented to the Minister of Lands and Land Development the urgent necessity to acquire Vincent Estate (of which the 1st accused was the owner) for the purpose of alienating it among certain inhabitants of the Chilaw District who had been rendered homeless by seasonal floods. While steps were being taken by the authorities to acquire the said land, the 1st accused contacted Mr. M. through the 2nd accused, a close associate of Mr. M. and offered a present in money, if the acquisition could be stopped. Thereafter by arrangement the 1st and 2nd accused met Mr. M. in his house on 22/12/58, when Mr. M. handed over a letter P 3 addressed to the Minister of Lands and Land Development withdrawing the application for the acquisition of the said estate and the 1st accused handed over to Mr. M a parcel containing Rs. 5,000/- (P6). When the accused were about to depart, the Police Officers, who were in Mr. M's house in concealment by arrangement with him came forward, disclosed their identity and took into custody among other things P 3 and P 6.

To establish that the gratification offered to Mr. M. was for his doing an act in his "capacity" as a Member of the House of Representatives the prosecution relied on the evidence of Mr. M. to the effect that (1) he wrote P1 and P3 in his capacity as a Member of Parliament.

(2) he wrote P1 in consequence of a resolution passed by a Rural Development Society at a meeting at which he was present on invitation.

(3) when he wrote P1 and P3 he described himself as "M.P., Chilaw."

Mr. M. also stated (1) that even before he became M.P. for Chilaw, he as a politician and a "public man" and also as a prospective candidate for Parliamentary Office used to make representations to the authorities on various matters.

(2) that he thought that as M.P. for Chilaw there was a duty or function entrusted to him to address P3 to the Minister, (but he did not indicate whence such duty or function was derived).

(3) that in his capacity as M.P. he attended social functions, opening schools, textile centres and rural development centres.

Held: (1) That the evidence led in the case did not establish that the gratification offered to Mr. M. was for his doing an act " in his capacity " as a Member of the House of Representatives and that both accused should, therefore, be acquitted.

(2) That a Member of the House of Representatives cannot be regarded as acting " in his capacity as such member " within the meaning of Section 14 of the Bribery Act, No. 11 of 1954, except in the exercise of the functions of his office as such member.

(3) That in invoking the assistance of the proviso to Section 14 of the Bribery Act to construe the preceding provision of the same section it should be borne in mind that often a provisio is inserted to allay fears and to protect persons who are unreasonably apprehensive of the effect of an enactment although there is no question of application to their case.

DE LIVERA AND ANOTHER *vs.* ATTORNEY GENERAL 89

Buddhist Law

Buddhist Temple—Land held by P under a Crown permit—Structures erected on the land by a Society for establishing a Buddhist Temple—Land dedicated to the Sangha by P and officers of the Society—Land at the time of dedication in the name of P only—Transfer of the rights by the Crown to plaintiffs-respondents as " trustees of the Society " after dedication—Validity of Title.

On a land which was held by one P under a Crown permit, buildings were erected for the purpose of establishing a Buddhist temple. The Plaintiffs-respondents and P, as members of a Society formed to further this object, dedicated this land to the Sangha by writing and placed in charge thereof the defendant's predecessor as *Viharadipathi*. The deed of dedication referred to the land as belonging to P having been purchased through the Society. At the time of dedication the land was held by P only, but was transferred thereafter to the plaintiff-respondents " as trustees of the Society " under a lease by the Crown.

The plaintiff-respondents instituted an action as ' trustees ' of the Society claiming title under the lease granted to them by the Crown.

The trial judge allowed the plaintiffs-respondents claim on the ground that the property did not become *Sanghika* as the donors did not have the necessary alienable interest in the land.

Held: That the action must be dismissed for the reason (*a*) That the plaintiffs-respondents must not be allowed to derogate from their grant. The Society had made a grant on the basis that it was the owner of the land. It cannot derogate from that grant by setting up a title of the Crown and its own leasehold interest under the Crown.

(*b*) That a dedication once made is not rendered ineffective by the absence of a notarial document executed in accordance with the Prevention of Frauds Ordinance.

RANDOMBE DHARMAWANSA THERO *vs.* UKKU BANDA AND OTHERS 55

Ceylon (Constitution) Order in Council

Power to legislate for peace order and good Government.

Per BASNAYAKE, C.J.—" The right of a citizen to invoke the aid of the courts is one that cannot be taken away by the rules of any association or body of persons. It is so fundamental that it cannot, in my view, be taken away even by our legislature itself. It is unnecessary for the purpose of this judgment to elaborate this view ; it is sufficient to say that a power to legislate for peace, order and good government, does not include a power to deny access to the courts which are the living symbols of peace, order and good government, for the denial of such right would be a negation of the very purpose for which legislative power is conferred on the legislature. Not only cannot such a right be taken away but it also cannot be denied by any court whose jurisdiction is invoked in proper proceedings.

See AZIZ *vs.* THONDAMAN 73

Civil Appellate Rules

Rules 4 and 2 (1)

See Civil Procedure 64

Civil Procedure

Misjoinder of parties and causes of action—Assignment and sub-letting—Action for ejectment.

Plaintiff, the lessor sued the 1st defendant his lessee, for cancellation of the lease, for ejectment from the premises leased, and damages for unpaid rent.

In the same action he also sued the 2nd and 3rd defendants for ejectment, on the ground that they were in wrongful possession of the premises, upon an informal lease granted to them by the 1st defendant, in breach of a covenant against assignment of the lease without the consent of the lessor.

Held: That the plaintiffs action must fail for misjoinder of parties and causes of action as :—

(1) The claim against the 1st defendant for cancellation of the lease and for rent was based on a contract to which the 2nd and 3rd defendants were not parties.

(2) The claim against the 2nd and 3rd defendants was only for ejectment based on delict arising from their alleged wrongful possession.

Obiter: Even if the 2nd and 3rd defendants were sub-tenants of the 1st defendant they could not have been sued along with the 1st defendant.

Per SANSONI, J.—There has been some confusion in this case arising from a failure to distinguish between assignment and sub-letting. The plaint refers to a breach of covenant in the lease, but that covenant is against assignment and not sub-letting. It seems to have been thought that a sub-letting came within the terms of the covenant, but there is of course no connection between the two.

SUMANASIRI *vs*, CASSIM LEBBE & OTHERS ... 17

Preliminary Objection — Appeal — Application for typewritten copies not accompanied by Kachcheri receipt showing payment of prescribed fees— Civil Appellate Rules 4 and 2 (1)—Payment into Court Order, 1939.

Held : That where an application for typewritten copies of the record of a case in appeal did not accompany the Kachcheri receipt showing that the prescribed fees have been deposited, the Supreme Court will reject such appeal.

Per BASNAYAKE, C.J.—When the Civil Appellate Rules are read together with the Payment into Court Order, 1939, it would follow that the application for typewritten copies shall be accompanied by proof that the prescribed fees have been deposited in the Kachcheri and that proof can only be furnished by the Kachcheri receipt.

HAJI HABIB & CO. *vs.* KUTHALATHAMMAL ... 64

Admission of facts—To be recorded with utmost care.

See Landlord and Tenant. 82

Application at close of Plaintiffs' case seeking to raise new issues unsupported by the necessary evidence and not pleaded cannot succeed.

See Rei Vindicatio 107

Civil Procedure Code

Preliminary Objection—Petition of Appeal filed on 14/9/57 with motion tendering notices of security for costs of appeal of petitioner-respondent and several other respondents—All notices stating that security will be tendered on 19/9/57 for costs of the petitioner-respondent—Omission to state that security would be tendered for the costs of other respondents—Order accepting petition of appeal and to issue notice minuted same day—Appellants' Proctor tendering on 16/9/57 fresh notices of security rectifying the omission returnable on 19/9/57— Notices tendered on 14/9/57 served on same respondents—Those unserved extended and reissued— Security accepted on 25/9/57 and order made to forward appeal to Supreme Court.

Objection that notice of security has not been given in manner prescibed by Section 756 of the Civil Procedure Code—Can the Court extend the date for tendering security mentioned in the notice—Civil Procedure Code, Sections 754, 756, 765—Meaning of the words "Court" and "receive" in Sections 754— Meaning of the word "forthwith" Section 756— Scope of sub-section (3) to Section 756—Meaning of the words "mistake" "omission" "defect" in Sub-Section 3—When relief under 756 (3) will not be given—How relief under this section may be applied for—Burden of satisfying Court that applicant is entitled to relief— Costs—Respondent may be deprived of costs or costs ordered against him if any objections that may be taken before trial judge, not taken.

Trial Judges' duty to supervise and control the recording of minutes in journal—Need to observe the provisions of Section 92 of the Civil Procedure Code.

Security bond—Need to perfect the bond before security accepted.

Petition of appeal from a judgment delivered on 4/9/57 was lodged in the office of the District Court at 10-35 a.m. on 14/9/57 together with a motion, which *inter alia* referred to the tender of notices for service on the Petitioner-respondent and his Proctor and on each of the 2-10 respondents-respondents to the effect that the appellant would on 19/9/57 tender security by deposit of Rs. 250/- for the Petitioner-respondent's costs of appeal and hypothecate the same and would on the same date deposit a sum sufficient to cover the expenses of serving the notices of appeal on the said respondents. The actual notices tendered stated that the sum of Rs. 250/- was for the Petitioner-respondents' costs of appeal. Reference to the tender of any security for the costs of appeal of the 2-10 respondents was omitted.

The minute made on the journal on 14/9/57 showed that the petition of appeal was submitted on the same day to the judge who made the order accepting the petition, etc., by initialling the minute in chambers. Steps were thereafter taken to give effect to the said orders.

On 16/9/57 the appellant's proctor filed a further motion tendering fresh notices for service on all the respondents. These notices were properly addressed to the respective respondents with the omission rectified and were also returnable on 19/9/57. This motion too was minuted and notices were ordered to issue.

On 19/9/57 notices lodged on 14-9-57 had been served on all the respondents except the 6th and 7th on whom they were extended and reissued returnable on 23/9/57.

On 25/9/57 the Court accepted security and ordered notice of appeal returnable on 27/10/57 on which day order to forward the appeal to the Supreme Court was made.

A preliminary objection was taken to the hearing of the appeal on the ground that the notice of tendering security had not been given to the 2-10 respondents in the manner prescribed by Section 756.

Held : (1) That the petition of appeal was received by the Court on 14/9/59 for the purposes of Section 756 of the Civil Procedure Code when it was handed to the appropriate officer of the Court at its office.

(2) That the appellant had failed to give notice of security to the 2nd to 10th respondents as required by Section 756 inasmuch as the notices tendered on 14/9/57 to be served on these respondents were to the effect that the appellant would tender security for costs of the petitioner-respondent only.

(3) That the second set of notices of tender of security handed on 16/9/59, though properly addressed to the respective respondents were not tendered forthwith as they were not given on the same day as the petition of appeal,

(4) That the words " presented to the Court " in section 754 (2) of the Civil Procedure Code means lodged with the proper officer of the Court, not handed over to the judge in open Court.

(5) That in the context " the court to which the petition is so presented shall receive it " in Section 754 (2) of the Civil Procedure Code, receiving contemplated is the manual act of accepting the document. It involves no judical process. In this context ' court ' does not necessarily mean the judge himself, it includes the appropriate officer of the Court Office.

(6) That in the context the expression " if those conditions are not fulfilled it shall refuse to receive it " in the same section, the word " it " refers to the judge himself and no other, because the act of refusing to receive the petition is a judicial function which the judge alone can perform. He must perform it within a reasonable time after the petition of appeal has been lodged at the office of the Court.

(7) That there is no requirement of the Code that the judge should make an order that the petition be accepted. No legal consequences attach to such an order (observations of Bertram, C. J. *in Fernando vs. Nikolas Appu 22 N.L. R. 1 on this point dissented from.*)

(8) That as the provisions of Section 765 (1) of the Civil Procedure Code enable the Supreme Court to admit and entertain a petition in a case where the provisions of Sections 754 or 756 or both have not been observed, there must be excluded from the scope of sub-section 3 of Section 756 all cases of non-observance or non-compliance with the provisions of Section 756.

(9) That Section 756 (3) was not designed to give relief in cases in which the acts, omissions or defects for which relief is sought are deliberate or are due to negligence, or could have been avoided with the exercise of such care as proctors are expected to exercise in the performance of their duties.

(10) That an applicant for relief under this subsection must, as in the case of an application under Section 765, satisfy the Court that the mistake, omission or defect was due to causes not within his control and that it was not due to his or his proctor's negligence or want of care and also that the respondent has not been materially prejudiced.

(11) That before the Court can accept security, the perfected bond must be submitted to it.

(12) That any objection that can be taken before the trial Judge should be raised before the petition of appeal is forwarded to the Supreme Court, and that the respondent should not wait till the hearing of the appeal to do so.

(13) That where a respondent has failed to take an objection which he may properly have taken before the trial Judge and which he successfully takes at the hearing, the Supreme Court will not only not allow costs, but also order him to pay the appellant the costs he would have been saved, if the objection had been taken in the Court of first instance.

(14) That an application for relief under Section 756 (3) must be by a written petition supported by an affidavit or affidavits and the burden of establishing that his case falls within the ambit of the sub-section is on the party seeking relief.

(15) That the Court does not lend its aid even under sub-section (3) to those who deliberately flout the requirements of the law. The same principle would govern the grant of relief against a defect.

(16) That a Court is not empowered to extend the date on which the appellant stated in his notice that he would give security.

Per BASNAYAKE, C.J.—" Before I part with this judgment I must not omit to refer to the unsatisfactory manner in which the journal of this action has been maintained. Going by the records that have come up before me in appeal I cannot escape the conclusion that Judges of first instance do not seem to realise that it is their duty to maintain a neat, legible and accurate journal in each action. They should supervise and control the recording of minutes in the journal and not leave it entirely to their clerks. Section 92 of the Civil Procedure Code declares that the journal shall be the principal record of the action, and that section requires that the Judge shall sign and date each minute. The signatures to the minutes in this case are illegible and the minutes are not dated. Judges should not disregard express provisions of the Code. On the contrary they should take pains to observe them. They should write their signatures legibly so that it will appear that the minutes have been signed by the Judges themselves.

Section 757—

Postponement, of hearing of action—Discretion of Judge—How it may be exercised—Civil Procedure Code, section 82.

Held : (i) That where the Court is satisfied that there is sufficient cause to grant an application for postponement, he may grant it even though the application is opposed, and may award the opposing party such costs as it thinks fit.

(ii) That the consent of parties is not a sufficient cause for directing that the hearing of an action be postponed.

Amendment of Pleadings—Section 93.—Duty of trial Court

Sections 17 *and* 18
See Rei Vindicatio 79

Compensation for Improvements

By lessee who obtained a minor's property for a term over one month from minor's father. Can such compensation be claimed.

See Minor 26

Compensation for Improvements—Land held by S and Z subject to fidei commissum—Lease of whole land by Z for thirty years to D—Covenant that D should erect buildings at his own expense, keep them in proper order and condition and deliver up the whole of the premises at the termination of the lease free of payment of any kind whatever—Death of S leaving C and three other children—Action by C under Partition Act No. 16 of 1951, claming declaration of title and sale under the Act during pendency of lease—Order for sale granted—Claim for compensation for improvements by D—Is he entitled to compensation as a bona fide possessor—Principles which govern a claim for compensation by a lessee whose contractual rights are prematurely determined—Roman Dutch Law—Unjust Enrichment.

S and Z became entitled to a half-share each of a property subject to a *fidei commissum* in favour of their descendants. S died leaving four children one of whom was C. C instituted action under the provisions of the Partition Act, No. 16 of 1951 claiming a declaration of title to the property and a sale under the Act. The appellant, who was the 5th defendant was made a party as he was in occupation of the property under a lease for thirty years from 1/1/1945 executed in his favour by Z in respect of the whole of the premises. The deed of lease stipulated *inter alia* (1) that the lessee should " within a reasonable time erect buildings at his own expense with proper materials of all sorts " on the said property, (2) that he should continue to use and enjoy the rights, benefits interest and income of the premises and the buildings erected during the pendency of the term of thirty years, (3) that the lessee should keep the said buildings in proper order and condition and at the end of the term of lease deliver up the whole of the premises free of payment of any kind whatever.

The 5th defendant entered upon the land as lessee and constructed the buildings as stipulated in the lease. He claimed a sum of Rs. 35,000/- as compensation for buildings erected and other improvements effected by him and prayed that in the event of a sale being ordered he be paid out this sum out of the proceeds of the sale. This claim was resisted by the other parties to the action.

The learned District Judge (1) held that the 5th defendant constructed the said buildings in the *bona fide* belief that the lessor Z was in fact the sole owner.

(2) directed that the property should be sold subject to the rights of the 6th and 7th defendants (appellants) who had been by that time substituted for the 5th defendant, to remain in possession of a half-share of the premises and the entirety of the buildings for the full term of thirty years demised by the lease.

(3) held that in the event of this order not being upheld, the appellants were entitled to compensation out of the proceeds of sale for improvements effected by the 5th defendant in a sum of Rs. 25,122/45.

That part of the order directing the appellants to remain in possession for the full thirty years was not supported in appeal. On an appeal to the Supreme Court, the claim for compensation by the appellants was rejected on the basis of the Judgment in *Soysa vs. Mohideen*, (1914) 17 N.L.R. 279.

On an appeal taken to the Privy Council from this decision of the Supreme Court,

Held : (1) That the case of *Soysa vs. Mohideen* (1914) 17 N.L.R. 279 was wrongly decided for it is based on the erroneous assumption that the claim there for compensation was by a lessee, whereas the very basis of the claim was that the lease had been repudiated.

(2) That the 5th defendant was entitled to the claim for compensation for it is not as lessee that he made the claim, but because he was denied his contractual rights by the premature termination of the lease. He was in the postiton of a *bona fide* occupier of a land on a lease which had been repudiated :

HASANALLY AND ANOTHER *vs.* MOHAMED CASSIM AND OTHERS. 100

Mala fide possessor not entitled to compensation for improvements made by him, which, though useful, are not necessary.

See Partition 57

Courts Ordinance

Proctor—Conviction for criminal breach of trust—Rule under Section 17 of the Courts Ordinance to show cause why he should not be removed from office—Application by Proctor to lead fresh evidence to establish innocence on charge already convicted—Insufficiency of material placed before Court in affidavit—should the Court exercise its discretion in allowing such fresh inquiry.

The respondent, a proctor of the Supreme Court, was called upon to show cause under section 17 of the Courts Ordinance why he should not be removed from the office of Proctor of the Supreme Court.

The ground of removal was that he was found guilty and convicted by the District Court of two offences of criminal breach of trust of clients' money entrusted to him for the purpose of conducting cases on their behalf.

The respondent had without success taken appeals from this conviction both to the Supreme Court as well as to the Privy Council.

In showing cause the respondent made an application for permission to lead evidence relating to the first offence, which had not been led at the trial, for the purpose of proving that he was not guilty of the offence, though he was convicted of it.

In support of his application he furnished an affidavit, containing the evidence proposed to be led, according to which he was not in Colombo on the day on which the money was alleged to have been entrusted to him in his office in Colombo.

The Supreme Court refused the application because :—

(1) The affidavit was silent as to why this evidence was not adduced at the trial.

(2) On the material placed before the Supreme Court by affidavit, no grounds were made out for permitting a fresh inquiry into the question of the respondent's guilt.

Quaere : Whether the Supreme Court has a discretion to embark on a fresh inquiry into the question of the respondents' guilt either on the evidence adduced at the trial or on new evidence.

Bail—Accused not brought to trial in due time—Application under Section 31 of the Courts Ordinance (Cap. 6)—Burden of proof shifted to Crown to show good cause.

In an application for bail under Section 31 of the Courts Ordinance on the ground that the prisoners have not been brought to trial without undue delay after commitment, the only cause which the Crown offered against the granting of it was that the work of the Supreme Court circuit was very heavy.

Held : That the Crown had not shown good cause against the granting of the application and that the prisoners should be admitted to bail.

Criminal Procedure Code

Autrefois Acquit—

Criminal Procedure Code, Sections 148 (1) (*a*) *and* 148 (1) (*b*), 150, 151, 151 (2) *and* 187 (1)—*Accused present on "police bail"—Examination of Police Officer before charging accused—Police Officer's evidence amounted to hearsay—Accused pleading guilty—Can Magistrate act on hearsay evidence in forming an opinion that there is sufficient ground to proceed against accused.*

Appellant who was charged by the Magistrate after the examination required by Section 187 (1) and 152 (2) of the Criminal Procedure Code pleaded guilty to a charge under Sections 43 and 44 of the Excise Ordinance and was convicted and sentenced to six months' rigorous imprisonment. He appealed on a point of law certified but the appeal was dismissed, there being no substance in it.

In the exercise of the powers of revision :

Held : That Section 187 (1) of the Criminal Procedure Code which requires the holding of the examination directed by Section 151 (2) of the same Code is not complied with by the Magistrate, when he proceeds to frame a charge against the accused on hearsay evidence.

Sections—190, 191, 194, 195 and 330.

Section 188 (2), *Section* 287—*Right of Accused person to be defended by Counsel.*

The refusal of a request for a postponement made by an accused to enable him to retain Counsel because the complainant, a foreign tourist, has made arrangements to leave the Island and is not likely to return, is a denial of a right given to the accused to be defended by Counsel, and vitiates a conviction.

Damages

Damages—resulting from collision between two Motor Vehicles—Plaintiff obtaining compensation for injury under policy of insurance—Is the defendant entitled to claim that the damages against him should be reduced by the amount so received by the Plaintiff.

Held : That the defendant in an action for damages resulting from the collision of motor vehicles cannot claim any benefit from the circumstance that the plaintiff has obtained compensation for the injury under a policy of insurance.

Promise to marry, breach of—Action for damages Marriage Registration Ordinance (Cap. 95) section 19—Intrepretation of—What the "writing" must contain to satisfy the Ordinance.

Held : That in an action for damages for breach of promise of marriage, the writing required by section 19 of the Marriage Registration Ordinance must contain an express promise to marry or confirm a previous oral promise to marry, *i.e.*, admit the making of the promise and evince continuing willingness to be bound by it.

(2) That the decision in *Jayasinghe vs. Perera* (1903) 9 N. L. R. 62 could not be upheld as containing a correct interpretation of the law.

Per LORD TUCKER.—"Some confusion seems to have arisen in this case with regard to the meaning of such words as "evidenced in writing" and "confirmation." The distinction, which must always be borne in mind, is between writing which contains the promise to marry and writing which may afford corroboration of a previous oral promise. The latter, which is sometimes described

that he received it on 2nd or 3rd of May, 1957—Insufficiency of proof of a clear month's notice—Is a tenant who disclaims tenancy entitled to notice to quit.

Where a notice to quit sent through a proctor, contained no date on it and the landlord sought to prove the date by producing the counterfoil of the notice and the postal receipt, without calling the Proctor and when the tenant denied that he received a clear month's notice.

Held : That it is reasonable to hold that the plaintiff has failed to prove that the defendant received a clear month's notice.

That a tenant who disclaims tenancy is not entitled to a notice to quit.

PEDRICK *vs.* MENDIS 71

Landlord and Tenant—Notice to quit on a date other than that corresponding to date of commencement of tenancy—Validity of such notice.

Held : (1) That when a tenancy commenced on 12-3-1952 a notice dated 30-1-1957 to the tenant to quit the premises on or before 1-3-1957 is bad in law.

(2) That in the absence of an agreement to the contrary, the notice of termination of a tenancy must run concurrently with a term of the letting and hiring and must expire at the end of that term.

Per BASNAYAKE, C.J.—" The whole purpose of admitting facts in a legal proceeding is to avoid having to prove them. Judges should therefore record them with the utmost care because the admissions take the place of proof. "

ZAHIR *vs.* DAVID SILVA 82

Lease

of Minor's property by his father for term over one month—Is it valid.

See Minor 26

Minor

Minor—Lease of minor's immovable property by his father for term over one month—Sanction of Court not obtained—Is it vaild—Is a party who obtains such lease entitled to say that lease was executed by lessor in his representative capacity unless so stated in the deed itself—Compensation for improvements made by such party—Is he entitled to claim.

Held : (1) That a father is not entitled to give a valid lease of his children's immovable property for a period exceeding one month without the sanction of Court.

(2) That, a party, who obtains a deed of lease of the minor's immovable property for a term exceeding one month from a person who happens to be the minor's natural guardian, is not entitled to say that the deed was executed by the lessor in his representative capacity unless it is so stated in the deed itself. Nor is he entitled to compensation for improvements made by him.

GUNASEKERA AND TWO OTHERS *vs.* ALBERT ... 26

Misjoinder

Misjoinder of parties and causes of action.

SUMANASIRI *vs.* CASSIM LEBBE AND OTHERS ... 17

Mortgage

Mortgage Ordinance 1927 (*Chap.* 74)—*Decree under lis pendens not registered—Sale of property by mortgagor to 3rd party after decree but before sale in execution of decree—Contest of title between transferee on private deed and purchaser under mortgage decree—Whose title is superior—Remedy under Section* 11 *of the Mortgage Ordinance.*

Held : (1) That a purchaser on a mortgage decree cannot avail himself of the original mortgage bond as a source of title if the '*lis pendens*' had not been registered.

(2) That where the '*lis pendens*' is not registered, a purchaser from the mortgagor obtains better title than a purchaser under a sale held in execution of the mortgage decree, which is subsequent in date to the transfer by the mortgagor.

(3) That the only remedy a purchaser under a mortgage sale held under the Mortgage Ordinance of 1927 (Cap. 74) is to avail himself of the provision of Section 11 of that Ordinance and ask that he be paid the amount of the purchase money or the money due under the mortgage, whichever is less.

FERNANDO *vs.* PERIS AND ANOTHER 35

Partition

Partition Act, No. 16 *of* 1951 *sections* 26 *and* 70—*Judgment in partition action pronounced—Date of interlocutory decree postponed—Can a party intervene after such judgment and before entering interlocutory decree.*

On 15th October, 1956, the learned District Judge delivered his judgment in a partition action and made the following order :—" Interlocutory decree for 30/10—Schedule of shares for 30/10 ". A party sought to intervene on 23/10/56 on the ground that interlocutory decree had not in fact been entered and he was entitled to do so under section 70 of the Partition Act, No. 16 of 1951.

PETERSINGHO *vs.* RATNAWEERA AND OTHERS ... 32

Partition Act, Sections 26 (1), 27 (2), 30, 31 *and* 32 —*Judge's duty to find shares each party is entitled to and enter interlocutory decree accordingly—Scheme of partition—Can the Court consider scheme of partition submitted to it but not prepared on a Commission issued by Court.*

Held : (1) That a scheme of partition may be considered by Court only when prepared upon a Commission issued by the Court under Section 27 (2) of the Partition Act and executed under the provisions laid down in Sections 30, 31 and 32 of the Act.

(2) That there is no provision in the Partition Act enabling a Judge to make such an order as " Statement of shares on 20-11-57. " The Judge must in his judgment find the shares which each party is entitled to and enter the interlocutory decree in accordance with the findings in the Judgment. (Section 26 (1) (7).

Partition Action—Title—Two parallel sets of deeds—Court deciding on prescriptive title without considering legal or paper title—Court's duty in such a case—Burden of proof—Need to decide legal or paper title first—Mala fide possessors—Improvements, useful but not necessary—Are they entitled to compensation.

Held : That when the legal title and a title based on prescription are in issue, the Court should first make a genuine effort to discover in which party the legal title is vested. If neither party has succeeded in establishing it, the Court should then proceed to decide the case on the issue of prescription.

(2) That the burden of proof of prescriptive title depends on the question of legal ownership.

(3) That *mala fide* possessors are not entitled to compensation for improvements made by them, which, though useful are not necessary.

Partnership

Partnership—Damages—Action against partners of a firm of Proctors on the ground of fraud practised by one of the partners—Dissolution of partnership later—Are innocent partners liable for the fraud of a co-partner during subsistence of partnership—Fraud discovered after several years—When cause of action arose—Prescription Ordinance, section 9—Civil Procedure Code, section 5.

1st and 2nd defendants, who were proctors formed a partnership in May 1945 and dissolved it in October, 1949. According to a division of work in the firm, the former attended to the notarial work, while the latter attended to the other branches of the firm's professional activities. In March, 1948 during the pendency of the partnership, the plaintiff paid to the defendants by cheque drawn in favour of the firm a sum of Rs. 7,000/- to be lent to one F on the security of a primary mortgage of a house, which transaction was arranged by the 1st defendant. A mortgage bond was forwarded to the plaintiff purporting to be a bond executed by F and interest was paid monthly up to October 1953. The plaintiff recalled the money in 1953 when she discovered that the 1st defendant had fraudulently misappropriated the money to his own use and remitted the interest himself without disclosing that fact and that F's, (the mortgagor's) signature on the bond was forged.

The 1st defendant was prosecuted for cheating and forgery and was convicted on his own plea.

The plaintiff filed this action against the 1st and 2nd defendants for the recovery of the sum of Rupees Seven thousand paid to them. The first defendant filed a motion consenting to judgment, but the 2nd defendant contested the claim. The District Court entered judgment against the 2nd defendant who appealed.

Held : That the 2nd defendant is liable for the fraud committed by the 1st defendant, his partner, while the partnership was still subsisting, although at the time the fraud was discovered he had ceased to be a partner and the 2nd defendant had no knowledge of the fraud till it was discovered. That the dissolution of the partnership does not end a partner's liability for his co-partner's fraud committed in the course of the business of the partnership.

(2) That the plaintiff's action was not barred by prescription as the cause of action did not arise till the fraud was discovered in November, 1953.

Payment into Court Order

Penal Code

Section 323—Charge of obstructing a Public Servant in the discharge of his duties—What the duty the Public Servant was discharging not referred to in charge and not established by evidence—Can a conviction be sustained under the Section.

Held : That on a charge under Section 323 of the Penal Code the accused is entitled to know what was the duty which the public servant was discharging in course of which he was obstructed. Where the prosecution failed to establish this a conviction cannot be sustained.

Precription

Footpath — Servitude — prescriptive user.— Evidence of user.

Burden of proof of prescriptive title depends on the question of the legal title.

Fraud by one partner of firm—Fraud discovered after several years—When cause of action arises.

Proctor

Convicted for criminal breach of trust—Removal from office—Can fresh evidence be led in Supreme Court.

Rei Vindicatio

Rei Vindicatio action, pendency of—Application to intervene by 3rd party—No objection by plaintiff—Intervenient praying for declaration of title to land, damages and ejectment of defendants—Objection to intervention by defendants—Intervention allowed—Appeal by defendants—Civil Procedure Code, Sections 17 *and* 18.

Held : (1) That as the plaintiff had not objected in this case to the intervention the application should be allowed, as there is nothing in the rule as contained in Sections 17 and 18 of the Civil Procedure Code against the granting of it, and as it may be that the plaintiff thinks that he will not get effectual and complete relief unless the intervention is allowed.

(2) That, where the plaintiff objects to an application for intervention, the test to determine whether it should be allowed or not is " May the order for which the plaintiff is asking directly affect the intervener in the infringement of his legal rights.

Per SANSONI, J.—Devlin J. warned that the test laid down by him cannot be applied to every sort of application to join parties. He pointed out that he was not attempting to lay down, or holding that the authorities lay down, " a test of universal efficiency ". If a plaintiff wants to add a defendant he will not have to show that the new defendant will be directly affected by an order in the action as then constituted, but only that he cannot get effectual and complete relief unless the new defendant is added. Similarly, where a defendant seeks to join a new defendant he need only show that he cannot effectually set up a defence which he wishes to set up unless the new defendant is joined or unless the order made binds the new defendant.

Rei vindicatio, action—Prayer inter alia for declaration of title to one-fourth share of a theatre and plants and machinery thereof and to be quieted in possession—Theatre constructed and equipped for adaptation as a Cinema with contributions made by plaintiff, defendant and others—Land on which theatre stands held by defendant on a notarial lease from a third party—Disputes between plaintiff and defendant—No notarial or other agreement in writing—Plaintiff declared entitled to a fractional share equivalent to amount he contributed towards total cost of construction and equipment.

Jus superficiarium, nature of—Its applicability to the instant case—Alternative claim based on jus superficiarium—Failure to plead or to lead necessary evidence—Can such claims succeed.

Application to raise new issues at the close of plaintiff's case—When may it be disallowed.

The plaintiff sued one K. and two others (7th and 8th defendants) for a declaration :

(*a*) that he be declared entitled to 1/4 share of " a theatre and the plants and machinery thereof ".

(*b*) that he be quieted in possession of that share.

(*c*) that K. be ordered to account to the plaintiff for his share of the rents and profits from June 1948 up to date of action.

The said theatre known as " Tivoli Theatre ", Nuwara Eliya, was constructed on a piece of land of which K had obtained a lease in his own name in 1945 from its owner. The cost of the building including the hire-purchase price of equipment required for its adaption for use as a Cinema was Rs. 145,185/70, to which the plaintiff contributed Rs. 45,559/- and K Rs. 26,848/- and 7th and 8th defendants the balance along with others not parties to the action. The intention of the parties was to form a Limited Liability Company to take over and run the theatre as a Cinema, but quarrels among the promoters prevented its formation.

The plaintiff alleged that K had unlawfully appropriated to himself all the mesne profits and rents of the theatre and refused to give plaintiff his share.

K. contested the claim pleading that the claim for 1/4 share was not maintainable in the absence of a notarial writing and that the claim for an account could not be sustained as there was no agreement in writing to do business in partnership, the capital being over Rs. 1,000/-.

After trial the learned District Judge held

(1) that the evidence did not establish a partnership.

(2) that plaintiff was entitled to Rs. 42,539/ Rs. 145,185/- of the buildings as he contributed that amount as stated by him.

(3) that the building was co-owned by the plaintiff and the defendants as the ownership of a building a part from the site on which it stands is known to our law and it is the *jus superficiarum.*

(4) that the absence of a notarial agreement did not preclude the plaintiff from claiming a fractional share of the building as against his co-builders.

The Supreme Court allowed K's appeal on the ground (*a*) that the learned Judge erred in holding that the ownership of a building apart from the site on which it stands is well known to our law and that it is the *jus superficiarum.*

(*b*) that the plaintiff's claim in the plaint was not to be declared entitled to a *jus superficiarum,* but to an undivided 1/4 share of the building.

On an appeal by the plaintiff to the Privy Council,

Held : (1) That the view taken by the Supreme Court was correct. As the partnership has been rejected and not relied upon in the Privy Council and as the claim based on *jus superficiarum* was not pleaded or presented to the Court and the contribution made by the plaintiff could give him no interest in the soil, there is no justification for the declaration made in his favour.

(2) That an application at the close of the plaintiff's case seeking to raise new issues unsupported by the necessary evidence and not pleaded could not succeed.

Rent Restriction

Rent Restriction Act No. 29 of 1948 Section 13 (1) (c)—Action to eject tenant on the ground that premises are required for the purpose of the business of the landlord—Business not in existence—Can landlord succeed.

Held : That a landlord, who has no business in existence at the time he seeks to eject the tenant, is not entitled to institute legal proceedings for ejectment on the ground that the premises are required by him for the purpose of his business.

Rent Restriction Act, No. 29 of 1948—Section 13 (1)—Action for ejectment of monthly tenant on ground that he was in arrear of rent—Rent not paid monthly, but once in three or four months for a long period—Defendant in arrear for 6 months—Notice terminating tenancy—Payment of arrears after notice—Action for ejectment filed notwithstanding—Can the defendant plead that rent was not payable monthly, but irregularly, therefore, not in arrears.

On a contract of monthly tenancy, the defendant has been plaintiff's tenant for several years. The defendant did not pay the rent monthly, but had got into the habit of paying overdue rents once in three or four months after reminders from the plaintiff. The plaintiff sued the defendant for ejectment under section 13 (1) of the Rent Restriction Act of 1948 on the ground that the defendant had been in arrear in respect of the rent for each of the months April to September, 1956, which overdue rent was paid after the notice to quit.

The defendant claimed that rent was payable not monthly, but at irregular intervals, once in 3 or 4 months, or even once a year.

The learned Commissioner held that there was no obligation to pay rent monthly as the plaintiff permitted the defendant to fall into arrears and pay the rent whenever demanded. The plaintiff appealed.

Held : (1) That in the absence of a stipulation as to the date on which the rent became payable, the defendant, was in law bound to pay the rent immediately upon the termination of each month.

(2) That payment of rent at longer intervals than a month is inconsistent with a contract of tenancy.

(3) The defendant was in arrears for one month after the due date and is not entitled to claim any benefit from his own laches to the prejudice of the landlord. The plaintiff was entitled to maintain the action for ejectment.

Servitude

Servitude—Declaration for a right of footpath—Prescriptive user—Evidence of user—Sole un-corroborated testimony of plaintiff—Balance of probability.

Plaintiff sued for a declaration that she had a right of footpath from her land over the defendant's land on to a public road, claiming the right by prescriptive user for a period of 20 years.

The surveyor called by the plaintiff said there was neither a path nor any traces of a path visible over the land. The judgment of the Commissioner of Requests did not indicate that he had taken into account the absence of any witness to support the plaintiff, nor were any reasons given for acting on the sole uncorroborated testimony of the plaintiff.

Held : (1) That there was no clear and convincing evidence that the path had been used for the prescriptive period, which would justify the Court in declaring a servitude of this nature.

(2) That although this was a civil case to be decided on a balance of probabilites, there are degrees of probability, and in this particular case, there was no proof commensurate with the degree of probability demanded by the particular subject matter.

Statutes

Trade Union

Registered Trade Union—Rules made providing for a right to appeal to the working committee from any disciplinary action taken by the Executive Council against any member, office-bearer, trustee etc.—Failure to provide in the said rules for the composition of the appellate body—Plaintiffs, members of the Executive Council of the Union,

expelled by the Executive Council and new members appointed at a meeting—Action instituted by plaintiffs for a declaration that the meeting is illegal and invalid and all acts done thereafter void—Right to bring such action—Has the Court a discretion to refuse such a decree.

Amendment of Pleadings—Civil Procedure Code, section 93—Duty of trial court.

Held : (1) That where the rules of a registered Trade Union provided for a right to appeal to its Working Committee from any disciplinary action taken by its Executive Council against any member, office-bearer, trustee, etc., without defining the composition of the appellate body, a person aggrieved by such disciplinary action is entitled to the aid of the law courts without appealing to the domestic appellate body.

(2) That the Civil Procedure Code makes provision for declaratory actions. The granting of a declaratory decree is not a matter in the judge's discretion. Once a plaint is entertained by court, the action must be decided by the court in the manner provided by the Civil Procedure Code, and the judge has no right to refuse to grant a decree in favour of the plaintiff, if he has established his right to relief.

(3) That in the matter of amendment of pleadings, it is essential that section 93 of the Civil Procedure Code should be scrupulously observed.

Trust

Charitable Trust—Sec. 99 Trusts Ordinance—Trusts for the feeding of Brahmins and for the performance of ABISHEKAM and NEIVETHIAM ceremonies—Whether a trust "for the advancement of religion or the maintenance of religious rites and practices," Sec. 99 (1) (c)—Element of public benefit—Charitable Trusts in England and Ceylon.

A notarially attested instrument dated 27th of July 1888 read as follows :—

"I Kanapathy Aiyer Sanmuga Aiyer, being desirous of my soul's attainment of salvation do hereby execute deed for the performance of Charity."

"As it is my desire that feeding of Brahmins should be conducted on each DWADASI day occurring every month, I assign the following place for that purpose."

(Here follows the description of the land Panrikoddu Valavu with reference to its boundaries.)

"I have in order to be of use for the performance of the duty mentioned above, and for religious worship given all that is contained within these boundaries the sacred name DWADASI MADAM and have executed this instrument for the performance of Charity."

(In the next paragraph, Sanmuga Aiyer gives three properties to this MADAM and continues).

"I have given over to the above mentioned DWADASI MADAM all these lands, so that with the income therefrom the feeding of Brahmins may be conducted on each DWADASI day occurring every month at the said DWADASI MADAM, and also to perform ABISHEKAM and NEIVETHIAM ceremonies on each VINAYAGA SATHURTHI constellation day every month to Sri Visuvalinga Maha Ganapathy Deity, who, as a blessing, has taken abode in the temple situated in the land called Panrikoddu Valavu."

(In the concluding paragraph Sanmuga Aiyer appointed himself and one Purushotam Aiyer as joint trustees and provided for the devolution of the trusteeship after their death.)

Plaintiff, the sole surviving heir of Sanmuga Aiyer claimed to inherit the lands enumerated in the deed on the footing that the deed did not create a valid charitable trust.

The learned District Judge of Jaffna decided in favour of the plaintiff and held that the deed did not create a valid charitable trust, as the trust in question was not for the public benefit. He applied decisions of the English Courts on the basis that the law of Ceylon regarding Charitable Trusts was the same as the law of England.

On appeal to the Supreme Court it was held :—

(1) That the trust declared by the deed was a Charitable Trust "for the advancement of religion and the maintenance of religious rites and practices" within the meaning of Sec. 99 (1) (c) of the Trusts Ordinance (Cap. 72).

(2) That the law of Ceylon regarding Charitable Trusts is not the same as the law of England.

(3) That whether a trust will be "for the benefit of the public or any section of the public" is largely a matter of evidence.

Unjust Enrichment

Words and Phrases

Present : BASNAYAKE, C.J., AND PULLE, J.

CHRISTIE ALEXANDER FERNANDO *vs.* THULASI NARAYANA IYER SIVASUBRAMANIAM

S. C. No. 444 A-B—*D. C. Jaffna* 173/L.

Argued on : 2nd and 3rd March, 1959.

Decided on : 12th May, 1959.

Charitable Trust—Sec. 99 Trusts Ordinance—Trusts for the feeding of Brahmins and for the performance of ABISHEKAM and NEIVETHIAM ceremonies, Whether a trust "for the advancement of religion or the maintenance of religious rites and practices," Sec. 99 (1) (c)*—Element of public benefit—Charitable Trusts in England and Ceylon.*

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" I Kanapathy Aiyer Sanmuga Aiyer, being desirous of my soul's attainment of salvation do hereby execute deed for the perfomance of Charity ."

" As it is my desire that feeding of Brahmins should be conducted on each DWADASI day occurring every month, I assign the following place for that purpose."

[Here follows the description of the land Panrikoddu Valavu with reference to its boundaries.]

" I have in order to be of use for the performance of the duty mentioned above, and for religious worship given all that is contained within these boundaries the sacred name DWADASI MADAM and have executed this instrument for the performance of Charity."

[In the next paragraph, Sanmuga Aiyer gives three properties to this MADAM and continues.]

" I have given over to the above mentioned DWADASI MADAM all these lands, so that with the income therefrom the feeding of Brahmins may be conducted on each DWADASI day occurring every month at the said DWADASI MADAM, and also to perform ABISHEKAM and NEIVETHIAM ceremonies on each VINAYAGA SATHURTHI constellation day every month to Sri Visuvalinga Maha Ganapathy Deity, who, as a blessing, has taken abode in the temple situated in the land called Panrikoddu Valavu ."

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On appeal to the Supreme Court it was held :—

(1) That the trust declared by the deed was a Charitable Trust " for the advancement of religion and the maintenance of religious rites and practices " within the meaning of Sec. 99 (1) (c) of the Trusts Ordinance. (Cap 72).

(2) That the law of Ceylon regarding Charitable Trusts is not the same as the law of England.

(3) That whether a trust will be " for the benefit of the public or any section of the public" is largely a matter of evidence.

Per BASNAYAKE, C.J.—" Although the categories of Charitable Trusts in Sec. 99 of the Trusts Ordinance and the classification by Lord Macnaghten in Pemsel's case are in many respects similar, it is unsafe..... to be guided solely by the numerous English cases which determine what are charitable purposes, especially as those cases are not easy to reconcile."

Per PULLE, J.—In England, the definition of Charity enunciated by Lord Macnaghten in Commissioners of Income Tax *vs.* Pemsels includes " trusts for the advancement of religion." In Ceylon Sec. 99 (1) (c) while including " trusts for the advancement of religion," expressly provides in addition for " trusts for the maintenance of religious rites and practices."

Cases cited : *Re Coats Trusts, Coats vs. Gilmour and others* (C.A.) 1948 1 AER 521, (H.L.) 1949 1 AER 848
Commissioners for Special Purpose of Income Tax vs. Pemsel 1891 AC 531

C. Thiagalingam, Q.C., with *C. Renganathan* and *E. R. S. R. Coomaraswamy* for the added defendents-appellants in 444B and for the added defendants-respondents in 444A.

H. W. Jayawardene, Q. C., with *C. Barr Kumarakulasinghe* and *N. R. M. Daluwatte* for the 1st defendant-appellant in 444A and for the 1st defendant-respondent in 444B.

A. Sambandan with *S. Sharvananda* and *S. Sivarasa* for the plaintiff-respondent in both appeals.

BASNAYAKE, C.J.

I have had the advantage of reading the judgment prepared by my brother Pulle, and I agree that the decree appealed from should be set aside and that the plaintiff's action should be dismissed with costs.

As my brother has stated the facts at length it is not necessary for me to recapitulate them all. The question that arises for decision is whether by deed No. 4867 of 27th July, 1888 (P1) Kanapathy Aiyer Sanmuga Aiyer created a charitable trust. Kanapathy Aiyer Sanmuga Iyer by that deed dedicated to religious charity the lands referred to therein. This is how he expressed his wish.

> "I, Kanapathy Aiyer Sanmuga Aiyer, residing at Vannarponnai West, Jaffna, being desirous of my soul's attainment of salvation do hereby execute deed for the performance of charity. As it is my desire that feeding of Brahmins should be conducted on each 'Duwadesi' day occurring every month, I assign the following place for that purpose."

After describing the land he goes on to say :

> "I have, in order to be of use for the performance of the duty mentioned above, and for religious worship given all that is contained within these boundaries, including building, well, cultivated and spontaneous plantations the sacred name 'Duwadesi' Madam and have executed this instrument for the performance of charity. The value of this is Rs. 500/-.
>
> "The properties I give over to this Madam are :—
> ....."

He then describes the properties, and states :

> "I have given over to the abovenamed 'Duwadesi' Madam all these lands so that with the income therefrom the feeding of Brahmins may be conducted on each 'Dwadasi' day occurring every month at the said 'Dwadasi' Madam and also to perform Abishekam and Neivethiam ceremonies on each Vinayaga Sathurthi day and on each Sathaya Lunar Constellation day every month to Sri Visuvalinga Maha Ganapathi Deity who, as a blessing, has taken abode in the Temple situated in the land called "Panrikoddu Walavu" at Vannarponnai East.
>
> "The above 'Duwadasi' Madam, the properties given over to it, and the several acts to be performed as aforementioned shall be managed by me and Veeravagu Aiyer Purushothama Aiyer of Vannarponnai as Trustees and after my death and that of Veeravagu Aiyer Purushothama Aiyer hereditarily as Trustees, and in the event of there being no male descendants, the said Purushothama Aiyer's female descendants only shall manage as Trustees.
>
> "As I have mortgaged one of the aforesaid lands called 'Panrikoddu Walavu' in extent 2¾ lms v.c., with all the appurtenances thereon to Madhava Aiyer Muttaiyar of Vannarponnai for Rs. 120/- and interest on the 30th of June of the current year before the Notary attesting these Presents, I shall myself redeem the same.
>
> "In accordance with these terms the said Trustee Veeravagu Aiyer Purushothama Aiyer too as a consenting party set his signature in the presence of Nagendra Aiyer Subramania Aiyer of Vannarponnai and Muttaiyar Sanmuga Aiyer of the same place at the office of the Notary on the 27th day of July 1888."

No particular formula is required by law for the creation of a trust. The requirement of law is that the author should make his meaning clear and evince his intention to create a trust and the Court will give effect to that intention. In the instant case Kanapathy Aiyer Sanmuga Aiyer the author of the trust declared by P1 has clearly indicated that the purpose of granting the lands in question to himself and another was for the advancement of his religion and maintenance of religious rites and practices of the Hindu faith. The beneficial interest is not vested in any ascertained individual or individuals but *in an uncertain and fluctuating body, the Brahmins.* Under the law in force in 1888 (Ordinance No. 7 of 1871) he was entitled to create a trust in the way he did

The Trust declared by P1 falls within the ambit of "Charitable Trust" as understood in our law (Section 99, Trusts Ordinance) and it is not necessary to have recourse to the law of England where Charity has a special legal meaning. In the preamble to the statute 43 Eliz. c.4 (since repealed) was a list of charitable uses which was taken by the Court of Chancery as a guide to determine what were and what were not charitable purposes. That statute was repealed by the Mortmain and Charitable Uses Act, 1888, which in section 13 (2) repeats

the list in the preamble to the statute of Elizabeth. It is as follows :—

> " Whereas landes tenementes rentes annuities pfittes hereditamentes, goodes chattels money and stockes of money, have been heretofore given limited appointed and assigned, as well by the Queenes moste excellent Majestie and her moste noble progenitors, as by sondrie other well disposed psons, some for releife of aged impotent and poore people, some for maintenance of sicke and maymed souldiers and marriners, schooles of learninge, free schooles and schollers in univsities, some for repaire of bridges portes havens causewaies churches seabankes and highewaies, some for educacon and pfermente of orphans, some for or towardes reliefe stocke or maintenance for howses of correccon, some for mariages of poore maides, some for supportacon ayde and helpe of younge tradesmen, handiecraftesmen, and psons decayed, and others for reliefe or redemption of prisoners or captives, and for aide or ease of any poore inhabitantes concninge paymente of fifteenes, settinge out of souldiers and other taxes ; whiche landes tenements rents annuities pfitts hereditaments goodes chattells money and stockes of money nevtheles have not byn imployed accordinge to the charitable intente of the givers and founders thereof, by reason of fraudes breaches of truste and negligence in those that shoulde pay delyver and imploy the same."

A gift to any of these purposes is charitable in England, but the list is not exhaustive and various other objects have from time to time been declared to come within the ambit of the Act. The popular meaning of the word " charitable " is widely different from the legal meaning in England and in our law too its legal meaning is limited by section 99 of the Trusts Ordinance. My brother has in his judgement referred to Lord Macnaghten's classification of " Charity " in its legal sense under four principal heads (*The Commissioners for Special Purposes of the Income Tax vs. Pemsel*, (1891) A.C. 531 at 583. In that case Lord Macnaghten after stating that the popular meaning of the words " charity " and " charitable " does not coincide with their legal meaning observes :

> " How far then, it may be asked, does the popular meaning of the word " charity " correspond with its legal meaning? " Charity " in its legal sense comprises four principle divisions : trusts for the relief of poverty ; trusts for the advancement of education ; trusts for the advancement of religion ; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly. It seems to me that a person of education, at any rate, if he were speaking as the Act is speaking with reference to endowed charities, would include in the category educational and religious charities, as well as charities for the relief of the poor. Roughly speaking, I think he would exclude the fourth division. Even there it is difficult to draw the line."

Although the categories of " charitable trusts " in section 99 of our Ordinance and the above classification are in many respects similar it is unsafe, as pointed out by my brother, to be guided solely by the numerous English cases which determine what are charitable purposes, especially as those cases are not easy to reconcile.

The learned District Judge is wrong when he states that our law regarding charitable trusts is the same as the English law. Our law as to charitable trusts is enacted in the Trusts Ordinance and even where the texts are apparently the same, we should be careful in accepting as authority for a proposition of law under one system judgments rendered under a different system of jurisprudence. Even though the propositions of law stated by the Courts in England might in some respects appear to correspond with the language used in our statutes we should interpret and apply our statute according to the conceptions of our law.

There is in this case the added circumstance that since 1888 till the present action there has been no question that a charitable trust was declared by deed P1 and that the lands in dispute were trust property. P6, P8, P12, P13, P15A and P17 are evidence of the uniform course of conduct of the parties.

The plaintiff is not entitled to claim the land " Seemanthidal and Thiruvalarthidal " as his private property.

Pulle, J.

There are two appeals in this case, numbered 444A and 444B. The first is by the defendant and the second by the three added defendants. The appellants seek to set aside a decree dated 31st May, 1956, in favour of the plaintiff by which he was declared " the owner, proprietor and possessed of the land and premises " comprising a divided extent of 23 lachams, p.c., out of a land called Seemathidal and Thiruvalarthidal situated within the Municipal limits of Jaffna. The plaintiff valued this land at Rs. 48,000/-.

It is common ground that the land belonged originally to one Kanapathy Aiyer Sanmuga Aiyer which he dealt with, along with other properties, by a notarially attested instrument P1 dated 27th July, 1888. The main controversy in the case centred on whether deed P1 created, within the meaning of section 99 (1) (c) of the Trusts Ordinance (Cap. 72), a charitable trust " for the advancement of religion or the maintenance of religious rites and practices." By deed P11 of 10th October, 1947, the plaintiff

leased the land in suit to the defendant, namely, the appellant in 444A, for a term of five years. In P 11 the plaintiff states that he held and possessed the land as the "hereditary trustee" under and by virtue of P1 of 1888 which he calls the "deed of Trust Appointment." The added defendants are three office-bearers of what is called the Board of Trustees of Panrikoddu Sri Visuvalinga Maha Ganapathy Kovil, Vannarponnai, Jaffna, who purported by deed No. 3237 of 25th July, 1955, (marked 2D4), to lease to the defendant an extent of 7½ lachams, p.c., out of the land in suit for a term of five years with an option to renew. The claim of the added defendants to lease the premises was based on a deed No. 6385 of 25th June, 1951, (2D5) by which two persons claiming to be *de jure* trustees of the premises in question, and other lands, settled a scheme for the management of the trust. It is clear from the admissions and findings in the case that if the land was comprised in a charitable trust, the right of the plaintiff to administer it would be unquestionable. The plaintiff, *qua trustee*, was entitled to have the defendant ejected on the termination in 1952 of the lease P11 granted to him by the plaintiff. The events immediately leading to the institution of the present case and the allegations in the plaint show plainly that the plaintiff is not interested in the land in the capacity of a trustee. He carries on business in Bombay under the name of "Subran Monie" and is apparently not in a position to discharge the duties of a trustee in Jaffna. His claim in this case as set out in the plaint is that deed P1 of 1888 "did not create any trust and the plaintiff is the absolute owner of the said land free from any trust or obligation whatsoever. The said deed No. 4867 of 27-7-1888 is invalid, inoperative and of no force or avail in law." It is on this basis that he has sought for and obtained a declaration in his favour under the decree appealed from.

The only question that falls to be determined on this appeal is whether Sanmuga Aiyer by deed P1 created a charitable trust. The material portions of the deed, as translated, are as follows :

> "I, Kanapathy Aiyer Sanmuga Aiyer, residing at Vannarponnai West, Jaffna, being desirous of my soul's attainment of salvation do hereby execute deed for the performance of charity. As it is my desire that feeding of Brahmins should be conducted on each "Duwadesi" day occurring every month, I assign the following place for that purpose." Here follows the description of a land called "Panrikoddu Walavu" in extent 2 11/16 lachams, v.c., with reference to its boundaries.

The second paragraph of P1 reads :

> "I have in order to be of use for the performance of the duty mentioned above and for religious worship given all that is contained within these boundaries including building, well, cultivated and spontaneous plantations the sacred name 'Duwadesi madam' and have executed this instrument for the performance of charity."

In the next paragraph the owner purports to "give over to this madam" three properties of which the first named is the land which is the subject matter of the action. The purpose for which the properties were given is expressed thus :

> "I have given over to the above mentioned "Duwadesi" madam all these lands so that with the income therefrom the feeding of Brahmins may be conducted on each "Duwadesi" day occurring every month at the said "Duwadesi" madam and also to perform Abishekam and Neivethiam ceremonies on each Vinayaga Sathurthi constellation day every month to Sri Visuvalinga Maha Ganapathi Deity who, as a blessing, has taken abode in the temple situated in the land called "Panrikoddu Walavu" at Vannarponnai East.'

In the concluding paragraph Sanmuga Aiyer appointed himself and one Purushotam Aiyer as joint trustees and provided for the devolution of the trusteeship after their deaths.

Before one could express with confidence whether or not the deed created a charitable trust, there are terms which have first to be understood. The significance of the Abishekam and Neivethiam ceremonies has to be explained. It is unfortunate that neither side thought it necessary to call a disinterested witness versed in the tenets and religious practices of Hindus in Jaffna to throw light on the religious significance of feeding Brahmins on "Duwadesi" day at a place called a "Madam" constituted for that purpose and of performing Abishekam and Neivethiam ceremonies at a temple dedicated to "Sri Visuvalinga Maha Ganapathi Deity who, as a blessing, has taken abode in the Temple situated in the land called "Panrikoddu Walavu" at Vannarponnai East." All the lawyers appearing in the case, save the Proctor for the plaintiff, are Hindus and so is the learned District Judge. Considering the statements in the two petitions of appeal and passages in the judgment under appeal there is a sharp difference of opinion as to the true nature and character of Abishekam and Neivethiam ceremonies and the feeding of Brahmins at the madam. In one passage the trial Judge states :

> "Mr. Kanaganayagam seeks to come under section 99 (1) (c). He submits that the provisions for the feeding of Brahmins (Brahamano bojana) once a month in this house.....and the performance of abishe-

kams (bathing of the deity) and neivethiams (offering of eatables to the deity) constitute 'maintenance of religious rites and practices.' Even if they are 'religious rites and practices,' there is nothing to show that they are of benefit to the community."

In another passage the learned Judge states :

"Sanmuga Aiyer did not purport to give the lands to the Sri Visuvalinga Maha Ganapathy temple. Had he done so it would be a valid charitable trust. But what he ordained was that, for the attainment of salvation of his soul, abishekams (bathing of the deity) and neivethiams (spreading of edibles before the deity) should be done from the income of the lands. That would not be religious rites. If he ordained that poojahs and/or festivals should be conducted at the temple one can consider them to be religious rites and practices."

The question suggests itself at once. If Abishekams and Neivethiams are not religious rites and practices, then what are they? If the celebration of poojahs is a religious rite, what is it that takes Abishekams and Neivethiams out of the category of religious rites? With all respect to the learned Judge I fail to see the difference between the one and the other *qua* religious rites. It strikes even a person who is not deeply versed in the tenets of the Hindu religion that the bathing of an image in which a particular deity is believed to dwell and who is worshipped in a public temple is an act of reverence towards that deity which could properly be called a religious rite or practice coming within the purview of section 99 (1) (c) of the Trusts Ordinance. The ceremony of Neivethiams consisting of the spreading of edibles before the image suggests the making of an offering to the deity in return for which the devotee hopes to receive spiritual or temporal favours.

As stated earlier it was the intention of Sanmuga Aiyer that Brahmins should be fed on each "Duwadesi" day of each month at the place called "Panrikoddu Walavu" and that the place to which he gave the "sacred" name of "Duwadesi Madam" should also be used for religious worship. On this part of the case the learned Judge states :

"If P1 had ordained that poor Brahmins in a particular area should be fed in the building on the land of 2 11/16ths lachams on Duwadesi day every month then it would pass the test of benefit to a section of the community" and would fall under section 99 (1) (a) of the Trusts Ordinance—for the relief of poverty. He continues, "The motive for the gift was the attainment of the salvation of his soul. This is of a private nature and cannot be said to be for benefit to the community. Therefore, it cannot be a charitable trust.

"P1 does not create a madam. It merely purports to give the name Duwadesi madam to the land and the house on it. A madam is a place of religious resort at which pilgrims rest and perform certain ceremonies. There should be a shrine in it, if any worship is to take place there. The evidence shows that there is no shrine in the building known as Duwadesi madam. There is no evidence that pilgrims go there to rest."

If unconnected with the performance of a public religious rite a person ordains the feeding of Brahmins, irrespective of their poverty, as a means of attaining salvation, there is much to be said for the view that such a disposition would not be a charitable trust. In the present case, however, the provisions relating to the feeding of Brahmins and the "assignment" of a place for that purpose indicate that Sanmuga Aiyer had in view the performance of ceremonies of a public character. Why should Brahmins, who admittedly are the priests of the Hindu religion, be fed in a particular place and on a particular day of the month, unless it be for the advancement of that religion? I presume that a Brahmin is fed not because he is poor but because he is a priest. Now it is common ground that a "madam" rightly called is a place of religious resort—*vide* section 99 (4). It is clear from P1 that Sanmuga Aiyer intended Panrikoddu Walavu to be not only a feeding place for Brahmins but also as a place of worship. It seems to me in the context that in designating the property as "Duwadesi madam" he did more than give a bare name, he did in fact constitute a madam. It is not likely that Sanmuga Aiyer intended that his successors in title should exercise full rights of ownership over the property, subject to the obligation to vacate it once a month for the feeding of the priests. In deciding whether by reason of P1 Panrikoddu Walavu was comprised in a charitable trust it is not a point against the appellants that there is no shrine on the property or that there is no evidence that it has been in fact a pilgrim's rest. If a place is constituted as a madam, it is for those who accept the trust to do what is necessary to make it a place of religious resort thereby it be known to pilgrims that they have a place of rest. The continuous breach of trust cannot defeat the trust.

In support of the case set up by the appellants that deed P1 created a charitable trust stress was laid on a number of transactions to which the plaintiff was a party in which he had admitted that he was the trustee of a charitable trust. In P7 of 1921 the plaintiff in granting a lease of Panrikoddu Walavu described himself as the *present* trustee of Duwadesi madam to the

management and possession of which he was entitled "as per the charity donation deed dated the 27th July, 1888."

Mention has already been made of the lease to the defendant P11 of 1947 in which the land in the present action was described by the plaintiff as "held and possessed by me as the hereditary trustee" under P1. By lease P12, also of 1947, the plaintiff leased to one Murugar Rajakuddy a 4 lacham block out of Seemathidal and Thiruvalarthidal. It is described as land belonging to Duwadesi madam by virtue of P1 and that the plaintiff possessed it as the "hereditary trustee and manager" of the madam. The plaintiff describes himself in like manner in deed P13 of 1949 which was executed as the result of a case, D. C. Jaffna No. 4355, filed by the plaintiff in 1948 in his capacity as trustee of Duwadesi madam against one Nagalingam Amirthalingam. It was alleged in this case that in 1938 a previous trustee one Sornammah, a sister of the plaintiff's mother, had leased Seemathidal and Thiruvalarthidal to Amirthalingam for 10 years by a deed of 1938 and that after the death of Sornammah in 1945 the lessee had failed to pay rent to the plaintiff. His prayer, *inter alia*, was :

"(a) for a declaration that he is the lawful trustee of the aforesaid trust land ;

(b) for a vesting order vesting the said land in the plaintiff."

A settlement reached by the parties was recorded as follows :

"Parties file following terms of settlement. The plaintiff is declared the lawful trustee of the trust described in para, 1 of the plaint and vesting order is to be entered in his favour vesting the said trust and its temporalities. The defendant to continue in occupation of the land in the schedule to the plaint for a period of two years from 1-3-1949 to 1-3-1951 on a fresh lease bond to be entered between the parties."

D. C. Jaffna No. 4425 was another case filed by the plaintiff. He claimed to eject the occupants of the madam in his capacity of trustee. The dispute was eventually settled. The plaintiff was declared the trustee of the madam and a vesting order made in his favour.

The last of the cases is D. C. Jaffna No. TR 78 in which the plaintiff sought on 21st December 1949, the permission of Court to sell the land which is the subject matter of the present action. In para. 3 of the affidavit (2D1) supporting the application the plaintiff stated :

"By his deed bearing No. 4867 dated July 27th, 1888, and attested by M. Kandasamy of Jaffna, Notary Public, the said Sanmuga Aiyer dedicated the house in which he lived at Vannarponnai to a madam referred to as "Duwadesi Madam" in the said deed for carrying out certain religious rites and dedicated three other pieces of lands, described in the schedule hereto, from the income of which the objects of the trust were to be carried out."

There was opposition to this application especially by one Arumugam Chettiar who claimed to be the trustee and manager of Sri Visuvalinga Maha Ganapathy temple referred to in P1. While reading through the evidence taken in case No. TR 78 it is difficult to resist the impression that had the plaintiff pressed his case to a finality he would have failed in his application. He applied on 27th September, 1951, to withdraw the application because he had been advised by his lawyers in regard to P1 that "according to the true nature of the said deed no charitable trust had been created and the full dominium over the property had been vested in the applicant unencumbered by any trust or legal obligation." The District Judge refused to allow the withdrawal but in appeal this court granted his request without prejudice to the parties to litigate the matter afresh.

It is, therefore, clear that from 1921 till 1951 the plaintiff had consistently taken up the position that deed P1 created a charitable trust and that by reason of its provisions the land which is the subject matter of this action was comprised in that trust. It cannot, however, be disputed that if on a true interpretation of the deed the creation of a charitable trust cannot be read into it, the admissions of the plaintiff do not preclude him from now asserting against the defendants that he is the legal owner of the property without a trust of any kind being attached to it. An issue of estoppel was raised by the defendants but it was decided against them and the correctness of that decision was not challenged before us. Now what is the weight to be attached to the admissions made by the plaintiff before the institution of the present action that he held the property as the trustee of a charitable trust? Obviously P1 is not a deed which, so to speak, interprets itself.

It contains words like "Duwadesi," "Madam," "abishekam," "neivethiam" which are not of common English usage, and, therefore, their true import has to be ascertained in the context of the religious beliefs of the person who executed the deed. These are matters of a factual character and in my opinion the admissions are tantamount to statements by the plaintiff that the "madam" referred to in P1 is a place of religious resort, that "abishekam" and "neivethiam" described as "ceremonies" in P1 are "religious rites and practices," and that the "madam" and these ceremonies were provided by Sanmuga Aiyer for the benefit of a section of the public. To my mind it is inconceivable to assign any content to his admission that he was the hereditary trustee of a charitable trust under P1 without reading into it an admission of those factual matters on which *extrinsic evidence could have been led to show* that Sanmuga Aiyer had used language in P1 which had the result of creating a charitable trust within the meaning of Chapter X of the Trusts Ordinance. If the contention is that the admission of the plaintiff did not have the effect indicated by me, then it was for him to adduce evidence to satisfy the Court that he had been led erroneously to making it and that upon a correct understanding of the language in P1 an intention to create a charitable trust could not be read into it.

The importance attached by the plaintiff to the judgments in *Re Coats Trusts, Coats vs. Gilmour and Others* in the Court of Appeal, (1948) 1 All E. R. 521 and in the House of Lords, (1949) 1 All E. R. 848 perhaps reveals the reason why the plaintiff, after having for several years put himself forward as the trustee of a charitable trust, alleged its non-existence and claimed to have inherited the lands comprised in it as the sole surviving heir of Sanmuga Aiyer. The learned trial Judge has referred to this case to support the proposition that a gift to be a valid charitable trust must be not only for the advancement of religion but also for the public and not merely private benefit, like the attainment of salvation of one's soul. Before dealing with the applicability of *Coats'* case I desire to comment on the statement of the Judge.

"I agree with learned counsel on both sides that our law regarding charitable trusts is the same as the English law." It seems to me that this is too wide a proposition. If a trust is claimed to be charitable and it falls within one or other of the categories specified in section 99 (1) of the Trusts Ordinance no principle of English law relating to charities is admissible to shew that it is not. The application of English law is limited by the provisions of section 2. The four divisions of "charity" in its legal sense as laid down by Lord Macnaghten in the well known case of *Commissioners for Special Purposes of Income Tax vs. Pemsel*, (1891) A.C. 531 at page 583 include "trusts for the advancement of religion. "Whilet rusts "for the advancement of religion are provided in section 99 (1) (c) express provision is also made for trusts for "the maintenance of religious rites and practices" which are not mentioned in the divisions set out in *Pemsel's* case. In deciding whether an instrument has created a charitable trust it seems to me to be unsafe to be drawn into the complexities of English legislation beginning with the preamble to the Act of Elizabeth I passed in the year 1601.

In the present case there was no need to have recourse to the English law to hold that a trust alleged to be charitable must be one for the public benefit because section 99 says so expressly. Whether a trust will be for the "benefit of the public or any section of the public" will be largely a matter of evidence. It is hardly helpful to judge that issue in the present case by a decision of the House of Lords, on the evidence placed before it, that a gift to a community of Carmelite nuns who led a purely contemplative life within the four walls of a convent and shut out from the outside world did not come within the spirit and intendment of the preamble to an Act passed in 1601 to make it a charity.

In my opinion the deed P1 created a valid charitable trust. At the argument in appeal the fate of the plaintiff's action rested solely on whether he is the unfettered owner of the property in question. I hold that he is not with the consequence that the decree appealed from should be set aside and the plaintiff's action dismissed with costs here and below.

Set aside.
~~Dismissed with Costs.~~

Present : WEERASOORIYA, J., SANSONI, J., AND SINNETAMBY, J.

SENARATNA vs. THE ATTORNEY-GENERAL

In the matter of an application under Section 17 of the Courts Ordinance (Cap. 6)

Argued on : 1st April, 1958
Delivered on : 9th May, 1958

Proctor—Conviction for criminal breach of trust-Rule under Section 17 of the Courts Ordinance to show cause why he should not be removed from office—Application by Proctor to lead fresh evidence to establish innocence of charge already convicted-Insufficiency of material placed before Court in affidavit—should the Court exercise its discretion in allowing such fresh inquiry.

The respondent, a proctor of the Supreme Court, was called upon to show cause under section 17 of the Courts Ordinance why he should not be removed from the office of Proctor of the Supreme Court,

The ground of removal was that he was found guilty and convicted by the District Court of two offences of criminal breach of trust of clients' money entrusted to him for the purpose of conducting cases on their behalf.

The respondent had without success taken appeals from this conviction both to the Supreme Court as well as to the Privy Council.

In showing cause the respondent made an application for permission to lead evidence relating to the first offence, which had not been led at the trial, for the purpose of proving that he was not guilty of the offence, though he was convicted of it.

In support of his application he furnished an affidavit, containing the evidence propose to be led, according to which he was not in Colombo on the day on which the money was alleged to have been entrusted to him in his office in Colombo.

The Supreme Court refused the application because :—

(1) The affidavit was silent as to why this evidence was not adduced at the trial.

(2) On the material placed before the Supreme Court by affidavit, no grounds were made out for permitting a fresh inquiry into the question by respondent's guilt.

Quaere : Whether the Supreme Court has a discretion to embark on a fresh inquiry into the question of the respondents' guilt either on the evidence adduced at the trial or on new evidence.

Cases considered : *In re Kandiah* 25 C.L.W. 87.
In re Durga Charan (1885) I.L.R. 7 Allahabad 290.
In re Rajendra Nath Mukerji (1899) I.L.R. 22 Allahabad 19.
In re Jayatilleke 35 N.L.R. 376.
Incorporated Law Society vs. Seme S.A.L.R. (1927) T.P.D. 857.
Incorporated Law Society vs. Levin S.A.L.R. (1928) T.P.D. 229.

M. Tiruchelvam, Acting Solicitor-General, with *J. G. T. Weeraratne, Crown Counsel,* and *Arthur Keuneman, Crown Counsel,* in support of the application.

E. B. Wikremanayake, Q.C., with *M. C. Abeywardene, A. Sambandan* and *C. D. S. Siriwardene,* for the respondent.

WEERASOORIYA, J.

The respondent has been called upon in these proceedings to show cause under Section 17 of the Courts Ordinance why he should not be removed from the office of Proctor of the Supreme Court. The ground of removal as stated in the rule issued on him is that he was on the 2nd of July, 1956, found guilty and convicted by the District Court of Colombo of the following offences :

1. That between the 8th day of October, 1952, and the 11th day of December, 1952, at Colombo in the division of Colombo within the jurisdiction of the District Court, Colombo, he being entrusted with property, to wit, a sum of Rs. 7601/- by M. Wijesiri Thero in the way of his business as Agent, to wit, Proctor for the plaintiff in case No. 5517/L of the District Court of Colombo did commit criminal breach of trust in respect of the said property, and that he did thereby commit an offence punishable under Section 392 of the Penal Code ;

2. That on or about the 26th day of May, 1953, at Colombo in the division of Colombo within the jurisdiction of the said District Court of Colombo, he being entrusted with property, to wit, a sum of Rs. 1,575)- by Mr. H. M. A. S. Abeywardene in the way of his business as Agent, to wit, Proctor for the defendant in case No. 380/Z of the District Court of Colombo, did commit criminal breach of trust in respect of the said property and that he did thereby commit an offence punishable under Section 392 of the Penal Code.

For each offence the respondent was sentenced to undergo simple imprisonment for six months and to pay a fine of Rs. 100/-, in default of payment to undergo simple imprisonment for a further period of two weeks, the sentences of imprisonment to run concurrently.

The respondent appealed to this Court against the conviction and sentences aforesaid but his appeal was dismissed on the 13th March, 1957. His application to the Privy Council for special leave to appeal from the order of this Court dismissing his appeal was refused on the 3rd October, 1957.

The first of the offences referred to was committed while the respondent was acting as Proctor for the Rev. Dhammadassi who was the plaintiff in D.C. Colombo case No. 5517/L which was an action relating to the incumbency of a certain temple at Mount Lavinia. The Rev. Dhammadassi was at the time nearly eighty years old and resident in Kandy, and his pupil Rev. Wijesiri, who lived in a temple at Gampaha, attended to various matters connected with the case. After trial judgment was given in favour of the plaintiff but an appeal which had been filed against it was pending.

Rev. Wijesiri was called as a witness for the prosecution at the trial of the criminal case against the respondent, and he said that in connection with the pending appeal he gave the respondent a sum of Rs. 230/- on the 8th October, 1952, of which Rs. 210/- was on account of fees to be paid to Counsel who would be retained to appear for the Rev. Dhammadassi at the hearing of the appeal and Rs. 20/- was for a typewritten copy of the evidence. He also said that some time later he received the letter P2 dated the 9th December, 1952, from the respondent requesting him to " send another Rs. 420/- for Mr. Weerasooriya's fees and Rs. 105/- for Mr. Dissanayaka's fees. Also Rs. 25/- for extra typewritten copy ", that as he was ill at the time he gave the sums called for in P2 (totalling Rs. 550/-) to the Rev. Nandasena on the 10th December, 1952, to be handed to the respondent on the following day and the Rev. Nandasena left for Colombo early on the 11th December (which was a Thursday) and returned at about 11 a.m. saying that he had given the money to the respondent.

But when the appeal came up for hearing there was no appearance of Counsel for the plaintiff-respondent (the Rev. Dhammadassi). Judgment was delivered on the 19th July, 1954, allowing the appeal and dismissing the plaintiff's action with costs in both Courts. The Rev. Dhammadassi has stated in evidence that when he heard of the result, and also that there had been no appearance of Counsel for him, he got in touch with the respondent who informed him that he had retained Counsel for the purposes of the appeal. This evidence is of special importance because it is entirely contrary to the defence put forward by the respondent at his trial, which was that he did not retain Counsel as he never received any monies to enable him to do so, either from the Rev. Wijesiri or the Rev. Nandasena. In fact, the respondent could not possibly have taken up any other defence since it has been established beyond all doubt that no Counsel was retained by him in connection with the appeal. Rev. Dhammadassi subsequently retained another Proctor and took steps to have the appeal decision vacated in which he succeeded. The appeal was thereafter re-listed and was heard in the presence of Counsel for both sides, and on that occasion judgment was delivered dismissing the appeal with costs. In convicting the respondent of the two offences with which he was charged, the learned District Judge stated that he had not the slightest doubt regarding the truthfulness of the evidence of the Rev. Dhammadassi, the Rev. Wijesiri and the Rev. Nandasena.

I have set out in some detail the facts relating to the first offence of which the respondent was convicted in view of an application made to us by Mr. Wickremanayaka, who appeared for the respondent, that he be permitted to adduce certain evidence relating to the offence which had not been led at the trial and which, he submitted, would prove that the respondent was not guilty of that offence although he was convicted of it. In making this application, Mr. Wickremanayake cited the case of *In re Kandiah* 25 C.L.W. 87. In that case the principle applicable as regards the leading of evidence in proceedings under Section 17 of the Courts Ordinance where (as in the present case) an order of removal is sought to be obtained against a member of the legal profession on the basis of his conviction for a crime or

offence, was expressed in the following terms by Macdonell, C.J. :

> " If the conviction alleged be of full force and effect, that is, has been affirmed on appeal or has not been appealed against within the time allowed for appeal then doubtless this Court will not allow that conviction to be re-argued before it on the evidence upon which that conviction was based ; it will not re-hear a matter which has been heard and determined or allow argument that evidence which was believed by the Court should not have been believed or that evidence disbelieved by it should have been accepted. But if the respondent has evidence besides that produced at the trial and conviction which evidence shows conclusively that he was not guilty of the crime or offence whereof he was convicted, a rule so framed as the present one—which is the usual way of framing it—does not deter him from bringing forward that evidence. Thus to illustrate the matter with an extreme case, if respondent had been convicted of committing a crime in Colombo on a certain day and could now bring forward evidence which was not brought before the Court convicting to prove conclusively that he was not in Colombo on that day but at a distance from it the rule so framed would not prevent this Court from considering that evidence or from holding if satisfied with that evidence that the respondent was not guilty of that crime or offence whereof he had been convicted as stated in the rule ".

Mr. Wickremanayake also relied on the Indian case of *In re Durga Charan* (1885) I.L.R. 7 Allahabad 290 where a pleader who had been convicted of cheating and whose conviction and sentence affirmed in appeal was brought up before the High Court in the exercise of the special jurisdiction conferred on it under the Letters Patent " to remove or to suspend from practice on reasonable cause an advocate or vakil whose name is borne on the rolls of the Court." On respondent's Counsel submitting that if he was permitted to go behind the conviction he could show that his client committed no offence at law the Chief Justice observed that he was entitled " to go behind it in order to show that ", and it would appear that Counsel was then heard on the question whether on the evidence adduced at the trial the act of the pleader amounted in law to the offence of cheating. But, as pointed out by the learned acting Solicitor-General, the procedure adopted in that case was expressly disapproved by the Privy Council in the case of *In re Rajendro Nath Mukerji* (1899) I.L.R. 22 Allahabad 19 where a vakil who was convicted of the offence of using as genuine a forged document was struck off the roll on the ground that the offence of which he was convicted was of such a nature as to render him unfit to remain on the roll. In the proceedings for his removal before the High Court it was held that the propriety in law or in fact of the conviction could not be questioned, and this ruling was made the principal ground of appeal to the Privy Council. Their Lordships, in dismissing the appeal, stated, in regard to the earlier case, that they did not agree with the Chief Justice where he says that the pleader's Counsel was entitled to go behind the conviction in order to show that he had committed no offence at law.

We were also referred by the Solicitor-General to the local case of *In re Jayatilleke* 35 N.L.R. 376 where the respondent, in showing cause against a rule issued on him for his removal from the office of a Proctor on the ground that he had been convicted of certain offences, filed an affidavit in which he traversed the correctness of his conviction. This Court held (without, however, considering the ruling in the case of *In re Kandiah* (*supra*) which, though an earlier decision, does not appear to have been brought to its notice) that the respondent could not be heard to question the correctness of his conviction in those proceedings.

In South Africa power is given to the Supreme Court under the Charter of Justice to remove an attorney from his office upon reasonable cause. The procedure adopted there is stated thus in Van Zyl's Judicial Practice (4th edition) page 42 : " The Court has a wide discretion in these matters and although there is a conviction against an attorney, if he is able to put such facts before the Court as to raise strong ground for thinking the conviction was wrong, the Court may make fresh inquiry and even examine all the witnesses afresh." He cites two cases in support of this statement, *Incorporated Law Society vs. Seme* S.A.L.R. (1927) T.P.D. 857 and *Incorporated Law Society vs. Levin* S.A.L.R. (1928) T.P.D. 229. In the former case the respondent, who was an attorney, had been convicted of the offence of theft and sentenced to one year's imprisonment with hard labour. Apparently no appeal was filed against the conviction and sentence. The submission of Counsel who appeared for the Law Society in support of the application for the removal of the respondent from the roll of attorneys was that the conviction was conclusive and that while the law provides certain remedies of which a convicted person may avail himself, the Court was not entitled to constitute itself a Court of appeal from the circuit Court by considering the merits of the case. For the respondent it was submitted that on the evidence adduced before the circuit Court he should have been acquitted. It was held that " a conviction for an act which renders an attorney unfit to remain on the roll will entitle the Court to strike him off in the absence of any resaon for doubting the correct-

ness of the conviction". The Court then proceeded to consider the evidence which had been adduced at the trial and came to the conclusion that on that evidence the charge against the respondent had not been proved and he should have been acquitted. According to these two decisions the discretion of the Courts to enquire afresh into the guilt of the respondent in regard to the offence of which he was convicted is not limited to a case where new evidence is available, as stated by Macdonell, C.J., in *Kandiah's* case (*supra*).

The evidence said to be available to prove that the respondent in the present case is not guilty of the first offence of which he was convicted is set out in his affidavit, according to which on the 11th December, 1952, he was not in Colombo at the time when, as alleged by the Rev. Nandasena, he was given the sum of Rs. 550/-. The respondent has also filed an affidavit from Mr. H. A. de Abrew, Proctor and Notary Public, and a Justice of the Peace, the gist of which is that the respondent came with his wife and family to Mr. de Abrew's house in Kalutara South at about 7 a.m. on the 11th December, 1952, and did not return to Colombo till the afternoon of the same day. If this is true the evidence given by the Rev. Nandasena that he went to the respondent's house at about 8 a.m. on that day and handed him the money cannot also be true. But as Kalutara is less than an hour's run by motor car from Colombo the possibility that the Rev. Nandasena gave the respondent the money on that day, though earlier than 8 a.m. and that the respondent thereafter went to Kalutara but reached there later than the time stated by Mr. de Abrew has, however, not been eliminated. The crucial point is the time of the respondent's arrival at Kalutara, and there is only Mr. de Abrew's statement as regards that. His affidavit is dated the 10th October, 1957, which is nearly five years after the alleged visit, and there is nothing in the affidavit to show that Mr. de Abrew's recollection after the lapse of such a period may not be incorrect when he puts the time of the respondent's arrival at Kalutara at 7 a.m. These matters, could, no doubt, have been gone into at the trial had it been put to the Rev. Nandasena in cross-examination that at the time when he says he gave the Rs. 550/- to the respondent the latter was away in Kalutara, and had Mr. de Abrew also been called as a witness on behalf of the respondent. Not only was the Rev. Nandasena not cross-examined on this basis but Mr. de Abrew was also not called as a witness. The affidavit of the respondent is silent as to why this evidence was not adduced at the trial. Even in the evidence given by the respondent there was nothing said about his having been away from Colombo on the morning of the 11th December, 1952.

Moreover, the fresh evidence said to be available relates only to the entrustment of the sum of Rs. 550/- and does not touch the case for the prosecution in regard to entrustment of the sum of Rs. 230/-, which was the Rev. Wijesiri and took place on the 8th October, 1952.

Although Mr. Wickremanayake stated that he had fresh evidence to prove that the respondent is not guilty even of the second offence of which he was convicted, the affidavit filed by the respondent does not indicate that any such evidence is available. The affidavit deals with certain items of the evidence led at the trial relating to that offence, but an examination of the points raised discloses nothing more than a reiteration of the respondent's innocence and that the evidence does not support the conviction.

Even if we have a discretion to embark on a fresh enquiry—whether on the evidence adduced at the trial or on new evidence—into the question of the respondent's guilt as regards either of the offences of which he was convicted, we were of the opinion that on the material placed before us in the affidavits no grounds were made out for permitting such a course in the present case. We, accordingly, refused Mr. Wickremanayake's application and stated that we would hear him only on the question whether there are any mitigating circumstances. The reasons for our refusal are now set out.

In view, however, of the conflicting decisions to which I have referred, the correct procedure to be adopted in proceedings such as these is by no means clear, and it might be necessary to have the position reconsidered by a fuller Court in an appropriate case.

SANSONI, J.—I agree.

SINNETAMBY, J.—I agree.

Removed from office of Proctor.

Present : H. N. G. FERNANDO, J.

Y. M. PREMADASA *vs.* T. Z. R. ASSEN, *Inspector of Police, Pettah*

S. C. 795-1958—*M. C. Colombo No.* 3554/C

Argued on : 5th January, 1958.
Decided on : 19th March, 1959.

Autrefois Acquit—Plea of charge under wrong Act—Discovery of error after close of prosecution and cross-examination of accused—Discharge of accused—Fresh charge under correct Act—Conviction —Can plea of autre fois acquit be maintained.

The accused was charged under section 27 (1) of the Explosives Act No. 21 of 1957, After the close of the prosecution case, the accused gave evidence and was cross-examined. At this stage the learned Magistrate discovered that the correct Act was the Explosives Act of 1956 and not of 1957. Thereupon he made order discharging the accused.

The accused was convicted after a second trial held on a new charge under the correct Act.

Held : (1) That , the order of discharge made in the 1st trial amounted to an order of acquittal as there is no provision in the Criminal Procedure Code which enables a Magistrate to make an order of discharge after the evidence for the prosecution is taken.

(2) The the plea of *autre foits acquit* is entitled to succeed.

Cases cited : *Gunaratne vs. Hendrick Apuhamy*, 52 N.L.R. 43.
Solicitor-General vs. Aradiel, 50 N.L.R. 233.
Senaratne vs. Lenohamy et el, 20 N.L.R. 44
Perera vs. Johoran, 47 N.L.R. 568.
(*vide Perera vs. Johoran*, 46 N.L.R. 333).
Solicitor-General vs. Aradiel, 50 N.L.R. 233.
(*J. H. Wanigasekera vs. K. Simon*, 57 N.L.R. 377).

M. M. Kumarakulasingham with *Malcoln Perera* for the accused-appellant.
J. A. de Silva, Crown Counsel for the Attorney General.

H. N. G. FERNANDO, J.

The appellant was on the 18th of November, 1958, convicted by the Magistrate of Colombo of an offence punishable under the Explosives Act, No. 21 of 1956. The only point argued at the appeal is one of *autrefois acquit.*

On 20th January, 1958 a report was filed in terms of Section 148 (1) (b) of the Criminal Procedure Code alleging that this appellant had been in possession of fireworks in contravention of the Explosives Regulations, 1957, and had thereby committed an offence punishable under Section 27 (1) of the Explosives Act, *No.* 21 *of* 1957 ; a charge framed in corresponding terms was read to him by the Magistrate on the same day. The trial took place on 12th March, 1958, on which day the case for the prosecution was closed and the appellant gave evidence in his defence and was also cross-examined. At this stage, the Magistrate noticed that the charge was erroneous, because the Explosives Act is Act No. 21 of 1956 and not No. 21 of 1957, which is a statute upon quite a different subject. The Magistrate then made order, stating that the charge was "absolutely wrong" and "should have been made under Section 27 (1) of the Explosives Act, No. 21 of 1956," and discharging the appellant. The present conviction was entered after a second trial which was held after a new (and correct) report had been filed and after the correct charge, *i.e.*, in relation to the Act of 1956, had been framed against the appellant.

The comparatively recent decision of Nagalingam, J., in *Gunaratne vs. Hendrick Appuhamy*, 52 N.L.R. 43, was given in circumstances very similar to those which existed in the present case. The accused, a pawn broker, was alleged to have charged an excessive amount as interest or profit upon a loan made by him on the pledge of a gold ring. By error, he was in the first instance charged with an offence punishable under Section 8 of Cap. 75 of the Legislative Enactments. At the time of the alleged offence, Cap. 75 had been repealed and the relevant new

statute was Ordinance No. 13 of 1942. After the case for the prosecution had been closed, this error was pointed out to the Magistrate who thereupon discharged the accused.

The correct charge (*i.e.*, under Section 17 of the new Pawn Brokers Ordinance) was framed in a subsequent prosecution of the accused and on that occasion the plea of *autrefois acquit* was upheld by the Magistrate, who acquitted the accused. The order of acquittal was affirmed on an appeal to this Court taken by the Crown. Nagalingam, J., observed that the conduct alleged did constitute an offence because it was conduct prohibited by Section 17 of Ordinance 13 of 1942 and that the wrong understanding on the part of the prosecutor of the provision of law under which the accused could have been punished did not have any effect on the offence committed. In the second prosecution the act he was alleged to have committed was the same act which was the subject of the first prosecution. Reference was made in the judgment to the principle said to be applicable under the English Law that the plea of *autrefois acquit* is only available if in the earlier proceedings the accused had been in peril of being convicted. With respect to this matter Nagalingam, J., referred to the observation of Basnayake, J., in *Solicitor-General vs. Aradiel*, 50 N.L.R. 233, that "Section 330 (1) is self contained and the question whether a plea under that section is sound or not had to be determined on an interpretation of that section."

My own view of the matter is that if in any particular situation some provision of the Code requires an order of acquittal to be made then the order has necessarily to be made. Neither the consideration that there has not been an adjudication on the merits nor the circumstance that Section 330 will apply consequent upon acquittal can in my opinion afford any justification for construing the word "acquit" or "acquittal" to mean a discharge. For present purposes I am content to point out that the judgments of the majority of the Court in *Senaratna vs. Lenohamy et al*, 20 N.L.R. 44, make no reference whatever to Section 194. The effect of that section is that if a Magistrate having properly declined to adjourn a hearing when the complainant does not appear makes an order of acquittal and thereafter properly declines to cancel his order (if cancellation is sought), then the order of acquittal will be a bar to a subsequent prosecution. Section 194 affords to my mind a perfect example of what may (to use the language of Wood Renton, C.J.) "be entirely contrary to the public interest that an accused person should be absolved for ever from all further proceedings against him in respect of the offence that formed the subject of the original charges."

Nevertheless that is the law under our Criminal Procedure Code, and it would not seem strange to me to find that other situations similar to that envisaged in Section 194 should also result in orders of acquittal having the effect declared by Section 330.

Nagalingam, J., thought fit to distinguish the decision in *Perera vs. Johoran*, 47 N.L.R. 568. That was a case of a prosecution for a contravention of a price control regulation. The accused had originally been charged for an offence alleged to have been committed in breach of a regulation which had been repealed prior to the date of the alleged offence. On appeal against this conviction (*vide Perera vs. Johoran*, 46 N.L.R. 333, Canekeratne, J., held that because the regulation had been repealed the proceedings were a nullity and therefore quashed the conviction. In doing so he said "I quash the conviction and leave it to the authorities, if so advised, to take any action against the accused." Subsequently the accused was again charged, on this occasion with a breach of the relevant new regulation which had been in force at the relevant time. The accused was again convicted, and on appeal, Dias, J., rejected the plea of *autrefois acquit*, relying to some extent on the English principle that there must be an acquittal on the merits. He interpreted the earlier order of Canekeratne, J., to be mere discharge and not an acquittal. With great respect it seems to me that the circumstances with which Dias, J., had to deal were no different from the circumstances in the case before Nagalingam, J. In each case the error of the prosecution was to frame the charge as under a repealed law, and in each case a first trial had been held up to the stage of the closure of the prosecution case. In neither case could there have been a "discharge" properly so called because there is no provision in the Code which enables a Magistrate to make an order of discharge after the closure of the case for the prosecution. Section 190 provides for a verdict either of acquittal or of guilty after the evidence for the prosecution has been taken, and in my opinion the accused is by law entitled to such a verdict. Section 191 only preserves the right of a Magistrate, for reasons given, to discharge

an accused at *any previous stage of the case.* Accordingly as was pointed out by Basnayake, J. in *Solicitor-General vs. Aradiel,* 50 N.L.R. 233, there is no power for a Magistrate to make an order of discharge *simpliciter* where the case for the prosecution has been closed and the defence has either called evidence or announced that no evidence is being called.

It seems to me that, in the case of the first prosecution instututed against this appellant, recourse might well have been had to Section 171 or to Section 172, either to disregard or else to correct an error in the charge which appears to have been quite innocuous to the defence; but since no attempt was made at the proper time to utilize the provisions of law which might have been available, the question of their applicability does not now arise.

For these reasons I am of opinion that the order made at the first trial amounted to an order of acquittal under Section 190, despite the fact that the Magistrate purported to "discharge" the accused (*J. H. Wanigasekera vs. K. Simon,* 57 N.L.R. 377.) The plea of previous acquittal has therefore to be upheld. I accordingly quash the conviction and acquit the accused.

Acquitted

Present : SANSONI, J. AND T. S. FERNANDO, J.

A. THAVATHURAI *Vs.* THOMMAI SOOSAI ROCHAI

S. C. 199 — 1957—*D. C. Mannar No.* 11024

Argued on : 4th May, 1959.
Decided on : 8th May, 1959.

Damages—resulting from collision between two Motor Vehicles—Plaintiff obtaining compensation for injury under policy of insurance—Is the defendant entitled to claim that the damages against him should be reduced by the amount so received by the Plaintiff.

Held: That the defendant in an action for damages resulting from the collision of motor vehicles cannot claim any benefit from the circumstance that the plaintiff has obtained compensation for the injury under a policy of insurance.

Cases referred to : *British Transport Commission vs. Gourlay* (1956) A.C. 185.
Bradburn vs. Great Western Railway (1874) L.R. 10 Ex 1.

G. D. C. Weerasinghe with *N. R. M. Daluwatte* for the Plaintiff-Appellant.

S. Sharvananda, for the Defendant-Respondent.

SANSONI, J.

This action was brought by the plaintiff to recover a sum of Rs. 4,266/87 from the defendant as damages resulting from a collision between the defendant's station wagon and the plaintiff's motor car.

The only matters in dispute were whether the plaintiff had proved the damage actually sustained by his motor car from the collision, and whether the plaintiff was entitled to recover any damages at all from the defendant, seeing that he had been indemnified by his insurers.

The learned District Judge held that as the plaintiff had received a sum of Rs. 2,081/33 from his insurers he was entitled to recover a sum of only Rs. 600/- from the defendant, to cover further damages which he had suffered but had not received from the insurers.

The repairers' bills for the repairs effected, totalling Rs. 2,081/33, were settled by the plaintiff's insurers and the learned Judge was satisfied that these repairs were necessary. The defendant-appellant's counsel urged that there was insufficient evidence to prove the actual damage suffered by the plaintiff's motor car as a result of this accident, but we do not think that there is any reason to doubt that these repairs were rendered necessary by this accident. As the plaintiff was deprived of the use of his motor car for three months and incurred other expenses owing to the accident, which the

learned Judge has assessed at Rs. 600/-, this sum must be added to the sum of Rs. 2,081/33, and the plaintiff is therefore entitled to recover the total sum of Rs, 2,681/33, unless the defence succeeds on the question of law.

Now the law has always been that a defendant cannot diminish the damages by showing that the plaintiff has obtained compensation for the injury under a policy of insurance—see 23 Halsbury (2nd edition) page 726. This rule has stood for nearly 200 years and has never been doubted. But it is submitted that a different view should now be taken in view of the decision of the House of Lords in *British Transport Commission vs. Gourley*, (1956) A.C. 185.

It was decided there that in assessing damages, in an action for personal injuries, for the loss of actual or prospective earnings, the Court must take account of the plaintiff's net earnings after deduction of tax, and not his gross earnings. The principle applied was that the plaintiff in such a case should be awarded such a sum of money as will put him in the same position as he would have been if he had not sustained the injuries, and it would therefore be wrong to award the plaintiff a sum without regard to the amount of tax for which he would be liable.

The case had nothing to do with the other principle that I referred to, that the defendant cannot claim any benefit from the circumstance that a plaintiff has been insured. There seems to be some uncertainty as to the true basis upon which that principle rests. Pigott B. in *Bradburn vs. Great Western Railway* (1874) L.R. 10 Ex 1 said: "There is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him. He does not receive that sum of money because of the accident, but because he has made a contract providing for this contingency; an accident must occur to entitle him to it, but it is not the accident but his contract which is the cause of his receiving it."

Another view is that a wrongdoer should not get the benefit of the fortuitous circumstance that the plaintiff was insured and appropriate to himself the benefit of the premium paid by the plaintiff to cover accident risks. An editorial note in the Law Quarterly Review, Vol. 72, page 154 says: "The rule concerning insurance is a peculiar one, based on considerations of public policy," and this is also the view of Mr. McKerron in his book The Law of Delict (5th edition) page 107 where he says: "The result of the decisions is that the plaintiff may sometimes receive double compensation. They are therefore anomalous in that they involve a departure from the rule that damages in the Aquilian action are essentially compensatory. The truth would appear to be that it is impossible to justify the anomaly on purely logical grounds, and that it must be regarded as based on considerations of social policy. The interests of society are sometimes better served by allowing the injured party to recover damages beyond the compensatory measure than by allowing the wrongdoer to benefit by the fact that some other person has discharged his liability. Moreover, the effect of refusing to allow recovery in full would be to deprive the third party of any right he might have to claim reimbursement from the injured party by subrogation or cession of action."

This comment and the note in the Law Quarterly Review were written after the decision in *British Transport Commission vs. Gourley*, (1956) A.C. 185 and they support the view that the decision in that case does not affect the principle I have referred to.

I would therefore set aside the judgment under appeal and give the plaintiff-appellant judgment in a sum of Rs. 2,861/33 and his costs in both Courts.

T. S. Fernando, J.
I agree.

Set aside.

Present : T. S. FERNANDO, J.

V. K. FERNANDO *vs.* S. ATHIMOOLAM AND OTHERS

S. C. Appeal No. 151 *of* 1958—*C. R. Kandy No.* 14514

Argued on : 8th May, 1959.
Decided on : 14th May, 1959.

Landlord and Tenant—Action for ejectment—Sub-letting—Absence of evidence that tenant placed his sub-tenants in exclusive possession of specific definable portions of the premises—Can Plaintiff succeed.

The plaintiff sued the 1st defendant, his tenant and 3 other defendants as sub-tenants of the 1st defendant, for ejectment from certain premises. The learned Commissioner held that the 1st defendant had not placed any of the other defendants in exclusive possession of any specific definable portion of the premises and dismissed the action purporting to follow the decision in Suppiah Pillai *vs.* Muthukaruppa Pillai, 54 N. L. R. 572.

Held : That the learned Commissioner's decision was correct.

Cases referred to : *Suppiah Pillai vs. Muthukaruppa Pillai* 54 N.L.R. 572.

Vernon Jonklaas, for the plaintiff-appellant.

T. Parathalingam with him *N. U Wirasekera*, for the defendants-respondents.

T. S. FERNANDO, J.

The sole question in issue in this action was whether the 1st defendant, the tenant of the plaintiff, had sublet to the 2nd, 3rd and 4th defendants a portion of the premises rented out by him from the plaintiff. It may be mentioned that the 4th defendant had died even before the stage of answer was reached, and the question of his ejectment from the premises did not therefore become a live issue at the trial. As between the plaintiff and the 1st defendant, however, the question whether the 1st defendant had sublet a portion of the premises to the 4th defendant remained to be decided.

The learned Commissioner of Requests has held that the evidence does not establish that the 1st defendant had sub-let specific portions of the premises to the other defendants. He has purported to apply to the facts of this case the decision of this Court in the case of *Suppiah Pillai vs. Muthukaruppa Pillai* 54 N.L.R. 572. Gratiaen J. in that case adopted certain rules to determine the question of sub-letting and both counsel before me were agreed that a proper application of these rules is decisive of the material issue in the present case. The plaintiff conceded while giving evidence that the premises were under the control of the 1st defendant and that he could not say that the latter had lost control of the premises as a result of the other defendants living there. The learned Commissioner moreover appears to have accepted the evidence of the 1st defendant that he is still free to occupy any portion of the premises. He has concluded on the evidence that the 1st defendant had not placed any of the other defendants in exclusive possession of any specific definable portion of the premises.

Mr Jonklaas has analysed the evidence in detail and contended before me that the conclusion reached by the learned Commissioner is against the weight of the evidence led at the trial. I am, however, unable to agree that the decision in this case on what is essentially a question of fact is not warranted on the whole of the evidence. In these circumstances as there has been no misapplication of the decision of this Court referred to above, the proper course for me to take is to affirm the judgement of the Court of Requests and to dismiss the appeal with costs.

Appeal dismissed with Costs.

Present : WEERASOORIYA, J. AND SANSONI, J.

SUMANASIRI vs. CASSIM LEBBE & OTHERS

S. C. Nos. 527 & 527A—D. C. Kandy No. 4407

Argued on : 8th February, 1957
Decided on : 21st February, 1957

Misjoinder of parties and causes of action—Assignment and sub-letting—Action for ejectment.

Plaintiff, the lessor sued the 1st defendant his lessee, for cancellation of the lease, for ejectment from the premises leased, and damages for unpaid rent.

In the same action he also sued the 2nd and 3rd defendants for ejectment, on the ground that they were in wrongful possession of the premises, upon an informal lease granted to them by the 1st defendant, in breach of a covenant against assignment of the lease without the consent of the lessor.

Held : That the plaintiffs action must fail for misjoinder of parties and causes of action as :—

(1) The claim against the 1st defendant for cancellation of the lease and for rent was based on a contract to which the 2nd and 3rd defendants were not parties.

(2) The claim against the 2nd and 3rd defendants was only for ejectment based on delict arising from their alleged wrongful possession.

Obiter : Even if the 2nd and 3rd defendants were sub-tenants of the 1st defendant they could not have been sued along with the 1st defendant.

Per SANSONI, J.—There has been some confusion in this case arising from a failure to distinguish between assignment and sub-letting. The plaint refers to a breach of covenant in the lease, but that covenant is against assignment and not sub-letting. It seems to have been thought that a sub-letting came within the terms of the covenant, but there is of course no connection between the two."

Followed : Ibrahim Saibo *vs.* Mansoor 54 N.L.R. 217.

P. Somatilakam for the 1st defendant-appellant in S. C. 527 and for the 1st defendant-Respondent in S.C. 527A.

N. E. Weerasooriya, Q.C., with *B. S. C. Ratwatte* for the 2nd and 3rd defendants-respondents in S. C. 527 and for the 2nd and 3rd defendants-appellants in S.C. 527A.

T. B. Dissanayake, for the plaintiff-respondent in both appeals.

SANSONI, J.

This action was brought by the executor of one Ran Kiri who, by deed of lease P2, dated 27th December, 1952, had leased certain lands to the 1st defendant for a term of five years and three months, commencing from that date. The agreed rent for the 1st year was Rs. 650/-, and for the rest of the term Rs. 400/- per annum.

One of the covenants in the deed provided that the lease should not be *assigned* without the consent of the lessor having been first obtained. The 2nd and 3rd defendants were sued on the allegation that they were sub-tenants of the 1st defendant and who were in wrongful possession of the leased premises, because the sub-letting was without the lessor's consent in breach of the covenant already referred to The plaintiff also pleaded that the 1st defendant had failed to pay the rent that fell due for the second year.

Although in paragraph 8 of the plaint it is averred that the 2nd and 3rd defendants were made parties to give them notice of the action, it is also averred that they were in wrongful possession of the leased premises, claiming possession upon an informal lease granted to them by the 1st defendant. In the prayer the plaintiff has asked :—

(1) That the lease be cancelled and that he be restored to possession of the premises and the defendants ejected, and

(2) For judgment against the 1st defendant for Rs. 400/- being the second year's rent.

The 1st defendant in his answer pleaded that he had been unable to get possession of the leased premises because one Abdul Majeed had claimed to be in possession upon an informal lease from Ran Kiri. He denied his liability to pay rent, and in reconvention he claimed a refund of Rs. 650/- paid as first year's rent and a further sum of Rs. 350/- as damages.

The 2nd and 3rd defendants denied that they possessed the leased lands under the 1st defendant. They claimed to have purchased the land from three parties upon a deed dated 10th September, 1953 and pleaded that they became the owners from that date. They also pleaded that there was a misjoinder of parties and causes of action.

At the trial issues were framed as to whether the 1st defendant sub-let the premises to the 2nd and 3rd defendants, and as to whether the 2nd and 3rd defendants entered into possession under such sub-letting. Other issues raised the question of misjoinder of parties and causes of action, whether the plaintiff was entitled to eject the 1st and/or the 2nd and 3rd defendants from the premises, and what damages if any the 1st defendant was entitled to recover.

The learned District Judge held that the 1st defendant was given possession of the leased lands, and that the 2nd defendant and the 3rd defendant were in possession under the 1st defendant. He did not consider the issue of misjoinder independently of these matters. He gave judgement for the plaintiff as prayed for against all the defendants, and dismissed the 1st defendant's claim in reconvention. The defendants have appealed against this judgment.

There has been some confusion in this case arising fom a failure to distinguish between assignment and sub-letting. The plaintiff refers to a breach of a covenant in the lease, but that convenant is against assignment and not sub-letting. It seems to have been thought that a sub-letting came within the terms of the covenant, but there is, of course, no connection between the two.

For the decision of this appeal it is fortunately not necessary to consider what flows from the error arising from this misunderstanding of the legal position. It seems to me that the plaintiff's action must fail because there is a clear misjoinder of parties and causes of action. The plaintiff's claim is for cancellation of the lease and for rent; these claims are against the 1st defendant based on a contract of lease: but this contract does not affect the 2nd and 3rd defendants, and the plaintiff's claim against them is only for ejectment and is based on delict arising from their alleged wrongful possession. According to the decision in *Ibrahim Saibo vs. Munsoor*, 54 N.L.R. 217 even if the 2nd and 3rd defendants were sub-tenants of the 1st defendant, they cannot be sued along with the 1st defendant. It is true that the Court has the power to add them in an appropriate case under section 18 of the Civil Procedure Code, but that is an entirely different matter.

No application seems to have been made to the Court at any time during the trial, nor was any made to us during the hearing of the appeal, to confine the action either to the 1st defendant or the 2nd and 3rd defendants. The plaintiff's attitude has been that there was no misjoinder. In this view he is wrong, and the only course open to us now is to dismiss the action on the ground of misjoinder of parties and causes of action as we do not think that in the circumstances we should at this stage remit the case to the trial Court to enable him to elect against which of the defendants he will proceed in the action.

There is left to be considered the claim in reconvention made by the 1st defendant for a refund of the 1st year's rent, and for damages for the plaintiff's alleged failure to put him in possession of the leased premises. It was agreed by all parties that Majeedu Lebbe was in possession of the leased premises until the Maha harvest of 1953 *i.e.*, about the 9th March, 1953. Majeedu Lebbe had worked the field in dispute on an informal agreement entered into with Ran Kiri. The land-owner's share of that crop, according to the Headman who took possession of it at the threshing floor, was 28 bushels of paddy worth, say, Rs. 10/- per bushel. The Headman sold this paddy and the 1st defendant would therefore be entitled to recover the sum of Rs. 280/- from the plaintiff as damages. The plaintiff will, of course, be entitled to recover the sale proceeds from the Headman.

The learned Judge has found that the leased lands were cultivated for the Yala season 1953 by the 2nd and 3rd defendants. He has accepted the evidence of the Headman that the 2nd and 3rd defendants, claiming to have a lease

from the 1st defendant, went into possession on that basis. The 2nd and 3rd defendants are relations of the 1st defendant; they did not obtain a transfer of these lands until 10th September, 1953; prior to 9th March, 1953 the 1st defendant had authorised the 2nd defendant to remove the land-owner's share of the Maha harvest. Everything points to the conclusion that the 2nd defendant and the 3rd defendant were acting under the 1st defendant when they started cultivating these fields in 1953. The 1st defendant is therefore not entitled to recover any damages which might have accrued after March 1953.

In the result the plaintiff's action must be dismissed as against all three defendants, and judgment must be entered for the 1st defendant against the plaintiff for a sum of Rs. 280/-. The decree under appeal is set aside and a decree will be entered in these terms. The plaintiff must pay the costs of all the defendants in both Courts.

WEERASOORIYA, J.

I agree.

Set aside.

Present : WEERASOORIYA, J.

FERNANDO vs. EXCISE INSPECTOR OF WENNAPPUWA

S. C. Application 305—*M. C. Chilaw No.* 25356

Argued on : 10th September, 1958.
Delivered on : 6th November, 1958.

Autrefois Acquit—*Accused charged with Excise offences—After close of prosecution case, accused called upon for defence—Defence counsel stating that he was not calling evidence and legal submission made that proceedings were illegal as charge defective—Order made acquitting accused—Second prosecution for same offences—Plea of* autrefois acquit—*Is it available—Criminal Procedure Code, sections* 187 (1), 190, 191, 194 *and* 195.

After the prosecution had closed its case the accused was called upon his defence. Counsel for the accused stated that he was not adducing evidence and submitted that the proceedings at the trial were illegal by reason of the fact that the Magistrate had omitted to conduct the examination as required by section 187 (1) of the Criminal Procedure Code.

The learned Magistrate upheld this objection and acquitted the accused. The order of acquittal did not show that he considered the evidence.

Thereafter, in respect of the same offences, a second prosecution was launched against the accused, who raised plea of *autrefois acquit*. This plea was rejected and the accused appealed to the Supreme Court to revise this order.

Held : (1) That the only provisions in the Criminal Procedure Code for a discharge of an accused person in a summary trial is section 191 and that section clearly contemplates a stage prior to the close of the case for the prosecution and the defence.

(2) That the proceedings in the 1st case had advanced beyond that stage when the Magistrate decided, although without considering the evidence, that the proceedings should be terminated on the ground of the defect in the charge. It was not open to the Magistrate to make any other order than the order of acquittal.

(3) That the plea of *autrefois acquit* was available to the accused in the circumstances.

Per WEERASOORIYA, J.—" It is to be noted that in our Criminal Procedure Code there are at least two instances, namely sections 194 and 195, where an order of acquittal may be made otherwise than on the merits of the case and, as pointed out in *The King vs. William*, 44 N. L. R. 73 the acquittal of an accused under either of these sections is sufficient to sustain a plea of *autrefois acquit* in a subsequent prosecution of him for the same offence.

Cases referred to : *Mohideen vs. Inspector of Police, Pettah* 59 N. L. R. 217.
Abeysekera vs. Goonewardene 39 N. L. R. 525.
Fernando vs. Rajasooriya 47 N. L. R. 399.
Wanigasekera (Food and Price Control Inspector) vs. Simon 57 N. L. R. 377.
The King vs. William 44 N. L. R. 73.
Solicitor General vs. Aradiel 50 N. L. R. 233.

A. H. C. de Silva, Q.C., with *A. K. Premadasa*, for the petitioner.
V. C. Gunatilaka, Crown Counsel, for the Attorney-General.

WEERASOORIYA, J.

The accused-petitioner was charged in M.C. Chilaw Case No. 16925 with the commission of certain offences punishable under the Excise Ordinance (Cap. 42). After the prosecution had adduced evidence at the trial and closed its case, the accused was called upon his defence. His proctor thereupon stated that he was not adducing any evidence, but he took the objection that the proceedings at the trial were rendered illegal by reason of the fact that although the accused was produced in Court otherwise than on a summons or warrant the Magistrate had omitted to conduct the examination as required by section 187 (1) of the Criminal Procedure Code before framing the charge against the accused. He relied on the decision in *Mohideen vs. Inspector of Police, Pettah* 59 N. L. R. 217*. The Magistrate upheld the objection and made order acquitting the accused. From the terms of the order it is clear that although the Magistrate acquitted the accused he did not do so on a consideration of the evidence but because he regarded that to be the appropriate order inasmuch as the case for the prosecution as well as for the defence had been closed.

Thereafter in respect of the same offences a second prosecution was launched against the accused in M.C. Chilaw Case No. 25355. On being charged in this case the accused took the plea of *autrefois acquit* relying on his acquittal in the previous case. The plea was rejected by the Magistrate, and the present application is made to revise that order of the Magistrate on the ground that it is wrong in law.

Two submissions against this application were made by Crown Counsel. One of them is that in view of the failure to frame a proper charge in the earlier case the trial in that case, including the order of acquittal, was a complete nullity with the result that there is no acquittal in respect of which the plea of *autrefois acquit* could be taken by the accused. This submission was based on certain observations made by Abrahams, C.J., in *Abeysekera vs. Goonewardene* 39 N. L. R. 525 that the absence of a charge vitiates the proceedings and renders the trial illegal *ab initio*. I do not think, however, that those observations were intended by that learned Judge to imply that a trial taking place on a defectively framed charge, or without any charge at all, is a proceeding entirely outside the scope of the Magistrate's jurisdiction. It is only in such a case that the purported order of acquittal may be said to be a nullity in the sense contended for by Crown Counsel, in that the order is to be regarded as never having been made and as one which need not even be set aside by this Court in the exercise of its appellate or revisionary powers. In my opinion this submission, therefore, fails.

The other submission of learned Crown Counsel was that a plea of *autrefois acquit* lies only in respect of an acquittal on the merits, and that as the acquittal in the earlier case clearly did not proceed on that basis the accused's plea was rightly rejected. Crown Counsel cited in this connection *Fernando vs. Rajasooriya* 47 N. L. R. 399 and *Wanigasekera (Food and Price Control Inspector) vs. Simon* 57 N. L. R. 377. While the judgments in these cases contain *dicta* which support the submission of Crown Counsel, it is to be noted that in our Criminal Procedure Code there are at least two instances, namely sections 194 and 195, where an order of acquittal may be made otherwise than on the merits of the case and, as pointed out in *The King vs. William*, 44 N. L. R. 73 the acquittal of an accused under either of these sections is sufficient to sustain a plea of *autrefois acquit* in a subsequent prosecution of him for the same offence. Learned Crown Counsel relied on a passage in the judgment of the Court of Criminal Appeal in that case that in section 190 the word "acquittal" has no artificial meaning but means an acquittal on the merits. But section 190 deals only with the recording of the verdict where, after the close of the case for the prosecution and of the defence, the Magistrate finds the accused either guilty or not guilty (*i.e.*, on the merits). Section 190 is not exhaustive of the instances where a verdict of acquittal may be recorded after the close of the case for the prosecution and the defence.

In my opinion the Magistrate adopted the correct course in M.C. Chilaw Case No. 16925 when he acquitted the accused instead of discharging him. The only provision in the Criminal Procedure Code for a discharge of an accused in a summary trial is section 191, and that section clearly contemplates a stage prior to the close of the case for the prosecution and the defence. The proceedings in M.C. Chilaw Case No. 16925 had advanced beyond that stage when the Magistrate decided, though without arriving at a definite finding whether the accused was guilty, or not guilty, that they should be terminated on the ground of the defect in the charge. In the circumstances it was not open to him to make

* C.L.W. (Edd.)

any other order than one of acquittal, and while that order stood unreversed the plea of *autrefois acquit* was available to the accused in the present case, *Solicitor-General vs. Aradiel* 50 N. L. R. 233.

I therefore uphold the plea of *autrefois acquit* and discharge the accused.

Accused discharged.

Privy Council Appeal No. 14 *of* 1958

Present at the Hearing : LORD REID, LORD TUCKER, LORD SOMERVELL OF HARROW, LORD DENNING, MR. L. M. D. DE SILVA

CYRIL VERNAL UDALAGAMA vs. IRANGANIE BOANGE

From
THE SUPREME COURT OF CEYLON

JUDGEMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
DELIVERED THE 29TH JULY, 1959.

Promise to marry, breach of—Action for damages—Marriage Registration Ordinance (Cap. 95) section 19—Interpretation of—What the "writing" must contain to satisfy the Ordinance.

Held : That in an action for damages for breach of promise of marriage, the writing required by section 19 of the Marriage Registration Ordinance must contain an express promise to marry or confirm a previous oral promise to marry, *i.e.*, admit the making of the promise and evince continuing willingness to be bound by it.

(2) That the decision in *Jayasinghe vs. Perera* (1903) 9 N. L. R. 62 could not be upheld as containing a correct interpretation of the law.

Per LORD TUCKER.—"Some confusion seems to have arisen in this case with regard to the meaning of such words as "evidenced in writing" and "confirmation". The distinction which must always be borne in mind is between writing which contains the promise to marry and writing which may afford corroboration of a previous oral promise. The latter, which is sometimes described as writing "which evidences a previous oral promise" is insufficient to support an action for breach of promise."

Cases referred to : *Jayesinghe vs. Perera* (1903) 9 N. L. R. 62.
Missi Nona vs. Arnolis (1914) 17 N. L. R. 425.
Karunawathie vs. Wimalasuriya (1941) 42 N. L. R. 390.

(*Delivered by* LORD TUCKER)

In this case the respondent sued the appellant for damages for breach of promise of marriage. A good deal of oral evidence, conflicting on many points, and some documentary evidence was placed before the trial Judge who held that no written or oral promise to marry was established on the evidence before him. The greater part of the evidence related to the question whether there was an oral promise to marry. For reasons which appear later it will be seen that this evidence was immaterial to a decision of this case and should therefore have been excluded.

On appeal the Supreme Court held that under the earlier decisions of that Court an "action for damages lies if, in a letter addressed by the defendant to the plaintiff, there is confirmation or at least an unqualified admission of a subsisting and binding oral promise of marriage". It held that the necessary elements existed and, setting aside the order of the District Judge, entered judgment for the respondent. The question is whether this ruling was correct.

It is convenient at this stage to state what in their Lordships' opinion is the law of Ceylon relating to the matter. An action does not lie in Ceylon for every breach of a promise to marry. A restriction is imposed by section 19 of the Marriages Registration Ordinance (Chapter 95 Legislative Enactments of Ceylon, Vol. III, p. 122), which, after making certain provision which has no bearing on cases of breach of promise, enacts as its final provision :

"……no action shall lie for the recovery of damages for breach of promise of marriage, unless such promise of marriage shall have been made in writing."

There is nothing further in the Ordinance or in any other Statute which has a bearing on the point.

Their Lordships are of opinion that the policy of the Legislature has been to limit the cases in which an action can be brought to those in which the promise itself is in writing. It may be contained in one or more documents. Documentary evidence which does not in express or other unequivocal terms contain a promise to marry is insufficient even though it may afford evidence of an oral promise to marry.

Some confusion seems to have arisen in this case with regard to the meaning of such words as " evidenced in writing " and " confirmation ", The distinction which must always be borne in mind is between writing which contains the promise to marry and writing which may afford corroboration of a previous oral promise. The latter, which is sometimes described as writing " which evidences a previous oral promise " is insufficient to support an action for breach of promise. The writing required to satisfy the Ordinance must contain an express promise to marry or confirm a previous oral promise to marry, *i.e.*, admit the making of the promise and evince continuing willingness to be bound by it.

An illustration of a writing which, while not containing in itself a promise to marry, might be put forward as affording evidence in writing of an oral promise to marry is to be found in the case of a writing which says, " I assure you I will carry out the promise I made last month ". On such a writing the question at once arises, was it a promise to marry ? or a promise to lend money ? or some other promise. The writing by itself only establishes that a promise was made. If it were possible to establish by oral evidence that the " promise made last month " was a promise to marry, the conflicts and uncertainties which may arise would be almost as much, if not quite as much, as in a case resting on oral testimony alone. In answer to oral evidence that it was a promise to marry, a contesting defendant may say it was a promise other than a promise to marry. Their Lordships are of the view that such a writing is insufficient to satisfy the statute.

The decision in *Jayesinghe vs. Perera* (1903) 9 N.L.R. 62, has been questioned in subsequent cases. Doubts have been expressed as to whether the writing relied on amounted merely to an admission in writing of a previous oral promise or was a repetition of the promise. If the word repetition imports an express promise to be bound by the previous oral promise this will suffice, but their Lordships are unable to find this in the letter in question in that case which, in answer to a request for a written promise of marriage, said, " I am not agreeable to what papa says for this reason : that is if I trust darling should not darling trust me ? If they have no faith in my word I cannot help it. If they don't believe my word I am not to blame." This is in effect saying, " You must rest content with such remedy as is offered you by an oral promise ", and is in express refusal to give what the Ordinance requires. Their Lordships are accordingly of opinion that the decision cannot be upheld.

Extrinsic evidence is only admissible where such evidence is permissible on general grounds, *e.g.*, where the surrounding circumstances may explain some ambiguity or identify some person referred to in the writing.

The basis of the judgment of the Supreme Court is to be found in the following passage on page 361 of the Record :—

> " Does P.1, read in conjunction with the letters D.7 and D.8, constitute a ' written promise ' within the meaning of the proviso to section 19 (3) ? The Ordinance does not declare that oral promises of marriage are null and void ; it merely renders them unenforceable unless they be evidenced in writing. The object is to avoid the risk of vexatious actions based on perjured testimony. The earlier authorities of this Court were all discussed during the argument and it is settled law that an action for damages lies if, in a letter addressed by the defendant to the plaintiff, there is either confirmation or at least an unqualified admission of a subsisting and binding oral promise of marriage. This is the effect of *Jayesinghe vs. Perera* (1903) 9 N.L.R. 62, *Missi Nona vs. Arnolis* (1914) 17 N.L.R. 425, and *Karunawathie vs. Wimalasuriya* (1941) 42 N.L.R. 390. The letter P.1 completely satisfies this minimum test."

Their Lordships have already indicated that the test referred to in this passage is not entirely satisfactory and has in fact given rise to differences of interpretation in its application.

As stated in the judgment of the Supreme Court, " The parties are well-educated Kandyan gentlefolk, and each of them is the child of parents who hold conservative ideas on the subject of marriage ". Negotiations for a marriage between them took place in the manner customary to such persons and various things had been done including the fixing of a dowry to be given by the plaintiff's father. If a marriage had gone through the next step would have been

a betrothal at which a certain ceremony would have been performed. This did not take place. It will appear from what is stated later that it is not necessary to examine the reasons for the failure. The parties saw each other and some letters passed between them. Their Lordships will now examine the documentary evidence to ascertain whether a promise to marry can be said to be contained in it. Three letters were relied on, two from the respondent to the appellant and one from the appellant to the respondent. These are the documents referred to in the judgment of the Supreme Court as D.7, D.8 and P.1. The first is the following :—

Boange Walauwa,
Kadugannawa.
18-12-50.

My darling Teddy,

I asked Mumy if I may write to you, and though she did not say no, she does not like me corresponding fearing that I might fall into trouble. But I thought it is my duty to write to you, and keep to my promise inspite of any obstacle standing in my way.

The other day I was anxiously waiting to meet you before leaving, but I had to come away with a heavy heart, as Daddy came early. I am still feeling wretched without you. The evenings are unbearable. When I think of you darling, I wish I could fly back to you. I don't know how I will stay here all alone till the 7th.

I would have liked to spend even the whole holiday there, but I have to please so many, with the result that I am unable to do what I want. I hope you understand me, my darling, and will not get angry with me for leaving you, inspite of you worrying me so much to stay behind. To spend even a minute with you is a great joy to me, though you seem to think that I was impatiently waiting to come home.

I am eveready to do anything for you, but unfortunately it is my fate that I am forbidden to do all I can for you, whom I love more than any one in this world. I know you always think that I don't care for you because I say can't for anything at all. Please don't think that I have no love for you, as I will truthfully tell you that I really love you from the very bottom of my heart.

— came here a few minutes after we came home. He was very good and did not try any of his pranks on me. Please don't tell anything to — because I don't want the others to say that I made up false stories about an innocent man. I am sure, now you have room to think that I too encouraged him ; that is why I don't want you to speak to — about this. I am not boasting, but it is the actual fact. I have never had anything to do with another person, and it has always been my one idea to love only one. Take my word I am not a person who is easily tempted. I have always aimed at having a pure character and you can be sure that in rain or sunshine I will stand by you till the end of my life. It was my ambition to find a man too with a pure character and I have found it in you. Therefore don't fear. I will always be faithful to you, my darling. I hope you are going for a change. If you are going to N'Eliya please be careful the way you drive the car. Can't you get someone to accompany you, without going alone ? I think I had better stop writing as I am getting late for the post. I will write to you again on Thursday.

With much love and kisses.
from
Yours for ever.
Girlie.

Certain initials irrelevant for the purposes of this appeal appear in the spaces left blank.

The next letter is :—

Boange Walauwa,
Kadugannawa.
19-12-50

My darling Teddy,

I hope my letter has reached you safely. Please be careful with my letters because there are silly people waiting to make unnecessary fuss.

Where did you all go yesterday ? I heard that you were going home last evening.

A little while ago we returned after a days outing in Kandy. I had a long jaw with Aunt about the girl whom —— and sister went to see at Kurunegala. As for me I was anxiously waiting to come back soon, so that I may keep to my promise.

Have you decided about your holiday ? Darling, you must go somewhere and have a good time. Again I am telling you, if you are going to N'Eliya please be careful the way you drive your car.

Though I am here my thoughts are with you my love. Day and night, I think of nothing else but you my darling. The house is still been built. My one work is telling Mummy how unfair they are in delaying like this. She too agrees with me, but I haven't got the courage to go and tell Daddy. He dosen't understand our position and is ready to get upset for the least thing. That is why I am telling you that I am placed in such a difficult position where I have to please so many.

Only I know what a lot of mental agony I have to undergo. Inspite of everything I never show it because I don't wish others to say that I can't get on in life.

I am also very anxious to know about your arrangements etc., therefore please write to me on Saturday. I can send one of my brothers to the post on that day. So please don't fail to let me know all about yourself. I am taking a great risk in asking you to write to me, but I hope everything will be O.K. Another thing, if you are going anywhere or not please let me know your holiday address.

I am sending you the Observer Crossword puzzle. If it is possible please do it and send it to me.

I have sat up till late today because I wanted to write to you somehow, when no one is about the place. It's past one o'clock and I am feeling sleepy too, so I think I had better conclude. Now please don't disappoint me.

With much love and kisses
From
Yours for ever,
Girlie.

The third letter, from appellant to respondent, is :

Kegalle.

21st December, 1950.

My darling dearest Girlie,

I received both your letters safe and sound. It was indeed sweet of you to have written to me exactly as promised. As you wanted to know my arrangements for the holidays—well here they are. Tomorrow morning I will be going to Kandy and Katugastota. As a matter of fact as the Post Mark will show you, I am posting this letter from Kandy. I will try to pick up Shelly and failing I will go up alone even to Nuwara Eliya. If I go up alone I will stay at the Grand Hotel, Nuwara Eliya. Otherwise I cannot definitely tell you where I will stay. I shall send you a Christmas Card from Nuwara Eliya to reach you on the 25th Morning. Thank you Darling for the anxiety you have expressed regarding my driving up. I shall indeed try to be careful as possible. Somebody has given you some wrong information, since I have not left Kegalle since you left on the 16th instant.

I am glad to hear that you have been getting out a bit. I think Darling if you can manage it, you too, should take a holiday somewhere, why not induce your Daddy to go somewhere for a few days. You have been working very hard and I think you fully well deserve a good holiday.

Girlie dear, I have been missing you very badly these days. Indeed the evenings are very dull and boring without you and I am waiting to go somewhere for a little rest. I am much thankful to you for the kind thoughts you have been having about me. Girlie I don't think I need repeat all what you have written to me, because I feel just the same way as you have expressed. I can assure you that all the expectations and the dreams you have of your future will not be in vain, you can confidently hope. The sooner it is, the better, I think. So that you should, if you possibly can, have a chat with your Daddy and tell him that this unnecessary delay is by no means good to either. It has been hanging fire since June but I find nothing appears to have been done. It is no use delaying now. I can tell your Daddy about it, but I don't want to hurt your feelings, it will be better if you could put it to him.

..... is yet down with measeles and it looks as if Sister and them will not be going anywhere for the holidays.

Darling I hope you are keeping good health. Please be careful of yourself and don't fall ill like last time what happened. I suppose the mornings are bitterly cold there.

Daya and I just returned from seeing " The Prince and the Pauper ". It was a nice picture with a fine story of how Henry VIII's son Edward for a lark exchanged places with a pauper's son and it became a serious matter and it was with great difficulty that the Prince managed to convince the people that he was the real Prince. I wonder whether you have seen any picture since you left on the 6th. Yes, that day, I thought you might still be there, when I came after the pictures and it was with great sorrow that I learnt from Daya that you had left. Darling my thoughts are always of you every day and I am most anxiously waiting till the 7th of next month. So please on no account must you keep away from coming on the 7th.

Don't worry I will not tell—a word of what you have told me, nor will I tell anyone a word of it. But Darling you must be extremely careful of yourself and don't allow people to treat you in the same manner that you were treated when you were a small girl of 8 or 9 years. Show them a little reserveness on your part and I am sure they will understand.

As regards the Puzzle I don't think you are in a hurry. I think the closing date is 16th January. I will have it made and give it to you when you come on the 7th.

Well, Girlie my sweetheart, what do you want from Nuwara Eliya—don't tell me you want the lake, or the park. I always think how wonderful it would have been if you could have accompanied me on this holiday —just you and me with all the cares and worries of this world forgotten for ten glorious days !

L. B. and Nanda were here last Friday evening. They too don't intend going anywhere. L. B. it seems is going to take a course of medicine at Galagedera and I suppose Nanda too will be there. Daya told me today that Nanda's little daughter is also down with measels—that means they too will have to stick at Yatiyantota.

Well Darling I think I better stop, now it is nearly 11-30 p.m. In the Christmas Card I shall give you my address in Nuwara Eliya and the date of my last day of stay there. Write to me then if you can.

Cheerio my sweetheart.

With love.

Teddy.

Neither of the Courts in Ceylon has been able to find in the correspondence above a promise to marry. Their Lordships are in the same position. The letters on the construction most favourable to the plaintiff do no more than assume that a marriage will take place as a result of an oral promise. Whether such promise was conditional or unconditional, and if the former, whether the condition was ever fulfilled, is not stated. Extrinsic evidence being inadmissible to supply the deficiencies in the correspondence the action necessarily failed.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgment and decree of the Supreme Court be set aside and the decree of the District Court restored. The respondent must pay the costs of this appeal and of the appeal to the Supreme Court.

Appeal allowed.

Present : SANSONI, J.

ISABELLA MENDIS vs. COMMISSIONER OF INCOME TAX

S. C. Application No. 302 1958

In the matter of an application for Revision in M. C. Colombo 49703/*A*

Argued on : 15th and 16th June, 1959.
Decided on : 22nd June, 1959.

Income Tax—Certificate issued on assessee under section 80 (1) *of the Ordinance—Conclusive effect in regard to correctness of the amount assessed.*

Held : That where a certificate is issued on an assessee under section 80 (1) of the Income Tax Ordinance on the ground of default in payment of an amount assessed as tax due from him, it is not open to the assessee at that stage to question the correctness of the amount specified in the certificate.

Per SANSONI, J.—A defaulter is not precluded from showing that the Magistrate has no jurisdiction, because his last known place of business or residence does not fall within the local jurisdiction of the Magistrate ; he may also show that he has paid the tax due ; or that he is not a defaulter, in that he is not the person assessed. But it is not open to him to question the correctness of the amount specified in the certificate.

Cases referred to : *Puswella vs. Commissioner of Income Tax* S. C. 463/1957 S. C. M. of 5th December, 1958.

K. Sivagurunathan, with *J. V. C. Nathaniel*, for the petitioner.
Mervyn Fernando, C.C., for the respondent

SANSONI, J.

The petitioner applies for the revision of the order of the Chief Magistrate, Colombo, fining her a sum of Rs. 37,458/20 and imposing a default sentence of six months simple imprisonment.

The order was made at the conclusion of certain proceedings which followed upon the issue of a certificate under section 80 (1) of the Income Tax Ordinance, Cap. 188. According to that certificate the petitioner as executrix of the estate of the late Mr. V. S. Samynathan had made default in the payment of Rs. 37,458/20 being income tax due from her. On being summoned under section 80 (1) the petitioner appeared and moved for an adjournment under section 80 (2) which was allowed. Thereafter a certificate under section 80 (3) was received confirming the amount of tax to be recovered as Rs. 37,458/20.

The petitioner then asked for time to show cause under section 27 proviso (3) of the Ordinance, and the matter was fixed for inquiry. At the inquiry the petitioner's counsel sought to show that she was not an executor within the meaning of section 2 of the Ordinance ; that she was not a defaulter within the meaning of section 80 ; and that even if she was a defaulter, her liability was limited to the sum specified in section 27 proviso (3). Crown Counsel who appeared for the Commissioner of Income Tax then raised a preliminary objection : he urged that the petitioner could not show cause in respect of these matters once the certificate under section 80 (3) was filed. The Magistrate upheld the objection and made the order now under consideration.

At the hearing before me the petitioner's counsel sought to raise the same objections. He urged that the petitioner was not an executor as defined in the Ordinance because no letters of administration had yet been issued to her ; and that even if she had defaulted in paying tax her liability should be limited to the sum mentioned in section 27 proviso (3). Crown Counsel submitted that the grounds which the petitioner sought to put forward should have been put forward at an earlier stage, when her liability to tax was assessed, and that she should have had recourse to the provisions for appealing if she was dissatisfied with the assessment.

I think that Crown Counsel's objection must be upheld. At the time a notice is issued under section 80 (1) the stage has been passed when the assessee can dispute the correctness of an assessment. Relief in that respect is limited to applying for an adjournment under section 80 (2). A defaulter is not precluded from showing that the Magistrate has no jurisdiction, because his last known place of business or residence does

not fall within the local jurisdiction of the Magistrate; he may also show that he has paid the tax due; or that he is not a defaulter, in that he is not the person assessed. But it is not open to him to question the correctness of the amount specified in the certificate.

The petitioner's counsel at the final stage of his reply drew my attention to the judgment of H. N. G. Fernando, J. in *Puswella vs. Commissioner of Income Tax* S.C. 463/1957 S.C.M. of 5th December, 1958. My brother there held that a defaulter showing cause was entitled to show that the default in payment was due to causes beyond his control *and* that there was no lack of good faith on his part *and* that at the time when section 80 is invoked the defaulter has not the means to make payment, and if these special circumstances are made out a Magistrate would desist from imposing the penal sanction of imprisonment on default of payment of the tax. It is not necessary in this case for me to express my views on this question because it does not appear that the petitioner sought to show cause on any of these grounds, and I should like to reserve my opinion on the point.

The application is dismissed.

Application dismissed.

Present : WEERASOORIYA, J., AND K. D. DE SILVA, J.

GUNASEKERA AND TWO OTHERS vs. K. M. ALBERT

S. C. 131—*D. C. Galle Case No. L*—5711

Argued on : 30th January, and 2nd February, 1959.
Decided on : 6th August, 1959.

Minor—Lease of minor's immovable property by his father for term over one month—Sanction of of Court not obtained—Is it valid—Is a party who obtains such lease entitled to say that lease was executed by lessor in his representative capacity unless so stated in the deed itself—Compensation for improvements made by such party—Is he entitled to claim.

Held : (1) That a father, is not entitled to give a valid lease of his children's immovable property for a period exceeding one month without the sanction of the Court.

(2) That, a party, who obtains a deed of lease of the minor's immovable property for a term exceeding one month from a person who happens to be the minor's natural guardian, is not entitled to say that the deed was executed by the lessor in his representative capacity unless it is so stated in the deed itself. Nor is he entitled to compensation for improvements made by him.

Cases referred to : *Mustapher Lebbe vs. Martinus* 6 N. L. R. 364.
Girigorishamy vs. Lebbe Marikar 30 N. L. R. 209.
Perera vs. Perera 3 Browne's Reports 150.
Lebbe vs. Christie 18 N. L. R. 353.

H. A. Chandrasena, for the plaintiffs-appellants.
H. W. Jayawardene, Q.C., with *E. A. G. de Silva*, for the defendant-respondent.

K. D. DE SILVA, J.

The 2nd and 3rd plaintiffs who are minors instituted this action on September 22, 1955 by their next friend the 1st plaintiff against the defendant for a declaration of title to the land called Keenakanda Waturawa in extent 7 acres and 38 perches and to recover possession of the said land together with damages in the sum of Rs. 9,365/- up to May 1955 and thereafter at the rate of Rs. 300/- per month until restoration of possession. Admittedly the 2nd plaintiff is entitled to 3/8th and the 3rd plaintiff to 5/8th shares of the land on the deeds P3 to P10 produced in the case. The learned District Judge, however, held that at the time of the institution of the action they were entitled to only three fourths. That is obviously due to an error and it was so conceded by Mr. H. W. Jayawardene, Q.C., who appeared for the defendant-respondent at the hearing of this appeal.

The plaintiffs alleged that in or about August, 1955 the defendant forcibly and unlawfully entered the land and started taking the produce of tea standing on it and continued to remain

in unlawful possession of the land denying and disputing the plaintiffs' title to it. The defendant filed answer on December 5, 1955 averring that Alfred Dias Gunasekera who is the husband of the 1st plaintiff and the father of the 2nd and 3rd plaintiffs gave a lease of a half share of this land to him on deed D1 of January 9, 1953 representing to him that he was entitled to that share. The defendant denied that he was in possession of the entire land. He further stated that the 2nd and 3rd plaintiffs were only nominal owners whereas Alfred Dias, his lessor, was the real owner of the interests leased on D1. He also alleged in his answer that this action was instituted at the instance of Alfred Dias. He further stated that in terms of the lease D1 he had improved the land and manured the tea plantation which cost him a sum of Rs. 2,500/-. In any event he claimed to be entitled to remain in possession of the interests leased on D1 until the sum of Rs. 2,500/- was paid to him. The case proceeded to trial on 12 issues. The learned District Judge held that a father had the right to look after the estates of the minor children according to the Roman-Dutch Law and that "there was nothing wrong in Gunasekera in leasing the land of his children. The possession of the defendant is lawful." Accordingly he dismissed the plaintiffs' action with costs. The appeal is from that judgment.

Mr. Jayawardene contended that Alfred Dias being the father of the minor plaintiffs was their natural guardian and that the natural guardian was entitled to give a lease of the minors' property according to the Roman-Dutch Law. The right of a father, who is undoubtedly the natural guardian, of his minor children, to manage their property during their minority cannot be challenged. But the question is how far does that right extend. Is he entitled to execute leases of the minors' immovable property for a number of years without the prior sanction of the Court? In my view he has no such right. In *Mustapher Lebbe vs. Martinus* 6 N. L. R. 364 it was held that a guardian is not entitled to alienate a minor's immovable property without the authority of the Court. In that case Leyard, C.J. observed "It is a clear principle of Roman-Dutch Law that a minor's immovable property cannot be alienated without a decree of a Court of competent jurisdiction." In the case of *Girigorishamy vs. Lebbe Marikar* 30 N. L. R. 209 decided by a Divisional Bench, a mortgage executed by the father of the minors and their guardian appointed by the Last Will of their mother came up for consideration. The mother of the minors had specifically authorized her husband and the guardian she appointed over the children to deal with a particular land she bequeathed to her minor children in case of any necessity for the expenses of the minor children—The minors' father and the guardian mortgaged that land after the death of the testator. It was held that the mortgagors were not entitled to do so. That decision was based on the principle enunciated in *Mustapher Lebbe vs. Martinus* 6 N. L. R. 364. Fisher, C.J. observed in that case that by the Courts Ordinance of 1889 the charge of the minor's property vested in the District Court and the procedure of dealing with that property was set out in sections 582 and 585 of the Civil Procedure Code. In *Perera vs. Perera* 3 Browne's Reports 150 Middleton, J. stated "As it has been held by good authority that a notarial lease in Ceylon is an alienation *pro tanto*, I would hold that all leases granted on behalf of a minor, and requiring to be notarially witnessed, are void, unless sanctioned by the Court. In the same case Wendt, J. stated that "any lease whatever for a term exceeding one month needs the Court's previous sanction for its validity." I would therefore hold that Alfred Dias was not entitled to execute the lease D1. Accordingly no rights passed on it to the defendant.

There is another reason why Mr. Jayawardene's argument must necessarily fail. The defendant did, neither in his answer nor in his evidence, take up the position that Alfred Dias executed this lease in his capacity as the natural guardian of his minor children who were entitled to this property. In *Girigorishamy vs. Lebbe Marikar* 30 N. L. R. 209 it was urged that the father of the minors had the power to execute the mortgage bond in his capacity as the executor of his wife's Last Will. The learned Chief Justice rejected that contention because he said that the recitals in the bond showed that it was not executed in his capacity as executor. I do not think a party who obtains a deed of lease of the minor's immovable property for a term exceeding one month from a person who happens to be the minor's natural guardian is entitled to say that the deed was executed by the lessor in his representative capacity unless it is so stated in the deed itself. In the deed D1 Alfred Dias did not purport to lease the property as the natural guardian of his minor children. On the contrary, according to the defendant, Alfred Dias represented to him that the property in fact belonged to him. That was not only a false representation but also a claim which was in fact adverse to the interests of his minor children. Therefore it cannot be argued that on D1 Alfred Dias was acting as the natural guardian in the

management of the property of his minor children. The possession of the property by the defendant on this lease must accordingly, be held, to be unlawful; nor do I think that the defendant is entitled to compensation for improvements—*Lebbe vs. Christie* 18 N. L. R. 353. The 2nd and 3rd plaintiffs are therefore entitled to a declaration of title to the entire land and to ejectment of the defendant from it and to recover damages. The learned District Judge held that the plaintiffs were not entitled to any damages. That was based on his finding that the possession of the defendant was lawful. The case must therefore go back to the Court below to assess the damages. The appeal is allowed with costs in both Courts. The learned District Judge is directed to enter decree in favour of the 2nd and 3rd plaintiffs in terms of this judgment after the damages are assessed.

Weerasooriya, J.
I agree.

Appeal allowed with costs.

Present : Sansoni, J.

PUNCHI NONA vs. EDMUND SINGHO AND TWO OTHERS

S. C. 88 *of* 1957—*C. R. Gampaha*/6012

Argued and decided on : 18th June, 1959.

Servitude—Declaration for a right of footpath—Prescriptive user—Evidence of user—Sole uncorroborated testimony of plaintiff—Balance of probability.

Plaintiff sued for a declaration that she had a right of footpath from her land over the defendant's land on to a public road, claiming the right by prescriptive user for a period of 20 years.

The surveyor called by the plaintiff said there was neither a path nor any traces of a path visible over the land. The judgment of the Commissioner of Requests did not indicate that he had taken into account the absence of any witness to support the plaintiff, nor were any reasons given for acting on the sole uncorroborated testimony of the plaintiff.

Held : (1) That there was no clear and convincing evidence that the path had been used for the prescriptive period, which would justify the Court in declaring a servitude of this nature.

(2) That although this was a civil case to be decided on a balance of probabilities, there are degrees of probability, and in this particular case, there was no proof commensurate with the degree of probability demanded by the particular subject matter.

Per Sansoni, J.—*Obiter* " It is only in a rare instance that, notwithstanding the absence of corroborative evidence, a Judge would consider it safe to act on the sole testimony of a plaintiff ".

Frederick Obeyesekera, with *W. G. G. L. de Silva*, for the 1st and 2nd defendants-appellants.
D. R. P. Goonetillake, with *N. R. M. Daluwatta*, and *A. K. Premadasa*, for the plaintiff-respondent.

Sansoni, J.

The plaintiff brought this action for a declaration that she had a right of foot-path from her house in Pelengahawatta to the Kirindiwela-Radawana road.

The plan made for the purpose of this action shows, and the surveyor has spoken to the fact, that the footpath from the point A to the point D was present on the ground and could be seen; but from the point D to the point F (which is that portion of the path which is disputed by the defendants and regarding which this whole case has been fought out) there is no path visible. The surveyor also said that if a footpath had been used for a very long time, and the plaintiff claimed to have used it for something like 20 years, he would have expected to see some trace of it on the ground even when he went there some 9 months later. The evidence of the surveyor, who is the plaintiff's own witness, damages her case to some extent. Another witness Ranawaka called by the plaintiff was disbelieved by the learned Commissioner and I do not intend to deal with his evidence. She also called the headman who did not say a word about the user of the path in dispute. He has

said that he was able to notice when he went to the spot on receiving a complaint from the plaintiff that this footpath was one that had been used for sometime, but then there is the surveyor's evidence as against this.

It is remarkable that the headman was not even questioned about the user of the path, and that not a single witness has been called to support the plaintiff's evidence that she had *used* the path in dispute. There are several neighbouring land owners who could not have failed to notice whether the path in dispute was in fact used by the plaintiff, and the omission to call any of them is a matter of some significance. We are left only with the plaintiff's evidence. Seeing that the plaintiff is seeking to impose the burden of a path on the defendant's land, it is necessary that there should be very clear and convincing evidence before a Court enters a decree in the plaintiff's favour.

I do not say that the plaintiff's evidence alone would be insufficient to prove her case, but in such a case I would expect to find some indication in the Commissioner's judgment that he has taken into account the absence of any witnesses to support the plaintiff. Unfortunately, his judgment consists largely of a recapitulation of the evidence given by the various witnesses and there is a marked absence of any comment on the demeanour of any particular witness and he has made no particular comment on the plaintiff herself as a witness. It is only in a rare instance that, notwithstanding the absence of a corroborative evidence, a Judge would consider it safe to act on the sole testimony of a plaintiff. He would have to advise himself that she was the person directly interested in the outcome of the case, and he might well ask why no other witnesses have been called to support the plaintiff.

It has been pointed out that the surveyor, when he went to the scene, saw a new wild pine plant at the point D which is the point at which the disputed path is said to enter the defendant's land, and that he found a gap in the fence at the point F, where the disputed path is said to leave the defendant's land and enter the land to the south. But one would equally well expect to find these features in a case where a land owner, over whose land somebody is trying to create a servitude, obstructs the path that is sought to be so used.

At one time I was inclined to think that the reservation of a footpath from the defendant's land running south over the other divided lots which were created in a partition *action* in 1924 would be a point in favour of the plaintiff's claim; but it is equally possible that such a path was reserved for the defendants because they had been using such a path to get to the high road from the common land, and that path was for that reason reserved in the partition decree. It has always been accepted that before a Court decrees a servitude of this nature, there must be clear and convincing evidence that it had been used for the prescriptive period. Although the test ultimately, as in every civil case, is the balance of probabilities, there are also degrees of probability, and in each particular case the Court would look to see if the proof is commensurate with the degree of probability demanded by the particular subject-matter. In this case, one asks why, if this footpath had been used for so many years, it was not possible to bring at least one credible independent witness to support the plaintiff's evidence.

I therefore set aside the judgment of the learned Commissioner and direct that a decree be entered dismissing the plaintiff's action with costs in both Courts.

Set aside.

Present : SINNETAMBY, J.

MENDIS, (SUB-INSPECTOR OF POLICE) *vs.* THERESA PEIRIS

S. C. 430 *of* 1959—*M. C. Colombo No.* 16929/*C*

Argued & Decided on : 8th June, 1959

Penal Code—Section 323 *—Charge of obstructing a Public Servant in the discharge of his duties—What the duty the Public Servant was discharging not referred to in charge not established by evidence—Can a conviction be sustained under the Section.*

Held : That on a charge under Section 323 of the Penal Code the accused is entitled to know what was the duty which the public servant was discharging in course of which he was obstructed. Where the prosecution failed to establish this a conviction cannot be sustained.

Ananda Karunatileke with *M. T. M. Sivardeen* for the accused-appellant.

I. F. B. Wikremanayake, C.C. for the Attorney-General.

SINNETAMBY, J.

The accused in this case was charged with having uttered obscene words in a public place to the annoyance of one Pelee Singho and others of No. 265, Thimbirigasyaya Road. On the 2nd count she was charged with obstructing P. C. Ran Banda in the course of the same transaction as set out in count (1) in the discharge of his duties as a Public Servant. One would naturally infer that the duty which Ran Banda performed on that day was to arrest the accused for having insulted Pelee Singho and others of No. 265, Thimbirigasaya Road, in a public place which was the charge the accused came to meet. All the evidence in the case, however, shows that the accused did not abuse Pelee Singho or anyone of No. 265, Thimbirigasyaya Road, but was abusing constable Ran Banda.

The learned Magistrate acquitted the accused on the 1st count on the ground that Pelee Singho had not been called to establish that he was annoyed by the use of these words. If, however, there was any evidence to show that Pelee Singho in point of fact was abused and the learned Magistrate had accepted that evidence, then there might have been some ground for the contention that inspite of the fact that the accused was acquitted on the 1st count, he would nevertheless be liable to be convicted on the 2nd count. The accused was entitled on a charge under Section 323 of the Penal Code, to know what was the duty which the Public Servant was discharging in the course of which he was obstructed by the accused. The accused would then be in a position to lead evidence to show that the Public Servant was not discharging any duty of that kind at the time.

In the present case, the only duty which according to the charge the accused was entitled to infer P.C. Banda was performing, was to arrest her for abusing Pelee Singho. This, the prosecution has completely failed to establish. Indeed all the evidence shows that she was abusing, as I stated earlier, constable Banda. The prosecution must take a little care in the presentation of the case and in the framing of charges contained in the 148 (1) (b) Report. Having charged the accused with insulting Pelee Singho, they led no evidence in support of it. The learned Magistrate acquitted the accused on the 1st count but curiously enough seems to have forgotton that fact when he came to impose sentence, for he sentenced the accused to 3 months rigorous improsonment on each count.

In my opinion, the charges have not been made out and I accordingly set aside the conviction and sentence and acquit the accused.

Set aside.

Present : H. N. G. FERNANDO, J. AND SINNETAMBY, J.

T. J. PERIES vs. ASGERALLY ABDULHUSSEIN JAFFERGEE *et al*

S. C. 534 (*F*) 1958—*D. C. Jaffna No. L.* 714

Argued on : 1st July, 1959.
Decided on : 20th July, 1959.

Landlord and Tenant—Premises used by tenant for furniture business—Tenant having the business premises temporarily during a period of civil commotion—Tenant's arrangement with occupier of adjoining premises to continue business on a commission basis—Payment of rent by tenant himself—Is landlord entitled to eject tenant on the ground of sub-letting.

Where the first defendant, a tenant who was carrying on a business as a furniture dealer, temporarily left his premises for two months during a period of civil commotion, and authorised the second and third defendant to carry on his furniture business while he was away by selling his furniture and paying him a commission on sales, but continued to pay rent himself.

Held: That the transaction, in the absence of any definite evidence to the contrary, was a letting on a temporary lease of the furniture business, and not a sub-letting of the premises themselves.

C. Renganathan for the first defendant-appellant.

No appearance for the respondents.

H. N. G. FERNANDO, J.

The sole ground upon which the learned District Judge has entered decree for the ejectment of the defendants from the premises the subject of this action is that the first defendant, who was the tenant of the plaintiffs, had sub-let the premises to the second and third defendants without the consent of the plaintiffs.

In appeal the position that the first defendant was the tenant under the plaintiffs has not been challenged, but the evidence of the sub-letting is in my opinion quite unsatisfactory.

The first defendant is a Sinhalese who had for many years been carrying on business in Jaffna and who had admittedly taken the premises in question on lease some ten years before the date of this action and there carried on a furniture business. During the communal disturbances in May 1958 the furniture in the first defendant's premises was thrown on the road and burnt by rioters and in the words of the plaintiffs' manager the first defendant "was sent as a refugee to South Ceylon". Nevertheless he continued to pay the rent and was not in arrears when the plaint was filed in August, 1958. The evidence for the defence that the first defendant returned to Jaffna two months after his forced departure has not been challenged.

Admittedly the second and third defendants who are lessees of the plaintiffs in the adjoining premises had been in occupation of the premises in question from about July 1958, but the defence version is that the first defendant requested the second and third defendants to help him in his business, for the purposes of which he would send furniture from another district in which he apparently made furniture. It is admitted also that the terms of the arrangement as between the defendants was that the second and third defendants would, for the purposes of the furniture business, purchase furniture from the first defendant and pay him a commission on sales, the rest of the profit being appropriated by the second and third defendants.

No single question was addressed to the third defendant (who was the only defence witness) upon the footing that the premises had been sub-let or that the first defendant was receiving any rent from the alleged sub-tenants, nor did the plaintiffs attempt in any other way to establish a sub-letting. In these circumstances I can see no good reason why the learned District Judge should have rejected the document P4 in which the first defendant requested permission from the plaintiffs for the second and third defendants "to occupy our shop and pay the rent on our behalf till we get back to Jaffna to resume our business". This document and the oral evidence support the version that while the first defendant remained the tenant he temporarily authorised the second and third defendants to carry on the furniture business, selling his furniture and paying him a commission on sales. The transaction, in the absence of any definite evidence to the contrary can properly be regarded as a letting on a temporary basis of the furniture business, and not as a sub-letting of the premises themselves. The fact that for convenience the second and third defendants, with the approval of the first defendant, effected certain alterations which gave easier access to the furniture shop from the adjoining shop already in their occupation is insufficient in my opinion to establish a sub-letting.

I would accordingly set aside the judgment and decree under appeal and dismiss the plaintiffs' action with costs in both Courts.

Set aside.

SINNETAMBY, J.
I agree.

Present : BASNAYAKE, C.J., AND SANSONI, J.

PETER SINGHO vs. RATNAWEERA & OTHERS

S. C. No. 240—D. C. (Inty) Tangalle No. P. 367

Argued and decided on : 27th April, 1959.

Partition Act, No. 16 of 1951 sections 26 and 70—Judgment in partition action pronounced—Date of interlocutory postponed—Can a party intervene after such judgment and before entering interlocuory decree.

On 15th October, 1956, the learned District Judge delivered his judgment in a partition action and made the following order :—" Interlocutory decree for 30/10—Schedule of shares for 30/10 "—a party sought to intervene on 23/10/56 on the ground that interlocutory decree had not in fact been entered and he was entitled to do so under section 70 of the Partition Act, No. 16 of 1951.

Held : That the Court had no power at that stage to add the party under section 70 of the Partition Act.

N. R. M. Daluwatte for the intervenient-appellant.

F. R. Dias, with *B. A. R. Candappa*, for the plaintiff-respondent.

BASNAYAKE, C.J.

This is an appeal from the order of the learned District Judge refusing the appellant's application to intervene in a partition action. On 15th October, 1956 the learned District Judge delivered his judgment, and made the following order :— " Interlocutory decree for 30/10. Schedule of shares for 30/10." On 19th October, 1956 the Proctor for the appellant filed a statement of claim and moved that the same be accepted and filed of record. He also moved that the parties disclosed in the statement of claim he added and that a date be given to notice them. On 23rd October, 1956 the appellant's Proctor submitted that he was entitled to intervene as the interlocutory decree had not in fact been entered. The respondent's Proctor objected to the addition of the appellant as a party. His objection was upheld.

Learned counsel for the appellant relies on section 70 of the Partition Act, No. 16 of 1951, which provides that the court may at any time before interlocutory decree is entered in a partition action add as party to the action any person who, claiming an interest in the land, applies to be added as a party to the action.

We do not think that section 70 empowers the Court to add as a party to the action a person who applies to be added as such after judgment has been pronounced in terms of section 26 of the Partition Act. That section provides that at the conclusion of the trial of a partition action, or on such later date, the Court shall pronounce judgment in open court, and the judgment shall be dated and signed by the Judge at the time of pronouncing it. As soon as may be after the judgment is pronounced, the Court shall enter an interlocutory decree in accordance with the findings in the judgment, and such decree shall be signed by the Judge. It would appear from section 26 that the entering of the interlocutory decree is a purely ministerial act and the Judge is bound by that section to enter the decree in accordance with the findings in the judgment. No purpose would therefore be served in admitting parties after he has pronounced judgment as required by Section 26. The Civil Procedure Code, which is applicable to proceedings under the Partition Act, recognises the practice that the formal decree is not entered on the same day that the judgment is delivered when it provides (S. 188) that it shall bear the same date as the judgment, and in the instant case the decree satisfies that requirement.

We therefore hold that the Court has no power to add a party under section 70 after the date on which the judgment as required by section 26 is pronounced.

The learned District Judge is right in refusing the application for intervention.

The appeal is accordingly dismissed with costs.

SANSONI, J.

I agree.

Appeal dismissed.

Present : BASNAYAKE, C.J.

NANAYAKKARA *vs.* PAWLIS SILVA

S. C. No. 67—*C. R. Colombo No.* 66188

Argued on : 23rd April, 1959.
Decided on : 29th May, 1959.

Rent Restriction Act No. 29 *of* 1948, *Section* 13 (1) (*c*)—*Action to eject tenant on the ground that premises are required for the purpose of the business of the landlord—Business not in existence—Can landlord succeed.*

Held : That a landlord, who has no business in existence at the time he seeks to eject the tenant, is not entitled to institute legal proceedings for ejectment on the ground that the premises are required by him for the purpose of his business.

H. W. Jayawardene, Q.C., with *S. L. D. Bandaranayake* and *L. C. Seneviratne*, for the defendant appellant.

H. Wanigatunga, with *A. K. Premadasa* and *R. D. B. Jayasekera*, for the plaintiff-respondent.

BASNAYAKE, C.J.

The plaintiff-respondent (hereinafter referred to as the plaintiff) is the owner of premises No. 154 Hill Street, Dehiwela, also described as 154, Karagampitiya, Dehiwela. The defendant-appellant (hereinafter referred to as the defendant) is his tenant. The plaintiff avers in his plaint " the premises are reasonably required for occupation of the plaintiff and his family as well as for the purposes of the business of the plaintiff within the meaning of section 13 (1) (*c*) of the Rent Restriction Act." But the question whether the premises are reasonably required for the occupation of the plaintiff and his family was not raised as an issue nor was evidence offered on the point. Perhaps the plaintiff abandoned the claim that he wanted these premises for his occupation as he is the owner of several houses which he has given on rent and lives in a house of his own. The main issue before the Court was whether the premises were reasonably required by the plaintiff for the purposes of his business. The plaintiff is 64 years old, is married and has four children. His daughter is married and his eldest son is twenty-four years old. His other children are still in school. The plaintiff is a mechanic and was first employed in the Navy. After three years' service he joined the South Western Bus Company. About one and a half years before the institution of the action he left that employment and became a watch repairer. He has given up that occupation owing to failing eye sight and was at the date on which he gave evidence without an occupation. He asserts that he wants to run a tea kiosk in these premises with his eldest son. Before 1943 he ran a tea kiosk and sold pots and pans in these premises but he gave up that business and converted these premises at a cost of Rs. 7,000/- into a bakery and leased them for ten years from 11th September, 1943 at a rent of Rs. 30/- to one Gurusinghe who carried on therein the business of a baker. While Gurusinghe's lease was subsisting the defendant came into occupation of the premises as his sub-tenant and remained there with the plaintiff's knowledge. On 30th March, 1951 about two years before the expiry of Gurusinghe's lease the plaintiff and his wife by an instrument notarially attested agreed to lease these premises to the defendant at a monthly rent of Rs. 50/- for a period of ten years comencing on 12th September 1953, the day after the expiry of the lease to Gurusinghe then current. It is common ground that the agreement to lease the premises to the defendant was given in consideration of an oral promise to give the plaintiff a sum of Rs. 8,000/- to enable him to pay off the debt he incurred in 1943 for the improvements he effected to the building. After the execution of the agreement the defendant appears to have put off paying the sum of Rs. 8,000/- on various pretexts, although the plaintiff kept on pressing him. Finally the plaintiff forced the defendant to give him the following written undertaking:—

" Swarnadesi Bakery

Hill Street, Dehiwela.
September 21, 1954

I the undersigned D. V. Nanayakkara do hereby take over the business premises No. 154 belonging to Sampatha Waduge Pablis Silva on a monthly rent.

I have undertaken to pay back on behalf of Pablis Silva a sum of Rs. 8,000/- being money borrowed by Pablis Silva, in instalments of Rupees Two thousand payable annually commencing from the month of November.

It is also agreed to deduct the rent of Bakery premises No. 154 (a sum of Rupees Fifty) from the sum of Rupees Eight Thousand.

I have agreed to the conditions set above and do hereby set my hand on a stamp of cents six in the presence of two witnesses.

A copy of this has been exchanged between the parties."

The plaintiff explains thus how the writing came to be given :

" I have been asking for Rs. 8,000/- from the beginning and he was postponing all the time and when I finally threatened to file action he gave me this agreement. I did not file action earlier because he was always postponing saying that he will give me the money today or tomorrow etc. He had been putting me off from March, 1951, up to September, 1954. During this period March 1951 to September 1954 I did not think of doing any business because he promised to set off my debts. I thought of doing business only after he refused to pay me the Rs. 8,000/- and so I thought I (would) do some business and make some money."

On 15th March, 1954 the plaintiff instituted an action in ejectment and for cancellation of the agreement to lease against the defendant treating it as a lease and alleging that the defendant had committed a breach of its terms. The defendant resisted the action and also questioned the jurisdiction of the Court of Requests over the matter. The plaintiff's action was dismissed with costs on 25th August, 1955. The instant proceedings were commenced on 3rd June, 1957.

The defendanat while admitting the execution of the above undertaking says that he did not abide by it as his Proctor advised him not to pay the money against the rent. The debt referred to was a mortgage debt of the plaintiff hypothecating his other property and not the premises in question. On the plaintiff's own evidence the conclusion that the plaintiff seeks to eject the defendant because the latter failed to give him the sum of Rs. 8,000/- he promised is irresistible. He seeks to bring himself within the ambit of section 13 (1) (c) of the Rent Restriction Act, No. 29 of 1948, by stating that he wants to run a tea kiosk. A landlord cannot avoid the operation of the prohibition contained in that section by a mere statement on oath that the premises are required for the purpose of trade or business. He must place before the Court evidence sufficient to convince it of the truth of his claim. The section requires the Court to come to the conclusion that the landlord reasonably requires the premises for the trade or business of the landlord. In the instant case the plaintiff's evidence destroys his own claim. Even if he actually means to carry on a tea kiosk business in the premises he is not in law entitled to eject the defendant. Under section 13 (1) (c) of the Rent Restriction Act, No. 29 of 1948, a landlord who has no business in existence at the time he seeks to eject the tenant is not entitled to institute legal proceedings for ejectment on the ground that the premises are required by him for the purpose of his business. In my view the words " for the purpose of the trade, business, profession, vocation or employment of the landlord " make this clear. Although the words of the Act of 1948 are slightly different from those of the corresponding provision in the Ordinance of 1942 and the word " his " has been replaced by the word " the " I think the provision still bears the same meaning. In *Mamuhewa vs Ruwanpatirana*, 39 C.L.W. 32, I held that a person who has no trade or business *in esse* at the time of the institution of the action was not entitled to maintain an action in ejectment under the Rent Restriction Ordinance, No. 60 of 1942. Learned counsel for the respondent cited the cases of *Hameedu vs. Adam Lebbe*, 50 N.L.R. 181, and *Andree vs. De Fonseka*, 51 N.L.R. 213, which take a different view, but I prefer to follow my previous decision.

I allow the appeal of the appellant and make order dismissing the plaintiff's action with costs both here and in the Court below.

Appeal allowed.

Present : SANSONI, J. AND SINNETAMBY, J.

JUNIS FERNANDO *vs.* REGINALD TIDIMON PEIRIS and ANOTHER

S. C. No. 203/*F* 1957—*D. C. Panadura No.* 3503

Argued on : 30th September, 1959.
Decided on : 16th October, 1959.

Mortgage Ordinance 1927 (*Chap.* 74)—*Decree under—lis pendens not registered—Sale of property by mortgagor to* 3*rd party after decree but before sale in execution of decree—Contest of title between transferee on private deed and purchaser under mortgage decree—Whose title is superior—Remedy under Section* 11 *of the Mortgage Ordinance.*

Held : (1) That a purchaser on a mortgage decree cannot avail himself of the original mortgage bond as a source of title if the '*lis pendens*' had not been registered.

(2) That where the '*lis pendens*' is not registered, a purchaser from the mortgagor obtains better title than a purchaser under a sale held in execution of the mortgage decree, which is subsequent in date to the transfer by the mortgagor.

(3) That the only remedy a purchaser under a mortgage sale held under the Mortgage Ordinance of 1927 (Cap. 74) is to avail himself of the provision of Section 11 of that Ordinance and ask that he be paid the amount of the purchase money or the money due under the mortgage, whichever is less.

Cases cited : *Nanayakkara vs. Abeygunawardena* 50 N.L.R. 484.

G. P. J. Kurukulasooriya, with *W. G. N. Weeratne* for the 2nd defendant-appellant.

D. R. P. Goonetilleke, for the plaintiff-respondents.

SINNETAMBY, J.

The facts of this case relevant for the purposes of this appeal are as follows :—

The First Defendant on the 5th May, 1920, mortgaged two lands one of which is the land which forms the subject matter of this action to the wife of the original plaintiff in this case. She instituted a hypothecary action to recover the money she had loaned but before its conclusion she died and the original plaintiff, who was also a party to the action was substituted in her place. On the 10th July, 1930, a decree was entered in favour of the original plaintiff in that case, namely D.C. Kalutara 14770. No steps appear to have been taken for some time after the mortgage decree was entered and the first defendant, on 12th January, 1938, by 2D 1, transferred his interests in the land in question to the second defendant who happens to be his brother-in-law. On the 5th April, 1949, after the execution of 2D 1, the land in question as well as the other mortgaged land was sold by the Fiscal and purchased by the original plaintiff. He has since died and his children, the respondents to this appeal, were substituted in his place. The Fiscal's conveyance P1 was executed subsequently on the 18th September, 1942, and an order for delivery of possession was made on 19th October, 1942. When the Fiscal went to deliver possession, the wife of the 2nd defendant objected claiming the property as her husband's under the conveyance 2D 1. The Fiscal did not deliver possession and reported to Court on the 12th November, 1942, to that effect. On 26th February, 1943, there was a second application for writ. Second defendant's wife once again claimed and the Fiscal made a report to that effect, P4. Thereupon, a notice was issued on the wife of the 2nd defendant Inasiya Fernando and on the first defendant. She appeared in Court and filed an affidavit 2D 7. At the inquiry her Counsel stated that he had no objection to the issue of a writ in as much as a claim was made on behalf of her husband who was not a party to the proceedings. This was on 29th February 1944, and thereafter, no steps were taken till 18th September, 1947, when there was a fresh application for writ which was allowed on 3rd December, 1947. It was returned unexecuted on the 4th September, 1948. A re-issue was obtained on 18th March, 1949, and when the Fiscal tried to execute it, the present first defendant, who was in possession refused to give up possession claiming a right to be on the land upon a lease which she had obtained from the 2nd defendant. On the 8th March, 1952, writ

was taken out again after a lapse of nearly 3 years and the Fiscal reported that he had executed the writ by ejecting the second defendant's wife that is I. Fernando and the first defendant who were on the premises. The 2nd defendant appears to have re-taken possession on the following day and nobody appears to have been placed in charge either by the Fiscal or by the Plaintiffs on the 8th of March. On 25th March, 1952, the second defendant submitted a Petition to the District Court setting out the facts in regard to the delivery of possession and the re-taking of possession by him, *vide* 2D 9. The plaintiff thereupon instituted the present action for a declaration of title. The learned District Judge delivered judgment in plaintiff's favour, holding that Deed 2D 1 was executed fraudulently and that it could not give 2nd defendant title in as much as he had notice of the mortgage decree. The present appeal is against that finding.

It is to be noted that the original mortgage bond and the 2nd defendant's deed of transfer 2D 1 have both been registered. There is no evidence of the '*lis pendis*' or the mortgage decree being registered. Indeed, on the 1st occasion on which this case came up for trial Counsel for the plaintiffs obtained a date to amend his plaint in order to plead registration. For this purpose he even agreed to prepay costs but no amended plaint was in fact filed nor has any effort been made either to plead registration or to prove it. The important facts, therefore, are that there is an unregistered mortgage decree in 1930 subsequent to which the original mortgagor had transferred the mortgaged property on the 12th January, 1938 to the 2nd defendant. The Fiscal's conveyance in favour of the purchaser under the mortgage decree was executed in 1942 and no possession was delivered till the 8th of March, 1952. In the meantime, the second defendant presumably entered into possession and remained in possession of the mortgaged property in which also from time to time the first defendant was found to be. In the absence of any question of prior registration the second defendant's Deed dated 12th January, 1938, must prevail over the Fiscal's conveyance P1 dated 18th September, 1952, upon which the plaintiffs claim.

It was submitted on behalf of the plaintiffs that the mortgage having been registered the subsequent transfer 2D 1 must be taken to be subject to the mortgage. This would have been so if there had been no mortgage action filed but a purchaser under the mortgage decree can only look to the decree for his title. A similar situation arose in the case of *Nanayakkara vs Abeygunawardene*, 50 N.L.R. 484. There as in this case, the contest was between the purchaser on a mortgage decree and a transferee from the mortgagor who obtained his conveyance subsequent to the date of the mortgage decree but prior both to the sale and the Fiscal's conveyance to the mortgage purchaser. Dealing with the argument that the purchaser under the mortgage decree is entitled to fall back on the mortgage itself as his source of title, Nagalingam, J. made the following observations :—

> " The doctrine of relation back was built up on the doctrine of '*lis pendens*.' So long as no statutory provision was made in regard to registration of '*lis pendens*,' from the moment of *litis contestatio* any dealing with the property would have been void as against the rights acquired under the decree. The legislature stepped in, in view of the hardships caused by applying this principle, and enacted a provision regarding the registration of *lis pendens* firstly by Ordinance 29 of 1917, and subsequently by the Registration of Documents Ordinance Cap. 101 ; by section 11 of this latter Ordinance the legislature enacted that no *lis pendens* instituted after November 9th 1917, should bind a purchaser unless and until the *lis pendens* is duly registered."

It will thus be seen that in order to avail himself of the original mortgage bond as a source of title it is essential that '*lis pendens*' should be registered. If that is not done, a purchaser from the mortgager obtains better title than a purchaser under a sale held in execution of the mortgage decree which is subsequent in date to the transfer on a private deed. The only remedy a purchaser under the mortgage sale has is to avail himself of the provision of Section 11 of the Mortgage Ordinance Chapter 74 (which is the relevant Ordinance applicable to the present case), and ask that he be paid the amount of the purchase money or the money due under the mortgage whichever is less. The plaintiffs in this case have not asked for any such remedy and it was suggested to us that even if he did so he would fail as his claim would be barred by prescription. That, however, it is not necessary for us to consider. Clearly, therefore, in this case, 2nd defendant-appellant's title must prevail over the title of the substituted plaintiffs. Neither in the course of the trial nor in the pleadings was any suggestion made that the deed 2D1 was a fraudulent transfer and the learned Judge was clearly not entitled to base his findings on a question that was not in issue between the parties. The appeal is accordingly allowed and Plaintiff's action dismissed with costs both here and in the Court below.

SANSONI, J.

I agree.

Appeal allowed.

Present : BASNAYAKE, C.J., AND PULLE, J.

THENUWARA *vs.* THENUWARA AND OTHERS

S. C. No. 126—*D. C. Colombo No.* 16607/T

Argued on : 8th, 9th, 10th, 11th, 18th and 19th December, 1958 and 2nd, 3rd, 5th, 6th, 10th, 11th and 12th February, 1959.
Decided on : June, 1959.

Preliminary Objection—Petition of Appeal filed on 14/9/57 *with motion tendering notices of security for costs of appeal of petitioner-respondent and several other respondents—All notices stating that security will be tendered on* 19/9/57 *for costs of the petitioner-respondent—Omission to state that security would be tendered for the costs of other respondents—Order accepting petition of appeal and to issue notice minuted same day—Appellants' Proctor tendering on*16/9/57 *fresh notices of security rectifying the omission returnable on* 19/9/57*—Notices tendered on* 14/9/57 *served on same respondents—Those unserved extended and reissued—Security accepted on* 25/9/57 *and order made to forward appeal to Supreme Court.*

Objection that notice of security has not been given in manner prescribed by Section 756 *of the Civil Procedure Code—Can the Court extend the date for tendering security mentioned in the notice,—Civil Procedure Code, Sections* 754, 756, 765*—Meaning of the words "Court" and "receive" in Sections* 754 *Meaning of the word "forthwith" in Section* 756*—Scope of sub-section* (3) *to Section* 756*—Meaning of the words 'mistake' 'omission' 'defect' in Sub-Section* 3 *—When relief under* 756 (3) *will not be given—How relief under this section may be applied for—Burden of satisfying Court that applicant is entitled to relief —Costs —Respondent may be deprived of costs or costs ordered against him if any objections that may be taken before trial judge, not taken.*

Trial Judges' duty to supervise and control the recording of minutes in journal—Need to observe the provisions of Section 92 *of the Civil Procedure Code.*

Security bond—Need to perfect the bond before security accepted.

Petition of appeal from a judgment delivered on 4/9/57 was lodged in the office of the District Court at 10-35 a.m. on 14/9/57 together with a motion, which *inter alia* referred to the tender of notices for service on the Petitioner-respondent and his Proctor and on each of the 2-10 respondents-respondents to the effect that the appellant would on 19/9/57 tender security by deposit of Rs. 250/- for the Petitioner-respondents costs of appeal and hypothecate the same and would on the same date deposit a sum sufficient to cover the expenses of serving the notices of appeal on the said respondents. The actual notices tendered stated that the sum of Rs. 250/- was for the Petitioner-respondents' costs of appeal. Reference to the tender of any security for the costs of appeal of the 2-10 respondents was omitted.

The minute made on the journal on 14/9/57 showed that the petition of appeal was submitted on the same day to the judge who made the order accepting the petition, etc. by initialling the minute in chambers. Steps were thereafter taken to give effect to the said orders.

On 16/9/57 the appellant's proctor filed a further motion tendering fresh notices for service on all the respondents. These notices were properly addressed to the respective respondents with the omission rectified and were also returnable on 19/9/57. This motion too was minuted and notices were ordered to issue.

On 19/9/57 notices lodged on 14-9-57 had been served on all the respondents except the 6th and 7th on whom they were extended and reissued returnable on 23/9/57.

On 25/9/57 the Court accepted security and ordered notice of appeal returnable on 27/10/57 on which day order to forward the appeal to the Supreme Court was made.

A preliminary objection was taken to the hearing of the appeal on the ground that the notice of tendering security had not been given to the 2-10 respondents in the manner prescribed by Section 756.

Held : (1) That the petition of appeal was received by the Court on 14/9/59 for the purposes of Section 756 of the Civil Procedure Code when it was handed to the appropriate officer of the Court at its office.

(2) That the appellant had failed to give notice of security to the 2nd to 10th respondents as required by Section 756 inasmuch as the notices tendered on 14/9/57 to be served on these respondents were to the effect that the appellant would tender security for costs of the petitioner-respondent only.

(3) That the second set of notices of tender of security handed on 16/9/59, though properly addressed to the respective respondents were not tendered forthwith as they were not given on the same day as the petition of appeal.

(4) That the words "presented to the Court" in Section 754 (2) of the Civil Procedure Code means lodged with the proper officer of the Court, not hand over to the judge in open Court.

(5) That in the context "the court to which the petition is so presented shall receive it" in Section 754 (2) of the Civil Procedure Code, receiving contemplated is the manual act of accepting the document. It involves no judicial process. In this context 'court' does not necessarily mean the judge himself, it includes the appropriate officer of the Court Office.

(6) That in the context the expression "if those conditions are not fulfilled it shall refuse to receive it" in the same section, the word "it" refers to the judge himself and no other, because the act of refusing to receive the petition is a judicial function which the judge alone can perform. He must perform it within a reasonable time after the petition of appeal has been lodged at the office of the Court.

(7) That there is no requirement of the Code that the judge should make an order that the petition be accepted. No legal consequences attach to such an order (observations of Bertram, C.J. in Fernando *vs.* Nikulan Appu 22 N.L.R. 1 on this point dissented from).

(8) That as the provisions of Section 765 (1) of the Civil Procedure Code enable the Supreme Court to admit and entertain a petition in a case where the provisions of Sections 754 or 756 or both have not been observed, there must be excluded from the scope of Sub-Section 3 of Section 756 all cases of non-observance or non-compliance with the provisions of Section 756.

(9) That Section 756 (3) was not designed to give relief in cases in which the acts, omissions or defects for which relief is sought are deliberate or are due to negligence, or could have been avoided with the exercise of such care as proctors are expected to exercise in the performance of their duties.

(10) That an applicant for relief under this sub-section must, as in the case of an application under Section 765, satisfy the Court that the mistake, omission or defect was due to causes not within his control and that it was not due to his or his proctor's negligence or want of care and also that the respondent has not been materially prejudiced.

(11) That before the Court can accept security, the perfected bond must be submitted to it.

(12) That any objection that can be taken before the trial Judge should be raised before the petition of appeal is forwarded to the Supreme Court, and that the respondent should not wait till the hearing of the appeal to do so.

(13) That where a respondent has failed to take an objection which he may properly have taken before the trial Judge and which he successfully takes at the hearing, the Supreme Court will not only not allow costs, but also order him to pay the appellant the costs he would have been saved, if the objection had been taken in the Court of 1st instance.

(14) That an application for relief under Section 756 (3) must be by a written petition supported by an affidavit or affidavits and the burden of establishing that his case falls within the ambit of the sub-section is on the party seeking relief.

(15) That the Court does not lend its aid even under sub-section (3) to those who deliberately flout the requirements of the law. The same principle would govern the grant of relief against a defect.

(16) That a Court is not empowered to extend the date on which the appellant stated in his notice that he would give security.

Per BASNAYAKE, C.J.—"Before I part with this judgement I must not omit to refer to the unsatisfactory manner in which the journal of this action has been maintained. Going by the records that have come up before me in appeal I cannot escape the conclusion that Judges of first instance do not seem to realise that it is their duty to maintain a neat, legible and accurate journal in each action. They should supervise and control the recording of minutes in the journal and not leave it entirely to their clerks. Section 92 of the Civil Procedure Code declares that the journal shall be the principal record of the action, and that section requires that the Judge shall sign and date each minute. The signatures to the minutes in this case are illegible and the minutes are not dated. Judges should not disregard express provisions of the Code. On the contrary they should take pains to observe them. They should write their signatures legibly so that it will appear that the minutes have been signed by the Judges themselves."

Cases referred to : *Rahuman vs. Mohamed* 40 C.L.W. 41.
Sulama Levai vs. Iburai Naina (1910) 2 Cur. L.R. 183.
Mohidin vs. Nalle Tamby 1 N.L.R. 377.
Kulantaivelpillai vs. Marikar 20 N.L.R. 471.
Queen vs. Judge of Bloomsbury County Court (1886) 17 Q.B.D. 788.
Fernando vs. Nikulan Appu 22 N.L.R.

de Silva vs. Seenathumma 41 N.L.R. 241.
Sivagurunathan vs. Doresamy 44 C.L.W. 38.
Katonis Appu vs. Charles and another (1928) 12 C.L.W. 162.
Silva vs. Goonesekere (1929) 31 N.L.R. 184.
Zahira Umma vs. Abeysinghe et al (1937) 39 N.L.R. 84.
Siyadoris Appu vs. Abeyenayake (1938) 13 C.L.W. 22, 18 Law Recorder 120,
Supramaniam Chettiar vs. Senanayake and others (1939) 16 C.L.W. 41.
Rahuman vs. Mohamed 40 C.L.W. 41.
Noris Appuhamy vs. Udaris Appu 58 N.L.R. 441.
Rankira vs. Silindu et el 10 N.L.R. 376.
Silva vs. Goonesekera 1 A.C.R. 100.
Julius vs. Hodgson 11 N.L.R. 25.
Mendis vs Mendis and others 2 C.W.R. 155.
Nagendran vs. Algina Peiris 49 C.L.W. 26.
Kandappan vs. Elliot 1 S.C.R. 37 : 2 C.L.R. 17.
Mendis vs. Jinadasa 24 N.L.R. 188.
Kangamy vs. Ramasamy Rajah 21 N.L.R. 106.

H. V. Perera, Q.C., with *E. F. N. Gratiaen, Q.C.*, and *K. N. Choksy*, for the 1st Respondent-appellant.

Colvin R. de Silva, with *C. G. Weeramantry, Carl Jayasinghe, H. Rodrigo* and *Stanley Perera* for the petitioner-respondent.

V. J. Martyn, with *D. T. P. Rajapakse* for the 5th respondent-respondent.

BASNAYAKE, C.J.

This is an appeal from the judgment of the District Judge of Colombo allowing an application, under section 537 of the Civil Procedure Code (hereinafter referred to as the Code), for the recall of probate of the will of Arthur Silva Thenuwara granted to the appellant, his widow. Of the ten persons who were named as respondents to that application the first is the appellant. The applicant (hereinafter referred to as the petitioner-respondent) and the 3rd and 4th respondents are brothers of the testator while the 2nd, 5th and 6th respondents are his sisters. The 7th to 10th respondents, all of whom are majors, are the children of a deceased sister of the testator. The respondents will be referred to in this judgment in the order in which their names appear in the petition of appeal. The petitioner-respondent alone was represented by a proctor at the hearing of the application. Besides the petitioner-respondent only the 5th respondent appeared at the hearing of the objections to this appeal.

When the appeal came on for hearing learned counsel for the petitioner-respondent took objection to its being heard on the ground that the appellant had failed to comply with certain imperative requirements of section 756 of the Code. Although the notice of tender of security had been given in his case in accordance with the section the petitioner-respondent was nevertheless entitled to object on the ground that there had been a non-observance of section 756. He submitted that the appellant's failure to comply with those requirements was fatal to the reception of the appeal by this court.

Shortly the material facts are as follows :— On 4th September, 1957 judgment was delivered in favour of the petitioner-respondent allowing his application for the recall of probate. At 10-35 in the morning of Saturday 14th September, 1957 the appellant's proctor lodged in the office of the District Court a petition of appeal, an application for typewritten copies of the record under the Civil Appellate Rules 1938, and other documents referred to in the following motion in writing bearing the caption of the proceedings :—

> " I move to tender the Petition of Appeal of the 1st Respondent-Appellant abovenamed against the judgment and order of this Court dated the 4th day of September, 1957, together with stamps to the value of Rs. 85/- and Rs. 85/- for the Secretary's certficate in appeal and the judgment of the Supreme Court.
>
> I also move for a paying-in-voucher for Rs. 50/- being fees for a typewritten copy of the brief.
>
> I further move for a notice under section 756 of the Civil Procedure Code for service on the Petitioner-Respondent and on each of the 2nd-10th Respondents-Respondents and on Mr. R. L. de Silva, Proctor for the Petitioner-Respondent, that I shall on behalf of the 1st Respondent-Appellant abovenamed on the 19th day of September, 1957 at 10-45 o'clock in the forenoon or soon thereafter tender security by deposit of Rs. 250/- for the Petitioner-Respondent's costs in appeal and hypothecate the same and will on the said date deposit in Court a sum sufficient to cover the expenses of serving notice of appeal on the Petitioner-Respondent and on each of the 2nd-10th Respondents-Respondents and on Mr. R. L. de Silva, Proctor for the Petitioner-Respondent.

I also tender notices for service on the Petitioner-Respondent and on each of the 2nd-10th Respondents-Respondents and on Mr. R. L. de Silva, Proctor for the Petitioner-Respondent.

Colombo, 14th day of September 1957."

The notice of tender of security referred to in the motion reads as follows :—

" Take notice that the Petition of Appeal presented by me in the abovenamed action on the 14th day of September, 1957, against the judgment and decree of the District Court of Colombo dated 4th day of September, 1957 in the said action, having been received by the said Court, counsel on my behalf will on the 19th day of September, 1957 at 10-45 o'clock of the forenoon or so soon thereafter, move to tender security by deposit of a sum of Rupees Two hundred and Fifty (Rs. 250/-) for the Petitioner-Respondent's costs in appeal and by hypothecation of the same and will on the said day deposit in Court a sum of money sufficient to cover the expenses of serving notice of appeal on you."

The minute in the journal of the action made on that day reads—

" (139) Mr. F. J. P. Perera, Pro., for 1st Respondent files petition of appeal against the judgment of this Court dated 4/9/57 together with stamps to the value of Rs. 85/- for Secy's Certificate in appeal and Rs. 85/- for S.C. Judgment.

He also moves for a p.i.v. for Rs. 50/- being fees for typewritten copies.

He further moves for a notice under section 756 of the C.P.C. for service on the Petitioner-Respondent and on each of the 2-10 Respondents and on Mr. R. L. de Silva, Proctor for Petitioner-Respondent that he will on 19/9/57 at 10-45 in the forenoon or soon thereafter tender security by deposit of Rs. 250/- for the Petitioner-Respondent's costs in appeal and hypothecate the same and will on the said date deposit in Court a sum sufficient to cover the expenses of serving notice of appeal on the Petitioner-Respondent and on each of the 2-10 Respondents and on Mr. R. L. de Silva, Proctor for Petitioner-Respondent.

He also tenders notice of security for service on the Petitioner-Respondent and on each of the 2-10 Respondents and on Mr. R. L. de Silva, Proctor for Petitioner-Resondent, Stamps Rs. 85/- affixed to blank forms of certficate in appeal and cancelled.

1. Accept.
2. Issue P.I.V. for Rs. 50/-.
3. Issue notice of tendering security for 19/9."

On the same day the following further minutes were made in the journal :—

" (140) P.I.V. for Rs. 50/- issued to F. J. P. Perera."

" (141) Proctor for 1st Respondent-Appellant tenders application for typewritten copies together with K.R. 0/14 No. 067035 of 14-9-57 for Rs. 50/-."

" (142) Notice of security issued Petitioner-Respondent 2-6, 8-10 and Proctor for Petitioner-Respondent to W.P. and on 7th Respondent to Gampaha."

It is not clear whether these minutes are signed by the District Judge or someone else. If they are not signed by the District Judge it is irregular and contrary to the requirements of section 92.

On 16th September, 1957 the following further motion in writing bearing the caption of the application was filed by the appellant's proctor:—

" The Petition of Appeal of the 1st Respondent-Appellant against the judgment and order of this Court having been filed, I move for a notice under Section 756 of the Civil Procedure Code on the Petitioner-Respondent and on each of the 2nd to 10th Respondents-Respondents and on Mr. R. L. de Silva, Proctor for the Petitioner-Respondent, that I shall on behalf of the 1st Respondent-Appellant abovenamed on the 19th day of September, 1957 at 10-45 o'clock in the forenoon or soon thereafter tender security by deposit of Rs. 250/- for the Petitioner-Respondent's costs in Appeal and a further sum of Rs. 250/- for the 2nd to 10th Respondents-Respondents costs in Appeal and hypothecate the same by bond and will on the said date deposit in Court a sum sufficient to cover the expenses of service (sic) notice of appeal on the Petitioner-Respondent and on each of the 2nd to 10th Respondents-Respondents and on Mr. R. L. de Silva, Proctor for the Petitioner-Respondent.

" I also tender notices for services on the Petitioner-Respondent and on each of the 2nd to 10th Respondents-Respondents and on Mr. R. L. de Silva, Proctor for the Petitioner-Respondents."

The notice of tender of security lodged with the above motion reads—

" To : 1. The Petitioner-Respondent, 2, 3, 4, 5, 6, 8, 9 10 Respondents abovenamed.

2. Mr. R. L. de Silva, Proctor for Petitioner-Respondent, No. 39 Ferry Street, Hultsdorf, Colombo.

' Take notice that the petition of appeal presented by me in the abovenamed action on the 16th day of September, 1957 against the judgment and decree of the District Court of Colombo dated 4th day of September, 1957 in the said action, having been received by the said court, Counsel on my behalf will on the 19th day of September, 1957 at 10-45 o'clock of the forenoon or so soon thereafter, move to tender security by deposit of a sum of Rupees Two hundred and Fifty (Rs. 250/-) for the Petitioner-Respondent's costs in appeal and Rupees Two hundred and Fifty (Rs. 250/-) for the 2nd to 10th Respondents-Respondents costs in appeal and by hypothecation of the same by Bond and will on the said day deposit in Court a sum of money sufficient to cover the expenses of serving notice of appeal on you'."

The following minute has been made in the journal in respect of this motion :—

" (143) 16-9-57—Proctor for 1st Respondent-Appellant moves for a notice under section 756 on the

Petitioner-Respondent and on each of the 2-10 Respondents-Respondents and on Mr. R. L. de Silva, Proctor for Petitioner-Respondent that he shall on behalf of the 1st Respondent-Appellant on the 19-9-57 at 10-45 in the forenoon or soon thereafter tender security by deposit of Rs. 250/- for the Petitioner-Respondent's costs in appeal and a further sum of Rs. 250/- for the 2-10 Respondents-Respondents costs in appeal and hypothecate same by Bond and will on the said date deposit in court a sum sufficient to cover the expenses of serving notice of appeal on the Petitioner-Respondent and on each of the 2-10 Respondents-Respondents and on Mr. R. L. de Silva, Proctor for Petitioner-Respondent. He also tenders notice for service on Petitioner-Respondent and on each of the 2-10 Respondents and on Mr. R. L. de Silva, Proctor for Petitioner-Respondent."

The above minute is followed by another which reads : " Issue Notices retble 19-9-57."

By 19th September, 1957 the notices lodged on 14th September had been served on the petitioner-respondent and the 2nd, 3rd, 4th, 5th, 8th, 9th, and 10th respondents, but not on the 6th and 7th respondents.

The precepts for service in respect of those two respondents were endorsed " Extended and reissued for service returnable 23rd September, 1957." In the case of the 6th respondent a further extension was granted and substituted service by affixing the notice to the gate and outer door was ordered. Although he did so, the learned District Judge had no power to extend the date on which the appellant stated, in his notice, that he would give security. That is evident from the section and it has also been so held by this court (*Rahuman vs. Mohamed*, 40 C.L.W. 41 ; *Sulama Levai vs. Iburai Naina* (1910) 2 Cur. L.R. 183). Except in the case of the 7th respondent each of the notices appears to have been addressed to the Petitioner-respondent and 2nd to 6th and 8th to 10th respondents-respondents and Mr. R. L. de Silva, proctor for the petitioner-respondent.

On 25th September, 1957 the District Judge made an order accepting security and ordered the issue of notice of appeal returnable on 17th October, 1957. By that date notice of appeal had been served on the petitioner, his proctor, and 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th respondents and order was made —" Forward record to S.C."

Of the objections taken by the petitioner-respondent the most important is that the notice of tendering security has not been given to the other respondents in the manner prescribed by section 756. This is a convenient point at which that section may be examined. It reads—

> " When a petition of appeal has been received by the court of first instance under section 754, the petitioner shall forthwith give notice to the respondent that he will on a day to be specified in such notice, and within a period of twenty days, or where such court is a Court of Requests, fourteen days, from the date when the decree or order appealed against was pronounced, computed as in the same section is directed for the periods of ten days and seven days therein respectively mentioned, tender security as hereinafter directed for the respondent's costs of appeal, and will deposit a sufficient sum of money to cover the expenses of serving notice of the appeal on the respondent. And on such day the respondent shall be heard to show cause if any against such security being accepted. And in the event of such security being accepted and also the deposit made within such period, then the court shall immediately issue notice of the appeal together with a copy of the petition of appeal, to be furnished to the court for that purpose by the appellant, to the Fiscal for service on the respondent who is named by the appellant in his petition of appeal, or on his proctor if he was represented by a proctor in the court of first instance, and shall forward to the Supreme Court the petition of appeal together with all the papers and proceedings of the case relevant to the decree or order appealed against ; retaining, however, an office copy of the decree or order appealed against, for the purposes of execution if necessary. And such proceedings shall be accompanied by a certificate (form No. 128, First Schedule) from the secretary or clerk of the court, stating the dates of the institution and decision of the case, in whose favour it was decided, the respective days on which petition of appeal was filed and security given, and whether either the plaintiff sued or the defendent defended in *forma pauperis*. . . . "

For the purpose of deciding the objection it is necessary to ascertain the meaning and content of the words—

> (*a*) " when a petition of appeal has been received by the court of first instance under section 754,"

and

> (*b*) " the petitioner shall forthwith give notice to the respondent."

In deciding the question whether the words " received by the court " in (*a*) above mean received by the Judge himself or the appropriate officer of the court office, it is necessary to ascertain the meaning of the word " court " in this context. The expression though defined in section 5 is not used throughout the Code in the sense of a Judge empowered by law to act judicially. The meaning of the expression varies with the context. In certain contexts it means the Judge exercising judicial functions, in others it means the Judge exercising ministrial functions, in still others it means the appropriate

ministerial officer of the court and not the Judge himself. There are also contexts in which the expression is used to mean the court-house, the hall in which the Judge sits when exercising his judicial function, or the institution known as the District Court or Court of Requests of a particular district or division.

Those functions of the court which involve the making of a decision or the giving of an order, permission, or leave, or a direction must be performed by the Judge himself. These functions I shall for convenience call judicial functions. Examples of such functions are found throughout the Code and the sections are too numerous to mention here. It is sufficient to say that those functions are conferred by words such as "the court may direct," "the court sees reason to require," "the court is satisfied," "the court shall order," "allowed by the court," "imposed by the court," "confirmed by the court," and "the court thinks fit." Whether such functions may be performed when the Judge is not sitting in open court would depend on its nature and on the provision of the Code which prescribes the function. Neither the Code nor the Courts Ordinance expressly authorises the performance of any of the functions of the court by the Judge when he is not sitting in open court. But there are decisions of this court which hold that functions vested by the Code in "the court" need not in every case be performed in open court (*Mohidin vs. Nalle Tamby*, 1 N.L.R. 377; *Kulantaivelpillai vs. Marikar*, 20 N.L.R. 471). But where, as in sections 39, 184, 186 and 373, express provision is made by the Code that certain functions should be performed in open court, those functions cannot be validly performed elsewhere. There are other functions vested in the court which do not involve the making of a decision or the giving of an order, permission, or leave, or a direction. They are not judicial functions and may for convenience be called ministerial functions. The ministerial functions of the court fall into two categories. Those which the Judge himself must perform, though not in every case, in open court and those which he need not perform himself. In the latter category are functions which involve manual acts and which by their nature are not such as need be performed by the Judge himself. They are mainly functions connected with receiving and filing in the proper place documents tendered by parties, or receiving documents forwarded to the court by other courts, the Fiscal and the Kachcheries, and the making of entries in registers or returns. As in the case of the judicial functions, the ministerial functions are found throughout the Code and the sections are too numerous to be specified. Without attempting to give an exhausitve list of the various contexts in which the ministerial functions of the "court" are prescribed it would be sufficient to say that such functions are conferred by words such as "application to court," "file or filed in court," "apply to court," "deposit or deposited in court," "deliver to the court," "pay into court," "paid into court," "paid out of court," "presenting to the court," "upon such notice being received by the court," "sending to such court," "Fiscal shall certify . . . to the court," "notified to the court," "notice shall be given to the court," "shall return . . . . . to the court." Where the receiving and filing of documents or the receiving of money or stamps is required by the Code the functions of the "court" in receiving and filing them may in my opinion properly be performed by the appropriate member of the court staff, but it is the Judge alone that has power to make any order thereon.

The case of *Queen vs. Judge of Bloomsbury County Court*, (1886) 17 Q.B.D. 788, shows that the position is not different under the English statutes governing court procedure. In that case Denman J. stated "There are many cases in the superior courts where an application to the court does not mean a formal application to the Judge or Judges in open court, but to the Judge's clerk or to a master."

A discussion of the words of section 756 referred to at (*a*) above necessarily involves a consideration of section 754 as it is expressly mentioned therein. That section requires that the petition of appeal should be "presented to the court" of first instance. I would construe the words "presented to the court" therein as meaning lodge with the proper officer of the Court— not hand over to the Judge in open court. The longstanding practice in the courts is an accord with this construction.

It is common ground that it is not the practice to hand over a petition of appeal to a Judge sitting in open court. The practice is to hand over a petition of appeal at the office of the court to the officer whose duty it is to receive such petition. Once that is done the petition is submitted to the Judge by the proper officer with the reeord of the case and a minute for the Judge's signature.

I now come to the word "receive" in the same section. It occurs twice therein— first in the

context "the court to which the petition is so presented shall receive it," and next in the context "If those conditions are not fulfilled it shall refuse to receive it." In the first context in which the word "receive" occurs it is obligatory on the court to receive the petition. The receiving contemplated there is the manual act of accepting the document. It involves no judicial process. When the document is handed over at the office of the court by the petitioner or his proctor in obedience to the requirement that the petition should be presented to the court within a prescribed period the appropriate officer in the office of the court must receive it and submit it to the Judge. In this context "court" does not necessarily mean the Judge himself; it includes the appropriate officer of the court office. The Judge may himself receive the petition of appeal if it is handed to him by the appellant or his proctor; but if it is handed to the appropriate officer of the court instead of to the Judge it is nevertheless received by the court. In the second context "it" means the Judge himself and no other, because the act of refusing to receive the petition is a judicial function which the Judge alone can perform. The Judge has a function to perform, *viz.*, to refuse to receive it if the conditions in the section are not fulfilled. That function is not the manual act of accepting the petition from the appellant or his proctor, but, once the petition has been handed in, the mental act of deciding whether the conditions prescribed by section 754 have been fulfilled. If they have not been fulfilled the Judge must refuse to receive it. There is no time limit for the performance of that function. He can perform it within a reasonable time after the petition of appeal has been lodged at the office of the court. The function may be discharged by making an order rejecting the petition for the reason that the prescribed conditions have not been fulfilled. The document itself should not be returned to the party that lodged it. The effect of the order refusing to receive the petition is that the appellant may not proceed under section 756.

The present practice seems to be, judging by minute (139) quoted above, for the Judge to make an order that the petition be accepted; but there is no requirement of the Code that such an order should be made. No legal consequences attach to such an order. Although learned counsel both for the appellant and for the respondent argued the case on the footing that "receive" in the first context meant received by the Judge, I find myself unable to accept that view, even though there is support for it in the observations of Bertram C.J., in the case of *Fernando vs. Nikulan Appu* (22 N.L.R. 1). With the greatest respect for so eminent and distinguished a Chief Justice of this court I find myself unable to subscribe to those observations which I think are *obiter* and are no part of the *ratio decidendi* of that case. I quote them below—

> "The receipt is the act of the Court, and before receiving the petition the Court must verify the fact that the petition is in time. It is not for the Court to communicate the receipt to the petitioner. It is for the petitioner to ascertain whether his petition has been received or not. In this case it is not clear at what precise time the Judge 'received' the petition. He may well have done so at the end of the day on the conclusion of the Court."

The view of Bertram C.J., does not take into account the words of section 754 (2) which make it obligatory on the court to receive the petition when it is presented regardless of whether the prescribed conditions have been fulfilled or not and also make it obligatory to refuse to receive it if the prescribed conditions are not fulfilled. If "receive" where it occurs first is construed as receive after verifying whether the prescribed conditions have been fulfilled, then the court will not be complying with the requirement embodied in the words "shall receive." Without receiving the document into its hands the court cannot perform the function of "refusing to receive it," because it must examine the document to arrive at its decision. The view of Bertram C.J., also imposes on the appellant the burden of maintaining a watch in order to ascertain when the petition of appeal receives the attention of the Judge in order that he may "forthwith" thereupon tender security. It may also result in shutting out a petition of appeal tendered on the last day if, by any chance, the Judge fails at the end of each day's work in court to stay over to attend to petitions lodged in the course of the day. The construction I seek to place on section 754 (2) enables the court to discharge both the obligations of "receiving" and of "refusing to receive" the petition of appeal while no undue burden is imposed upon the appellant or his proctor.

Now I come to the second question propounded by me—What is the meaning of the word "forthwith" in section 756? Its ordinary meaning is "immediately", "at once", "without delay or intervals." In section 756 the notice of tender of security has to be given forthwith upon the petition being received by the court. The words "under section 754" in section 756

indicate that the word "received" in the latter section bears the same meaning as it bears in the place where it first occurs in the former. The petition of appeal is therefore received by the court for the purposes of section 756 when it is handed to the appropriate officer of the court at its office. Learned counsel for the appellant placed great reliance on the meaning given to the expression "forthwith" in *Fernando vs. Nikulan Appu* (*supra*). Bertram C.J. observes therein—

> "It appears that hitherto the word 'forthwith' has not been in practice strictly construed. I am prepared to take this circumstance into account in considering whether in this particular case the delay has been explained. In all the circumstances I am not prepared to declare that the delay of one day prevents us from holding that the notice was given 'forthwith' within the meaning of the section.
>
> "I think, however, that, as a general rule, it is the intention of the section that the notice should be filed on the same day as the receipt is verified or can reasonably be verified. It is important that this principle should be observed, all the more so as delays may interpose themselves between the filing of the notice in Court and its actual delivery by the Fiscal's officer."

Even according to the view of Bertram C.J., a notice not filed on the *same day* as that on which the receipt by the Judge is verified or can reasonably be verified is not given "forthwith." I have already explained above why I am unable to share the view that in order to give the notice of tender of security it is necessary that the Judge should make an order "receiving" the petition of appeal.

Apart from this difference of opinion I am in respectful agreement with the view that "forthwith" should be construed in the context as meaning the same day on which the petition of appeal is presented to the court and received by it. I use the words "received by it" in the sense which I have explained above. That is also the meaning given to the expression "forthwith" by a Bench of five Judges of this court in the case of *de Silva vs Seenathumma* (41 N.L.R. 241). That Bench was specially constituted by the Chief Justice in 1940 in view of the "mis-apprehension and uncertainty" as to the meaning of section 756. In that case Soertsz J. who delivered the judgment of the court adopted the view of Bertram C.J. in *Fernando vs. Nikulan Appu* (*supra*) that what was intended by the words "give notice forthwith" in the section was not that the notice should be served forthwith but that it should be "tendered or filed" forthwith. But the Judges do not appear to have accepted the view, expressed for the purpose of that particular case, that notice of security given a day after the day on which the petition is presented is given "forthwith." They appear to have preferred the general rule expressed by Bertram C.J. "that notice should be filed the same day" as that on which the petition is received, for, Soertsz J. in summing up the conclusions of the court says, "notice of security, unless waived, must be tendered or filed on the day on which the petition of appeal is received by the court." In neither *Fernando's* case (*supra*) nor *de Silva's* case (*supra*) did the questions that have been raised in the instant case arise for decision. This is the first time that, so far as reported decisions go, this court has been called upon to determine the meaning of the expressions "court" and "receive" in sections 754 (2) and 756.

Now I shall revert to the facts of the instant case. The petition of appeal and the notices of tender of security were lodged in the office of the District Court on the same day and at the same time; but the notices, save the one meant for the petitioner-respondent, were defective in that they informed the other respondents that security would be tendered for the costs of the petitioner-respondent on 19th September, 1957. No notice of tender of security informing the other respondents that security for their costs of appeal would be tendered on 19th September was lodged in the office of the District Court on 14th September.

The notices lodged in the office of the District Court on 16th September were in accordance with form 126 of the First Schedule to the Code and informed each of the respondents that security would be given for the costs of that respondent, but they contained the erroneous statement that a petition of appeal was presented on 16th September whereas the previous notices contained the correct statement that a petition of appeal was presented on 14th September. Learned counsel for the appellant sought to justify the second notice lodged on 16th September as being the correct notice given forthwith, in the sense of within a reasonable time, after the proctor had ascertained the fact that the Judge had received the petition of appeal.

It is therefore necessary to decide the following questions that arise for consideration:—

(*a*) What was the day on which the petition of appeal was received by the court in the instant case?

(*b*) Were the notices of security tendered on the same day?

The petition of appeal bears on its face the seal of the District Court of Colombo with the date "14th September 1957" in the centre of it. The words "Received at 10-35 a.m. today" are written over it and initialled by the writer. The minute in the journal of the same date quoted above shows that the petition of appeal was handed in at the office of the District Court on 14th September, 1957 and submitted on the same day to a Judge of the court who made the orders referred to therein by initialling the minute.

It is common ground that the District Court of Colombo does not ordinarily sit on a Saturday and that 14th September being a Saturday no District Judge was sitting in open court on that day. It is also common ground that, on every Saturday, one of the District Judges is present in his chambers and attends to such work of the court as may be performed in chambers. The minutes (140), (141) and (142) indicate that after minute (139) in the journal was initialled by the Judge in chambers steps were taken to give effect to his orders by issuing a paying-in-voucher for Rs. 50/- and also issuing the notices of security to the Fiscal for service on the respondents. The precepts to the Fiscal to serve the notices of security on the respondents bear the date 14th September, 1957. The minutes (139), (140), (141) and (142) establish that the petition of appeal was handed in at the office of the District Court and that the officer whose duty it was to do so submitted it to the Judge in chambers on 14th September, 1957 and that he made the orders contained in minute (139), and that the steps referred to in minute (140), (141) and (142) of the journal were taken thereafter on the same day.

In my view the petition of appeal was received by the "court" on 14th September, 1957 when it was lodged in the office of the court. The notices of security tendered on the same day informed only the petitioner-respondent that security for his costs of appeal would be tendered on the date specified therein. Certain notices meant for the other respondents were in fact delivered; but they were to the effect that the appellant would tender security for the petitioner-respondent's costs of appeal.

In the case of *Sivagurunathan vs. Doresamy*, (44 C.L.W. 38) this court held that where a statute requires that notice should be given to a party to a suit and indicates the form in which that notice should be given, that notice should comply with the requirements of the statute and should be in the prescribed form. A notice under section 756 must be addressed to the party to whom notice has to be given and delivered to that party and inform him that on the date specified therein security for his costs in appeal will be tendered. Section 756 requires that notice of security should be given to each of the respondents named in the petition of appeal *Katonis Appu vs. Charles and another* (1938) 12 C.L.W. 162; *Sivagurunathan vs. Doresamy* (*supra*).

The appellant has therefore not given notice of security to respondents other than the petitioner-respondent as required by section 756. The second set of notices of tender of security handed on 16th September though properly addressed to the respective respondents were not tendered "forthwith" as they were not given on the same day as the petition of appeal. Now what is the consequence of that failure? This court has authoritatively decided in *de Silva's* case (*supra*) that non-compliance with the section is fatal to the appeal and that it cannot be entertained by this court.

The question that arises next is whether relief under subsection (3) of section 756 can be granted. The subsection reads—

> "In the case of any mistake, omission, or defect on the part of any appellant in complying with the provisions of this section, the Supreme Court, if it should be of opinion that the respondent has not been materially prejudiced, may grant relief on such terms as it may deem just."

Before considering the meaning of the words used in the above provision I shall discuss its ambit. At the time of the introduction in 1921, by amending Ordinance No. 42 of 1921, of the provision now appearing as subsection (3), which was so numbered at the revision of the legislative enactments in 1938, there was and there still is a provision of the Code (s.765) which empowers this court to admit and entertain a petition of appeal from the decree of any original court, although "the provisions of sections 754 and 756 have not been observed." In introducing the provision for relief in subsection (3) the legislature clearly did not intend to make provision for the very matters for which provision already existed in section 765 (1). Therefore in determining the scope of subsection (3) there must be excluded from it those matters which fall within the ambit of section

765 (1). As that provision enables the Supreme Court to admit and entertain a petition in a case where the provisions of section 754 or 756 or both have not been observed, there must be excluded from the scope of subsection (3) all cases of non-observance of or non-compliance with the provisions of section 756. Apart from the above considerations the very words "any mistake, omission, or defect on the part of any appellant in complying with the provisions of this section" seem to exclude from its ambit cases of non-compliance of the provisions of the section.

The view that cases of non-compliance with the provisions of section 756 do not fall within the ambit of subsection (3) is of long standing. In the case of *Silva vs. Goonesekere*, (1929) 31 N.L.R. 184, Fisher C.J. observed—

> "I do not think that this additional paragraph can be held to apply to cases where there has been a substantial non-compliance with the provisions of the section. In my opinion it applies to more or less trivial omissions where it may be said that although the strict letter of the law has not been complied with the party seeking relief has been reasonably prompt and exact in taking the necessary steps."

In the same case Drieberg J. who took the same view quoted the statement of objects and reasons of Ordinance No 42 of 1921 which are as follows :—

> "It has been found lately that a number of appeals have had to be dismissed owing to failure of strict compliance with the provisions of section 756 of the Civil Procedure Code. This non-compliance has in certain cases been in respect of matters not of material importance ; and it is thought well to give the Suprem Court power to waive such failures to comply in cases where the respondent is not materially affected by such waiver."

In *Zahira Umma vs. Abeysinghe et al* (1937) 39 N.L.R. 84, a Bench of three Judges affirmed the view previously expressed that the provision for relief did not extend to cases of non-compliance with the requirements of section 756. Abrahams C.J. who delivered the judgment of the court states—

> "I think, however, that if we gave relief in this case we should be completely ignoring that provision of section 756 which says that notice of security must be given and the fact that no material prejudice has resulted, and I see no reason why in the circumstances we should inquire as to whether it has resulted, cannot be regarded as an excuse for non-compliance with an essential term of section 756. The petitioner says that she did everything she could, but she has not given any excuse for not doing what she should.
>
> "It seems to me that there are two forms of a breach of section 756 in respect of which this Court ought not to give relief. One is when, whether a material prejudice has been caused or not, non-compliance with one of the terms of section 756 has been made without an excuse, and the other is when though non-compliance with an essential term may be trivial, a material prejudice has been occasioned."

This decision has since been followed in *Siyadoris Appu vs. Abeyenayake*, (1938) 13 C.L.W. 22 ; 18 Law Recorder 120, and in *Suppramaniam Chettiar vs. Senanayake and others*, (1939) 16 C.L.W. 41, where de Kretser J. refused to grant relief in a case in which no notice of tendering of security and no security had been given to two of the respondents named in the petition of appeal. He refused to do so on the ground that the provision applies only to formal defects and not to a non-compliance with the requirements of section 756. This was the view taken by Abrahams C.J. earlier in *Katonis Appu vs. Charles and another* (*supra*) wherein he stated—

> "In this connection, I would refer to *Saleem vs. Yoosoof et al* (17 Ceylon Law Recorder 117) and, as this has been complete non-compliance with the provisions of the law, I do not see how it can be excused."

Finally it was confirmed by the authoritative decision of a Bench of five Judges in *de Silva vs. Seenathuma* (*supra*) where it was held that relief under subsection (3) cannot be given in a case in which no notice of tender of security has been given as required by the section. In that case Soertsz J. who delivered the judgment of the court elaborated the view expressed earlier by Abrahams C.J. in *Zahira Umma vs. Abeysinghe* (*supra*) where it was held that relief under subsection (3) cannot be given in a case in which no notice of tender of security has been given as required by the section, thus—

> "The first part of that statement is intended to lay down that where there has been a *total failure* to comply with one of the terms of section 756, relief will not be given even if it should be apparent that no material prejudice has been occasioned to the respondent by such a failure, for premptory requirements of the law must be given full effect."

Having determined its ambit by exclusion of cases of non-compliance I shall now proceed to examine the meaning of the subsection. It is permissible to consult the dictionary when ascertaining the meaning of a word in a statute. Now according to the dictionary (S.O.E.D.) the expressions "mistake," "omission," and "defect" have the following meanings :—

"Mistake" means a misconception of the meaning of something, an error or fault in thought or action.

" Omission " is the act of omitting or fact of being omitted, and " omit " means to leave out, not to insert or include.

" Defect " means the fact of falling short, lack or absence of something necessary to completeness, a fault, flaw or imperfection.

" Mistake " is also discussed in Sweet's Law Dictionary thus : " Although ' mistake ' and ' ignorance ' are strictly speaking not identical the one being positive and the other negative, they are commonly used as convertible terms in law, their effects being identical. " Mistake " may then be defined as a misapprehension as to the existence of a thing, arising either from ignorance in the strict sense, that is, absence of knowledge on the subject, or from mistake in the strict sense, that is, a false belief on the point."

It would appear from the history of the legisaation as set out in the decisions I have examined l bove and the setting in which the subsection occurs that it was not designed to give relief in cases in which the acts, omissions, or defects for which relief is sought are deliberate or are due to negligence or could have been avoided with the exercise of such care as proctors are expected to exercise in the performance of their duties.

The subsection vests in this court a discretionary power to be exercised in cases which fall within its ambit. The existence of a mistake, omission or defect of the kind contemplated in it will by itself not be a ground for the grant of relief. It is not to be given for the mere asking. It would not be advisable to attempt to compile an exhaustive list of cases that fall within the ambit of subsection (3). In our reports there are instances in which relief has been given. The considerations that should govern the grant of relief would depend on the circumstances of each case. The burden on an applicant for relief under the subsection is not less than that imposed on an applicant for leave under section 765. An applicant for relief must, as in the case of an application under section 765, satisfy the court that the mistake, omission, or defect, was due to causes not within his control and that it was not due to his or his proctor's negligence or want of care and also that the respondent has not been materially prejudiced (*Rahuman vs. Mohamed*, 40 C.L.W. 41; *Noris Appuhamy vs. Udaris Appu*, 58 N.L.R. 441). The adoption of any other standard would place a premium on laxity and encourage appellants and their proctors not to devote sufficient attention or attach sufficient importance to the procedure governing appeals.

Now reverting to the instant case it would appear that the appellant's difficulties in this case are entirely due to her proctor's negligence in not examining with care the notices of tender of security lodged with the petition of appeal on 14th September. This court has in a number of cases held that the negligence or mistake of the proctor of a party is not a ground on which relief can be claimed.

In the case of *Rankira vs. Silindu et al* (10 N.L.R. 376) which was an application for leave to appeal notwithstanding lapse of time Middleton J. observed—

> " In this case I am asked to admit a petition of appeal notwithstanding lapse of time, and it is clear that the petition is out of time solely and entirely by the laches of the proctor engaged by the applicant, and I take it when a proctor is retained in an action he becomes the recognized and accredited full agent of the party in the action, and any act of his in the proceedings must be looked upon as an act of the party himself. He is also fortified by the peculiar technical knowledge that his office is clothed with, and if he makes an error, it is to all intents and purposes the error of his client which that client must be responsible for."

The same principle has been laid down in *Silva vs. Goonesekera* (1 A.C.R. 100) and in an unreported case in S.C. Min. Aug. 23, 1907—D.C. Galle 8398, both of which are referred to by Middleton J. In the case of *Julius vs. Hodgson* (11 N.L.R. 25) this court refused to grant relief in a case where an appeal petition was not presented in time owing to the default of the proctor of the party seeking to appeal. This case was followed in *Mendis vs. Mendis and others* (2 C.W.R. 155) where relief was refused against the mistake of the proctor of the party in computing the appealable period. In the case of *Nagendran vs. Algina Peiris* (49 C.L.W. 26) relief under subsection (3) was refused as the default was due to the proctor's incompetence or negligence.

The conclusion I have reached on the main objection makes it unnecessary for me to deal with the other points. But I wish to refer to one of those points as a question of practice is involved. Objection was taken to the execution of the bond hypothecating the money in deposit before the date on which the security was accepted. The appellant offered security by the deposit of Rs. 250/- and hypothecation of that sum by bond. Before the court can accept the security the perfected bond must be submitted

to it. Section 757 also indicates it. My view finds support in the cases of *Kandappan vs. Elliot* (1 S.C.R. 37 ; 2 C.L.R. 17) and *Mendis vs. Jinadasa* (24 N.L.R. 188) wherein De Sampayo J. says—

> " When the rest of the section is read with the expression 'accepted,' it appears clear that 'acceptance' really implies 'completion' of the security within the time limit, namely, twenty days. It cannot be completed unless the bond provided for in section 756 is executed."

The objection based on the ground that the hypothecary bond was executed before the acceptance of the security by the court is therefore not sound.

Learned counsel for the appellant submitted that it was highly undesirable that parties should raise objections of this nature in this court over a year after the petition of appeal was presented. He submitted that objection to the failure to give security in the manner required by section 756 should be raised in the court of trial, which is empowered to decide the matter and hold that the appeal has abated in a case where the petitioner has failed to give security and to make the deposit as provided in the section. I am inclined to agree with learned counsel that any objection that can be taken before the trial Judge should be taken before him, before the petition of appeal is forwarded to this court, and that respondents should not wait till the hearing of the appeal to do so. Where an objection is successfully taken in the lower court the record with typewritten copies of the briefs will not be forwarded to this court, nor will it be necessary for the appellant to go to the expense of retaining counsel to argue the appeal. We shall therefore in future not only not allow costs to a respondent who has failed to take an objection which he may properly have taken before the trial Judge and which he successfuly takes here in appeal, but also order him to pay the appellant the costs he would have been saved if the objection had been taken timeously. I am fortified in the view I have expressed above by the judgment of Bertram C.J. in *Kangamy vs. Ramasamy Rajah* (21 N.L.R. 106)—

> " I think it is desirable if it is in the power of the party to raise the point in the District Court, that he should do so there, and that, if he prefers to wait until the case comes to the Supreme Court before taking the point, he should then run the risk of losing his costs."

There is one other matter to which I should like to refer and that is the form in which applications for relief under section 756 (3) should be made. There is no uniform practice. In some cases, as in the instant case, the appellant's counsel makes the application orally, in the course of his argument of an objection taken to the hearing of the appeal, and invites the court to grant relief in the event of the respondent's objection being upheld. This court is at a disadvantage in dealing with such an oral application. The decision of an application under section 756 (3) involves the decision of questions of fact. The material necessary for the decision of such questions should be placed before the court in an affidavit or affidavits which should be attached to the petition. If the respondent does not admit the appellant's version of the facts he should be afforded an opportunity of filing a counter affidavit or affidavits. This court cannot decide such a question of fact as whether " the respondent has not been materially prejudiced " without the necessary material before it. It is therefore in the interests of all parties, and essential for the proper determination of the issues involved in an application for relief under subsection (3), that a written petition supported by an affidavit or affidavits shall be made by a party seeking relief. The burden is on the party seeking relief to establish that his case falls within the ambit of subsection (3) and to place before the court all the facts on which he relies for the grant of relief. That this is the proper procedure to be followed in obtaining relief is also indicated in the cases of *Zahira Umma vs. Abeysinghe* (*supra*) and *Rahuman vs. Mohamed* (*supra*). In the instant case the appellant tendered an affidavit from her proctor which we did not entertain, as it was for the purpose of showing that the action he took was correct and according to law, and not for the purpose of the application for relief.

Learned counsel for the appellant strenuously maintained that there had been no mistake, omission, or defect, on her part, and at the same time asked for relief. It seems to me that the basis of an application under subsection (3) is the existence of an admitted mistake, omission or defect. The applicant should in seeking relief admit the fact that a mistake had been made or that there had been an omission or that a defect exists and state what it is and ask for relief against such mistake, omission or defect.

Whether a mistake or omission has been made by the appellant is a matter within his knowledge. If he does not admit by way of affidavit that he has made a mistake or that an omission has occurred then there would be no material

before the court that his act or omission is not deliberate. The court does not lend its aid even under subsection (3) to those who deliberately flout the requirements of the law. The same principle would govern the grant of relief against a defect.

The appeal is rejected. We make no order for costs as the main objection is one that the respondent was free to take in the court below.

Before I part with this judgment I must not omit to refer to the unsatisfactory manner in which the journal of this action had been maintained. Going by the records that have come up before me in appeal I cannot escape the conclusion that Judges of first instance do not seem to realise that it is their duty to maintain a neat, legible and accurate journal in each action. They should supervise and control the recording of minutes in the journal and not leave it entirely to their clerks. Section 92 of the Civil Procedure Code declares that the journal shall be the principal record of the action, and that section requires that the Judge shall sign and date each minute. The signatures to the minutes in this case are illegible and the minutes are not dated. Judges should not disregard express provisions of the Code. On the contrary they should take pains to observe them. They should write their signatures legibly so that it will appear that the minutes have been signed by the Judges themselves.

In the instant case especially in regard to the entries material to this appeal, the minutes have been so carelessly, illegibly, and untidily written with erasures, cancellations and corrections that the journal does no credit to the premier District Court of this country. The irregularities are so many that learned counsel for the petitioner-respondent suggested that some person interested in the appellant had been at work. I am unable to say that the suggestion is entirely unfounded especially as the portion of the all important minute (139) where the date should have appeared under the Judge's signature is not there.

I hope that Judges of first instance will take to heart these remarks of mine and give the journal of an action or proceeding the attention that it deserves as the principal record of the action.

PULLE, J.

Before the heaing of the appeal in this case the petitioner-respondent gave to the Proctor for the 1st respondent, who is the appellant, a written notice dated 22nd November, 1958, in which were formulated the grounds on which it was proposed to take objection to the validity of the appeal. The petition of appeal bearing the date 14th September, 1957, was placed in the record on the same day and submitted to an additional District Judge in Chambers and the order made thereon, also on the same date, is that it be " accepted." The argument proceeded on the basis that the " receiving " of a petition of appeal for the purpose of section 754 (2) is a judicial act and that in the present case that act was performed when the Judge signed the journal entry No. 139. Section 756 (1) of the Civil Procedure Code provides, *inter alia*.

> " When a petition of appeal has been received by the court of the first instance under section 754, the petitioner shall forthwith give notice to the respondent that he will on a day to be specified in such notice, and within a period of twenty days . . . . from the date when the decree or order appealed against was pronounced . . . tender security as hereinafter directed for the respondent's costs of appeal, and will deposit a sufficient sum of money to cover the expenses of serving notice of appeal on the respondent."

Along with the petition of appeal the Proctor for the appellant tendered for service, through the Fiscal, on the petitioner-respondent and his Proctor and on the other respondents to the appeal notices informing them of the tender of security. On the same day on which the petition of appeal was accepted by the Judge, namely, the 14th September, 1957, these notices were placed in the hands of the Fiscal who took the usual steps to have them served. Except the notices intended for the petitioner-respondent and his Proctor the rest were admittedly bad, because the notice intended for the others stated that the appellant would tender security not for their costs of appeal but for the costs of the petitioner-respondent.

On Monday, the 16th September, 1957, the appellant filed a motion and moved for fresh notices tendering security in Rs. 250/- for the costs of the petitioner-respondent and separate security in the sum of Rs. 250/- for the costs of the other respondents. The submission on behalf of the petitioner-respondent and the 5th respondent is that the appellant did not comply with the imperative provision in section 756 (1) in that he failed " forthwith " to give the specified notices when the petition of appeal had been received by the Judge on the 14th September and that, therefore, the appeal should be rejected. This submission was based largely on the decision given by a bench of five Judges in

De Silva vs. Seenathuma et al, (1940) 41 N.L.R. 241. The ruling of this bench was that " notice of security, unless waived, must be given forthwith, that is to say, must be tendered or filed on the day on which the petition of appeal is received by the Court."

The second submission that the appeal should be rejected is based on that part of section 756 which provides for giving notice of appeal after the security tendered by the appellant had been accepted. It reads as follows :

> " And in the event of such security being accepted . . then the court shall immediately issue notice of appeal together with a copy of the petition of appeal, to be furnished to the court for that purpose by the appellant, to the Fiscal for service on the respondent who is named by the appellant in his petition of appeal, or on his Proctor if he was represented by a proctor in the court of the first instance, and shall forward to the Supreme Court the petition of appeal together with all the papers and proceedings of the case relevant to the decree or the order appealed against."

It is alleged that the appellant tendered for service along with the notices of appeal two copies less of the petition of appeal than were needed for service on the petitioner-respondent and his Proctor and on the other respondents, with the result that all the respondents could not have been served with copies of the petition of appeal.

Thirdly there was a group of objections associated with the actual tender and acceptance of security for the cost in appeal of all the parties opposed to the appellant. The notices handed to court on the 14th and 16th September for service specified 19th September as the day on which the appellant would tender security for costs. It was not done on that day because all the notices —there were two sets of them—could not be served before that day. It may here be mentioned that the 2nd to 10th respondents to the petition filed by the petitioner-respondent contesting the will did not at any time in the court below enter an appearance and, therefore, difficulties with which one is familiar were bound to arise in attempting to serve processes on parties at addresses not given by the appellant but by the petitioner-respondent. It so happened in this case that two of the respondents were not found at the places to which the notices were directed, so that when the notices were ultimately served the date for tendering security, namely, 19th September— which could not be altered—had already passed. In regard to the tendering of security it was contended that as the bond hypothecating the two sums of Rs. 250/- had been executed on the 23rd September and the court " accepted " the security on the 25th September there had been a failure to " tender " security prior to its acceptance by court. Assuming that the notices of tender of security had been given "forthwith " in terms of section 756 it could not be argued, having regard to the events which occurred after the notices were handed in for service, that the appeal had necessarily to be rejected. Provision is made in sub-section 3 of section 756 that

> " In the case of any mistake, omission, or defect on the part of any appellant in complying with the provisions of this section, the Supreme Court, if it should be of opinion that the respondent has not been materially prejudiced, may grant relief on such terms as it may deem fit."

It was not necessary for the appellant to invoke the relief provided by this sub-section because in my opinion the bond which had been duly executed on 23rd September, could become valid security in the sense that the obligor would become liable at the time the court accepted it and incorporated it in the record. I do not see any merit in the argument that there was a failure to comply with section 756 (1) solely on the ground that the execution of the bond had taken place before the court made its order accepting the security already embodied in a bond which had been executed. The requirement is that on the due date the appellant has to tender security and not make an offer to tender it or otherwise express a willingness to execute later an instrument securing the costs in appeal of the opposite parties.

There remain for consideration the first two objections which, if upheld, would according to the decision in *De Silva vs. Seenathuma et al*, (41 N.L.R. p. 241, at p. 249) be fatal to the appeal. Of these objections the second raises questions of a factual character and I shall deal with it at once.

The petitioner-respondent who in the District Court petitioned against the appellant taking any benefits under the will named ten respondents of whom the first named is the appellant. The latter was apparently advised to give notice of appeal to both the petitioner-respondent and his Proctor, so that eleven notices of appeal, with a copy of the petition of appeal attached to each, had to be furnished to court. Eleven notices of appeal were sent for service under the authority of three Precepts addressed to the Fiscal. There was one Precept relating to

service on the 5th respondent who was then residing in Nuwara Eliya District. The third Precept at page 703 of the record related to the service of notices on the petitioner-respondent and his Proctor and on the 2nd, 3rd, 4th, 6th, 8th, 9th and 10th respondents. This Precept refers to nine notices of appeal but only to *seven* copies of the petition of appeal from which it is sought to be inferred that nine notices of appeal with only seven copies of the petition of appeal had been furnished to court and that, therefore, there was a breach of section 756 (1). I am not prepared to reject the appeal on this ground for the following reasons :

(*a*) It is unlikely that, if the Fiscal was asked to serve nine notices with seven copies of the petition of appeal, he would have refrained from calling the attention of the court to the fact that two copies were short. There appears to be no query by the Fiscal.

(*b*) There is not even an affidavit from any one of the nine persons, notices on whom were covered by the third Precept, stating that when the notice of appeal was served there was not attached to it a copy of the petition of appeal.

(*c*) Over a year elapsed between the service of notices and the formulation of objections and it is now too late to enter on an investigation to ascertain whether two of the respondents were served with notices unaccompanied by copies of the petition of appeal.

(*d*) An error in stating the number of copies of the petition of appeal which accompanied the third Precept cannot reasonably be ruled out.

I come now to the most important of the objections, namely, the first. As stated earlier the notices regarding tender of security which were filed on 14th September, save the two notices relating to the tender of security for the costs of the petitioner-respondent, were admittedly bad. It was submitted to us on behalf of the petitioner-respondent that the appellant's right to have his appeal heard was conditioned on his conforming strictly to the requirement in section 756 (1) that upon the petition of appeal having been received by court the petitioner shall " forthwith " give notice to the respondents of the tender of security within twenty days reckoned from the date of the order appealed from. It is said that the appellant did " forthwith " give notice but that notice was bad and no question could arise of giving another notice " forthwith " on 16th September. A large part of the argument involved the examination of both the original and the typed copy of the journal entries which indicated that on the 14th September itself the appellant's Proctor had obtained a paying in voucher (referred to in the entries as P.I.V.) to deposit Rs. 40/- to cover the expenses of serving notices of appeal on the respondents. This sum was deposited at the Kachcheri and the receipt tendered to court on the same day. From this circumstance it was sought to be argued that the appellant's Proctor must have known on 14th September that the District Judge had made order receiving the petition of appeal. It was also argued that the Proctor sought to conceal the mistake he had made in drawing up irregular notices of tender of security filed on the 14th September, by representing in the notices filed on the 16th September for service that the petition of appeal was presented to court on the latter date. Our attention was also drawn to certain alterations in the journal entries relating to the P.I.V. which, according to learned counsel for the petitioner-respondent, reinforced his contention that the Proctor for the appellant knew on the 14th itself of the order made by court. It is not possible, judging by the alterations in the journal entries, for me to say with any degree of confidence that the circumstances point unmistakably to the Proctor's knowledge on the 14th itself of the order made on that day. I am, therefore, content to deal with the case on facts which are beyond dispute. It cannot be contested that when the appellant's Proctor tendered at the office of the District Court the set of papers minuted in the journal against entry No. 139 he foresaw the possibility of the Judge on that day itself receiving the petition of appeal and making the ancillary order to issue the notices tendering security. The notices were left with the court with no other object than that of complying with section 756 (1) of giving them " forthwith " upon the court accepting the petition of appeal.

It was submitted to us on the authority of *Fernando et al vs. Nikulan Appu et al*, (22 N.L.R. 1) that the tendering of fresh notices of security on the 16th September was a compliance with the requirement to do " forthwith " the act of giving notice. The argument was that the set of notices, handed in on the 14th September did not have any legal validity and could be ignored and that, in the absence of evidence that the appellant's Proctor had verified on the 14th

itself that the Judge had made order "accepting" the petition of appeal, he had given the necessary notices "forthwith." In *Fernando's* case the petition of appeal was tendered on 5th February, 1920, and the notice was filed on 7th February, 1920. Bertram C.J., said,

> "It is not for the Court to communicate the receipt to the petitioner. It is for the petitioner to ascertain whether his petition has been received or not. In this case it is not clear at what precise time the Judge *received* the petition. He may well have done so at the end of the day on the conclusion of the Court. On this supposition the petitioner could have ascertained the fact of the receipt the next day and could on the same day have filed his notice . . . ."

He went on to add,

> "I think, however, that, as a general rule, it is the intention of the section that the notice should be filed on the same day as the receipt is verified or can reasonably be verified. It is important that this principle should be observed, all the more so as delays may interpose themselves between the filing of the notice in Court and its actual delivery by the Fiscal's officer."

In the present case what the appellant thought were correct notices were filed along with the petition of appeal but we were asked to ignore them on the ground of their invaildity and look to the notice filed on 16th September as being the first and proper act of giving notice "forthwith." It is at this point that I am unable to find an adequate answer to the contention of learned counsel for the petitioner-respondent. The practice is long standing that the Proctor for an appellant hands to the Secretary or other official of the court the petition of appeal and the necessary notices for service through the Fiscal. If the appeal is in time the Judge signs the minute in the journal which also contains words to the effect, "Accept petition of appeal, issue paying-in voucher and notices tendering security." Had the notices of the 14th September not been defective it could not possibly be argued that there was a failure to comply with section 756 (1) because they had been tendered before the act of "receiving" by the court. It may here be repeated that two of the notices, namely, the one intended to be served on the petitioner-respondent and the other on his Proctor, were quite in order. Counsel for the petitioner-respondent put his argument in this form that there cannot be acts done "forthwith" twice, once on the 14th and once again on the 16th. The contention is that the appellant had "forthwith" tendered notices of security on the 14th but it turned out that all but two were not the notices required to be given by the section. Assuming that in *De Silva vs. Seenathumma et al*, (41 N.L.R. 241) the Bench of five Judges approved the ruling in *Fernando vs. Nikulan Appu*, (22 N.L.R. 1), the latter case is distinguishable on the facts. I have, therefore, with considerable reluctance come to the conclusion that the first objection must be upheld.

Before I conclude I wish to make some observations. Within three weeks of the date of the judgment under appeal the appellant had given adequate security for the costs of appeal of the petitioner-respondent and the other respondents. It could hardly be urged that by reason of the appellant tendering on the 16th and not on the 14th a set of correct notices the respondents have been materially prejudiced. Having regard to the wide terms in which sub-section 3 of section 756 is expressed I would be inclined to grant relief to the appellant but I am precluded from doing so by the decision in *De Silva's* case which has laid down that the failure to tender notice of security contemporaneously with the receipt of the petition of appeal by the Judge is fatal to the appeal and not curable by sub-section 3. *De Silva's* case was decided in 1940 and it has since been consistently followed, even though a decision on all the points enumerated at p. 249 of 41 N.L.R. was not necessary for the disposal of the preliminary objection raised in that case.

I agree to the order proposed by my Lord, the Chief Justice.

Appeal rejected.

Present : WEERASOORIYA, J., AND K. D. DE SILVA, J.

CHARLES COSTA *vs.* D. G. WIJEMANNE

S. C. 76 and Application No. 210 in D. C. Panadura Case No. 4824

Argued on : 27th and 28th January, 1959.
Decided on : 6th August, 1959.

Appeal—Abatement—Petition of Appeal and Notice of Security filed on the same day—Cash security deposited in Court before returnable date of notice—Acceptance of security in court on notice

returnable date by Proctor of plaintiff-respondent—Bond hypothecating security filed same day—Bond perfected before returnable date of notice— Bond executed in the presence of Justice of the Peace—Validity of security—Civil Procedure Code, Section 757.

The defendant-appellant filed on 14/12/1956 a petition of appeal and a notice on the plaintiff-respondent tendering him a security of Rs. 250/-. The Court ordered the issue of notice of security and made it returnable on 4/1/1957. A sum of Rs. 250/- was deposited in Court on 12/12/1956.

On 4/1/1957 the proctor for plaintiff-respondent accepted the security tendered in Court, whereupon a bond hypothecating a sum of Rs. 250/- was filed and the Court ordered the issue of the notice of appeal. The bond in question had been executed on 31st December, 1956, a date anterior to the notice returnable date, and in the presence of a Justice of the Peace.

The plaintiff-respondent sought to abate the appeal on the ground :—

(*a*) that the bond had been perfected before the security had been accepted by the Court, and therefore was not valid.

(*b*) that the bond was not a valid hypothecation as it did not conform to the provisions of section 757 of the Civil Procedure Code. Section 757 requires that hypothecation of immovable property or money as security for costs should be executed before the Judge, or the Secretary or the Chief Clerk of the Court. It does not provide for the execution of such bonds before a Justice of Peace.

Held : That the trial judge was correct in allowing the application for abatement of the appeal on both the grounds.

Cases cited : *Fernando vs. Fernando* 23 N.L.R. 453.
De Silva vs. Seenethuma 41 N.L.R. 241.
Ranasinghe vs. Pieris 57 N.L.R. 538.
Demodera Tea Company Ltd. vs. Pedrick Appu 22 N.L.R. 381
Mohammud Thambi vs. Pathumma 1 Ceylon Law Recorder 26.
Queen's Advocate vs. Thamba Pillai (1859) 3 Lorenz Reports 303.

H. V. Perera, Q.C., with *E. A. G. de Silva*, and *M. L. de Silva*, for the defendant-appellant.

C. Thiagalingam, Q.C., with *T. P. P. Goonetilleke*, for the plaintiff-respondent.

K. D. DE SILVA, J.

This is an application by the defendant petitioner for the revision of the order made by the District Judge, Panadura, on April 2, 1957 abating his appeal filed on December 14, 1956 in D.C. Panadura Case No. 4824. There is also an appeal from this order. It is appeal No. 76 which was taken up with this application. Judgment was entered for the plaintiff respondent on December 14, 1956. On the same day the defendant petitioner tendered a petition of appeal which was accepted by Court. Thereafter his proctors filed on the same day the notice of security calling upon the respondent to take notice that the appellant would on the 4th day of January, 1957 (or so soon thereafter as is possible) move to tender security by depositing in Court to the credit of the case a sum of Rs. 250/-. Order was made to issue notice of security returnable on 4-1-1957. The appellant's proctors also obtained a deposit note from the Court on December 12, 1956 to deposit a sum of Rs. 250/-. This sum was deposited in the kachcheri and a kachcheri receipt was obtained and filed in Court on the same day. On January 4, 1957 which was the returnable date of the notice of security the proctor for the plaintiff respondent appeared in Court and stated that he was accepting the security. The notice had already been served on him personally. Immediately after the respondent's proctor expressed his willingness to accept the security tendered, a perfected bond hypothecating the sum of Rs. 250/- was filed and order was made to issue notice of appeal. The bond in question was signed by the appellant on December 31, 1956 at Colombo in the presence of a Justice of the Peace. On April 2, 1957 the respondent's proctor moved that the appeal be abated for the reasons set out in the motion. The matter was fixed for inquiry and the learned District Judge having heard Counsel who appeared for each party made his order abating the appeal for the reasons (1) that the bond had been perfected before the security had been accepted by the Court and (2) the bond in question is not a valid hypothecation as required by section 757 of the Civil Procedure Code. The learned District Judge considered himself bound by the decisions in *De Silva vs. Seenethumma* 41 N.L.R. 241 and *Ranasinghe vs. Pieris* 57 N.L.R. 538 on the question whether a bond perfected

before the acceptance of the security by the Court is valid or not. In the former case a Divisional Bench held that it was irregular to accept the security tendered before the notices of security were served on all the respondents. But, in that case relief under sub-section 3 of section 756 was granted with reluctance because material prejudice had not been caused to the respondents. In the latter case I held, sitting alone, that the security bond can be perfected only after the notice of security had been served on the respondent and the security has been accepted by Court. In that case the security bond had been perfected before the service of the notice of security and before the acceptance of the security by the Court and I refused to grant relief under sub-section 3 of section 756 C.P.C. In the earlier case Soertsz J., while granting relief under that sub-section, stated that that decision did not mean that in future cases relief would necessarily be given in similar circumstances. In the case of the *Demodera Tea Company Ltd. vs. Pedrick Appu* 22 N.L.R. 381, De Sampayo J. held that the acceptance of the security was a judicial act and should be evidenced by an order of the Court. In the instant case it was contended by Mr. H. V. Perera, Q.C. that the bond had been perfected after the security had been accepted by the Court. According to him the bond in question must be considered to have been perfected only after it was tendered to Court although the bond itself was signed on December 31, 1956 in the presence of a Justice of the Peace. I am unable to agree with that view. The date of the bond is the date on which it was signed although it was tendered to Court only on January 4, 1957.

The object of giving notice of security as contemplated by section 756 is to afford an opportunity to the respondent to satisfy himself that the security proposed to be tendered is adequate if it is to be given in cash or if it is proposed to be given by hypothecating immovable property that the amount of the security is adequate and also the title to the property intended to be hypothecated is sound. Therefore if the security is to be given in cash and the amount of such security is adequate no prejudice would be caused to the respondent by the acceptance of such security even before the notice of security has been served on him although it would amount to an irregularity. It is also well known that in most District Courts there are fixed schedules of security for costs prepared by Judges in consultation with and the approval of the proctors habitually practising in those Courts and those schedules are strictly adhered to. It was not suggested that the security tendered in this case by the appellant was insufficient. Therefore I am prepared to reconsider my earlier decision (57 N.L.R. 588) with the view to the granting of relief under sub-section 3 of section 756. But unfortunately for the appellant, the 2nd objection is clearly entitled to succeed. As stated earlier this bond was signed before a Justice of the Peace. There is no provision for the execution of bonds hypothecating movable property under section 757 before a Justice of the Peace. In *Mohammud Thambi vs. Pathumma* 1 Ceylon Law Recorder 26 an appellant tendered a security bond hypothecating immovable property signed by the obligor before the Chief Clerk of the District Court. Objection was taken to this bond because it was not executed in the manner prescribed by Ordinance No. 18 of 1940 or Ordinance No. 17 of 1852. This objection was rejected by Bertram C.J. who stated that the bond in question had been executed in accordance with a practice which had always prevailed for a long time past in our District Courts. He observed "We should hesitate very long before giving a decision contrary to that general practice." Again the same Chief Justice gave effect to that long standing practice in *Fernando vs. Fernando* 23 N.L.R. 453. In that case the proctor for the appellant executed in his office a bond by hypothecating immovable property and tendered it to Court. Objection was taken to it on the ground that it was not executed either before the Judge or the Secretary in accordance with the established practice. That objection was upheld. In doing so the learned Chief Justice referred to the judgment of the Full Court in *Queen's Advocate vs. Thamba Pulle* 1859, 3 Lorensz Reports 303 and stated "That case established an exception to the general statutory rule that every mortgage of immovable property must be executed in accordance with the requirements of Ordinance No. 7 of 1840. The Court in establishing that exception said that the provisions of section 2 of the Ordinance No. 7 of 1840 evidently referred to conventions between parties and not to judicial hypothecs constituted as this is by the order of the Court. That exception has ever since been recognized. The question is what did the Court mean by establishing it. I think it meant to rule that the requirements of section 2 of the Ordinance No. 7 of 1840 were not intended to apply to hypothecary bonds executed as an incident in Judicial procedure before the Court." The effect of the bond under section 757 hypothecating the money in deposit is to create a

judicial hypothec over that money. Surely, if in the matter of hypothecating immovable property under section 757 the bond has to be executed before the Judge or the Secretary or the Chief Clerk, as the case may be, by parity of reasoning, a bond hypothecating money as security for costs should also be executed in the same manner. This bond has not been executed either before the Judge or the Secretary and therefore section 756 (1) read with section 757 has not been complied with. The application is refused with costs. Appeal No. 76 is dismissed without costs.

WEERASOORIYA, J.

I agree.

Application refused.
Appeal dismissed.

Present : H. N. G. FERNANDO, J., AND T. S. FERNANDO, J.

RANDOMBE DHARMAWANSA THERO *vs.* (1) RUPASINGHE MUDIYANSELAGE UKKU BANDA and two others (as Trustees of the Sri Sugatha Samodhaya Society, Kilinochchi).

S. C. 97 (*F*)/*L* 1957—*D. C. Chavakachcheri No.* 964

Argued on : 10th and 11th December, 1958.
Decided on : 24th March, 1959.

Buddhist Temple—Land held by P under a Crown permit—Structures erected on the land by a Society for establishing a Buddhist Temple—Land dedicated to the Sangha by P and officers of the Society—Land at the time of dedication in the name of P only—Transfer of the rights by the Crown to plaintiffs-respondents as "trustees of the Society" after dedication— Validity of Title.

On a land which was held by one P under a Crown permit, buildings were erected for the purpose of establishing a Buddhist temple. The Plaintiffs-respondents and P, as members of a Society formed to further this object, dedicated this land to the Sangha by writing and placed in charge thereof the defendant's predecessor as *Viharadipathi*. The deed of dedication referred to the land as belonging to P having been purchased through the Society. At the time of dedication the land was held by P only, but was transferred thereafter to the plaintiff-respondents "as trustees of the Society" under a lease by the Crown.

The plaintiff-respondents instituted an action as 'trustees' of the Society claiming title under the lease granted to them by the Crown.

The trial judge allowed the plaintiffs-respondents claim on the ground that the property did not become *Sanghika* as the donors did not have the necessary alienable interest in the land.

Held : That the action must be dismissed for the reason (*a*) That the plaintiffs-respondents must not be allowed to derogate from their grant. The Society had made a grant on the basis that it was the owner of the land. It cannot derogate from that grant by setting up a title of the Crown and its own leasehold interest under the Crown.

(*b*) That a dedication once made is not rendered ineffective by the absence of a notarial document executed in accordance with the Prevention of Frauds Ordinance.

Cases referred to : *Tissera vs. William* 45 N.L.R. 358.
Saranankara Unnanse et al vs. Indajoti Unnanse et al 20 N.L.R. 385 at p. 396.
Wickremesinghe et al vs. Unnanse et al 22 N.L.R. 236.
Dhammavisuddhi Thero et al vs. Dhammadassi Thero 57 N.L.R. 469.

N. E. Weerasooriya, Q.C., with *H. W. Jayawardene, Q.C.*, *P. Ranasinghe*, and *M. L. de Silva*, for the defendant-appellant.

Sir Lalita Rajapakse, Q.C., with *T. B. Dissanayake*, and *D. C. W. Wickremesekera*, for the plaintiffs-respondents.

H. N. G. FERNANDO, J.

The three plaintiffs instituted this action for a declaration that they are entitled to the possession of the land in dispute and for the ejectment of the defendant therefrom. It is clear that the land is the property of the Crown, and that in the year 1947 one Peduruappuhamy was the tenant of the land under a permit from the Crown.

It would appear that a Society called the Sri Sugatha Samodhaya Society was formed in 1938

with the object of establishing a Buddhist temple at Kilinochchi, and funds were gradually collected for that object. In or before the year 1947, the Society commenced to put up temporary structures on the land held by Peduruappuhamy under his Crown permit, the expectation being that the Society would obtain the consent of the appropriate authority to a transfer of the rights under the permit. The Government Agent was informed of these wishes of the Society by letter dated 22nd November, 1947.

The trial Judge has held on the evidence that the land was dedicated to the Sangha by the members of the Society " under the presidency of Randompe Somasiri Tissa", and the documents make it clear that the ceremony of dedication took place on 23rd November, 1947. It is quite beyond doubt that the Society intended Somasiri Tissa to be the *Viharadipathi*, and that the defendant monk was subsequently placed in charge of the temple by Somasiri Tissa. Despite these circumstances the learned Judge was constrained to hold that the property did not become *Sanghika*, for in his view the donors " did not have the necessary alienable interest in the land."

The matter of the transfer of rights in the land from Peduruappuhamy appears to have involved the usual delays, and it was not until 1951 that a lease was granted by the Crown to the three plaintiffs, " as trustees of the Society." In consequence of certain disputes between the defendant on the one hand, and the plaintiffs or the Society on the other, the plaintiffs instituted this action in 1955 relying on the right to possession conferred on them by the Crown lease, and averring that they do so " as Trustees " of the Society.

The writing dated 23rd November, 1947, described as a " deed of dedication " is signed by Peduruappuhamy and all the officers of the Society. It refers to the land in question as being land " *belonging to Peduruappuhamy, ... having been purchased through the Society . . . . .* for the purpose of erecting a Buddhist monastery." There is no representation here that the land is the property of the Crown, but on the contrary a representation that it is held by Peduruappuhamy on behalf of the Society. A report subsequently presented to and adopted by a meeting of the Society confirms that the land was duly dedicated to the Maha Sangha of the Amarapura Sect. In effect therefore, the plaintiffs, who claim in this action to represent the Society, are now attempting to contradict the representation made in 1947 that the land was held in the name of Peduruappuhamy for and on behalf of the Society. In my opinion, the simple answer to this claim is stated in the maxim *allegans contraria non est audiendus.*

The matter is put in a slightly different form in the English Law, namely that " a man shall not derogate from his own grant." The Society having in 1947 made a grant on the basis that it was owner, cannot now derogate from that grant by setting up the title of the Crown and its own leasehold interest under the Crown. In these circumstances, it is scarcely necessary for the defendant to rely on the decision in *Tissera vs. William*, 45 N.L.R. 358, to the effect that a donee who is in possession of property gifted to him may avail himself of the *exceptio doli* when he is sued by the donor or a person claiming under the donor.

Another argument raised at the appeal by counsel for the plaintiff has to be dealt with briefly, namely that, although the ceremony of dedication has a religious significance, a dedication is in law ineffective unless it is accompanied by a notarial document executed in accordance with the Prevention of Frauds Ordinance. Counsel cited no precedent in support of this contention, and indeed there are numerous decisions of this Court which negative it. In *Saranankara Unnanse et al vs. Indajoti Unnanse et al*, 20 N.L.R. 385 at page 396, Bertram C.J. accepted the view that property becomes *Sanghika* by virtue of the formal ceremony of dedication. In *Wickremesinghe et al vs. Unnanse et al*, 22 N.L.R. 236, there was no evidence of any notarial transfer, but the Court nevertheless considered whether the property had become *Sanghika* through dedication and decided that no dedication had taken place. In the very recent case of *Dhammavisuddhi Thero et al vs. Dhammadassi Thero*, 57 N.L.R. 469, the present Chief Justice held that property was *Sanghika* although no notarial document was produced in proof of a transfer to the Sangha or to a particular priest on behalf of the Sangha.

For the reason set out above, the judgment of the District Court declaring the plaintiffs entitled to possession of the land in dispute and directing the ejectment of the defendant must be set aside and order made that the plaintiffs' action be dismissed with costs.

The defendant-appellant will be entitled to the cost of this appeal.

T. S. FERNANDO, J.

I agree.

Dismissed with costs.

Present : K. D. DE SILVA, J. AND H. N. G. FERNANDO, J.

AHAMED THAJUDEEN *vs.* MUSTAPHA NEINA MARIKKAR PATHUMUTTU NATCHIYA AND OTHERS

S. C. No. 908 - 909—*D. C. Matara Case No.* 16216

Argued on : 3rd, 4th, 5th, 6th, and 19th March, 1959.
Decided on : 18th December, 1959.

Partition Action—Title—Two parallel sets of deeds—Court deciding on prescriptive title without considering legal or paper title—Court's duty in such a case—Burden of proof—Need to decide legal or paper title first—Mala fide possessors—Improvements, useful but not necessary—Are they entitled to compensation.

Held : (1) That when the legal title and a title based on prescription are in issue, the Court should first make a genuine effort to discover in which party the legal title is vested. If neither party has succeeded in establishing it, the Court should then proceed to decide the case on the issue of prescription.

(2) That the burden of proof of prescriptive title depends on the question of legal ownership.

(3) That *mala fide* possessors are not entitled to compensation for improvements made by them, which, though useful are not necessary.

Cases cited : *Dissanayake vs. Dingihamy*, 17 C.L. Rec. 83.
Karunadasa vs. Abdul Hameed, 59 N.L.R. 353.
General Tea Estates Co. vs. Pulle, 9 N.L.R. 98.

E. B. Wickramanayake, Q.C., with *A. F. Wijemanne*, for the plaintiff-appellant in Appeal No. 909.

M. Markhani, for the 43rd defendant-appellant in Appeal No. 908.

N. E. Weerasooriya, Q.C., with *D. R. P. Goonetilleke*, for the 8th to 12th and 15th defendants-respondents in both Appeals.

K. Herat with *S. D. Jayasundera*, for the 13th and 14th defendants-respondents in both Appeals.

Sirimevan Amarasinghe with *R. D. B. Jayasekera*, for the 29th defendant-respondent in both Appeals.

K. D. DE SILVA, J.

Ahamed Thajudeen, the plaintiff, instituted this action on May 1, 1944 for the partition of the field called Hallajilebbegemahawila *alias* Mahawilakumbura depicted in plan No. 621 filed of record marked X. The extent shown in the plan is 28 acres and 33 perches.

According to the devolution of title set out by the plaintiff the original owner of this field was M. L. U. Idroos Lebbe Marikkar, Mudaliar (hereinafter referred to as Idroos) who died leaving 4 sons and 2 daughters. The four sons were Omaru, Ismail, Mustapha and Mohamadu Neina while the two daughters were Pathu Muthu and Seinambu the latter of whom died without marriage or issue. It would appear from the deed P1 of October 20, 1893, that on the occasion of the marriage of Mustapha his father had verbally gifted this property to him. This deed which was executed by Omaru and Ismail in favour of their brother Mustapha purports to confirm that gift. The other children of the original owner did not however, execute any such deeds of confirmation. Therefore the plaintiff concedes 2/9th to Mohamadu Neina and 1/9th to Pathu Muthu by right of inheritance. Mustapha by deed P2 of 1907 conveyed 1/4th share to his nephew Abdul Rahiman the son of his brother Omaru and he by deed P3 of 1940 sold that share to Mohamed Buhari who by deed P4 of 1943 sold 2/141 share to the 4th defendant. The balance rights of Buhari were inherited by his widow and brother the 2nd and 3rd defendants respectively. The 4th defendant died after the institution of this action and the 28th defendant is the administrator of his estate. The remain-

ing rights of Mustapha, that is to say, 6/9th less 1/4th devolved at his death on his three sons Makeen, Noordeen and Ibrahim and daughter the 1st defendant. Noordeen by deed P7 of 1944 sold his share to his brother Makeen who on deed P6 of the same year conveyed all his interests to the plaintiff for a consideration of Rs. 5,000/-. Ibrahim also sold his rights to the plaintiff on deed P8 of 1944 for a sum of Rs. 1,856/-. Mohamadu Neina's 2/9ths passed on his last will 16D1 dated April 15, 1903 to his grandson the 16th defendant. The 5th, 6th and 17th to 20th defendants inherited the 1/9th share of Pathu Muthu.

Thomas Singho the 8th defendant, who raised the main contest, asserted a claim to the whole land on an entirely different devolution of title. According to him this field at one stage belonged to Pathu Muthu widow of Abdul Cader, Abu Cassim, Pathu Muthu Natchiya and Lavena Marikkar in equal shares. By deed 8D8 of 1902 Pathu Muthu conveyed her 1/4th share to C. L. M. M. Ismail. Abu Cassim by deed 8D9 of 1903 sold his 1/4th share to Abdulla Marikkar who also acquired the 1/4th share of Pathu Muthu Natchiya on deed 8D11 of 1903. Abdulla Marikkar who was thus entitled to 1/2 share sold the same to C. L. M. M. Ismail the vendee on 8D8. On the death of Levena Marikkar his 1/4th share devolved on his four children Rahiman, Abubackkar, Haleema and Pathu Muthu. Rahiman by deed 8D1 of 1906 sold his share to Ismail the vendee on 8D8. Abubackkar by deed 8D13 of 1903 sold his rights to Abdulla Marikkar the vendee on 8D9. Ismail the vendee on 8D8 also acquired the shares of Haleema and Pathu Muthu on deeds 8D14 of 1906 and 8D15 of 1901 respectively. Abdulla Marikkar conveyed all his rights to the aforesaid Ismail on deed 8D10 dated January 9, 1904. Ismail who had thus purported to purchase the entire land died leaving as his sole heir his sister Kadija Umma the 13th defendant who is the wife of the 14th defendant and they by deed 8D7 dated August 5, 1942 conveyed their interests to the 8th defendant for a consideration of Rs. 750/-. The deed 8D7 was made subject to a notarial agreement 8D5 dated July 17, 1937 entered into between the 13th defendant on the one hand and the 9, 10, 11 and 12th defendants on the other. According to this agreement the 9, 10, 11 and 12th defendants were to become entitled to a 1/4th share on their asweddumising the whole land within a period of ten years. These defendants supported the 8th defendant at the trial and, in any event, they claimed a sum of Rs. 6,523/10 as compensation for improvements on the basis that they had asweddumised the lands in terms of the agreement 8D5.

The 43rd defendant who is said to be the trustee of the Godapitiya mosque claimed the field as the trust property of that mosque. At the trial the counsel for the plaintiff stated that his client was willing to concede a 1/28th share to the mosque. According to the statement of claim filed by the 43rd defendant this field belonged to the original owner disclosed by the plaintiff subject to the charitable trust.

After trial the learned District Judge held that the 8th defendant and his predecessors in title had been in possession for a period of over ten years and dismissed the action and ordered the plaintiff to pay double stamp duty.

These appeals are from that judgment. The appeal No. 908 is by the 43rd defendant but it was not pressed. The appeal which was argued was that of the plaintiff. That is appeal No. 909.

Mr. Wijemanne who argued this appeal contended that the learned District Judge had seriously misdirected himself both on law and facts. After merely recapitulating the devolution of title set out by the plaintiff the learned District Judge mentioned the deeds relied on by the 8th defendant and proceeded to state " These deeds have been executed under another source of title, so that on either side there are deeds to prove title. One will have now to consider who was in possession of the field." Although the deeds relating to title relied on by both parties were merely mentioned in the course of the judgment the learned District Judge has clearly failed to examine these deeds with a view to ascertaining as to which party had the legal or paper title to the subject matter of the action. In view of the fact that there were two parallel sets of deeds, it would appear, that the learned Judge thought that it was unnecessary to decide the question of legal or paper title. It was his clear duty to decide that question before embarking on the perilous journey to discover who in fact had been in possession of the property. When the legal title and a title based on prescription are in issue, as in the instant case, the Court should first make a genuine effort to discover in which party the legal title is vested, but, if neither party has succeeded in establishing it the Court should then proceed to decide the case on the issue of prescription. The learned Judge has failed to do that in this case. It has been repeatedly held by this Court that

in an action for declaration of title the question of title must be investigated before proceeding to decide the issue of prescription. *Dissanayake vs. Dingihamy* 17 C.L. Rec. 83. *Karunadasa vs. Abdul Hameed* 59 N.L.R. 353.

The burden of proof of prescription depends on the question of legal ownership. Therefore when the learned Judge proceeded to decide the issue of prescription without first examining the legal title of the parties he misdirected himself on the law.

The corpus sought to be partitioned is a portion of a larger land of about 141 acres. The earlier deeds relied on by both parties are in respect of this larger land. The earliest title deed in respect of the land surveyed for the purpose of this case is P2 of 1907. However, it is conceded that the deeds relied on by all the parties take in the subject matter of the action. The parties also proceeded on the basis that it was possessed as a divided portion of the larger land and was dealt with as a separate entity.

The earliest title deed produced in respect of the larger land is P1 of 1893. That deed has been executed on the basis that the original owner of that land was Idroos and that he had gifted it verbally to his son Mustapha. Prior to that deed, Mustapha had mortgaged and leased it on numerous occasions also on the basis that it originally belonged to his father. The document P9 is an informal writing given by him in the year 1883 whereby he authorised one Don Abaran to cultivate a portion of this field. He also gave similar leases on deeds—*vide* 16D11 of 1884, 16D5, 16D6, 16D7 and 43D2 of 1886 and 16D8 of 1887. He also mortgaged rights in divided portions of the larger land by deeds P10 of 1888, P11 of 1893, P12 of 1894 and P13 of 1907. It is relevant to note that P11 and P13 are usufructuary mortgages the latter of which was in favour of one Don Davith the vidane aratchi of Maragoda in Weligama district. He also entered into the planting agreement 16D4 of 1885 with one Aberan. On the death of Mustapha his estate was administered by his nephew Abdul Rahiman and a share of this field was included in the inventory P5 dated 21-9-1910 filed in that case. Mohamadu Neina the brother of Mustapaha by deed 16D10 of the year 1904 mortgaged a share of the land sought to be partitioned to one Don Davith de Silva constable aratchi. The executor of the last will of Mohamadu Neina leased a share of this field on deed 16D9 of 1915. Abdul Rahiman the vendee on P2 who was also the administrator of the estate of his uncle Mustapha leased this field to Don Dionis Dahanayake Yapa and James by deed P19 dated 27-1-1923 for a period of five years commencing from 27-1-1923. Earlier he had leased it to Carolis Jayatilleke for a similar period commencing from 1-1-1921 on deed P14 dated 9-9-1920. Thereafter by deed P21 dated 21-9-1932 he leased it to R. D. Samarasinghe for a period of 10 years.

The 8th defendant has failed to produce any title deed in respect of the larger land or the divided portion sought to be partitioned executed prior to 1901. His earliest title deed is of the year 1901. However, during a brief period of five years, that is to say, from 1901 to 1906, as many as eight title deeds came into being where none existed before. This was due to the burst of activity on the part of Ismail and Abdulla Marikkar. However, neither during this period nor earlier was a single deed of lease or mortgage executed on the basis of the devolution of title set up by the 8th defendant. According to him the land was originally owned by four persons in equal shares. But no evidence whatsoever has been adduced to show how they became entitled to those shares. The vendors to the 8th defendant were not called to give evidence on his behalf in support of the title pleaded by him. No attempt was made by him to trace the original ownership to a common source. On the other hand the plaintiff has not only traced his title from a common source but he has also produced apart from the title deeds, a large number of mortgage bonds and leases in support of the devolution of title set up by him. The plaintiff's purchase appears to have been a speculative one. On the deed 8D7 he paid only Rs. 750/- for the entire land which is about 28 acres and 33 perches in extent. On the evidence led in the case I have no hesitation in holding that the original owner of this land was Idroos and that it devolved on parties as set out in the evidence of the plaintiff's vendor Makeen. Therefore the burden is on the 8th defendant to establish a prescriptive title. The 8th defendant relied on the evidence of Yapa, the vidane aratchi, Palihawardena the vel vidane and Henderick the 10th defendant to prove that his predecessor in title Ismail possessed this field. The learned District Judge appears to have been impressed by the evidence of the vidane aratchi and the 10th defendant and he has accepted their evidence. The evidence of the vel vidane was favourable to the plaintiff to a great extent. The learned District Judge, however, was not prepared to accept that part of his evidence. In acting on the evidence

of the vidane aratchi and the 10th defendant he has not given sufficient consideration, in my opinion, to certain infirmities inherent in their evidence. The vidane aratchi stated that in the year 1920 he cultivated this field during both seasons on the written instructions of the Mudliyar and that he gave the land owner's share of the paddy to Ismail. This same witness gave evidence in case No. 22629 of the Police Court of Matara. (P16). In that case Carolis Jayatilleke the lessee of Abdul Rahiman on P14 charged Ismail and 11 others on 19-3-1921 with having committed criminal trespass in respect of this field. This vidane aratchi who was called as a witness for the defence in that case stated that he cultivated this field in 1920 at the request of the Mudliyar but he also said that the order of the Mudliyar was not in writing. But, the Mudliyar who was called by the Magistrate denied that he had authorized the vidane aratchi to cultivate the field. The learned Magistrate disbelieved the evidence of the vidane aratchi and convicted Ismail. In appeal however, the conviction was set aside for the reason that there was a technical defect in the charge. It is also important to observe that this witness resides about three miles away from the land in question. Therefore, it is hardly likely that he would know with certainty as to who possessed this field during a period of years. In fact, he admitted that he did not know who cultivated the field during the period covered by the Huwandiram lists P22 and P23. The vel vidane who has to perform certain duties in connection with this field would be in a better position to give evidence relating to possession. He stated that from 1932 to 1937 this field was cultivated by Don Andrias, Samarasinghe, Punchi Appu the 9th defendant and others and during that period the land owner's share was taken by Samarasinghe the lessee on P21. The Huwandiram lists P22, P23, and P24 prepared by this vel vidane and certified by Yapa the vidane aratchi show that the cultivator of this field during the years 1934, 1935 and 1936 was Samarasinghe. Although the vidane aratchi at first admitted that Andrias and others cultivated this field under Samarasinghe after 1932 he later said that he did not know whether they worked for him after 1932. He appears to have been very reluctant to make any admission which was favourable to the plaintiff, although he had to admit that he certified the Huwandiram lists P22 to P24.

That Samarasinghe possessed this field from 1932 to 1937 cannot be doubted. Samarasinghe stated that the 9th, 10th and 11th defendants were his cultivators during that period. The learned Judge has, however, stated that the 10th defendant had " stoutly denied " that they were cultivators under Samarasinghe. On a perusal of the evidence of the 10th defendant one cannot conclude that there was such a " stout " denial on his part. This is what he stated in cross-examination. " Samarasinghe took the paraveni share of the share worked by Andiris (*i.e.* 11th defendant). Andiris is my cousin brother. Punchiappu (*i.e.* 9th defendant) also worked that same portion, he also gave the paraveni share to Samarasinghe. That was the position till the dispute arose." The dispute referred to by the 10th defendant arose in 1938. It is true that in re-examination he stated that he did not know whether the 9th and 11th defendants gave a paraveni share to Samarasinghe. It would appear that while the 9, 10 and 11th defendants were working as cultivators under Samarasinghe they along with the 12th defendant obtained the agreement 8D7 dated 17-7-1937 from the 13th defendant and claimed to be entitled to possess the field in terms of that agreement. Thereafter Samarasinghe charged the 9, 10 and 11th defendants on 21-9-1938 in M.C. Matara Case No. 21898 (P27) with criminal misappropriation of his share of the paddy. The Magistrate held that this was a civil dispute and acquitted the accused. Thereafter Samarasinghe gave up possession of the field.

According to the plaintiff's case Don Dionis and James possessed this field on the lease P19 of 27-1-1923 which was for a period of 5 years. The learned District Judge held that there was no evidence that the lessees possessed on that lease. He has clearly misdirected himself on that point because witness Carnelis Wickremaratne stated " I know Don Dionis Dahanayake Yapa and H. Don James. They are both dead. I know that they took a lease of this land from one Abdul Rahiman. That was in 1922 or 1923. They possessed the field on the lease without any dispute." The fact that Samarasinghe was able to take possession of the field in 1932 without any opposition shows that immediately before that Abdul Rahiman also had undisputed possession of it. There is strong reason to believe that the lessees on P19 exercised their rights on the lease as stated by Carnelis Wickramaratne. The learned Judge's observation that Carnelis Wickremaratne was not a witness in the case P27 is incorrect.

The learned District Judge also observed that Idroos' successors in title had not executed any deeds after 1907 till the year 1920. Here again,

he overlooked the fact that in the year 1915 the executor of the last will of Mohamadu Neina had given the lease 16D9 for a period of 4 years.

In the year 1911 a quantity of paddy from this field was seized on a writ issued against Ismail. Then Abdul Rahiman preferred a claim to this paddy. That claim was dismissed because the claimant admitted that he had given a usufructuary mortgage of the field. Thereupon Don Davith the usufractuary mortgagee on P13 claimed this paddy but that claim abated because the amount due on the writ had been paid (*vide* P26). These two claims go to show that Abdul Rahiman had not abandoned his rights to this field. The learned District Judge was of the opinion that Samarasinghe forcibly cultivated a portion of this field and that Ismail's cultivators had been led into the belief that Samarasinghe was cultivating on behalf of Ismail since neither Ismail nor his representatives came to the field from about the year 1929. There is no evidence whatever to show either that Samarasinghe cultivated the field forcibly or that he induced Ismail's cultivators to believe that he was cultivating it on behalf of Ismail. It is however true that there is no evidence that either Ismail or anyone on his behalf came to the field after 1929. It is also relevant to observe that Ismail was adjudged a lunatic in 1929 and he remained insane until he died in the lunatic asylum in the year 1937. Therefore it is hardly likely that during that period, at least, anyone possessed the field on his behalf. Abdul Rahiman was a resident of Matara whereas Ismail resided at Talapitiya in Galle. That being so Abdul Rahiman was in a better position to control the possession of this field than his rival Ismail, who was living further away from it.

By an informal writing dated 5-1-07, of which P28 is a certified translation, Abdul Rahiman had authorised Punchiappu the 9th defendant to cultivate a portion of this field during the Yala season of 1907. This writing has been filed of record in M.C. Matara Case No. 21898 (P27). The record in that case was produced at the trial of this case and pointed reference was made to the signature of the 9th defendant appearing on that writing. The learned District Judge refused to consider the document P28 and he further observed that the usufructuary mortgage P13 was in existence during this period. I am unable to understand why the learned District Judge refused to consider this document when the original itself was placed before him. No objection was taken to the production of P28. The 9th defendant was present during the trial. He did not give evidence. If he challenged the genuineness of this informal writing he should have said so. The usufructuary mortgage bond P13 referred to by the learned Judge was executed on 18-3-07 whereas the informal writing was given to the 9th defendant on 5-1-07. By that document he was authorized to cultivate the field during the Yala season of 1907. That being so this informal writing does not appear to be inconsistent with P13.

The 8th defendant also relied on the deed of agreement 8D16 dated 27-5-07 by which three persons namely D. V. Punchiappu, Kaluappu and W. C. Punchiappu agreed to cut two drains in the larger land on the payment of a sum of Rs. 37/50 by Ismail. There is no evidence as to whether these two drains were in fact dug.

The learned Judge stated that the contesting defendants had produced Huwandiram lists from 1923 to 1932 and also for 1945. He relied on these documents in holding that Ismail had been in possession of this field. These Huwandiram lists are 8D19 to 8D25. They do not cover the full period of 1923 to 1932. 8D19 is for the year 1923. This list shows that the field was cultivated by Don Andrias and others. There is a gap from 1923 to 1927. 8D20 which is the next Huwandiram list is dated 12-7-27. Under the column "name of owner or cultivator" appears the name "Seeyem Maham, Talapitiya, Galle." But during that year no part of the field has been cultivated. It is also not clear who this "Seeyem Maham" is. 8D21, 8D22 and 8D23 are for the years 1928, 1929 and 1930 respectively. 8D24 which is for the year 1932 gives the names of the cultivators as Samarasinghe Andiris and others. According to the evidence of the vel vidane, Samarasinghe Andiris was a cultivator under Abdul Rahiman's lessee R. D. Samarasinghe. Even if it is assumed, although it is not safe to do so in my opinion, that the cultivators whose names appear in 8D21 to 8D23 worked under Ismail that would only show that during the years 1928 to 1930 Ismail had possession of this field. The learned District Judge's finding that Ismail and his successors in title had possession "if not from 1907, at least from 1923, up to now" is not warranted by the evidence. The evidence adduced in the case is quite inadequate, in my opinion, to hold that the 8th defendant and his predecessors in title had acquired a prescriptive title to the field in question. The plaintiff and and his co-owners are therefore entitled to the subject matter of the action.

The 9th, 10th, 11th and 15th defendants claimed compensation for asweddumising and improving the field. The 10th defendant stated that he and the other defendants who claimed compensation had spent about six to seven thousand rupees on these improvements. His evidence on this point is supported by the vidane aratchi, but, in my opinion, this vidane aratchi is a very unreliable witness. It is clear that the 10th defendant has highly exaggerated both the extent of the improvements and the cost of those improvements. His own witness the vel vidane stated that the present cultivable extent of the field is 54 or 56 bushels. The Huwandiram lists 8D20 of 1927, 8D21 of 1928, 8D22 of 1929, 8D23 of 1930, 8D24 of 1932, P22 of 1934, P23 of 1934 and P24 of 1936 give the cultivable extent as 48 bushels while 8D25 of 1943 fixes it at 65 bushels. Therefore the new area brought under cultivation after the agreement 8D5 was entered into in 1937 is not so considerable as the 10th defendant and the vidane aratchi attempted to make out. In any event the 9, 10, 11 and 12th defendants are not entitled to any compensation for improvements effected by them because they were undoubtedly *mala fide* possessors. These parties when they entered into this agreement knew that Ismail the grantor had no title to this property. The 9, 10 and 11th defendants in fact had cultivated the field under Samarasinghe the lessee of Abdul Rahiman and, in fact, it was while working the field as such that they entered into this agreement with the 13th defendant. Earlier the 9th defendant had obtained the writing P28 in the year 1907 from Abdul Rahiman acknowledging the latter's ownership of the field. It would appear that the 13th defendant made use of the 9 to 12th defendants to set up a false claim and they were only too willing to lend their support to the 13th defendant for that purpose. The improvements effected by the 9 to 12th defendants though useful are not necessary improvements. Hence they are not entitled to compensation — *General Tea Estates Co. vs. Pulle* 9 N.L.R. 98.

I would, therefore, allow the appeal of the plaintiff and set aside the judgment and decree appealed against. I direct the District Judge to enter a decree for partition allotting soil shares in terms of the evidence of witness Makeen and also make an appropriate order for costs of partition. The 8 to 15 and 29th defendants will pay the costs of this appeal and the costs of contest in the Court below to the plaintiff. The appeal of the 43rd defendant is also dismissed with costs payable to the plaintiff.

H. N. G. FERNANDO, J.

I agree.

Appeal allowed.

Present : BASNAYAKE, C.J.

LUKMANJEE & SONS Ltd. *vs.* A. PONNIAH PILLAI

S. C. No. 73—C. R. Colombo No. 66760

Argued on : 23rd and 24th April, 1959.
Decided on : 24th April, 1959.

Rent Restriction Act, No. 29 *of* 1948—*Section* 13 (1)—*Action for ejectment of monthly tenant on ground that he was in arrear of rent—Rent not paid monthly, but once in three or four months for a long period—Defendant in arrear for* 6 *months—Notice terminating tenancy—Payment of arrears after notice—Action for ejectment filed notwithstanding—Can the defendant plead that rent was not payable monthly, but irregularly, therefore, not in arrears.*

On a contract of monthly tenancy, the defendant has been plaintiff's tenant for several years. The defendant did not pay the rent monthly, but had got into the habit of paying overdue rents once in three or four months after reminders from the plaintiff. The plaintiff sued the defendant for ejectment under section 13 (1) of the Rent Restriction Act of 1948 on the ground that the defendant had been in arrear in respect of the rent for each of the months April to September, 1956, which overdue rent was paid after the notice to quit.

The defendant claimed that rent was payable not monthly, but at irregular intervals, once in 3 or 4 months, or even once a year.

The learned Commissioner held that there was no obligation to pay rent monthly as the plaintiff permitted the defendant to fall into arrears and pay the rent whenever demanded. The plaintiff appealed.

Held : (1) That in the absence of a stipulation as to the date on which the rent became payable, the defendant, was in law bound to pay the rent immediately upon the termination of each month.

(2) That payment of rent at greater intervals than a month is inconsistent with a contract of tenancy.

(3) The defendant was in arrears for one month after the due date and is not entitled to claim any benefit from his own laches to the prejudice of the landlord. The plaintiff was entitled to maintain the action for ejectment.

Dissented from : *Suppiah vs. Kandiah* 58 N.L.R. 479.

H. W. Jayawardene, Q.C., with *B. S. C Ratwatte*, for the plaintiff-appellant.

Clarence de Silva, with *R. D. B. Jayasekera*, for the defendant-respondent.

Basnayake, C.J.

The plaintiff is a limited liability company which owns a number of houses in a place known as Lukmanjee Square. The defendant has been a tenant for a number of years in house No. 14 owned by the plaintiff in that square. The monthly rent was Rs. 25/28. It would appear from documents P1 to P11 that the defendant did not pay his rent monthly, but had got into the habit of paying the overdue rent once in three or four months, whenever reminded by the plaintiff that he was in arrear. From October 1951 till November 1955 the plaintiff had from time to time sent eleven notices drawing the attention of the defendant to the fact that he was in arrear. The plaintiff seeks to come within the ambit of proviso (*a*) of section 18 (1) of the Rent Restriction Act, No. 29 of 1948, which enables a landlord, without the authorisation of the Board, to institute an action for the ejectment of a tenant, where the rent has been in arrear for one month after it has been due. The plaintiff states that the defendant had been in arrear in respect of the rent for each of the months April, May, June, August and September, 1956 for more than a month after it became due. The overdue rent was paid after the notice terminating the contract of tenancy was given. The defendant claimed that the rent was payable by him not monthly, but at irregular intervals; once in three or four months or even once a year. The Secretary and Accountant of the plaintiff stated that under the contract of tenancy the defendant was obliged to pay rent every month at the plaintiff's office at Grandpass, but that though the defendant was irregular in his payments, the plaintiff was indulgent, and sent reminders to him to pay the rent whenever it fell into arrear.

The learned trial Judge seems to have wrongly inferred that there was no obligation to pay rent monthly from the fact that the plaintiff was indulgent and permitted the defendant to fall into arrear and pay his rent whenever demanded. It is not denied that the tenancy was a monthly tenancy, and in the case of a monthly tenancy the rent must be paid monthly either at the beginning of the month, when there is a stipulation to that effect, or at the end of it, where payment of rent in advance is not stipulated. In the instant case there was no stipulation that the rent should be paid in advance; the defendant was, therefore, in law bound to pay the rent immediately upon the termination of each month (Pothier,—Letting and Hiring, Part III s.134 p.55, Mulligan's Translation). Admittedly he did not do so and was therefore in arrear for one month after the rent had become due. The plaintiff was therefore entitled to bring this action to have him ejected.

Learned counsel for the respondent relies on the case of *Suppiah vs. Kandiah* (58 N.L.R. 479) In that case my brother H. N. G. Fernando held that where the practice had been for the landlord to accept the rent once in several months, the question whether the tenant is in arrear must be considered in terms of that practice. With great respect to my brother I find myself unable to agree with that decision. As stated above it is settled law that in the case of a monthly tenancy the rent becomes due immediately upon the expiration of a month unless there is an agreement to pay monthly in advance. Payment of rent at greater intervals than a month is inconsistent with a contract of monthly tenancy. A contract which provides for payment of rent at greater intervals than a month would be of no avail in law unless it is in writing and signed by the party making it in the presence of a notary and two witnesses (s. 2 Prevention of Frauds Ordinance). Such a contract cannot be implied. The indulgence of the landlord does not have the effect of altering the law, nor is the tenant entitled to claim any benefit from his

own laches to the prejudice of the landlord. For the purpose of section 13 (1) (a) of the Rent Restriction Act, No. 29 of 1948, the rent would be in arrear if it is not paid on the due date, and if it is in arrear for one month after the due date, the landlord becomes entitled to institute an action in ejectment.

I think the learned trial Judge is wrong in holding that the plaintiff has failed to establish that the rent had been in arrear for one month after it had become due. I accordingly allow the appeal with costs and declare the plaintiff entitled to an order as prayed for in the plaint.

Appeal Allowed.

Present : BASNAYAKE, C.J., AND PULLE, J.

HAJI HABIB & Co. CEYLON Ltd. *vs.* KUTHALATHAMMAL

S. C. No. 1—*D. C. (Inty) Colombo No.* 5914/*MB*

Argued on : 20th and 21st October, 1959.
Decided on : 21st October, 1959.

Preliminary Objection—Appeal—Application for typewritten copies not accompanied by Kachcheri receipt showing payment of prescribed fees—Civil Appellate Rules 4 and 2 (1)—Payment into Court Order, 1939.

Held : That where an application for typewritten copies of the record of a case in appeal did not accompany the Kachcheri receipt showing that the prescribed fees have been deposited, the Supreme Court will reject such appeal.

Per BASNAYAKE, C.J.—When the Civil Appellate Rules are read together with the Payment into Court Order, 1939, it would follow that the application for typewritten copies shall be accompanied by proof that the prescribed fees have been deposited in the Kachcheri and that proof can only be furnished by the Kachcheri receipt.

Cases cited : *Sopaya Peiris and another vs. Wilson de Silva*, 59 N.L.R. 73.

A. C. Nadarajah with *C. Ranganathan*, for the plaintiff-appellant.

S. Sharvananda, for the defendant-respondent.

BASNAYAKE, C.J.

Learned counsel for the respondent has taken a preliminary objection to the hearing of this appeal. He submits that the appeal must be deemed to have abated by the operation of Rule 4 of the Civil Appellate Rules, 1938, as the appellant has failed to make the application for typewritten copies of the record in accordance with those Rules. Rule 2 (1) requires that every application for typewritten copies of the record shall be accompanied by the fees prescribed in the schedule to the Civil Appellate Rules, 1938. In the instant case the application for typewritten copies was handed on 26th December, 1958 but was not accompanied by the fees or proof that the fees had been deposited at the Kachcheri. Learned counsel for the appellant relies on the case of *Sopaya Peiris and another vs. Wilson de Silva* 59 N.L.R. 73. In that case this court held that the requirement that the application for typewritten copies of the record should be accompanied by the fees prescribed in the schedule was rendered impossible of performance, in the sense that neither the Judge nor the officers of the court are permitted by the existing administrative machinery, the Payment into Court Order, 1939, and the financial regulations applicable to the courts, to accept the prescribed fees in cash even if tendered along with the application. In the same judgment this court held that in view of those regulations and Order it would be sufficient compliance with Rule 2 (1) if the prescribed fees were paid into the Kachcheri and the Kachcheri receipt accompanied the application for typewritten copies.

In the course of the argument my brother Pulle drew my attention to the fact that there is no real conflict between the Civil Appellate Rules, 1938, and the Payment into Court Order, 1939. The Payment into Court Order, 1939, provides :

" 1. (1) Where any person elects or is required by any order of Court or by any written law for the time being in force, to make payment of any money into Court, in connection with any action or proceeding, the payment shall not be made otherwise than in accordance with the provisions of the next following

paragraphs of this order, and where any such person is represented by a proctor, the payment shall not be made except through that proctor."

It further provides that—

"(2) (a) Whenever any person whether acting for himself or as proctor for any other person, has occasion to pay money into Court, he shall signify his intention so to do, in the case of a District Court, to the Secretary or, in the case of a Court of Requests, to the Chief Clerk of the Court, either personally or by letter, and the Secretary or the Chief Clerk, or other officer duly authorised for the purpose by the Court, shall furnish such person with a deposit note in such form as may be prescribed by the Financial Regulations of the Government for the time being in force. Such person shall deliver the deposit note, or send it by post, together with, the money to the Kachcheri or Treasury of the district."

and

"(b) Receipt of the money at the Kachcheri or the Treasury shall be acknowledged by the signature of the Government Agent or the Assistant Government Agent or other officer duly authorised in that behalf, on that part of the deposit note which bears the heading 'Payer's Slip,' and such part shall be detached and delivered or sent by post to the person who made the payment, the other part being retained at the Kachcheri or Treasury as the authority for the retention of the money. The usual Kachcheri receipt shall be forwarded to the Court forthwith."

Clauses (5) provides that—

"(5) In each of the cases referred to in the foregoing paragraph the date of the Kachcheri receipt shall be deemed to be the date of payment into Court."

When the Civil Appellate Rules are read together with the Payment into Court Order, 1939, it would follow that the application for typewritten copies shall be accompanied by proof that the prescribed fees have been deposited in the Kachcheri and that proof can only be furnished by the Kachcheri receipt. In the instant case the Kachcheri receipt did not accompany the application for typewritten copies. In our opinion the appellant has failed to make an application for typewritten copies in accordance with the requirements of the Civil Appellate Rules and his appeal must therefore be deemed to have abated.

We accordingly reject the appeal.

Pulle, J.
I agree.

Appeal rejected.

Present : Weerasooriya, J.

TIKIRI BANDA *vs.* T. PERIMPANAYAGAM, (SUB-INSPECTOR OF POLICE, KURUNEGALA)

S. C. No. 790—*M. C. Kurunegala* 42487

Argued on : 7th and 9th October, 1959.
Delivered on : 7th December, 1959.

Criminal Procedure Code, Sections 148 (1) (*a*) *and* 148 (1) (*b*), 150, 151, 151 (2) *and* 187 (1)—*Accused present on "police bail"—Examination of Police Officer before charging accused—Police Officer's evidence amounted to hearsay—Accused pleading guilty—Can Magistrate act on hearsay evidence in forming an opinion that there is sufficient ground to proceed against accused.*

Appellant who was charged by the Magistrate after the examination required by Section 187 (1) and 152 (2) of the Criminal Procedure Code pleaded guilty to a charge under Sections 43 and 44 of the Excise Ordinance and was convicted and sentenced to six months' rigorous imprisonment. He appealed on a point of law certified but the appeal was dismissed, there being no substance in it.

In the exercise of the powers of revision :

Held : That Section 187 (1) of the Criminal Procedure Code which requires the holding of the examination directed by Section 151 (2) of the same Code is not complied with by the Magistrate, when he proceeds to frame a charge against the accused on hearsay evidence.

Cases cited : *Mohideen vs. Inspector of Police, Pettah*, 59 N.L.R. 217.

A. Nagendra with *D. W. Abeykoon*, for the accused-appellant.

V. S. A. Pullenayagam, Crown Counsel, with *P. Nagendran, Crown Counsel*, for the Attorney-General.

WEERASOORIYA, J.

The accused-appellant was convicted of offences punishable under sections 43 and 44 of the Excise Ordinance (Cap. 42) and sentenced to six months' rigorous imprisonment in respect of each offence, the sentences to run concurently. As he pleaded guilty to the charges no appeal lies against the convictions except on a matter of law. The only point of law certified in the petition of appeal is without any substance and the appeal must, therefore, be dismissed.

But learned counsel for the accused, relying on the decision in *Mohideen vs. Inspector of Police, Pettah* 59 N.L.R. 217 submitted that notwithstanding the plea of guilty tendered by the accused his convictions are vitiated by reason of the Magistrate's failure to comply with the provisions of section 187 (1) of the Criminal Procedure Code in regard to the framing of the charges, and on that ground invited me, in the exercise of my powers of revision, to set aside the convictions and remit the case for a fresh trial in accordance with law.

It appears from the record that on the 17th November, 1958, when the trial took place, the accused was present "on Police bail" and, therefore, otherwise than on summons or warrant. Section 187 (1) of the Criminal Procedure Code requires the Magistrate in such a case to hold the examination directed by section 151 (2) and to frame a charge thereafter if he is of opinion that there is sufficient ground for proceeding against the accused. The examination directed under Section 151 (2) is an examination on oath of the person who has brought the accused before Court and of any other person who may be present in Court able to speak to the facts of the case. Purporting to act under section 151 (2) the Magistrate examined Police Sergeant Perera of the Kurunegala Police who was present and whose evidence is as follows :—

> "On 14-11-58 whilst P.C. 5307 and 2256 were on patrol duty they received information to the effect that this produced accused was manufacturing arrack. They proceeded to Hanwella and at a distance they noticed some smoke going up from the jungle and they quietly approached the place and found the accused manufacturing arrack. They arrested the accused in the act with utensils and also found 6 drams of arrack. The accused was taken into custody with productions and produced at station."

On this evidence, which is plainly hearsay, the Magistrate proceeded to frame the charges to which the accused pleaded guilty.

Mr. Nagendra for the accused submitted that in order to frame a charge under section 187 (1) there should be legally admissible evidence on which the Magistrate can form an opinion that there is sufficient ground for proceeding against an accused. Crown Counsel contended, on the other hand, that in holding an examination under section 151 (2) the Magistrate may act on hearsay evidence. No previous decision of this Court directly in point was cited to me by counsel, but despite the absence of authority I have no hesitation in taking the view, on a consideration of the relevant provisions of law, that the procedure adopted by the Magistrate in the present case is irregular.

Sections 150 and 151 of the Criminal Procedure Code set out the steps to be taken by the Court after the institution of proceedings and before the issue of process. Section 150 provides that where the offence alleged in any proceedings instituted under section 148 (1) (a) or section 148 (1) (b) is an indictable one the Magistrate may, although no person by name is accused of having committed such offence, examine on oath the complainant or any other person able to speak to the facts of the case. Such examination may be held in private. If after such examination the Magistrate considers there are sufficient grounds for proceeding against any person, he is required to issue process against such person. Section 151 (2) provides that where proceedings have been instituted on any person being brought before a Magistrate's Court in custody without process accused of having committed an offence which such Court has jurisdiction to inquire or try, the Magistrate shall forthwith examine on oath the person who has brought the accused and any other person present and able to speak to the facts of the case. Under section 151B such examination may be held in private.

In my opinion these provisions, in which the emphasis is on an examination on oath of a person or persons able to speak to the facts of the case, exclude hearsay statements being acted upon for the purpose of any action that may be taken under them. Therefore, section 187 (1) of the Criminal Procedure Code, which requires the holding of the examination directed by section 151 (2), was not complied with by the Magistrate when he proceeded to frame a charge against the accused on the evidence of Police Sergeant Perera. If there was no person present in Court able to speak to the facts of the case the

Magistrate should have secured the attendance of such a person and examined him before framing a charge against the accused.

In *Mohideen vs. Inspector of Police, Pettah,* (*supra*) it was held that non-compliance with section 187 (1) is a fatal irregularity. Acting in revision I set aside the convictions of the accused and the sentences passed on him and I send the case back for a fresh trial before another Magistrate.

Set aside.

Present : SANSONI, J.

A. V. LEON SINGHO *et al. vs.* THE ATTORNEY-GENERAL

A. P. N. No. 476/59—*S. C.* 59—*M. C. Colombo* 10190/A.

In the matter of an application for Bail under section 31 *of the Courts Ordinance.*

Argued on : 26th October, 1959.
Decided on : 30th October, 1959.

Bail—Accused not brought to trial in due time—Application under Section 31 *of the Courts Ordinance (Cap. 6)—Burden of proof shifted to Crown to show good cause.*

In an application for bail under Section 31 of the Courts Ordinance on the ground that the prisoners have not been brought to trial without undue delay after commitment, the only cause which the Crown offered against the granting of it was that the work of the Supreme Court circuit was very heavy.

Held : That the Crown had not shown good cause against the granting of the application and that the prisoners should be admitted to bail.

Cases cited : *De Mel vs. The Attorney-General.* (1940) 47 N.L.R. 136.

Malcolm Perera, for petitioners.

E. R. de Fonseka, Crown Counsel, for Attorney-General.

SANSONI, J.

The eight accused in this case have petitioned this Court to admit them to bail on the ground that they have not been brought to trial in spite of having been committed to trial on 6th November, 1958. The application is made under section 31 of the Courts Ordinance (Cap. 6). To quote the words of Nihill J. in *de Mel vs. Attorney-General* (1940) 47 N.L.R. 136, in a case where section 31 is applicable " the burden has shifted from the prisioners to the Crown.....and it is now for the Crown to show good cause why bail should not be accorded to them ".

Although the commitment was on 6th November, 1958 I was informed by Crown Counsel that the brief was received by the Attorney-General only on 9th December, 1958, and it was returned to the Magistrate with instructions which were not complied with until 19th February, 1959. The indictment was eventually signed on 15th March, 1959 and served on the accused in March and April 1959.

The 1st Criminal Sessions of the Western Circuit began on 12th January 1959 and concluded on 19th March, 1959, and I think it is fair to say that in the circumstances the accused could not reasonably have expected to be brought to trial at those sessions. The 2nd Criminal Sessions began on 20th March, 1959 and ended on 8th July, 1959, yet this case was not added to the calendar because there were already too many cases on it.

The 3rd Criminal Sessions began on 10th July, 1959 and ended on 9th October, 1959. This case was fixed for trial on 15th September, 1959, but it was not reached. The 4th Criminal Sessions began on 10th October, 1959 and are still pending. The trial of this case has been fixed for the 17th November, 1959.

The question I have to consider is whether the Crown has shown good cause. The only cause that has been offered is that the work of the Western Circuit is so heavy that it was not possible for the accused to be brought to trial at

either of the two sessions which were held after they might properly have been tried. This is undoubtedly the cause of the delay, but I do not consider it to be a good cause for refusing bail. A stage must surely be reached when prisoners on remand could expect that they should be tried or released on bail. Relying again on the opinion of Nihill J. in the case cited that "section 31 contains an important principle safeguarding the liberty of the subject who has a right to be brought to trial with reasonable despatch," I think I should be ignoring this principle if I were to refuse the present application.

The legislature intended, when it enacted section 31, that prisoners should be brought to trial in the Supreme Court within a reasonable time after commitment. When there has been undue delay, as there has been in this case, the prisoners affected should not be denied the relief provided by the section. I would hold that the Crown has not shown good cause in this case, and that the eight petitioners should be admitted to bail.

I order that each accused may be admitted to bail in a sum of Rs. 10,000/-. Each bail bond will provide that the accused shall, between his release on bail and the termination of the trial, report himself on the Monday of every week at the nearest Police Station, and that the bond shall be subject to cancellation if the accused communicates with any witness for the prosecution.

Present : BASNAYAKE, C.J., AND SANSONI, J.

DE SILVA & OTHERS *vs.* DE SILVA & OTHERS

S. C. No. 655 *with S. C.* 174—*D. C. Kalutara* 3027.

Argued and Decided on : 16*th October*, 1959.

Partition Act, Sections 26 (1), 27 (2), 30, 31 *and* 32—*Judge's duty to find shares each party is entitled to and enter interlocutory decree accordingly—Scheme of partition—Can the Court consider scheme of partition submitted to it but not prepared on a Commission issued by Court.*

Held : (1) That a scheme of partition may be considered by Court only when prepared upon a Commission issued by the Court under Section 27 (2) of the Partition Act and executed under the provisions laid down in Sections 30, 31 and 32 of the Act.

(2) That there is no provision in the Partition Act enabling a Judge to make such an order as "Statement of shares on 20-11-57." The Judge must in his judgment find the shares which each party is entitled to and enter the interlocutory decree in accordance with the findings in the judgment. (Section 26 (1) (7.)

Sir Lalita Rajapakse, Q.C., with *K. C. de Silva* and *M. L. de Silva*, for the plaintiff-appellant, and the 12th and 13th defendants-appellants in S. C. 655 and for the 1st to 8th defendants-appellants in S. C. 174.

N. E. Weerasooriya, Q.C., with *Nimal Senanayake*, for the 11th defendant-respondent in both Appeals.

Nimal Senanayake, for the 9th defendant-respondent in S. C. 174.

BASNAYAKE, C.J.

Appeal No. 655 is dismissed with costs.

At the end of the judgment in appeal No. 174 appears the following statement : "Statement of shares on 20-11-57." I am unable to find any provision of the Partition Act on which such an order as the District Judge has made can be founded. The Judge must in his judgment find the shares which each party is entitled to and enter the interlocutory decree in accordance with the findings in the judgment — section 26 (1).

On 20th November, 1957 the statement of shares was filed and the order made on that day reads : "Consideration as to whether sale or partition and costs all on 3-12-57." In the

meantime it would appear that the plaintiff had taken surveyor Rajapakse to the land for the purpose of preparing a scheme for partition and sale. This scheme was discussed on 14th February, 1958, and the learned Judge ordered a sale holding that the interests of all parties can best be conserved by the land being sold in its entirety. The procedure adopted by the Court is not in conformity with the provisions of the Partition Act, No. 16 of 1951. A scheme of partition may be considered only upon a commission issued by the court under section 27 (2) and executed in accordance with the provisions laid down in sections 30, 31, and 32 of the Act. Both counsel for the appellants and counsel for the respondents are agreed that the scheme which was discussed on 14th February, 1958 is not a scheme prepared under the statute.

We therefore set aside the order for sale made by the learned trial Judge and send the case back to the lower court in order that a commission under section 27 of the Act may be issued. There will be no costs of this appeal.

Sansoni, J.

I agree.

Set aside.

Present : Basnayake, C.J., and de Silva, J.

MEIYAPPAN THEVAR *vs.* ARUNASALAM CHETTIAR & OTHERS

S. C. No. 66—D. C. (Inty) Nuwara Eliya No. 4173

Argued and Decided on : 27th August, 1959.

Postponement, of hearing of action—Discretion of Judge—How it may be exercised—Civil Procedure Code, section 82.

Held : (i) That where the Court is satisfied that there is sufficient cause to grant an application for postponement, he may grant it even though the application is opposed, and may award the opposing party such costs as it thinks fit.

(ii) That the consent of parties is not a sufficient cause for directing that the hearing of an action be postponed.

H. W. Jayawardene, Q.C., with *F. R. Dias* and *N. R. M. Daluwatte*, for the plaintiff-appellant.

Vernon Jonklass, for the 2nd, 3rd, and 4th defendants-respondents.

Basnayake, C.J.

This is an appeal from an order refusing to grant a postponement of the trial in this action in which the plaintiff seeks to recover a sum of Rs. 4,000/- due on a promissory note together with the interest thereon. It was instituted on 4th December, 1956, and the plaint was amended on 22nd February, 1957. On 1st March, 1957, the answer of the 1st defendant and that of the 2nd, 3rd, and 4th defendants were filed. The trial was fixed for 14th June, 1957. On that day the proctor for both the plaintiff and the defendants applied for a postponement on the ground that their respective counsel were unable to attend. On 11th July, 1957, the 2nd, 3rd, and 4th defendants moved to amend their answer. On 23rd August, 1957, the next date of trial the proctor for the 2nd, 3rd, and 4th defendants moved for a postponement of the hearing. It was granted on payment of Rs. 52/50 as costs to the plaintiff and the trial was fixed for 1st November, 1957. On 4th October, 1957, the proctor for 2nd to 4th defendants moved for a further postponement of the trial which was fixed for 1st November, with the consent of the other parties and eventually the trial was fixed for 14th February, 1958. Even on that date the trial did not take place and was again postponed till 6th June, 1958. On that day when the case was taken up for trial the plaintiff was unrepresented. Mr. Ponnusamy a proctor who did not represent any of the parties to the action informed the Court that the proctor for the plaintiff, Mr. Asirwathan, had requested him to mention that he was not able to leave Colombo " for certain reasons " and that his counsel was also not able to come from Colombo owing to the

curfew. The Judge then made the following minute :—

> " Mr. Advocate Jonklass objects to a postponement and he states that the reasons which Counsel and Proctor for the plaintiff have given for their absence are not tenable and that neither Counsel nor Proctor appearing for the 2nd, 3rd, and 4th defendants have been informed of the inability of the plaintiff's Counsel or his Proctor from being present today.
>
> " I ask the plaintiff whether he is ready to go on with this case.
>
> " Plaintiff states that he cannot proceed to trial without his Proctor. He further states that some of his documents, namely ledger, pass-book and other account books, are with his Proctor, and desires a postponement of this trial to get ready."

The learned Judge thereafter made the following order:—

> ' In the circumstances of this case where the plaintiff's Proctor is not present in Court and where Counsel appearing for the 2nd to 4th defendants strenuously objects to a postponement, I feel there is no alternative but to refuse the plaintiff's application for a postponement. I accordingly refuse the plaintiff's application."

The trial then proceeded and judgment was reserved.

The material portion of section 82 of the Civil Procedure Code which empowers a Court to grant the postponement of a hearing reads :

> " When any case is in its turn called on for hearing upon the day appointed therefor, the court may, for sufficient cause to be specified in its written order, direct that the hearing be postponed to a day which shall be fixed in the order, upon such terms as to costs or otherwise as the court shall think fit."

This section vests in the Court a discretion to grant a postponement for sufficient cause. The onus of satisfying the Court that there is " sufficient cause " is on the party seeking the postponement. This Court does not interfere in appeal in a case where a Court of first instance has exercised its discretion unless it is shown that some error has been made in exercising the discretion. A person invoking this Court's appellate jurisdiction must satisfy it that the Court of first instance has committed an error in fact or law. Has the learned Judge committed such an error in refusing the postponement.

The plaintiff's proctor has filed an affidavit explaining the circumstances in which he failed to appear on 6th June, 1958. In paragraph 7 of that affidavit he states that on the same day postponements were granted in three other civil cases of his on the very same grounds as were urged in the instant case. It would appear from that circumstance that the learned Judge refused the postponement in this case not because in his view sufficient cause had not been shown but because he thought he was bound to refuse a postponement, even in a case where there is sufficient cause for granting it, if the opposing counsel objects. In his order cited above he says :

> " Counsel appearing for the 2nd to 4th defendants strenuously objects to a postponement. I feel there is no alternative but to refuse the plaintiff's application for a postponement. I accordingly refuse the plaintiff's application."

The learned Judge was clearly mistaken in thinking that he was bound to refuse an application for a postponement if it is opposed. Whether there is opposition or not he has no power to postpone the hearing of an action unless he is satisfied that there is sufficient cause for doing so. Where he is satisfied that there is sufficient cause he may grant a postponement even though the application is opposed and may award the opposing party such costs as he thinks fit. It should be noted that consent of parties alone is not sufficient cause for directing that the hearing of an action be postponed.

As the learned District Judge has erred in law in thinking that he was bound to refuse the postponement merely because it was strenuously opposed by counsel for the 2nd to 4th defendants, we set aside his order of 6th June, 1958, and all proceedings of that day and direct that a date be fixed for the trial of the action, and that the case be proceeded with. There is no reason why the 2nd to 4th defendants should be called upon to bear the expenses they incurred in getting ready for the trial on 6th June. It is therefore proper that the plaintiff should pay them their actual costs, which counsel agree should be Rs. 525/-.

We accordingly make order that the plaintiff do pay this sum to the 2nd to 4th defendants. There will be no costs of the appeal.

DE SILVA, J. *Set aside.*

I agree.

Present : K. D. de Silva, J.

H. D. PEDRICK *vs.* M. R. M. MENDIS

S. C. 82—*C. R. Colombo Case No.* 66260

Argued on : 14th, 29th and 30th July, 1959.
Decided on : 21st December, 1959.

Landlord and Tenant—Notice to quit by proctor undated—No proof as to when notice was posted except counterfoil of notice and registered postal receipt showing date 29/4/57*—Defendant pleading that he received it on* 2nd or 3rd *of May,* 1957*—Insufficiency of proof of a clear month's notice—Is a tenant who disclaims tenancy entitled to notice to quit.*

Where a notice to quit sent through a proctor, contained no date on it and the landlord sought to prove the date by producing the counterfoil of the notice and the postal receipt, without calling the Proctor and when the tenant denied that he received a clear month's notice.

Held : That it is reasonable to hold that the plaintiff has failed to prove that the defendant received a clear month's notice.
That a tenant who disclaims tenancy is not entitled to a notice to quit.

Cases referred to : *Muttu Natchia vs. Patuma Natchia* 1 N.L.R. 21.
Sundera Ammal vs. Jusey Appu 36 N.L.R. 400.

C. S. Barr Kumarakulasinghe, with *G. L. L. de Silva* and *D. C. W. Wickramasekera,* for the defendant-appellant.

H. W. Jayawardene, Q.C., with *D. R. P. Goonetilleke,* for the plaintiff-respondent.

K. D. de Silva, J.

This is an action for rent and ejectment. The plaintiff averred in the plaint that the defendant took on rent from her premises No. 515, Galle Road, Mount Lavinia, on a monthly tenancy at a rental of Rs. 37/50 a month and sought to eject him on the ground that the rent for the months of January, February and March, 1957, was in arrear. She also averred that on April 29, 1957, she had given notice to the defendant to quit the premises on or before the 31st day of May, 1957.

The defendant filed answer denying that the plaintiff let the premises to him but that he took the same on rent on or about May 1, 1954, from one G. H. Dharmadasa on a monthly tenancy at a rental of Rs. 50/- a month.

It is not denied by the plaintiff that originally the defendant took these premises on rent from Dharmadasa but she stated that thereafter the latter by deed P7 of December 4, 1956, leased these premises to her for a period of 10 years. Her position is that after the execution of this lease the defendant attorned to her and paid her rent for December, 1956, but he failed to pay the rent for January, February and March, 1957. The defendant admitted the execution of the lease P7. He stated that after that lease was executed Dharmadasa instructed him to pay the rent to the plaintiff and that he did so for the month of December, 1956. He however denied that he became the tenant of the plaintiff. His position was that the plaintiff received the rent as the agent of Dharmadasa.

The learned Commissioner of Requests, after trial, held with the plaintiff and entered judg-

ment in her favour. This appeal is against that judgment.

At the hearing of the appeal Mr. Barr Kumarakulasinghe the counsel for the defendant-appellant raised two points. Firstly, he contended that there was no contract of tenancy between his client and the plaintiff and secondly, the notice to quit which is produced in the case marked D2 is bad in law.

The first point is not a sound one. The defendant's contention that he paid the rent to the plaintiff as the agent of Dharmadasa is not borne out by the evidence in the case. After the lease P7 was executed the defendant wrote the letter P1 on January 17, 1957, to the plaintiff enclosing a money order for Rs. 50/- being the rent for December stating that Dharmadasa had informed him that he had leased the premises to the plaintiff for a period of 10 years and that he had requested him to pay the rent to her. Then on January 30, 1957, the defendant addressed the letter P2 to the plaintiff calling for a receipt for the rent paid for December and also informing her that the roof was leaking and that the house required repairs and white washing. In that letter he asked her to get the necessary repairs done. No reply was sent to that letter. Therefore, the defendant wrote the letter P3 on April 25, 1957, to the plaintiff requesting her again to get the necessary repairs effected. He also stated in that letter that a sum of Rs. 275/- was necessary to effect these repairs and enquired from the plaintiff whether she would give him permission to get the work done. When the plaintiff failed to carry out the necessary repairs the defendant claimed to have retained the rent due after January, 1957, for the purpose of effecting those repairs. He stated that he did so at the request of Dharmadasa who according to him was the landlord. Dharmadasa who was called as a witness by the defendant denied that he gave such instructions to the defendant and he also said that no repairs were, in fact, necessary. On June 5, 1957, the defendant sent a money order for Rs. 187/50 to the plaintiff in payment of the rent in arrear. The plaintiff however refused to accept this payment and returned the money order to the defendant. There is very clear evidence that soon after the lease P7 was executed in favour of the plaintiff by Dharmadasa the defendant attorned to the plaintiff. The position that the defendant took up in this case that he was not a tenant of the plaintiff is quite untenable.

The next point which arises for decision relates to the notice to quit given by the plaintiff to the defendant. According to the plaintiff this notice was sent to the defendant by registered post on the 29th April, 1957. The document D2 is the notice which the defendant received. His counsel contended that this was not a valid notice for two reasons namely (1) it was not correctly dated and (2) it was received by the defendant only on the 2nd or 3rd May, 1957. It is true that this notice has not been correctly dated because neither the month nor the year appears at the top of it although in the body of the notice itself the defendant is required to quit on the 31st day of May, 1957. The plaintiff however has produced the counterfoil P9 of this notice and the postal receipt P8. Both these documents bear the date 29-4-'57. This notice was sent by the plaintiff's proctor but he was not called as a witness to state that he posted it on 29-4-'57. The defendant's evidence that he received the notice to quit on 2nd or 3rd May, 1957, stands uncontradicted. Therefore, it is reasonable to hold that the plaintiff has failed to prove that the defendant received a clear month's notice which he was entitled to receive. Hence D2 is not a valid notice. The counsel for the defendant contended that the plaintiff's action must fail on that ground. The Rent Restriction Act No. 29 of 1948 does not provide for giving such notice. It is the common law which requires that a monthly tenancy should be determined by a month's notice. However the common law also provides that a tenant who disclaims the tenancy is not entitled to a valid notice to quit. In *Muttu Natchia vs. Patuma Natchia* 1 N.L.R. 21 dealing with a tenant who disclaimed the tenancy Browne, J. stated "It was unnecessary therefore that the plaintiff, as he did, should have averred or have sought to prove any notice to quit given by him to the defendant, and defendant was not entitled to have the action dismissed because no valid notice was given." This decision was followed in *Sundera Ammal vs. Jusey Appu* 36 N.L.R. 400.

I, therefore, hold that the defendant in this case who denied that he was the tenant of the plaintiff was not entitled to a notice to quit. I dismiss the appeal with costs.

Appeal dismissed.

Present : BASNAYAKE, C.J., AND PULLE, J.

AZIZ AND OTHERS vs. THONDAMAN AND OTHERS

S. C. No. 9—D. C. (Inty.) Colombo No. 683/Spl.

Argued on : 17th June, 1959.
Decided on : 26th October, 1959.

Registered Trade Union—Rules made providing for a right to appeal to the working committee from any disciplinary action taken by the Executive Council against any member, office-bearer, trustee etc.—Failure to provide in the said rules for the composition of the appellate body—Plaintiffs, members of the Executive Council of the Union, expelled by the Executive Council and new members appointed at a meeting—Action instituted by plaintiffs for a declaration that the meeting is illegal and invalid and all acts done thereafter void—Right to bring such action—Has the Court a discretion to refuse such a decree.

Amendment of Pleadings—Civil Procedure Code, section 93—Duty of trial court.

Held, (1) That where the rules of a registered Trade Union provided for a right to appeal to its Working Committee from any disciplinary action taken by its Executive Council against any member, office-bearer trustee, etc., without defining the composition of the appellate body, a person aggrieved by such disciplinary action is entitled to the aid of the law courts without appealing to the domestic appellate body.

(2) That the Civil Procedure Code makes provision for declaratory actions. The granting of a declaratory decree is not a matter in the judge's discretion. Once a plaint is entertained by court, the action must be decided by the court in the manner provided by the Civil Procedure Code, and the judge has no right to refuse to grant a decree in favour of the plaintiff, if he has established his right to relief.

(3) That in the matter of amendment of pleadings, it is essential that section 93 of the Civil Procedure Code should be scrupulously observed.

Per BASNAYAKE, C.J.—"The right of a citizen to invoke the aid of the courts is one that cannot be taken away by the rules of any association or body of persons. It it so fundamental that it cannot, in my view, be taken away even by our legislature itself. It is unnecessary for the purpose of this judgment to elaborate this view ; it is sufficient to say that a power to legislate for peace, order and good government, does not include a power to deny access to the courts which are the living symbols of peace, order and good government, for the denial of such right would be a negation of the very purpose for which legislative power is conferred on the legislature. Not only cannot such a right be taken away but it also cannot be denied by any court whose jurisdiction is invoked in proper proceedings."

C. G. Weeramantry, for the plaintiffs-appellants.

E. B. Wickramanayake, Q.C., with *R. L. N. de Zoysa*, for the defendants-respondents.

BASNAYAKE, C.J.

The five plaintiffs claim to be members of the Executive Council of the Ceylon Workers' Congress, a Trade Union registered under the Trade Unions Ordinance. In this action which they have instituted against the forty-four defendants who were at the material time members of the Executive Committee of the same Trade Union they pray a declaration—

(*a*) that the meeting of the defendants on 18th December, 1955, was irregularly held and that its proceedings are null and void ;

(*b*) that the resolutions passed at the said meeting were wrongfully passed ;

(*c*) that the plaintiffs are entitled to have those proceedings expunged from the minutes ;

(*d*) that the expulsion of the plaintiffs from the Ceylon Workers' Congress and its Executive Council is illegal and invalid ;

(*e*) that the election of K. Rajalingam the 3rd defendant as President and of M. Periasamy, V. R. Velu, V. Annamalay, N. Vellayan and M. Ettiyapan as members of the Executive Council is illegal and invalid ;

(*f*) that the declaration submitted to the Registrar of Trade Unions on the authority of the said meeting of 18th December, 1955, is illegal and invalid ;

(*g*) that the changes caused to be made in the Register of Trade Unions are illegal and invalid ;

(*h*) that the plaintiffs are members and office-bearers of the Trade Union known as the Ceylon Workers' Congress ;

(*i*) that the defendants acted illegally when they purported to exercise the functions of the Executive Council with persons or members who were illegally elected ;

(*j*) that the meetings held by the defendants subsequent to 18th December, 1955, were bad for want of notice to the plaintiffs and others who are members of the Executive Council and that the proceedings at such meeting are null and void.

Twenty-two of the defendants filed a joint answer on 27th August, 1956. On 29th October, 1956, the 19th, 25th and 41st defendants filed answer. On 26th November, 1956, the 21st and 35th defendants indicated to the court that they had no objection to the plaintiffs' prayer being granted. On 12th March, 1957, the trial was commenced and counsel for the respective parties suggested in the form of issues the questions of fact and law which they invited the court to decide ; but as counsel for the defendants based his issues on what he called "an amended answer" which was not before the court the trial was adjourned.

I must pause to point out that the Judge and counsel all proceeded on the basis that the defendants were at complete liberty to amend the answer as they liked. Filling of fresh pleadings under the guise of amended pleadings has now become the rule and Judges of first instance do not appear in the majority of appeals that have come before me to exercise the discretion vested in them by section 93 of the Civil Procedure Code. It is essential that in the exercise of their functions trial Judges should scrupulously observe the provisions of the Code. Section 93 provides—

> "At any hearing of the action, or any time in the presence of, or after reasonable notice to, all the parties to the action before final judgment, the court shall have full power of amending in its discretion, and upon such terms as to costs and postponement of day for filing answer or replication, or for hearing of cause, or otherwise, as it may think fit, all pleadings and processes in the action, by way of addition, or of alteration, or of omission. And the amendments or additions shall be clearly written on the face of the pleading or process affected by the order ; or if this cannot conveniently be done, a fair draft of the document as altered shall be appended to the document intended to be amended, and every such amendment or alteration shall be initialled by the Judge."

In the instant case the defendants were allowed to file a second answer called "an amended answer" without first submitting to the Judge the amendments they invited the court to make and obtaining his order thereon. The Judge himself did not give his mind to the alterations that were made in the original answer and acted in complete disregard of the provisions of section 93.

The following issues were suggested by counsel for the plaintiffs :—

"1. Was notice of the meeting of the Executive Council of the Ceylon Workers' Congress that was purported to have been held on 18-12-55 not duly given—
   (*a*) to the plaintiffs ?
   (*b*) to the other members of the Executive Council ?

"2. Was the failure to give notice deliberate with a view to a keeping away the said members ?

"3. If issues 1 and/or 2 are answered in the affirmative—
   (*a*) were the resolutions passed at the said meeting void and of no effect ?
   (*b*) are the plaintiffs entitled to have the proceedings of the said meeting expunged from the said minutes ?

"4. Was the expulsion of the plaintiffs from the membership which is purported to have taken place on the resolution of 18-12-55—
   (*a*) ultra vires on (*sic*) the body that purported to expel ?
   (*b*) irregular and illegal in that the said members were not given any opportunity to defend themselves ?

"5. Was the expulsion of the plaintiffs from holding office in the Ceylon Workers' Congress which is purported to have taken place on a resolution of 18-12-55—
   (*a*) ultra vires on (*sic*) the body that purported to expel ?
   (*b*) irregular and illegal in that the said members were not given any opportunity to defend themselves ?

"6. If issues 4 and/or 5 are answered in the affirmative—
   (*a*) were the said expulsions irregular and invalid ?
   (*b*) were the elections of the persons named in paragraph 9 to fill those places illegal and irregular ?
   (*c*) was the declaration submitted to the Registrar of Trade Unions on the authority of the said meeting irregular and illegal ?
   (*d*) were the changes caused to be made in the Register of Trade Unions irregular and illegal ?
   (*e*) are the plaintiffs entitled to a declaration that they are still the office-bearers and members of the Ceylon Workers' Congress ?

Counsel for the defendants agreed to the above issues and suggested the following further issues :—

"7. Is this court debarred from entertaining this action by the Rules of the Ceylon Workers' Congress ?

"8. If so, can the plaintiffs have and maintain this action?

"9. Was the alleged election of the plaintiffs and the various officers null and void for non compliance with Rule 16 of the Congress?

"10. On and before 18-12-55 and during dates material to this action did the following persons hold the respective offices:

Mr. Thondaman	...	*President*
Mr. Somasunderam	...	*Secretary*
Mr. Kumaravel	...	*Treasurer*

When the hearing was resumed on 3rd October, 1957, counsel for the defendants who was not the counsel who appeared for them on 12th March, 1957, the first date of trial, withdrew issues 9 and 10. It is not clear under what provision learned counsel or the court acted because if those matters dealt with in the issues arose on the pleadings and were in dispute it was the duty of the Judge to decide them.

Learned counsel for the defendants next invited the court to decide issues 6 (*e*) and 7 before the other issues were decided. Counsel for the plaintiffs objected to issue 6 (*e*) being decided first but had no objection to issue 7 being so decided. Thereupon counsel for the defendants suggested the following issue as issue 9—

"Even if all the averments of fact in the plaint are held to be true, are the plaintiffs or any of them entitled to the relief prayed for in the plaint or any part thereof?"

Counsel for the plaintiffs having no objection to this issue the Judge proceeded to try and determine issues 7 and 9 first.

The learned District Judge has come to the conclusion that the plaintiffs were not given notice of the meeting at which they were expelled and that in consequence they were denied an opportunity of being heard before they were expelled and that there has been a violation of the *audi alteram partem* rule of natural justice. He also went on to hold—

"It follows then that the principles of natural justice have been violated in their expulsion and they would ordinarily have the remedy open to members irregularly or improperly expelled namely the right to bring an action against the Committee for a declaration that the expulsion is void and the plaintiffs are still members of the association and for an injunction to restrain the Committee and their servants and the servants of the club from excluding them from the association or exercising their rights as members."

But in view of Rule 12 (5) of the Rules of the Ceylon Workers' Congress which gave a right of appeal to the Working Committee of the Ceylon Workers' Congress to any member, office-bearer, trustee, District Council, Branch or Agency or its or their office-bearers, against any disciplinary action taken by the Executive Council under the power conferred by that Rule, he held that the plaintiffs who had admittedly come into court without appealing to the domestic appellate body should have appealed to the Working Committee of the Ceylon Workers' Congress and that they must exhaust their domestic remedies before invoking the aid of the courts. He concluded his judgment thus—

"It appears to me that this is not a fit case for the exercise of my discretion in favour of the plaintiffs to grant them the declaratory decree they ask for.

"I hold (A) that the plaintiffs are not entitled to come into court until they have exhausted the remedies open to them in the domestic tribunal in terms of the rules which show their contract, (B) that in any event this is not a fit case for the granting of a declaratory decree in that it would be a decree without consequential relief in terms of the relief sought for in the pleadings.

"In the result I dismiss plaintiffs' action with costs."

The learned Judge and even learned counsel do not appear to have examined the rules of the Ceylon Workers' Congress (marked X1) filed with the plaint. Those rules do not provide for the composition of the appellate body. They do not state—

(*a*) by whom the Working Committee of the Ceylon Workers' Congress is to be constituted;

(*b*) whether they are to be elected or nominated and by what procedure;

(*c*) how many shall be members of that Committee;

(*d*) how long that body is to hold office;

(*e*) how appeals are to be taken to that body;

(*f*) how many members shall hear an appeal.

Now it is impossible for an aggrieved person to appeal to a body whose composition is not defined and which exists only in name. Even the following agreement recorded in the course of the argument does not provide a solution: "It is agreed that Rule 12 (5) should now read 'Ceylon Democratic Congress'." We are not

informed how this body is constituted or what its powers are, and whether it can entertain an appeal by the plaintiffs. The foundation of the Judge's judgment is wrong and for this reason alone it must be reversed. But as the learned Judge has also proceeded to express his views as to the powers of the court in an action in which it is sought to obtain a declaratory decree, which I am of opinion are wrong, I think I must deal with the question, which is one of considerable importance.

The learned Judge seems to think that the granting of a declaratory decree is a matter in his discretion. He seems to have derived this view from certain English decisions cited to him by learned counsel for the defendants. The Civil Procedure Code makes provision for declaratory actions. In modern society in which the state is constantly encroaching on the subjects' rights it is becoming increasingly necessary for the subject to seek this remedy. A person is free to institute an action if he has a cause of action, which is the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury (section 5). An action may be brought—

(*a*) for the prevention or redress of a wrong ;

(*b*) to assert a right which is denied ;

(*c*) to enforce an obligation the fulfilment of which is refused ;

(*d*) to enforce the performance of a duty the performance of which is neglected ;

(*e*) to obtain redress for the infliction of an affirmative injury ;

(*f*) to have a right or status declared ;

and the court is empowered (section 217) to grant a decree or order commanding any person—

(*a*) to pay money ;

(*b*) to deliver movable property ;

(*c*) to yield up possession of immovable property ;

(*d*) to grant, convey, or otherwise pass from himself any right to, or interest in, any property ;

(*e*) to do any act not falling under any one of the foregoing heads ;

or it may enjoin that person—

(*f*) not to do a specified act, or to abstain from specified conduct or behaviour ;

or it may, without affording any substantive relief or remedy—

(*g*) declare a right or status.

Once a plaint is presented and the court does not refuse under section 46 (2) to entertain it on any of the grounds prescribed therein, or does not reject it thereunder, the action must be decided by the court in the manner provided in the Civil Procedure Code, and the Judge has no right to refuse to grant a decree in favour of the plaintiff if he holds that he has established his right to relief. In the instant case the learned Judge was clearly mistaken in thinking that he was free to refuse to grant the plaintiffs a decree in their favour although they had established their case. Once an action reaches the stage of trial the Judge must give judgment for the party in whose favour he has found (section 184). He has no discretion to deny judgment to the successful party, as the learned District Judge has done in the instant case. The right of a citizen to invoke the aid of the courts is one that cannot be taken away by the rules of any association or body of persons. It is so fundamental that it cannot, in my view, be taken away even by our legislature itself. It is unnecessary for the purpose of this judgment to elaborate this view ; it is sufficient to say that a power to legislate for peace, order and good government, does not include a power to deny access to the courts which are the living symbols of peace, order and good government, for the denial of such right would be a negation of the very purpose for which legislative power is conferred on the legislature. Not only cannot such a right be taken away but it also cannot be denied by any court whose jurisdiction is invoked in proper proceedings.

For the above reasons the order of the District Judge is set aside and the case is sent back for trial on the remaining issues.

The appellants are declared entitled to costs both here and below.

Set aside.

PULLE, J.
I agree.

Present : SANSONI, J.

THE ATTORNEY-GENERAL OF CEYLON *vs.* MUDALIHAMIGE KIRIBANDA *et al.*

S. C. 58/59—*M. C. Anuradhapura* 13383.

Argued on : 27th October, 1959.
Decided on : 2nd November, 1959.

Plea of autrefois acquit—Accused discharged as prosecution not ready—Fresh charge for same offence—Plea of autrefois acquit upheld by Magistrate—Appeal by prosecution—Criminal Procedure Code, sections 190, 191, 194, 195 *and* 330.

The two accused, husband and wife were charged in an earlier case with having in their possession parts of the hemp plant. After several postponements the Magistrate made order discharging them as the prosecution was not ready to go to trial.

Thereafter, the present case was filed against them on the same charge and the Magistrate upheld a plea of *autrefois acquit.*

The prosecution appealed.

Held : That in view of the decision in *R. vs. William* 44 N.L.R. 73 the effect of the order made by the Magistrate in the earlier case was not an order made on the merits of the case and for that reason the plea of *autrefois acquit* cannot be sustained.

Cases referred to : *Senaratna vs. Lenohamy* (1957) 20 N.L.R. 44.
Sumangala Thero vs. Piyatissa Thero (1937) 39 N.L.R. 265.
Gabriel vs. Soysa (1930) 31 N.L.R. 314.
Weerasinghe vs. Wijeyesinghe (1927) 29 N.L.R. 208.
R. vs. William (1942) 44 N.L.R. 73.
Don Abraham vs. Christoffelsz (1953) 55 N.L.R. 92.
Dias vs. Weerasingham (1953) 55 N.L.R. 135.

V. S. A. Pullenayagam, C.C., for the appellant.

No appearance for the respondents.

SANSONI, J.

This is an appeal by the Attorney-General against an order of the Magistrate upholding a plea of *autrefois acquit.*

The two accused had been charged in an earlier case No. 8232 with the offence of having in their possession parts of the hemp plant. The trial of that case was postponed several times, and eventually the Magistrate made order discharging the accused, remarking that four dates of trial were enough punishment for the two accused, who are husband and wife, and who had to come a distance of 14 miles to Court.

The present case was thereafter filed against them, on the same charge. The question I have to decide is whether Crown Counsel is right when he submits that the order made in case No. 8232 was not one of acquittal and is therefore no bar to a second prosecution.

Sections 190 and 191 of the Criminal Procedure Code are the relevant sections. They read :

190. If the Magistrate after taking the evidence for the prosecution and defence and such further evidence (if any) as he may of his own motion cause to be produced finds the accused not guilty, he shall forthwith record a verdict of acquittal. If he finds the accused guilty he shall forthwith record a verdict of guilty and pass sentence upon him according to law and shall record such sentence.

191. Nothing hereinbefore contained shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, but he shall record his reasons for doing so.

On a reading of these sections one may well conclude that the earliest stage at which a verdict of acquittal may be recorded is after all the evidence for the prosecution has been taken, though the Magistrate is empowered to make an order of discharge at any previous stage, which

I take to mean a stage earlier than the close of the case for the prosecution.

Two sections were considered in *Senaratna vs. Lenohamy* (1917) 20 N.L.R. 44. In that case a Vidane Arachchi charged certain accused with theft and voluntarily obstructing him in the discharge of his public functions. On the trial date his witnesses were not present, and he could not go on without them. The Magistrate thereupon discharged the accused. It was never in dispute that the order fell under section 191, and the only question argued was whether it prevented the accused being charged again for the same offences. The majority view was that the order was no bar to a fresh prosecution. De Sampayo, J., said that the words " at any previous stage of the case " in section 191 import that all the evidence for the prosecution, as contemplated by section 190, had not been taken ; he also said that if the prosecutor has put before the Court all the evidence which is available to him, or which he is allowed a reasonable opportunity to produce the accused will be entitled to demand a verdict at the hands of the Magistrate instead of an inconclusive order of discharge, so that he may not be vexed again ".

The same view was taken by Soertsz, J., in *Sumangala Thero vs. Piyatissa Thero* (1937) 39 N.L.R. 265 where the learned Judge held that the Magistrate cannot enter an order of acquittal before the conclusion of the case for the prosecution. He added : " If, therefore, the Magistrate puts an end to the proceedings before the complainant had led all his evidence, the order by which he does so is an order of discharge and no more ". The learned Judge disagreed with the view taken by Garvin, J., in *Gabriel vs. Soysa* (1930) 31 N.L.R. 314 and in *Weerasinghe vs. Wijeyesinghe* (1927) 29 N.L.R. 208 that an order of acquittal can be made before the case for the prosecution was closed.

The question was therefore ripe for decision, as to whether an order of acquittal can be made before the end of the case for the prosecution, and it came before the Court of Criminal Appeal in *R. vs. William* (1942) 44 N.L.R. 73. The accused in that case had raised the plea of *autrefois acquit* but it had been overruled by the presiding Judge and he was convicted by the unanimous verdict of the jury. At a previous trial for the same offences, before a Magistrate who had assumed jurisdiction as District Judge he had been acquitted after the evidence of four witnesses had been recorded, but before all the witnesses for the prosecution had been called. If the view of Garvin, J., was correct the plea of *autrefois acquit* should have been upheld, but the Court of Criminal Appeal approved the view taken by Soertsz, J. Hearne, J. said : " We take the view that the wording of section 190 means that a Magistrate is prevented from making an order of acquittal under that section till the end of the case for the prosecution. It follows that although the Magistrate of Avisawella purported to make an order under section 190, in reality he made an order under section 191, mistakenly calling it an acquittal, instead of a discharge. Such an order cannot support a plea of *autrefois acquit* ". Hearne, J. also pointed out that an acquittal under our Code is not necessarily an order made on the merits, for under sections 194 and 195 orders of acquittal can be made before the merits are gone into ; but so far as section 190 is concerned the learned Judge said : " the word ' acquittal ' has no artificial meaning. It means an acquittal on the merits ". Two distinct and unequivocal propositions were therefore enunciated by the Court in that judgment : (1) that an order of acquittal cannot be made at a trial until the case for the prosecution has been closed, and (2) that an order of acquittal which purports to have been made under section 190 must be made on the merits and on no other ground.

In view of that judgment it is easy to pronounce on the true effect of the order made by the Magistrate in case No. 8232. It was certainly not an order made on the merits and for that reason the plea of *autrefois acquit* cannot be sustained. Nor does the fact that the prosecution was unable to go to trial because of the absence of the Government Analyst's report make any difference ; it was a very similar situation to that which arose in *Senaratna vs. Lenohamy* (1917) 20 N.L.R. 44, and a discharge in those circumstances does not bar a fresh prosecution.

I wish, with respect, to point out that the opinion of Hearne, J. in *R. vs. William* (1942) 44 N.L.R. 73 that the case of *Senaratna vs. Lenohamy* (1917) 20 N.L.R. 44 was wrongly decided seems to have arisen from a misapprehension of the particular provision of the Code under which that case was instituted. It was a prosecution initiated with a report under section 148 (1) (*b*) by a public officer ; an order of acquittal under section 194 could not therefore have been made, though Hearne, J. seems to

have thought it could, for that section only applies where a complaint has been made under section 148 (1) (*a*). But this is by the way.

It would serve no useful purpose for me, having regard to the binding effect of the decision in *R. vs. William* (1942) 44 N.L.R. 73, to consider certain judgments which have been based on a view that cannot be reconciled with that decision. It would appear that a strong current of authority began to flow in a contrary direction, starting with the judgments of Nagalingam, A.C.J. in *Don Abraham vs. Christoffelsz* (1953) 55 N.L.R. 92 and *Dias vs. Weerasingham* (1953) 55 N.L.R. 135. The judgment in *R. vs. William* (1942) 44 N.L.R. 73 does not appear to have been brought to the notice of the learned Judge before he gave judgment in those cases.

With great respect to the learned Judges who have thought that the decision in *R. vs. William* (1942) 44 N.L.R. 73 can be reconciled with the view taken by Nagalingam, A.C.J., I find myself unable to share their opinion.

For the reasons I have given this appeal must be allowed. I set aside the order of discharge and send the case back to the Magistrate in order that he might proceed with the trial according to law.

Set aside.

Present: Basnayake, C. J. and Sansoni, J.

V. PONNUTHURAI *et al* vs. NONA BULKIES JUHAR and another

S. C. No. 145A—B.—*D. C. Trincomalee No.* 5170.

Argued on: 9th and 10th November, 1959.
Decided on: 21st December, 1959.

Rei Vindicatio action, pendency of—Application to intervene by 3rd party—No objection by plaintiff—Intervenient praying for declaration of title to land, damages and ejectment of defendants—Objection to intervention by defendants—Intervention allowed—Appeal by defendants—Civil Procedure Code, Sections 17 *and* 18.

Held: (1) That as the plaintiff had not objected in this case to the intervention the application should be allowed, as there is nothing in the rule as contained in Sections 17 and 18 of the Civil Procedure Code against the granting of it, and as it may be that the plaintiff thinks that he will not get effectual and complete relief unless the intervention is allowed.

(2) That, where the plaintiff objects to an application for intervention, the test to determine whether it should be allowed or not is "May the order for which the plaintiff is asking directly affect the intervener in the infringement of his legal rights."

Per Sansoni, J.—Devlin J. warned that the test laid down by him cannot be applied to every sort of application to join parties. He pointed out that he was not attempting to lay down, or holding that the authorities lay down, "a test of universal efficiency". If a plaintiff wants to add a defendant he will not have to show that the new defendant will be directly affected by an order in the action as then constituted, but only that he cannot get effectual and complete relief unless the new defendant is added. Similarly, where a defendant seeks to join a new defendant he need only show that he cannot effectually set up a defence which he wishes to set up unless the new defendant is joined or unless the order made binds the new defendant.

Cases referred to: *Meideen vs. Banda* (1895) 1 N.L.R. page 51.
Amon vs. Raphael Tuck and Sons Ltd. (1956) 1 Q.B. 357
Miguel Sanchez and Co. vs. The Result (1958) 2 W.L.R. 725.
Moser vs. Marsden (1892) 1 Ch. 487.

E. R. S. R. Coomaraswamy with *E. B. Vannitamby* for the 1st defendant appellant in S. C. No. 145A and for 2nd defendant appellant in S. C. No. 145B.

N. E. Weerasooria, Q. C. with *J. N. David* for the 3rd defendant respondent in both appeals.
M. I. M. Cassim with *M. T. M. Sivardeen* for the plaintiff respondent in both appeals.

SANSONI, J.

These are two connected appeals from an order allowing the 3rd defendant-respondent to intervene in an action between the plaintiff and the 1st and 2nd defendants-appellants. The plaintiff sued for a declaration of title to a particular land, tracing title from one Meera Lebbai Tampi who is said to have died leaving the plaintiff as his sole heir. He pleaded that the first defendant asserted title to the land in February 1956 and transferred the land to the 2nd defendant. He claimed a declaration of title, ejectment, and restoration of himself to possession.

The first defendant in his amended answer set out a different chain of title, and ultimately pleaded a purchase by him from one Wellawattage Gunawardene Dissanayake upon deed No. 646 dated 14th November 1955. The 2nd defendant pleaded a purchase by him for valuable consideration, presumably from the first defendant though he does not expressly say so. He also pleaded that he was not a necessary party and that no decree obtained by the plaintiff can bind him, though he gave no reasons for this strange plea.

After the case had been fixed for trial, the intervenient filed a statement of claim setting out his title which ends with a purchase by him on deed No. 11648 dated 21st November, 1928. He attacked deed No. 646 dated 14th November, 1955 as a false document, and pleaded that he was the owner of the land. He claimed that the 2nd defendant had, since his alleged purchase, cut down trees on the land to the value of Rs. 5,000/-. In his prayer he asked that he be added as a party, that he be declared entitled to the land, that the defendants be ejected from it and he be placed in quiet possession, and for damages in Rs. 5,000/-. In view of certain observations I shall make it is important to remember at this stage that the plaintiff neither consented nor objected to the intervention, though both defendants objected to it. After inquiry, the learned judge allowed the intervenient's application and directed that he be added as the 3rd defendant. It is from this order that the appeals have been taken.

It was pointed out as for back as 1895 in *Meideen vs. Banda* (1895) 1 N.L.R. page 51 that the language of Section 18 of the Civil Procedure Code corresponds with the language of Order 16 Rule 11 of the Rules of the Supreme Court of England, and both in that case and in later cases guidance has been sought from English decisions where similar questions arose for decision. Order 16 Rule 11 reads: "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the aplication of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added". The rest of the rule need not be quoted as it does not affect the present matter. The relevant provisions of Sections 17 and 18 of the Code read:

"17. No action shall be defeated by reason of the misjoinder or nonjoinder of parties, and the court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Nothing in this Ordinance shall be deemed to enable plaintiffs to join in respect of distinct causes of action.

If the consent of any one who ought to be joined as a plaintiff cannot be obtained, he may be made a defendant, the reasons therefor being stated in the plaint."

"18 (1) The Court may on or before the hearing, upon the application of either party, and on such terms as the court thinks just, order that the name of any party, whether as plaintiff or as defendant, improperly joined, be struck out; and the court may at any time, either upon or without such application, and on such terms as the court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added".

It is not feasible to consider in detail the many local decisions dealing with the subject of addition of parties, nor is it easy to extract any guiding principles from them as each case seems to have been decided on its particular facts. The question that arises on the present appeals is this: the plaintiff not objecting, can a third party claim to intervene in a pending rei vindicatio action where he proposes to obtain a declaration of title and consequential relief in his own favour? I shall first consider the matter as though the plaintiff had objected to the intervention. The answer would have then depended on the meaning one gives to the words "any person whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action" for obviously the intervenient in this case is not a person who "ought to have been joined."

The English rule has been closely analysed in a learned judgment by Devlin, J. in *Amon vs. Raphael Tuck and Sons Limited* (1956) 1 Q.B. 357 which was a case where the plaintiff opposed the intervention. The judgment was followed and applied by Willmer J. in *Miguel Sanchez and Co. vs. The Result* (1958) 2 W.L.R. 725. Devlin J. reviewed all the authorities and pointed out that two views had been expressed on the meaning of the words in question. The broader view is that the court has a wide discretionary power to join any person who has a claim to the subject matter of the action, for such a person can urge that the question involved in his cause of action cannot be settled without joining him. Thus if the subject matter of the action is the ownership of movable or immovable property, such a person should be allowed to come in and put forward his claim to it. The narrower view emphasises that the presence of the intervenient must be necessary for the prescribed purpose of deciding and settling questions involved in the action as it stands between the existing parties. On this view, the test whether a person should be added or not becomes a matter of jurisdiction and not of discretion. The following words of Lindley L. J. in *Moser vs. Marsden* (1892) 1 Ch. 487 were quoted by Devlin J. as furnishing a clue to the solution of the problem: "In order to properly understand the rule we must look at the whole of it. It begins by saying 'No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties'—that is the key to the whole question: if the court cannot decide the question without the presence of other parties, the cause is not to be defeated, but the parties are to be added so as to put the proper parties before the court." Ultimately the narrower construction of the rule was adopted by Devlin J, who laid down the test to determine whether an intervention should be allowed when the plaintiff objects to it as being: "May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights?" The rule was regarded as giving effect to the practice in equity, which was to join as parties all those whose presence was necessary to complete and effectual justice, as compared with the common law practice, which was to join only parties who should have been joined, such as joint contractors.

If this test were to be applied to the present action, but still on the basis that the plaintiff had objected, I think that the application for intervention would fail. The intervenient will not be affected in the enjoyment of his legal rights by any judgment that may be given in the action between the plaintiff and the 1st and 2nd defendants. I would stress the point that the intervenient does not claim that he is now in possession of the land in dispute, for in his prayer he asks that the plaintiff and the defendants be ejected. Execution of a decree for possession which the plaintiff may obtain would therefore not have affected him. But what is the position where, as in this case, the plaintiff does not object to the intervention? And in this instance I think that when the plaintiff does not object he may be taken to consent.

Devlin J. warned that the test laid down by him cannot be applied to every sort of application to join parties. He pointed out that he was not attempting to lay down, or holding that the authorities lay down, "a test of universal efficacy". If a plaintiff wants to add a defendant he will not have to show that the new defendant will be directly affected by an order in the action as then constituted, but only that he cannot get effectual and complete relief unless the new defendant is added. Similarly, where a defendant seeks to join a new defendant he need only show that he cannot effectually set up a defence which he wishes to set up unless the new defendant is joined or unless the order made binds the new defendant. He added: "It is not that the construction of the rule differs according to the circumstances. The construction of the rule is and must be the same in all circumstances; but the test that is appropriate to determine whether a party is necessary

or not may vary according to the circumstances." Now in this action the plaintiff is dominus litis, and just as he cannot be compelled to fight a litigant not of his own choice if he objects to an intervenient coming into the case, I also think that where he does not object to the intervention such intervention should be allowed unless there is something in the rule which forbids it. It may be that the plaintiff thinks that he will not get effectual and complete relief unless the intervention is allowed and the validity of the deed No. 646 dated 14th November, 1955 is inquired into; or he may think that the issue of prescriptive possession would be most conveniently decided, from his point of view, in one action instead of two.

Counsel for the appellants objected that his clients would be hampered in pleading in reply to the claim put forward by the added party. I do not think that he need have any fears on this ground. Under Section 79 of the Code the Court can allow further pleadings in order that the real issues between the parties may be raised, and if the answer filed by the added party requires it, there should be no objection to amended pleadings being filed by the 1st and 2nd defendants in order to meet that answer.

I would therefore dismiss these appeals with costs.

Basnayake, C.J.
I agree.

Appeals dismissed with costs.

Present : Basnayake, C.J.

ZAHIR *vs.* DAVID SILVA

S. C. No. 202—*C. R. Matara No.* 6379

Argued on : 26th August and 7th September, 1959.
Decided on : 28th October, 1959.

Landlord and Tenant—Notice to quit on a date other than that corresponding to date of commencement of tenancy—Validity of such notice.

Held : (1) That when a tenancy commenced on 12-3-1952 a notice dated 30-1-1957 to the tenant to quit the premises on or before 1-3-1957 is bad in law.

(2) That in the absence of an agreement to the contrary, the notice of termination of a tenancy must run concurrently with a term of the letting and hiring and must expire at the end of that term.

Per Basnayake, C.J.—"The whole purpose of admitting facts in a legal proceeding is to avoid having to prove them. Judges should therefore record them with the utmost care because the admissions take the place of proof."

H. W. Jayewardene, Q.C., with *G. T. Samarawickreme* and *N. R. M. Daluwatte*, for the plaintiff-appellant.

D. S. Jayawickreme, Q.C., with *R. D. B. Jayasekera*, for the defendant-respondent.

Basnayake, C.J.

The only question for decision on this appeal is whether the defendant's tenancy has been terminated by a valid notice. It is clear from the receipts, P1a to P1j, spread over the period 1952 to 1956, produced by the plaintiff that the tenancy was one that commenced on the 12th day of the month. The first of them (P1a) dated 12th March 1952 reads: "Received from Mr. K. H. M. T. David Silva the sum of Rupees Thirty Nine only being house rent for three months due in respect of premises No. 140 at Kotuwegoda for the month commencing from 12th March 1952 to 11th June 1952", and the last of them (P1j) dated 29th May 1956 reads: "Received from Mr. K. H. M. T. David Silva of Kotuwegoda the sum of Rupees Thirty Nine being house rent due for three months in receipt of premises No. 140 at Kotuwegoda for the month commencing from 12th August 1954 to 11th November 1954". The plaintiff's own evidence is also to the effect that the tenancy commenced

on 12th March 1952. He states: "I say that this defendant came into occupation of these premises on 12-3-52, the amount shown in P1a is the first payment made by him to me when he came into occupation of these premises." The defendant appears to have been a most unsatisfactory tenant who never paid his rent regularly. His rent was always in arrears and was paid at irregular intervals. On 31st January 1957 the total amount of his arrears was Rs. 325/- and on that day the plaintiff's Proctor sent the following letter terminating his tenancy :—

"I write this on instructions from your Land-lord Mr. M. I. A. M. Zahir of Kotuwegoda, Matara.

"I am instructed by my client to request you to pay forthwith the sum of Rupees Three hundred and twenty-five (Rs. 325/-) due as arrears of rental in respect of the premises occupied by you as my client's tenant.

"I am further instructed to request you to leave and quit the above premises on or before the first day of March this year (1957).

"If you fail to comply with this legal action will be taken against you."

The defendant's Proctor replied on 20th February 1957 denying that he was in arrears. He nevertheless forwarded a money order for Rs. 325/- and demanded a statement showing the standard rental and the permitted increases.

Of the issues tried by the learned Judge issues 7 and 10 alone are material to this appeal. They read—

"9. On what date did the tenancy commence?

"10. If the tenancy commenced on 12th March 1952 is the notice to quit dated 30-1-57 requesting, the defendant to quit and vacate the premises on or before 1-3-57 valid in law?"

The learned Judge has held that the tenancy commenced on 12th March 1952 and that the notice is bad in law.

The tenancy is undoubtedly a monthly tenancy which ran from the 12th day of one month to the corresponding day of the succeeding month.

It is settled law that in the absence of an agreement to the contrary the notice of termination of a tenancy must run concurrently with a term of the letting and hiring and must expire at the end of that term. In the instant case the tenancy being one that ran not from the 1st day of the month but from the 12th day the landlord was not entitled to terminate it except at the end of one of the monthly periods. The learned Judge is right in holding that the notice is bad in law. The plaintiff is himself to blame for the predicament in which he finds himself. For if he had given the full facts to his Proctor when he instructed him to send the notice terminating the defendant's tenancy it is not likely that the notice would have gone in the terms in which it was sent.

Before I conclude this judgment I think it is necessary to refer to one other point. Before the issues were determined the following admission was recorded: "Tenancy is admitted and the notice to quit is also admitted". The cryptic form of this record created difficulties as the trial proceeded. The words "notice to quit is also admitted" was understood by the plaintiff's lawyers as being an admission that the notice was valid and by the defendant's lawyers as being an admission that a notice was given but without any admission of its validity.

On account of this uncertainty as to the meaning of the admission when at the end of the plaintiff's case defendant's counsel sought to raise issue No. 10 it was vehemently opposed; but the learned judge rightly accepted it.

Now the whole purpose of admitting facts in a legal proceeding is to avoid having to prove them. Judges should therefore record them with the utmost care because the admissions take the place of proof. Trial Judges should bear in mind the precise terms of section 58 of the Evidence Ordinance which reads—

"No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

"Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions".

The judicious and careful use of the above provision will go a long way to shorten civil trials.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Present : BASNAYAKE, C. J., AND PULLE, J.

DIAS ABEYESINGHE *vs.* DANIEL AND ANOTHER

S. C. No. 384—D. C. Colombo No. 31748/M

Argued on : 26th and 27th, May 1959
Decided on : 10th July, 1959

Partnership—Damages—Action against partners of a firm of Proctors on the ground of fraud practised by one of the partners—Dissolution of partnership later—Are innocent partners liable for the fraud of a co-partner during subsistence of partnership—Fraud discovered after several years—When cause of action arose—Prescription Ordinance, section 9—Civil Procedure Code, section 5.

1st and 2nd defendants, who were proctors formed a partnership in May 1945 and dissolved it in October, 1949. According to a division of work in the firm, the former attended to the notarial work, while the latter attended to the other branches of the firm's professional activities. In March, 1948 during the pendency of the partnership, the plaintiff paid to the defendants by cheque drawn in favour of the firm a sum of Rs. 7,000/- to be lent to one F on the security of a primary mortgage of a house, which transaction was arranged by the 1st defendant. A mortgage bond was forwarded to the plaintiff purporting to be a bond executed by F and interest was paid monthly up to October 1953. The plaintiff recalled the money in 1953 when she discovered that the 1st defendant had fraudulently misappropriated the money to his own use and remitted the interest himself without disclosing that fact and that F's, (the mortgagor's) signature on the bond was forged.

The 1st defendant was prosecuted for cheating and forgery and was convicted on his own plea.

The plaintiff filed this action against the 1st and 2nd defendants for the recovery of the sum of Rupees Seven thousand paid to them. The first defendant filed a motion consenting to judgment, but the 2nd defendant contested the claim. The District Court entered judgment against the 2nd defendant who appealed.

Held : (1) That the 2nd defendant is liable for the fraud committed by the 1st defendant, his partner, while the partnership was still subsisting, although at the time the fraud was discovered he had ceased to be a partner and the 2nd defendant had no knwoledge of the fraud till it was discovered. That the dissolution of the partnership does not end a partner's liability for his co-partner's fraud committed in the course of the business of the partnership.

(2) That the plaintiff's action was not barred by prescription as the cause of action did not arise till the fraud was discovered in November, 1953.

Cases cited : *Hackney vs. Knight* (1890—1) VII Times Law Reports, 254.
Blair vs. Bromley (2 ph. 354; 5 Hare 542.
Moore vs. Knight (1891) 1 ch. 547.
Board of Trade vs. Cayzer Irvene & Co. (1927) A. C. 610.

N. K. Choksy, Q.C., with *H. W. Jayawardene, Q.C.*, and *F. R. Dias* for 2nd Defendant-appellant.
Walter Jayawardena with *W. D. Gunasekara* and *Nimal Senanayake* for plaintiff-respondent.

BASNAYAKE, C.J.

This is an action for the recovery of a sum of Rs. 7,000/- against two persons who carried on the business of Proctors and Notaries in partnership under the name of " C. M. G. de Saram and Dias Abeyesinghe ". During the subsistence of the partnership the plaintiff paid to the defendants by cheque dated 3rd March, 1948, drawn in favour of the firm a sum of Rs. 7,000/- to be lent to one D. H. Fernando of No. 16/3, Hampden Lane, Wellawatte, with interest at 10 per cent or 8 per cent per annum if paid punctually. This loan was to be secured by the primary mortgage of a house and land in extent 17.56 perches and bearing assessment No. 16/3, Hampden Lane, Wellawatte. The cheque was sent in response to the following letter of 2nd March, 1948 :—

" C. M. G. DE SARAM & DIAS-ABEYESINGHE,
Proctors & Notaries Public.

Our Ref. S/NM/Gen.

Gaffoor Building
(First Floor)
Fort, Colombo 1.

2nd March, 1948.

Mrs. N. L. Daniel,
213, Turret Road,
COLOMBO 7.

Dear Madam,

Loan of Rs. 7,000/-.

With reference to our recent conversation with yon on the telephone, we have been able to arrange a loan of Rs. 7,000/- on the security of a primary mortgage

of a house and land in extent 17·56 perches bearing No. 16/3, and situated at Hampden Lane, off High Street, Wellawatte. We have inspected the property and find that the house is a well built one and we are of the view that the property affords a sufficient margin of security for a loan of Rs. 7,000/-.

We have examined the title deeds and find that the present owner, Mr. D. H. Fernando, has good title to the property.

The following will be the terms of the loan:—

(1) " The loan will be repayable on three months' notice on either side.

(2) Interest will be at the rate of 8% per annum, with a default rate of 10%, payable monthly in advance. The interest per month will be Rs. 46/67.

Will you please let us have a cheque in our favour for the amount of the loan.

Yours faithfully,
C. M. G. De Saram & Dias-Abeyesinghe
(Sgd.) C. M. G. de Saram,
Partner.

CMG/TDS."

On 4th March, 1948, the following receipt was issued by the firm :—

" C. M. G. De Saram & Dias-Abeyesinghe, Proctors & Notaries Public, 229 Colombo. E3/ Receipt

Gaffoor Building, Fort,
Colombo, 4th March, 1948.

Mrs. N. L. Daniel

Received from Mrs. N. L. Daniel the sum of Rupees Seven thousand only—by cheque being amount of loan to Mr. D. H. Fernando for the security of a primary mortgage of premises No. 16/3, Hampden Lane, Wellawatte.

C. M. G. De Saram & Dias-Abeyesinghe
(Sgd.) C. M. G. de Saram,
(on a 6 cts. stamp)
Rs. 7,000/-. *Partner.*"

On 13th March, 1948, the following letter was sent to the plaintiff by the defendants :—

" C. M. G. De Saram & Dias-Abeyesinghe.

Our Ref. S/NM/Gen.

Gaffoor Building
(First Floor)
Fort, Colombo 1.

13th March, 1948.

Mrs. N. L. Daniel,
213, Turret Road,
Colombo 7.

Dear Madam,

Loan of Rs. 7,000/-.

With reference to the above matter, we confirm having advised you recently that there would be a little delay in the mortgage bond in your favour being completed because Mr. Fernando was endeavouring to make arrangements to find the balance Rs. 3,000/-. As mentioned to you Mr. Fernando required a loan of Rs. 10,000/- but we informed him that you could only lend Rs. 7,000/-. Mr. Fernando is purchasing another property and requires Rs. 10,000/- and there will be a little delay in completing the purchase. We have therefore told Mr. Fernando that as you have already paid us the amount of the loan, we would have to pay interest and to this he has agreed. We accordingly, enclose our cheque in your favour for Rs. 46/67 being interest in advance for the month 15th March to 14th April, 1948. We have told Mr. Fernando that arrangements must be made for the bond to be signed before the 15th April. We will advise you of further progress in due course.

In the meantime, please send us a receipt for the sum of Rs. 46/67.

Yours faithfully,
C. M. G. De Saram & Dias-Abeyesinghe
(Sgd.) C. M. G. de Saram,
Partner.

Encl.
CMG/TDS."

On 20th April, 1948, the firm again wrote as follows :—

" C. M. G. De Saram & Dias-Abeyesinghe,
Proctors & Notaries Public.

Gaffoor Building,
(First Floor)
Fort, Colombo 1.

20th April, 1948.

Mrs. N. L. Daniel,
No. 213, Turret Road,
Colombo.

Dear Madam,

Loan of Rs. 7,000/- to Mr. D. H. Fernando

With reference to the above loan, the mortgage bond in your favour was signed by Mr. D. H. Fernando yesterday and we write to give you the particulars in regard to the bond.

(1) The mortgage bond bears No. 2343 dated 19th April, 1948, and attested by C. M. G. de Saram, Notary Public.

(2) Name and address of borrower: Mr. D. H. Fernando, No. 16/3 Hampden Lane, off High Street, Wellawatte.

(3) The rate of interest is 8% p.a. with a default rate of 10% p.a.

(4) The interest is payable monthly in advance on the 15th day of each and every month, with ten days of grace. The next payment of interest is on the 15th May, 1948.

(5) The loan is repayable on three months' notice on either side.

We enclose our cheque in your favour for Rs. 46/67 being interest due by Mr. Fernando for the period 15th April to 14th May, 1948. Kindly send *us* the receipt.

Mr. Fernando wishes to pay the interest every month through us and we will in future pay the interest to you.

When the mortgage bond has been registered, we will forward same to you, together with the title deeds of the property mortgaged.

Yours faithfully,
C. M. G. DE SARAM & DIAS-ABEYESINGHE
(Sgd.) C. M. G. de Saram
Partner.

Encl.
NAF."

On 14th September, 1948, the mortgage bond was forwarded with the following letter :—

" C. M. G. DE SARAM & DIAS-ABEYESINGHE,
Proctors & Notaries Public.

Our Ref. S/NM/Gen.

Gaffoor Building,
(First Floor)
Fort, Colombo 1.
14th September, 1948.

Mrs. N. L. Daniel,
213, Turret Road,
COLOMBO.

Dear Madam,

Loan to Mr. D. H. Fernando

With reference to the above matter we forward herewith the mortgage bond in your favour bearing No. 2343 dated 19th April, 1948, (C. M. G. de Saram, N.P.), together with the title deeds of the property mortgaged, in one packet.

Kindly acknowledge receipt.

Yours faithfully,
C. M. G. DE SARAM & DIAS-ABEYESINGHE
(Sgd.) C. M. G. de Saram
Partner.

CMG/TDS."

The interest was paid regularly up to 14th October, 1953. Thereafter no interest was paid. The plaintiff wanted the money as she was building an annexe to her house and it was when she recalled it that she discovered that the 1st defendant had fraudulently appropriated the money to his own use and remitted the interest himself without disclosing that fact, and that the mortgagor's signature on the bond was forged. That discovery was made in November 1953, and this action was instituted in April 1954.

D. H. Fernando confirmed that the money was not borrowed by him and that he did not sign the mortgage bond sent by the defendants to the plaintiff. The 1st defendant was charged to case No. 49737 in the Joint Magistrate's Court of Colombo with cheating and forgery. He pleaded guilty to the charges on 9th February, 1954, and was convicted and sentenced to six months' simple imprisonment on the charge of cheating and six months' rigorous imprisonment on the charge of forgery.

The 1st defendant filed a motion consenting to judgment. The 2nd defendant alone contested this action. The first question that arises for decision is whether the 2nd defendant is liable to pay the plaintiff's claim.

The law of partnerships to be administered by us is the same as would be administered in England in the like case at the corresponding period if such question or issue had arisen or had to be decided in England (section 3 Civil Law Ordinance). Under the law of England every partner is an agent of the firm and his other partners for the purpose of the business of the partnership ; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner (section 5 Partnership Act 1890). This liability extends even to fraudulent acts committed by a partner in the course of the business of the partnership.

The legal position of an innocent partner is aptly stated by Hawkins, J., in *Hackney vs. Knight* (1890-1) VII Times Law Reports 254—

> " I desire to say at once that I find no evidence of personal fraud or moral delinquency on the part of Mr. Gregory, but the position of the member of a firm is such that in law he becomes personally responsible for the fraud or moral delinquency of any other member of, or any other person intrusted by, the firm to represent and act for it in the business of the firm. Practically each member of a firm becomes, as regards the management and business of the firm, a surety for every other member of it, and for every person intrusted by the firm to act for it, and the act of each in regard to the business is the act of all ; thus there may be fraudulent conduct on the part of some member or members of the firm for which the whole firm is legally responsible, though the rest of its members are personally without blame."

This aspect of the liability of co-partners is also discussed in the cases of *Blair vs. Bromley* (2 Ph. 354 ; 5 Hare 542) and *Moore vs. Knight* (1891) 1 Ch. 547. It is sufficient to quote here a passage from one of those two cases. In the former case Lord Cottenham states—

> " In this case the payment of the £4,500 into the funds of William Bromley and his partner, for the purpose of investment, is proved, and their liability admitted. Afterwards Mr. Bromley, one of the partners, representing that it had been invested, paid sums equal to the interest, and made a charge in a bill of costs for some of the expenses incident to such investment.
>
> " Whether the defendant knew of the transaction or not, he certainly had the means of knowing it. But neither is necessary ; for the duty of laying out the money was in the ordinary course of the business of

the firm; and they had undertaken it; and in that case I agree with what is laid down by the Master of the Rolls in *Sadler vs. Lee* (6 Beav. 330) that all the partners became liable for the several acts of each."

In the instant case the partnership was formed in May 1945, and dissolved in October, 1949. There was a division of work between the two partners. The 1st defendant attended to the notarial work while the 2nd defendant attended to the other branches of the firm's professional work. Although it was the 1st defendant who personally attended to the transaction in question, as it fell within his division of work, the 2nd defendant is liable; because as stated above a partner is liable for the fraud of his co-partner. The 2nd defendant is liable for the fraud committed by the 1st defendant, his partner, while the partnership was still subsisting, although at the time the fraud was discovered he had ceased to be a partner and the 2nd defendant had no knowledge of the fraud till it was discovered. The dissolution of the partnership does not end a partner's liability for his co-partner's fraud committed in the course of the business of the partnership. (*Hackney vs. Knight* (*supra*)).

Learned Counsel for the 2nd defendant-appellant placed great reliance on the fact that the plaintiff wrote to the 1st defendant when in November, 1953, she wanted the money recalled. I do not think that circumstance is of any avail. She did that in accordance with the practice she had followed in all her transactions with the firm, viz., dealing direct with the partner in charge of this particular branch of the firm's activities. She had been a client of the firm since November, 1946, and had before the one in question made five investments totalling Rs. 30,000/-. In every case the cheque was drawn in favour of the firm.

The next question for decision is whether the instant action is barred by the provisions of section 9 of the Prescription Ordinance. That section enacts that no action shall be maintainable for any loss, injury, or damage, unless the same shall be commenced within two years from the time when the cause of action shall have arisen. Learned Counsel for the 2nd defendant-appellant contended that the cause of action arose on the date on which the money was paid to the defendants. I am unable to agree. If the expression is to be understood in the sense in which it is defined in section 5 of the Civil Procedure Code, as I think it should, viz., the wrong for the prevention or redress of which an action may be brought, or the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, the infliction of an affirmative injury, the cause of action did not arise till the fraud was discovered in November, 1953.

Even apart from the definition in our Civil Procedure Code, if the matter is examined by reference to the meaning the expression bears in English Law and in the English Statute of Limitation, the plaintiff's cause of action did not arise till November, 1953. In Sweet's Law Dictionary the expression is defined thus— "cause of action means the fact or combination of facts which give rise to a right of action." In the case of *Board of Trade vs. Cayzer Irvine & Co.* (1927) A.C. 610 Viscount Dunedin made the following observation which is quoted in text books :—

> "Cause of action in the statute of James means that which makes action possible; and in the present case that is the award of the arbitrator, for until it is in being no action is possible."

The plaintiff did not become entitled to sue the defendants until she discovered the fraud. She had a mortgage bond, and interest was being paid regularly to her by the firm. The defendants represented to the plaintiff that this was being done at the instance of the mortgagor who desired to pay his interest through them. How could it be said that in these circumstances the right to sue arose before the discovery of the fraud?

Even if this question is approached from the angle of decided English cases the result is the same. The best way of illustrating this is by citing two passages from *Blair vs. Bromley* (*supra*). They are as follows :—

> "In the present case, the misrepresentation continued until the fraud was discovered: the case therefore, according to Sir William Grant, is the same as if on that day the fund, having been previously invested, had been called in and received by Messrs. Bromley, in which case there could not have been any question as to the Statute of Limitations. Those who, having a duty to perform, represent to those who are interested in the performance of it that it has been performed, make themselves responsible for all the consequences of the non-performance."
>
> "What, then, in the nature of the liability which so arises from the misrepresentation? Merely a guarantee that the parties whose interest might be affected by the misrepresentation shall be placed in the same situation as if the fact represented were true. The misrepresentation was probably made for a fraudulent purpose; but the consequence is a merely civil liability; and as one partner may certainly bind another as to any matter within the limits of their joint business, so he may by an act which, though not constituting a contract by itself, is in equity considered as having all the consequences of one.
>
> "I am, therefore, of opinion that William Bromley's partner, though he had no knowledge, or means of knowledge, of his misrepresentation, would have been affected by this equity arising from it, and that time did not begin to run against the plaintiff's right until the discovery of the fraud."

Finally I wish to add that the argument of learned Counsel for the appellant that, as concealed fraud is not specifically pleaded, the 2nd defendant's plea of prescription is entitled to prevail, because the actual fraud was committed in 1948, cannot be sustained for the reason that it is apparent, from the facts averred by the plaintiff in the plaint, that the fraud was concealed till October 1953, and that she had no knowledge of it till the 1st defendant stopped remitting the interest on the bond.

The learned District Judge was therefore right in holding that the action was not barred by section 9. The appeal is accordingly dismissed with costs.

Appeal dismissed

Pulle, J.

I agree.

Present : Weerasooriya, J. and H. N. G. Fernando, J.

NIKATENNE *v.* PERUMAL CHETTY *et al.*

S. C. No. 613—*D. C.* (*F*) *Kandy* (*Insolvency*) *No.* 200.

Argued on : 29th September, 1959.
Delivered on : 22nd October, 1959.

Insolvency—Debtor failing to deposit in Court the amount ordered—Is Court justified in withdrawing protection under the Insolvency Ordinance (*Cap.* 82) *Section* 151 (5).

Held : The failure to deposit in Court the amount ordered by the Court does not amount to a concealment or making away of property within the meaning of Section 151 (5) of this Insolvery Ordinance. To establish this offence under section 151 (5) of the ordinance, there must be proof of the intent on the part of the insolvent to diminish the sum which is to be divided among his creditors or to give an undue preference to any of them. The power to withdraw protection cannot be exercised except at the sitting appointed for the last examination of the insolvent.

Case referred to : *Fernando vs. Miller and Co.*, 41 N.L.R. 383.

E. B. Vannitamby for the insolvent-appellant.

No appearance for the respondents.

Weerasooriya, J.

This is an appeal by an insolvent from an order withdrawing protection granted to him.

The appellant was in October, 1956, ordered to deposit in Court a sum of Rs. 250/- monthly out of his salary. He appears to have complied with this order up to April, 1957, but defaulted thereafter. On the 5th November, 1957, when the case was called in some other connection, an application was made on behalf of one of the proved creditors that the protection granted to the appellant be withdrawn as he had failed to deposit the Rs. 250/- as ordered. The Additional District Judge, without giving the appellant an opportunity of showing cause against the application, thereupon withdrew his protection holding that he had committed an offence under section 151 (5) of the Insolvency Ordinance (Cap. 82) in that he concealed or made away with the money which should have been deposited.

I do not think that the failure of the appellant to deposit the money amounts to a concealment or making away of his property within the meaning of section 151 (5). Moreover, an offence under section 151 (5) requires that there should have been an intent on the part of the insolvent to diminish the sum to be divided among his creditors or to give an undue preference to any of them. There is no proof of such intent in the present case.

There is another ground for setting aside the order withdrawing protection. Section 151 of the Insolvency Ordinance makes it clear that the power to withdraw protection cannot be exercised except at the sitting appointed for the last examination of the insolvent. That stage is not reached until the second public sitting is held—vide section 89. In the present case the second public sitting, originally fixed for the 5th June, 1956, has not yet been held.

Moreover, section 36 of the Insolvency Ordinance provides as follows : " If the insolvent be not in prison or custody at the date of the adjudication, he shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender during the time by this Ordinance limited for such surrender, and for such further time as shall be allowed him for finishing his examination.....". The appellant not having finished his examination, he is entitled to protection during the time allowed for it. See in this connection the case of *Fernando vs. Miller & Co., et al.* (41 N.L.R. 383).

The order withdrawing protection is set aside and the record is remitted to the Court below with a direction to grant the appellant protection in terms of section 36 of the Insolvency Ordinance. The appellant's costs of appeal will be paid by the creditor-respondent at whose instance the order withdrawing protection was made.

H. N. G. Fernando, J.

I agree.

Set aside.

Present : WEERASOORIYA, J., AND SINNETAMBY, J.

DE LIVERA AND ANOTHER *vs.* THE ATTORNEY-GENERAL

S. C. No. 31 *A-B.—D. C. Criminal Colombo Case No. N* 1939.

Argued on : 21st, 22nd, 25th, 26th, 27th and 29th January and 1st and 2nd, February 1960.
Decided on : 4th April, 1960.

Bribery Act., No. 11 *of* 1954, *Sections* 14, 15—*Charges under Section* 14 (*a*) *and* 14 (*b*)—*Offering gratification to a member of the House of Representatives as an inducement for doing an act in his capacity as such member—Meaning of the words "in his capacity as such member"—Effect of a proviso on the preceding provisions—What should be borne in mind in construing statutes.*

The 1st and 2nd accused were tried on an indictment framed under Sections 14 (*a*) and 14 (*b*) of the Bribery Act No. 11 of 1954. The 1st accused was charged on counts 1 and 3 with having, on the 19th and 22nd December 1958, respectively, committed an offence punishable under Section 14 (*a*) of the said Act in that he offered a gratification of Rs. 5,000/- to one Mr. W. J. C. Munasinghe, a member of the House of Representatives, as an inducement or reward for doing an act in his capacity as such member, to wit, addressing a letter to the Minister of Lands and Land Development requesting him to abandon the proposal for the acquisition of Vincent Estate, Chilaw.

The 2nd accused was charged with aiding and abetting the offences.

In addition, the 1st and 2nd accused were charged with having on 22/12/58 abetted the acceptance by the said Mr. W. J. C. Munasinghe of a gratification of Rs. 5,000/- as an inducement or reward for his doing the aforesaid act, an offence punishable under Section 14 (*b*) read with Section 25 (2) thereof.

Both accused were convicted and sentenced to terms of imprisonment and they appealed.

Briefly the facts not challenged in appeal are as follows :— Mr. M. was the member of the House of Representatives for the Chilaw Constituency. He by letter P 1 represented to the Minister of Lands and Land Development the urgent necessity to acquire Vincent Estate (of which the 1st accused was the owner) for the purpose of alienating it among certain inhabitants of the Chilaw District who had been rendered homeless by seasonal floods. While steps were being taken by the authorities to acquire the said land, the 1st accused contacted Mr. M. through the 2nd accused, a close associate of Mr. M., and offered a present in money, if the acquisition could be stopped. Thereafter by arrangment the 1st and 2nd accused met Mr. M. in his house on 22/12/58, when Mr. M. handed over a letter P3 addressed to the Minister of Lands and Land Development withdrawing the application for the acquisition of the said estate and the 1st accused handed over to Mr. M a parcel containing Rs. 5,000/- (P6). When the accused were about to depart, the Police Officers, who were in Mr. M's house in concealment by arrangement with him came forward, disclosed their identity and took into custody among other things P3 and P6.

To establish that the gratification offered to Mr. M. was for his doing an act in his "capacity" as a Member of the House of Representatives the prosecution relied on the evidence of Mr. M. to the effect that (1) he wrote P1 and P3 in his capacity as a Member of Parliament.

(2) he wrote P1 in consequence of a resolution passed by a Rural Development Society at a meeting at which he was present on invitation.

(3) when he wrote P1 and P3 he described himself as "M.P., Chilaw."

Mr. M. also stated (1) that even before he became M.P. for Chilaw, he as a politician and a "public man" and also as a prospective candidate for Parliamentary Office used to make representations to the authorities on various matters.

(2) that he thought that as M.P. for Chilaw there was a duty or function entrusted to him to address P3 to the Minister, (but he did not indicate whence such duty or function was derived).

(3) that in his capacity as M.P. he attended social functions, opening schools, textile centres and rural development centres.

Held : (1) That the evidence led in the case did not establish that the gratification offered to Mr. M. was for his doing an act "in his capacity" as a Member of the House of Representatives and that both accused should, therefore, be acquitted.

(2) That a Member of the House of Representatives cannot be regarded as acting "in his capacity as such member" within the meaning of Section 14 of the Bribery Act, No. 11 of 1954, except in the exercise of the functions of his office as such member.

(3) That in invoking the assistance of the proviso to Section 14 of the Bribery Act to construe the preceding provision of the same section it should be borne in mind that often a proviso is inserted to allay fears and to protect persons who are unreasonably apprehensive of the effect of an enactment although there is no question of application to their case.

Per WEERASOORIYA, J.—"The question whether the gratification offered to Mr. Munasinghe on the 19th December, 1958, was for his doing an act in his " capacity " as a member of the House of Representatives has to be decided in the light of the circumstances existing as at that date, and without reference to the subsequent letter, P3, or the evidence of Mr. Munasinghe as to the " capacity " in which he wrote it."

Per SINNETAMBY, J.—" Having regard to the provisions of Sections 14, 15 and 22, it cannot in this case be said that the intention of the Legislature was that the words " in his capacity " should be used or understood in a larger and more popular sense. Furthermore, it is a penal enactment and, therefore, if two views are possible in regard to the interpretation to be placed upon the words, the benefit of any doubt should be given to the accused."

Authorities cited : *Tarttelin vs. Bowen*, 1947 (2) A.E.R. p. 837.
Stephenson vs. Higginson, 1852 (10) English Reports — House of Lords. p. 638.
West Darley Union vs. Metropolitan Life Assurance Society, 1897 Appeal Cases. p. 647 at p. 652.

H. V. Perera, Q.C., with *S. Nadesan, Q.C.*, *E. J. Cooray*, *J. A. L. Cooray* and *N. Satyendra* for the 1st Accused-Appellant.

Dr. Colvin R. de Silva, with *M. M. Kumarakulasingham* for the 2nd Accused-Appellant.

D. St. C. B. Jansze, Q.C., *Attorney-General*, with *L. B. T. Premaratne*, *Crown Counsel*, and *V. S. A. Pullenayagam*, *Crown Counsel*, for the Crown-Respondent.

WEERASOORIYA, J.

The two accused-appellants were tried before the District Court of Colombo on an indictment framed under the special provisions of the Bribery Act, No. 11 of 1954 (hereinafter referred to as " the Act "). The 1st accused-appellant was charged on counts 1 and 3 with having, on the 19th and 22nd December, 1958, respectively, committed an offence punishable under section 14 (*a*) of the Act in that he offered a gratification of Rs. 5,000/- to one Welikala James Charles Munasinghe, a member of the House of Representatives, as an inducement or reward for his doing an act in his capacity as such member, to wit, addressing a letter to the Minister of Lands and Land Development requesting him to abandon the proposal for the acquisition of Vincent Estate, Chilaw. The 2nd accused-appellant was charged on counts 2 and 4 with abetment of those offences. In addition, the 1st accused was charged on count 5, and the 2nd accused on count 6, with having, on the 22nd December, 1958, abetted the acceptance by Welikala James Charles Munasinghe of a gratification of Rs. 5,000/- as an inducement or reward for his doing the aforesaid act, and with having thereby committed an offence punishable under section 14 (*b*) read with section 25 (2) of the Act. They were convicted on all counts and sentenced to terms of imprisonment, and have filed these appeals from their convictions and sentences.

At the material time Mr. Munasinghe was the member for Chilaw in the House of Representatives. He was also the Chief Government Whip and General Secretary of the Sri Lanka Freedom Party. Vincent Estate is situated within his constituency and was owned by the 1st accused. On the 28th October, 1958, Mr. Munasinghe addressed to the Minister of Lands and Land Development the letter P1 strongly recommending as a matter of urgency the acquisition of Vincent Estate for alienation to the inhabitants of certain villages in the Chilaw District who had been displaced from their homes as a result of floods. P1 bears the printed heading " House of Representatives " and is signed by Mr. Munasinghe as " M.P. Chilaw ". At the time the Minister of Lands and Land Development, Mr. C. P. de Silva, was the authority empowered under the Land Acquisition Act, No. 9 of 1950, to initiate acquisition proceedings and to give the necessary direction in that behalf. The question whether Vincent Estate should be acquired or not was, therefore, primarily a matter for him.

On the representations contained in P1 the Minister decided that Vincent Estate should be acquired, and he gave the following directions to the Land Commissioner : " For early action. M.P. Chilaw asks this land for alienation in ½ acre lots for people who got ruined by the floods and those people of Chilaw town who have employment but no houses to live in. Please take acquisition proceedings immediately ". Soon afterwards, the Government Agent, Puttalam, called for a report from the Divisional Revenue Officer regarding the proposed acquisition. Before that report was received, the 1st accused who, presumably, had learnt of the steps that were being taken, saw the Government Agent.

The object of the visit was clearly to dissuade the authorities from proceeding with the acquisition. The 1st accused told the Government Agent that the estate, in part, was itself liable to floods and therefore not suitable for a housing scheme. The Government Agent referred the 1st accused to Mr. Munasinghe as the member of Parliament for Chilaw and the person who put forward the proposal to acquire the estate, and he also informed the 1st accused that the final authority on the question whether it should be acquired or not was the Minister of Lands and Land Development.

It is the evidence of Mr. Munasinghe that prior to the 19th December, 1958, the 1st accused was a stranger to him, but he had known the 2nd accused well from about 1947, when Mr. Munasinghe became the Chairman of the Madampe Town Council, in which office he continued till 1956 except for a short break of about three months. During that period the 2nd accused was the Secretary of the Madampe Town Council and closely associated with Mr. Munasinghe, whom he often visited in his bungalow. At the time of the alleged offences, however, the 2nd accused was the Secretary of the Puttalam Urban Council, while Mr. Munasinghe was residing in Kelaniya. It may be inferred that the 1st accused knew the 2nd accused and also the latter's previous association with Mr. Munasinghe. According to Mr. Munasinghe, the 2nd accused came to his house in Kelaniya on the morning of the 19th December, 1958. The 2nd accused said that he came at the instance of the 1st accused, who was "pestering" him for an introduction to Mr. Munasinghe, that the 1st accused was anxious that his estate should not be acquired and was prepared to give Mr. Munasinghe or his party or any person nominated by Mr. Munasinghe a present of money if the acquisition was stopped. Mr. Munasinghe stated that he requested the 2nd accused to come with the 1st accused at 7-30 p.m. on the same day and the 2nd accused went away promising to do so. In the meantime Mr. Munasinghe got in touch with the Police and it was arranged for some Police officers to be present in concealment at the house of Mr. Munasinghe within hearing distance of any conversation that would take place between him and the accused when they met in the evening. Mr. Munasinghe has stated in evidence that at that meeting the 1st accused offered him Rs. 5,000/- in cash to stop the acquisition, that he undertook to give the 1st accused on the 22nd December, at about 9-30 or 10-00 p.m., being the date and time fixed for their next meeting, a letter addressed to the Minister of Lands and Land Development withdrawing his earlier application for the acquisition of the estate, in return for which the 1st accused was to hand him the sum of Rs. 5,000/-.

On the 22nd December the Police were again present, unknown to the accused, when the latter came to see Mr. Munasinghe as arranged. On that occasion Mr. Munasinghe gave the 1st accused the letter P3 addressed to the Minister in which he withdrew his application for the acquisition of the estate, stating that it was not suitable for housing purposes as a part of it gets submerged during seasonal floods. P3 is written on notepaper bearing the printed heading "Chief Government Whip" and is signed by Mr. Munasinghe as "M.P. Chilaw". The 1st accused took the letter and handed to Mr. Munasinghe a wrapped parcel, P6, containing the Rs. 5,000/-. As for the 2nd accused, apart from being present, he neither did nor said anything. When the accused were about to depart the Police officers came forward, disclosed their identity and took into custody, among other things, the letter P3 and the parcel P6.

The facts as set out above have been accepted by the trial Judge and were not challenged in appeal. It is, therefore, with reference to these facts that the questions of law which were argued before us need be considered. But conceding these facts, learned counsel for both the accused contended that the Crown has failed to prove the charges against their clients. On behalf of the 2nd accused it was contended, further, that on the same facts no offence of abetment as alleged against him has been made out even if the 1st accused be held to have committed the offences with which he is charged.

Section 14 of the Act is as follows :—

A person—

(*a*) who offers any gratification to a judicial officer, or to a member of either the Senate or the House of Representatives, as an inducement or a reward for such officer's or member's doing or forbearing to do any act in his judicial capacity or in his capacity as such member, or

(*b*) who being a judicial officer or a member of either the Senate or the House of Representatives, solicits or accepts any gratification as an inducement or a reward for his doing or forbearing to do any act in his judicial capacity or in his capacity as such member.

shall be guilty of an offence punishable with rigorous imprisonment for a term not exceeding seven years or a fine not exceeding five thousand rupees or both:

Provided, however, that it shall not be an offence under the preceding provisions of this section for any trade union or other organisation to offer to a member of either the Senate or the House of Representatives, or for any member to accept from any trade union other organisation, any allowance or other payment solely for the purposes of his maintenance ".

The proviso it may be stated, was not a part of the section as originally enacted, but was subsequently added by the Bribery (Amendment) Act, No. 17 of 1956.

Section 15 of the Act reads :—

" A member of either the Senate or the House of Representatives who solicits or accepts any gratification as an inducement or a reward for—

(*a*) his interviewing a public servant on behalf of any person, or

(*b*) his appearing on behalf of any person before a public servant exercising judicial or quasi-judicial functions,

shall be guilty of an offence punishable with rigorous imprisonment for a term not exceeding seven years or a fine not exceeding five thousand rupees or both :

Provided, however, that it shall not be an offence under the preceding provisions of this section for a member of either the Senate or the House of Representatives to appear as an advocate or a proctor before a Court or before a statutory tribunal of which a public servant is not a member ".

It is to be observed, by way of contrast with section 14, that under section 15 a member of the Senate or the House of Representatives who solicits or accepts a gratification as an inducement of a reward for the doing of any act specified therein commits an offence irrespective of whether in the doing of it the offender acts in his capacity as such member or not.

Since the Rs. 5,000/- offered to Mr. Munasinghe is undeniably a gratification within the definition of that term in section 91 of the Act, the substantial issue in this case is whether the gratification was offered to him for his doing an act in his " capacity " as a member of the House of Representatives within the meaning of section 14. The District Judge, in dealing with the matter with particular reference to the letters P1 and P3, stated as follows :

" .....the question to be decided in this case is whether Mr. J. C. W. Munasinghe is legally competent or legally " incapacitated " from doing the act which he did when as a member of Parliament he wrote the letters P1 and P3 to the Hon. Minister of Lands..... The accused would certainly be entitled to an acquittal at the hands of this Court if Mr. Munasinghe as a member of Parliament usurped to himself the executive powers of the Minister of Lands and chose to write to the Land Commissioner directing him to take steps to acquire the 1st accused's land or if he chose to write to the Land Commissioner directing him not to take steps to acquire this land. In such an event Mr. Munasinghe the member of Parliament would certainly not have the legal capacity to act in that manner. The position here is entirely different. Mr. Munasinghe M.P. has not usurped the functions of the executive. All that he has done is to suggest to the executive authority as M.P. for Chilaw that a certain land in his electoral area be acquired to give relief to flood victims also in his electoral area.....This is the sort of request even a private citizen can make to an executive authority.....If a private citizen can do exactly what Mr. Munasinghe M.P. has done, can it be said that Mr. Munasinghe has no legal capacity to do this act as member of Parliament for the area ? It is true that Mr. Munasinghe M.P. can make the same suggestion that has been made in the letters P1 and P3 to the Minister in Parliament and this is a right which a private citizen who is not an M.P. does not have but merely because an M.P. has the right to make this suggestion to a Minister in Parliament is he thereby legally ' incapacitated ' as M.P. from making the same suggestion to the same Minister outside the House of Representatives ?.....In my opinion Mr. Munasinghe was not legally incompetent or legally ' incapacitated ' as Member of Parliament from writing the documents P1 and P3 to the Hon. Minister of Lands and Land Development. In the result I have no alternative but to find the accused guilty of the charges laid against them ".

From the foregoing passage in his judgment it would seem that the learned Judge took the view that Mr. Munasinghe's " capacity " to write the letters P1 and P3 as a member of Parliament stood established from the fact that he was not prevented by any legal incapacity, either as a member of Parliament or as a private citizen, from communicating with the Minister in terms of those letters. With respect, I do not think that the test applied by him is correct. The Attorney-General, while maintaining that the convictions entered against the accused are right, stated that he was unable to support the reasons given by the Judge for holding that P1 and P3 were written by Mr. Munasinghe in his " capacity " as a member of Parliament.

It is necessary, therefore, to consider whether there is any other basis on which it could be said that the gratification offered to Mr. Munasinghe was for his doing an act in his " capacity " as a member of the House of Representatives.

As regards the expression " in his judicial capacity " in section 14, the Attorney-General as well as counsel for the accused were agreed that while a judge may have administrative or ministerial functions to perform in addition to his judicial or quasi-judicial functions, he can be said to act in a judicial capacity only in the

performance of his judicial or quasi-judicial functions. The immunity attaching to a judge in respect of an act done in his judicial capacity does not extend to acts which are of a purely administrative or ministerial character—Mc Kerron on the Law of Delict (4th edition) 114.

The Attorney-General contended, however, that the expression " in his judicial capacity " in section 14 is not the equivalent of " in his capacity as a judge ", which latter expression (according to him) is of wider import, and would even include acts done by a judge in a purely administrative or ministerial character. By parity of reasoning he contended, further, that the expression " in his capacity as such member " in section 14 was advisedly used by the draftsman so as to bring within its ambit the acts of a member which do not strictly fall within the scope of his legal functions as a member of the Senate or the House of Representatives.

It is common ground that when a member of the Senate or the House of Representatives does an act which is exclusively within his power do do as such member, he does it in his " capacity " as such member. The Attorney-General conceded, however, that the act of Mr. Munasinghe in writing P1 or P3 does not fall into the category of acts which were exclusively within his power to do as a member of the House of Representatives. But according to him, there are other acts, falling outside that category, which a member of the Senate or the House of Representatives may do in his " capacity " as such member even though the same acts may be done by him in some other " capacity " as well. He was constrained to admit that in respect of such an equivocal act it may be difficult, and sometimes impossible, to establish the particular " capacity " in which it was done.

Assuming (without deciding) that the Attorney-General is right in his contentions, I think it will be convenient to consider at this stage what evidence is relied on by the prosecution to establish that the gratification offered to Mr. Munasinghe on the 19th and 22nd December, 1958, was for his doing an act in his " capacity " as a member of the House of Representatives. I shall first discuss the evidence regarding the gratification offered on the 22nd December, 1958. Mr. Munasinghe stated (somewhat belatedly) on being recalled by the prosecution after his evidence as a witness had been concluded, that he wrote P1 and P3 in his " capacity " as a member of Parliament. There is also the circumstance that in signing P1 and P3 he described himself as " M.P. Chilaw ". In regard to P1 he had stated earlier that it was written as a result of a resolution passed by the Sangathatana Rural Development Society at a meeting at which he was present by invitation. He admitted that even before he became a member of Parliament he, as a politician and a " public man " , and also as a prospective candidate for parliamentary office, used to make representations to the authorities on various matters. I do not think that on his election as member for Chilaw he could be regarded as having ceased to be a politician and a " public man ". On the contrary, his character as a politician and a " public man " may well have become more pronounced after his election. If P1 could have been written by him in his " capacity " as a member of the House of Representatives (in the sense contended for by the Attorney-General) the prosecution would have to concede that it could also have been written by him in his " capacity " as a politician or a " public man ", or, as the trial Judge stated, even as a private citizen. It follows that P3 could also have been written by Mr. Munasinghe in one or other of these several " capacities ". The burden on the prosection is to establish that P1 and P3 were written by Mr. Munasinghe in his " capacity " as a member of the House of Representatives and not in any other " capacity ". It seems to me that in order to establish this the prosecution has to rely entirely on the evidence of Mr. Munasinghe. The Attorney-General submitted that in considering the question of the " capacity " in which Mr. Munasinghe wrote P1 or P3 the evidence of Mr. Munasinghe on the point should be accepted as he is in the best position to say in what " capacity " he acted or purported to act.

The prosecution contends that the evidence of Mr. Munasinghe is supported by the circumstance that in signing P1 and P3 he described himself as " M.P. Chilaw ". There might have been force in this contention if the evidence showed that Mr. Munasinghe adopted such a description only when he purported to act in his " capacity " as a member of Parliament. The contrary is, however, indicated by the fact that the letter P4, which is addressed to the 1st accused and bears the same date as P3, is also signed by Mr. Munasinghe as " M.P. Chilaw ". Even on the construction which the learned Attorney-General sought to put on the expression " in his capacity as such member " in section 14 of the Act, I do not

think it could seriously be contended that P4 was written by Mr. Munasinghe in that " capacity ". There seems to be no other circumstance which supports Mr. Munasinghe when he says that he wrote P1 and P3 in his " capacity " as a member of Parliament.

On being cross-examined as to why he claims to have written P1 and P3 in his " capacity " as a member of Parliament, Mr. Munasinghe stated as follows :

" I told the Court earlier that I wrote the letter P1 in my capacity as a member of Parliament. I took the view that I was entitled to write it in my capacity as a member of Parliament... I thought that in my capacity as a member of Parliament there was a duty or function entrusted to me to write to the Minister in respect of that matter. I think what I thought was correct. I have opened a number of buildings. The latest building I opened was a school building. That was the Thambagalla Government School. I was invited to open that building because I was a member of Parliament. I opened it in my capacity as a member of Parliament....

Q. In your view what are the other things you have opened in your capacity as a member of Parliament ?

A. Rural Development Society textile centres and a number of things like that.

Q. So far as you are concerned you consider that opening of school buildings and opening of rural development society buildings etc. you have to do in your capacity as a member of Parliament ?

A. Yes ".

He also added that he had inspected certain flood affected private buildings and even attended " some social functions " in his capacity as a member of Parliament.

In regard to his evidence that he thought that in his capacity as a member of Parliament there was a duty or function entrusted to him to write to the Minister in terms of P1, he did not indicate whence such a duty or function was derived. The fact that he thought that there was such a duty or function would not, of course, establish the existence of such a duty or function in a member of the House of Representatives. There is not a scintilla of evidence that when P1 or P3 was written the acquisition of Vincent Estate or any other land for the relief of flood victims was the subject of any action taken or contemplated to be taken in the House of Representatives.

Even more unacceptable are Mr. Munasinghe's views that in attending social functions, opening school buildings, textile and rural development society centres, which he is invited to do because he is a member of Parliament, he thereby acts in his capacity as such member. No attempt was made by the learned Attorney-General to justify these views. While the good faith of Mr. Munasinghe in holding these views may be conceded, in my opinion they are entirely misconceived, and I do not see how they can avail the prosecution in establishing that he acted in his " capacity " as a member of the House of Representatives when he wrote P1 or P3 Whether he acted in that " capacity " or not is essentially a matter for the Court to decide.

The prosecution is in an even less favourable position in regard to the gratification offered on the 19th December, 1958, because on that date the letter P3 had not yet been written. The only arrangement arrived at on that occasion for any action to be taken by Mr. Munasinghe in order that the acquisition of Vincent Estate should not be proceeded with was to address a letter to the Minister withdrawing his earlier application for its acquisition, stating as the ground for the withdrawal that a portion of the estate gets inundated periodically. It was not envisaged by the parties to the arrangement that the letter should be written in Mr. Munasinghe's " capacity " as a member of Parliament or in any other " capacity ". There was no discussion at all on the subject for the simple reason, I think, that neither Mr. Munasinghe nor the 1st accused gave his mind to it. As far as the 1st accused was concerned, it was quite immaterial to him in what " capacity " Mr. Munasighe wrote that letter.

The question whether the gratification offered to Mr. Munasinghe on the 19th December, 1958, was for his doing an act in his " capacity " as a member of the House of Representatives has to be decided in the light of the circumstances existing as at that date, and without reference to the subsequent letter, P3, or the evidence of Mr. Munasinghe as to the " capacity " in which he wrote it.

It seems to me, therefore, that even if the expression " in his capacity as such member " in section 14 of the Act is given the wide construction contended for by the Attorney-General, the prosecution has failed to establish that the gratification offered to Mr. Munasinghe, whether on the 19th or the 22nd December, 1958, was for his doing an act in his " capacity " as a member of the House of Representatives.

I shall now deal briefly with the submissions of learned counsel for the accused as regards the proper construction of the same expression. According to Mr. H. V. Perera—and his submissions were adopted by Dr. Colvin R. de Silva—that expression bears a meaning corresponding to the expression " in his judicial capacity " in Section 14 of the Act. Therefore, he submitted, a member of the Senate or the House of Representative's acts in his "capacity" as such member only in the exercise of the functions of his office as such member, and this he does when he participates in proceedings in the Senate or the House of Representatives, as the case may be, and not otherwise.

In this connection Mr. Perera referred to certain proceedings in the English House of Commons as showing how the expressions " capacity", when used in relation to a member of Parliament, and " proceedings in Parliament " are understood in English Parliamentary practice. No objection was taken by the learned Attorney-General to these citations. One of the citations was from the debate which took place on the 30th October, 1947 (Hansard, House of Commons Debates, Fifth Series, Vol. 443, Columns 1094, *et seq.*) when a report of the Committee of Privileges in regard to an alleged breach of privilege was discussed. The Committee had taken the view in their report that the attendance of members of the House of Commons at a private party meeting within the precincts of the Palace of Westminster during the current parliamentary session in order to discuss matters connected with the proceedings of Parliament was attendance in their capacity as members of Parliament. But this view was not accepted by the Government, and in moving a Government motion arising on the report, Mr. Herbert Morrison, who was then Leader of the House, stated as follows :

> " With great respect to the Committee, this seems to be going too far. Their opinion is based on the conclusion that Members attending such meetings attend in their capacity as Members of Parliament. According to the precedents, however, Members are only regarded as acting ' in the capacity of Members' when they take part in Parliamentary proceedings. Indeed, even in transactions with constituents Members have never been regarded, for purposes of privilege, as acting in their capacity as Members ".

But he did not proceed to state what these precedents were, nor were we referred to any in the course of the argument in appeal. It would appear, however, that the view expressed by the Committee of Privileges on that occasion did not find favour with the majority of the members of the House of Commons.

The notion of including within the expression " proceedings of Parliament " a private party meeting appears to have been derived from an earlier report (in 1939) of the Select Committee on the Official Secrets Acts arising out of a complaint by a member relating to the privilege of freedom of speech. What was assimilated in that report to proceedings in Parliament was the sending to a Minister by a Member of Parliament of the draft of a question which the member proposed to put to the Minister in Parliament, or the showing of such a draft to another member with a view to obtaining advice as to the propriety of putting the question or the manner in which it should be framed.

The more recent trend has been, however, for the House of Commons not to countenance attempts at any extension of the expression " proceedings of Parliament". This would appear from the proceedings of the 30th October, 1947, to which I have already referred, and also from the proceedings in the House on the 8th July, 1958 (Hansard, House of Commons Debates, Fifth Series, Vol. 591, Columns 208 *et seq.*) relating to the report of the Committee of Privileges on an alleged breach of privilege the facts of which are briefly as follows : On the 8th February, 1957, a member of Parliament made representations to the Minister of Power in a letter regarding the disposal of scrap by the London Electricity Board. The letter was referred to the Chairman of the Board by direction of the Minister. In that letter various allegations of improper conduct had been made against the Board. The Chairman of the Board thereupon wrote to the member concerned stating that the aspersions contained in the member's letter were completely unjustified and requesting their unqualified withdrawal. On the member refusing to do this the Board's solicitors wrote to the member that proceedings would be taken against him for libel if he did not tender a suitable apology. The member then brought the matter up in the House of Commons, and it was referred to the Committee of Privileges. It is necessary to state only two of the conclusions of the Committee in their report, which were :—

(*a*) that in writing the letter dated the 8th February, 1957, the member was engaged in a " proceeding in Parliament " within the meaning of the Bill of Rights, 1688, and

(*b*) that the London Electricity Board and their solicitors, in threatening to commence proceedings for libel against the member, had acted in breach of the Privilege of Parliament. If I may say so with respect, it is to the credit of the House of Commons that these conclusions were rejected, though only after a somewhat acrimonious debate.

There appears to be no judicial definition of the expressions " proceedings in Parliament " or " capacity " as a member of Parliament. But the Courts have from time to time stated what various specific matters connected with Parliament do or do not fall within the ambit of its " proceedings." These cases are referred to in Erskine May's Parliamentary Practice (14th edition) 61. They afford no precedent for holding that in writing the letters P1 or P3 Mr. Munasinghe was acting in his " capacity " as a member of the House of Representatives. I see no reason to give to " capacity " in the expression " in his capacity as such member " in Section 14 of the Act a wider meaning than that which the word bears in the expression " in his judicial capacity " in the same section. I agree with the submission of Mr. H. V. Perera that a member of the House of Representatives cannot be regarded as acting " in his capacity as such member " within the meaning of Section 14 except in the exercise of the functions of his office as such member. The prosecution has failed to prove that in writing P1 or P3 Mr. Munasinghe was acting in the exercise of any such function.

Before I conclude this judgment I wish to refer to an argument of the Attorney-General based on the proviso to section 14. By virtue of the proviso it would not be an offence under the preceding provisions of the section for any trade union or other organization to offer to a member of the Senate or the House of Representatives, or for any such member to accept from any trade union or other organization, any allowance or other payment solely for the purposes of his maintenance. While an allowance is a " gratification " within the definition of that term in Section 91 of the Act, neither the offer nor the acceptance of such gratification would *per se* be punishable as it is also necessary for the constitution of an offence under Section 14 that the gratification is offered or accepted as an inducement or reward for the member's doing or forbearing to do any act in his " capacity " as such member. The Attorney-General submitted that in the case contemplated in the proviso all the elements of an offence under the preceding provisions of the section are present in that the member concerned, in utilising the allowance towards his maintenance as a member. would thereby be doing an " act " in his " capacity " as such member. On the strength of this submission the Attorney-General invited us to regard the proviso as indicating that there may be the doing of an " act " by a member of the House of Representatives in his " capacity " as such member within the meaning of Section 14 even though the " act " be not done in the course of proceedings in the House. I am unable, however, to agree that a member of the House of Representatives who maintains himself is doing an " act " within the meaning of Section 14, or that such member who maintains himself on an allowance which is paid to him for no other reason than that he is a member of the House of Representatives is doing an " act " in his " capacity " as such member. If the learned Attorney-General's argument is to prevail, it could be said of a member of the House of Representatives that in eating his lunch or dinner (being part of the process of maintaining himself) the cost of which is met from the allowance paid to him, he is doing an " act " in his " capacity " as such member.

It is possible, as Mr. H. V. Perera suggested, that the genesis of the proviso to Section 14 is in the findings of the Bribery Commission in its report published as Sessional Paper No. XII of 1943, that certain nominated European members of the former State Council had accepted a " gratification " within the Commission's terms of reference in that they were in receipt of a regular allowance paid to them by the Chamber of Commerce and certain other organizations. In view of these findings the legislature may have intended, in enacting the proviso to Section 14, that the offer of an allowance by a trade union or other organization solely for the purposes of maintenance of a member of the Senate or the House of Representatives, or the acceptance of the allowance by such member, should be taken out of the operation of the preceding provisions of the section even if the understanding on which the allowance is paid is that the member would conduct himself in a particular way in proceedings in the Senate or the House of Representatives, as the case may be.

In considering whether this particular proviso throws any light on the construction of the preceding provisions of Section 14, it is well to bear in mind, however, that while the effect of an excepting or qualifying proviso is, ordinarily, to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it, often a proviso is inserted to allay fears and to protect persons who are unreasonably apprehensive of the effect of an enactment although there is really no question of its application to their case.

In my opinion, the prosecution has failed to prove that the gratification offered to Mr. Munasinghe on the 19th or the 22nd December, 1958, was for his doing an act in his "capacity" as a member of the House of Representatives. This failure goes to the root of all the charges. In the circumstances, however, reprehensible the conduct of the accused may have been, they are entitled to an acquittal on those charges. I set aside their convictions and the sentences passed on them and acquit them.

SINNETAMBY, J.

I agree with the views expressed by my brother, Weerasooriya, in the judgment prepared by him, which I have had the advantage of reading, and would like to add a few reasons of my own in support of the conclusions he has reached.

The Bribery Act of 1954 was enacted with the object of cleansing the public life of this country by introducing provisions to cope with "modern methods of corruption", some of which were not contemplated and many of which were not provided for in the somewhat antiquated provisions of the Penal Code. It makes provisions for the prevention, detection and punishment for bribery. Part 2 deals with the offence of bribery in its various forms and enacts provisions detailing the circumstances in which a person would be guilty of the offence.

Section 14 had special reference to bribery of judicial officers, Senators, and members of Parliament. Sub-section (*a*) of Section 14 penalised the offer of any gratification to a judicial officer, as an inducement or a reward for such officer doing or forbearing to do any act in his judicial capacity, or to a member of the Senate, or the House of Representatives, as an inducement or a reward to act or forbear to do any act *in his capacity as such Member*. In order to understand and appreciate the significance of the term "in his capacity as such member" it would be useful to examine a few of the other privisons of this part of the Act.

In contrast to Section 14, Section 15 penalised a member of Parliament—for the purpose of this case I shall confine myself to members of Parliament—who accepts a gratificaiton for interviewing a public servant or appearing before a judicial tribunal of which a public servant is a member: it does not postulate that the member should appear "in his capacity as a member" in order to render himself or the person who offers the gratification liable to incur the penalty. Here the mere fact that he is a member places a restriction on the right he otherwise had.

Section 22 penalises a person who offers gratification to a member of a local body or of a scheduled institution. I shall confine myself to members of a local body for the purpose of this case as they bear a closer resemblance to members of Parliament. Sub-section (*a*) (i) deals with the exercise by such a member of his rights to vote or abstain from voting at a meeting where the gratification offered is to induce him to do one or the other of these things. This sub-section penalises the person offering the bribe. Clearly in that case a member is influenced in respect of proceedings in the Council, where he acts in his capacity as a member. Sub-section (*a*) (ii) deals with the gratification given for the purpose of such member performing or omitting to perform an official act and penalises the offering of a bribe for such a purpose. The expression "official act" has not been defined but its ordinary dictionary meaning is an act pertaining to the office which such member holds; it must, furthermore, in the context be in respect of an office in the local body or institution. It must necessarily relate to an activity the member would not be able to indulge in but for the fact that he is a member. One may, therefore, with justification, infer that it relates to an act which a member performs in his capacity as a member; that is to say, something, which he would not have been able to do or abstain from doing but for the fact that he is a member. There is a penalisation in this sub-section of yet another kind of activity. This sub-section also penalises gratification given as an inducement or reward to a member for his aid in procuring, expediting, delaying, hindering or preventing the performance of an official act. It seems to me that, in regard to this kind of activity, it can be done, not only by a member, but also by a person who is not a member. It follows, therefore, that where a member does an act to achieve this object, though he does not do something by virtue of his membership, the giver of the gratification would nevertheless be guilty under that sub-section from the mere fact of the recipient's membership: the latter would then not be acting in his capacity as a member. Likewise, in sub-section (*a*) (iii) the offer of a gratification, as an inducement or reward for a member's aid in procuring or preventing the passage of a vote or the granting of any con-

tract or advantage in favour of a person, is penalised; but a member's aid may be given either because no one but a member by virtue of his membership is in a position to give it, or because the aid is of a kind capable of being given by anyone quite irrespective of whether he is a member or not, but it so happens that he is a member. In the former case he would, it seems to me, be acting in his capacity as a member but in the latter case he would not. It may be an act which even a non-member can perform by influencing those entitled to vote or grant a contract, but if he happens to be a member, that mere fact makes both the giver of the gratification and the recipient liable under sub-sections (*a*) (iii) and (*c*), respectively. It will thus be seen that in Section 22 what is penalised is the giving of a gratification not only for acts to be done by a member by virtue of the rights, powers, privileges, etc., which he is entitled to enjoy by virtue of his membership, but also for similar acts which he in common with non-members is in a poistion to do. In the latter event the giver is penalised only if the recipient happens to be a member. If my view of Section 22 is correct, it would lend support to the view that Section 14 (*a*) is confined to those cases in which a member does an act which he is able to do only by virtue of the legal powers vested in him as a member and which act he would not be able to perform but for the fact that he is a member.

A person may act in various capacities: he may act in his official capacity when he performs functions pertaining to the office he holds; but, although he cannot divest himself of the office he holds, he may still act in a private or personal capacity, *i.e.*, when he does something which he in common with other people who are not holders of that office are able to do. In interpreting Section 14, therefore, it seems to me, one must first ask oneself whether the act, for the doing of which a gratification is offered, is one which the member of Parliament can do only because he is a member of Parliament. If so, it is something which he does in his capacity as such member. If it is something which he could have done even though he were not a member, the mere fact that he is a member does not bring the act within the purview of the section. In the result, in order to decide whether a person is acting in his capacity as a member of Parliament, one has first to ascertain what exclusive legal rights, powers, duties, privileges, and so on, attach to membership of Parliament. If the act falls outside the exclusive rights, powers, etc., of a member of Parliament then one cannot say that he is acting in his capacity as such member.

The learned Attorney-General contended that the words "in his capacity as such member" occurring in Section 14 is used in the popular sense to cover even cases in which a member performs an act which is not strictly referable to his exclusive legal powers. If this is so the acts penalised by Section 15, namely, the receipt of a reward or fee to appear before a public servant, etc., would be covered by Section 14. Why then was there any necessity to enact Section 15? The existence of Section 15 in the Act favours the view that the words "in his capacity as such member" are used in the strictly legal sense which I have endeavoured to explain; otherwise, it seems to me, it would have been more appropriate to use the words "in any capacity" in place of the words "in his capacity as such member" in Section 14. In this connection it will also be useful to refer to certain decided cases where the same or similar expressions have been judicially considered.

In the case of *Tarttelin vs. Bowen*, 1947 (2) A.E.R., p. 837, a member of the armed forces was charged with having in his possession a firearm without a certificate from the proper licencing authorities. Section 5 of the Firearms Act of 1937 provided that a certain provision of the Act, in so far as it relates to the possession of firearms and ammunition, does not apply to "persons in the services of His Majesty in their capacity as such." The Justices were of the opinion that the Act permitted the possession of a firearm and ammunition by a Flight Lieutenant in the Royal Air Force though they had not been issued to him as a member of His Majesty's Forces. In point of fact, they had been purchased by him privately without a certificate from the proper authority. The King's Bench Division consisting of Lord Goddard, Lord Humprey and Lord Atkinson set aside the order of the Justices. The Chief Justice, Lord Goddard said, "This seems entirely to overlook the words "in their capacity as such," and held that the possession of a firearm by a member of the armed forces is an offence unless it had been issued to him or acquired by him in his capacity as a member of the armed forces. The exemption they held did not apply to private purchases made by members of the armed forces. It seems to me that, likewise, the offer of a gratification under Section 14 to a member of Parliament to do something in his private capacity would not be an offence. In *Stephenson vs. Higginson*, 1852 (10) English

Reports—House of Lords, p. 638, the question that arose was whether the Registrar of an Ecclesiastical Court who had prepared documents and done acts necessary for obtaining letters of administration had committed an offence in breach of Sections 9 and 10 of Act, No. 54, Geo. 3, c. 68, which prohibited the doing of an act "appertaining or belonging to the office, function, or practice of a proctor, for or in consideration of any gain fee or reward" without being enrolled as a proctor. The evidence in this case showed that it was customary for the Registrar, where there was no contest, to prepare these documents. The House of Lords held that, in construing the provisions of the Act of Parliament, the acts intended to be prohibited were those which were legally incident to the office of a proctor, not those which though usually performed by him were not of right incident to his office. Therefore, the Registrar who had prepared the documents had not subjected himself to the penalty imposed by the Act. The Lord Chancellor in the course of his judgment said "it seems to me, therefore, that the words 'appertaining or belonging' are words used in their proper sense and meaning, *i.e.*, in the sense of rightly and exclusively belonging to the office of a proctor." Further, the opinion was expressed that in construing an Act of Parliament, "every word must be understood according to its legal meaning, unless it shall appear from the context that the Legislature has used it in a popular or more enlarged sense; that is the general rule; but in a penal enactment, where you depart from the ordinary meaning of the word, used, the intention of the Legislature that those words should be understood in a more large or popular sense must plainly appear."

Having regard to the provisions of Sections 14, 15 and 22, it cannot in this case be said that the intention of the Legislature was that the words "in his capacity" should be used or understood in a larger and more popular sense. Furthermore, it is a penal enactment and, therefore, if two views are possible in regard to the interpretation to be placed upon the words, the benefit of any doubt should be given to the accused.

In this connection, the learned Attorney-General contended that it is the duty of a Court to consider a statute in such a way as to "suppress the mischief and advance the remedy." He referred to a passage in *Maxwell* (10*th edition*, *page* 68) where it is stated that "even where the usual meaning of the language falls short of the whole object of the Legislature, a more extended meaning may be attributed to words, if they are fairly susceptible of it. The construction must not, of course, be strained to include cases plainly omitted from the natural meaning of the words." He also relied on another passage in *Maxwell* (10*th edition*, *page* 7) to the effect that one "should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

In the case of the Bribery Act I do not think the words used in Section 14, having regard to the other provisions in this part of the Act are fairly susceptible of the meaning which the learned Attorney-General sought to put upon it; nor do I think that in placing the construction we have placed upon it, we would be reducing the legislation to futility or make it ineffectual.

With regard to the proviso to Section 14 and the argument based upon it, I agree entirely with the views expressed by my brother.

I would respectfully endorse the opinion of Lord Watson in *West Darley Union vs. Metropolitan Life Assurance Society*, 1897, Appeal Cases, p. 647, at p. 652, "if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive the provisions by implication from the proviso." In the same case Lord Herchell explained how meaningless provisos sometimes come to be enacted merely to allay the unreasonable fears of apprehensive persons who think that some Court may possibly apply the main provision of the enactment to their case though in point of fact they are not applicable.

The first accused, therefore, in offering the gratification to Mr. Munasinghe did not induce Mr. Munasinghe to do an act *in his capacity as a member* of the House. However, reprehensible the conduct of the first accused may be, and whatever other offence he may have been guilty of, he certainly was not guilty of the offence contemplated by Section 14 (*a*) of the Bribery Act.

I agree that the convictions should be set aside and both the accused acquitted.

Convictions set aside.

Privy Council Appeal No. 3 of 1959

Present: VISCOUNT SIMONDS, LORD TUCKER, LORD JENKINS, LORD MORRIS OF BORTH-Y-GEST, MR. L. M. D. DE SILVA.

HUSSENABAI HASSANALLY AND ANOTHER *vs.* MOHAMED MUHEETH MOHAMED CASSIM AND OTHERS

From

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICAL COMMITTEE OF THE PRIVY COUNCIL,

DELIVERED THE 7TH MARCH, 1960

Compensation for Improvements—Land held by S and Z subject to fidei commissum—Lease of whole land by Z for thirty years to D—Covenant that D should erect buildings at his own expense, keep them in proper order and condition and deliver up the whole of the premises at the termination of the lease free of payment of any kind whatever—Death of S leaving C and three other children—Action by C under Partition Act No. 16 of 1951, claiming declaration of title and sale under the Act during pendency of lease—Order for sale granted—Claim for compensation for Improvements by D—Is he entitled to compensation as a bona fide possessor—Principles which govern a claim for compensation by a lessee whose contractual rights are prematurely determined—Roman Dutch Law—Unjust Enrichment.

S and Z became entitled to a half-share each of a property subject to a *fidei commissum* in favour of their descendants. S died leaving four children one of whom was C. C instituted action under the provisions of the Partition Act No. 16 of 1951 claiming a declaration of title to the property and a Sale under the Act. The appellant, who was the 5th defendant was made a party as he was in occupation of the property under a lease for thirty years from 1/1/1945 executed in his favour by Z in respect of the whole of the premises. The deed of lease stipulated *inter alia* (1) that the lessee should " within a reasonable time erect buildings at his own expense with proper materials of all sorts " on the said property, (2) that he should continue to use and enjoy the rights, benefits interest and income of the premises and the buildings erected during the pendency of the term of thirty years, (3) that the lessee should keep the said buildings in proper order and condition and at the end of the term of lease deliver up the whole of the premises free of payment of any kind whatever.

The 5th defendant entered upon the land as lessee and constructed the buildings as stipulated in the lease. He claimed a sum of Rs. 35,000/- as compensation for buildings erected and other improvements effected by him and prayed that in the event of a sale being ordered he be paid out this sum out of the proceeds of the sale. This claim was resisted by the other parties to the action.

The learned District Judge (1) held that the 5th defendant constructed the said buildings in the *bona fide* belief that the lessor Z was in fact the sole owner.

(2) directed that the property should be sold subject to the rights of the 6th and 7th defendants (appellants), who had been by that time substituted for the 5th defendant, to remain in possession of a half-share of the premises and the entirety of the buildings for the full term of thirty years demised by the lease.

(3) held that in the event of this order not being upheld, the appellants were entitled to compensation out of the proceeds of sale for improvements effected by the 5th defendant in a sum of Rs. 25,122/45.

That part of the order directing the appellants to remain in possession for the full thirty years was not supported in appeal. On an appeal to the Supreme Court, the claim for compensation by the appellants was rejected on the basis of the judgment in *Soysa vs. Mohideen*, (1914) 17 N.L.R. 279.

On an appeal taken to the Privy Council from this decision of the Supreme Court,

Held: (1) That the case of *Soysa vs. Mohideen* (1914) 17 N.L.R. 279 was wrongly decided for it is based on the erroneous assumption that the claim there for compensation was by a lessee, whereas the very basis of the claim was that the lease had been repudiated.

(2) That the 5th defendant was entitled to the claim for compensation for it is not as lessee that he made the claim, but because he was denied his contractual rights by the premature termination of the lease. He was in the position of a *bona fide* occupier of a land on a lease which had been repudiated:

Per: LORD TUCKER,—" The question whether or not the possession of a lessee is possessio civilis may be open to argument."

Per: LORD TUCKER,—It would, as their Lordships think, be difficult to imagine a clearer violation of the moral principle upon which the rule against unjust enrichment rests, than that an owner, who has, for whatever reason, prematurely brought a lease to an end, should at once deny to the lessee the rights which the lease or the common law gives him as lessee and, because he was a lessee, deny also his claim to compensation for improvements. Their Lordships must accordingly pronounce that this case was wrongly decided and have the less reluctance in doing so because, long though the decision has stood, no questions of title can be affected by a contrary view of the law.

Overruled : *Soysa vs. Mohideen* (1914) 17 N.L.R. 279.

Cases referred to *Bellingham vs. Bloometje Buchanians Reports*
Parkin vs. Lippert, (1895) 12 S.C.R. 179.
Rubin vs. Botha, S.A.S.C.R. App. Div. (1911) page 568.
De Beers Mines vs. London & South African Exploration Company, (10 Juta 359).
Fletcher vs. Bulawayo Waterworks Company Ltd. (1915) S.A.L.R. App. Div. 636.
Hevawitarne vs. Dangan Rubber Company Ltd. 17 N.L.R. 49.
Government Agent, Central Province vs. Letchiman Chetty 24 N.L.R. 37.
Appuhamy vs. The Doloswala Tea and Rubber Company Ltd. 25 N.L.R. 267.
Jasohamy vs. Podihamy, 44 N.L.R. 385.

E. F. N. Gratiaen, Q.C., with *Walter Jayawardena* for the appellants.

No appearance for the respondents.

VISCOUNT SIMONDS

This appeal from a judgment of the Supreme Court of the Island of Ceylon raises a question of considerable importance. It has involved an examination of a body of case law in which their Lordships have had the advantage of the assistance of learned counsel for the appellants, who, appearing without an opponent, has impartially directed attention to all material authority. The facts which are not in dispute can be shortly stated.

The appellants are the executors and trustees of the estate of one Akbarally Abdulhussan Davoodbhoy, who was orginally the fifth defendant in the action out of which this appeal arises. Upon his death they were substituted for him as defendants. He will for convenience sometimes be referred to as the fifth defendant.

The action was concerned with certain land situated in New Moor Street, Colombo, which at the date of her death was held by one Rahumath Umma subject to a fideicommissum created in 1871 in favour of her descendants. She died in 1921 leaving as her heirs two daughters Umma Shiffa and the second respondent Zaneera Umma, each of whom became entitled to a half share of the property subject to the fideicommissum. Umma Shiffa died in March, 1938, leaving as heirs her four children, the youngest of whom, Mohamed Cassim, became the plaintiff in the action and is a respondent to this appeal and the others were defendants in the action and are also respondents to this appeal. The position then was that the second respondent was entitled to 4/8th shares of the property and the other four respondents who have been mentioned to 1/8th share each, all such shares being subject to the fideicommissum. For this reason there were added as defendants certain children of one of the children of Umma Shiffa who are also respondents to this appeal. It was in these circumstances that the plaintiff (the first respondent) brought his action under the provisions of the Partition Act No. 16 of 1951 claiming a declaration of title to the property and a sale under the Act. But for the reason which will now be stated he made defendants not only the persons who were interested with him under the fideicommissum but also the fifth defendant whose interest arose in a different way. It is not disputed that the latter's interest was such that he was a proper and necessary party to the suit.

On the 11th December, 1945, the respondent Zaneera Umma, who was entitled to 4/8th shares of the property by a deed of that date granted to the fifth defendant in consideration of the sum of Rs. 2,700 and of the covenants and conditions therein contained a lease of the property for thirty years from the 1st January, 1945, at the yearly rent of Rs. 180 for the first fifteen years and thereafter at the yearly rent of Rs. 240. The deed contained a covenant by the lessee that he would " within a reasonable time lay out and expend at his own expense in erecting and completing fit for habitation with

proper materials of all sorts upon the said ground dwelling houses, tenements, shops, boutiques or factories " as therein provided. It was further provided that the lessee having completed the erection of the buildings as therein mentioned should continue to exercise use and enjoy the rights, benefits, interest and income of the premises and the buildings erected thereon during the pendency of the term of thirty years demised by the lease and, further, that the lessee should keep the said buildings in proper order and condition and at the end of the term deliver up the whole of the premises to the lessor free of payment of any kind whatever.

The fifth defendant as lessee entered upon the demised land and duly constructed upon it the buildings for which the lease stipulated. The learned District Judge held that Zaneera Umma held herself out as the sole owner of the land and that the fifth defendant constructed the buildings in the *bona fide* belief that she was in fact the sole owner. He further held that the plaintiff in the action and the other heirs of Umma Shiffa made no protest but stood by and acquiesced in the improvement of the land by the fifth defendant. The Supreme Court did not concur in this last finding, but their Lordships do not think that this is material.

In these circumstances the fifth defendant by his amended Statement of Claim in the action (*inter alia*) claimed that in the event of a sale of the property being ordered in terms of the Partition Act the sum of Rs. 35,000 as compensation for the buildings erected and other improvements effected by him should be paid to him out of the proceeds of sale.

The learned District Judge in the first place directed that the property should be sold subject to the right of the sixth and seventh defendants (the present appellants), who had by then been substituted for the fifth defendant, to remain in possession of a half share of the premises and the entirety of the buildings thereon for the full term of thirty years demised by the lease. This part of the order has not been supported by the appellants and need not further be considered. The learned Judge however further held that in the event of his order not being upheld the appellants were entitled to compensation out of the proceeds of sale for improvements effected by the fifth defendant. He fixed the quantum of compensation at Rs. 25,122.45 and this figure is not in dispute. It is this part of the decision which was rejected by the Supreme Court on appeal and the appellants now seek to maintain.

The Supreme Court in deciding that the respondents are entitled to enjoy the fuits of the fifth defendant's labour and expense without paying any compensation therefor were largely influenced by a decision of the Supreme Court in *Soysa vs. Mohideen* (1914) 17 N.L.R. 279. But before examining this case their Lordships think it right to refer to certain authorities which, had they there been referred to might well have led to a different conclusion. Their immediate purpose in doing so is to show that hitherto no distinction had been drawn between the case of an improver whose *bona fide* occupation had rested on a purported lease and that of any other improver who had assumed to be in lawful possession, but that, on the contrary, the right of the improver to compensation rests on the broad principle that the true owner is not entitled to take advantage, without making compensation, of the improvements effected by one who makes them in good faith believing himself to be entitled to enjoy them whether for a term or in perpetuity.

Reference may first be made to textbooks of high authority. In Wille's " Principles of South African Law " 4th Ed. at page 479 it is said " A very common application of the doctrine of unjust enrichment occurs in cases where improvements or additions to landed property have been made, without the express or implied consent of the owner of the property, by a person in possession of the property. A person who expends money or labour in improving property with the intention of doing so for his own benefit whereas in fact he had no right or title to the property, in consequence of which the improvements are acquired by the owner of the property by virtue of accession is entitled to claim from the latter the amount by which the property has been enhanced in value.

Improvements of this nature are effected as a rule to the land of one person by a *bona fide* possessor of the land, such as a fiduciary, or by a person who belives that he is a fideicommissary. A *bona fide* occupier of land, such as a person occupying land under the mistaken belief that he has a lease of the property has the same right to compensation as a *bona fide* possessor. "

Earlier editions of this work had substantially the same statement.

In "The South African Law of Obligations" by Lee and Honoré (1950), paragraph 713 at p. 189 runs as follows :

"Preservation and improvement of property. A persons who preserves the property of another from loss, deterioration or destruction, or who, acting on his own behalf, improves the property of another in the belief that it is or will be his own (or in some cases that it belongs to a third person) may claim compensation from the owner for necessary and useful expenses thereby incurred not exceeding the value of the benefit accruing to the owner." For this proposition numerous cases were cited to some of which their Lordships will now refer. Before doing so they observe that in the present case the often troublesome questions whether the improver has acted *bona fide* or *mala fide* and whether he is entitled to remain in occupation of the land until compensation has been paid do not arise. The *bona fides* of the fifth defendant is admitted and the appellants do not in a partition action claim to remain in possession.

In 1874 the case of *Bellingham vs. Bloometje* Buchanan's Reports page 36 was decided by Villiers C. J. in the Supreme Court of the Cape of Good Hope. It must be examined at length because it goes to the root of the matter and it has not been fully appreciated in the Supreme Court of Ceylon. The headnote so far as material is as follows "Where a person has *bona fide* built upon land not his own he is entitled to compensation for useful expenses incurred by him to the extent to which the value of the land has been enhanced by the building." The defendant acting in good faith and the belief that he had a lease of certain land, which in fact did not form part of land leased to him, built on it a house and a dam. The true owners sought to evict him. It was held that he was entitled to compensation for the amount by which the value of the land was enhanced by the house and dam. At page 38 of the Report the Chief Justice says "I am of opinion that the appellant had not sufficient reasons to believe he was building on another man's ground but that he was the *bona fide* occupier of the land . . . All the Roman Dutch authorities are agreed that where a *bona fide* occupier has built upon land belonging to another he is entitled to compensation for the useful expenses incurred by him, that is to say, for the expenses to the extent to which the value of the land has been enhanced by the building." For this proposition the learned Judge cites a wealth of authority, including Voet & Grotius, and then goes on to discuss the rights of a *mala fide* possessor, which are not now relevant. But the salient fact is that in this case the improver, who was held to be entitled to compensation, thought that he was, but in fact was not, the lessee of the land which he had improved. It was because he *bona fide* thought that he was entitled to occupy the land and in that belief improved it, that his claim to compensation arose. Nothing turned on the fact that he was truly the lessee of the adjoining land or that his *bona fide* mistake was about the boundaries of the land demised. He was a *bona fide* occupier.

In *Parkin v. Lippert* (1895) 12 S.C.R. 179 the facts were somewhat complicated but the case illustrates the importance of bearing in mind the distinction between improvements effected by a lessee whose lease endures for the stipulated term and those effected by a lessee whose term is prematurely determined by operation of law. The material part of the headnote is as follows "Where a lessor takes advantage of the law which puts premature end to a lease upon the insolvency of the lessee, he is liable, in the absence of any stipulation to the contrary, to the trustee of the lessee's estate for the value of improvements made by such lessee in contemplation of the lease being allowed to run its full term and to a sub-lessee to whom the lessee had legally sublet the land before his insolvency and who in contemplation of the lease continuing to its end had made such improvements." The same learned Judge having invoked the principle that "the presumption against forfeiture of property in any shape or form lies at the root of the well-known maxim of our law that no one shall be enriched at the expense of another" observed that there was no difference in principle, although there might be in degree between the case of a lease being abruptly terminated by the operation of a special law and that of a *bona fide* possessor making improvements in the belief that he will have the permanent enjoyment of them. Here then was the case of an improver who, lawfully occupying under a lease and in that capacity making improvements, was entitled to compensation because his occupation was prematurely determined.

In *Rubin v. Botha* S.A.S.C.R. App. Div. 1911 page 568 the essential facts closely resembled those of the present case and the decision derives special importance from the fact that it was that of Lord de Villiers C.J., Innes J. and Maasdorp J.P. There the plaintiff and defendant

entered into an agreement of lease under which the plaintiff was to have the use and occupation of a portion of the defendant's farm for ten years without payment of rent and was to erect a building thereon which at the expiration of that period was to become the property of the defendant. After the plaintiff had erected the building and been in occupation of the building for three years the defendant gave him notice to quit on the ground that the agreement was null and void as not having been executed as required by the Transvaal law. It was held that the plaintiff was entitled to be paid for the improvements to the extent to which the value of the defendant's farm had been improved thereby less the value of the plaintiff's use and occupation for three years. There was a difference of opinion as to the quantum of compensation which does not arise in the present case, but there was unanimity upon the right to some compensation. Some passages may be quoted from the judgment of the Chief Justice with whom Maasdorp J. agreed. " The present case " he said " differs from the many cases in the Cape Supreme Court relating to the compensation payable to the owner of land by the person effecting improvements thereon in this respect that the improvements were made by a person who knew that he was not the owner and intended that the buildings should become the property of the owner but believed that he would as lessee enjoy the use and occupation for the full period contemplated by the lease executed between him and the owner. That lease proved to be null and void by reason of its not being notarial and the question to be determined is what should be the basis of the compensation admittedly payable by the defendant to the plaintiff. " The learned Chief Justice then referred to his decision in *Bellingham vs. Bloometje*, which has already been cited, and to the authority of Groenewegen upon which it had been decided, and said " Lessees as has often been pointed out in the Cape cases, especially in *De Beers Mines vs. London & South African Exploration Company* (10 Juta 359) stand on a different footing from other occupiers as their rights have been defined by special legislation. Where however as in the present case, the relation of lessor and lessee does not exist between the owner and the occupier by reason of the agreement of lease proving null and void, there is no valid reason why the basis of compensation applicable to lessees should be applied to improvements made by the occupier. " Then after referring to the already cited case of *Parkin vs. Lippert* the Chief Justice said " The plaintiff was not a " possessor " in the strictly juristic sense of the term but he was a *bona fide* occupier who believed he had the right not only of occupation but of erecting the buildings on the land so occupied. True it is that he intended that the building should become the property of the defendant but only upon the expiration of the ten years during which the occupation was to last. The defendant took advantage of the law which, by declaring the lease to be void, frustrated the true intentions of both parties, and there appears to me to be no reason in the world why he should not be subject to the equitable rule of the Dutch law that no one should be enriched to the deteriment and injury of another ". Then a little later " The defendant in the present case took advantage of the law which declared his agreement to be void and he cannot insist upon compensation being payable as if the lease had been a valid one. "

Their Lordships have referred at length to this case both because it appears to them to apply in an unimpeachable way the cardinal principle of Roman Dutch Law in regard to unjust enrichment and because it was ignored in the leading case of *Soysa vs. Mohideen* to which they will presently recur. But before doing so they will mention the case of *Fletcher vs. Bulawayo Waterworks Company, Ltd.* (1915) S.A.L.R. App. Div. 636. In that case again the defendants had leased a piece of land but had by mistake sunk a well beyond its boundary within the plaintiff's land. The plaintiff bringing an action for ejectment, the defandant claimed compensation for the improvement effected by the sinking of the well. The Court (consisting of Innes, C.J., Solomon, J.A., and Maasdorp, J.A.), considered and applied *Rubin vs. Botha* and held that they were entitled to it. There is much in the judgments of all three judgments which illuminates the principle but Their Lordships think it sufficient to cite a single passage from the judgment of the Chief Justice : " But it", he said (the case of *Rubin vs. Botha*) " certainly did decide that a person who had made improvements upon the land of another, not as possessor but under the mistaken idea that he was a lessee, was entitled to compensation on the same basis as a possessor, subject to an equitable deduction necessitated by the special circumstances."

Why then, it must be asked, did the Court in the present case deny to the 5th defendant the right to compensation, thereby depriving him of the fruit of his labours and expense and permitting the unjust enrichment of the co-heirs ?

The answer is found in *Soysa vs. Mohideen* which, rightly perhaps, appeared to them to be a binding authority. It must therefore be closely examined. Two important points were raised in the case, only one of which is relevant to the present question, and the facts can be shortly stated. A parcel of land which was subject to a fidei commissum had been occupied by the defendant in the action as lessee of one of the fiduciarii who was entitled to one half of the property and had agreed to pay him half the value of the buildings upon the termination of the lease. The plaintiffs, the fidei commissarii, (the fiduciarii having died) successfully challenged the validity of the lease, whereupon the defendant claimed to retain possession of the land until the plaintiff paid him half the cost of his improvements. This claim was rejected by the Court, and once again Lordships must cite considerable passages of the judgment, pointing out with respect how error has found its way into their conclusions. At a first hearing before Lascelles, C.J., that learned Judge said, " I think there can be no doubt that under the Roman-Dutch law a lessor had not the jus retentionis which would entitle him to remain in possession against a successful claimant until he has been compensated for improvements. The occupation of a lessee is not possessio civilis, for he does not occupy the property in the belief that it is his own. On the contrary his interest in the property is defined and limited by the terms of the lease." The learned Chief Justice thought that the uncertainty which existed upon that branch of the law should be set at rest and adjourned the case for re-argument before the Collective Court. The observation that has been cited proved to be the basis of the judgment of that Court. The Chief Justice himself added little to his previious judgment. De Sampayo, A.J., opens the relevant part of his judgment with the words " A lessee is not a *bona fide* possessor and is therefore not entitled to compensation for improvements on that footing." Their Lordships observe that he, like the Chief Justice, assumes that he is dealing with a claim by a lessee whereas the very basis of the claim is that the lease has been repudiated and that he cannot claim under it. In the words of Lord de Villiers he was not a possessor in the strict juristic sense but he was a *bona fide* occupier who had effected improvements in the mistaken belief that he would enjoy them for the term of the lease. The learned Judge proceeded to distinguish other cases upon which Their Lordships do not think it necessary to pronounce. His judgment was in Their Lordships' view vitiated by the original erroneous assumption. None of the cases in the South African Courts, to which reference has been made, were noticed by the Court. Pereira, J., fell into the same errors. After stating that it was well settled law in the colony that, in order to be entitled to compensation for improvements, a person should have not only possession of the property but *bona fide* possession of it and that by " possession " is here meant what is, known to the civil law as the *possessio civilis* as distinguished from the *possessio naturalis*, he held that a lessee has not *possessio civilis* of the land that he enjoys under the lease, for he knows that the land he enjoys does not belong to him: therefore he is not entitled to compensation for improvements. The question whether or not the possession of a lessee is *possessio civilis* may be open to argument. But in this context it is beside the point. For, as already stated, the claim made by the defendant in the case under review (like the claim made by the appellants in the present case) was not made *qua lessee* but in respect of the *bona fide* occupation of land under a lease which had been repudiated. It would as their Lordships think, be difficult to imagine a clearer violation of the moral principle upon which the rule against unjust enrichment rests, than that an owner, who has, for whatever reason, prematurely brought a lease to an end, should at once deny to the lessee the rights which the lease or the common law gives him as lessee and, because he was a lessee, deny also his claim to compensation for improvements. Their Lordships must accordingly pronounce that this case was wrongly decided and have the less reluctance in doing so because, long though the decision has stood, no question of title can be affected by a contrary view of the law.

But though this decision has stood for so many years, there have been in the Courts of the Island of Ceylon cases which in principle are not easy to reconcile with it. Thus in *Hevawitarane vs. Dangan Rubber Company, Ltd.*, 17 N.L.R. 49 (a case decided shortly before *Soysa vs. Mohideen*) it was held that a " *bona fide* possessor " need not necessarily be the owner of the property possessed, nor need he have a legal right to possess it but that it is sufficient if his possession is the result of an honest conviction in his mind of a right to possess. These words were quoted with approval by Wood Renton, A.C.J., from Pereira Right to Compensation and were not dissented from by the same Pereira, J., who was a party to the decision in the later case. It would seem that a discrimination between these two cases can only rest upon a confusion as to

the capacity in which a person, who thought he occupied under a valid lease but did not, claims.

A case which usefully illustrates the spirit in which the principle has been developed is the *Government Agent, Central Province vs. Letchiman Chetty*, 24 N.L.R. 37. There the relevant facts (taken from the head note) were that the Government Agent took steps to acquire a swamp under the Land Acquisition Ordinance but suspended it. On the outbreak of plague he entered into possession under the Plague Regulations and in anticipation of the conclusion of the acquisition proceedings improved the land by filling it and draining it with drains which extended out of the land. No formal order of possession was obtained under the Land Acquisition Ordinance. At this stage the scheme was modified, and the old proceedings under that Ordinance were abandoned and new proceedings started. The question then was whether the land should be valued as at the date of the award in those proceedings, or whether the Government Agent was entitled to compensation for improvements effected by him while he was in possession. He was held to be so entitled upon the ground that he was a *bona fide* possessor. For a person who takes possession of land and executes improvements upon it in expectation of a formal title which in good faith he believes himself certain to obtain may be such a possessor. Bertram, C.J., in a weighty and learned judgment treats of the development of the law, observing " In my opinion it would be a most unfortunate position, if the law had not developed principles which would enable it to deal justly with such a case." In that case the question was mainly whether the possession was *mala fide* or *bona fide*. No doubt, appears to have been entertained that if there was *bona fides* a valid claim to compensation was established. Again it appears to Their Lordships that upon any equitable principles it is unjustifiable to deny to an evicted lessee compensation which is awarded to one who has no title at all however firm may be his belief that he will get one.

Reference must now be made to *Appuhamy vs. The Doloswala Tea and Rubber Company, Ltd.*, 25 N.L.R. 267. In that case there was much discussion of the rights of a lessee in respect of improvements and Garvin, A.J., said, " It is well settled law that in Ceylon a lessee who has improved his leasehold cannot maintain a claim for compensation in respect of these improvements against a third party who establishes a title superior to that of his lessor from a source other than the lessor. The law was declared in this sense in the case of *Soysa vs. Mohideen*. Since the decision of that case nothing new has been discovered in the writings of the jurists." The learned Judge then referred to the two South African cases which have already been examined *Bellingham vs. Bloometje* and *Rubin vs. Botha* and said, " In neither of these cases was compensation granted to the improver in his character of lessee of the property improved. Indeed it was the circumstance that he was not in law the lessee of the premises which enabled him to contend that he was a possessor who entered upon the premises *bona fide* and with the intention of holding and enjoying the premises, if not as owner, at lease for a specific period of time and entitled in equity to a measure of compensation assessed on that footing." It is difficult to understand why the acknowledged principle of those cases did not apply to the case before the learned Judge. But at least he did not dissent from it and the high authority of Garvin, J., may be said to reinforce that of the distinguished South African Judges who affirmed the right to compensation in such a case.

In *Jasohamy vs. Podihamy*, 44 N.L.R. 385, the right of compensation for improvements was extended to a usufructuary who made improvements with the consent and acquiescence of the owner. The interest of the case lies in the fact that Keuneman, J., cites from Wille's Principles of South African Law (1937 Edition), p. 353, the passage which has already been quoted. It will be observed that the generality of the statement of the relevant law in this citation does not exclude the case of a person who occupies land and improves it in the mistaken belief that he is a lawful lessee. This view is enforced by the fact that the learned Judge then refers without disapproval to the cases of *Rubin vs. Botha* and *Fletcher vs. Bulawayo Waterworks Company, Ltd.*

Learned counsel referred Their Lordships to many other cases in which, as he contended, the Courts of Ceylon had sought to mitigate the rigour of the law as laid down in *Soysa vs. Mohideen* by means of the doctrine of acquiescence or otherwise. But they think it unnecessary to examine them and will return to the case under appeal. As already observed, the Judges of the Supreme Court founded their judgment on *Soysa vs. Mohideen* and in partiuclar on the passages that have already been cited from the judgment of Pereira, J., Mr. Justice Fernando

concludes the relevant part of his judgment by saying that, having considered many of the cases subsequent to *Soysa*, he would hold that none of them had in any way qualified the principle therein laid down that the rights, if any, arising from a contract between a lessor and lessee cannot be enforced by the lessee as aganist the *fidei commissary* owners who were not parties to the contract. This passage serves to emphasize in the clearest way the error which permeates Soysa's case and the case under appeal. In that case, as in this, the claim of the improver was based not on contractual rights under the lease but upon an equitable principle which is an application of the cardinal rule against unjust enrichment. It is beside the mark to discuss whether the possession of a lessee is *civilis* or *naturalis* for it is not as lessee that the claim is made. It is, on the contrary, because he is denied his contratual rights by the premature termination of the lease, that he asserts his claim to compensation. Their Lordships entertain no doubt that in allowing it they follow the line of development of an important equitable principle, and derive some satisfaction from the fact that the law of Ceylon will thus be brought into harmony with that established in South Africa nearly a century ago.

As they take this view upon the main question that was argued, Their Lordships do not think it necessary to discuss an alternative claim, which was founded on the view that the lessor, Zaneera Umma, was entitled to compensation as between herself and her co-heirs and that by subrogation the fifth defendant and therefore the appellants are entitled to the benefit of her claim. This is a matter which may in some other case call for determination. It is unnecessary and would be inexpedient to deal with it now.

Their Lordships are satisfied that the final adjustment of the rights of the parties including the party claiming compensation as an improver can and should be made in the partition suit. The amount of compensation, if payable, has not been disputed, nor has any equitable plea been advanced for its reduction.

Their Lordships will therefore humbly advise Her Majesty that the Order of the Supreme Court should be set aside, that the Order of the District Court should be restored so far as it directed the sale of the property in accordance with the provisions of the Partition Act 1951 and the bringing of the proceeds of sale into Court to abide further order and the payment of costs but that provision should be made by such further order for paying the sum of Rs. 25,125.45 thereout to the appellants in priority to the beneficial interests of other parties.

The respondents must pay the costs of the appellants in the Supreme Court and of this appeal.

Set aside.

Privy Council Appeal No. 19 *of* 1959

Present: VISCOUNT SIMONDS, LORD TUCKER, LORD JENKINS, LORD MORRIS OF BORTH-Y-GEST, MR. L. M. D. DE SILVA.

S. A. SUPPIAH *vs.* J. J. KANAGARATNAM (deceased) AND OTHERS

From

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

DELIVERED THE 18TH FEBRUARY, 1960

Rei vindicatio, action—Prayer inter alia for declaration of title to one-fourth share of a theatre and plants and machinery thereof and to be quieted in possession—Theatre constructed and equipped for adaptation as a Cinema with contributions made by plaintiff, defendant and others—Land on which theatre stands held by defendant on a notarial lease from a third party—Disputes between plaintiff and defendant—No notarial or other agreement in writing—Plaintiff declared entitled to a fractional share equivalent to amount be contributed towards total cost of construction and equipment.

Jus superficiarium, nature of—Its applicability to the instant case—Alternative claim based on jus superficiarium—Failure to plead or to lead necessary evidence—Can such claims succeed.

Application to raise new issues at the close of plaintiff's case—When may it be disallowed.

The plaintiff sued one K and two others (7th and 8th defendants) for a declaration :

(*a*) that he be declared entitled to 1/4 share of " a theatre and the plants and machinery thereof ".

(*b*) that he be quieted in possession of that share.

(*c*) that K. be ordered to account to the plaintiff for his share of the rents and profits from June 1948 up to date of action.

The said theatre known as " Tivoli Theatre ", Nuwara Eliya, was constructed on a piece of land of which K had obtained a lease in his own name in 1945 from its owner. The cost of the building including the hire-purchase price of equipment required for its adaption for use as a Cinema was Rs. 145,185/70, to which the plaintiff contributed Rs. 45,559/- and K Rs. 26,848/- and 7th and 8th defendants the balance along with others not parties to the action. The intention of the parties was to form a Limited Liability Company to take over and run the theatre as a Cinema, but quarrels among the promoters prevented its formation.

The plaintiff alleged that K had unlawfully appropriated to himself all the mesne profits and rents of the theatre and refused to give plaintiff his share.

K contested the claim pleading that the claim for 1/4 share was not maintainable in the absence of a notarial writing and that the claim for an account could not be sustained as there was no agreement in writing to do business in partnership, the capital being over Rs. 1,000/-.

After trial the learned District Judge held
(1) that the evidence did not establish a partnership.
(2) that plaintiff was entitled to Rs. 42,539/ Rs. 145,185/- of the buildings as he contributed that amount as stated by him.
(3) that the building was co-owned by the plaintiff and the defendants as the ownership of a building apart from the site on which it stands is known to our law and it is the *jus superficiarum.*
(4) that the absence of a notarial agreement did not preclude the plaintiff from claiming a frachional share of the building as against his co-builders.

The Supreme Court allowed K's appeal on the ground (*a*) that the learned Judge erred in holding that the ownership of a building apart from the site on which it stands is well known to our law and that it is the *jus superficiarum.*
(*b*) that the plaintiff's claim in the plant was not to be declared entitled to a *jus superficiarum,* but to an undivided 1/4 share of the building.

On an appeal by the plaintiff to the Privy Council,

Held : (1) That the view taken by the Supreme Court was correct. As the partnership has been rejected and not relied upon in the Privy Council and as the claim based on *jus superficiarum* was not pleaded or presented to the Court and the contribution made by the plaintiff could give him no interest in the soil, there is no justification for the declaration made in his favour.

(2) That an application at the close of the plaintiff's case seeking to raise new issues unsupported by the necessary evidence and not pleaded could not succeed.

Cases cited : *Samaranayake vs. Mendoris,* 30 N.L.R. 203.
Samarasekera vs. Munasinghe, 55 N.L.R. 558.

Stephen Chapman, Q.C., with *Ralph Milner,* for the appellants.
Walter Jayawardena for the respondents.

LORD TUCKER

The appellant was the plaintiff in an action heard in the District Court of Nuwara Eliya on various dates in the years 1952 and 1953, judgment in which was delivered on the 5th February, 1954. The defendants were J. J. Kanagaratnam and the present respondents Nos. 8 and 9, Thambiah and Selliah Pillai. The plaintiff, however, claimed no relief against the two last-named parties who were joined only for conformity. Judgment was given against Kanagaratnam. On his death the respondents numbered 1-7, having been substituted in his place as defendants, successfully appealed to the Supreme Court and the plaintiff now appeals to Her Majesty in Council against the judgment of that Court dated 28th June, 1957. The appel-

lant Suppiah and the deceased Kanagaratnam will be referred to hereafter as plaintiff and defendant.

The action concerned the rights of the parties with regard to the Tivoli Theatre, Nuwara Eliya, which had been constructed between November, 1946, and 10th July, 1947 on a piece of land of which the defendant had obtained a lease in his own name dated 31st October, 1946, from the owner, a widow named Moraes. The cost of the building including the hire purchase price of the equipment required for its adaptation for use as a cinema was Rs. 145,185/70, to which the plaintiff had contributed Rs. 42,559/- and the defendant Rs. 26,848/-. The balance had been provided by the respondents numbered 8 and 9 and three other persons not parties to the action named Ranasinghe, Karuppiah Pillai and Dr. Silva, who had obtained promissory notes or oral promises to repay the sums advanced by them. The intention of all these persons was to form a limited liability company to take over and run the theatre as a cinema. As the costs of building increased some of those who had embarked on this venture claimed their money back, quarrels between the original promoters broke out, and the company was never formed. Hence these proceedings.

It will be convenient at this stage to examine the averments and relief claimed in the plaint dated 19th June, 1950. Para. 1 states that the subject matter of the action was the Tivoli Theatre bearing assessment number 81 and more particularly described in the schedule thereto. The schedule describes the property as " all that theatre called and known as ' Tivoli Theatre ' Nuwara Eliya bearing assessment No. 81 in Ward No. 2 on the Udapussellawa Road, Nuwara Eliya in the Central Province and bounded on the north by property belonging to Varghese, presently occupied by Roy Studio, south by municipal premises, east by Chelhurst path and west by Old is Bazaar Main Road ".

Para. 2 reads : " The plaintiff and the defendants built the said theatre called and known as the ' Tivoli Theatre ' and equipped it with plant and machinery and the palintiff and defendants became entitled to the said theatre together with the said plant and machinery in the proportion of one-forurth share to each ".

Para. 3 alleged that the defendant " as such co-owner " had been in possession since June, 1948, and collected the rents and profits for the benefit of himself and the other co-owners.

Para. 4 alleged that the defendant had unlawfully appropriated to himself all the mesne profits and rents of the theatre and refused to give the plaintiff his share.

Para. 5 alleged that a cause of action had thus arisen to sue the defendant for declaration of title to and possession of the undivided one-fourth share of the theatre and for mesne profits and rents together with interest thereon.

The prayer is as follows :—

" Wherefore the plaintiff prays :—

(1) That he be declared entitled to one-fourth share of the said theatre and the plants and machinery thereof.

(2) That he be placed in quiet possession of the said one-fourth share.

(3) That the defendant be ordered to account to the plaintiff for his share of the rents and profits from June, 1948, up to date of action.

(4) For judgment against the first defendant in such sum as may be found due to the plaintiff on such accounting.

(5) For costs of this action and for such other and further relief as to this Court shall seem meet."

By his answer the defendants denied the averments in the plaint and pleaded that he was in possession under a lease granted by the widow Moraes which fact was well known to the plaintiff when he contributed to the cost of the building. He further pleaded that the claim to a share was not maintainable in the absence of notarial writing, and similarly the claim for an account could not be sustained in the absence of an agreement in writing to carry on business at the theatre as the capital exceeded Rs. 1,000 and in fact the business was carried on in partnership.

At the hearing before the Board, counsel for the defendant stated that he did not contend that any partnership existed prior to the building of the theatre.

On these pleadings issues were framed and approved. They appear on pages 30 and 31 of the record and need not be set out.

It is difficult to suppose that anyone reading these pleadings and the issues framed thereon would infer that the plaintiff at the trial was going to endeavour to establish a right to a *jus superficiarium* as against the defendant in his capacity as lessee under a lease for 20 years.

This right in Roman Dutch law, which seems but rarely to have arisen for consideration in the Courts of Ceylon and as to the nature of which it is necessary to refer to the ancient jurists, is nowhere mentioned in the pleadings or issues. It is defined by Grotius in Book II of his Jurisprudence of Holland at Ch. 46, sections 8—10, as translated by Professor Lee at page 279 of Volume 1 of his translation of Grotius as follows :—

> 8. " The right of superficies is the right which a man has to a building standing upon another man's ground.
>
> 9. This right is not full ownership, because in law no one can be full owner of the building if he is not at the same time owner of the ground : but it is the right of building upon the site, and of retaining and using the building until the ground-owner pays the value of the building or an agreed sum.
>
> 10. This right is acquired and lost like immovable property : and is understood to be effectively granted when the owner of the soil allows anyone to build upon it."

The District Jude described the case made by the plaintiff as follows :

" The case for the plaintiff is that the partnership or company which was to do business in the building was to come into being only after the building was completed and that the building itself was not an asset or liability of the partnership but was a building co-owned by plaintiff and the 1st, 2nd and 3rd defendants ".

He held on the evidence that the association with regard to the building was not a partnership, but having considered the sums contributed by the parties he said :—" I am satisfied on the evidence before me that plaintiff contributed Rs. 42,559 to the nearest rupee out of the total spent on the theatre. *I therefore am of opinion he is entitled to Rs.* 42,559/145,185 *of this building.*" (The italics are not those of the learned Judge.)

A few lines later he continued :—" The ownership of a building apart from the site on which it stands is well known to our law. It is called the right of Superficies. Now counsel for the first defendant claims that in the absence of a notarial agreement plaintiff cannot claim this right. What is the right of Superficies ? It is the right to build on the soil and to hold and use the building and until such time as the owner of the soil tenders the value of the building if the amount to be paid has not been previously agreed upon. Now in this case if the plaintiff was seeking to enforce rights as against the soil owner there might be merit in the contention of counsel for the first defendant but what plaintiff is seeking in this case is only to be declared to his fractional share of the building as against others who with him have put up the building and one of whom now does not concede to him his fractional share although that very person admits that plaintiff did contribute, even as he contributed to the putting up of the building. I can see no legal objection to plaintiff being declared entitled to his fractional share as against his co-builders ". Finally at the end of the penultimate paragraph of his judgment he said, " I would point out, however, that in this case plaintiff is not seeking to be declared entitled to the building as against the soil owner—what plaintiff is seeking is a declaration of what fractional share of the building he is entitled to as against the other co-owners of the building which has nothing to do with the right of Superficies." He proceeded to make a declaration that the plaintiff is entitled to Rs. 42,559/145,185 of the Tivoli Theatre building and equipment.

Their Lordships find difficulty in ascertaining the basis upon which this judgment rests. As no case had been pleaded or presented to the Court in support of a claim based on the *jus superficiarium* they agree that no such claim could have succeeded, but as partnership has been rejected and is not now relied upon and as the contribution made by the plaintiff could give him no interest in the soil there remains no justification for the declaration made.

The Supreme Court allowed the defendant's appeal.

Sansoni, J. (with whose judgment de Silva, A.J. agreed) said that the learned Judge was in error in saying " the ownership of a building apart from the site on which it stands is well known to our law. It is called the right of Superficies ". He said " It is clear beyond doubt that our law does not recognise the ownership of a building apart from the land on which it stands " and referred to the case of *Samaranayake vs. Mendoris*, 30 N.L.R. 203. He then referred to the submission of counsel for the plaintiff that his claim could be supported on the ground of the *jus superficiarium*. He said there were several objections to this contention, the chief being that the plaintiff's claim was to be declared entitled not to a *jus superficiarium* but to an undivided ¼ share of the building and added that he could not at that late stage be allowed to make out a new case quite different from the one to be found in his plaint.

With all these observations their Lordships are in complete agreement. On the hearing before the Board counsel for the plaintiff put the claim to *jus superficiarium* in the forefront of his case and invited their Lordships to hold that this right can be acquired as against a leaseholder and in the absence of a notarial document. He conceded that he could cite no decided case in his favour on either of these points but based himself on references to passages in the works of ancient jurists which he said supported his contention. In two or three cases in Ceylon, the last of which prior to the present case was *Samarasekera vs. Munasinghe* 55 N.L.R. 558, the question of the requirement of notarial writing to support the acquisition of a *jus superficiarium* otherwise than by prescription, has been discussed but always left open for future decision.

In these circumstances their Lordships would in any event have been loath to give any decision on such important and difficult questions without the assistance of considered judgments by the Courts of Ceylon on the subject, but in the present case there is the further fatal objection as stated in the judgment of the Supreme Court that a claim on the basis of *jus superficiarium* was not open to the plaintiff on his pleading.

Counsel for the plaintiff submitted in the alternative that he was entitled to a declaration that the defendant was a trustee of the lease for the plaintiff and the other defendants or that the case should be remitted for reconsideration on this basis.

It is clear that no such claim was pleaded nor were the facts necessary to support it alleged. At the close of the plaintiff's case in the District Court counsel for the plaintiff asked for leave to raise the following issue :—" Is the first defendant in possession of the Tivoli theatre partly on his own behalf and partly on behalf of the plaintiff and the second and third defendants as trustee ? " Counsel for the defendant objected on the ground that this was raising an entirely new issue of which he had had no notice and which he was not ready to meet. Counsel for the plaintiff replied that it was clear that the theatre was built by monies advanced by the plaintiff and the first, second and third defendants and that the first defendant taking advantage of the position had got into possession to the disadvantage of the others. He said that in such circumstances section 92 of the Trust Ordinance applied. At this stage the learned Judge raised the question whether any action for declaration of title to immovable property could be joined with a claim to a share of the profits of a business carried on in the theatre. The case was adjourned for a week when after further argument the Judge ruled that the joinder was bad. Accordingly counsel for the plaintiff agreed, without prejudice to his rights to an appeal, to amend the plaint by striking out the claim to a share of the profits of the business. On the defendant lodging his petition of appeal the plaintiff lodged a cross objection against the District Judge's decision as to misjoinder. A study of the arguments before the District Judge and the Judge's ruling on this point seems to show either that the new issue was regarded as relevant only to the plaintiff's claim to a share of the profits and was necessarily ruled out when the Judge decided that such a claim could not be joined, or that the question of the suggested new issue was lost sight of in the discussion as to joinder and never raised again. However this may be it is clear that an application at the close of the plaintiff's case seeking to raise a new issue unsupported by the necessary evidence and not pleaded could not succeed, and there are no findings upon which such a declaration could now be made. Their Lordships are accordingly of opinion that the alternative claim also fails.

For the reasons stated their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Present : T. S. Fernando J.

KODITHUWAKU ARACHCHIGE JAYASINGHE *vs.* M. P. W. MUNASINGHE, SUB-INSPECTOR OF POLICE, MANNAR.

S. C. No. 783 *of* 1958—*M. C. Mannar*, 19792

Argued and Decided on : 17th November 1959
Delivered on : 26th November, 1959.

Criminal Procedure Code Section, s. 188 (2), *Section* 287—*Right of accused person to be defended by Counsel.*

The refusal of a request for a postponement made by an accused to enable him to retain Counsel because the complainant, a foreign tourist, has made arrangements to leave the Island and is not likely to return, is a denial of a right given to the accused to be defended by Counsel, and vitiates a conviction.

Colvin R. de Silva with *M. L. de Silva*, for the accused-appellant.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General.

T. S. FERNANDO, J.

The appellant appeals against a conviction and sentence entered against him in the Magistrate's Court of Mannar in a case where he was charged with the offences of criminal trespass and attempt to use criminal force.

Two points have been urged against the upholding of this conviction, but it has become necessary to consider only one of these points. The appellant's counsel urges that the appellant has been deprived of a fair trial in that, by reason of the learned Magistrate's failure to comply with the provisions of section 188 (2) of the Criminal Procedure Code, he had no opportunity of being defended by a pleader. It must be noted that section 287 of the Criminal Procedure Code recognises the right of an accused person to be defended by a pleader in proceedings in a criminal court.

The appellant appears to have been arrested on the 26th August 1958 on a complaint made to the Police by the woman aggrieved by the conduct imputed to the appellant and then produced before the Magistrate by the Police on the following day, *viz.*, 27th August. On that day he was charged with the commission of the offences referred to above and, on his pleading not guilty, was asked whether he was ready for trial. The record shows that the accused replied he was ready for trial, but immediately thereafter stated he wanted time to retain a lawyer. As he had a right to be defended by a lawyer his request was legitimate, particularly as from the moment of his arrest the previous day he was in the custody of the Police till he was produced in Court. He was in my opinion entitled to have time to retain a lawyer to defend him. He was refused time for this purpose because the learned Magistrate was informed that a postponement even of 24 hours would involve the complainant who was a foreign tourist being deprived of the opportunity of leaving Ceylon as arranged by her. The appellant having been refused the opportunity he desired, his trial began then and there on the 27th August and ended in his conviction that very day.

It would appear that the refusal to grant time to the appellant to enable him to instruct a lawyer was influenced by the desire of the Magistrate to ensure that the prosecution would not be deprived of the evidence of the most material witness. However understandable this desire may have been, a trial at which the appellant was deprived of one of the most valued legal rights of an accused person in spite of his expressed desire to exercise that right cannot be said to be a fair trial. I have, therefore, set aside the conviction and sentence.

In ordinary circumstances I would have directed that a fresh trial of the appellant do take place; but it is clear that the material witnesses have left Ceylon in circumstances in which they are never likely to return, or desire to return. The directing of a fresh trial therefore would serve no purpose.

Conviction and sentence set aside.

END OF VOL. LVII.