The Ceylon Law Weekly

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WITH A DIGEST

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In an appeal from a decision of the District Court in a civil proceeding, the stamp duty for the Supreme Court decree is payable on the value of the subject matter of the action and not on the value of the relief sought in appeal. The fact that the value of the relief sought in appeal is less than the value of the action makes no difference.

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Appellate Procedure Privy Council) Order 1921, *Paragraphs* 6, 11 *and* 18—*Application for extension of time allowed for printing record signed and filed by Proctor whose appointment in writing filed earlier—No writing filed appointing new Proctor—Objection to application—Can the Court entertain such application —Civil Procedure Code, sect ons* 25 *and* 27.

This is an application by the Attorney-General—the appellant—for an extension of the time allowed by paragraph 11 of the Appellate Procedure Privy Council) Order, 1921, for the printing of the record of the case for the purposes of transmission to the Privy Council. The application had been signed and filed by Proctor L on behalf of the appellant.

In terms of paragraph 6 of the aforesaid Order a writing had been filed earlier in the Registry appointing Proctor S to act for the appellant in connection with the appeal.

Objection was taken by the respondent to the application that at time of the filing of this application, no document had been filed in terms of paragraph 6 of the said order appointing Proctor L to act for the appellant in connection with the appeal.

Held: (1) That if an appellant desires to be represented by a Proctor, other than the one whose act of appointment has previously been filed in terms of paragraph 6, or the one who by implication is recognised by that paragraph as the party's proctor, for the purposes of the appeal, a document appointing a new proctor must be filed under that paragraph.

(2) That in the absence of such a "new" appointment neither the Registrar, nor the Court, nor the opposing party can regard any act or application of a "new" proctor as being done or made on behalf of the appellant.

(3) That a complete omission to file the act of appointment cannot be subsequently supplied.

Per H. N. G. FERNANDO, J.—"If we were now to decide that applications of the present kind can be entertained although made by Proctors in respect of whom the requisite acts of appointment have not been filed previously or contemporaneously, we would be providing a dangerous precedent for the excuse of lapses on the part of Proctors and parties in complying with the procedure set out in the various enactments concerning appeals to the Privy Council and applications connected therewith."

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Buddhist Law

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In 1951, 2nd and 3rd defendant's tutor, R, instituted action, N0. 7508 D.C. Kurunegala against the plaintiff in this action praying *inter alia* that R be declared controlling Viharadhipathi of Pallegama Temple. In his answer filed in the said case D.C. 7508, the present plaintiff prayed for a declaration that he is the lawful controlling Viharadhipathi and that R's action be dismissed. After trial R's action was dismissed but there was no declaration in present plaintiff's favour. In the present action against the 2nd and 3rd defendants for a declaration that the plaintiff is the lawful controlling Viharadhipathi, he pleaded that the decree in D.C. 7508 operated as *res judicata* against the 2nd and 3rd defendants, who claimed title through R.

The learned District Judge upheld the plaintiff's plea of *res judicata.*

In appeal it was contended on behalf of the 2nd and 3rd defendants-appellants that the principle of *res judicata* did not apply in this case because (1) in the case of a tutor and his pupil, the pupil takes after and not under the tutor.

(2) no question of property is involved but merely the right to an office in a dispute regarding an incumbency;

(3) the decree in D.C. 7508 did not declare the plaintiff entitled to the incumbency.

Held: (1) That the decision in D.C. 7508 D.C. Kurunegala is *res judicata* against the 2nd and 3rd defendants as the relationship of tutor and pupil in Buddhist Ecclesiastical Law is sufficient to make the pupil privy of his tutor.

(2) That the expression "same parties" in Section 207 of the Civil Procedure Code was used in the sense in which they were understood in the Roman-Dutch Law, viz., in an extended sense which by a legal fiction, included certain classes of persons other than the parties actually engaged in the action.

Per SANSONI, J. —(*a*) "Now although an incumbency is an office, I have tried to show in my judgment in *Podiya vs. Sumangala Thero* (1956) 58 N.L.R. 29 that it is an office to which rights in property attach; and for that reason I think the principle of *res judicata* would apply."

(*b*) . . . ."*Res judicata*, in other words, is a matter of substance," see Caspersz, page 77. The determining factor is not the decree but the decision of the matter in controversy.

The point has been dealt with by Jayawardene, A.J., in *Velupillai vs. Muthupillai* (1923) 25 N.L.R. 264. Generally speaking estoppel or *res judicata* may

arise either where there is identity of cause of action or where there is identity of point of issue."

Buddhist Temporalities

Buddhist Temporalities Ordinance, (Cap. 222), Sections 2, 4 (i), 20 and 25—Land gifted to Vihare by last will—Management of land for the benefit of Vihare entrusted to executors as Trustees—Executors conveying land by deed to Viharadhipathy subject to condition in will as regards its management—Claim after fourteen years by Viharadipathy to possession of land and the right to have account of income from trustees—Is he entitled to such claim—Did the land vest in the Viharadhipathy.

Is a Buddhist Temple a juristic person—Meaning of the words "property belonging to the temple" in section 20 of the Buddhist Temporalities Ordinance—Does it include property vested in private trustees for the benefit of the temple.

By clause 5 of the last will of Mrs. H. W. who died in 1940, a gift was made to the Kelaniya Raja Maha Vihare in the following terms:—"I give two hundred and fifty acres out of all that paddy field called Kalawewa Farm situated in the North-Central Province, Ceylon, to the Raja Maha Vihare, Kelaniya. The selection of the 250 acres I leave to my executors and the management of the same for the benefit of the said Vihare, I entrust to my trustees hereinafter named."

The Trustees named in the will were her three sons to whom by clause 7 of the said will, she gave considerable property for certain charitable purposes including restoration work at the said Kelaniya Vihare.

The Trustees assuming that it was their duty under the will, conveyed the 250 acres selected out of 1,000 acres to the then Viharadhipathy, Rev. D and succesors in office subject to the express condition in the said will, that the "management of the said property for the said Vihare shall be in the Trustees."

Rev. D. died in 1947 and was succeeded by Rev. B., the plaintiff, who was the trustee of the Kelaniya Vihare duly appointed under the Ordinance. The Trustees contined to collect the income and apply it as they thought fit for the purposes of the Vihare. No complaint was made by Rev. B. until 1954 when he claimed that he was entitled to an account of the income which the Trustees had received and to the possession of the land, to establish which claim this action was instituted.

The District Court held that he was entitled to an account of the income and payment of it, but that he was not entitled to the possession of the land. On an appeal to the Supreme Court, this order was set aside.

The plaintiff appealed to the Privy Council where it was contended on his behalf (1) that a Vihare is a juristic person and as such is entitled to accept and own property and accordingly clause 5 of the will operated as an outright gift to the Vihare.

(2) that even though a Vihare is not a juristic person, the 250 acres were vested in him by virtue of the Buddhist Temporalities Ordinance (Cap. 222).

(3) that even if the 250 acres did not come within the Buddhist Temporalities Ordinance, nevertheless the trust in the will must be given effect and that it was a valid charitable trust.

Held: (1) That a Buddhist Temple is not a juristic person. It has no legal personality.

(2) That the view of the Supreme Court that the words "property belonging to any temple" in Section 20 of the said Ordinance mean only property which has been dedicated to the temple, is correct.

(3) That the land in question did not vest in the plaintiff as the duly appointed Viharadhipathy of the said Vihare by virtue of Section 20 of the said Ordinance, as the land in question constituted, property vested in private trustees for the benefit of the temple.

(4) That the word "management" in Clause 5 of the Will cannot be confined to the cultivating and letting of the land and the collection of the income. It extends also to the management of the income.

(5) That the words "for the benefit of the said Vihare in clause 5 above connote that the Trustees are the persons to decide how the income should be applied for the purposes of the temple.

(6) That to hold that the income of the land should be paid to the plaintiff will amount to a refusal to give effect to the trust created by the will.

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Section 238—Meaning of the words "all persons"

Section 247—Action under, for declaration that a deed by judgment-debtor alienating property to another be set aside—Alienated property acquired by judgment-debtor after judgment debt—When may such alienation becomer fraudulent.

Held: That the alienation of property acquired after the judgment debt cannot be said to be fraudulent except in a case where the creditor has been induced by the debtor to believe that after-acquired property would be available to him and he has in the belief that that property would be available for the recovery of his debts given the debtor credit.

Per BASNAYAKE, C J —The law is not that a judgment-debtor may never after a judgment has been entered against him alienate his property nor is the law that a judgment-debtor who inherits property

after a judgment has been entered against him is not free to alienate his inherited property until the judgment-debtor chooses to execute his decree especially as under our law there is no time limit to the first application for the execution of a decree.

Defendant absent—Ex parte *trial—Provisions of sec* 85 *of the Civil Procedure Code imperative.*

A defendant on whom summons had been served but who had not filed answer was absent on the trial date The trial judge proceeded to hear the case *ex parte* and dismissed the plaintiff's action.

Held: That the provisions of section 85 of the Civil Procedure Code are imperative and that the learned trial Judge was therefore wrong in dismissing the plaintiff's action. He should have entered a decree *nisi* in favour of the plaintiff and issued to the defendant a notice of such decree The defendant, if it chose, could have then availed itself of the provisions of section 86.

Sections 184, 185 *and* 186—*Failure on the part of the judge who heard the case to date and sign judgment at time of pronouncing it—Validity of judgment.*

Held: That the failure on the part of a judge to date and sign the judgment in open Court at the time of pronouncing it as required by section 186 of the Civil Procedure Code renders the judgment invalid.

Section 337—*Application for Execution after final Partition decree—Does section apply.*

Section 769 (2)—*Application for reinstatement of appeal dismissed—Is it a final judgment of the Court.*

Section 207—*Meaning of 'same parties'.*

Sections 706, 704, (2)—*Act on to recover debt due on promissory note—Application for leave to appear and defend—Should it be decided on affidavits alone—Provisions of this Chapter to be strictly adhered to.*

In an action instituted under Chapter 53 of the Civil Procedure Code to recover a debt due on a promissory note, the defendant sought leave to appear and defend the action under Section 706 of the Code Instead of the prescribed procedure being followed, the defendant was called to give evidence in support of his application and to submit himself to cross-examination and to produce documents The learned trial Judge later made order that the defendant should deposit a sum of Rs 10,000 as security before filing answer, as he considered that the defence set out in the defendant's affidavit was not made *bona fide*.

Held: That in a proceeding under Chapter 53 of the Civil Procedure Code the prescribed rules should be strictly observed and any order made without observing them cannot be treated as a valid order under that Chapter. Section 704 (2) must be read with Section 706 and the decision a Court has to make under Section 704 (2) would thus have to be made according to the prescribed procedure, on the affidavits alone.

Sections 325 *and* 328—*Declaration of right to incumbency obtained in favour of D—Writ of possession issued under decree so obtained—Right to recover possession not embodied in Section—P, a third party, ejected under said writ of possession—Proceedings under Section* 328 *of the Civil Procedure Code—Effect of such ejectment.*

D, a Buddhist monk, obtained a decree in his favour for a declaration against three other monks that he was entitled to the office of Viharadhipathy, incumbent and trustee of two temples and to the management and control of their temporalities Upon an application to execute this decree a writ of possession was issued and P, another Buddhist monk, who was in occupation of a room in the temple, was ejected. Upon a petition and affidavit P aplied for proceedings under Section 328 of the Civil Procedure Code praying that he be restored to possession. The Court duly directed the application to be numbered as a plaint and D filed answer denying that P was entitled to the relief claimed. After trial the learned District Judge held *inter alia* that P was not entitled to be restored to possession. P. appealed.

Held: (1) That the decree entered in favour of D was not a decree under Section 217 (*c*) of the Civil Procedure Code and therefore when the Court issued writ of possession, it acted without jurisdiction.

(2) That the writ of possession issued was a nullity.

(3) That where a Court makes an order without jurisdiction it has inherent power to set it aside and the person affected by the order is entitled *ex debito justitiae* to have it set aside.

(4) That it is not necessary to appeal from an order which is a nullity.

(5) That failure to take the objection at an earlier stage that the Court had no jurisdiction did not prevent it from being taken in appeal.

Per SANSONI, J —The question now arises as to what order we should make on this appaeal. The plaintiff asked the Court to restore him to possession of the room, becasue he had been dispossessed of it in execution of the decree. Section 328, no doubt, contemplates dispossession under decrees for possession of immovable property, but this is not a matter which we can allow to stand in the way of the plaintiff, for we must have regard to the substance rather than the form Justice requires that he should be restored to the position he occupied before the invalid order was made, for it is a rule that the Court will not permit a suitor to suffer by reason of its wrongful act. The Court will, so far as possible, put him in the position which he would have occupied if the wrong order had not been made. It is a power which is inherent in the Court itself, and rests on the principle that a Court of Justice is under a duty to repair the injury done to a party by its act: see *Rodger vs Comptoir D'Escompte de Paris* (1871) L R 3 P C 465 The duty of the Court under these circumstances can be carried out under its inherent powers.

Co-owners

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Court of Criminal Appeal Decisions

Murder, charge of—Suspension of Capital Punishment Act, No 20 of 1958—Offence committed while the Act was in operation—Regulation suspending operation of Act—Trial and conviction while Regulation in force—Effect on sentence.

A and B had each committed the offence of murder at a time when the Suspension of Capital Punishment Act, No 20 of 1958, was in operation. They were tried, convicted and sentenced to death at a time when a certain Regulation (made by the Governor-General under the Public Security Ordinance), which suspended the operation of this Act was in force. It was contended by Counsel for A that the effect of the Regulation was to render inoperative both the Suspension of Capital Punishment Act and Section 296 of the Penal Code and that while the Regulation was in force there was no law which made murder punishable. The main argument of Counsel for B was that the Regulation had no retroactive operation.

Held: (1) That the effect of the Regulation suspending of Capital Punishment Act is undoubtedly to restore the punishment of death for the offence of murder committed *after* the coming into operation of the Regulation and while it is in operation.

(2) That the Regulation referrred to is prospective in effect and cannot be construed as being retroactive. It will thus not apply to the case of those who committed the offence of murder before it came into operation and are tried after it came into operation.

(*a*) Difference between the "repeal" and "suspension" of an enactment, (*b*) the presumption against retrospective or retroactive legislation and the scope of the maxim "Nova constitutio futuris formam imponere debet non praeteritis" and, (*c*) the expressions "retrospective" and "retroactive" explained and discussed

Courts Ordinance

Section 86—Is it open to a Court to issue injunction in Partition actions in respect of movable property.

Section 71—Failure to raise objection in pleadings—Can it be raised in appeal. 84

Criminal Procedure Code

Section 429—Power of Court to call fresh evidence.

On a charge of retention of stolen property, after the defence had closed its case, the Court, *ex proprio motu*, called a witness who was on the list of witnesses for the prosecution but who had not been called by the prosecution, and convicted the accused on the ground that this witness' evidence contradicted the explanation given by the accused for his possession of the stolen articles.

Held: That as the prosecution was at all times aware of the evidence the witness was in a position to give, but refrained from calling him, the introduction of this witness' evidence into the case was irregular, and unauthorised by S 429 of the Criminal Procedure Code.

Section 187 (1)—Failure to comply with the 2nd part of the Section—Magistrate recording evidence as required under section 151 (2) of Criminal Procedure Code in respect of only one charge in the report under section 148 (1) (b) of the same Code—Accused charged on other counts in the report without recording evidence in relation to them—Conviction after trial—Is it fatal to a conviction—Is it curable under section 425 of the Criminal Procedure Code.

A report was made to court by a Sub-Inspector of Police under section 148 (1) (*b*) of the Criminal Procedure Code setting out four charges under the Motor Traffic Act against the accused. The accused appeared in Court otherwise than on a summons or warrant and the Magistrate purporting to act under section 187 (1) of the Criminal Procedure Code recorded the evidence of the Sub-Inspector who stated that he found the accused driving a vehicle smelling of liquor. This evidence related to the 1st charge only.

Without any further evidence the Magistrate proceeded also to frame charges as in the other counts on the said report and recorded the accused's plea which was one of not guilty. There was, therefore, no evidence on which the Magistrate could have arrived at a decision as to whether there was sufficient ground for proceeding against the accused on those charges as required by section 187 (1) aforesaid.

The Magistrate after trial convicted and sentenced the accused on all the four counts and the accused appealed.

Held: (1) That the failure of the Magistrate to comply with the 2nd part of the imperative provisions of section 187 (1) of the Criminal Procedure Code before framing the 2nd, 3rd and 4th charges vitiated the convictions thereon.

(2) That this failure is not one curable under section 425 of the Criminal Procedure Code.

Customs Ordinance

Customs Ordiance charge under Section 158 (1)—Theft of motor car battery—Confession made to Customs officer—Does it come within section 25 of the Evidence Ordinance.

Held: That a confession made to a Customs Officer does not come within Section 25 of the Evidence Ordinance.

Evidence Ordinance

Section 114—presumption of ouster.

Evidence, direct and hearsay—Evidence Ordinance, Section 60, 32 (5)—Effect of admission of hearsay into record without objection.

Last Will—Of no value unless probate granted—Evidence Ordinance, Section 32(6).

Held that: (1) A person is not qualified to give oral evidence of matters not within his personal knowledge unless Section 32, for example, applies. Such evidence would not satisfy the requirements of Section 60 of the Evidence Ordinance.

(2) Such evidence does not become legal evidence by the mere fact that it passed into the record of the proceedings unnoticed by the Judge or without objection being taken by the opposite side.

(3) An instrument purporting to be the Last Will of a person cannot be acted on as his Last Will unless it has been proved in the District Court in the manner prescribed by the Civil Procedure Code. Nor is such an instrument such a Will as is contemplated in Section 32 (6) of the Evidence Ordinance.

Statements by prosecution witnesses at previous trial—Use by defence Counsel in cross-examination at re-trial—Evidence Ordinance, Section 145 (1).

Held that: Where an accused is being re-tried after a previous abortive trial, defence counsel has the right in cross-examining the prosecution witness, to utilise statements made by them at the previous trial. Section 145 (1) of the Evidence Ordinance confers this right.

Sections 101, 107, 108—*Rules regarding burden of proof—Registration of Old Deeds and Instruments Ordinance, Section* 2 (1) *b—Registration of a Last Will—Averment that a Last Will admitted to probate—How averment to be proved—Evidence Ordinance, Sections* 91, 64, 65.

1. Averring that one J. had not been heard of for seven years, the plaintiffs invited the Court to presume he was dead. They did not themselves affirm that he was dead. The defendant, on the other hand, did not affirm that J. was alive but put the plaintiffs to the proof of his death. The trial Judge held that there was no proof that J. was alive and that he should be presumed dead.

Held: That the burden was on the plaintiffs through out to prove the fact of J.'s death and it never shifted to the defendant. For Sections 107 and 108 to come into operation and the burden of proof to get shifted from one to the other there must be one person who affirms that a person is dead and another who affirms that that person is alive.

Per BASNAYAKE, C.J.—"These two sections do not enact a presumption of law or of fact but enact rules governing the burden of proof like any one of the other rules that precede them. Section 107 enacts the rule and Section 108 enacts the proviso to it."

2. The trial Judge held that there was no proof that an alleged Last Will and its Probate were registered but that registration of a certain deed which referred to the Will was sufficient.

Held: That to satisfy Section 2 (1) (*b*) of Ordinance, No. 35 of 1947, although it was unnecessary that the subsequently registered instrument should contain a reproduction of the terms of the old unregistered instrument, mere mention of it is insufficient. The reference in the registered instrument must be such as to give its reader sufficient information regarding the unregistered instrument to enable him to trace it and refer to it in order to ascertain its purport.

3. The plaintiffs had also averred that a certain Last Will had been admitted to Probate.

Held: That since they had not produced the Probate iself as Section 91 of the Evidence Ordinance would require nor brought themselves within Section 65 and produced secondary evidence, the evidence they had, in fact, produced was insufficient. There was thus no proof that the Will in question had been admitted to Probate. It could not therefore be acted on as the Last Will of the deceased.

Exceptio Rei Venditae et Traditae

Exceptio rei venditae et traditae—J, owner of a land in financial difficulties—J represents to L by document that his several debts amounted to Rs. 16,000/—*Land sold to L for Rs.* 16,000/- *subject to right of retransfer within five years—Death of L and his title passing to daughter—Daughter in possession as new owner and acknowledged by J and his wife, the appellant—Same Land sold in execution of decree, notice of service registered and served at the time of sale to L—This decree not disclosed in document indicating total liabilities amounting to Rs.* 16,000/—*Sale by fiscal in execution of this decree—Purchase by third party who conveys to J's nominee, his wife—Action for declaration of title and eviction by J's nominee against L's daughter—Civil Procedure Code, Section* 238—*Meaning of the words "all persons".*

J, who owned a property worth about Rs. 30,000/- was in financial difficulties. This property was under seizure in several cases. L, an uncle of J, reluctantly agreed to assist J. to settle his debts to prevent the said property from being sold in execution on J indicating by a document that his several debts totalled Rs. 16,000/-. In 1950, J conveyed the said property to L for Rs. 16,000/-, subject to the vendor's right to repurchase it for the same amount within five years. The deed contalned the usual warranties and the assurance that the vendour would execute or cause to be exceuted all such further acts. . .deeds. . . .for the further and more perfectly assuring the said premises. . . . .as may be reasonably required. The Rs. 16,000/- was paid to the creditors disclosed in the said document, and L was placed in possession.

Later L died and the property passed to his daughter, the 2nd respondent, whom J and his wife—the appellant—acknowledged as the new owner.

When J. indicated to L. the extent of his liabilities in 1950, he had inadevertently omitted to mention another debt payable under decree in case No. 9041/S.D.C. Colombo. At the time of the conveyance to L, a notice of seizure under section 237 of the Civil Procedure Code in execution of the said decree had been served on J and registered. The Fiscal sold the said property in execution and was purchased for Rs. 250/-by T, a third party, who, a few days after obtaining the Fiscal's conveyance sold the premises for Rs. 3,000/- to J's nominee and wife, the appellant who instituted this action, against L's devisee and others occupying under her, for a declaration of title and eviction.

The District Judge held that the transfer to L was void under section 238 of the Civil Procedure Code and that J's nominee, the appellant got good title from T. In appeal the Supreme Court held that the benefit of appellant's title passed immediately to L's devisee (2nd respondent) under the Roman Dutch Law doctrine of the *exceptio rei venditae et traditae*—

On an appeal to the Privy Council, from the judgment of the Supreme Court.

Held: (1) That the view taken by the Supreme Court was correct.

(2) That, though the words "all persons" in section 238 of the Civil Procedure Code are *ex facie* wide enough to include the judgment-debtor himself, having regard to the purpose for which the section was enacted, namely to protect persons against the acts of the judgment-debtor, it must be said that in this context, by implication these words do not include the judgment-debtor.

(3) That to hold that J is rendered immune by section 238 from the consequences of his act, namely the conveyance to L would be to permit gross injustice.

(4) That if section 238 does not render void, as between themselves, the deed of conveyance from J to L there is no statutory provision which hinders the operation of the common law.

(5) That, therefore, the title passed by operation of law automatically from the appellant as J's nominee to L's devisee under the doctrine of the *exceptio rei venditae et traditae*.

Excise Ordinance

The statutory presumption raised by a certificate of the Government Analyst issued under Section 3 of the Excise (Amendment) Act 36 of 1957 to the effect that liquor is unlawfully manufactured, does not extend to a certificate or report to the same effect issued by a Deputy or Assistant Government Analyst.

Fidei Commissum

Subject to four generations—How the four generations may be computed—Prescription against Fidei-commissaries and minors.

In case of doubt and when prohibition is difficult to understand an instrument should be construed as creating not a perpetual fidei commissum but only one that extends to the fourth degree of succession.

Industrial Disputes

No. 43 of 1950 as amended by No. 62 of 1957—Tribunal constituted under Section 31A—Application for gratuity under Section 31B by workman—Meaning of the word "due" in the Section—Has the Tribunal jurisdiction to order payment of gratuity which is not legally due.

Held: That the word "due" in Section 31 B (1) (b) of the Industrial Disputes Act, No. 43 of 1950 as amended by Act No. 62 of 1957, means "legally due." Hence a Tribunal established under the Act acts in excess of jurisdiction when it orders the payment of a gratuity which is not due.

No. 43 of 1950 as amended by Act No. 62 of 1957—Section 47— Definition of Workman—Distinction between workman and independent contractor—Test to be applied.

Z, a delivery peon, was employed on 21.5.1956, by the Times of Ceylon., Ltd., on a written contract, the terms of which were to be effect—

(*a*) that he would be paid a commission of /-02 cents for every copy delivered;

(*b*) that failure to deliver a paper will result in his having to pay the value of the paper;

(*c*) that in case he was unable to call for his papers, the office must be notified or a substitute sent;

(*d*) that he would be held responsible for all delivery errors;

(*e*) that he should collect the papers at the times stipulated by the Circulation Manager;

(*f*) that his commission would be paid once a month;

(*g*) that failure to call for copies for distribution, without due notice, or non-delivery of copies taken would result in the termination of his contract.

Z was a temporary monthly-paid employee of the same firm from 1954 to 1956. Under this contract, the section of Colombo to be served by Z was a distance of about two miles and the number of subscribers involved were 84 for the Evening *Times* and 94 for the *Sunday Times*. The times stipulated for the collection of the papers were 2.30 p.m. on week days and 4 a.m. on Sundays.

Apart from the distribution of papers provided for in the said contract Z also undertook the distribution to subscribers of a magazine for which he was paid at the rate of 2 1/2 cents per copy delivered and also worked on Saturdays on the job of packing newspapers and loading the packages into the Company's vans for which he was paid at the rate of 44 cents an hour.

On 31.5.1959, Z failed to turn up to collect the copies of the *Sunday Times* for distribution and failed to notify his inability to attend or to send a substitute, contrary to his previous practice. Thereupon the Company terminated his contract.

Z applied through the Trade Union for relief to the Labour Tribunal established under the Industrial Disputes (Amendment) Act, No. 62 of 1957. The Tribunal held that he was a "workman" within the meaning of the definition of that term in Section 47 of the Industrial Disputes Act, No. 43 of 1950 as amended by Act No. 62 of 1957 and not an independent contractor as contended for by the Company and ordered his reinstatement in employment with payment of back-wages.

The Company appealed.

Held: (i) That in the circumstances the true relationship between Z and the Company was one approximating that between a hirer and an independent contractor. The essence of the work he had under-

taken to do was the distribution of the copies of the two newspapers and that could have been effected through agents or substitutes. The work connected with the distribution of the magazine, the packing of newspapers and the loading of vans aforesaid were not done in pursuance of the said contract, but on a purely voluntary basis.

(ii) That, therefore, Z was not a "workman" within the meaning of that term in Section 47 of the Industrial Disputes Act, No. 43 of 1950 as amended by Act No. 62 of 1957.

(iii) That the Appeal Court could interfere with the decision of the Tribunal, where it is satisfied that in reaching the decision appealed from, the Tribunal has misdirected itself in the application of the correct test or tests.

Per T. S. FERNANDO, J.—"The question of the distinction between a workman as defined in the Industrial Disputes Act, 1947 (of India) and an independent contractor came up recently for consideration by the Supreme Court of India in *D.C. Works, Ltd.* vs. *State of Saurashtra* (1957) A.I.R.S.Cat 264, a case which was well in the mind of the Tribunal whose decision is now canvassed before me. In that case, the Supreme Court of India after considering many decisions, principally of the English Courts, stated that "the principle which emerges from the authorities is that the *prima facie* test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or, to borrow the words of Lord Uthwatt in *Mersey Docks and Harbour Board* vs. *Coggins and Griffith (Liverpool), Ltd.*, (1947) 1 A.C. at 23, the proper test is whether or not the hirer had authority, to control the manner and execution of the act in question."

TIMES OF CEYLON, LTD., *vs.* NIDAHAS KARMIKA SAHA VELANDA SAVAKA VURTHIYA SAMITIYA .. 66

Intrepretation

Of Statutes—See **Statutes.**

Judgment

Judge hearing case vacates office before judgment pronounced—Judgment written, signed and dated while not holding judicial office—Pronounced in open Court by another judge holding office—Is such judgment valid—Long delay in writing judgement—Effect—Civil Procedure Code, Section 185.

The hearing of a case was concluded on 17-7-1956, and the judgment was reserved to be delivered on 1-8-1956, on which date it was not ready. In the meantime the District Judge who heard the case vacated office and judgment was not ready till June, 1957, when it could not be pronounced owing to proceedings arising out of an application by the defendants for further hearing and addresses. The judgment written on 17-6-1957, and signed and dated on that day by the Judge who heard the case was pronounced in open Court by one of the Additional District Judges on 13-1-1958, after the former had been duly appointed as District Judge on that day for the purpose of delivering the judgment.

Held: (1) That the judgment should be set aside as owing to the long delay between the conclusion of the hearing and the date on which the judgment was written, the learned Judge appeared not only to have lost the advantage he had of seeing and hearing the witnesses, but his recollections of the fine points in the evidence also seems to have become faint at the time he wrote the judgment.

(2) That the judgment is not in law a judgment of the Court, as at the time he recorded his decisions the Judge did not hold judicial office and was not qualiffed to express a valid judicial opinion.

Per BASNAYAKE, C.J.—"Section 185 of the Civil Procedure Code empowers a Judge to pronounce a judgment written by his predecessor, but not pronounced. It is evident from the words "but not pronounced" that the section contemplates the case of a judgment written by a Judge while holding judicial office and at a time when he is qualified to pronounce it, and not to a judgment written after he ceases to hold office. The view I have taken finds support in the case of *Thamotharampillai vs. Ponniah* 1 C.W.R. 68) and *Wijesekera vs. Dabarera et al* (3 C.L.R. 111)".

Per SINNETAMBY, J.—"These cases show that what matters is that the person who writes the judgment should be a judge of the Court when he hears the case as well, as on the day on which he signs and dates it for the purpose of delivery. I am aware that this practice has been in existence for quite a long time and that there are several judgments is existence to-day which have been signed and dated by Judges in similar circumstances. They have always been regarded as perfectly valid. To take any other view may have the effect now of rendering all these judgments invalid and ineffective. Even if this practice is in fact incorrect, I do not think it desirable that at this late date it should be reviewed or dissented from. In any event, whatever views we express upon this question, having regard to the matters we are called upon to decide in this case, would, it seems to me, be merely *obiter*."

SARAVANAMUTTU *vs.* SARAVANAMUTTU 4

See also HARVEY *vs.* CHELLIAH 75

Judicial Notice

House situated within Urban Council limits—judicial notice taken that owner of house liable to pay rates.

CHARLES COORAY AND ANOTHER *vs.* PETER SAMARASINGHE 11

Landlord and Tenant

Payment of rent by cheque—Has third party right to pay tenant's rent by cheque.

Held: That even where there is an implied agreement that a landlord is to accept cheques in payment of rent, this does not cast an obligation on the landlord to accpet a cheque drawn in his favour by a person other than the tenant, in payment of rent. Nor has a third person a right to force the landlord of another to accept a cheque drawn by him in payment of the other's rent. Such a payment would not amount to payment in terms of the contract of letting or hiring.

CASSIM *vs.* KALIAPPA PILLAI AND ANOTHER .. 64

Landlord and tenant—Rent deposited "in advance"—Will it automaticaally liquidate arrears—Payment of rent by cheque.

The 1st defendant had deposited three months' rent "in advance" with the plaintiff at the commencement of his tenancy. He later fell into arrears for more than a month after the rent became payable.

Held: That in the absence of an express agreement to the contrary it could properly be inferred from the course of conduct between the parties during the tenancy that it was an implied term of contract that the rent deposited "in advance" was to be retained as a deposit by the landlord while the tenancy subsisted and that it did not relieve the tenant of his obligation to pay the rent of each month on the due date.

Held also: That a tenant is not entitled, unless by prior agreement express or implied, to tender cheques in settlement of the rent payable by him.

Maintenance

Illegitimate children of Muslim parents—Mother (applicant) not married to defendant—Application made to Magisgrates' Court under Maintenance Ordinance—Does Muslim Marriage and Divorce Act, No. 13 of 1951 give exclusive jurisdiction to Quazi.

Held: That an application for maintenance in respect of illegitimate children made by their mother, who, has at no time been married to their alleged father, do not come within the special provisions of the Muslim Marriage and Divorce Act. No. 13 of 1951 They have to be prosecuted under the general statute—the Maintenance Ordinance.

Section 14—Failure on the part of the Magistrate to examine applicant on oath or affirmation prior to issue if summons—Application for maintenance dismissed after trial—Are proceedings a nullity—Effect of applicant's acquiesence in non-compliance.

Held: (1) That the failure to comply with Section 14 of the Maintenance Ordinance rendered the proceedings, including the order dismissing the application, a nullity.

(2) That the applicant's acquiesence or consent cannot cure the defect.

Manufacture of Matches Ordinance

Manufacture of Matches Ordinance, Chapter 131, Legislative Enactments—Licence to manufacture matches—Partnership—Bequest of Share in partnership asset by deceased partner—Use by surviving partner of such asset after dissolution—Right of devisee to profits arising by use of such share.

A licence to manufacture matches was issued by the Director of Industries in 1949 to one Mrs. Iddamalgoda and the defendant "trading under the firm, name and style of D. G. Iddamalgoda". Iddamalgoda died in 1950 having bequeathed by last will to the plaintiff her interest in the licence and her interest in the partnership business of making matches. The defendant continued to use the licence in the business representing to the Director that the business and the licence were carried on and held in partnership.

Held: That the licence was a partnership asset and that the plaintiff as devisee of the deceased's interest in the partnership was entitled to receive such share of the pofits since dissolution as could be attributable to the use of the licence.

Master and Servant

Prima facie test for determination of relationship between master and servant.

Merchandise Marks

Merchandise Marks Ordinance, (Cap. 122)—Section 2 (2)—Charge under—Sale and possession of aerated waters manufactured by the appellant in bottles embossed with the names of other aerated water manufacturing companies—Labels bearing appellant's name and address attached to bottles—Absence of intention to deceive public—Meaning of the words acted innocently" in Section 2 (2)

The appellant, carrying on the business of manufacturing aerated waters, mineral waters, etc., under the name of Dominion Aerated Water Co., having come into possession of certain bottles belonging to two other companies, ("Schwepps (Overseas) London' and "Ceylon Mineral Waters") with their names embossed on them, filled them with aerated waters variously described as "Orange Barley", "Sparkling Orange Barley" and "Fruit Flavour Cocktail", and attached labels bearing the appellant's name and address.

The appellant's servants sold some of these bottles of aerated waters to a police constable, who reported the matter to the Police. The Police found 119 bottles embossed with the name of the Schwepps (Overseas) London and 56 bottles embossed with the name of the "Ceylon Mineral Waters", all filled with aerated waters manufactured by the appellant's Co., and bearing the aforesaid lables.

The Police charged the appellant under Section 2 (2) of the Merchandise Marks Ordinance on two counts for keeping in his possession for sale or any purpose of trade the said bottles of aerated waters, to which a false trade description had been applied. The learned Magistrate, following the decision in *Stone vs. Burn*, L.R. 1910 1 K.B. at 927, convicted the appellant, although his findings appeared to show that the appellant was not deceiving the public. He was also satisfied that the appellant was in the habit of purchasing empty bottles bearing the marks of the said two companies which were readily available from itinerant vendors.

On an appeal to the Supreme Court.

Held: (1) That the conviction should be upheld.

(2) That the words "acted innocently" in section 2 (2) of the Merchandise Marks Ordinance (Cap. 122) point to an absence of an intention to infringe the Ordinance. Such an intention can only exist where such infraction was committed by inadvertense or by mistake of fact. Here the appellant was aware of what he was doing and claimed to have a right to do it as the bottles were readily available in the market.

Muslim Law

Muslim Marriage and Divorce Act, No. 13 of 1951— Application for maintenance in respect of illegitimate children made by their mother who was not married to alleged father—Does Act apply.

JIFFRY *vs.* NONA BINTHAN 49

Ouster

Meaning of—Presumption of ouster.

ABDUL MAJEED *vs.* UMMA ZAREENA AND OTHERS .. 17

Partition

Partition Action—Omission in Interlocutory decree— Not a matter arising in appeal—May the interlocutory decree be amended in appeal to include the matter omitted in the exercise of the powers of Revision.

The Supreme Court, acting in revision amended the interlocutory decree in a partition action, although the matter requiring amendment did not arise in the appeal.

ARNOLIS *vs.* MARSHALL 14

Partition action—Application for execution after final decree—Does section 337 of the Civil Procedure Code apply.

Held: That section 337 of the Civil Procedure Code does not apply to an application for a writ under a final decree for partition directing the Fiscal to place the applicant in possession of the lots allotted to him in the final decree and to eject any person in unlawful possession thereof.

Per BASNAYAKE, C.J.—"In the context of section 337 the words 'other property' mean other property *ejusdem generis* of money, and therefore, mean other movable property and does not include immovable property. Section 337 therefore does not apply to a decree commanding any person to yield up possession of immovable property."

CHARLES SINGHO *vs.* JINADASA APPUHUAMY .. 83

Partition Act No. 16 of 1951, action under—Is it open to a court to issue an injunction in such action in respect of movable property—Courts Ordinance, Section 86.

Jurisdiction—Failure to raise objection in pleadings— Objection raised in petition of appeal for the first time.

Held: (1) That there is nothng in the Partition Act which precludes a court from issuing an injunction under section 86 of the Courts Ordinace in proceedings under that Act in respect of movable property.

(2) That where a party failed to raise objection to the jurisdiction of the court in his pleadings, he is precluded by Section 71 of the Courts Ordinance from raising it later.

DEERASOORIYA *vs.* VANDERPOORTEN 84

Partnership

It is clear law that where a surviving partner carries on the business of the firm, with its capital or assets after the death of his partner, the legal representatives of the deceased are entitled to such share of the profits since dissolution as the Court may find to be atributable to the use of his share of the partnership assets.

PERERA *vs.* ABEYWARDENE 37

Penal Code

Section, 392 A (as amended by Government Gazette Extraordinary, No. 9,773 of 24th September, 1947)— Public Servant charged under this Section for failure duly to pay over or to account for moneys in his charge according to books kept by him—Requirement under the Section addressed by an official appointed by the Auditor-General—Validity of such requirement— Should a conviction under Section 392 be substituted in appeal for one under Section 392 A.

Held: (1) That where a requirement under Section 392 A of the Penal Code (as amended by Government Gazette No. 9.773 of 24th September, 1947) is addressed by an official appointed by the Auditor-General to a public servant to pay over or produce any money or balance of any money shown in the books or accounts kept by him and in his charge as a public servant, no charge under Section 392 A lies against such public servant on his failure to comply with the said requirement. The provisions of Section 392A are imperative.

(2) That such a requirement must be addressed by one of the officials mentioned in the Section, viz., the Secretary to the Treasury, the Deputy Secretary to the Treasury, the Auditor-General, the Assistant Auditor-General or any officer specially appointed by the Secretary to the Treasury.

(3) That a conviction under section 392 of the Penal Code should not be susbtituted in appeal for one under section 392A of the same code.

ARIYARATNE *vs.* S. I. POLICE, SPECIAL BRANCH, KANDY 89

Prescription

Co-owners—Prescription among—Property gifted subject to fideicommission for four generations—How the four generations may be computed—Prescription against fideicommissaries and minors—Admission that party claiming prescriptive title has been collecting rent and in possession for over thirty-five years—Is this sufficient to establish prescriptive title withou other evidence—Ouster, meaning of—Presumption of ouster When may such presumption arise—Burden of Proof— Prescription Ordinance, Sections 3 and 13—Evidence Ordinance Section 114.

One AL. in 1872, gifted a land to his wife M, subject to a *fideicommissum* in favour M's descendants up to tthe 4th generation. M died leaving three children, *viz.*, R, a son and two daughters C. and U. The plaintiff and the defendants excepting the 13th were the descendants of C and U. 13th defendant was the son of R. In 1953 plaintiff instituted this action to partition the land. The 13th defendant pleaded *inter alia* that he had acquired a prescriptive title to the land.

At the trial, the plaintiff's counsel admitted that "the 13th defendant's father had been in possession from prior to 1916." The 2nd defendant, (born in 1923) called by the plaintiff admitted in cross-examination that "from the time he became aware of things, the 13th defendant had been collecting rent from the property." At the close of the plaintiff's case a further admission was recorded as follows: "Plaintiff

admits that from 1916, the 13th defendant collected rents." The 13th defendant gave no evidence, and relied on the aforesaid admissions in support of his claim to prescriptive title.

The learned District Judge in effect held that the 13th defendant had continuous and exclusive possession of the premises, since 1916, but rejected his claim on the ground that he failed to prove that the *proviso* to section 3 and section 13 of the Prescription Ordinance did not apply to his claim. The 13th defendant appealed.

Held: (1) That in counting the number of generations for the purpose of a *fidei commissum* which endures for four generations the immediate donee is not taken into account.

(2) By De Silva, J. and H. N. G. Fernando, J. (Basnayake, C.J. dissentiente) that the 13th defendant being a co-heir, the proof adduced in the case is insufficient to establish prescriptive title inasmuch as (*a*) the admissions made amount to no more than a concession that the 13th defendant was in undisturbed and exclusive possession since 1916.

(*b*) there is no evidence of adverse or independent title as required by section 3 of the Prescription Ordinance.

(*c*) there are no proved circumstances from which a presumption of ouster could rise. In fact there is no necessity to resort to a presumption of ouster, as the 13th defendant, who claimed to have originated the adverse possession was alive at the time of the trial, but failed to give evidence.

(3) That the presumption of ouster should be applied if and only if, the long continued possession by a co-owner and his predecessors in interest cannot be explained by any reasonable explanation other than that at some point of time in the distant past, the possession became adverse to the rights of the co-owners.

ABDUL MAJEED *vs.* UMMA ZAREENA & OTHERS .. 17

Section 3—*Decree for ejectment from a land—Effect of judgment-debtor remaining therein for prescriptive period.*

Held: That it is possible for a judgment-debtor against whom a decree for ejectment from a land has been passed, to acquire a right to a decree under Section 3 of the Prescription Ordinance by continuing to remain therein for a period of over 10 years after the date of decree without doing any act by which he directly or indirectly acknowledges a right in the judgment-creditor or in any other person.

SAMUEL *vs.* DHARMASIRI AND ANOTHER 76

Privy Council

Printing of record under Appellate Procedure (Privy Council) Order.

ATTORNEY GENERAL *vs.* M. WILFRED SILVA.. 8

Appeals Privy Council Ordinance, Schedule, Rule 1 (a)—*Meaning of words "Final Judgment of the Court".*

Held: That where an application has been made under section 769 (2) of the Civil Procedure Code, for the reinstatement of an appeal which has been dismissed for non-appearance, the judgment dismissing the application for reinstatement is not the "final judgment of the Court" referred to in rule 1 (*a*) of the Schedule to the Appeals (Privy Council) Ordinance. The "final judgment of the Court" contemplated in rule 1 is the judgment by which the action between the parties was decided in appeal.

SAMICHCHI APPU *vs.* BARONCHIHAMY & OTHERS.. 86

Privy Council, leave to appeal to—Objection that judgment in question not a 'final' judgment, within the meaning of rule 1 *of the schedule to the Appeals (Privy Council) Ordinance.*

The defendant filed an application to set aside a sale held in the execution of a mortgage decree. On the date of inquiry the defendant and his proctor were absent and the Court dismissed the application. On the following day, the defendant moved to vacate the order made and to refix the matter for inquiry on the ground that he was prevented by illness from attending Court. The District Court refused the application and the defendant unsuccessfully appealed to the Supreme Court.

On an application for leave to appeal to the Privy Council,

Held: That the judgment of the Supreme Court affirming the order of the District Court is not a final judgment within the meaning of Rules 1 in Schedule to the Appeals (Privy Council) Ordinance.

USOOF *vs.* HONGKONG & SHANGHAI BANKING CORPORATION 111

Privy Council Decisions

Buddhist Temporalities Ordinance Sections 2, 4 (1), 20 *and* 25.

BUDDHARAKKITA THERO *vs.* WIJEWARDENE AND OTHERS 1

Exceptio rei venditae et traditae.

PERERA *vs.* PERERA AND OTHERS 32

Registration of old Deeds and Instruments Ordinance

Section 2 (1)(*b*).

DAVOODBHOY *vs.* FARROOK AND OTHERS . .. 57

Res judicata

Does principle apply in case of tutor and pupil—Buddhist law.

PIYARATANA THERO AND OTHERS *vs.* PEMANANDA THERO 100

Revision

Supreme Court acting in revision amended interlocutory decree in partition action although the matter requiring amendment did not arise in the appeal.

ARNOLIS *vs.* MARSHALL 14

Roman Dutch Law

Doctrine of Exceptio rei venditae et traditae.

PERERA *vs.* PERERA AND OTHERS 32

Servitude

Servitude—Right to enter adjoining land to erect temporary scaffolding to re-erect wall—When it comes into existence—Damages.

Held: (1) That the Roman Dutch Law recognises servitude to enter upon a neighbour's land and erect a temporary scaffolding for the purpose of repairing or re-erecting a wall.

(2) That such a servitude comes into existence only on the making of an order granting it and damages can be claimed only from the date of such order.

Per T. S. FERNANDO, J.—"Plaintiff's house is situated within the Urban Council limits of Kotte and judicial notice can be taken of the fact that owners of house property are liable to pay rates."

CHARLES COORAY AND ANOTHER *vs.* PETER SAMARASINGHE 11

Servitude—Action, for declaration that there is no footpath over plaintiff's land—Loss of plaintiff's title pending action—Is plaintiff entitled to maintain it—Failure of plaintiff to produce deed alleged to be in his possession in support of his case—Effect of such failure.

Held: That where a plaintiff in an action for declaration that there is no servitude over a land belonging to him parts with his title pending such acton, he is not entitled to maintain it.

(2) That where the plaintiff stated that he had in his possession a deed to support his title but failed to produce it, his opponent is entitled to ask the court to presume that the said deed, if produced would not have supported his case.

PEIRIS APPU *vs.* THE VILLAGE COMMITTEE OF MOLODDUWA 81

Stamps

Stamps Ordinance—Appeal from a decision in testamentary proceedings—Failure to give stamps for the decree of the Supreme Court—Should the appeal be rejected.

Held: That the failure to supply stamps for the decree of the Supreme Court on an appeal from a decision in a testamentary proceeding is fatal to the reception of the appeal.

PODIHAMINE *vs.* PERERA AND OTHERS 15

Appeal—Stamps for Supreme Court decree—Value of relief sought in appeal less than value of action—Amount of duty payable—Stamp Ordinance, Schedule A, Part II.

In an appeal from a decision of the District Court in a civil proceeding, the stamp duty for the Supreme Court decree is payable on the value of the subject matter of the action and not on the value of the relief sought in appeal. The fact that the value of the relief sought in appeal is less than the value of the action makes no difference.

FERANNDO *vs.* COREA 78

Statutes

Difference between 'repeal' and 'suspension'—The presumption against retrospective or retroactive legislation.

THE QUEEN *vs.* CAROLIS 90

Suspension of Capital Punishment Act 20 of 1958

Offence committed while Act in operation—Regulation suspending operation of Act—Trial and conviction while regulation in force—Effect on sentence.

THE QUEEN *vs.* CAROLIS 90

Tesawalamai

Tesawalamai—Donation of tediatetam property by husband including wife's share—Has a husband the right to do so—Effect of sale by the donee to a bona fide purchaser for value—Right of wife to pre-empt share to which such donee had acquired title.

Held: (1) That a husband cannot, under the Tesawalamai, validly dispose of his wife's half-share of the tediatetam, if the acquisition took place before the date of operation of the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947.

(2) That where a husband purports to donate the whole of a property which forms part of the tediatetam, the donee acquires legal title only to the husband's half-share and the wife continues to remain vested with her half-share, the effect of the conveyance being to constitute between the donee and the wife the relationship of co-owners. Not only may she vindicate her share, but she has also the right of pre-emption as regards the share held by the donee and a sale by the donee to a *bona fide* purchaser for value without notice of the wife's rights cannot affect these rights.

(3) That a wife may sue alone to assert these rights, joining her husband as a defendant, should he refuse to join as plaintiff.

ANNAPILLAI *vs.* ESWARALINGAM AND OTHERS .. 41

Trade Marks

See Under MERCHANDISE MARKS

Urban Council

Judicial notice taken that owners of property within Council limits liable to pay rates.

CHARLES COORAY AND ANOTHER *vs.* PETER SAMARASINGHE 11

Wills

Last Will—Of no value unless probate granted.

MUHAMED FAUZ AND ANOTHER *vs.* SALHA UMMA AND ANOTHER 46

Registration of Last Will—Averment that Will admitted to probate—How averment to be proved.

DAVOODBHOY *vs.* FAROOK AND OTHERS 57

Words and Phrases

"Buddhist temple" is not a juristic person.

BUDDHARAKKITA THERO *vs.* WIJEWARDENA AND OTHERS 1

"disability" in P 13 *Prescription Ordinance.*

DAVOODBHOY *vs.* FARROOK AND OTHERS 5

Workmen's Compensation

Workmen's Compensation Ordinance—Burden of proof on the claimant—Can the Commissioner make order giving benefit of his doubt to the applicant.

That in a claim under the Workmen's Compensation Ordinance, the applicant must establish that the workman died in an accident arising out of and in the course of his employment.

It is wrong for a Commissioner to make an order against the employer giving the benefit of doubt to the applicant.

Workmen's Compensation Odinance, Section 3—*Tamil estate labourer engaged in normal work in estate—Estate situated in area in which there was tension at the time due to racial enmity—Disturbances involving physical violence and damage to property—Gang of Sinhalese labourers coming to the spot and assaulting the Tamil labourer resulting in his death—Can such death be regarded as arising out of his employment within the meaning of Section* 3 *of the Ordinance.*

P, a Tamil labourer on a rubber estate was directed by its conductor on a certain day to do the work of "forking" the earth close to one of the roads running by the estate. No other labourer was working close to him at the time. While so engaged in his ordinary work he was seen by some Sinhalese villagers who were out on that day to assault Tamils owing to the prevalence of tension at that time due to unprecedented racial enmity between the Tamils and the Sinhalese, with resultng disturbances in many areas. The villagers got hold of P and subjected him to a beating which proved fatal. It was not suggested that P or the conductor was aware of any risk of attack on the Tamils working on the estate on that day.

P's widow applied for relief under the Workmen's Compensation Ordinance (Cap. 117) and the Commissioner in terms of Section 39 of the Ordinance submitted for the opinion of the Supreme Court the question whether the accident which resulted in the death of P in the circumstances can be regarded as arising out of his employment within the meaning of Section 3 of the Ordinance.

Held: That in the circumstances, the answer to the question submitted must be in the negative, as the said injuries to P caused by the said villagers did not result in some reasonable sense from a risk incidental to his employment.

Privy Council Appeal No. 10 of 1959

Present : VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD DENNING

REV. MAPITIGAMA BUDDHARAKKITA THERO *vs.* DON EDMUND WIJEWARDENA AND OTHERS

From

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

DELIVERED THE 26TH APRIL, 1960

Buddhist Temporalities Ordinance, (Cap. 222), Sections 2, 4 (i), 20 and 25—Land gifted to Vihare by last will—Management of land for the benefit of Vihare entrusted to executors as Trustees—Executors conveying land by deed to Viharadhipathy subject to condition in will as regards its management—Claim after fourteen years by Viharadipathy to possession of land and the right to have account of income from trustees—Is he entitled to such claim—Did the land vest in the Viharadhipathy.

Is a Buddhist Temple a juristic person—Meaning of the words "property belonging to the temple" in section 20 of the Buddhist Temporalities Ordinance—Does it include property vested in private trustees for the benefit of the temple.

By Clause 5 of the last will of Mrs. H. W. who died in 1940, a gift was made to the Kelaniya Raja Maha Vihare in the following terms :—"I give two hundred and fifty acres out of all that paddy field called Kalawewa Farm situated in the North-Central Province, Ceylon, to the Raja Maha Vihare, Kelaniya. The selection of the 250 acres I leave to my executors and the management of the same for the benefit of the said Vihare, I entrust to my trustees hereinafter named ".

The Trustees named in the will were her three sons to whom by clause 7 of the said will, she gave considerable property for certain charitable purposes including restoration work at the said Kelaniya Vihare.

The Trustees assuming that it was their duty under the will, conveyed the 250 acres selected out of 1,000 acres to the then Viharadhipathy, Rev. D and successors in office subject to the express condition in the said will, that the "management of the said property for the said Vihare shall be in the Trustees ".

Rev. D. died in 1947 and was succeeded by Rev. B., the plaintiff, who was also the trustee of the Kelaniya Vihare duly appointed under the Ordinance. The Trustees continued to collect the income and apply it as they thought fit for the purposes of the vihare. No complaint was made by Rev. B. until 1954 when he claimed that he was entitled to an account of the income which the Trustees had received and to the possession of the land, to establish which claim this action was instituted.

The District Court held that he was entitled to an account of the income and payment of it, but that he was not entitled to the possession of the land. On an appeal to the Supreme Court, this order was set aside.

The plaintiff appealed to the Privy Council where it was contended on his behalf (1) that a Vihare is a juristic person and as such is entitled to accept and own property and accordingly clause 5 of the will operated as an outright gift to the Vihare.

(2) that even though a Vihare is not a juristic person, the 250 acres were vested in him by virtue of the Buddhist Temporalities Ordinance (Cap. 222).

(3) that even if the 250 acres did not come within the Buddhist Temporalities Ordinance, nevertheless the trust in the will must be given effect and that it was a valid charitable trust.

Held : (1) That a Buddhist Temple is not a juristic person. It has no legal personality.

(2) That the view of the Supreme Court that the words "property belonging to any temple" in Section 20 of the said Ordinance mean only property which has been dedicated to the temple, is correct.

(3) That the land in question did not vest in the plaintiff as the duly appointed Viharadhipathy of the said Vihare by virtue of Section 20 of the said Ordinance, as the land in question constituted, property vested in private trustees for the benefit of the temple.

(4) That the word " management " in Clause 5 of the Will cannot be confined to the cultivating and letting of the land and the collection of the income. It extends also to the management of the income.

(5) That the words " for the benefit of the said Vihare in clause 5 above connote that the Trustees are the persons to decide how the income should be applied for the purposes of the temple.

(6) That to hold that the income of the land should be paid to the plaintiff will amount to a refusal to give effect to the trust created by the will.

Pennycuick, Q.C. with *Bernstein* for the Appellant.

Walter Jayawardena for the Respondents.

LORD DENNING

This case arises out of the will of Mrs. Helena Wijewardena, a widow who died on 10th November, 1940. She took a great interest in a famous Buddhist temple at Kelaniya called the Raja Maha Vihare (Great Royal Temple) and by her will she gave 250 acres of land to it. Since her death the land has been managed by the trustees of her will. They have had possession of it and collected the rents and profits from it. They have used the income for the purposes of the temple, as for instance, in making improvements to it, paying the tom-tom beaters, and so forth. This went on for many years. But in 1954 the Viharadipathi (the High Priest or chief incumbent) of the temple claimed that he was entitled to have from the trustees an account of the income they had received and to have them pay to him the moneys in their hands, and furthermore that he was entitled to possession of the land itself.

On 6th July, 1955, the Judge of the District Court (Sirimanne, A.D.J.) held that the Viharadipathi was entitled to an account of the income and payment of it but that he was not entitled to possession of the land. The trustees of the will appealed to the Supreme Court of Ceylon (Basnayake, C.J. and Pulle, J.) who on 18th June, 1957, allowed the appeal and set aside the order of the District Court. The Viharadipathi now appeals to Her Majesty in Council. He accepts the decision that he is not entitled to possession of the land, but he claims that he is entitled to have the income paid over to him.

Their Lordships must point out that there is no suggestion that the trustees of the will have mismanaged the property or misappropriated the funds. They have applied the income for the purposes of the temple: and in so far as this has been done with his consent or concurrence, the Viharadipathi does not seek to disturb it. But he seeks to obtain payment of any sums which were not paid out with his concurrence: and he does seek to have the income paid over to him for the future. He claims that it is for him to apply it as he thinks fit for the purposes of the temple: and not for the trustees of the will to do it. The District Court decided in favour of the Viharadipathi on this point, but the Supreme Court decided it in favour of the trustees of the will.

This issue depends largely on the true interpretation of the will. Mrs. Helena Wijewardena died on 10th November, 1940. By her will she appointed her three sons to be her executors. The material gift was in clause 5:

> " I give two hundered and fifty acres out of all that paddy field called Kalawewa Farm situate in the North Central Province Ceylon to the Rajamal Vihare Kelaniya. The selection of the 250 acres I leave to my executors and the management of the same for the benefit of the said Vihare I entrust to my Trustees hereinafter named. "

She afterwards, in clause 7, gave considerable property to her same three sons as trustees for certain charitable purposes which she specified, including restoration work at the Kelaniya Temple, aiding her poor relations and supporting Buddhist charitable institutions.

The executors seem to have assumed that, under the provisions contained in clause 5, it was their duty to convey the land to the Viharadipathi. Accordingly they selected 250 acres out of the 1,000 acres of paddy fields: and on 27th November, 1942, they executed a deed by which they conveyed it to the then Viharadipathi, the Reverend Mapitigama Dharmmarkkitha High Priest and his successors in office " subject always to the conditions in the said will expressly contained, namely, that the management of the said property for the said Vihare shall be in the Trustees in the said will ".

A serious question has now arisen as to the meaning of the word " management " in the

will and in the deed : but their Lordships observe that for many years after the execution of that deed, the trustees managed the 250 acres in this sense, that they not only collected the income from the 250 acres, but they also applied it as they thought fit for the purposes of the Vihare. The then Viharadipathi, the Reverend Mapitigama Dharmmarkkita died on 19th July, 1947, and was succeeded by the Reverend Mapitigama Buddharakkita Thero, the plaintiff in this action. The trustees of the will continued to collect and apply the income as before. No complaint was made by the Viharadipathi until February 1954, when his solicitor claimed the money in the hands of the trustees as income of the 250 acres.

Have the trustees of the will been doing wrong all these years in applying the income themselves for the purposes of the Vihare ? That depends on the true interpretation of clause 5 of the will.

The Viharadipathi sought in his case before their Lordships to say that a Vihare (Buddhist Temple) is a juristic person and as such entitled to accept and own property : and that accordingly when the testatrix said : " I give hundred and fifty acres . . . to the Rajamal Vihare Kelaniya " this operated as an outright gift to the Temple. Their Lordships cannot accept this view. There is a long line of authority to show that a Buddhist Temple is not a juristic person. It is not like the deity of a Hindu Temple. It is not a corporation. It has no legal personality. The authorities to this effect are so numerous and so weighty that Mr. Pennycuick before their Lordships did not feel able to controvert them.

The Viharadipathi next sought to say that, even though a Vihare is not a juristic person, nevertheless the 250 acres were vested in him the Viharadipathi by virtue of the Buddhist Temporalities Ordinance (chapter 222 of the legislative enactments of Ceylon). The material provisions of this Ordinance are as follows :—

" 2. " temple " means vihare . . . or any place of Buddhist worship . . .

4. (1) The management of the property belonging to every temple . . . shall be vested in a person . . . duly appointed trustee under the provisions of this Ordinance.

20. All property movable, and immovable, belonging or in any wise appertaining to or appropriated to the use of any temple . . . shall vest in the trustee . . . for the time being of such temple.

25. All issues rents moneys profits and offerings received by any trustee for or on behalf of a temple shall with the sanction of the public trustee be appropriated by such trustee for the following purposes :

(here are set out several purposes directly connected with the temple, but also)

(*d*) the promotion of education.

(*e*) . . . the customary hospitality to bhikkhus and others . . . " .

The Viharadipathi is himself the trustee of the Raja Maja Vihare duly appointed under the provisions of the Ordinance.

At first sight sections 4 and 20 do seem wide enough to cover property which is given by will to a temple such as is contained in the first sentence of clause 5 of the will. Such property would seem to be " property belonging to " a temple. But their Lordships have come to the conclusion that this is not correct. If the definition of " temple " is written into clause 20, we find that it says that all property belonging to a Vihare or any place of Buddhist worship shall vest in the trustee. But a vihare is not a juristic person. A place of Buddhist worship is not a juristic person. It cannot have property belonging to it. Some interpretation must be sought beyond the literal words. To what then does section 20 apply ? The answer given by the Supreme Court of Ceylon was that it deals only with *sanghika* property which has been dedicated to the Sangha, that is, it deals only with property which has been dedicated to the priesthood as a whole, with all the ceremonies and forms necessary to effect a dedication, but with special attention to the priests of a particular temple. Viewing the object and intent of the Ordinance, their Lordships think this is correct. Vast temporalities were granted in olden days by the Sinhalese kings to the Sangha (priesthood) of the ancient temples. These priests had renounced all worldly possessions and were unable adequately to protect and manage their properties. The Buddhist Temporalities Ordinance was passed so that trustees could be appointed to manage such properties. It did not apply at all to property which was vested in private trustees for the benefit of the temple as a charitable trust.

Mr. Pennycuick seemed disposed to concede that, so far as dispositions *inter vivos* were concerned, the Ordinance only applied to property which had been dedicated to the sangha with all the ceremonies and formalities necessary to effect a dedication, see *Wickremesinghe* v. *Unnanse* 22 N.L.R. 236 : but he submitted that, so far as

dispositions by will were concerned, there was no need for any ceremonies or formalities. No gift by will could ever take effect, he said, if such ceremonies or formalities were needed : because of necessity the donor was not able to be present to comply with them. Their Lordships realise the force of this contention, but they do not feel able to give effect to it. It must be remembered that it is only in comparatively recent times that a person in Ceylon has been permitted to dispose of property by will : and the legislature may well be presumed to have intended that gifts by will should take effect only under the Ordinances regulating wills and trusts and not under the Buddhist Temporalities Ordinance.

Their Lordships think that this can be tested by taking this very case : Under clause 5 of the will, the testatrix clearly intended that the 250 acres should be managed by the trustees of the will : and that it should be applied for the purposes of this particular temple only. But if section 20 of the Ordinance applies so as to vest the 250 acres in the Viharadipathi, it would mean that the management of the property would be vested in him, see section 4 of the Ordinance : and the income could be applied, not only for the purposes of this particular temple, but also for the various purposes of section 25 of the Ordinance. Thus the provisions of clause 5 of the will would be overridden by the terms of the Ordinance. Their Lordships cannot agree to an interpretation of the Ordinance which would lead to this result.

Their Lordships are of opinion therefore that the 250 acres of land did not vest in the Viharadipathi by virtue of section 20 of the Buddhist Temporalities Ordinance.

There remains a further point which was taken on behalf of the Viharadipathi. Even if the 250 acres did not come within the Ordinance, nevertheless the trust in the will must be given effect. On its proper construction it was, said Mr. Pennycuick, a gift for the general purposes of the Temple. The Temple was not merely a building. It was a charitable institution. A gift to it must be construed as a gift for the purposes of the institution which can and should be carried out by paying the income to the governing body of the institution. It was a valid charitable trust. The income should therefore, he said, be paid over to the Viharadipathi as the trustee of the Temple.

Their Lordships feel the force of this argument but they do not think it should be given effect. The effect of the first sentence in clause 5 of the will is cut down by the second sentence : " The management of the same for the benefit of the said Vihare I entrust to my Trustees ". Their Lordships think that the word " management " in this sentence is not to be confined to management of the property strictly so called, that is, to the cultivation and letting of the land and the collection of the income. It extends also to the management of the income. The words " for the benefit of the said Vihare " connote that the trustees are to consider the ways in which the Vihare should benefit. In short that they should decide on the particular purposes to which the income should be applied. And their Lordships are the more disposed to accept this interpretation when they remember that for 12 years or more the parties have acted on that footing.

True it is that this means that there is no great distinction between the position of the trustees of the will under clause 5 and their position under clause 7, except that the purposes are different. But their Lordships feel it unnecessary to search for any further distinction. The intention of the testatrix may well have been to effect a distinction as to the purposes and nothing more.

In the result their Lordships are of opinion that the trustees of the will are the persons to decide how the income should be applied for the purposes of the Temple. They find themselves in agreement with the judgment of the Supreme Court of Ceylon. They will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs.

Appeal dismissed.

Present : Basnayake, C.J., and Sinnetamby, J.

SARAVANAMUTHU vs. SARAVANAMUTHU

S. C. No. 22—D. C. Colombo No. 3453/D

Argued on : 6th and 7th May, 1959.
Decided on : 10th June, 1959.

Judgment—Judge hearing case vacates office before judgment pronounced—Judgment written, signed and dated while not holding judicial office—Pronounced in open Court by another judge holding

office—Is such judgment valid—Long delay in writing judgment—Effect—Civil Procedure Code, Section 185.

The hearing of a case was concluded on 17-7-1956, and the judgment was reserved to be delivered on 1-8-1956, on which date it was not ready. In the meantime the District Judge who heard the case vacated office and judgment was not ready till June, 1957, when it could not be pronounced owing to proceedings arising out of an application by the defendant for further hearing and addresses. The judgment written on 17-6-1957, and signed and dated on that day by the Judge who heard the case was pronounced in open Court by one of the Additional District Judges on 13-1-1958, after the former had been duly appointed as District Judge on that day for the purpose of delivering the judgment.

Held : (1) That the judgment should be set aside as owing to the long delay between the conclusion of the hearing and the date on which the judgment was written, the learned Judge appeared not only to have lost the advantage he had of seeing and hearing the witnesses, but his recollections of the fine points in the evidence also seems to have become faint at the time he wrote the judgment.

(2) That the judgment is not in law a judgment of the Court, as at the time he recorded his judicial decisions the Judge did not hold judicial office and was not qualified to express a valid judicial opinion.

Per BASNAYAKE, C.J.—"Section 185 of the Civil Procedure Code empowers a Judge to pronounce a judgment written by his predecessor, but not pronounced. It is evident from the words "but not pronounced" that the section contemplates the case of a judgment written by a Judge while holding judicial office and at a time when he is qualified to pronounce it, and not to a judgment written after he ceases to hold office. The view I have taken finds support in the cases of *Thamotharampillai vs. Ponniah* (1 C.W.R. 68) and *Wijesekera vs. Dabarera et al* (3 C.L.R. 111)".

Per SINNETAMBY, J.—"These cases show that what matters is that the person who writes the judgment should be a Judge of the Court when he hears the case as well, as on the day on which he signs and dates it for the purpose of delivery. I am aware that this practice has been in existence for quite a long time and that there are several judgments in existence to-day which have been signed and dated by Judges in similar circumstances. They have always been regarded as perfectly valid. To take any other view may have the effect now of rendering all these judgments invalid and ineffective. Even if this practice is in fact incorrect, I do not think it desirable that at this late date it should be reviewed or dissented from. In any event, whatever views we express upon this question, having regard to the matters we are called upon to decide in this case, would, it seems to me, be merely *obiter*."

Cases referred to : *Kanetgey vs. Ookoovalle*, 2 Lorenz Reports 49.
Davidson vs. Silva, 2 S.C.R. 10.
Thamotharampillai vs. Ponniah, 1 C.W.R. 68.
Wijesekera vs. Dabarera et al, 3 C.L.R. 111.
Fernando vs. The Syndicate Boat Company Limited, 2 N.L.R. 206.

G. E. Chitty, Q.C., with *A. S. Vanigasooriyar* and *Stanley Perera*, for the defendant-appellant.

J. N. Fernandopulle, with *M. Shanmugalingam*, for the plaintiff-respondent from 7-5-59.

BASNAYAKE, C.J.

This is an appeal by the defendant to an application for a decree for a separation *a mensa et thoro*. The defendant-appellant (hereinafter referred to as the appellant) is the husband of the plaintiff-respondent (hereinafter referred to as the respondent).

Learned Counsel for the appellant has argued two preliminary questions of importance. The facts material for the decision of those two questions are as follows :—The hearing of the application was concluded on 27th July, 1956. On that day judgment was reserved to be delivered on 1st August, 1956. After judgment was reserved the District Judge who heard the case vacated his office. On 1st August, 1956, the judgment was not delivered as it was not ready. It would appear from the minutes in the journal that it was not ready till 17th June, 1957, on which day the following minute appears in the journal :—"Inform proctors that judgment will be delivered on 19-6-57," and notice was ordered on the respondent and her proctor. On 18th June, 1957, the proctor for the appellant moved by a motion in writing that the case be fixed for further hearing and further addresses. On 26th July, 1957, the matter of the motion was fixed for inquiry on 18th October, 1957. On that day Counsel for the respective parties were heard and on 18th December, 1957, order was made refusing the appellant's application. The Judge who heard the application also made order that the judgment dated and signed on 17th June, 1957, by the Judge who had ceased to hold office after 1st August, 1956, will be delivered at 10-45 a.m., on 13th January, 1958,

and the Secretary of the Court was directed to take steps to have the Judge appointed as a District Judge on that day for the purpose of delivering the judgment. The appointment was accordingly made by the following letter of appointment :—

" Copy to : D. J., Colombo.
Ref. his lr. No.— of 18-12-57.

No. JAA/11/48.
Office of the Judicial Service Commission,
P. O. Box 573.
Colombo, 20th December, 1957.

APPOINTMENT

Sir,

The Judicial Service Commission has been pleased to appoint you to be Additional District Judge, Colombo, on 13th January, 1958, to enable judgment to be delivered in D.C. Colombo Case No. 3453/D.

2. It is understood that you are willing to act without remuneration.

3. Your attention is specially invited to paragraphs 690-703 of the Financial Regulations, copies of which are available in all the Courts.

I am, Sir,
Your obedient Servant,

(Sgd.) D. E. WIJEYEWARDENE,

Secretary, Judicial Service Commission.

P. A. W. Kingsley Herat, Esqr.,
Advocate,
" Shiranthi ",
209, Quarry Road,
Dehiwala."

On 13th January, 1958, the judgment written on 17th June, 1957, and signed and dated on that day by Mr. Herat was pronounced in open Court by one of the additional District Judges.

The first point taken by learned Counsel is that the Judge who heard the case was *functus officio* on the date on which he wrote the judgment and that although it was pronounced by a Judge of the Court it has no validity as it was written by a person who had ceased to be a Judge and was no longer qualified to give a judicial decision.

The second point is that as nearly a year had elapsed between the conclusion of the hearing and the date on which the judgment was written, the Judge was bound to have lost the advantage of the impressions created by the witnesses whom he saw and heard, and that his recollection of the fine points in the case would have faded from his memory by the time he came to write the judgment, especially as he had by that time been nearly a year at the Bar and was engaged in a busy practice.

Learned Counsel for the appellant drew our attention to some features of the judgment which he submitted indicate that the Judge's recollection of the niceties of the evidence had faded. In the course of his judgment the learned Judge himself says that " the evidence in the case became so evenly balanced that I am not ashamed to confess that the decision of this case has given me considerable anxiety and difficulty."

Learned Counsel for the appellant emphasised the point that the learned Judge had described the evidence of two witnesses who gave important evidence for the appellant as colourless, a description which he submitted their evidence did not merit. He further submitted that the way in which the learned Judge had dealt with their evidence supports his contention that the evidence was not vivid in the Judge's mind at the time he wrote the judgment. As a further indication of the fact that the Judge's recollection of the evidence was faint learned Counsel drew our attention to his observations about the attitude of the defendant towards the female servants, which he submitted were unsupported by the evidence.

In regard to the first point I am of opinion that the judgment is not in law a judgment of the Court as at the time he recorded his judicial decisions the Judge did not hold judicial office and was not qualified to express a valid judicial decision. To perform the functions of a Judge a person must hold that office. (*Kanetgey vs. Ookoovalle*, 2 Lorenz Reports 49 ; *Davidson vs. Silva*, 2 S.C.R. 10).

Section 185 of the Civil Procedure Code empowers a Judge to pronounce a judgment written by his predecessor, but not pronounced. It is evident from the words " but not pronounced " that the section contemplates the case of a judgment written by a Judge while holding judicial office and at a time when he is qualified to pronounce it, and not to a judgment written after he ceases to hold such office. The view I have taken finds support in the cases of *Thamotharampillai vs. Ponniah* (1 C.W.R. 68) and *Wijesekera vs. Dabarera et al* (3 C.L.R. 111). In the former case De Sampayo, J., held that a

judgment written after a Judge had ceased to hold judicial office is not a judgment that can be validly pronounced under section 185 by his successor. De Sampayo, J. also indicates that there are other decisions of this Court to the same effect although he has not referred to them by name. In the latter case Schneider, J. after making the following observation—

> "Having regard to the provisions of Sections 184 to 187 of the Civil Procedure Code the law seems to be that the judgment must be written by the Judge who has heard the case. If he writes this judgment while still holding office his successor may pronounce it."

proceeded to state—

> "Mr. Seymour evidently wrote out his judgment after he ceased to be the District Judge of Chilaw and before he was appointed as Additional District Judge for the 14th of May 1920, when his order was pronounced by Mr. Coomaraswamy the then District Judge."

This statement cannot be reconciled with the earlier part of his judgment wherein he states—

> "His order in writing signed by him and dated the 28th of February 1920, was delivered by his successor on the 14th of May 1920. Mr. Seymour ceased to act as District Judge of Chilaw after the 28th of February, 1920. He was gazetted as Additional District Judge of Chilaw for the 14th of May to enable his order to be pronounced."

The other decision of this Court to which reference should be made is the case of *Fernando vs. The Syndicate Boat Company Limited* (2 N.L.R. 206). That decision proceeds on section 88 (then section 89) of the Courts Ordinance. It does not appear that the Judge wrote his judgment at a time when he had ceased to hold office. He ceased to hold office after hearing the evidence. He was again appointed to the office of District Judge and on that day he pronounced his judgment. The report does not show that the Judge performed any judicial function at a time when he was not qualified to do so.

In regard to the second point I am of opinion that the submission of Counsel that the long delay has prejudiced the appellant is not without justification. The learned Judge appears to have not only lost the advantage he had of seeing and hearing the witnesses, but his recollection of the fine points in the evidence also seems to have become faint at the time he wrote the judgment.

The judgment of the learned District Judge is therefore set aside and the case is sent back for hearing *de novo*. As the successful party is the husband I make no order for costs.

Sinnetamby, J.

I agree with the order which my Lord the Chief Justice proposes to make in this case.

In a case which turns more on the impressions created by the conduct and evidence of witnesses as in divorce proceedings, than on the construction of documents as in a commercial case, the importance of making a decision when the facts and the impressions on the mind of the judge are fresh and clear cannot be too strongly stressed. In this case the long delay has been demonstrated to have manifestly affected the Judge in arriving at his findings and I agree that on this ground alone the judgment cannot be allowed to stand. I also agree that a judgment written by a Judge who was "*functus officio*" on the day on which he signed and dated it is invalid.

For the decision of this case it is not necessary to go any further but I understand from my Lord the Chief Justice that he proposes to state his views on the validity of a judgment prepared by a Judge while he was "functus officio," but signed and dated by him on a day on which he was specially gazetted to deliver the judgment. With great respect I find myself unable to agree with the view which my Lord the Chief Justice holds upon this question; and lest it be thought that I agree with them, I desire to place my opinion on record.

In my view a judgment prepared by a Judge while he was "functus officio" would be valid if he signs and dates it on the day on which he is subsequently gazetted as a Judge of the Court to deliver it. By signing and dating his judgment on the day on which he is appointed, a Judge merely adopts and confirms qua Judge an opinion he had formed while he was not a Judge of that particular Court. In my opinion it makes no difference that he was holding judicial office in some other judicial division; so far as the Court having jurisdiction over the case is concerned, such a person is in no different position to that of any ordinary person.

The case of *Wijeseckere vs. Dabarera, et al* (1921), 3 C.L. Rec. 111, is relevant in this connection. It was sought to obtain a declaration that no order made in the circumstances detailed by Schneider, J., was invalid. The order was

held to be valid and in this connection Schneider, J., made the following observations :—

> " Having regard to the provisions of Sections 184-187 of the Civil Procedure Code the law seems to be that the judgment must be written by the Judge who heard the case. If he writes this judgment while still holding office his successor may pronounce it..... Mr. Seymour evidently wrote out his judgment after he ceased to be the District Judge of Chilaw and before he was appointed as Additional D.J. for the 15th of May, 1920, when his order was pronounced by Mr. Coomarasamy, the then District Judge. If Mr. Seymour himself had delivered his judgment on the 14th of May, 1920, and signed and dated it, no objection could have been taken as he was Additional D.J. on that day. That he should have written his judgment before-hand and brought it to the Court should make no difference whatever."

In *Fernando vs. The Syndicate Boat Co., Ltd.*, (1896), 2 N.L.R. 206, the facts show that Mr. Grenier heard a case when he was Acting District Judge, Colombo. When he ceases to be Acting District Judge he had not delivered his judgment. Subsequently he was appointed Additional District Judge for one day for the express purpose of delivering judgment. Bonsor, C.J., held that the judgment was valid.

These cases show that what matters is that the person who writes the judgment should be a Judge of the Court when he hears the case as well, as on the day on which he signs and dates it for the purpose of delivery. I am aware that this practice has been in existence for quite a long time and that there are several judgments in existence to-day which have been signed and dated by Judges in similar circumstances. They have always been regarded as perfectly valid. To take any other view may have the effect now of rendering all these judgments invalid and ineffective. Even if this practice is in fact incorrect, I do not think it desirable that at this late date it should be reviewed or dissented from. In any event, whatever views we express upon this question, having regard to the matters we are called upon to decide in this case, would, it seems to me be merely *obiter*.

Set aside.

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

THE ATTORNEY-GENERAL OF CEYLON *vs.* MAHAMADACHIGE WILFRED SILVA

S. C. Application No. 366

Application for an extension of time to print the record to the Privy Council in S. C. 785 *D. C. Colombo* 34746/M.

Argued on : 18th September, 1959.
Decided on : 21st December, 1959.

Appellate Procedure (Privy Council) Order 1921. *Paragraphs* 6, 11 *and* 18—*Application for extension of time allowed for printing record signed and filed by Proctor other than by Proctor whose appointment in writing filed earlier—No writing filed appointing new Proctor—Objection to application—Can the Court entertain such application—Civil Procedure Code, sections* 25 *and* 27.

This is an application by the Attorney-General—the appellant—for an extension of the time allowed by paragraph of the Appellate Procedure (Privy Council) Order, 1921, for the printing of the record of the case for the purposes of transmission to the Privy Council. The application had been signed and filed by Proctor L on behalf of the appellant.

In terms of paragraph 6 of the aforesaid Order a writing had been filed earlier in the Registry appointing Proctor S to act for the appellant in connection with the appeal.

Objection was taken by the respondent to the application that at the time of the filing of this application, no document had been filed in terms of paragraph 6 of the said order appointing Proctor L to act for the appellant in connection with the appeal.

Held : (1) That if an appellant desires to be represented by a Proctor, other than the one whose act of appointment has previously been filed in terms of paragraph 6, or the one who by implication is recognised by that paragraph as the party's proctor, for the purposes of the appeal, a document appointing a new proctor must be filed under that paragraph.

(2) That in the absence of such a " new " appointment neither the Registrar, nor the Court, nor the opposing party can regard any act or application of a " new " proctor as being done or made on behalf of the appellant.

(3) That a complete omission to file the act of appointment cannot be subsequently supplied.

Per H. N. G. FERNANDO, J.—" If we were now to decide that applications of the present kind can be entertained although made by Proctors in respect of whom the requisite acts of appointment have not been filed previously or contemporaneously, we would be providing a dangerous precedent for the excuse of lapses on the part of Proctors and parties in complying with the procedure set out in the various enactments concerning appeals to the Privy Council and applications connected therewith. "

Cases referred to and distinguished : *Aitken, Spence & Co. vs. Fernando* 4 N.L.R. 35.
Tillekeratne vs. Wijesinghe 11 N.L.R. 270.
Kadirgamadas et al vs. Suppiah et al 56 N.L.R. 172.
Silva vs. Cumaratunga 40 N.L.R. 139.

J. W. Subasinghe, Crown Counsel, for the defendant-petitioner.

E. R. S. R. Coomaraswamy, with *Neville Wijeratne* and *M. Amerasingham*, for the plaintiff-respondent.

H. N. G. FERNANDO, J.

This is an application under Paragraph 18 of the Appellate Procedure (Privy Council) Order, 1921, for an extension of the time allowed by Paragraph 11 of the same Order for the printing of the record of the case for the purposes of transmission to the Privy Council. On 28th April, 1959, this Court had granted an extension of time for printing until 28th July 1959, and, in anticipation of further time being required, the present application for further extension was filed in this Court on 18th July, 1959.

The party making the present application, who is also the appellant in the proposed appeal to the Privy Council, is the Attorney-General. In terms of Paragraph 6 of the Order mentioned above, there had been filed in the Registry of this Court an instrument dated 5th December 1958, by which the appellant appointed Proctor A. H. M. Sulaiman to act for the appellant in connection with the appeal.

The present application has been filed and signed, not by Mr. Sulaiman, but by Proctor S. C. O. de Livera, and the objection has been taken that at the time of the filing of the application no document had been filed in terms of Paragraph 6 appointing Mr. de Livera to act for the Attorney-General in connection with the appeal. Counsel has argued in addition, that, in conformity with section 27 of the Civil Procedure Code, leave of Court should first have been obtained for the revocation of the proxy previously held by Mr. Sulaiman and that a proxy in favour of Mr. de Livera should have been filed under Paragraph 6 either before, or contemporaneously with, the present application.

It seems clear that, if an appellant desires to be represented by a Proctor, other than the one whose act of appointment has previously been filed in terms of Paragraph 6 or the one who by implication is recognized by that Paragraph as the party's Proctor for the purposes of the appeal, a document appointing the new Proctor must be filed under that Paragraph. In the absence of such a " new " appointment, neither the Registrar nor the Court, nor the opposing party, can be expected to regard any act or application of a " new " Proctor as being verily done or made on behalf of the appellant. Indeed a proxy in his favour is a *sine qua non* to enable any Proctor to take any step on behalf of a litigant in a civil action. The only question for our decision is whether the failure to file the appointment of the new Proctor absolutely precludes this Court from entertaining an application filed by him, or whether on the other hand the defect can be cured by the appointment being filed *after* the application is made. In the present instance, the revocation of the proxy of Mr. Sulaiman, and an appointment in favour of Mr. de Livera, were filed with the Registrar on 14th August, 1959.

Crown Counsel has sought to rely on the decision in *Aitken, Spence & Co. vs. Fernando* 4 N.L.R. 35. In that case, there had been a reference to arbitration under section 676 of the Code signed by the Proctors for the plaintiffs on record ; the Proctors purported to act by virtue of a special authority referred to in that section. But the special authority had, in relation to some of the plaintiffs, been signed not by themselves but by the holders of their powers of attorney. In an appeal against the award, the objection was taken that these powers of attorney or copies thereof had not been filed in Court as required by section 25 (*b*) of the Code, and that the reference to arbitration was bad for that reason. During the course of the argument in appeal, the Court (Bonser, C.J. and Moncrieff, J.) intervened to express the opinion that the

powers of attorney may be filed at any stage of the case. The Court's reasons for this opinion were not stated in the judgment, and I am therefore not in a position to consider whether their reasons would be applicable in a case where there has been a failure to file, not a power of attorney to a recognized agent, but the appointment of a Proctor for a party.

A decision more directly in point is that of *Tillekeratne vs. Wijesinghe* 11 N.L.R. 270. In that case, the plaintiff's action has been dismissed in the lower Court on default of his appearance, and on appeal to this Court it was discovered that the proxy in favour of the plaintiff's Proctor, though duly filed in the lower Court, had not been signed by him. The Court in rejecting the contention that an unsigned proxy was void made the following observations :—

> "Section 27 enacts that "the appointment of a proctor to make any appearance or application or do any act as aforesaid shall be in writing signed by the client and shall be filed in Court." In my opinion that is only directory. If a plaintiff appearing throughout the action by a proctor, whom he has instructed to act for him, but whose proxy he had forgotten to sign, were to recover judgment, and if the omission to sign were then discovered and the proxy signed, the Court could not, in my opinion, hold that the whole of the proceedings on the part of the plaintiff up to and including the judgment were void because of the non-signature of the proxy ; or, if the plaintiff failed in the action and it was dismissed with costs, the Court could not hold that the decree under such circumstances was of no effect against the plaintiff. No doubt the enactment means, though it does not in terms say so, that the appointment is to be signed and filed before the proctor does anything in the action. But if the omission to sign is not because the proctor has not in fact any authority, and if the client afterwards ratifies what has been done in his name by signing the authority, in my opinion that satisfies the requirements of the enactment ".

It has to be noted that the construction placed on sections 25 and 27 of the Code in these two decisions were in the nature of *obiter dicta*, for in each instance the party taking the objection was in any event successful on other grounds. Moreover, in each of them, the default was not noticed or relied on in the lower Court, but only at the hearing of the appeal. The decisions are therefore not clear authority for the proposition that a defendant on being served with summons cannot successfully object to the exercise of the Court's jurisdiction on the ground that a proxy or power of attorney has not been duly signed or filed.

In *Kadirgamadas, et al vs. Suppiah, et al* 56 N.L.R. 172 there had been an action by the plaintiff against two defendants. The original plaintiff and the original first defendant both died after the institution of the action. An order had been made on 4th June 1951, substituting five persons in place of the deceased plaintiff, but this order was subsequently set aside on 4th April 1952, by another Judge who instead substituted one Suppiah. In place of the deceased first defendant, certain other defendants including the former second defendant had been substituted. It would appear however that although the original second defendant had signed a proxy in favour of Proctor Nalliah, the other defendants who were substituted in place of the deceased first defendant had not signed a proxy in favour of Mr. Nalliah or any other Proctor, at the proper time. On 25th April 1952, a petition of appeal was filed, on behalf of all the defendants, against the order for substitution made on 4th April 1952. At the hearing of the appeal a preliminary objection was taken on the ground that Mr. Nalliah had no authority to sign the petition of appeal on behalf of those defendants who had not by that time executed a proxy in his favour. In fact such a proxy had been filed only on 8th May 1952, *i.e.*, after the appealable time had expired.

Nevertheless Gunasekera, J., held that the irregularity in the appointment of Mr. Nalliah had been cured by the subsequent filing of the proxy in his favour. This opinion was to a great extent based on the view taken in *Tillekeratne vs. Wijesinghe* 11 N.L.R. 270 that the requirements of section 27 of the Code are merely directory. But the learned Judge was careful to point out that from 16th November 1951, until 21st March 1952, Mr. Nalliah had acted on behalf of all the defendants in connection with the application for substitution ultimately decided on 4th April 1952, the order upon which was the subject of the appeal. He also referred to the case of *Silva vs. Cumaratunga* 40 N.L.R. 139 where it had been held that if there is a Proctor on record, the petition of appeal must be signed by him because "this Court cannot recognize two proctors appearing for the same party in the same cause". It seems to me that the decision in *Kadirgamadas, et al vs. Suppiah, et al* 56 N.L.R. 172 does not assist the appellant in the present application for two reasons :—firstly the proxy filed in that case after the date of the petition of appeal was entertained partly at least because the Proctor had previously functioned without objection taken that he lacked a proxy, and secondly that decision recognized the principle that a Proctor on record cannot be replaced by a Proctor with-

out a proxy. To entertain the present application which was made by Mr. de Livera at a time when the "current" appointment under Paragraph 6 of the Appellate Procedure (Privy Council) Order, 1921, was in favour of Mr. Sulaiman, would be to act contrary to that principle.

If a plaintiff in default can be permitted to rectify his omission even when the default is pointed out at the earliest possible time, and does not in such an event have to file a fresh plaint, decisive consequences may follow. For example, although rectification may take place at a time when the cause of action sued upon has become prescribed, the fact that the plaint was filed within time will render the action nevertheless maintainable. Similarly, if one were to consider the case of an appeal to the Privy Council, which must be filed within 30 days of the date of the judgment of the Supreme Court: suppose the application for leave to appeal is filed within time by a Proctor, but no instrument of his appointment is filed within the 30 days under Paragraph 6 of the Order, can it be held that the application for leave has been duly made if, after objection taken by the respondent, the omission to file the appointment is rectified at some subsequent date? It seems to me that in such an event the respondent can properly maintain that there has been no due application for leave to appeal. Even if the decision in *Tillekeratne vs. Wijesinghe* 11 N.L.R. 270 has to be followed, that would mean only that an unsigned act of appointment can be subsequently rectified, but not that a complete omission to file the act of appointment can be subsequently supplied.

If we were now to decide that applications of the present kind can be entertained although made by Proctors in respect of whom the requisite acts of appointment have not been filed previously or contemporaneously, we would be providing a dangerous precedent for the excuse of lapses on the part of Proctors and parties in complying with the procedure set out in the various enactments concerning appeals to the Privy Council and applications connected therewith.

I would refuse the application with costs fixed at Rs. 157/50.

Application refused with costs.

WEERASOORIYA, J.
I agree.

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

V. CHARLES COORAY AND ANOTHER vs. U. PETER SAMARASINGHE

S. C. 412 (*Final*) *of* 1957—*D. C. Colombo* 642/Z

Argued on: 21st November, 1958.
Decided on: 27th February, 1959.

Servitude—Right to enter adjoining land to erect temporary scaffolding to re-erect wall—When it comes into existence—Damages.

Held: (1) That the Roman-Dutch Law recognises a servitude to enter upon a neighbour's land and erect a temporary scaffolding for the purpose of repairing or re-erecting a wall.
(2) That such a servitude comes into existence only on the making of an order granting it and damages can be claimed only from the date of such order.

Per T. S. FERNANDO, J.—"Plaintiff's house is situated within the Urban Council limits of Kotte and judicial notice can be taken of the fact that owners of house property are liable to pay rates".

Cases referred to: *Mazista State Quarries Ltd. vs. Oosthuizen et al* (1943) T.P.D. 28.

G. T. Samarawickreme, for the defendants-appellants.

W. D. Gunasekera, for the plaintiff-respondent.

T. S. FERNANDO, J.

This appeal raises the question of the point of time at which a servitude of the nature of a way of necessity arises.

The plaintiff and the defendants in this action are owners of lands adjoining each other. On the land of the plaintiff stood a house which was being rented out by him to a tenant, and on June 3rd 1955, a wall of this house collapsed rendering the house untenantable until the wall was reconstructed. The wall that collapsed adjoined the fence that separated the land of the plaintiff from that of the defendants, and it is not in dispute that construction of the wall was not possible unless a temporary scaffolding was erected on defendants' land to enable the building operations to be completed. This the defendants were not willing to permit, and the plaintiff instituted this action claiming (*a*) a declaration that he is entitled to enter the defendants' land for the purpose of repairing and re-erecting the wall of his house, (*b*) a decree enjoining the defendants not to prevent the plaintiff from so entering and (*c*) damages.

The learned District Judge, after trial, held with the plaintiff and, on July 17th 1957, entered judgment as prayed for, fixing the damages at Rs. 18/24 a month from July 1955. The assessed rent of the plaintiff's house was Rs. 13/24 a month.

The Roman-Dutch Law recognises a servitude of the nature claimed by the plaintiff. We were referred to Hall and Kellaway on Servitudes, page 89, where it is stated that :—

> "If it is impossible to construct a building except by entering upon the adjoining land and even erecting a scaffolding on it, the owner may be compelled to permit such entry and erection *ex necessitate* (Voet, 8-2-14)."

I reproduce below (from 2 Gane's translation, pages 454—455 the comment of Voet referred to above) :—

> "8-2-14. (XV)—*Dumping of building material etc.* Also a servitude of a neighbour being allowed to shoot earth, rocks and stones on to his neighbour's site, or of keeping them lodged there ; or of cutting stones on his own ground so that chips fall on to his neighbour's site ; or of making ramps or scaffoldings on a neighbour's site for building purposes."

At the argument before us, learned Counsel for the defendants did not contend that the plaintiff was not entitled to enter upon his clients' land and erect a temporary scaffolding for the purpose of reconstructing the wall. He limited his argument to the question that damages can be claimed only from the date of the order of the Court granting the servitude. He contended that the relief claimed by the plaintiff is an order of Court constituting a servitude and that this servitude comes into existence only on the making of the order by the Court. He himself relied (1) on the comment by Voet (8-2-14.– 2. Gane's translation, page 455) which I reproduce below :—

> "Even an unwilling neighbour could be constrained to grant such liberty for the erection of scaffoldings, if the building cannot be carried out in any other way. That is both because of the favour shown to public appearance, and also on the analogy of the road which must needs be yielded to one who is deprived of any other way out and way in."

and (2) on another comment by Voet contained in 8.3.4. See 2. Gane's translation, page 467—in dealing with the origin of the rural servitude of a right of a necessary way (*via ex necessitate*) :—

> "In addition to right of way to be established or refused at the discretion of the owner of a servient tenement, there is furthermore a right of way which must be granted of necessity by the owner of a servient tenement when the neighbouring farm has no access and egress. It is commonly called a way of necessity ..... But that was in fairness extended by the commentators to all landed estates which lacked access and egress, to the extent, that is to say, that on the duty of a Judge being extraordinarily invoked the neighbour should either on receipt of a just price establish a full right of way, or should at least grant such right on sufferance, to be exercised at the time when need should demand it ; and that with the least possible harm to the neighbour suffering it."

In support of his contention, defendants' Counsel has relied also on the South African Case of *Mazista State Quarries Ltd. vs. Oosthuizen et al* (1943) T.P.D. 28. In that case, an applicant claimed against the respondents an order *pendente lite* restraining the latter from hindering his use of a road over their property. The applicant had not instituted an action against the respondents for a final grant of a way of necessity over the latter's property, but had stated in his application that he proposed to institute such an action. It was held that the applicant was not entitled to the order *pendente lite* claimed by him inasmuch as the Court could not in advance give him a right *which could only be acquired at a later date.*

One of the recognised methods of creating servitudes is by a decree of Court. Hall and

Kellaway in their treatise on Servitudes state at page 37:—

> "Both Voet and Grotius in the passages referred to by Maasdorp in support of his statement seem to regard partition suits as being the only cases through which servitudes are created by judicial decree. In two other cases, perhaps, this may be said to take place, i.e., when a party to a suit seeks to obtain a way of necessity over his neighbour's land by means of the action '*de servitute constituenda*' and where an award of arbitrators by which rights of servitudes are established is made an order of Court as was done in.....',

The claim of the plaintiff in this case being one which is recognised on the analogy of the right of way of necessity is one which, in my opinion, becomes effective only on the making of an order by the Court, and accordingly the contention of defendants' Counsel that damages can accrue only from the date of the order of Court is entitled to prevail.

A further point raised on behalf of the defendants was that the damages awarded represent the rent that could have been recovered by the plaintiff had the defendants not prevented the reconstruction of the wall. No consideration has been paid to the circumstance that the rates were payable by the plaintiff. Plaintiff's house is situated within the Urban Council limits of Kotte and judicial notice can be taken of the fact that owners of house property are liable to pay rates. There is no evidence as to the amount of the rates payable in respect of this house, but we consider that the plaintiff should have furnished this evidence. We would accordingly reduce the damages by the probable amount of the rates the plaintiff would have had to pay and fix the damages at Rs. 10/- a month.

In the result, the appeal is dismissed subject to the modification of the decree of the District Court that damages are payable at the rate of Rs. 10/- a month as from the date of decree, viz., July 17th 1957.

There will be no costs of this appeal.

SANSONI, J. *Appeal dismissed.*
I agree. *Decree for damages varied.*

Present: T. S. FERNANDO J.

K. M. DON LAZARUS *vs.* W. W. F. WAAS, SUB-INSPECTOR OF POLICE, WELLAMPITIYA.

S. C. No. 242 of 1959—M. C. Colombo, 10621/C

Argued on: 24th November, 1959
Decided on: 30th November, 1959

Criminal Procedure Code, Section 429—Power of Court to call fresh evidence.

On a charge of retention of stolen property, after the defence had closed its case, the Court, *ex proprio motu*, called a witness who was on the list of witnesses for the prosecution but who had not been called by the prosecution, and convicted the accused on the ground that this witness' evidence contradicted the explanation given by the accused for his possession of the stolen articles.

Held: That as the prosecution was at all times aware of the evidence the witness was in a position to give, but refrained from calling him, the introduction of this witness' evidence into the case was irregular, and unauthorised by S 429 of the Criminal Procedure Code.

Case cited: *The King vs. Aiyadurai* (1942) 43 N.L.R. 289 *at* 293.

Ananda Karunatilleke, for the 1st Accused-appellant.

P. Nagendran, Crown Counsel, for the Attorney-General.

T. S. FERNANDO J.

After the case for the defence had been closed the learned Magistrate decided to call a witness named Albert. Albert had been in attendance at the trial as he had been summoned on behalf of the prosecution. His name appears in the list of witnesses attached to the section 148 (1) (*b*) report presented to court. The evidence of Albert having been taken, the Magistrate made order convicting the appellant and in his statement of reasons for the conviction observed that he could not accept the evidence of the appellant and of his witness because their

evidence was contradicted by the evidence of Albert.

The material question at the trial which was one in respect of a charge of retention of stolen property was whether the appellant's explanation for the possession of the stolen articles was a reasonable one. It has been held unreasonable because it was contradicted by Albert. The prosecution was at all times aware of the evidence Albert was in a position to give but refrained from calling him. It is contended on the appellant's behalf that in these circumstances the introduction into the case of Albert's evidence was irregular and unauthorised by the provisions of section 429 of the Criminal Procedure Code. A number of cases have been referred to before me, but it is sufficient to mention only one of them. In *The King vs. Aiyadurai* (1942) 43 N.L.R. 289 at 293, Howard C. J. formulated the principle that "fresh evidence called by a Judge *ex proprio motu*, unless *ex improviso*, is irregular and will vitiate the trial, unless it can be said that such evidence was not calculated to do injustice to the accused". The only use to which Albert's evidence was put was to discredit the appellant's explanation of an innocent possession of the stolen articles. The discrediting in this manner of the appellant's explanation was not a matter that arose *ex improviso*, and the use to which Albert's evidence has been put by the learned Magistrate is, in my opinion, irregular.

I would for this reason quash the conviction and sentence of the appellant and direct that he be acquitted.

Conviction Quashed.

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

ARNOLIS *vs.* MARSHALL

S. C. No. 449—D. C. Colombo No. 7300—P

Argued on : 2nd October, 1959.
Delivered on : 22nd October, 1959.

Partition Action—Omission in Interlocutory decree—Not a matter arising in appeal—May the interlocutory decree be amended in appeal to include the matter omitted in the exercise of the powers of Revision.

The Supreme Court, acting in revision, amended the interlocutory decree in a partition action, although the matter requiring amendment did not arise in the appeal.

A. L. Jayasuriya, for the 1st defendant-appellant.

G. P. J. Kurukulasuriya with *C. D. S. Siriwardene*, for the plaintiff-respondent.

WEERASOORIYA, J.

This is an action for partition. The title to the land, and the plantations and buildings thereon, is admittedly in the plaintiff and the 1st defendant in equal shares subject, however, to the life interest of the 2nd defendant in and over the building bearing assessment No. 84, which life interest has devolved on the 1st defendant by right of purchase.

The only contest at the trial was whether the plaintiff alone effected certain improvements valued at Rs. 7,000/- to the buildings and is

entitled to compensation therefor or whether the 1st defendant contributed Rs. 4,000/- towards the cost of them. The District Judge has held in favour of the plaintiff and the present appeal by the 1st defendant is from that finding. We see no reason, however, to interfere with it.

Mr. Jayasuriya who appeared for the 1st defendant drew our attention to the fact that despite the plaintiff having conceded at the trial that the first defendant had purchased the life interest of the 2nd defendant in and over premises No. 84, the interlocutory decree contains no reference to it. Although the matter does not arise in appeal we think that the interlocutory decree should be amended by the insertion of the following paragraph immediately before the last paragraph thereof: "It is further ordered and decreed that the building bearing assessment No. 84 is subject to a life interest in the 2nd defendant and the same has devolved on the 1st defendant by right of purchase." It will be for the 1st defendant to take the necessary steps to have effect given at the final partition to the right so reserved.

Acting in revision we direct that the interlocutory decree be amended in the manner indicated above, and subject to this direction the appeal is dismissed with costs.

H. N. G. Fernando, J.
I agree.

Decree amended.

Present: Basnayake, C.J., and Pulle, J.

PODIHAMINE vs. JORANIS PERERA AND OTHERS

S. C No. 81—*D. C. (Inty) Colombo No.* 15330/T

Argued and Decided on: 6th November, 1959

Stamps Ordinance—Appeal from a decision in testamentary proceedings—Failure to give stamps for the decree of the Supreme Court—Should the appeal be rejected.

Held: That the failure to supply stamps for the decree of the Supreme Court on an appeal from a decision in a testamentary proceeding is fatal to the reception of the appeal.

Cases referred to: *Attorney-General vs. Karunaratne* 37 N.L.R. 57.

H. W. Jayawardene, Q.C., with *D. R. P. Goonetileke* for the petitioner-appellant.
W. D. Gunasekara for the 1st respondent-respondent.
P. N. Wikremanayake for 19th respondent-respondent.

V. Tennakoon, Senior Crown Counsel, with *E. R. de Fonseka*, Crown Counsel, as *amicus curiae* (on notice).

Basnayake, C. J.

This appeal comes up before us for an order whether it should be listed for hearing as the necessary stamps for the Supreme Court decree have not been supplied by the appellant. Learned counsel contends that under the Schedule to the Stamp Ordinance no stamp duty is payable on the decree of the Supreme Court as the appeal is from a decision in a testamentary proceeding and all stamp duties payable on such proceedings are prescribed in Part III of Schedule A of the Stamp Ordinance which makes no provision for stamp duty on the decree of the Supreme Court. He relies on two decisions of this court reported in *42 N. L. R. 289* and *42 N. L. R. 411* as supporting the proposition that the only stamp duty payable in testamentary proceedings whether it be in the original court or in appeal is contained in Part III of the Stamp Ordinance. The former of the two cases decided that in guardianship proceedings documents other than those mentioned in paragraph F (*f*) of Schedule A, Part II, of the Stamp Ordinance are exempt from stamp duty. In the latter case it was held that proceedings under section 68 of the Courts Ordinance for the transfer of a testamentary case from one

District Court to another should be stamped under Part III of Schedule A of the Stamp Ordinance. In the course of the judgment in the latter case Moseley, S. P. J., said " Indeed in the case referred to immediately above, Withers J. described the purpose of Part III in the Ordinance of 1890 as ' to exhaust the duties chargeable in testamentary proceedings in the Supreme Court and the District Courts'. "

We are unable to agree that that statement applies to the Stamp Ordinance in its present form and that Part III of Schedule A of the Stamp Ordinance does contain the stamp duties payable in proceedings in the Supreme Court and on instruments passed under its seal.

In our opinion it is clear that Part III of the Stamp Ordinance contains only duties payable in the District Court in testamentary proceedings. No provision is made therein for the stamp duty payable on the decree of the Supreme Court for the same reason that no such provision is made in Part II in respect of proceedings other than testamentary proceedings in the District Court. If learned counsel's contention is sound then all decrees of the Supreme Court would not be liable to duty. Such a view is untenable in the face of item 9 of Part II of the tariff prescribed for law proceedings in the Supreme Court. The scheme of the Ordinance is that each part of the tariff is exhaustive of the duties payable on proceedings in the court in respect of which the duties are prescribed. In respect of the stamp duty payable on the decree of the Supreme Court the duty on which is prescribed in the tariff applicable to the Supreme Court, the legislature has enacted a special provision which reads —

> " In appeals to the Supreme Court the appellant shall deliver to the Secretary of the District Court or clerk of the Court of Requests, together with his petition of appeal, the proper stamp for the decree or order of the Supreme Court and certificate in appeal which may be required for such appeal. "

It has been authoritatively decided by this court that failure to comply with that provision is fatal to the reception of an appeal. (*Attorney-General* v. *Karunaratne*, 37 N. L. R. 57).

The appeal is rejected with costs.

Rejected.

PULLE J.

I agree.

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

SINNADURAI *alias* KATHIRAVELU vs. MANIMUGALAI

S. C. No. 550—*D. C. Jaffna No.* 10626

Argued and Decided on : 9th October, 1959.

Civil Procedure Code, Section 218 (*j*)—*Does a driver of an omnibus come within this section.*

Held : The driver of an omnibus is not a labourer or domestic servant within the meaning of Section 218 (j) of the Civil Procedure Code.

C. Chellappah for the defendant-appellant.

K. Sivagurunathan for the plaintiff-respondent.

BASNAYAKE, C.J.

The only question which arises for decision in this appeal is whether the driver of an omnibus belonging to the Ceylon Transport Board comes within the provisions of section 218 (j) of the Civil Procedure Code. That provision declares that " the wages of labourers and domestic servants " shall not be liable to seizure and sale in execution of a decree of court. In our opinion the driver of an omnibus does not come within the ambit of either of the expressions labourer and domestic servant.

The appeal is dismissed with costs.

Appeal dismissed.

SANSONI, J.

I agree.

Present : BASNAYAKE, C.J., DE SILVA, J., AND H. N. G. FERNANDO, J.

ABDUL MAJEED *vs.* UMMU ZANEERA AND OTHERS.

S. C. 260/56—*D. C. Colombo No.* 6970/*M*

Argued on : 24th and 25th September, 1959.

Decided on : 11th December, 1959.

Co-owners—Prescription among—Property gifted subject to fideicommissum for four generations —How the four generations may be computed—Prescription against fideicommissaries and minors—Admission that party claiming prescriptive title has been collecting rent and in possession for over thirty-five years—Is this sufficient to establish prescriptive title without other evidence—Ouster, meaning of—Presumption of ouster—When may such presumption arise—Burden of Proof—Prescription Ordinance, Sections 3 *and* 13*—Evidence Ordinance Section* 114.

One AL. in 1872, gifted a land to his wife M, subject to a *fideicommissum* in favour M's descendants up to the 4th generation. M died leaving three children, *viz.*, R, a son and two duaghters C and U. The plaintiff and the defendants excepting the 13th were the descendants of C and U. 13th defendant was the son of R. In 1953 plaintiff instituted this action to partition the land. The 13th defendant pleaded inter alia that he had acquired a prescriptive title to the land.

At the trial, the plaintiff's counsel admitted that "the 13th defendant's father had been in possession from prior to 1916." The 2nd defendant, (born in 1923) called by the plaintiff admitted in cross-examination that "from the time he became aware of things, the 13th defendant had been collecting rent from the property". At the close of the plaintiff's case a further admission was recorded as follows : "Plaintiff admits that from 1916, the 13th defendant collected rents". The 13th defendant gave no evidence, and relied on the aforesaid admissions in support of his claim to prescriptive title.

The learned District Judge in effect held that the 13th defendant had continuous and exclusive possession of the premises, since 1916, but rejected his claim on the ground that he failed to prove that the proviso to section 3 and section 13 of the Prescription Ordinance did not apply to his claim. The 13th defendant appealed.

Held : (1) That in counting the number of generations for the purpose of a fideicommissum which endures for four generations the immediate donee is not taken into account.

(2) By De Silva J. and H. N. G. Fernando J. (Basnayake C.J. dissentiente) that the 13th defendant being a co-heir, the proof adduced in the case is insufficient to establish prescriptive title inasmuch as (*a*) the admissions made amount to no more than a concession that the 13th defendant was in undisturbed and exclusive possession since 1916.

(*b*) there is no evidence of adverse or independent title as required by section 3 of the Prescription Ordinance.

(*c*) there are no proved circumstances from which a presumption of ouster could arise. In fact there is no necessity to resort to a presumption of ouster, as the 13th defendant, who claimed to have originated the adverse possession was alive at the time of the trial, but failed to give evidence.

(3) That the presumption of ouster should be applied if and only if, the long continued possession by a co-owner and his predecessors in interest cannot be explained by any reasonable explanation other than that at some point of time in the distant past, the possession became adverse to the rights of the co-owners.

Per BASNAYAKE C.J.—"Those who assert that the period of ten years began to run as against them only after a certain date in view of the proviso to section 3 or section 13 must produce evidence of facts which bring their case within those provisions.

Per DE SILVA, J.—"In considering whether or not a presumption of ouster should be drawn by reason of long-continued possession alone of the property owned in common, it is relevant to consider the following, among other matters :—

(*a*) The income derived from the property.
(*b*) The value of the property.
(*c*) The relationship of the co-owners and where they reside in relation to the situation of the property.
(*d*) Documents executed on the basis of exclusive ownership.

Per H. N. G. FERNANDO, J.—" Firstly, section 3 imposes two requirements—" undisturbed and uninterrupted possession " *and* " possession by a title adverse or independent " ; secondly the question whether the second of these requirements is satisfied does not arise unless the first of them has been proved. It is clear from the judgment of the Privy Council in *Corea's* case, 15 N. L. R. 65, that a co-owner in possession can satisfy the second requirement in two different modes :—

(*a*) by proving that his entry was not by virtue of his title as a co-owner, but rather of some other claim of title ; in fact Their Lordships, in *Corea's* case, rejected the finding of the Supreme Court that the possessor had entered as sole heir of the former owner ;

(*b*) by proving that, although his entry was by virtue of his lawful title as a co-owner, nevertheless he had put an end to his possession in that capacity by ouster or something equivalent to ouster, and that therefore and thereafter his possession had been by an adverse or independent title.

Cases referred to: *Mohamedaly Admajee* vs. *Hadad Sadeen*, 58 N.L.R. 217 at 227.
Corea vs. *Appuhamy*, 15 N.L.R. 65.
Cadija Umma vs. *Don Manis*, 40 N.L.R. 392 at 396.
Doe vs. *Prosser*, 1 Cowper 216—98 E. R. 1052 (1774).
Hornblower vs. *Read*, 1 East 568.
Tillekeratne vs. *Bastian* 21 N. L. R. 12.
Hamidu Lebbe vs. *Ganitha*, 27 N. L. R. 33.
Britto vs. *Muttunayagam*, 20 N. L. R. 327.
Umma Ham vs. *Koch*, 47 N. L. R. 107.
Careem vs. *Ahamadu*, 5 C. L. Rec. 170.
Sideris vs. *Simon*, 46 N. L.R. 273.
Githohamy vs. *Karanagoda*, 56 N.L.R. 250.
Subramamam vs. *Sivaraja et al*, 46 N.L.R. 540.
Fernando vs. *Podi Nona*, 56 N. L. R. 491.
Pillai vs. *Rawther*, 1 L.R. 25 Bomb. 137.
Rajapakse vs. *Hendrick Singho*, 61 N. L. R. 32.

H. V. Perera, Q.C., with *H. Ismail* for 13th Substituted Defendant-Appellant.

M. S. M. Nazeem with *M. T. M. Sivardeen* for Plaintiff-Respondent.

S. Sharvananda with *M. Shanmugalingam* for 4th to 8th Defendants-Respondents.

H. W. Jayewardene, Q.C., with *M. Rafeek* and *L. C. Seneviratne* for 9th Defendant-Respondent and for 10th Substituted Defendant-Respondent.

H. Mohideen with *S. M. Uvais* for 12th Defendant-Respondent.

BASNAYAKE, C.J.

This is an action under the Partition Act, No. 16 of 1951, instituted on 17th September 1953. The main contest at the trial was whether deed No. 260 dated 16th July 1872 attested by J. W. Vanderstraaten created a *fideicommissum* which endured for four generations. The learned District Judge held that the deed created a *fideicommissum* and learned counsel for the 13th defendant-appellant, who may conveniently be referred to hereinafter as the appellant, does not challenge that finding. The appellant had also claimed that he was entitled to a decree in his favour under section 3 of the Prescription Ordinance as he had possessed the entire land since the year 1916.

The learned District Judge while in effect holding that the appellant had continuous and exclusive possession of the premises since 1916 rejected his claim for a decree in his favour under section 3 of the Prescription Ordinance on the ground that he had failed to prove that the proviso to section 3 and section 13 of the Ordinance did not apply to his claim. The decision that the burden of proving the exceptions rests on the appellant is canvassed in appeal. It is submitted that the learned District Judge has wrongly cast on the appellant the burden of proving matters which in law he is not bound to prove. The portion of the learned District Judge's judgment to which objection is taken runs as follows :—

" In fact, the burden is on the 13th defendant to prove that he had acquired a title by prescriptive possession to the interests of all the parties to this action, who are the descendants of Muttu Natchia. *His prescriptive possession has been interrupted always with the death of a fiduciary. It is for him to produce the*

death certificates of the successive fiduciaries and the birth certificates of the several fidei commissarii. Ansa Umma, one of the daughters of Muttu Natchia, died leaving three children, the 9th and 10th defendants and one Mohamed Razeen. Ansa Umma was a fiduciary. It is not known when she ided. It is only after her death that the 13th defendant would start to possess adversely against the 9th and 10th defendants and Mohamed Razeen. There is no evidence as to the age of the 9th and 10th defendants. Similarly in the case of all the other defendants it cannot be held that the 13th defendant acquired a prescriptive title to their interests. I hold that the 13th defendant has not acquired a prescriptive title to the interests of the plaintiff or any other defendants ".

The plaintiff and the other defendants claim the benefit of the proviso to section 3 and section 13. Those provisions read :—

" Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute.

" 13. Provided nevertheless, that if at the time when the right of any person to sue for the recovery of any immovable property shall have first accrued, such person shall have been under any of the disabilities hereinafter mentioned, that is to say —

(*a*) infancy,
(*b*) idiocy,
(*c*) unsoundness of mind,
(*d*) lunacy, or
(*e*) absence beyond the seas,

then and so long as such disability shall continue the possession of such immovable property by any other person shall not be taken as giving such person any right or title to the said immovable property, as against the person subject to such disability or those claiming under him, but the period of ten years required by section 3 of this Ordinance shall commence to be reckoned from the death of such last-named person, or from the termination of such disability, whichever first shall happen ; but no further time shall be allowed in respect of the disabilities of any other person :

" Provided also that the adverse and undisturbed possession for thirty years of any immovable property by any person claiming the same, or by those under whom he claims, shall be taken as conclusive proof of title in manner provided by section 3 of this Ordinance, notwitstanding the disability of any adverse claimant. "

Learned counsel's contention that the learned District Judge has wrongly cast on the appellant the burden of proving the exception is sound. The rule of evidence is that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Those who assert that the period of ten years began to run as against them only after a certain date in view of the proviso to section 3 or section 13 must produce evidence of facts which bring their case within those provisions. Learned counsel's submission is supported by the decision of the Privy Council in this case of *Mohamedaly Adamjee* vs. *Hadad Sadeen* (58 N. L. R. 217 at 227) to which he has referred us. In that case the Board made the following observations :—

" Looking at the matter first as a question of construction they think that once parties relying upon prescription have brought themselves within the body of section 3 the onus rests on anyone relying upon the proviso to establish their claim to an estate in remainder or reversion at some relevant date and they cannot discharge this onus unless they establish that their right fell into possession at some time within the period of ten years ".

In the instant case except in regard to the plaintiff, and the 1st and 2nd defendants, the parties have produced no evidence which brings their claims within the proviso to section 3 or section 13. But it is contended on behalf of the 9th and 10th defendants-respondents that the appellant is a co-heir and that proof that he collected the entire rent since the year 1916 is insufficient to bring his case within section 3. It is therefore necessary to deal with that aspect of the case with which the learned District Judge has not dealt specially though an argument in regard to it appears to have been addressed to him.

It had been laid down by the Privy Council in the case of *Corea* vs. *Appuhamy* (15 N. L. R. 65) that the possession of a co-owner is in law possession of the other co-owners ; that it is not possible for a co-owner to put an end to his possession *qua* co-owner by any secret intention in his mind ; that nothing short of ouster or something equivalent to ouster could bring about that result.

In the case of *Cadija Umma* vs. *Don Manis* (40 N. L. R. 392 at 396) in dealing with the case of an agent's possession the Privy Council said —

" Ouster apart, a man's possession by his agent is not dispossession by his agent. The like is true between co-owners in Ceylon, and is the ground of decision in *Corea's* case. "

It is therefore necessary first to understand what the Privy Council meant by the words " his possession was in law the possession of his co-owners ". What is the kind of possession contemplated by these words ? Is it a possession in which the rights of the other co-owners are recognised or is it a possession in which they

are not? For the answers to these questions we have to look to the English Law, as section 3 of the Prescription Ordinance is based on concepts of English and not on those of Roman-Dutch law. The English law on the subject is nowhere better expressed than in *Doe* vs. *Prosser* (1 Cowper 216—98 E. R. 1052 (1774) wherein Lord Mansfield and Justice Acton have explained what is meant by adverse possession and ouster. The former explains the law thus :

> " So in the case of tenants in common ; the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion ; because such possession is not adverse to the right of his companion, but in support of their common title ; and by paying him his share, he acknowledges him co-tenant. Nor indeed is a refusal to pay of itself sufficient, without denying his title. But if, upon demand by the co-tenant of his moiety, the other denies to pay, and denies his title, saying he claims the whole and will not pay, and continues in possession ; such possession is adverse and ouster enough. "

Justice Acton's words are pithy and to the point. He says —

> " There have been frequent disputes as to how far the possession of one tenant in common shall be said to be the possession of the other, and what acts of the one shall amount to an actual ouster of his companion. As to the first, I think it is only where the one holds possession as such, and receives the rents and profits on account of both. With respect to the second, if no actual ouster is proved, yet it may be inferred from circumstances, which circumstances are matter of evidence to be left to a jury. "

It would appear therefore that on the facts of the instant case the co-owners cannot claim the benefit of the appellant's possession as he has possessed not on their behalf but for himself without giving them their share of the rent.

Next let me consider whether in the instant case there is evidence of " ouster " or " something equivalent to ouster ". The meaning of " ouster " an expression which is not discussed in our reports must first be ascertained. Now " ouster " is a concept of English law. It is defined thus in Sweet's Law Dictionary :

> To oust a person from land is to take the possession from him so as to deprive him of the freehold. An ouster may be either rightful or wrongful. A wrongful ouster is a disseisin. "

According to Blackstone—

> " Ouster, or dispossession, is a wrong or injury that carries with it the amotion of possession : for thereby the wrong-doer gets into the actual occupation of the land or hereditament, and obliges him that has a right to seek his legal remedy, in order to gain possession, and damages for the injury sustained. And such ouster, or dispossession, may either be of the *freehold*, or of *chattels real* ; ' a distinction which was formerly of the utmost importance, as the remedies for an ouster of the freehold were not only peculiar in their nature, but were confined in their use to that species of property ; while those which the law afforded for recovery of the possession of *chattels real* were totally inapplicable to all estates of freehold. We shall see afterwards how the action of ejectment has come to supply the place of nearly all these remedies '. "
>
> " Ouster of the *freehold* then ' was, and in theory may still be ' effected by one of the following methods : 1. Abatement ; 2. Intrusion ; 3. Disseisin ; 4. Discontinuance ; 5. Deforcement '. " (*Blackstone, Vol. III p.* 176—*Kerr's edition* 1862).

The last named is the form of ouster that applies to the case of a co-owner who decides to keep out the other co-owners. Blackstone describes it thus—(*ibid*, p. 181).

> " The fifth and last species of injuries by ouster or privation of the freehold, where the entry of the present tenant or possessor was originally lawful, but his detainer was now become unlawful, was that by deforcement. This, in its most extensive sense is nomen *generalissimum* ; a much larger and more comprehensive expression than any of the former ; it then signifying the holding of any lands or tenements to which another person has a right. "

Blackstone gives many examples of deforcement and the only one germane to the subject under discussion is the following—(*ibid*, p. 182).

> " Another species of deforcement is, where two persons have the same title to land, and one of them enters and keeps possession against the other ; as where the ancestor dies seised of an estate in fee-simple, which descends to two sisters as co-parceners, and one of them enters before the other, and will not suffer her sister to enter and enjoy her moiety ; this is also a deforcement. "

In the instant case there is evidence of " ouster " in the sense stated in the passage from Blackstone last cited and the English cases I shall refer to later in this judgment. The appellant came into possession of the land in 1916 on the death of his father, who himself had been in possession of it, and has continued to take the entire rent from that day. The plaintiff and the 1st and 2nd defendants are the great-great-grand-children of the author of the *fideicommissum*. Several generations of his descendants have been content to allow the appellant and his father to collect the entire rent. There is no evidence that till the date of this action in September 1953 any one has even questioned the appellant's right to take the rent during these thirty-seven years.

Apart from actual ouster in the sense stated above English law recognises a presumption of ouster. The cases of *Doe* vs. *Posser* (*supra*) and *Hornblower* vs. *Read* (1 East 568) decide that ouster may be presumed in a case where uninterrupted possession for thirty-six years

is established. In the former case Lord Mansfield stated —

> " It is very true that I told the Jury, they were warranted by the length of time in this case, to presume an adverse possession and ouster by one of the tenants in common, of his companion ; and I continue still of the same opinion—Some ambiguity seems to have arisen from the term ' actual ouster ', as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary. But that is not so. A man may come in by a rightfull possession, and yet hold over adversely without a title. If he does, such holding over, under circumstances, will be equivalent to an actual ouster. "

After enunciating the rule that the possession of one tenant in common, *eo nomine*, as a tenant in common, can never bar his companion because such possession is not adverse to the right of his companion, but in support of their common title, Lord Mansfield adds —

> " . . . but in this case no evidence whatsoever appears of any account demanded, or of any payment of rents and profits, or of any claim by the lessors of the plaintiff, or of any acknowledgment of the title in them, or in those under whom they would now set up a right. Therefore I am clearly of opinion, as I was at the trial, that an undisturbed and quiet possession for such a length of time is a sufficient ground for the jury to presume an actual ouster, and that they did right in so doing. "

Justice Acton in the same case puts the proposition thus :

> " Now in this case, there has been a sole and quiet possession for 40 years, by one tenant in common only, without any demand or claim of any account by the other, and without any payment to him during that time. What is adverse possession or ouster, if the uninterrupted receipt of the rents and profits without account for near 40 years is not ? "

Justice Willes in agreeing with Lord Mansfield and Justice Acton states —

> " The possession is a possession of 16 years above the 20 prescribed by the Statute of Limitations, without any claim, demand, or interruption whatsoever ; and therefore, after a peaceable possession for such a length of time, I think it would be dangerous now to admit a claim to defeat such possession. However strict the notion of actual ouster may formerly have been, I think adverse possession is now evidence of actual ouster. "

In the latter case Lord Kenyon C.J. observes —

> " I have no hesitation in saying where the line of adverse possession begins and where it ends. *Prima facie* the possession of one tenant in common is that of another : every case and dictum in the book is to that effect. But you may shew that one of them has been in possession and received the rents and profits to his own sole use, without account to the other, and that the other has acquiesced in this for such a length of time as may induce a jury under all the circumstances to presume an actual ouster of his companion. And there the line of presumption ends. "

In this discussion it is important to bear in mind the words of Lord Mansfield quoted above that actual ouster is not some act accompanied by force. The expression is defined in Black's Law Dictionary thus :—

> " Actual ouster does not mean a physical eviction, but a possession attended with such circumstances as to evince a claim of exclusive right and title, and a denial of the right of the other tenants to participate in the profits. "

The presumption of ouster referred to in the cases cited by me is one that a court may draw under section 114 of the Evidence Ordinance, which provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common courses of natural events, human conduct, and public and private business in their relation to the facts of the particular case.

The facts of the instant case fall within the ambit of Lord Kenyon's words. Here the appellant has been in possession and received the rent to his own use without accounting to the others and those others have acquiesced in it for such a length of time as will enable the court to presume under all the circumstances an actual ouster of the others more than ten years before the institution of this action.

Before I part with this judgment I wish to add that in counting the number of generations for the purpose of a *fideicommissum* which endures for four generations the person who has been expressly named and is the immediate donee is not taken into account. This is what Van Leeuwen says :—

> " It has been received as a general rule, that a *fideicommissum* of this or a similar kind in a case of doubt and when the prohibition is difficult to be understood, is not perpetual, but only extends to the fourth degree of succession, counting from him to whom after the death of the first heir the inheritance has come saddled with such a burden, up to the fourth degree beyond him inclusive, for the person who has been burdened expressly and by name does not form a degree, but his successor is the first to do so. " (*Censura Forensis, Part I, Book III, Ch. VII, S.* 14, *Ford's Translation, p.* 92).

For the reasons stated above the appellant is entitled to a decree in his favour declaring him entitled to all the shares excluding those of the plaintiff and the 1st and 2nd defendants.

In regard to costs the appellant is entitled to the costs of the contested trial as against the plaintiff who alone resisted his claim. The other costs will be borne by the parties declared entitled to the land *pro rata*. The appellant would also be entitled to the costs of appeal payable by the 9th and 10th defendants.

De Silva, J.

The plaintiff instituted this action under the Partition Act, No. 16 of 1951 praying for a sale of the premises described in the schedule to the plaint. Admittedly the property in question belonged to one Ibrahim Lebbe Ahamado Lebbe. He by deed No. 260 dated the 16th July, 1872 (P2) gifted it to his wife Muttu Natchia subject to certain conditions. The plaintiff and certain defendants contended that this deed created a valid *fideicommissum* in favour of the children and the remoter descendants of the donor and donee binding on four generations. Muttu Natchia and her husband died leaving two daughters and one son. The daughters were Candumma and Ansa Umma while the son was Abdul Rahaman. Abdul Majeed the 13th defendant is the only child of Abdul Rahaman. The plaintiff and the other defendants are the successors in title of the two daughters of Muttu Natchia. The 13th defendant took up the position that P2 did not create a valid *fideicommissum*. He also averred in his answer that Muttu Natchia had "put him in complete possession" of the property and that thereafter he had been in sole and exclusive possession of it and had acquired a prescriptive title to the entire property or at least to the shares claimed by the plaintiff and 1, 2, 5, 6, 7, 8, 11 and 12th defendants and the rights which the 9th and 10th defendants derived from one Noor Lahira the grand-child of Ansa Umma.

The learned District Judge held that P2 created a valid *fideicommissum* which endured for four generations and rejected the claim of the 13th defendant based on prescription. He allotted shares according to the devolution of title as set out in the plaint and entered a decree for sale. This appeal is by the 13th defendant against the judgment and decree.

At the hearing of this appeal the finding of the learned District Judge that the deed P2 created a valid *fideicommissum* binding on four generations was not challenged. The learned counsel for the appellant, however, contended that his client had established a prescriptive title to the half share which devolved on the 2 to 9th defendants and Noor Bahira. That is the main question for decision on this appeal.

At the trial the counsel for the plaintiff made an admission regarding the possession of this land. It is recorded in the following terms. "Mr. Weerasinghe admits that the 13th defendant's father has been in possession from prior to 1916." The only persons who gave evidence were the 2nd defendant and the 11th defendant. The 13th defendant neither gave evidence nor called any witness on his own behalf. The 2nd defendant was called on behalf of his sister the plaintiff while the 11th defendant did not give any evidence whatsoever in regard to possession. However, it was elicited from the 2nd defendant in cross-examination that from the time he became aware of things the 13th defendant had been collecting the rent of this property. It is significant to observe that the age of the 2nd defendant when he gave evidence was 32. After the plaintiff's case was closed the following admission is also recorded. "Plaintiff admits that from 1916 the 13th defendant collected the rents."

Thus the prescriptive title set up by the appellant rests solely on the two admissions I have quoted above and the statement of the 2nd defendant that from the time he came to know things the 13th defendant had been collecting the rent of the building which stands on this land which is 12·61 perches in extent. The plan P1 reveals that practically the whole land is covered by this building. It is rather remarkable that although it was elicited from the 2nd defendant in cross-examination that the 13th defendant collected the rent yet no attempt was made to obtain any admission from him that the entire rent collected was also appropriated by the 13th defendant. I do not think for a moment that when the counsel for the plaintiff admitted that from the year 1916 the 13th defendant was in possession and before that the latter's father had been in possession he meant to concede that the possession they had was of the character contemplated by section 3 of the Prescriptive Ordinance. The word "possession" was obviously used by him in a loose and vague sense. Probably he meant merely physical possession and this is made clearer by the 2nd admission which only conceded that the 13th defendant collected the rent. If he admitted that these two persons had possession in the sense the word is used in that section there was no purpose in going on with the trial thereafter. From the evidence of the 2nd

defendant and the two admissions referred to one cannot reasonably say that anything more was conceded than that the 13th defendant let out the premises and collected the entire rent. There is no definite evidence as to what he did with the rent whether he appropriated the whole of it for himself, shared it with the other co-owners, spent it on the maintenance of the building or used it for charitable purposes. It would not be strange if the 13th defendant collected the rent and looked after the building and before him his father did so. Of the three children of Muttu Natchia the 13th defendant's father was the only male. That being so it is quite natural, these parties being Muslims, that the 13th defendant's father, the only male in the family, was in charge of the premises and collected the rent. On the death of the father the son may well have taken over those duties without any objection from the other co-owners. If the 13th defendant did not appropriate for himself the entire rent his claim to this property on a prescriptive title is quite untenable. The prescriptive title is set up on the basis that he appropriated the entire rent for himself. Assuming that he did so, although the evidence is insufficient for so holding, is he entitled to succeed on the issue of prescription?

As the deed P2 created a valid *fideicommissum* the 13th defendant and the other descendants of Muttu Natchia and her husband would be co-owners of this property. In *Corea* v. *Iseris Appuhamy*, 15 N. L. R. 65, the Privy Council recognized the principle "Prossession is never considered adverse if it can be referred to a lawful title." There is no doubt that in the instant case the 13th defendant entered into possession of the property in the character of a co-owner. In that case the Privy Council further held that, in law, the possession of one co-owner is also the possession of his co-owners, that it was not possible to put an end to that possession by any secret intention in his mind and that nothing short of ouster or something equivalent to ouster could put an end to that possession. An invitation by the counsel for the respondent to presume an ouster or something equivalent to an ouster from Iseris's long-continued possession was rejected by Their Lordships of the Privy Council in that case but the point was not fully considered.

In *Tillekeratne* v. *Bastian*, 21 N. L. R. 12 a case decided by a Bench of three Judges, this Court held that it was open to the Court, from lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner had since become adverse. Bertram C.J. who delivered the main judgment in that case referred to the observations of Lord Mansfield in *Doe* v. *Prosser*, 1774, 1 Cowper 217, and followed the principle enunciated therein. Lord Mansfield said in that case "But if, upon demand by the cotenant of his moiety, the other denies to pay and denies his title, saying he claims the whole and will not pay, and continues in possession, such possession is adverse and ouster enough .... In this case no evidence whatever appears of any account demanded, or of any payment of rents and profits, or of any claim by the lessors of the plaintiff, or of any acknowledgement of the title in them, or in those under whom they would now set up a right. Therefore, I am clearly of opinion, as I was at the trial, that an undisturbed and quiet possession for such a length of time is sufficient ground for the jury to presume an actual ouster .... ".

Whether the presumption of ouster is to be drawn or not depends on the circumstances of each case. In *Tillekeratne* v. *Bastian* 21 N.L.R. 12, there were three circumstances of great importance which justified this Court in presuming an ouster. They were:—(1) Bastian whose share was in issue had not been recognized by the other members of his family as the lawful child of his father (2) Neither Bastian nor his vendee claimed a share of the plumbago dug from the land and (3) The share of this land purchased from Bastian was not included in the schedule of assets of the vendee when he became insolvent. There are no circumstances of such importance in the instant case.

In regard to the observations of Lord Mansfield referred to above I would venture to say that there is some risk in applying the principle enunciated by him indiscriminately to a set of similar circumstances existing in this country. Our land tenure is different from that prevailing in England and our laws of inheritance in respect of immovable property also differ from theirs. Common ownership of lands is rampant here whereas it is comparatively rare in England. Our social customs and family ties have some bearing on the possession of immovable property owned in common and should not be lost sight of. Many of our people consider it unworthy to alienate ancestral lands to strangers. Those who are in more affluent circumstances permit their less fortunate relatives to take the income of the ancestral property owned in common. But that does not mean that they intend to part with their rights in those lands

permanently. Very often if the income derived from such a property is not high the co-owner or co-owners who reside on it are permitted to enjoy the whole of it by the other co-owners who live far away. But such a co-owner should not be penalized for his generous disposition by converting the permissive possession of the recipient of his benevolence to adverse possession.

In considering whether or not a presumption of ouster should be drawn by reason of long-continued possession alone, of the property owned in common, it is relevant to consider the following, among other matters :—

(*a*) The income derived from the property.

(*b*) The value of the property.

(*c*) The relationship of the co-owners and where they reside in relation to the situation of the property.

(*d*) Documents executed on the basis of exclusive ownership.

If the income that the property yields is considerable and the whole of it is appropriated by one co-owner during a long period it is a circumstance which when taken in conjunction with other matters would weigh heavily in favour of adverse possession on the part of that co-owner. The value of the property is also relevant in considering this question although it is not so important as the income. If the co-owners are not related to one another and they reside within equal proximity to the property it is more likely than not that such possession is adverse and it would be particularly so if the property is valuable or the income from it is considerable. If the co-owners are also co-heirs the position would be otherwise.

In this case it is unfortunate that no evidence has been led to show what the income from this property was. If the rent was high it would have been a point in favour of the 13th defendant if he appropriated the whole of it. The fact that no evidence was adduced by the 13th defendant on the question of rent, probably, indicates that the rent was not much. In the plaint the property is valued at Rs. 75,000/-. That would appear to be a fair valuation as the premises were situated in Prince Street, Pettah. The building on it must be an old one because none of the co-owners claimed to have constructed it. If the rent was small, not much would have been left, after paying the rates and taxes, to be shared by the co-owners. If that assumption is correct the fact that the other co-owners did not press the 13th defendant for their shares of the income would not be a strong point against them. That of course, is on the basis that the 13th defendant appropriated to himself the whole income. In this case the 13th defendant has failed to produce a single document executed by him on the basis that he was the sole owner of the property. The absence of such documents goes to show that he did not intend to change the character of his possession or to assert a title to the whole property.

There is also no ostensible reason why the other co-owners should have meekly acquiesced if they became aware that the 13th defendant was setting up an independent title to the entire property.

In my view the evidence of possession by the 13th defendant is wholly insufficient to hold that he has acquired a prescriptive title to a share of any of the co-owners.

I am also inclined to the view that no occasion to draw a presumption of ouster arises where a co-owner relies only on his own exclusive possession, as in this case, in support of the prescriptive title he sets up. The 13th defendant relied on his possession alone according to the statement of claim filed by him. Therefore he ought to know when he decided to assert a title to the property adverse to the interests of his co-owners. What is the overt act he did which brought to the notice of his co-owners that he was denying their rights to the property? Did he refuse to give their shares of the income? He did not say so. But the burden was on him to establish the prescriptive title. The presumption of ouster is drawn, in certain circumstances, when the exclusive possession has been so long-continued that it is not reasonable to call upon the party who relies on it to adduce evidence that at a specific point of time, in the distant past, there was in fact a denial of the rights of the other co-owners. The duration of exclusive possession being so long it would not be practicable in such a case to lead the evidence of persons who would be in a position to speak from personal knowledge as to how the adverse possession commenced. Most of the persons who had such knowledge may be dead or cannot be traced or are incapable of giving evidence when the case comes up for trial. In such a situation it would be reasonable,

in certain circumstances, to draw the presumption of ouster. But in the instant case the party who claimed to have orginated the adverse possession was alive at the time of the trial. He is no other than the 13th defendant himself. There was no necessity, therefore, to resort to a presumption of ouster. The 13th defendant's adverse possession, if any, was a question of fact which he could and should have proved. He failed to do so. In *Tillekeratne* v. *Bastian*, 21 N. L. R. 12, Bertram C.J. while dealing with the circumstances in which the presumption of ouster may be drawn stated " If it is found that one co-owner and his predecessors in interest have been in possession of the whole property for a period as far back as reasonable memory reaches ; that he and they have done nothing to recognize the claims of the other co-owners ; that he and they have taken the whole produce of the property for themselves ; and that these co-owners have never done anything to assert a claim to any share of the property, it is artificial in the highest degree to say that such person and his predecessors in interest must be presumed to be possessing all this time in the capacity of co-owners, and that they can never be regarded as having possessed adversely, simply because no definite positive act can be pointed to as originating or demonstrating the adverse possession ". All the circumstances set out in this passage are not present in the exclusive possession attributed to the 13th defendant in this case. It is significant to note that the learned Chief Justice contemplates here a case where a *co-owner and his predecessors in interest* are concerned. I do not think that he would have been prepared to draw the presumption of ouster if the exclusive possession relied on was solely that of the co-owner who set up the prescriptive title. In such a case ouster or something equivalent to ouster would have to be proved, as any other question of fact, by leading the necessary evidence.

The presumption that possession is never considered adverse if it can be referred to a lawful title may sometimes be displaced by the counter-presumption of ouster in appropriate circumstances. However, this counter presumprion should not be reached lightly. It should be applied if and, only if, the long continued possession by a co-owner and his predecessors in interest cannot be explained by any reasonable explanation other than that at some point of time, in the distant past, the possession became adverse to the rights of the co-owners. Indeed, this is not such a case.

The appeal must therefore be dismissed. The judgment, however, needs variation on one point. The learned District Judge was of the view that the rights allotted to the plaintiff and certain defendants specified by him were free of the *fideicommissum*. That is not correct. Only the 1/9th share originally belonging to Noor Lahira and which devolved on 9 to 12th defendants will not be subject to the *fideicommissum*. As this *fideicommissum* endures for four generations it would be only the 5th generation of *fideicommissary* heirs who would inherit the property free of the *fideicommissum*. Therefore the proceeds of sale of the balance 8/9ths of the property should be deposited in Court and would be subject to the *fideicommissum*. The substituted defendants appellants will pay the costs of this appeal to the respondents.

H. N. G. FERNANDO, J.

It is common ground in this case that the land which is the subject of the action belonged originally to one Ibrahim Lebbe Ahamado Lebbe. By a deed No. 260 of 16th July 1872 he made a gift of that land to his wife Muttu Natchia subject to certain conditions. Muttu Natchia had three children ; her son Abdul Rahuman was the father of the 13th defendant ; her two daughters were the ancestors of the plaintiff and the other defendants. When the plaintiff instituted this action for the partition of the land on the basis that the deed P2 created a *fideicommissum* in favour of the descendants of Muttu Natchia up to the fourth generation, the 13th defendant filed answer claiming that the deed P2 of 1872 did not create a *fideicommissum* and also that the deed was void for want of acceptance on behalf of the persons designated as *fideicommissaries*. In addition the 13th defendant claimed that Muttu Natchia had placed him (the 13th defendant) in complete possession of the property and that he had acquired prescriptive title thereto as against all or some at least of the other parties to the action. The issues concerning the question whether the deed did create a valid *fideicommissum* and the question of due acceptance were answered in the lower Court against the 13th defendant, and the correctness of those answers has not been canvassed at the hearing of the appeal. On behalf however of the appellants, who are the heirs of the 13th defendant who died after the filing of the appeal, it has been strenuously argued that the appellants are entitled to a decree in their favour under section 3 of the

Prescription Ordinance in respect of the shares of certain of the defendants in the action. I have therefore to refer to the evidence concerning possession and to the conclusions reached by the District Judge on the issue of prescription.

At the commencement of the trial, the Counsel who appeared for the plaintiff is recorded as having admitted that " the 13th defendant's father had been in possession from prior to 1916 and that the 13th defendant came into possession in 1916 ". Thereafter the second defendant, a brother of the plaintiff, gave evidence. According to this evidence, the plaintiff, her sister the first defendant, and her brother the second defendant succeeded to interests in the property on the death of their mother in 1939 but were all minors at that time. The second defendant, who was the eldest of the three was born in 1923, and would have attained majority only in 1944. The plaint having been filed in September 1953 it is clear that the 13th defendant cannot claim a decree under the Prescription Ordinance, in respect of the shares to which these three parties were entitled, and the District Judge so held. This finding is not now challenged.

In regard to the interests of certain other parties, there was no evidence which established clearly the time at which their interests accrued or their ages at that time. The learned District Judge however took the view that it was for the 13th defendant to prove the time of accrual of these interests and to establish that the parties have been free of the disability of minority for over ten years prior to the institution of the action. On this ground he held that the 13th defendant, having failed to establish the necessary matters, was not entitled to a decree in respect of the interests of the parties concerned. He accordingly allotted to the 13th defendant only the one-third share which under the deed P2 accrued to him as the only child of his father Abdul Rahaman and rejected his claim to the entirety of the property. It has been argued for the appellants that the District Judge wrongly placed on the 13th defendant the burden of showing when the interests of these other parties accrued and of further establishing that they were free of the disability of minority referred to in section 13. It seems to me that this argument is entitled to succeed, and in the absence of evidence to the contrary, I will assume that neither the Proviso to section 3, nor the provisions of section 13 can be of avail to these parties.

The second defendant and the eleventh defendant were the only witnesses called at the trial, the second defendant being called on behalf of the plaintiff and the eleventh defendant on his own behalf. In his evidence-in-chief the second defendant gave no evidence whatsoever concerning possession of the property, but in cross-examination the following questions and answers were recorded :—

> **Q.** You know who is occupying these premises ?
> *A.* A. R. Abdul Majeed the 13th defendant is occupying these premises.
>
> **Q.** Has he not rented it out to anybody ?
> *A.* He has rented it out and he is collecting the entire rent. From the time I became aware of things he has been collecting the rent.

The 11th defendant gave no evidence concerning possession and *the 13th defendant neither gave evidence himself nor called any witnesses.*

The learned District Judge did not expressly consider in his judgment the question whether the possession of the 13th defendant was of the character required by section 3 of the Ordinance. He has either assumed that his possession was of the requisite character, or else considered it unnecessary to deal with the question because he decided that in any event the claim of the 13th defendant had to fail on other grounds.

The arguments for the appellants have been, firstly that the learned District Judge impliedly held, and in view of the admission of plaintiff's Counsel could rightly hold that the possession of the 13th defendant was of the nature contemplated in section 3, and secondly that such a conclusion was justified by the evidence which is reproduced above. As to the first argument, I am quite unable to accede to it. Even if the admission "that the 13th defendant's father had been in possession before 1916 and that the 13th defendant came into possession in 1916 " can legitimately be construed to mean that the possession of the 13th defendant had been "undisturbed and uninterrupted " since 1916, it is inconceivable that the Counsel who appeared for the parties opposed to the 13th defendant did intend to concede to the latter the right to a decree under section 3. The admission, for what it was worth, was made at the commencement of the trial by Counsel appearing for the plaintiff, who could in no way be prejudiced by it, because he had been a minor and was in

any event protected by section 13. No similar admission was made by Counsel representing the fourth to eighth defendants, or by Counsel representing the ninth and tenth defendants, all of whom are *fideicommissaries* under the deed P2. In fact at the stage of the addresses it was stated on behalf of the ninth and tenth defendants that, even if a *fideicommissum* had not been duly created, these defendants were in any event co-owners against whom the 13th defendant, who was not a stranger could not prescribe. In these circumstances, it is impossible to regard the admission by the plaintiff's Counsel as having involved a concession, binding on the other parties, that the character of the 13th defendant's possession had been of such a nature that the possession could be of avail against his *co-fideicommissaries* or co-owners.

I have therefore to consider the second argument for the appellants, namely that the evidence reproduced above was sufficient to entitle the 13th defendant to a decree against all those parties who had failed to bring themselves within the protection afforded either by the Proviso to section 3 or by section. Be it noted that this evidence was only to the effect that the 13th defendant let out the premises and had always *collected* the rents : there was no specific statement either that he had appropriated the rents exclusively for himself or that he had never given a share to any of the other *fideicommissary* heirs of Muttu Natchia.

But let me assume, although I cannot agree, that the only reasonable meaning of the evidence of the second defendant is that the 13th defendant, for nearly forty years from 1916, not only gathered the rents of the premises, but also appropriated them solely for himself without ever giving or conceding a share in the rents to any descendants of his two aunts. Upon this assumption, the 13th defendant undoubtedly had *undisturbed and uninterrupted possession* of the property in the sense contemplated by section 3 of the Prescription Ordinance, for (in the language of the parenthesis in section 3) his possession was " unaccompanied by payment of rent, by the performance of any service or duty, or by any other act from which a right existing in any other person would fairly or naturally be inferred '. But a person is not entitled to a decree under section 3 by virtue of such possession alone : the section requires the proof of a second element, namely that the possession must be " *by a title adverse to or independent of that of the claimant or the plaintiff in such action* ". That this is a distinct and separate element was emphasised by Bertram C.J. in his judgment in *Tillekeratne* vs. *Bastian* 21 N. L. R. 12. Having referred to a view earlier prevailing that the parenthesis was intended to be an explanation of everything which the section required the possessor to establish, and having cited certain judgments and Thompson's Institutes as endorsing that view, the learned Chief Justice, adopting an explanation earlier used by Wendt, J., pointed out that the *coup de grace* had been administered by the decision in *Corea* vs. *Appuhamy*, 15 N. L. R. 65, to the theory that the words in the parenthesis were intended as a definition of " adverse title ". He then referred to the suggestion made in Pereira's Laws of Ceylon that the parenthesis was intended to be explanatory of the expression " undisturbed and uninterrupted possession "—a suggestion which was expressly adopted by the Privy Council in *Corea's* case (at page 77) :—" The section explains what is meant by undisturbed and uninterrupted possession . . . . . Assuming that the possession of Iseris has been undisturbed and uninterrupted since the date of his entry, *the question remains, has he given proof, as he was bound to do, of adverse or independent title* ? "

Having regard to my own unfamiliarity with a subject which has received much critical and learned consideration from the Bench and the Bar, and in connection with which Lord Mansfield had observed :—" the more we read, unless we are very careful to distinguish, the more we shall be confounded ", I must be pardoned if, in the course of my attempt to analyse the problem which possession by a co-owner presents, I emphasise too much that which should have been obvious. Firstly, section 3 imposes two requirements—" undisturbed and uninterrupted possession " *and* " possession by a title adverse or independent " ; secondly the question whether the second of these requirements is satisfied does not arise unless the first of them has been proved. It is clear from the judgment of the Privy Council in *Corea's* case, 15 N. L. R. 65, that a co-owner in possession can satisfy the second requirement in two different modes :—

(*a*) by proving that his entry was not by virtue of his title as a co-owner, but rather of some other claim of title ; in fact Their Lordships, in Corea's case, rejected the finding of the Supreme Court that the possessor had entered as sole heir of the former owner ;

(*b*) by proving that, although his entry was by virtue of his lawful title as a co-owner, nevertheless he had put an end to this possession in that

capacity by ouster or something equivalent to ouster, and that therefore and thereafter his possession had been an adverse or independent title.

Long-continued possession by itself is clearly not contemplated in either of these two modes of proving that the possession of a co-owner had been " by a title adverse or independent ". The appellants therefore obtain no assistance from the decision in *Corea's* case. On the contrary I find it impossible to distinguish the facts of that case from the facts of the present one, and the decision operates strongly against the appellants. I have now to consider the so-called presumption of ouster which was referred to by the Privy Council in the judgment.

In *Tillekeratne* vs. *Bastian*, 21 N. L. R. 12 Bertram C.J. adopted from *Smith's Leading Cases*, the definition of adverse possession, *i.e.* " possession held in a manner incompatible with the claimant's title", and he observed that the question whether possession by a co-owner is adverse must be considered in the light of three principles of law, the third of which is :— " that a person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity ". Having thereafter referred to the English Law, and to early Ceylon cases, he went on to hold that there is a counter-principle which is part of the law of Ceylon and that it is open to the Court, from lapse of time in conjunction with the circumstances of the case, *to presume that possession originally that of a co-owner has since become adverse.* He later explained how this presumption should be applied :— " It is in short a question of fact, whenever long-continued exclusive possession is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that *that separate and exclusive possession had become adverse at some date* more than ten years before action was brought ". The words I have parenthesised indicate that this presumption is available in connection with the mode (*b*) of proving an adverse or independent title which I have elicited from the judgment in *Corea's* case, namely in order to establish that although the entry had been *qua* co-owner, the possession had commenced at some later time to be upon an assertion of an adverse title. No such presumption would be available to counter the principle that a co-owner is presumed to *enter* by virtue of his lawful title. The presumption referred to by Bertram C.J. has since been usually referred to as the presumption of ouster.

The argument for the appellants has been that this presumption of ouster, applies in their case, that it is just and reasonable that the possession of the 13th defendant, having been exclusive and of long duration, should be regarded as having become adverse at some time after 1916. Let me first repeat the language employed by Bertram C.J. :—" it is open to a Court from lapse of time *in conjunction with the circumstances of the case* . . . . . " ; " whenever long-continued possession is proved to have existed, whether it is not just and reasonable *in all the circumstances of the case* . . . . . " Long-continued possession (for nearly 40 years) was established indisputably in the case of *Tillekeratne* vs. *Bastian* 21 N. L. R. 12, but that was not all—Each of the three Judges thought it necessary, as indeed Bertram C.J.'s language rendered it necessary, to refer to circumstanes, quite distinct from the mere duration of possession, which induced them to apply the presumption :—

" Though Babappu was the legitimate son of Allis, *he was not accorded this status by the family* " ;

" It is a very significant fact that *Tillekeratne*, who purported to have acquired his (Babappu's) share in 1893, became insolvent in 1897, *and did not include this land in the schedule of his assets* ".

" It would moreover be *contrary to equity that a person possessing a doubtful status* in a family, who has lived apart from it for a generation in another locality *should be permitted* through the medium of a sale to a speculative purchaser to revive his obsolete pretensions, and *to assist those claiming through that purchaser to invade the family inheritances* ".

(*per* BERTRAM C.J.)

" Although he (Babappu) purported to sell to Tillekeratne in 1893, his vendee never possessed, nor was the land included in the inventory of his estate on his death in 1901, and *his* (the vendee's) *heirs made no attempt to assert any right until 1916* ".

(*per* SHAW, J.)

" Babappu appears not to have been really recognized as a legitimate son of Allis by the rest of the family. *He must have known that he was being intentionally excluded from possession* ".

" While a co-owner may without any inference of acquiescence in an adverse claim allow such natural produce as the fruits of trees to be taken by the other co-owners, the aspect of things will not be the same in the case where valuable minerals are taken for a long series of years without any division in kind or money ".

(*per* DE SAMPAYO, J.)

There were thus in that case several proved circumstances rendering it reasonable to presume that the possessors' title had become adverse to that of their co-owner : the co-owner's status in the family was doubtful and had not been accorded to him : valuable minerals had been appropriated for the sole benefit of the possessors : the co-owner must have known that he was being intentionally excluded from possession : the actual claimant was a vendee from the co-owner, but this vendee had himself neither possessed nor claimed his share for over ten years. Were not these cogent circumstances from which to infer that the possession had become adverse at some time ?

The passages which I have cited from the judgments in *Tillekeratne* vs. *Bastian*, 21 N. L. R. 12, were *preceded* by certain observations which fall from Bertram C.J. (at pages 20 and 21) :—

> " It is the reverse of reasonable to impute a character to a man's possession which his whole behaviour has long repudiated. If it is found that one co-owner and his predecessors in interest have been in possession of the whole property for a period as far back as reasonable memory reaches ; that he and they have done nothing to recognize the claims of the other co-owners ; that he and they have taken the whole produce of the property for themselves ; and that these co-owners have never done anything to assert a claim to any share of the produce, it is artificial in the highest degree to say that such a person and his predecessors in interest must be presumed to be possessing all this time in the capacity of co-owners, and that they can never be regarded as having possessed adversely, simply because no definite positive act can be pointed to as originating or demonstrating the adverse possession. Where it is found that presumptions of law lead to such an artificial result, it will generally be found that the law itself provides a remedy for such a situation by means of counter-presumptions ".

Read out of their context, these observations may tend to support the view that adversity may be presumed from mere long-continued and exclusive possession. They emphasise the absurdity and artificiality which might prevail if there were no " counter-presumption ", but they do not constitute an enunciation of the principles governing the application of that presumption. They are only a preface or preamble, so to say, to the enunciation of principles which is to follow and which is contained in the passages I have earlier cited, and cannot be regarded as altering or extending the principles as so enunciated.

In *Hamidu Lebbe* vs. *Ganitha*, 27 N. L. R. 33, one of two brothers had been in exclusive possession for nearly forty years. They had quarrelled and the excluded brother had left the ancestral village. Dalton J., relying on the decision in *Tillekeratne* vs. *Bastian*, 21 N. L. R. 12, was much inclined to presume from these circumstances that this brother must unsuccessfully have preferred a claim to his share, and that the possession would thereafter have been adverse. He felt, however, that the Privy Council decisions in *Corea's* case and in *Brito* vs. *Muttunayagam*, 20 N. L. R. 327 (where a father had possessed his widow's share after a quarrel with his children) did not permit him to presume adverse possession. Ennis J. observed that " *some definite facts would have to be proved* " from which one could infer a change in the character of the possessor's intention with regard to the holding of the land. If the quarrel and the departure of the co-owner from the village did not constitute sufficiently definite facts from which this inference could be drawn, would it ever be reasonable to draw that inference where all that is proved (as is so in the present case) is long-continued possession ?

There have been numerous subsequent decisions of this Court which have denied to co-owners in exclusive possession a decree under section 3 of the Prescription Ordinance, but it is sufficient for present purposes to summarize their effect by reference to some of them. Exclusive possession for many years, coupled with the execution by the possessor of deeds inconsistent with the title of his co-owners, is insufficient in the absence of evidence that the co-owners knew of and acquiesced in the execution of the deeds. This proposition was accepted as settled law in *Umma Ham* vs. *Koch*, 47 N. L. R. 107 which followed earlier decisions to the same effect :—*Careem* vs. *Ahamadu* 5 C. L. Rec. 170, and *Sideris* vs. *Simon*, 46 N. L. R. 273. The preparation of a Plan indicating that the possessor regarded himself as exclusively entitled to a specific portion of the common land and purporting to allot another specific portion to his co-owners, coupled with dealings by the possessor with his portion on the basis of sole ownership, does not justify a presumption of ouster in the absence of evidence that the co-owners acquiesced in the preparation of the plan of partition :—*Githohamy* vs. *Karanagoda*, 56 N. L. R. 250. It is significant that, in these and other cases, there was almost invariably reliance, even by unsuccesful possessor's, *upon some circumstance additional to the mere fact of long and undisturbed and uninterrupted possession*, and that proof of some

such additional circumstance has been regarded in our Courts as a *sine qua non* where a co-owner sought to invoke the presumption of ouster.

I am aware of one decision only which is seemingly contrary to the *cursus curiae* as just stated. There is language in the judgment of Canakaratne J. in *Subramaniam* vs. *Sivaraja et al* 46 N. L. R. 540, to indicate that the taking of profits exclusively and continuously for a very long period, and the acquiescence of co-tenants in the possessor's omission to account, would justify the presumption of an ouster. But there is no reference in the judgment to any earlier decision relative to prescription by co-owners, and the facts as stated in the judgment show that there had been no proof that the person in possession claimed title from the same source as did her adversaries. On the contrary the claims of title were mutually exclusive. I cannot regard this case as providing a relevant precedent, but even if it does there is at least one ground upon which it should be distinguished. While the possessor's name had continuously appeared in the assessment Register of the Sanitary Board as the owner of the property, and she alone had paid the rates, the alleged co-tenants had in some years placed their names also on the Register. The fact that they did so but nevertheless did not receive any of the profits from the possessor might have justified the inference that they had staked a claim to their share in the profits and had been rebuffed by the possessor. Even in that case therefore the possessor, if she was properly regarded as a co-owner, did rely upon a circumstance additional to the fact of long possession, as a ground on which the presumption of ouster might be drawn.

That line of decisions, one of the more recent being *Fernando* vs. *Podi Nona*, 56 N. L. R. 491, which recognize the principle that, where a stranger obtains a transfer of the entire land from one co-owner, his possession commences as adverse, is not relevant to the present discussion. "The possession of a stranger in itself indicates that his possession is adverse":— Leach C.J. in *Pillai* vs. *Rawther*, 1 L. R. 23 Bomb. 137. When the title upon which the stranger enters into possession, though in law defective, is based upon a transfer to him of the entire land, it is nevertheless a title adverse, inasmuch as it constitutes a denial of the rights of others. What such a stranger proves is an *entry* by a title adverse—the mode (*a*) of proof which I have elicited from the judgment in *Corea's* case, and not the mode (*b*) (*i.e.* of change in the character of the possession) which is required of a person who enters *qua* co-owner. Those decisions therefore throw no light on the question I am now considering.

The judgment in the case of *Rajapakse* vs. *Hendrick Singho*, 61 N. L. T. 32, though delivered on June 22, 1959, was not referred to during the argument of the present appeal, and I was unaware of it when the preceding part of this judgment was prepared. The facts in that case were, briefly, as follows:— The original owner had conveyed and undivided portion of the land to T by deeds executed in 1919 and 1920: T in 1921 transferred an undivided 11/19 share to his grandson, who in turn sold the undivided interests in 1927 to G: the plaintiff purchased the interests of G in May 1953 and instituted a partition action in August of the same year. The defendants, who were descendants of the original owner and thus entitled to the shares outstanding after the transfers of 1919 and 1920, claimed that they had exclusively possessed the entire land from 1922 and had divided the produce among themselves and to the exclusion of the plaintiff's predecessors in title. The grandson of T, who had been a predecessor of the plaintiff and had been the owner of the undivided interests for about six years, admitted at the trial that neither he nor his successor G had ever occupied the land, and that the defendants had lived on the land and enjoyed the produce to the exclusion of himself and G. It was held on these facts that there was overwhelming evidence upon which ouster could be presumed.

The plaintiff in that case claimed under T, *who was a purchaser* and not an heir of the original owner, and the plaintiff's predecessors were strangers to the family of the orginal owner. It is reasonable to assume that when a stranger purchases undivided interests in land, he does so as an investment and with the object of enjoying his due share of the fruits. If having purchased such an interest, a stranger does not assert his right to possession, but instead acquiesces in the exclusive appropriation of the entire produce by the members of the family of the original owner, it may be reasonable to presume from his unusual conduct that he either acknowledged the exclusive rights of the family or else failed in an effort to assert his own rights. Indeed this same feature, namely that the rights of the family were challenged only after a long period of acquiescence on the part of a stranger-

purchaser, was one of the circumstances which induced this Court in *Tillekeratne* vs. *Bastian*, 21 N. L. R. 12, to presume that there had been an ouster. If the *ratio decidendi* of the decision in *Rajapakse* vs. *Hendrick Singho* is that acquiescence, on the part of a purchaser of an undivided interest, in the exclusive possession of the entire land and the appropriation of its profits by the other co-owners, is a circumstance from which the adversity of the possession of the other co-owners can be inferred, then that decision may be in consonance with the *dicta* of Bertram C.J. and Ennis J. to which I have earlier referred. If that be the basis of the decision, it is easily distinguishable from the present case, where the title has throughout remained vested in the members of the same family.

Before concluding this judgment, it may be useful to add one observation concerning the presumption of ouster. Some of the presumptions mentioned in the Evidence Ordinance are arbitrary, in the sense that a Court is permitted to presume the existence of facts, even though it may be uncertain that the facts did indeed exist. The presumption of legitimacy is a good example of such an arbitrary presumption: a Court may be compelled to regard the child of a wife as legitimate despite the availability of evidence, whether direct or in the from of admissions, which can establish illegitimacy. The presumptions as to the regularity of official acts and the "course of business" are also examples, though less pointed, of something akin to a "rule of thumb". In my view, however, the so-called presumption of ouster is not to be applied arbitrarily, but only if proved circumstances tend to show, firstly the probability of an ouster, and secondly the difficulty or impossibility of adducing proof of the ouster. If the circumstances justify the opinion that possession must have become adverse at some time, a Judge is not in reality presuming an ouster: he rather gives effect to his opinion despite the absence of the proof of ouster which a co-owner ordinarily be required to adduce. This aspect of the matter was touched upon by Bertram C.J. in *Tillekeratne* vs. *Bastian*, 21 N. L. R. 12, (at page 18).

The principle as stated in judgments of Bertram C.J. in *Tillekeratne* vs. *Bastian*, 21 N. L. R. 12, and of Ennis J. in *Hamidu* vs. *Ganitha*, 27 N. L. R. 33, that the inference of ouster can only be drawn in favour of a co-owner upon proof of circumstances additional to mere long possession, has been consistently recognized and strictly applied. To draw that inference from mere duration of possession would be to disregard the very terms in which they stated the principle, and to ignore the requirement of an "adverse or independent title" prescribed in section 3. Moreover, if exclusive possession alone is to suffice, after what period will it be just and reasonable to presume ouster? There being nothing in the section to the contrary, a particular Judge may well be inclined to presume ouster from possession for a period of ten years: but if another Judge declines to do so unless the period is much longer, can it be said that one Judge is right and the other wrong? Will not such a situation be reminiscent of the days when the principles of Equity were said to vary with the length of the Chancellor's toe? The proposition we are invited to uphold is not only contrary to settled law; it contains no criterion by the application of which consistency of judicial decisions can be reasonably expected.

Our Courts have constantly recognized the rule that undisturbed and uninterrupted possession by a co-owner does not suffice to entitle him to a decree unless there is proof of the ouster of the other co-owners. The decision in *Tillekeratne* vs. *Bastian*, 21 N. L. R. 12, recognized an exception to that rule and permits adversity of possession to be presumed in the presence of circumstances additional to the fact of undisturbed and uninterrupted possession for the requisite period. If the true effect of the exception is that the fact of such possession *simpliciter* establishes a title "adverse or independent", what need is there for a co-owner to prove ouster and what scope remains for the operation of the rule? What need for a co-owner to prove anything more than is required of a trespasser?

I would hold for the reasons stated that the 13th defendant was entitled only to the one-third share which accrues to him under the deed which created the *fideicommissum*, and that he did not acquire any title by prescription to any other share. The judgment of the District Judge has therefore to be affirmed, subject to the correction of one error therein. As stated in the judgment, it is only the fifth *fideicommissary* heir who holds the property free of the *fideicommissum*. It was common ground at the hearing of the appeal that none of the parties are of the fifth generation. Accordingly, the *fideicommissum* attaches to all the shares allotted in the judgment and to the proceeds of sale, except to the 1/9 share referred to by my brother de Silva. I agree with the order proposed by him.

Appeal dismissed.

Privy Council Appeal No. 24 *of* 1957

Present : VISCOUNT SIMONDS, LORD TUCKER, LORD JENKINS, LORD MORRIS OF BORTH-Y-GEST, MR. L. M. D. DE SILVA.

BEATRICE SUNEETHRA PERERA *vs.* N. A. PERERA AND OTHERS

From

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

DELIVERED THE 8TH MARCH, 1960

Exceptio rei venditae et traditae—J, owner of a land in financial difficulties—J represents to L by document that his several debts amounted to Rs. 16,000/-—*Land sold to L for Rs.* 16,000/- *subject to right of re-transfer within five years—Death of L and his title passing to daughter—Daughter in possession as new owner and acknowledged by J and his wife, the appellant,—Same land sold in execution of decree, notice of seizure under which registered and served at the time of sale to L—This decree not disclosed in document indicating total liabilities amounting to Rs.* 16,000/-—*Sale by Fiscal in execution of this decree—Purchase by third party who conveys to J's nominee, his wife—Action for declartion of title and eviction by J's nominee against L's daughter—Civil Procedure Code, Section* 238—*Meaning of the words " all persons "*.

J, who owned a property worth about Rs. 30,000/-, was in financial difficulties. This property was under seizure in several cases. L, an uncle of J, reluctantly agreed to assist J. to settle his debts to prevent the said property from being sold in execution on J indicating by a document that his several debts totalled Rs. 16,000/-. In 1950, J conveyed the said property to L for Rs. 16,000/-, subject to the vendor's right to repurchase it for the same amount within five years. The deed contained the usual warranties and the assurance that the vendor would execute or cause to be executed all such further acts .....deeds ..... for the further and more perfectly assuring the said premises ..... as may be reasonably required. The Rs. 16,000/- was paid to the creditors disclosed in the said document, and L was placed in possession.

Later L died and the property passed to his daughter, the 2nd respondent, whom J and his wife—the appellant—acknowledged as the new owner.

When J. indicated to L. the extent of his liabilities in 1950, he had inadvertently omitted to mention another debt payable under decree in case No. 9041/S D.C. Colombo. At the time of the conveyance to L, a notice of seizure under section 237 of the Civil Procedure Code in execution of the said decree had been served on J and registered. The Fiscal sold the said property in execution and was purchased for Rs. 250/- by T, a third party, who, a few days after obtaining the Fiscal's conveyance sold the premises for Rs. 3,000/- to J's nominee and wife, the appellant who instituted this action against L's devisee and others occupying under her for a declaration of title and eviction.

The District Judge held that the transfer to L was void under section 238 of the Civil Procedure Code and that J's nominee, the appellant got good title from T. In appeal the Supreme Court held that the benefit of appellant's title passed immediately to L's devisee (2nd respondent) under the Roman Dutch Law doctrine of the *exceptio rei venditae et traditae*.

On an appeal to the Privy Council, from the judgment of the Supreme Court,

Held : (1) That the view taken by the Supreme Court was correct.

(2) That, though the words " all persons " in section 238 of the Civil Procedure Code are *ex facie* wide enough to include the judgment-debtor himself, having regard to the purpose for which the section was enacted, namely to protect persons against the acts of the judgment-debtor, it must be said that in this context, by implication these words do not include the judgment-debtor.

(3) That to hold that J is rendered immune by section 238 from the consequences of his act, namely the conveyance to L would be to permit gross injustice.

(4) That if section 238 does not render void, as between themselves, the deed of conveyance from J to L there is no statutory provision which hinders the operation of the common law.

(5) That, therefore, the title passed by operation of law automatically from the appellant as J's nominee to L's devisee under the doctrine of the *exceptio rei venditae et traditae*.

Cases cited : *Anund Lall Doss vs. Shaw* (1872) Sutherland's Weekly Reporter, p. 313.
Gunatilleke vs. Fernando (1921) 22 Ceylon N. L. R. 385.

Mr. L. M. D. de Silva

This is an action for declaration of title brought in July, 1951, by the appellant in the District Court of Colombo in respect of certain property which had previously been sold by her husband one Julius Perera to one Lewis on Deed D 9 of the 17th April, 1950. Lewis had died in August, 1950, leaving the property to his daughter the second respondent who was the second defendant in the action. Probate of Lewis' will was issued to the second defendant's husband who was the first defendant and is the first respondent. The appellant also asked for an order of eviction. The third, fourth and fifth respondents are persons in occupation under the second respondent.

The learned District Judge gave judgment for the appellant subject to the payment by her of a sum of Rs. 12,304.79 as compensation to the respondent. This compensation was in respect of a similar sum belonging to Lewis which had been utilised to pay off a mortgage on the property.

The appellant and respondent both appealed to the Supreme Court. The former complained that the order for compensation was insupportable and the latter contended that the appellant was not entitled to a declaration of title or to a writ of ejectment. The Court of Appeal (Gratiaen, J., with whom Gunasekara, J., agreed) held that the respondent was entitled to succeed, set aside the order of the District Judge and dismissed the action. For reasons which follow their Lordships are of opinion that the decision of the Supreme Court must be upheld. In view of that opinion the correctness of the order for compensation does not arise for consideration.

The Supreme Court accepted the findings of fact of the District Judge and those that are relevant to a decision of this appeal can be shortly stated. The appellant (plaintiff) has been found to be a nominee of Julius her husband. At the end of 1949 and in the beginning of 1950 Julius was in serious financial difficulties. His property was under seizure in several cases one of which was D. C. Colombo 9041/S. In that case judgment had been entered for Rs. 1,000/- and interest payable on a promissory note. In April, 1950, Lewis, who was Julius' uncle, reluctantly agreed to assist Julius to settle his debts so as to prevent his property, worth about Rs. 30,000/-, from being sold in execution. He received from Julius a document indicating that Rs. 16,000/- was required to meet his liabilities. An agreement was arrived at and was implemented on the 17th April, 1950, whereby Julius sold the property to Lewis for Rs. 16,000/- subject to the vendor's right to repurchase it for the same amount within five years. The conveyance contained the following warranties and assurances :—

> " And I the said vendor for myself and my heirs, executors, administrators and assigns do hereby covenant, promise and declare with and to the said vendee, his heirs, executors, administrators and assigns that the said premises hereby sold and conveyed are free from any encumbrance whatsoever and that I have not at any time heretofore made done or committed or been party or privy to any act, deed, matter or thing whatsoever whereby or by reason whereof the said premises or any part thereof are, is, can, shall or may be impeached or encumbered in title, charge, estate or otherwise howsoever and that I and my aforewritten shall and will at all times hereafter warrant and defend the same or any part thereof unto him and his aforewritten against any person or persons whomsoever and further also shall and will at all times hereafter at the request of the said vendee or his aforewritten do and execute or cause to be done and executed all such further and other acts, deeds, matters, assurances and things whatsoever for the further and more perfectly assuring the said premises hereby sold and conveyed and every part thereof, unto him or his aforewritten as by him or his aforewritten may be reasonably required ".

The Rs. 16,000/- was paid to the creditors whose names had been disclosed in the document handed by Julius to Lewis. At the same time Lewis was placed in possession of the property as owner and Julius acted as rent collector from his former tenants who attorned to Lewis. When Lewis died and the property passed to the second respondent the appellant and Julius acknowledged her as the new owner.

The material upon which the appellant's case was constructed arose from the following further facts. When Julius persuaded Lewis in April, 1950, to save the property from forced sales he had (perhaps through inadvertence as stated by the Supreme Court) omitted to mention in the statement of his debts the debt payable under the decree in D.C. Colombo No. 9041/S (mentioned above) under which at the time a notice of seizure under section 237 (1) of the Civil Procedure Code (set out below) had been served on him and registered. Lewis was unaware of the decree and of the seizure. It will be seen presently that the appellant (Julius' nominee) is claiming on a title derived through execution proceedings in case 9041/S against Julius. The registration of the seizure had been kept alive by the judgment-creditor's proctor, a Mr. Rasanathan. In

pursuance of the seizure the property was put up for sale by the Fiscal and purchased in February, 1951, for Rs. 250/- by one Thiagarajah who was Rasanathan's father-in-law. He has been held by the Courts in Ceylon to have been Rasanathan's nominee. A few days after Thiagarajah had obtained a Fiscal's Transfer on the sale in execution he sold it to the appellant for Rs. 3,000/-. She then instituted this action. In effect Julius is trying to evict the devisee from Lewis to whom he had transferred the property and who had helped him out of his difficulties.

The learned District Judge held that Thiagarajah was a nominee of Rasanathan but found that it was " not possible to hold that Thiagarajah was a nominee for Julius Perera ". Chiefly for this reason he was unable to hold that the execution proceedings were a fraud contrived by Julius (as alleged by the respondent) and the Supreme Court found itself " unable to hold that the learned Judge was wrong in rejecting this argument (of fraud) on the evidence before him. " The District Judge held that the transfer to Lewis was void under the provision of section 238 of the Civil Procedure Code (set out below) and that the appellant, though Julius' nominee, got good title from Thiagarajah and that she was entitled to succeed. The Supreme Court held that although the title passed through the execution proceedings in the first instance to the appellant the benefit of that title passed immediately thereon to Lewis' devisee under the Roman Dutch Law doctrine of the *exceptio rei venditae et traditae.*

The only question which arises on this appeal is whether the Supreme Court was right in so holding. It will be necessary to consider the doctrine itself and also whether the sections of the Ceylon Procedure Code referred to above in any way hinder or modify the application of the doctrine.

Sections 237 and 238 are to the following effect :—

" 237.—(1) If the property is immovable, the seizure shall be made by a notice signed by the Fiscal prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift or otherwise ".

The only other subsection of this section has no bearing on the questions arising in this case.

" 238. When a seizure of immovable property is effected under a writ of execution and made known as provided by section 237 and notice of the seizure is registered before the first day of January, nineteen hundred and twenty-eight, in the book formerly kept under section 237 or is registered on or after the first day of January, nineteen hundred and twenty-eight, under the Registration of Documents Ordinance, any sale, conveyance, mortgage, lease, or disposition of the property seized, made after the seizure and registration of the notice of seizure and while such registration remains in force is void as against a purchaser from the Fiscal selling under the writ of execution and as against all persons deriving title under or through the purchaser ".

It is argued for the appellant that as a purchaser from Thiagarajah she is a person " deriving title under or through the purchaser " at the fiscal's sale and that consequently section 238 makes " void " as against her (and in effect against Julius she being Julius' nominee) the conveyance by Julius to Lewis. Their Lordships do not agree.

As observed by the Supreme Court the words " all persons " in section 238 are words of the " utmost generality " and " are ex facie wide enough to include the judgment-debtor himself ". But the section has been designed and enacted to protect persons against the acts of the judgment-debtor and not to protect or to benefit the judgment-debtor himself. The implication therefore arises that in this context " all persons " do not include the judgment-debtor. It is reasonable and just to hold that such an implication arises and the necessity for so holding is illustrated by the facts of this case. To hold that the judgment-debtor is rendered immune by section 238 from the consequences of his own act, namely the conveyance by him to Lewis, would be to permit gross injustice because by so holding Julius who had sold a property and had had the advantage of the consideration would be enabled to evict his vendee (actually vendee's devisee). He would do so by taking advantage of a consequence of the non-disclosure by him to Lewis (whether deliberately or by inadvertence it matters not) of something he should have disclosed namely the decree and seizure in case 9041/S. If this disclosure had been made Lewis would without doubt have paid off the judgment debt or made some other arrangement before accepting the conveyance from Julius.

Their Lordships observe that in the case of *Anund Lall Doss* v. *Shaw* (1872 Sutherland's Weekly Reporter p. 313) the Board, dealing with a section of the Indian Civil Procedure Code which declared " null and void " a private

alienation after a seizure in execution proceedings had been effected, thought it could not be " null and void against all the world including even the vendor ". The language of the section was in many ways different from section 238 and the facts in the case were also different but the view expressed supports the view taken by their Lordships.

If, as held by their Lordships, section 238 does not render void as between themselves the deed of conveyance from Julius to Lewis there is no statutory provision which hinders the operation of the common law. Their Lordships are of opinion that the title passed by operation of law automatically from the appellant as Julius' nominee to the second respondent under the doctrine of the *exceptio rei venditae et traditae* at the moment that Thiagarajah transferred the property to the appellant. This doctrine and its development are discussed in a judgment of the Board delivered by Lord Phillimore in *Gunatilleke* v. *Fernando* (1921) 22 Ceylon N.L.R. 385. Relying on the authority of Voet Book 21 Title 3 he there set out in terms appropriate to that case the basic principle relevant to the present case thus :—

> " under this exception the purchaser who had got possession from a vendor, who at the time had no title, could rely upon a title subsequently acquired by the vendor ".

In the present case it might perhaps be suggested that it could not be said that Julius (at the time he executed the conveyance in favour of Lewis) had no title. It could be suggested that he had a title which he could not alienate. A reference to the authority relied on by Lord Phillimore shows that the *exceptio* is applicable to such a case. Voet Book 21 Title 3 Section 1 (Gane's translation) is to the following effect :—

> " When the right of an alienator is confirmed the right also of him to whom if you have regard to the start of the matter, the alienation had been wrongfully made, is confirmed at the first moment of acquisition of ownership by the original vendor ".

Any " alienation wrongfully made " and not necessarily an alienation by a person without title is covered. Julius when the was under a prohibition against alienation made a wrongful alienation which was ineffective and the doctrine is applicable to his conveyance. It will also be seen that under the doctrine " at the first moment of acquisition " of title by Julius (under the deed in favour of his nominee) that title passed to the second defendant as Lewis' successor.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed. As the respondents have not appeared there will be no order as to costs.

Appeal dismissed.

Present : Basnayake, C.J., and De Silva, J.

BATUWANTUDAWA *vs.* SELVADURAI AND ANOTHER

S. C. No. 302/57—*D. C. Kegalla No.* 10160/L

Argued and Decided on : 8th December, 1959.

Civil Procedure Code, Section 247—*Action under, for declaration that a deed by judgment-debtor alienating property to another be set aside—Alienated property acquired by judgment-debtor after judgment debt—When may such alienation become fraudulent.*

Held : That the alienation of property acquired after the judgment debt cannot be said to be fraudulent except in a case where the creditor has been induced by the debtor to believe that after-acquired property would be available to him and he has in the belief that that property would be available for the recovery of his debts given the debtor credit.

Per Basnayake C.J.—The law is not that a judgment-debtor may never after a judgment has been entered against him alienate his property nor is the law that a judgment-debtor who inherits property after a judgment has been entered against him is not free to alienate his inherited property until the judgment-debtor chooses to execute his decree especially as under our law there is no time limit to the first application for the execution of a decree.

H. W. Jayawardene, Q.C., with *D. R. P. Goonetilleke*, for the 2nd Defendant-Appellant.

S. Sharvananda for the Plaintiff-Respondent,

BASNAYAKE, C. J.

In February 1947 in D. C. Colombo case No. 7248/S the plaintiff Selvadurai obtained judgment against Upali Batuwantudawa the 1st defendant in a sum of Rs. 12,075/28. On a writ of execution issued in that case he seized on 30th December 1954 the right, title and interest of the 1st defendant in an estate known as Dangolla Estate in the Kegalle District. On 17th January 1955 the 2nd defendant claimed the property as his on a deed No. 105 of 15th December 1953 attested by Notary Abraham of Colombo (P4). By that deed Upali Batuwantudawa in consideration of a sum of Rs. 5,000/- paid by his brother Ananda Batuwantudawa transferred to him the former's right title and interest in Dangolla Estate. On 11th May 1955 the District Court of Kegalle upheld the claim of the 2nd defendant. The plaintiff thereupon instituted this action on 23rd May 1955 praying a declaration that deed No. 105 executed by the 1st defendant Upali Batuwantudawa in favour of the 2nd defendant Ananda Batuwantudawa be set aside as being in fraud of creditors, and that the 1st defendant's right, title and interest in Dangolla Estate be declared liable to be seized and sold on the writ issued in the Colombo case. He alleged that he had obtained judgment for a sum of Rs. 12,075/28 in the District Court of Colombo case No. 7248 that after the decree the defendant had paid a sum of Rs. 3,959/96 and that the balance was still due from the 1st defendant. The plaintiff's plaint was amended on 29th September 1956 by the addition to paragraph 6 of the plaint of the words " in fraud and in collusion of (*sic*) the 2nd defendant ". The 1st defendant did not file answer nor did he appear at the trial.

The 2nd defendant denied the allegations in the plaint, and specifically denied the allegation that deed No. 105 was executed in fraud of creditors and put the plaintiff to the proof thereof. He also pleaded that the plaint disclosed no cause of action. Among the matters in dispute submitted for decision is the following vital issue which was answered against the 2nd defendant-appellant.

> " (5) Was such alienation (*a*) in fraud of creditors, including the plaintiff (*b*) did the said alienation render 1st defendant insolvent and unable to meet the claim of the plaintiff (*c*) was the said alienation executed in fraud and in collusion between 1st and 2nd defendants (*d*) without consideration. "

The learned District Judge held that the 1/12th share of the 1st defendant was sold for no consideration and that in respect of that share the sale was in fraud of his creditors. It would appear from the evidence that the 1st and 2nd defendants who are brothers inherited 1/12th share each of Dangolla Estate which is in extent 195 acres and planted with rubber and coconut. On 10th December, 1951 by deed No. 1383 of that date attested by Peter Daniel Anthonisz Mack, Notary Public, the 2nd defendant sold to one Don Charles Wijewardene for a sum of Rs. 5,000/- his interests in the estate. On the same day by deed No. 1384 attested by the same notary Don Charles Wijewardene agreed to sell the interests purchased on deed No. 1383 to the 1st defendant within a period of three years on payment of a sum of Rs. 6,000/-. By deed No. 1464 of 15th December, 1953 attested by Peter Daniel Anthonisz Mack, Don Charles Wijewardene conveyed the interests purchased by him on deed No. 1383 to Upali Batuwantudawa the 1st defendant. On that very day the 1st defendant executed deed No. 105 in favour of the 2nd defendant for a consideration of Rs. 5,000/- (P4). The 2nd defendant stated in evidence that he subsequently paid his brother a sum of Rs. 7,000/- and also advanced to him a sum of Rs. 6,000/- in May 1953. The 2nd defendant's evidence as to the payment of the consideration on the deed No. 105 (P4) is uncontradicted. He has produced the account books of the estate in support of his statement. The learned trial Judge has rejected the evidence of the account books on the ground that they are in his view fabricated. We are unable to find in the evidence support for the view formed by him and we think that he acted wrongly in rejecting the evidence afforded by the account books. Learned counsel for the appellant has drawn our attention to the relevant entries in the account books. We are satisfied that they support the 2nd defendant's claim that he paid his brother for the transfer of his share. It does not appear that that evidence has been scrutinised by the learned District Judge with the care that it deserved.

In an action based on fraud or collusion or both the plaintiff must prove those allegations. In the instant case it is not established that Upali Batuwantudawa's transfer to his brother was in fraud of his creditors. The decree in the plaintiff's favour was entered in 1947. The plaintiff continued to lend money to the 1st defendant even after the decree. The deed which the plaintiff seeks to impugn was executed in 1953 and the interests the 1st defendant sold thereunder were those inherited by him from his mother on her death several years after the judgment.

Alienation by a judgment debtor of property inherited by him several years after a judgment against him cannot be said to be in fraud of the judgment-creditor. The law is not that a judgment-debtor may never after a judgment has been entered against him alienate his property nor is the law that a judgment-debtor who inherits property after a judgment has been entered against him is not free to alienate his inherited property until the judgment-debtor chooses to execute his decree especially as under our law there is no time limit to the first application for the execution of a decree. It is the diminution of the estate which the debtor had already acquired that is reckoned as a fraud done to the prejudice of the creditors. The alienation of property acquired after the judgment debt cannot be said to be fraudulent except in a case where the creditor has been induced by the debtor to believe that after acquired property would be available to him and he has in the belief that that property would be available for the recovery of his debts given the debtor credit. In the instant case the judgment-creditor does not claim that he was moved by any such consideration. He appears to have extended credit to the judgment-debtor in the hope that he would be returned as a member of Parliament at one of the many elections at which he sought the franchise. In this connexion it must not be overlooked that the law does not encourage delay in the execution of decrees (ss. 337 and 347 Civil Procedure Code) and a judgment-debtor who refrains from executing his decree for as much as eight years cannot be in a more advantageous position than if he had been prompt. In the course of the trial the bad character of the 1st and 2nd defendants seems to have been elicited both in examination-in-chief and in cross-examination and we are unable to see the relevance of it. The learned trial Judge appears to have been influenced by that evidence.

We accordingly set aside the judgment of the learned trial Judge and dismiss the plaintiff's action with costs in both courts.

Set aside.

De Silva, J.

I agree.

Present : Weerasooriya, J. and H. N. G. Fernando, J.

C. L. D. PERERA *vs.* A. H. C. ABEYWARDENE

S. C. 607 *F*/1957—*D. C. Colombo No.* 38557/*M*

Argued on : 2nd October, 1959 and 3rd December, 1959.

Decided on : 16th June, 1960

Manufacture of Matches Ordinance, Chapter 131, *Legislative Enactments—Licence to manufacture matches—Partnership—Bequest of Share in partnership asset by deceased partner—Use by surviving partner of such asset after dissolution—Right of devisee to profits arising by use of such share.*

A licence to manufacture matches was issued by the Director of Industries in 1949 to one Mrs. Iddamalgoda and the defendant "trading under the firm, name and style of D. G. Iddamalgoda". Iddamalgoda died in 1950 having bequeathed by last will to the plaintiff her interest in the licence and her interest in the partnership business of making matches. The defendant continued to use the licence in the business representing to the Director that the business and the licence were carried on and held in partnership.

Held : That the licence was a partnership asset and that the plaintiff as devisee of the deceased's interest in the partnership was entitled to receive such share of the profits since dissolution as could be attributable to the use of the license.

C. Renganathan for the plaintiff-appellant.

E. B. Wikramanayake, Q.C., with *V. Ratnasabapathy* for the defendant-respondent.

H. N. G. FERNANDO, J.

For the purposes of this judgment it is necessary to set out in some detail an account of the facts upon which the present dispute arises. One Mrs. Iddamalgoda was prior to November, 1939 the holder of a licence to manufacture matches which had been issued under Chapter 131 of the Legislative Enactments. That Ordinance prohibits the manufacture of matches except by persons holding licences thereunder, and allows to each licencee a manufacturer's quota, *i.e.* a particular number of cases of matches which he may manufacture each month. In Mrs. Iddamalgoda's case, the quota allowed by her licence was 10 cases per month. In November 1939, she entered into an agreement (P1) with the Defendant by which she leased her rights in the licence to the Defendant for a period of ten years in consideration of the payment to her of Rs. 7/50 per month per case of the quota allowed by the licence and of the payment in addition of Rs. 3/- per month per case in the event of the quota being increased. Again in 1940, it appears that Mrs. Iddamalgoda sold a half-share of the licence to a third party, who in turn sold that half-share to the Defendant. The result of these transactions, as apparently accepted by the parties, was that from 1940 the Defendant was regarded as the owner of a half-share of the rights under the licence, and Mrs. Iddamalgoda as the owner of the remaining half-share, but that this remaining half-share was held by the Defendant as lessee subject to his liability to make the payments above-mentioned in respect of half only of the number of cases allowed by the quota. The legality of these transactions, having regard to the provisions of the Ordinance, is not relevant for present purposes, and the Defendant appears to have honoured his obligations as under the agreement of lease.

The licence to which I have referred must apparently have expired in 1949, for in January 1949 a new licence was issued to "Rosalind Anestia Iddamalgoda and A. H. C. Abeywardene trading under the firm, name and style of D. G. Iddamalgoda of Maha Mega, Maharagama, and Dehiwela" to be in force for 10 years from 1st February 1949, allowing a monthly quota of 50 cases. It would appear from the evidence and the claim of the Plaintiff, who was the only witness at the trial, that after the issue of the new licence as well, the Defendant was regarded as the owner of a half-share of the interests under the licence, and as the lessee of the remaining half-share on terms identical with those stipulated in the lease of 1939, and that accordingly Mrs. Iddamalgoda received from the Defendant Rs. 7/50 per month in respect of 5 cases (one-half of the ten referred to in the lease agreement) and Rs. 3/- per month in respect of 20 cases (one-half of the increase over the former quota of 10 cases). According to this apportionment, Mrs. Iddamalgoda would have been entitled to a payment of Rs. 97/50 per month.

Mrs. Iddamalgoda died in 1950 leaving a last will by which she bequeathed to the Plaintiff her rights and privileges under the Ordinance, which meant obviously her interest in the licence, and her interests in the Pound Mark Safety Match Manufacturing Business. The Plaintiff had sued the Defendant in Action No. 26536 in respect of a half-share interest for the period ending on 30th May, 1952. The Defendant did not contest that Action, and Judgment was entered against him. The present action is for the recovery of a sum calculated at the rate of Rs. 97/50 per month for the period 1st June 1952 to 31st May, 1956.

In examining these facts, it is important to note that the "current licence" for present purposes is that issued on January 31st, 1949, in the name of Mrs. Iddamalgoda and the Defendant "trading under the firm, name and style of D. G. Iddamalgoda" a designation denoting that the deceased lady and the Defendant had represented themselves to the Director of Industries as being partners of the firm, and had been accepted as such by the Director. Furthermore, in his Notification D2 of March 5th 1956, issued after the death of Mrs. Iddamalgoda, in which the Director gave notice of his intention to issue a licence to the "legal successor of Mrs. Iddamalgoda", the Director reiterated the fact that the 1949 licence had been issued "under the firm name", and stated that the Defendant "as the sole surviving partner" of the firm, was the legal successor of Mrs. Iddamalgoda's right, title and interest in the business to manufacture matches. There being in the case the evidence only of the Plaintiff and the documents the only justifiable inference is that, both prior to the issue of the 1949 licence and again after the death of Mrs. Iddamalgoda, the Defendant had represented to the Director that the business and the licence were carried on and held in partnership. These circumstances appear unfortunately to have escaped the attention of the trial Judge. Even more unfortunate is the fact that both he and

counsel for the Defendant appear to have been misled by a Notice in the "Government Gazette" dated 27th January 1949 in which the Director of Commerce notified *his intention* to issue the relevant licence to the Defendant. Apparently this Notice induced counsel to frame, and the learned Judge to answer in the affirmative, the following issues :—

> " 6. Did the Defendant by notification published in the "Government Gazette" No. 9,945 dated 3-2-49 obtain a licence to manufacture 600 cases of safety matches per annum ?
>
> 7. If so, was the defendant entitled to manufacture matches in his own name as from that date ? ".

The trial Judge has held that the licence of 1949 was issued *by mistake* to Mrs. Iddamalgoda and the Defendant jointly. I need not refer to his reasons for that conclusion (with which I feel compelled to disagree), because no issue was framed at the trial as to the validity of the 1949 licence, and because the Defendant should surely have been precluded from canvassing such a question having regard to the fact that he represented himself in 1956 to the Director of Industries as the " legal successor " of Mrs. Iddamalgoda and the sole surviving partner of the firm which held the 1949 licence. The fact that Mrs. Iddamalgoda was no longer alive at the time of the trial would have placed an extremely heavy onus on the Defendant even if he had framed an appropriate issue and attempted to support it by giving evidence. The fact that the licence of 1949 was issued on January 31st, 1949 (four days subsequent to the date of the Gazette Notice) in the name of the firm must in the circumstances be taken to mean that the mistake, if any, was in the Notice or the decision which preceded it, and not in the licence itself.

Despite this erroneous finding, the learned Judge proceeded to consider other relevant issues on the assumption that Mrs. Iddamalgoda had in fact been a partner in the manufacturing business referred to in the licence and therefore a joint holder of the licence. (In the absence of evidence that the capital of the partnership exceeded Rs. 1,000/- that assumption had necessarily to be made on the material available). But even on that basis he held with the Defendant for the reason that in his view Mrs. Iddamalgoda's rights terminated at her death and did not pass under her last Will to the Plaintiff. While accepting the principle that in ordinary circumstances the Defendant would have been liable to account to the legal representatatives of his deceased partner for the profits arising from his use of the licence, the Judge did not apply that principle in this case, apparently in view of the provision of the following Regulation made under the Ordinance :

> " Regulation 6 (1) A : Upon the death of a person carrying on the business of manufacturing matches under a licence issued under the Ordinance, the Director may issue a licence to any applicant who appears to the Director to be a legal successor to the deceased's right and title to, and interest in, such business. "

The learned Judge was of opinion that under this Regulation it may have been open to the Plaintiff to ask for a licence in his name, as legal successor of the deceased lady, and appears to have considered that this was *the only means* by which the Plaintiff could, if at all, have derived the benefits of the rights bequeathed to him. It is fortunately not necessary for me to decide whether the terms of the Regulation are such as to be applicable upon the death of a partner of a partnership which is the holder of a licence. Since in such a case the person carrying on the business under the licence is *the partnership*, and not the individuals as such, it may be that the death of an individual partner would not bring the provisions of the Regulation into operation ; and if so, the situation that would exist (and for which the Regulations do not seem to provide), is not that a person carrying on the business has died, but that the partnership which held the licence has become dissolved by death.

But whether or not the Plaintiff had any rights under the Regulation, the fact remains that the licence, which was a partnership asset, continued to be utilized by the Defendant at least until May 31st 1956, and it is not the Defendant's case that the utilization of the licence was prohibited by statute. In fact it is not even clear that the same licence was not utilized by the Defendant after that date. (Because of a Notice published in the Gazette of March 9th, 1956, the learned Judge has assumed that the Defendant was thereafter granted a new licence solely in his own name ; but that being only a *Notice of Intention* to grant a licence, the finding that the Defendant did obtain such a licence should not have been reached in the absence of any evidence of the actual issue of the licence). It is clear law that where a surviving partner carries on the business of the firm with its capital or assets after the death of his partner, the legal representatives of the deceased

are entitled to such share of the profits since dissolution as the Court may find to be attributable to the use of his share of the partnership assets. (Partnership Act 1890, section 42; Lindley on Partnership 11th Edition, page 711, *et seq.*). The rights of a legatee (like the Plaintiff) are defined by Lindley (*idem*, page 759):—

> "A specific bequest by a partner of his share in the partnership clearly does not entitle the legatee to become a partner himself unless there is some agreement to that effect binding upon the surviving partner. The right of the legatee is simply to be paid the amount due to the testator at the time of his death in respect of his share; *and also*, under the circumstances and subject to the qualifications already noticed *to receive a proportion of the profits made since the testator's death.*"

The question whether a legatee can enforce these rights directly as against a surviving partner and whether his appropriate action is one to which the executor of the deceased partner's will should be made a party is again one which has not been raised in these proceedings and does not now arise for consideration.

The only estimate of the value to the Defendant of his utilization of the rights under the licence is that furnished in the Plaintiff's evidence. I would hold that the Plaintiff as the legatee of the deceased's interests in the assets of the partnership is entitled to a proportion of the profits determined according to that estimate.

The appeal is allowed and judgment will be entered for the plaintiff as prayed for with costs in both Courts.

Appeal Allowed.

WEERASOORIYA, J.

I agree.

Present : BASNAYAKE, C.J.

URBAN COUNCIL, TRINCOMALEE *vs.* AMJADEEN

S. C. No. 12—*Workmen's Compensation Case No. C/25/3/56*

Argued and decided on : 24th April, 1959.

Workmen's Compensation Ordinance—Burden of proof on the claimant—Can the Commissioner make order giving benefit of his doubt to the applicant.

That in a claim under the Workmen's Compensation Ordinance, the applicant must establish that the workman died in an accident arising out of and in the course of his employment.

It is wrong for a Commissioner to make an order against the employer giving the benefit of doubt to the applicant.

C. Renganathan, with *Siva Rajaratnam*, for the Respondent-Appellant.

No appearance for the Applicant-Respondent.

BASNAYAKE, C.J.

This is an appeal under the Workmen's Compensation Ordinance by the employer the Urban Council of Trincomalee. The only point taken by learned counsel for the appellant is that there is no evidence that death resulted from an injury caused to the workman by an accident arising out of and in the course of his employment. There has been no autopsy and the medical evidence does not establish that death resulted from an injury caused by an accident arising out of and in the course of his employment. The Commissioner has made an order against the employer on the ground that there is a doubt and that he proposes to give the benefit of the doubt to the applicant. This he cannot do and he is clearly wrong. It is for the applicant to establish that the workman died in an accident arising out of and in the course of his employment. The appellant is therefore entitled to succeed and I accordingly set aside the order of the Commissioner and allow the appeal. There will be no costs of the appeal.

Appeal allowed.

Present : K. D. DE SILVA, J AND H. N. G. FERNANDO, J.

ANNAPILLAI, *vs.* ESWARALINGAM AND OTHERS.

S. C. 471F—1957, *D. C. Point Pedro No.* 5279/*L*

Argued on : 15th and 16th June, 1960.

Decided on : 18th July, 1960.

Tesawalamai—Donation of tediatetam property by husband including wife's share—Has a husband the right to do so—Effect of sale by the donee to a bona fide purchaser for value—Right of wife to pre-empt share to which such donee had acquired title.

Held : (1) That a husband cannot, under the Tesawalamai, validly dispose of his wife's half-share of the tediatetam, if the acquisition took place before the date of operation of the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance, No. 58 of 1947.

(2) That where a husband purports to donate the whole of a property which forms part of the tediatetam, the donee acquires legal title only to the husband's half-share and the wife continues to remain vestee with her half-share, the effect of the conveyance being to constitute between the donee and the wifd the relationship of co-owners. Not only may she vindicate her share, but she has also the right of pre-emption as regards the share held by the donee and a sale by the donee to a *bona fide* purchaser for value without notice of the wife's rights cannot affect these rights.

(3) That a wife may sue alone to assert these rights, joining her husband as a defendant, should he refuse to join as plaintiff.

Cases referred to : *Seelachchy* vs. *Visuvanathan Chetty*, 23 N. L. R. 97.
Parasathy Ammal vs. *Manikam*, 3 N. L. R. 271.
Sampasivam vs. *Manikam*, 23 N. L. R. 257.
Tankamuttu vs. *Kanapathipillai*, 25 N. L. R. 153.
Iya Mattayar vs. *Kanapathipillai*, 29 N. L. R. 301.
Kumaraswamy vs. *Subramaniam*, 56 N. L. R. 44.
Sangarapillai vs. *Devaraja Mudaliyar*, 38 N. L. R. 1.
Wallmachy, wife of Cadergarmer vs. *Sinnayer Cadergamer and others. Muttukrishna's Notes on the Thesawalamai*, p. 263.
Mootar Sinnetamby vs. *Periar Aronen and others. Muttukrishna's Notes on the Thesawalamai*, p. 264.
Ramer Sangerepulle vs. *Comary Ramer and others. Muttukrishna's Notes on the Thesawalamai*, p. 258.
Walliamma, wife of Maylwagenam vs. *Maylwagenam, her husband and another. Muttukrishna's Notes on the Thesawalamai*, p. 16.

S. J. V. Chelvanayagam, Q.C., with *S. Sharvananda* for the plaintiff-appellant.

H. W. Jayawardene, Q.C., with *T. Arulanandan* and *L. C. Seneviratne* for the substituted defendants-respondents.

H. N. G. FERNANDO, J.

The plaintiff and the 4th defendant are wife and husband, and persons to whom the *Tesawamai* applies. The action is one for pre-emption of a share in a certain land which has been the subject of three transactions :—

(1) By the deed 3D2 of 19th October, 1943, the 4th defendant obtained a transfer in his name of a land described as being 10¼ lms. v.c. in extent from one Vyramuttu Nagalingam and his wife, Alankaran. The description in the Schedule to the deed indicates that the 10¼ lms. of land transferred was part of a larger divided extent of 16 lms. and 9 kulies.

(2) On 21st June, 1944, the 4th defendant joined with Vyramuttu Nagalingam and Alankaran in executing the deed 3D1, by which those three persons donated to the 2nd defendant an extent of about 14½ lms., comprising the 10¼ lms. dealt with by 3D2 and a further extent which had formed part of the larger divided extent of 16 lms. and 9 kulies.

(3) On 26th October, 1955, the 2nd defendant (joining with her husband the 1st defendant)

by 3D3 sold to the 3rd defendant either the whole or a part of the corpus which the 2nd defendant had received on 3D1 but clearly including the 10¼ lms. originally transferred to the 4th defendant by 3D2 of 1943.

The case for the plaintiff has been that the 10¼ lms. transferred to her husband by 3D2 of 1943 was property acquired by the husband during the subsistence of their marriage, and therefore *tediatatem*, and that accordingly the plaintiff became entitled to a half-share or 5⅛ lms. of the land, and her husband the 4th defendant to the remaining 5⅛ lms. On the assumption that the husband had no power to donate his wife's share and that the plaintiff remains entitled to her share, the plaintiff claims that the donation 3D1 was only effective to convey to the 2nd defendant the husband's half-share, and that, since the entire extent donated by 3D1 remained undivided, the plaintiff and the 2nd defendant had become co-owners of that extent. On this basis the plaintiff claims that she was entitled to notice of the prospective sale of the 2nd defendant's share, and for default of such notice that she is now entitled to pre-empt the share to which the 2nd defendant had title by virtue of 3D1.

A number of issues were framed at the trial, one of which raised the question whether the deed 3D2 of 1943 in favour of the plaintiff's husband, the 4th defendant, had been executed without consideration and in trust for the 2nd defendant. An affirmative answer to this issue would have disposed conclusively of the plaintiff's claims, for if the 4th defendant has been merely a trustee the land conveyed to him could not have formed part of the *tediatatem* of himself and his wife. It was also contended on behalf of the 3rd defendant (the ultimate purchaser on 3D3) that he was a *bona fide* purchaser without notice of the plaintiff's interests, although no issue on this question was framed. No evidence was led in regard to either of these two matters, nor was the trial judge invited to decide upon certain fundamental issues framed on behalf of the plaintiff, for the reason apparently that counsel on both sides were (understandably, I may say) eager to enter into the disputation of the interesting points of law which arise upon the transactions which I have mentioned. In the result, the judgement under appeal dealt only with what were regarded as preliminary issues of law, which, together with the answers given by the trial judge, are set out below :—

Issue 9 Is the plaintiff co-owner of the land described in the Schedule to the plaint within the meaning of the Pre-emption Act No. 59 of 1947 ?
Answer : No.

Issue 10 If not, can the plaintiff maintain this action ?
Answer : No.

Issue 13 Can the plaintiff maintain this action for pre-emption during the subsistence of her marriage with her husband the 4th defendant ?
Answer : No.

Issue 14 Does deed No. 19378 of 21-6-1944 executed by the 4th defendant convey title to the entirety of the extent dealt with by the said deed in favour of the 2nd defendant ?
Answer : Yes.

Issue 15 If the above issues are answered in the affirmative, is the plaintiff entitled to maintain this action ?
Answer : No. "

The answer to issue No. 9 depends mainly on the acceptance by the trial judge of the opinion expressed by De Sampayo J., in *Seelachchy* vs. *Visuvanathan Chetty*, (1922) 23 N. L. R. 97 that " a husband may, under the *Tesawalamai*, make a donation of the entirety of the acquired property just as much as admittedly he may sell or mortgage the same ". That opinion, if correct, would mean that the plaintiff's interest in the land ceased entirely upon the execution of 3D1, in which event she was never a co-owner with the 2nd defendant and therefore without status to seek pre-emption of the latter's share in the land.

De Sampayo J., did not follow the contrary decision in the much earlier case of *Parasathy Ammal* vs. *Sethupulle*, (1872) 3 N. L. R. 271 although Garvin A.J., regarded that decision as express authority for the contention that under the Tamil customary law a husband could only donate half the acquired property, and although Bertram C.J., accepted the same decision as correctly stating the law. The same statement of the law had been accepted by Schnieder A.J., in the case of *Sampasivam* vs. *Manikam*, (1921) 23 N. L. R. 257, which had been decided prior to *Seelachchy* vs. *Visuvanathan Chetty*, (1922) 23 N. L. R. 97. Indeed it is interesting to find that De Sampayo J., did not subsquently press his own former opinion, for he appears in his judgement in *Tankamuttu* vs. *Kanapathipillai*, (1923) 25 N. L. R. 153 implicitly to accept the limitation of the husband's power to donate only his own half-share. For completeness, I

should mention also the judgement to the same effect in *Iya Mattayer* vs. *Kanapathipillai*, (1928) 29 N. L. R. 301 where Dalton J., carefully considered the earlier decisions, and Gratiaen J.'s clear statement in *Kumaraswamy* vs. *Subramaniam*, (1954) 56 N. L. R. 44 that " an undivided half-share . . . . . had automatically vested in (the wife) the non-acquiring spouse, by operation of law ".

I am satisfied, therefore, that there is no longer any basis, in the decisions of this Court, for the view that a husband can under the *Tesawalamai* validly dispose of his wife's share of the *tediatatem*, if the acquisition took place before the date of operation of the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance No. 58 of 1947. The question whether that Ordinance has resulted in a change in the law regarding the husband's powers was given an answer by way of an *obiter dictum* in the judgement of Gratiaen J., mentioned above, but it does not arise for consideration on the facts of the present case. The learned District Judge has held that the 3rd defendant was a *bona fide* purchaser for value; this finding is unwarranted because no evidence was led at the trial and the point was not conceded by counsel who appeared on behalf of the plaintiff. It was however submitted to us that even if the plaintiff is successful in this appeal, the case will have to be remitted to the District Court, where it will be open for the 3rd defendant to establish this point by evidence. I shall therefore proceed to consider whether the plaintiff's claim can in law be met by a finding that the 3rd defendant had in fact purchased the property without notice of the plaintiff's interests.

In *Seelachchy* vs. *Visuvanathan Chetty* (1922) 23 N. L. R. 97, the husband had donated the acquired property to his son. After the husband's death, the property was mortgaged by the son and sold in execution of a mortgage decree to one of the mortgagees who was held to be a *bona fide* purchaser. The widow instituted her action against the purchaser to vindicate her half of the property. In the course of his judgement, holding against the widow, Bertram C.J., makes certain observations which, for purposes of the present appeal, it is useful to set out in some detail. The observations were to the following effect:—

(*a*) A *Tesawalamai* husband is restricted from disposing of the common property by donation to the extent of more than one half.

(*b*) The wife has a vested right to a share in each property as it is acquired, and not merely a share in the totality of the acquisitions at the dissolution of the marriage. " The idea of a community in all systems seems to be to import an *ipso facto* co-proprietorship in all properties which fall into the community ".

(*c*) The husband is the absolute manager of the community. If he ignores the limitation of his powers of donation and purports to make a gift of the whole of one of the acquired properties, his act is probably not *ipso facto* null so far as relates to the wife's share. " I am inclined to believe that the balance of authority is in favour of the proposition that the wife's remedy arises only on the dissolution of the marriage by way of compensation, and that at any rate, in the absence of express provision in the *Tesawalamai*, the principles of the Roman-Dutch law might well be adopted by analogy. The question, however, has not been very carefully examined, and it appears to me that it might well be left to be further elucidated in some subsequent case by evidence of local custom such as appears to have been frequently tendered in old *Tesawalamai* cases. It is not necessary to decide the case upon this ground, for, as I will proceed to show, even if the alienation by the husband within the local realm of the *Tesawalamai* would have been *ipso facto* void, and even though within these limits a *rei vindicatio* action from the beginning would have for the recovery of the property, no such action lies in the present case on grounds quite independently of the question just discussed ".

(*d*) " I hold that when the plaintiff's husband purchased the property now under consideration, he acquired it, in consequence of his marriage contract, subject to a constructive trust in favour of his wife, and that his wife was entitled to sue him for a formal conveyance of her interest, or, as Voet puts it, subject to a *necessitas communicandi*.

But the right so acquired by the wife could not prejudice any *bona fide* purchaser claiming from the donee of her husband, even though the gift to this donee was a breach of this constructive trust. "

It is on the last of these observations that counsel for the 3rd defendant now relies for his contention that, if the 3rd defendant is shown to have purchased the property by 3D3 of 1955 in good faith and for value, the plaintiff's title to a share must be held to have passed absolutely to the 3rd defendant; if this contention be correct then the plaintiff is not a shareholder and therefore has no status to maintain an action for pre-emption.

The application by Bertram C.J., of principles derived from the English law of Trusts to the case of an alienation by a *Tesawalamai* husband of the entirety of a land forming part of the *tediatatem* has not apparently been considered in subsequent judgements of this Court; our notice was not drawn during the argument of this appeal to any later opinion in agreement

with the view taken by Bertram C.J. In these circumstances I feel myself entitled to reconsider that view.

A " constructive trust " of the nature contemplated in the relevant part of Bertram C.J.'s judgement is one where the person holding the legal title or *dominium* is bound by trust law to hold the property for the benefit of another. In such a case, unless of course the express or implied terms of the trust prevent alienation, the trustee has an undoubted right to convey the legal title to a third party, who will then become the holder of the legal title, although he will himself ordinarily be bound to hold the property for the benefit of the beneficiary. The principle that a *bona fide* purchaser for value without notice of a trust will hold the legal title absolutely and free of the trust is the recognised exception to the general rule. The point which I wish to emphasise for present purposes in that a conveyance *by a trustee* can undoubtedly vest in a transferee either the same legal title held by him, or sometimes even a title freed from the trust. In the case of *tediatatem* the husband has, like a trustee usually has, unqualified power to convey the legal title by a *sale*. But (as indicated in the first part of this judgement) he has not the power to *donate* any more than a half-share of *tediatatem* property. A purported donation of the remaining half-share cannot, in my opinion, be equated to a conveyance by a trustee for the reason that the husband does not hold the legal title to that half-share. In the case of a *sale* the conveyance is fully effective, but only because (in the forceful language of Macdonell C.J. in *Sangarapillai* vs. *Devaraja Mudaliyar*, (1936) 38 N. L. R. 1) " the husband is the sole and irremovable attorney of his wife with regard to alienations by sale or mortgage ", and " for purposes of such alienation, the wife's *persona* is merged in that of the husband. ". If a husband's right to sell his wife's share flows from his possession of a status equivalent to that of an attorney in the modern law, then clearly he cannot be regarded as the holder of the legal title to the wife's share. The purpose of a power of attorney to sell is to confer a power of sale upon a person *who has not the legal title*, so that the status of an attorney is quite inconsistent with the status of an owner. In *Kumaraswamy* vs. *Subramaniam*, (1954) 56 N. L. R. 44, Gratiaen J., pointed out that it was quite wrong to suggest that the husband's power of alienation proceeds from the enjoyment of any *dominium* over the wife's share. Both Bertram C.J. (in his observations set out at (*b*) above) and Macdonell C.J. appear to acknowledge that by operation of law a *Tesawalamai* wife acquires a title to *tediatatem* property. Section 20 of Chapter 48 expressly provided (prior to 1947) that the *tediatatem* shall be property common to the two spouses, both of whom shall be equally entitled thereto. This concept of community of property, where the husband as the manager and head of the community has the power to sell his wife's interests, cannot in my opinion fairly be equated to that of a trust, where the title is vested solely in a trustee subject to obligations existing in favour of other persons.

It seems to me, therefore, that where *tediatatem* property is donated by a husband, the donee acquires legal title only to the husband's half-share and the wife continues to remain vested with her half-share, the effect of the conveyance being to constitute as between the donee and the wife the relationship of co-owners, and not the relationship of trustee and beneficiary. Indeed this proposition was implicit in Bertram C.J's own observation that a husband can validly donate only a half-share. Since the donee has title only to a half-share, it is in my view unreasonable to hold that, if the donee subsequently purports to sell the entirety of the property, he is a trustee of the other half-share. If the donee himself is not a trustee of the wife's share, no question can subsequently arise as to whether a purchaser from him is or is not bound by the trust.

Bertram C.J.'s opinion (though not acted upon in *Seelachchy* vs. *Visuvanathan Chetty*, (1922) 23 N. L. R. 97) that " the wife's remedy arises only on the dissolution of the marriage by way of compensation " is also adverse to the plaintiff's case. In this view the wife would not have the right to vindicate her half-share even from a donee to whom her husband has transferred the entirety of an acquired property ; and if her only right is to seek compensation from her husband or his legal representative after the marriage is dissolved by death or divorce, then clearly the wife could not be regarded as a co-owner with the donee for the purposes of the law of pre-emption. In his judgement in *Tankamuttu* vs. *Kanapathipillai*, (1923) 25 N. L. R. 153, De Sampayo J., regarded *Seelachchy* vs. *Visuvanathan Chetty*, (1922) 23 N. L. R. 97, as having decided that this right to compensation is the only remedy available to the wife. But as Dalton J., pointed out in *Iya Muttayer* vs. *Kanapathipillai* (1928) 29 N. L. R. 301, the opinion of Bertram C.J., now under consideration, was expressed only by him, and was not utilised even by him to

decide *Seelachchy* vs. *Visuvanathan Chetty*, (1922) 23 N. L. R. 97. Garvin J. obviously disagreed with that opinion while De Sampayo J., did not refer to it. With great respect, I am in agreement with the reasons stated by Dalton J., for his conclusion against the view that an unauthorised donation of acquired property by the husband can give rise only to a claim for compensation.

In *Iya Muttayer* vs. *Kanapathipillai*, (1928) 29 N. L. R. 301, the husband on 7th August, 1921, had purported to sell all the *tediatatem* lands to his brother. The transfer was obviously designed to deprive the wife's heirs of the right to inherit her half-share, for it was executed only two days before the death of the wife. It therefore amounted to a conveyance without valuable consideration, and was fairly equated to a *donation* to the brother. The wife's heir, her daughter, thereafter claimed the wife's share or, in the alternative, a sum of Rs. 750/- (being half the value of the land) as compensation. After examining the earlier decisions, Dalton J., held that the husband had no right to donate more than one half of the property, and that the daughter was entitled to a declaration of title (as against the donee) to the other one half. We see here that although the husband had purported to alienate full title before his wife's death, the wife's heir was held entitled to vindicate a half-share after her death. This could only be on the basis, firstly, that the wife was entitled to the half-share at the time of her death, and secondly, that immediately prior to her death she had the right to vindicate that share in an action against the donee ; unless she had enjoyed both these rights, the right of vindication could not have been transmitted to her heir. It is clear to me that the judgement of Dalton J., expressly decided in favour of the wife the question which I am now considering. The only difference in the present case is that here there has been a further purported alienation by the donee. But if, as I hold, the alienee cannot claim the benefit of the privilege which the Trust law affords to a *bona fide* purchaser without notice of a trust, that difference does not affect the wife's right to vindicate her share.

The following questions arise on issue No. 9: firstly, was the donation invalid as to the wife's share, secondly, did the wife by reason of the donation become a co-owner with the donee, and thirdly, was her legal relationship to the donee such as to confer on her the right of pre-emption of the share held by the donee? For the reasons stated above, these questions have all to be answered in favour of the plaintiff. I would further hold that the fact that the 3rd defendant may have had no knowledge or notice of the plaintiff's right to a half-share is of no relevance.

The next problem for consideration upon the issues decided by the trial judge is presented by Issue No. 13, and it is two-fold in nature. In so far as this issue raises the question whether the wife's remedy is restricted to a claim for compensation and does not include a right to vindicate her share from the donee or a subsequent alienee, I have already decided the question in favour of the plaintiff. But Mr. Jayawardene has argued another question which seems also to arise on the same issue, namely the question whether the wife can sue in her own right, or whether on the other hand her claim to pre-empt the outstanding share should not be preferred by her husband on her behalf, or else by both husband and wife as joint plaintiffs. Here again Mr. Jayawardene has relied on the rights of management conferred on the husband by the customary law, in virtue of which he has been described as the " irremovable attorney ". Mr. Jayawardene referred to two decisions noted in Muttukrishna's *Notes on the Tesawalamai*. The decision noted at page 263 is not relevant, for what was decided was that a wife cannot maintain an action against the husband to recover her dowry property unless she first obtains a divorce. The decision noted at page 264 was in a case where the acquired property apparently consisted of an *otty* mortgage and the wife sued the husband and the other *otty* holders to recover her share of the *otty* money. The decision that she could not maintain such an action is in accord with the principle that the husband as manager has the sole right to invest *tediatatem* moneys, and, therefore, the sole right to decide whether and when to sue for recovery. The reverse situation arose in *Sangarapillai* vs. *Devaraja Mudaliyar*, (1936), 38 N. L. R. 1, where it was held that the husband had the sole right to mortgage *tediatatem* property and that it was unnecessary to join the wife in an action upon the mortgage bond. Macdonell C.J., while referring to the husband's right of sale or mortgage, was careful to guard himself against any expression of opinion with regard to *donation* by the husband of the wife's half-share.

These cases only serve to establish the proposition that the husband is the proper person to sue or be sued when he makes *authorised*

investments of, or executes *authorised* encumrances over, acquired property.

Muttukrishna, at page 258 has a note of a case where the husband successfully sued his wife for a declaration that he was jointly entitled with the wife to a property purchased by the wife solely in her name, thus showing at least that the wife is competent *to be sued* in respect of acquired property held in her name. It is difficult to reconstruct the facts from a note in Muttukrishna, but there is a case noted by him at page 16 where a wife sued her husband and another in relation to property alleged to constitute acquired property of the spouses. A had first married B leaving a daughter, who was married to D and who had died leaving an infant child. A had contracted a second marriage to C. It would appear from the note that C sued her husband A and also A's son-in-law D in order to assert rights to property acquired by A prior to his second marriage. The suit by the wife seems to have been unsuccessful in that the Court decided that D, as the guardian of his wife's infant child, held all the dowry property of B as well as half of the property acquired prior to the second marriage. The legal problems presented by the facts of this case were referred to Commissioners for report—an indication that the case was probably contested with care. But no question appears to have been raised as to the competency of the wife to litigate with her husband and a third party in her attempt to assert her rights in acquired property.

It being clear law that a husband cannot validly donate the wife's half-share of the *tediatatem*, it would be unreasonable to suppose that a wife, although a co-owner with a person to whom the husband purports to transfer the entirety of the property, is powerless to assert her rights either by way of vindication or pre-emption, if the husband chooses to remain inactive. In the absence of any authority to the contrary or any express provision in the *Tesawalamai* debarring a wife from suing alone in such a case, I consider it only reasonable to apply in this situation the well-known practice that a party who should join as a plaintiff, but refuses to do so, may instead be joined as a defendant. In this way resort may, I think, be had to the principle *ubi jus ibi remedium*. I would accordingly hold that the plaintiff's action was properly instituted by the joinder of her husband as a defendant.

In the result the issues with which I have dealt have to be answered as follows :—

Issue No. 9 : "Yes"
Issue No. 10 : The question does not arise.
Issue No. 13 : "Yes"
Issue No. 14 : "No"
Issue No. 15 : The question does not arise.

The plaintiff's appeal is allowed, and the case is remitted to the District Court for trial on the other issues. But I must repeat that the question whether the 3rd defendant was a *bona fide* purchaser for value is of no relevance and should not be agitated. To avoid possible misunderstanding, I should point out once more that this judgement relates to property acquired *before* the Amending Ordinance No. 58 of 1947 came into operation.

Although I have for convenience referred in this judgement to the 3rd defendant, he died after the decree appealed from was entered, and the defendants 3A, 3B, and 3C were substituted in his place. These defendants must pay to the plaintiff the costs of the past proceedings in the District Court and the costs of this appeal.

K. D. de SILVA, J.
I agree.

Appeal allowed.

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

MOHAMED FAUZ AND ANOTHER vs. SALHA UMMA AND ANOTHER.

S. C. No. 242/57—D. C. Colombo, No. 6877/L.

Argued on : November 23 and 24, 1959.

Decided on : July 26, 1960.

Evidence, direct and hearsay—Evidence Ordinance, Section 60, 32 (5)—Effect of admission of hearsay into record without objection.

• *Last Will—Of no value unless probate granted—Evidence Ordinance, Section* 32 (6).

Held that: (1) A person is not qualified to give oral evidence of matters not within his personal knowledge unless Section 32, for example, applies. Such evidence would not satisfy the requirements of Section 60 of the Evidence Ordinance.

(2) Such evidence does not become legal evidence by the mere fact that it passed into the record of the proceedings unnoticed by the Judge or without objection being taken by the opposite side.

(3) An instrument purporting to be the Last Will of a person cannot be acted on as his Last Will unless it has been proved in the District Court in the manner prescribed by the Civil Procedure Code. Nor is such an instrument such a Will as is contemplated in Section 32 (6) of the Evidence Ordinance.

Sir Lalita Rajapakse, Q.C., with *C. Chellappah* and *D. C. W. Wickremasekera* for the Plaintiffs-Appellants.

H. W. Jayewardene, Q.C., with *M. Markhani* and *L. C. Seneviratne* for the 1st Defendant-Respondent.

P. Somatilakam with *N. R. M. Daluwatte* for the 2nd Defendant-Respondent.

BASNAYAKE, C.J.

In this action the five plaintiffs, M. M. Mohamed Fauz, M. M. Abdul Majid, M. M. Mohamed Cassim, M. M. Ainul Wadooda and Sulaima Lebbe Mohamed Shathy seek a declaration that they are entitled to premises No. 210, Old Moor Street in Colombo, as against the two defendants, Salha Umma, widow of Madina Marikar Hadjiar Cassim Lebbe Marikar, and S. P. K. Subbiah Pulle. They claim that they are the heirs of one Meera Lebbe Ibrahim Lebbe who owned the land and buildings in 1835. The second defendant is the tenant of the 1st defendant. He is prepared to attorn to the rightful owner whoever it be. The 1st defendant disputes the claim of the plaintiffs and asks that their action be dismissed.

The burden of proof is on the plaintiffs as the 1st defendant has denied all the material allegations in the plaint and specifically denied that either the plaintiffs or those from whom they claim title ever owned or possessed the house and land in dispute. The plaintiffs rely on the copy of a Will which they claim was executed by Meera Lebbe Ibrahim Lebbe on 4th April, 1835, and which they assert is his Last Will (P1). It is described as the true copy of a Last Will filed in D.C., Colombo, Case No. 24358/Testy but there is no evidence that it was proved in that case as the Last Will of Ibrahim Lebbe. An instrument which purports to be the Last Will of a person cannot be acted on as his Last Will unless it has been proved in the District Court in the manner prescribed by the Civil Procedure Code. The only evidence that a Will is a person's Last Will that may be admitted is the probate of that Will. We have so held in S.C. 402/D.C., Colombo, 6419/L—Supreme Court Minutes (Civil) of 23rd October, 1959.* In the instant case no probate has been produced. There is, therefore, no proof that the Will P1 is the Last Will of Ibrahim Lebbe. The case set out in the plaint of 3rd June, 1953, is—

(*a*) that Ibrahim Lebbe had two brothers—Cassim Lebbe and Ahamadu Lebbe—, three daughters—Sinnachchi Kandu, Candu Natchia, and Sewatha Umma (also referred to in the proceedings as Suwella Umma)—, and two sons—Ahamadu Lebbe and Abubucker Levve ;

(*b*) that the premises in dispute was bequeathed to Sewatha Umma who died intestate and without issue and leaving as her only heir her sister, Sinnachchi Kandu (also referred to as Sinnachchi Kannu) who died intestate leaving two sons—Naina Marikar and Sulaima Lebbe ;

(*c*) that Naina Marikar had four children—Kadija Umma, Pathumma Natchia,. Seyadu Mohammed, and Sulaima Lebbe ;

(*d*) that Kadija Umma by her first husband had four sons—Majeed, Wadood, Muheeth and Wahid ;

(*e*) that the 1st, 2nd, 3rd and 4th plaintiffs are the children of Muheeth who died in 1944 ; and

(*f*) that the 5th plaintiff is one of the two sons of Sulaima Lebbe.

The case for the plaintiffs rests entirely on the oral testimony of the 5th plaintiff. Although in examination-in-chief he traced the connexion of the four plaintiffs and himself to Meera Lebbe Ibrahim Lebbe, as if he were able to give direct

*See 58 C.L.W. 57.

evidence of the relationships of the past by blood and marriage, in cross-examination he revealed the fact that he had no personal knowledge of the matters of which he spoke to in his examination-in-chief. These are the relevant questions and answers :—

Q. Do you know who are the heirs of Suwella Umma ?

A. I am unable to say beyond the documents because at the time I was not born.

* * * *

Q. Therefore you could not have known who Suwella Umma's intestate heirs were ?

A. I do not know.

Q. Nor could you tell who Sinnachchi Kannu was ?

A. I was not born when Sinnachchi Kannu was alive ".

Among the matters in regard to which the 5th plaintiff gave oral testimony are the following :—

(*a*) the number of children Ibrahim Lebbe had,
(*b*) that Sewatha Umma was one of them,
(*c*) that she predeceased her elder sister, Sinnachchi Kandu,
(*d*) that Sewatha Umma died childless and intestate,
(*e*) that Sinnachchi Kandu was Sewatha Umma's sole heir,
(*f*) that on Sewatha Umma's death the premises in dispute passed to Sinnachchi Kandu, and
(*g*) that on Sinnachchi Kandu's death it passed to her children.

Admittedly these are not matters within his personal knowledge and unless he was able to testify to any statement made to him in regard to them by any deceased person who had special means of knowledge of those matters he was not qualified to give oral evidence of them at all, and he should not have been permitted to do so. Oral evidence must, in all cases whatever, be direct ; that is to say—

(1) if it refers to a fact which could be seen it must be the evidence of a witness who says he saw that fact ;
(2) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact ;
(3) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense or in that manner ;
(4) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. (Section 60, Evidence Ordinance).

The fact that no objection was taken to his testimony does not make the statements made by him legal evidence. Besides the function of admitting evidence is vested in the Judge (Section 136, Evidence Ordinance) and statements of facts which are not relevant under the Evidence Ordinance which pass unnoticed by the Judge or without objection by the opposite side are not legal evidence merely because they have been recorded by the shorthand-writer and are in the record of the proceedings.

The 5th plaintiff's version of the genealogy of the first four plaintiffs and himself is not relevant even as hearsay under Section 32 of the Evidence Ordinance because he does not testify to statements made to him regarding the relationships by blood and marriage by persons who had special means of knowledge and who are now dead (Section 32 (5)). The material in P1 as to the number of children of Ibrahim Lebbe, their names, and the bequests made to them cannot be admitted as relevant evidence under Section 32 (6) as there is no proof that that document is his Last Will. An instrument which purports to be a Will in respect of which probate has not been granted is not such a Will as is contemplated in Section 32 (6) and the statements made in such a document are not relevant. For hearsay testimony as to relationship by blood or marriage to be relevant it must satisfy the requirements of sub-section (5) or (6) of Section 32 which read—

(5) When the statement relates to the existence of any relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage, or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

(6) When the statement relates to the existence of any relationship by blood, marriage, or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait, or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

Once the 5th plaintiff's oral testimony and P1 are ruled out there is no proof of any of the material allegations in the plaint and the case of the plaintiffs must fail.

As against the failure of the plaintiffs to produce legal evidence in support of the allegations in their plaint the 1st defendant has produced a document (1D3) in which the father

of the first four plaintiffs as executor of his Last Will has stated on affirmation that the premises in dispute is the property *inter alia* of the 1st defendant's deceased husband, Madina Marikar Hadjiar Cassim Lebbe Marikar. The action of the plaintiffs should therefore have been dismissed.

The plaintiffs also claim that they and their predecessors in title have been in quiet and undisturbed possession of the premises for the last ten years and upwards. There is no proof of that claim. On the contrary the 1st defendant has established that she has received the rents of the house from the time of the death of the husband, Cassim Lebbe Marikar on 12th January, 1923, but she asks for nothing more than the dismissal of the plaintiff's action with costs, and that is what the learned District Judge should have done.

We therefore dismiss the plaintiffs' action.

The appeal is dismissed with costs.

Appeal dismissed.

SANSONI, J.

I agree.

Present: T. S. FERNANDO, J.

M. T. M. JIFFRY *vs.* NONA BINTHAN

S. C. Application No. 263 *of* 1960.—*Application in Revision in M. C. Colombo* 30980/A.

Argued on: 18th July, 1960.

Decided on: 1st September, 1960.

Maintenance—Illegitimate children of Muslim parents—Mother (applicant) not married to defendant—Application made to Magistrate's Court under Maintenance Ordinance—Does Muslim Marriage and Divorce Act, No. 13 *of* 1951 *give exclusive jurisdiction to Quazi.*

Held: That an application for maintenance in respect of illegitimate children made by their mother, who, has at no time been married to their alleged father, do not come within the special provisions of the Muslim Marriage and Divorce Act, No. 13 of 1951. They have to be prosecuted under the general statute—the Maintenance Ordinance.

Distinguished: *Abdul Gaffoor vs. Joan Cuttilan* (1956) 61 N.L.R. 89.

M. S. M. Nazeem (with him, *M. T. M. Sivardeen*) for the defendant-petitioner.

Malcolm Perera, for the applicant-respondent.

T. S. FERNANDO, J.

On the 29th January, 1960 the applicant-respondent made an application in the Magistrate's Court in terms of the Maintenance Ordinance (Cap. 76) claiming an order against the defendant-petitioner for maintenance in respect of her two illegitimate children aged 18 and 7 months respectively. She alleged that the defendant is the father of these two children. It is common ground that the applicant and the defendant are Muslims and that the applicant has at no time been married to the defendant.

The defendant took objection to the Magistrate entertaining the application on the ground that the Quazi appointed by the Minister for the area in question had exclusive jurisdiction to inquire into and adjudicate upon any claim for maintenance by or on behalf of a child of Muslim parents. On his behalf reliance was placed on Sections 47 (1) and 48 of the Muslim Marriage and Divorce Act, No. 13 of 1951. The learned Magistrate, relying upon a statement contained in the judgment of Fernando J. in *Abdul Gaffoor vs. Joan Cuttilan* (1956) 61 N.L.R. at 89, that the Kathi Court and the Magistrate's Court have concurrent jurisdiction to hear and determine applications for maintenance, decided that he had jurisdiction to adjudicate on the application. The proceedings before me are designed to canvass the correctness of the Magistrate's decision in regard to jurisdiction.

The relevant part of Section 47 (1) and the entirety of Section 48 of Act No. 13 of 1951 are reproduced below :—

47 (1). "The powers of the Quazi under this Act shall include the power to inquire into and adjudicate upon .... (*c*) any claim for maintenance by or on behalf of a child (whether legitimate or illegitimate) ; ".

48. "Subject to any special provision in that behalf contained in this Act, the jurisdiction exercisable by a Quazi under Section 47 shall be exclusive and any matter falling within that jurisdiction shall not be tried or inquired into by any other court or tribunal whatsoever."

It was argued on behalf of the defendant that the reference in *Abdul Gaffoor vs. Joan Cuttilan* (*supra*) to the Quazi's Court and the Magistrate's Court having concurrent jurisdiction to adjudicate on maintenance applications has been made *per incuriam* and that the attention of the learned judge who decided that case may not have been drawn to Section 48 of the Act. The learned judge makes no reference in the judgment to either section, but it is clear that he was dealing with proceedings for maintenance between parties who had been married and divorced, and in respect of those proceedings the Quazi's Court obviously had jurisdiction which was the jurisdiction upheld in appeal. It appears to me that Section 48 had the effect of making that jurisdiction exclusive and not concurrent with that of the Magistrate's Court, but having regard to the order actually made on appeal the reference in the judgment to concurrent jurisdiction played no part in the ultimate decision.

Mr. Malcolm Perera, for the applicant, contended that the Quazi's Court had no jurisdiction at all to hear the present applicant's application as Section 2 of the Muslim Marriage and Divorce Act, No. 13 of 1951, which section governs the whole of the Act, declares that "This Act shall apply only to the marriages and divorces, and other matters connected therewith, of those inhabitants of Ceylon who are Muslims." As the applicant and the defendant are not married it was not open, he argued, to invoke the jurisdiction of the Quazi under Section 47 which must be limited to matters connected with marriage or divorce between the parties. He pointed out that in *Abdul Gaffoor's case* (*supra*) the maintenance of the ex-wife and the child was a matter connected with the divorce and the Quazi's Court rightly had jurisdiction to adjudicate upon the matter of maintenance.

It is correct, as has been pointed out on behalf of the defendant, that Section 47 confers on a Quazi power to adjudicate upon a claim for maintenance by or on behalf of an illegitimate child as well, but this power must be construed in a way which does not detract from the force of the governing section 2 which I have quoted above. It may be mentioned that by section 1 (2) of the Muslim Marriage and Divorce Regulation Ordinance (Cap. 99) which also had made provision for a Kathi to adjudicate upon claims for maintenance by or on behalf of a child (whether legitimate or illegitimate), and which was repealed by Act No. 13 of 1951, that Ordinance was declared applicable "only to subjects of His Majesty professing Islam", while the corresponding section of the existing Act reads, as I have shown already, that the Act "shall apply only to the marriages and divorces, and other matters connected therewith, of those inhabitants of Ceylon who are Muslims." The change is not without significance, and whatever might have been the position if section 2 of the Act had been couched in the same terms as Section 1 (2) of the Ordinance, it is impossible to deny that the change in phraseology has had the effect of restricting the applicability of the Act. A marriage between persons who are Muslims does not have the effect of legitimating children born to them before marriage. — (See Ameer Ali on Mahommedan Law, 5th ed, at pages 199 and 201 - "The Mussulman Law does not recognise the doctrine of *legitimatio per subsequens matrimonium*.) The legislature may well have thought of that case in enacting Section 47 (1) (*c*) in the terms it did. Mr. Perera added another case as having possibly been in the contemplation of the legislature, viz., the case of children procreated as a result of a void marriage. These are but two instances which indicate that there are certain classes of illegitimate children whose claims for maintenance are exclusively within the jurisdiction of the Quazi for they can be said to be matters connected with marriage within the meaning of Section 2. Then, again, what is the position in respect of maintenance for an illegitimate child born to a non-Muslim woman by a Muslim father. If Section 47 (1) (*c*) of the Act is to be interpreted literally, without reference to Section 2, even such a child may have to submit to the exclusive jurisdiction of a Quazi's Court. I do not think that was ever the intention of the legislature.

Applications for maintenance in the case of children like those of the present applicant who has at no time been married to their alleged

father are not, in my opinion, within the special Act (Act No. 13 of 1951), but fall to be prosecuted under the general statute (the Maintenance Ordinance).

As the Magistrate's Court has held that it has jurisdiction, I would dismiss this application and order that the record be returned for the proceedings now to be continued in that Court. The petitioner must pay the costs of this application which I fix at Rs. 52/50.

Application Dismissed.

Present : WEERASOORIYA J.

CLAUDE SILVA *vs.* T. C. JOSEPH, SUB-INSPECTOR OF POLICE.

S. C. No. 1170—*M. C. Colombo South* 97273.

Argued on : 25th and 30th March, 1960.

Delivered on : 5th August, 1960.

Criminal Procedure Code, Section 187 (1)—*Failure to comply with the* 2nd *part of the Section—Magistrate recording evidence as required under section* 151 (2) *of Criminal Procedure Code in respect of only one charge in the report under section* 148 (1) (*b*) *of the same Code—Accused charged on other counts in the report without recording evidence in relation to them—Conviction after trial—Is it fatal to a conviction—Is it curable under section* 425 *of the Criminal Procedure Code.*

A report was made to court by a Sub-Inspector of Police under section 148 (1) (*b*) of the Criminal Procedure Code setting out four charges under the Motor Traffic Act against the accused. The accused appeared in Court otherwise than on a summons or warrant and the Magistrate purporting to act under section 187 (1) of the Criminal Procedure Code recorded the evidence of the Sub-Inspector who stated that he found the accused driving a vehicle smelling of liquor. This evidence related to the 1st charge only.

Without any further evidence the Magistrate proceeded also to frame charges as in the other counts on the said report and recorded the accused's plea which was one of not guilty. There was, therefore, no evidence on which the Magistrate could have arrived at a decision as to whether there was sufficient ground for proceeding against the accused on those charges as required by section 187 (1) aforesaid.

The Magistrate after trial convicted and sentenced the accused on all the four counts and the accused appealed.

Held : (1) That the failure of the Magistrate to comply with the 2nd part of the imperative provisions of section 187 (1) of the Criminal Procedure Code before framing the 2nd, 3rd and 4th charges vitiated the convictions thereon.

(2) That this failure is not one curable under section 425 of the Criminal Procedure Code.

PER WEERASOORIYA J.—" Section 187 (1) may be dissected into two parts : The first part requires the Magistrate to hold the examination directed by Section 151 (2) ; and the second part requires that if on that examination he is of opinion that there is sufficient ground for proceeding against the accused he shall frame a charge against the accused. The case of *Mohideen vs. Inspector of Police, Pettah* (59 N.L.R. 217) dealt with the failure of the Magistrate to comply with the requirements of the first part of Section 187 (1). But a failure to comply with the first part of Section 187 (1) would necessarily involve a failure to comply with the requirements of the second part as well. In that case a Divisional Bench held that where the accused was brought up before the Court otherwise than on a summons or warrant the failure to hold the examination directed by Section 151 (2) is not curable under Section 425 and vitiates the conviction. (The sections referred to are sections of the Criminal Procedure Code).

Cases cited : *Mohideen vs. Inspector of Police, Pettah* (59 N.L.R. 217).

M. M. Kumarakulasingham for the accused-appellant.

R. Abeysuriya, Crown Counsel, for the Attorney-General.

WEERASOORIYA J.

The accused-appellant was charged on four counts with the commission of offences punishable under the Motor Traffic Act, No. 14 of 1951. He was found guilty on all the counts and sentenced to a fine of Rs. 50/- on each of the first and second counts, and a fine of Rs. 10/- on the fourth count. No separate sentence was imposed in respect of the conviction on the

third count, apparently for the reason that the charge under it was in the nature of an alternative to the charge under the fourth count.

With the conviction and sentence on the first count, under which the accused was charged with having driven his van No. CV. 4119 on the highway when under the influence of alcohol, I see no reason to interfere, as there is sufficient evidence, which the Magistrate has accepted, to sustain it.

The accused was charged under the second count with having driven the van on the highway recklessly or in a dangerous manner, under the third count with having driven the van on the highway when he was not the holder of a driving licence valid for driving vehicles of the class to which the van belonged, and under the fourth count with having failed to carry his driving licence in the motor vehicle or on his person and to produce it for inspection on demand made by a police officer. In regard to the charges under these three counts, Mr. Kumarakulasingham raised a point of law that the Magistrate had failed to comply with the peremptory requirements of Section 187 (1) of the Criminal Procedure Code and that the convictions on those charges are thereby vitiated.

The proceedings show that on the 17th July, 1959, the accused appeared in Court otherwise than on a summons or warrant, and the Magistrate purporting to act in terms of Section 187 (1), recorded the evidence of Mr. Joseph, Sub-Inspector of Police, Mirihana, which is as follows :—

> "On 13-7-59 at 9-10 p.m. I stopped and checked private van CV 4119 proceeding towards Maharagama and found this accused driving the vehicle smelling of alcohol. He was produced before the Doctor and the Doctor reported that he was under the influence of liquor".

This evidence clearly relates only to the charge against the accused under the first count (of driving the van on the highway when under the influence of alcohol) and at the most would have justified the framing of the charge under that count. But without any further evidence the Magistrate proceeded to frame charges as in the other three counts also and record the accused's plea, which was one of not guilty. These charges are identical with those set out in the report to Court under Section 148 (1) (*b*) of the Criminal Procedure Code which Mr. Joseph had filed on the same date, and from which, it would appear, they were transferred to the charge sheet without the Magistrate having given his mind to the need for arriving at a decision, as Section 187 (1) of the Criminal Procedure Code requires him to do, whether on the evidence before him there was sufficient ground for proceeding against the accused on those charges.

Section 187 (1) may be dissected into two parts : The first part requires the Magistrate to hold the examination directed by Section 151 (2) ; and the second part requires that if on that examination he is of opinion that there is sufficient ground for proceeding against the accused he shall frame a charge against the accused. The case of *Mohideen* vs. *Inspector of Police, Pettah*, 59 N. L. R. 217, dealt with the failure of the Magistrate to comply with the requirements of the first part of Section 187 (1). But a failure to comply with the first part of Section 187 (1) would necessarily involve a failure to comply with the requirements of the second part as well. In that case a Divisional Bench held that where the accused was brought up before the Court otherwise than on a summons or warrant the failure to hold the examination directed by Section 151 (2) is not curable under Section 425 and vitiates the conviction. (The sections referred to are sections of the Criminal Procedure Code).

In the present case the Magistrate cannot be said to have failed to comply with the requirements of the first part of Section 187 (1). But, in my opinion, he has failed to comply with the requirements of the second part of the section in that, before framing the charges on the second, third and fourth counts of the charge sheet, he manifestly did not consider the question whether on the evidence before him there was sufficient ground for proceeding against the accused. As this is a question essentially for the Magistrate, the position would, no doubt, have been different had there been even a scintilla of evidence of an admissible nature relating to those charges on which he might have formed the opinion that there was ground for proceeding against the accused on those charges.

The point which arises for decision is, therefore, whether a failure to comply with the second part of section 187 (1) is curable under Section 425 or whether the convictions on the charges in respect of which the failure has occurred are thereby vitiated. No previous decision exactly in point was cited to me at the hearing of the appeal. But it seems to me that if the failure to comply with the require-

ments of the first part of section 187 (1) is not curable under Section 425, it would be illogical to hold otherwise in regard to the failure to comply with the requirements of the second part of the section. The section is so designed as to ensure that in a summary trial an accused who is brought up otherwise than on a summons or warrant will not be called upon to face a charge unless the Magistrate has formed an opinion, based on evidence elicited as a result of the examination directed under the first part, that there is sufficient ground for proceeding against him on that charge. It would seem, therefore, that the first part of Section 187 (1) is only complementary of the second and more material part of the section. In my opinion the failure of the Magistrate to comply with the requirements of the second part of the section is, therefore, not curable under Section 425, and the convictions of the accused on the second, third and fourth counts are thereby vitiated.

The view that I have taken appears to be supported by the observations of my Lord the Chief Justice in *Mohideen* vs. *Inspector of Police, Pettah* (*supra*) where, however, this particular question did not directly arise for consideration. Those observations are as follows: "If the provisions of Section 187 are imperative, as I think they are, it is difficult to resist the conclusion that the requirement that the Magistrate shall ascertain whether there is sufficient ground for proceeding against the accused after the examination directed by Section 151 (2) is also imperative".

The conviction of the accused on the first count and the sentence passed thereunder are affirmed. The convictions of the accused on the second, third and fourth counts of the charge sheet are set aside and he is discharged thereform. I also set aside the sentences passed in respect of the convictions on the second and fourth counts. In all the circumstances I do not think that this is an appropriate case in which to order a retrial of the accused on the charges in the second, third and fourth counts.

Set aside.

Present : T. S. FERNANDO, J.

RICHARD PIERIS & CO., LTD. *vs.* D. J. WIJESIRIWARDENA

S. C. Appeal (Labour Tribunals) No. 5 of 1959—Labour Tribunal Case, No. 123 of 1959

Argued on : 28th June, 1960.
Decided on : 5th September, 1960.

Industrial Disputes Act, No. 43 of 1950 as amended by No. 62 of 1957—Tribunal constituted under Section 31A—Application for gratuity under Section 31B by workman—Meaning of the word "due" in the Section—Has the Tribunal jurisdiction to order payment of gratuity which is not legally due.

Held : That the word "*due*" in Section 31 B (1) (*b*) of the Industrial Disputes Act, No. 43 of 1950 as amended by Act No. 62 of 1957, means "legally due". Hence a Tribunal established under the Act acts in excess of jurisdiction when it orders the payment of a gratuity which is not due.

G. E. Chitty, Q.C., with *Carl Jayasinghe* for the appellant.

No appearance for the respondent.

T. S. FERNANDO, J.

This is an appeal against an order made by a Labour Tribunal established in terms of Section 31A of the Industrial Disputes Act, No. 43 of 1950, as amended by the Industrial Disputes (Amendment) Act, No. 62 of 1957. An appeal can be preferred only on a question of law, and the substantial question of law raised is that the Tribunal in making an order for the payment of a gratuity to the applicant has acted in excess of its jurisdiction which, it is claimed, is limited to ordering payment of a gratuity that is due to the applicant from his employer.

Section 31B provides for the making by or on behalf of a workman of applications to a Labour

Tribunal for relief or redress in respect of any of the following matters :—

(*a*) the termination of his services by his employer ;
(*b*) the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits ;
(*c*) such other matters pertaining to the relationship between an employer and a workman as may be prescribed.

It was not claimed that the application was in respect of the matters referred to in (*a*) or (*c*), but that it fell within the matters described in (*b*) above.

The following facts appear not to have been in dispute at the inquiry by the Tribunal :—

The applicant was an employee of Richard Pieris & Co., Ltd., as Chief Foreman for a period of 7 years and 9 months terminating on 31st March, 1959. His services were terminated by the company after a notice served on him five months before 31st March, 1959, and the reason given by the company was that he had reached the age of 64 years. Sometime prior to the date of termination, the Board of Directors of the company had decided that with effect from 1st April, 1959, no employee of the company shall be continued in service after he had attained the age of 60 years.

The applicant had, prior to his employment with the company, been employed by the Ford Company for some 17 years, but when the Ford Company ceased to do business in Ceylon (Richard Pieris & Co., Ltd., having taken over the business in Ceylon of the Ford Company) that company had paid an admittedly adequate gratuity to the applicant in consideration of his 17 years of service.

At the time the applicant came to be employed under Richard Pieris & Co., Ltd., in 1951 there existed a Provident Fund Scheme for all employees of the company, the company contributing roughly about 12% of the salary of an employee, while the employee himself contributed 10%. Under this Scheme, the applicant had become entitled to receive at the time his services with the company were terminated a sum of Rs. 6,814.15, and this sum had been drawn by the applicant.

Apart from the Pension Fund Scheme, there was a Long Service Bonus Scheme under which every employee who had completed 25 years' service with the company was entitled to three months' basic salary. The applicant's service had lasted less than eight years, and he was therefore not entitled to any bonus under this Scheme.

A Gratuity Scheme also came into operation *after the date the applicant's services with the company terminated* according to which an employee at the time of retirement becomes entitled to one month's basic salary for each completed year of service less the company's contribution to the Provident Fund. It is clear that, even if this Scheme had been in existence while the applicant was in the company's service, the applicant would have received nothing thereunder as the gratuity would have amounted to Rs. 3,115/- while the company's contribution to the Provident Fund was some Rs. 3,474.45.

The facts appearing to be as stated above, the position taken up by the company was that under the existing Schemes no sum of money remained due and payable to the applicant. The applicant claimed that an order should be made entitling him (*a*) to a suitable gratuity, and (*b*) to suitable compensation for loss of career. When the application came up for inquiry the applicant withdrew any claim for compensation for loss of career. At the conclusion of the inquiry, the Tribunal stating that "it is now settled as a matter of principle that, when the finances of a business concern permits two retiring benefits to employees may be allowed on the footing that a provident fund provides a certain measure of relief only and a portion of that constitutes the employee's wages that he or his family would ultimately receive and that this provision in the present day conditions is wholly insufficient relief", held that the applicant is entitled to a gratuity at the rate of two-thirds of the basic salary for a period of seven years. Calculating at this rate for the period stated, the company was ordered to pay a sum of Rs. 2,076.66 to the applicant.

It was argued for the company that the application to the Tribunal is for relief or redress against the withholding of a gratuity or other benefit that is *due* to the applicant from the employer, and it was contended that this meant legally due. It is unfortunate that I was left without the assistance of any argument on behalf of the applicant on this question in which there appears to be no earlier decision of this Court. I drew the attention of learned counsel

to Section 31C (1) which empowers the Tribunal to " make such order as may appear to the Tribunal to be just and equitable ". Counsel in reply has contended that, broadly speaking, the jurisdiction of the Tribunal is limited by the Act to the ascertainment of dues as distinguished from the formulation of schemes, and that nothing can be said to be just and equitable which is outside the framework of the Act itself. As illustrative of the situation in which Section 31C (1) may have application, counsel instanced the case where a gratuity or other benefit had become due but not legally enforceable, and, again, where such a benefit is payable under existing conditions of service but was not available to those who had been in employment under different conditions of service. The Act itself gives me no certain guide as to the meaning to be attached to the relevant provisions of Section 31, and in this situation I have arrived at the conclusion that my duty is to place on the word *due* in Section 31B (1) (*b*) of the Act the meaning " legally due " as claimed by the company. In support of the conclusion to which I have been driven in this matter, I might refer to the provision in Sub-Section (5) of Section 31B which precludes the applicant seeking any other *legal* remedy where he had made an application under Section 31B ans again shutting him out from the remedy under this Act where he has first resorted to any other *legal* remedy. A legal remedy presupposes a legal wrong, and in the context under discussion the legal wrong would be the refusal to pay a sum of money or grant some benefit legally due. In regard to the power of the Tribunal to make such order as may appear to it to be just and equitable there is point in Counsel's submission that justice and equity can themselves be measured not according to the urgings of a kind heart but only within the framework of the law.

For the reasons indicated above, I hold that the Tribunal acted in excess of its jurisdiction under the Act in ordering the payment of a gratuity which was not due to the applicant. The order of the Tribunal appealed from is set aside, but I refrain from making an order for costs in this case.

Set aside.

IN THE COURT OF CRIMINAL APPEAL

Present : BASNAYAKE, C.J. (PRESIDENT), GUNASEKARA, J., AND SANSONI, J.

THE QUEEN *vs.* HAKMANA JALATHGE *alias* PATTIMAHATHMAYA

Appeal No. 79 *of* 1960 *with Application No.* 93 *of* 1960—*S. C. No.* 20/*M. C. Tissamaharama, No.* 32462.

Argued and Decided on : June 9, 1960.

Statements by prosecution witnesses at previous trial—Use by defence Counsel in cross-examination at re-trial—Evidence Ordinance, Section 145 (1).

Held that : Where an accused is being re-tried after a previous abortive trial, defence counsel has the right in cross-examining the prosecution witnesses, to utilise statements made by them at the previous trial. Section 145 (1) of the Evidence Ordinance confers this right.

Colvin R. de Silva with *M. L. de Silva* for the Accused-Appellant.

J. G. T. Weeraratne, C.C. for the Attorney-General.

BASNAYAKE, C.J.

In this case the accused was indicted with an offence punishable under Section 300 of the Penal Code, for shooting Police Constable No. 889 Carolis. It would appear from the proceedings that there had been a previous trial which had proved abortive. The present trial commenced on 31st March, 1960, and ended on 12th April, 1960. The transcript of the proceedings shows that in the course of the case for the prosecution learned counsel for the accused sought to utilise the evidence given at the previous trial for the purpose of contradicting

some of the prosecution witnesses but that he refrained from doing so on an indication from the learned presiding Judge that the trial should proceed without any reference to the previous trial.

This is how the relevant portion of the transcript of the shorthand record reads :—

"*Crown Counsel :* Before I commence my cross-examination I would like to draw Your Lordship's attention to the evidence of this accused at the previous trial.

Court : We will go on with this case without any reference to the previous trial".

Some time later in the course of the cross-examination of the accused, learned Crown Counsel put the following questions :—

"*Q.* Can you recall the evidence you gave at the previous trial?

A. Yes, I remember.

Q. Did you on that occasion tell this Court that the Inspector of Police, Tissa . . ."

Thereafter the transcript reads as follows :—

"*Defence Counsel to Court :* My Lord, I object to my learned friend referring to any evidence given at the previous trial.

Court : But a witness can well be asked about a former statement he made which is inconsistent with his evidence here?

Defence Counsel : I object because when I tried to question a witness for the prosecution yesterday about his evidence at the previous trial Your Lordship did not allow me to do so.

Court : As far as I remember I merely expressed the view that evidence given at the previous trial should be avoided as much as possible but I did not make an order.

Defence Counsel : On Your Lordship telling me not to refer to the evidence at the last trial, I did not refer at all to it. So that now if Your Lordship allows my learned friend who appears for the prosecution to do so I submit that it will be unfair for the defence and to the accused because I have not had the privilege or advantage of cross-examining the witnesses for the prosecution on the previous trial.

Crown Counsel : Except this, that I have provision to utilise that section with Your Lordship's permission where this accused makes a completely different statement at this trial.

Court to Crown Counsel : I think you had better refrain from doing so because I have got a feeling that Mr. Perera may have a grievance though I do not think I over-ruled any of his questions.

Defence Counsel : Your Lordship definitely told me not to ask any questions on the previous trial because the record was not before Your Lordship's Court. Otherwise I would have cross-examined the witnesses very severely.

Court : What I really felt at the time was that one did not have for ready reference, any particular answer given by a witness at that time. So I merely made a suggestion that it is better if we can go through the evidence in this Court without involving ourselves too much with the evidence given at the last trial.

Crown Counsel : I am prepared to take the answer that he gave because I have with me the evidence given by him on the previous occasion—I have made on my own notes because I prosecuted at that last trial also, but if Your Lordship thinks that there might be an element of unfairness I will certainly drop the matter.

Court : I do have a definite recollection of cautioning counsel on both sides not to get too much involved in the evidence given at the previous trial.

Crown Counsel : My Lord, in that case I will not pursue the matter. As it is, in my view, the accused has said sufficient for the purposes of my case".

It would appear from the passages of the transcript reproduced above that defence counsel was precluded by the trial Judge from utilising the statements made by the prosecution witnesses at the previous trial for the purpose of cross-examining them. Under Section 145 (1) of the Evidence Ordinance, defence counsel is entitled to cross-examine a witness "as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved". That right was denied to the accused in this case, and we think that the learned trial Judge was wrong in not permitting defence counsel to utilise the previous proceedings for the purpose of cross-examining the prosecution witnesses. Of the grounds of appeal the only ground which counsel for the appellant pressed is ground 7 which reads as follows :—

"It is respectfully submitted that the defence was illegally precluded from utilising the evidence at the previous trial of the prisoner and that this led to a miscarriage of justice".

That ground is one of substance and must be upheld. We accordingly allow the appeal and quash the conviction.

There remains for consideration the further question whether we should direct a judgment of acquittal to be entered in favour of the appellant or order a fresh trial. This offence was committed two years ago. The accused has had to stand two trials at great expense to himself. The present trial lasted from 31st March, 1960, till 12th April, 1960. We are of opinion that, in the circumstances of this case having regard to the nature of the prosecution evidence, and the fact that at the first trial the jury were divided 4 to 3, the accused should not be put in jeopardy a third time, and direct that a judgment of acquittal be entered in his favour.

Appeal allowed.

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

DAVOODBHOY *vs.* FAROOK AND OTHERS.

S. C. No. 402—*D. C. Colombo, No.* 6419/*L.*

Argued on : 13th February, and 9th, 10th, 21st, 22nd, 23rd and 24th July, 1959.
Decided on : 23rd October, 1959.

Evidence Ordinance, Sections 101, 107, 108—*Rules regarding burden of proof—Registration of Old Deeds and Instruments Ordinance, Section* 2 (1) *b—Registration of a Last Will—Averment that a Last Will admitted to probate—How averment to be proved —Evidence Ordinance, Sections* 91, 64, 65.

1. Averring that one J. had not been heard of for seven years, the plaintiffs invited Court to presume he was dead. They did not themselves affirm that he was dead. The defendant, on the other hand, did not affirm that J. was alive but put the plaintiffs to proof of his death. The trial Judge held that there was no proof that J. was alive and that he should be presumed dead.

Held : That the burden was on the plaintiffs throughout to prove the fact of J.'s death and it never shifted to the defendant. For Sections 107 and 108 to come into operation and the burden of proof to get shifted from one to the other there must be one person who affirms that a person is dead and another who affirms that that person is alive.

Per BASNAYAKE, C.J.—" These two sections do not enact a presumption of law or of fact but enact rules governing the burden of proof like any one of the other rules that precede them. Section 107 enacts the rule and Section 108 enacts the proviso to it ".

2. The trial Judge held that there was no proof that an alleged Last Will and its Probate were registered but that registration of a certain deed which referred to the Will was sufficient.

Held : That to satisfy Section 2(1) (*b*) of Ordinance, No. 35 of 1947, although it was unnecessary that the subsequently registered instrument should contain a reproduction of the terms of the old unregistered instrument, mere mention of it is insufficient. The reference in the registered instrument must be such as to give its reader sufficient information regarding the unregistered instrument to enable him to trace it and refer to it in order to ascertain its purport.

3. The plaintiffs had also averred that a certain Last Will had been admitted to Probate.

Held : That since they had not produced the Probate itself as Section 91 of the Evidence Ordinance would require nor brought themselves within Section 65 and produced secondary evidence, the evidence they had, in fact, produced was insufficient. There was thus no proof that the Will in question had been admitted to Probate. It could not therefore be acted on as the Last Will of the deceased.

Per BASNAYAKE, C.J. (*obiter*).—

(*a*) In a case of doubt and when the prohibition is difficult to understand an instrument should be construed as creating not a perpetual fidei commissum but only one that extends to the fourth degree of succession.

(*b*) In the proviso to Section 13 of the Prescription Ordinance " disability " means incapacity to do legal acts, and a fidei commissary whose right to possession has not accrued cannot be said to be under a " disability ". *Cassim* vs. *Dingihamy* (9 N.L.R. 257) followed.

Cases referred to : *Cassim vs. Dingirihamy,* (9 N.L.R. 257).

H. V. Perera, Q.C., with *Walter Jayawardene* and *Nimal Senanayake* for the Defendant-Appellant.

Sir Lalita Rajapakse, Q.C., with *D. C. W. Wickremasekera* for the Plaintiffs-Respondents.

BASNAYAKE, C.J.

The first and second plaintiffs are the children of one Samsudeen Mohamed Jaleel and the third and fourth plaintiffs are the minor children of Jaleel's deceased daughter, Quraisha. The case for the plaintiffs is—

(*a*) that Hamidu Lebbe Samsudeen *alias* Colenda Marikar Samsudeen was by virtue

of Deed No. 663 of 5th June, 1902, attested by Notary, F. A. Prins, the owner of the land in dispute, subject to a fidei commissum created by Last Will No. 418 dated 22nd July, 1850;

(*b*) that Hameedu Lebbe died leaving two children, Samsudeen Mohamed Jaleel and Samsudeen Zubaida Umma;

(*c*) that Zubaida Umma died leaving an only child who also died without issue;

(*d*) that Jaleel became the sole owner of the land subject to the fidei commissum;

(*e*) that Jaleel has not been heard of since the early part of the year 1942;

(*f*) that Jaleel should be presumed to be dead from the early part of 1949;

(*g*) that the first and second plaintiffs were each entitled to 2/5th share and the third and fourth plaintiffs to 1/10th share each;

(*h*) that the first and second plaintiffs by deed No. 1570 of 4th October, 1951, attested by Notary, K. Rasanathan, transferred a half of their respective shares to the sixth plaintiff who is entitled to 2/5th share.

They ask that they be declared entitled to the land described in the Schedule to the plaint subject to the fidei commissum pleaded by them, that the defendant be ejected therefrom and for damages.

The defendant denies that Colenda Marikar Samsudeen held the land subject to a fidei commissum. He challenges the claim of the plaintiffs that the Last Will No. 418 of 22nd July, 1850, created a fidei commissum and that it was admitted to probate. The defendant further pleads that Jaleel was the absolute owner of the land in dispute and claims it by right of purchase from him on 8th November, 1917, from which date he undoubtedly has been in possession.

The learned District Judge has held—

(*a*) that Mohideen Natchchia executed the Last Will No. 418 of 22nd July, 1850, a certified copy of the duplicate of which is produced marked P2, and that it was admitted to probate in D.C., Colombo, Case No. 1734;

(*b*) that P2 creates a fidei commissum in perpetuity;

(*c*) that there is no proof that Jaleel is alive and should be presumed to be dead.

Learned counsel for the defendant-appellant submitted—

(*a*) that there is no proof that Jaleel is dead;

(*b*) that the Last Will P2 is not registered as required by Ordinance No. 35 of 1947;

(*c*) that there is no proof that P2 was admitted to probate;

(*d*) that the Last Will P2 does not create a perpetual fidei commissum;

(*e*) that the defendant has possessed the land for thirty years and was under the second proviso to Section 13 of the Prescription Ordinance entitled to it.

The first of the above points was strenuously pressed. In dealing with it Sections 107 and 108 of the Evidence Ordinance were discussed at great length by both counsel. These two sections occur in a group of sections in the Part of the Evidence Ordinance entitled "Production and Effect of Evidence" and under the heading "Of the Burden of Proof". The first rule enacted under this heading is in Section 101 which reads—

> "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> "When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".

It is not necessary for the purposes of this case to refer to any of the other rules which occur between Sections 101 and 107. It will be convenient at this point to quote Sections 107 and 108. They are as follows:—

> "107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

"108. Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it".

It is essential to bear in mind that these two sections do not enact a presumption of law or fact but enact rules governing the burden of proof like any one of the other rules that precede them. Section 107 enacts the rule and Section 108 enacts the proviso to it. In one case it is sufficient to "show" that the person about whom the question has arisen was alive within thirty years, in the other it must be "proved" that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive. These sections regulate the burden of proof in a case in which one party affirms that a person is dead and the other party that the same person is alive, and the question for decision is whether the person is dead or alive.

In the instant case the plaintiffs state in paragraphs 6 and 7 of the plaint that—

"6. The said Samsudeen Mohamed Jaleel has not been heard of since the early part of the year 1942 and the plaintiffs plead that the said Samsudeen Mohamed Jaleel should be presumed to be dead as from the early part of 1949.

"7. The said Samsudeen Mohamed Jaleel left as his heirs his children the first and second plaintiffs and a daughter, Quraisha, who became entitled to the said land and premises as at early 1949 subject to the same entail and fidei commissum".

The above allegations in the plaint are answered by the defendant as follows:—

"6. Answering to paragraph 6 of the plaint the defendant puts the plaintiff to the proof of the death of the said Jaleel.

"7. Answering to paragraph 7 of the plaint the defendant states that he is unaware that the 1st and 2nd plaintiffs and Quraisha are the heirs of the said Jaleel and therefore puts the plaintiffs to the proof thereof. The defendant denies that the 1st and 2nd plaintiffs and Quraisha became entitled to the said land and premises".

It would appear from the foregoing that the question that arises for decision is not whether Jaleel is alive or dead but whether he is dead. Doubtless if a man is not dead he must be alive; but in a civil trial it is for the party on whom the burden rests to discharge it and failure of the party on whom the burden does not rest to disprove any fact the burden of proof of which lies on the other does not enable him to succeed. Now in the instant case the plaintiffs cannot maintain this action unless they prove that Jaleel is dead, for if he is not dead, on their own showing they have no right to be declared entitled to the land or to be placed in possession of it. The burden of proof in a case such as this would be governed by Section 101 and not Sections 107 and 108 for, the legal right of the plaintiffs is dependent on the fact of Jaleel's death which the plaintiffs ask the Court to presume without proving by affirmative evidence. They do not indicate that they have in mind Section 114 of the Evidence Ordinance and there is no other section under which the Court may be invited to presume the existence of a fact. The best form of proof of a person's death is the production of his death certificate with evidence as to the identity of the person to whose death it relates. In the absence of such a certificate it is open to a person to produce evidence of those who knew the deceased and were present at his death and attended his funeral. Where proof of death cannot be furnished by direct evidence a party on whom the burden lies may seek to discharge the burden by proving such facts and circumstances as would enable the Court to presume that the person is dead.

In a case where one party affirms that a person is dead and another that he is alive, if a party produces evidence to the effect that he was alive within thirty years then the person who affirms that he is dead must prove that he is dead; but if the person who affirms that he is dead instead of proving that he is dead leads evidence which proves that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive then the person who affirms that he is alive must prove that he is alive. So that in a case where the question is whether a person is alive or dead and one party affirms that he is dead and the other that he is alive and it is in evidence that he was alive within thirty years the burden that lies on the party that affirms that he is dead by virtue of Section 107 to prove that he is dead shifts by operation of Section 108 to the party that affirms that he is alive if it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive. The instant case is not such a one. Here the plaintiffs invite the Court to presume that Jaleel is dead. They do not even affirm that he is dead.

So much for the provisions governing the Gurden of proof I shall now examine the evidence. biving evidence on the 29th November, 1956, the first plaintiff said—

(*a*) that his father, who was a gem merchant, left Ceylon in August, 1942, by Talaimannar train for Madras in India ;

(*b*) that he had not heard of him up to the date on which he gave evidence ;

(*c*) that he wrote to some people in India inquiring about his father but got no replies ;

(*d*) that he wrote to a Company with which his father had business dealings in Singapore and he was informed that he had not come there ;

(*e*) that his father was 65 years of age when he left for India ;

(*f*) that his father had friends in Ceylon ;

(*g*) that he has not paid any estate duty on the footing that his father is dead.

The witness, Mohamed Muktar, who gave evidence on behalf of the first plaintiff said that he made inquiries from his children about a year or two after Jaleel left for India and was informed that he was getting on well. Neither Jaleel's wife who was alive nor his other son, the second plaintiff, gave evidence. The evidence tendered by the plaintiffs does not establish that Jaleel is dead nor may a Court presume upon the material offered by them regard being had to the common course of natural events, that Jaleel is dead. The best evidence of Jaleel's age, his birth certificate, is not produced. But even accepting the first plaintiff's statement, which is hearsay and not proof of his age, that Jaleel was 65 years of age when he left for India in 1942, on 17th October, 1951, the date on which this action was instituted, he would be 74 years of age. There are many persons of that age alive today and the Court may not presume on the evidentiary material before it that a man of 74 is dead. The plaintiffs have therefore not established either by affirmative or by presumptive proof that Jaleel is dead and their action must fail. The learned District Judge's approach to the burden that lay on the plaintiff's is wrong. He had addressed to himself the question—" Is Jaleel alive ? " The defendant did not affirm that he was alive. He put the plaintiffs to the proof of the fact on which they relied, namely, that he is dead, a fact on the proof of which the success of their case depended. The burden was on them throughout to prove that fact. It never shifted to the defendant. As explained above, for Sections 107 and 108 to come into operation and the burden of proof to get shifted from one to the other there must be one person who affirms that a person is dead and another who affirms that that person is alive.

The following issues were suggested by counsel for the defendant on the subject of Jaleel's death :—

" **9. Has the said Samsudeen Mohamed Jaleel not been heard of since the first part of 1942 ?**

" **10. If so does the presumption arise that the said Jaleel is dead ? "**

The learned trial Judge adopted these issues and answered them in the affirmative. They do not show precisely whether learned counsel had in mind Section 114 of the Evidence Ordinance or Sections 107 and 108. It would appear that both Judge and counsel were not clear as to the provisions governing the burden of proof in a case such as this. The learned Judge's answers are wrong. The evidence is that up to about 1944 his children heard from Jaleel, and the evidence produced does not support a presumption under Section 114 of the Evidence Ordinance.

I now come to the second point urged by learned counsel. The trial Judge has held that neither the Will (P2) nor the Probate of that Will was duly registered and it is therefore not necessary to discuss it further as there is no proof that they were registered. The issue on this point is as follows : " Was the alleged Last Will and/or Probate if any thereof duly registered ? " The learned Judge has answered it thus—" No proof of this, but the registration of deed 663 of 1902 (P6) which refers to the Will is sufficient ". There is no evidence that P2 and the Probate thereof were registered either under the enactment relating to the registration of documents now in force or any of the enactments on the subject in force at the time of the execution of the Will or the grant of Probate or thereafter.

P6 undoubtedly refers to a Will of Mohideen Natchia. The only question is whether P2—Will No. 418—is referred to therein.

Section 2 of Ordinance No. 35 of 1947 reads—

" (1) On and after the first day of January, 1948, no instrument affecting any land, which was executed or made at any time prior to the first day of January, 1864, shall unless—

(*a*) it was, at the date of the commencement of this Ordinance, duly registered under any of the Ordinances specified in sub-section (3) ; or

(*b*) it is referred to in any other instrument which was, at the date of the commencement of this Ordinance, registered under any of the Ordinances specified in sub-section (3) as an instrument affecting that land ; or

(*c*) it is registered in accordance with the provisions of this Ordinance,

be of any force or avail or be received in evidence in any Court as against any person claiming any interest in such land upon valuable consideration or any other person claiming under any such person, for the purpose of proving the land to be subject to a trust or *fidei commissum*.

" In this sub-section " interest " means an interest created or arising whether before or after the date of the commencement of this Ordinance.

(2) The provisions of sub-section (1) shall apply to any instrument executed or made prior to the second day of February, 1840, notwithstanding that such instrument may have been registered under the Sannases and Old Deeds Ordinance.

(3) The Ordinances referred to in paragraphs (*a*) and (*b*) of sub-section (1) are—

The Registration of Documents Ordinance (Cap. 101)
The Land Registration Ordinance, No. 14 of 1891
The Land Registration Ordinance, No. 5 of 1877
The Land Registration Ordinance, No. 8 of 1863 ".

The expression " referred to " does not mean " incorporated in ". It is therefore not necessary that the subsequently registered instrument should contain a reproduction of the terms of the old unregistered instrument. Is mere mention of the unregistered instrument sufficient or should the registered instrument refer to it in such terms that anyone reading it can if he is so minded ascertain the contents of the unregistered instrument by search at a Land Registry or a Court where records of deeds and documents are preserved? I am inclined to think that the reference in the registered instrument should be such as to give to its reader sufficient information regarding the unregistered instrument to enable him to trace it and refer to it in order to ascertain its purport.

The references in P6 to the Last Will are as follows :—

" Whereas Mohideen Natchia, widow of Amidol Lebbe Samsee Lebbe, by her Last will and Testament dated twenty-second July, 1850, executed before me, Coonje Marikar Mohamado Lebbe, Notary Public of Colombo, the original whereof is in Tamil and is filed of record in the District Court of Colombo in Case No. 1734 declared that she was in the possession of the premises described in the Schedule A hereto and which premises she declared to bequeath to her eldest son, Samsee Lebbe Amidol (Hamidu) Lebbe, with intent and meaning that it shall be under the bond of fidei commissum for ever and the said premises and the profits arising therefrom she willed that the said Samsee Lebbe Hamidu Lebbe should enjoy, but the same could not be sold or mortgaged for any debts or be otherwise ruined, wasted or damaged but that her descendants should inherit the same with the intent and meaning that if it be found necessary that the said premises should be bestowed for dowry the same should be given with the same intent and meaning and that if there should be no heirs to the said property it should devolve upon the mosque as is more fully stated in the fifth clause of the said Last Will.

" And whereas the said Mohideen Natchia died on or about the twenty-fourth December, 1855, and the said Last Will and Testament of the twenty-second July, 1850, was duly proved in suit No. 1734 of the District Court of Colombo and Probate thereof granted to Samsy Lebbe Ahamadu Lebbe, the Executor in the said Last Will and Testament named ".

This is not only a reference to a Last Will but is also an incorporation of the substance of that Will and in my opinion more than satisfies the requirements of Section 2 (1) (*b*) ; but this does not answer learned counsel's contention that Will No. 418 (P2) is not referred to. There is no evidence that the Will referred to in P6 and Will No. 418 (P2) are the same. It cannot therefore he said that P2 is referred to in P6.

In regard to the third point there is no proof that Will No. 418 (P2) was proved. Neither the Probate nor the testamentary proceedings in which the Will was proved are produced. The first plaintiff has produced a letter dated 30th September, 1952 (P3) from the Secretary of the District Court of Colombo to the effect that the Probate and Inventory in D.C., Colombo, 1734T dated 15th September, 1852, are missing according to an Inventory prepared some years ago. This letter does not prove that Will No. 418 (P2) has been admitted to Probate in the case mentioned therein.

He also produces a document (P4) which is as follows :—

"IN THE DISTRICT COURT OF COLOMBO

TESTAMENTARY INDEX

* * * *

	Number
Mohedin Natchie of Colombo ...	... 1734

* * * *

'True copy' of extract from Testamentary Index Register, page 197 in D.C., Colombo.

(Sgd.) E. SANGARAPILLAI,
Asst. Secretary,
D.C., Colombo.

Certified this 10th day of December, 1953".

Even this document does not prove that the Will No. 418 (P2) has been admitted to Probate. Another document on which the first plaintiff relied for the purpose of establishing that the Will P2 has been proved is P5 which is the copy of a deed No. 8744 executed on 4th April, 1856, by Samsu Lebbe Ahamadu Lebbe, one of the sons of Mohideen Nachchia. The recitals relied on are as follows :—

"And whereas the said Mohideen Natchchi heretofrom to wit at Colombo on or about the 24th day of December One thousand eight hundred and fifty-five departed her life having previously made and published her last will and testament bearing date the twenty-second day of July One thousand eight hundred and fifty and thereby appointing one of her two sons, namely, Samsu Lebbe Ahamadu Lebbe, sole executor of the said Last Will who proved the said Last Will before the District Court of Colombo in the case No. 1734 and obtained Probate thereof a copy of which said Probate bearing date the thirty-first day of March One thousand eight hundred and fifty-six is hereunto annexed".

The same deed also refers to an extract of the Last Will which is annexed to it in these terms—"as is morefully stated in the fifth clause of the said Last Will an extract from which is hereto annexed". The copy of the Probate is not annexed to the certified copy of the deed produced in this case nor is there an extract of the Last Will. He also relies on the copy of a deed (P6) of 27th May, 1902, executed by Colenda Marikar which refers to a Last Will of 22nd July, 1850, which was proved in suit No. 1734 of the District Court of Colombo and Probate thereof was granted to Samsy Lebbe Ahamadu Lebbe, the executor of the said Last Will and Testament.

Do the documents on which the first plaintiff relies prove that the Will produced in the instant case has been proved as the Last Will of Mohideen Natchchia? I think not. The granting of Probate is a matter which is required by law to be reduced to the form of a document. Section 91 of the Evidence Ordinance provides that in such a case no evidence shall be given in proof of the terms of such matter except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible. The Probate has not been produced although it would appear from the documents produced that a Probate was in existence in 1856. There is no legal evidence that the Probate which was in existence in 1856 has been destroyed or lost. The Probate is a document given by the Court to the executor. P4 establishes only that the entry Mohedin Natchie of Colombo... $\frac{\text{Number}}{1734}$ occurs in the Testamentary Index. That is not enough to to bring Section 65 of the Evidence Ordinance into operation and to permit of secondary evidence of the Probate being given, if such evidence were, in fact, available.

The evidence that has been produced by the first plaintiff to prove the Probate of the Will in question is not even secondary evidence though that evidence has been allowed. Now the rule is that documents must be proved by primary evidence (Section 64, Evidence Ordinance). The exceptions are to be found in Section 65 which reads—

"Secondary evidence may be given of the existence, condition, or contents of a document in the following cases :—

(1) When the original is shown or appears to be in the possession or power—
  (i) of the person against whom the document is sought to be proved, or
  (ii) of any person out of reach of, or not subject to, the process of the Court, or
  (iii) of any person legally bound to produce it,
  and when, after the notice mentioned in Section 66, such person does not produce it ;

(2) When the existence, condition, or contents of the original have been proved to be admitted in writing by the person against whom it is sought to be proved, or by his representative in interest ;

(3) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time ;

(4) when the original is of such a nature as not to be easily movable ;

(5) when the original is a public document within the meaning of Section 74 ;

(6) when the original is a document of which certified copy is permitted by this Ordinance or by any other law in force in this Island to be given in evidence ;

(7) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (1), (3), and (4), any secondary evidence of the contents of the document is admissible.

In case (2), the written admission is admissible.

In case (5) or (6), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (7), evidence may be given as to the general result of the document by any person who has examined them, and who is skilled in the examination of such documents ".

In the instant case even if the plaintiffs had a certified copy of the Probate they would not have been entitled to produce it without bringing themselves within the ambit of Section 65. There being no proof that the Will No. 418 (P2) has been admitted to Probate it cannot be acted on as the Last Will of the deceased. It is therefore unnecessary to decide whether the Will No. 418 (P2) creates a perpetual fidei commissum. But as a great deal of time appears to have been devoted at the trial to a discussion of the effect of this Will (P2) and as the learned District Judge has referred to it at length and formed the conclusion that it creates a perpetual fidei commissum, I think I should express my opinion. The effective part of the document " X ", which is the translation of Will No. 418 made by the plaintiffs' expert, reads—

" I give unto my first son, Samsi Lebbe Hameedu Levvai subject to the condition of fidei commissum in perpetuity over the entirety of the property. He shall only enjoy the income from the said three houses and the garden appertenant thereto but shall not sell or mortgage the same for any debts or in any other manner alienate the same or do any kind of damage and even the successive progeny will only possess the same subject to the condition and if it became necessary to give the said properties as dowries even then the said condition of fidei commissum shall be attached to the whole of the said property, and the said property shall be continued to be possessed and in the event of there being no persons at any time who shall be entitled to the said properties then the same shall be given over to the Mosque ".

At the trial a dispute arose as to the true rendering into English of the Will, which is in Tamil. Expert evidence was called by both sides. The dispute centred round the words " even the successive progeny " in the above extract. The defendant's expert gives the following persion : " even their respective children shall possess the properties ". The learned District Judge has preferred the version of the plaintiffs' expert. The contentious words are " Thangal Thangaludaiya ". The defendant's expert restricts the meaning to " their children ". He is certain it never means " generation " or " progeny ". Of the two meanings I prefer the meaning which tends to support the view that the instrument does not create a perpetual fidei commissum. My view finds support in the following passage in Van Leeuwen's *Censura Forensis*, Bk. III, Ch. VII, Sec. 14 (Foord's translation)—

" It has been received as a general rule, that a fidei commissum of this or a similar kind in a case of doubt and when the prohibition is difficult to be understood, is not perpetual, but only extends to the fourth degree of succession, counting from him to whom after the death of the first heir the inheritance has come saddled with such a burden, up to the fourth degree beyond him inclusive, for the person who has been burdened expressly and by name does not form a degree, but his successor is the first to do so ."

The last point of learned counsel is that the defendant is entitled to a decree in his favour by virtue of his possession of the land for thirty years. He relies on the following proviso to Section 13 of the Prescription Ordinance :—

" Provided also that the adverse and undisturbed possession for thirty years of any immovable property by any person claiming the same, or by those under whom he claims, shall be taken as conclusive proof of title in manner provided by Section 3 of this Ordinance, notwithstanding the disability of any adverse claimant ".

It has been held by a Bench of three Judges in the case of *Cassim* vs. *Dingihamy* (9 N.L.R. 257) that in the proviso " disability " means incapacity to do legal acts, and that a fidei commissary whose right to possession has not accrued cannot be said to be under " disability ". With that decision I am in respectful agreement.

For the above reasons I set aside the decree of the District Court and direct that a decree be entered dismissing plaintiffs' action with costs.

In view of the order I have made the cross objections are also dismissed.

The plaintiffs are ordered to pay the costs of appeal to the defendant.

PULLE, J.

I agree.

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

CASSIM *vs.* KALIAPPA PILLAI AND ANOTHER

S. C. No. 679/57—D. C. Colombo No. 36600/M.

Argued on : June 1, 2 and 3, 1960.
Decided on : June 3, 1960.

Landlord and tenant—Payment of rent by cheque—Has third party right to pay tenant's rent by cheque.

Held : That even where there is an implied agreement that a landlord is to accept cheques in payment of rent, this does not cast an obligation on the landlord to accept a cheque drawn in his favour by a person other than the tenant, in payment of rent. Nor has a third person a right to force the landlord of another to accept a cheque drawn by him in payment of the other's rent. Such a payment would not amount to payment in terms of the contract of letting or hiring.

Authorities cited : *Voet*, 19.2.8.
Smith vs. *Cox* (1940) 3 A.E.R. 546.

H. W. Jayewardene, Q.C., with *M. S. Mohamed* for the Plaintiff-Appellant.

H. V. Perera, Q.C., with *S. Sharvananda* for the Defendants-Respondents.

BASNAYAKE, C.J.

In this action the plaintiff, who is the owner of premises No. 65, Sea Street, Colombo, sought to eject the 1st defendant, Kumara Perumal Kaliappa Pillai, who was his tenant of those premises since February, 1947, on a monthly tenancy, on the grounds that he was in arrear of rent for one month after it had become due, and that he had sub-let the premises without his prior consent in writing. Both these are grounds which permit a landlord to institute proceedings for the ejectment of a tenant without the authorisation of the Rent Control Board.

It would appear that the defendant by an indenture No. 4245 dated 30th March, 1955, attested by Kartigasu Thiru Chittampalam, Notary Public, transferred the business he was carrying on at the premises No. 65, Sea Street and No. 19, Dam Street to Periannapillai Tirupathy, the 2nd defendant, as trustee for his seven children of a trust named the "Kumaraperumal Trust". By that indenture Kaliappa Pillai transferred to Tirupathy as trustee—

> ". . . All and singular the stock-in-trade, shop goods, Oilman stores, sundries and All and singular the furniture fittings and other articles of trade and things whatsoever lying in the aforesaid premises No. 65, Sea Street in Colombo and No. 19, Dam Street in Colombo and all and singular the moneys, book-debts and other assets of whatsoever including the goodwill, quota rights, import rights and other licences and privileges as aforesaid of the business carried on by the Settlor under the name, style and firm of "Sri Lanka Stores" and the deposits with the Landlords of the said premises and the Government Electrical and Telephone Departments and morefully described in the schedule hereto and delivered possession of same . . .".

The 1st defendant was not residing at No. 65, Sea Street, but at No. 8, Charlemont Road, Wellawatte. It is common ground that the rent of the premises was paid to the plaintiff on or before the 10th of each month. It was the practice for the 1st defendant to pay his rent by cheque drawn on his bank, but on 6th April, 1955, the plaintiff received a cheque drawn on the Indian Bank, Limited (P 1) and signed as follows :—

> "Sri Lanka Stores,
> P. Tiruppathy,
> *Proprietor.*"

with the following letter (P 1A) :—

> "SRI LANKA STORES
> IMPORTERS & EXPORTERS,
> Oilmanstores, Groceries, Hardware, Stationery, etc.
>
> 65, Sea Street,
> Colombo 11, 6.4.1955.

Mr. M. S. M. Cassim,
Mills Avenue,
Skinner's Road South,
Colombo.

Dear Sir,
Herewith enclosing a I.B. cheque No. C. 131048 for Rs. 210·83 (Rupees two hundred and ten and cents eighty-three) being house rent for the above premises for the month of March, 1955.

Please be kind enough to acknowledge receipt for same.

Thanking you,
Yours faithfully,
(Sgd.) Illegibly,
S. L. S. ".

The plaintiff says that the cheque and the letter which accompanied it put him on inquiry, as the cheque was signed by a person who was not his tenant, and he went to the premises at No. 65, Sea Street, and found that P. Tiruppathy, the 2nd defendant, was carrying on business there. Thereafter on 5th May, 1955, the 1st defendant sent to the plaintiff a cheque drawn on the Bank of Ceylon and signed—

" Sri Lanka Stores,
K. P. Kaliappa Pillai,
Proprietor ".

with the following letter of the same date (P 5) :—

SRI LANKA STORES
Importers & Exporters.
Oilmanstores, Groceries, Hardware, Stationery, etc.

65, Sea Street,
Colombo 11, 5.5.1955.

M. S. M. Cassim, Esq.,
Colombo.

Dear Sir,
Herewith enclosing a Bank of Ceylon Cheque No. D/3 99850 for Rs. 210·83 being house rent for the month of April, 1955.

Please be kind enough to acknowledge receipt for same.

Thanking you,
Yours faithfully,
(Sgd.) Illegibly,
for S. L. S. ".

In neither of the letters did the person who signed it describe the capacity in which he did so. It is contended on behalf of the plaintiff that the learned District Judge was wrong in dismissing his action holding that the Indian Bank Cheque (P 1) discharged the 1st defendant's liability in respect of the rent for March, and that it was the duty of the plaintiff to have returned the cheque if he was not accepting it as payment of rent. The plaintiff has proved by calling an officer of the Indian Bank, Limited, that the 2nd defendant's account in that Bank had been closed on 9th March, 1955, and that at the time the 2nd defendant had drawn the cheque in the plaintiff's favour he had no account in the Indian Bank. The question that arises for decision is whether the cheque sent by the 2nd defendant operated in law as payment of his rent by the 1st defendant.

Payment in a contract of letting and hiring must be in cash (*Voet*, Bk. XIX, *Tit.* 2, s. 8). The landlord is under no obligation to accept payment by cheque unless there is an agreement, express or implied, to do so. Such an agreement may be presumed when over a long period of time the landlord has accepted cheques drawn by the tenant on his bank account without question. But even such an implied agreement does not cast an obligation on the landlord to accept a cheque drawn by a person other than the tenant in his favour in payment of rent. Nor has a third person a right to force the landlord of another to accept a cheque drawn by him in payment of that other's rent. Such a payment by a third person not being a payment in terms of the contract of letting and hiring would not amount to payment thereunder. In the instant case there was not only a payment by a cheque drawn by a person other than the tenant but the cheque itself was drawn by a person who had no account current at the time at the Bank on which it was drawn. " Sri Lanka Stores " is not a legal person. The existence of those words on the cheque (P 1) is no indication that the plaintiff's tenant was the drawer of the cheque especially as any such impression is erased by the name of the drawer and his description of himself as proprietor. The accompanying letter did not clarify the position. In the circumstances it is understandable that the plaintiff became suspicious of the cheque. The sudden departure from the practice of sending his own cheque, without a word of warning, put him on his guard. In our opinion the cheque sent by the 2nd defendant drawn on the Indian Bank, Limited, does not operate as payment of rent by the 1st defendant.

Learned counsel for the appellant has drawn our attention to the case of *Smith* vs. *Cox* (1940) 3 All. E.R. 546 cited in Woodfall on Landlord and Tenant, where the question of payment of rent by a stranger has been considered. In view of the conclusion we have reached it is not necessary to discuss that decision.

On the question of sub-tenancy it is clear from the indenture entered into by the 1st defendant and the 2nd defendant that the 1st defendant had surrendered his interests in the business, and that he was not living on the premises in question and had no interest as a tenant. Learned counsel for the respondent had argued that although the 1st defendant did not carry on the business he was entitled to be the tenant. On the evidence before us we are unable to escape the conclusion that the 1st defendant having transferred the business by deed sought by this indirect method to transfer the tenancy to the trustee. In his evidence the 1st defendant says that the rent of the premises was paid by by him personally, and that even after the business was transferred he paid the rent himself. The statement of accounts produced by him does not bear that out and the rents paid on account of the premises in question are shown in the accounts of the business after the transfer.

We, therefore, think that the plaintiff's action is entitled to succeed, and we accordingly set aside the judgment of the learned District Judge and direct that judgment be entered for the plaintiff as prayed for in his plaint with costs both here and below.

Set aside.

SANSONI, J.
I agree.

Present : T. S. FERNANDO, J.

THE TIMES OF CEYLON, LTD., APPELLANT *vs.* THE NIDAHAS KARMIKA SAHA VELANDA SEVAKA VURTHIYA SAMITIYA, APPLICANT-RESPONDENT.

S. C. Appeal No. 6 of 1959—Labour Tribunal Case, No. 155 of 1959.

In the matter of an appeal under Section 31 D (2) of the Industrial Disputes Act, No. 43 of 1950.

Argued on : 24th and 25th, May, 1960.
Decided on : 31st August, 1960.

Industrial Disputes Act, No. 43 of 1950 as amended by Act No. 62 of 1957—Section 47—Definition of Workman—Distinction between workman and independent contractor—Test to be applied.

Z, a delivery peon, was employed on 21.5.1956, by the Times of Ceylon, Ltd., on a written contract, the terms of which were to the effect—

(*a*) that he would be paid a commission of -/02½ cents for every copy delivered ;
(*b*) that failure to deliver a paper will result in his having to pay the value of the paper ;
(*c*) that in case he was unable to call for his papers, the office must be notified or a substitute sent ;
(*d*) that he would be held responsible for all delivery errors ;
(*e*) that he should collect the papers at the times stipulated by the Circulation Manager ;
(*f*) that his commission would be paid once a month ;
(*g*) that failure to call for copies for distribution, without due notice, or non-delivery of copies taken would result in the termination of his contract.

Z was a temporary monthly-paid employee of the same firm from 1954 to 1956. Under this contract, the section of Colombo to be served by Z was a distance of about two miles and the number of subscribers involved were 84 for the Evening *Times* and 94 for the *Sunday Times*. The times stipulated for the collection of the papers were 2.30 p.m. on week days and 4 a.m. on Sundays.

Apart from the distribution of papers provided for in the said contract Z also undertook the distribution to subscribers of a magazine for which he was paid at the rate of 2½ cents per copy delivered and also worked on Saturdays on the job of packing newspapers and loading the packages into the Company's vans for which he was paid at the rate of 44 cents an hour.

On 31.5.1959, Z failed to turn up to collect the copies of the *Sunday Times* for distribution and failed to notify his inability to attend or to send a substitute, contrary to his previous practice. Thereupon the Company terminated his contract.

Z applied through the Trade Union for relief to the Labour Tribunal established under the Industrial Disputes (Amendment) Act, No. 62 of 1957. The Tribunal held that he was a " workman " within the meaning of the definition of that term in Section 47 of the Industrial Disputes Act, No. 43 of 1950 as amended by Act, No. 62 of 1957 and not an independent contractor as contended for by the Company and ordered his reinstatement in employment with payment of back-wages.

The Company appealed.

Held : (i) That in the circumstances the true relationship between Z and the Company was one approximating that between a hirer and an independent contractor. The essence of the work he had undertaken to do was the distribution of the copies of the two newspapers and that could have been effected through agents or substitutes. The work connected with the distribution of the magazine, the packing of newspapers and the loading of vans aforesaid were not done in pursuance of the said contract, but on a purely voluntary basis.

(ii) That, therefore, Z was not a " workman " within the meaning of that term in Section 47 of the Industrial Disputes Act, No. 43 of 1950 as amended by Act, No. 62 of 1957.

(iii) That the Appeal Court could interfere with the decision of the Tribunal, where it is satisfied that in reaching the decision appealed from, the Tribunal has misdirected itself in the application of the correct test or tests.

Per T. S. FERNANDO, J.—" The question of the distinction between a workman as defined in the Industrial Disputes Act, 1947 (of India) and an independent contractor came up recently for consideration by the Supreme Court of India in *D.C. Works, Ltd.* vs. *State of Saurashtra* (1957) A.I.R. (S.C.) at 264, a case which was well in the mind of the Tribunal whose decision is now canvassed before me. In that case, the Supreme Court of India after considering many decisions, principally of the English Courts, stated that " the principle which emerges from the authorities is that the *prima facie* test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or, to borrow the words of Lord Uthwatt in *Mersey Docks and Harbour Board* vs. *Coggins and Griffith (Liverpool), Ltd.*, (1947) 1 A.C. at 28, the proper test is whether or not the hirer had authority, to control the manner and execution of the act in question ".

Cases cited : *Simmons* vs. *Heath Laundry Co.* (1910) 1 K.B. 543. at 552.
Yemens vs. *Noakes* (1880) 6 Q.B.D., at 532.
Sadler vs. *Henlock*, 4 E. & B. at 578.
Performing Rights Society, Ltd. vs. *Mitchell and Booker* (1924) 1 K.B. at 767.
D.C. Works, Ltd. vs. *State of Saurashtra* (1957) A.I.R. (S.C.) at 264.
Mersey Docks and Harbour Board vs. *Coggins and Griffith (Liverpool), Ltd.* (1947) 1 A.C. at 28.

H. V. Perera, Q.C. (with him, *L. E. J. Fernando*), for the appellant.

S. P. Amarasingham (with him, *F. X. J. Rasanayagam*), for the applicant-respondent.

T. S. FERNANDO, J.

The sole question that arises on this appeal is whether a person who has been described in the proceedings as a delivery peon who was under contract with a newspaper company to deliver copies of that company's newspapers to certain subscribers in Colombo who had paid subscriptions to the company for the newspapers (including delivery thereof) is a workman within the meaning of the Industrial Disputes Act, No. 43 of 1950. The determination of this seemingly simple question has caused me a great deal of anxiety and the only consolation I can seek in the situation in which I have found myself is the discovery that in the past judges who have had to decide whether a person is a workman or employee or servant as defined in various statutes as distinguished from an independent contractor have experienced difficulty and similar anxiety.

The question before me arises in the following circumstances. The Industrial Disputes (Amendment) Act, No. 62 of 1957, provides for the establishment, for the purposes of the Industrial Disputes Act, No. 43 of 1950, of Labour Tribunals, each such Tribunal consisting of one person. Applications to a Labour Tribunal for relief or redress in respect, *inter alia*, of the termination by an employer of a workman's services were provided for by the Amendment Act which empowered the Tribunal, after inquiry, to make such order as may appear to the Tribunal to be just and equitable. Subject to a right of appeal to the Supreme Court on a question of law, the order of a Labour Tribunal is declared to be final and one that shall not be questioned in any court.—(see new sections 31A, 31B, 31C, and 31D).

Section 47 of the Industrial Disputes Act, No. 43 of 1950, as amended by Act, No. 62 of 1957, defines *workman* as meaning " any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour and includes any person ordinarily employed under any such contract whether such person is or is not in

employment at any particular time and, for the purposes of any proceedings under this Act in relation to any industrial dispute, as including any person whose services have been terminated ".

I have not been able to discover whether this definition has been taken over from legislation on a similar subject in any other country, but it may be mentioned that learned counsel appearing for both parties to this appeal have addressed me on the footing that, according to the definition quoted above, a person who is an independent contractor falls outside the category of *workman*. The Tribunal itself dealt with the application on the assumption that it would have had no jurisdiction to inquire into the complaint if the person concerned was an independent contractor. In the circumstances it is permissible to seek some guidance on the question I have here to decide from decisions both in India and in England as to the test or tests to be applied in determining whether a person is to be regarded as a workman or employee or servant as distinguished from an independent contractor. The distinction between the two classes has been broadly stated to be that, while in the case of the former there is a *contract of service*, in the case of the latter what comes into existence is a *contract for services*. In the case of *Simons* vs. *Heath Laundry Co.* (1910) 1 K.B. 543 at 552, Buckley, L.J., discussing the meaning of the expression "*contract of service*", stated :—

> "A servant", said Bramwell, L.J., in *Yemens* vs. *Noakes* (1880) 6 Q.B.D. at 532, "is a person subject to the command of his master as to the manner in which he shall do his work". To distinguish between an independent contractor and a servant the test is, says Crompton, J., in *Sadler vs. Henlock*, 4 E. & B. at 578, whether the employer retains the power of controlling his work".

Again, in the case of *Performing Rights Society, Ltd.* vs. *Mitchell and Booker* (1924) 1 K.B. at 767, Mc Cardie, J., dealing with a similar question, observed that "it seems reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant. This circumstance is, of course, one only of several to be considered, but it is usually of vital importance ".

The question of the distinction between a workman as defined in the Industrial Disputes Act, 1947 (of India) and an independent contractor came up recently for consideration by the Supreme Court of India in *D. C. Works, Ltd.* vs. *State of Saurashtra*, (1957) A.I.R. (S.C.) at 264, a case which was well in the mind of the Tribunal whose decision is now canvassed before me. In that case, the Supreme Court of India after considering many decisions, principally of the English Courts, stated that "the principle which emerges from the authorities is that the prima facie test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or, to borrow the words of Lord Uthwatt in *Mersey Docks and Harbour Board* vs. *Coggins and Griffith (Liverpool) Ltd.* (1947) 1 A.C. at 23, the proper test is whether or not the hirer had authority to control the manner and execution of the act in question". The Court also expressed the opinion that the correct method of approach in determining the question would be to consider whether having regard to the nature of the work there was due control and supervision by the employer and adopted in this connection the observations of Fletcher-Moulton, L.J., in *Simmons* vs. *Heath Laundry Co.* (*supra*) quoted below :—

> "The greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the grounds for holding it to be a contract of service, and similarly the greater the degree of independence of such control the greater the probability that the services rendered are of the nature of professional services and that the contract is not one of service ".

With these observations as to the nature of the crucial test to be applied serving as a guide, the task for the Tribunal was to apply the test to the facts as found by it in order to determine whether the person concerned was or was not a *workman* within the meaning of the Act.

Let me now state the facts as found by the Tribunal :—

The delivery peon concerned (whom I shall hereinafter refer to as Zubair, which is his name) was employed by the Times of Ceylon, Ltd., a company publishing newspapers, from about August, 1954, till 21st May, 1956, as a temporary monthly paid employee. His work during that period was to deliver the evening edition of the Times on week days and the Sunday edition of the same newspaper on Sundays to a section of the Company's subscribers who had contracted with the company for delivery to them of these

newspapers. He was paid a monthly salary during this period. On the 21st May, 1956, Zubair's period of temporary employment as a delivery peon on a monthly salary was terminated and his connection with the company came from that day to be governed by a contract the terms of which are to be found in document R1, the text of which is reproduced below :—

21st May, 1956.

MR. M. I. M. ZUBAIR,
Delivery Peon.

Dear Sir,

Please acknowledge receipt of this letter confirming your acceptance of our terms for the contract to distribute our subscribers' copies in Colombo.

The terms are :—

(1) You will be paid a commission of -/02½ cents for every copy delivered.

(2) Failure to deliver a paper will result in your having to pay the value of the paper.

(3) In case you are unable to call for your papers this office must be notified or a substitute sent.

(4) You will be held responsible for all delivery errors.

(5) You will collect your papers at the times stipulated by the Circulation Manager.

(6) Your commission will be paid once a month.

(7) Failure to call for copies for distribution, without due notice, or non-delivery of copies taken will result in the termination of your contract.

Yours faithfully,

(Signed).....
Circulation Manager.

The section of Colombo to be served by Zubair under this contract covered a distance approximately of two miles and the number of subscribers involved in that section at the time Zubair's services were terminated were 84 for the Evening Times and 94 for the Sunday Times. The times stipulated for collection of the papers were 2.30 p.m. on week days (for the Evening Times) and 4 a.m. on Sundays (for the Sunday Times).

Apart from the distribution of the Evening Times and the Sunday Times as provided for in the contract R1, Zubair also undertook the distribution to subscribers of a magazine called *Rasavahini* for which work he was paid at the rate of 2½ cents per copy delivered and also worked on Saturdays on the job of packing newspapers and loading the packages into the company's vans. For this latter work he was paid by the company at the rate of 44 cents an hour.

Zubair had been unable to call for papers on certain days, but he appears to have notified the company in time of his inability to attend with the result that the company was able to effect delivery of the newspapers through the aid of certain persons who were in their employment as monthly paid servants and who were described as reserve peons. On Sunday, 31st May, 1959, however, Zubair failed to turn up to collect the copies of the Sunday Times for distribution to the company's subscribers and failed also to notify his inability to attend or to send a substitute. The Company thereupon terminated his contract on the very next day and claimed to be entitled to do so under Clause 7 of R1.

Zubair submitted to the Tribunal that his inability to turn up at the office on 31st May, 1959, to collect the papers or to send a substitute to attend to the delivery of the papers was due to the fact that his wife quite unexpectedly developed labour pains on the night of the 30th/31st May, 1959, and gave birth to a child at 3.25 a.m. that day. The Tribunal accepted Zubair's explanation for his lapse as being true.

On these facts the Tribunal has found that the company varied the terms of employment of Zubair as a monthly paid employee to that of an employee on a commission basis and, bearing in mind the test to be applied in determining whether Zubair is a workman, that the manner in which he was to perform his duties was within the control of the company. Observing that Zubair's duties were not confined to those set out in R1, but that it was within the company's rights to stipulate the time, the number of houses to which the papers were to be delivered, what was to be distributed apart from the newspapers and what work was to be done on certain

nights for which payments were made by the hour, the Tribunal went on to hold that *Zubair was under contract personally to execute work or labour and therefore was a workman and not an independent contractor.* Holding the termination of his contract unjustified, the Tribunal ordered his reinstatement in employment with payment of back-wages.

Learned counsel for the trade union that made the application to the Tribunal for relief on behalf of Zubair submitted that the decision of the Tribunal was a question of fact which is based upon sufficient evidence and that in the circumstances no question of law arises. The point of law is formulated by the appellant in this way :—The Tribunal is authorised by law to grant relief or redress only in respect of the termination by an employer of the services of a *workman*, and it cannot by wrongly determining that a person is a *workman* exercise a jurisdiction which it does not possess. The question of law has, in my opinion, been correctly formulated in this case. The distinction between a workman and an independent contractor can often be very fine and, if the Tribunal (the judge of fact) has reached a finding one way or the other and has not misdirected itself in so doing, the finding, is not one which can be made the subject of appeal.

Although the learned judge who constituted the Tribunal in this case has given sufficient indication in his order that he was aware of the test or tests to be applied in determining whether Zubair was a workman, I am satisfied for the reasons I shall indicate below that in reaching the decision appealed from he has misdirected himself in the application of the test or tests.

Bearing in mind that the ultimate test to be applied is whether the hirer had authority to control the manner and execution of the Act in question or, to put it in the words to be found in the judgment of the Supreme Court of India, whether there exists in the master a right to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, it is undeniable that the act in question in this case or the work Zubair undertook to do was the distribution of the copies of the two newspapers. That was the essence of the work he had agreed to do or, I should add, to get done. Attendance at the office at a time to be stipulated by the company was merely incidental to this essential part of the contract although here again, it seems to me, the Tribunal was in error when it held that the stipulation of the time of collection was outside the terms of the contract—see clause 5 of R1.

The conclusion reached by the Tribunal that according to the terms of the contract R1 it is a contract personally to execute work or labour is opposed, in my opinion, to the ordinary interpretation of its terms. The essential purpose of the contract was to ensure the distribution of the newspapers to the subscribers, and the necessary inference from its terms is that the essential work of distribuiton could have been effected through agents or substitutes, at the option of Zubair himself. This inference is made clearer by the clause which permits Zubair to have the copies of the newspapers even collected by an agent or substitute. There is nothing in this contract to prevent Zubair getting all the necessary work done by an agent or substitute. Such a feature, it seems almost superfluous to add, is quite inconsistent with the relationship between master and servant or between workman and employer. Although there is no specific mention of it in the order of the Tribunal, the uncontradicted evidence on behalf of the company was that Zubair was free to distribute the newspapers through a substitute and that once the newspapers are removed from the office, the company knows nothing about the distributor's movements and does not require a report from him in regard to the distribution. Not only in the terms of the written contract but even in such practices as had grown up in relation to it there is nothing which would justify the finding that the company had authority to control the manner of distribution. The circumstance that some control may be said to have been retained by the company to vary from time to time the actual number of subscribers to whom delivery was to be effected was merely incidental and did not have the effect of vesting any control, much less detailed control, over the manner in which the most important and necessary part of the work, viz., the distribution, was to be executed. It seems difficult to resist the conclusion that the true relationship between Zubair and the company was one approximating that between a hirer and an independent contractor.

There is one other matter which might usefully be mentioned at this stage. The learned

judge in his order states that part of the duties of Zubair included the distribution of the magazine, *Rasavahini*, when called upon to do so as well as to undertake the packing of newspapers and the loading of vans on Saturday nights. While, no doubt, Zubair performed these services, it is relevant to bear in mind that these things were being done not in pursuance of any obligations under the contracts R1, but purely on a voluntary basis as Zubair's time was his own, and he was free to accept or refuse that work unlike in the case of the delivery of the copies of the Evening Times and the Sunday Times.

The conclusion I have come to on the evidence accepted by the Tribunal in this case is that Zubair was not obliged under the contract to come personally to the company's office to accept delivery or to effect delivery himself. The whole and not merely a part of the essential work under the contract could have been done by an agent or substitute of Zubair. In view of this conclusion, I am compelled to hold that the question whether Zubair was a workman within the meaning of the Industrial Disputes Act should have been answered by the Tribunal in the negative. If so, the Tribunal would have had no jurisdiction to make the order relating to reinstatement and payment of back wages.

Before disposing of this appeal I wish to observe that I cannot help feeling that, in drafting the contract in the terms contained in document R1, the company had deliberately set out to transform the character of a workman which Zubair appears to have held up to 21st May, 1956, to that of an independent contractor. Zubair is hardly likely to have realised the significance of the change effected, but my duty here is to interpret the contract that existed on 31st May, 1959, according to the relevant law, and the company becomes thereby entitled to the decision I have reached on this appeal. At the same time, is it too much to hope that, as no doubt is being entertained that the immediate lapse that brought about the termination of Zubair's contract was occasioned by his wife giving birth to a baby at a time when his presence and assistance was vital at his home, the company may find it possible, notwithstanding this litigation, to renew its contract with this unfortunate man at an early date !

I allow the appeal and quash the order of the Tribunal. The respondent trade union must pay the costs of this appeal which, having regard to the apparent capacity to pay of the respective parties, I limit to a sum of Rs. 105/-.

Appeal allowed.

Present : WEERASOORIYA, J.

PODINA *vs.* RANASINGHE.*

S. C. No. 1160—*M. C. Teldeniya No.* 2337.

Argued on : 29th and 30th August, 1960.
Delivered on : 7th October, 1960.

Maintenance Ordinance, Section 14—*Failure on the part of the Magistrate to examine applicant on oath or affirmation prior to issue of summons—Application for maintenance dismissed after trial—Are proceedings a nullity—Effect of applicant's acquiesence in non-compliance.*

Held : (1) That the failure to comply with Section 14 of the Maintenance Ordinance rendered the proceedings, including the order dismissing the application, a nullity ;

(2) That the applicant's acquiesence or consent cannot cure the defect.

* For Sinhalese Translation See p. 2 of the Sinhala Section

Per WEERASOORIYA, J.—I do not think, however, that such an argument is tenable in view of the decision in *Rupasinghe* vs. *Somawathie* (*supra*). While, if I may say so with respect, I am unable to agree with that decision, it is, nevertheless, binding on me and the present appeal has to be disposed of on that basis.

Cases cited: *Rupasinghe* vs. *Somawathie*, 61 N.L.R. 457.
Namasivayam vs. *Saraswathy*, 50 N.L.R. 333.
Sebastian Pulle vs. *Magdalene*, 50 N.L.R. 494.

M. S. M. Nazeem with *M. T. M. Sivardeen* for applicant-appellant.

K. Sivasubramaniam with *D. S. Nethsinghe* for defendant-respondent.

WEERASOORIYA, J.

This is an appeal from an order of the Magistrate of Teldeniya dismissing an application for maintenance filed by the appellant against the respondent who is her husband.

The point has been taken on behalf of the appellant that the procedure adopted by the Magistrate prior to the issue of summons was in contravention of Section 14 of the Maintenance Ordinance (Cap. 76) in that he failed to examine the appellant on oath on affirmation, or duly to record such examination. Relying on the recent decision of this Court in *Rupasinghe* vs. *Somawathie*, 61 N. L. R. 457, learned counsel submitted that the failure to comply with Section 14 has rendered the proceedings, including the order dismissing the application for maintenance, a nullity and that the case should, therefore, be sent back for fresh proceedings in accordance with law.

It was because of the conflicting views expressed in *Namasivayam* vs. *Saraswathy*, 50 N. L. R. 333, and *Sebastian Pulle* vs. *Magdalene*, 50 N. L. R. 494, (each of which is a decision of a single Judge) that the case of *Rupasinghe* vs. *Somawathie* (*supra*) was referred to a bench of two Judges. The appellant in that case was the respondent to an application for the payment of maintenance, and the appeal was from an order requiring him to pay maintenance. There, too the Magistrate failed to comply with the provisions of Section 14, and in appeal it was held that the non-compliance was fatal to the order and rendered it null and void.

Mr. Nethsinghe for the respondent did not dispute that there has been a failure in the present case to comply with Section 14, but he submitted that at the most it is an irregularity which does not affect the validity of the order dismissing the application for maintenance. I do not think, however, that such an argument is tenable in view of the decision in *Rupasinghe* vs. *Somawathie* (*supra*). While, if I may say so with respect, I am unable to agree with that decision, it is, nevertheless, binding on me and the present appeal has to be disposed of on that basis.

Mr. Nethsinghe also submitted that the *ratio decidendi* of that case is inapplicable to the present case as the appellant, who is the party who initiated the proceedings for maintenance and practically acquiesced in the Magistrate's non-compliance with the provisions of Section 14, should not now be allowed to challenge the validity of the order made in those proceedings. But if the result of such non-compliance is to render those proceedings null and void, I do not see that consent or acquiescence on the part of the appellant can possibly cure the defect.

The order appealed from is declared null and void, and the case is sent back for fresh proceedings to be taken before another Magistrate in accordance with law. There will be no order as regards costs.

Present : WEERASOORIYA, J.

*WILBERT *vs.* INSPECTOR VANDEN DRIESEN (Crimes, Foreshore)

S. C. No. 575—Joint Magistrate's Court, Colombo, Case No. 16097.

Argued on : 24th March 1960.
Decided on : 30th August, 1960.

Customs Ordinance, charge under Section 158 (1)—Theft of motor car battery—Confession made to Customs officer—Does it come within section 25 of the Evidence Ordinance.

Held : That a confession made to a Customs Officer does not come within Section 25 of the Evidence Ordinance.

Case referred to : *Rose* vs. *Fernando* 29 N. L. R. 45.

S. Sharvananda for the Accused-Appellant.

R. Abeyesuriya, Crown Counsel, for the Attorney-General.

WEERASOORIYA, J.

The accused-appellant was charged with the commission of an offence punishable under Section 158 (1) of the Customs Ordinance in that he did have in his possession on the 29th March, 1959, a 12 volt motor car battery bearing No. E.N.F.O. 57/206E valued at Rs. 175/-, being property reasonably suspected to have been stolen from a ship, boat, quay, wharf or warehouse in the Port of Colombo. After trial he was convicted of this offence and sentenced to three months' rigorous imprisonment.

The evidence shows that the accused was driving a motor car which came out of the Delft Quay when it was halted by the customs authorities at one of the exit gates and searched. Inside the bonnet was found the battery which forms the subject matter of the charge. It has been conclusively established that the battery came from one of six new lorries which had been unloaded from a ship on to the Delft Quay on the day of the alleged offence.

The accused was taken before an assistant preventive officer of the Customs to whom he made a statement which the prosecution produced at the trial through the officer who recorded it. The evidence of the officer that the accused made such a statement to him has been accepted by the Magistrate. In this statement the accused claimed to be the owner of the battery, that he had got it " rebuilt " and intended to recharge and use it as an extra battery. At the trial, however, he gave evidence denying that he made such a statement. His defence was that he was a supplier of meals to ships calling at the Port of Colombo, that on the 29th March, 1959, he went to the Delft Quay in his car in order to ascertain whether a particular ship which he was expectfng had arrived, and that when leaving the Quay his car was halted at the gate and searched and the battery, which he saw for the first time, was found inside the bonnet. He dsclaimed all knowledge as to how the battery came to be there.

It seems to me that this defence was rightly rejected by the Magistrate, particularly in view of the accused's statement to the assistant preventive officer. But Mr. Sharvananda for the accused took objection to that statement on the ground that it amounted to a confession and was made to a " police officer " within the meaning of that term in Section 25 (1) of the Evidence Ordinance.

There is nothing in the proceedings to show what the duties of an assistant preventive officer are, but on an examination of the Customs Ordinance it would appear that he has certain limited powers of stopping vessels or vehicles and searching them for smuggled goods and of arresting or searching persons suspected of being concerned in the commission of offences against the Customs Ordinance. I do not think that merely because he is invested with these powers he can be regarded as a " police officer " for the purposes of Section 25 (1) of the Evidence Ordinance. No express authority was cited by Mr. Sharvananda for the submission that an assistant preventive officer of the Customs should be so regarded. As observed by Fisher,

*For Sinhalese Translation, see p. 8 of the Sinhala Section.

C.J., in *Rose* vs. *Fernando*, 29 N.L.R. 45, the "established practice of the Courts based on the opinion of many learned Judges has been to construe the section (Section 25 as it then was) as applying to statements made to those who are authorised to exercise powers which constitute them Police Officers in all but in name, such persons for instance, as Police Headmen, who are directly authorised and required to concern themselves with the same range of crimes as that with which the police force themselves are concerned." In that case, which is a decision of a Divisional Bench of this Court, an Excise Inspector was held not to be a police officer within the meaning of Section 25 of the Evidence Ordinance even though in respect of offences under the Excise Ordinance he is vested with certain powers corresponding to those of a police officer.

It was after this decision that the Legislature took action to amend Section 25 of the Evidence Ordinance by the addition of the present subsection (2) which provides that no confession made to a forest officer with respect to an act made punishable under the Forest Ordinance, or to an excise officer with respect to an act made punishable under the Excise Ordinance, shall be proved as against any person making such confession. In consequence of this amendment the position with regard to a confession to an excise officer has changed from that stated in *Rose* vs. *Fernando* (*surpa*), but the *ratio decidendi* of that case would apply to the question whether an officer of the Customs is a "police officer" for the purposes of Section 25 (1) of the Evidence Ordinance. That question I would, therefore, answer in the negative. In view of this answer it is unnecessary to decide the further point whether the statement made by the accused to the assistant preventive officer amounts to a confession as defined in Section 17 (2) of the Evidence Ordinance. Even if the statement amounts to a confession the reception of it in evidence is not contrary to the provisions of Section 25 (1) of the Evidence Ordinance.

The conviction of the accused and the sentence passed on him are affirmed and the appeal is dismissed.

Appeal dismissed.

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

DE SILVA *vs.* THE URBAN COUNCIL OF KOLONNAWA

S. C. 297—*D. C. Colombo No.* 43434/*M*

Argued and Decided on: June 14th, 1960.

Defendant absent—Ex parte *trial*—*Provisions of sec.* 85 *of the Civil Procedure Code imperative.*

A defendant on whom summons had been served but who had not filed answer was absent on the trial date. The trial Judge proceeded to hear the case *ex parte* and dismissed the plaintiff's action.

Held: That the provisions of section 85 of the Civil Procedure Code are imperative and that the learned trial Judge was therefore wrong in dismissing the plaintiff's action. He should have entered a decree *nisi* in favour of the plaintiff and issued to the defendant a notice of such decree. The defendant, if it chose, could have then availed itself of the provisions of section 86.

C. R. Gunaratne with *M. S. M. Nazeem* and *M. T. M. Sivardeen* for the plaintiff-appellant.

E. A. G. De Silva, for the defendant respondent.

BASNAYAKE, C.J.

This is an action against the Urban Council of Kolonnawa by one of its women employees whose services have been terminated. The plaintiff claimed damages for wrongful termination of her services. Summons was served on the defendant but no answer was filed, and the case was fixed for *ex parte* trial. On the date fixed for the trial the defendant did not appear, and the learned trial Judge proceeded to hear the case *ex parte*, and dismissed the plaintiff's action. In his judgment he said: "The plaintiff admits that she had been given a month's notice, which I consider is reasonable. She had been employed as a midwife for seven years. In these circumstances I think her claim is bad in law. An employer is entitled to terminate the services of a monthly paid employee on giving the employee a month's notice."

The defendant has appealed from the judgment of the learned District Judge. It is submitted by counsel for the appellant that the

procedure prescribed by section 85 of the Civil Procedure Code has not been observed. That section provides that " if the defendant fails to appear on the day fixed for his appearance and answer, or if he fails to appear on the day fixed for the subsequent filing of his answer, or for the filing of the replication, or on the day fixed for the hearing of the action, and if the Court is satisfied by affidavit of the process server, stating the facts and circumstances of the service, or otherwise, that the defendant has been duly served with summons, or has received due notice of the day fixed for subsequent filing of answer, or of replication, or of the day fixed for the hearing of the action, as the case may be, or if the defendant shall fail to file his answer on the day fixed therefor, and if on the occasion of such default of the defendant the plaintiff appears, then the court shall proceed to hear the case *ex parte* and to pass a decree *nisi* in favour of the plaintiff in form No. 22 in the First Schedule or to the like effect ... and shall issue to the defendant a notice of every such decree *nisi*."

This is an imperative requirement of the Civil Procedure Code which the learned District Judge should have followed.

The learned Judge was wrong in dismissing the plaintiff's action. He should have entered a decree *nisi* in favour of the plaintiff and issued to the defendant a notice of such decree, and, if the defendant chose to avail itself of the provisions of section 86 of the Civil Procedure Code and satisfy the court that it had reasonable grounds for the default in appearing or in filing answer, the court had power to grant the relief provided in that section.

We, therefore, set aside the judgment of the learned District Judge and send the case back to the lower court for a decree *nisi* to be entered in favour of the plaintiff.

The appellant is entitled to the costs of the appeal.

SANSONI, J.

I agree.

Set aside and sent back.

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

HARLEY *vs.* CHELLIAH

S. C No. 172—*D. C. Gampola No.* 890

Argued and Decided on : 12th November, 1959.

Civil Procedure Code, Sections 184, 185 *and* 186—*Failure on the part of the judge who heard the case to date and sign judgment at time of pronouncing it—Validity of judgment.*

Held : That the failure on the part of a judge to date and sign the judgment in open Court at the time of pronouncing it as required by section 186 of the Civil Procedure Code renders the judgement invalid.

Cases referred to: *Saravanamuttu vs. Saravanamuttu* 61 N. L. R. 1.
S. C. No. 75/D. C. (F) Galle No. L 653.
Bharat vs. The Queen (1959) 3 W. L. R. 406.

G. E. Chitty, Q.C., with *E. B. Vannitamby* for the defendant-appellant.

E. R. S. R. Coomaraswamy with *B. A. R. Candappa* for the plaintiff-respondent.

BASNAYAKE, C.J.

Learned counsel for the appellant submits in this case that the provisions of sections 184, 185 and 186 of the Civil Procedure Code have not been complied with. At the conclusion of the hearing of the case on 8th September 1956 Judge Sivagnanasunderam announced, as he is required to do by section 184 (1) of the Civil Procedure Code, that the judgment would be delivered on 23rd November 1956. On that date the judgment was not delivered, nor was any order made under section 184 (2) of the Code which provides that if the court is not prepared to give its judgment on the day fixed under section 184 (1) a yet future day may be appointed and announced for the purpose.

It would appear from the minute in the journal under the date 20th February 1957 that, by then, Judge Sivagnanasunderam had forwarded to the District Judge who was then holding office

the record in the case together with the documents and a judgment signed by him but undated. That judgment was put in the safe of the court and order was made that steps be taken to gazette Judge Sivagnanasunderam as Additional District Judge, Kandy, to deliver the judgment on 22nd March 1957. On that day it would appear that the judgment signed by Judge Sivagnanasunderam was pronounced in open court by the presiding Judge in the presence of the proctors. It was neither dated nor signed by him as required by section 186 of the Code which provides : " The judgment shall be written in English, and shall be dated and signed by the Judge in open court at the time of pronouncing it ". It has been held in the case of *Saravanamuttu* v. *Saravanamuttu* (61 N. L. R. 1) and in *S. C. No. 75/D. C. (F) Galle No. L/653* (unreported S. C. Minutes of 4th November 1959), that non-observance of the requirements of the Code renders a judgment invalid. In our opinion the judgment in this case is not valid. It will be of interest to note that in deciding a similar question the Privy Council in the recent case of *Bharat* v. *The Queen* (1959) 3 W. L. R. 406 expressed the view that the decision of an appeal not pronounced in accordance with section 30 of the Fiji Court of Appeal Ordinance was bad in law. We set aside the judgment and decree and send the case back for a fresh trial.

There is a further matter to which we wish to refer, and that is that a period of seven months has elapsed between the conclusion of the trial and the delivery of the judgment. Such a long delay seriously impairs the value of the judgment of a Judge of first instance as it cannot be gainsaid that the impression made on the Judge's mind by the witnesses is bound to fade after a passage of time so long as seven months.

We make no order as to the costs of the appeal.

Set aside and sent back.

SANSONI, J.
I agree.

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

M. SAMUEL *vs.* A. J. DHARMASIRI AND ANOTHER.

S. C. No. 301—*D. C. Kegalle, No.* 6988.

Argued on : May 31 and June 1, 1960.

Decided on : June 1, 1960.

Prescription Ordinance, Section 3—*Decree for ejectment from a land—Effect of judgment-debtor remaining therein for prescriptive period.*

Held : That it is possible for a judgment-debtor against whom a decree for ejectment from a land has been passed, to acquire a right to a decree under Section 3 of the Prescription Ordinance by continuing to remain therein for a period of over 10 years after the date of decree without doing any act by which he directly or indirectly acknowledges a right in the judgment-creditor or in any other person.

Cases referred to : *Wimalasekera* vs. *Dingirimahatmaya*, 39 N.L.R. 25.
Fernando vs. *Wijesooriya*, 48 N.L.R. 320 at 325-326.
Jane Nona vs. *Gunewardane*, 49 N.L.R. 522.
Muttu Caruppen, et al vs. *Ran Kira, et al*, 13 N.L.R. 326.

H. V. Perera, Q.C., with *E. A. G. de Silva*, for the plaintiff-appellant.

H. W. Jayawardene, Q.C., with *D. R. P. Goonetileke*, for the defendants-respondents.

BASNAYAKE, C.J.

The only question that arises for decision in this case is whether a judgment-debtor against whom a decree for ejectment from a land has been passed acquires a right to a decree under Section 3 of the Prescription Ordinance by continuing to remain therein for a period of over 10 years after the date of the decree without doing any act by which he directly or indirectly acknowledges a right in the judgment-creditor or any other person.

Shortly the facts are as follows:—On 22nd October, 1934, K. M. P. Kumarappa Chettiyar and K. M. P. R. Periya Caruppen Chettiyar, as plaintiffs, instituted in D.C. Kurunegala Case No. 17767 an action against Jalathpedige Ruben the 2nd defendant to this action, and his father Jalathpedige Unga. They alleged that by deed No. 2383 of 10th May, 1932, Unga and Ruben, the defendants, sold and transferred to them the shares in the lands described in the schedule to the plaint and that on the same day the defendants entered into a deed of agreement whereby they undertook to pay to the plaintiffs a sum of Rs. 6,000/- within a period of four years, on receipt of which payment the plaintiffs undertook to transfer the said shares in the lands to the defendants. They also alleged that it was agreed that the defendants should remain in possession of the said shares in the lands paying interest on the sum of Rs. 6,000/- at the rate of 10% per annum, and that if they failed to pay the capital or the interest on the due dates, the agreement should be declared null and void and that the defendants should hand over possession of the said shares in the lands to the plaintiffs. As the defendants had failed to pay the interest and upon such default had failed to quit and deliver possession of the lands as agreed upon by them, the plaintiffs prayed that the agreement be declared null and void, that the defendants be ejected from the said lands, and that they be placed in quiet possession. They also asked that the defendants be ordered to pay jointly and severally damages in a sum of Rs. 500/- and continuing damages in a sum of Rs. 500/- per annum till they were restored to possession. The plaintiffs succeeded in that action and on 16th December, 1935, a decree was entered in their favour ordering and decreeing that the agreement dated 10th May, 1932, be declared null and void. The decree further ordered that the defendants be ejected from the lands described in the schedule to the decree and that the plaintiffs be placed in quiet possession thereof. The defendants were also ordered jointly and severally to pay to the plaintiffs the sum of Rs. 500/- as damages and continuing damages at the rate of Rs. 500/- per annum till the plaintiffs were restored to possession of the said lands. On 20th February, 1936, the plaintiffs moved for a writ of possession against the defendants and the application was allowed. On 29th June, 1936, the Deputy Fiscal, Kurunegala, returned the writ of possession and reported that the plaintiffs did not attend to take delivery of possession of the lands. No further attempt appears to have been made to execute the decree till 7th November, 1940, when another application was made for the issue of a writ of possession. On this application the Court ordered that affidavits should be filed and that notice be issued on the defendants. No further steps appear to have been taken on that application, because on 6th February, 1942, another application was made by the plaintiffs for a writ of possession. An affidavit from the plaintiffs' attorney was filed and the plaintiffs' Proctor moved that the writ of possession be re-issued for execution and that it be against Ruben alone, because by that time his father, Unga, had died. The Court ordered notice to issue on the 2nd defendant. Though notice was served and order for a writ of possession was made, no steps were taken by the plaintiffs till 19th October, 1942, when they moved for execution of the writ of possession. Objection was taken to that application by the 2nd defendant on the ground that he had acquired a right to a decree in his favour under Section 3 of the Prescription Ordinance in respect of the lands in dispute, and that the plaintiffs had failed to exercise due diligence to procure satisfaction of the decree and that 10 years had elapsed from the date of the decree. The learned trial Judge refused the application for execution of the writ on the ground that it was barred by the operation of Section 337 (1) of the Civil Procedure Code.

The instant action was instituted, by the plaintiff, Mutunayakage Samuel, to whom Reena Neiyappa Chettiar, the attorney of Kumarappa Chettiar and Caruppen Chettiar, had sold their interests. He prayed that he be declared entitled to half share of the said land and that the land be partitioned in terms of the provisions of the Partition Ordinance. The defendants resisted the action and asked that it be dismissed. The main issue tried by the learned Judge is one of prescription which he has held in favour of the defendants. In his judgment he observes that " it is perfectly clear that from the date of the decree in D.C. Kurunegala, Case No. 17767, ordering the ejectment of Unga and Reuban, the possession of Unga and Reuban became adverse. That their possession continued to be adverse is proved by the fact that various applications were made for a writ of possession by the chetties, and attempts were made by them to obtain possession ".

The learned District Judge has rejected the evidence that the defendants gave the Chetties a share of the produce. Learned counsel for the appellant confined his arguments to the question of law. It is common ground that after the decree in D.C., Kurunegala, Case No. 17767,

the defendants continued to be in possession of the lands and to enjoy the produce. The 2nd defendant was (the 1st having died) in possession of them even at the time of this action. It is urged that a judgment-debtor who remains on a land which is the subject-matter of the action does not become entitled to claim the benefit of Section 3 of the Prescription Ordinance by so remaining, and that in the instant case the fact that when the plaintiffs sought to obtain possession of the lands, the defendants urged that no due diligence had been shown in executing the writ of possession was an indication of a right existing in another person.

We have been referred to the cases of *Wimalasekera* vs. *Dingirimahatmaya*, 39 N.L.R. 25, *Fernando* vs. *Wijesooriya*, 48 N.L.R. 320 at 325-326, and *Jane Nona* vs. *Gunawardena*, 49 N.L.R. 522. In the first of those cases it was held that a successful action for declaration of title to land is an interruption of defendant's adverse possession of the land (p. 28). In the second case Canekeratne, J., observed :—

> "Another essential requisite to constitute such an adverse possession as will be of efficacy under the statute is continuity; and whether a possession is 'undisturbed and uninterrupted' depends much upon the circumstances. If the continuity of possession is broken before the expiration of the period of time limited by the statute, the seisin of the true owner is restored; in such a case to gain a title under the statute a new adverse possession for the time limited must be had. Where there is a contest as regards the title to a land if the claim of the parties is brought before a Court for its decision and there is an assumption that meanwhile the party occupying shall remain in possession, the running of the statute in favour of the defendant is suspended; otherwise a bar will all the while be running which the plaintiff could by no means avert. If the plaintiff fails in his action there has been no break in the continuity of possession of the defendant. If the plaintiff succeeds the continuity of possession of the one who was keeping the rightful owner out of his possession is broken; the result of the finding of the Court is to restore the seisin of the plaintiff."

In the third case (*Jane Nona* vs. *Gunawardena*) it was held following *Muttu Caruppen, et al* vs. *Ran Kira, et al* (1910) 13 N.L.R. 326, that a judgment-debtor can by adverse possession for the requisite period after he has lost his title by the sale in execution obtain a decree declaring him entitled to the land.

The question whether the defendant to an action is entitled to a decree in his favour by virtue of undisturbed and uninterrupted possession by a title adverse to or independent of that of the plaintiff is one that falls to be determined on the facts of each case. No hard and fast rule can be laid down. If the facts establish an undisturbed and uninterrupted possession for ten years previous to the bringing of the action unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred, then the defendant is entitled to a decree in his favour. In the instant case it is not disputed that the 2nd defendant had undisturbed and uninterrupted possession for ten years previous to the bringing of the action. There is no claim that any rent was paid by him; and the claim that he paid a share of the produce to the plaintiff's predecessor has been rejected by the learned District Judge and we see no reason to disagree with that conclusion.

The only remaining question then is whether there is any other act of the 2nd defendant from which an acknowledgment of a right existing in the plaintiff or his predecessors in title may fairly and naturally be inferred. The evidence is that though the plaintiff's predecessors obtained a writ of possession on 20th February, 1936, they did not attend to take delivery of possession of the lands. Four years later, on 7th November, 1940, another application was made for writ of possession and though notice of it was given to the 2nd defendant no steps were taken till 19th October, 1942, when the plaintiffs moved for execution of the writ of possession. The 2nd defendant objected to that application and claimed that he was entitled to the land by virtue of his possession. It would appear, therefore, that the only act of the 2nd defendant was a denial of the right of the plaintiff's predecessors to the land. His act is, therefore, not an act from which an acknowledgment of a right existing in the plaintiff's predecessors may fairly and naturally be inferred and he is entitled to the decree he asks for.

We are of opinion that the appeal should be dismissed with costs and we accordingly do so.

SANSONI, J.
I agree.

Appeal dismissed.

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

KANAPATHY PILLAI *vs.* DHARMADASA AND ANOTHER

S. C. No. 453—D. C. Kandy, No. L. 5321

Argued on: 6th and 7th, September, 1960.

Decided on: 7th September, 1960.

Landlord and tenant—Rent deposited "in advance"—Will it automatically liquidate arrears—Payment of rent by cheque.

The 1st defendant had deposited three months rent "in advance" with the plaintiff at the commencement of his tenancy. He later fell into arrears for more than a month after the rent became payable.

Held: That in the absence of an express agreement to the contrary it could properly be inferred from the course of conduct between the parties during the tenancy that it was an implied term of contract that the rent deposited "in advance" was to be retained as a deposit by the landlord while the tenancy subsisted and that it did not relieve the tenant of his obligation to pay the rent of each month on the due date.

Held also: That a tenant is not entitled, unless by prior agreement express or implied, to tender cheques in settlement of the rent payable by him.

Cases followed: *Samaraweera* vs. *Ranasinghe*, 59 N.L.R. 395.
Cassim vs. *Kaliappa Pillai and another*, 58 C.L.W.

H. W. Jayawardene, Q.C., with *C. Ranganathan* and *N. R. M. Daluwatte* for the plaintiff appellant.

Vernon Jonklaas for the defendants-respondents.

BASNAYAKE, C.J.

The only questions that arise for decision on this appeal are—

(*a*) whether the rent payable by the 1st defendant to the plaintiff had been in arrear for one month after it became due, and

(*b*) whether the 1st defendant had sublet the premises No. 212, Rangala Road, or any part of it to the 2nd defendant without the plaintiff's prior consent in writing.

Shortly the facts are as follows—

The 1st defendant took on rent in 1944 premises No. 212, Rangala Road, from the plaintiff. He deposited three months' rent at the time the tenancy commenced and paid in cash each month's rent as it became due. The rent was payable in cash on or before the 10th day of the succeeding month. At the time of the institution of this action on 1st January 1958 the monthly rent was Rs. 40/- and the plaintiff claimed that there was due to him the rent for the months from February 1957 to December, of that year. The 1st and 2nd defendants filed a joint answer. In it the 1st defendant admitted that he deposited 3 months rent with the plaintiff and that he paid the rent monthly until the end of January 1957. He stated that thereafter as the plaintiff was away from the Island he was unable to tender the rent personally to him and that, when on 17th April he received a notice to quit from the plaintiff's proctor, he remitted to the plaintiff's proctor by cheque a sum of Rs. 80/- being rent for February and March 1957 and on 4th May 1957 he sent a further cheque for Rs. 40/- being rent for April 1957, all of which were returned to his proctor. The learned District Judge holds that the 1st defendant was not in arrear. In doing so he says—"On these facts, the tenant was in arrears of the rent for February 1957, and had been so for more than a month after the rent became payable; the defence that was raised was that rent which the plaintiff had been paid in advance should be set off; the evidence does not show any specific agreement in regard to this money but it was admitted that three months' rent was handed over as advance; where rent has been paid in advance and accepted as such by the landlord, I think the tenant is entitled, in the absence of any agreement to the contrary, to have the rent so paid set off against any rent that may remain unpaid; this being

my view, the 1st defendant could not have been in arrears of rent; nor for the same reason could he have been in arrears of rent for March and April 1957; but in regard to these two months the tenant has pleaded that he remitted two months' rent and later a further month's rent which the landlord declined to accept; the refusal was made known to the tenant almost a month after the cheques had been sent; the tenant was under no obligation in view of the refusal to continue to send cheques; his obligation to tender the payment was suspended until the landlord signified to him that he should make payment; I think the tenant was not in arrears of rent; and the claim to eject him on this ground cannot be sustained".

We are unable to reconcile the learned Judge's finding "the tenant was in arrears of rent for February 1957, and had been so for more than a month after the rent became payable" with his conclusion "the 1st defendant could not have been in arrears of rent; nor for the same reason could he have been in arrears of rent for March and April 1957".

In our country the relations between landlord and tenant are regulated by the principles which regulate the contract of letting and hiring.

On the facts before us we agree with the learned Judge that the 1st defendant was bound by the terms of his contract to pay the rent for each month as it became payable and that he had been in arrear for more than a month after the rent became payable; but we are unable to agree with him that the three months' rent deposited "in advance" with the plaintiff at the commencement of the tenancy, in the absence of an agreement in that behalf, automatically liquidated the arrears of rent when it was not paid as it fell due. From 1944, when the tenancy commenced, till January 1957 the 1st defendant had paid the rent of each month as it became due. The 1st defendant does not say that it was agreed at any time that the three months' rent deposited "in advance" by him at the commencement of the tenancy should be utilised against the rent of any month for which he failed to pay on the due date. In the absence of an express agreement to the contrary it may properly be inferred from the course of conduct between the parties for the thirteen years of the tenancy that it was an implied term of contract that the rent deposited "in advance" was to be retained as a deposit by the landlord while the tenancy subsisted and that it did not relieve the tenant of the obligation to pay the rent of each month on the due date.

The learned Judge's finding that in view of the refusal of the landlord to accept his cheques the tenant was under no obligation to pay his rent cannot be sustained. It is contrary to the decision of this Court in *Samaraweera* vs. *Ranasinghe*, 59 N. L. R. 395 and the decision in *Cassim* vs. *Kaliappa Pillai and another* S. C. 679/57—D. C. Colombo 36600/M S. C. Minutes of 3-6-1960 wherein this Court has held that a tenant is not entitled, unless by prior agreement express or implied, to tender cheques in settlement of the rent payable by him. For thirteen years the 1st defendant had paid his rent in cash. He was not entitled therefore on his own motion to decide to pay his rent by tendering a cheque for the amount. The landlord was within his rights in returning the cheques and the tenant was not relieved of his obligation to pay his rent in cash as he had done during the preceding thirteen years.

Learned counsel for the respondents frankly admitted that even if the advance held by the plaintiff was utilised against the rent payable for the months of February, March and April 1957 he was unable to maintain, in view of the decision in *Samaraweera* vs. *Ranasinghe* (*supra*), that the rent had not been in arrear for one month after it had become due as the 1st defendant had not paid any rent after the cheques were returned and this action was not instituted till January 1958.

In regard to the second point the plaintiff has produced the counterfoil of a licence issued for the year 1957 by the Town Council of Teldeniya in favour of the 2nd defendant to store tobacco at the premises let to the 1st defendant and called the Vice-Chairman of the Town Council, who has been a member of the Council for nine years and Vice-Chairman for six years, to testify to the fact that he knew that the 2nd defendant was carrying on the business of selling cigars and tobacco at the premises let to the 1st defendant. He deposed to the fact that the business of selling cigars and tobacco was the 2nd defendant's own and that when he commenced that business the 1st defendant ceased to carry on any business there. He was able to vouch for this because he had been to the premises on a number of occasions during the material period. In cross-examination he said "from the end of 1955 the 1st defendant had nothing to do in these premises". Although the 2nd defendant joined the 1st defendant

in filing the answer he did not give evidence or take part in the trial. The 1st defendant sought to explain his absence by saying that he disappeared after the communal disturbances of 1958. His defence was that the 2nd defendant was his employee but he produced no evidence in support of it beyond his bare word. It would appear that the 1st defendant had three other places of business at Weragantota, Katugastota and Peradeniya, which he commenced after 1944. Of these the one at Katugastota was the largest. Although the learned District Judge regarded the evidence contained in the licence as evidence which, if unexplained, would go a long way to establish the plaintiff's case, he decided the issue of subletting against the plaintiff on the ground that there was no proof that the premises No. 12, Rangala Road, referred to in the licence are the same as premises No. 212, Rangala Road. In doing so the learned District Judge appears to have rejected not only the evidence in document P3, the extract from the assessment register which shows that No. 212 has since 1952 been given the new number of 12, but also the oral testimony of the Vice-Chairman of the Town Council who testified to the fact that the 2nd defendant carried on his own business in the very premises let by the plaintiff to the 1st defendant. Besides he appears to have overlooked the fact that the 1st defendant while denying any knowledge of the licence issued to the 2nd defendant in respect of No. 12, Rangala Road, admitted at the end of his evidence that the premises let to him bear No. 12. We see no reason for not accepting the evidence tendered on behalf of the plaintiff on this point, especially when the 2nd defendant the only other person able to give material evidence did not do so. Having regard to the facts of this case his absence from the witness box creates the presumption that his evidence, if he had been called to testify, would have been unfavourable to the 1st defendant. We are unable to uphold the finding of the learned Judge on this issue as well.

We therefore set aside the judgment of the learned District Judge and direct that decree be entered for the plaintiff as prayed for with costs. The 1st defendant is entitled to credit in the sum of Rs. 120/- being the amount in deposit with the plaintiff.

The appellant is entitled to the costs of this appeal.

Sansoni, J.

I am content to allow this appeal, so far as the claim to eject the tenant goes, on the ground that rent was in arrears for several months. Mr. Jonklaas very properly conceded that as the tenant had failed to pay or even tender rent after 4th May, 1959, the landlord's claim to eject him could not be resisted.

On the question of sub-letting, the learned District Judge appears to have overlooked the tenant's own admission regarding the altered assessment number of the premises. There was a large volume of other evidence which also pointed unmistakably to the 2nd defendant having entered into and continued in sole occupation of the premises in dispute. The only reasonable conclusion, I think, is that the 2nd defendant was in occupation as the sub-tenant of the 1st defendant.

I agree with the order made by my Lord the Chief Justice.

Set aside.

Present : T. S. Fernando, J.

*H. B. PIERIS APPU *vs.* THE VILLAGE COMMITTEE OF MOLODDUWA

S. C. No. 3 of 1960—C. R. Matara No. 3500.

Argued on : 27th and 28th September, 1960.
Decided on : 7th October, 1960

Servitudes—Action, for declaration that there is no footpath over plaintiff's land—Loss of plaintiff's title pending action—Is plaintiff entitled to maintain it —Failure of plaintiff to produce deed alleged to be in his possession in support of his case—Effect of such failure.

* For Sinhalese Translation, see p. 6 of the Sinhala Section.

Held : (1) That where a plaintiff, in an action for declaration that there is no servitude over a land belonging to him, parts with his title pending such action, he is not entitled to maintain it.

(2) That where the plaintiff stated that he had in his possession a deed to support his title but failed to produce it, his opponent is entitled to ask the court to presume that the said deed, if produced would not have supported his case.

N. E. Weerasooria, Q.C. (with him, *S. D. Jayasundera* and *S. N. Seneviratne*) for the plaintiff-appellant.

A. F. Wijemanne, for the defendant-respondent.

T. S. FERNANDO, J.

This action was filed as long ago as 1951 by the plaintiff-appellant claiming a declaration that there is no foot-path over what he alleged was his land Yaddehigewatte *alias* Kurundugoda-watte. The defendant Village Committee in its answer claimed that the foot-path in question was a public foot-path used as such from time immemorial. After many vicissitudes the trial dragged itself to a close some eight years later, *i.e.* in May 1959, when the learned Commissioner of Requests delivered judgment dismissing the plaintiff's action with costs, holding, inter alia, that the plaintiff had between the time of the institution of the action and the time of the trial lost whatever title be had to the land referred to above.

Mr. Weerasooria has criticised, not without justification, the finding of the court below in regard to the existence of a public foot-path over the land in question, and has contended that the learned Commissioner has misdirected himself in regard to the nature of the allegations made against the plaintiff in a certain prosecution instituted by the defendant Village Committee in 1950. I should add, however, that I have not heard Mr. Wijemanne in reply to the arguments of Mr. Weerasooria against the finding that there is a public foot-path over the land referred to above as it became apparent to me that these arguments need be considered only if Mr. Weerasooria succeeded in satisfying me that the learned Commissioner's finding that the plaintiff had no title to this land was wrong.

The plaintiff admitted while under cross-examination that he had parted with the rights he had acquired on deeds P2 and P1 in 1944 and 1953 respectively to his brother-in-law Wimalaratne some three years after the institution of this action and some four years before the trial. If the acquired rights were all the rights the plaintiff had in this land it is clear that he could not have maintained this action. The plaintiff however claimed that he had inherited 1/20th share of this land through his mother Thinohamy. He however failed to prove how Thinohamy became entitled to any share in this land, and the learned Commissioner, understandably enough, did not find it possible to hold that the plaintiff retained to himself rights which he alleged devolved on him from his mother. In the course of his evidence the plaintiff stated that he reserved the rights obtained through his mother at the time he sold to Wimalaratne and that he had the deed at home. If he was interested in satisfying the court that he did have this alleged share in the land the burden of producing the deed said to support his case was on him. The defendant is entitled to claim that the non-production of such a deed indicates that the deed when produced will not support his evidence.

I was unable to say that the plaintiff has succeeded in showing that he had any interest in the land in question at the time of trial and, therefore, there was no purpose in considering whether the court below was right in the answer it gave to issue 2 relating to the existence of a public foot-path.

I would dismiss the appeal with costs.

Appeal dismissed.

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

CHARLES SINGHO *vs.* JINADASA APPUHAMY

S. C. No. 155/58—*D. C. Kalutara No.* 27068

Argued and Decided on : September 9, 1960.

Partition action—Application for execution after final decree—Does section 337 *of the Civil Procedure Code apply.*

Held : That section 337 of the Civil Procedure Code does not apply to an application for a writ under a final decree for partition directing the Fiscal to place the applicant in possession of the lots allotted to him in the final decree and to eject any person in unlawful possession thereof.

Per BASNAYAKE, C.J.—" In the context of section 337 the words ' other property ' mean other property *ejusdem generis* of money, and therefore, mean other movable property and does not include immovable property. Section 337 therefore does not apply to a decree commanding any person to yield up possession of immovable property ".

A. L. Jayasuriya with *N. S. A. Goonetileke* for the 22nd defendant-appellant.

L. W. de Silva with *H. Rupesinghe* for the plaintiff-respondent.

BASNAYAKE, C.J.

The only question that arises for decision on this appeal is whether section 337 of the Civil Procedure Code applies to an application, in a partition action after final decree for partition has been entered, for a writ directing the Fiscal to place the applicant in possession of the lots allotted to him in the final decree and to eject any persons in unlawful possession thereof. This precise question learned counsel submitted has not been the subject of any previous decision of this Court.

Shortly the facts are as follows :—In the final decree for partition of a land called Etawila Kumbura entered on 22nd March, 1955, the plaintiff was declared entitled to Lots A and F. On 29th July, 1955, his Proctor applied for a writ of possession. In the cage which provides for the mode in which the Court's assistance is required to be stated the following statement occurs :—

" On a writ of execution issued to the Deputy Fiscal Kalutara, against the defendants and to place the plaintiff in possession of Lots A and F of the subject-matter of partition ".

On that application, in accordance with the established practice in partition proceedings, the following writ was issued to the Fiscal :—

" **Writ of Delivery of Possession**
In the District Court of Kalutara

Geekiyanage Don Jinadasa Apphuamy of Maha Heenatiyangala, Kalutara
No. 27068. *vs.*
(Here follows names of the 27 defendants).

The Deputy Fiscal of Kalutara
or his officers.

Whereas by virtue of Final Decree dated 22nd March, 1955, entered in the above case the Plaintiff abovenamed is entitled to the following lots of the land called Etawila Kumbura situated at Nagoda in Kalutara Badda within the jurisdiction of this Court to wit :

" 1. All that allotment of land called Lot A of Etawila Kumbura situated at Nagoda in Kalutara Badda in Kalutara Totamune in Kalutara District and bounded on the North by the road, East by Lot 3 in the said plan No. 641, South by Lot 3 and West by Lot B of the same land containing in extent A. 0-R. 0-P. 35, and

" 2. All that allotment of land called Lot F of Etawila Kumbura situated at Nagoda aforesaid and bounded on the North by Lot E of the said land, East by Main Road and South by Lot G and West by P.P.A. 2328/7 and containing in extent A. 6-R. 3-P. 25.5.

" And whereas the Defendants abovenamed are still in possession of the said two properties.

" These are to command you that without delay you enter the said premises and deliver peaceful possession of the same to the Plaintiff abovenamed or his authorised agent and to eject any of the defendants their agents, workmen, nominees or any other person bound by the Decree, and who may refuse to vacate.

" You are further required to make your return to Court stating the manner you execute this writ and in failure of which to state the reason thereto, returnable.

" Given under my hand at Kalutara this 20th day of July, 1955.

(Sgd.).....
District Judge ".

When the Fiscal's Officer proceeded to the land in dispute along with the plaintiff's agent, one Nanayakkara, he was obstructed by a crowd of people chief of whom was the wife of the 22nd defendant. They refused to allow the Fiscal's Officer to hand over possession of the land. The Fiscal's Officer fearing a breach of the peace left the place and reported the matter to his superior officer. His report is as follows :—

> " My officer reports that he repaired to the premises mentioned herein along with the plaintiff's agent with a view to deliver possession of the same, but the possession could not be delivered as the 22nd defendant's wife, Bentaraguruge Mary Nona, informed my officer that the eastern boundary of Lot A as shewn by the plaintiff's agent is wrong and until the boundries are clearly defined by a Surveyor, she will not allow the Fiscal's Officer to deliver possession and hence the possession could not be delivered.
>
> (Sgd.).....
> *Deputy Fiscal, Kalutara.*
>
> 9.8.1955 ".

Nanayakkara who was present with the Fiscal's Officer on this occasion, and who claims to have been present when the boundaries of the different allotments were demarcated on the ground by the Surveyor, supports the Fiscal's Officer's story of the resistance offered to him when he went to execute the writ. A second application for a writ was made on 17th June, 1957. This was opposed on the ground that it was barred by section 337 of the Civil Procedure Code as due diligence was not used to procure complete satisfaction of the decree on the application made on 19th July, 1955. Section 337 reads :—

> " (1) Where an application to execute a decree for the payment of money or delivery of other property has been made under this Chapter and granted, no subsequent application to execute the same decree shall be granted unless the Court is satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree, or that execution was stayed by the decree-holder at the request of the judgment-debtor. Also no such subsequent application shall be granted after the expiration of ten years from any of the following dates, namely—
>
> (*a*) the date of the decree sought to be enforced, or of the decree, if any, on appeal affirming the same ; or
>
> (*b*) where the decree or any subsequent order directs the payment of money or the delivery of property to be made at a specified date,— the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree.
>
> " (2) Nothing in this section shall prevent the Court from granting an application for execution of a decree after the expiration of the said term of ten years, where the judgment-debtor has by fraud or force prevented the execution of the decree at some time within ten years immediately before the date of the application ".

In our opinion section 337 of the Civil Procedure Code does not apply to the instant case. That section speaks of an application to execute a decree for the payment of money or delivery of other property. Neither the present nor the previous application is of the kind contemplated therein. The application is not to execute a decree commanding any person to pay money or to deliver property.

In the context of section 337 the words " other property " mean other property *ejusdem generis* of money and therefore means other movable property and does not include immovable property. Section 337 therefore does not apply to a decree commanding any person to yield up possession of immovable property. This view finds support in sections 323 and 324. Although in the instant case there is no express decree commanding any person to yield or deliver up possession of immovable property the final decree in a partition action under the Partition Ordinance has for long been regarded as implying such a command and there are decisions of this Court which so hold.

The appeal is dismissed with costs.

SANSONI, J.
I agree.

Appeal dismissed.

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

* DEERASOORIYA *vs.* VANDERPOORTEN

S. C. No. 86 *A-B—D. C. Badulla No.* 11329

Argued on : 27th and 28th, October, 1959.
Decided on : 28th October, 1959.

Partition Act No. 16 of 1951, action under—Is it open to a court to issue an injunction in such action in respect of movable property—Courts Ordinance, Section 86.

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* For Sinhalese Translation, see p. 5 of the Sinhala Section.

**Jurisdiction—Failure to raise objection in pleadings—Objection raised in petition of appeal for the first time.*

Held: (1) That there is nothing in the Partition Act which precludes a court from issuing an injunction under section 86 of the Courts Ordinance in proceedings under that Act in respect of movable property.

(2) That where a party failed to raise objection to the jurisidiction of the court in his pleadings, he is precluded by Section 71 of the Courts Ordinance from raising it later.

C. Thiagalingam, Q.C. with *V. Arulambalam*, for the 4th defendant-appellant in both Appeals.

H. V. Perera, Q.C., with *Sir Ukwatte Jayasundera, Q.C., C. G. Weeramantry* and *E. B. Vannitamby*, for the plaintiff respondent in both Appeals.

BASNAYAKE, C.J.

Appeal No. 86A is against certain orders made in the course of the proceedings under the Partition Act. It was argued by learned counsel for the appellant that it is not open to a court to issue an injunction in respect of movable property under section 86 of the Courts Ordinance in proceedings under the Partition Act. We are unable to uphold that contention. There is nothing in the Partition Act which precludes a court from issuing an injunction under that section of the Courts Ordinance in proceedings under that Act. The terms of section 86 of the Courts Ordinance are very wide. It provides that an injunction may be issued " in any action instituted in any District Court or Court of Requests ". We also do not think that the court is precluded from making an order under Chapter L. of the Civil Procedure Code in proceedings under the Partition Act.

In regard to the objection raised in the petition of appeal to the jurisdiction of the court below we wish to observe that throughout the proceedings in the lower court no objection was taken to its jurisdiction. The appellant is precluded by section 71 of the Courts Ordinance from raising that question now. It reads :

" Whenever any defendant or accused party shall have pleaded in any cause, suit, or action, or in any prosecution brought in any District Court, without pleading to the jurisdiction of such District Court, neither party shall be afterwards entitled to object to the jurisdiction of such court, but such court shall be taken and held to have jurisdiction over such cause, suit, action, or prosecution :

" Provided that where it shall appear in the course of the proceedings that the cause, suit, action, or prosecution was brought in a court having no jurisdiction intentionally and with previous knowledge of the want of jurisdiction of such court, the Judge shall be entitled at his discretion to refuse to proceed further with the same, and to declare the proceedings null and void ".

Learned counsel for the appellant also sought to argue that there was no consent order or decree and that the plaintiff-respondent's application for writ is bad. No objection was at any time taken to the order of the 11th June 1954 on the ground that it was not an order of the court. As a matter of fact all the proceedings throughout were on the basis that it was an order of the court and the parties themselves have acted on the footing that it was an order of the court. The learned trial Judge who made the order has meant it to be so and has said so in the course of his judgment. There is no substance in learned counsel's contention.

The appeal is dismissed with costs.

Appeal No. 86B is also dismissed.

PULLE, J.

I agree.

Appeal dismissed.

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

W. N. R. SAMICHCHI APPU *vs.* N. BARONCHIHAMY AND OTHERS

Application for Final Leave to Appeal to the Privy Council in S. C. No. 154/D. C. Tangalla, No. 6205.—(Application No. 100)

Argued and Decided on: 12th May, 1960.

Appeals Privy Council Ordinance, Schedule, Rule 1 (a)—*Meaning of words "Final Judgement of the Court".*

Held: That where an application has been made under section 769 (2) of the Civil Procedure Code, for the reinstatement of an appeal which has been dismissed for non-appearance, the judgment dismissing the application for reinstatement is not the "final judgment of the Court" referred to in rule 1 (*a*) of the Schedule to the Appeals (Privy Council) Ordinance. The "final judgment of the Court" contemplated in rule 1 is the judgment by which the action between the parties was decided in appeal.

N. E. Weerasooria, Q.C., with *W. Wimalachandra* for the defendant-appellant—petitioner.

H. W. Jayewardene, Q.C., with *D. R. P. Goonetilcke* for the 1st, 2nd and 3rd plaintiffs-respondents—respondents.

BASNAYAKE, C.J.

This is an application by the defendant-appellant for final leave to appeal to the Privy Council. The plaintiffs-respondents sued the defendant-appellant to recover the value of the coconuts gathered by the defendant-appellant from a plantation of 634 coconut trees standing on a land called Tennapita Serugahahena *alias* Karuwalahenayaya which was the subject-matter of the Partition Case No. 5552 of the District Court of Tangalla. In that action the plaintiffs prayed judgment in a sum of Rs. 3,900/- against the defendant, and for further damages at the rate of Rs. 600/- per crop from 21st, September 1951 till possession of the land was given. After trial the learned District Judge delivered judgment declaring that the defendant was liable to pay Rs. 300/- per crop from July 1949 in respect of the disputed coconut trees, and that the plaintiffs were entitled to be restored to possession and to recover costs of the action.

The defendant appealed against the judgment and the appeal was dismissed with costs on the 22nd October, 1959. Neither his counsel nor the defendant appeared at the hearing of the appeal. Thereafter an application was made under section 769 (2) of the Civil Procedure Code praying that the appeal be reinstated. That application was heard after notice to the plaintiffs and it was dismissed on the 16th December, 1959.

Objection to the grant of final leave is taken on the following grounds :—

"(*a*) That the matter in dispute on the appeal does not amount to or is of the value of Rs. 5,000/- or upwards ; and

(*b*) That the petition for leave to appeal was filed 30 days after the date of the judgment of the Court dismissing the appeal."

Learned counsel for the petitioner submits that the final judgment for the purpose of the application of the Court for the purpose of rule 1 (*a*) of the rules in the Schedule to the Appeals (Privy Council) Ordinance is the judgment dismissing the application for the reinstatement of the appeal and not the judgment dismissing the appeal itself. He further contends that as the final judgment is the judgment dismissing the application for reinstatement of the appeal, the application for final leave to appeal to the Privy Council is within time. We are unable to agree that the final judgment of the Court

referred to in rule 1 (*a*) is the judgment dismissing the application for reinstatement of the appeal. The final judgment of the Court contemplated in rule 1 is the judgment by which the action between the parties was decided in appeal.

The application for final leave to appeal to the Privy Council is refused.

The respondents are entitled to their costs.

SANSONI, J.

I agree.

Application refused.

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

FERNANDO *vs.* COREA

S. C. No. 568/59—*D. C. Chilaw No.* 14214.

Argued and Decided on: 28th June, 1960.

Appeal—Stamps for Supreme Court decree—Value of relief sought in appeal less than value of action—Amount of duty payable—Stamp Ordinance, Schedule A, Part II.

In an appeal from a decision of the District Court in a civil proceeding, the stamp duty for the Supreme Court decree is payable on the value of the subject matter of the action and not on the value of the relief sought in appeal. The fact that the value of the relief sought in appeal is less than the value of the action makes no difference.

Distinguished: *Mohideen* vs. *Suppiah* (1959) 61 N. L. R. 154.

C. Ranganathan for the defendant-appellant.

No appearance for the plaintiff-respondent.

BASNAYAKE, C.J.

This appeal has been listed by the Registrar for the directions of this Court as sufficient stamps have not been delivered together with the petition of appeal for its decree.

The plaintiff in this action sought to recover a sum of Rs. 2,500/- as damages suffered by her by reason of the defendant's breach of the covenants of the contract of lease with her. The defendant resisted the action and asked that it be dismissed. After trial the learned District Judge awarded the plaintiff damages in a sum of Rs. 2,000/-. This appeal is from that judgment.

In the petition of appeal the defendant asked that—

(*a*) the judgment and decree of the learned District Judge be set aside;

(*b*) that the plaintiff's action be dismissed; and

(*c*) for costs of the appeal and of the trial.

It is submitted by learned counsel for the appellant that the correct amount of stamps has been tendered as the appeal petition and the decree should be stamped according to the value of the relief sought in appeal, and that in the instant case the value of relief sought is Rs. 2,000/- which is the value for the purpose of stamp duty. We are unable to uphold the submission of learned counsel. The value of an action for the purpose of stamp duty is not altered by the fact that the value of the relief sought in appeal is less than that of the subject-matter of the action. Learned counsel referred us to the case of *Mohideen* vs. *Suppiah* (61 N.L.R. 154). That is a decision under the Appeals (Privy Council) Ordinance where the value

of matter in dispute on the appeal is the basis on which stamp duty is payable, and is consistent with the previous decisions of this Court on the matter of determining the value of the proceedings in appeals to the Privy Council for the purpose of stamp duty.

The duty prescribed in Schedule A Part II of the Stamp Ordinance *Containing the Duties on Law Proceedings in the Supreme Court in Civil Proceedings* is payable on the value of the action and is not on the value of the relief sought in appeal. The fact that the value of the relief sought in appeal is less than the value of the action makes no difference. Both my brother who wrote the judgment cited by counsel and I agree that that case does not apply to the determination of the correct stamp duty payable in respect of appeals to this Court.

The appeal is accordingly rejected.

Sansoni, J.
I agree.

Appeal rejected.

Present: T. S. Fernando, J.

AGONIS PERERA *vs.* GANEGAMA, SUB-INSPECTOR OF POLICE, ATURUGIRIYA

S. C. No. 393 of 1959—M. C. Colombo No. 9294/C

Aruged and Decided on : 24th November, 1959.

Excise (Amendment) Act 36 of 1957—Section 3.

The statutory presumption raised by a certificate of the Government Analyst issued under Section 3 of the Excise (Amendment) Act 36 of 1957 to the effect that liquor is unlawfully manufactured, does not extend to a certificate or report to the same effect issued by a Deputy or Assistant Government Analyst.

N. R. M. Daluwatte, for the accused-appellant.

P. Nagendram, Crown Counsel, for the Attorney-General.

T. S. Fernando J.

The Excise (Amendment) Act, No. 36 of 1957—section 3—provides that the production of a certificate of *the Government Analyst* that he is satisfied that any liquor analysed by him is not liquor of a description that could have been manufactured under the authority of a licence issued under the Excise Ordinance and is not liquor that could have been manufactured in a Government distillery raises a rebuttable presumption that the liquor so analysed is unlawfully manufactured.

In order to prove that the liquor, possession of which was brought home to the appellant, was unlawfully manufactured, the prosecutor relied upon the *statutory presumption* referred to above, but unfortunately for him he produced not a certificate of *the Government Analyst* but a report of two persons, viz., *an Assistant Government Analyst* and *the Deputy Government Analyst*. Even assuming that the report is equivalent to a certificate, it must be noted that the expression "Government Analyst" in not defined either in the Act or in the Excise Ordinance as including the deputy or any of the assistants of the Government Analyst. The expression must receive its ordinary meaning. If the legislature intended the certificate of an officer other than the Government Analyst himself to be sufficient to raise the presumption, such an intention should, in my opinion, have found specific expression in the statute itself. I can discover nothing even in the Interpretation Ordinance that can avail the prosecutor in the circumstances of this case.

The conviction and sentence are set aside and the appellant is acquitted.

Acquitted.

Present : H. N. G. FERNANDO, J. †

ARIYARATNAM *vs.* S. I. POLICE, SPECIAL BRANCH, KANDY

S. C. 88/'60—*M. C. Kandy* 2522.

Argued and decided on : 5th August, 1960.

Penal Code, Section 392 *A* (*as amended by Government Gazette Extraordinary, No.* 9,773 *of* 24*th September,* 1947)—*Public Servant charged under this Section for failure duly to pay over or to account for moneys in his charge according to books kept by him—Requirement under the Section addressed by an official appointed by the Auditor-General—Validity of such requirement—Should a conviction under Section* 392 *be substituted in appeal for one under Section* 392 *A.*

Held : (1) That where a requirement under Section 392 A of the Penal Code (as amended by Government Gazette No. 9,773 of 24th September, 1947) is addressed by an official appointed by the Auditor-General to a public servant to pay over or produce any money or balance of any money shown in the books or accounts kept by him and in his charge as a public servant, no charge under Section 392 A lies against such public servant on his failure to comply with the said requirement. The provisions of Section 392A are imperative.

(2) That such a requirement must be addressed by one of the officials mentioned in the Section, viz., the Secretary to the Treasury, the Deputy Secretary to the Treasury, the Auditor-General, the Assistant Auditor-General or any officer specially appointed by the Secretary to the Treasury.

(3) That a conviction under section 392 of the Penal Code should not be substitnted in appeal for one under section 392A of the same Code.

Dr. Colvin R. de Silva with *M. M. Kumarakulasingham* and *S. Saravanamuttu* for the accused-appellant.

P. Colin-Thome, Crown Counsel, for the Attorney-General.

H. N. G. FERNANDO, J.

The appellant has been convicted on a charge under Section 392A of the Penal Code in respect of a sum of just under Rs. 2,000/-. That Section makes punishable the failure by a Public Servant either to pay over or produce money or balances apparently due according to accounts kept by him in his official capacity, or else to duly account for such money or balances. But no offence arises unless there is such a failure when the Public Servant is required (to pay over, produce or account) by one of the officials mentioned in the Section. In its amended form* the only officials whom the Section mentions are, the Secretary to the Treasury or the Deputy Secretary to the Treasury, the Auditor-General, the Assistant Auditor-General or any officer specially appointed by the Secretary to the Treasury to examine the accounts of the Department concerned. It will be seen that in order to bring the Section into operation there must, first, be a requirement addressed to the Public Servant either by one of the functionaries expressly mentioned or else by an officer specially appointed by the Secretary to the Treasury to examine the accounts in question.

In this case the officer who addressed a requirement to the appellant was not a person holding a special appointment made by the Secretary to the Treasury. His authority, P 1, which has been produced, purports to appoint him a deputy to the Auditor-General for the purpose of examining the relevant accounts, but that authority has been granted by the Auditor-General and not by the Secretary to the Treasury. The provisions in Section 392A as to the officer by whom a requirement mentioned in the Section should be given is manifestly an imperative provision and it would not be open for me to take notice of the fact that virtually speaking an authority granted by the Auditor-General should be regarded as being as good as one granted by the Secretary to the Treasury.

The circumstances to which I have referred have the result that the prosecution has failed to prove an essential ingredient of the charge, namely, that there was a failure to pay money or to account for money when required to do so by an officer mentioned in the Section. The charge, therefore, must necessarily fail.

*See Government Gazette Extraordinary, No. 9,773 of 24th September, 1947, p. 1935.

† For Sinhalese Translation see page 10 of the Sinhala Section.

Crown Counsel has invited me to consider whether in the circumstances a conviction of an offence under Section 392 cannot be entered in substitution. Considering that the burden of proof on the prosecution in a charge under Section 392A is, even to some slight extent, of a lesser degree than that which obtains in charges framed under Section 392, I cannot agree to that. Such a course by me would entail the necessity to reach findings of fact on matters which may not have received the consideration of the trial judge.

I hold that no charge under Section 392A lies against the appellant on the facts which the prosecution are able to prove. Accordingly the appeal has to be allowed and the appellant acquitted.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

President : BASNAYAKE, C.J. (PRESIDENT), T. S. FERNANDO, J., AND SINNETAMBY, J.

THE QUEEN *vs.* EDWIN ARTHUR FERNANDO

(1) *Appeal No.* 123 *of* 1959 *with Application No.* 154 *of* 1959—*S. C. No.* 19—*M.C. Panadure No.* 54733

Argued on : December 2 and 3, 1959.
Decided on : December 21, 1959.

(2) *Appeal No.* 124 *of* 1959 *with Application No.* 155 *of* 1959—*S.C. No.* 16—*M. C. Dambulla No.* 9172.

THE QUEEN *vs.* CAROLIS

Argued on : December 2 and 3, 1959.
Decided on : December 21, 1959.

Murder, charge of—Suspension of Capital Punishment Act, No. 20 of 1958—Offence committed while the Act was in operation—Regulation suspending operation of Act—Trial and conviction while Regulation in force—Effect on sentence.

A and B had each committed the offence of murder at a time when the Suspension of Capital Punishment Act, No. 20 of 1958, was in operation. They were tried, convicted and sentenced to death at a time when a certain Regulation (made by the Governor-General under the Public Security Ordinance), which suspended the operation of this Act was in force. It was contended by Counsel for A that the effect of the Regulation was to render inoperative both the Suspension of Capital Punishment Act and Section 296 of the Penal Code and that while the Regulation was in force there was no law which made murder punishable. The main argument of Counsel for B was that the Regulation had no retroactive operation.

Held : (1) That the effect of the Regulation suspending the Suspension of Capital Punishment Act is undoubtedly to restore the punishment of death for the offence of murder committed *after* the coming into operation of the Regulation and while it is in operation.

(2) That the Regulation referred to is prospective in effect and cannot be construed as being retroactive. It will thus not apply to the case of those who committed the offence of murder before it came into operation and are tried after it came into operation.

(*a*) Difference between the " repeal " and " suspension " of an enactment, (*b*) the presumption against retrospective or retroactive legislation and the scope of the maxim " Nova constitutio futuris formam imponere debet non praeteritis " and, (*c*) the expressions " retrospective " and " retroactive " explained and discussed.

Authorities referred to : *Kay* vs. *Goodwin* (1830), 6 Bing. 576.
Surtees vs. *Ellison* (1829), 9 B & C 750.
Brown vs. *Barry*, 3 U.S. 365.
Gardner vs. *Lucas* (1878), 3 L. R. App. Cases 582.
Colonial Sugar Refining Co. vs. *Irving* (1905) A. C. 369.
Voet, 1.3.17.
Jockey Club of South Africa vs. *Transvaal Racing Club* (1959) 1 S. A. L. R. 441.
West vs. *Gwyne*, 104 L. T. 759.
Calder vs. *Bull*, 3 Dall. 368 ; 1 L. Ed. 648.
Crawford on Statutory Construction (at p. 575).
Director of Public Prosecutions vs. *Lamb* (1941) 2 A. E. R. 499.
Buckman vs. *Button* (1943) 2 A. E. R. 82.
Wicks vs. *Director of Public Prosecutions* (1947) 1 A. E. R. 205.

Colvin R. de Silva with *M. L. de Silva* and *J. N. David* (assigned) for the accused-appellant.

V. T. Thamotheram, Senior Crown Counsel, for the Attorney-General—(Appeal No. 123.)

G. E. Chitty, Q.C., with *E. B. Vannitamby, R. Rajasingham, Tissa Dias Bandaranayake*, and *Lucian Jayetileke* (assigned) for accused-appellant.

V. T. Thamotheram, Senior Crown Counsel, for Attorney-General—(Appeal No. 124.)

BASNAYAKE, C.J.

The appeals in the above mentioned cases were heard together in the sense that learned counsel for the respective appellants in the two cases were permitted to address us one after the other and learned counsel for the Crown was heard in reply to both. This course was adopted on the ground of convenience as the sole question argued in both appeals is the legality of the sentence of death passed on the appellants.

On 27th December, 1958, the appellant in the first appeal committed the offence of murder for which he was indicted on 18th March, 1959 and convicted on 9th October, 1959. In the second appeal the appellant committed the same offence on 6th December, 1958 and was indicted on 16th June, 1959 and convicted on 16th October, 1959. The trial of the first case commenced on 2nd October and that of the second on 12th October, 1959. At the time the offences were committed the Suspension of Capital Punishment Act, No. 20 of 1958, which came into force on 9th May 1958 was in operation. Sections 2 and 3 of that Act reads :

> " 2. During the continuance in force of this Act—
>
> (*a*) capital punishment shall not be imposed under Section 296 of the Penal Code for the commission of murder and under Section 299 of the Penal Code for the abetment of suicide, and
>
> (*b*) Sections 296 and 299 of the Penal Code shall have effect as if, for the word " death " occurring in each of those sections, there were substituted the words " rigorous imprisonment for life ".
>
> " 3. This Act shall continue in force for three years and shall then expire :
>
> " Provided, however, that if the Senate and the House of Representatives by resolution so declare, this Act shall continue in force for such further period as may be specified in such resolution."

When the appellants were tried and convicted and sentenced there was in force a Proclamation made under section 2 of the Public Security Ordinance, No. 25 of 1947, as amended by Act No. 22 of 1949, Act No. 34 of 1953 and Act No. 8 of 1959 (hereinafter referred to as the Public Security Ordinance) and published in Gazette No. 11,863 of 25th September, 1959. That Proclamation reads :

> " Whereas I am of opinion that, by reason of the imminence of a state of public emergency in Ceylon, it is expedient so to do in the interests of public security, the preservation of public order and the maintenance of supplies and services essential to the life of the community :
>
> " Know Ye that I, Oliver Ernest Goonetilleke, Governor-General, do, by virtue of the powers vested in me by Section 2 of the Public Security Ordinance, No. 25 of 1947, as amended by Act No. 22 of 1949, Act No. 34 of 1953 and Act No. 8 of 1959, by this Proclamation declare that the Provisions of Part II of that Ordinance shall come into operation throughout Ceylon on the Twenty-fifth day of September, One thousand Nine hundred and Fifty-nine."

There was also in force at that time the following Regulation made by the Governor-General under section 5 of the Public Security Ordinance and published in Gazette No. 11,881 of 2nd October, 1959 :

> " During the continuance in force of this regulation the operation of the Suspension of Capital Punishment Act, No. 20 of 1958, shall be suspended."

On the expiry of the Proclamation and Regulation referred to above a Proclamation and Regulation in like terms came into force (Gazettes 11,917 and 11,921 of 25th October, 1959). They were succeeded by another Proclamation and Regulation in exactly the same terms on 24th and 25th November respectively (Gazettes 11,963 and 11,966 of 24th and 25th November, 1959). The last mentioned Regulation ceased to be in force on the revocation on 3rd December, 1959 (Gazette 11,992) of the Proclamation made under section 2 of the Public Security Ordinance. On 2nd December, 1959 there came into operation an Act intituled the Suspension of Capital Punishment (Repeal) Act,

No. 25 of 1959, designed to restore the punishment of death for murder. That Act reads :

> " The Suspension of Capital Punishment Act, No. 20 of 1958, is hereby repealed.
>
> " 3. Notwithstanding anything in any other written law, capital punishment shall be imposed—
>
> (*a*) under Section 296 of the Penal Code on every person who, on or after the date of the commencement of this Act, is convicted of the offence of murder committed prior to that date ; and
>
> (*b*) under Section 299 of the Penal Code on every person who, on or after that date, is convicted of the offence of abetment of suicide committed prior to that date."

So much for the relevant enactments and regulations. Now what is the effect of the Regulation which declares that during its continuance in force the operation of the Suspension of Capital Punishment Act, No. 20 of 1958, shall be suspended ? At the respective trials of the appellants it appears to have been assumed that its effect was to bring into operation section 296 of the Penal Code. That section reads : " whoever commits murder shall be punished with death ". Learned counsel for the first appellant contended that that assumption was wrong. He contended that the effect of the Regulation was to render inoperative both section 296 and the Suspension of Capital Punishment Act and that while the Regulation was in force there was no law in operation which made murder punishable. The main argument of learned counsel for the second appellant was that the Regulation had no retroactive operation.

It was not contended that the effect of the Suspension of Capital Punishment Act was not to prohibit the imposition of the punishment of death and to provide for the imposition of imprisonment for life for the offence of murder even in the case of those who had committed murder before the commencement of that Act when the punishment for murder was death. As the punishment imposed by Suspension of Capital Punishment Act was less severe than that imposed by section 296 of the Penal Code it was not contended that the Act was not retroactive. It had in fact been interpreted and acted upon as being retroactive and on and after the date on which it came into operation all persons convicted of the offence of murder committed before that date were sentenced to imprisonment for life instead of to death. But in regard to the Regulation which suspends the Suspension of Capital Punishment Act it is contended that the suspension of a suspension does not bring into operation the law that was first suspended. Although so far as immediate effect is concerned there is little practical difference between a repeal and a suspension, the repeal of an enactment and its suspension are not the same. The effect of the repeal of an enactment is, subject to the provisions of section 6 of the Interpretation Ordinance and any express provision in the repealing enactment, to obliterate it as completely from the statute book as if it had never been enacted or as if it had never existed. (*Kay vs. Goodwin* (1830) 1830) 6 Bing 576 at 582 ; *Surtees vs. Ellison* (1829) 9 B & C 750 at 752). The suspension of an enactment does not have the same effect nor does it attract the provisions of section 6 of the Interpretation Ordinance. In the case of a suspension the statute is not erased from the statute book. It is there but it is dormant and does not speak in so far as the suspension is operative. Its operation is arrested for the duration of the suspension and to the extent to which the suspension operates ; but it is on the statute book and exists and is not erased therefrom and is operative in so far as it is not affected by the written law suspending it (*Brown vs. Barry*, 3 U.S. 365). The effect of the suspension of the Suspension of Capital Punishment Act is to remove to the extent to which the Regulation is operative and for the time during which it is in force the curb imposed, temporary though it be, on the law whose operation was suspended by the Act. That the effect of the Regulation suspending the Suspension of Capital Punishment Act is to restore the punishment of death for the offence of murder committed after the coming into operation of the Regulation and while it is in operation is not in doubt. But the further and more important question of its effect in respect of those who committed the offence of murder before and are tried after it came into operation is not entirely free from difficulty. Is the punishment that is to be inflicted the punishment that is in the Act that has been suspended and during whose operation the offence was committed or the punishment which has come into existence or revived by the suspension of the enactment suspending it ? The answer to that question is largely dependent on the language and scope of the provision of law suspending the suspension. It is a well-settled rule of construction of statutes and statutory instruments that the presumption is that a statute or statutory instrument is prospective and not retrospective or retroactive. There are countless judicial dicta on this topic, but it is sufficient to refer to one or two of the more authoritative of them. In *Gardner vs. Lucas* (1878) 3 L.R. App. Cases 582 at 601 Lord O'Hagan stated : " unless

there is some declared intention of the Legislature—clear and unequivocal—or unless there are some circumstances rendering it inevitable that we should take the other view, we ought to presume that an Act is prospective and is not retrospective." Lord Macnaghten expressed the rule in terms not less effective in *Colonial Sugar Refining Co. vs. Irving* (1905) A.C. 369, when he stated: "statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested". Although these dicta make no express mention of retroactive legislation it is governed by the same rule. It will thus be seen that legislation is never presumed to be retrospective or retroactive, and therefore a law will only be applied to cases occurring after its date, unless it appear from the statute itself that it is intended to have retrospective or retroactive effect. This rule is deeply founded on good sense and strict justice because to deprive persons of rights acquired by transactions perfectly valid according to the law at the time or to punish them for what was lawful before the statute or to impose a severer punishment than that which was in force before the time of the new written law would be unjust and oppressive. The rule arises from the ancient maxim: "*nova constitutio futuris formam imponere debet non praeteritis*" (A new law ought to impose its conditions on the future, not on the past). The rule is as well established in Roman-Dutch law as it is in the Anglo-American system. In Book I, Tit. 3, s. 17, Voet states :—

> "It is certain further that laws give shape to affairs of the future, and are not applied retrospectively to acts of the past. They are rules of action, precepts regulating the lives of men, and they have to be promulgated before they have obligatory force, as we said above. Thus those things which were done prior to a new law under precept or ancient right stand fast. If a penalty has to be imposed for wrong-doing committed before a new law which perhaps sharpens the penalties, then it must be inflicted according to the terms of the old and not of the succeeding new law. How, asks the Emperor, did past time sin when, ignorant of the present law, it pursued the ancient practice of its rights."

Voet instances six exceptions to this rule. They are—

> (i) when the legislator has nevertheless expressed himself otherwise in clear words, treating both of past time and of present affairs;
> (ii) when the Emperor brings in a new law by written answer or decree on matters clearly in doubt;
> (iii) when past affairs to which some obvious and ingrained injustice or disgrace attaches;
> (iv) when reason dictates that a law should also be applied to the past when it is not so much a case of incorporating something new in a new law as rather interpreting a previous doubtful law;
> (v) when an absurd meaning would spring from the law, if it were not also applied to the past;
> (vi) when some exemption or exception is brought in by the new law. (Gane, Vol. I, pp. 47-49).

Turning to the Courts of the Commonwealth we find that the principle is affirmed with equal force in Australia, Canada, India, New Zealand and South Africa. In the last mentioned country it was reasserted as recently as last year in the case of *The Jockey Club of South Africa vs. Transvaal Racing Club* ((1959) 1 S.A.L.R. 441 at 451)—

> "A well-known rule of interpretation is that, in the absence of express provision to the contrary, a statute regulates future conduct and is construed as operating only on cases or facts which came into existence after it was passed."

Although the Suspension of Capital Punishment Act of 1958 did not make it clear beyond doubt that it applied to offences committed before as well as after the Act, justice was not offended by its being construed as if it had a retroactive operation and applied to offences committed before it came into force because the punishment created by it was less severe. There is a great and apparent difference between making persons liable to a lighter and heavier punishment than that in force at the time of the offence. That difference becomes more pronounced when the heavier punishment is death. The Regulation does not indicate with certainty that the Regulation-making authority intended that it should apply to offences committed before the date on which it came into operation. It has left the intention unexpressed and there is nothing in it that goes to rebut the presumption that the regulation is not retroactive. On the other hand the act repealing the Suspension of Capital Punishment Act makes it clear beyond doubt that it is intended to be retroactive and creates no difficulty of interpretation although it may offend the canons of justice and morality as it plainly overrides the presumption that the Legislature will not unjustly deprive a citizen of his vested rights or make him suffer more severe punishment for an offence than that to which he was liable at the time he committed it. This is a convenient point at which to explain the expressions retrospective and "retroactive" which have been used above without definition and as if they were synonymous. Although writers and Judges do not always use them in their strict sense and use them indiscriminately each of them has a special meaning. A retrospective enactment is an enactment that is brought into operation from a date before that

on which it is enacted or in the words of Buckley L.J. in *West vs. Gwyne* (104 L.T. 759 at 762):

> "If an Act provides that as at past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective."

Such enactments are generally speaking found in the field of taxation law. Our legislation of the last two years contains many examples. A retroactive enactment is one which comes into operation on or after the date on which it is enacted but applies to acts which though partly done before the enactment still remain to be completed or performed after the enactment comes into force or to offences committed before the enactment came into operation but in respect of which the offenders have not been tried or punished. The Suspension of Capital Punishment (Repeal) Act, No. 25 of 1959, is a striking example of retroactive legislation. In other words it is an enactment creating rights or obligations or imposing penal sanctions on the basis of events which have already taken place. In America such legislation is better known as *ex post facto* legislation. *Ex post facto* legislation is thus defined:

> "1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
> "2. Every law that aggravates a crime or makes it greater than it was, when committed.
> "3. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed.
> "4. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender. (*Calder* vs. *Bull*, 3 Dall 368; 1 L. Ed. 648).

Ex post facto laws which impose a more severe punishment alone are regarded as obnoxious. The rule is thus stated in Crawford on Statutory Construction at p. 575:

> "Where the punishment is altered, and, consequently, in the light of human experience and morality, favours the defendant, he cannot complain of the retroactive effect of the law which changes the punishment. Obviously, since the condemnation of *ex post facto* legislation is founded on its inherent harshness, the basis of the condemnation disappears where the alteration operates in favour of the accused or condemned person."

In the light of the principles of interpretation above enunciated the conclusion that the Regulation is prospective is inescapable and it cannot with reason be construed as being retroactive. It must be construed as applying only to offences of murder committed after it came into operation and the suspension of the Suspension of Capital Punishment Act operates as a suspension only as respects those who committed murder while the Regulation was in force and are also tried and convicted during that time. In the case of offences of murder committed before the date of the Regulation the punishment is as prescribed in the Suspension of Capital Punishment Act as the Regulation did not have the effect of suspending the Act in respect of offences committed before it came into operation.

The cases of *Director of Public Prosecution vs. Lamb* (1941) 2 All E.R. 499, *Buckman vs. Button* (1943) 2 All E.R. 82, and *Wicks vs. Director of Public Prosecutions* (1947) 1 All E. R. 205, are of little avail to the Crown. In each of those cases the court held that there was no doubt that the written law it had to construe was retroactive. In the first named case Humphreys J. while affirming the established rule said:

> ". . . where a statute alters rights of persons, or creates fresh liabilities in regard to persons, or creates or imposes obligations upon persons and thereby alters the law, such a statute ought not to be held to be retroactive in its operation unless the words are clear precise and quite free from ambiguity. For such a proposition there is the most ample authority . . . That doctrine, while I fully subscribe to it, and would willingly give full effect to it in any case where it was possible to do so, to my mind has no effect at all in a case where the language of the statute, or, as in this case, of the order in council, is plain and can mean only that which it says."

For the above reasons we hold that the appellants were not liable to be punished with death but only with imprisonment for life. We accordingly quash the sentence of death passed on them at their respective trials and pass a sentence of rigorous imprisonment for life in substitution therefore in respect of each of them.

Sentence varied.

Present: T. S. FERNANDO, J.

VALLIAMMA *vs.* TRAFFORD HILL RUBBER ESTATES LIMITED

S. C. No. 1 *of* 1960—*Workmen's Compensation Application No.* C3/75/58.

Argued on: 27*th June*, 1960.

Decided on: 13*th September*, 1960.

Workmen's Compensation Ordinance, Section 3—Tamil estate labourer engaged in normal work in estate—Estate situated in area in which there was tension at the time due to racial enmity—Disturbances involving physical violence and damage to property—Gang of Sinhalese labourers coming to the spot and assaulting the Tamil labourer resulting in his death—Can such death be regarded as arising out of his employment within the meaning of Section 3 of the Ordinance.

P, a Tamil labourer on a rubber estate was directed by its conductor on a certain day to do the work of "forking" the earth close to one of the roads running by the estate. No other labourer was working close to him at the time. While so engaged in his ordinary work he was seen by some Sinhalese villagers who were out on that day to assault Tamils owing to the prevalence of tension at that time due to unprecedented racial enmity between the Tamils and the Sinhalese, with resulting disturbances in many areas. The villagers got hold of P and subjected him to a beating which proved fatal. It was not suggested that P or the conductor was aware of any risk of attack on the Tamils working on the estate on that day.

P's widow applied for relief under the Workmen's Compensation Ordinance (Cap. 117) and the Commissioner in terms of Section 39 of the Ordinance submitted for the opinion of the Supreme Court the question whether the accident which resulted in the death of P in the circumstances can be regarded as arising out of his employment within the meaning of Section 3 of the Ordinance.

Held : That in the circumstances, the answer to the question submitted must be in the negative, as the said injuries to P caused by the said villagers did not result in some reasonable sense from a risk incidental to his employment.

Cases cited : *Mitchinson* vs. *Day Brothers*, L. R. (1913) 1 K. B. at 608.
Brooker vs. *Thomas Borthwick & Sons (Australasia) Ltd.*, (1933) A. C. at 676.
Charles Appu vs. *Controller of Establishments* (1946) 47 N. L. R. at 464.
Lawrence vs. *George Mathews (1924) Ltd.* (1929) 1 K. B. D. at 19.
Holden vs. *Premier Waterproof and Rubber Co., Ltd.* (1930) 23 B. W. C. C. at 471.

S. C. Crossette-Thambiah, for the applicant.

No appearance for the respondent.

E. R. de Fonseka, Crown Counsel, as *amicus curiae* on notice from Court.

T. S. FERNANDO, J.

The Commissioner for Workmen's Compensation has, in terms of section 39 of the Workmen's Compensation Ordinance (Cap. 117) submitted for the opinion of this Court the question whether the accident which resulted in the death of a workman in the circumstances set out hereunder can be regarded as *arising out of his employment* within the meaning of section 3 of the Ordinance.

The deceased Ponniah was a Tamil and a labourer on Trafford Hill Rubber Estate and was working on 29th May, 1958 in one of the divisions of the estate. The estate is situated in Galagedera, one of the many areas in which at this time there was tension due to unprecedented racial enmity between the Tamils and the Sinhalese with resulting disturbances involving physical violence and damage to property. At about 3 p.m. on this day a gang of Sinhalese labourers came on to that part of the estate in which the deceased was engaged in his ordinary work and subjected him to an assault causing injuries on him, which injuries resulted in his death within a few hours.

The Commissioner is apparently satisfied that the injuries to the workman were caused by an accident arising *in the course of* his employment, but invites the opinion of this Court on the remaining question whether the accident was one *arising out of* his employment.

It would have been useful for my present purpose if the facts relating to the accident had been inquired into by the Commissioner in greater detail, but Mr. Crossette-Thambiah who argued the matter before me on behalf of the applicant with conspicuous fairness stated that Ponniah had been directed by the conductor of this estate to do the work of "forking" the earth close to one of the roads running by the estate. No other labourer was working close to him at the time. While engaged in his work, he was unfortunate enough to be espied by some Sinhalese villagers who were out that day to assault Tamils and who happened to be going along the road close to where Ponniah was working. The villagers came on to the estate, got hold of Ponniah and subjected him to the beating which proved fatal. It was not suggested that either Ponniah or the conductor who allocated work to him was aware of any risk of

attack by the Sinhalese on the Tamils working on the estate that day. In answering the question submitted to this Court I shall consider the statements made by Mr. Crossette-Thambiah as supplementing the admitted facts.

The meaning of the expression "arising out of his employment" appearing in legislation relating to Workmen's Compensation has been the subject of much judicial comment, but the multitude of cases on the subject only serves to emphasize the difficulty of applying the principles to be gleaned therefrom to the particular facts of a given case.

"Nothing can come 'out of the employment'," said Buckley L.J. in *Mitchinson vs. Day Brothers*, L. R. (1913) 1. K. B. at 608, "which has not in some reasonable sense its origin, its source, its causa causans in the employment. That the injury must be one resulting in some reasonable sense from a risk incidental to the employment has I think been decided over and over again". Lord Atkin in *Brooker vs. Thomas Borthwick & Sons (Australasia) Ltd.* (1933) A.C. at 676, dealing with this point stated :—

> "The principle which emerges seems to be clear. The accident must be connected with the employment: must arise "out of" it. If the workman is injured by some natural force such as lightning, the heat of the sun, or extreme cold, which in itself has no kind of connection with employment, he cannot recover unless he can sufficiently associate such injury with his employment. This he can do if he can show that the employment exposed him in a special degree to suffering such an injury. But if he is injured by contact physically with some part of the place where he works, then, apart from questions of his own misconduct, he at once associates the accident with his employment and nothing further need be considered. So that if the roof or walls fall upon him, or he slips on the premises, there is no need to make further inquiry as to why the accident happened".
>
> "Their Lordships' attention was drawn to various decisions in cases in which workmen were injured by bombs and shells from bombardment during the war. They do not refer to them in detail, for they appear to confirm the conclusions which their Lordships have reached. Neither bombs nor shells having ordinarily anything to do with a workman's employment. It is therefore necessary to show special exposure to injury by them. They represent exactly for this purpose the operation of such forces as lightning, heat or cold."

I am grateful both to Counsel for the applicant and to Crown Counsel who appeared at the instance of this Court for the assistance they have given me in regard to reported decisions bearing on the question that has been submitted to this Court. Mr. Crossette-Thambiah, while frankly stating the difficulties in his way, sought to bring the case of this workman within the statute by contending that he was exposed to danger by reason of his having been compelled to work alone and unprotected in proximity to the road where he was an obvious target for the rioters as distinguished from the case of the other Tamil labourers who were in numbers in the middle of the estate well out of sight from the road and who thereby escaped assault that day. This is similar to an argument addressed to Wijeyewardene J. and rejected by that learned judge in *Charles Appu vs. Controller of Establishments* (1946) 47 N.L.R. at 464. Reliance was there placed by counsel on what may be termed the fourth proposition contained in the judgment of Russell L.J. in *Lawrence vs. George Mathews (1924) Ltd.*, (1929) 1 K.B.D. at 19 :—

> "Sufficient causal relation or causal connection between the accident and the employment is established if the man's employment brought him to the particular spot where the accident occurred, and the spot in fact turns to be a dangerous spot. If such a risk is established, then the accident "arises out of" the employment, even though the risk which caused the accident was neither necessarily incident to the performance of the man's work, nor one to which he was abnormally subjected."

What was meant by a dangerous spot in the passage reproduced above was explained by Lawrence L.J. in *Holden vs. Premier Waterproof and Rubber Co. Ltd.* (1930) 23 B.W.C.C. at 471, (a decision of the Court of Appeal of England in which it was held that the risk of being attacked by a madman did not arise out of the employment either by reason of the duties performed by the workman concerned or by reason of the locality in which they were performed) when he observed that :—

> "I think it is plain that what is meant by a dangerous spot in this connection is a spot which owing to its locality is in fact inherently dangerous although the danger may be a lurking danger and not known to any one, such as a wall with a bad foundation which may collapse—a tree which may fall; it does not mean that because the accident happened at a particular spot, and because the workman did in fact incur danger at that spot, that therefore it was a dangerous spot within the fourth proposition."

There was nothing inherently dangerous, in this sense, in the place where Ponniah happened to be working at the time the villagers attacked him. The motive for the attack was obviously that Ponniah was a Tamil. The risk of Ponniah being beaten up because he was a Tamil was not, in my opinion, one reasonably incidental to his employment as a labourer on this estate or one which had any kind of connection or association with his employment.

I would therefore answer in the negative the question submitted by the Commissioner whether the accident which caused the death of the workman arose out of his employment.

There will, of course, be no costs of this proceeding.

Present : T. S. FERNANDO, J.

THIYAGARAJAH *vs.* PERERA, INSPECTOR OF POLICE, COLOMBO.

S. C. No. 58 *of* 1960—*M. C. Colombo No.* 20311/B.

Argued on : 29th June, 1960 and 28th July, 1960.

Decided on : 5th September, 1960.

Merchandise Marks Ordinance, (*Cap.* 122),—*Section* 2 (2)—*Charge under—Sale and possession of aerated waters manufactured by the appellant in bottles embossed with the names of other aerated water manufacturing companies—Labels bearing appellant's name and address attached to bottles—Absence of intention to deceive public—Meaning of the words " acted innocently " in Section* 2 (2).

The appellant, carrying on the business of manufacturing aerated waters, mineral waters, etc., under the name of Dominion Aerated Water Co., having come into possession of certain bottles belonging to two other companies, (" Schweppes (Overseas) London " and " Ceylon Mineral Waters ") with their names embossed on them, filled them with aerated waters variously described as "Orange Barley ", "Sparking Orange Barley" and "Fruit Flavour Cocktail ", and attached labels bearing the appellant's name and address.

The appellant's servants sold some of these bottles of aerated waters to a police constable, who reported the matter to the Police. The Police found 119 bottles embossed with the name of the Schweppes (Overseas) London and 56 bottles embossed with the name of the " Ceylon Mineral Waters ", all filled with aerated waters manufactured by the appellant's Co. and bearing the aforesaid labels.

The Police charged the appellant under Section 2 (2) of the Merchandise Marks Ordinance on two counts for keeping in his possession for sale or any purpose of trade the said bottles of aerated waters to ,which a false trade description had been applied. The learned Magistrate, following the decision in Stone *vs.* Burn, L. R. 1910 1 K.B. at 927, convicted the appellant, although his findings appeared to show that the appellant was not deceiving the public. He was also satisfied that the appellant was in the habit of purchasing empty bottles bearing the marks of the said two companies which were readily available from itinerant vendors.

On an appeal to the Supreme Court.

Held : (1) That the conviction should be upheld.

(2) That the words " acted innocently " in section 2 (2) of the Merchandise Marks Ordinance (Cap. 122) point to an absence of an intention to infringe the Ordinance. Such an intention can only exist where such infraction was committed by inadvertence or by mistake of fact. Here the appellant was aware of what he was doing and claimed to have a right to do it as the bottles were readily available in the market.

Followed : *Stone vs. Burn,* L.R. (1910) 1 K.B. at 927.
Referred to : *Christie's Case,* L.R. (1900) 2 Q B. at 522.

G. E. Chitty, Q.C. with *Ananda Karunatilake* and *Hannan Ismail* for the accused-appellant.

Wakeley Paul, Crown Counsel, for the Attorney-General.

T. S. FERNANDO, J.

The appellant was convicted in the Magistrate's Court on the two charges which are reproduced below :—

(1) That he did on 24th June 1959 at Rodney Street, Borella, have in his possession for sale or for any purpose of trade goods, to wit, 119 bottles of aerated waters to which a false trade description, namely, the words " MANUFACTURED UNDER THE AUTHORITY OF THE PROPRIETORS SCHWEPPES (OVERSEAS) LONDON, ENGLAND " and " SCHWEPPES " and been applied, and thereby committed an offence in breach of section 2 (2) of the Merchandise Marks Ordinance (Cap. 122), punishable under section 2 (4) of the same Ordinance.

(2) That he did at the time and place aforesaid have in his possession for sale or for any purpose of trade goods, to wit, 56 bottles of aerated waters to which a false trade description, namely, " CEYLON MINERAL WATERS " and " THIS BOTTLE IS THE PROPERTY OF CEYLON MINE-

RAL WATERS LIMITED" had been applied, and thereby committed an offence in breach of section 2 (2) of the Merchandise Marks Ordinance (Cap. 122), punishable under section 2 (4) of the same Ordinance.

Another person, a servant of the appellant, was charged along with him and convicted in respect of the sale of 3 bottles of aerated waters of the kind described in charge (1) above and of 3 bottles of the kind described in charge (2) above. The servant was fined a sum of Rs. 20/- in respect of each charge, while the appellant was fined a sum of Rs. 75/- also in respect of each charge.

Section 2 (2) of the Merchandise Marks Ordinance enacts that every person who sells or exposes for, or has in his possession for, sale or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive, is falsely applied, as the case may be, shall, unless he proves

(*a*) .....

and (*b*) .....

or (*c*) that otherwise he had acted innocently, be guilty of an offence against this Ordinance.

The question raised in this court on behalf of the appellant is one of law, but before dealing with that question it is necessary to state the facts as found in the court below.

The appellant carries on at 20/1, Rodney Street, Borella, the business of manufacturing aerated waters, mineral waters, fruit drinks and cordials under the name of Dominion Aerated Water Co., a name duly registered as required by the Business Names Ordinance (Cap. 120). On the day specified in the charges, the appellant's servant referred to above sold to a police constable six bottles of aerated waters bearing labels on which had been printed the words "LOTUS BRAND—LANKA ORANGE— Dominion Aerated Water Co., 20/1, Rodney Street, Colombo. 8", and three of which had the words reproduced in charge (1) embossed on them, while the other three had embossed on them the words reproduced in charge (2). Of the embossed words, the word "SCHWEPPES" had been embossed on the bottom of the bottles. The purchase was made by the constable in question by prior arrangement with his superior officer, an inspector of police, who was attempting on this day to secure evidence of the sale of these bottles of aerated waters. On the constable reporting the purchase to the inspector, the latter went along to the permises of the appellant and took into his custody some 175 bottles of aerated waters of the two descriptions referred to above. The appellant was present in his premises at the time the bottles were taken over by the inspector. It may be added that in the case of the bottles referred to in charge (2), apart from the words already reproduced in that charge, the following legend had also been embossed :—"ANY UNAUTHORISED PERSON FILLING THIS BOTTLE WILL BE PROSECUTED".

The 175 bottles all bore labels similar to the labels on the bottles sold by the appellant's servant to the constable. Certain other bottles were also taken charge of by the inspector, and these too bore labels containing the name and address of the appellant's business while the waters themselves were described variously as ORANGE BARLEY, SPARKLING ORANGE BARLEY and FRUIT FLAVOUR COCKTAIL. Each of the bottles was corked with the familiar crown corks, but these corks were all plain with no markings or printing on them, and different from the corks used by the Mineral Water Company on its bottles which had markings on them. Specimens of the contents of some of the 175 bottles found in the possession of the appellant were sent for analysis by the Government Analyst who reported that the contents were different from any of the varieties of the Schweppes orange drinks or the other kinds of orange drinks manufactured by the Ceylon Mineral Water Company.

The Magistrate was satisfied that these bottles had once been the property of the Ceylon Mineral Water Company which, by arrangement with the manufacturers of the aerated and mineral waters known as *Schweppes*, manufactures Schweppes waters in Ceylon in addition to other kinds of aerated or mineral waters. It is not disputed that none of the waters manufactured by the Ceylon Mineral Waters Company is described by the names *Lanka Orange*, *Orange Barley*, *Sparkling Orange Barley* or *Fruit Flavour Cocktail* which were the names printed on the labels attached to the bottles taken away from the premises of the appellant. He was further satisfied that in buying the bottles of the kind found in the appellant's possession no reasonable person was likely to be misled into

the belief that he was buying Schweppes waters or any of the other kinds of waters manufactured by the Ceylon Mineral Water Company.

The appellant proved to the Magistrate's satisfaction that he was in the habit of purchasing empty bottles in the open marked through itinerant empty bottle vendors and that bottles bearing the Schweppes marks and the marks of the Ceylon Mineral Water Company are always available for purchase in that way.

In spite of these findings which appear to show that the appellant was not deceiving the public, the learned Magistrate found the charges established, and in reaching this finding he was undoubtedly influenced, as indeed I am, in deciding the question raised on appeal, by a decision of the King's Bench Division in England on a case stated by justices after a conviction entered by them in a prosecution for an offence under the Merchandise Marks Act of 1887 (50 51 Vict. CH. 28). The case I refer to is *Stone* vs. *Burn*, L. R. (1910) 1. K. B. at 927 where three judges of the King's Bench (Lord Alverstone C.J., Pickford J. and Lord Coleridge J.) concurred in the opinion that a conviction was correctly entered in a case which has such a striking resemblance to the case before me in regard to both facts and law that the two are almost indistinguishable from each other. In that case, Stone, a bottler of beer, having in the course of his business come into possession of certain bottles belonging to the Felinfoel Brewery Company and embossed with that company's name, filled them with beer brewed by Bass & Co., placed Bass & Co.'s labels upon them, and then sold the contents as being Bass & Co.'s beer. The Court upheld the finding that a false trade description, *viz.*, the Felinfoel Brewery Company's name, had been applied to the beer brewed by Bass & Co. none the less because the presence of the Bass labels on the bottles would prevent any reasonable purchaser from supposing that he was buying anything but Bass's beer. In forming the opinion they did, the judges of the King's Bench felt that effect had to be given to section 5 of the Merchandise Marks Act, the relevant part of which reads that "a person shall be deemed to apply a trade mark or mark or trade description to goods who encloses the goods which are sold or exposed or had in possession for any purpose of sale, trade or manufacture, in, with or to any *covering*..... .....to which a trade mark or trade description has been applied". By sub-section (2) of section 5 the expression "*covering*" is defined as including a bottle. As Pickford J. put it (*vide* page 932), "if in so doing he applied the Felinfoel company's name to the beer it clearly was a false name,.....and therefore when he sold the beer he sold goods to which a false trade description was applied and consequently by virtue of section 5 he committed an offence unless he proved that he acted *innocently*".

The question of law raised by Mr. Chitty on behalf of the appellant was two-fold :—

(1) that having regard to the findings of the Magistrate, even if it is held that a trade description was applied it was not a false trade description,

and (2) that in any event the Magistrate was in error when he concluded that the appellant had failed to prove that he acted innocently.

Mr. Chitty contended that the case of *Stone* vs. *Burn* (*supra*) had been wrongly decided and urged me to take the view that the word "innocently" in section 2 at least bears not only the meaning put upon it by the King's Bench but also the meaning "not guilty". He went on to argue that the findings of fact reached by the learned Magistrate negatived that the appellant acted guiltily in the matter of the bottling of the waters manufactured by him in the way he did. While I have not been unimpressed by the argument of learned counsel, I do not consider it cogent enough to disregard the opinion of a Bench of three judges that the innocence contemplated by the statute exists only where the infraction was committed by inadvertence or mistake of fact. Lord Alverstone C.J. observed that "mere ignorance of the provisions of the statute" does not amount to innocence for this purpose. The words "*acted innocently*" point to the same misapprehension of fact for he did what he did with full knowledge and claiming that he had a right to do it". Lord Coleridge J. put the same matter thus :— "But, as was said by Chanwell J. in *Christie's case*, L. R. (1900) 2. Q. B. at 522, the innocence contemplated by the Act is innocence of any intention to infringe the Act of Parliament. Such intention can only exist where the infraction was committed by inadvertence or mistake of fact. And here the appellant knew all the facts—his only mistake was as to the effect of the statute".

Our own statute, the Merchandise Marks Ordinance (Cap. 122) passed in 1889 is almost

word for word and section for section a repetition of the Merchandise Marks Act of 1887 which has been the subject of interpretation in *Stone's case* (*supra*). Having regard to the close identity in facts between that case and this, the authority is absolutely in point and I would respectfully adopt it for application to the question raised in appeal before me. The learned Magistrate has found that the appellant, just as much as Stone in the English case, was not labouring under any mistake of fact, that he was aware of what he was doing and claimed to have a right to do it as the bottles were readily available in the market. In these circumstances the appeal must be dismissed. I do so and think it is not irrelevant to observe at this stage that the appellant has previously been convicted of an offence punishable under this same Ordinance.

Appeal dismissed.

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

S. C. No. 60—*D. C. Kurunegala No.* 12263.

PIYARATANA THERO AND OTHERS *vs.* PEMANANDA THERO

Argued on : November 18 and 23, 1959.

Decided on : June 22, 1960.

Buddhist Ecclesiastical Law—Succession according to rule of Sisyanusisya Paramparawa—Relationship of tutor and pupil—Does the principle of res judicata apply in the case of tutor and pupil—Is a question of property involved in an action for an incumbency.—Civil Procedure Code, meaning of the words " same parties " in Section 207.

In 1951, 2nd and 3rd defendants' tutor, R, instituted action, No. 7508 D.C. Kurunegala against the plaintiff in this action praying *inter alia* that R be declared controlling Viharadhipathi of Pallegama Temple. In his answer filed in the said case D.C. 7508, the present plaintiff prayed for a declaration that he is the lawful controlling Viharadipathi and that R's action be dismissed. After trial R's action was dismissed but there was no declaration in present plaintiff's favour. In the present action against the 2nd and 3rd defendants for a declaration that the plaintiff is the lawful controlling Viharadhipathi, he pleaded that the decree in D.C. 7508 operated as *res judicata* against the 2nd and 3rd defendants, who claimed title through R.

The learned District Judge upheld the plaintiff's plea of *res judicata.*

In appeal it was contended on behalf of the 2nd and 3rd defendants-appellants that the principle of *res judicata* did not apply in this case because (1) in the case of a tutor and his pupil, the pupil takes after and not under the tutor. (2) no question of property is involved but merely the right to an office in a dispute regarding an incumbency; (3) the decree in D.C. 7508 did not declare the plaintiff entitled to the incumbency.

Held : (1) That the decision in D.C. 7508 D.C. Kurunegalle is *res judicata* against the 2nd and 3rd defendants as the relationship of tutor and pupil in Buddhist Ecclesiastical Law is sufficient to make the pupil privy of his tutor.

(2) That the expression " same parties " in Section 207 of the Civil Procedure Code was used in the sense in which they were understood in the Roman-Dutch Law, viz., in an extended sense which by a legal fiction, included certain classes of persons other than the parties actually engaged in the action.

Per SANSONI, J.—(*a*) "Now although an incumbency is an office, I have tried to show in my judgment in *Podiya vs. Sumangala Thero* (1956) 58 N.L.R. 29 that it is an office to which rights in property attach; and for that reason I think the principle of *res judicata* would apply. "

(*b*) ..... "*Res judicata*, in other words, is a matter of substance," see Caspersz, page 77. The determining factor is not the decree but the decision of the matter in controversy. "

The point has been dealt with by Jayawardene, A.J., in *Velupillai vs. Muthupillai*, (1923) 25 N.L.R. 264. Generally speaking estoppel or *res judicata* may arise either where there is identity of cause of action or where there is identity of point of issue ".

Cases cited : *Murugiah* vs. *Jainudeen*, 56 N.L.R. 176 at 181.
Samichi vs. *Pieris*, 16 N.L.R. 257.
Rev. Moragolle Sumangala vs Rev Kiribamune Piyadasst, 56 N.L.R. 322.
Podiya vs. *Sumangala Thero* (1956) 58 N. L. R. 29.
Punnananda vs. *Weliwitiya Soratha* (1950) 51 N. L. R. 372.
Kader vs. *Marikar* (1942) 43 N. L. R. 387.
Velupillai vs. *Muthupullai* (1923) 25 N. L. R. 264.

H. V. Perera, Q.C., with *T. B. Dissanayake* for the 2nd to 5th defendants-appellants.

E. B. Wikramanayake, Q.C., with *U. B. Weerasekera* for the plaintiff-respondent.

BASNAYAKE, C.J.

The plaintiff Pallewela Pemananda Thera controlling Viharadhipati of Tekawa Vihare instituted this action against Karandawa Piyaratana Thera of Karandawa Temple, Hettipola, Pihimbiya Piyaratana Thera of Giratalane Temple, Hettipola, Amunuwala Saddananda Thera of Hinguregama Vihare, K. M. Dingiri Banda Vidane of Pallegama, Hettipola, P. M. William Singho of Pallegama and K. K. Sediris Appu of Silvathgama, Hettipola. He prayed that he be declared the controlling Viharadhipati of the Pallegama Vihara of Tekawe and that the defendants be ejected from that Vihare and its lands and that he be placed in quiet possession thereof. He also claimed damages in Rs. 500/- and continuing damages at Rs. 500/- per annum.

The 1st defendant Karandawa Piyaratana Thera stated in answer to the plaint that he made no claim whatsoever to the Vihare or its temporalities. So did the 4th defendant Dingiri Banda Vidane and the 5th defendant P. M. William Singho who are the President and the Secretary respectively of the Dayaka Sabhawa. Of consent the 1st defendant was discharged from the action. The 2nd and 3rd defendants maintained—

(1) that Pihimbiya Piyaratana Thera, the 2nd defendant, is the lawful Viharadhipati of Pallegama Vihare and is entitled to administer its temporalities ;
(2) that Amunuwala Saddananda Thera, the 3rd defendant, is the senior pupil of the 2nd defendant ;
(3) that the 6th defendant, K. K. Sediris Appu, is a tenant under the 2nd defendant.

At the trial the plaintiff's pleader suggested the following issues :—

" 1. Was Tekawa Sumangala Thera at one time the Viharadhipati of this temple ?
2. Did he die leaving as his pupil, Tekawa Ratanajoti Thera, as Viharadhipati ?
3. Did Tekawa Ratanajoti Thera die leaving plaintiff his senior pupil and his successor fn office ?
4. Did the defendants enter into forcible possession of this temple and the temporalities attached thereto on 15.11.54 ?
5. Are the defendants in forcible possession of this said temple and the temporalities since that day ?
6. What damages, if any, is the plaintiff entitled to ?
7. Is the decree in case 7508 of this Court *res judicata* as against the defendants or any of them in regard to the subject-matter of this action ? "

It is not necessary to refer to the issues suggested by counsel for the 1st defendant as he has been discharged from the action of consent. Counsel for the other defendants suggested :—

" 10. Has the title of the plaintiff, if any, to the said incumbency been lost by lapse of time ?
11. Has the title of the plaintiff, if any, been lost by abandonment of the said temple ?
12. Is there a misjoinder of parties and/or causes of action ?
13. If there is such a misjoinder, can the plaintiff have and maintain this action ? "

At the outset of the trial the following admissions were recorded :—

(*a*) It is admitted that the 2nd and 3rd defendants are the pupils of Maguran Kadawela Ratanapala Thera who was the plaintiff in D.C. Kurunegala Case No. 7508. The 2nd and 3rd defendants do not claim any title except through Ratanapala Thera.
(*b*) It is also admitted that the plaintiff is the successor in office of Tekawa Ratanajoti Thera.
(*c*) It is admitted that if the judgment in D.C. Kurunegala Case No. 7508 is *res judicata*, it binds not only the 2nd and 3rd defendants but it binds 2nd to 5th defendants also.
(*d*) Damages were agreed at Rs. 400/- per annum from 15.11.54.

The following agreement is also recorded :— " Defendants undertake not to press the other issues if the plaintiff succeeds on the issue of *res judicata*."

Shortly the facts are as follows :— Tekawa Sumangala was the Viharadhipati of both Tekawa and Pallegama Vihares. When he died his senior pupil Tekawa Ratanajoti succeeded him. The plaintiff is admittedly Ratanajoti's

pupil and successor; but at the time of Ratanajoti's death Magurankadawela Ratanapala Thera was in charge of the temple as adhikari by virtue of the following writing given to him by Tekawa Sumangala Thera :—

" In the Saka Era 1810 Month of Ill.

I the undersigned Tekawa Sumangala Thera, Viharadhipathy of Tekawa Vihare and Pallegama Vihare in Giratalana Korale Dewamedi Hatpattu Sath Korale state as follows :—

As I do not have any of my pupils to keep at Pallegama Vihare now and as I am going to Satarakorale to reside I have entrusted my friend, Magurukadawala Ratanapala Thera of Karandawa Temple in Karanda Pattu Korale to improve and to live at the said place.

Further it was agreed that I or any of my pupillary successors come and ask the place he has to hand over the same to him.

(Sgd.) TEKAWA SUMANGALA THERA."

On 2nd May 1949 Magurukadawala Ratanapala by the following notarially attested writing purported to transfer the Adikarishiip to the plaintiff :—

No. 17067.

LANDS 6

Deed of Transferring of Adikarishiip or Incumbency.

To all to whom these presents shall come I, Magurankandawala Ratanapala Thero, Viharadhipathy of Hinguregama Vihare sends Greetings :—

Whereas Tekawe Sumangala Thero, the incumbent of Tekawe Vihare in Giratalana North and Pallegama Vihare in the aforesaid Korale, about sixty years ago by ola writing dated (Saka era 1810 in the month of Ill) (ශක වර්ෂ 1814 ක්වූ ඉල් මස පූර අටවක් දින) transferred and assigned to me the said Magurankadawala Ratanapala Thero, the properties mentioned in the schedule annexed hereto belonging to the said Pallegama Vihore and mentioned in list No. 185 of the year 1870 and deposited in the Kandy Kachcheri (which is not before us) for the purpose of improving and possessing same.

Whereas by the said ola writing it was laid down as condition that the said premises should be retransferred and assigned to the said Donor, Tekawe Sumangala Thero or any pupil of his entitled to be pupillary succession if they ask for a retransfer.

Whereas I the said Magurankandawela Ratanapala Thero am ill for a long time and in feeble health and am old and I have not been able to improve and possess the properties or render any assistance to the priesthood or for the improvement of the said Viharas.

Whereas Pallewela Pemananda Thero, Viharadhipathy of Siri Bodisiparamaya Purana Vihare, Tekawe, in Giratalawa Korale aforesaid, who comes from the pupillary succession of the said Tekawe Sumangala Thero promised to look after the said properties in a better manner and requested me to hand over the adikarishiip of the said properties according to Sangika rights.

Therefore I the said Ratanapala Thero agree to give the adikarishiip of the said properties to the said Pallewela Pemananda Thero.

Know all men by these presents and I the said Magurankadawela Ratanapala Thero in consideration of the abovementioned reasons do hereby transfer my rights and privileges as adikarishiip to the said properties according to Sangika rights unto the said Pallewela Pemananda Thero and his pupillary succession to improve and possess the said properties.

Whereas the said Pallewela Pemananda Thero accepted the abovementioned adikarishiip with pleasure.

In witness whereof the said Magurankadawela Ratanapala Thero and Pallewella Pemananda Thero do set our hands hereunto and to two others of the same tenor and date as these presents on this 2nd May, 1949, at Kurunegala."

(Here follows the Schedule of Lands)

On 27th April, 1951 Ratanapala instituted D. C. Kurunegala Case No. 7508 against Pallewela Pemananda Thera the plaintiff in which he prayed that deed No. 17067 be declared to be of no force or avail to vest defendant with the right to be Viharadhipati of Pallegama Temple or to the control or management of its temporalities, and that he be declared Viharadhipati of Pallegama Temple and controlling Viharadhipati as defined in the Buddhist Temporalities Ordinance.

Pallewela Pemananda Thera denied the allegations in that plaint, narrated the case now set out by him, and prayed that the plaintiff's action be dismissed, and that he be declared the controlling Viharadhipati of the temple.

After trial the plaintiff's action was dismissed. The material portion of the decree reads :

" It is ordered and decreed that the plaintiff's action to declare the deed No. 17067 dated 2nd May, 1949, attested by L. M. P. Jayawardene, Notary Public, null and void and that he be declared Viharadhipati of Pallegama Temple and controlling Viharadhipati as defined in the Buddhist Temporalities Ordinance, be and the same is hereby dismissed."

The learned District Judge holds that the decree in that case binds the 2nd and 3rd defendants. He says :

" It is clear on the law that the pupils would be bound by the earlier decree against their tutor as to whether the tutor was the Viharadhipathi of the temple or not. This is clear from the judgment of Gratiaen, J., in *Rev. Moragolle Sumangala* vs. *Rev.*

Kiribamune Piyadassi (56 N.L.R. 322). The 2nd and 3rd defendants claim title through Ratanapala who was admittedly held not to be the Viharadhipathi of this temple but the plaintiff was declared to be the Viharadhipati of this temple. Hence the defendants are bound by that decision."

The learned District Judge is mistaken in thinking that in that action the plaintiff was declared to be the Viharadhipati of Pallegama Vihare. There is no such declaration in the decree. Although it would appear from the plaintiff's answer in that case that he asked for such a declaration it was not granted. The 2nd defendant who is the senior pupil of Ratanapala whose action to be declared Viharadhipati of the temple in dispute was dismissed claims that he is the lawful Viharadhipati by succession. The following admissions were recorded before the plaintiff commenced his case :—

"It is admitted that the 2nd and 3rd defendants are pupils of Maguran Kadawala Ratanapala Thero who was the plaintiff in D.C. 7508. The 2nd and 3rd defendants do not claim any title except through Rataanpala Thero. It is also admitted that the plaintiff is the successor in office of Tekawe Ratanajoti Thero. It is admitted that if the judgment in that case is *res judicata* it binds not only 2nd and 3rd defendants but it binds 2nd to 5th defendants."

The plaintiff gave evidence on his behalf. The defendants neither gave evidence nor called witnesses on their behalf. The only question for decision is whether the 2nd defendant is barred by the decree against his tutor from maintaining in the present action that he is the Viharadhipati by virtue of being Ratanapala's senior pupil.

The Legislature has sought to give effect to the Roman Law maxims of *res judicata pro veritate habetur* (or *accipitur*) (Dig. 1.5,25), *nemo debet bis vexari si constat curiae quod sit pro una et eadem causa* ; *reipublicae interest ut sit finis litium*, and *res judicata inter alios, aliis neque nocet neque prodest* by enacting sections 34, 207 and 406 of the Civil Procedure Code, section 330 of the Criminal Procedure Code, and sections 41 and 42 of the Evidence Ordinance. Section 100 of the Evidence Ordinance may be invoked in appropriate cases for the purpose of resorting to the English rules of Estoppel by record.

The statutory provisions abovementioned must be read against the background of our common law as they are designed to give statutory effect to the basic concepts of that law, concepts which are common to all systems based on Roman Law. The enactment of the law of *res judicata* partly as a matter of procedure in the Civil Procedure Code and partly as a matter of evidence in the Evidence Ordinance is appropriate, in that *res judicata* operates both in the field of civil procedure and in the field of evidence. In our system of law the judgment which is relied on as barring the subsequent action must be both pleaded and proved in evidence. I think the same is the rule in systems which require strict pleadings before trial.

For the purpose of this judgment I shall confine my attention to section 207 of the Civil Procedure Code. That section reads :—

"All decrees passed by the Court shall, subject to appeal, when an appeal is allowed, be final between the parties ; and no plaintiff shall hereafter be non-suited.

Explanation.—Every right of property, or to money, or to damages, or to relief of any kind which can be claimed, set up, or put in issue between the parties to an action upon the cause of action for which the action is brought, whether it be actually so claimed, set up, or put fn issue or not in he action becomes, on the passing of the final decree in the action, a *res adjudicata*, which cannot after be made the subject of action for the same cause wards between the same parties."

In the instant case the 2nd defendant was not named as a party to the original action which Ratanapala brought. The question then is— Does the section apply only to the parties named either as party plaintiff or defendant to an action or does the word "parties" therein extend to persons other than those named as parties to the action ? If so, to what classes of persons does the expression extend ? In Roman-Dutch Law the expression had an extended meaning as would appear from the following quotations from Voet and Huber. Voet (Bk XLIV — Tit. 2 s. 3 — Gane's transaltion Vol. 6 p. 558)—

"A deceased and his heir, a principal and his agent, a free town and its manager, an insane person or a soldier and his curator, a ward and his guardian and a father and the son of his household are in civil law the same person. So are a creditor and his debtor in regard to the thing pledged, if the debtor gave the thing in pledge to his creditor after he had claimed it from a third person and had lost his case, and later the creditor wishes to take steps against the winning party by the action on pledge. So are two joint (and several) debtors or creditors, if one of them has suffered a rebuff in claiming a thing or, when the thing was claimed from one of two joint (and several) debtors, he has been absolved in a judicial proceeding. So are a surety and the debtor, if judgment has been given in favour of the debtor ; and a purchaser and his vendor, if the vendor has been absolved or has had judgment against him, though not also if that is the case with the purchaser,"

Huber (The Jurisprudence of My Time — Gane's translation Vol. 2 p. 338)—

> "Testator and heir, principal and agent, purchaser and seller, owner and successor in ownership, debtor and surety, and also the first members of a family and their successors entitled to one and the same fideicommissum, though not heirs of each other, are considered as the same persons."

It would appear that the expression *inter easdem personas* in Roman-Dutch Law which is translated by some as "between the same parties" and by others as "between the same persons" was extended by a legal fiction to certain classes of persons other than the parties actually engaged in the action. This extended meaning of the expression "same parties" has been recognised from the earliest times in our law and it must be presumed that when the Legislature enacted the Civil Procedure Code it used those words in the sense in which it was understood in our common law of *res judicata* and did not intend to make any alteration in that law (*Murugiah vs. Jainudeen*, 56 N.L.R. 176 at 181), because there is no indication in the Civil Procedure Code that the Legislature intended to use the word "parties" in a sense different from that in which Voet and Huber used it in their commentaries. I find support for my opinion in the following words of Lascelles C.J. in *Samichi vs. Pieris* (16 N.L.R. 257) :—

> "The law of *res judicata* has its foundation in the civil law, and was part of the common law of Ceylon long before Civil Procedure Codes were dreamt of. But even if these sections contain an exhaustive statement of the law on this point, I cannot see that there is anything in them which is inconsistent with the principles which have been followed in the English, Indian, and American Courts."

The interpretation I seek to give to the words "same parties" in section 207 is not inconsistent with the rules of construction of statutes as stated in such standard treatises as Craies (p. 112 — 5th Ed.) and Maxwell (p. 82 — 10th Ed.). They are to the effect that in construing the words of an Act of Parliament in the absence of a clear indication from its express language that the Legislature did intend to go against the ordinary rules of law they should be construed on the basis that it did not intend to do so.

The English Law has devised a very convenient nomenclature in the word "privy" for those persons who are in the law bound by a decree though not named as parties to an action. In that system "privies" are classified as (a) privies in blood—ancestor and heir ; (b) privies in law—testator and executor, intestate and administrator ; and (c) privies in estate—testator and devisor— vendor and purchaser, lessor and lessee—successive incumbents of the same benefice—assignor and assignee of a bond. The word "privy" has been used in the judgments of this court and I shall also adopt it for the sake of convenience. No hard and fast rule as to who is a "privy" can, apart from the well-known instances cited above, be laid down. But the development of the doctrine of *res judicata* would be hampered if Voet's enumeration of persons bound by a decree is treated as exhaustive and incapable of extension to other like cases. In deciding whether a judgment is a bar to persons other than the parties named in an action reagitating the same question we should bear in mind the maxims cited earlier in this judgment.

I shall now turn to the submission of learned counsel for the appellant. He argued that as a pupil does not in Buddhist Ecclesiastical Law either derive title from his tutor or claim under him he is not his privy. It is true that a pupil does not derive title from his tutor in the sense that a purchaser derives title from his vendor or an assignee from the assignor. In the succession known as *sisyanu sisya paramparawa* pupil succeeds tutor. A Viharadhipati is not the owner of his temple or its temporalities. He is a trustee with power, subject to certain exceptions, to appoint another as trustee if he so chooses. He cannot transfer his rights in his lifetime although he may appoint agents to look after or manage the temple or temples and their temporalities. He is not free to nominate a person other than a pupil as his successor. If he dies without nominating a successor his senior pupil succeeds to the office of Viharadhipati and thereby becomes entitled to exercise the management of the temples of which his predecessor was Viharadhipati. Hukm Chand in his treatise on Res Judicata (p. 193, 1894 Ed.) cites several instances similar to the relationship of Viharadhipati and successor in which the courts have held the successor to be barred from reagitating the decision given against the predecessor. In discussing the subject of Privies, Halsbury (3rd Ed. Vol. 15 p. 197) classifies successive incumbents of the same benefice as privies in estate. In my opinion the relationship of tutor and pupil in Buddhist Ecclesiastical Law is sufficient to make the pupil bound by a judgment against the tutor in a case in which he seeks to reagitate a decision against his tutor by virtue of being his pupil. The use of such expressions as "deriving title from", "claiming under" and "claiming through" have led to

some of the difficulties that have arisen on the subject of " privies " in *res judicata*. The fact that those words are appropriate when speaking of certain classes of " privies " does not limit the scope of the word to those cases.

In the instant case the 2nd defendant the pupil of Ratanapala seeks to reagitate the question whether Ratanapala was Viharadhipati of Pallegama Vihare, for, without establishing that his tutor was Viharadhipati of that Vihare, he cannot succeed. Now it was decided in the previous action that Ratanapala was not the Viharadhipati. In this action by the plaintiff against the 2nd defendant and others the law does not permit the 2nd defendant to raise the question again because though not named as a party to the original litigation he cannot succeed without reagitating the question which was decided in the litigation between his tutor and the plaintiff. That a pupil is a privy of his tutor seems to have never been doubted. In the case of *Rev. Moragolle Sumangala vs. Rev. Kiribamune Piyadasi* (56 N.L.R. 322) it was taken for granted that the pupil of a Viharadhipati was his privy and was barred *qua* pupil from reagitating the questions decided in an action to which his tutor was named as a party.

I, therefore, hold that the judgment against Ratanapala in D.C. Kurunegala Case No. 7508 is *res judicata* against the second defendant.

The appeal is therefore dismissed with costs.

SANSONI, J.

I have touched on this subject in *Podiya vs. Sumangala Thero*, (1956) 58 N.L.R. 29, and I should like to add some observations by way of supplementing what I said on that occasion.

Mr. H. V. Perera's main argument was that the principle of *res judicata* cannot apply because (1) in the case of a tutor and his pupil the pupil takes after and not under the tutor, and the pupil is therefore not a privy of the tutor: (2) no question of property is involved, but merely the right to an office, in a dispute regarding an incumbency.

Now although an incumbency is an office, I have tried to show in my judgment in *Podiya vs. Sumangala Thero*, (1956) 58 N.L.R. 29, that it is an office to which rights in property attach; and for that reason I think the principle of *res judicata* would apply. To quote a well-known passage from Bigelow on Estoppel (5th Edn.) page 142: " In the law of estoppel, one person becomes privy of another, (1) by succeeding to the position of that other as regards the subject of the estoppel, (2) by holding in subordination to that other . . . . . But it should be noticed that the ground of privity is *property* and not personal relation." If, as was held in *Punnananda vs. Weliwitiya Soratha*, (1950) 51 N.L.R. 372, and subsequent cases, a pupil loses his right of succession when his tutor abandons or renounces his rights to an incumbency, it can only be on the ground of privity. In my view, a pupil who claims an incumbency on the ground that his tutor was in the line of succession to that incumbency is claiming it on the ground of property: he would, moreover, for the purpose of the law relating to *res judicata*, be the privy of his tutor if he claims under the same title as that under which his tutor claimed in the earlier litigation. If, however, he claims under a different title which is independent of that put forward by his tutor, he would not be the privy of his tutor. Hukm Chand in his Treatise on the Law of Res Judicata (1894) says, at page 184: " Privies are held bound because they have succeeded to some estate or interest which was bound in the hands of its former owner; and the extent of the estoppel, so far as the privy is concerned, is limited to controversies affecting this estate or interest." Caspersz in his book on Estoppel and Res Judicata (1909) page 162 says that " the test is to be whether the title to the subject matter of the two litigations is the same . . . . A lawyer will probably ask himself the question, " Is the same title involved ? "

Mr. Perera submitted that a tutor and his pupil were in a position similar to a fiduciary and a fidei commissary, and I think the analogy is a proper one. While a fiduciary, in relation to fideicommissaries, can be regarded as representing the inheritance, a tutor in relation to his pupils in a particular line of succession can be regarded as representing the succession of that line. But it must be remembered that in certain respects the pupil's position is more precarious than that of the fidei-commissary, in that the tutor enjoys the powers of abandonment and nomination which a fiduciary does not. Then the decision in *Kader vs. Marrikar* (1942) 43 N.L.R. 387, with which I respectfully agree, leads to the result that just as a fideicommissary is a privy of the fiduciary and is bound by a judgment against the latter, a pupil is

bound by a judgment against his tutor, provided that the pupil is claiming under the same title as the tutor claimed under in the earlier action.

Mr. Perera also urged that since what was suggested in issue (7) as *res judicata* was the decree in case 7508, and the decree in that case did not declare the present plaintiff entitled to the incumbency, the issue must be answered against the plaintiff. I think this is too technical a view of the matter, for it overlooks the principle that " the decree itself is not the test of what is or is not *res judicata*, but that the question in each case is what did the Courts really decide ? *Res judicata*, in other words, is matter of substance," see Caspersz, page 77. The determining factor is not the decree but the decision of the matter in controversy.

The point has been dealt with by Jayawardene, A.J. in *Velupillai vs. Muthupillai*, (1923) 25 N.L.R. 264. " Generally speaking, estoppel or *res judicate* may arise either where there is identity of cause of action or where there is identity of point in issue. Where there is identity of causes of action, the judgment in the case is a bar to all further litigation upon the same property, claim or right. In such cases, it must be shown that there is identity between the present and former causes of action. If they are identical, the plea of estoppel is good. This is the class of estoppel by *res judicata* dealt with in the explanation to section 207. In the other class of cases, identity of causes of action is immaterial, and the only question to be decided is whether the point in issue is identical in the two cases. In such cases, the judgment on the issue creates an estoppel with regard to all matters in dispute upon the decision on which the finding was based." The two kinds of estoppel have sometimes been referred to as estoppel by judgment and estoppel by verdict. In the latter case, " an actual decision on any matter directly in issue in a suit is conclusive of that issue in every subsequent suit brought on any cause of action or for any purpose or object " : See Hukm Chand, page 7.

I find that in Case 7508, issues (9) and (10) were as follows :—

(9) Was Thekewa Sumangala Thero at one time the viharadipathi of the temple in claim ?

(10) Is the defendant (the present plaintiff) pupil in succession of the said Thekewa Sumangala Thero ?

and both issues were answered in the affirmative. Thus we have a case of estoppel by verdict in the present plaintiff's favour against the party whose title, and no other, is relied on by the present defendants-appellants. They are conclusively barred by that verdict.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

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

DE SILVA *vs.* ALI MOHAMED AND ANOTHER

S. C. No. 94/59—*D. C. Nuwara Eliya No.* 4518.

Argued on : June 23 and 27, 1960.
Decided on : June 27, 1960.

Civil Procedure Code, Chapter 53, Sections 706, 704, (2)—Action to recover debt due on promissory note—Application for leave to appear and defend—Should it be decided on affidavits alone—Provisions of this Chapter to be strictly adhered to.

In an action instituted under Chapter 53 of the Civil Procedure Code to recover a debt due on a promissory note, the defendant sought leave to appear and defend the action under Section 706 of the Code. Instead of the prescribed procedure being followed, the defendant was called to give evidence in support of his application and to submit himself to cross-examination and to produce documents. The learned trial Judge later made order that the defendant should deposit a sum of Rs. 10,000 as security before filing answer, as he considered that the defence set out in the defendants' affidavit was not made *bona fide*.

* For Sinhalese Translation see page 11 of the Sinhala Section.

Held : That in a proceeding under Chapter 53 of the Civil Procedure Code the prescribed rules should be strictly observed and any order made without observing them cannot be treated as a valid order under that Chapter. Section 704 (2) must be read with Section 706 and the decision a Court has to make under Section 704 (2) would thus have to be made according to the prescribed procedure, on the affidavits alone.

H. W. Jayawardene, Q.C., with *S. Sharvananda* for the defendant-appellant.

H. V. Perera, Q.C., with *Vernon Vijetunge* and *D. S. Wijewardene* for the plaintiffs-respondents.

BASNAYAKE, C.J.

The plaintiffs instituted this action under Chapter LIII of the Civil Procedure Code to recover a debt due on a promissory note made by the defendant on 2nd February, 1956 for a sum of Rs. 19,000/- with interest at the rate of 18% per annum payable on demand. They sought to obtain judgment in a sum of Rs. 28,951/-. The defendant sought leave to appear and defend the action under section 706 of the Civil Procedure Code. In the affidavit submitted by him to the Court he stated that from time to time on various dates between 6th May, 1951, and 26th January, 1952, he borrowed money from the 2nd plaintiff and that at the end of each month he gave the 2nd plaintiff a cheque for the amount of principal and interest then due. It is common ground that the transactions between the defendant and the plaintiffs commenced in 1951 the date of the promissory note. The defendant admitted the execution of the promissory note in suit but has asked for relief under section 2 of the Money Lending Ordinance on the following grounds :—

(*a*) that the return received by the creditor over and above what was actually lent, having regard to sums already paid on account is excessive.

(*b*) that the transaction was harsh and unconscionable,

(*c*) that the transaction was induced by undue influence,

(*d*) that the lender took as security for the loan a promissory note in which the amount stated as due was to the knowledge of the lender fictitious, and

(*e*) that the promissory note was not enforceable as it did not comply with Section 10 (1) of the Money Lending Ordinance.

On 24th April, 1959, the matter came up for hearing in open Court when the defendant's Proctor asked that the defendant be allowed to plead and defend the action unconditionally and also invoked the powers of the Court under section 2. The learned District Judge heard the Proctors for the respective parties. At the conclusion of the argument the Proctor for the defendant agreed that the question whether the defendant should be allowed leave to appear and defend the action should be taken up first. He then called the defendant to give evidence. He was cross-examined at great length and thereafter the Court fixed 29th May, 1959, for the purpose of delivering its order but it was refixed on that date for another day and finally delivered it on 17th July, 1959. After giving his reasons the learned Judge made the following order :—

"... I hold that the Defence of the Defendant as set out in his affidavit is not made *bona fide* and I therefore order that he should deposit a sum of Rs. 10,000/- as security before he files the Answer."

It is difficult to reconcile the procedure adopted by the learned trial Judge in deciding the application of the defendant with the provisions of the Civil Procedure Code. Section 706 which is the provision applicable to an application for leave to appear and defend provides that the Court shall upon application by the defendant give leave to appear and to defend the action upon—

(*a*) the defendant paying into Court the sum mentioned in the summons, or

(*b*) upon affidavits satisfactory to the Court, which disclose—

(i) a defence, or

(ii) such facts as would make it incumbent on the holder to prove consideration, or

(iii) such other facts as the Court may deem sufficient to the application, and

(iv) on such terms as to security, framing, and recording issues, or otherwise, as the Court thinks fit.

In the instant case without following the prescribed procedure the defendant was called to give evidence in support of his application for leave to appear and defend and submit himself to cross-examination and to produce docu-

ments. The result was that in determining the application for leave to appear and defend the learned Judge was influenced by matters which are not relevant to the consideration of the application and overlooked the provisions of section 704 (2).

Now that provision which must be read along with section 706 reads :

> " The defendant shall not be required, as a condition of his being allowed to appear and defend, to pay into Court the sum mentioned in the summons, or to give security therefor, unless the Court thinks his defence not to be *prima facie* sustainable, or feels reasonable doubt as to its good faith."

This decision falls to be made according to the prescribed procedure on the affidavits alone. In the instant case the learned Judge did not do so. The learned District Judge does not state that he thinks that the defence is not *prima facie* sustainable or that he feels reasonable doubt as to its good faith. His order that the defendant should deposit Rs. 10,000/- as security cannot therefore be sustained.

It is submitted by counsel for the respondent that this is not a case in which the defendant should be allowed to appear and defend without security because the learned trial Judge has held that " the defence of the defendant as set out in his affidavit is not made *bona fide.*" Chapter LIII provides a special procedure to be followed in the case of liquid claims which places the plaintiff in a highly advantageous position in which he would not be under the ordinary procedure. On the other hand the defendant is at a disadvantage and does not enjoy the rights of a defendant under the ordinary procedure. In a proceeding under Chapter LIII the prescribed rules should be strictly observed and any order made without observing them cannot be treated as a valid order under that Chapter. We therefore set aside the order of the learned District Judge. An examination of the procedure of the Courts in England where it is the same as ours and the decisions thereon (Order 14) confirms us in the view we have expressed above.

We accordingly allow the appeal and direct that the defendant be allowed to appear and defend without his being required to furnish security. The appellant is entitled to the costs of the appeal and of the inquiry in the Court below.

An effort should be made to bring this action to an end with the least possible delay as it is now nearly eighteen months since it was commenced.

SANSONI, J.
I agree.

Appeal allowed.

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

WELEGEMMEDDE SRINIVASA THERO *vs.* GALLELLE SUDASSI THERO

S. C. No. 440—*D. C. Kandy No. L.* 3167/*A.*

Argued on : November 3 and 15, 1960.

Decided on : 13th December, 1960

Civil Procedure Code, Sections 325 *and* 328—*Declaration of right to incumbency obtained in favour of D—Writ of possession issued under decree so obtained —Right to recover possession not embodied in Section—P, a third party, ejected under said writ of possession—Proceedings under Section* 328 *of the Civil Procedure Code—Effect of such ejectment.*

D, a Buddhist monk, obtained a decree in his favour for a declaration against three other monks that he was entitled to the office of Viharadhipathy, incumbent and trustee of two temples and to the management and control

of their temporalities. Upon an application to execute this decree a writ of possession was issued and P, another Buddhist monk, who was in occupation of a room in one of the temples, was ejected. Upon a petition and affidavit P applied for proceedings under Section 328 of the Civil Procedure Code praying that he be restored to possession. The Court duly directed the application to be numbered as a plaint and D filed answer denying that P was entitled to the relief claimed. After trial the learned District Judge held *inter alia* that P was not entitled to be restored to possession. P. appealed.

Held : (1) That the decree entered in favour of D was not a decree under Section 217 (*c*) of the Civil Procedure Code and therefore when the Court issued writ of possession, it acted without jurisdiction.

(2) That the writ of possession issued was a nullity.

(3) That where a Court makes an order without jurisdiction it has inherent power to set it aside and the person affected by the order is entitled *ex debito justitiae* to have it set aside.

(4) That it is not necessary to appeal from an order which is a nullity.

(5) That failure to take the objection at an earlier stage that the Court had no jurisdiction did not prevent it from being taken in appeal.

Per SANSONI, J.—The question now arises as to what order we should make on this appeal. The plaintiff asked the Court to restore him to possession of the room, because he had been dispossessed of it in execution of the decree. Section 328, no doubt, contemplates dispossession under decrees for possession of immovable property, but this is not a matter which we can allow to stand in the way of the plaintiff, for we must have regard to the substance rather than the form. Justice requires that he should be restored to the position he occupied before the invalid order was made, for it is a rule that the Court will not permit a suitor to suffer by reason of its wrongful act. The Court will, so far as possible, put him in the position which he would have occupied if the wrong order had not been made. It is a power which is inherent in the Court itself, and rests on the principle that a Court of Justice is under a duty to repair the injury done to a party by its act : see *Rodger vs. Comptoir D'Escompte de Paris* (1871) L. R. 3 P. C. 465. The duty of the Court under these circumstances can be carried out under its inherent powers.

Cases cited : *Vangadasalem* vs. *Chettiyar* (1928) 29 N. L. R. 445.
Kofi Forfie vs. *Seifah* (1958) 2 W. L. R. 52.
Jayalath vs. *Abdul Razak* (1954) 56 N. L. R. 145.
Rodger vs. *Comptoir D'Escompte de Paris* (1871) L. R. 3 P. C. 465.

T. B. Dissanayake for the plaintiff-appellant.

Vernon Jonklaas for the defendant-respondent.

SANSONI, J.

The plaintiff in the present action was ejected from a room in the Hippola Pansala in Malwatte Vihara when a writ, issued by the District Judge in case No. L. 3167, was executed. In that case the defendant sued three other Buddhist priests for a declaration that he was entitled to the offices of Viharadhipati, incumbent and the trustee of Bogahapitiya Vihara and Hippola Pansala, and to the management and control of their temporalities. The defendant obtained judgment as prayed for in that case and on 2nd August, 1957, upon his application to execute the decree, a writ of possession was issued.

Complaint was made by the defendant as judgment-creditor under section 325 of the Code that he could not get complete possession of Hippola Pansala, and on 13th May, 1958, the District Judge ordered that the writ be re-issued to the Fiscal to deliver possession to the defendant of a room which was locked, breaking open the door of the room if necessary. At the time that order was made in Court, it was brought to the notice of the Judge that the room which was locked was claimed by the plaintiff, and the Judge thereupon directed that if the plaintiff resisted the writ officer and made a claim, that should be reported to Court.

The writ was accordingly re-issued on 17th May, and it was returned to Court on 30th May with an affidavit of the Fiscal's officer who stated that he went to the premises on 21st May, accompanied by the judgment-creditor and two Police Constables, and delivered possession of

the room to the judgment-creditor. The affidavit continued, "This room which was found closed on the previous occasion was kept open on this day." The plaintiff in his affidavit of 27th May, which was filed in Court the next day, stated that he informed the Fiscal, Central Province, of his claim to the room by a letter dated 19th May, and that he also informed the writ officer of his claim and produced documents in support of it when that officer came to execute the writ together with the judgment-creditor and two Police Officers. He complained in that affidavit that he was assaulted and removed bodily out of the room after which the plaintiff took possession of it together with the furniture and other articles in it. He said that he still had the key, and complained that the writ officer had not reported his claim.

On 2nd July, the plaintiff filed a petition and affidavit; he asked that his application be numbered as a plaint and proceedings taken under section 328, and that he be restored to possession of the room. The plaintiff was examined on oath and the Judge directed that the petition be numbered as a plaint, and that a plaint in proper form be filed. Accordingly a plaint was filed in the present action No. L. 3167A wherein the plaintiff prayed that he be restored to possession of the room. The defendant, who is the judgment-creditor in L. 3167, filed answer denying that the plaintiff was in any way entitled to the room or exclusive possession of it. The learned Judge has, in his judgment, accepted the position that the plaintiff was ejected from the room in execution of the decree, and having regard to the earlier history of this matter there can be no doubt that the plaintiff was dispossessed of the room notwithstanding his protests. But the learned Judge also held that the plaintiff was not in law entitled to possession of the room or to be restored to possession, because the defendant as Viharadhipati was entitled to control the occupation of the Pansala.

At the hearing before us Mr. Dissanayake for the plaintiff submitted that the decree entered in L. 3167 was not a decree under section 217 (c) of the Code and no writ of possession should have been issued. In view of the terms of that decree, which merely declared that the plaintiff in that action was entitled to certain offices and to the management and control of certain temporalities, I do not think it can be said to fall within section 217 (c) which relates to a decree commanding the person against whom it operates "to yield up possession of immovable property," nor does it even fall within section 323 which applies if the decree or order is "for the recovery of possession of immovable property or any share thereof by the judgment-creditor, or if it directs the judgment-debtor to yield or deliver up possession thereof to the judgment-creditor." I am unable to construe the decree as one which decreed possession of any property to the defendant in these proceedings: nor was any possession asked for in case No. L. 3167. The position of the defendant is no better than that of a plaintiff who obtains a declaration of title to immovable property, without also obtaining a declaration of his right to the immediate possession of that property: see *Vangadasalam vs. Chettiyar* (1928) 29 N.L.R 445. It follows that sections 323 to 330 do not apply, because thay only apply to decrees for the recovery of possession of immovable property.

Since the decree was one in respect of which, under the Code, the judgment-creditor could not ask for, and the Court had no power to issue, a writ of possession, it seems to me that the Court was acting without jurisdiction in issuing such a writ. The foundation of a writ of possession is a decree for possession, and a writ of possession which is not founded on such a decree is a nullity, because in issuing it the Court acts in excess of its jurisdiction. Where a Court makes an order without jurisdiction, as in this case, it has inherent power to set it aside; and the person affected by the order is entitled *ex debito justitiae* to have it set aside. It is not necessary to appeal from such an order, which is a nullity: see the judgment of the Privy Council in *Kofi Forfic vs. Seifah*, (1958) 2 W.L.R. 52.

The failure of the present plaintiff to take the objection that the Court had no jurisdiction, which he could have taken at an earlier stage of this action, does not prevent him from taking it now, for an objection to the jurisdiction of the Court is one which we must entertain when our attention is called to it, since we are dealing with an absence of jurisdiction which is apparent when one looks at the decree. Mr. Jonklaas referred us to the case of *Jayalath vs. Abdul Razak*, (1954) 56 N.L.R. 145, but the Court was not there dealing with a case of absence of

jurisdiction, but with a case of a wrong or irregular exercise of jurisdiction.

The question now arises as to what order we should make on this appeal. The plaintiff asked the Court to restore him to possession of the room, because he had been dispossessed of it in execution of the decree. Section 328, no doubt, contemplates dispossession under decrees for possession of immovable property, but this is not a matter which we can allow to stand in the way of the plaintiff, for we must have regard to the substance rather than the form. Justice requires that he should be restored to the position he occupied before the invalid order was made, for it is a rule that the Court will not permit a suitor to suffer by reason of its wrongful act. The Court will, so far as possible, put him in the position which he would have occupied if the wrong order had not been made. It is a power whcih is inherent in the Court itself, and rests on the principle that a Court of Justice is under a duty to repair the injury done to a party by its act : see *Rodger vs Comptoir D'Escompte de Paris*, (1871) L.R. 3 P.C. 465. The duty of the Court under these circumstances can be carried out under its inherent powers.

I would, therefore, direct that the plaintiff be restored to possession of the room which he was occupying in the Hippola Pansala prior to the execution of the writ in case No. L. 3167. With regard to costs, seeing that the plaintiff failed to take the point of jurisdiction in the District Court and permitted these lengthy proceedings to go on in that Court, he is not entitled to any costs of the proceedings in the lower Court, but he will have his costs of appeal.

H. N. J. FERNANDO, J.

I agree.

Appeal Allowed.

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

S. C. Application No. 271.

A. E. M. USOOF *vs.* THE HONGKONG & SHANGHAI BANKING CORPORATION

Argued on : 18th November, 1960.
Decided on : 13th December, 1960

Privy Council, leave to appeal to—Objection that judgment in question not a 'final' judgment, within the meaning of rule 1 of the schedule to the Appeals (Privy Council) Ordinance.

The defendant filed an application to set aside a sale held in the execution of a mortgage decree. On the date of inquiry the defendant and his proctor were absent and the Court dismissed the application. On the following day, the defendant moved to vacate the order made and to refix the matter for inquiry on the ground that he was prevented by illness from attending Court. The District Court refused the application and the defendant unsuccessfully appealed to the Supreme Court.

On an application for leave to appeal to the Privy Council.

Held : That the judgment of the Supreme Court affirming the order of the District Court is not a final judgment within the meaning of Rules 1 in schedule to the Appeals (Privy Council) Ordinance.

Cases cited : *Scott* vs. *Mohammadu* (1914) 18 N. L. R. 53.
Vint vs. *Hudspith* (1885) 29 Ch. D. 322.

E. B. Wikramanayake, Q.C., with *S. Sharvananda* for the Defendant-Appellant-Petitioner.

H. W. Jayawardene, Q.C., with *V. S. Martyn* for the Plaintiff-Respondent-Respondent.

SANSONI, J.

The defendant seeks leave to appeal to the Privy Council from a judgment of this Court, and the objection has been taken that the judgment in question is not a final judgment.

In execution of a mortgage decree against the defendant, properties belonging to him were sold by public auction. He filed an application in the District Court to have the sale set aside, and the matter was fixed for inquiry, but on the inquiry date he and his proctor were both absent and the District Judge dismissed the application with costs and confirmed the sale. On the following day the defendant moved the District Judge to vacate the order made and to refix the matter for inquiry, pleading that he had been prevented by illness from attending Court. That application was refused by the District Judge and it was from that order of refusal that the defendant appealed to this Court without success.

Is the judgment of this Court affirming the order of the District Judge a final judgement ? In my opinion it is not, because this Court had no need to go into the rights of the parties in the subject-matter of the action. The merits of the case were never inquired into, and all that this Court decided was that the District Judge was right in holding that the defendant was not entitled to have the *ex parte* order set aside. The position would probably have been different if the defendant had, instead of moving the District Judge to vacate the *ex parte* order, appealed against the order dismissing his application to set aside the sale. For if such an appeal had been dismissed, it might have been argued that the order of this Court finally disposed of the defendant's rights to the properties, and as such was a judgment affecting the merits of the case. In the case of the judgment under consideration, however, the Court had no need to go into the merits at all, the only question being whether the defendant had good cause or not for being absent on the day of the inquiry. Such a question is hardly one to be taken as far as the Privy Council.

Mr. Wikramanayake, however, urged that the defendant had no right to appeal against the *ex parte* order dismissing his application, and that his only remedy was to move the District Judge to vacate his order. I am not so sure that the defendant had no right to appeal, although there would be little doubt as to the outcome of such an appeal. As pointed out by Pereira, J. in *Scott vs. Mohammadu*, (1914) 18 N.L.R. 53, the local cases discussing what a party should do when an *ex parte* order has been made against him turn more or less on the judgments in *Vint vs. Hudspith*, (1885) 29 Ch. D. 322. Those judgments did not decide that the Court of Appeal could not entertain an appeal from a judgment given by default, but that such appeals were to be discouraged and the Court may refuse to entertain them. But the question whether an appeal would have lain or not to this Court cannot affect the decision of the question whether the judgment now sought to be appealed from is a final judgment.

I would dismiss this application with costs.

H. N. G. FERNANDO, J.
I agree.

Application Dismissed.

End of Vol. LVIII.