The Ceylon Law Weekly

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

With a section in Sinhalese

VOLUME LIX

WITH A DIGEST

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PERERA *vs.* PERERA 39

Appeal—Supreme Court Appeals (Special Provisions) Act, No 4 of 1960, sections 2, 4 and 5—Relief asked for after an appeal had been held to have been abated in the District Court—Do these provisions apply to such a case—Civil Procedure Code, sections 756(2), 759—Civil Appellate Rules of 1938, Rule 4—Interpretation Ordinance section 6(3)

Held : That the provisions of the Supreme Court Appeals (Special Provisions) Act No 4 of 1960, do not apply to any appeal which a Court of first instance had already declared to have abated by an order validly made under the law as it stood prior to the date on which the Act came into operation.

Per WEERASOORIYA, J.—(*a*) " In my opinion the expression 'not finally disposed of by the Supreme Court' refers to appeals which were pending at the date when Act No. 4 of 1960 came into operation, and not to appeals which had already been disposed of as a result of a previous valid order of abatement "

(*b*) "Section 4 confers no express power on the Supreme Court to set aside an order of abatement of an appeal which has been validly made by a Court of first instance. No such additional power is expressly conferred by section 5 ; and unless such a power is to be implied, it would seem that the transmission of the record to the Supreme Court in such a case is a futile proceeding "

(*c*) "A statute is not to be construed so as to have a greater retrospective operation than its language renders necessary—*per* LINDLEY, L.J., in *Lauri vs. Renad.* Even in construing a section which is to a certain extent retrospective, this maxim ought to be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain—Maxwell on Interpretation of Statutes (10th Edition) 214."

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Is he bound by limitation in Proxy given to Proctor.

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Absence of Counsel retained by accused—Assigned counsel—Insufficient time given for preparation of case and for receiving instructions from the accused—Effect.

Held : That assigned counsel should be allowed sufficient time for the preparation of his case and for obtaining instructions from the accused.

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Civil Procedure Code

Application by defendant for leave to appeal to the Privy Council—Death of plaintiff who sued as trustee and principal of a Buddhist educational institution—Application by successor for substitution—Application opposed on the ground that the action abated with the plaintiff's death and that petitioner's appointment unlawful—Civil Procedure Code, section 392, 395, 404—Trusts Ordinance, sections 13, 113(1)—Schedule to the Appeals (Privy Council) Ordinance, Rule 26.

The plaintiff as Principal, and trustee of the Vidyodaya Pirivena, a Buddhist educational institution, and subject of a charitable trust, obtained judgment (*see* 59 N.L.R. 412) against the first defendant for declaration of title and ejectment. The Supreme Court dismissed an appeal by the first defendant who then obtained leave to appeal to the Privy Council. Thereafter the plaintiff died and his successor applied for substitution and also for a certificate under Rule 26 of the rules in the Schedule to the Appeals (Privy Council) Ordinance. He based his claim on an appointment by a body of persons authorised by the deed creating the charitable trust to appoint a Principal, whenever the office became vacant.

The first defendant opposed the application on the ground that on the authority of the Divisional Bench case of *Dhammananda Thero vs. Ratnasara Thero* 60 N.L.R. 7, the action abated with the death of plaintiff.

Held : (1) That the facts of the said Divisional Bench case did not apply to the present case as the plaintiff sought to vindicate his title to the premises in question as trustee. Under section 113(1) of the Trusts Ordinance the title to the trust property would in such a case devolve on his successor without the need for any conveyance or vesting order. Nor were sections 392 and 395 of the Civil Procedure Code applicable to this case.

(2) That in the absence of any contradiction in the petitioner's affidavit that he is the duly appointed Principal of the said Vidyodaya Pirivena the petitioner is entitled to a certificate under Rule 26 of the rules to the Schedule to the Appeals (Privy Council) Ordinance that he is the proper person to be substituted on the record in place of the deceased plaintiff.

DHAMMANANDA NAYAKA THERO *vs.* SORATHA NAYAKE THERO 1

Section 93—Amendment of plaint after filing—Can amendment be allowed to alter character of action.

Held : (1) That the machinery of amendment of pleadings cannot be used in order to convert an action of one character into that of another.

(2) That the powers confirmed on the Court by section 93 of the Civil Procedure Code are subject to the proviso contained in section 46(2) of the Code.

Per BASNAYAKE, C.J.—" The procedure for amendment of pleadings is prescribed in section 93 of the Civil Procedure Code and should be followed."

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Civil Procedure Code (*Contd.*)

Sections 24 *and* 27—*Proxy appointing Proctor—Is counsel bound by limitation in it—Scope of counsel's authority.*

A was the defendant in an action filed by *B*, a minor. On the trial date counsel for *A* applied for a postponement in order to enable him to summon a material witness. He also undertook to pay the agreed costs of the opposing party *B* before a stated time on a stated day, if the postponement were granted, and consented to judgment being entered against *A* if costs were not so paid. It was submitted that as *A* had not, by the instrument appointing him, given his proctor authority to consent to judgment counsel appearing for him had also no authority to do so.

Held : That *A* was bound by the action of his counsel in coming to such an agreement.

Per BASNAYAKE, C.J.—" An authority granted by a lay client to his proctor in writing (commonly known as a Proxy) undoubtedly limits the Proctor's authority. He cannot go counter to it ; but I do not think that it can be said that the writing is exhaustive of his powers nor is the lay client precluded from enlarging the scope of the powers granted by the writing either expressly or impliedly. Such extension of the proctor's authority may be given orally or may be inferred from the lay client's conduct."

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Sections 91, 408—*Compromise of action—Compromise due to mistake of fact—Judgment entered in terms of agreement—Effect of mistake—Is appeal or restitutio in integrum the proper remedy.*

Plaintiff sued the defendants for a right of cartway from his land in the plan produced over the lots belonging to the defendants. He claimed by right of long user and alternatively for a right of way of necessity. Only the 6th and 8th defendants contested plaintiff's claim.

Sixth defendant in the course of his cross examination stated that a more convenient roadway was possible over lots 162 and 163 belonging to one D and that these two lots were vacant lots. Counsel for the plaintiff then offered to have the plaintiff's case dismissed if the 6th defendant point out a 10 ft. roadway which could run over the two vacant blocks.

The challenge was accepted later after counsel for 6th and 8th defendants had consulted their clients and the judge recorded the terms of the agreement. According to the agreement the 6th defendant undertook to point out a possible cartway over lots 162 and 163 reasonably straight and not going through buildings and parapet walls.

At the inspection of the premises that followed Counsel for the 6th defendant applied to resile from the agreement as the 6th defendant had accepted the challenge under a mistake of fact that the vacant land he had contemplated were lots 162 and 163. The judge refused to accept the explanation and held that the 6th defendant had failed to point out the roadway and entered judgment in accordance with the agreement declaring the plaintiff entitled to the roadway over defendants' lots.

The 6th and 8th defendants appealed against the order.

Held : That the sixth defendant was mistaken when he said he could point out a roadway over the lots in question and that a court in the exercise of its equitable jurisdiction will, where a mistake of fact calls for it, grant relief.

Held further : (BY BASNAYAKE, C. J. and K. D. DE SILVA, J.)—That a court of law is a forum for the determination of disputes by a judge on evidence and not by challenge and counter challenge in regard to factual situations which are easily verifiable. Decision of a cause in this way is foreign to our Code and perhaps not found in any system of Civil Procedure.

(ii) That the decree in the present case was not one under section 408 of the Civil Procedure Code.

Per BASNAYAKE, C.J.—" Where a statute provides special machinery which if resorted to renders a decree final the finality prescribed by the Act does attach to a decree unless there is a clear manifestation of a conscious intention of the parties to resort to that machinery with a knowledge of the consequences it involves and there has been a strict compliance with the requirements of the statute.... The Code (section 91) requires that a memorandum in writing of every motion should be delivered to the Court at the time it is made by pleader or counsel."

In a separate judgment SANSONI, J. held that on the facts of this case the defendant's proper remedy was an application for restitutio in integrum and not by way of an appeal.

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Sections 408, 91—*Compromise of action—Procedure to be followed.*

Held : (1) That it is desirable that settlements reached or made in an action should be clearly explained to parties and their signatures or thumb impressions obtained.

(2) That in the case of a settlement or compromise of an action, the provisions of sections 408 and 91 of the Civil Procedure Code should be followed.

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Civil Procedure Code, section 343—*See under*
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Contempt of Court

Contempt of court—Courts Ordinance, section 57—*Person requesting proctor for one party to do something to help the opposite party in the course of proceedings—Complaint to Court regarding such conduct—Conviction and sentence for contempt of court on failure to show cause against—Absence of provision empowering Magistrate to punish for such offence—Applicability of section* 15 *of the Criminal Procedure Code.*

The petitioner was called upon by the Magistrate, (purporting to act under section 57 of the Courts Ordinance), to show cause why he should not be punished for contempt of Court in that he interfered with the administration of justice in requesting a proctor appearing for one party "to do something" for the opposite party.

The petitioner replied that he had no cause to show and the Magistrate thereupon sentenced him to imprisonment for one month.

Held : (1) That there is no provision of law which empowered the Magistrate to punish the petitioner for the act imputed to him as a contempt of Court.

(2) That the learned Magistrate's view that offences cognisable under section 57 of the Courts Ordinance could be punished under section 15 of the Criminal Procedure Code is erroneous as that section does not prescribe the penalty for an offence It only defines the limits of its punitive powers of a Magistrate's Court.

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Co-operative Societies

Co-operative Societies Ordinance (as amended by Act No 21 of 1949), sections 45(1) and 46(1)—How may a dispute be referred for decision under section 45(1)—Validity of Rule 38(13) made under section 46(1)—Must all heirs of a deceased officer or employee be made parties to proceedings.

Held : (1) That rule 38(13) made under section 46(1) of the Co-operative Societies Ordinance which provides for the enforcement of an arbitrator's award on a decree of Court, is not *ultra vires.*

(2) That the reference of a dispute under section 45(1) of the Co-operative Societies Ordinance need not be in the form of an agreed statement signed by both parties to the dispute. A reference made *ex parte* can be valid.

(3) That in view of the specific provisions of section 45(1) of the Co-operative Societies Ordinance (as amended by Act No. 21 of 1949), where there is a dispute between a registered Society and the heirs of a deceased officer or employee, all the heirs need not be made parties to the arbitration proceedings.

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Co-operative Societies Ordinance—Reference to arbitration under section 45(2)—Award made—Procedure on application for enforcement—Rule 38(13) made under section 46(2) of the Ordinance.

Held : That an application under rule 38(13) made under section 46(2) of the Co-operative Societies Ordinance (Cap. 107), for the enforcement of an award made on a reference to arbitration under section 45(2) of the Ordinance, should be by petition and affidavit in proceedings by way of summary procedure under Chapter XXIV of the Civil Procedure Code.

KODIYAR PATTU CO-OPERATIVE, AGRICULTURAL PRODUCE AND SALES SOCIETY LTD. *vs.* ABDUL HAMEED 47

Court of Criminal Appeal Decisions

Court of Criminal Appeal Ordinance No. 23 of 1938 section 6(1)—Accused convicted on two counts—Murder and culpable homicide—Sentence of life imprisonment imposed—Omission of sentence on culpable homicide—Appeal to Court of Criminal Appeal—Conviction and sentence for murder set aside—Has the Court of Criminal Appeal jurisdiction to impose appropriate sentence for culpable homicide.

Two accused, father and son were convicted by the Supreme Court on count (1) of the indictment, to wit, for murder and on counts 2 and 3 for culpable homicide—three distinct offences. The trial Judge sentenced both accused for rigorous imprisonment for life—a sentence appropriate for murder—and was silent as regards the sentences on counts 2 and 3.

On appeal to the Court of Criminal Appeal, the appeal of the 2nd accused was dismissed, but the appeal of the 1st accused against the verdict and sentence on the 1st count was allowed and an order of acquittal was directed to be entered in respect of that charge. The jury's verdict on the 2nd and 3rd counts was not challenged by counsel in appeal.

Having quashed the conviction of the respondent on count 1, the Appeal Judges held that they had no jurisdiction under section 6(1) of the Court of Criminal Appeal Ordinance No. 23 of 1938, to pass the appropriate sentences on counts 2 and 3 on which the Jury's verdict of guilty stood.

Held : That in place of the sentence that had been quashed, the Court, under section 6(1) of the Court of Criminal Appeal Ordinance, can pass the sentence appropriate to the conviction on the remaining counts on which the appellant has been convicted, but not sentenced.

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Courts of Admiralty Ordinance

Ceylon Courts of Admiralty Ordinance (Cap. 7), section 23—Rules 19 and 23 made thereunder—Procedure in proving several distinct claims against same party—How should questions of priority be decided.

Held : That in Admiralty actions, where there are several distinct claims against the same party, they should be proved in separate actions, while priorities as between the several plaintiffs should be left to be decided after their claims have been proved. Rule 23 of the Rules for Vice-Admiralty Courts made under

section 23 of the Ceylon Courts of Admiralty Ordinance, does not enunciate a rule any different from this.

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Courts Ordinance

Section 45 (*a*) *and* (*b*)—*Does Habeas Corpus lie in case of child in father's custody.*

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Section 57—*See* under Contempt of Court.

Courts Ordinance, sections 20 *and* 42—*Injunction, alternatively Writ of Prohibition—Letter of resignation—Commissioner taking steps to summon meeting for electing successor—Application for injunction or mandate in nature of Writ of Prohibition to restrain Commissioner from holding meeting—Do these remedies lie—Municipal Councils Ordinance No.* 29 *of* 1947, *sections* 15 *and* 17.

The petitioner, the Deputy Mayor of the Municipal Council, Galle forwarded to the Commissioner of the Council his letter of resignation dated 30-1-61 and later by letter dated 4-2-61 purported to withdraw it. The Commissioner notwithstanding the second letter took steps to summon a meeting for the election of a Deputy Mayor. The petitioner applied to the Supreme Court for an injunction or a mandate in the nature of a Writ of Prohibition under sections 20 and 42 of the Courts Ordinance respectively.

It was argued for the petitioner (*a*) that the proper officer who could have validly accepted the resignation was the Mayor, and as he had not accepted the resignation, the petitioner still remained the Deputy Mayor; (*b*) that as the letter of resignation was withdrawn, the Commissioner had no power to summon the meeting.

Held : (1) That the Commissioner was the proper officer to whom the letter of resignation should be addressed by the Deputy Mayor, and by sending the said letter of resignation to him the petitioner vacated his office and, therefore, had no *locus standi* to maintain this application.

(2) That a Writ of Prohibition did not lie as the Commissioner was not performing a judicial function.

(3) That an injunction under section 20 of the Courts Ordinance is a very restricted remedy and is granted only in exceptional circumstances.

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Criminal Procedure Code

Sections 9 *and* 135—*Sufficiency of, to confer jurisdiction on Magistrate.*

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Section 127—*Proof of statement to reduced writing under this section.*

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Section 37—*Production of person arrested before a Magistrate within* 24 *hours and with the least possible delay—Illegality of such delay.*

QUEEN *vs.* O. A. JINADASA 97

Sections 413, 419—*Powers exercisable by a Magistrate under section* 419—*Can he order property to be delivered to someone other than the person from whom it was seized.*

One *H* made a complaint to the Police that some unknown person had taken forcible possession of his car while he was driving it. Subsequently the car was produced at the Moratuwa Police Station by *P* the present petitioner, who claimed to be its present owner, having bought it from one Edward. On an application made in that behalf by the Inspector of Police, the Magistrate immediately ordered the car to be returned to *H*. There was nothing to show that any criminal proceedings regarding the alleged theft of the car had been instituted at the time it was produced before the Magistrate or even before the present application for revision.

Held : That the only provision of law to which this order is referable was section 419 of the Criminal Procedure Code and that under this section the Magistrate could have either returned the property to the same person, or, refused to do so if he thought it necessary to detain the property for the purposes of any proceedings before him. But he could not order property removed from the possession of one person to be given to another The Magistrate therefore had no power to order possession of the car to be given to *H*.

PUNCHINONA *vs* HINNIAPPUHAMY 33

Section 253—*Procedure to be followed after an accused person with previous convictions has been convicted at a trial in Supreme Court.*

THE QUEEN *vs* VITHANAGE PREMADASA *et al.* .. 34

Section 440(1)—*Perjury—When is an offence under this section committed—What a Magistrate is required to do in convicting a person under this section*

Held : That the offence of perjury under section 440(1) of the Criminal Procedure Code is not committed, unless the Court, being a subordinate court finds that a witness made *a particular statement* knowing or believing it to be false and the court records its finding and gives its reasons. The Magistrate should record what in his opinion was the statement that the witness made knowing or believing it to be false

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Crimtnal Procedure Code, section 15—*Applicability.*

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Customs Ordinance

Customs Ordinance (*Cap* 185), *sections* 127, 8(1)—*Inquiry concerning offence under section* 127—*Duty of inquiring officer to act judicially—Rules of natural justice to be observed.*

After an inquiry held by the Deputy Collector of Customs (the 2nd respondent) the petitioner was called upon to pay a penalty of Rs 10,000 under the provivisons of section 127 of the Customs Ordinance, on the basis of certain findings arrived at as a result of the inquiry. It was conceded that no opportunity was given to the petitioner at the inquiry, of meeting the case against him. However, it was submitted on behalf of the respondents that no obligation to give such an opportunity arose, as the respondents were exercising purely administrative or executive functions in taking action in this matter and therefore no duty to act judicially was imposed on them.

Held: (1) That the petitioner's liability to a penalty under section 127 had to be objectively assessed and that the 2nd respondent had been under a duty to act judicially in holding the inquiry

(2) That the second respondent had, therefore, to conform to certain rules of "natural justice" in holding the inquiry and that these rules had apparently been disregarded by him. The findings arrived at against the petitioner were therefore of no legal effect.

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Damages

Damages—Tort of negligence—Liability for—Test to determine remoteness of damage—Foreseeability test.

The respondents, ship repairers, owned a timber wharf which they used in the course of their business. Moored to this, at the critical time, was a ship which the respondents were refitting. The appellants were charterers of a vessel, The Waggon Mound, which had been moored to another wharf some 600 feet away, and had taken in furnace oil. In this process, by the carelessness of the appellant's servants, a large quantity of furnace oil was allowed to spill on the water. It spread, being thickly concentrated along the foreshore near the respondents' property. The respondents when they became aware of this condition, stopped welding or burning operations, but were later informed and formed the view that they could safely resume operations. At about 2 p.m. on November 1st 1951, the oil near the wharf caught fire, and the fire damaged both the ship and the wharf. It was found as a fact by the trial judge that the respondents did not know and could not reasonably be expected to know that the oil could be set afire when spread on water. He also held that, as a direct result of the escape of the oil, the respondents had suffered some damage in that the oil had got upon the slipways, congealed upon them, and interfered with their use of the ships. No claim for compensation was made in respect of it, but compensation was claimed for the damage by fire.

Held : That in the tort of negligence, a man must be considered to be responsible only for such probable consequences of his act as a reasonable man ought to have foreseen. It is not consonant with current ideas of justice or morality that for an act of negligence however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be 'direct.' In *Re Polemis & Furness Withy & Co. Ltd.*, (1921) 3 K.B. 560, should no longer be regarded as good law.

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Defamation

Defamation, action for—Publication of contents of pleadings—Plea of privilege raised by defendant—Reports of judicial proceedings—Does plea apply to publications of contents of pleadings before commencement of trial.

The plaintiff sued the defendant Co. for the recovery of damages arising out of the publication of certain articles alleged to be defamatory of the plaintiff. These articles had been published in certain of the defendant Company's newspapers and they had set out the contents of the plaint and the answers filed in a divorce action in which the plaintiff had been made co-respondent. They referred to the plaintiff as being co-respondent in that action and each article had a headline which read : "Doctor cited in Divorce Suit." The defendant Company admitted publication, but pleaded that the publication was privileged as (1) they were fair and accurate reports of judicial proceedings, and (2) they were in respect of matters which the defendant had a duty or interest to communicate to readers of its newspapers and its readers had an interest in knowing. The learned District Judge held that the publication of the articles was not privileged as the publication of the contents of the pleadings before the trial commenced was not covered by privilege.

Held : That the articles in question were a fair and accurate report of judicial proceedings taking place in open Court and in the absence of any allegation of malice, the plea of privilege was entitled to succeed.

Per SANSONI, J.—"The rule that allows publication applies, however to documents which, even though they are not read aloud in open Court, can be taken as read. The present appeal, in my view, relates to such documents."

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Entail and Settlement Ordinance

Deed of gift containing prohibition against alienation —Only persons who would benefit on breach of such prohibition designated—Validity of such prohibition—Entail and Settlement Ordinance, sections 2, 3.

A gifted a land to his son *B*, reserving a life interest in the property to himself and subject to a condition prohibiting alienation. The deed also designated the persons on whom the property was to devolve in the event of a breach of such condition, but it did not expressly designate the persons for whose benefit the prohibition was provided if the condition was not violated. The question was whether the prohibition was valid in view of the provisions of section 3 of the Entail and Settlement Ordinance.

Held : That in view of the decisions of the Supreme Court on the point, a prohibition such as this must be considered valid.

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Estoppel—

Does decision under section 73 of Income Tax Ordinance on appeal from an assessment in any one year create an estoppel in respect of an assessment for any subsequent year.

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Evidence Ordinance, sections 25, 27—When information given by an accused in Police custody becomes admissible—Inadmissibility of evidence that raises the inference of a confession

Criminal Procedure Code section 122—Proof of statements reduced to writing under this section

Criminal Procedure Code, section 37—Police Ordinance (Cap 43), section 66—Production of person arrested before a Magistrate within 24 hours and with the least possible delay—Illegality of such delay.

Requirement that names of all material witnesses should be on the indictment—No burden on defence to call such witness whose name omitted—Evidence Ordinance, section 114—Jury to be directed that they could draw presumption under Illustration (f) of this section where material witness not called by prosecution.

Held : (1) That if statements made by an accused person are to become admissible under section 27 of the Evidence Ordinance, they must *relate distinctly to a fact discovered in consequence* of such statements

(2) That the evidence of a Police Officer which constitutes information to the jury that an accused had made a confession, is inadmissible unless it comes within the exception contained in section 27.

(3) That oral testimony of statements reduced to writing under section 121 of the Criminal Procedure Code should not be admitted in evidence without the production of the writing itself.

(4) That section 37 of the Criminal Procedure Code and section 66 of the Police Ordinance require that a person arrested without a warrant be produced before a Magistrate with the least possible delay. The limit of 24 hours prescribed in both sections does not enable the Police to detain an accused person for that length of time even when he can be produced earlier or to deliberately refrain from producing him before a Magistrate.

The case for the prosecution was that the gun which the accused was alleged to have used to commit the murder had been handed by him with the cartridges to one Charlis with instructions that it be given to a man named Arnolis, and that Arnolis had subsequently handed the gun to the Police. Although Arnolis gave evidence at the inquiry before the Magistrate, his name was not included in the list of witnesses on the indictment. At the trial, the prosecution sought to support Charlis' evidence that he had handed over the gun to Arnolis and also to show the Police had recovered the same gun from Arnolis, not by calling Arnolis, but indirectly. The only two witnesses who gave material evidence on this point were Charlis himself and the Police Sergeant who recovered the gun and both of them gave evidence of what Arnolis did. Crown Counsel gave the fact of Arnolis being a close relative of the accused as the reason for his not being called as a witness. The learned trial Judge while telling the jury that the defence was entitled to comment on the fact of Arnolis not being a witness, also pointed out that Crown Counsel had given a reason for his not being called and that the defence could well have called Arnolis themselves, to contradict Charlis.

Held : (5) That Arnolis being a material witness, his name should have been included in the list of witnesses on the indictment and that the defence had been taken unawares and also prejudiced by the indirect manner in which the prosecution had sought to prove what Arnolis had done, without affording the defence an opportunity of cross-examining him in regard to evidence of such a vital nature.

(6) That the evidence of Charlis and the Sergeant when divorced from the oral testimony of Arnolis himself, did not establish with the certainty that is required in a capital case, that Arnolis gave the Police the very gun and cartrigdes handed to him by Charlis —especially as the latter could not say anything more than that the gun produced in the case was *like* the gun he gave Arnolis.

(7) That the learned trial Judge's direction to the jury that the defence could have called Arnolis, was wrong in law, as the burden was on the prosecution to prove its case and it was not for the defence to prove the negative

(8) That this was essentially a case in which the jury should have been dir ected that it was open to them to presume from the failure of the prosecution to call Arnolis, that his evidence, if produced would be unfavourable to the prosecution.

THE QUEEN *vs.* O. A. JINADASA 97

Section 45—Conviction based on Evidence of Sub-Inspector specially trained by Excise Department for identifying excisable articles—Is such evidence relevant?

FERNANDO *vs* S.-I. KALUBOWILA 93

Excise Ordinance

Evidence Ordinance, section 45—Excise Ordinance, (Cap. 42) as amended by Act No 36 of 1957, sections 43 (b), 43 (c), and 44 (1), (2)—Conviction for unlawfully manufacturing arrack, possessing 'pot arrack' and utensils used for its manufacture—Conviction based on opinion of Sub-Inspector specially trained by Excise Department for identifying excisable articles—Is such evidence relevant under section 45 of the Evidence Ordinance—Magistrate's failure to give sufficient consideration (a) to defects in the prosecution evidence and (b) to the evidence for the defence.

The accused was charged with offences under the Excise Ordinance, relating to the unlawful manufacture of arrack, the possession of pot arrack and utensils and apparatus used in manufacturing the same. He was convicted on the evidence of a Sub-Inspector of Police who described himself as an expert who had gone through a special course of training in the Excise Department to identify excisable articles and said that he had given evidence in more than 250 cases of a similar nature.

Held : That the Sub-Inspector cannot be said to be an expert within the meaning of section 45 of the Evidence Ordinance. His evidence was therefore irrelevant.

Held also : That where a Magistrate failed to give sufficient consideration (*a*) to the conduct of the prosecution, in case in which the integrity of the Police was assailed and (*b*) to the evidence led by the defence, the conviction should not be allowed to stand.

FERNANDO *vs.* S.I. KALUBOWILA 93

Gazette

Gazette bringing section 51 of Paddy Lands Act into operation in a particular district—Need Gazette be referred to in the charge or be produced in evidence.

COMMISSIONER OF AGRARIAN SERVICES *vs.* V. KUMARASAMY 73

Habeas Corpus

Writ of habeas corpus—Petition by mother—Does writ lie in case of child in father's custody—Principles applicable—Courts Ordinance, section 45 (a) and (b)—What considerations apply in deciding questions of custody.

The petitioner sought the custody of her 9 1/2 year old son who was with his father, the 1st respondent. The report of the Magistrate who inquired into the petition was to the effect that the petitioner should be given custody. Counsel for the 1st respondent, submitted that no writ of habeas corpus lay as the father was entitled to the custody of his child and the child was therefore in lawful custody. The present case would therefore not come within section 45 (*b*) of the Courts Ordinance. He further submitted that as, under the Roman-Dutch law, the rights of the father were superior to those of the mother in regard to the custody of the children of the marriage and as no divorce or separation had been granted in the present case, the Court had no jurisdiction to deprive the father of the child's custody "except under the Court's powers as upper guardian of all minors to interfere with the father's custody" on certain special grounds.

Held : (1) That the principles under which our Courts would issue a writ of habeas corpus were the same as those which regulate the issue of such a writ in England and a writ, therefore, did lie in cases like the present.

(2) That section 45 (*a*) of the Court's Ordinance was much wider than section 45 (*b*) and would cover cases where the writ is used with respect to the custody of infants. Here the question would be, not whether the infant's liberty was restrained, but what was the proper order to make in the interests of the child, as regards the custody.

(3) That in dealing with questions of custody the paramount consideration was the welfare and happiness of the infant and the rights of the father would prevail only if they were not displaced by such considerations.

WERAGODA *vs.* WERAGODA AND ANOTHER .. 49

Husband and Wife (*see also under Marriage*)

Marriage by habit and repute—How proved.

ELARIS FERNANDO *vs.* WILLIAM DABRERA & OTHERS 4

Income Tax

Income Tax Ordinance (Cap. 188), sections 2, 7, 73, 75—Whether decision under section 73 on appeal from an assessment in any one year creates an estoppel in respect of an assessment for any subsequent year—Trusts Ordinance (Cap. 72). section 99 (1)—Whether trust a valid charitable trust.

A trust was set up in 1942, the trustees to apply the whole income from the trust property during the life of the Grantor for such purposes and in such manner as the grantor should in his absolute discretion direct, and thereafter for all or any of the purposes set out in sub-heads (*a*)-(*g*) of paragraph 2 of the Trust deed. The whole income could, under the deed, be devoted to the purpose set out in paragraph 2 (*b*). The recipients of the benefits under this paragraph 2 (*b*) were to be selected by the Board from certain classes of persons in a certain order, the first class, standing first in order, being male decendants along either the male or female line of the grantor or any of his brothers or sisters. In respect of the assessment for the revenue year 1949-50, the Board of Review decided on appeal that the trust income was exempt from tax, on the basis that the income was that of a trust of a public character established solely for charitable purposes. In respect of the assessment for the next five years, however, the Board decided that they were not exempt from tax.

Held : That the decision on assessment for the year 1949-50 did not set up an *estoppel per rem judicatam* preventing the Board from deciding that the assessment for the subsequent years were not exempt from tax. The Board on appeal exercises a limited jurisdiction to decide one issue, namely, the amount of the assessable income for the year in which the assessment is challenged. Although this decision may involve the construction of statutes or a consideration of the general law, these matters must be treated as collateral to the one issue before the Board.

(2) That no trust under which beneficiaries are defined by reference to a purely personal relationship with a named propositus can be a valid charitable gift. Inasmuch as clause (i) of sub-head (*b*) confers an absolute priority to the benefit of the trust income on the grantor's own family, the trust was a family trust under which the income was made available to provide for the education of relatives of the grantor. The trust was, therefore, not a valid charitable trust.

TRUSTEES OF THE ABDUL GAFFOOR TRUST *vs.* THE COMMISSIONER OF INCOME TAX 65

Income Tax Ordinance (Cap. 188), sections 2, 7 (1)c —Trusts Ordinance (Cap. 72), section 99(1)—Charitable trust—Liability to income tax where purpose solely religious—Charitable purpose—Section 2 of the Income Tax Ordinance prior to amendment by Income Tax (Amendment) Act, No. 44 of 1958—Time when trust established for purpose of exemption.

A trust was constituted on 30th January, 1952, the income from which had under the trust deed, to be

first applied to pay off a mortgage existing on the trust property and thereafter for purposes solely connected with the advancement of religion. The mortgage debt was discharged in November, 1956. The trustees were assessed for income tax for periods subsequent to this debt, but on appeal the Board of Review held them not liable. On a case stated from the decision of the Board,

Held : (1) That the objects of the trust were not charitable purposes within section 2 of the Income Tax Ordinance as that section stood before its amendment by the Income Tax (Amendment) Act No. 44 of 1958, inasmuch as the advancement of religion or the maintenance of religious rites and practices were not comprehended by that section.

(2) That, therefore, the trust income was not exempt from tax.

(3) That the words 'established solely for charitable purposes' in section 7 (1)*c* are used to denote a trust having for the time being legal effect or operation, its purposes being wholly charitable. The fact that the income was at an earlier date applied for non-charitable purposes would not necessarily exclude the trust from the ambit of section 7 (1)*c*.

COMMISSIONER OF INCOME TAX *vs.* BADDRAWATHIE FERNANDO CHARITABLE TRUST 104

Interpretation Ordinance

Interpretation Ordinance, section 6 (3)*—Construction of.*

DON EDWIN *vs.* DEPUTY COMMISSIONER FOR WORKMEN'S COMPENSATION 51

Section 6 (3)*—Repeal of former written law—Effect of*

PECHCHIMUTTU *vs.* RASIAH 89

Kandyan Law

Kandyan Law—Kandyan widow without minor children—Is she entitled to sell deceased husband's immovable property for the payment of debts due by the deceased.

Held : That a Kandyan widow without minor children has no right to sell her deceased husband's immovable property for the payment of his debts—or in so far as it affected the rights of the deceased's other heirs.

UDUPOTHEGEDERA BABI *vs.* DANTUWA .. 11

Kandyan Law—Intestate succession—Child of diga married parents dying unmarried and without issue—Does property inherited from his mother devolve on father or on brothers and sisters.

Held : (By a majority decision BASNAYAKE, C.J. and DE SILVA, J. dissenting) : That on the death (before the coming into operation of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938) of a Kandyan unmarried and without issue, leaving surviving him his brothers and sisters and his diga married father, his deceased mother's immovable property, which she acquired by purchase before her marriage in diga and which he inherited on her death, goes absolutely to his father and not to his brothers and sisters.

KARUNAWATHIE MENIKE *vs.* EDMUND PERERA .. 17

Magistrate

Functions of Magistrates under Prevention of Crimes Ordinance.

QUEEN *vs.* VITHANAGE PREMADASA *et al.* .. 34

Maintenance

Maintenance Ordinance, section 2*—A wife's income should not be taken into account in assessing the amount of maintenance payable by a husband to his wife.*

FERNANDO *vs.* FERNANDO 95

Marriage—(*see also under Husband and Wife*)

Marriage by habit and repute, proof of—Is evidence of customary or religious rites essential—How is presumption of such marriage drawn and how rebutted.

Held : That to establish a marriage by habit and repute, evidence of customary rites or religious rites is not always necessary, Where neither of the parties is alive and the marriage itself was contracted at a very early date evidence of customary rites or religious rites would be difficult, if not impossible, to obtain and is, therefore, not insisted on.

Held further : That, if two persons are living together as husband and wife and are recognised as such by everybody in the circle in which they move, a presumption in favour of marriage arises ; and, if there is no evidence to the contrary, the Court is entitled to presume that the parties were duly married as required by law.

Per SINNETAMBY, J.—"On the other hand, if a party seeks to establish a customary marriage by the performances of some religious ceremony and fails in that, then the presumption is rebutted and the mere fact that the two persons subsequently lived together as husband and wife does not establish marriage."

ELARIS FERNANDO *vs.* WILLIAM DABRERA AND OTHERS 4

Master and Servant

Master and servant—Negligence—Liability of master for servant's delicts committed in the scope of employment—Liability of principal for torts of agent.

The plaintiff was injured while travelling in a car owned by the 1st defendant and driven by the 2nd defendant. The 2nd defendant, who was employed as a driver by the 1st defendant, while travelling on the 1st defendant's business, picked up several passengers, of whom the plaintiff was one, The 2nd defendant had been expressly forbidden to take such passengers.

Held : That inasmuch as the 2nd defendant was acting outside the scope of his employment, the 1st defendant was not liable to the plaintiff.

Per BASNAYAKE, C.J.—"The 2nd defendant was the employee of the 1st defendant. If he was also his agent the latter's liability falls to be determined according to the law of principal and agent. Our

law on that branch of law is the same as the English law (section 3, Civil Law Ordinance)."

DE SILVA *vs.* DHARMASENA 92

Minor

In father's custody—Does writ of habeas corpus lie when custody of a child is sought by mother.

WERAGODA *vs.* WERAGODA AND ANOTHER .. 49

Mistake

Compromise of action due to mistake of fact—Judgment entered in terms of agreement—Effect of mistake.

PERERA *vs.* PERERA 39

Mortgage

Mortgage Act No. 6 of 1949—Application by present owner of mortgaged premises for stay of sale under mortgage decree for a period of six months on the ground that arrangements have been made to obtain loan for settlement of mortgage decree—Refused by Court under section 61 (1) (d)—Application to Supreme Court to revise order of refusal—Civil Procedure Code, section 343.

Held : That the power of the Court under section 343 of the Civil Procedure Code to grant an adjournment of the sale on an application by the present owner of mortgaged premises is not affected by the modification in section 61 (1) (*d*) of the Mortgage Act of 1951.

ARIYARATNE *vs.* SENEVIRATNE 16

Motor Traffic Act, 1951

Motor Traffic Act, 1951—Charge under section 25 failure to give notice of non-user of motor vehicle—Vehicle liable for tax under Heavy Oil Motor Vehicles Taxation Ordinance, (Cap. 190)—Application to Government Agent for waiver of heavy oil tax as from December 1956 as the vehicle was being "scrapped"—Grant of waiver by Government Agent after ensuring that vehicle is dismantled—Notice of non-user for 1957—Charge for failure to give notice of non-user for 1958—Is charge maintainable.

The appellant was charged with and convicted of possessing on 1.1.58 a motor lorry bearing number I.C. 512 for which revenue licence was not in force, a contravention of section 25 (1) of the Motor Traffic Act of 1951.

The defence established that the appellant, being liable, in addition to the tax payable for the annual licence, for the tax imposed under the Heavy Oil Motor Vehicles Taxation Ordinance (Cap. 190) applied to the Government Agent for a waiver of heavy oil tax as from 15.12.56 as the vehicle was being "scrapped." The Government Agent, after being satisfied on investigation that the vehicle was dismantled, granted the waiver asked for.

The appellant gave notice of non-user for 1957 as required by section 37 of the Act. The prosecution conceded the validity of the said notice for 1957, but it appears to have been contended in the Magistrate's Court that the appellant had failed to apply for cancellation of the registration under section 18 of the Act.

The learned Magistrate stated that, if the vehicle was unserviceable, it was for the appellant as its registered owner to get the registration cancelled, and convicted the appellant.

Held : That, in the circumstances, the charge could not be maintained against the appellant as what the appellant possessed on 1.1.58 were the parts of a dismantled lorry, which had ceased to be a motor vehicle as contemplated to the Act.

FERNANDO *vs.* GOVERNMENT AGENT, KANDY .. 23

Municipal Councils

Municipal Councils Ordinance No. 29 of 1947—Sections 15 and 17—Member's letter of resignation—To whom should it be sent—Once sent, can it be withdrawn.

EDMUND *vs.* FELIX FERNANDO 76

Muslim Law

Not part of Thesawalamai but may be looked at to ascertain principles underlying presumption in that system—Such rules as are otherwise appropriate and not in conflict with Thesawalamai may be borrowed as are suitable for Ceylon.

MANGALESWARI *vs.* SELVADURAI AND OTHERS .. 61

Natural Justice

Administrative body with duty to act judicially must act in accordance with principles of natural justice.

TENNEKOON *vs.* PRINCIPAL COLLECTOR OF CUSTOMS 36

Negligence

See under Damages, Master and Servant

Paddy Lands Act

Paddy Lands Act, No. 1 of 1958, sections 3, 4, 51 and 63—Charge under section 4 (5) punishable under section 4 (9)—Absence of reference in said sub-section to the local jurisdiction of Magistrate—Does such omission deprive Magistrate of his jurisdiction to try such charge—Criminal Procedure Code, sections 9 and 135—Sufficiency of, to confer jurisdiction.

Gazette bringing section 51 of the Act into operation in a particular district—Need such Gazette be referred to in the charge or be produced in evidence.
Sections 3 (1) and 63—Meaning of word "letting."

Held : (1) That although section 4 (5) of the Paddy Lands Act, No. 1 of 1958, which created the offence of eviction and section 4 (9), which provided the punishment for it, did not provide as to what Magistrate's Court had jurisdiction in respect of such offence, the jurisdiction conferred by sections 9 and 135 of the Criminal Procedure Code was sufficient to enable a Magistrate to try such offence if committed within his local jurisdiction. There was no need for further provision to be made in this behalf in the Act.

(2) That the Gazette which brought section 51 of the Paddy Lands Act into operation in a District need not be recited in the charge or marked in evidence by the prosecution. The evidence of an Assistant Commissioner appointed under the Act, who stated that the Act had not been brought into operation in that District, is sufficient if believed. There was no need of any particular proof of his status to give such evidence.

(3) That if a tenant cultivator pays as rent a consideration consisting of paddy, then, to constitute a letting under the Act and therefore also to make such person a "tenant cultivator" in terms of section 3 (1) and (63) that the paddy must be a share of the produce from the land let.

COMMISSIONER OF AGRARIAN SERVICES *vs.* V. KUMARASAMY 73

Paddy Lands Act, No. 1 of 1958, sections 3 and 4 (1) —Field cultivated during Maha Season only—Lying fallow during Yala season—Owner asking cultivator to cease cultivating—Owner channelling water to field for Yala cultivation by him—Does this amount to eviction within the meaning of section 4 (1) of the Act—Does such cultivator come within the meaning of tenant cultivator in section 3 of the Act.

Held : (1) That a person who at the time when the Paddy Lands Act came into force, has been the cultivator of a paddy field which is worked during the Maha season only, is a tenant cultivator of that field within the meaning of section 3 of the Paddy Lands Act.

(2) That an owner, who, after requesting such cultivator not to work the field in future, himself channels water for cultivation during the Yala season, evicts his tenant cultivator within the meaning of the Act.

WIJEYADORU (ASST. COMMISSIONER OF AGRARIAN SERVICES) *vs.* SIRISENA 75

Partition

Partition Act No 16 of 1951, sections 25, 26—Determination of shares of parties in partition action —Provisions of these sections to be strictly followed.

Held : That in a partition action the shares of the parties must be determined by the Judge as required by the provisions of section 25 of the Partition Act. It is the shares so determined that the Court is required to enter in the interlocutory decree.

MEMANIS *vs.* EIDE 46

Partition action—Partition Act No. 16 of 1951, sections 2, 23, 26—Powers of a court thereunder—Effect of plaintiff including separate lot belonging to a third party, in corpus to be partitioned—Can the court exclude it—Civil Procedure Code, section 839.

Held : That where in a partition action the plaintiff has wrongly included as part of the *corpus*, land belonging to a person other than one of the co-owners of the land sought to be partitioned, a Court has power to make an order excluding such a lot. Since section 26 of the Partition Act does not exhaust all the orders which a Court can make, such an order would be within the inherent powers of the Court under section 839 of the Civil Procedure Code.

HEWAVITHARNA *vs.* THEMIS DE SILVA AND OTHERS 57

Penal Code

Sections 294, 89, 93—Charge of murder—Plea of private defence—Does existence of intention to kill negative such plea—What must a person prove to get benefit of Exception 2 to section 294.

Held : (1) That when a person causes death in the exercise of his right of private defence, the fact that he kills with the intention to kill does not deprive him of the benefit of the general exception in section 89 of the Penal Code if his act falls within the ambit.

(2) That when a person is found to have gone beyond his right of private defence in causing death, he is not entitled to the immunity conferred by section 89 but he can claim the benefit of exception 2 to section 294 if the ingredients of that exception are present. To obtain its benefit such person must prove, according to the standard of proof expected of the defence in a criminal case, that—

(*a*) in the exercise in good faith of the right of private defence of person or property he exceeded the right given to him by law,

(*b*) he caused death without premeditation, and

(*c*) without any intention of doing more harm than is necessary for the purpose of such defence.

QUEEN *vs.* SOKKALINGAM 55

Section 315—Causing hurt by means of corrosive substance—Adequacy of punishment.

FERNANDO *vs.* JAYASUNDERA 28

Plaint

See under Civil Procedure Code—Pleadings.

Pleadings

Amendment of plaint after filing—Can amendment be allowed to alter character of action.

EKANAYAKE *vs.* EKANAYAKE 3

Police Ordinance

Section 66—Production of person arrested before a Magistrate within 24 hours and with the least possible delay—Illegality of such delay.

QUEEN *vs.* O. A. JINADASA 97

Prescription

Claim to incumbency of Vihare—Period of prescription.

PITAWELA SUMANGALA *vs.* HURIEKADUWE DHAMMANANDA 59

Presumption

Of marriage by habit and repute.

ELARIS FERNANDO *vs.* WILLIAM DABRERA AND OTHERS 4

Prevention of Crimes Ordinance

Sections 2, 4 and 6—Criminal Procedure Code, section 253—Allegations of previous convictions against an accused—Such convictions neither admitted nor proved—Effect on sentence—Functions of Magistrates under the Prevention of Crimes Ordinance.

In this case the 4th accused had been convicted along with two others, of charges of robbery. The sentence passed on him was identical with that passed on the 3rd accused, who had admitted three previous convictions. There was, however, an allegation of two previous convictions against the 4th accused too, but these had neither been admitted by him nor proved by the Crown.

Held : That as it appeared that the learned trial Judge had, in determining the 4th accused's sentence, taken into account material which was clearly not in evidence, the sentence passed on the 4th accused should be reduced.

Held further : That section 6 of the Prevention of Crimes Ordinance had no application to cases such as the present where the Court has power to impose very long terms of imprisonment in respect of the very offences of which the accused have been found guilty.

Observations regarding the functions a Magistrate should perform under the Prevention of Crimes Ordinance.

QUEEN *vs.* VITHANAGE PREMADASA *et al.* .. 34

Principal and Agent

Liability of principal for torts of agent.

DE SILVA *vs.* DHARMASENA 92

Privy Council

Appeals (Privy Council) Ordinance—Schedule, Rule 26—Proper person to be substituted on record in place of deceased plaintiff.

DHAMMANANDA NAYAKE THERO *vs.* SORATHA NAYAKE THERO 1

Court of Criminal Appeal Ordinance, section 6 (1).

QUEEN *vs.* EDIRMANASINGHAM 13

See also under—Damages; Tesavalamai.

Proctor

Limitation in proxy—Is Counsel bound by limitation.

MOHIDEEN ALI *vs.* HASSIM 6

Resignation

Once sent, can it be withdrawn.

EDMUND *vs.* FELIX FERNANDO 76

Restitutio-in-Integrum

Compromise of action due to mistake of fact—Judgment entered in terms of agreement—Is appeal or restitutio-in-integrum the proper remedy.

PERERA *vs.* PERERA 39

Roman-Dutch Law

Not part of Tesawalamai but may be looked at to ascertain principles underlying presumption in that system. Such rules as are otherwise appropriate and not in conflict with Thesawalamai may be borrowed as are suitable for Ceylon.

MANGALESWARI *vs.* SELVADURAI 61

Servitude

Way of necessity—Is principle applicable to widening of existing road.

Held : That where the owner of a dominant tenement already has access and egress to the public road, he is not entitled by "way of necessity" to have an existing road widened.

JAYASURIYA *vs.* HETTIKUMARANA 80

Supreme Court (Special Provisions) Act No. 4 of 1960

Sections 2, 4 and 5 do not apply to an appeal which a court of first instance had already declared to have abated.

PECHCHIMUTTU *vs.* RASIAH 89

Tesawalamai

Tesawalamai—Right of pre-emption—Time at which right can be enforced—Conditions to be satisfied for enforcement.

The appellant and the first respondent (who was her father and natural guardian) inherited in 1935 a property as co-owners in equal shares. In 1937 the first respondent sold his share to the second respondent, who in turn sold to the third and fourth respondents. The appellant, as a co-owner, held a right of pre-emption, while neither the second, third, or fourth respondents had such a right. The appellant became aware of this sale only in 1950.

Held : (1) Under the Tesawalamai, she could enforce her right of pre-emption by having the transfer to the second respondent set aside on condition she brought into Court the sum paid as consideration by the second respondent.

(ii) Her cause of action to set aside the transfer only arose when she became aware of the transfer.

(iii) There was no onus on her to prove that, had she in fact received notice of the transfer, she could and would have purchased the property herself within reasonable time rather than permit it to be sold to a stranger.

(iv) Knowledge of the transfer in a natural guardian as interested as the first respondent was not notice to the appellant.

Per THE JUDICIAL COMMITTEE : Although neither the Muslim Law nor the Roman Dutch Law is part of the Tesawalamai, it is possible to look at the former system to ascertain the principles underlying pre-emption in those systems. And if these are otherwise appropriate and not in conflict with the Tesawalamai, to borrow such rules as are suitable for Ceylon.

MANGALESWARI *vs.* SELVADURAI AND OTHERS .. 61

Town Councils Ordinance

Quo Warranto, writ of—Town Councils Ordinance, No. 3 of 1946, sections 33, 33A & 40—Section 33A (2)(g) introduced by section 7 of the Local Authorities (Election of Officials) Act, No. 39 of 1961—Election of Vice-Chairman—Has Chairman right to exercise casting vote.

At a meeting held on 30-1-1960 *inter alia* for the election of a Vice-Chairman of a Town Council, the number of votes cast for the petitioner and the respondent being equally divided, the Chairman exercised his casting vote in favour of the respondent. The petitioner applied for a *Writ of Quo Warranto* challenging the validity of the election on the ground that the Chairman had no right to a casting vote.

Held : That the Chairman had no right to exercise a casting vote in view of section 33A (2) (*g*) of the Town Councils Ordinance as amended by section 7 of the Local Authorities (Election of Officials) Act No. 39 of 1951. In such a situation the election should be by the drawing of lots. The election of the respondent was, therefore, void.

ALVAPILLAI SABARATNAM *vs.* SELLIAH SINNADURAI 108

Trusts Ordinance

Trusts Ordinance (Cap. 72)—Section 99 (1)—Whether trust a valid charitable trust.

TRUSTEES OF ABDUL GAFFOOR TRUST *vs.* THE COMMISSIONER OF INCOME TAX 65

Trusts Ordinance—Sections 13 and 113 (1)—

DHAMMANANDA NAYAKE THERO *vs.* SORATHA NAYAKE THERO 1

Section 99—Charitable Trust—Liability to income tax where purpose solely religious—Charitable purpose.

COMMISSIONER OF INCOME TAX *vs.* BADDRAWATHIE FERNANDO CHARITABLE TRUST 104

Words and Phrases

1. "Not finally disposed of by the Supreme Court".

See under—*Appeal*

2. "Expert"—See *Excise Ordinance*

3. "Marriage by habit and repute"—See under *Marriage.*

4. "Letting"—see *Paddy Lands Act.*

5. "Tenant cultivator"--See under *Paddy Lands Act.*

Workmen's Compensation

Workmen's Compensation Ordinance (Cap. 117), sections 40 and 41—Amending Act No. 31 of 1957—Section 41 amended by enabling seizure and sale of immovable property of defaulter to pay amount due on award of compensation—Award made in 1953 prior to amendment—Application to issue writ in 1958 under section 41 (2) as amended—Interpretation Ordinance, section 6 (3)—Is the amendment retrospective in operation—Prescription.

On 30-5-58, an application was made in the District Court of Colombo in terms of section 41 (2) of the Workmen's Compensation Ordinance (Cap. 117) as amended by the Workmen's Compensation (Amendment) Act, No. 31 of 1957 for the issue of writ to seize and sell certain immovable property belonging to the appellant in order to realise the balance due from him on an award of compensation dated 21-11-1953 in favour of a workman.

The appellant objected to the issue of writ on the ground that section 41 (2), being a subsequent amendment introduced in 1957, was not retrospective in operation and, therefore, the writ was not available. The District Judge dismissed the objection.

In appeal it was contended (1) relying on section 6 (3) (*c*) of the Interpretation Ordinance, that the procedure for the recovery of the money due under the award is governed by sections 40 and 41 as they stood prior to the said amendment of 1957, viz., recovery by the sale of movable property as in the case of a fine imposed by a Magistrate.

(2) that, if section 6 (3) (*c*) is held not applicable, the general principles which govern the question as to the extent to which subsequent legislation can be regarded as interfering with the rights of parties in a pending action would be applicable.

(3) that the application for writ was prescribed in law.

Held : (1) That the amendments effected to sections 40 and 41 by Act No. 31 of 1957, cannot be regarded as a repeal of any part of these sections either expressly or by implication, and therefore section 6 (3) of the Interpretation Ordinance is inapplicable.

(2) That it cannot be said that any rights of the appellant were adversely affected by the amendments to sections 40 and 41, by which the legislature sought to make good an omission by providing for an additional method of recovery by seizure and sale of immovable property.

(3) That the proceedings taken under section 41 for the enforcement of an award are analogous to proceeding in execution of a decree and are a continuation of the action in which the award was made. The application, therefore, was not prescribed in law.

DON EDWIN *vs.* DEPUTY COMMISSIONER FOR WORKMEN'S COMPENSATION 51

Writs

1. *Habeas Corpus*—See under Habeas Corpus .. 49

2. *Prohibition*—See under Courts Ordinance .. 76

3. *Certiorari*—See under Customs Ordinance .. 36

4. *Quo Warranto*—See under Town Councils Ordinance 108

Weerasooriya, J. & Sansoni, J.

DHAMMANANDA NAYAKE THERO *vs.* SORATHA NAYAKE THERO

SORATHA NAYAKE THERO vs. DHAMMANANDA NAYAKE THERO

Applications No. 83 *No.* 124, *and No.* 133.

Argued on: 1*st April* 1960
Decided on: 5*th August*, 1960.

Application by defendant for leave to appeal to the Privy Council—Death of plaintiff who sued as trustee and principal of a Buddhist educational institution—Application by successor for substitution—Application opposed on the ground that the action abated with the plaintiff's death and that petitioner's appointment unlawful—Civil Procedure Code, sections 392, 395, 404—*Trusts Ordinance, sections* 13, 113(1)—*Schedule to the Appeals (Privy Council) Ordinance, Rule* 26.

H. W. Jayawardene, Q.C., with *N. R. M. Daluwatte* for the petitioner in Applications Nos. 83 and 124.

E. B. Wikramanayake, Q.C., with *C. D. S. Siriwardene* for the petitioner in Application No. 133.

H. W. Jayawardene, Q.C., with *N. R. M. Daluwatte* for the 1st respondent in Application No. 133.

The plaintiff as Principal and trustee of the Vidyodaya Pirivena, a Buddhist educational institution, and subject of a charitable trust, obtained judgment (see 59 N.L.R. 412) against the first defendant for declaration of title and ejectment. The Supreme Court dismissed an appeal by the first defendant who then obtained leave to appeal to the Privy Council. Thereafter the plaintiff died and his successor applied for substitution and also for a certificate under Rule 26 of the rules in the Schedule to the Appeals (Privy Council) Ordinance. He based his claim on an appointment by a body of persons authorised by the deed creating the charitable trust to appoint a Principal, whenever the office became vacant.

The first defendant opposed this application on the ground that on the authority of the Divisional Bench case of *Dheerananda Thero* v *Ratnasara Thero* 60 N.L.R. 7. the action abated with the death of plaintiff.

Held : (1) That the facts of the said Divisional Bench case did not apply to the present case as the plaintiff sought to vindicate his title to the premises in question as trustee Under section 113(1) of the Trusts Ordinance the title to the trust property would in such a case devolve on his successor without the need for any conveyance or vesting order. Nor were sections 392 and 395 of the Civil Procedure code applicable to this case.

(2) That in the absence of any contradiction in the petitioner's affidavit that he is the duly appointed Principal of the said Vidyodaya Pirivena the petitioner is entitled to a certificate under Rule 26 of the rules in the Schedule to the Appeals (Privy Council) Ordinance that he is the proper person to be susbstituted on the record in place of the deceased plaintiff.

Distinguished : *Dheerananda Thero* v *Ratnasara Thero* 60 N.L.R. 7 (D.B.)
Authorities cited: *Thirumalai v Arunachella Padayachi.* (1926) A.I.R. Madras 540
Sabapathipillai v Vaithialingam 40 N.L.R. 107.
Kulasekera Appuhamy v Malluwa 28 N.L.R. 246.
Bentwich—The Practice of the Privy Council in Judicial Matters (9th Edition p. 195)

WEERASOORIYA, J.

These three connected applications relate to an appeal which the 1st defendant in Case No. 2882 of the District Court of Colombo intends to prefer to Her Majesty in Council from the judgment (59 N.L.R. 412) of this Court affirming the judgment and decree of the District Court in favour of the plaintiff. In that action the plaintiff, as the duly appointed principal of a Buddhist educational institution known as the Vidyodaya Pirivena, sought a declaration that he is the trustee of a charitable trust created by deed No. 1259, dated the 9th March, 1876, for establishing and maintaining in the premises described in the schedule to the plaint a pirivena for the purpose of teaching Buddhism, that he holds the premises and is entitled to them as such trustee and for an order ejecting the 1st defendant therefrom. Under deed No. 1259 power was given to an unincorporated body of persons by the name of the Vidyadhara Sabha to appoint a principal of the Vidyodaya Pirivena whenever a vacancy in the office occurred. The persons who at the time of the institution of the action formed the Vidyadhara Sabha were also made parties defendants but no relief was claimed against them.

* For Sinhalese Translation, see p. 9 of the Sinhala Section.

The 1st defendant in his answer asserted that the premises described in the schedule to the plaint formed a temple of which he is the lawful incumbent or viharadipathi, and to which the Vidyodaya Pirivena is appurtenant, that the appointment of a principal of the pirivena required his approval and that the purported appointment of the plaintiff as principal (presumably without his approval) was unlawful.

After the 1st defendant obtained final leave under the provisions of The Appeals (Privy Council) Ordinance (Cap. 85) to appeal to Her Majesty in Council, the plaintiff-respondent died (on the 15th February, 1960). Thereupon the 1st defendant filed Application No. 83 for a certificate under Rule 26 of the rules in the schedule to that Ordinance as to who, in the opinion of this Court, is the proper person to be substituted in place of the deceased plaintiff. He subsequently filed Application No. 124 for an order staying the further printing of the record (for the completion of which time had been granted till the 21st May, 1960) pending the decision of the question of the substitution of a person in place of the deceased plaintiff, stating as the reason for the application that with the death of the plaintiff the action had abated.

The petitioner in Application No. 133 claims that he was appointed principal of the Vidyodaya Pirivena in succession to the plaintiff by the Vidyadhara Sabha at a meeting held on the 4th March, 1960, and as such he applies for a certificate under Rule 26 that he is the proper person to be substituted or entered on the record in place of the plaintiff. It will be convenient to consider this application first.

In opposing this application Mr. Jayawardene who appeared for the 1st defendant submitted that (as stated in Application No. 124) the action abated with the death of the plaintiff. For this submission he relied on sections 392 and 395 of Chapter XXV of the Civil Procedure Code entitled **"Of the Continuation of actions after alteration of a party's status"** and on the decision of a Divisional Bench of this Court in *Dheerananda Thero vs. Ratnasara Thero* (60 N.L.R. 7.) The plaintiff in that case, as the incumbent of a Buddhist temple, sued the defendant alleging that the latter was unlawfully disputing his right to the incumbency, was disobedient and disrespectful to him and obstructing him in the lawful exercise of his rights as incumbent. He prayed that he be declared the incumbent and that the defendant and his agents be ejected from the temple. The defendant, who filed answer claiming to be the lawful incumbent of the temple, died after the trial commenced, but before it was concluded. At the instance of the plaintiff another monk who was residing in the temple was substituted by the District Judge on the basis that any rights which the deceased may have had to the incumbency devolved after the deceased's death on the party substituted. The trial then proceeded and judgment was given declaring the plaintiff to be the incumbent and ordering the ejectment of the substituted defendant from the temple. On appeal by the substituted defendant the Divisional Bench held that the cause of action did not survive on the death of the original defendant and that the action had, therefore, abated. This decision appears to have proceeded on the basis that as the action was one for declaration of a status the maxim *actio personalis moritur cum persona* applied to the case.

I do not think, however, that it is possible to take a similar view in regard to D.C. Colombo Case No. 2882. The averments and the prayer in the plaint in that case (the issues on which the trial proceeded are not before me) make it clear that the action was one in which the plaintiff, as trustee, sought to vindicate his legal title to the premises in suit. If the averments are true, the trustee was bound under section 13 of the Trusts Ordinance (Cap. 72) to maintain the action. There can be no question that on the death of a sole trustee who has filed such an action, the right to sue on the cause of action would survive to his successor in the office of trustee. By virtue of Section 113(1) of the Trusts Ordinance the title to the trust property would in such a case devolve on the successor without the need for any conveyance or vesting order. The continuation of a pending action in these circumstances appears to be specially provided for in section 404 in Chapter XXV of the Civil Procedure Code. This section is substantially the same as Rule 22, order 10 of the Indian Civil Procedure Code. It was held in *Thirumalai* v. *Arunachella Padayachi* (1926) A.I.R. Madras, 540 that where a trustee dies or retires and another is elected in his place the devolution of the trust estate on the new trustee is a devolution of an interest within the meaning of rule 10. See also the local case of *Sabapathipillai* v. *Vaithialingam.* (40 N.L.R. 107)

In my opinion, if the petitioner in Application No. 133 is the duly appointed principal of the Vidyodaya Pirivena he would, under section 404 of the Civil Procedure Code, be the proper person to continue the action had it been pending. It was held in *Kulasekere Appuhamy* v. *Malluwa* (28 N.L.R 246) that the words "pending the action" in in section 404 mean during the progress of the action and before final decree. But although the provisions

of that section may not be available to the petitioner for the purposes of getting himself substituted as a party in D.C. Colombo Case No. 2882, inasmuch as the decree in that case has already been entered, what we are concerned with now is whether the petitioner is the proper person to be substituted or entered on the record in place of the deceased plaintiff under Rule 26 of the rules in the schedule to The Appeals (Privy Council) Ordinance. The reason for this rule is stated by Bentwich as follows in *The Practice of the Privy Council in Judicial Matters :* "The Privy Council must have proper parties before it or its decrees will not be binding. Where, therefore, it becomes known before the lodging of the petition at the Council Office that either a party appellant or respondent has died since the date of the order finally giving leave to appeal to the Sovereign in Council, an Order of Revivor must be obtained before the petition of appeal can be lodged. Under the Judicial Committee Rules, it is for the Court below to determine who are the right parties."

No attempt has been made by the 1st defendant to contradict the statement in the affidavit of the petitioner that he is the duly appointed principal of the Vidyodaya Pirivena. Although Mr. Jayawardene suggested that the matter be referred under Rule 13 of the rules in the Appellate Procedure (Privy Council) Order, 1921, to the District Court of Colombo for inquiry and report as to who, if any, is the proper person to be substituted in place of the deceased plaintiff, I do not think that in the circumstances, it is necessary to do so. In my opinion, the petitioner is entitled to a certificate under Rule 26 of the rules in the schedule to The Appeals (Privy Council) Ordinance that he is the proper person to be substituted or entered on the record in place of the deceased plaintiff, and I therefore order that such a certificate issue in his favour. The 1st defendant will pay the petitioner the costs of this application.

In view of the above order there appears to be no need to make any order in the other two applications (Nos. 83 and 124). I leave it open, however, to the 1st defendant, if he is so advised, to make an application based on proper material, under Rule 18 of the rules in the Appellate Procedure (Privy Council) Order, 1921, for such extension of time as may be necessary for the prints of the record to be delivered to the Registrar.

SANSONI, J. *Application No.* 133 *allowed.*
I agree. *No. order on Nos.* 83 and 124.

Present: **Basnayake, C.J. and Sansoni, J.**

EKANAYAKE *vs.* EKANAYAKE

S. C. No. 154/59—*D. C. Kandy No. L.* 4999

Argued and Decided on: August 5, 1960.

Civil Procedure Code, section 93—*Amendment of plaint after filing—Can amendment be allowed to alter character of action.*

Held : (1) That the machinery of amendment of pleadings cannot be used in order to convert an action of one character into that of another.

(2) That the powers confirmed on the Court by section 93 of the Civil Procedure Code are subject to the proviso contained in section 46(2) of the Code.

Per BASNAYAKE C J —"The procedure for amendment of pleadings is prescribed in section 93 of the Civil Procedure Code and should be followed."

Authorities cited : *Wijewardene v. Lenora.* 60 N.L.R. 457; 56 C.L.W. 1.

N. E. Weerasooria, Q.C., with *T. B. Dissanayake* for the defendant-appellant.

Vernon Jonklass, for the plaintiff-respondent.

BASNAYAKE, C.J.

The only question that arises for decision on this appeal is whether the amendments sought to be made to the plaint, as indicated in the document called "the amended plaint", filed on 23rd September 1959 should be allowed. In his plaint dated 4th January, 1957 the plaintiff alleged that the Western boundary between the plaintiff's and the defendant's land had disappeared and he prayed that that boundary be defined and demarcated. He also prayed the ejectment of the defendant from that

portion of the land on which the defendant had encroached, and for damages. In the "amended plaint" the plaintiff asked for a declaration of title to the land described in the schedule to the plaint, which is in extent about 13 acres and that the defendant be ejected from that portion marked Lot 1 in Plan No. 4152 dated 19th May, 1957, made by Surveyor L. A. de C. Wijetunga.

The action filed in January, 1957, was an action for definition of a boundary. The amendments which the plaintff sought to make would, if allowed, convert that action to one of declaration of title to land. It has been said over and over again that the use of the machinery of amendment of pleadings was not be permitted for the conversion of an action of one character to that of another.

Learned counsel for the appellant cited the following passgage from the case of *Wijewardene v. Lenora* (60 N.L.R. 457 at 463) :—

> "An examination of the provisions of Chapter VII of the Civil Procedure Code discloses that the power conferred by section 93 is subject to one limitation. Section 46(2) provides that before a plaint is allowed to be filed, the Court may refuse to entertain it for any of the reasons specified therein and return it for amendment *provided that no amendment shall be allowed which would have the effect of converting an action of one character into an action of another or inconsistent character.* If, before a plaint is allowed to be filed, an amendment which would have the effect of converting an action of one character into an action of another or inconsistent character is not permitted, the power conferred on the Court by section 93 for amending the plaint after it is filed cannot be greater." We are in agreement with that view.

Before we part with this judgment we wish to point out that the procedure for amendment of pleadings is prescribed in section 93 of the Civil Procedure Code and should be followed. In the instant case it has not been observed. After two years and eight months a fresh plaint has been lodged, under the guise of amending the plaint originally filed, with no indication whatsoever thereon as to what portions of the plaint it is sought to amend. The course adopted in this case is not authorised by the Code. The whole purpose of the Code would be defeated if parties were allowed to ignore its provisions and adopt their own procedure.

The order of the learned District Judge allowing the amended plaint cannot, therefore, stand. We accordingly set aside that order and direct that the record be sent back to the lower Court for trial in due course.

The appellant is entitled to the costs of the appeal.

SANSONI, J. *Set aside and sent back.*

I agree.

Present: **Sinnetamby, J. and L.B. de Silva, J.**

ELARIS FERNANDO *vs.* WILLIAM DABRERA & OTHERS

S. C. No. 39(*F*) 1958—*D. C. Chilaw No.* 13553/*P*

Argued on: 1*st February*, 1961.
Decided on: 13*th March*, 1961.

Marriage by habit and repute, proof of—Is evidence of customary or religious rites essential—How is presumption of such marriage drawn and how rebutted.

Held : That to establish a marriage by habit and repute, evidence of customary rites or religious rites is not always necessary. Where neither of the parties is alive and the marriage itself was contracted at a very early date evidence of customary rites or religious rites would be difficult, if not impossible, to obtain and is, therefore, not insisted on.

Held further : That, if two persons are living together as husband and wife and are recognised as such by everybody in the circle in which they move, a presumption in favour of marriage arises; and, if there is no evidence to the contrary, the Court is entitled to presume that the parties were duly married as required by law.

Per SINNETAMBY, J. —"On the other hand, if a party seeks to establish a customary marriage by the performances of some religious ceremony and fails in that, then, the presumption is rebutted and the mere fact that the two persons subsequently lived together as husband and wife does not establish marriage."

Distinguished: *Kandiah v. Thangamany*, 55 N.L.R. 568.
Referred to : *Laddu Adirishamy v. Peter Perera*, 38 C.L.W. 87.

N. E. Weerasooria, Q.C., with *H. Wanigatunga* and *Cecil de S. Wijeratne*, for the plaintiff-appellant.

W. D. Gunasekera for the 7th and 8th defendants-respondents.

SINNETAMBY, J.

The plaintiff instituted this action for partition of the land called Paluwelgalamukalana, alleging that he, the 1st defendant, and the 2nd defendant were co-owners. The 1st defendant William claimed the land exclusively as his own, basing it on prescription. William's claim, however, failed both in the original court and in appeal, and an interlocutory decree for partition was entered. Subsequently, it was discovered that certain other parties had to be added, and they were duly added: the interlocutory decree was accordingly amended on 18th February, 1955. Up to that stage, the 7th and 8th defendants were not parties to the action; but, on the 22nd of June, 1955, they moved to intervene claiming that Catherina Hamy, through whom the plaintiff, the 1st defendant, 2nd defendant and the other intervening defendants derived title, was not married to Juan Dabrera, to whom the property originally belonged. They alleged that Juan Dabrera died without issue and that they were the legal heirs of Juan Dabrera, being the children of his sister. The main question for decision, therefore, was whether Juan Dabrera was married to Catherina Hamy. If there was a marriage, the intervenients, namely the 7th and 8th defendants, would have no title: but, if they were not married, the plaintiff and the other defendants would not inherit. It was suggested for the plaintiff that these intervenients were put up by William to obtain a decree in their favour, with the object of depriving the plaintiff and others of their shares.

In order to succeed in their intervention, the 7th and 8th defendants had to establish an interest in the land by proving, first, that they were, in fact, heirs of Juan Dabrera, and, then, that Juan Dabrera was not married to Catherina Hamy. It is not necessary for us to deal with the question of whether the intervenients' mother is the sister of Juan Dabrera as we are satisfied that, upon he evidence, Juan Dabrera must be held to have married Catherina Hamy. No certificate of marriage was produced. The plaintiff claimed that the evidence establishes marriage by habit and repute. The learned Judge took the view that, to establish marriage by habit and repute, there must always be satisfactory evidence of some customary rites followed by evidence of habit and repute. In our view, he misdirected himself on this point. If one of the parties to the marriage is alive, then of course, it would be necessary to establish the existence of marriage ceremonies, for, a party to the marriage must necessarily be aware of it and be able to give evidence in regard to it; but where neither of the parties are alive, and the marriage itself was contracted at a very early date, evidence of customary rites or religious rites would be difficult, if not impossible to obtain, and is, therefore, not insisted on. It is for that reason that the law recognises proof of a marriage by habit and repute. Reference was made by learned counsel for the 7th and 8th defendants to *Kandiah* v. *Thangamany* (55 N.L.R. 568) wherein acting Chief Justice Nagalingam made the following observations :—

> "Under our law, however, some antecedent public ceremony in the presence of relatives, friends or third parties, has to take place before the mere circumstances of the parties living together as man and wife followed by recognition of their living together as man and wife by friends and relations can form the basis of a deduction that there was a lawful marriage between the parties. It is not unimportant to stress that the fact of two parties living together as man and wife and their being recognised as such by friends and relations gives rise to a presumption—and a presumption only—of marriage. It does not prove the fact of marriage, and the presumption is not an irrebuttable presumption but one which may be disproved."

In that case, there was evidence available and led to establish the performance of alleged customary marriage rites: that evidence was unsatisfactory and showed that an invalid marriage ceremony was performed. In those circumstances, the presumption of marriage by habit and repute could not be drawn, as the evidence led rebutted the presumption.

It is clear, therefore, that the fact that two persons are living together as husband and wife and are recognised as such by everybody in the circle in which they move creates a presumption in favour of marriage; and, in the absence of rebuttable evidence to the contrary, the Court is entitled to presume that the parties were duly married as required by law. On the other hand, if a party seeks to establish a customary marriage by the performance of some religious ceremony and

fails in that, then, the presumption is rebutted and the mere fact that the two persons subsequently lived together as husband and wife does not establish marriage.

In the present case, no attempt was made to prove that there was a marriage solemnized according to religious or customary rites. All that was sought to be proved was evidence which would enable the presumption of marriage to be drawn. Had the learned Judge not taken a wrong view of the law on this question, he may, perhaps, have come to a different conclusion. The evidence shows that Juan Dabrera and his wife lived together and were accepted by everybody as husband and wife. Emaline the 7th defendant stated that Juan Dabrera and Catherina Hamy were not married in the Roman Catholic church. That is understandable as Catherina Hamy was a Buddhist. That explains why Juan Dabrera was not given a Catholic funeral. From this fact, it would be most unreasonable to assume, as the learned trial Judge did, that the denial of a Catholic burial to Juan Dabrera was because he was not married to his wife. The only positive item of evidence against the marriage is the document 7D1, which is the birth certificate of one of the children, where the parents are stated not to have been married: but as was observed by the Judges who decided the case reported in 38 Ceylon Law Weekly, at page 87* an entry of "not married" in a register is intended by parties who are illiterate to mean no more than "not registered". There undoubtedly is evidence to establish the fact that after Juan Dabrera married Catherina Hamy and conducted her to the village, there was no ceremony of marriage performed; but, this does not preclude the possibility, indeed the probability, of a marriage ceremony being performed in the bride's home at Mawila. There was no evidence that a ceremony was performed at Moratuwa which is Juan Dabrera's home town or Mawila where Catherina Hamy's parents lived, but the evidence clearly discloses that from the moment of their arrival in the village they were accepted and treated as husband and wife.

I would accordingly hold that a marriage by habit and repute has been established and dismiss the intervention of the 7th and 8th defendants with costs both here and in the court below.

L. B. DE SILVA, J. *Appeal Allowed.*

I agree.

*Laddu Adrishamy *vs.* Peter Perera.

Present : **Basnayake, C. J., and Sansoni, J.**

MOHIDEEN ALI *vs.* HASSIM

In the matter of an Application for Restitution in Integrum in D.C. Colombo Case No. 43561/*M* (*Application No.* 524)

Argued on: June 22, 23 *and* 24, 1960.
Decided on: December 19, 1960

H. V. Perera, Q.C., with *R. Manikkavasagar* for the Defendant-Petitioner.
H. W. Jayawardene, Q.C., with *M. T. M. Sivardeen* for the Plaintiff-Respondent.

Civil Procedure Code, sections 24, 27—*Proxy appointing proctor—Is counsel bound by limitation in it—Scope of counsel's authority.*

A was the defendant in an action filed by *B* a minor. On the trial date counsel for *A* applied for a postponement in order to enable him to summon a materal witness. He also undertook to pay the agreed costs of the opposing party *B.* before a stated time on a stated day, if the postponement were granted, and consented to judgment being entered against *A* if costs were not so paid. It was submitted that as *A* had not, by the instrument appointing him, given his proctor authority to consent to judgment counsel appearing for him had also no authority to do so.

Held : That *A* was bound by the action of his counsel in coming to such an agreement.

Per BASNAYAKE. C.J.—"An authority granted by a lay client to his proctor in writing (commonly known as a Proxy) undoubtedly limits the Proctor's authority. He cannot go counter to it; but I do not think that it can be said that the writing is exhaustive of his powers nor is the lay client precluded from enlarging the scope of the powers granted by the writing either expressly or impliedly. Such extension of the proctor's authority may be given orally or may be inferred from the lay client's conduct."

Per SANSONI. J.—"In myview, when an advocate is retained and briefed by a proctor he has complete authority over the action. The manner of conducting it, whether he should abandon it or not, whether he should enter into a compromise are all matters within his discretion. He is not the mere mouthpiece either of his client or of his proctor. His authority is a general one, which includes the power to compromise or to make an admission. If any limitation is placed on his authority, it must be communicated to the other side in order to be effective".

BASNAYAKE, C.J.

The only question for decision on this application is whether a party to a civil suit is bound by the action of his counsel in consenting to judgment against him on his failure to pay the agreed costs of the opposing party which he has undertaken to pay before a stated time on a stated day on condition a postponement is granted to him to enable him to summon a material witness.

Shortly the facts are as follows :- The petitioner (hereinafter referred to as the defendant) is the defendant in an action for damages for injuries suffered by the plaintiff, a minor. When the case was taken up for trial on the 30th April 1959 the defendant's counsel applied for a postponement of the trial. The relative minute in the record reads:

"Mr. Subramaniam begs for a date. He says that a material witness for him could not be summoned for today as his name was ascertained from the Police only today. He consents to pre-pay the costs of the other side, which is agreed on at Rs. 150/-.

It is also agreed that if costs are not paid before 10 a.m. on the trial date (15/10/59) judgment should be entered for plaintiff as prayed for.

Trial is refixed for 15/10/59."

When the case was taken up on 15th October, 1959, counsel for the plaintiff stated that the costs had not been paid and moved for judgment in terms of the order of 30th April, 1959.

The relative minute reads :

"Mr. Hassan says that the pre-payment order made on the last trial date 30.4.59 has not been carried out and that costs had not been paid as agreed. He moves that judgment be entered for plaintiff as agreed on that date.

Mr. Subramaniam says that he is unable to admit this as his proctor is absent today. He moves for an adjournment.

Mr. Hassan objects and says he is able to prove that the costs have not been paid. He points to the fact that the defendant is also present and would himself know whether or not he paid the costs."

Thereafter the plaintiff's counsel called evidence. He first called his proctor who stated that on 30th April 1959 the defendant moved for a date and consented to pre-pay Rs. 150/- before 10 a.m. on 15th October, 1959, and that the costs had not been paid and that it was also agreed that judgment should be entered as prayed for by the plaintiff. The next friend gave evidence to state that the defendant agreed to pre-pay Rs. 150/- before 10 a.m. on 15th October 1959 but no costs had been paid either by the defendant or by his Proctor. Mr. Subramaniam then stated that he was not in a position to call any witnessess. The learned Judge then made the following order :-

"On the last trial date, 30/4/59, the defendant obtained a date consenting to pre-pay costs agreed on at Rs. 150/- before 10 a.m. today. He also agreed that judgment should be entered for the plaintiff as prayed for if he failed to pay costs. Mr. Sheriff, proctor for the plaintiff,and the plaintiff's next friend, have given evidence on oath that these costs have not been paid as agreed. I accept this evidence which is not contradicted. In terms of the order of 30/4/59 I enter judgment for plaintiff as prayed for."

Learned counsel for the defendant submits that as the defendant had not, by the instrument appointing him, given the proctor authority to consent to judgment, counsel appearing for him had no authority to do so. Learned counsel invited our attention to sections 24 and 27 of the Civil Procedure Code and the form of appointment of a proctor in the Schedule to the Code. He submitted that the authority of the proctor of a party to a suit was limited by the terms of the instrument of appointment and that as section 24 provided that an advocate instructed by a proctor represents the proctor in Court the advocate's authority could never be greater than that given to the proctor. He compared the forms of appointment of a proctor in the Schedule to the Code with the instrument of appointmnt in the instant case and pointed out that the words "and consent to a judgment being entered against. . . .as to. . . . . said Proctor shall appear fit and proper" in the form in the Schedule did not appear in the instrument of appointment given by the petitioner, and that the proctor had therefore no authority to consent to judgment.

Although the Schedule to the Code contains a form of appointment giving specific authority to the proctor as in the case of a power of attorney, section 27 does not contemplate such an appointment. It states :

(1) 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; and every such appointment shall contain an address at which service of any process which under the provisions of this Chapter may be served on a proctor, instead of the party whom he represents, may be made.

(2) When so filed, it shall be in force until revoked with the leave of Court and after notice to the proctor by a writing signed by the client and filed in court.

An authority granted by a lay client to his Proctor in writing (commonly known as a Proxy) undoubtedly limits the Proctor's authority. He cannot go counter to it; but I do not think that it can be said that the writing is exhaustive of his powers nor is the lay client precluded from enlarging the scope of the powers granted by the writing either expressly or impliedly. Such extension of the proctor's authority may be given orally or may be inferred from the lay client's conduct. In the instant case the lay client was in Court both when the undertaking was given and when his counsel consented to judgment. He chose not to give evidence when the plaintiff did so. The affidavit of the plaintiff's Proctor shows that he called at the office of the defendant's Proctor on three occasions and requested him to forward a cheque for Rs. 150/- from his client as costs in compliance with the order of 30th April 1959 and the defendant's Proctor's clerk informed him that his employer had been informed of his visits to his office and that a cheque would be sent. There is no counter affidavit from the defendant's Proctor and I see no reason to reject the statements made by the plaintiff's Proctor. The Proctor knew about the undertaking but took no steps to repudiate it. It must therefore be presumed that the Advocate acted not only with the authority of the lay client who was present in Court and who according to the plaintiff's affidavit was consulted by his counsel but also that of his Proctor who did nothing repudiate his counsel's action before the next date on the ground that he had acted in excess of his authority and outside his instructions. In the instant case even if the writing is regarded as exhaustive—and I have already stated above it is not—the petitioner and his proctor by their conduct must be taken to have ratified their advocate's action.

SANSONI, J.

I cannot accept the interpretation which Mr. H. V. Perera seeks to give to section 24 of the Code which says that an advocate instructed by a proctor "for this purpose" represents the proctor in Court. I find it impossible to say what the words "for this purpose" mean in the context. I think this sentence in the section was only intended to say that the advocate and not the proctor should conduct the case of his client in Court. I do not accept the proposition that the advocate, by reason of this section, is merely the agent of the proctor who has retained him to appear. The limitation which Mr. Perera seeks to impose on an advocate's authority is something quite revolutionary, and it is opposed to a long line of decisions in which the powers of counsel have been considered and laid down.

This Court has always accepted the view that an advocate has the same authority as a counsel who appears in the English Courts. In Mathews v. Munster (1887) 20 Q.B.D. 141, Lord Esher, M.R., said that when a client has requested counsel to act as his advocate "he thereby represents to the other side that counsel is to act for him in the usual course, and he must be bound by that representation so long as it continues, so that a secret withdrawal of authority, unknown to the other side, would not affect the apparent authority of counsel." He also pointed out that while counsel has no power over matters that are collateral to the suit, his consent to a verdict against his client is a matter within his authority. "If the client is in Court and desires that the case should go on and counsel refuses, if after that he does not withdraw his authority to counsel to act for him, and acquaint the other side with this, he must be taken to have agreed to the course proposed."

In my view, when an advocate is retained and briefed by a proctor he has complete authority over the action. The manner of conducting it, whether he should abandon it or not, whether he should enter into a compromise, are all matters within his discretion. He is not the mere mouthpiece either of his client or of his proctor. His authority is a general one, which includes the power to compromise or to make an admission. If any limitation is placed on his authority it must be communicated to the other side in order to be effective. "He has the power to act without

asking his client what he shall do. He has no master, but he is the conductor and regulator of the whole thing." (1885) 15 Q.B.D. 54 at 58. I do think it is necessary to cite further authority, for these propositions are too well-known.

There is no merit in the present application because when the order of 30th April, 1959, was made, the defendant was present in Court, and this is an added circumstance which renders the agreement entered into on that day binding on him. I agree that the application should be refused with costs.

Application Refused.

Present: **Weerasooriya, J. and L. B. de Silva J.**

THE UDUWA CO-OPERATIVE STORES SOCIETY LIMITED *vs.* UKKU AMMA, *et al.*

S. C. No. 401/57—D. *C.* (*F*) *Kandy No. X* 2143

Argued on: 2nd December, 1960
Delivered on: 25th January 1961

Co-operative Societies Ordinance (*as amended by Act No.* 21 *of* 1949), *sections* 45(1) *and* 46(1)—*How may a dispute be referred for decision under section* 45(1)—*Validity of Rule* 38(13) *made under section* 46(1)—*Must all heirs of a deceased officer or employee be made parties to proceedings.*

Held : 1. That rule 38(13) made under section 46(1) of the Co-operative Societies Ordinance which provides for the enforcement of an arbitrator's award as a decree of Court, is not *ultra vires.*

2. That the reference of a dispute under section 45(1) of the Co-operative Societies Ordinance need not be in the form of an agreed statement signed by both parties to the dispute. A reference made *ex parte* can be valid.

Followed : *Pinikahana Kahaduwa Co-operative Society Ltd. v. Herath*, 59 N.L.R. 145.
Distinguished: *Don Nereus v. Halpe Katana Co-operative Stores Ltd.*, 57 N.L.R. 505.

Held further: 3. That in view of the specific provisions of section 45(1)c of the Co-operative Societies Ordinance (as amended by Act No. 21 of 1949), where there is a dispute between a registered Society and the heirs of a deceased officer or employee, all the heirs need not be made parties to the arbitration proceedings.

E. B. Wikramanayake, Q.C., with *C. R. Gunaratne* for petitioner-appellant.

H. W. Jayawardene, Q.C., with *A. M. Ameen* for respondents.

WEERASOORIYA J.

One M. P. Herat, who was the treasurer of the appellant society (The Uduwa Co-operative Stores Society Limited) died on the 28th February, 1955. At the time of his death there was due from him to the Society a sum of Rs. 2420/22 cents being the balance of moneys received by him on behalf of the Society and not accounted for. He left as his heirs his widow, who is the 1st respondent, and five children, four of whom are the 2nd to the 5th respondents. The other child is said to be a minor and is no party to these proceedings.

On the 12th May, 1955, the committee of the Society referred for decision under section 45(1) of the Co-operative Societies Ordinance, as amended by the Co-operative Societies (Amendment) Act, No. 21 of 1949, a dispute said to have arisen between the Society and the respondents in regard to their alleged liability, as the heirs of the deceased treasurer, to pay to the Society the said sum of money. The dispute was thereupon referred in terms of section 45(2) (b) for disposal by an arbitrator, who in due course made an award directing the respondents jointly and severally to pay to the Society the sum of Rs. 2420/22 cents.

On the 15th June, 1956, the appellant filed the award in the District Court of Kandy and moved by way of summary procedure to have it enforced as a decree of Court. Thereafter, on an order *nisi* entered by the Court, the respondents appeared and filed a statement setting out various grounds against the appellant's application being allowed. But as they had not filed any affidavit in support of these grounds, they were informed by the Additional District Judge that they should state orally their objections to the enforcement of the award, and that he would proceed to inquire into those objections. The proctor for the respondents then called the 1st respondent as a witness and elicited from her certain objections to the validity

of the award. On a consideration of these objections the Additional District Judge discharged the order *nisi* and dismissed with costs the application of the appellant to have the award enforced as a decree of Court. From this order the appellant has appealed.

One of the objections taken by the 1st respondent was that her consent had not been obtained to the arbitration proceedings and that she was not a party to the reference of the dispute. This objection was upheld by the Additional District Judge on the strength of the opinion of my Lord the Chief Justice in *Don Nereus* v. *Halpe Katana Co-operative Stores Ltd.*, 57 N.L.R. 505, that the proper way in which a dispute should be referred for decision under section 45(1) of the Co-operative Societies Ordinance is "to send to the Registrar an agreed statement setting out the relevant facts and the matters in dispute signed by both parties to the dispute." The Additional District Judge also took the view (although the point was not specifically raised in the form of an objection by the 1st respondent) that Rule 38(13) made under section 46(1) of the Co-operative Societies Ordinance, and which provides for the enforcement of an award as a decree of Court, is *ultra vires*. This finding was also based on an opinion to that effect expressed by my Lord the Chief Justice in the same case. But in regard to these opinions, it should be mentioned that L. W. de Silva, J., who was the other member of the Bench which heard that case, while concurring in the order allowing the appeal, stated that he did so only on the ground that there was a breach of a rule of natural justice in that the appeal filed against the award of the arbitrator was dismissed without the appellant having been given a hearing; and he added that since the procedure to be followed in referring a dispute to the Registrar for decision in terms of section 45 of the Co-operative Societies Ordinance was not a point which was argued before them, he was refraining from expressing an opinion on that matter. If I may say so with respect, the two opinions of my Lord the Chief Justice to which I have referred cannot, therefore, be said to form part of the decision in that case.

In *The Pinikahana Kahaduwa Co-operative Society Ltd.*, v. *Herath* 59 N.L.R. 14 which was an appeal specially reserved for hearing before a Bench of five Judges in view of the decision in *Don Nereus* v. *Halpe Katana Co-operative Stores Ltd.* (*supra*), the majority of the Bench expressly dissented from the opinion of my Lord the Chief Justice that Rule 38(13) is *ultra vires*. They would also appear to have dissented from the other opinion expressed by my Lord the Chief Justice that a reference of a dispute under section 45(1) of the Co-operative Societies Ordinance should be in the form of an agreed statement signed by both parties to the dispute. For they upheld as valid the award of the arbitrator notwithstanding that the reference in that case had been made ex-parte by the committee of the Society (a fact which I have verified from the record). Pulle, J., who delivered the majority judgment, pointed out that the procedure to be followed was already set out in Rule 38(13), which provides for a reference by, *inter alia*, the committee of the society concerned.

At the time when the order appealed from in the present case was made, *The Pinikahana Kahaduwa Co-operative Society Ltd.*, v. *Herath* case had not yet been decided by this Court. In view, however, of the majority judgment in that case, the finding of the Additional District Judge that the award in favour of the appellant is not enforceable as a decree of Court cannot be sustained on the grounds stated by the learned Judge.

At the hearing of the appeal Mr. Jayawardene for the respondents took two further objections, neither of which had been stated by the 1st respondent at the inquiry. One objection is that no dispute is shown to have *arisen* between the Society and the respondents (in the sense that a demand for payment was made by the former and repudiated by the latter) prior to the reference of the alleged dispute for decision under section 45(1) of the Co-operative Societies Ordinance, and, therefore, the reference was invalid and all the steps subsequently taken under section 45 were of no force or avail in law. Paragraph 5 of the affidavit filed by the president of the appellant Society contains, however, a categorical statement that after the death of the deceased treasurer a dispute arose between the Society and the respondents as to what sum of money was in his hands as treasurer of the Society and what sum the respondents as his heirs should pay the Society. No evidence to the contrary was adduced by the respondents at the inquiry. In my opinion this objection fails. The other objection is that since the dispute, if any, involved all the heirs of the deceased, all of them should have been made respondents to the arbitration proceedings. I do not think that this objection is tenable seeing that section 45(1) (c) of the Co-operative Societies Ordinance (as amended by Act No. 21 of 1949) specificially provides for the reference of a dispute arising between a registered society and *any* heir or legal representative of a deceased officer or employee.

Prevention of Crimes Ordinance

Sections 2, 4 and 6—Criminal Procedure Code, section 253—Allegations of previous convictions against an accused—Such convictions neither admitted nor proved—Effect on sentence—Functions of Magistrates under the Prevention of Crimes Ordinance.

In this case the 4th accused had been convicted along with two others, of charges of robbery. The sentence passed on him was identical with that passed on the 3rd accused, who had admitted three previous convictions. There was, however, an allegation of two previous convictions against the 4th accused too, but these had neither been admitted by him nor proved by the Crown.

Held : That as it appeared that the learned trial Judge had, in determining the 4th accused's sentence, taken into account material which was clearly not in evidence, the sentence passed on the 4th accused should be reduced.

Held further : That section 6 of the Prevention of Crimes Ordinance had no application to cases such as the present where the Court has power to impose very long terms of imprisonment in respect of the very offences of which the accused have been found guilty.

Observations regarding the functions a Magistrate should perform under the Prevention of Crimes Ordinance.

QUEEN *vs.* VITHANAGE PREMADASA *et al.* .. 34

Principal and Agent

Liability of principal for torts of agent.

DE SILVA *vs.* DHARMASENA 92

Privy Council

Appeals (Privy Council) Ordinance—Schedule, Rule 26—Proper person to be substituted on record in place of deceased plaintiff.

DHAMMANANDA NAYAKE THERO *vs.* SORATHA NAYAKE THERO 1

Court of Criminal Appeal Ordinance, section 6 (1).

QUEEN *vs.* EDIRMANASINGHAM 13

See also under—Damages; Tesavalamai.

Proctor

Limitation in proxy—Is Counsel bound by limitation.

MOHIDEEN ALI *vs.* HASSIM 6

Resignation

Once sent, can it be withdrawn.

EDMUND *vs.* FELIX FERNANDO 76

Restitutio-in-Integrum

Compromise of action due to mistake of fact—Judgment entered in terms of agreement—Is appeal or restitutio-in-integrum the proper remedy.

PERERA *vs.* PERERA 39

Roman-Dutch Law

Not part of Tesawalamai but may be looked at to ascertain principles underlying presumption in that system. Such rules as are otherwise appropriate and not in conflict with Thesawalamai may be borrowed as are suitable for Ceylon.

MANGALESWARI *vs.* SELVADURAI 61

Servitude

Way of necessity—Is principle applicable to widening of existing road.

Held : That where the owner of a dominant tenement already has access and egress to the public road, he is not entitled by "way of necessity" to have an existing road widened.

JAYASURIYA *vs.* HETTIKUMARANA 80

Supreme Court (Special Provisions) Act No. 4 of 1960

Sections 2, 4 and 5 do not apply to an appeal which a court of first instance had already declared to have abated.

PECHCHIMUTTU *vs.* RASIAH 89

Tesawalamai

Tesawalamai—Right of pre-emption—Time at which right can be enforced—Conditions to be satisfied for enforcement.

The appellant and the first respondent (who was her father and natural guardian) inherited in 1935 a property as co-owners in equal shares. In 1937 the first respondent sold his share to the second respondent, who in turn sold to the third and fourth respondents. The appellant, as a co-owner, held a right of pre-emption, while neither the second, third, or fourth respondents had such a right. The appellant became aware of this sale only in 1950.

Held : (1) Under the Tesawalamai, she could enforce her right of pre-emption by having the transfer to the second respondent set aside on condition she brought into Court the sum paid as consideration by the second respondent.

(ii) Her cause of action to set aside the transfer only arose when she became aware of the transfer.

(iii) There was no onus on her to prove that, had she in fact received notice of the transfer, she could and would have purchased the property herself within reasonable time rather than permit it to be sold to a stranger.

(iv) Knowledge of the transfer in a natural guardian as interested as the first respondent was not notice to the appellant.

Per THE JUDICIAL COMMITTEE : Although neither the Muslim Law nor the Roman Dutch Law is part of the Tesawalamai, it is possible to look at the former system to ascertain the principles underlying pre-emption in those systems. And if these are otherwise appropriate and not in conflict with the Tesawalamai, to borrow such rules as are suitable for Ceylon.

MANGALESWARI *vs.* SELVADURAI AND OTHERS .. 61

Town Councils Ordinance

Quo Warranto, writ of—Town Councils Ordinance, No. 3 of 1946, sections 33, 33A & 40—Section 33A (2)(g) introduced by section 7 of the Local Authorities (Election of Officials) Act, No. 39 of 1961—Election of Vice-Chairman—Has Chairman right to exercise casting vote.

At a meeting held on 30-1-1960 *inter alia* for the election of a Vice-Chairman of a Town Council, the number of votes cast for the petitioner and the respondent being equally divided, the Chairman exercised his casting vote in favour of the respondent. The petitioner applied for a *Writ of Quo Warranto* challenging the validity of the election on the ground that the Chairman had no right to a casting vote.

Held : That the Chairman had no right to exercise a casting vote in view of section 33A (2) (*g*) of the Town Councils Ordinance as amended by section 7 of the Local Authorities (Election of Officials) Act No. 39 of 1951. In such a situation the election should be by the drawing of lots. The election of the respondent was, therefore, void.

ALVAPILLAI SABARATNAM *vs.* SELLIAH SINNADURAI 108

Trusts Ordinance

Trusts Ordinance (Cap. 72)—Section 99 (1)—Whether trust a valid charitable trust.

TRUSTEES OF ABDUL GAFFOOR TRUST *vs.* THE COMMISSIONER OF INCOME TAX 65

Trusts Ordinance—Sections 13 and 113 (1)—

DHAMMANANDA NAYAKE THERO *vs.* SORATHA NAYAKE THERO 1

Section 99—Charitable Trust—Liability to income tax where purpose solely religious—Charitable purpose.

COMMISSIONER OF INCOME TAX *vs.* BADDRAWATHIE FERNANDO CHARITABLE TRUST 104

Words and Phrases

1. "Not finally disposed of by the Supreme Court".

See under—*Appeal*

2. "Expert"—See *Excise Ordinance*

3. "Marriage by habit and repute"—See under *Marriage.*

4. "Letting"—see *Paddy Lands Act.*

5. "Tenant cultivator"--See under *Paddy Lands Act.*

Workmen's Compensation

Workmen's Compensation Ordinance (Cap. 117), sections 40 and 41—Amending Act No. 31 of 1957—Section 41 amended by enabling seizure and sale of immovable property of defaulter to pay amount due on award of compensation—Award made in 1953 prior to amendment—Application to issue writ in 1958 under section 41 (2) as amended—Interpretation Ordinance, section 6 (3)—Is the amendment retrospective in operation—Prescription.

On 30-5-58, an application was made in the District Court of Colombo in terms of section 41 (2) of the Workmen's Compensation Ordinance (Cap. 117) as amended by the Workmen's Compensation (Amendment) Act, No. 31 of 1957 for the issue of writ to seize and sell certain immovable property belonging to the appellant in order to realise the balance due from him on an award of compensation dated 21-11-1953 in favour of a workman.

The appellant objected to the issue of writ on the ground that section 41 (2), being a subsequent amendment introduced in 1957, was not retrospective in operation and, therefore, the writ was not available. The District Judge dismissed the objection.

In appeal it was contended (1) relying on section 6 (3) (*c*) of the Interpretation Ordinance, that the procedure for the recovery of the money due under the award is governed by sections 40 and 41 as they stood prior to the said amendment of 1957, viz., recovery by the sale of movable property as in the case of a fine imposed by a Magistrate.

(2) that, if section 6 (3) (*c*) is held not applicable, the general principles which govern the question as to the extent to which subsequent legislation can be regarded as interfering with the rights of parties in a pending action would be applicable.

(3) that the application for writ was prescribed in law.

Held : (1) That the amendments effected to sections 40 and 41 by Act No. 31 of 1957, cannot be regarded as a repeal of any part of these sections either expressly or by implication, and therefore section 6 (3) of the Interpretation Ordinance is inapplicable.

(2) That it cannot be said that any rights of the appellant were adversely affected by the amendments to sections 40 and 41, by which the legislature sought to make good an omission by providing for an additional method of recovery by seizure and sale of immovable property.

(3) That the proceedings taken under section 41 for the enforcement of an award are analogous to proceeding in execution of a decree and are a continuation of the action in which the award was made. The application, therefore, was not prescribed in law.

DON EDWIN *vs.* DEPUTY COMMISSIONER FOR WORKMEN'S COMPENSATION 51

Writs

1. *Habeas Corpus*—See under Habeas Corpus .. 49

2. *Prohibition*—See under Courts Ordinance .. 76

3. *Certiorari*—See under Customs Ordinance .. 36

4. *Quo Warranto*—See under Town Councils Ordinance 108

Weerasooriya, J. & Sansoni, J.

DHAMMANANDA NAYAKE THERO *vs.* SORATHA NAYAKE THERO

SORATHA NAYAKE THERO vs. DHAMMANANDA NAYAKE THERO

Applications No. 83 *No.* 124, *and No.* 133.

Argued on: 1*st April* 1960
Decided on: 5*th August*, 1960.

Application by defendant for leave to appeal to the Privy Council—Death of plaintiff who sued as trustee and principal of a Buddhist educational institution—Application by successor for substitution—Application opposed on the ground that the action abated with the plaintiff's death and that petitioner's appointment unlawful—Civil Procedure Code, sections 392, 395, 404—*Trusts Ordinance, sections* 13, 113(1)—*Schedule to the Appeals (Privy Council) Ordinance, Rule* 26.

H. W. Jayawardene, Q.C., with *N. R. M. Daluwatte* for the petitioner in Applications Nos. 83 and 124.

E. B. Wikramanayake, Q.C., with *C. D. S. Siriwardene* for the petitioner in Application No. 133.

H. W. Jayawardene, Q.C., with *N. R. M. Daluwatte* for the 1st respondent in Application No. 133.

The plaintiff as Principal and trustee of the Vidyodaya Pirivena, a Buddhist educational institution, and subject of a charitable trust, obtained judgment (see 59 N.L.R. 412) against the first defendant for declaration of title and ejectment. The Supreme Court dismissed an appeal by the first defendant who then obtained leave to appeal to the Privy Council. Thereafter the plaintiff died and his successor applied for substitution and also for a certificate under Rule 26 of the rules in the Schedule to the Appeals (Privy Council) Ordinance. He based his claim on an appointment by a body of persons authorised by the deed creating the charitable trust to appoint a Principal, whenever the office became vacant.

The first defendant opposed this application on the ground that on the authority of the Divisional Bench case of *Dheerananda Thero* v *Ratnasara Thero* 60 N.L.R. 7. the action abated with the death of plaintiff.

Held : (1) That the facts of the said Divisional Bench case did not apply to the present case as the plaintiff sought to vindicate his title to the premises in question as trustee Under section 113(1) of the Trusts Ordinance the title to the trust property would in such a case devolve on his successor without the need for any conveyance or vesting order. Nor were sections 392 and 395 of the Civil Procedure code applicable to this case.

(2) That in the absence of any contradiction in the petitioner's affidavit that he is the duly appointed Principal of the said Vidyodaya Pirivena the petitioner is entitled to a certificate under Rule 26 of the rules in the Schedule to the Appeals (Privy Council) Ordinance that he is the proper person to be susbstituted on the record in place of the deceased plaintiff.

Distinguished : *Dheerananda Thero* v *Ratnasara Thero* 60 N.L.R. 7 (D.B.)
Authorities cited: *Thirumalai v Arunachella Padayachi.* (1926) A.I.R. Madras 540
Sabapathipillai v Vaithialingam 40 N.L.R. 107.
Kulasekera Appuhamy v Malluwa 28 N.L.R. 246.
Bentwich—The Practice of the Privy Council in Judicial Matters (9th Edition p. 195)

WEERASOORIYA, J.

These three connected applications relate to an appeal which the 1st defendant in Case No. 2882 of the District Court of Colombo intends to prefer to Her Majesty in Council from the judgment (59 N.L.R. 412) of this Court affirming the judgment and decree of the District Court in favour of the plaintiff. In that action the plaintiff, as the duly appointed principal of a Buddhist educational institution known as the Vidyodaya Pirivena, sought a declaration that he is the trustee of a charitable trust created by deed No. 1259, dated the 9th March, 1876, for establishing and maintaining in the premises described in the schedule to the plaint a pirivena for the purpose of teaching Buddhism, that he holds the premises and is entitled to them as such trustee and for an order ejecting the 1st defendant therefrom. Under deed No. 1259 power was given to an unincorporated body of persons by the name of the Vidyadhara Sabha to appoint a principal of the Vidyodaya Pirivena whenever a vacancy in the office occurred. The persons who at the time of the institution of the action formed the Vidyadhara Sabha were also made parties defendants but no relief was claimed against them.

* For Sinhalese Translation, see p. 9 of the Sinhala Section.

The 1st defendant in his answer asserted that the premises described in the schedule to the plaint formed a temple of which he is the lawful incumbent or viharadipathi, and to which the Vidyodaya Pirivena is appurtenant, that the appointment of a principal of the pirivena required his approval and that the purported appointment of the plaintiff as principal (presumably without his approval) was unlawful.

After the 1st defendant obtained final leave under the provisions of The Appeals (Privy Council) Ordinance (Cap. 85) to appeal to Her Majesty in Council, the plaintiff-respondent died (on the 15th February, 1960). Thereupon the 1st defendant filed Application No. 83 for a certificate under Rule 26 of the rules in the schedule to that Ordinance as to who, in the opinion of this Court, is the proper person to be substituted in place of the deceased plaintiff. He subsequently filed Application No. 124 for an order staying the further printing of the record (for the completion of which time had been granted till the 21st May, 1960) pending the decision of the question of the substitution of a person in place of the deceased plaintiff, stating as the reason for the application that with the death of the plaintiff the action had abated.

The petitioner in Application No. 133 claims that he was appointed principal of the Vidyodaya Pirivena in succession to the plaintiff by the Vidyadhara Sabha at a meeting held on the 4th March, 1960, and as such he applies for a certificate under Rule 26 that he is the proper person to be substituted or entered on the record in place of the plaintiff. It will be convenient to consider this application first.

In opposing this application Mr. Jayawardene who appeared for the 1st defendant submitted that (as stated in Application No. 124) the action abated with the death of the plaintiff. For this submission he relied on sections 392 and 395 of Chapter XXV of the Civil Procedure Code entitled **"Of the Continuation of actions after alteration of a party's status"** and on the decision of a Divisional Bench of this Court in *Dheerananda Thero vs. Ratnasara Thero* (60 N.L.R. 7.) The plaintiff in that case, as the incumbent of a Buddhist temple, sued the defendant alleging that the latter was unlawfully disputing his right to the incumbency, was disobedient and disrespectful to him and obstructing him in the lawful exercise of his rights as incumbent. He prayed that he be declared the incumbent and that the defendant and his agents be ejected from the temple. The defendant, who filed answer claiming to be the lawful incumbent of the temple, died after the trial commenced, but before it was concluded. At the instance of the plaintiff another monk who was residing in the temple was substituted by the District Judge on the basis that any rights which the deceased may have had to the incumbency devolved after the deceased's death on the party substituted. The trial then proceeded and judgment was given declaring the plaintiff to be the incumbent and ordering the ejectment of the substituted defendant from the temple. On appeal by the substituted defendant the Divisional Bench held that the cause of action did not survive on the death of the original defendant and that the action had, therefore, abated. This decision appears to have proceeded on the basis that as the action was one for declaration of a status the maxim *actio personalis moritur cum persona* applied to the case.

I do not think, however, that it is possible to take a similar view in regard to D.C. Colombo Case No. 2882. The averments and the prayer in the plaint in that case (the issues on which the trial proceeded are not before me) make it clear that the action was one in which the plaintiff, as trustee, sought to vindicate his legal title to the premises in suit. If the averments are true, the trustee was bound under section 13 of the Trusts Ordinance (Cap. 72) to maintain the action. There can be no question that on the death of a sole trustee who has filed such an action, the right to sue on the cause of action would survive to his successor in the office of trustee. By virtue of Section 113(1) of the Trusts Ordinance the title to the trust property would in such a case devolve on the successor without the need for any conveyance or vesting order. The continuation of a pending action in these circumstances appears to be specially provided for in section 404 in Chapter XXV of the Civil Procedure Code. This section is substantially the same as Rule 22, order 10 of the Indian Civil Procedure Code. It was held in *Thirumalai* v. *Arunachella Padayachi* (1926) A.I.R. Madras, 540 that where a trustee dies or retires and another is elected in his place the devolution of the trust estate on the new trustee is a devolution of an interest within the meaning of rule 10. See also the local case of *Sabapathipillai* v. *Vaithialingam.* (40 N.L.R. 107)

In my opinion, if the petitioner in Application No. 133 is the duly appointed principal of the Vidyodaya Pirivena he would, under section 404 of the Civil Procedure Code, be the proper person to continue the action had it been pending. It was held in *Kulasekere Appuhamy* v. *Malluwa* (28 N.L.R 246) that the words "pending the action" in in section 404 mean during the progress of the action and before final decree. But although the provisions

of that section may not be available to the petitioner for the purposes of getting himself substituted as a party in D.C. Colombo Case No. 2882, inasmuch as the decree in that case has already been entered, what we are concerned with now is whether the petitioner is the proper person to be substituted or entered on the record in place of the deceased plaintiff under Rule 26 of the rules in the schedule to The Appeals (Privy Council) Ordinance. The reason for this rule is stated by Bentwich as follows in *The Practice of the Privy Council in Judicial Matters :* "The Privy Council must have proper parties before it or its decrees will not be binding. Where, therefore, it becomes known before the lodging of the petition at the Council Office that either a party appellant or respondent has died since the date of the order finally giving leave to appeal to the Sovereign in Council, an Order of Revivor must be obtained before the petition of appeal can be lodged. Under the Judicial Committee Rules, it is for the Court below to determine who are the right parties."

No attempt has been made by the 1st defendant to contradict the statement in the affidavit of the petitioner that he is the duly appointed principal of the Vidyodaya Pirivena. Although Mr. Jayawardene suggested that the matter be referred under Rule 13 of the rules in the Appellate Procedure (Privy Council) Order, 1921, to the District Court of Colombo for inquiry and report as to who, if any, is the proper person to be substituted in place of the deceased plaintiff, I do not think that in the circumstances, it is necessary to do so. In my opinion, the petitioner is entitled to a certificate under Rule 26 of the rules in the schedule to The Appeals (Privy Council) Ordinance that he is the proper person to be substituted or entered on the record in place of the deceased plaintiff, and I therefore order that such a certificate issue in his favour. The 1st defendant will pay the petitioner the costs of this application.

In view of the above order there appears to be no need to make any order in the other two applications (Nos. 83 and 124). I leave it open, however, to the 1st defendant, if he is so advised, to make an application based on proper material, under Rule 18 of the rules in the Appellate Procedure (Privy Council) Order, 1921, for such extension of time as may be necessary for the prints of the record to be delivered to the Registrar.

SANSONI, J. *Application No.* 133 *allowed.*
I agree. *No. order on Nos.* 83 and 124.

Present: **Basnayake, C.J. and Sansoni, J.**

EKANAYAKE *vs.* EKANAYAKE

S. C. No. 154/59—*D. C. Kandy No. L.* 4999

Argued and Decided on: August 5, 1960.

Civil Procedure Code, section 93—*Amendment of plaint after filing—Can amendment be allowed to alter character of action.*

Held : (1) That the machinery of amendment of pleadings cannot be used in order to convert an action of one character into that of another.

(2) That the powers confirmed on the Court by section 93 of the Civil Procedure Code are subject to the proviso contained in section 46(2) of the Code.

Per BASNAYAKE C J —"The procedure for amendment of pleadings is prescribed in section 93 of the Civil Procedure Code and should be followed."

Authorities cited : *Wijewardene v. Lenora.* 60 N.L.R. 457; 56 C.L.W. 1.

N. E. Weerasooria, Q.C., with *T. B. Dissanayake* for the defendant-appellant.

Vernon Jonklass, for the plaintiff-respondent.

BASNAYAKE, C.J.

The only question that arises for decision on this appeal is whether the amendments sought to be made to the plaint, as indicated in the document called "the amended plaint", filed on 23rd September 1959 should be allowed. In his plaint dated 4th January, 1957 the plaintiff alleged that the Western boundary between the plaintiff's and the defendant's land had disappeared and he prayed that that boundary be defined and demarcated. He also prayed the ejectment of the defendant from that

portion of the land on which the defendant had encroached, and for damages. In the "amended plaint" the plaintiff asked for a declaration of title to the land described in the schedule to the plaint, which is in extent about 13 acres and that the defendant be ejected from that portion marked Lot 1 in Plan No. 4152 dated 19th May, 1957, made by Surveyor L. A. de C. Wijetunga.

The action filed in January, 1957, was an action for definition of a boundary. The amendments which the plaintff sought to make would, if allowed, convert that action to one of declaration of title to land. It has been said over and over again that the use of the machinery of amendment of pleadings was not be permitted for the conversion of an action of one character to that of another.

Learned counsel for the appellant cited the following passgage from the case of *Wijewardene v. Lenora* (60 N.L.R. 457 at 463) :—

> "An examination of the provisions of Chapter VII of the Civil Procedure Code discloses that the power conferred by section 93 is subject to one limitation. Section 46(2) provides that before a plaint is allowed to be filed, the Court may refuse to entertain it for any of the reasons specified therein and return it for amendment *provided that no amendment shall be allowed which would have the effect of converting an action of one character into an action of another or inconsistent character.* If, before a plaint is allowed to be filed, an amendment which would have the effect of converting an action of one character into an action of another or inconsistent character is not permitted, the power conferred on the Court by section 93 for amending the plaint after it is filed cannot be greater." We are in agreement with that view.

Before we part with this judgment we wish to point out that the procedure for amendment of pleadings is prescribed in section 93 of the Civil Procedure Code and should be followed. In the instant case it has not been observed. After two years and eight months a fresh plaint has been lodged, under the guise of amending the plaint originally filed, with no indication whatsoever thereon as to what portions of the plaint it is sought to amend. The course adopted in this case is not authorised by the Code. The whole purpose of the Code would be defeated if parties were allowed to ignore its provisions and adopt their own procedure.

The order of the learned District Judge allowing the amended plaint cannot, therefore, stand. We accordingly set aside that order and direct that the record be sent back to the lower Court for trial in due course.

The appellant is entitled to the costs of the appeal.

SANSONI, J. *Set aside and sent back.*

I agree.

Present: **Sinnetamby, J. and L.B. de Silva, J.**

ELARIS FERNANDO *vs.* WILLIAM DABRERA & OTHERS

S. C. No. 39(*F*) 1958—*D. C. Chilaw No.* 13553/*P*

Argued on: 1*st February*, 1961.
Decided on: 13*th March*, 1961.

Marriage by habit and repute, proof of—Is evidence of customary or religious rites essential—How is presumption of such marriage drawn and how rebutted.

Held : That to establish a marriage by habit and repute, evidence of customary rites or religious rites is not always necessary. Where neither of the parties is alive and the marriage itself was contracted at a very early date evidence of customary rites or religious rites would be difficult, if not impossible, to obtain and is, therefore, not insisted on.

Held further : That, if two persons are living together as husband and wife and are recognised as such by everybody in the circle in which they move, a presumption in favour of marriage arises; and, if there is no evidence to the contrary, the Court is entitled to presume that the parties were duly married as required by law.

Per SINNETAMBY, J. —"On the other hand, if a party seeks to establish a customary marriage by the performances of some religious ceremony and fails in that, then, the presumption is rebutted and the mere fact that the two persons subsequently lived together as husband and wife does not establish marriage."

Distinguished: *Kandiah v. Thangamany*, 55 N.L.R. 568.
Referred to : *Laddu Adirishamy v. Peter Perera*, 38 C.L.W. 87.

N. E. Weerasooria, Q.C., with *H. Wanigatunga* and *Cecil de S. Wijeratne*, for the plaintiff-appellant.

W. D. Gunasekera for the 7th and 8th defendants-respondents.

SINNETAMBY, J.

The plaintiff instituted this action for partition of the land called Paluwelgalamukalana, alleging that he, the 1st defendant, and the 2nd defendant were co-owners. The 1st defendant William claimed the land exclusively as his own, basing it on prescription. William's claim, however, failed both in the original court and in appeal, and an interlocutory decree for partition was entered. Subsequently, it was discovered that certain other parties had to be added, and they were duly added: the interlocutory decree was accordingly amended on 18th February, 1955. Up to that stage, the 7th and 8th defendants were not parties to the action; but, on the 22nd of June, 1955, they moved to intervene claiming that Catherina Hamy, through whom the plaintiff, the 1st defendant, 2nd defendant and the other intervening defendants derived title, was not married to Juan Dabrera, to whom the property originally belonged. They alleged that Juan Dabrera died without issue and that they were the legal heirs of Juan Dabrera, being the children of his sister. The main question for decision, therefore, was whether Juan Dabrera was married to Catherina Hamy. If there was a marriage, the intervenients, namely the 7th and 8th defendants, would have no title: but, if they were not married, the plaintiff and the other defendants would not inherit. It was suggested for the plaintiff that these intervenients were put up by William to obtain a decree in their favour, with the object of depriving the plaintiff and others of their shares.

In order to succeed in their intervention, the 7th and 8th defendants had to establish an interest in the land by proving, first, that they were, in fact, heirs of Juan Dabrera, and, then, that Juan Dabrera was not married to Catherina Hamy. It is not necessary for us to deal with the question of whether the intervenients' mother is the sister of Juan Dabrera as we are satisfied that, upon he evidence, Juan Dabrera must be held to have married Catherina Hamy. No certificate of marriage was produced. The plaintiff claimed that the evidence establishes marriage by habit and repute. The learned Judge took the view that, to establish marriage by habit and repute, there must always be satisfactory evidence of some customary rites followed by evidence of habit and repute. In our view, he misdirected himself on this point. If one of the parties to the marriage is alive, then of course, it would be necessary to establish the existence of marriage ceremonies, for, a party to the marriage must necessarily be aware of it and be able to give evidence in regard to it; but where neither of the parties are alive, and the marriage itself was contracted at a very early date, evidence of customary rites or religious rites would be difficult, if not impossible to obtain, and is, therefore, not insisted on. It is for that reason that the law recognises proof of a marriage by habit and repute. Reference was made by learned counsel for the 7th and 8th defendants to *Kandiah* v. *Thangamany* (55 N.L.R. 568) wherein acting Chief Justice Nagalingam made the following observations :—

> "Under our law, however, some antecedent public ceremony in the presence of relatives, friends or third parties, has to take place before the mere circumstances of the parties living together as man and wife followed by recognition of their living together as man and wife by friends and relations can form the basis of a deduction that there was a lawful marriage between the parties. It is not unimportant to stress that the fact of two parties living together as man and wife and their being recognised as such by friends and relations gives rise to a presumption—and a presumption only—of marriage. It does not prove the fact of marriage, and the presumption is not an irrebuttable presumption but one which may be disproved."

In that case, there was evidence available and led to establish the performance of alleged customary marriage rites: that evidence was unsatisfactory and showed that an invalid marriage ceremony was performed. In those circumstances, the presumption of marriage by habit and repute could not be drawn, as the evidence led rebutted the presumption.

It is clear, therefore, that the fact that two persons are living together as husband and wife and are recognised as such by everybody in the circle in which they move creates a presumption in favour of marriage; and, in the absence of rebuttable evidence to the contrary, the Court is entitled to presume that the parties were duly married as required by law. On the other hand, if a party seeks to establish a customary marriage by the performance of some religious ceremony and

fails in that, then, the presumption is rebutted and the mere fact that the two persons subsequently lived together as husband and wife does not establish marriage.

In the present case, no attempt was made to prove that there was a marriage solemnized according to religious or customary rites. All that was sought to be proved was evidence which would enable the presumption of marriage to be drawn. Had the learned Judge not taken a wrong view of the law on this question, he may, perhaps, have come to a different conclusion. The evidence shows that Juan Dabrera and his wife lived together and were accepted by everybody as husband and wife. Emaline the 7th defendant stated that Juan Dabrera and Catherina Hamy were not married in the Roman Catholic church. That is understandable as Catherina Hamy was a Buddhist. That explains why Juan Dabrera was not given a Catholic funeral. From this fact, it would be most unreasonable to assume, as the learned trial Judge did, that the denial of a Catholic burial to Juan Dabrera was because he was not married to his wife. The only positive item of evidence against the marriage is the document 7D1, which is the birth certificate of one of the children, where the parents are stated not to have been married: but as was observed by the Judges who decided the case reported in 38 Ceylon Law Weekly, at page 87* an entry of "not married" in a register is intended by parties who are illiterate to mean no more than "not registered". There undoubtedly is evidence to establish the fact that after Juan Dabrera married Catherina Hamy and conducted her to the village, there was no ceremony of marriage performed; but, this does not preclude the possibility, indeed the probability, of a marriage ceremony being performed in the bride's home at Mawila. There was no evidence that a ceremony was performed at Moratuwa which is Juan Dabrera's home town or Mawila where Catherina Hamy's parents lived, but the evidence clearly discloses that from the moment of their arrival in the village they were accepted and treated as husband and wife.

I would accordingly hold that a marriage by habit and repute has been established and dismiss the intervention of the 7th and 8th defendants with costs both here and in the court below.

L. B. DE SILVA, J. *Appeal Allowed.*

I agree.

*Laddu Adrishamy *vs.* Peter Perera.

Present : **Basnayake, C. J., and Sansoni, J.**

MOHIDEEN ALI *vs.* HASSIM

In the matter of an Application for Restitution in Integrum in D.C. Colombo Case No. 43561/*M* (*Application No.* 524)

Argued on: June 22, 23 *and* 24, 1960.
Decided on: December 19, 1960

H. V. Perera, Q.C., with *R. Manikkavasagar* for the Defendant-Petitioner.
H. W. Jayawardene, Q.C., with *M. T. M. Sivardeen* for the Plaintiff-Respondent.

Civil Procedure Code, sections 24, 27—*Proxy appointing proctor—Is counsel bound by limitation in it—Scope of counsel's authority.*

A was the defendant in an action filed by *B* a minor. On the trial date counsel for *A* applied for a postponement in order to enable him to summon a materal witness. He also undertook to pay the agreed costs of the opposing party *B*. before a stated time on a stated day, if the postponement were granted, and consented to judgment being entered against *A* if costs were not so paid. It was submitted that as *A* had not, by the instrument appointing him, given his proctor authority to consent to judgment counsel appearing for him had also no authority to do so.

Held : That *A* was bound by the action of his counsel in coming to such an agreement.

Per BASNAYAKE, C.J.—"An authority granted by a lay client to his proctor in writing (commonly known as a Proxy) undoubtedly limits the Proctor's authority. He cannot go counter to it; but I do not think that it can be said that the writing is exhaustive of his powers nor is the lay client precluded from enlarging the scope of the powers granted by the writing either expressly or impliedly. Such extension of the proctor's authority may be given orally or may be inferred from the lay client's conduct."

Per SANSONI. J.—"In myview, when an advocate is retained and briefed by a proctor he has complete authority over the action. The manner of conducting it, whether he should abandon it or not, whether he should enter into a compromise are all matters within his discretion. He is not the mere mouthpiece either of his client or of his proctor. His authority is a general one, which includes the power to compromise or to make an admission. If any limitation is placed on his authority, it must be communicated to the other side in order to be effective".

BASNAYAKE, C.J.

The only question for decision on this application is whether a party to a civil suit is bound by the action of his counsel in consenting to judgment against him on his failure to pay the agreed costs of the opposing party which he has undertaken to pay before a stated time on a stated day on condition a postponement is granted to him to enable him to summon a material witness.

Shortly the facts are as follows :- The petitioner (hereinafter referred to as the defendant) is the defendant in an action for damages for injuries suffered by the plaintiff, a minor. When the case was taken up for trial on the 30th April 1959 the defendant's counsel applied for a postponement of the trial. The relative minute in the record reads:

"Mr. Subramaniam begs for a date. He says that a material witness for him could not be summoned for today as his name was ascertained from the Police only today. He consents to pre-pay the costs of the other side, which is agreed on at Rs. 150/-.

It is also agreed that if costs are not paid before 10 a.m. on the trial date (15/10/59) judgment should be entered for plaintiff as prayed for.

Trial is refixed for 15/10/59."

When the case was taken up on 15th October, 1959, counsel for the plaintiff stated that the costs had not been paid and moved for judgment in terms of the order of 30th April, 1959.

The relative minute reads :

"Mr. Hassan says that the pre-payment order made on the last trial date 30.4.59 has not been carried out and that costs had not been paid as agreed. He moves that judgment be entered for plaintiff as agreed on that date.

Mr. Subramaniam says that he is unable to admit this as his proctor is absent today. He moves for an adjournment.

Mr. Hassan objects and says he is able to prove that the costs have not been paid. He points to the fact that the defendant is also present and would himself know whether or not he paid the costs."

Thereafter the plaintiff's counsel called evidence. He first called his proctor who stated that on 30th April 1959 the defendant moved for a date and consented to pre-pay Rs. 150/- before 10 a.m. on 15th October, 1959, and that the costs had not been paid and that it was also agreed that judgment should be entered as prayed for by the plaintiff. The next friend gave evidence to state that the defendant agreed to pre-pay Rs. 150/- before 10 a.m. on 15th October 1959 but no costs had been paid either by the defendant or by his Proctor. Mr. Subramaniam then stated that he was not in a position to call any witnessess. The learned Judge then made the following order :-

"On the last trial date, 30/4/59, the defendant obtained a date consenting to pre-pay costs agreed on at Rs. 150/- before 10 a.m. today. He also agreed that judgment should be entered for the plaintiff as prayed for if he failed to pay costs. Mr. Sheriff, proctor for the plaintiff,and the plaintiff's next friend, have given evidence on oath that these costs have not been paid as agreed. I accept this evidence which is not contradicted. In terms of the order of 30/4/59 I enter judgment for plaintiff as prayed for."

Learned counsel for the defendant submits that as the defendant had not, by the instrument appointing him, given the proctor authority to consent to judgment, counsel appearing for him had no authority to do so. Learned counsel invited our attention to sections 24 and 27 of the Civil Procedure Code and the form of appointment of a proctor in the Schedule to the Code. He submitted that the authority of the proctor of a party to a suit was limited by the terms of the instrument of appointment and that as section 24 provided that an advocate instructed by a proctor represents the proctor in Court the advocate's authority could never be greater than that given to the proctor. He compared the forms of appointment of a proctor in the Schedule to the Code with the instrument of appointmnt in the instant case and pointed out that the words "and consent to a judgment being entered against. . . .as to. . . . . said Proctor shall appear fit and proper" in the form in the Schedule did not appear in the instrument of appointment given by the petitioner, and that the proctor had therefore no authority to consent to judgment.

Although the Schedule to the Code contains a form of appointment giving specific authority to the proctor as in the case of a power of attorney, section 27 does not contemplate such an appointment. It states :

(1) 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; and every such appointment shall contain an address at which service of any process which under the provisions of this Chapter may be served on a proctor, instead of the party whom he represents, may be made.

(2) When so filed, it shall be in force until revoked with the leave of Court and after notice to the proctor by a writing signed by the client and filed in court.

An authority granted by a lay client to his Proctor in writing (commonly known as a Proxy) undoubtedly limits the Proctor's authority. He cannot go counter to it; but I do not think that it can be said that the writing is exhaustive of his powers nor is the lay client precluded from enlarging the scope of the powers granted by the writing either expressly or impliedly. Such extension of the proctor's authority may be given orally or may be inferred from the lay client's conduct. In the instant case the lay client was in Court both when the undertaking was given and when his counsel consented to judgment. He chose not to give evidence when the plaintiff did so. The affidavit of the plaintiff's Proctor shows that he called at the office of the defendant's Proctor on three occasions and requested him to forward a cheque for Rs. 150/- from his client as costs in compliance with the order of 30th April 1959 and the defendant's Proctor's clerk informed him that his employer had been informed of his visits to his office and that a cheque would be sent. There is no counter affidavit from the defendant's Proctor and I see no reason to reject the statements made by the plaintiff's Proctor. The Proctor knew about the undertaking but took no steps to repudiate it. It must therefore be presumed that the Advocate acted not only with the authority of the lay client who was present in Court and who according to the plaintiff's affidavit was consulted by his counsel but also that of his Proctor who did nothing repudiate his counsel's action before the next date on the ground that he had acted in excess of his authority and outside his instructions. In the instant case even if the writing is regarded as exhaustive—and I have already stated above it is not—the petitioner and his proctor by their conduct must be taken to have ratified their advocate's action.

SANSONI, J.

I cannot accept the interpretation which Mr. H. V. Perera seeks to give to section 24 of the Code which says that an advocate instructed by a proctor "for this purpose" represents the proctor in Court. I find it impossible to say what the words "for this purpose" mean in the context. I think this sentence in the section was only intended to say that the advocate and not the proctor should conduct the case of his client in Court. I do not accept the proposition that the advocate, by reason of this section, is merely the agent of the proctor who has retained him to appear. The limitation which Mr. Perera seeks to impose on an advocate's authority is something quite revolutionary, and it is opposed to a long line of decisions in which the powers of counsel have been considered and laid down.

This Court has always accepted the view that an advocate has the same authority as a counsel who appears in the English Courts. In Mathews v. Munster (1887) 20 Q.B.D. 141, Lord Esher, M.R., said that when a client has requested counsel to act as his advocate "he thereby represents to the other side that counsel is to act for him in the usual course, and he must be bound by that representation so long as it continues, so that a secret withdrawal of authority, unknown to the other side, would not affect the apparent authority of counsel." He also pointed out that while counsel has no power over matters that are collateral to the suit, his consent to a verdict against his client is a matter within his authority. "If the client is in Court and desires that the case should go on and counsel refuses, if after that he does not withdraw his authority to counsel to act for him, and acquaint the other side with this, he must be taken to have agreed to the course proposed."

In my view, when an advocate is retained and briefed by a proctor he has complete authority over the action. The manner of conducting it, whether he should abandon it or not, whether he should enter into a compromise, are all matters within his discretion. He is not the mere mouthpiece either of his client or of his proctor. His authority is a general one, which includes the power to compromise or to make an admission. If any limitation is placed on his authority it must be communicated to the other side in order to be effective. "He has the power to act without

asking his client what he shall do. He has no master, but he is the conductor and regulator of the whole thing." (1885) 15 Q.B.D. 54 at 58. I do think it is necessary to cite further authority, for these propositions are too well-known.

There is no merit in the present application because when the order of 30th April, 1959, was made, the defendant was present in Court, and this is an added circumstance which renders the agreement entered into on that day binding on him. I agree that the application should be refused with costs.

Application Refused.

Present: **Weerasooriya, J. and L. B. de Silva J.**

THE UDUWA CO-OPERATIVE STORES SOCIETY LIMITED *vs.* UKKU AMMA, *et al.*

S. C. No. 401/57—D. *C.* (*F*) *Kandy No. X* 2143

Argued on: 2nd December, 1960
Delivered on: 25th January 1961

Co-operative Societies Ordinance (*as amended by Act No.* 21 *of* 1949), *sections* 45(1) *and* 46(1)—*How may a dispute be referred for decision under section* 45(1)—*Validity of Rule* 38(13) *made under section* 46(1)—*Must all heirs of a deceased officer or employee be made parties to proceedings.*

Held : 1. That rule 38(13) made under section 46(1) of the Co-operative Societies Ordinance which provides for the enforcement of an arbitrator's award as a decree of Court, is not *ultra vires.*

2. That the reference of a dispute under section 45(1) of the Co-operative Societies Ordinance need not be in the form of an agreed statement signed by both parties to the dispute. A reference made *ex parte* can be valid.

Followed : *Pinikahana Kahaduwa Co-operative Society Ltd. v. Herath*, 59 N.L.R. 145.
Distinguished: *Don Nereus v. Halpe Katana Co-operative Stores Ltd.*, 57 N.L.R. 505.

Held further: 3. That in view of the specific provisions of section 45(1)c of the Co-operative Societies Ordinance (as amended by Act No. 21 of 1949), where there is a dispute between a registered Society and the heirs of a deceased officer or employee, all the heirs need not be made parties to the arbitration proceedings.

E. B. Wikramanayake, Q.C., with *C. R. Gunaratne* for petitioner-appellant.

H. W. Jayawardene, Q.C., with *A. M. Ameen* for respondents.

WEERASOORIYA J.

One M. P. Herat, who was the treasurer of the appellant society (The Uduwa Co-operative Stores Society Limited) died on the 28th February, 1955. At the time of his death there was due from him to the Society a sum of Rs. 2420/22 cents being the balance of moneys received by him on behalf of the Society and not accounted for. He left as his heirs his widow, who is the 1st respondent, and five children, four of whom are the 2nd to the 5th respondents. The other child is said to be a minor and is no party to these proceedings.

On the 12th May, 1955, the committee of the Society referred for decision under section 45(1) of the Co-operative Societies Ordinance, as amended by the Co-operative Societies (Amendment) Act, No. 21 of 1949, a dispute said to have arisen between the Society and the respondents in regard to their alleged liability, as the heirs of the deceased treasurer, to pay to the Society the said sum of money. The dispute was thereupon referred in terms of section 45(2) (b) for disposal by an arbitrator, who in due course made an award directing the respondents jointly and severally to pay to the Society the sum of Rs. 2420/22 cents.

On the 15th June, 1956, the appellant filed the award in the District Court of Kandy and moved by way of summary procedure to have it enforced as a decree of Court. Thereafter, on an order *nisi* entered by the Court, the respondents appeared and filed a statement setting out various grounds against the appellant's application being allowed. But as they had not filed any affidavit in support of these grounds, they were informed by the Additional District Judge that they should state orally their objections to the enforcement of the award, and that he would proceed to inquire into those objections. The proctor for the respondents then called the 1st respondent as a witness and elicited from her certain objections to the validity

of the award. On a consideration of these objections the Additional District Judge discharged the order *nisi* and dismissed with costs the application of the appellant to have the award enforced as a decree of Court. From this order the appellant has appealed.

One of the objections taken by the 1st respondent was that her consent had not been obtained to the arbitration proceedings and that she was not a party to the reference of the dispute. This objection was upheld by the Additional District Judge on the strength of the opinion of my Lord the Chief Justice in *Don Nereus* v. *Halpe Katana Co-operative Stores Ltd.*, 57 N.L.R. 505, that the proper way in which a dispute should be referred for decision under section 45(1) of the Co-operative Societies Ordinance is "to send to the Registrar an agreed statement setting out the relevant facts and the matters in dispute signed by both parties to the dispute." The Additional District Judge also took the view (although the point was not specifically raised in the form of an objection by the 1st respondent) that Rule 38(13) made under section 46(1) of the Co-operative Societies Ordinance, and which provides for the enforcement of an award as a decree of Court, is *ultra vires*. This finding was also based on an opinion to that effect expressed by my Lord the Chief Justice in the same case. But in regard to these opinions, it should be mentioned that L. W. de Silva, J., who was the other member of the Bench which heard that case, while concurring in the order allowing the appeal, stated that he did so only on the ground that there was a breach of a rule of natural justice in that the appeal filed against the award of the arbitrator was dismissed without the appellant having been given a hearing; and he added that since the procedure to be followed in referring a dispute to the Registrar for decision in terms of section 45 of the Co-operative Societies Ordinance was not a point which was argued before them, he was refraining from expressing an opinion on that matter. If I may say so with respect, the two opinions of my Lord the Chief Justice to which I have referred cannot, therefore, be said to form part of the decision in that case.

In *The Pinikahana Kahaduwa Co-operative Society Ltd.*, v. *Herath* 59 N.L.R. 14 which was an appeal specially reserved for hearing before a Bench of five Judges in view of the decision in *Don Nereus* v. *Halpe Katana Co-operative Stores Ltd.* (*supra*), the majority of the Bench expressly dissented from the opinion of my Lord the Chief Justice that Rule 38(13) is *ultra vires*. They would also appear to have dissented from the other opinion expressed by my Lord the Chief Justice that a reference of a dispute under section 45(1) of the Co-operative Societies Ordinance should be in the form of an agreed statement signed by both parties to the dispute. For they upheld as valid the award of the arbitrator notwithstanding that the reference in that case had been made ex-parte by the committee of the Society (a fact which I have verified from the record). Pulle, J., who delivered the majority judgment, pointed out that the procedure to be followed was already set out in Rule 38(13), which provides for a reference by, *inter alia*, the committee of the society concerned.

At the time when the order appealed from in the present case was made, *The Pinikahana Kahaduwa Co-operative Society Ltd.*, v. *Herath* case had not yet been decided by this Court. In view, however, of the majority judgment in that case, the finding of the Additional District Judge that the award in favour of the appellant is not enforceable as a decree of Court cannot be sustained on the grounds stated by the learned Judge.

At the hearing of the appeal Mr. Jayawardene for the respondents took two further objections, neither of which had been stated by the 1st respondent at the inquiry. One objection is that no dispute is shown to have *arisen* between the Society and the respondents (in the sense that a demand for payment was made by the former and repudiated by the latter) prior to the reference of the alleged dispute for decision under section 45(1) of the Co-operative Societies Ordinance, and, therefore, the reference was invalid and all the steps subsequently taken under section 45 were of no force or avail in law. Paragraph 5 of the affidavit filed by the president of the appellant Society contains, however, a categorical statement that after the death of the deceased treasurer a dispute arose between the Society and the respondents as to what sum of money was in his hands as treasurer of the Society and what sum the respondents as his heirs should pay the Society. No evidence to the contrary was adduced by the respondents at the inquiry. In my opinion this objection fails. The other objection is that since the dispute, if any, involved all the heirs of the deceased, all of them should have been made respondents to the arbitration proceedings. I do not think that this objection is tenable seeing that section 45(1) (c) of the Co-operative Societies Ordinance (as amended by Act No. 21 of 1949) specificially provides for the reference of a dispute arising between a registered society and *any* heir or legal representative of a deceased officer or employee.

The order dismissing with costs the application of the appellant for the enforcement of the award as a decree of Court is set aside. The record will be returned to the District Court with a direction that the award be enforced as a decree of that Court. The respondents will pay the appellant the costs of this appeal and also a sum of Rs. 105/- fixed by the Additional District Judge as costs of the inquiry in the District Court. In view of this order I wish to advert to a matter which was incidentally discussed at the hearing of the appeal without, however, any argument being addressed to us on the point, namely, whether in the enforcement of the award as a decree of Court all the property of the respondents which falls within the description of "property" in section 218 of the Civil Procedure Code is liable to be seized and sold in realisation of the amount due under the award, or only such property as came into their hands as the heirs of the deceased. The question is not one which arises on this appeal. It may or may not arise in the course of the execution proceedings that will take place as a result of the award being enforced, and is reserved for decision if and when it does arise.

L. B. DE SILVA, J.

I agree.

Set aside.

Weerasooriya, J. and L. B. de Silva, J.

UDUPOTHEGEDERA BABI *vs.* DANTUWA *et al*

S. C. No. 319/59(*F*)—*D. C. No. Badulla* 13061

Kandyan Law—Kandyan widow without minor children—Is she entitled to sell deceased husband's immovable property for the payment of debts due by the deceased.

Argued on: 19*th and* 26th *January*, 1961.
Decided on: 28*th February* 1961.

Held : That a Kandyan widow without minor children has no right to sell her deceased husband's immvoab e property for the payment of his debts in so far as it affected the rights of the deceased's other heirs.

T. B. Dissanayake for the Defendant-Appellant.

No appearance for the Plaintiffs-Respondents.

L. B. DE SILVA, J.

The Plaintiff claimed the lands in suit by inheritance from their deceased brother Himiya, subject to the life interest of his widow Muthi. Plaintiffs concede that the life interest of Muthi has now devolved on the defendant on Deed No. 362 (D17) of 17th July, 1955.

The defendant Appellant claimed the entirety of the said lands on two grounds :-

(1) As the adopted daughter of Himiya.
(2) The Deed D17 was executed by the widow of the deceased to settle his debts and it conveyed the rights of the deceased to the defendant-appellant.

The learned District Judge has held that the defendant has failed to prove that she was adopted by the deceased for purposes of inheritance. We see no reason to interfere with the finding of the Learned District Judge on this point.

On the 2nd ground, the Learned District Judge has held that the defendant has failed to prove that it was necessary for the widow to sell these lands for the payment of the deceased's debts, though some debts of the deceased were in fact settled by the widow by the said sale.

We were prepared to hold in this case that the widow sold the said properties upon the deed (D17) to settle the debts of the deceased and that it was necessary for her to do so for this purpose.

The parties are governed by the Kandyan Law. We heard Counsel for the appellant further on the question whether a Kandyan widow who had no children, was entitled to sell the immovable property of her deceased husband to settle his debts, in so far as it affected the rights of the deceased's other heirs.

We are indebted to the learned Counsel for the appellant for the assistance that he has given us

on this matter, which involves a difficult question of Kandyan Law, specially as the respondents were unrepresented in this appeal.

It has been held in Appuhamy vs Kiri Heneya (2 N.L.R. 155) as follows :-

"A widow left by her husband's death with young children was by Kandyan Law the head of the house and family until her sons grew up to manhood. She had the right to give her daughters out in diga, on her devolved the duty of paying her husband's debts. Administration of an intestate's estate was unknown to the Kandyan Law. The widow held the position and owed to her children and her husband's creditors the duty which now is laid on a legal representative."

It was held in that case that the sale by the widow of the acquired lands of her deceased husband, conveyed good title as against the son of the deceased.

In that case Lawrie J. was dealing with the right of a Kandyan widow left with a young son at the death of her husband, to sell the acquired immovable property of her husband, to settle his debts.

In Supan Chetty vs. Kumarihamy (3 Balasingham's Reports, 96) 1905, Middleton J. held as follows :-

"Looking at the position of the diga widow generally as disclosed in Armour and Sawer and the words of the second paragraph of page 18 of Sawer, I would hold that the meaning of the words following in paragraph 9 page 18 of Sawer is that the widow is not liable personally but as a sort of administratrix to see that the debts of the deceased are paid whether she inherits as a childless widow or does not inherit as in the case where she has children. *Although she does not inherit, the property is more or less under her control especially if there are minors and this I would infer is the reason why the liability to pay the debts is put on her.*"

He further stated at page 98, "It would seem that a diga married widow may only inherit when she is left childless" and cited 'Armour's Grammar of Kandyan Law' by Perera (p. 22), referring to the authority of Sawer.

What Perera stated at page 22 on the authority of Armour was as follows :-

"If the deceased proprietor left no issue, and had survived his parents and has full brothers and sisters, then his widow will have an absolute 'Lat Himi' right to such lands as belonged to the deceased by right of acquest (that is to say, lands which were not derived to him by inheritance but which he had acquired by purchase, or which he had obtained from a stranger by rendering assistance) to the exclusion of the deceased's more distant relations, (paternal aunt's children for instance)."

The case of Supan Chetty vs. Kumarihamy is not quite relevant to the point at issue is this case, as the question at issue there was whether the widow was personally liable for her husband's debts irrespective of what she had inherited from her husband.

Sawer's Digest of the Kandyan Law, page 18, under Memoranda of the Laws which regulate the succession to Movable property, para. 1 states, "When a man dies intestate, his widow and children are his immediate heirs, the widow having the custody and administration of the property, so long as she lives in her husband's house. . . . ." The administration of property referred to there is the administration of movable property.

Sawer's Digest, Chapter 1, Succession to Immovables, at para. (1) states, "When a man dies intestate, his widow and children are his immediate heirs, but the widow, although she has the chief control and management of the landed estate of her deceased husband, has only a life interest in the same. . . . ."

It is clear that the widow has the chief control and management of the immovable property of her deceased husband when he had left children but not otherwise. I may mention that the widow's life interest extends only to the acquired lands of the deceased husband and not to his inherited lands.

Under Chapter 11, Succession to Movables, Sawer's Digest at page 21, para. 13 states: "The debts of the deceased must be paid by those who inherit his or her property, according to the value of their respective shares. . . ."

Chapter 11, para. 14 states, "It is the pious duty incumbent on sons to pay their parent's debts, although they may not have inherited any property from them. . . . ."

Chapter11, para. 15 states, "A diga wife is liable to pay the debts of the deceased husband, whether she may have inherited property from him or not. . . ."

It is against the recognised principles of justice that an heir should be liable for the debts of the deceased in excess of his inheritance. As there are conflicting statements by Sawer's on such liability, in the passage cited above, Middleton J. held in Supan Chetty vs. Kumarihamy, that there was no such personal liability of a widow under the Kandyan Law.

In Bantara Menika vs. Imbuldeniya, (50 N.L.R. 478) it was held that under the Kandyan Law, a widow with minor children, has a right to mortgage the estate of her deceased husband for the payment of his debts.

In that case too, the Court considered the right of a Kandyan widow with minor children to mortgage the immovable property of the deceased husband, to pay his debts. Gunasekera J. held that if she had a right to alienate immovable property for that purpose, there appears to be no reason in principle for holding that she could not exercise the lesser right of mortgaging the property.

Sawer's Digest of Kandyan Law, Chapter IX, paragraph 3 states, "The widow has no right to dispose of her husband's lands contrary to what the law directs, although she has a usufruct of them, unless she was specially authorised by her husband that he might thereby secure to his relict the dutiful obedience of his children."

Learned Counsel for the appellant was not able to cite to us any case where a widow, without children, was held to have the right to sell the immovable property of her deceased husband, to pay his debts.

There was some reason why a widow with minor children, should have been given that right. She was the head of the family and she owed a duty to protect the interests of her minor children by settling the deceased's debts even by the sale of his immovable property. She could naturally be expected to safeguard the interests of her own children, in the absence of any form of administration under the Kandyan Law. She could owe no such duty to the collateral heirs of her husband when the deceased has left no issue.

Considering the general principles of the Kandyan Law and the reported cases, I hold that a Kandyan widow without minor children, has no right to sell her deceased husband's immovable property so as to affect the rights of other heirs of the deceased.

The Appeal is dismissed without costs.

WEERASOORIYA, J.

I agree.

Appeal Dismissed.

Present : **Lord Reid, Lord Tucker, Lord Denning, Lord Morris of Borth-Y-Gest, Mr. L. M. D. de Silva.**

THE QUEEN *vs.* PANIKKAPODY EDIRIMANASINGHAM

Privy Council Appeal No. 12 *of* 1960
Delivered : 17*th January*, 1961.

Court of Criminal Appeal Ordinance No. 23 *of* 1938 *section* 6(1)—*Accused convicted on two counts—Murder and culpable homicide—Sentence of life imprisonment imposed—Omission of sentence on culpable homicide—Appeal to Court of Criminal Appeal—Conviction and sentence for murder set aside—Has the Court of Criminal Appeal jurisdiction to impose appropriate sentence for culpable homicide.*

Two accused, father and son were convicted by the Supreme Court on count (1) of the Indictment, to wit, for murder and on counts 2 and 3 for culpable homicide- three distinct offences—The trial Judge sentenced both accused for rigorous imprisonment for life—a sentence appropriate for murder—and was silent as regards the sentences on counts 2 and 3.

On appeal to the Court of Criminal Appeal, the appeal of the 2nd accused was dismissed, but the appeal of the 1st accused against the verdict and sentence on the 1st count was allowed and an order of acquittal was directed to be entered in respect of that charge. The jury's verdict on the 2nd and 3rd counts was not challenged by counsel in appeal.

Having quashed the conviction of the respondent on count 1, the Appeal Judges held that they had no jurisdiction under section 6(1) of the Court of Criminal Appeal Ordinance No 23 of 1938 to pass the appropriate sentences on counts 2 and 3 on which the Jury's verdict of guilty stood.

Held : That in place of the sentence that has been quashed, the Court, under section 6(1) of the Court of Crimina Appeal Ordinance, can pass the sentence appropriate to the conviction on the remaining counts on which the appelleant has been convicted, but not sentenced.

F. W. Lawton Q. C. with T. O. Kellock for the Crown—Appellant.

E. F. N. Gratiaen Q. C. with Walter Jayawardene and Miss Manouri de Silva for the Accused-Respondent.

LORD TUCKER

In the indictment dated 8th April 1958 the respondent was charged jointly with his son in the first count that on or about 27th July, 1957 they did murder one Sembakutti Kandapodi and thereby committed an offence punishable under section 296 of the Penal Code of Ceylon. The second count

charged them at the time and place aforesaid and in the course of the same transaction with shooting one Palipody Nagamany with a gun and causing him hurt with such intention or knowledge and under such circumstances that had they by such act caused the death of the said Palipody Nagamany they would have been guilty of murder and that they thereby committed an offence punishable under section 300 of the Penal Code. The third count charged them at the time and place aforesaid and in the course of the same transaction with shooting at one Eliyathamby Palipody with a gun with such intention or knowledge and under such circumstances that had they by such act caused the death of the said Eliyathamby Palipody they would have been guilty of murder and thereby committed an offence punishable under section 300 of the Penal Code.

The two accused were tried at a session of the Supreme Court of Ceylon in its Criminal Jurisdiction for the Eastern Circuit at Batticaloa on the 8th September, 1958 and following days.

On 12th September, 1958 after the Judge's summing up the jury retired and on their return to court were asked with regard to each separate count whether they were unanimously agreed on their verdict in respect of each of the accused and by their foreman answered on each count that they found both accused guilty.

The Judge thereupon said: "Inform the verdict to the accused. Tell the first accused that I sentence him to rigorous imprisonment for life. I sentence the second accused for rigorous imprisonment for life."

The verdict and sentence were formally recorded as follows :—

"The unanimous Verdict of the Jurors sworn to try the matter of accusation in this case is that the prisoners (1) P. Edirimanasingham and (2) E. Gopalapillai are guilty of the offences as set out in Counts (1), (2) and (3).

Sgd.
Foreman".

"Sgd. O. W. Wanniachy
Clerk of Assize, S.C.
Batticaloa.

On this Indictment the sentence of the Court, pronounced and published this day, is that the prisoners (1) P. Edirimanasingham and (2) E. Gopalapillai be kept in rigorous imprisonment for Life.

Sgd. O. W. Wanniachy
Clerk of Assize, S.C.
Batticaloa."

A sentence of rigorous imprisonment for life exceeds the maximum permitted by the Code for the offences charged in counts 2 and 3.

On 26th January, 1959 on appeal to the Court of Criminal Appeal by both accused the appeal of the second accused was dismissed but the appeal of the first accused (the present respondent) against the verdict and sentence on the first count of the indictment was allowed on the ground that the verdict was not warranted by the evidence and a verdict of acquittal in his case was directed to be entered in respect of that charge. The jury's verdict against the respondent on the second and third counts was not challenged by counsel on the appeal.

It is clear from the above narrative of events that the trial Judge passed sentence on the respondent on one count only and that no question of the effect of what is generally referred to as a "general sentence", i.e. a sentence intended by the Judge to cover more than one count, arises in the present case. Such a sentence which is sometimes to be found in cases in England both before and since the establishment of the Court of Criminal Appeal and the Indictments Act of 1915 appears to be unknown in Ceylon having regard to the provisions of the Criminal Code and may well be illegal, but it is not necessary further to explore this question as no such sentence was in fact imposed in this case.

The Court of Criminal Appeal having quashed the conviction of the respondent on count 1 held they had no jurisdiction to pass the appropriate sentences on counts 2 and 3 on which the jury's verdict of guilty stood.

In Ceylon where the trial Judge has omitted to pass sentence forthwith he may of his own motion or at the instance of the prosecution pass sentence

at a later date but not after the close of the sessions. The relevant part of section 251 of the Criminal Procedure Code is as follows :—

> "251. If the accused is convicted the Judge shall either forthwith or before the close of the sessions pass judgment on him according to law."

Accordingly the sessions having closed no question of remitting the case to the trial Judge for sentence arose on the appeal.

The Attorney-General on behalf of the prosecution obtained special leave by Order in Council of 12th August, 1959 to appeal against the decision of the Court of Criminal Appeal.

The sole question in the appeal is whether or not the Court of Criminal Appeal were right in holding that section 6 (1) of the Court of Criminal Appeal Ordinance No. 23 of 1938 does not give them jurisdiction in a case such as this to impose the appropriate sentences on those counts of an indictment on which the Judge has omitted so to do.

Section 6 (1) is as follows :—

> "6. (1) If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some charge or part of the indictment, has been properly convicted on some other charge or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial or pass such sentence in substitution therefor as they think proper and as may be warranted in law by the verdict on the charge or part of the indictment on which the court consider that the appellant has been properly convicted."

The Court of Criminal Appeal accepted the argument of counsel for the present respondent that the sub-section only conferred power on the court to pass sentence in substitution for the sentence passed by the trial Judge and that when the trial Judge has passed no sentence at all the question of substitution does not arise. After referring to certain English decisions and in particular to the case of *Rex* v. *O'Grady* 28 Cr. App. R. 33 the learned Chief Justice delivering the judgment of the court said they were unable to accept *O'Grady's* case as having any persuasive force as no reasons were given in that case for what seemed to them a disregard of the words of section 5 (1) of the English Criminal Appeal Act of 1907, which are identical with those of section 6 (1) of the Ceylon Ordinance.

The judgment proceeded "In the instant case as the learned Judge has not passed any sentence at all on the 2nd and 3rd charges we are unable to pass a sentence in substitution of that passed at the trial. The Ordinance does not empower this Court to supply the omission of the trial Judge."

Their Lordships, with respect, feel unable to accept this interpretation of the section. It is in terms dealing with a case where an appellant has not been properly convicted on some charge or part of an indictment. This applies to count 1 in the present case. The conviction and sentence thereon no longer stand, but the court is empowered to substitute for that which has disappeared such sentence as may be warranted in law the verdict on the charge or part of the indictment on which the appellant has been properly convicted. This, in their Lordships' view, can only mean that in place of the sentence that has been quashed the court can pass the sentence appropriate to the convictions on the remaining counts on which the appellant has been convicted but not sentenced. The section refers to "the sentence passed on the appellant at the trial". Where the court affirms such sentence the applicaton of the sub-section may be restricted to cases where there has been a general sentence, but where the sentence passed on the appellant at the trial—in this case rigorous imprisonment for life—has been quashed the words of the sub-section in their ordinary and natural meaning appear to their Lordships to confer power on the Court of Criminal Appeal to substitute a proper sentence for that which has been quashed which can only be done by passing sentence on the remaining good counts. This was the course adopted in *O'Grady's* case in this country and their Lordships see no reason to suppose that this was done *per incuriam*.

It is not necessary to express any opinion as to whether or not the sub-section warrants the court in increasing a sentence passed at the trial on some other count with regard to which there has been no appeal against sentence. Their Lordships prefer the view taken by the Court of Criminal Appeal in Ceylon in the unreported case of *Regina*

v. *K. G. Sediris* decided on 5th March, 1956 to that reached in the present case.

For these reasons their Lordships will humbly advise Her Majesty that this appeal be allowed and that the case be remitted to the Court of Criminal Appeal in Ceylon for such action as they may consider appropriate in the circumstances.

Appeal allowed.

Present: **Basnayake, C. J. and de Silva, J.**

ARIYARATNE *vs.* SENEVIRATNE

Application for Revision in D. C. Colombo No. 6390/*MB*
(*Application No.* 578)

Argued and Decided on: December 16, 1959.

Mortgage Act No. 6 *of* 1949—*Application by present owner of mortgaged premises for stay of sale under mortgage decree for a period of six months on the ground that arrangements have been made to obtain loan for settlement of mortgage decree—Refused by Court under section* 61(1)(*d*)—*Application to Supreme Court to revise order of refusal-Civil Procedure Code, Section* 343.

Held : That the power of the Court under section 343 of the Civil Procedure Code to grant an adjournment of the sale on an application by the present owner of mortgaged premises is not affected by the modification in section 61(1) (d) of the mortgage Act of 1951.

C. Ranganathan with *M. M. K. Subramaniam* for the Petitioner.

S. Sharvananda for the Plaintiff-Respondent.

BASNAYAKE, C.J.

This is an application for revision of the order made by the District Judge refusing the application of the petitioner for a stay for a period of 6 months of the sale of the mortgaged property under the hypothecary decree entered in this action. The petitioner is the present owner of the land which has been mortgaged to the plaintiff-respondent for a sum of Rs. 16,000/-. He states that he has made arrangements to obtain a loan from the Industrial Credit Corporation and pay the mortgagee who has obtained judgment as well as two other mortgagees. The learned District Judge has refused the application of the petitioner on the ground that section 61(1)(d) of the Mortgage Act No. 6 of 1949 as amended by the Mortgage (Amendment) Act No. 53 of 1949 does not permit any person other than the judgment-debtor to ask for a stay of execution. In our opinion the interpretation placed on that section of the Mortgage Act by the learned District Judge is not correct. Section 343 of the Civil Procedure Code empowers the Court for sufficient cause to stay execution proceedings at any stage thereof, and make order for adjournment of sale. Section 61(1)(d) of the Mortgage Act limits that power in the case of actions under that Act. The limitations are—

(*a*) that unless the judgment debtor satisfies the Court that there is reason to believe that the amount of the decree may be raised by mortgage, lease or private sale of the mortgaged land or of any other immovable property of such debtor, the Court cannot stay execution in order to allow him time for payment, and

(*b*) that the time granted cannot exceed six months.

The power of the Court under Section 343 of the Civil Procedure Code in a proper case to grant an adjournment of the sale on an application made by the owner of the mortgaged property is not affected by the modification. Having regard to the circumstances set out in the affidavit of the petitioner we are of the view that this is a case in which relief should be afforded.

We accordingly direct an adjournment of the sale fixed for 17th December 1959 to 17th February, 1960 on condition—

(*a*) that the petitioner pays before 4 p.m. today to the Proctor of the judgment-creditor the sum of Rs. 7,000/-, and

(*b*) that the petitioner pays the advertisement and the auctioneer's charges on or before 24th December 1959.

If the amount due to the judgment-creditor is not paid on or before 17th February 1960 then the sale should take place after advertisement if the judgment-creditor considers it necessary. If the judgment-debtor pays the amount due on the decree to the judgment-creditor after the judgment-creditor has incurred expenses in advertising the sale, then he should also pay such additional expenses to the judgment-creditor and also the auctioneer's charges. The Registrar of this Court is directed to issue an order for the stay of the sale on the production of a receipt for a sum of Rs. 7,000/- from the Proctor of the judgment-creditor.

DE SILVA, J. *Relief granted.*

I agree.

* For Sinhala translation see Sinhala section vol. 1 part 5 p. 17

Present: **Basnayake, C.J., de Silva, J., Sansoni, J., H. N. G. Fernando, J. and T. S. Fernando, J.**

KARUNAWATHIE MENIKE *vs.* EDMUND PERERA

S. C. No. 541—*D. C. Kandy No. P.* 5029

Argued on: July 5, 6 *and* 7, 1960.
Decided on: November 11, 1960.

Kandyan Law—Intestate succession—Child of diga married parents dying unmarried and without issue —Does property inherited from his mother devolve on father or on brothers and sisters.

Held : (By a majority decision BASNAYAKE, C.J. and DE SILVA, J. dissenting): That on the death (before the coming into operation of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938) of a Kandyan unmarried and without issue, leaving surviving him his brothers and sisters and his diga married father, his deceased mother's immovable property, which she acquired by purchase before her marriage in diga and which he inherited on her death, goes absolutely to his father and not to his brothers and sisters.

Authorities referred to : *Armour's Grammar of the Kandyan Law (Ed. by Perera)*
Sawers' Digest of the Kandyan Law (Ed. by Modder)
D'Oyly—A Sketch of the Constitution of the Kandyan Kingdom
Niti Niganduva
Modder—The Principles of Kandyan Law
Hayley—The Laws and Customs of the Sinhalese
Marshall's Judgments
Appuhamy v. Silva, 56 N.L.R. 247.
Chelliah v. Kuttapitiya Tea and Rubber Co. Ltd., 34 N.L.R. 89.
Appuhamy v. Hudu Banda, 7 N.L.R. 242.
Bungappu v. Obias Apphumay, 2 Browne 286 (1901).
Bisona v. Janga and Others, 41 C.L.W. 40.
Ranhotia v. Bilinda, 12 N.L.R. 111.
Ran Menika v. Mudalihamy, (1913) 2 C.A.C. 116.
Appuhamy v. Dingiri Menika, 9 S.C.C. 34.
Dingiri Menika v. Appuhamy, 10 N.L.R. 114.
D. C. Kandy No. 23620—*Austin p.* 155
In re the Estate of Punchi Banda, (1907) 2 A.C.R. 29.
Ukkuhamy v. Bala Etana, 11 N.L.R. 226.
Kiri Menika v. Mutu Menika, 3 N.L.R. 376.
Bourne v. Keane, 1919 A.C. 815.
Bishop of London v. Ffytche, (1782) 1 Brown P.C. 211.

B. S. C. Ratwatte with *D. C. W. Wickremasekera* for the defendant-appellant.

H. W. Jayawardene, Q.C., with *M. Rafeek* and *C. P. Fernando* for the plaintiff-respondent.

BASNAYAKE, C.J.

This appeal was argued before de Silva J. and myself on 7th December 1959. As there are conflicting decisions on the question of Kandyan Law arising on this appeal and as some of the decisions are not in harmony with the law as stated by Sawers and D'Oyly and declared by the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938, under Section 51 of the Courts Ordinance, I made order that this case shall be heard by five Judges of this Court.

The question for decision is whether on the death of a Kandyan unmarried and without issue, leaving surviving him his brothers and sisters and his diga married father, his deceased mother's immovable property which she acquired by purchase before her marriage in diga and which he inherited on her death goes absolutely to his father or to the brothers and sisters subject to a life interest in favour of the father.

Learned counsel for the appellant sought to canvass the decisions of this Court which are not consistent with the law as stated by Sawers.

It is common ground that Bandara Menika and Ukku Banda were husband and wife and were married in diga on 7th August 1899. At the time of her marriage Bandara Menika was the owner of the land in dispute by right of purchase from Tikiri Mudianse on deed P3 of 30th August 1892. On her death it devolved on her five children Muttu Banda (1/5), Kumarihamy (1/5), Kamalawathie (1/5), Ran Banda (1/5) and Karunawathie (1/5) in equal shares. Muttu Banda died on 7th October 1931 unmarried and issueless. On his death Ukku Banda claimed that he became entitled to his deceased son's share in the property inherited from

his mother and sold it to the plaintiff by deed P6 of 16th May 1932. The plaintiff also purchased the shares of Kumarihamy (1/5) by P7 of 17th April 1930, Kamalawathie by P8 of 16th January 1933, Ran Banda by P9 of 12th January 1935 and Karunawathie by P10 of 12th August 1940. By deed D1 of 13th August 1942 the plaintiff transferred to the defendant the 1/5 share purchased on P10 from Karunawathie Menika. The defendant disputes Ukku Banda's right to inherit the maternal property of his son and asserts that Muttu Banda's (1/5) share devolved on his brother and sisters.

In the instant case the learned District Judge has held that the father inherits the property absolutely on the authority of the case of *Appuhamy* v. *Silva*, 56 N.L.R. 247. In that case Gratiaen J. held that the father succeeded absolutely on the footing that the decision in *Chelliah* v. *Kuttapitiya Tea and Rubber Co. Ltd.*, 34 N.L.R. 89, was an authoritative decision on the point. I find myself unable to agree with his view that that is an authoritative decision. Garvin J. expressly states after quoting section 33 of Sawers Digest and referring to the case of *Appuhamy* v. *Hudu Banda*, (1903) 7 N.L.R. 242:

> "There seems no reasons to doubt that a diga married father is at least entitled to a life interest in the landed property of a deceased child, which such child inherited through his mother. Kiri Menika is therefore entitled at least to a life interest in the lands involved in the action."

> "It was submitted, however, that he is entitled to inherit such deceased child's property without any limitation, it being premised that such child died without issue. This is a point upon which the Kandyan law is far from being clearly ascertained and *I am not sure that it is necessary for the purposes of this case to decide the question.*"

He then goes on to say:

> "Inasmuch however as the question has been raised and argued at some length it is perhaps desirable that we should express our views upon the point."

It is clear from these words that the Judges did not purport to do more than express their views on the point as it had been raised and argued at length. On the facts of the case before him Garvin J. said:

> "....In this particular case since the property of the child was originally that of her grandfather it may well be that in the absence of closer relations of the intestate child's mother, the father would be preferred to the children of the child's mother's sisters who by contracting *diga* marriages had excluded themselves from participating in that inheritance."

Garvin J. makes no reference in this Judgment to the case of *Bungappu* v. *Obias Appuhamy*, 2 Browne 286 (1901), which is a judgment of two Judges and was decided before *Appuhamy* v. *Hudu Banda* (*supra*) to which he refers. In Bungappu's case Moncreiff J. with Browne J. concurring states:

> "By Kandyan Law, on the death of a person without issue leaving parents, brothers, and sisters, the usufruct of his acquired proerty goes to his parents, and in this case the usufruct of Appuhamy's acquired property went to Dingiri Menika, the mother."

This is a clear decision and is in point. Though it deals with acquired property the rule of succession of the parents is the same in the case of inherited property. The judgment refers to the passages of Sawers and Marshall quoted below.

In the case of *Appuhamy* v. *Hudu Banda* (*supra*) Middleton J. following Sawers but independently of *Bungappu* v. *Obias Appuhamy* (*supra*) formed the view that the diga married father derived only a life interest in the immovable property of his deceased son dying intestate and issueless and leaving brothers and sisters. In *Bisona* v. *Janga and others*, 41 C.L.W. 40, I followed that decision in preference to the case of *Ranhottia* v. *Bilinda*, (1909) 12 N.L.R. 111. In *Ranhottia*'s case the Court followed the view of Armour in preference to the view contained in section 96 of Marshall's Judgments. Even, assuming that what appears in section 96 of Marshall is the view of Sawers the reason for preferring Armour to Sawers is not stated. In *Ran Menika* v. *Mudalihamy*, (1913) 2 C.A.C. 116, and *Appuhamy* v. *Dingiri Menika*, 9 S.C.C. 34, the opinions of Marshall and Sawers were preferred to Armour's. Grenier J. who wrote the judgment in *Ranhottia's* case observes:

> "It will thus be seen that there is a direct conflict between *Sawer* and *Armour* in regard to the question whether the *acquired property* of a son goes to the father or to the brothers and sisters. According to *Armour*, where both father and mother are alive, and one of their sons dies unmarried, childless, and intestate, his *acquired property* goes absolutely to the mother to the exclusion of the father, and it is only in the event of the mother having predeceased her son that the father becomes entitled to the property. I need hardly say that *Armour's* opinion is not based upon any positive rule of the Kandyan Law to be found in any standard authority on the subject, nor is *Sawer's* opinion, on the other hand, based on any such authority. But dealing as we are with a system of primitive law and custom such as obtains amongst Kandyans, I am inclined to think that the District Judge was right in following the opinion of *Armour* rather than of *Sawer*."

The two statements referred to by Grenier J. are *Armour* (Perera at p. 88-89) and *Marshall*, section 96. Though he refers to Sawers, p. 13, I have not been able to trace at that page in Modder's edition the passage he had in mind. They are as follows :-

> *Armour*—"The mother is the heiress to the acquired property of all kinds, left by her child who died unmarried and without issue and intestate and such property will be entirely at her disposal. The mother is entitled to all the movable property left by her daughter who died a widow, childless, and intestate, to the exclusion of the deceased

daughter's full sisters and their issue. If the mother had departed this life, previous to the demise of her child, then the father will be entitled to the reversion of the deceased child's acquired property, if circumstances did not disqualify the father from coming to the succession."

Marshall, section 96—"If a person die childless, but leaving parents, brothers and sisters, the property which the deceased may have received from his or her parents reverts to them respectively (if from the father, to the father, if from the mother to the mother) and his acquired property, whether land, cattle or goods, also goes to his parents, but only the usufruct of it. The parents cannot dispose of such acquired property by sale, gift or bequest, but it must devolve on the brothers and sisters, who however, have only the same degree of interest in their deceased brother's acquired property that they have in their deceased parent's estate, ultimately it is divided equally among the brothers of the whole blood of the deceased, or their sons according to what would have been their father's share; failing brothers' sons, it goes to sisters of the whole blood or their sons, failing them, to the brothers of the half-blood, uterine, and their children, failing them, to the sisters of the half-blood, uterine, and their children, failing both brothers and sisters of the half-blood uterine and their children, to brothers of the half-blood by the father's side and their children, next to sisters of the half-blood, by the father's side and their children, next to the mother's sister's side, that is to say, the mother's sister's children (see the latter part of par. 91), failing them, to the mother's brothers and their children, next to the father's brothers, and their children, and, failing them, to the father's sister's and their children."

The only other passage in Armour which has a bearing on the question before us though it does not deal with a case in which the deceased son leaves brothers and sisters is that at Perera p. 76. This is what he says:

'The father is entitled to inherit the lands and other property, which his deceased infant child had inherited from the mother, in preference to the relations of the person from whom that property had been derived to the said child's mother."

The judgment of Grenier J. is itself not a strong expression of opinion in the Kandyan Law. The report does not show that the case of *Appuhamy* v. *Hudu Banda* (*supra*) was cited or considered. Nor does the earlier case of *Dingiri Menika* v. *Appuhamy* 10 N.L.R. 114, show that the view taken in *Appuhamy's* case was considered. *Dingiri Menika's* case itself does not appear to be an authoritative expression of opinion. This is what Wendt J. says:

"In this unsatisfactory state of the authorities, the learned District Judge, whose long administration of the Kandyan Law in the District Courts of Kandy and Kurunegala entitled his opinion on a controverted point to very great weight, has accepted the view adopted in the case of *Austin*. No decided case distinctly negativing the father's right, which was there recognised, has been brought to our notice, and I think the judgment of the Court below should be affirmed."

The report of the case in Austin p. 155 is very meagre and deals with the succession to paternal property a case the facts of which are entirely different from the one before us and does not apply to it, the conflict of claims there being between the father of the deceased child and the children of her deceased grandaunt. It reads "Sorana was the original proprietor of a certain land. He had a sister called Poossamba, and a daughter (who was married to plaintiff) called Rangkiry. At Sorana's death, the daughter succeeded to the land; and on the death of the latter, her daughter Belinda (born to plaintiff) became entitled to the same. She however also died shortly after, and her father in this suit claims the land as sole heir-at-law. The defendants are the children of Poossamba (Rangkiry's paternal aunt). The Court below held that the father was the heir-at-law of his child". In appeal it was affirmed.

Sawers and Armour contain the only extant collections of the customs of the Kandyans. The subsequent works of Modder and Hayley cite Sawers and Armour as authorities. Marshall's exposition based on Sawers and Armour has also come to be regarded as authoritative. The only other statement of Kandyan law is the Niti Niganduwa. There is nothing in it which contradicts Sawers or which is directly in point on the question before us. It would appear from the observations of Dias J. in *Appuhamy* v. *Dingiri Menika*, 9 S.C.C. 34, that Marshall's opinions on Kandyan law were treated as of great weight as far back on 1889. The case of *In re the Estate of Punchi Banda*, (1907) 2 A.C.R. 29, decides that the diga married father of an intestate dying without issue is entitled to inherit, before the uterine half-sisters and brothers of his deceased mother, the property derived from his mother, which she in turn inherited from her father. This is also not decisive of the point before us. *Ukkuhamy* v. *Bala Etana*, (1908) 11 N.L.R. 226, decides that when a Kandyan dies unmarried intestate and without issue his acquired immovable property devolves on his mother (the father being dead) in preference to the deceased's brothers and sisters. In this state of the decisions of this Court none of which can be regarded as authoritative decisions we must turn to the writers on Kandyan law such as Sawers, Armour and Marshall. Of these Sawers and Marshall are regarded as being more authoritative than Armour. Of Sawers Laurie J. who himself was an authority on Kandyan Law and whose opinion on questions of Kandyan Law has always been regarded with respect says in *Kiri Menika* v. *Mutu Menika*, 3 N.L.R. 376, at 378, "I regard Sawers as the best authority on Kandyan Law. He was Judicial Commissioner of Kandy from 17th August, 1821, until he retired on pension on 3rd July, 1827". Of Armour the

same Judge says, at p. 379 "Mr. Armour's opinion has not the same weight as Mr. Sawers', for he was not a Judge; he was appointed Interpreter to the Judicial Commissioner in October, 1819; afterwards he was Secretary to the Judicial Commissioner's Court, an office which he held when Mr. Sawers was the Commissioner." Of Armour's work Laurie J. says "Armour's grammar of Kandyan Law (first published in the Ceylon Miscellany in 1842) is mainly a translation of the Niti Niganduwa."

The following is what Sawers says on the point arising in this case (s. 33, p. 12) :—

> "A wife dying intestate, leaving a son who inherits her property, and that son dying without issue, the father has only a life interest in the property, which the son derived or inherited from or through his mother. At the father's death, such property goes to the son's uterine brothers or sisters, if he have any, and failing them, to the son's nearest heirs in his mother's family".

Earlier he had said in s. 29, p. 10 :-

> "Failing immediate descendants, that is, issue of his own body by a wife of his own or higher caste, a man's next heir to his landed property, (reserving the widow's life interest) is his father, or if the father be demised the mother, but this for a life interest only or on the same conditions as she holds her deceased husband's estate, which is merely in trust for her children; next, the brother or brothers and their sons; but failing brothers and their sons, his sister or sister's son succeeds."

Marshall adopts the view of Sawers. In his treatise he says :-

> "79. Failing immediate descendants, that is, issue of his own body by a wife of his own or of higher caste, a man's next heir to his landed property (reserving the widow's life interest) is his father, or if the father be dead, the mother, but for a life interest only " (*Marshall*, p. 338).
>
> "83. If a wife die intestate, leaving a son who inherits her property, and that son die without issue, the father has only a life interest in the property which the son derived from or inherited through his mother. And at the father's death such property goes to the son's uterine brothers or sisters, if he have any, and, failing them, to the son's nearest heirs in his mother's family." (*Marshall*, p. 340).

Even John D'Oyly confirms the view that the parents get only a life interest. See D'Oyly, p. 105:

> "*N.B.* The Chiefs say that both Parents have an equal life interest only in the property—the property must. ultimately go the the brother.
>
> "If he leave only a Father and Brothers, his land and goods to his Father—for life only.
>
> "If he leave only a Father, Sister or Sister's son, the same—for life only.
>
> "If a man die leaving Father and Mother and Brothers and Sisters, property acquired from either of his parents reverts—if he has no Father, both to his Mother—if no Mother, both to his Father.
>
> "But only a life interest—It must be kept for the Brothers and for the Sisters married in Binna."

The following statement in the Niti Niganduwa at p. 111 supports the view that the father has only a life interest: "Again, inasmuch as the property of the mother is, on her death, inherited by her child or children, if she dies leaving her husband, he may, on behalf of the children, take care of the lands etc. so inherited, but he cannot appropriate or alienate any portion of them."

The fact that the view I have expressed above has been adopted by the Legislature in section 16 of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938 when enacting that piece of Legislation, to my mind, reinforces the conclusion I have reached. As the Kandyan Law Commission did not recommend any change in the diga widower's right to the acquired property of his deceased wife (s. 256-269, Report of the Kandyan Law Commission), Section 16 may be rightly regarded as a declaration and not an amendment of Kandyan Law.

I therefore set aside the judgment of the learned District Judge and direct that the shares of the respective parties be determined according to the law as stated herein and that decree be passed accordingly.

DE SILVA, J.
I agree.

SANSONI, J.

The question for decision is whether property which a Kandyan child of diga married parents inherited from his mother devolves, on his death unmarried and without issue, on his father or on his brother and sisters.

It has been recognised long ago that the institutional writers Sawers and Armour did not express any decided or clear opinion on the point. Sawers at page 8 of Campbell's edition says: "Failing immediate descendants, that is, issue of his own body by a wife of his own or a higher caste, a man's next heir to his landed property, (reserving the widow's life interest) is his father, or if the father be demised, the mother, but this for a life interest only, or on the same condition as she holds her deceased husband's estate, which is merely in trust for her children; next the brother or brothers and their sons; but failing brothers and their sons, his sister or sister's son succeeds". This passage has been commented on in Modder's Kandyan Law (1914 edition) at page 599 in the following terms: "It is noticeable that while Sawers restricts the mother's right to a usufruct, it does not subject a father's claim to any limitation whatsoever, but leaves it unqualified and absolute." Modder also

cites it as authority for the following statement at section 307: "Property, inherited from his or her mother or maternal ancestors by a person dying childless and intestate, will devolve on his or her heirs on the mother's side in the following order: (1) the diga married father, (2) brothers and sisters of the full blood equally, and their issue per stirpes." Modder also remarks at page 490 that although Sawers does not expressly state that it is a condition precedent to the father's inheriting that he should have been married in diga, the dictum should be understood as implying a marriage in diga which was the most common form of marriage.

In *Ukkuhamy* v. *Bala Etana*, (1908) 11 N.L.R. 226, Wendt, J. agreed with the view of Lawrie, J. that his passage in Sawers refers to the paraveni property of the person: he also pointed out that it deals with a case in which all the degrees of relationship are represented.

In *Dingiri Menika v. Appuhamy*, (1907) 10 N.L.R. 114, there was a contest between a diga married father and the mother's half brothers and sisters with regard to property which the deceased child inherited from his mother. The District Judge had held that the father was the sole heir, following the Supreme Court decision in D.C. Kandy No. 23620, (1852) Austin 155. Wendt, J. referred to the passage at page 8, which I have already quoted, and pointed out that a difficulty was created by another passage at page 9 of Sawers which reads: "A wife dying intestate, leaving a son who inherits her property, and that son dying without issue, the father has only a life interest in the property which the son derived or inherited from or through his mother; at the father's death such property goes to the son's uterine brothers or sisters, if he have any, and failing them to the son's nearest heirs of his mother's family." Wendt, J. then cited Armour (Perera's edition page 76), who said that "the father (by jataka uruma) is entitled to inherit the lands and other property which his deceased infant child had inherited from the mother, in preference to the relations of the person from whom that property had been derived to the said child's mother." While remarking that the authorities were in an unsatisfactory state, Wendt, J. adopted the view of the District Judge whose experience of the administration of the Kandyan Law entitled his opinion to very great weight. He also remarked that no decided case negativing the father's right had been brought to their notice. Middleton, J. agreed with Wendt, J. and this is significant, because in *Appuhamy* v. *Hudu Banda*, (1903) 7 N.L.R. 242, Middleton, J. had previously held that a diga married widower was entitled only to a life interest in property which his deceased children had inherited from their mother. In his judgment in that case, which was that of a single Judge, Middleton, J. referred to the passages at page 9 of Sawers, and page 76 of Armour, but not to the passage at page 8 of Sawers.

The father's claim to an absolute estate even in his child's acquired property was upheld in *Ranhotia* v. *Bilinda*, (1903) 12 N.L.R. 111. Mr. Hayley in his book on Kandyan Law, published in 1923, doubted the correctness of the decisions in *Ukkuhamy* v. *Bala Etana*, (1908) 11 N.L.R. 226 and *Ranhotia* v. *Bilinda*, (1909) 12 N.L.R. 111 but the view taken earlier has always prevailed.

The question was again raised, after a lapse of 25 years, in *Chelliah* v. *Kuttapitiya Tea and Rubber Co.*, (1932) 34 N.L.R. 84. Garvin, J., with whom Jayawardene, A.J. agreed, considered the question whether property which a Kandyan inherited from her mother devolved on her father or on her maternal cousins. It may be that it was not necessary to decide the question in that case, but it was raised and argued at some length. Garvin, J. referred to the earlier authorities, which I have already mentioned and said: "The weight of judicial decision would seem to favour the view that the father is heir to the property of his child who dies intestate and without issue, not merely to a life interest therein but to the full dominium."

Finally in *Appuhamy* v. *Silva*, (1955) 56 N.L.R. 247, Gratiaen, J. (with whom I agreed) followed the ruling in *Chelliah* v. *Kuttapitiya Tea and Rubber Co.* (1909) 12 N.L.R. 111. We were there invited to reconsider the question in view of the decision of Basnayake, J. (as he then was) in *Bisona* v. *Janga* (1948) 41 C.L.W. 40, where it was held that the father inherited only a life interest in his child's property. Gratiaen, J. in his judgment said that it was "not at all desirable to disturb a long-established ruling on any question affecting rights of succession."

Most of the judges who have had to consider whether a father inherited only a life interest or an absolute interest in property which his deceased child had inherited from the mother have admitted that it was not an easy matter to decide, but a decision had to be made and it was made many years ago. On such a matter "it was more important that the applicable rule of law be settled than that it be settled right" as Brandeis, J. once observed. In *Bourne* v. *Keane*, (1919) A.C. 815, Lord Buckmaster said that when decisions upon which title to property depends have been accepted for a long period of time they should not be altered even by the House of Lords unless it could be said positively that they were wrong and productive of inconvenience.

Whatever may be the better view it is clear that for at least fifty years this Court has, save for one instance, consistently held that the father succeeds to the full dominium. The profession and the public would have acted on that basis, and I think we would be doing grave injustice to many persons if we were now to disturb the law as laid down by successive generations of judges.

I would dismiss this appeal with costs.

H. N. G. FERNANDO, J.

I agree with the reasons given by my brother Sansoni (whose judgment I have had the opportunity of reading) for declining to reconsider the view maintained in a series of decisions of this Court upon the question of law arising in this appeal. The Legislature had a clear opportunity when the Kandyan Law Declaration and Amendment Ordinance of 1938 was enacted, to declare retrospectively that the law on this question should not be taken to have been what those decisions had stated it to be. The circumstance that this opportunity was not availed of is an additional reason why I do not feel disposed to overrule the view which this Court has hitherto upheld.

T. S. FERNANDO, J.

I have had the advantage of reading the judgment prepared by my brother Sansoni and, as I find myself in agreement with him that this appeal should be dismissed, I shall content myself by setting down shortly the reasons for my conclusion.

The question for decision is whether on the death on 7th October 1931 of a Kandyan unmarried and without issue, leaving surviving him his brothers and sisters and his diga married father, his deceased mother's immovable property which she had acquired by purchase before her marriage in diga and which he had inherited on her death goes (a) absolutely to his father or (b) to his brothers and sisters subject to a life interest in favour of his father.

This question has to be decided according to the law relating to intestate succession to property among the Kandyans as it obtained on 7th October 1931. Had the question been one of application of the law declared as having effect on and after 1st January 1939 it would have had to be decided in accordance with the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, section 16 of which enacted as follows :-

> "If a person shall die intestate after the commencement, of this Ordinance leaving him or her surviving parents whether married in binna or in diga, or a parent, but no child or descendant of a child and no surviving spouse, then—
>
> (a) the parents in equal shares, or if one only be alive, then that one shall, if there be surviving any brother or sister of the deceased or the descendant of a brother or sister, be entitled to a life-interest in the acquired property of the deceased. The right of a sole surviving parent shall arise and continue whether or not the other parent shall have died before the deceased intestate . . . . . ."

The relevant law has from and after 1st January 1939 therefore been settled by legislation but, as evidenced by the need for the constitution of this Divisional Court, when the question has to be decided in accordance with the law as understood before that date difficulties arise on account of certain differences of opinion to be gathered from reported decisions of the Supreme Court. In view of the approach to the problem that has commended itself to me it does not appear to me, to be necessary to examine decisions of the Court that have been delivered in the very distant past, and I shall examine only those decisions that date from about fifty years ago.

In the year 1907, a bench of two judges of this Court (Wendt, J. and Middleton, J.) in *Dingiri Menika* v. *Appuhamy* (1907) 10 N.L.R. at 144 upheld the view of the law that has been applied by the District Judge against whose judgment the present appeal has been preferred. In doing so Wendt, J. observed as follows :-

> "In this unsatisfactory state of the authorities, the learned District Judge, whose long administration of the Kandyan Law in the District Courts of Kandy and Kurunegala entitles his opinion on a controverted point to very great weight has accepted the view adopted in the case of *Austin*, (1852) Austin's Rep., p. 155. No decided case distinctly negativing the father's right which was there recognised has been brought to our notice, and I think the judgment of the court below should be affirmed."

Middleton J. (who had in the earlier case of *Appuhamy* v. *Hudu Banda*, (1903) 7 N.L.R. p. 155 taken the opposite view) in agreeing with Wendt J.'s decision stated:-

> "I agree that in view of the conflicting character of the original authorities we should affirm the learned District Judge's judgment following the case reported in Austin, p. 155, and hold that a diga-married father of an intestate dying wihout issue is entitled to inherit before the uterine half-sisters and brother of his deceased mother the property derived from his mother which she, in turn, had inherited from her father."

In the following year, 1908, Wendt J. in *Ukkuhamy* v. *Bala Etana* 11 N.L.R. at 226, held that where a Kandyan dies unmarried, intestate and without issue his acquired immovable property devolves on his mother (the father being dead) in preference to his (deceased's) brothers and sisters. Wendt, J. for reasons he has set out in that judgment did not consider that the case of *Bungappu* v. *Obias Appuhamy*, (1901) 2 Br. at 286, embodies an authoritative decision.

In 1909, a bench of two Judges (Hutchinson, C.J. and Grenier, J.) in *Ranhotia* v. *Bilinda* (1909) 12 N.L.R. 111, after referring to the conflict between the statements contained in *Sawer's Digest* and in *Armour* stated that it seems right that in case a son dies unmarried, childless and intestate, his acquired property should go to his father to the exclusion of his brothers.

This same question was raised in a case—*Chelliah* v. *Kuttapiyita Tea and Rubber Co.* ((1932) 34 N.L.R. 89 at 97, that was decided by Garvin, S.P.J. and Jayawardene, A.J. some 23 years later. The question before the Court in that case was whether a father is heir to his child born in a diga connection in respect of landed property inherited through the mother who inherited in virtue of her retention or re-acquisition of her rights of inheritance to her father's estate. Garvin, S.P.J. was not sure whether it was necessary for the purpose of the case before him to decide the question that is now before us, but as this latter question had been raised and argued at great length he thought it was perhaps desirable that the Court should express its view. Having entered thereafter upon a consideration of previous decisions and other authorities he went on to say:-

> "The weight of judicial decision would seem to favour the view that the father is heir to the property of his child who dies intestate and without issue not only to a life interest therein but to the full dominium. While I am myself inclined to think that it is more in keeping with the principles of intestate succession so far as they are discernible in the Kandyan Law that the father should take only a life-interest in the property which his deceased child inherited from his mother the balance of judicial decision is the other way."

Even if the view be taken that the statement reproduced above has to be considered as an *obiter dictum*, nevertheless the observations of a judge of the eminence of Garvin, S.P.J. must carry great weight. It is significant that after 23 years went by, in 1955, another bench of two judges (Gratiaen, J. and Sansoni, J.) in *Appuhamy* v. *Silva* followed the opinion expressed by the judges who decided *Chelliah's case* (*supra*) and applied it to the case before them. In doing so, the Court declined to accede to an invitation to review the question as if it were *res integra*. Nor did the Court think it appropriate that the controversy should be revived by the convening of a Collective Court, notwithstanding a decision in 1948 (*Bisona* v. *Janga*, 41 C.L.W. at 40), to a contrary effect, Gratiaen J. stating that it is not at all desirable to disturb a long-established ruling on any question affecting rights of succession. As a great judge (Lord Mansfield) said nearly a hundred and eighty years ago in *Bishop of London* v. *Ffytche*, (1782) 1 Brown P.C. 211. "They had heard very strongly upon the other side arguments to the contrary; and certainly it might have admitted of a difference of opinion; but since it has been judicially established, there is a period when it is wiser, better and safer not to go back to arguments at large. He did not know where it would lead to. . . . .The object of the law is certainty, especially such parts of the law as are of extensive and general influence, which affect the property of many individuals and which inflict pecuniary penalties; which create personal disabilities; and which work forfeitures of temporal rights." That certainty has been ensured for us by the legislature where the question of succession now before us is to be decided as on, or, after 1st January 1939. Where it arises for decision as at an earlier date, there should be no less certainty and our duty appears to be to apply the law that has been applied since 1907, i.e. for more than half century, rather than disturb it.

For the reasons which I have set out above the judgment of the District Court should in my opinion be affirmed and this appeal dismissed with costs.

Appeal dismissed.

Present: **T. S. Fernando, J.**

FERNANDO *vs.* THE GOVERNMENT AGENT, KANDY*

S. C. No. 21 *of* 1960—*M. C. Panwila No.* 1307.

Argued on: 31*st August*, 1960
Decided on: 13*th September* 1960.

Motor Traffic Act, 1951—*Charge under section* 25 *for failure to give notice of non-user of motor vehicle—Vehicle liable for tax under Heavy Oil Motor Vehicles Taxation Ordinance*, (*Cap* 190)—*Application to Government Agent for waiver of heavy oil tax as from December* 1956 *as the vehicle was being "scrapped"—Grant of waiver by Government Agent after ensuring that vehicle is dismantled—Notice of non-user for* 1957—*Charge for failure to give notice of non-user for* 1958—*Is charge maintainable.*

*For Sinhala Translation, see Sinhala section, vol. I, part 5, p. 18

The appellant was charged with and convicted of possessing on 1-1-58 a motor lorry bearing number I.C. 512 for which revenue licence was not in force, a contravention of Section 25(1) of the Motor Traffic Act of 1951.

The defence established that the appellant, being liable, in addition to the tax payable for the annual licence, for the tax imposed under the Heavy Oil Motor Vehicles Taxation Ordinance (Cap. 190) applied to the Government Agent for a waiver of heavy oil tax as from 15-12-56 as the vehicle was being "scrapped". The Government Agent, after being satisfied on investigation that the vehicle was dismantled granted the waiver asked for.

The appellant gave notice of non-user for 1957 as required by section 37 of the Act. The prosecution conceded the validity of the said notice for 1957, but appears to have contended in the Magistrate's Court that the appellant failed to apply for cancellation of the registration under Section 18 of the Act.

The learned Magistrate stated that, if the vehicle was unserviceable, it was for the appellant as its registered owner to get the registration cancelled, and convicted the appellant.

Held : That, in the circumstances, the charge could not be maintained against the appellant as what the appellant possessed on 1.1.58 were the parts of a dismantled lorry, which had ceased to be a motor vehicle as contemplated by the Act.

No appearance for the accused-appellant;

M. M. Kumarakulasingham, as *amicus curiae*, at the instance of the Court;

T. M. K. Seneviratne, Crown Counsel, for the Attorney-General.

T. S. FERNANDO, J.

This appeal raises a point of some interest to owners of motor vehicles, particularly motor vehicles which have become unserviceable.

The appellant is the registered owner of motor lorry bearing distinctive number IC. 512, the date of the first registration being 16th August, 1949. Being a heavy oil motor vehicle, the appellant as registered owner was liable to pay, in addition to the licence fee for the yearly revenue licence under the Motor Traffic Act, 1951, the tax imposed by the Heavy Oil Motor Vehicles Taxation Ordinance (Cap. 190). On 27th October, 1956, he applied to the Government Agent for a waiver of the heavy oil tax as from 15th December, 1956 "as the vehicle is being scrapped"—to use the language of the appellant appearing in his application. The Government Agent caused an investigation to be made by the Police into the condition of the vehicle and waived the tax as from 15th December, 1956, and that tax has not been claimed thereafter from the appellant.

The appellant gave notice of non-user for the year 1957 as required by section 37 of the Motor Traffic Act, 1951. He failed to give a similar notice in respect of the year 1958, but he has again given (on 30th December 1958) notice of non-user P. 2 in respect of the year 1959. In P. 2 which is the printed form supplied by the licensing authority, the appellant states that he does not intend to use the vehicle "because the vehicle has been scrapped." The charge framed in the present case against the appellant was that of possessing on 1st January 1958, motor lorry bearing number IC. 512 for which a revenue licence was not in force, a contravention of section 25(1) of the Act. In view of the charge which related to the lack of a revenue licence for the year 1958, a notice of non-user for 1959 is irrelevant. There was admittedly no notice of non-user given for 1958, but the prosecution conceded that for the previous year (1957) a valid notice of non-user had been given to the licensing authority. This notice must have been given before 1st January 1957, but it was not produced by the prosecution. Had it been produced, the Court, would have been in a position to examine the reason, if any, given by the appellant for the non-user. This notice must have been given about the time the appellant made application for a waiver of the heavy oil tax in which application made in October, 1956, he referred to the imminent scrapping of the vehicle. Whether or not the appellant referred in the notice of non-user in respect of the year 1957 to the scrapping of the vehicle, it has been proved in this case that the licensing authority had been informed of the scrapping of the vehicle and had caused an investigation to be made into the condition of the vehicle. The investigation was made by Police Constable Dharmalingam who testified that he made an inspection of the vehicle in 1956 at the Government Agent's request and found that the lorry had been dismantled, that it was not serviceable and that it was not possible in his opinion to make it serviceable. The Village Headman of the area also testified that the lorry was unserviceable and that he had not seen the lorry running on the road in 1958. On the evidence in the case the only finding that could have been reached in regard to the condition of this motor vehicle in 1958 was that it was not serviceable.

Section 18 of the Act requires the Registrar to cancel the registration of a motor vehicle if he is satisfied that the vehicle has been permanently removed from Ceylon, or destroyed, or dismantled and broken up or otherwise rendered permanently unserviceable. The prosecution appears to have contended in the Magistrate's Court that the appellant failed to apply for cancellation of the registration referred to in section 18, and the learned Magistrate in his order states that if the vehicle is unserviceable it is for the registered owner to get the registration cancelled "thereby putting once and for all an end to any doubt that he is in possession of that vehicle which is unserviceable." It is not necessary for the purposes of the present appeal to consider the question whether a cancellation of the registration of a motor vehicle must be preceded by an application therefor made by the registered owner. The prosecution in this case relying on sections 16 and 17 of the Act under which the registered owner for the time being is deemed to be the owner of the motor vehicle claimed to maintain the charge framed against the appellant on the sole circumstance that he had failed to give notice of non-user for the year in question, viz. 1958. As the only finding of fact which the Court could have reached on the evidence in the case in regard to the condition of the "vehicle" was that it had been either dismantled or rendered unserviceable, that finding in my opinion disposed of the allegation in the charge that the appellant possessed this *lorry* on the date specified, viz. 1st, January 1958. What the appellant possessed on that date were certain parts of the lorry; he possessed a dismantled lorry, a lorry which had been rendered unserviceable, the circumstances strongly indicating that it had been rendered permanently unserviceable; in short, what the appellant possessed on 1st January 1958 had ceased to be a motor vehicle as contemplated by the Act.

The prosecution, therefore, failed to establish the charge laid against the appellant and he should, in my opinion, have been acquitted. The conviction and sentence are set aside.

I should add that I am grateful for the assistance given by learned counsel who appeared as *amicus curiae* at the instance of the Court.

Conviction and sentence set aside.

Present: **Basnayake, C.J., Pulle, J., and H. N. G. Fernando, J.**

IN RE P. K. ENSA*

Rule Nisi issued under section 47 of the Courts Ordinance (Chapter 6) on P. K. Ensa of Telunpitiya, 21st defendant in D.C. Avissawella Case No. 8708/P re-Contempt of Court.

Dates of hearing: July 30 & 31, 1959.

Undertaking given to Court—No order made embodying such undertaking —Acts in breach of such undertaking—Does it amount to a contempt of Court.

Held : That it is a contempt of court to act in breach of an undertaking given to a court, even though such undertaking is not embodied in an order.

M. Tiruchelvam, Deputy Solicitor-General with *H. L. de Silva*, Crown Counsel as *Amicus Curiae* (on notice).

N. Abeysinghe for Respondent.

BASNAYAKE, C.J.

The respondent Palle Kandelage Ensa the 21st defendant in D.C. Avissawella Partition Case No. 8708, (hereinafter referred to as the respondent), was called upon to show cause why she should not be punished for contempt of Court in that she acted in breach of an undertaking given by her to the District Court of Avissawella.

Shortly the facts are as follows :-

The plaintiffs in their plaint filed on 18th July, 1957, in addition to praying a partition of the land also prayed that the respondent be restrained by Injunction from building on the land. On 27th August 1957 she filed through her proctor Nissanka Perera objections to the application for the injunction. She stated therein that she was renovating a house on the land where she was permitted to reside about 20 years ago by her mother the 12th defendant and asked that the notice be dissolved. The matter was then fixed for inquiry for 5th September 1957. On that day the following minute was made by the District Judge—

"Mr. Perera states that his client has been in possession of a house on this land with the per-

*For Sinhala translation, see Sinhala Section vol. I part 5, p. 19.

mission of her mother Kalu, the 12th defendant and that this house collapsed about a year ago, and she is putting up a house on the same foundation at the instance of her mother. Both counsel move for a date as the Headman who is a very material witness is absent. Allowed.

The 21st defendant undertakes not to continue the building operations pending the result of this inquiry. L.T.I. of 21st defendant."

The inquiry was then refixed for 25th September 1957. On that day too the respondent undertook not to continue the building operations pending the result of the trial. The undertaking is thus recorded by the District Judge—"The 21st respondent undertakes not to continue the building operations pending the result of the trial without prejudice to any rights she may have to the house or to the premises."

It would appear from the petition of the 6th plaintiff petitioner dated 17th October, 1957, that despite this undertaking while the trial was still pending the respondent re-commenced building operations on 10th October. When this petition was filed notice was issued on the respondent for 4th November 1957. On that day she stated "as there was no order restricting me from continuing the building operations in accordance with the law, it is true that I continued the building operations after the undertaking given by me. I am not leading any evidence." Thereupon after hearing Counsel the learned District Judge made order referring the matter of the respondent's contempt to this court. She has appeared in response to a rule *nisi*. She sought to show cause and called witnesses and gave evidence on her own behalf. The evidence proved beyond doubt that the respondent acted in breach of the undertaking, and we accordingly convicted her and sentenced her to three months' rigorous imprisonment at the conclusion of the hearing and stated that we would deliver our reasons later, which we accordingly do now. It is a contempt of court to act in breach of an undertaking given to a court. The law is thus stated in *Oswald on Contempt* (3rd Edn.) p. 108:

"An undertaking entered into or given to the Court by a party or his counsel or solicitor is equivalent to and has the effect of an order of the Court, so far as any infringement thereof may be made the subject of an application to the Court to punish for its breach. The undertaking to be enforced need not necessarily be embodied in an order."

PULLE, J. *Rule made absolute*
I agree. *convicted and sentenced.*

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

Present: **Basnayake, C.J., and de Silva, J.**

DON WILLIAM *v.* SEEMON PERERA & OTHERS

S.C. No. 54—*D.C. No. Panadura* 4388

Deed of gift containing prohibition against alienation—Only persons who would benefit on breach of such prohibition designated—Validity of such prohibition—Entail and Settlement Ordinance, sections 2, 3.

Argued on: September 4 *and* 14, 1959.
Decided on: October 28, 1959.

A gifted a land to his son *B*, reserving a life interest in the property to himself and subject to a condition prohibiting alienation. The deed also designated the persons on whom the property was to devolve in the event of a breach of such condition, but it did not expressly designate the persons for whose benefit the prohibition was provided if the condition was not violated. The question was whether the prohibition was valid in view of the provisions of section 3 of the Entail and Settlement Ordinance.

Held : That in view of the decisions of the Supreme Court on this point, a prohibition such as this must be considered valid.

Followed : *Salonchi v. Jayatu*, 27 N.L.R. 366.

Per BASNAYAKE, C.J.—"Now the way I construe the provision in the second limb of section 3 is that the 'person or persons in whose favour or for whose benefit' the prohibition is made are the persons to whom the property is to pass whether the prohibition is obeyed or not by the person prohibited and not those to whom the property is to pass only in case the prohibition is contravened. . . . . .But as this Court has in a number of decisions held that a prohibition such as that imposed in P1 is valid, I must defer to those decisions by which I am bound."

H. W. Jayawardene, Q.C., with *C. P. Fernando* for plaintiff-appellant.

E. A. G. de Silva for 1st, 2nd, 3rd and 4th defendants-respondents.

BASNAYAKE, C.J.

The only question that arises for decision on this appeal is whether the prohibition against alienation of the land gifted to Wadduwage Seemon Perera by deed No. 137 of 28th September 1942 attested by S. Gunasekera, Notary Public, (P.1), is valid. By that deed Wadduwage Amaris Perera gifted to his son Wadduwage Seemon Perera the land in extent half an acre with two tiled boutiques thereon described in the Schedule thereto reserving to himself a life interest. The material portion of it reads—

"To have and to hold the said premises together with all right easements privileges appurtenances thereunto belonging or used or enjoyed therewith or reputed or known as part parcel or members thereof unto the said Donee for ever subject however to the right of life interest hereby reserved in favour of the said Donor and also subject to the conditions that the said Donee shall not during his natural life sell gift mortgage transfer or lease except for a period of two years at a time or otherwise alienate or encumber the said premises or any part thereof and that if the said Donee should in anywise sell gift mortgage transfer or alienate or lease for a period exceeding two years at a time the said premises or any part thereof the same shall immediately devolve and descend on his sisters Wadduwage Selesthina Perera, Wadduwage Helena Perera and Wadduwage Charlotte Perera and their heirs."

The gift has been accepted by the donee but not by the persons to whom it is to pass on a contravention of the prohibition. Contrary to this prohibition Seemon Perera, while Amaris Perera was still alive, by deed No. 1995 of 3rd March 1947, attested by Victor L. Tilakaratne, Notary Public, (P2), sold to the plaintiff a portion of the land gifted to him by deed P1. Amaris Perera died in July 1954 and the plaintiff instituted this action in September 1954 praying a declaration of title to the land purchased by him on deed P2 and that the defendants Seemon Perera, Selesthina Perera, Helena Perera, Charlotte Perera and two others, be ejected therefrom.

The learned District Judge has held that the prohibition against alienation imposed by P1 is valid and has dismissed the plaintiff's action.

Under the Roman-Dutch law a prohibition such as the one in P1 is valid. Sande (Webber's translation, pp. 173-174) states in his Treatise on Restraints upon Alienation—

"Even although therefore, a prohibition upon alienation contains no reason which is specially expressed, yet if the testator mentions a person to whom he wishes the property to pass, in case it is alienated in breach of the prohibition, such prohibition is valid, and the penalty is enforced."

Is the position different under our law?

The Entail and Settlement Ordinance prescribes the kinds of prohibition against alienation which are not permitted. The relevant sections are 2 and 3. They read—

"2. No prohibition, restriction, or condition against the alienation of any immovable property declared or contained in any will, deed, or other instrument, which shall be executed after the proclamation of this Ordinance, shall be effectual to prevent or restrict the alienation of such property for a longer period than the lives of persons who are in existence or *en ventre sa mere* at the time such will, deed, or instrument is executed and are named, described, or designated in such will, deed or instrument, and the life of the survivor of such persons.

"3. Any such prohibition, restriction, or condition against alienation as aforesaid shall be null and void, so far as it prohibits or restricts alienation for a longer period than that limited in the preceding section. But where the will, deed, or instrument in which any prohibition, restriction, or condition against alienation is contained does not name, describe, or designate the person or persons in whose favour or for whose benefit such prohibition, restriction, or condition is provided, such prohibition, restriction, or condition shall be absolutely null and void."

Now the way I construe the provision in the second limb of section 3 is that the "person or persons in whose favour or for whose benefit" the prohibition is made are the persons to whom the property is to pass whether the prohibition is obeyed or not by the person prohibited and not those to whom the property is to pass only in case the prohibition is contravened. Taking the instant case as an example, the persons in whose favour or for whose benefit the prohibition is provided appear to be heirs or devisees, though they are not named or designated, for, if Seemon Perera died without committing a breach of the prohibition the property would pass to his heirs or devisees and his three sisters would not benefit at all. They would get the property only if the donee contravened the prohibition; but they cannot be said to have benefited by the prohibition. They benefit rather from the breach of the prohibition and not its observance.

The scheme of the enactment is to provide for the imposition of effective restraints against

alienation so that those who execute instruments designed to benefit the children of those to whom they give or leave immovable property may achieve the end in view.

But as this Court has in a number of decisions held that a prohibition such as that imposed in P1 is valid, I must defer to those decisions by which I am bound. It is sufficient to refer to the case of *Salonchi v. Jayatu* (27 N.L.R. 366), which is a decision of a Bench of three Judges, in which it was held that a prohibition against alienation does not fall within the ambit of the second limb of section 3 if it is accompanied by a designation of the person or persons who shall take where the prohibition is wrongfully disregarded and the property is alienated in contravention of the terms of such a prohibition.

Learned counsel for the appellant also contended that deed P1 was invalid for want of acceptance by the 2nd, 3rd, and 4th defendants, the sisters of the donee, to whom the land was to go if the donee contravened the prohibition. This point was neither raised at the trial nor taken in the petition of appeal, and I do not think we would be justified in entertaining and deciding in appeal a question of mixed law and fact not tried in the court below.

The appeal is accordingly dismissed with costs.

DE SILVA, J.

I agree.

Appeal Dismissed.

Present: T. S. Fernando, J.

ARTHUR FERNANDO *vs.* JAYASUNDERA, Sub-Inspector of Police, Maharagama

S. C. No. 520 *of* 1960/*M. C.. Colombo South No.* 99400

Argued on: 22nd July and 10th August, 1960.
Decided on: 22nd August, 1960.

Penal Code S. 315—*Causing hurt by means of corrosive substance—Adequacy of punishment.*

Per T. S. FERNANDO, J.—"The use of corrosive acids like formic and acetic acid as a means of causing hurt is becoming so frequent that it is necessary for the Courts now to reflect on the manner in which those persons convicted of causing hurt to others by employing cruel methods should be adquately punished."

S. B. Lekamage, for the accused-appellant.

V. C. Goonatilleke, Crown Counsel, for the Attorney-General.

T. S. FERNANDO, J.

When this appeal came up for hearing on 22nd July 1960, the accused-appellant was neither present nor represented at the hearing. Upon consideration of the appeal I saw no reason whatsoever to interfere with the conviction. The appellant had been convicted of causing hurt to a man named Saineris by throwing some corrosive acid on his chest, arm and face and had been sentenced to a term of one month's rigorous imprisonment. The use of corrosive acids like formic and acetic acid as a means of causing hurt is becoming so frequent that it is necessary for the Courts now to reflect on the manner in which those persons convicted of causing hurt to others by employing cruel methods should be adequately punished. It appeared to me that the sentence imposed by the learned Magistrate was quite inadequte having regard to the nature of the offence of which the appellant had been convicted. In order to give the appellant a further opportunity of satisfying this Court that the sentence should not be enhanced, I directed that the appeal be relisted for hearing on the question of the adequacy of the sentence after a notice specially served on the appellant. When the appeal came on hearing on 10th August 1960, the appellant was represented by counsel who urged before me that the appellant had (1) hitherto been of good character, (2) as a result of his conviction lost his employment in the service of the Government and, (3) thereby lost his chief source of income which was the mainstay of his large family consisting of his wife and seven children the eldest of whom was but ten years of age. He submitted that the appellant was a foolish, hot-tempered man who had been badly advised to file an appeal in a case where sober reflection would have convinced him he had been somewhat generously treated by the Magistrate in the matter of the sentence.

While I still think that the punishment imposed in this particular case is too lenient, having regard to the submissions of appellant's counsel referred to above by me and the circumstance that the manner in which I have dealt with this case may cause the learned Magistrate to consider in any similar case in the future what punishment is adequate in this type of case, I would refrain from interfering with the sentence already passed and content myself with the dismissal of the appeal.

Appeal Dismissed.

Present: **Sansoni, J., and H. N. G. Fernando, J.**

THE ASSOCIATED NEWSPAPERS OF CEYLON LTD., *vs.* DE SILVA

S.C. No. 223 and 232—D. C. Colombo No. 42945/M.

Defamation, action for—Publication of contents of pleadings—Plea of privilege raised by defendant—Reports of judicial proceedings—Does plea apply to publication of contents of pleadings before commencement of trial.

Argued on: 27th & 28th October and 1st November, 1960.
Decided on: November 22, 1960.

The plaintiff sued the defendant Co. for the recovery of damages arising out of the publication of certain articles alleged to be defamatory of the plaintiff. These articles had been published in certain of the defendant Company's newspapers and they had set out the contents of the plaint and answer filed in a divorce action in which the plaintiff had been made co-respondent. They referred to the plaintiff as being co-respondent in that action and each article had a headline which read "Doctor cited in Divorce Suit." The defendant Company admitted publication, but pleaded that the publication was privileged as (1) they were fair and accurate reports of judicial proceedings, and (2) they were in respect of matters which the defendant had a duty or interest to communicate to readers of its newspapers and its readers had an interest in knowing. The learned District Judge held that the publication of the articles was not privileged as the publication of the contents of the pleadings before the trial commenced was not covered by privilege.

Held : That the articles in question were a fair and accurate report of judicial proceedings taking place in open Court and in the absence of any allegation of malice, the plea of privilege was entitled to succeed.

Per SANSONI, J —"The rule that allows publication applies, however to documents which, even though they are not read aloud in open Court, can be taken as read. The present appeal, in my view, relates to such documents."

Followed : *Kavanagh v. Argus Printing and Publishing Co.*, (1939) W.L.D. 284
Distinguished: *Rex v. Astor* (1913) 30 T.L.R. 10
Richardson v. Wilson (1879) 7 R. 237
Abt v. Registrar of Supreme Court (1899) 16 S.C. 476
Transvaal Chronicle v. Roberts, (1915) T.P.D. 188
Kingswell v. Robinson, (1913) W.L.D. 129

H. V. Perera, Q.C., with *G. T. Samarawickreme* and *D. R. P. Goonetilleke* for defendant-appellant in S.C. No. 223 and for defendant-respondent in S.C. No. 232.

H. W. Jayawardene, Q.C., with *P. N. Wickremanayake* for plaintiff-respondent in S.C. No. 223 and for plaintiff-appellant in S.C. No. 232.

SANSONI, J.

The plaintiff sued to recover a sum of Rs. 50,000/- from the defendant as damages arising from the publication of four articles in the Sunday Observer of 10th November, 1957, and the Thinakaran of 11th November, 1957. All four articles refer to the plaintiff being the co-respondent in a divorce action filed in the District Court of Panadura. That action was filed on 12th June, 1957; answer was not filed by the wife although she was served with summons, but an answer was filed by the present plaintiff on 15th October, 1957, and on that day the trial was fixed for 31st January, 1958. The present plaintiff in that answer denied the charge of adultery made against him, and asked for the dismissal of the action. The four articles in question correctly set out the contents of the plaint and the answer filed in the divorce action, and mentioned that the case had been fixed for trial on 31st January, 1958. Each article had a headline which read "Doctor cited in Divorce Suit."

The defendant in its answer admitted the publication of the articles in question and pleaded that such publication was privileged because (1) they were fair and accurate reports of judicial proceedings, and (2) they were in respect of matters which the defendant had a duty or interest to communicate to the readers of its newspapers, and its readers had an interest in knowing.

When the case came up for trial, the plaintiff's counsel suggested the following issues:

(1) Are (*a*) the headlines,
(*b*) the articles,
defamatory of the plaintiff?

(2) To what damages will the plaintiff be entitled?

The defendant's counsel suggested issues based on the defence of privilege raised in the answer. It will be noted that no issue raising the question of malice was suggested by the plaintiff's counsel.

The only evidence called was that of the plaintiff's proctor who produced the articles in question, and through him were also produced the plaint, answer, and journal entries in the divorce action.

The learned District Judge held that the publication of the articles in question was not privileged because the publication of the contents of the pleadings before the trial commenced was not covered by privilege. He awarded the plaintiff Rs. 1,000/- as damages and the defendant has appealed.

"The rule of law is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, then the publication without malice of a fair and accurate report of what takes place before that tribunal is privileged," said Lord Esher, M.R., in *Kimber v. The Press Association*, (1892) 1 Q.B. 65. Although it was suggested before us that the articles in question were not a fair and accurate report because of the headlines, I see no substance in this contention. The plaintiff was a doctor and the headlines, "Doctor cited in Divorce Suit", are perfectly accurate.

I shall deal with some other incidental questions raised by Mr. Jayawardene before I consider what seems to me to be the main question arising on this appeal. It was urged that as the article first appeared on the front page of the Sunday Observer, the defendant was giving it undue publicity. I see nothing in this complaint: in later editions the same articles occupied less prominent positions, as one would expect. Nor do I read anything sinister into the delay between the filing of the answer and the publication of the articles. Another submission was that the evidence of the reporter or the Editor of the defendant's newspaper should have been led to show how a copy of the pleadings in question was obtained: it was suggested that some malicious person had those pleadings published in order to appeal to the idle curiosity or the desire for gossip on the part of the readers of the newpapers. In the absence of an issue suggesting that the publication was malicious, the defendant need only show that the articles were a fair and accurate report of judicial proceedings which took place in open court. The circumstances then create the privilege, and it was not necessary for the defendant to lead evidence to rebut a suggestion of malice which was never raised in the issues. Where a report is privileged, it does not matter whether the newspaper reporter was himself present in Court or not: so long as his facts are accurate, and correctly set out what actually happened in Court, the source of his information is irrelevant.

The question for decision thus boils down to this: Are the articles a publication of judicial proceedings which took place in open court? In deciding this question one must be careful to distinguish what takes place in open court and before the Judge, from what takes place, say, before an officer of the Court in his office. It is also necessary to bear in mind that, under our procedure, every action of regular procedure must be instituted by presenting a plaint, which will be filed of record only if the Court entertains it. When it has been so entertained by the Court and filed, the Court orders a summons to issue to the defendant. When the defendant appears in answer to the summons either in person or by proctor, he does so in open Court. If he does not admit the plaintiff's claim, he or his proctor must deliver to the Court a written answer, which the Court may reject or return for amendment if it is defective; if it is accepted by the Court, the case is fixed for trial, and such an order is again a judicial order.

In considering whether the publication of pleadings before the trial is privileged or not, it would be wrong to be guided blindly by decided cases from other countries, where a procedure which is quite different from ours may obtain. I do not know what the English procedure is. We were told that in England an action is commenced by the issue of a writ of summons which is endorsed with a statement of the nature of the claim made; and that after such a writ has been served on the defendant he delivers his defence; and that these steps in the procedure do not take place either before the Judge or in open court. In *Rex v. Astor*, (1913) 30 T.L.R. 10, Scrutton, J. said that newspapers ought not to publish in full the private proceedings before the case came on for trial, and he instanced a statement of claim, an affidavit, and a writ. In no sense can it be said that the entertaining of a plaint, the ordering of a summons to issue, the filing of an answer, and the fixing of a case for trial under our procedure, are private proceedings; they are all steps in a judicial proceedings: and certainly the filing of the answer and the fixing of the case for trial are proceedings which take place in open Court.

Mr. Jayawardene also referred us to the Scottish case of *Richardson v. Wilson*, (1879) 7. R. 237

which was a case filed in consequence of defamatory statements made in a summons in another action. It was held by the Court of Session that a summons which has been called in Court, but upon which no other step of procedure has followed is not a public document, and any person who publishes defamatory statements contained in it is liable to an action of damages. But the judgments show that 'calling a summons' merely means that the summons is placed in the hands of an officer of the Court, called the Clerk of the process, who had a duty not to part with it or to give access to it except to the parties or their agents. The Lord Ordinary pointed out in his judgment that nothing occurs in Court at this stage, and what was published was not a report of judicial procedure but the contents of a writ which were at the time even unknown to the Court. When the case went up in appeal, the Lord President said that whatever takes place in open Court, either before or after the proper hearing of a case, falls under the rule that the publication by newspapers of what takes place in Court at the hearing of a cause is undoubtedly lawful. The principle on which the rule is founded was that "as Courts of Justice are open to the public, anything that takes place before a Judge or Judges is thereby necessarily and legitimately made public, and being once made legitimately public property, may be republished without inferring any responsibility." He then went on to say that the defender was seeking to apply the rule to what did not fall either within the rule itself or the principle on which the rule was founded. No discussion or proceedings had taken place before a Judge, and since no newspaper reporter or any member of the Public could have obtained access legitimately to the summons, it must have been obtained in any illegitimate manner. In these circumstances the publication in question was obviously not the publication of proceedings which were either judicial or which had taken place in open Court.

In *Abt. v. Registrar of Supreme Court*, (1899) 16 S.C. 476, the question considered was whether a stranger to a suit was entitled as of right to inspect the pleadings in the Registrar's office before judgment has been pronounced. The application was refused on the ground that the case may never come into Court and, therefore, did not concern the public. The case is similar to the Scottish case, in that it turned on the point that the case had not reached the stage of being dealt with in open Court. A similar case is that of *Transvaal Chronicle v. Roberts*, (1915) T.P.D. 188, in which damages were claimed from a newspaper which published defamatory statements which a husband made about his wife in his affidavit answering to an application for alimony. The affidavit was filed in the Court Registrar's office, and the case was never called in open Court because the application was withdrawn. De Villiers, J.P. held that the publication was not privileged. He cited with approval a dictum of Mason, J. in *Kingswell v. Robinson:* (1913) W.L.D. 129, "I have no doubt that the publication of documents filed in pending civil proceedings, and not brought up in open Court, is not privileged, apart from some privileged occasion, such as some special public interest in the information which they contain." Having said that the privilege attaches only to matters which have transpired in open Court, the learned Judge, in considering what falls within the rule, said that "documents which have not been actually read, but to which counsel have referred or which have been used in the course of the proceedings, and which are necessary for a proper understanding of the case" are within the spirit of the rule. Bristowe, J. who agreed with De Villiers, J.P. said that while the public had a right to read fair and proper reports of the proceedings of Courts of Justice, it is a very different thing to say that a newspaper reporter has a right of access to any of the records of the Court where the matter has not come before the Court at all. Where a matter has never been brought into Court, it seemed to him undesirable and not in the public interest to publish affidavits which have never been used. But he also said that so far as matters that occur in Court are concerned, a reporter ought to know what occurred there, and he was at liberty to report all particulars appearing on the record which may be necessary to explain what actually occurred in the Court.

Kingswell v. Robinson, (*Supra*) was an action for damages based on the publication of a defamatory letter which was referred to in certain affidavits filed in a prosecution for criminal libel. The letter itself, although it was referred to in the affidavits, was never produced before the Magistrate, nor was it read or referred to in any proceedings which took place before the Magistrate. A newspaper reporter obtained a copy of the letter from the solicitor and published its contents along with a report of the other proceedings. In the course of his judgment holding that the publication of the letter was not privileged, Mason, J. said that the principle that everyone is entitled to publish a fair account of judicial proceedings in open Court embraced the right "to give all such information as may be necessary to enable the public to comprehend the course and result of those proceedings. In Courts of law judges and counsel frequently refer to documents which they have perused, but which are not read aloud. So far as these documents are used in the course of proceedings or constitute a ground for discussion or decision, a newpaper is, in my opinion, entitled in ordinary circumstances to publish their contents as fully as if they had been read aloud and reported verbatim." But he held that this rule did not apply to records which are filed in legal proceedings, but which have not yet been discussed or referred to in public. The reason is that in the one case the proceedings and the relevant documents come before the public in open Court, while in other cases there is no proceedings in open Court and the documents are in no sense made public because the stage of publicity has not been reached, and even though it be a judicial proceeding it is not a proceeding in open Court to which the rule applied. All the cases I have discussed so far relate to the publication of documents referred to or filed in legal proceedings, but not dealt with in open Court. They are, therefore, not applicable to the facts of the present case.

The rule that allows publication applies, however to documents which, even though they are not read aloud in open Court, can be taken as read. The present appeal, in my view, relates to such documents. The District Judge sitting in open Court had the case called in order that the answer might be filed and the case fixed for trial. It is true that the plaint and the answer would not have been read aloud in Court, but any reporter who was present would certainly have known that the trial was to take place upon the pleadings filed before the Judge. He was, in my opinion, entitled to report the contents of those pleadings, because they formed the subject of a judicial order made in open Court fixing the case for trial upon those pleadings, and they were necessary to a proper understanding of the case.

An analogous case arose with regard to a charge sheet handed in open Court to a Magistrate, which contained particulars of the charge, but to the contents of which no verbal reference was made. I refer to the case of *Kavanagh v. Argus Printing and Publishing Company*, (1939) W.L.D. 284. It was held that where a charge sheet was handed to the Magistrate, sitting in open Court, for his information, that was tantamount to reading it. It was taken as read and, therefore, anyone reporting the actual proceedings in Court was entitled to incorporate in his report the contents of the charge sheet including the particulars of the charge. Distinguishing the case of *Kingswell v Robinson*, (*Supra*) Millin, J. said that while the defamatory letter in that case was never placed before the Magistrate, or in any way taken as read or seen by him, in the case he was deciding it was necessary that the Magistrate should be informed of the charge, and he actually did see the charge because it was handed to him. He said: "It was handed to him for that purpose at any rate. . . if the contents of the document are not deemed to be part of the proceedings in Court when handed to the Magistrate for his information, then it is a secret document, a secret communication between the prosecutor and the Magistrate, a view which need only be stated to be rejected."

This decision, to which Mr. H. V. Perera drew our attention, seems to me to cover the facts of the case we have to decide, and it shows quite clearly that privilege attaches to the publication of judicial proceedings in open Court where documents ments are placed before the Judge, though their contents are not read out. I hold that the articles in question were privileged as being fair and accurate reports of judicial proceedings held in open Court, and the plaintiff's action should have been dismissed on this ground.

The appeal of the defendant is allowed with costs in both Courts. The cross-appeal of the plaintiff on the question of damages is dismissed.

H. N. G. Fernando, J.

I agree.

Appeal allowed.

Present: **H. N. G. Fernando, J.**

PUNCHINONA *vs.* HINNIAPPUHAMY*

In the matter of an application in Revision in M. C. Galle Case No. 6897.
S.C. No. 437, 1958.

Argued on: 14*th November*, 1958.
Decided on: 23*rd January*, 1959.

Criminal Procedure Code, sections 413, 419—*Powers exercisable by a Magistrate under section* 419—*Can he order property to be delivered to someone other than the person from whom it was seized.*

One *H* made a complaint to the Police that some unknown person had taken forcible possession of his car while he was driving it. Subsequently the car was produced at the Moratuwa Police Station by *P*, the present petitioner, who claimed to be its present owner, having bought it from one Edward. On an application made in that behalf by the Inspector of Police, the Magistrate immediately ordered the car to be returned to *H*. There was nothing to show that any criminal proceedings regarding the alleged theft of the car had been instituted at the time it was produced before the Magistrate or even before the present application in revision.

Held : That the only provision of law to which this order is referable was section 419 of the Criminal Procedure Code and that under this section the Magistrate could have either returned the property to the same person, or, refused to do so if he thought it necessary to detain the property for the purposes of any proceedings before him. But he could not order property removed from the possession of one person to be given to another. The Magistrate therefore had no power to order possession of the car to be given to *H*.

Authorities referred to : *Costa v. Peries*, 13 C.L.Rec. 73.
Binduwa v. Tyrrell, 4 C.A.C. 1.

C. G. Weeramantry with *E. B. Vannitamby* and *H.Ismail* for the petitioner.

Colin Mendis for the respondent.

H. N. G. FERNANDO, J.

This is an application in revision against an order made by the learned Additional Magistrate of Galle in the following circumstances. On 10th October 1958, a car No. EN 2284 was produced by the Police before the Magistrate together with a report stating (1) that one Hinniapphuamy had made a complaint that while he was driving the car on 26th September 1958, some unknown person had forcibly taken possession of the car, and (2) that the car had subsequently been produced at the Moratuwa Police station by the present petitioner who claimed to be the owner of the car having bought it from one Edward. In accordance with an application made in that behalf by the Inspector of Police, the Magistrate immediately ordered the car to be returned to Hinniappuhamy.

The only provision of law to which this order is referable is Section 419 of the Criminal Procedure Code. That section applies to property which is seized by a Police Officer (a) under Section 29 of the Code, or (b) when the property is alleged or suspected to have been stolen, or (c) when the property is found under circumstances which create suspicion of the commission of an offence.

It is clear in this case that the car has not been seized either under Section 29 or found under circumstances referred to at (c) above. Although there is no evidence on the point, I will assume that the car was in fact seized after the petitioner produced it at the Moratuwa Police station and that the ground of the seizure was that it was alleged or suspected to have been stolen. Nevertheless, the Magistrate had no power to order possession of the car to be given to Hiinniappuhamy. "When the property seized has been removed from the possession of a person, the Court has a larger discretion under Section 413 as to the order it can make than it has under Section 419. Under the latter section, *it has either to return the property to the same person, or refuse to do so if it thinks it necessary to detain the property for the purposes of proceedings before it*.....It has no power under the section to order property seized and removed from the possession of one person to be given to another person because the possession of property cannot be lightly interfered with." (*Costa vs. Peries*, 13 C.L. Rec. 73).

It is important to realize that Section 419 is not a provision which confers jurisdiction to decide disputed claims to possession. Its object is to

*For Sinhalese Translation see vol. 1, part 6, p. 21 of the Sinhala Section.

provide for the Magistrate being brought with the least possible delay into official touch with the property seized by the Police (*Binduwa vs. Tyrell*, 4 C.A.C. 1). If the Magistrate does not consider "official" custody to be necessary, he has no alternative but to order delivery back to the person from whose possession the property was seized.

There would be more grounds than one which would justify an order under Section 419 "respecting the custody and production of property". One ground would be that neutral custody is expedient in order to ensure that property, the production in evidence of which is considered necessary in criminal proceedings, will be duly produced when required. Another ground would be that the Court is *prima facie* satisfied that if the property is kept in custody pending an inquiry or trial, the claimant will be entitled at its conclusion to an order for delivery under Section 413. In the present case, however, there is nothing on the record to show that any criminal proceedings with respect to the alleged theft of the motor car had been instituted at the time when the car was produced before the Magistrate, nor was Counsel aware whether any such proceedings had been instituted prior to the hearing of this application. In the circumstances, there was no material upon which an order for custody and production could have been duly made.

I set aside the Magistrate's order in so far as it authorises the continued possession of the car. In pursuance of that part of the order which requires the car to be produced upon notice from the Magistrate's Court the Magistrate will now require production of the car. He will then consider whether "official" custody is necessary and will in doing so have regard to the question whether any proceedings in respect of any alleged theft of the motor car have been instituted up to date against the petitioner or any other person. Failing an order for "official" custody, he will direct delivery of the car to the petitioner.

Set aside and sent back.

IN THE COURT OF CRIMINAL APPEAL

Present: **Basnayake, C.J.** (President), **Pulle, J., and H. N. G. Fernando, J.**

THE QUEEN *vs.* VITHANAGE PREMADASA, *et al.*

S.C. No. 20—*M.C. Colombo, No.* 41225
Appeals Nos. 147-149 *of* 1958 *with Applications Nos.* 184-186 *of* 1958

Argued on: January 30, 1959
Decided on: February 23, 1959

Prevention of Crimes Ordinance, sections 2, 4 *and* 6 *—Criminal Procedure Code, section* 253*— Allegations of previous convictions against an accused—Such convictions neither admitted nor proved— Effect on sentence—Functions of Magistrates under the Prevention of Crimes Ordinance.*

In this case the 4th accused had been convicted along with two others, of charges of robbery. The sentence passed on him was identical with that passed on the 3rd accused, who had admitted three previous convictions. There was, however, an allegation of two previous convictions against the 4th accused too, but these had neither been admitted by him nor proved by the Crown.

Held : That as it appeared that the learned trial Judge had, in determining the 4th accused's sentence, taken into account material which was clearly not in evidence, the sentence passed on the 4th accused should be reduced.

Held further : That section 6 of the Prevention of Crimes Ord: had no application to cases such as the present where the Court has power to impose very long terms of imprisonment in respect of the very offences of which the accused have been found guilty.

Observations regarding the functions a Magistrate should perform under the Prevention of Crimes Ordinance.

Cases referred to : *Pillai v. Sirisena*, 31 C.L.W. 32.

L. W. de Silva with *D. C. W. Wickremasekara* for the 3rd accused-appellant.

1st accused-appellant in person.

4th accused-appellant in person.

Ananda Pereira, Senior Crown Counsel, for the Attorney-General.

BASNAYAKE, C.J.

The question that arises for decision in this appeal is whether the sentence passed on the 4th accused, who was convicted along with two others of charges of robbery, should be reduced on the ground that the learned Commissioner in imposing his sentence took into account two previous convictions for theft alleged against him but neither admitted by him nor proved.

After the jury returned the verdict learned Crown Counsel stated "1st accused has seventeen previous convictions". Each of them appears to have been described by Crown Counsel by reference to the date of offence, nature of offence and amount of punishment, and the accused asked whether he admitted the convictions. He admitted nine of them. Thereafter Crown Counsel stated: "This accused is liable to enhanced punishment in terms of section 6 of the Prevention of Crimes Ordinance."

To an inquiry by the Commissioner of Assize whether the accused had admitted his previous convictions before the Magistrate, Crown Counsel stated that no admission had been recorded.

Next Crown Counsel stated: "The 3rd accused has 3 previous convictions", and proceeded to describe them in the same manner as he described the convictions of the 1st accused. The accused admitted all the convictions. Crown Counsel then stated as in the case of the 1st accused that the 3rd accused was also liable to enhanced punishment under section 6 of the Prevention of Crimes Ordinance.

The accused were found guilty of offences punishable with fourteen and twenty years' rigorous imprisonment respectively and the Commissioner had power to impose the maximum sentence if he thought it fit to do so. That being the case it is not clear why learned Crown Counsel drew the learned Commissioner's attention to section 6 of the Prevention of Crimes Ordinance. That section empowers a court before which a person who has previously twice or oftener been convicted of any crime and has been sentenced on such convictions to undergo rigorous imprisonment exceeding in the aggregate one year is again convicted of a crime, to sentence him to rigorous imprisonment for a period not exceeding two years in addition to any punishment other than imprisonment to which he may be liable, in any case in which the court would not otherwise have jurisdiction so to do. It has no application to a case such as this where the court has power to impose such long terms of imprisonment in respect of the very offences of which the accused have been found guilty. It should be noted that the power to impose the imprisonment prescribed in the section is in addition to any punishment *other than imprisonment* to which the convicted person may be liable. This section has been discussed in several decisions of the Supreme Court. It is sufficient to refer to one of them, *Pillai v. Sirisena*, 31 C.L.W. 32.

Lastly Crown Counsel stated: "The 4th accused has two previous convictions." They were for offences committed on the same day in November 1956. The accused did not admit either of the convictions. Crown Counsel volunteered the statement that no admission had been recorded by the Magistrate.

The Commissioner of Assize then imposed the following sentences on the accused :-

1st accused, 10 years' rigorous imprisonment on count 1, and 15 years' rigorous imprisonment on acount 2,

3rd accused, 8 years' rigorous imprisonment on count 1, and 10 years' rigorous imprisonment on count 3,

4th accused, 8 years' rigorous imprisonment on count 1, and 10 years' rigorous imprisonment on count 3.

The punishment imposed on the 3rd accused who admitted three previous convictions, on the last of which he had been sentenced in 1945 to 8 years' rigorous imprisonment, and on the 4th accused who did not admit any previous convictions and against whom none were proved, is the same. It is difficult to escape the conclusion that the previous convictions alleged against the 4th accused though neither admitted nor proved were taken into account by the learned Commissioner in determining his sentence. There is no evidence that he played a prominent part in the robbery. The main evidence against him is the existence of his palm print (P5) on the near side rear mudguard and a finger print (P4) on the plated portion of the near side rear door of the car which the accused used for getting away after the crime.

The learned Commissioner appears to have been influenced by material which was not in evidence in determining the sentence on the 4th accused. He should not have been treated in the same way as the 3rd accused who admitted previous convictions for crimes. We accordingly reduce his sentence on count 1 to a term of rigorous imprisonment for four years and on count 3 to a term of rigorous imprisonment for 5 years, the sentence to run concurrently.

Before we part with this judgment we must express our dissatisfaction with the way the Magistrate who held the inquiry into these offences has acted. He does not seem to have given his mind to the documents he was signing or paid any regard to the functions he had to perform under the Prevention of Crimes Ordinance. We can find no excuse for his appending the following certificate under his hand to a blank form in which he purports to have acted under section 2(3) of the Prevention of Crimes Ordinance, but which does not show that he has in fact done so :-

> "I hereby certify that the above record was taken in my presence and contains accurately the whole of the examination of the accused and that it was not practicable for me to record it in the Sinhalese/Tamil language in which it was made."

Magistrates who have statutory functions to perform should pay heed to the statutes under which they act and carefully observe their requirements and not act in a perfunctory manner, as the Magistrate has acted in the instant case.

We wish to take this opportunity of drawing the attention of all Magistrates to the necessity of complying strictly with the requirements of section 2 of the Prevention of Crimes Ordinance. It should be borne in mind that sub-section (5) of that section provides that any statement or evidence recorded and any document tendered under it may be put in and read as evidence at the trial at such time after the conviction as it becomes material to inquire into the past record and character of the accused.

Magistrates should also note that where the accused when called upon to admit or deny separately each of the convictions set forth in the certificate issued by the Registrar of the Finger Prints and Identification Office either does not make a statement or makes a statement denying all or any of the convictions the Magistrate after recording the statement (if any) in the prescribed manner should proceed to record in respect of such of the convictions as the accused does not admit, the evidence prescribed in section 4.

The procedure to be followed after an accused person with previous convictions has been convicted at a trial in the Supreme Court is to be found in section 253 of the Cirminal Procedure Code. The requirements of paragraph (b) of sub-section (1) of that section have not been observed in the instant case. There has been no inquiry concerning the previous convictions which the accused denied. Although the proceedings under section 2 of the Prevention of Crimes Ordinance appear to have been forwarded to the Attorney-General long before the date of this trial it is deplorable that no endeavour was made to produce the evidence necessary for proving at the trial the previous convictions which the accused denied.

The appeals of the 1st and 3rd accused are dismissed and their applications are refused.

Subject to the variation in the sentence, the application and appeal of the 4th accused are also dismissed.

Appeals dismissed.
Sentence of 4th accused varied.

Present: **Weerasooriya, J.**

TENNEKOON *vs.* THE PRINCIPAL COLLECTOR OF CUSTOMS, *et al.*

Application No. 373/'57 for a Mandate in the nature of a Writ of Certiorari on A. O. Weerasinghe, Principal Collector of Customs, Colombo, and another.

Argued on: 11th July, 1958, *and 10th December*, 1958.
Delivered on: 23rd February, 1959.

Customs Ordinance (*Cap.* 185), *sections* 127, 8(1)—*Inquiry concerning offence under section* 127—*Duty of inquiring officer to act judicially—Rules of natural justice to be observed.*

After an inquiry held by the Deputy Collector of Customs (the 2nd. respondent) the petitioner was called upon to pay a penalty of Rs. 10,000 under the provisions of section 127 of the Customs Ordinance, on the basis of certain findings arrived at as a result of the inquiry. It was conceded that no opportunity was given to the petitioner at the inquiry, of meeting the case against him. However, it was submitted on behalf of the respondents that no obligation to give such an opportunity arose, as the respondents were exercising purely administrative or executive functions in taking action in this matter and therefore no duty to act judicially was imposed on them.

Held : (1) That the petitioner's liability to a penalty under section 127 had to be objectively assessed and that the 2nd. respondent had been under a duty to act judicially in holding the inquiry.

(2) That the second respondent had, therefore, to conform to certain rules of "natural justice" in holding the inquiry and that these rules had apparently been disregarded by him. The findings arrived at against the petitioner were therefore of no legal effect.

Cases referred to : *R v. Manchester Legal Aid Committee, Ex parte Brands & Co., Ltd.*, (1952) 1 A.E.R. 480.
Fisher v. Keane, (1879) 11 Ch.D. 353.
Labouchere v. The Earl of Wharncliffe, (1879) 13 Ch.D. 346.
Nakkuda Ali v. Jayaratne, 51 N.L.R. 457.
Board of Education v. Rice, (1911) A.C. 179.
Local Government Board v. Arlidge, (1915) A.C. 120.

N. E. Weerasooria, Q.C., with *F. A. de Silva* for the petitioner.

A. C. Alles, Acting Solicitor-General, with *P. Naguleswaram*, Crown Counsel, for the respondent.

WEERASOORIYA, J.

This is an application for a mandate in the nature of a writ of *Certiorari* to quash an order made by the first respondent, who is the Principal Collector of Customs, calling upon the petitioner to pay a penalty of Rs. 10,000/- under the provisions of section 127 of the Customs Ordinance (Cap. 185). This penalty was imposed on the basis of the following findings arrived at by the second respondent, the Deputy Collector of Customs, Colombo :-

(a) that the petitioner "had been concerned in the unshipping of two bars of gold being goods the import of which is restricted and which were imported contrary to the restrictions imposed by law";

(b) that he "had knowingly harboured, kept or concealed the two bars of gold being goods the importation which is restricted by law and which were imported contrary to such restrictions."

Under section 21(1) (c) of the Exchange Control Act, No. 24 of 1953, no person shall, except with the permission of the Central Bank of Ceylon, import any gold into Ceylon.

On the 22nd May, 1956, the petitioner, then an acting Sub-Inspector of Police, was detailed for duty as a ship's visiting officer in the port of Colombo. In the performance of that duty it would have been lawful for him to go on board any of the ships that were in the port. One of these ships was the S.S. "Vietnam".

Acording to an affidavit filed by the petitioner in these proceedings he had boarded the S.S. "Vietnam" at about 4.30 p.m. on the 22nd May, 1956, when he came across two unwrapped gold bars which had apparently been dropped by an unidentified member of the crew who "ran up a flight of stairs and disappeared on the petitioner's approach". The petitioner picked up the gold bars and after an unsuccessful search for the person who dropped them he decided to report the matter to his superior officer Mr. Hamid, Inspector of Police, and for that purpose he disembarked from the S.S. "Vietnam" and entered the Port Health Officer's launch in which he proceeded towards the passenger jetty. It would appear, however, that Inspector Hamid was not at the passenger jetty then but was in a Police launch which was plying somewhere in the harbour area. After the petitioner got to the passenger jetty and not finding Inspector Hamid there he entered another launch, the "Pearl", which lay alongside the jetty and requested the coxswain of it to take him to the Police launch. Just then two Customs officers entered the launch. One of them was an Assistant Charges Officer of the Customs, Mr. Ponniah.

The versions given by the petitioner and Mr. Ponniah as to what happened as this stage are substantially at variance. According to the petitioner, as the Customs officers arrived he of his own accord showed them the gold bars and accompanied by them he went to the Baggage Hall where he handed over the bars to the Charges Officer, his statement was recorded by the second respondent, he was told that there would be an inquiry into the matter and he then went away. Mr. Ponniah states, on the other hand, that on certain information he had received he kept watch on the movements of the petitioner from the time the latter went on board the S.S. "Vietnam" and till the petitioner entered the launch "Pearl". Having followed the petitioner into the launch "Pearl" Mr. Ponniah informed the petitioner that he had received information that the petitioner was carrying some gold bars which he requested the petitioner to hand to him, whereupon the petitioner pleaded with him to keep silent about the matter. He then saw the petitioner attempting to insert his hand into his trousers pocket and, in order to prevent the petitioner from throwing any contraband article into the sea, he held on to the pocket and with the assistance of the Chief Preventive Officer, Mr. Speldewinde, (who also had in the meantime come on board the launch) two bars of gold were taken out from the petitioner's hip and trousers pockets respectively.

According to the affidavit of the second respondent, before arriving at the findings which I have set out earlier he held an inquiry into the circums-

tances in which the gold bars came to be found on the petitioner's person at which he recorded on oath the statements of the petitioner, the Assistant Charges Officer Mr. Ponniah and the Chief Preventive Officer, Mr. Speldewinde. The petitioner has stated in his affidavit that the inquiry was held "behind his back", and this statement has not been contradicted in any of the affidavits filed by the respondents. The learned Acting Solicitor-General in fact conceded that no opportunity was given to the petitioner at the inquiry of meeting the case against him. The argument advanced by him was that no obligation arose to give the petitioner such an opportunity since the respondents were exercising purely administrative or executive functions in taking action in this matter under section 127 of the Customs Ordinance and, therefore, no duty to act judicially was imposed on them. But, as pointed out in *R v. Manchester Legal Aid Committee, Ex parte Brands & Co., Ltd.*, (1952) 1 A.E.R. 480, an administrative body may be under a duty to act judicially, though the question whether in a given case such a duty arises or not would depend on a variety of circumstances "which it would be impossible, and, indeed, inadvisable, to define exhaustively". That case is also authority for the view that as a general rule a duty to act judicially would arise where an administrative body in arriving at its decision has to consider the matter solely on the facts and the evidence before it and apart from any extraneous considerations such as policy and expediency.

Even a purely domestic tribunal as, for instance, the committee of a club, which under the rules has power to expel a member on the ground of misconduct, would appear to be under a duty to act judicially when exercising such power. See in this connection the dictum of Jessel, M.R., in *Fisher v. Keane*, (1879) 11 Ch.D. 353 at 362, that a committee functioning on such on occasion must act according to the ordinary principles of justice and should not convict a man of a grave offence which shall warrant his expulsion from the club without fair, adequate and sufficient notice and an opportunity of meeting the accusation brought against him. Another case is *Labouchere v. Earl of Wharncliffe*, (1879) 13 Ch.D. 346 at 352, where the Court stated that although it had nothing to do with the question whether the decision of the committee to expel a member was right or wrong it was nevertheless concerned whether the accused had been given fair notice and due inquiry had been made.

In *Nakkuda Ali v. Jayaratne* (*Controller of Textiles*), 51 N.L.R. 457 at 461, the Privy Council, in considering the question against whom a writ of certiorari may be granted, stated that "the only relevent criterion by English law is not the general status of the person or persons by whom the impugned decision is made but the nature of the process by which he or they are empowered to arrive at their decision. When it is a judicial process or a process analogous to the judicial, *certiorari* can be granted."

In view of these cases I do not think that the test sought to be applied by the Acting Solicitor-General, as conclusive of the question whether or not the respondents were under a duty to act judicially, is one which can be accepted. That question must, therefore, be considered in the light of certain other circumstances which I shall now proceed to discuss.

It is to be noted that section 127 of the Customs Ordinance does not require that the liability of a person to a penalty or forfeiture should be established to the satisfaction of the Principal Collector or other officer of the Customs. On the contrary, the language of the section indicates that the matter has to be considered objectively. Section 8 (1) of the Customs Ordinance requires that persons who are questioned on matters relative to the customs or the conduct of officers or persons employed therein shall be examined on oath and any person who gives false evidence on being so questioned is deemed to be guilty of giving false evidence in a judicial proceeding and liable to be dealt with accordingly. The Acting Solicitor-General readily granted that section 8(1) applied to any inquiry involving the questioning of witnesses which may have to be held for the purposes of section 127. It was, no doubt, in compliance with section 8(1) that the second respondent, in holding an inquiry into the circumstances in which the gold bars came to be found on the petitioner's person, recorded on oath the statements of the petitioner and certain of the Customs Officers as stated in the second respondent's affidavit to which I have already referred. The liability of the petitioner to a penalty or forfeiture under section 127 of the Customs Ordinance had, therefore, to be objectively assessed on an evaluation of the evidence on oath of the persons examined at the inquiry. The matter had to be decided by the second respondent solely on the facts of the particular case, solely on the evidence before him, and apart from any extraneous considerations. In other words, he had to act judicially—*R v. Manchester Legal Aid Committee, Ex parte Brand & Co., Ltd.*, (*supra*).

The obligation on the second respondent to act judicially meant that in holding that inquiry he had to conform to certain rules of "natural

justice." These rules have been laid down from time to time in a number of decisions of the House of Lords in England. He had, for instance, to give "a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view" (*Per* Lord Loreburn in *Board of Education v. Rice* (1911) A.C. 179 at 182), and to give to each of the parties "the opportunity of adequately presenting the case made" (*Per* Viscount Haldane in *Local Government Board v. Arlidge*, (1915) A.C. 120 at 132). It would seem that these rules were disregarded by the second respondent. Although the petitioner's statement was recorded at the inquiry it does not appear that in regard to any allegation made by the Customs officers which was prejudicial to him he was given any opportunity of contradicting or correcting it. The contents of the statement made by the petitioner on that occasion are not in evidence in these proceedings, but it may be assumed that they were of an exculpatory nature. As I have already stated, it was conceded by the learned Acting Solicitor-General that no opportunity was given to the petitioner at the inquiry, of meeting the case against him.

I hold, therefore, that the findings arrived at by the second respondent against the petitioner are of no legal effect. As for the order calling upon the petitioner to pay the penalty of Rs. 10,000/-, although the letter dated the 26th May, 1956, communicating that order to the petitioner purported to be written on behalf of the first respondent, it is clear from the second respondent's affidavit that the order was in fact made by the second respondent. That order is quashed. The second respondent will pay to the petitioner his costs of this application which I fix at Rs. 525/-.

Application allowed.

Present: **Basnayake, C.J., de Silva, J. and Sansoni, J.**

CORNELIUS PERERA & OTHERS *vs.* LEO PERERA

S. C. No. 103/57—*D. C. Panadura No.* 2808 *with Application* 346

Argued on: July 7, 8, 11, 12, 13 *and* 14, 1960.
Decided on: December 19, 1960.

Civil Procedure Code secs. 91, 408—*Compromise of action—Compromise due to mistake of fact—Judgement entered in terms of agreement—Effect of mistake—Is appeal or restitutio in integrum the proper remedy.*

Plaintiff sued the defendants for a right of cartway from his land lot 164 in the plan produced over the lots belonging to the defendants. He claimed by right of long user and alternatively for a right of way of necessity. Only the 6th and 8th defendants contested plaintiff's claim.

Sixth defendant in the course of his cross examination stated that a more convenient roadway was possible over lots 162 and 163 belonging to one D and that these two lots were vacant lots. Counsel for the plaintiff then offered to have the plaintiff's case dismissed if the 6th defendant could point out a 10 ft. roadway which could run over the two vacant blocks.

The challenge was accepted later after counsel for 6th and 8th defendants had consulted their clients and the judge recorded the terms of the agreement. According to the agreement the 6th defendant undertook to point out a possible cartway over lots 162 and 163 reasonably straight and not going through buildings or parapet walls.

At the inspection of the premises that followed Counsel for the 6th defendant applied to resile from the agree ment as the 6th defendant had accepted the challenge under a mistake of fact that the vacant lands he had contemplated were lots 162 and 163. The judge refused to accept the explanation and held that the 6th defendant had failed to point out the roadway and entered judgment in accordance with the agreement declaring the plaintiff entitled to the roadway over defendants' lots.

The 6th and 8th defendants appealed against the order.

Held: That the sixth defendant was mistaken when he said he could point out a roadway over the lots in question and that a court in the exercise of its equitable jurisdiction will, where a mistake of fact calls of it, grant relief.

Held further: (By BASNAYAKE C.J. and K. D. DE SILVA J.) (i) That a court of law is a forum for the determination of disputesby a judge on evidence and not by challenge and counter challenge in regard to factual situations which are easily verifiable. Decision of a cause in this way is foreign to our Code and perhaps not found in any system of Civil Procedure.

(ii) That the decree in the present case was not one under sec. 408 of the Civil Procedure Code.

Per BASNAYAKE, C.J.—"Where a statute provides special machinery which if resorted to renders a decree final the finality prescribed by the Act does not attach to a decree unless there is a clear manifestation of a conscious intention of the parties to resort to that machinery with a knowledge of the consequences it involves and there has been a strict compliance with the requirements of the statute. . . . . The Code (Sec. 91) requires that a memorandum in writing of every motion should be delivered to the Court at the time it is made by pleader or counsel."

In a separate judgement SANSONI, J. held that on the facts of this case the defendant's proper remedy was an application for restitutio in integrum and not by way of an appeal.

H. W. Jayawardene, Q.C., with *D. R. P. Goonetilleke, L. C. Seneviratne* and *H. E. P. Cooray* for 6th, 7th and 8th defendants-appellants in the appeal and for 6th, 7th and 8th defendants-petitioners in the Application.

N.K. Choksy, Q.C., with *D. C. W. Wickremasekera* for plaintiff-respondent in both the appeal and the Application.

D. R. P. Goonetilleke for 1st and 2nd defendants-respondents in both the Appeal and the Application.

C. D. S. Siriwardene, with *A. A. de Silva* for 4th and 5th defendants-respondents in both the Appeal and the Application.

Cecil de S. Wijeratne, with *J. V. M. Fernando* and *A. A. de Silva* for 9th defendant-respondent in both the Appeal and the Application.

BASNAYAKE, C.J.

This is an action for a right of cartway. The plaintiff sued the eight defendants for a declaration described in paragraphs 4 to 9 and 9a of the amended plaint filed on 20th April, 1956, for damages, and for ejectment. He also prayed for a right of cart way of necessity in the event of the Court holding that he was not entitled to a cartway by right of user. Although there were eight defendants the action was fought by the plaintiff on the one hand and the 6th and 8th defendants on the other.

In the course of his evidence the 6th defendant said—

". . . . .I say that there is no right of way over my land to the plaintiff's land. The land between the pltff's land and the duplication road belongs to Mrs. P. C. H. Dias. That land is not built upon. It is possible conveniently to have a roadway along the northern or southern boundaries of Mrs. P. C. H. Dias's land to lead to the pltff's land. I know Mr. Karunaratne's land. Mr. Karunaratne's land is to the south and abuts the plaintiff's land. There is a house built on this land. I have been to the plaintiff's land through Mr. Karunaratne's land. There was a roadway leading to Mr. Karunaratne's house."

In the course of his cross-examination plaintiff's counsel showed him town plan 1D4 and in answer to his questions the 6th defendant said—

". . . .This is a town plan. Lot 164 in this plan is plaintiff's land. It is lots 162 and 163 in this plan that belong to Mrs. P. C. H. Dias. I cannot say whose land is immediately to the north of lots 162 and 163. I deny that lot 162 belongs to Mr. Dunstan Cooray. I state that it belongs to Mrs. P. C. H. Dias.

Q: I put it to you that lot 162 is fully built on?

A: No. It is vacant land.

If one goes there even today he can see this land. I know Dr. Cooray's house. Dr. Cooray's house is at the junction of the duplication road and the 5th Cross Street. That is what is shown as 116 in 1D4."

In answer to the Judge the 6th defendant said—

". . . .I still say that the two blocks of land which adjoins the plaintiff's land on its east is vacant land. That is the two blocks between the duplication road and the plaintiff's land. My mother was living in Colombo at the time the case was filed against her by Mr. C. E. A. Perera. She has been living in Colombo since 1914. I say that a 10 foot road can be given from the duplication road over the two vacant blocks of land I spoke of to the plaintiff's land."

At this stage the counsel for the plaintiff challenged the 6th defendant to point out a 10 foot roadway which can run over the two vacant blocks on the land immediately to the east of the plaintiff's land and between the plaintiff's land and the duplication road. He stated that he was willing to have his action dismissed if such a road is pointed out. Counsel for the 6th and 8th defendants stated that he was unable to accept the challenge as only one of his clients was present in Court. This incident occurred before the luncheon adjournment. When the Court resumed after lunch, counsel for the 6th and 8th defendants stated that he had consulted his clients and that he was willing to accept the challenge of the plaintiff made by his counsel. Then plaintiff's counsel stated that the challenge was in respect of lots 162 and 163 and if the defendant can point out a 8-10 foot cart road over those lots he was willing to stand by his challenge. He added, however that the road to be pointed out must be reasonably straight and it must not run through buildings or parapet walls.

Counsel for the 6th and 8th defendants stated that he was willing to accept even that challenge. He stated that he would point out a 8-10 foot road running over lots 162 and 163 to the plaintiff's land which is reasonably straight. Thereupon the District Judge made the following record :-

"It is agreed between the parties that the 6th defendant will point out a 8-10 foot road from the duplication road to the plaintiff's land on lots 162 and 163 in plan 1D4.

It is agreed that the Court should decide whether the said road is reasonably straight. It is also agreed that the road to be pointed out must not run through parapet walls or buildings.

It is further agreed that if the 6th defendant points out such a road and the Court considers that it is reasonably straight, then the plaintiff's action is to be dismissed with costs.

If, however, the 6th defendant is unable to point out such a road or point out a road which does not entirely fall on lots 162 and 163 or which is not in the opinion of the Court reasonably straight, then judgment should be entered for the plaintiff declaring him entitled to a roadway 8 feet wide along Z L M C B A N O in plan marked P1 without payment of any compensation and with costs to the plaintiff against 1, 2 and 6-8 defendants.

It is also agreed that the Court should inspect the 8-10 foot road that will be pointed by the 6th defendant. If the Court is unable to decide whether the said roadway falls within lots 162 and 163 it is further agreed that this Court should avail itself of the assistance of Mr. J. M. R. Fernando, Surveyor, in arriving at a decision on that point.

.. ..

The 6th and 9th defendants are present. The terms are explained to the parties and they agree to the terms.

Inspection tomorrow at 9.30 a.m."

On the following day when the District Judge inspected the land counsel for the plaintiff and counsel for the 1st, 2nd, 6th, 7th, 8th and 9th defendants were present instructed by their respective Proctors. The plaintiff and the 1st and 6th defendants were present. The following record was made by the District Judge :-

"Mr. Advocate Goonetilleke wants it noted that the 7th and 8th defendants were contactedby Mr. D. R. de Silva, his Proctor during the luncheon interval yesterday afternoon after the first challenge by the plaintiff was recorded. He states that the 7th and 8th defendants had no notice of the challenge made in the afternoon after the challenge of the morning was accepted, after the luncheon interval.

Mr. Advocate Goonetilleke states that the 6th defendant accepted the challenge by a mistake of fact, the mistake of fact being that the vacant land between the duplication road and the plaintiff's land was comprised of lots 162 and 163 and that he now suspects that the vacant land between the duplication road and the pltff's is not lots 162 and 163 although he was led to believe that it was so by the plaintiff.

Mr. Advocate Goonetilleke therefore states that his clients want to resile from the terms of agreement entered into yesterday."

Upon this the learned Judge made the following order :-

"I am not at all satisfied with the explanation given by learned Counsel for resiling from the agreement. The terms of settlement were explained to the parties in detail by Court and they understood very accurately the nature of the terms.

The 7th and 8th defendants were represented by their Proctor Mr. D. R. de Silva who was instructing Counsel Mr. Advocate T. P. P. Goonetilleke, who appeared for them.

Agreement was entered into by Mr. Advocate T. P. P. Goonetilleke on behalf of the defendants he represented. I therefore hold that all the defendants whom Mr. Advocate Goonetilleke

represented are bound by the agreement entered into yesterday.

I call upon the 6th defendant to point out the 8-10 foot roadway on lots 162 and 163 running to the plaintiff's land from the duplication road as agreed by him yesterday. He states that he is not taking part in the inspection in view of the statement made by his counsel earlier. He does not point out any roadway to me.

Mr. Advocate Perera states that the defendants are not entitled to resile from the agreement entered into yesterday, and they have failed to point out the road. He moves that judgment be entered according to the consent order of yesterday.

Documents to be filed by all parties before the 13th. Judgment on 14.3.57."

On that day District Judge pronounced judgment declaring the plaintiff entitled to a right of cartway 8 feet wide along the track Z L M C B A N O in plan No. 688 marked P1 over the defendants' land without payment of any compensation. He also directed the 1st, 2nd, and 6th-8th defendants to pay the plaintiff the costs of the action.

That the 6th defendant was mistaken when he said he could point out a roadway 8-10 feet wide from the duplication road to the plaintiff's land over lots 162 and 163 in plan 1D4 is beyond question. Must he suffer for that mistake? I think not.

It is contended that he is bound by his mistake and cannot resile from it even after it became evident that he consented to have his action dismissed on a mistaken impression that lot 162 was a land without buildings. I am unable to assent to so unreasonable a proposition. Although it is generally recognised that in litigation there is an element of chance I cannot bring myself to think that it is so much a matter of chance as to come within the realm of betting or wagering, for what happened in this case savours of it. Challenge and counter challenge was thrown out by the respective counsel each confident of the correctness of his assertion of a factual situation which was easily verifiable and was in fact verified when the Judge inspected the allotment over which the 6th defendant asserted and the plaintiff's counsel denied that a cartway could be demarcated.

A Court of law is the forum for the determination of disputes by a Judge upon evidence and not upon challenge and counter challenge. The Civil Procedure Code makes no provision for what happened in this case. Decision of a cause in the way in which this action was decided is utterly foreign to our Code and I know of no system of Civil Procedure in which such a procedure finds acceptance.

The expression "mistake" is too well known to need a definition but I think it would be useful to indicate its scope in law, and I think the best way of doing it would be to quote Story's definition of it which has stood the test of time. It runs thus:

> "This (mistake) is sometimes the result of accident, in its large sense; but, as contradistinguished from it, it is some unintentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence."

Mistakes are for the purpose of deciding their legal consequence divided into two classes—mistakes of law and mistakes of fact. The former class of mistakes need not be referred to here as the question for decision relates to a mistakes of fact. It is accepted on all hands that a Court in the exercise of its equitable Jurisdiction will, where a mistake of fact calls for it, grant relief. To my mind the instant case falls into that category of cases in which a Court would grant relief especially when the relief is sought by way of appeal.

An appeal is not barred in the instant case because in my view the decree is not one passed under section 408 of the Civil Procedure Code which provides that a decree passed thereunder is final. That section provides:

> "If an action be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the action, such agreement, compromise, or satisfaction shall be notified to the court by motion made in presence of, or on notice to, all the parties concerned, and the court shall pass a decree in accordance therewith, so far as it relates to the action, and such decree shall be final, so far as relates to so much of the subject matter of the action as is dealt with by the agreement, compromise, or satisfaction."

The procedure adopted here as already observed does not satisfy the requirements of section 408 and even if the consent given by counsel for the 6th and 8th defendants had not been vitiated by a mistake of fact the decree entered in terms of an arrangement such as we have here will not attract the finality given to decrees passed under section 408. Where a statute provides special machinery which if resorted to renders a decree final, the finality prescribed in the Act does not attach to a decree unless there is a clear manifestation of a conscious intention of the parties to resort to that

machinery with a knowledge of the consequences it involves and there has been a strict compliance with the requirements of the statute. Here there was not even an attempt to comply with the requirements of section 408. The Code (s. 91) requires that a memorandum in writing of every motion should be delivered to the Court at the time it is made by pleader or counsel. No such writing has been tendered by counsel, nor is it clear from the record that the parties gave their mind to every part of what has been recorded by the trial Judge especially the words:-

> "If, however, the 6th defendant is unable to point out such a road or point out a road which does not entirely fall on lots 162 and 163 or which is not in the opinion of the Court reasonably straight, then judgment should be entered for the plaintiff declaring him entitled to a roadway 8 feet wide along Z L M C B A N O in plan marked P1 without payment of any compensation and with costs to the plaintiff against 1, 2 and 6-8 defendnts."

In this connexion the following opinion expressed by Burnside, C. J. in Philippu *vs.* Ferdinands. (1 Matara Cases 207 at 210) is relevant :-

> "And I should hold that any admission which might be made for the defendants attempting to bind them to their manifest prejudice in the very essence of the defence on their pleadings and contrary to their contention on their evidence would not bind them without showing that they had expressly authorised their counsel to make it and with a full knowledge of its effect."

Is is not necesary to discuss the cases cited by learned counsel as no case which directly affects the question involved on this appeal has been referred to, nor is it necessary to discuss the submissions made by learned counsel on the subject of an advocate's authority to effect a compromise in the course of an action.

Decisions on mistake in the law of contract are of little assistance in the decision of a question such as we have before us.

For the reasons stated above, I set aside the judgment and decree and direct that a trial *de novo* be held.

The appellants are entitled to costs both here and below.

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

SANSONI, J.

There is an appeal by the 6th to 8th defendants and there is also an application for *restitutio in integrum* filed by them. Both were heard together. Since the judgment entered by the District Judge followed upon an agreement entered into between Counsel appearing for the respective parties, I would hold that no appeal lies either from that judgment or from the order refusing to allow the appellant to resile from their agreement. Their proper remedy is an application for *restitutio in integrum*.

The plaintiff filed an answering affidavit in the application for restitution, in paragraphs 3 and 4 of which he refers to the 6th defendant's evidence given at the trial; the 6th defendant described the two lots between the plaintiff's land and High Street, as shown in the Town Survey Plan 1D4, as vacant lots and said that the plaintiff could easily get a right of way over those two lots. There is no doubt, and I do not think Mr. Choksy contested that position, that the plaintiff all along knew that of those two lots, lot 163 was vacant land, but lot 162 was entirely built upon; the plaintiff therefore knew that it was not possible to have a roadway over lot 162. This position, as the plaintiff says in his affidavit, was specificially put to the 6th defendant in cross-examination, but the 6th defendant persisted in stating that lot 162 was vacant land.

Thus it is abundantly clear that the agreement into which the parties entered through their counsel was the result, so far as the 6th to 8th defendants are concerned, of a mistake made by the 6th defendant in thinking that lot 162 was vacant land. His counsel, no doubt on the 6th defendant's instructions, and acting on behalf of the 7th and 8th defendants also, was influenced by the same mistake. The main question that arises for decision is whether the 6th to 8th defendents are entitled to have the agreement set aside because of that mistake.

Now the Roman Dutch Law enables a person to avoid an agreement for mistake on his part when the mistake is an essential and reasonable. one. It must be essential in the sense that there was a mistake as to the person with whom he was dealing (*error in persona*) or as to the nature or subject matter of the transaction (*error in negotio, error in corpore*). A mistake in regard to incidental matters is not enough. The test of reasonableness is satisfied if the person shows either (1) that the error was induced by the fraudulent or innocent misrepresentation of the other party, or (2) that the other party knew, or a reasonable person

should have known, that a mistake was being made, or (3) that the mistake was, in all the circumstances excusable (*justus et probabilis error*) even where there was absence of misrepresentation or knowledge on the part of the other party. An agreement entered into in the course of an action, like any other agreement, may be set aside on these grounds.

In the present case the mistake made by the 6th defendant and counsel appearing for the 6th to 8th defendants is with regard to an essential matter. They were mistaken in regard to the location of the particular lots over which the road was to run and as to whether those lots were vacant or built upon. Has the test of reasonableness also been satisfied? I think it has, and I think the case falls within the second of the three categories of reasonableness which I have just set out. This is a case where the plaintiff knew that the 6th defendant and his counsel were labouring under a mistake as to the true situation and the nature of the land over which the proposed road was to run. Mr. Choksy urged that the 6th defendant persisted in his mistake after his attention was repeatedly drawn to the correct position. That would have been a sufficient answer if the 6th defendant's plea had been that his mistake was excusable, or in other words fell within the third category of reasonableness. In such a case negligence or persistent disregard of the means of knowledge disqualifies the party from pleading *justus error*, but it is different where one party is mistaken and the other party knows that he is mistaken. Such knowledge is decisive and makes all the difference, because in a case like that the party who knows the true state of facts knows also that his intention is different from that of the mistaken party, and no agreement of minds is possible in such a situation.

The law, therefore, allows the mistaken party to claim that the contract is void *ab initio* because there was no consensus on the terms of the contract. In such a case there is a radical variance between the offer and the acceptance. The reason is set out in the following passage from the judgment of Hannen, J. in *Smith* v. *Hughes*, (1871) 6 Q.B. 597: "The promisor is not bound to fulfil a promise in a sense in which the promisee knew at the time the promisor did not intend it. . . .if by any means he knows that there was no real agreement between him and the promisor, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promisor did not assent". This case is cited by Wessels in his Law of Contract in South Africa (2nd Edition) Vol. I, Section 911. A South African case frequently cited in this connection is *Logan* v. *Beit*, (1890) 7 S.C. 197, the headnote of which reads: "Where the terms of a contract are unambiguous, one of the contracting parties is not entitled to restitution on the ground that he misapprehended its meaning, in the absence of proof that the other contracting party knew, or had reason to know, at the time of the contract that he was so misapprehending it." Lee and Honore in the South African Law of Obligations, section 40, having referred to this case, make the comment that if there was or should have been such knowledge on the part of the other contracting party, the absence of *justus* error, that is, a mistake that is reasonable and justifiable, makes no difference. Another case where a Court granted relief, imputing to the offeree knowledge of the mistake made by the offeror, is *Webster* v. *Cecil*, (1861) 30 Beav. 62. There Cecil, who had already refused to sell his land to Webster for £ 2,000 wrote a letter offering it to him for £1,250. Webster accepted by return of post and Cecil immediately gave him notice hat he had mistakenly written £1,250 for £2,250. The Court set aside the contract. Wessels cites this case in section 975 for the proposition: "If the mistake was known to the other party or if a reasonable man would have detected the mistake, it would be *dolus* to insist upon the contract being carried out with the error".

There is, in fact, no difference between English Law and Roman Dutch Law on this matter. Cheshire and Fifoot in the Law of Contract (4th Edition, page 173) call this particular type of mistake 'unilateral', where one only of the parties is mistaken and the other party knows or must be taken to know that the first party is mistaken. In such a case the judicial approach to the problem is subjective, in that the innocent party is allowed to prove the effect upon his mind of the error in order to avoid its consequences. The distinguishing feature of a case of unilateral mistake is that only one party is mistaken and the mistake of that party is known, or ought to be known, to the other. The party which knows of the mistake in such a case knows also that there is a complete lack of agreement and, therefore, cannot maintain that there is a contract such as there would have been if the objective test had been applied. The knowledge of the error is decisive and makes it impossible to apply the objective test of intention, which is the test applied where the parties misunderstand each other and both are mistaken without either being aware of any mistake. That type of mistake is termed "mutual".

The next question that arises is whether the agreement of the 6th to 8th defendants' counsel to the terms of the settlement, binds the 6th to 8th defendants. For the reasons I have already given I would hold that this is not a case where the 6th

to 8th defendants should be bound by the agreement made by their counsel. The mistake of the 6th defendant being known to the plaintiff, the settlement entered into by their respective counsel derives no validity from the mere fact that their counsel agreed to the terms. This Court has ample powers to give relief by setting aside a judgment which has been entered upon an agreement based on mistake. No Court will lend its authority to compel observance of an agreement so arrived at. I see nothing irregular or objectionable in the agreement itself. It is a common and well-established method of solving a dispute such as arose in this case. The District Judge, however, had no power to set aside the agreement entered into, and the appeal filed against his judgment entered in terms of the agreement was misconceived. It is unnecessary, in the view I have formed of the situation arising from the mistake made by 6th to 8th defendants' counsel, to consider the arguments addressed to us on section 408 of the Code. I reserve my opinion on the interpretation of that section. I would only add that I am not prepared to whittle down the powers of counsel to enter into settlements. It has often been held by this Court that counsel has, by reason of his retainer, complete authority over the action and the mode of conducting it, including an abandonment of it. He can compromise in all matters connected with the action and not merely collateral to it, even contrary to the instructions of his client ,unless the opposite side had knowledge that he was acting contrary to authority. In my view, he does not require his client's authority to make an admission.

I agree that the judgment and decree should be set aside and a trial *de novo* held. But with regard to costs, I would not award the appellants any costs of the appeal since they mistook their remedy in appealing. I would award them the costs of the application for *restitutio in integrum*, in which I hold that they have succeeded. And I would order the parties to bear their own costs of the abortive trial since they are equally to blame for the inconclusive agreement.

Appeal allowed.

Present: **Basnayake, C.J.**

ANTHONY RAJAH *vs.* THE QUEEN*

S.C. No. 1040/60—*M.C. Trincomalee No.* 26088

Argued and Decided on: March 14, 1961.

Criminal Procedure Code, Section 440(1)—*Perjury—When is an offence under this section committed—What a Magistrate is required to do in convicting a person under the section.*

Held : That the offence of perjury under section 440(1) of the Criminal Procedure Code is not committed, unless the Court, being a subordinate court finds that a witness made *a particular statement* knowing or believing it to be false and the court records its finding and gives its reasons. The Magistrate should record what in his opinion was the statement that the witness made knowing or believing it to be false.

E. B. Vannitamby for the witness-appellant.

A. A. de Silva, Crown Counsel, for the Attorney-General.

BASNAYAKE, C.J.

This is an appeal by a witness who has been convicted of perjury and fined Rs. 50/- in default one month's rigorous imprisonment. The learned Magistrate has made no reference to the provision of law under which he acted, but it may be inferred from the words addressed by him to the appellant that he had section 440(1) of the Criminal Procedure Code in mind. That section reads:

*For Sinhala Translation, see Sinhala section vol. 1, part 6, p. 22

"If any person giving evidence on any subject in open court in any judicial proceeding under this Code gives, in the opinion of the court before which the judicial proceeding is held, false evidence within the meaning of section 188 of the Penal Code it shall be lawful for the court, if such court be the Supreme Court, summarily to sentence such witness as for a contempt of the court to imprisonment either simple or rigorous for any period not exceeding three months or to fine such witness in any sum not exceeding two hundred rupees; or if such court be an inferior court to order such witness to pay a fine not exceeding fifty rupees and in default of payment of such fine to undergo rigorous imprisonment for any period not exceeding two months. Whenever the power given by this section is exercised by a court other than the Supreme Court the Judge or Magistrate of such court shall record the reasons for imposing such fine."

In the instant case the witness said:

"I did not load some batteries into the lorry at the warehouse. I saw the batteries in court at the Police Station. I did not load individual batteries as in court into a lorry, but I loaded battery cases. I loaded them into an open lorry. . . .I did not load the battery cases at the request of 3rd accused. I did not load any battery cases. I was only by the side. I did not notice any batteries inside the cases. At the Police Station I was shown these batteries. I was assaulted and asked to say that I loaded them into the lorry."

The learned Magistrate thereupon addressed the witness thus:

"You told the court that you loaded battery cases into a lorry. Later you said that you did not load any battery cases."

He then proceeded to record the following:-

"I inform the witness that one of these statements is false. I ask the witness whether he has any cause to show why he should not be dealt with for perjury. Witness states that he did not say as recorded. I can remember this witness's statement which was recorded correctly at my dictation and this witness has deliberately gone back on his earlier statement. I fine the witness Rs. 50/-. In default one month R.I."

The learned Magistrate does not state which is the statement which in his opinion the witness made knowing or believing it to be false. In a proceeding under section 440(1) of the Criminal Procedure Code the Magistrate should record what in his opinion was the statement which the witness made knowing or believing it to be false. An offence under the section is not committed unless the court, being a subordinate court, finds that a witness made a particluar statement knowing or believing it to be false and the court records its finding and gives its resasons. In the instant case the learned Magistrate has not done so. I therefore set aside the conviction and acquit the appellant.

Set aside.

Present: **Basnayake, C.J., and H. N. G. Fernando, J.**

MEMANIS *vs.* EIDE*

S.C. No. 14—*D.C. Balapitiya No. NP.* 780

Argued & Decided on: March 16, 1960,

Partition Act No. 16 *of* 1951, *sections* 25,26—*Determination of shares of parties in partition action—Provisions of these sections to be strictly followed.*

Held : That in a partition action the shares of the parties must be determined by the Judge as required by the provisions of section 25 of the Partition Act. It is the share so determined that the Court is required to enter in the interlocutory decree.

L.W. de Silva, with *D. C. W. Wickremasekera* for the 4th defendant-appellant.

No appearance for the plaintiff-respondent.

BASNAYAKE, C.J.

It is brought to our notice by learned counsel for the appellant that the headman stated in the evidence at the trial that lots A, B, and C, the lands sought to be partitioned, are Crown land, and that he reported that fact to the Government

*For Sinhalese Translation, see Sinhala section Vol. 1 part 6, page 24

Agent but that no action was taken. He has also spoken about a Government survey of this land in 1937. The Learned District Judge has not investigated this aspect of the case. In view of this evidence it is important that, before the partition decree is entered, the court should satisfy itself that the land does not belong to the Crown. We therefore direct the learned District Judge to issue notice on the Attorney-General so that the Crown should have an opportunity of making its claim to the land if in fact it is Crown land.

Learned counsel for the appellant has also drawn our attention to an illegality in the judgment in this case. In his judgment the learned Judge says: "Plaintiff's Proctor will file a schedule of shares, which when filed will form part and parcel of this judgment" and there is schedule of shares filed which he has adopted in entering the interlocutory decree. Section 25 of the Partition Act, No. 16 of 1951, provides that the Judge shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share or interest of each party to, of, or in the land to which that action relates, and shall consider and decide which of the orders mentioned in section 26 should be made. In the instant case there has been no determination of the shares of the parties as required by the Partition Act. It is the share so determined by the Judge that the court is required to enter in the interlocutory decree. The course taken by the learned District Judge is contrary to the provisions of section 26 of the Partition Act. We therefore set aside the interlocutory decree and direct that the case be sent back to the lower court for determination of the shares by the Judge, in the event of his deciding that the land sought to be partitioned is not Crown land.

The appellant is entitled to the costs of the appeal.

H.N.G.FERNANDO, J.

I agree.

Set aside and sent back.

Present: **Weerasooriya, J.**

THE KODDIYARPATTU CO-OPERATIVE, AGRICULTURAL PRODUCERS & SALES SOCIETY, LTD. *vs.* ABDUL HAMEED, *et al.*

S.C. No. 242/56—*C.R. Trincomalee No.* 802.

Argued on: 17*th January*, 1961.
Delivered on: 5*th May*, 1961.

Co-operative Societies Ordinance—Reference to arbitration under Section 45(2)—*Award made—Procedure in application for enforcement—Rule* 38 (13) *made under section* 46(2) *of the Ordinance.*

Held : That an application under rule 38(13) made under section 46(2) of the Co-operative Societies Ordinance (Cap. 107) for the enforcement of an award made on a reference to arbitration under section 45(2) of the Ordinance should be by petition and affidavit in proceedings by way of summary procedure under Chapter XXIV of the Civil Procedure Code.

Followed : *Bandahamy vs. Senanayake*, 62 N.L.R. 313.
Jayasinghe vs. Boragodawatte Co-operative Stores, 56 N.L.R. 462.
de Silva vs. Galkissa Wattarappola Co-operative Stores Society, 54 N.L.R. 326.

E. R. S. R. Coomaraswamy, with *H. Mohideen* for the plaintiff-appellant.

No appearance for defendants-respondents.

WEERASOORIYA, J.

The plaintiff-appellant is a co-operative society registered under the Co-operative Societies Ordinance (Cap. 107). On a reference to arbitration under section 45(2) of that Ordinance an award was given directing the defendants-respondents to pay a sum of Rs. 280/28 to the plaintiff. This award the plaintiff sought to enforce by filing on the 19th August, 1955, an action by way of regular procedure against the defendants for the recovery of the amount due. In the answer of the defendants various defences were taken attacking the validity of the award. After trial the learned Commissioner of Requests delivered judgment dismissing the action with costs, one of the grounds for doing so being that the award was bad as there was no proof that the reference to arbitration was of a dispute touching the business of the plaintiff. From this judgment the plaintiff has appealed.

Rule 38(13) of the rules made under section 46(2) of the Co-operative Societies Ordinance, and published in Government Gazette No. 10,086 of the 24th March, 1950, is in the following terms:

> "A decision or an award shall on application to any civil court having jurisdiction in the area in which the society carries on business be enforced in the same manner as a decree of such court."

This rule, it will be observed, does not specify the procedure to be adopted in applying for the enforcement of the award as a decree of Court. The question as to the correct procedure has been the subject of conflicting judicial opinion, but in the recent case of *Bandahamy v. Senanayake*, 62 N.L.R. 313, the majority of a divisional bench of seven Judges held that the correct procedure is as stated by a divisional bench of three Judges in *Jayasinghe v. Boragodawatte Co-operative Stores*, 56 N.L.R. 462, which had affirmed the decision in *de Silva v. Galkissa Wattarappola Co-operative Stores Society*, 54 N.L.R. 326. The effect of these decisions is that an application under rule 38(13) for the enforcement of an award should be by petition and affidavit in proceedings by way of summary procedure under Chapter XXIV of the Civil Procedure Code.

The only authority that learned counsel for the plaintiff was able to cite in support of the procedure adopted in the present case is an *obiter dictum* of Gratiaen, J., in the last mentioned case, that one of the courses open to a person applying to enforce an award is to do so "in a regular action". But it was the alternative procedure laid down in the same case—of applying by petition and affidavit by way of summary procedure—that was adopted by the bench of three Judges (of whom Gratiaen, J., himself was one) in the subsequent case of *Jayasinghe v. Boragodawatte Co-operative Stores* (*supra*) and held to be the correct procedure by the majority of the seven Judges in *Bandahamy v. Senanayake* (*supra*). The terms of rule 38(13) clearly contemplate proceedings in the nature of execution proceedings, and not the filing of a regular action for the enforcement of an award. It is a well established rule that where an enactment creates new rights or obligations and provides a special procedure for their enforcement, resort must be had to the prescribed procedure and to no other in enforcing those rights or obligations. There seems to be no ground for departing from that rule in the present case.

With all respect to Gratiaen, J., I am, therefore, of the opinion that the present action is misconceived and was rightly dismissed by the Commissioner of Requests. The appeal is dismissed, but without costs, as the defendants-respondents were not represented at the hearing of it. In view of the particular ground on which the appeal is disposed, of, no final decision is given by me in regard to the Commissioner's findings on the issues framed at the trial. In the result, in any fresh proceedings that the plaintiff may be advised to take for the enforcement of the award in terms of rule 38(13), the parties would appear to be free to raise such of the same issues as may properly be said to arise for decision in those proceedings.

Appeal dismissed.

Present: **Sansoni, J.**

DAYANGANI WERAGODA *vs.* R. WERAGODA AND ANOTHER.

S.C.P. 320/60

In the matter of an application for a Writ of Habeas Corpus to produce the body of Master Veraj Sharm Weragoda

Argued on: 13*th*, 14*th*, 15*th and* 21*st March*, 1961.
Decided on: 29*th March*, 1961.

Writ of habeas corpus—Petition by mother—Does writ lie in case of child in father's custody—Principles applicable—Courts Ordinance, section 45(*a*) *and* (*b*)*—What considerations apply in deciding questions of custody.*

The petitioner sought the custody of her 9 1/2 year old son who was with his father, the 1st. respondent. The report of the Magistrate who inquired into the petition was to the effect that the petitioner should be given custody. Counsel for the 1st. respondent submitted that no writ of habeas corpus lay as the father was entitled to the custody of his child and the child was therefore in lawful custody. The present case would therefore not come within section 45(b) of the Courts Ordinance. He further submitted that as, under the Roman-Dutch law, the rights of the father were superior to those of the mother in regard to the custody of the children of the marriage and as no divorce or separation had been granted in the present case, the Court had no jurisdiction to deprive the father of the child's custody "except under the Court's powers as upper guardian of all minors to interfere with the father's custody" on certain special grounds.

Held : (1) That the principles under which our Courts would issue a writ of habeas corpus were the same as those which regulate the issue of such a writ in England and a writ, therefore, did lie in cases like the present.

(2) That section 45(a) of the Courts Ordinance was much wider than section 45(b) and would cover cases where the writ is used with respect to the custody of infants. Here the question would be, not whether the infant's liberty was restrained, but what was the proper order to make in the interests of the child, as regards its custody.

(3) That in dealing with questions of custody the paramount consideration was the welfare and happiness of the infant and the rights of the father would prevail only if they were not displaced by such considerations.

Cases referred to : *Gooneratnayaka v. Clayton*, 31 N.L.R. 132
In re Spence, 2 P.H. 247
R. v. Gyngall, (1893), 2 Q.B. 232
In re Fynn, 2 D.G. & S. 457
In re Agar Ellis, (1883), 24 Ch. D. 317
R v. Greenhill, 4 A. & E. 624
R. v. Barnado, (1891), 1 Q.B. 194
McKee v. McKee, 1951 A.C. 352
Calitz v. Calitz, 1939 A.D. 56

Dr. Colvin R. de Silva with *H. D. Tambiah* and *K. Palakidnar* for the petitioner.

H. W. Jayawardene, Q.C., with *R. de Silva* and *L. C. Seneviratne* for the 1st respondent.

SANSONI, J.

This is petition by a mother in which she asks for the custody of her son who is now 9½ years old. The boy is now with his father, the 1st respondent. The parties were married on 19th October, 1951, and the child was born on 11th September, 1952. The Magistrate who was asked to inquire into the petition and report to this Court has recommended that the petitioner should be given the custody of the child.

Mr. Jayawardene, who appeared for the 1st respondent, took the objection that no writ of *habeas corpus* lies in this case because the father is entitled to the custody of his child, and the child being therefore in lawful custody the writ cannot be issued, since the writ only lies where a person is "illegally or improperly detained in public or private custody." Those are words taken from section 45(b) of the Courts Ordinance (Cap. 6); but section 45(a) is in much wider terms, and enables the writ to be issued to bring up "the body of any person to be dealt with according to law." Since the matter was argued at some length, I think I ought to deal with this question first.

It was decided in *Gooneratnayaka v. Clayton*, (1929) 31 N.L.R. 132, that the principles upon which such a writ should be issued should be the same as those which regulate the issue of the writ in England. Upon looking into the history of the matter in England, I find that prior to the Judicature Act of 1873 the writ was issued either by the Court of King's Bench, where the common law

was applied, or by the Court of Chancery, which exercised equity jurisdiction. Speaking of the latter jurisdiction, *Lord Cottenham L.C.* in the case of *In re Spence*, 2 P.H. 247, said: "Courts of law interfere by a habeas for the protection of the person of anybody who is suggested to be improperly detained. This Court interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the Crown as *parens patriae*, and the exercise of which is delegated to the Great Seal."

After the Judicature Act, proceedings were instituted in the Queen's Bench Division, and the Judges exercised the paternal jurisdiction which was vested in the Court of Chancery as being the guardian of all infants. The Court had the power in that capacity to supersede the natural guardianship of a parent. In *R.v. Gyngall*, (1893) 2 Q.B. 232, Lord Esher M. R. explaining how the Chancery jurisdiction was exercised said: "The natural parent in the particular case may be affectionate, and may be intending to act for the child's good, but may be unwise, and may not be doing what a wise, affectionate and careful parent would do. The Court may say in such a case that, although they can find no misconduct on the part of the parent, they will not permit that to be done with a child which a wise, affectionate, and careful parent would not do." The jurisdiction, however, must be exercised judicially and with caution before the parental right is interfered with, though its exercise "is not confined to cases where there has been misconduct on the part of the parent." He cited the case of *In re Fynn*, 2 D.G. & S. 457, where Knight Bruce V.C. said: "Before this jurisdiction can be called into action, it (i.e. the Court) must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shown himself to be a person of such a description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his right should be treated as lost, or suspended—should be superseded or interfered with. If the word 'essential' is too strong an expression it is not much too strong."

In the case of *In re Agar Ellis*, (1883) 24 Ch. D. 317, Brett M. R. after pointing out that the question before the Court upon *habeas corpus* is whether the person is in illegal custody without that person's consent, said that up to a certain age children cannot consent or withhold consent and the Court does not inquire in such cases whether the child consents to be where it is. (The age is now accepted as 14 in the case of boys and 16 in the case of girls.) The principles upon which the Court acts were also stated by *Coleridge*, J. in *R. v. Greenhill*, 4 A. & E. 624, where in dealing with a case such as the present one he said: "Where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that where the legal custody is no restraint exists; and where the child is in the hands of a third person that presumption is in favour of the father." The learned Judge, however, added "but, although the first presumption is that the right custody according to law is also the free custody, yet, if it be shown that cruelty or corruption is to be apprehended from the father a counter presumption arises." It has been pointed out over and over again that the writ has always been used with respect to the custody of infants in order to decide whether the person in whose custody they are should continue to have them. "In such cases it is not a question of liberty but of nurture, control, and education"—*per Lord Esher M.R.* in *R.v. Barnado, Jones's* case, (1891) 1 Q.B. 194.

I do not think it necessary to go into this aspect of the matter any further. The authorities I have cited appear to me to answer sufficiently the objection taken by Mr. Jayawardene and I think that section 45(a) covers those cases where the writ is used with respect to the custody of infants. In those cases the writ is issued not in order to enquire whether the infant's liberty is restrained but in order that the Supreme Court may decide what order should be made, after inquiry, as to the child's custody, in the interests of the child. This question is quite distinct from the question as to who should be appointed a curator of the property and a guardian of the person of a minor, under Chap. 40 of the Civil Procedure Code, and the two should not be confused.

The next matter I have to consider is whether the petitioner's application should be granted or not. In *McKee v. McKee*, (1951) A.C. 352, Lord Simonds, delivering the judgment of the Privy Council, said that in questions of custody "the welfare and happiness of the infant is the paramount consideration. . . . .to this paramount consideration all others yield." It is true that he was there dealing with a case from Canada, but he said that the same principle applied in England. I have no doubt that this is the principle that should guide me in the present application also. Although in England the principle applies because, I suppose, the Court is the guardian of all infants, in Roman-Dutch Law the State is regarded as the upper guardian of all minors. I do not think there is any material difference in the two concepts. In deciding

what is best for the child, the Court will have regard to the rights of either parent, their character, and any other factors which the Court thinks ought to be weighed.

Much stress was laid by Mr. Jayawardene on the Roman-Dutch Law principle enunciated in *Calitz v. Calitz*, (1939) A.D. 56, that the rights of the father are superior to those of the mother in regard to the custody of the children of the marriage and where no divorce or separation has been granted, the Court has no jurisdiction to deprive the father of his custody "except under the Court's powers as upper guardian of all minors to interfere with the father's custody on special grounds, such for example as danger to the child's life, health or morals." I think that danger to the child's life, health or morals is only an example of the special grounds which would justify the interference of the Court. As I see it, the Court will decide who is to have the custody of the child after taking into account all the factors affecting the case and after giving due effect to all presumptions and counter-presumptions that may apply, but bearing in mind the paramount consideration that the child's welfare is the matter that the Court is there to safeguard. The rights of the father will prevail if they are not displaced by considerations relating to the welfare of the child, for a petitioner who seeks to displace those rights must make out his or her case.

I have before me a careful and well-considered report made by the learned Magistrate before whom both parents gave evidence. He has formed a most unfavourable impression of the character of the 1st respondent, and has disbelieved him wherever his evidence came into conflict with that of the petitioner. According to his findings, the 1st respondent left the matrimonial home on 26th February, 1960 and returned to it on 1st April, 1960, only to leave it again on the following day. On 8th April, the day before the Easter holidays were to begin, he went to the school where the child was and removed the child, after giving the Headmaster a false excuse. There is no doubt that he acted callously, without any regard for his wife's feelings; and it is probably true that he is using the child to bring pressure on his wife to make her more submissive to him, so that she and her mother might provide him with more money, as they had been doing all along.

The 1st respondent has also been guilty of making entirely unfounded suggestions of immoral conduct against the petitioner in respect of two men. There is a possibility that the child's mind might be poisoned and turned against his mother if he were to remain with his father. The 1st respondent's departure from the matrimonial home appears to be unjustifiable, while the petitioner has behaved quite properly throughout. The learned Magistrate also found that the 1st respondent assaulted his wife when his demands for money were not met.

I do not think it is necessary to discuss the evidence at any length because I am in agreement with the view which the learned Magistrate formed of the parties, and his opinion as to what would be in the best interests of the child. I would not like it to be thought that the mother is being preferred because she is wealthier than the father or can give the child a more comfortable home; such a consideration would not disable him in any way from having the child's custody. But he does seem to be lacking in a due sense of responsibility when he allows himself to be arrested for non-payment of a sum of Rs. 169/- due as income tax. The child, if left where he is, would be brought up by his father and two or three servants, and I think it is better in all the circumstances that his mother should have the custody. I direct, however, that the father should have the right to visit the child once a week at the petitioner's residence, or any other place to be agreed upon between the parties, or to be decided on by the Magistrate, if the parties cannot agree.

Application allowed.

Present: **Weerasooriya, J. and T. S. Fernando, J.**

DON EDWIN *vs.* DEPUTY COMMISSIONER FOR WORKMEN'S COMPENSATION*

S.C. No. 2—D.C. (Inty) Colombo No. 2368/X

Argued on: 3rd and 4th March, 1960.
Delivered on: 5th January, 1961.

Workmen's Compensation Ordinance (Cap. 117), Sections 40 and 41—Amending Act No. 31 of 1957—Section 41 amended by enabling seizure and sale of immovable property of defaulter to pay amount

*For Sinhala Translation, see Sinhala section vol. 1, part 7, p. 25

due on award of compensation—Award made in 1953 *prior to amendment—Application to issue writ in* 1958 *under section* 41(2) *as amended—Interpretation Ordinance, section* 6(3)*—Is the amendment retrospective in operation—Prescription.*

On 30/5/58, an application was made to the District Court of Colombo in terms of section 41(2) of the Workmen's Compensation Ordinance (Cap. 117) as amended by the Workmen's Compensation (Amendment) Act, No. 31 of 1957 for the issue of writ to seize and sell certain immovable property belonging to the appellant in order to realise the balance due from him on an award of compensation dated 21-11-1953 in favour of a workman.

The appellant objected to the issue of writ on the ground that section 41(2), being a subsequent amendment introduced in 1957, was not retrospective in operation and, therefore, the writ was not available. The District Judge dismissed the objection.

In appeal it was contended (1) relying on section 6 (3) (c) of the Interpretation Ordinance, that the procedure for the recovery of the money due under the award is governed by sections 40 and 41 as they stood prior to the said amendment of 1957, viz. recovery by the sale of movable property as in the case of a fine imposed by a Magistrate.

(2) that, if section 6 (3) (c) is held not applicable the general principles which govern the question as to the extent to which subsequent legislation can be regarded as interfering with the rights of parties in a pending action would be applicable.

(3) that the application for writ was prescribed in law.

Held : (1) That the amendments effected to sections 40 and 41 by Act, No. 31 of 1957, cannot be regarded as a repeal of any part of these sections either expressly or by implication, and therefore section 6 (3) of the Interpretation Ordinance is inapplicable.

(2) That it cannot be said that any rights of the appellant were adversely affected by the amendments to sections 40 and 41, by which the legislature sought to make good an omission by providing for an additional method of recovery by seizure and sale of immovable property.

(3) That the proceedings taken under section 41 for the enforcement of an award are analogous to proceeding in execution of a decree and are a continuation of the action in which the award was made. The application, therefore was not prescribed in law.

Cases cited : *The Queen v.* (1) *Fernando and* (2) *Carolis*, 61 N.L.R. 395; 58 C.L.W. 90.
Attorney General v. Francis, 47 N.L.R. 467.
Director of Public Prosecutions v. Lamb, (1941) 2 A.E.R. 499.
Hitchcock v. Way, 6 Ad. and El. 493; 112 E.R. 360.
Starey v. Graham, (1899) 1 Q.B. 406.
Supramaniam Chettiar v. Wahid, 58 N.L.R. 140.
Peiris v Cooray, 12 N.L.R. 140.
Siyana Gangaboda Co-operative Union Ltd. v. Amarasekera, 60 N.L.R. 45.

WEERASOORIYA, J.

This appeal arises from an application to the District Court of Colombo in terms of section 41(2) of the Workmen's Compensation Ordinance (Cap. 117) as amended by the Workmen's Compensation (Amendment) Act, No. 31 of 1957, for the issue of writ to seize and sell certain immovable property belonging to the respondent-appellant in order to realise the balance due from him on an award of compensation in favour of one R. P. Lewis Singho, a workman. The amount of the award, which is dated the 21st November, 1953, was Rs. 4246/50 including costs. As a result of proceedings taken under section 41 of the Ordinance (before it was amended) a sum of Rs. 2376/76 was recovered by distress and sale of the appellant's movable property leaving a balance due of Rs. 1869/74, in respect of which the application under section 41(2) was made.

The appellant filed objections to the issue of writ, of which the only one pressed at the inquiry before the District Judge was that section 41(2), being a subsequent amendment introduced by Act No. 31 of 1957, is not retrospective in operation and, therefore, the method of recovery provided therein is not available in this case. The District Judge dismissed the objections and the present appeal is against that order.

Prior to the enactment of Act No. 31 of 1957 any sum payable in terms of an award of compensation under the Workmen's Compensation Ordinance was recoverable under section 41 as if it were a fine imposed by a Magistrate, which meant that only the movable property of a person against whom the award was made could be seized and sold. Moreover, section 40 prohibited recourse to the civil Courts for the purpose of enforcing any liability incurred under the Ordinance. But by virtue of Act No. 31 of 1957, the existing section 41 was re-numbered as section 41(1), and a new provision introduced as sub-section (2) enabling seizure and sale of immovable property of the defaulter under a writ issued by a District Court or a Court of Requests on an application made in

that behalf; and section 40 was consequently amended so as to confer jurisdiction on those Courts to entertain an application under section 41(2).

In contending that the procedure for the recovery of any sum due under the award is governed by sections 40 and 41 as they stood prior to the amendments effected by Act No. 31 of 1957, Mr. Samarawickreme who appeared for the appellant relied strongly on section 6(3) (c) of the Interpretation Ordinance (Cap. 2) which reads as follows:-

> "Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected—
>
> (*a*) .....
> (*b*) .....
> (*c*) any action proceeding or thing pending or incompleted when the repealing written law comes into operation, but every such action, proceeding or thing may be carried on and completed as if there had been no such repeal."

If the above provision applies to this case there can be no doubt that Mr. Samarawickreme's contention is entitled to succeed, provided the application for writ was made in an "action, proceeding or thing pending or incompleted" when the amendments to sections 40 and 41 came into operation. Learned Crown Counsel who appeared for the respondent argued, however, that the amendments cannot be regarded as amounting to a repeal of sections 40 and 41 or any part of them, and that section 6(3) (c) is therefore not applicable.

The usual processes by which the legislature provides that existing law shall cease to be operative are amendment, repeal, suspension and expiry. Amendment is the wider term, and may include a repeal as, for instance, where a law is repealed in part and added to in part—both processes being regarded as an amendment of the law. To repeal means to abrogate or annul. When the amendments of sections 40 and 41 by Act No. 31 of 1957 are examined it is apparent that there has been no abrogation or annulment of any part of those sections, either expressly or by implication. Suspension and expiry are also different from repeal. It was held in *The Queen vs.* (1)*Fernando and* (2) *Carolis*, (61 N.L.R. 395), that the suspension of an enactment does not attract the provisions of section 6 of the Interpretation Ordinance. In *Attorney General v. Francis*, (47 N.L.R. 467) section 6(3) was held not to apply to written laws that have expired. Section 6 was thereafter amended by the addition of a new subsection (3A) dealing with the expiration of written law.

A similar question was considered under section 38(2) of the English Interpretation Act, 1889, in *Director of Public Prosecutions v. Lamb*, (1941) 2 A.E.R. 499), That case dealt with the effect of an amendment of Regulation 9 of the Defence (Finance) Regulations, 1939, by the addition of a new paragraph at the end of the existing regulations, and three Judges of the King's Bench Division (Humphreys, Tucker and Cassels, JJ.) decided that the amendment did not amount to a repeal.

I would, therefore, hold that section 6(3) of the Interpretation Ordinance has no application to the present case.

Mr. Samarawickreme stated that in the event of section 6(3) being held not to be applicable, he would fall back on the general principles which govern the question as to the extent to which subsequent legislation can be regarded as interfering with the rights of parties in a pending action. These principles are clear enough. As stated by Lord Denham in *Hitchcock v. Way*, (6 Ad. & El 943; 112 E.R. 360), "the law as it existed when an action was commenced must decide the rights of the parties in the suit unless the Legislature express a clear intention to vary the relation of litigant parties to each other." But even so, it is necessary to ascertain whether any rights of the appellant are adversely affected by the amendments to sections 40 and 41. Mr. Samarawickreme submitted that these sections, as they stood prior to the amendments, conferred on the appellant an immunity from seizure of his immovable property for the recovery of what is due under the award.

In *Starey v. Graham*, (1899) 1 Q.B. 406 at 411, Channell, J., defined, "right acquired" as "some specific right which in one way or another has been acquired by an individual, and which some persons have got and others have not." He pointed out that it does not mean a "right" in the sense in which it is often popularly used, such as a "right" which a person has to do that which the law does not expressly forbid. In my opinion, sections 40 and 41 prior to the amendments cannot be regarded as conferring on the appellant any right or immunity as claimed for him by Mr. Samarawickreme. I incline to the view, which found favour with the learned District Judge too, that this is simply a case where there was a lacuna in the procedure originally laid down in section 41 which, in effect, prevented any property other than movable property being seized and sold in the enforcement of an award; and that in introducing the subsequent amendments the legislature sought to make

good the omission by providing for the additional method of recovery by seizure and sale of immovable property as well.

Maxwell on *The Interpretation of Statutes* (10th edition, 213) points out that it is upon the presumption that the legislature does not intend what is unjust that the leaning against giving a retrospective operation to a statute rests. There can be no question that even after the appellant's movable property was seized and sold and a part of the amount due on the award realised, his liability to pay the balance continued without any diminution notwithstanding that at the time there was no machinery provided in the Ordinance for the enforcement of that liability by the issue of writ against his immovable property. It could hardly be urged, therefore, that injustice will be caused if sections 40 and 41 in their amended form are so construed as would permit of recourse to the additional method of recovery provided therein against a debtor who, having the means to satisfy an award, refuses to do so. This is another reason for holding that the amendments are retrospective in operation.

I think that the case of *Supramaniam Chettiar v. Wahid*, (58 N.L.R. 140), decided by my brother and to which Mr. Samarawickreme drew our attention, can be distinguished from the present case. The plaintiff in that case had obtained a money decree against the defendants and caused to be seized in execution of the decree a certain sum which was owing to the 2nd defendant from his employer as "salary". The validity of the seizure was, however, challenged on the ground that under item (m) of the proviso to section 218 of the Civil Procedure Code the salary and allowances of an employee in a shop or office are exempt from sezure if they do not exceed Rs. 500/- per mensem. Admittedly the salary and allowances of the 2nd defendant, who was an office employee, did not exceed that figure. The seizure took place after section 218 was amended by the addition of item (m) to the list of excepted property in the proviso. But the action was filed, and decree obtained, before the coming into operation of the amendment. My brother held that the right to seize all sums of money by way of salary and allowance of the 2nd defendant, which had accrued to or vested in the plaintiff with the entering of the decree, was not taken away by the subsequent amendment. As section 218 confers on the holder of a money decree a positive right to seize and sell certain specified property, the *ratio decidendi* of that case would appear to be in accord with Channell, J.'s definition of a "right acquired" in *Starey v. Graham*, (*supra*).

The final objection taken by Mr. Samarawickreme to the issue of writ is based on prescription. He submitted that a cause of action accrued when the award of compensation was entered on the 21st November, 1953, and the application for writ was, in relation to that cause of action, an "action" which should have been filed within three years of the entering of the award, whereas it was filed only on the 30th May, 1958, and was therefore prescribed under section 10 of the Prescription Ordinance (Cap. 55). Section 3 of the Workmen's Compensation Ordinance provides that (subject to the exceptions in the proviso) if personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of the Ordinance. Section 16 imposes a time limit for the institution of proceedings to recover compensation. According to Mr. Samarawickreme, the proceedings instituted in respect of the liability of the appellant under section 3 were brought to a termination when the award now sought to be enforced was made, and a fresh cause of action arose upon the award. An ordinary civil action does not, however, terminate with the entering of the decree, and proceedings taken in execution have, as far as I am aware, been always regarded as a continuation of the action. In *Peiris v. Cooray*, (12 N.L.R. 362), it was held that there is no time limit within which a first application for the execution of a writ may be granted. As pointed out in that case, section 5 of the Prescription Ordinance, which restricted the right of a judgment-creditor to execute a decree after the expiry of ten years, was repealed by the Civil Procedure Code. Although the decree was over ten years old when it was sought to be executed it was never contended, that the repeal of section 5 notwithstanding, any of the other provisions of the Prescription Ordinance applied to the case. In the *Siyana Gangaboda Co-operative Stores Union Ltd. v. Amarasekera*, (60 N.L.R. 45), the question that arose was in regard to the enforcement of an award under the Co-operative Societies Ordinance (Cap. 107). The rules made under the Ordinance provide for the enforcement of an award as a decree of Court. An objection taken to the enforcement of the award on the ground that no application to have the award filed in Court had been made in terms of section 696 of the Civil Procedure Code within six months of the making of the award, was upheld by the District Judge. In appeal this Court took the view that section 696 was not applicable and sent the case back to the District Court for writ of execution to issue. The application for enforcement of the

award had been made nearly six years after the date of the award. Although the question of prescription was not especifically raised or considered, the decision appears to have proceeded on the basis that a valid award under the Co-operative Societies Ordinance can be enforced as a decree of Court irrespective of the time that has elapsed.

In my opinion, the proceedings taken under section 41 of The Workmen's Compensation Ordinance for the enforcement of an award are analogous to proceedings in execution of a decree, and are a continuation of the action in which the award was made. They do not constitute a separate action, nor does section 10 of the Prescription Ordinance apply to such proceedings.

For these reasons the appeal fails and must be dismissed with costs.

T. S. FERNANDO, J.

I agree.

Appeal dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present: **Basnayake, C.J.** (*President*), **T. S. Fernando, J., and Sinnetamby, J.**

THE QUEEN *vs.* SOCKKALINGHAM

Appeal No. 12 *of* 1959 *with Application No.* 150 *of* 1959
S.C. No. 60—*M.C. Colombo South No.* 91575

Argued on: December 1*st*, 1959
Decided on: February 29*th*, 1960.

Penal Code, sections 294, 89, 93—*Charge of murder—Plea of private defence—Does existence of intention to kill negative such plea—What must person prove to get benefit of Exception* 2 *to section* 294.

Held : (1) That when a person causes death in the exercise of his right of private defence, the fact that he kills with the intention to kill does not deprive him of the benefit of the general exception in section 89 of the Penal Code if his act falls within its ambit.

(2) That when a person is found to have gone beyond his right of private defence in causing death, he is not entitled to the immunity conferred by section 89 but he can claim the benefit of exception 2 to section section 294 if the ingredients of that exception are present. To obtain its benefit such person must prove, according to the standard of proof expected of the defence in a criminal case, that—
(*a*) in the exercise in good faith of the right of private defence of person or property he exceeded the right given to him by law,
(*b*) he caused death without premeditation, and
(*c*) without any intention of doing more harm than is necessary for the purpose of such defence.

Neville Wijeratne (Assigned) for the accused-appellant.

V. S. A. Pullenayagam, Crown Counsel, for the Attorney-General.

BASNAYAKE, C.J.

The only question that arises for decision on this appeal is whether the learned Commissioner's directions on the law of private defence are correct.

Shortly the material facts are as follows :- The accused Sockkalingham, son of Kandiah, was an employee at an eating-house known as Mills View Cafe in Havelock Road, Wellawatte. There was a dispute as to his true salary. His employer maintained that it was Rs. 55/- for the first month and Rs. 60/- per mensem thereafter. The accused claimed that it was Rs. 75/- per mensem. On 16th October 1958 he left the service of his employer, according to him for no apparent reason; but according to the accused for non-payment of his salary despite repeated demands. At about 4 p.m. he came to the boutique with a Police Officer and removed his belongings. It is common ground that he came again at about 7 p.m. According to the prosecution he entered the boutique from the back door bringing with him an iron rod, and without a word struck the deceased Raman on the head. He also struck with the same rod an employee by name Pandy, son of Suppiah Reddiyar, and unsuccessfully attempted to strike the cashier Vengadasalem. He was arrested and disarmed no sooner than he got an to the road by a bystander, who detained him till police constable Dayaratne took charge of him and the iron rod. Raman sustained a fracture of the skull which resulted in his death. The accused stated that it was he who was attacked with the iron rod and that in

defence he seized it and ran out of the boutique waving it. He is unable to say whether it struck anyone.

On these facts the learned Commissioner directed the Jury on the law of private defence of person. He said :-

> I have just explained to you, in this case the accused says that he was acting in the exercise of his right of private defence. It is defined in this way.
>
> Nothing is an offence which is done in the exercise of the right of private defence. Every person has a right subject to certain restrictions to defend his own body or the body of any other person against an offence affecting the human body. In this case we are not concerned with property. I shall deal with only conditions that you may be called upon to consider in this case. There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. The whole purpose of the accused's conduct was to defend himself and in the course of defending himself he was entitled to use whatever harm that was necessary to repel any unlawful assault on him. The right of private defence of the body extends to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the excercise of the right as may reasonably cause apprehension of death or even of grievous hurt. If the accused felt that when these people were assaulting him there was danger to his life or that there was likely that grievous hurt would be caused to him he has even the right to cause the death of his assailant. But if in the exercise of his right of private defence he has caused more harm than it is necessary to inflict for the purpose of his defence, then his offence would not be murder but the lesser offence of culpable homicide not amounting to murder.

The above directions are unexceptionable and set out succinctly the law of private defence of person.

Then he proceeded to explained section 92(4) and Exception 2 to section 294 of the Penal Code thus—

> Now, what then is the position where there was no apprehension of death? Well as I mentioned earlier, one of the essential conditions was that :-
>
> "The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence."
>
> What if a person, while acting in defence of himself, does exercise, does inflict more harm than it is necessary to inflict for his defence? If he does not inflict more harm he is not guilty of any offence. But what is the position where he does inflict a little more? Does the law give him no protection at all? It is for that purpose that this exception has been created to the definition of murder :-
>
> "Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom is he excercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence."
>
> Then, in such a case, the offence is not murder but culpable homicide not amounting to murder. But, there are essential conditions to that. He must act in 'good faith'. By 'good faith' is meant—the ordinary connotation of the term means 'honestly', 'sincerely'. But the law says something more in regard to 'good faith' when considered in this context :-
>
> "Nothing is said to be done or believed in good faith which is done or believed without due care and attention."
>
> You see, the fact that he honestly believed that he was in danger is not sufficient. Did he exercise sufficient care and attention before he believed that he was in danger, acting in the exercise of his right of private defence? And there is the other condition: The harm that he inflicts should be without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence. You see, the sole intention must be to defend, not to cause harm. If he does an act intending to cause harm while defending himself—not merely to repel—then it is murder. But, if he commits an error of judgment and inflicts more harm than is necessary, but solely for the purpose of defending himself, then it is culpable homicide not amounting to murder.

Learned Counsel submits that the following passage is wrong in law and constitutes a misdirection—

> "You see, the sole intention must be to defend, not to cause harm. If he does an act intending to cause harm while defending himself—not merely to repel—then it is murder. But, if he commits an error of judgment and inflicts more harm than is necessary, but solely for the purpose of defending himself, then it is culpable homicide not amounting to murder."

We are of opinion that the direction against which the appellant complains is wrong and cannot be reconciled with what he stated so well earlier.

When a person causes death in the exercise of his right of private defence there is little doubt that he does so intentionally. The fact that he kills with the intention to kill does not deprive him of the benefit of the general exception in section 89 of the Penal Code if his act falls within its ambit. Section 93 clearly provides that in the exercise of the right a person may voluntarily cause death or any other harm to the assailant. When death is caused and the question is whether the person who caused it acted within this right or not and it is found that he went beyond his right he is not entitled to the immunity conferred by section 89 but he can claim the benefit of Exception 2 to section 294 if the ingredients of that exception are present. To obtain its benefit the person who causes death must prove, according to the standard of proof expected of the defence in a criminal case, that—

(*a*) in the exercise in good faith of the right of private defence of person or property he

exceeded the right given to him by law,

(*b*) he caused the death without premeditation, and

(*c*) without any intention of doing more harm than is necessary for the purpose of such defence.

The learned Commissioner was therefore wrong in saying "the sole intention must be to defend and not to cause harm. If he does an act intending to cause harm while defending himself—not merely to repel—then it is murder."

Although the particular passage is open to objection we are inclined to think that the summing up taken as a whole sets out the law correctly and that the jury could not have been misled in their consideration of the defence.

The appeal is dismissed and the application is refused.

Appeal dismissed.

Present: **L. B. de Silva, J. and H. W. Tambiah, J.**

NANDAWATHIE HEVAVITHARNA *vs.* THEMIS DE SILVA AND OTHERS

S.C. No. 75/60—*D.C. Balapitiya Case No. N.P.* 367

Argued on: 17*th March* 1961
Decided on: 24*th March* 1961.

Partition action—Partition Act No. 16 *of* 1951, *sections* 2, 23, 26—*Powers of a court thereunder—Effect of plaintiff including separate lot belonging to a third party, in corpus to be partitioned—Can the court exclude it—Civil Procedure* Code, *section* 839.

Held : That where in a partition action the plaintiff has wrongly included as part of the *corpus*, land belonging to a person other than one of the co-owners of the land sought to be partitioned, a Court has power to make an order excluding such a lot. Since section 26 of the Partition Act does not exhaust all the orders which a Court can make, such an order would be within the inherent powers of the Court under section 839 of the Civil Procedure Code.

Luinona vs. Gunasekera, 60 N.L.R. 346, not followed.

Cases referred to : *Banda vs. Weerasekera*, 23 N.L.R. 157.
Narsingh Das vs. Mangal Dubey, 1883, 5 All. 163
Sedohami vs. Mahomadu Ali, 7 N.L.R. 247.

E. B. Wickramanayake, Q.C. with *S. W. Jayasuriya* for the plaintiff-appellant.

No appearance for the defendants-respondents.

TAMBIAH, J.

The plaintiff instituted this action to partition a land called Koradolawela depicted as lots A-G in plan, 3590 dated 31-3-55 mady by Mr. E. de Z. Gunawardena, Licensed Surveyor marked "X" in the course of the proceedings.

The 7th defendant filed answer claiming lot F in the said plan as a separate and distinct portion forming part of a land called Koradellendeniya. The fifth and sixth defendants claimed lot E as a separate land. The 30th defendant claimed a divided portion as the property of the Crown. Those defendants claimed therefore the exclusion of these lots.

At the trial, the plaintiff sought to restrict the partition action to lots, A,B,C, and D in the plan and asked for the exclusion of lots E, F and G. It was contended by Counsel for the seventh defendant that the plaintiff having filed a partition action for a land, of an extent of 1 acre and 38 perches, and having registered the *lis pendens* in respect of this land, cannot now ask for a partition of a portion of it, and therefore he submitted that plaintiff's action must be dismissed. The learned Judge, purporting to follow the ruling in *Luinona vs. Gunasekera*, (1958), 60 N.L.R. 346, held that the plaintiff's action must necessarily fail and dismissed it with costs. The plaintiff has appealed from this order.

It was contended on behalf of the plaintiff-appellant that the District Judge had no power to dismiss a partition case in view of the provisions of the Partition Act, No. 16 of 1951. Learned Counsel for the appellant also urged that the trial judge had misapprehended the ruling in *Luinona's case* (*supra*). In that case it was held that where the plaintiff in a partition case has sought to include land belonging to a person, other

than the co-owner of the land sought to be partitioned, then the proper course for the District Judge to adopt is to deal with that land also and to declare the person, who proves title to it as the owner in the interlocutory decree. In the course of his judgment Basnayake, C.J., said at p. 349:

"The scheme of the Partition Act is that once an action is instituted and *lis pendens* is duly registered the action must proceed in respect of the land described in the plaint except where a larger land is made the subject-matter of the action. In such a case the procedure prescribed by section 25 must be followed. The Act makes no provision for excluding from the action any part of the land to which the action relates. If allotments of land of which some of the parties to the action are sole owners are included by the plaintiff in his action the only way of dealing with them under the scheme of the Act is by declaring in both the interlocutory and final decrees such parties entitled to those separate allotments."

It has hitherto been the practice of the Courts to exclude a separate land wrongly included by a plaintiff as being part of the *corpus* of the partition case. However, in view of the far-reaching consequences of the ruling in *Luinona's* case it is necessary to consider whether the Court should investigate the title of such separate allotments. An examination of some of the provisions of the Partition Act becomes relevant.

The Partition Act, section 2, is as follows :-

"Where any *land belongs in common to two or more owners*, any one or more of them may institute an action for the partition or sale of the land in accordance with the provisions of this Act." It would appear that by this section the Courts are empowered to entertain partition actions only in respect of lands which are co-owned. Even prior to this Act the Courts regarded "with strong disapproval any attempt to use the Partition Ordinance for the purpose of dealing in an action with distinct portions of land in which the shareholders and the interests are not the same." (*Per* Bertram, C.J., in *Banda v. Weerasekera*, (1921), 23 N.L.R. 157 at p. 159).

Section 3 sets out the manner in which a plaint should be presented in the appropriate Court, section 4 deals with the requisites of the plaint, section 5 sets out the persons who have to be made parties, section 6 provides for the registration of a *lis pendens*, section 7 specifies the consequences of the failure to comply with section 4, 5 or 6, and section 8 and the succeeding sections set out the procedure to be followed in partition cases. The Court has to issue a commission to the surveyor to make a preliminary survey of the land set out in the plaint (see section 16). The Surveyor has to make the survey and furnish a report in which he must set out the particulars specified in section 18 of the Act. Where there is a dispute regarding the *corpus* of the partition, special provisions are made by section 23(1) which is in the following terms:

"Where a defendant in a partition action avers that the land described in the plaint is only a portion of a larger land which should have been made the subject-matter of the action or *that only a portion of the land so described should have been made such subject matter*, the Court may on such terms as to the deposit or payment of costs or survey as the Court may order, issue a commission to a surveyor directing him to survey the extent of land referred to by the defendant."

Section 23(3) is as follows :-

"Where a survey made under a commission issued under sub-section (1) of the section discloses that the land described in the plaint is only a portion of a larger land which should have ben made the subject-matter of the action, the Court shall specify the party to the action by whom, and the date on or before which, an application for the registration of the action as a *lis pendens* affecting that larger land shall be filed in Court, and the provisions of sections 6, 8 (a) and 11 shall apply to that application."

The Act also imposes certain duties on the parties to the action specified by the Court under section 23(3) of the Act (see section 23(4)). The Act also lays down procedure to be followed where on the application of the defendant, the Court finds that a larger land has to be the subject-matter of the partition. Although section 23(1) deals with a case where a plaintiff has included in his plaint a larger *corpus* than the one which is the subject-matter of the partition action, the Act has not expressly stated that the Court has the power not to exclude such a lot. Section 26 set out the powers of the Court in entering an interlocutory decree as follows:-

"26(1). At the conclusion of the trial of a partition action, or on such later date as the Court may fix, the Court shall pronounce judgment in open Court, and the judgment shall be dated and signed by the judge at the time of pronouncing it. As soon as may be after the judgment is pronounced, the Court shall enter an interlocutory decree in accordance with the findings in the judgment, and such decree shall be signed by the judge."

"26(2). The interlocutory decree *may include* one or more of the following orders, so however that the orders are not inconsistent with one another :-

(*a*) order for a partition of the land;
(*b*) order for a sale of the land in whole or in lots;
(*c*) order for a sale of a share or portion of the land and a partition of the remainder;
(*d*) order that any portion of the land representing the share of any particular part only shall be demarcated and separated from the remainder of the land;
(*e*) order that any specified portion of the land shall continue to belong in common to specified parties or to a group of parties;
(*f*) order that any share shall remain unallotted."

Section 26(2) does not exhaust the powers of the Court, since the words of the sub-sections show

that the interlocutory decree contemplated by it "*may include*" one or more of the remedies set out there. The use of the words 'may include' suggest that the orders specified in the sub-section are not exhaustive. Thus although there is no provision in section 26 to dismiss an action the Court's power to do so cannot be questioned.

There is no provision in the Partition Act that the Court is obliged to make any of the orders set out in section 26(2), in respect of the land that is described in the plaint. Nor is there any provision in the Act providing for the declaration of title to a land solely owned by a person which has been wrongly included in the *corpus* sought to be partitioned. In such cases the practice hitherto has been to exclude the land which is outside the subject-matter of the partition action and which is claimed or proved to have been the property of a person who is not a party to the proceedings. It is not uncommon for a plaintiff to include small portions of land in the *corpus* belonging to other persons. In all such cases if the Court has to adjudicate also on the title of the owners of those lands, then the Court will be obliged to investigate the title of lands which do not come within the purview and scope of section 2 of the Partition Act. Further, if the Court has to examine the title of persons whose lands have been wrongly included in the *corpus*, great inconvenience and hardship may be caused to persons who may be quite content to possess such lands in common or, if it happens to be the land of a single individual, to possess it by himself. In our view it is not the intention of the Legislature in passing the Partition Act that the Court should partition any lands other than those that came within the ambit of section 2 of the Act.

As section 26 does not exhaust all the orders which a Court could make, in our view the Court has the inherent power, under section 839 of the Civil Procedure Code, to make an order excluding a lot which has been wrongly included in the *corpus*. Therefore we respectfully differ from the ruling in *Luinona's* case (*supra*) which is not binding on us. In this connexion the following observations of Mahmood, J., in *Narsingh Das v. Mangal Dubey*, (1883, 5 All. 163 at p. 172) are apposite, "Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibitions cannot be presumed." Under the Partition Ordinance, No. 10 of 1863, now repealed, this Court has recognised the procedure of reducing the *corpus* in the partition suit. (see *Sedohami vs. Mahomadu Ali*, (1896) 7 N.L.R. 247 at p. 250).

We would therefore set aside the order of the learned District Judge and direct him to proceed with the partition of the lots A-D in the plan filed of record, and to exclude the other lots. The plaintiff will not be entitled to the costs of this appeal.

L. B. DE SILVA, J.
I agree.

Set aside.

Present: **Basnayake, C.J. and L. W. de Silva, A.J.**

PITAWELA SUMANGALA *vs.* HURIEKADUWE DHAMMANANDA

S.C. No. 198/1956—*D.C.* (*Inty*) *Kandy L* 4556

Argued and decided on: 19*th September*, 1957.

Buddhist Temporalities Ordinance (*Cap.* 222), *sections* 4 (1), 20 *and* 34—*Claim to incumbency—Is it prescribed in* 3 *years.*

The plaintiff claiming to be the rightful Viharadhipathy of Potgul Vihare (exempted from the operation of section 4(1) of the Buddhist Temporalities Ordinance, instituted this action in June, 1955 alleging that from March, 1946 the 1st defendant (Pitawela Sumangala) had disputed his right to the incumbency and had kept him out of possession of the endowments of that Vihare and praying—

(*a*) for a declaration that he is the Viharadhipathy of the said Vihare,
(*b*) for ejectment of the defendant from the Vihare property and restoration to possession.

The defendant pleaded *inter alia* that the plaintiff's cause of action was prescribed, on the basis of the plaintiff's admission that his rights were first disputed in 1946.

This plea of prescription was tried as a preliminary issue. Counsel for the defendant cited *Rawata Unnanse vs. Ratnajothi Unnanse*, 3 C.W.R. 193, and *Terunnanse vs. Terunnanse*, 28 N.L.R. 477, in support of his contention that the claim of the plaintiff was barred as more than three years had lapsed after the cause of action arose.

The learned District Judge (Mr. M. M. Maharoof) held that these decisions were given prior to the Buddhist Temporalities Ordinance (Cap. 222) of 1931 came into force, when a claim to an incumbency was regarded only as a claim for a declaration of status and therefore did not apply to the present case. The learned Judge stated that an incumbency action brought under the present Ordinance in respect of a temple where the temple property vests in the incumbent would involve the question of title to the temple lands and that section 34 of the Ordinance makes the Prescription Ordinance inapplicable in cases brought for the assertion of title to temple property. He accordingly held in favour of the plaintiff. The defendant appealed.

H. V. Perera, Q.C. with *C. R. Gunaratne, B. Aluwihare and T. B. Dissanayake* for the defendant-appellant.

H. W. Jayawardane, Q.C. with *B. S. C. Ratwatte* for the plaintiff-respondent.

The Supreme Court after hearing Counsel dismissed the appeal with costs.

The following is the judgment of the District Court which was appealed from:

ORDER

The plaintiff who claims to be the rightful Viharadhipathy of Potgul Vihare according to the Sissiyanu Sissiya Paramparawa which is the rule of succession to the incumbency obtaining in that vihare, alleges that from March 1946 the 1st defendant has disputed his right to the incumbency and has kept him out of possession of the endowments of that vihare. He asks that he be declared the vihara-adipathy of the vihare, that the first defendant be ejected from the vihare property and that he be placed in possession.

The issues arising on the pleading have been framed and certain admissions recorded. Two of the issues-viz 12 and 15, are issues of law and I have been asked to try them first. These issues refer to the same matter and arise on the averment in the answer that plaintiff's cause of action is prescribed. The averment is based on plaintiff's admission that his rights were disputed first in March, 1946. Learned Counsel for the defendants submits that a claim for an incumbency would be time barred if made more than three years after the cause of action arose. In the present instance the cause of action, on plaintiff's own admission, arose in March, 1946 and action was only instituted in June, 1955. As more than 3 years had passed the claim was prescribed.

The two Supreme Court decisions—3 C.W.R. 193 and 28 N.L.R. 477—cited by counsel and which have not been overruled support his contention. They lay down the rule that a claim to an incumbency is a claim to a declaration of status and that such a claim would be prescribed in three years after the cause of action arose.

At the time that the Supreme Court made the decisions referred to, the Ordinance that governed Buddhist temporalities was Ordinance 8 of 1905. That Ordinance did not vest the incumbent of a temple with the temporalities of that temple. The property belonging to a temple vested in trustees. So that when a claim to an incumbency was made it did not involve the question of ownership of temple property. A claim to an incumbency was, as indicated by their Lordships, only a claim for a declaration of status.

In November, 1931 the new Buddhist Temporalities Ordinance came into operation. It is set out in Chapter 222 of the Legislative Enactments. The present case is governed by this Ordinance. Under this Ordinance, in certain circumstances, all the temple property would vest in the Viharadhipathy who was known as the controlling Viharadhipathy. It has been admitted that Potgul vihare is one of those vihares in which the endowments vest in the Viharadhipathy. An incumbency action brought under the present Ordinance in respect of a temple where the temple property vests in the incumbent would not be an action brought for the mere declaration of a status but would also involve the question of title to the temple lands.

Learned counsel for the plaintiff submits that the present plaintiff is not asking for a declaration of status—on the admissions he is the Viharadhipathy of this vihare—what he does ask for is that as Viharadhipathy, he be declared entitled to the endowments of this vihare and be placed in possession therein. Section 34 of the Ordinance makes the Prescription Ordinance inapplicable in cases brought for the assertion of title to temple property.

The admissions referred to are these:-It has been admitted that Sri Sunanda was a former Viharadhipathy, that the rule of succession is Sissiyanu Sissiya Paramparawa, that this vihare is exempted from the operation of section 4(1) of Chap. 222 of L.E. That Sri Sunanda died in 1914, that he left in order of seniority the pupils Pitawela Seelananda, N. Sumangala and K. Sumana, that P. Seelananda, a senior pupil, died on the 31st March, 1946 and that the plaintiff is the senior pupil of P. Seelananda. One could assume on these admissions that the plaintiff is the Viharadhipathy of this temple. I agree with the submissions made by learned counsel for the plaintiff. I do not think, in view of the circumstances set out by me that the cases referred to by learned counsel for the defendants would apply to the present case.

I am of the view that the present action is a claim by the controlling Viharadhipathy of a temple to be declared entitled to the temple properties from which he has been kept out of possession by the defendants. In view of the provisions of section 34 of the present Ordinance such a claim could be made at any time and would not be barred by the provisions of the Prescription Ordinance. I would, therefore, answer the two preliminary issues in the negative, The case must proceed to trial on the other issues raised.

Appeal dismissed.

Privy Council Appeal No. 10 *of* 1958

Present : **Lord Morton of Henryton, Lord Radcliffe, Lord Denning, Lord Morris of Borth-y-Gest, Mr. L. M. D. de Silva.**

MANGALESWARI *vs.* SELVADURAI AND OTHERS

From
THE SUPREME COURT OF CEYLON

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

DELIVERED THE 26TH APRIL, 1961

Tesawalamai—Right of pre-emption—Time at which right can be enforced—Conditions to be satisfied for enforcement.

The appellant and the first respondent (who was her father and natural guardian) inherited in 1935 a property as co-owners in equal shares. In 1937 the first respondent sold his share to the second respondent, who in turn sold to the third and fourth respondents. The appellant, as a co-owner, held a right of pre-emption, while neither the second, third, or fourth respondents had such a right. The appellant became aware of this sale only in 1950.

Held : (i) Under the Tesawalamai, she could enforce her right of pre-emption by having the transfer to the second respondent set aside on condition she brought into Court the sum paid as consideration by the second respondent.

(ii) Her cause of action to set aside the transfer only arose when she became aware of the transfer.

(iii) There was no onus on her to prove that, had she in fact received notice of the transfer, she could and would have purchased the property herself within a reasonable time rather than permit it to be sold to a stranger.

(iv) Knowledge of the transfer in a natural guardian as interested as the first respondent was not notice to the appellant.

Per THE JUDICIAL COMMITTEE: Although neither the Muslim Law nor the Roman Dutch Law is part of the Tesawalamai, it is possible to look at the former systems to ascertain the principles underlying pre-emption in those systems. And if these are otherwise appropriate and not in conflict with the Tesawalamai, to borrow such rules as are suitable for Ceylon.

Overruled : *Velupillai v. Pulendra* (1951) 53 N.L.R. 472, XLV C.L.W. 45.

Referred to : *Kathiresu v. Kasinather* (1923) 25 N.L.R. 331.
Suppiah v. Thambiah, (1904) 7 N.L.R. 157.
Mailvaganam v. Kandiah, (1930) 32 N.L.R. 211.
Karthigesu v. Parupathy, (1945) 46 N.L.R. 162, XXX C.L.W. 8.
Sabapathipillai v. Sinnatamby, (1948) 50 N.L.R. 367.

Stephen Chapman, Q.C. with *John Stephenson, Q.C.* for the appellant.

Gilbert Dold with *J. B. Baker* for the 2nd, 5th, 6th, 7th and 8th respondents.

MR. L. M. D. DE SILVA

The appellant, a minor at the time but now a major, instituted this action through her duly appointed next friend in the District Court of Chavakachcheri on the 30th August, 1950 to enforce a right of pr-emption under the law of Tesawalamai in respect of an undivided half share of a certain land. It is agreed that the law of Tesawalamai is applicable to the rights of parties in this case. She prayed that a deed of conveyance executed by the first respondent in favour of the second respondent be set aside and that the first respondent be ordered to execute a deed of transfer in her favour on her bringing into Court a sum of Rs. 1,500, which was the consideration paid by the second respondent to the first on the deed, or other sum as the Court might fix.

The learned District Judge entered judgment in her favour on the 28th November, 1950 giving her time till the 18th December, 1950 to deposit a sum of Rs. 1,500 in Court. She has deposited in Court the said sum of Rs. 1,500 and a further sum of Rs. 1,500 determined by the District Judge to be payable as compensation for improvements.

The Supreme Court (Gunasekera J. with whom Gratiaen J. agreed) set aside the said judgment and dismissed the action. The present appeal is from that order.

The appellant (born in 1930) and her father the first respondent inherited as co-owners in equal shares the property in question under the last will of her mother who died in 1935. In September, 1937 the first respondent sold his half share of it to the

second respondent who in turn has sold the property to the third and fourth respondents. The appellant as a co-owner falls into the category of persons entitled to pre-empt under the Tesawalamai. The second and third and fourth respondents do not fall into this category. It has been stated by the appellant in evidence, and found by the learned District Judge, that she did not become aware of the sale till after the institution of a certain partition action (the details of which are not material to this case) on the 10th January, 1950. This finding has not been challenged on this appeal or elsewhere.

The Tesawalamai is a body of customary law obtaining among the inhabitants of the Northern Province of Ceylon. Its origin has been the subject of some controversy. It was collected and put into writing at the instance of the Dutch Governor Simons in 1706 and, after the British occupation, given the force of law by Regulation 18 of 1806 which as amended by Ordinance No. 5 of 1869 is now Chapter 51 of the Legislative Enactments of Ceylon (Vol. II, p. 49). Part VII relates to pre-emption. There have been subsequent amendments but these were subsequent to the date of the sale mentioned above and have not been invoked by the parties in the Courts in Ceylon.

Under the Tesawalamai any of several persons (among them co-owners as stated above) falling into a defined category had on any proposed sale of a land to a person outside the category the right to demand that the property be sold to him on the same terms and conditions as on the proposed sale. Notice had to be given to all persons in the category or else the sale was liable to be defeated by any of them. The position was correctly stated in the judgment of the Supreme Court in *Kathiresu v. Kasinather* (1923, 25 N.L.R. 331 at p. 332) thus :—

> "The Tesawalamai itself declared the form of notice to be given wherea co-owner has the right of pre-emption. But by Ordinance No. 4 of 1895, so much of the Tesawalamai as requires publication and schedules (these were prescribed formalities) of intended sales of immovable property was repealed. But this Court held in *Suppiah* v. *Thambiah* (1904, 7 N.L.R. 157), that notwithstanding the abolition of publication and schedules of intended sales, the liability of a co-owner desiring to sell his share of a land to give reasonable notice to his other co-owners of the intended sale still survived."

It was further held in *Kathiresu v. Kasinather* and approved in *Mailvaganam v. Kandiah* (1930, 32 N.L.R. 211 at p. 213) "that a person who has knowledge of an intended sale by a co-owner of his share and does not offer to exercise his right of pre-emption cannot thereafter bring an action for pre-emption and that the burden of proof is on the defendant to prove that he either gave formal notice or that the plaintiff had knowledge of the intended sale."

Their Lordship are of opinion consistently with views expressed by the Supreme Court of Ceylon in various decisions that where no notice has been given before the sale a cause of action accrues to a pre-emptor on his gaining knowledge of the sale to have it set aside and the property transfered to him on the same terms as those on which the sale had taken place. This principle while it stood created no doubt a serious difficulty in making sure that a proposed transfer of land would be sound. Amending legislation has been passed in 1947 to meet this and other difficulties arising from the Tesawalamai in dealing with land.

The Supreme Court allowed the appeal of the respondents and dismissed the action on the basis of the case of *Velupillai v. Pulendra* (1951, 53 N.L.R. 472 at p. 474) decided two years earlier by the same judges in which it was held "it is fundamental to the cause of action such as is alleged to have arisen in this case that the pre-emptor should establish by positive proof that, had he in fact received the requisite notice, he would and could have purchased the property himself within a reasonable time rather than permit it to be sold to a stranger." On an examination of the evidence in the present case they came to the conclusion that the appellants' estate was insufficient for the purpose (of a purchase) at the time of the sale by the first respondent to the second in 1937. For these reasons they dismissed the action.

It is necessary now to examine whether the view expressed in *Velupillai v. Pulendra* is sound. It has been urged by counsel for the appellant and not challenged by counsel for the respondent that there is nothing in the statutory provisions of the Tesawalamai or in previous decisions of the Supreme Court which supports the view mentioned. In such circumstances the Courts in Ceylon have derived assistance sometimes from the Roman Dutch Law and sometimes from the Muslims Law relating to pre-emption. There has been a difference of opinion as to which system should be resorted to. It was held by the Supreme Court in the case of *Karthigesu v. Parupathy* (1945, 46 N.L.R. 162 at p. 163): "Pre-emption as it prevails in British India owes its origin entirely to Mahomedan Law and the provisions in the Tesawalamai (Legislative Enactments, Volume 2, Chapter 51, Part 7) may be due to the early occupation of North Ceylon for a time by Mahomedans or the later occupation

by the Malabars who had themselvs come under Mahomedan influence in India. The decisions of the Indian Courts on questions of pre-emption may, therefore, be taken as guides so far as such decisions are not affected by Statutes or the personal law governing persons of Islamic faith."

But it was held in *Sabapathypillai v. Sinnatamby* (1948, 50 N.L.R. 367) that "where the Tesawalamai is silent the Roman Dutch Law is applicable". This view has also been expressed in other cases.

Counsel for the appellant argues, correctly in their Lordships' opinion, that there is nothing in either system which supports the view expressed in *Velupillai v. Pulendra* and that on the contrary there is a certain amount which appears to be inconsistent with it.

It appears to their Lordships that neither the Roman Dutch Law nor the Muslim can be regarded as part of the law of Tesawalamai but that it is permissible to look at the law obtaining in those systems, to ascertain the reasoning which underlies the principles of pre-emption as it is to be found in them in dealing with various problems; and, when not in conflict with the principles of Teswalamai as established in Ceylon and otherwise appropriate, to borrow such rules and concepts as seem best suited to the situation in Ceylon.

Grotius Book III Chapter XVI section 10 (Lee's Translation of the Jurisprudence of Holland by Hugo Grotius p. 379) says:

> "10. The right of recall must be instituted within a year of the sale or, at all events, within a year of its coming to the knowledge of the person asserting the right, as to which he may be put to this oath."

He does not say that the pre-emptor must show he was able to produce the money necessary for pre-emption at the time of the sale, or at the time it comes to his knowledge.

Voet in his commentary on the Pandects (Berwick's Translation p. 61) founding himself upon Tiraquellus says:

> "A renunciation of the right of retractus is indeed not to be inferred merely from one having refused to purchase the thing when offered to him by a cognate; for many circumstances might dissuade him from an immediate purchase, for example, less astuteness on the part of the cognate (vendor) than on that of the extraneous purchaser, which might make it more to the advantage of the latter to avail himself of the right of retractus after it has been already purchased than to be himself the first purchaser; want of ready money which however he might be able to procure within the year allowed for the exercise of the right; and many others. Tiraquellus *De retractu gentilit.* pl. *gloss.* 9. *n.* 145. Nor is renunciation to be inferred from the circumstance of his having been present at the sale and remaining silent; for such silence is rather to be attributed to his knowledge that his right would last for the term of a whole year or other period defined by statute."

Retraction (or naesting) was the name given in Roman Dutch Law to pre-emption.

It will be seen that under the Roman Dutch Law a pre-emptor was in a position much more privileged than under the law of Ceylon. There is nothing in the Roman Dutch Law which directly or indirectly supports the view on which the judgment of the Supreme Court rests.

Their Lordships have been referred to various passages in the works of Mulla, Wilson and Tyabji which satisfy them of the negative proposition that there is nothing in the Muslim Law which supports directly or indirectly the view of the Supreme Court. They will make reference to a passage which appears in Wilson's Anglo Muhammadan Law (sixth Edition p. 415 Article 387):

> "It is not necessary according to Muhammadan Law but it is sometimes required by the local wajib-ul-arz (local record of rights p. 66 ib) that the owner of property should give notice to the persons having the right of pre-emption before selling it to a stranger. Under the Muhammadan Law the right cannot be lost by the delay in making the demand until the existence of a binding contract has actually come to the knowledge of the pre-emptor; where notice is required by the wajib-ul-arz the right is lost unless the pre-emptor replies to the notice within a reasonable time after receiving it, offering to purchase at the price asked, or at a price to be settled in accordance with provisions of the wajib-ul-arz."

There is no indication in this passage or elsewhere that if the property is sold without notice the pre-emptor asserting his right to pre-emption in an action must "establish by positive proof that had he in fact received the requisite notice, he could and would have purchased the property himself rather than permit it to be sold to a stranger"

and no indication of anything which resembles what has just been said in any way.

It appears from what has been said that there is nothing in the Roman Dutch Law or the Muslim Law which can be said to support the principle upon which the judgment of the Supreme Court rests. The passages quoted tend on the whole to be opposed to such a principle. As already stated there is nothing in the statute law or in the decisions of the Ceylon Courts which has a bearing on it. Their Lordships are of opinion that it must be held that the principle does not form part of the law in Ceylon. The Supreme Court in laying down the principle observed: "A would be pre-emptor cannot claim to be in a better position by not receiving notice of the intended sale than he would have been if he had received such notice." On the other hand it has to be noted that the point of time at which the cause of action arises in the case of a sale without notice is, as already stated, the time at which the person deprived of his rights as a pre-emptor comes to know of the sale. This may be a considerable time after the sale and still further from the time at which he should have received notice. Had he received notice and did not possess the necessary money at the time he might have raised it. It would not be just to insist that he should establish facts which might well have existed some considerable time before the action but of which it might at the time of action be difficult to obtain evidence in a convincing form; for instance a person who might at the relevant time have assisted the pre-emptor with money might be dead or, if alive, his evidence could be criticised on the ground that is saying he would have done something which he was never called upon to do in the past and would not be called upon to do in the future.

It was argued that the vendor being the father of the minor was her natural guardian and that his knowledge of the sale should be imputed to her. The Supreme Court did not decide this question as the view discussed above taken by it was sufficient to dispose of the case. Their Lordships do not find it necessary to consider the general question as to the circumstances if any under which notice to a natural guardian can under the law of Ceylon be said to be notice to a minor sufficient to bind him (or her). They are of opinion that notice to, or the knowledge of, a natural guardian as interested as the first respondent could not be imputed to the appellant.

The Muslim Law while recognising the doctrine of pre-emption does not look upon it with favour. Thus Tyabji says at p. 724 "Pre-emption is not favoured by the law" and further "The right of shaffa (pre-emption) is but a feeble right as it is a disseising another of his property merely in order to prevent apprehended inconveniences". In Ceylon it was said rightly by the Supreme Court in 1923 in the case of *Kathiresu v. Kasinather* (above) "The right of pre-emption imposes a serious fetter on an owner's right of free disposition of property, and the facts have to be carefully scrutinized before a co-owner is allowed to set aside a sale on such a ground." In the case of *Velupillai v. Pulendra* (above) the Supreme Court was no doubt quite rightly scrutinizing the circumstances closely, but with all respect their Lordships cannot find sufficient material upon which the view expressed by it can be sustained.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal should be allowed, the decree of the Supreme Court set aside and the decree of the District Court restored. The costs in the Supreme Court and on this appeal must be paid by the 2nd to 11th respondents. The 1st respondent filed no answer and raised no opposition at any stage of the case.

Appeal allowed.

Privy Council Appeal No. 53 *of* 1959

Present: **Lord Morton of Henryton, Lord Radcliffe, Lord Morris of Borth-Y-Gest, Mr. L. M. D. de Silva**

THE TRUSTEES OF THE ABDUL GAFFOOR TRUST

vs.

THE COMMISSIONER OF INCOME TAX

From

THE SUPREME COURT OF CEYLON

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

DELIVERED THE 19TH APRIL, 1961

Income Tax Ordinance (*Cap.* 188), *sections* 2, 7, 73, 75—*Whether decision under section* 73 *on appeal from an assessment in any one year creates an estoppel in respect of an assessment for any subsequent year—Trusts Ordinance* (*Cap.* 72), *section* 99(1)—*Whether trust a valid charitable trust.*

A trust was set up in 1942, the trustees to apply the whole income from the trust property during the life of the Grantor for such purposes and in such manner as the grantor should in his absolute discretion direct, and thereafter for all or any of the purpose set out in sub-heads (*a*)—(*g*) of paragraph 2 of the Trust deed. The whole income could, under the deed, be devoted to the purpose set out in paragraph 2 (*b*). The recipients of the benefits under this paragraph 2 (*b*) were to be selected by the Board from certain classes of persons in a certain order, the first class, standing first in order, being male descendants along either the male or female line of the grantor or any of his brothers or sisters. In respect of the assessment for the revenue year 1949/50, the Board of Review decided on appeal that the trust income was exempt from tax, on the basis that the income was that of a trust of a public character established solely for charitable purposes. In respect of the assessment for the next five years, however, the Board decided that they were not exempt from tax.

Held : (1) That the decision on assessment for the year 1949/50 did not set up an *estoppel per rem judicatam* preventing the Board from deciding that the assessment for the subsequent years were not exempt from tax. The Board on appeal exercises a limited jurisdiction to decide one issue, namely, the amount of the assessable income for the year in which the assessment is challenged. Although this decision may involve the construction of statutes or a consideration of the general law, these matters must be treated as collateral to the one issue before the Board.

(2) That no trust under which beneficiaries are defined by reference to a purely personal relationship with a named propositus can be a valid charitable gift. Inasmuch as clause (i) of sub-head (*b*) confers an absolute priority to the benefit of the trust income on the grantor's own family, the trust was a family trust under which the income was made available to provide for the education of relatives of the grantor. The trust was therefore not a valid charitable trust.

Case considered : *Hoystead v. Commissioner of Taxation*, (1926) A.C. 155, cannot be treated as constituting a legal authority on the question of estoppels in respect of successive years of tax assessment.

Cases referred to : *Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation*, 1931 A.C. 275.
Reg. v. Hutchings, 6 Q.B.D. 300.
Broken Hill Proprietary Co., Ltd. v. Broken Hill Municipal Council 1926 A.C. 94.
Inland Revenue Commissioners v. Sneath, (1932) 2 K.B. 362.
Patuck v. Lloyd, 171 L.T. 240.
Society of Medical Officers of Health v. Hope, 1960 A.C. 551.
Re Compton, (1945) Ch. D. 123.
Income Tax Commissioner v. Pemsel, (1891) A.C. 531.
Oppenheim v. Tobacco Securities Trust Co., Ltd., 1951 A.C. 297.
Re Koettgen's Will Trusts, (1954) 1 Ch. 253.

E.F.N. Gratiaen, Q.C. with *Michael Nolan, S. Basnayake* and *M. Sanmuganathan* for the appellants.

Sir John Senter, Q.C. with *Walter Jayawardene* for the respondents.

LORD RADCLIFFE

This appeal from a Judgment of the Supreme Court of Ceylon dated 26th November, 1958 concerns five assessments to income tax for the revenue years 1950/51 to 1954/55 which have been made upon the income of a trust, styled the Abdul Gaffoor Trust, of which the appellants are the Trustees. The Appellants' case is that these assessments ought to be discharged because the Trust is an "institution or trust of a public character established solely for charitable purposes" within the meaning of S. 7(1) (*c*) of the Ceylon Income Tax Ordinance, 1932 (No. 2 of 1932, as subsequently amended) and its income is accordingly exempt from liability to the tax. For the moment it is sufficient to note that by virtue of the Interpretation section of the Ordinance, S.2, "charitable purpose" is to be held to include "relief of the poor, education and medical relief".

The Trust in question was set up by a Deed dated 24th December, 1942 executed by one Noor Deen Hadjiar Abdul Caffoor, the Grantor, of the one part and certain persons of the other part who were to act as the intended trustees. The trust property was stated to be of the value of Rs. 2,050,000, lawful money of Ceylon, at the date of the Deed. The overriding trust in the Deed was that during the life of the Grantor the Trustees were to apply the whole of the income for such purposes and in such manner as the Grantor himself should in his absolute discretion direct, whether or not such purposes should fall within those directed by the Deed to be operative after the Grantor's death. It is plain therefore that until his death, which took place on 1st November, 1948, the current trust income was not in any sense devoted to charitable purposes. Accordingly it can be argued that for this reason alone the Abdul Gaffoor Trust is not capable of being described as "established solely for charitable purposes". This argument was placed before the Supreme Court by the Respondent and was there rejected on the ground that the word "established" had no essential connection with the date of the founding Trust Deed and that the critical test for the purposes of the exemption of income from tax was the nature of the trusts that were operative in the year to which the claimed exemption related. The respondent's submission was repeated to their Lordships on the ground that it was desired to keep the point open. The point was not fully developed in argument and, for reasons which will shortly appear, their Lordships find it unnecessary to express any opinion upon it.

Once the Grantor was dead his overriding trust came to an end. The trust income thereafter was to be held by the Trustees upon trust, after reserving a sum of Rs. 1,000 a month for upkeep and maintenance of the trust property, for all or any of a number of enumerated purposes which were set out in subheads (*a*) to (*g*) inclusive of paragraph 2 of the Trust Deed. The application of the income for or among these purposes was left to the absolute and uncontrolled discretion of a Board, to be set up under the Trust, consisting of the Trustees and certain other named persons.

It is more convenient to set out these trust purposes in full as expressed in the Deed than to try to reduce the expression of them by an abridgement.

They are as follows :-

(*a*) A sum not exceeding one thousand rupees (Rs. 1,000/-) a month for the remuneration of the Trustees and the expenses incurred by them in connection with the administration of the trust and for the payment of the costs of professional Accountants Solicitors Counsel or Agents or Managers or other persons whomsoever for or relating to any services rendered or other things done in connection with matters relating to the trusts hereby created or the trust property.

(*b*) A sum not exceeding in all one thousand rupees (Rs. 1,000/-) a month for the education instruction or training in England or elsewhere abroad of deserving youths of the Islamic Faith in such professions vocations occupations industries arts or crafts trades employments subjects lines or any other departments of learning or human activity whatsoever as the Board may in its aforesaid discretion decide in the case of each such deserving youth with a like discretion in the Board from time to time change modify or alter or completely discontinue in the case of each such youth either the object or objects of instruction education or training selected for him by the Board (from among the objects enumerated above) or the place or places or countries whereat such education training or instruction is being given from time to time. The Board may under a like discretion partially or wholly discontinue any assistance it may have given or may be giving in the case of any such youths. It shall be lawful for the Board out of the said sum to pay for or provide the whole or any part of the cost of any such youth going abroad from or in returning to Ceylon once or oftener as the Board may under such discretion aforesaid from time to time decide. The recipients of the benefits provided for in this Clause shall be selected by the Board from the following classes of persons and in the following order :—

(i) male descendants along either the male or female line of the Grantor or of any of his brothers or sisters failing whom

(ii) youths of the Islamic Faith not being male descendants as aforesaid of the Grantor or of his brothers or sisters born of Muslim parents

of the Ceylon Moorish Community permanently resident in the City of Colombo (wherever such youths may have been or be resident from time to time) failing whom

(iii) youths of the Islamic Faith not being male descendents as aforesaid of the Grantor or of his brothers or sisters born of Muslim parents of the Ceylon Moorish Community permanently resident anywhere else in the said Island of Ceylon other than in Colombo (wherever such youths may have been or be resident from time to time).

(*c*) A sum not exceeding two hundred and fifty rupees (Rs. 250/-) a month for the education of deserving youths of the Islamic Faith born of Muslim parents of the Ceylon Moorish Community permanently resident in Ceylon at either the University of Ceylon or any Institution associated with or affiliated to it or the Ceylon Law College or any other scholastic or vocational or professional or agricultural or industrial or other technical institution public or private in Ceylon.

(*d*) A sum not exceeding two hundred and fifty rupees (Rs. 250-/) a month for providing dowries for poor girls of the Islamic Faith wherever resident born of Muslim parents of the Ceylon Moorish Community permanently resident in the City of Colombo.

(*e*) A sum not exceeding two hundred and fifty rupees (Rs. 250/-) a month for supplementing the income of the Ghaffooriyah Arabic School at Maharagama in the said Island founded by the Grantor in the event of the funds already provided for the said School under the relative trusts proving insufficient.

(*f*) A sum not exceeding one thousand rupees Rs. 1,000/-) a month to be accumulated from month to month and distributed for charity once a year during the month of Ramadan.

(*g*) any surplus or any sums not expended on any of the above objects shall be credited to a reserve fund to be used in such proportions to such extents at such time or times and from time to time and in such manner as the Board may in its absolute and uncontrolled discretion decide (1) for the purpose of meeting any unforeseen expenditure or contingency in connection with the trust property, (2) in furtherance of all or any one or more of the various objects of the trust, (3) for educating in a secondary school or secondary schools in Ceylon poor deserving boys of the Islamic Faith born of Muslim parents permanently resident in Ceylon (wherever such boys may have been or be resident from time to time) and (4) for the relief of poverty distress or sickness amongst members of the Islamic Faith in Ceylon.

If one accepts, as their Lordships do, the Supreme Court's reading of the words "for charity" in subhead (*f*) as meaning no more than "for the relief of the poor", it appears that in any year after the Grantor's death the whole of the trust income, after allowing for administrative expenses, was destined to be applied for purposes that can broadly be described as serving education or the relief of poverty or of sickness or distress. *Prima facie*, these would qualify as charitable purposes.

The first main point taken on behalf of the appellants is that as between themselves and the Respondent the question of exemption has been conclusively decided in their favour by a decision of the Board of Review, constituted under the Income Tax Ordinance, which decision was given on the 22nd December, 1954 upon an appeal made by them to that Board against assessment for the revenue year 1949/50. It is not in dispute that this decision was given or that the ground upon which exemption was allowed was that the income was that of a trust of a public character established solely for charitable purposes.

The appellants therefore are seeking to treat the decision of the Board of Review as setting up an *estoppel per rem judicatam* on the question of the trust income's right to be exempted from tax. This plea has not hiterhto prevailed in the various hearings in Ceylon, it has been rejected in turn by the Commissioner of Income Tax, acting under S.69 of the Ordinance, by the Board of Review, acting under S.73, and by the Supreme Court, under S.74. For the reasons which will appear their Lordships are also of opinion that it cannot succeed.

The grounds for rejecting the *estoppel* in the Courts of Ceylon have been stated either as "the previous decision of the Board of Review which relates to an assessment for a year previous to the years of assessment which are now before us is not binding on us" (Decision of the Board of Review, paragraph 2) or as depending upon the question whether the Board of Review performs judicial and not merely administrative functions or, to put it in yet another way, upon the question whether the Board was intended to function as a Court of competent jurisdiction to decide litigation between the subject and the Crown (Judgment of the Supreme Court). These different ways of approaching the issue reflect differences of formulation which are to be found in judgments in this country on similar or analogous issues. It is to be observed however that such differences could well lead to different conclusions in certain circumstances; for, if the fundamental reason why there is no *estoppel* is based upon the idea that the Board of Review does not possess adequate status as a judicial court of competent jurisdiction, it might seem to follow that a decision of the Supreme Court on the other hand when given on a Case stated to it would set up an *estoppel per rem judicatam* in respect of tax for other years; whereas if the essence of the matter is that a question of liability to tax for one year is always to be treated

as inherently a different issue from that of liability for another year, even though there may appear to be similarity or identity in the questions of law on which they respectively depend, it would seem to be the consequence on the contrary that a Supreme Court decision would no more be capable of setting up an *estoppel* than would be made by the Board of Review, whatever its precise status as a judicial tribunal.

In their Lordships' opinion the question of *estoppel* cannot be decided merely by inquiring to what extent the Board of Review exercises judicial functions. The critical test is not the bare issue whether or not such a Board exercises judicial power, an issue which can indeed arise in other contexts, such as the constitutional question decided in *Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation* (1931) A.C. 275. What is important here is that the Board of Review is a tribunal set up under the Income Tax Ordinance for the purpose of deciding income tax appeals at a certain stage of their prosecution, and that decisions given with regard to such appeals are effective only within the limited jurisdiction that the Ordinance creates for all tribunals that deal with the matter of an appeal. All such appeals remain in one sense a part of the process of assessment since all the tribunals, including the Supreme Court, have independent power to increase or reduce the assessment under appeal. While therefore it is unexceptionable to say that the Board of Review when exercising its powers under S.73 is acting in a sense judicially, that the dispute which it has to determine is at any rate somewhat analogous to a *lis inter partes* and that the assessor who made the assessment or some other representative of the Commissioner (S.73 (3)), resembles a party hostile to the appellant, these considerations, are not those that are critical to the issue of *estoppel*. The critical thing is that the dispute which alone can be determined by any decision given in the course of these poceedings is limited to one subject only, the amount of the assessable income for the year in which the assessment is challenged. It is only the amount of that assessable income that is concluded by an assessment or by a decision on an appeal against it (see S.75). Although, of course, the process of arriving at the necessary decision is likely to involve the consideration of questions of law, turning upon the construction of the Ordinance or of other statutes or upon the general law, and the tribunal will have to form its view on those questions, all these questions have to be treated as collateral or incidental to what is the only issue that is truly submitted to determination (cf. *Reg. v. Hutchings*, 6 Q.B.D. 300).

It is in this sense that in matters of a recurring annual tax a decision on appeal with regard to one year's assessment is said not to deal with "*eadem quaestio*" as that which arises in respect of an assessment for another year and, consequently, not to set up an *estoppel*. It is precisely that point that was raised and accepted by this Board in 1926 in *Broken Hill Proprietary Co. Ltd. v. Broken Hill Municipal Council* (1926) A.C. 94, where it is said (p. 100) "the decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question—namely the valuation for a different year and the liability for that year. It is not *eadem quaestio*, and therefore the principle of *res judicata* cannot apply".

The *Broken Hill* decision is in itself a striking application of the principle involved, since the earlier judgment which it was sought to set up as an *estoppel* was one given by the High Court of Australia on a rating assessment referred to it by way of appeal under the tax procedure. It underlines the point that it is not the status of the tribunal itself, judicial or administrative, that forms the determining element for *estoppel* in cases of this kind but the limited nature of the question that is within the tribunal's jurisdiction. The judgment of the High Court that had been given in the earlier year was explicitly directed to the construction of a particular section of the rating Act and to the correct measurement of the liability in the light of that construction. Precisely the same point arose in the later year and was ultimately decided by this Board in a sense contrary to that which had previously been adopted.

So, in the present appeal, the earlier decision of the Board of Review governing the 1949/50 assessment was based upon a construction of S.7 (1) (*c*) of the Income Tax Ordinance as applied to the income of the Abdul Gaffoor Trust; and the same point of construction now arises again but in respect of assessments of that income for other and later years. In their Lordships' opinion it is not possible to distinguish the principle of the *Broken Hill* decision from that which should prevail in the present case on any such ground as that here the earlier decision related to the taxpayer's "status" as an exempt person while in the *Broken Hill* the decision "merely" related to the correct amount of the assessment: for in truth, as has been explained, in all these cases which arise under income tax or rating appeal procedure the decision is essentially as to the correct amount (if any) of the assessment and in the one case as

much as in the other the decision was based upon a question of law, the proper interpretation of one of the provisions of the taxing Act.

To apply the principle of the *Broken Hill* decision to the case now before their Lordships is to bring it into line with what seems to be by now the regular course of authority with regard to appeals in successive years against income tax or rating assessments—See *Inland Revenue Commissioners v. Sneath* (1932) 2 K.B. 362. *Patuck v. Lloyd*, 171 L.T. 340. *Reg. v. Hutchings*, supra, *Society of Medical Officers of Health v. Hope* (1960), A.C. 551. It may be that the principles applied in these cases form a somehat anomalous branch of the general law of *estoppel per rem judicatam* and are not easily derived from or transferred to other branches of litigation in which such *estoppels* have to be considered; but in their Lordships' opinion they are well established in their own field and it is not by any means to be assumed that the result is one that should be regretted in the public interest.

The decision of this Board in *Hoystead v. Commissioner of Taxation* (1926), A.C. 155 is not consistent with this line of authority and the appellants naturally relied upon it in their argument. What happened in that case was that an assessment to federal land tax in Australia for the year 1918/19 had been the subject of appeal and a case was stated for the opinion of the High Court on a point of law that determined the assessment, the correct interpretation of the taxing statute with regard to joint interests in land taken by the assessees under their father's will.

There was a later appeal in respect of the assessment for the year 1920/21; and the question that was brought to this Board was whether th Commissioner of Taxation was estopped in the matter of that assessment by the judgment that had been delivered by the High Court in the earlier proceedings. The Board decided that he was. Unfortunately however the argument that the determination of an assessment for one year could not set up an *estoppel* upon an assessment for another year, an argument that was accepted by the Board at almost the same time in the *Broken Hill* case, does not appear either to have been presented to the Board or to have been noticed or adjudicated upon in the opinion which was delivered by Lord Shaw. It is not possible to explain why the matter was dealt with in this way; and it is fair to note that in the majority judgment of the High Court, which was reversed on the appeal, there is a reference, though a passing one, to the point of "*eadem quaestio*". In the result however the attention of the Board in delivering its opinion was wholly occupied with a discussion of what is quite a different issue in connection with estoppel, whether there can in law be *estoppel per rem judicatam* in respect of an issue of law which, though fundamental to the issue, has been conceded and not argued in an earlier proceeding.

Their Lordships are of opinion that it is impossible for them to treat *Hoystead's* case as constituting a legal authority on the question of *estoppels* in respect of successive years of tax assessment. So to treat it would bring it into direct conflict with the contemporaneous decision in the *Broken Hill* case; and to follow it would involve preferring a decision in which the particular point was either assumed without argument or not noticed to a decision, in itself consistent with much other authority, in which the point was explicitly raised and explicitly determined.

For these reasons their Lordships are satisfied that the respondent is not estopped by the 1954 decision of the Board of Review from challenging the appellants' claim that the income of the Abdul Gaffoor Trust is exempt from tax under S.7 of the Income Tax Ordinance.

It is necessary now to turn to the question of exemption. To qualify at all there must be income of an "established" trust. Having regard to the nature of the Abdul Gaffoor Trust it cannot be validly established unless it falls within the definition of "charitable trust" which is contained in S.99 (1) of the Trusts Ordinance, 1918. This definition includes any trust "for the benefit of the public or any section of the public" falling within any one of a number of categories which extend to such purposes as the relief of poverty and the advancement of education or knowledge. To satisfy the definition contained in the Income Tax Ordinance therefore the Abdul Gaffoor Trust must be a charitable trust "of a public character": to be a subsisting charitable trust at all it must be a trust for the benefit of the public or some section of it.

In order to determine this question their Lordships think that the following principles may safely be applied in the interpretation of the Ceylon Ordinances. First, the general principles that govern the English law as to the validity of charitable trusts can be invoked. It seems plain that both the conception of a trust itself and the conception of what constitutes a charitable trust have been much influenced by English law.

Secondly, there is no necessity to include in those general principles rules of the English law that appear to be specially associated with English local conditions or English history or which appear to be now accepted as anomalous incidents of the general law. Thirdly, there is no significant difference between the meaning of "of a public character" and the meaning of "for the benefit of the public or any section of it". The two phrases are often used interchangeably in English decisions and text books—see, e.g., the quotation from Tudor. Charities, 5th Ed., p. 11, employed by Lord Greene M.R. in *Re Compton* (1945) Ch.D. 123 at 128—"a universal rule that the law recognises no purpose as charitable unless it is of a public character. That is to say a purpose..... must be directed to the benefit of the community or a section of the community". Charitable trusts must be "trusts of a public nature" (see Lord Macnaghten in *Pemsel's* case (1891) A.C. 531 at 580). Fourthly, although educational purposes are themselves charitable purposes, no trust under which the beneficiaries are defined by reference to a purely personal relationship with a named propositus can be a valid charitable gift. If, therefore, persons for whose benefit an educational trust is created, derive their title to their benefits by proving their qualifications in this way, whether as descendants of a named person or as employees of a named company, the trust must be regarded merely as a family trust and not as one for the benefit of a section of the community (see *Re Compton* supra, *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (1951) A.C. 297).

Their Lordships do not think that it would be consistent with these principles to apply to the law of Ceylon any doctrine that had as its foundation the ancient English institution of educational provision for "Founders Kin" in certain schools and colleges or old English decisions about charitable relief for poor relations of a testator. The former provisions were commonly accepted as validly instituted, though there seems to be virtually no direct authority as to the principle upon which they rested and they should probably be regarded as belonging more to history than to doctrine: the latter are today treated as no more than an anomaly in the general law.

Is then the Abdul Gaffoor Trust a charitable trust? It was not disputed that to detemine this it is necessary to treat the whole trust income as if it were appropriated for the purposes specified in clause 2 (*b*). This is so because the form in which the various trust sub-heads are expressed is such that no definite sum of money is dedicated to any one and the power given by sub-head (*g*) makes it possible for the whole of the income to be carried to a reserve fund which could then be expended as from time to time the Board thought proper in the exclusive implementation of the purposes of sub-head (*b*). To test whether any particular trust is a charitable one what must be asked is whether the income is bound with certainty to be applied to charitable purposes, not whether it may be so applied. Unless therefore sub-head (*b*) itself declares a valid charitable purpose, no part of the Trust comes within the exempting provision of the Ordinance.

There are several material constituents in this particular purpose. The money is to be used for "education, instruction or training" in any department of human activity. Their Lordships will assume, without deciding, that this could be called an educational purpose. The recipients of the benefit are "deserving youths of the Islamic Faith". So long, however, as there are male descendants in either the male or female line of the Grantor or any of his brothers or sisters for whose education the Board are prepared to provide or reserve money on the ground that they qualify as deserving youths of the Islamic Faith, no other youth of that Faith can obtain any benefit under the trust purpose. They can only come in "failing" the line of the descendants.

It was argued with plausibility for the appellants that what this trust amounted to was a trust whose general purpose was the education of deserving young people of the Islamic Faith and that its required public character was not destroyed by the circumstance that a preference in the selection of deserving recipients was directed to be given to members of the Grantor's own family. Their Lordships go with the arguments so far as to say that they do not think that a trust which provides for the education of a section of the public necessarily loses its charitable status or its public character merely because members of the founder's family are mentioned explicitly as qualified to share in the educational benefits or even, possibly, are given some kind of preference in the selection. They part with the argument, however, because they do not consider that the trust which is now before them comes within the range of any such qualified exception. Considering what is in effect the absolute priority to the benefit of the trust income which is conferred on the Grantor's own family by clause (i) of sub-head (*b*), the only fair way to describe this Trust is as a family trust under which the income is made available to provide for the education or training

of relatives of the propositus, in this case the Grantor himself, provided only that they are young, deserving and of the required Faith. These conditions do not make it the less a family trust. Such a trust is not a trust of a public character solely for charitable purposes.

In the Supreme Court judgment much consideration was given to the English decision *Re Koettgen's Will Trusts* (1954) 1 Ch. 253, the facts of which have much in common with those of the present case. The trust there created was expressed to be for the promotion and furtherance of commercial education; the persons eligible were British born subjects without sufficeint means to obtain at their own expense an education for a higher commercial career; and in selecting beneficiaries the trustees were directed to give preference to employees of members of the families of employees of a named company. It is evident that the Court's decision, which upheld the trust as a valid trust for charitable purposes, turned on the exact construction which was given to the words of the will. It was argued that the trust was one "primarily for the benefit of the employees. . . .and their families, and that it was only if there were insufficient employees or members of their families that the public could come in as beneficiaries under the trust." The learned judge says in his judgment that he did not accept that as the true construction of the clause in question; if he had accepted it, it is evident that he would have rejected the trust as a charitable bequest. The construction that he adopted as correct was that the primary class of beneficiaries consisted of persons without sufficient means to obtain commercial education at their own expense and that the preference given merely amounted to a duty in the trustees to select employees or members of their families, if available, out of this primary class.

It is not necessary for their Lordships to say whether they would have put the same construction on the will there in question as the learned Judge did or whether they regard the distinction which he made as ultimately maintainable. The decision edges very near to being inconsistent with *Oppenheim's* case, but it is sufficient to say that the construction of the gift which was there adopted does not tally with the construction which their Lordships are bound to place upon the Trust which is now before them. Here the effect of the wording of clause 2 (*b*) (i) is to create a primary disposition of the trust income in favour of the family of the Grantor.

For the reasons which have been set out above their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the Respondent's costs of the appeal.

Appeal dismissed.

IN THE COLONIAL COURT OF ADMIRALTY OF CEYLON

Present: **H. N. G. Fernando, J.**

BANK OF CEYLON *vs.* THE SHIP "STARLINE TRADER"
(*presently lying in the Harbour of Colombo*) *and her freight.*

Application No. 16/1960.

Argued on: March 27th, 1961.
Decided on: March 28th, 1961.

Ceylon Courts of Admiralty Ordinance (*Cap.* 7), *section* 23—*Rules* 19 *and* 23 *made thereunder*—*Procedure in proving several distinct claims against same party—How should questions of priority be decided.*

Held : That in Admiralty actions, where there are several distinct claims against the same party, they should be proved in separate actions, while priorities as between the several plaintiffs should be left to be decided after their claims have been proved. Rule 23 of the Rules for Vice-Admiralty Courts made under section 23 of the Ceylon Courts of Admiralty Ordinance, does not enunciate a rule any different from this.

S. J. Kadirgamar with *K. Viknarajah* for the plaintiff.

G. F. Sethukavaler for the defendant.

D. S. Jayawickrema, Q.C. with *Miss Maureen Seneviratne* and *Desmond Fernando* for the Master of the "*Starline Enterprise*".

C. G. Weeramantry with *V. J. Martyn* for the Maldivian Nationals Trading Corporation.

H. N. G. FERNANDO, J.

The plaintiff, the Bank of Ceylon, instituted this action in November 1960 for the enforcement of a mortgage of the Ship "*Starline Trader*" by the sale of the ship and the application of the proceeds of the sale in deduction of the sums of money due on the mortgage. The Ship was arrested by order of this Court on 25th November, 1960.

On 1st December, 1960 the Maldivian Nationals Trading Corporation (Ceylon Ltd.) moved to enter an appearance in the action indorsing upon their notice a claim alleged to be due on account of wages and reclaim and numerous other payments alleged to have been made in respect of the Ship.

On 27th January, 1961 the Eastern Starlines Ltd., the owner of the vessel, moved with the consent of the plaintiff to enter appearance in the action as defendant. This motion has been allowed by the Court and no difficulty arises in respect of the matter.

On 30th January 1961 the Master of the vessel applied for a *caveat* against the release of the Ship and also moved to be added as a party-plaintiff in the action indorsing a claim in respect of wages due to him as Master and other services rendered by him to Eastern Starlines Ltd.

On 24th February, 1961 the plaintiff tendered a minute of consent to judgment from Eastern Starlines Ltd. and moved for judgment accordingly. This last mentioned consent motion together with the motions of the Maldivian Nationals Trading Corporation and of the Master of the vessel were taken up for hearing together. All the parties to whom I have referred consented through counsel to judgment being entered against the Ship for the amount due on the mortgage and stated that they will have no objection to the sale of the Ship under a decree of Court but counsel appearing for the Maldivian Nationals Trading Corporation and for the Master of the vessel both contended that the claims of these parties should be adjudicated upon before "release of the proceeds of sale of the Ship."

On behalf of the plaintiff was contended that the other two claimants should not be joined as plaintiffs principally upon the ground that their claims might well be in conflict with those of the plaintiff, and that it would be inconvenient and inappropriate for conflicting claims of different plaintiffs to be dealt with in one action. Counsel for the plaintiff also submitted that parties who enter an appearance automatically become defendants and that the two parties in question are accordingly defendants and for that reason cannot be added as plaintiffs.

Counsel appearing for the two claimants stressed their right to be added as plaintiffs relying principlally upon Rule 23 of the Rules for Vice Admiraty Courts set out at pages 18 et seq. of Vol. I of the Subsidiary Legislation and referred to in section 23 of the Ceylon Courts of Admiralty Ordinance, Cap. 7.

The principal provision regarding appearance is set out in Rule 19 "a party appearing to a writ of summons shall file an appearance at the place directed in the writ.". Having regard to the terms of the form of a writ of summons *in rem* set out in the Appendix to the Rules whereby the writ is addressed "to the owners and all others interested in the Ship" and to the warning that in default of appearance "the said action may proceed and judgment may be given in your absence" it would seem *prima facie* that a party appearing to a writ of summons would be ordinarily only a party who had some interest in contesting the claim of the plaintiff against the Ship. This view of the matter gains support from a passage in *Williams & Bruce on 'Admiralty Actions in Appeal'* (*3rd Edition at page* 271). (I am indebted to counsel for the plaintiff for the reference, although in my view it does not support the position taken up by him):-

"Where there are other claimants besides the plaintiff, who seek to enforce claims against the property, it is usual for them to institute a fresh suit, and, if necessary, to apply for the Court on motion to withhold its final decree in the original suit until all the claims have been brought before the Court. Where several suits are pending against the same property or proceeds the course commonly taken is that, at the hearing of each suit, on application made on behalf of the plaintiff in the remaining suits, the Court reserves all questions of priority, and such questions subsequently come onto be argued on motion or on a special case."

The practice thus envisaged would seem to be that distinct claims should be proved in distinct actions, while priorities as between several plaintiffs are left to be decided after the various claims have been proved.

In my opinion Rule 23 of our Rules does not enunciate a different principle in providing that "persons having interests of the same nature arising out of the same matter may be joined in the same action whether as plaintiffs or as defendants." That Rule to my mind caters for a situation where, to use the phraseology of the Civil Procedure Code, "several persons have the same cause of action," the best instance in the present context being

perhaps that of different claims arising upon one collision or joint salvaging operations. In a *note* (*z*) *at page* 289 *of Williams & Bruce* it is suggested that actions for necessaries are the only Admiralty actions in which several claims of a like nature usually occur. In terms of Rule 23 I can see no similarity in the nature of the interests claimed respectively by the mortgagee of a Ship who wants foreclosure and a party like the Master of the Ship who has a claim for necessaries.

Although therefore counsel for the plaintiff in this action has on behalf of his client, very fairly expressed his willingness that questions of priority as betweeen the plaintiff and the other claimants should be reserved for consideration after enforcement of the decree, it seems to me that neither of the two claimants has taken the proper steps to safeguard his interests, if any. I would hold that if these claimants desire to prove their claims, they should do so by themselves instituting actions and, if they are so advised, by filing notice of *caveat* under Rule 161. In view of the assurance given by counsel for the plaintiff their interests would in all probability be adequately safeguarded if they take the proper steps without delay. *Note* (*r*) *at page* 271 *of Williams & Bruce* shows that in order to reserve questions of priority either the plaintiff in each suit intervenes in the other suits or else the Court *ex mero motu* will reserve such questions for the appropriate time. The applications of the Maldivian Nationals Trading Corporation Ltd. and of the Master of the Ship to be added as parties to the present action are refused with costs.

Let judgment be entered in favour of the plaintiff in terms of the endorsement on a writ of summons.

The plaintiff will be entitled to the costs of the consideration of the motion for judgment.

Applications refused.

Present: **Sansoni, J.**

COMMISSIONER OF AGRARIAN SERVICES *vs.* V. KUMARASAMY

S.C. No. 672/1960—*M.C. Trincomalee No.* 24150

Argued on: 25th January, 1961
Decided on: 1st February, 1961

Paddy Lands Act, No. 1 *of* 1958, *sections* 3, 4, 51 *and* 63—*Charge under section* 4(5) *punishable under section* 4(9)—*Absence of reference in said sub-sections to the local jurisdiction of Magistrate—Does such omission deprive Magistrate of his jurisdiction to try such charge—Criminal Procedure Code, sections* 9 *and* 135—*Sufficiency of, to confer jurisdiction.*

Gazette bringing section 51 *of the Act into operation in a particular district—Need such Gazette be referred to in the charge or be produced in evidence.*

Sections 3(1) *and* 63—*Meaning of word "letting".*

V. S. A. Pullenayagam C. C. for the complainant-appellant.

S. Sharvananda for the accused-respondent.

Held : (1) That although section 4(5) of the Paddy Lands Act, No. 1 of 1958, which created the offence of eviction and section 4(9), which provided the punishment for it, did not provide as to what Magistrate's Court had jurisdiction in respect of such offence, the jurisdiction conferred by sections 9 and 135 of the Criminal Procedure Code was sufficient to enable a Magistrate to try such offence if committed within his local jurisdiction. There was no need for further provision to be made in this behalf in the Act.

(2) That the Gazette which brought section 51 of the Paddy Lands Act into operation in a District need not be recited in the charge or marked in evidence by the prosecution. The evidence of an Assistant Commissioner appointed under the Act, who stated that the Act had not been brought into operation in that District, is sufficient if believed. There was no need of any particular proof of his status to give such evidence.

(3) That if a tenant cultivator pays as rent a consideration consisting of paddy, then, to constitute a letting under the Act (and therefore also to make such person a "tenant cultivator" in terms of sections 3(1) and (63) that paddy must be a share of the produce from the land let.

SANSONI, J.

This is an appeal by the Attorney-General from an acquittal. The charge on which the case went to trial reads :-

> "You are hereby charged, that you did, within the jurisdiction of this Court, being the landlord of an extent of paddy land called Pattanaipathi situated at Thiriyai in the Administrative District of Trincomalee in which Administrative District the provisions of the Paddy Lands Act, No. 1 of 1958 that come into operation on a date appointed under sub-section 1 of section 2 have not been brought into operation did, on or about the 20th day of August, 1958, at Thiriyai, evict from the said extent of land without the written sanction of the Commissioner of Agrarian Services, one S. Ponnadurai who would be the tenant cultivator of the said extent of land if those provisions were in operation in the said Administrative District in breach of section 4(5) of the Paddy Lands Act, No. 1 of 1958 and did thereby commit an offence punishable under section 4(9) of the said Act."

The learned Magistrate found, on the facts, that the charge had been proved, but he held that he had no jurisdiction to hear the case, although this point was not raised by the defence and was therefore not met by the prosecution at the trial. His reason was that neither section 4(5) nor section 4(9) of the Act provides which Magistrate's Court should have jurisdiction in respect of such an offence. He compared section 4 with section 21(1) which empowers a Magistrate's Court "within whose jurisdiction such extent wholly or mainly lies", to issue an order of eviction. The reason for such a provision in section 21(1) obviously is that unless a Magistrate's Court is empowered to issue an order of eviction, it would have no jurisdiction to do so under the Criminal Procedure Code. But in view of sections 9 and 135 of that Code which confer jurisdiction on a Magistrate's Court to try all prosecutions for offences committed within its local jurisdiction, there was no need for further provision to be made in this behalf in the Act. I find that the learned Magistrate has referred to section 9 in his order, and this should have been sufficient authority for him to hold that he had jurisdiction in this case.

Another ground on which he held against the prosecution was that it had failed to mark in evidence or recite in the charge the Gazette which brought into operation section 51 of the Act in respect of the Trincomalee district. Section 51 provides for the appointment of Deputy and Assistant Commissioners of Agrarian Services and other officers and servants for the purposes of the Act: it has nothing to do with the creation of the offence charged. The cases relied on by the learned Magistrate, which require that when a charge is laid under a rule, regulation or by-law which is required by law to be published in the Gazette, the Gazette should be referred to in the charge, have no application to this case. The learned Magistrate apparently thought that the evidence of the Assistant Commissioner of Agrarian Services, who stated that the Act had not been brought into operation in that district, could not be acted on unless he had the status of that office and that status could not be proved unless the Government Gazette bringing section 51 into operation in that district was mentioned in the charge. Nobody questioned the status of the witness, who said that he was duly appointed. But in any case there was no need for him to have a particular status to give such evidence: if the evidence he gave was believed, nothing more was necessary. I do not see how a Gazette dealing with the matter of his appointment can find a place in the charge.

Although the grounds on which the acquittal was based are therefore wrong, I have still to decide whether the order should be set aside. Mr. Sharvananda urged that the prosecution had failed to prove that the person evicted came within the expression 'tenant cultivator', Section 3(1) provides that a person shall be the tenant cultivator of an extent of paddy land when he is the cultivator of an extent let to him under any oral or written agreement, and if he is a citizen of Ceylon. The point stressed on behalf of the accused is that the word 'let' when used with reference to any extent of paddy land has been defined in section 63 of the Act. It means "to permit any person, under an oral or a written agreement, to occupy and use such extent in consideration of the performances of any service by him or the payment of rent consisting of a sum of money or a share of the produce from such extent."

In this case, the alleged tenant cultivator referred, in the course of his evidence, to the payment of "lease money". He then produced as P2 what he called a receipt for the lease money. A year's "lease amount" has been described in that document as six avanams of paddy. The document on which the land was leased to him has also been produced, but it does not specify what the consideration or the rent for the letting consisted of. It is not clear to me, from the evidence led by the prosecution, whether the consideration consisted of money or of paddy. If it was the latter, it would not be a letting under the Act unless that paddy was a share of the produce from the extent of and let.

Since the learned Magistrate was satisfied that the evidence proved the charge, what appears to

me to be ambiguous was probably not so to him. But the evidence on record is not as clear as it should be, as to what the terms of the agreement were. This appears to me to be a case where a fresh investigation of the facts should be held.

In the circumstances I set aside the order of acquittal and send the case back for a fresh trial by another Magistrate.

Set aside and sent back.

Present: **Tambiah, J.**

WIJEYADORU, (Assistant Commissioner of Agrarian Services, Kandy) *vs.* SIRISENA*

S.C. No. 594/1960—*M.C. Gampola No.* 9320

Argued on: 7*th and* 9*th March*, 1961.
Decided on: 14*th March*, 1961.

Paddy Lands Act, No. 1. *of* 1958, *Sections* 3 *and* 4(1)—*Field cultivated during Maha Season only—Lying fallow during Yala season—Owner asking cultivator to cease cultivating—Owner channelling water to field for Yala cultivation by him—Does this amount to eviction within the meaning of section* 4(1) *of the Act—Does such cultivator come within the meaning of tenant cultivator in section* 3 *of the Act.*

Held : (1) That a person, who at the time when the Paddy Lands Act came into force, has been the cultivator of a paddy field which is worked during the Maha season only, is a tenant cultivator of that field within the meaning of section 3 of the Paddy Lands Act.

(2) That an owner, who, after requesting such cultivator not to work the field in future, himself channels water for cultivation during the Yala season, evicts his tenant cultivator within the meaning of the Act.

J. G. T. Weeraratne, C.C. with *V. C. Gunatilake, C.C.* for the complainant-appellant.

G. P. J. Kurukulasuriya for the accused-respondent.

TAMBIAH, J.

In this case the accused-respondent was charged as follows :

"You, being the landlord of an extent of paddy land called Aswedduma Kumbura, situated at Tumpelawaka in the Administrative District of Kandy, in which said Administrative District the provisions of section 4(1) of the Paddy Lands Act, No. 1 of 1958 came into operation on the 20th day of September, 1958 in terms of an order made under section 2(1) of the said Act by the Minister of Agriculture and Food and published in the Gazette Extraordinary No. 11528 of 19th September, 1958, did in April, 1959 at Tumpelawaka, within the jurisdiction of this Court, evict one H.G. Kirihamy, a tenant cultivator of the said extent of paddy land in breach of section 4(1) of the Paddy Lands Act, No. 1 of 1958, and that you did thereby commit an offence punishable under section 4(9) of the said Act."

It is not disputed that the Paddy Lands Act became applicable to the area where this land is situated in September, 1958 and it is common ground that the accused is the owner of the land referred to in the charge. Kirihamy stated in the course of his evidence that his father-in-law was working this field originally as an ande cultivator under the accused and after his father-in-law died in 1957, he succeeded as the ande cultivator and he continued to work the field on this basis. When he worked this field from 1957-59 on this basis he gave the accused half share of the produce. But he also stated that when he stopped working this field in March, 1959, he gave the accused 1/4 share according to the Paddy Lands Act, and he himself took 3/4 share. Kirihamy stated that because he gave the accused the share according to the Paddy Lands Act, the accused asked him to stop working the field and thereafter came with some labourers and irrigated the field in April 1959. He also stated that this field is worked only in the Maha season and lies fallow from March to August every year.

After the close of the case for the prosecution the learned trial Judge held that since Kirihamy was only an ande cultivator under the accused for the Maha season, no offence was committed even if the accused has evicted Kirihamy in April, 1959. The Magistrate was of the view that in the light of this finding the accused should be acquitted. The learned Judge also held that Kirihamy was an ande cultivator under the accused for the Maha season in 1958 and that this season commenced in August and ended in February, 1959. The question for determination is whether Kirihamy

*For Sinhala Translation, see Sinhala section vol. 1, part 8, p. 29

was a tenant cultivator within the meaning of Section 3(1) of the Paddy Lands Act No. 1 of 1958 The sub-section is as follows :-

> "Where any person is the cultivator of any extent of paddy land let to him under any oral or written agreement made before or after the coming into operation of this Act in the Administrative District in which that extent wholly or mainly lies, then, if he is a citizen of Ceylon, he shall, subject to the provisions of this Act, be the tenant cultivator of that extent."

It is not denied that Kirihamy is a citizen of Ceylon and that he was the cultivator of the extent of paddy land referred to in the charge, which had been let to him under an oral agreement between him and the accused. This relationship subsisted at the time the Act came into operation, namely, September 1958, which is the point of time relevant to determine whether the relationship of tenant cultivator and landlord under Section 4 of the Act existed. It follows that Kirihamy was a tenant cultivator within the meaning of Section 3(1) of the Act. By Section 4(1) of the Act, a tenant cultivator of any extent of paddy land is given the right to occupy and use such extent in accordance with the provisions of the Act and cannot be evicted from such extent by or at the instance of the landlord notwithstanding anything to the contrary in any oral or written agreement by which such extent has been let to the tenant cultivator. The landlord is also forbidden from interfering in the occupation and use of such extent by the tenant cultivator, and is prohibited to receive from him any rent in excess of that required by the Act to be paid in respect of such extent of the land. He is further restrained from evicting a tenant cultivator in respect of any land to which this Act applies, except with the written sanction of the Commissioner granted on his being satisfied that the eviction is to be made *bona fide* for any such cause as may be prescribed by the Act. The landlord who evicts the cultivator in contravention of Section 4(5), commits an offence punishable under Section 4(9) of the Act.

Mr. Kurukulasuriya, who appeared for the accused-respondent, submitted that this provision, being one that took away the rights of owners of land, should be strictly construed. He contended that this Act did not apply to the facts of this case since in April, 1959, the month in which, according to the charge, the accused is said to have evicted Kirihamy, the latter had no possession and was only an ande cultivator for the Maha season which commenced in August, 1959. I regret that am unable to accept this contention.

The learned Judge has, therefore, erred in law in holding that the relationship of tenant cultivator and landlord did not exist in April, 1959.

I would set aside the order of the learned Magistrate acquitting the accused-respondent and remit the case in order that the learned Judge may proceed with the trial on the footing that Kirihamy was a tenant cultivator under the accused-respondent in respect of the land which has been set out in the charge.

Set aside and sent back.

Present: **Tambiah, J.**

H. K. EDMUND *vs.* K. J. FELIX FERNANDO, Municipal Commissioner, Galle*

In the matter of an Application for an injunction under section 20 of the Courts Ordinance or a mandate in the nature of a Writ of Prohibition under section 42 of the Courts Ordinance.

S.C. No. 91

Argued on: 3rd *March*, 1961.
Decided on: 3rd *March*, 1961.

Courts Ordinance, sections 20 *and* 42—*Injunction, alternatively Writ of Prohibition—Letter of resignation sent by Deputy Mayor to Commissioner of Municipal Council—2nd letter purporting to withdraw resignation—Commissioner taking steps to summon meeting for electing successor—Application for injunction or mandate in nature of Writ of Prohibition to restrain Commissioner from holding meeting—Do these remedies lie—Municipal Councils Ordinance No.* 29 *of* 1947, *sections* 15 *and* 17.

The petitioner, the Deputy Mayor of the Municipal Council, Galle forwarded to the Commissioner of the Council his letter of resignation dated 30-1-61 and later by letter dated 4-2-61 purported to withdraw it. The Commissioner, notwithstanding the second letter took steps to summon a meeting for the election of a Deputy Mayor. The petitioner applied

*For Sinhala translation, see Sinhala section, vol. 1, part 8, p. 30

to the Supreme Court for an injunction or a mandate in the nature of a Writ of Prohibition under sections 20 and 42 of the Courts Ordinance respectively.

It was argued for the petitioner (a) that the proper officer who could have validly accepted the resignation was the Mayor, and as he had not accepted the resignation, the petitioner still remained the Deputy Mayor;

(b) that as the letter of resignation was withdrawn, the Commissioner had no power to summon the meeting.

Held : (1) That the Commissioner was the proper officer to whom the letter of resignation should be addressed by the Deputy Mayor, and by sending the said letter of resignation to him the petitioner vacated his office and, therefore, had no *locus standi* to maintain this application.

(2) That the Writ of Prohibition did not lie as the Commissioner was not performing a judicial function.

(3) That an injunction under section 20 of the Courts Ordinance is a very restricted remedy and is granted only in exceptional circumstances.

Cases referred to : *Mohamado v. Ibrahim*, (1895) 2 N.L.R. 36.

C. Renganathan with *M. S. M. Nazeem* and *M. T. M. Sivardeen* for the petitioner.

H. V. Perera, Q.C, as *Amicus Curiae*.

TAMBIAH, J.

This is an application for an Injunction under section 20 of the Courts Ordinance, or a mandate in the nature of a Writ of Prohibition under section 42 of the Ordinance, restraining the respondent, who is the Commissioner of the Municipal Council of Galle, from holding a meeting for the election of a Deputy Mayor on 4.5.1961. At the close of the argument I made order refusing the application and intimated to Counsel that I would give my reasons later. The court is indebted to Mr. H. V. Perera, Q.C. for his kind assistance as *amicus curiae* at my invitation.

The Petitioner who was elected to the office of Deputy Mayor of the Municipal Council of Galle, in January, 1960 sent to the respondent a letter of resignation (marked P. 1), dated 30.1.61. The letter is in the following terms :-

30th January, 1961.

The Municipal Commissioner,
M.C., Galle.

Sir,

I hereby tender my resignation from the office of Deputy Mayor, Galle, M.C. with effect from 5th February, 1961.

Yours faithfully,
H. K. EDMUND,
Deputy Mayor.

The petitioner states in his affidavit that the respondent retained P1, and that he sent to the respondent another letter (marked P2) dated 4.3.61 purporting to withdraw his resignation.

P2 is the following terms:-

Galle, 4th February, 1961.

The Municipal Commissioner,
M.C., Office,
Galle.

Sir,

My letter of resignation from the office of Deputy Mayor, Galle which is to take effect from the 5th instant (5th February, 1961), is hereby withdrawn by me.

Yours faithfully,
H. K. EDMUND,
Deputy Mayor".

On the resignation of the Deputy Mayor the respondent was the proper officer empowered to take the necessary steps to summon a meeting of the Municipal Council for the election of a Deputy Mayor to fill the vacancy. Hence the letter of resignation P1, was addressed to and received by the officer empowered to act on it.

It was contended for the petitioner that the proper officer who could have validly accepted the resignation was the Mayor of the Council and not the Commissioner, and that as his resignation was not accepted by the Mayor the petitioner still remained the Deputy Mayor. It was further argued that since the letter of resignation addressed to the Commissioner was withdrawn by P2, he had no power to summon the meeting.

Section 15(3) of the Municipal Councils Ordinance No. 29 of 1947 enacts as follows :-

"If any elected Mayor or Deputy Mayor dies, or resigns or vacates his office as a Councillor or ceases to be a Councillor, the Commissioner shall by notice in writing summon

the Councillors and hold an election in accordance with the provisions of this section."

Under the Municipal Councils Ordinance the Municipal Commissioner next to the Mayor, is the chief executive officer of the Municipal Council (section 171 (1)) and is empowered to exercise all the powers, duties and functions conferred or imposed upon, or vested in , or delegated to him by the Ordinance, (section 171 (2)).

Learned Counsel contended that until the Mayor accepted the resignation, the petitioner could not be said to have resigned from the office of Deputy Mayor. But he was unable to refer me to any legal provisions to support the proposition that the Deputy Mayor's resignation should be accepted by the Mayor before it could become valid, or that the office of the Deputy Mayor was not vacated until the acceptance of the resignation by the Mayor or the Municipal Commissioner. There was no contractual obligation between the Municipal Council and the Petitioner when he was elected as Deputy Mayor, and hence his resignation need not be accepted by an officer of the council. The act of resignation is a unilateral one, and by sending his letter of resignation to the Commissioner, who was the proper officer to whom a letter of resignation by the Deputy Mayor should be addressed, the petitioner vacated his office. Therefore I hold that the petitioner has no *locus standi* to maintain this application.

There are also other difficulties in granting this application. Mr. Renganathan quite rightly conceded that the Writ of Prohibition did not lie in this case as the Respondent was not performing any judicial function. An injunction under section 20 of the Courts Ordinance is a very restricted remedy and is granted only in exceptional circumstances. The scope and ambit of section 20 was set out as follows by Bonser C.J. in *Mahamado vs. Ibrahim*, (1895, 2 N.L.R. 36 at p. 37).

"It would appear, therefore, that the powers of granting injunction is a strictly limited one to be exercised only on special grounds, and in special circumstances (1) where irremediable mischief would ensue from the act sought to be restrained; (2) an action would lie for an injunction in some court of originai jurisdiction; and (3) the plaintiff is prevented by some substantial cause from applying to that court."

The Petitioner cannot bring an action in the District Court without giving one month's notice to the respondent (section 306 (1) of the Municipal Councils Ordinance). As the petitioner is not in a position to bring an action for injunction in the District Court, he is not entitled to ask for an injunction.

Furthermore, an injunction will not be granted where there is an equally effective alternative remedy. If the petitioner's position is that he is still the Deputy Mayor, it is open to him to apply for a Writ of Quo Warranto on the person elected to that office by the Council and who functions in the capacity, in his place.

I feel that the granting of an injunction in the present circumstnces will seriously impede the functioning of the Municipal Council.

For these reasons I have refused the application.

Application refused.

Present: **Weerasooriya, J.**

UKKU AMMA *v.* PARAMANATHAN, *et al.*

S.C. No. 34—*C.R. Matale No.* 13077

Argued on: 21*st*, 22*nd* & 24*th September*, 1959.
Delivered on: 27*th November*, 1959.

Civil Procedure Code, sections 408, 91—*Compromise of action—Procedure to be followed.*

Held : (1) That it is desirable that settlements reached or made in an action should be clearly explained to parties and their signatures or thumb impressions obtained.

(2) That in the case of a settlement or compromise of an action, the provisions of sections 408 and 91 of the Civil Procedure Code should be followed.

Cases refered to : *Fernando v. Singoris Appu*, 26 N.L.R. 469.
Punchibanda v. Punchibanda, 42 N.L.R. 382.

Vernon Jonklaas for the plaintiff-appellant.

T. B. Dissanayake with *A. H. Moomin* for the defendants-respondents.

WEERASOORIYA, J.

The plaintiff-appellant is the present owner of all that northern portion depicted as Lot A in partition plan No. 23/1931, filed of record, and also of the eastern half of the house standing on the southern portion depicted as Lot B in the same plan. She has filed this action against the defendants-respondents for a definition of the boundary between lots A and B alleging that the defendants (of whom the 2nd defendant is admittedly entitled to lot B) had encroached on a portion of lot A and on the portion of the said house belonging to her.

After the issues had been framed the trial was adjourned for the 6th May, 1958. The proceedings on that date show an entry made by the Commissioner "case settled", and below that appear in his handwriting the terms of the purported settlement. The present appeal is from the order of the Commissioner dismissing the plaintiff's subsequent application to have the settlement set aside and the trial proceeded with.

The terms of settlement as recorded by the Commissioner are as follows:

"The boundary between the plaintiff's and defendant's land to be the existing live fence marked in Plan No. 384 filed of record, up to the enderu tree on that fence. From that enderu tree the boundary to go up to the eastern corner of the southern phase of the well. The southern phase (which is 6 feet, 10 inches) (of the well) also will be a boundary. Then from the western corner of the southern phase of the well, a line 18 feet in length up to the existing live fence and providing an opening of 12 feet. Then along the live fence, and then the wire fence marked as the southern boundary of lot 3, on that side.

Then on the western side, the southern boundary of lot 2 and western boundary of lot F. (Lot F thus goes to plaintiff).

The defendants to be entitled to erect a step to the southern phase of the well at their expense and to use the well in common.

Re building in the same plan.

A & B to the plaintiff.

C, D & G to the defendants.

The present temporary partition between B & C to be demolished and a wall in brick and lime to be erected by defendants at his (*sic*) own expense.

A plan on these lines to be prepared by Mr. Samarasinghe at joint expense."

Plan No. 384 which is mentioned in the above terms of settlement was prepared on the 6th February, 1958, for the purpose of this action, and shows certain existing encroachments, not only on lot A, but also on lot B, in plan No. 23/1931. After the settlement was recorded, plan No. 384A dated the 2nd August, 1958, was prepared which purports to show the respective portions of lots A and B and of the house allotted to the plaintiff and the defendants under the settlement and, on the order of the Commissioner, decree was entered in terms of the settlement and plan No. 384A.

The plaintiff has stated in her petition of appeal that she did not consent to the settlement of the 6th May, 1958. According to the journal entry of that date the plaintiff was represented by a proctor and the defendants by counsel instructed by a proctor. There is nothing to indicate that the parties themselves were present.

Although it was held in *Fernando v. Singoris Appu*, 26 N.L.R. 469, that a proctor can under the general authority of his proxy enter into a compromise which is binding on his client, it would appear from the observations of Soertsz, J., in *Punchibanda v. Punchibanda. et al*, 42 N.L.R. 382, that this Court has more than once indicated the desirability of settlements, adjustments and admissions that are reached or made being explained clearly to the parties and their signatures or thumb impressions obtained. This procedure was not followed in the present case. Having regard to the involved nature of the terms in the first two paragraphs of the settlement, as recorded, I have grave doubts whether the plaintiff would have understood the settlement even if it had previously been put to her. The first paragraph refers to an enderu tree on a live fence marked in plan No. 384, but no such tree is shown in the live fence depicted in that plan. It is not clear even from the subsequent plan No. 384A whether there is such a tree.

Section 408 of the Civil Procedure Code provides that an agreement or compromise shall be notified to Court by motion. Under section 91, where the motion is by the advocate or proctor for a party, a memorandum in writing of such motion is required to be at the same time delivered to Court. Not only have these provisions not been complied

with, but there is nothing in the recod to show at whose instance the settlement was arrived at.

In these circumstances I would allow the appeal of the plaintiff with costs. The decree entered in terms of the settlement is vacated and the case will be sent back for the trial to be proceeded with according to law. All costs so far incurred in the Court below will be costs in the cause. This order will not, however, preclude the parties from arriving at any lawful adjustment or compromise of the action, if they so desire, and notifying the same to Court in terms of section 408 of the Civil Procedure Code.

Appeal allowed.

Present: **Basnayake, C.J.,** and **Sansoni, J.**

JAYASURIYA *v.* HETTIKUMARANA

S.C. No. 188/59—*D.C. Negombo No.* 19677

Argued & Decided on: July 21, 1960.

Servitudes—Way of necessity—Is principle applicable to widening of existing road.

Held : That where the owner of a dominant tenement already has access and egress to the public road, he is not entitled by "way of necessity" to have an existing road widened.

A. C. Gooneratne for the defendant-appellant.

No appearance for the plaintiff-respondent.

BASNAYAKE, C.J.

In this case the plaintiff sought to obtain a declaration that he is entitled "by way of necessity" to a strip of land 2 feet wide depicted as A, B, D, E in the sketch annexed to his plaint. The defendant resisted the action. The learned District Judge dismissed the plaintiff's claim to a right of way of necessity, but proceeded to declare him entitled to a strip of land at point "A" sufficient to round off a bend in his road so as to enable him to take large lorries and double bullock carts to his land. The evidence is that single bullock carts and lorries can use this road in its present state.

The learned Judge is wrong in granting the plaintiff the land in question as a way of necessity. The right of necessary way is thus described by Voet (Book VIII Tit. 3 s. 4):

> "In addition to the 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."

He further says:

> "Such way of necessity to be vouchsafed on sufferance differs from other rights of way in this, that it can not only be closed by the owner of the servient tenement, but can also be ruined by cutting it or digging it up; with the proviso that on request only and under pressure of need he is bound to open it and furnish it in a suitable condition for use." (Gane Vol. 2, p. 468).

In the instant case the plaintiff already has access and egress to the public road, and he is not entitled by "way of necessity" to widen an existing road.

We therefore set aside that part of the order of the learned District Judge which declares that the plaintiff entitled to a strip of land at point "A" sufficient to round off the bend.

The appeal is allowed with costs.

SANSONI, J.

I agree.

Appeal allowed.

Privy Council Appeal No. 23 of 1960

Present: **Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker, Lord Morris of Borth-y-Gest**

OVERSEAS TANKSHIP (U.K.) LIMITED
vs.
MORTS DOCK & ENGINEERING COMPANY LIMITED

From
THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
DELIVERED THE 18TH JANUARY, 1961.

Damages—Tort of negligence—Liability for—Test to determine remoteness of damage—Foreseeability test.

The respondents, ship repairers, owned a timber wharf which they used in the course of their business. Moored to this, at the critical time, was a ship which the respondents were refitting. The appellants were charterers of a vessel, The Waggon Mound, which had been moored to another wharf some 600 feet away, and had taken in furnace oil. In this process, by the carelessness of the appellants' servants, a large quantity of furnace oil was allowed to spill on the water. It spread, being thickly concentrated along the foreshore near the respondents' property. The respondents, when they became aware of this condition, stopped welding or burning operations, but were later informed and formed the view that they could safely resume operations. At about 2 p.m. on November 1st 1951, the oil near the wharf caught fire, and the fire damaged both ship and wharf. It was found as a fact by the trial judge that the respondents did not know and could not reasonably be expected to know that the oil could be set afire when spread on water. He also held that, as a direct result of the escape of the oil, the respondents had suffered some damage in that the oil had got upon their slipways, congealed upon them, and interfered with their use of the ships. No claim for compsensation was made in respect of it, but compensation was claimed for the damage by fire.

Held : That in the tort of negligence, a man must be considered to be responsible only for such probable consequences of his act as a reasonable man ought to have foreseen. It is not consonant with current ideas of justice or morality that for an act of negligence however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can said be to be 'direct'.

In *Re Polemis & Furness Withy & Co., Ltd*, (1921) 3 K.B. 560, should no longer be regarded as good law.

[Editorial Note: This decision does not, strictly speaking, bind the English Courts. As to its effect in England, see *Goodhart*, (1961) 77 L.Q.R. 175. As to the principle in *Re Polemis* in South Africa see *Lee & Honore*, South African Law of Obligation, §756 (iv)**]**.

Cases referred to: *H. M. S. London*, (1914), P. 72.
Smith v. London & South Western Railway Co., (1870) L.R. 6 C.P. 14.
Weld Blundell v. Stephens, (1920) A.C. 956.
Rigby v. Hewitt, (1850) 5 Exch. 240.
Greenland v. Chaplin (1850) 5 Exch. 243.
Sharp v. Powell, (1872) L.R. 7 C.P. 253.
Cory & Son Ltd. v. France Fenwick & Co. Ltd., (1911) 1 K.B. 114.
Lynch v Knight, (1861) H.L.C. 577.
Clark v. Chambers, (1878) 3 Q.B.D. 327.
Hadley v. Baxendale, (1854) 9 Exch. 341.
Thurogood v. Vanden Bergh & Jurgens, (1951) 2 K.B. 537; (1951) 1 A.E.R. 682.
Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd., (1949) 2 K.B. 528; (1949) 1 A.E.R. 997.
Minister of Pensions v. Chennel, (1947) 1 K.B. 253; (1946) 2 A.E.R. 719.
Palsgref v. Long Island Railway, (1928) 248 N.Y. Reps. 339.
Donoghue v. Stevenson, (1932) A.C. 562.
Bourhill v. Young, (1942) 2 A.E.R. 396; (1943) A.C. 91.
Aldham v. United Dairies (London) Ltd., (1939) 4 A.E.R. 522; (1940) 1 K.B. 507.
Woods v. Duncan, (1946) 1 A.E.R. 420; (1946) A.C. 401.
Glasgow Corporation v. Muir, (1943) A.C. 448; (1943) 2 A.E.R. 44.
Owners of Dredger Liebosch v. Owners of Steamship Edison, (1933) A.C. 449.
Roe v. Minister of Health, (1954) 2 Q.B. 66; (1954) 2 A.E.R. 131.
King v. Phillips, (1953) 1 Q.B. 429; (1953) 1 A.E.R. 617.
Blyth v. Birmingham Waterworks Coy., (1856) 11 Exch. 784.
Rylands v. Fletcher, (1868) L.R. 3, H.L. 330.

A. Roskill, Q.C. with *C. L. D. Meares, Q.C.* and *Michael Kerr* for the appellants.

R. L. Taylor, Q.C. with *Russell Bainton* for the respondents.

VISCOUNT SIMONDS

This appeal is brought from an order of the Full Court of the Supreme Court of New South Wales dismissing an appeal by the appellants, Overseas Tankship (U.K.) Ltd., from a judgment of Mr. Justice Kinsella exercising the Admiralty Jurisdiction of that Court in an action in which the appellants were defendants and the respondents Morts Dock & Engineering Co., Ltd. were plaintiffs.

In the action the respondents sought to recover from the appellants compensation for the damage which its property known as the Sheerlegs Wharf in Sydney Harbour and the equipment thereon had suffered by reason of fire which broke out on the 1st November, 1951. For this damage they claimed that the appellants were in law responsible.

The relevant facts can be comparatively shortly stated inasmuch as not one of the findings of fact in the exhaustive judgment of the learned trial Judge has been challenged.

The respondents at the relevant time carried on the business of shipbuilding, ship-repairing and general engineering at Morts Bay, Balmain, in the Port of Sydney. They owned and used for their business the Sheerlegs Wharf, a timber wharf about 400 feet in length and 40 feet wide, where there was a quantity of tools and equipment. In October and November, 1951, a vessel known as the "Corrimal" was moored alongside the wharf and was being refitted by the respondents. Her mast was lying on the wharf and a number of the respondents' employees were working both upon it and upon the vessel itself, using for this purpose electric and oxy-acetylene welding equipment.

At the same time the appellants were charterers by demise of the s.s. "Wagon Mound", an oil-burning vessel which was moored at the Caltex Wharf on the nothern shore of the harbour at a distance of about 600 feet from the Sheerlegs Wharf. She was there from about 9 a.m. on the 29th October until 11 a.m. on the 30th October, 1951, for the purpose of discharging gasolene products and taking in bunkering oil.

During the early hours of the 30th October, 1951, a large quantity of bunkering oil was through the carelessness of the appellants' servants allowed to spill into the bay and by 10.30 on the morning of that day it had spread over a considerable part of the bay, being thickly concentrated in some places and particularly along the foreshore near the respondents' property. The appellants made no attempt to disperse the oil. The "Wagon Mound" unberthed and set sail very shortly after.

When the respondents' works manager became aware of the condition of things in the vicinity of the wharf he instructed their workmen that no welding or burning was to be carried on until further orders. He enquired of the manager of the Caltex Oil Company, at whose wharf the "Wagon Mound" was then still berthed, whether they could safely continue their operations on the wharf or upon the "Corrimal". The results of this enquiry coupled with his own belief as to the inflammability of furnace oil in the open led him to think that the respondents could safely carry on their operations. He gave instructions accordingly but directed that all safety precautions should be taken to prevent inflammable material falling off the wharf into the oil.

For the remainder of the 30th October and until about 2 p.m. on 1st November, work was carried on as usual, the condition and congestion of the oil remaining substantially unaltered. But at about that time the oil under or near the wharf was ignited and a fire, fed initially by the oil, spread rapidly and burned with great intensity. The wharf and the "Corrimal" caught fire and considerable damage was done to the wharf and the equipment upon it.

The outbreak of fire was due, as the learned Judge found, to the fact that there was floating in the oil underneath the wharf a piece of debris on which lay some smouldering cotton waste or rag which had been set on fire by molten metal falling from the wharf: that the cotton waste or rag burst into flames: that the flames from the cotton waste set the floating oil afire either directly or by first setting fire to a wooden pile coated with oil and that after the floating oil became ignited the flames spread rapidly over the surface of the oil and quickly developed into a conflagration which severely damaged the wharf.

He also made the all important finding, which must be set out in his own words. "The raison d'etre of furnace oil is, of course, that it shall burn, but I find the defendant did not know and could not reasonably be expected to have known that it was capable of being set afire when spread on water." This finding was reached after a wealth of evidence which included that of a distinguished scientist' Professor Hunter. It receives strong confirmation from the fact that at the trial the respondents strenuously maintained that the appellants had discharged petrol into the bay on no

other ground than that, as the spillage was set alight, it could not be furnace oil. An attempt was made before their Lordships' Board to limit in some way the finding of fact but it is clear that it was intended to cover precisely the event that happened.

One other finding must be mentioned. The learned Judge held that apart from damage by fire the respondents had suffered some damage from the spillage of oil in that it had got upon their slipways and congealed upon them and interfered with their use of the slips. He said "The evidence of this damage is slight and no claim for compensation is made in respect of it. Nevertheless it does establish some damage which may be insignificant in comparison with the magnitude of the damage by fire, but which nevertheless is damage which beyond question was a direct result of the escape of the oil." It is upon this footing that their Lordships will consider the question whether the appellants are liable for the fire damage. That consideration must begin with an expression of indebtedness to Mr. Justice Manning for his penetrating analysis of the problems that to-day beset the question of liability for negligence. In the year 1913 in the case of *H.M.S. London* (reported in (1914) Prob. 72 at p. 76), a case to which further reference will be made, Sir Samuel Evans, P., said "The doctrine of legal causation, in reference both to the creation of liability and to the measurement of damages, has been much discussed by judges and commentators in this country and in America. Vast numbers of learned and acute judgments and disquisitions have been delivered and written upon the subject. It is difficult to reconcile the decisions; and the views of prominent commentators and jurists differ in important respects. It would not be possible or feasible in this judgment to examine them in anything approaching detail." In the near half-century that has passed since the learned President spoke those words the task has not become easier, but it is possible to point to certain landmarks and to indicate certain tendencies which, as their Lordships hope, may serve in some measure to simplify the law.

It is inevitable that first consideration should be given to the case of *In re Polemis & Furness Withy & Company Ltd.* (1921) 3 K.B. 560 which will henceforward be referred to as "Polemis". For it was avowedly in deference to that decision and to decisions of the Court of Appeal that followed it that the Full Court was constrained to decide the present case in favour of the respondents. In doing so Mr. Justice Manning after a full examination of that case said "To say that the problems doubts and difficulties which I have expressed above render it difficult for me to apply the decision in *In re Polemis* with any degree of confidence to a particular set of facts would be a grave understatement. I can only express the hope that, if not in this case, then in some other case in the near future the subject will be pronounced upon by the House of Lords or the Privy Council in terms which, even if beyond my capacity fully to understand, will facilitate for those placed as I am, its everyday application to current problems." This *cri de coeur* would in any case be irresistible but in the years that have passed since its decision *Polemis* has been so much discussed and qualified that it cannot claim, as counsel for the respondents urged for it, the status of a decision of such long standing that it should not be reviewed.

What then did *Polemis* decide? Their Lordships do not propose to spend time in examining whether the issue there lay in breach of contract or in tort. That might be relevant for a tribunal for which the decision was a binding authority: for their Lordships it is not. It may however be observed that in the proceedings there was some confusion. The case arose out of a charter party and went to arbitration under a term of it and the first contention of the charterers was that they were protected from liability by the exception of fire in the charter party. But it is clear from the pleadings and other documents, copies of which were supplied from the Record Office, that alternative claims for breach of contract and negligence were advanced and it is clear too that before Mr. Justice Sankey and the Court of Appeal the case proceeded as one in which, independently of contractual obligations, the claim was for damages for negligence. It was upon this footing that the Court of Appeal held that the charterers were responsible for all the consequences of their negligent act even though those consequences could not reasonably have been anticipated. The negligent act was nothing more than the carelessness of stevedores (for whom the charterers were assumed to be responsible) in allowing a sling or rope by which it was hoisted to come into contact with certain boards, causing one of them to fall into the hold. The falling board hit some substances in the hold and caused a spark: the spark ignited petrol vapour in the hold: there was a rush of flames and the ship was destroyed. The special case submitted by the arbitrators found that the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated. They did not indicate what damage might have been so anticipated.

There can be no doubt that the decision of the Court of Appeal in *Polemis* plainly asserts that, if the defendant is guilty of negligence, he is responsible for all the consequences whether reasonably foreseeable or not. The generality of the proposition is perhaps qualified by the fact that each of the Lords Justices refers to the outbreak of fire as the direct result of the negligent act. There is thus introduced the conception that the negligent actor is not responsible for consequences which are not "direct" whatever that may mean. It has to be asked then why this conclusion should have been reached. The answer appears to be that it was reached upon a consideration of certain authorities, comparatively few in number, that were cited to the Court. Of these three are generally regarded as having influenced the decision. The earliest in point of date was *Smith v. London & South Western Railway Co.* Law Rep. 6 C.P. 14. In that case it was said that "when it has once been determined that there is evidence of negligence the person guilty of it is equally liable for its consequences whether he could have foreseen them or not" see per Baron Channell at page 21. Similar observations were made by other members of the Court. Three things may be noted about this case: the first, that for the sweeping proposition laid down no authority was cited: the second, that the point to which the Court directed its mind was not unforeseeable damage of a different kind from that which was foreseen, but more extensive damage of the same kind: and the third that so little was the mind of the Court directed to the problem which has now to be solved that no one of the seven Judges who took part in the decision thought it necessary to qualify in any way the consequences for which the defendant was to be held responsible. It would perhaps not be improper to say that the law of negligence as an independent tort was then of recent growth and that its implications had not been fully examined. The second case was "*H.M.S. London*" which has already been referred to. There the statement in Smith's case was followed, Sir Samuel Evans citing Blackburn, J. "What the defendants might reasonably anticipate is only material with reference to the question whether the defendants were negligent or not and cannot alter their liability if they were guilty of negligence." This proposition which provides a different criterion for determining liability and compensation goes to the root of the matter and will be discussed later. It was repeated by Lord Sumner in the third case which was relied on in *Polemis*, namely *Weld-Blundell v. Stephens* (1920) A.C. 956 at p. 983. In that case the majority of their Lordships of whom Lord Sumner was one held, affirming a decision of the Court of Appeal, that the plaintiff's liability for damages in certain libel actions did not result from an admitted breach by the defendant of the duty that he admittedly owed to him. Lord Dunedin (another of the majority) decided the case on the ground that there was there no evidence which entitled the jury to give the affirmative answer that they did to the question as put to them that the actions of libel and damages recovered were the "natural and probable consequences" of the proved negligence of the defendant. Lord Wrenbury (the third of the majority) summed up his view of the case by saying "I am quite unable to follow the proposition that the damages given in the libel actions are in any way damages resulting from anything which Stephens did in breach of duty." Lord Sumner whose speech their Lordships, like others before them, have not found in all respects easy to follow said "What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is of want of due care according to the circumstances. This however goes to culpability not to compensation." But this observation followed a passage in which his Lordship, directing his mind to the problem of causation, has asked what were "natural probable and necessary consequences" and had expressed the view that "direct cause" was the best expression. Adopting that test he rejected the plaintiff's claim as too remote. The question of foreseeability became irrelevant and the passage cited from his speech was unnecessary to his decision. Their Lordships are constrained to say that this dictum (for such it was) perpetuated an error which has introduced much confusion into the law.

Before going forward to the cases which followed Polemis, their Lordships think it desirable to look back to older authorities which appear to them to deserve consideration. In two cases in 5 Exchequer Reports *Rigby v. Hewitt* at p. 240 and *Greenland v. Chaplin* at p. 243, Pollock C.B. affirmed at p. 248 (stating it to be his own view only and not that of the Court) that he entertained "considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise and in respect of mischief which would by no possibility have been foreseen and which no reasonable person would have anticipated." It was not necessary to argue this question and it was not argued.

Next, one of many cases may be cited which show how shadowy is the line between so-called culpability and compensation. In *Sharp v. Powell* Law Rep. 7 C.P. 253 the defendant's servant in

breach of the Police Act washed a van in a public street and allowed the waste water to run down the gutter towards a grating leading to the sewer about 25 yards off. In consequence of the extreme severity of the weather the grating was obstructed by ice and the water flowed over a portion of the causeway and froze. There was no evidence that the defendant knew of the grating being obstructed. The plaintiff's horse while being led past the spot slipped upon the ice and broke its leg. The defendant was held not to be liable. The judgment of Bovill C.J. at p. 258 is particularly valuable and interesting. "No doubt", he said, "one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom: but, generally speaking, he is not liable for damage which is not the natural or ordinary consequences of such an act unless it be shewn that he knows or has reasonable means of knowing that consequences not usually resulting from the act are by reason of some existing cause likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury so as to render the wrongdoer liable to an action." Here all the elements are blended, "natural" or "ordinary consequences", "foreseeability", "proximate cause". What is not suggested is that the wrongdoer is liable for the consequences of his wrong doing whether reasonably foreseeable or not, or that there is one criterion for culpability, another for compensation. It would indeed appear to their Lordships that, unless the learned Chief Justice was making a distinction between "one who commits a wrongful act" and one who commits an act of negligence, the case is not reconcilable with Polemis. In that case it was not dealt with except in a citation from *Weld-Blundell v. Stephens.*

Mention should also be made of *Cory & Son Ltd. v. France Fenwick & Co. Ltd.* (1911) 1 K.B. 114. In that case Lord Justice Vaughan Williams citing the passage from the judgment of Pollock C.B. in *Greenland v. Chaplin*, which has already been read, said at p. 122 "I do not myself suppose that although, when these propositions were originally laid down, they were not intended as positive judgments but as opinions of the learned Judge, there would be any doubt now as to their accuracy". And Kennedy L.J. said of the same passage "with that view of the law no one would venture to quarrel". Some doubt was expressed in Polemis as to whether the citation of which these learned Judges so emphatically approved was correct. That is irrelevant. They approved that which they cited and their approval has high authority. It is probable in any case that it had not occurred to them that there was any such dichotomy as was suggested in Polemis. Nor, clearly, had it at an earlier date occurred to Lord Wensleydale in *Lynch v. Knight*, 9 H.L.C. 577, nor to Cockburn, C.J. in *Clark v. Chambers*, 3 Q.B.D. 327. The impression that may well be left on the reader of the scores of cases in which liability for negligence has been discussed is that the Courts were feeling their way to a coherent body of doctrine and were at times in grave danger of being led astray by scholastic theories of causation and their ugly and barely intelligible jargon.

Before turning to the cases that succeeded it, it is right to glance at yet another aspect of the decision in Polemis. Their Lordships, as they have said, assume that the Court purported to propound the law in regard to tort. But up to that date it had been universally accepted that the law in regard to damages for breach of contract and for tort was, generally speaking, and particularly in regard to the tort of negligence, the same. Yet *Hadley v. Baxendale*, was not cited in argument nor referred to in the judgments in Polemis. This is the more surprising when it is remembered that in that case, as in any another case, the claim was laid alternatively in breach of contract and in negligence. If the claim for breach of contract had been pursued, the charterers could not have been held liable for consequences not reasonably foreseeable. It is not strange that Sir Fredrick Pollock said that Blackburn and Willes, J.J. would have been shocked beyond measure by the decision that the charterers were liable in tort: see Pollock on Torts 15th Edn. p. 29. Their Lordships refer to this aspect of the matter not because they wish to assert that in all respects to-day the measure of damages is in all cases the same in tort and in breach of contract but because it emphasises how far Polemis was out of the current of contemporary thought. The acceptance of the rule in Polemis as applicable to all cases of tort would directly conflict with the view theretofore generally held.

If the line of relevant authority had stopped with Polemis, their Lordships might, whatever their own views as to its unreason, have felt some hesitation about over-ruling it. But it is far otherwise. It is true that both in England and in many parts of the Commonwealth that decision has from time to time been followed: but in Scotland it has been rejected with determination. It has

never been subject to the express scrutiny of either the House of Lords or the Privy Council, though there have been comments upon it in those Supreme Tribunals. Even in the inferior Courts judges have, sometimes perhaps unwittingly, declared themselves in a sense adverse to its principle. Thus Lord Justice Asquith himself, who in *Thurogood v. Van den Bergh & Jurgens* (1951) 2 K.B. 537, had loyally followed Polemis, in *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* (1949) 2 Q.B. 528, holding that a complete indemnity for breach of contract was too harsh a rule, decided that "the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach". It is true that in that case the learned Lord Justice was dealing with damages for breach of contract. But there is nothing in the case to suggest, nor any reason to suppose, that he regarded the measure of damage as different in tort and breach of contract. The words "tort" and "tortious" have perhaps a somewhat sinister sound but, particularly where the tort is not deliberate but is an act of negligence, it does not seem that there is any more moral obliquity in it than in a perhaps deliberate breach of contract, or that the negligent actor should suffer a severer penalty. In *Minister of Pensions v. Chennell* (1947) 1 K.B. 253, Denning, J. (as he then was) said "Foreseeability is as a rule vital in cases of contract; and also in cases of negligence, whether it be foreseeability in respect of the person injured as in *Palsgref v. Long Island Rly.* (discussed by Professor Goodhart in his Essays p. 129), *Donoghue v. Stevenson* and *Bourhill v. Young* or in respect of intervening causes as in *Aldham v. United Dairies (London) Ltd.* and *Woods v. Duncan*. It is doubtful whether in *re Polemis and Furness Withy & Co.* can survive these decisions. If it does, it is only in respect of neglect of duty to the plaintiff which is the immediate or precipitating cause of damage of an unforeseeable kind." Their Lordships would with respect observe that such a survival rests upon an obscure and precarious condition.

Instances might be multiplied of deviation from the rule in Polemis but their Lordships think it sufficient to refer to certain later cases in the House of Lords and then to attempt to state what they conceive to be the true principle. In *Glasgow Corporation v. Muir* (1943) A.C. 448, at p. 454, Lord Thankerton said that it had long been held in Scotland that all that a person can be bound to foresee are the reasonable and probable consequences of the failure to take care judged by the standard of the ordinary reasonable man while Lord Macmillan said that "it was still left to the judge to decide what in the circumstances of the particular case the reasonable man would have had in contemplation and what accordingly the person sought to be made liable ought to have foreseen." Here there is no suggestion of one criterion for determining culpability (or liability) and another for determining compensation. In *Bourhill v. Young* (1943) A.C. 91 at p. 101 the double criterion is more directly denied. There Lord Russell of Killowen said "In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double role. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damage, i.e., to the question of compensation not to culpability, but it is also relevant in testing the existence of a duty as the foundation of the alleged negligence, i.e., to the question of culpability not to compensation." This appears to be in flat contradiction to the rule in Polemis and to the dictum of Lord Sumner in *Weld-Blundell v. Stephens.*

From the tragic case of *Woods v. Duncan* (1946) A.C. 401, the facts of which are too complicated to be stated at length, some help may be obtained. There Viscount Simon analysed the conditions of establishing liability for negligence and stated them to be (1) that the defendant failed to exercise due care, (2) that he owed the injured man the duty to exercise due care and (3) that his failure to do so was the cause of the injury in the proper sense of the term. He held that the first and third conditions were satisfied, but inasmuch as the damage was due to an extraordinary and unforeseeable combination of circumstances the second condition was not satisfied. Be it observed that to him it was one and the same thing whether the unforeseeability of damage was relevant to liability or compensation. To Lord Russell of Killowen in the same case the test of liability was whether the defendants (Cammell Laird & Coy. Ltd.) could reasonably be expected to foresee that the choking of a test cock (itself undoubtedly a careless act) might endanger the lives of those on board; Lord Macmillan asked whether it could be said that they, the defendants, ought to have foreseen as reasonable people that if they failed to detect and rectify the clogging of the hole in the door the result might be that which followed, and, later, identifying, as it were, reasonable foreseeability with causation, he said "the chain of causation, to borrow an apposite phrase, would appear to consist of missing links."

Enough has been said to show that the authority of Polemis has been severely shaken though lip-service has from time to time been paid to it. In their Lordships' opinion it should no longer be regarded as good law. It is not probable that many cases will for that reason have a different result though it is hoped that the law will be thereby simplified, and that in some cases at least palpable injustices will be avoided. For it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor whould be liable for all consequences however unforeseeable and however grave, so long as they can be said to be "direct". It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.

This concept applied to the slowly developing law of negligence has led to a great variety of expressions which can, as it appears to their Lordships, be harmonised with little difficulty with the single exception of the so-called rule in Polemis. For, if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any other similar description of them) the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man, that he ought to have foreseen them. Thus it is that over and over again it has happened that in different judgments in the same case and sometimes in a single judgment liability for a consequence has been imposed on the ground that it was reasonably foreseeable or alternatively on the ground that it was natural or necessary or probable. The two grounds have been treated as coterminous, and so they largely are. But, where they are not, the question arises to which the wrong answer was given in Polemis. For, if some limitation must be imposed upon the consequences for which the negligent actor is to be held responsible—and all are agreed that some limitation there must be—why should that test (reasonable foreseeability) be rejected which, since he is judged by what the reasonable man ought to foresee, corresponds with the common conscience of mankind, and a test (the "direct" consequence) be substituted which leads to nowhere but the never ending and insoluble problems of causation. "The lawyer" said Sir Fredrick Pollock "cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause." Yet this is just what he has most unfortunately done and must continue to do if the rule in Polemis is to prevail. A conspicuous example occurs when the actor seeks to escape liability on the ground that the "chain of causation" is broken by a "*nova causa*" or "*novus actus*" "*interveniens*".

The validity of a rule or principle can sometimes be tested by observing it in operation. Let the rule in Polemis be tested in this way. In the case of the "Liesbosch" (1933) A.C. 448, the appellants whose vessel had been fouled by the respondents claimed damages under various heads. The respondents were admittedly at fault: therefore said the appellants, invoking the rule in Polemis, they were responsible for all damage whether reasonably foreseeable or not. Here was the opportunity to deny the rule or to place it secure upon its pedestal. But the House of Lords took neither course: on the contrary it distinguished Polemis on the ground that in that case the injuries suffered were the "immediate physical consequences" of the negligent act. It is not easy to understand why a distinction should be drawn between "immediate physical" and other consequences nor where the line is to be drawn. It was perhaps this difficulty which led Lord Denning in *Roe v. Minister of Health* [(1954) 2 Q.B. 66 at p. 85], to say that foreseeability is only disregarded when the negligence is the immediate or *precipitating* cause of the damage. This new word may well have been thought as good a word as another for revealing or disguising the fact that he sought loyally to enforce an unworkable rule.

In the same connection may be mentioned the conclusion to which the Full Court finally came in the present case. Applying the rule in Polemis and holding therefore that the unforeseeability of the damage by fire afforded no defence, they went on to consider the remaining question. Was it a "direct" consequence? Upon this Mr. Justice Manning said, "Notwithstanding that, if regard is had separately to each individual occurrence in the chain of events that led to this fire, each occurrence was improbable and, in one sense, improbability was heaped upon improbability, I cannot escape from the conclusion that if the ordinary man in the street had been asked, as a matter of common sense, without any detailed analysis of the circumstances, to state the cause of the fire at Mort's Dock, he would unhesitatingly have assigned such cause to spillage of oil by the appellant's employees". Perhaps he would and probably he would have added "I never should

have thought it possible". But with great respect to the Full Court this is surely irrelevant, or, if it is relevant, only serves to show that the Polemis rule works in a very strange way. After the event even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility. The Polemis rule by substituting "direct" for "reasonably foreseeable" consequence leads to a conclusion equally illogical and unjust.

At an early stage in this judgment their Lordships intimated that they would deal with the proposition which can best be stated by reference to the well known dictum of Lord Sumner "This however goes to culpability not to compensation". It is with the greatest respect to that very learned Judge and to those who have echoed his words that their Lordships find themselves bound to state their view that this proposition is fundamentally false.

It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. Just as (as it has been said) there is no such thing as negligence in the air, so there is no such thing as liability in the air. Suppose an action brought by A for damage caused by the carelessness (a neutral word) of B, for example a fire caused by the careless spillage of oil. It may of course become relevant to know what duty B owed to A, but the only liability that is in question is the liability for damage by fire. It is vain to isolate the liability from its context and to say that B is or is not liable and then to ask for what damage he is liable. For his liability is in respect of that damage and no other. If, as admittedly it is, B's liability (culpability) depends on the reasonable foreseeability of the consequent damage, how is that to be determined except by the foreseeability of the damage which in fact happend—the damage in suit? And, if that damage is unforeseeable so as to displace liability at large, how can the liability be restored so as to make compensation payable?

But, it is said, a different position arises if B's careless act has been shown to be negligent and has caused some foreseeable damage to A. Their Lordships have already observed that to hold B liable for consequences however unforeseeable of a careless act, if, but only if, he is at the same time liable for some other damage however trivial, appears to be neither logical nor just. This becomes more clear if it is supposed that similar unforeseeable damage is suffered by A and C but other foreseeable damage, for which B is liable, by A only. A system of law which would hold B liable to A but not to C for the similar damage suffered by each of them could not easily be defended. Fortunately, the attempt is not necessary. For the same fallacy is at the root of the proposition. It is irrelevant to the question whether B is liable for unforeseeable damage that he is liable for foreseeable damage, as irrelevant as would the fact that he had trespassed on Whiteacre be to the question whether he had trespassed on Blackacre. Again suppose a claim by A for damage by fire by the careless act of B. Of what relevance is it to that claim that he has another claim arising out of the same careless act? It would surely not prejudice his claim if that other claim failed: it cannot assist it if it succeeds. Each of them rests on its own bottom and will fail if it can be established that the damage could not reasonably be foreseen. We have come back to the plain common sense stated by Lord Russell of Killowen in *Bourhill v. Young*. As Lord Denning said in *King v. Phillips* (1953), 1 Q.B. 429 at p. 441, "There can be no doubt since *Bourhill v. Young*, that the test of *liability for shock* is foreseeability of *injury by shock*". Their Lordships substitute the word "fire" for "shock" and endorse this statement of the law.

Their Lordships conclude this part of the case with some general observations. They have been concerned primarily to displace the proposition that unforeseeability is irrelevant if damage is "direct". In doing so they have inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen? This accord with the general view thus stated by Lord Atkin in *Donoghue v. Stevenson* (1932) A.C. 562 at p. 580. "The liability for negligence whether you style it such or treat it as in other systems as a species of *culpa* is no doubt based on a general public sentiment of moral wrongdoing for which the offender must pay". It is a departure from this sovereign principle if liability is made to depend solely on the damage being the "direct" or "natural" consequence of the precedent act. Who knows or can be assumed to know all the processes of nature? But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was "direct" or "natural", equally it would be wrong that he should escape liability, however "indirect" the damage, if he foresaw or could reasonably foresee

the intervening events which led to its being done; cf. *Woods v. Duncan* (1946) A.C. at p. 442. Thus foreseeability becomes the effective test. In reasserting this principle their Lordships conceive that they do not depart from, but follow and develop, the law of negligence as laid down by Baron Alderson in *Blyth v. Birmingham Waterworks Coy.* (1856) 11 Ex. 784.

It is proper to add that their Lordships have not found it necessary to consider the so-called rule of "strict liability" exemplified in *Rylands v. Fletcher* and the cases that have followed or distinguished it. Nothing that they have said is intended to reflect on that rule.

One aspect of this case remains to be dealt with. The respondents claim, in the alternative, that the appellants are liable in nuisance if not in negligence. Upon this issue their Lordships are of opinion that it would not be proper for them to come to any conclusion upon the material before them and without the benefit of the considered view of the Supreme Court. On the other hand having regard to the course which the case has taken they do not think that the respondents should be finally shut out from the opportunity of advancing this plea, if they think fit. They therefore propose that on the issue of nuisance alone the case should be remitted to the Full Court to be dealt with as may be thought proper.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed and the respondents' action so far as it related to damage caused by the negligence of the appellants be dismissed with costs but that the action so far as it related to damage caused by nuisance should be remitted to the Full Court to be dealt with as that Court may think fit. The respondents must pay the costs of the appellants of this appeal and in the Courts below.

Appeal allowed.

Present: **Weerasooriya, J., and L. B. de Silva, J.**

PECHCHIMUTTU *vs.* RASIAH

S.C. Application No. 466.

Application for relief under section 756(3) *of the Civil Procedure Code in D.C. Kalmunai* 216/L.

Argued on: 27*th January*, 10*th February and* 24*th March*, 1961.
Delivered on: 6*th July*, 1961.

Appeal—Supreme Court Appeals (Special Provisions) Act, No. 4 of 1960, *sections* 2, 4 *and* 5—*Relief asked for after an appeal had been held to have been abated in the District Court—Do these provisions apply to such a case—Civil Procedure Code, sections* 756(2), 759—*Civil Appellate Rules of* 1938, *Rule* 4—*Interpretation Ordinance, section* 6(3).

Held : That the provisions of the Supreme Court Appeals (Special Provisions) Act, No. 4 of 1960, do not apply to an appeal which a Court of first instance had already declared to have abated by an order validly made under the law as it stood prior to the date on which the Act came into operation.

Per WEERASOORIYA, J.—(*a*) "In my opinion, the expression 'not finally disposed of by the Supreme Court' refers to appeals which were pending at the date when Act No. 4 of 1960 came into operation, and not to appeals which had already been disposed of as a result of a previous valid order of abatement."

(*b*) "Section 4 confers no express power on the Supreme Court to set aside an order of abatement of an appeal which has been validly made by a Court of first instance. No such additional power is expressly conferred by section 5; and unless such a power is to be implied, it would seem that the transmission of the record to the Supreme Court in such a case is a futile proceeding."

(*c*) "A statute is not to be construed so as to have a greater retrospective operation than its language renders necessary—*per* Lindley, L.J., in *Lauri v Renad*. Even in construing a section which is to a certain extent retrospective, this maxim ought to be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain—Maxwell on Interpretation of Statutes (10th Edition) 214."

Cases referred : *De Silva v Seenathumma*, 41 N.L.R. 241; XVI C.L.W. 105.
Ahamadulebbai v. Jubariummah, 62 N.L.R. 474
Fernando v. Samaranayake, 62 N.L.R. 397.
Akilandanayaki v. Sothinagaratnam, 53 N.L.R. 385; XLVI C.L.W. 67.
Lauri v. Renad (1892), 3 Ch. 402.

S. Sharvananda for the defendant-petitioner.

C. Ranganathan for the plaintiff-respondent.

WEERASOORIYA, J.

The action in respect of which this application is made was instituted by the plaintiff-respondent against the defendant-petitioner for declaration of title to a certain allotment of land and for ejectment and damages. After trial the plaintiff obtained judgment as prayed for. The appeal that was filed by the defendant against the judgment was, on the 16th September, 1960, held by the District Judge to have abated under section 756(2) of the Civil Procedure Code on the ground that the notice of tender of security, which is required to be given by an appellant under section 756(1), had not been duly given in that it was addressed to, and served on, the plaintiff's proctor.

Section 756(3) of the Civil Procedure Code provides for relief being granted to an appellant in respect of any mistake, omission or defect in complying with the provisions of section 756, provided the respondent has not been materially prejudiced. It was held, however, by a Bench of five Judges in *de Silva v. Seenathumma*, 41 N.L.R. 241, that an appellant's failure to give to the respondent, in terms of section 756(1), notice of tender of security for the latter's costs of appeal is not a matter in respect of which relief can be given under section 756(3). In the recent case of *Ahamadulebbai v. Jubariummah*, 62 N.L.R. 474, a Bench of three Judges held that a notice of tender of security addressed to and served on the respondent's proctor is not a notice given to the respondent as required by section 756(1). In view of these decisions Mr. Sharvananda who appeared for the defendent-petitioner did not press the application in so far as it relates to the obtaining of relief under section 756(3).

Alternatively, relief is asked for in the application (as subsequently amended) under the Supreme Court Appeals (Special Provisions) Act, No. 4 of 1960, which came into operation on the 14th October, 1960, that is, after the appeal was held to have abated. In dealing with this part of the application the following provisions of the Act call for notice :

"2. Where, in respect of any appeal to the Supreme Court under the Civil Procedure Code, there is any error, omission or default in complying with the provisions of that Code or any other written law relating to such appeal, the Court of first instance shall, notwithstanding anything to the contrary in that Code or such other written law, transmit to the Supreme Court the petition of appeal together with all the papers and proceedings of the case relevant to the decree or order appealed against."

"4. (1) Subject to the provisions of sub-section (2), where an appeal referred to in section 2. . . . .has been presented to the Court of first instance. . . . .within the time prescribed by any written law relating to such appeal, the Supreme Court shall not exercise the powers vested in such Court by any written law to reject or dismiss that appeal on the ground only of any error, omission or default on the part of the appellant in complying with the provisions of any written law relating to such appeal, unless material prejudice has been caused thereby to the respondent to such appeal."

(2) The Supreme Court shall, in the case of any appeal referred to in sub-section (1), which is not rejected or dismissed by such Court direct the appellant to comply with such directions as the Court may deem necessary for the purpose of rectifying, supplying or making good any error, omission or default so referred to within such time and upon such conditions as may be specified in such directions, and shall reject or dismiss that appeal if the appellant fails to comply with such directions."

"5. The preceding provisions of this Act shall apply, in addition to appeals to the Supreme Court on or after the date of commencement of this Act, to appeals presented before the date of commencement of this Act but not finally disposed of by the Supreme Court."

The effect of sections 2 and 4 is that if an appeal has been filed within time, but any error, omission or default subsequently occurs in complying with the provisions of the Civil Procedure Code or other written law relating to such appeal, the Supreme Court is required, without in the first instance exercising the powers vested in such Court by any written law to reject or dismiss the appeal on the ground only of such error, omission or default (except in a case where material prejudice has been caused thereby to the respondent) to give the appellant an opportunity, on such conditions as may be specified in any directions given in that behalf, of rectifying, supplying or making good such error, omission or default.

Under section 756(2) of the Civil Procedure Code where an appellant has failed to give security and to make the deposit as provided in section 756(1) the appeal shall be held to have abated. Rule 4 of the Civil Appellate Rules, 1938, provides that an appeal shall be deemed to have abated where the appellant fails to make application for typewritten copies in accordance with the requirements of those rules, or to pay within the prescribed time any additional fees due in respect of

such copies. In my judgment in *Fernando v. Samaranayake*, 62 N.L.R. 397, I expressed the opinion that although the abatement of an appeal is brought about by operation of law, the Court should enter a formal order of abatement, or the equivalent of it. Where an appeal which comes up before the Supreme Court is shown to have abated under section 756(2) of the Civil Procedure Code or Rule 4 of the Civil Appellate Rules, 1938, the usual order that would be made is one rejecting or dismissing the appeal on the ground that it has abated. Power is also given to the Court under section 759 of the Civil Procedure Code to reject an appeal where the petition of appeal has not been drawn up in the manner prescribed in section 758.

In respect of an appeal to the Supreme Court under the Civil Procedure Code, I think that the reference in section 4(1) of Act No. 4 of 1960 to the powers vested in the Courts "by any written law to reject or dismiss" that appeal should be construed as a reference to the powers of the Supreme Court under the provisions of sections 756(2) and 759 of the Civil Procedure Code and Rule 4 of the Civil Appellate Rules, 1938, relating to the abatement of an appeal. No other written law vesting in the Supreme Court power to reject or dismiss such an appeal on the ground mentioned in section 4(1) was brought to our notice. In so far as the provisions referred to are to be regarded as imperative, they would appear to have been impliedly repealed by sections 2 and 4 of Act No. 4 of 1960. If this view is correct—and no argument to the contrary was addressed to us by counsel on either side—the question that arises is, to what extent, if any, the order of abatement of the 16th Septembr, 1960, which it is conceded, was rightly made under section 756(2) of the Civil Procedure Code, is affected by sections 2 and 4 of Act No. 4 of 1960, read with section 5 thereof.

Section 6(3) of the Interpretation Ordinance (Cap. 2), in so far as is material to the question under consideration, is in the following terms:

> "Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected—
>
> (*a*) the past operation of anything duly done or suffered under the repealed written law;
>
> (*b*) .....
>
> (*c*) any action, proceeding or thing pending or incompleted when the repealing written law comes into operation, but every such action, proceeding or thing may be carried on and completed as if there had been no such repeal."

That sections 2 and 4 of Act, No. 4 of 1960, apply to appeals filed on or after the date on which the Act came into operation is, or course, undeniable. By virtue of section 6(3) (*c*) of the Interpretation Ordinance, sections 2 and 4 of Act, No. 4 of 1960, would not apply to appeals which were pending at such date unless there is express provision making them applicable. Section 5 of Act, No. 4 of 1960, provides, however, that sections 2 and 4 shall apply as well to appeals presented before that date but "not finally disposed of by the Supreme Court".

In my opinion, the expression "not finally disposed of by the Supreme Court" refers to appeals which were pending at the date when Act, No. 4 of 1960, came into operation, and not to appeals which had already been disposed of as a result of a previous valid order of abatement.

In other words, section 5 is an express provision making sections 2 and 4 applicable to pending appeals, whereas, in the absence of it, all such appeals would, in terms of section 6(3) (*c*) of the Interpretation Ordinance, be carried on and completed as if there had been no repeal of the existing law by sections 2 and 4 of Act, No. 4 of 1960.

Mr. Sharvananda contended, however, that in construing the expression "not finally disposed of by the Supreme Court" emphasis should be laid on the words "by the Supreme Court", and that since in the present case the order abating the appeal was made by the District Court, the appeal is one which has not yet been finally disposed of by the Supreme Court and, therefore, section 5 applies to it. He was constrained to concede that on such a literal construction, a Court of first instance would be obliged, in terms of section 2, read with section 5, of Act No. 4 of 1960, to transmit to the Supreme Court the record of every case in which an appeal which was filed was declared to have abated, however remote the point of time at which such declaration had been made; and similar action wuld have to be taken by the "appropriate authority" referred to in section 3(1). On the same construction, where a Court of first instance, acting in purported compliance with section 2 read with section 5, transmits to the Supreme Court the record of a case in which an order of abatement has already been validly entered by the Court of first instance, the question that arises is, what action may be taken by the Supreme Court in regard to such appeal.

The powers of the Supreme Court in such a case are limited to the powers conferred on it by section 4.

Section 4 confers no express power on the Supreme Court to set aside an order of abatement of an appeal which has been validly made by a Court of first instance. No such additional power is expressly conferred by section 5; and unless such a power is to be implied, it would seem that the transmission of the record to the Supreme Court in such a case is a futile proceeding.

I do not think, however, that such an implied power can be admitted in view of the provisions of section 6(3) of the Interpretation Ordinance. Paragraph (*a*) of section 6(3) specifically refers to "the past operation of anything duly done or suffered under the repealed written law". As pointed out by Gratiaen, J., in *Akilandanayaki v. Sothinagaratnam*, 53 N.L.R. 385, section 6(3) "is an adaptation of section 38 of the Interpretation Act, 1889, of England except that our legislature has designedly introduced (by substituting the words 'in the absence of any express provision to the contrary' for the words 'unless a contrary-intention appears' of the English model) an even stronger presumption against *ex post facto* legislation."

A statute is not to be construed so as to have a greater retrospective operation than its language renders necessary—*per* Lindley, L.J., in *Lauri v. Renad*, (1892), 3 Ch 402 at 421. Even in construing a section which is to a certain extent retrospective this maxim ought to be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain—Maxwell on Interpretation of Statues (10th edition) 214.

I hold that section 5 of Act, No. 4 of 1960, does not apply to an appeal which a Court of first instance had already declared to have abated by an order validly made under the law as it stood prior to the date on which the Act came into operation.

The application is dismissed with costs.

L. B. DE SILVA, J.
I agree.

Application dismissed.

Present: **Basnayake, C.J., and Sansoni, J.**

DE SILVA *vs.* DHARMASENA

S.C. No. 338—*D.C. Kalutara No.* 30109

Argued & Decided on: June 3, 1960.

Master and servant—Negligence—Liability of master for servant's delicts committed in the scope of employment—Liability of principal for torts of agent.

The plaintiff was injured while travelling in a car owned by the 1st defendant and driven by the 2nd defendant The 2nd defendant, who was employed as a driver by the 1st defendant, while travelling on the 1st defendant's business, picked up several passengers, of whom the plaintiff was one. The 2nd defendant had been expressly forbidden to take such passengers.

Held : That, inasmuch as the 2nd defendant was acting outside the scope of his employment, the 1st defendant was not liable to the plaintiff.

Per BASNAYAKE, C.J.—"The 2nd defendant was the employee of the 1st defendant. If he was also his agent the latter's liability falls to be determined according to the law of prinicpal and agent. Our law on that branch of law is the same as the English law (s. 3, Civil Law Ordinance)."

Case referred to: *Twine v. Bean's Express Ltd.*, 62 T.L.R. 458.

[This distinction between the liability of a principal for the torts of his agents and the liability of a master for the torts of servants is discussed by Brooke-Smith "Liability for the negligence of another—Servant or Agent?" 70 L.Q.R.253. As to whether in vicarious liability a personal breach of duty by the master is required, see F. H. Newmark, "*Twine v. Bean's Express Ltd.*, 17 M.L.R. 102.] [Edd.]

H. W. Jayewardene, Q.C., with *H. Wanigatunge* and *C. P. Fernando*, for the 1st defendant-appellant.

N. E. Weerasooria, Q.C., with *E. R. S. R. Coomaraswamy*, for the plaintiff-respondent.

BASNAYAKE, C.J.

This is an action for damages for injuries sustained by the plaintiff while travelling in the car of the 1st defendant driven by the 2nd defendant. The only question argued on this appeal is that there is no evidence to establish that the 2nd defendant who was a servant of the 1st defendant was at the material time acting within the scope of his employment. Shortly the facts are as follows:- The 1st defendant was the owner of the car in which the plaintiff travelled. He directed his driver, the 2nd defendant, who at the time of the accident had been in his employment for nearly a fortnight, to take the car from Balapitiya to Colombo in order that it may be serviced by the agents, Messrs Richard Pieris & Company Limited. He also directed the 2nd defendant to take in the car one H. S. de Silva who had helped him to purchase the car. The driver went to the house of H. S. de Silva, but finding that he was not there he returned to Balapitiya and left for Colombo. On the route he picked up five passengers. The plaintiff was one of them. The 1st defendant has given evidence to the effect that he had forbidden his driver to carry any passengers and the driver supported him by saying in his evidence that he had been forbidden to carry passengers in the car without the express permission of the 1st defendant. The learned District Judge rejected their evidence and proceeded to say:

> "This is a private car. It is quite right for intending passengers to presume that a car with a hiring number could be boarded by them for the purpose of taking them on any journey. This car has a private number and the question thus is whether this car was expressly or impliedly authorised by the 1st defendant to ply for hire. The driver has taken a full complement of passengers, and if one were to read his evidence he must have taken passengers before, though he states that this is the first occasion on which he took passengers."

He then proceeded to hold that the 2nd defendant took passengers with the authority of the 1st defendant. We find no support in the evidence for such a conclusion. In fact the testimony is the other way.

The 2nd defendant was the employee of the 1st defendant. If he was also his agent the latter's liability falls to be determined according to the law of principal and agent. Our law on that branch of law is the same as the English law (s. 3, Civil Law Ordinance). Although the 2nd defendant's journey to Colombo was on the 1st defendant's business his taking passengers was unauthorised by him. The passengers were trespassers as far as the 1st defendant was concerned. The plaintiff, who was one of them, cannot therefore hold the 1st defendant liable for the injury suffered by him as he owed no duty to him. A case in point is *Twine v. Bean's Express Ltd.*, (62 Times Law Reports 458). In that case the Master of the Rolls (Greene) said:

> "The plaintiff can, of course, only succeed if she can show that her husband's unfortunate death was due to a breach of duty which the defendants owed towards him. The fact that the driver of the van owed a duty to her husband cannot help her in these proceedings. In my opinion the case is a clear one. The deceased man was on the defendant's van in circumstances in which the Judge has found (and I do not see that he could have found otherwise) that he had no right to be there at all- and the driver of the van had no right to take him on to the van.....Unfortunately for the plaintiff her husband was on that van, as the Judge found, as a tress-passer, and I cannot see how any other conclusion of fact could have been come to."

We therefore allow the appeal and dismiss the plaintiff's action with costs in both Courts as against the 1st defendant.

SANSONI, J.
I agree.

Appeal allowed.

Present: **Basnayake, C.J.**

MITRADASA FERNANDO *vs.* S.I., Kalubowila*

S.C. No. 950/1960—*M.C. Colombo No.* 33015/*B*

Argued and Decided on: March 15, 1961.

Evidence Ordinance, section 45—*Excise Ordinance, (Cap.* 42) *as amended by Act No.* 36 *of* 1957, *sections* 43 (*b*), 43 (*e*), *and* 44(1), (2)—*Conviction for unlawfully manufacturing arrack, possessing 'pot arrack' and utensils used for its manufacture—Conviction based on opinion of Sub-Inspector specially*

*For Sinhala Translation, see Sinhala section vol. 1, part 9, p. 35

trained by Excise Department for identifying excisable articles—Is such evidence relevant under section 45 of the Evidence Ordinance—Magistrate's failure to give sufficient consideration (a) to defects in the prosecution evidence and (b) to the evidence for the defence.

The accused was charged with offences under the Excise Ordinance, relating to the unlawful manufacture of arrack, the possession of 'pot arrack' and utensils and apparatus used in manufacturing the same. He was convicted on the evidence of a Sub-Inspector of Police who described himself as an expert who had gone through a special course of training in the Excise Department to identify excisable articles and said that he had given evidence in more than 250 cases of a similar nature.

Held : That the Sub-Inspector cannot be said to be an expert within the meaning of section 45 of the Evidence Ordinanace. His evidence was therefore irrelevant.

Held also : That where a Magistrate failed to give sufficient consideration (*a*) to the conduct of the prosecution, in case in which the integrity of the Police was assailed and (*b*) to the evidence led by the defence, the conviction should not be allowed to stand.

K. Shinya with *Nimal Senanayake*, for the accused-appellant.

A. A. de Silva, Crown Counsel, for the Attorney-General.

BASNAYAKE, C.J.

The appellant has been convicted of the following charges :-

"1. That at Nawagamuwa on 12th April, 1960, he did manufacure an excisable article unlawfully to wit: 624 drams of arrack without a license granted in that behalf by the Government Agent, Western Province, in breach of section 14(*a*) of Chapter 42 L.E.C. and thereby committed an offence punishable under section 43 (*b*) of Chapter 42, L.E.C.

"2. That at the same time and place aforesaid he did use utensils and apparatus to wit: (1) One empty glass jar, (2) One copper coil wire, (3) One funnel, (4) One large barrel, (7) One large barrel used for cooling purposes, (8) One large barrel where base and soda are kept, (9) Empty 8 dram bottles for the purpose of manufacturing an excisable article to wit: Pot arrack without a licence granted in that behalf by the Government Agent of the Western Province in breach of section 14 (*e*) of Chapter 42 L.E.C. and thereby committed an offence punishable under section 43 (*e*) of Chapetr 42 L.E.C.

"3. That at the same time and place aforesaid he did without lawful authority have in his possession 624 drams of liquor called "Pot Arrack" an excisable article which had been unlawfully manufactured in breach of section 44(1) (2) of Chapter 42 L.E.C. as amended by Excise Amendment Act, No. 36 of 1957 and thereby committed an offence punishable under section 44(1) (2) of Chapter 42 L.E.C. as amended by the Excise Amendment Act, No. 36 of 1957."

Proceedings were instituted on a report under section 148(1) (*b*) of the Criminal Procedure Code by Police Sergeant U. K. Elwin. After the charges had been read out and on the application of the Sub-Inspector of Police, Kalubowila, the Magistrate made order that the production be sent to the Government Analyst for examination and report, but the productions were not in fact sent to the Government Analyst. Instead of producing a report from the Government Analyst the prosecution sought to establish that the liquor was not liquor manufactured at any authorised manufactory by the evidence of a Sub-Inspector of Police called Sahib who claimed to be an expert. He described himself as a Sub-Inspector of Police who had gone through a special course of training in the Excise Department to identify excisable articles. He says that the contents of the bottles marked P1A and P1B are in his opinion pot arrack and not Government arrack. The opinion of Sub-Inspector Sahib is not relevant unless he comes within the class of persons contemplated in section 45 of the Evidence Ordinance. That section provides:

"When the Court has to form an opinion as to foreign law, or of science, or art, or as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, the opinions upon that point of persons specially skilled in such foreign law, science, or art, or in questions as to identity or genuineness of handwriting or finger impresions, palm impressions or foot impressions, are relevant facts."

In the instant case the evidence does not show that Sahib is specially skilled in any science or art which qualifies him, as in the case of the Government Analyst, to express an opinion on the question whether the bottles P1A and P1B contained Government arrack or pot arrack. He says that he has given evidence in more than 250 cases of this nature. That does not bring him within the ambit of section 45 of the Evidence

Ordinance and his opinion as to the contents of the liquor in the bottles marked P1A and P1B is not relevant and cannot be acted on.

Apart from that, the fact that the liquor was at the Police Station from the 12th of April to the 22nd April and the following further facts lend support to the suggestion made by the defence that this is a false case. Among the productions brought into court were two glass jars each said to contain 176 drams of "pot arrack". Two bottles were drawn from each of the jars to serve as specimens. One set was marked P1A and the other P1B. They were said to be sealed with the seal bearing the initials of the Sub-Inspector and the thumb impression of the accused. The accused's thumb impression appeared on a side of the bottles. The Sub-Inspector admitted that there was nothing to prevent the four bottles being tampered with without displacing the thumb impression because the accused's thumb impression had been placed on a side of each bottle and not on the top. When he was asked why the thumb impression of the accused was put on a side of the bottles he gave the following unconvincing explanation :-

"The thumb impression of the accused was not put at the mouth of the bottles for the reason when those bottles are sent to the Government Analyst that seal is broken."

The accused gave evidence on his own behalf and he called the headman and two others, Sediris Singho and Don Gunasekera. The learned Magistrate has not only based his finding on the irrelevant evidence of Sub-Inspector Sahib, but he has also failed, in a case where the integrity of the police has been assailed, to give sufficient consideration to the conduct of Sub-Inspector, Kalubowila—

(*a*) in not sending the productions to the Government Analyst after an order in that behalf had been made,

(*b*) in sealing the bottles in such a way that they can be tampered with and

(*c*) in detaining in the Police Station for 10 days without producing in court the productions taken in the raid.

Apart from the above omissions he has also failed to give sufficient consideration to the evidence called by the defence.

I set aside the conviction and acquit the accused-appellant.

Appeal allowed.

Present: **Tambiah, J.**

FERNANDO *vs.* FERNANDO*

S.C. No. 1031/1960—*M.C. Kandy No.* 9575

Argued on: 10*th and* 22*nd February*, 1961.
Decided on: 28*th February*, 1961.

Maintenance Ordinance (*Cap.* 76), *section* 2—*Should the wife's income be taken into account in fixing the quantum of maintenance payable by a husband.*

Held : That the wife's income should not be taken into account in assessing the amount of maintenance payable by a husband to his wife.

Cases referred to : *Sivasamy vs. Rasiah* (44 N.L.R. 241).

D. R. P. Goonetilleke for the applicant-appellant.

G. Candappa for the defendant-respondent.

*For Sinhala translation, see Sinhala section, vol. 1, part 9, p. 35

TAMBIAH, J.

The only question that arises in this case is whether the Court should consider the wife's means in fixing the *quantum* of maintenance payable by the husband. The Magistrate states in his order dated, 14.10.59, as follows:

"The defendant is prepared to pay without prejudice to his rights, a sum of Rs. 30/- per month, as maintenance to his wife. He gets an income of about Rs. 350/- per month as a stenographer in the Bank of Ceylon, Kandy. This is admitted and it is also admitted that the applicant gets an income of a similar amount as Secretary of the Girls' Farm School, Kundasale. In these circumstances the question of maintenance becomes merely a question of the enforcement of a legal right by the wife. I would fix the maintenance at Rs. 30/- per month, as from today.....The amount is fixed at Rs. 30/- after I have given consideration to the fact that she herself is earning an income."

It was contended by the Counsel for the applicant-appellant that the learned judge has misdirected himself in taking into account the income of the wife in fixing the *quantum* of maintenance payable to her by the husband.

Section 2 of the Maintenance Ordinance reads as follows:

"If any person having sufficient means neglects or refuses to maintain his wife, or his legitimate or illegitimate child unable to maintain itself, the Magistrate may upon the proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate, not exceeding one hundred rupees, as the Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct. Such allowance shall be payable from the date of the order."

The provisions of section 2 of the Maintenance Ordinance have been authoritatively interpreted by a Divisional Bench of the Supreme Court in *Sivasamy vs. Rasiah* (44 N.L.R. 241). It was held in that case a wife who is possessed of means is entitled to claim maintenance from her husband provided he has sufficient means himself. Soertsz, S.P.J. after citing section 2 stated as follows:

"These words, correctly interpreted, can only mean that while the right of children to maintenance depends on both their inability to maintain themselves and on the possession of sufficient means by the father, the right of the wife to maintenance is conditioned only on the possession of sufficient means by the husband and is not affected by the fact that she has sufficient means of her own. That conclusion emerges all the clearer when we read further down in the section the words of contrast providing for an order of maintenance for "*his* wife" and for "*such* child". The word "such" is used as an adjunct to the word "child", and not to the word "wife" in order to emphasise the fact that in the case of the child, inability to maintain itself is one of the conditions upon which the father's liability rests..... the words of the section are clear and they must govern the question. While the word "child" in its equivocation as to sex, makes the word "itself" the appropriate pronoun, to use that pronoun to refer to the antecedent "wife" would be to cast a thoroughly unwarranted aspersion on a perfectly unambigous sex. I read section 2 of the Ordinance as entitling a wife to maintenance in virtue of her wifehood alone and to obtain it by proof that her husband has sufficient means" (at p. 243).

That case was remitted to the Magistrate so that he might fix such monthly allowance as he thought fit, *having regard to the means of the husband.*

I am bound by the above ruling of the Divisional Bench that the means of the wife should not be taken into account in ordering maintenance. It follows that a judge cannot take the wife's means into account in fixing the *quantum* of maintenance which the husband has to pay. If, however, he is in indigent circumstances he would not be liable to pay maintenance. But if he is possessed of sufficient means and it is proved that he has neglected or refused to maintain his wife, then in fixing the *quantum* only the means of the husband should be taken into account.

The Counsel for the defendant argued that since section 26 of the Married Women's Property Ordinance casts a liability on a wife, who has means to support a husband in indigent circumstances, the Legislature intended that the wife's means should be a factor in determining the amount of maintenance she is entitled to in the circumstances specified in section 2 of the Maintenance Ordinance. But these two sections contemplate two entirely different situations, and the interpretation placed on section 2 of the Maintenance Ordinance in *Sivasamy vs. Rasiah* (*supra*) in no way conflicts with section 26 of the Married Women's Property Ordinance.

The learned Magistrate in this case has erred in taking the applicant-appellant's income into account in assessing the amount of maintenance payable to her at Rs. 30/-.

Having regard to the income of the defendant-respondent, I order him to pay as maintenance to his wife a monthly sum of Rs. 60/- from the date of the Magistrate's order.

Accordingly I allow the appeal with costs.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present: **Basnayake, C.J.** (*President*), **Sansoni, J.,** and **H. N. G. Fernando, J.**

THE QUEEN *vs.* O. A. JINADASA

Appeal No. 154 *of* 1960 *with Application No.* 173 *of* 1960.
S.C. No. 7—*M.C. Matara No.* 55614.

Argued on: September 16, 1960.
Decided on: December 5, 1960.

Evidence Ordinance, sections 25, 27—*When information given by an accused in Police custody becomes admissible—Inadmissibility of evidence that raises the inference of a confession.*

Criminal Procedure Code section 121—*Proof of statements reduced to writing under this section.*

Criminal Procedure Code, section 37—*Police Ordinance* (*Cap.* 43), *section* 66—*Production of person arrested before a Magistrate within* 24 *hours and with the least possible delay—Illegality of such delay.*

Requirement that names of all material witnesses should be on the indictment—No burden on defence to call such witness whose name omitted—Evidence Ordinance, section 114—*Jury to be directed that they could draw presumption under Illustration* (*f*) *of this section where material witness not called by prosecution.*

Held : (1) That if statements made by an accused person are to become admissible under section 27 of the Evidence Ordinance, they must *relate distinctly to a fact discovered in consequence* of such statements.

(2) That the evidence of a Police Officer which constitutes information to the jury that an accused had made a confession, is inadmissible unless it comes within the exception contained in section 27.

(3) That oral testimony of statements reduced to writing under section 121 of the Criminal Procedure Code should not be admitted in evidence without the production of the writing itself.

(4) That section 37 of the Criminal Procedure Code and section 66 of the Police Ordinance require that a person arrested without a warrant should be produced before a Magistrate with the least possible delay. The limit of 24 hours prescribed in both sections does not enable the Police to detain an accused person for that length of time even when he can be produced earlier or to deliberately refrain from producing him before a Magistrate.

The case for the prosecution was that the gun which the accused was alleged to have used to commit the murder had been handed by him with two cartridges to one Charlis with instructions that it be given to a man named Arnolis, and that Arnolis had subsequently handed the gun to the Police. Although Arnolis gave evidence at the inquiry before the Magistrate, his name was not included in the list of witnesses on the indictment. At the trial, the prosecution sought to support Charlis' evidence that he had handed over the gun to Arnolis and also to show how the Police had recovered the same gun from Arnolis, not by calling Arnolis, but indirectly. The only two witnesses who gave material evidence on this point were Charlis himself and the Police Sergeant who recovered the gun and both of them gave evidence of what Arnolis did. Crown Counsel gave the fact of Arnolis being a close relative of the accused as the reason for his not being called as a witness. The learned trial Judge while telling the jury that the defence was entitled to comment on the fact of Arnolis not being a witness, also pointed out that Crown Counsel had given a reason for his not being called and that the defence could well have called Arnolis themselves, to contradict Charlis.

Held : (5) That Arnolis being a material witness, his name should have been included in the list of witnesses on the indictment and that the defence had been taken unawares and also prejudiced by the indirect manner in which the prosecution had sought to prove what Arnolis had done, without affording the defence an opportunity of cross-examining him in regard to evidence of such a vital nature.

(6) That the evidence of Charlis and the Sergeant when divorced from the oral testimony of Arnolis himself, did not establish with the certainty that is required in a capital case, that Arnolis gave the Police the very gun and cartridges handed to him by Charlis—especially as the latter could not say anything more than that the gun produced in the case was *like* the gun he gave Arnolis.

(7) That the learned trial Judge's direction to the jury that the defence could have called Arnolis, was wrong in law, as the burden was on the prosecution to prove its case and it was not for the defence to prove the negative.

(8) That this was essentially a case in which the jury should have been directed that it was open to them to presume, from the failure of the prosecution to call Arnolis, that his evidence, if produced would be unfavourable to the prosecution.

Per BASNAYAKE, C.J. (*President*)—(a) "When section 27 of the Evidence Ordinance permits proof of any information received from an accused person, whether it amounts to a confession or not, if any fact is deposed to as discovered in consequence of the information, that section constitutes an exception both to the express prohibition against confessions in section 25 as well as the implied prohibition recognised in *The King v. Kalubanda*."

(b) "The law requires (section 66 of the Police Ordinance), that an accused person taken into custody by a Police Officer without warrant must forthwith be delivered into the custody of the officer in charge of a station *in order that such person may be secured* until he can be brought before a Magistrate to be dealt with according to law. That is the lawful purpose to be served by means of detention and we would sternly and emphatically disapprove of what seems to have become the common practice of compelling an accused person to accompany the Police from place to place for the purpose of participating in the detection of a crime. To delay his production before a Magistrate in order that this unlawful purpose may be served is illegal and deserving of censure."

Cases referred to : *The King v. Kalubanda* 15 N.L.R. 422.
Regina v. J. Anandagoda, 62N,.L.R. 241.

R. L. N. de Zoysa with *Douglas Wijeratne* (assigned) and *K. Charavanamuttu*, for the accused-appellant.

V. S. A. Pullenayagam, Crown Counsel, for the Attorney-General.

BASNAYAKE, C.J.

The appellant a young man of 21 years has been convicted of the offence of murder of Jayawickrema Munasinghe Aratchige Piyadasa *alias* Ulugedera Lamaya on 6th October, 1958.

Shortly the facts are as follows :- The deceased was a married man of thirty years and the father of four children. He owned a boutique about 1/4 of a mile from his mother's house which was his home. The hours during which the boutique was open for business were 7 a.m. to 6 p.m. He slept in the boutique, but took his meals in his home. His wife deputised for him in the boutique when he went home for his meals. A foot path as well as the V.C. road provided access from the house to the boutique. The deceased usually took the footpath which ran over undulating land and traversed a citronella plantation and scrub jungle. On the day on which he was shot the deceased went home about 4.30 p.m. He took his dinner towards dusk and was returning along the footpath when he was shot about 500 yards from his home.

The case for the prosecution rests on circumstantial evidence. The circumstances relied on are as follows :- When Liyanage Charlis *alias* Dingimahattaya was taking his night meal he heard the report of a gun. The sound of gun shots at night in that part of the country being not unusual he did not pay special attention to it. As he got out of his house after his meal the appellant hurriedly stepped on to his compound with a gun. When asked "Why are you coming with a gun in haste?" the appellant said "Keep this gun." When Charlis refused to do so the appellant, placing the gun against the wall of the verandah and two cartridges on the floor, said "I am going towards the boutique. You better go and hand over these to Bala Mama." "Bala Mama" is a man called Arnolis the younger brother of the appellant's mother who lived near by. The witness says he did as he was told, and almost immediately took the gun and the two cartridges and handed them to Arnolis. On the following day seeing the appellant go past when he was washing his face at a well a little distance away from the scene of the murder Charlis asked him "Umbawath ara miniyata wedi tibbada?" ("Was it you who shot that man by any chance?"). To this the appellant replied "Owu, mama wedithibba. Umbata Onayanaha." ("Yes, I shot. It is not your business.")

Another item of circumstantial evidence comes from the witness Don Davith. His story is that when he was plastering the house of the appellant about a week before the murder the appellant told him that the deceased had cut Pinkoratuwa Loku Mahatmaya with a katty and that he had also set fire to a heap of citronella straw belonging to the same person and added "Kewa bath vitharai; thawath bath kanna thiyanna neha." ("Deceased will have to be satisfied with the rice he had eaten; he will not be allowed to eat any more rice.")

A third item of circumstantial evidence proceeds from the witness Goigoda Gamage Peneris who lived about a mile from the deceased's house. When he was on his way to the house of Bala Mahatmaya *alias* Heen Appuhamy at Waipothaira he met the appellant at dusk carrying a gun 40 or 50 fathoms from the place where the deceased lay fallen and about 100 yards from the appellant's house.

The next link in the chain of circumstantial evidence on which the prosecution relied was provided by Sergeant Thabrew who described how Arnolis fetched the gun (P3) produced in the case and two 16 bore cartridges from the scrub jungle in front of his house and handed it to him and how the appellant picked up a cartridge case (P4) from the citronella plantation near which the deceased was shot and handed it to him. The prosecution placed great reliance on the testimony of the ballistics expert who testified that P4 was fired from the gun P3.

The appellant gave evidence on his behalf. He denied that he shot the deceased or that he had any enmity towards him. He denied all the statements attributed to him by the Police as having been made by him. His story is that he went to the scene having heard at about 8 p.m. that the deceased had been shot, that he was there throughout till the post-mortem was held and that he helped to build a hut to shelter the Police officers guarding the corpse from the rain and a messa on which to place the dead body till the post-mortem.

Learned counsel for the appellant contended that—

(*a*) the appellant's conviction was vitiated by the proof as against him of a confession made to a Police officer.

(*b*) statements reduced to writing under section 122 of the Criminal Procedure Code were used in contravention of sub-section (3) thereof to corroborate the evidence of witnesses.

(*c*) statements of witnesses not made on oath were proved contrary to the provisions of the Evidence Ordinance.

(*d*) the learned Judge misdirected the jury on the matter of on whom lay the *onus* of calling the witness Arnolis.

The above submissions will now be discussed in their order. In regard to (*a*) it is necessary to set out the following evidence elicited from Sergeant Thabrew :-

"1047. Q: The accused you have already told us made a statement to you?
A: Yes.

1048. Q: Have you got that statement before you?
A: Yes.

1049. Q: Did the accused in the course of his statement to you say that he had a 16 bore single barrel breach loading gun?
A: Yes.

1050. Q: Did the accused in the course of his statement also tell you, 'I called out for Dingi Mahattaya and gave a gun and two cartridges to him.'?
A: Yes.

"1051. Q: Did he also say, 'I can produce the gun and the cartridges?'
A: Yes.

1052. Q: You recall when I examined you in chief on Friday you told us, at a certain stage you went with the accused to the spot where the deceased's body lay fallen?
A: Yes.

1053. Q: Why did you go to that spot with the accused?
A: In search of the cartridge case which the accused said he could point out at the scene.

1054. Q: Because the accused told you that he could hand to you an empty cartridge case?
A: Yes.

1055. Q: In the course of his statement did he say, 'The empty cartridge case was thrown out at the spot?'
A: Yes.

1056. Q: I take it you went to the spot as a result of that part of the accused's statement?
A: Yes.

1057. Q: And I think you have already told us that the accused took from the middle of a citronella bush an empty cartridge and handed it to you which you produced P4 and this was sent subsequently to the Government Analyst?
A: Yes.

.. ..

1068. Q: Did the accused tell you that he had asked Charlis to hand over the gun and the cartridges to the accused's uncle Arnolis?
A: Yes.

1069. Q: Did Dingi Mahattaya tell you that the accused had asked him to hand over the gun and the two cartridges to his uncle, Arnolis?
A: Yes."

We think that the answers 1050 and 1051 should not have been admitted in evidence. This Court in *Anandagoda's* case, (62 N.L.R. 214), approved that part of the reasoning in *The King v. Kalubanda*, (15 N.L.R. 422), which rejected as being inadmissible evidence which constitutes information to the jury that the accused had made a confession.

When section 27 of the Evidence Ordinance permits proof of any information received from an accused person, whether it amounts to a confession or not, if any fact is deposed to as discovered in consequence of the information, that section constitutes an exception both to the express prohibition against confessions contained in section 25 as well as the implied prohibition recognised in *The King v. Kalubanda*, (*supra*). If therefore, because of the answers to questions 1054 and 1055 an inference might be drawn that the accused had made a confession, the situation which would arise in consequence is unavoidable and is permitted by section 27 to arise. But the answers to questions 1050 and 1051 are not on the same footing because the statements of the accused which those answers contain do not within the terms of section 27(1) *relate distinctly to a fact discovered in consequence* of the statements. The gun and the cartridges referred to in the statements were not discovered in consequence thereof. According to the evidence they were discovered when Arnolis fetched them from the scrub jungle in front of his house and handed them to Sergeant Thabrew. Arnolis was traced not because of any statement concerning him made by the accused but only because the witness Charlis *alias* Dingimahatmaya apparently told the Police that he had handed over the gun to Arnolis. It follows from this summary of the facts that the statements contained in answers to questions 1050 and 1051 were not admissible under section 27; that being so, they were inadmissible because they raised the inference that the accused had confessed to the commission of the offence.

The appellant in his evidence denied all the statements attributed to him. He said that he was subjected to criminal force by Sergeant Thabrew and that he was compelled to go from place to place by the Police. He was arrested at 5 p.m. on 11th October, 1958, five days after the shooting. He was taken to the house of the witness Charlis at 10 p.m. He appears to have been detained in Police custody that night and brought back to the house of Arnolis next morning at 8 a.m. and, thence, at about 10 a.m. to the place at which the deceased was shot, and from there taken once more to the Police Station, where at about 7 p.m. his statement was recorded. The appellant was produced only at 9.45 a.m. on 15th October before the Magistrate of the Magistrate's Court at Matara, who was informed by the Police that the appellant desired to make a statement to him. The Police in the instant case have deliberately flouted sections 37 and 66 of the Criminal Procedure Code and the Police Ordinance respectively. No valid explanation is offered for the illegal detention of the appellant in Police custody or for his being taken from place to place.

It is difficult to resist the impression that he was so detained in the hope that he may help the Police to gather evidence which might secure his conviction. We have noticed a similar tendency on the part of the Police in a number of cases which have come before this Court in recent years. The law requires (section 66 of the Police Ordinance), that an accused person taken into custody by a Police Officer without warrant must forthwith be delivered into the custody of the officer in charge of a station *in order that such person may be secured* until he can be brought before a Magistrate to be dealt with according to law. That is the lawful purpose to be served by means of detention and we would sternly and emphatically disapprove of what seems to have become the common practice of compelling an accused person to accompany the Police from place to place for the purpose of participating in the detection of a crime. To delay his production before a Magistrate in order that this unlawful purpose may be served is illegal and deserving of censure.

The allegation of the appellant that the Police used criminal force on him, though denied by the officers who gave evidence, may not be without substance, when considered in the light of the fact that the appellant was indeed improperly detained in custody without being produced before a Magistrate at the earliest opportunity.

We have pointed out above that sections 37 of the Criminal Procedure Code and 66 of the Police Ordinance require that a person arrested without a warrant should be produced before a Magistrate

with the least possible delay. The limit of twenty-four hours prescribed in the both sections does not enable the Police to detain an accused person for that length of time even when he can be produced earlier or to deliberately refrain from producing the accused before a Magistrate as in the instant case.

Objection was also taken to the following evidence given by Sergeant Thabrew as irrelevant and unwarranted by the Evidence Ordinance :-

"952. Q: Were you at the Hakmana bazaar on the 9th?

A: No. I met Don Davith on the 10th evening at Waipothaira and he then gave me certain information.

953. Q: What was the information he gave you?

A: He told me on that occasion that he was mudding the walls of the house belonging to the accused along with the accused and that the accused told him that the deceased was a bad man, that he had set fire to some citronella *and that on one occasion when his (accused's) step-mother gave birth to a child and he had no money he went to the deceased's boutique and asked for some sugar on credit but that the deceased did not give the sugar and that he (accused) would not allow him to live very long.*"

Now Don Davith had not made any reference to the incident regarding the refusal to sell sugar and the evidence of Sergeant Thabrew was irrelevant and should not have been allowed. The improper admission of such an important item of evidence designed to prove a motive for the crime has undoubtedly prejudiced the accused.

There is a further defect in the admission of evidence which learned counsel stressed. Oral testimony of statements reduced to writing under section 121 has been improperly admitted in evidence without the production of the writing itself. The entire statement of the appellant as mentioned earlier, and the statements made by Don Davith and Charlis, have been improperly admitted.

Another feature of the prosecution case which does no credit to the Crown at all is the way in which the evidence of Arnolis, a vital witness for the prosecution, has been withheld from the Court The prosecution sought to support the evidence of Charlis that he delivered to Arnolis the gun which he says the accused brought that night, not by calling him, but indirectly. His evidence was vital to the case. If he admitted the handing over of the gun and the two cartridges Charlis's evidence would have been corroborated on a vital circumstance. On the other hand if he denied that Charlis brought the gun it would have gravely impaired the value to be attached to Charlis's evidence on this very important matter. The course adopted by the prosecution does not inspire confidence in in the way in which the case against the accused has been conducted. It does not show that there has been in this case that detachment that one is entitled to expect in a prosecution by the Attorney-General. Although Arnolis was examined at the inquiry before the Magistrate his name has not even been included in the indictment. The extracts I quote below will show what grave prejudice has been caused by the way in which the prosecution has produced evidence of the finding of a gun in the scrub jungle in front of Arnolis's house without an opportunity being afforded to the defence of cross-examining so essential a witness as Arnolis. Although the prosecution is under no obligation to include the name of every person examined before the Magistrate at the inquiry under Chapter XVI of the Criminal Procedure Code, it is bound to include in the list of witnessess in the indictment the names of all material witnesses. Arnolis was such a witness and the appellant has been taken unawares by the omission of his name from the indictment and by the indirect manner in which it has been sought to introduce his evidence in regard to the handing over of the gun by the following evidence of Sergeant Thabrew and Charlis :-

"984. Q: Did you come back with Arnolis?

A: I came back to the house of Arnolis along with Arnolis, Charlis, the accused and the constables in the morning of the 12th at about 8 a.m.

985. Q: Having come back were you able to get this gun?

A: Yes, Arnolis then went to the shrub jungle just in front of his house and pulled out a 16 bore gun and handed it to me.

986. Q: Was that gun concealed in that shrub jungle?

A: Yes, it was hidden there.

987. Q: (Shown gun P3). Is this that gun?
A: Yes. About 2 fathoms away towards his house from the place where the gun was hidden he took out two 16 bore cartridges and handed them over to me. They had been buried there.

988. Q: (Shown P15 and P16). Were these the cartridges?
A: Yes.

989. Q: You took P3, P15 and P16 into your custody?
A: Yes.

"990. Q: You recorded the statement of Charlis?
A: Yes, I recorded it in the compound of Arnolis after finding the gun and the cartridges.
.. ..

1093. Q: You recorded the statement of witness Arnolis?
A: Yes.

1094. Q: Arnolis also gave evidence in the lower court?
A: Yes.

1095. Q: This gun was discovered on a hillside opposite Arnolis' house?
A: It was discovered in Arnolis' compound

1096. Q: Immediately in front of Arnolis' house there is a compound about 20 ft. broad?
A: He has no separate compound. Arnolis' house is on a higher elevation and this gun was found on a lower elevation.

1097. Q: Arnolis' house is on a cutting on a hillside?
A: I cannot say that. It is on a slight hill.

1098. Q: And this gun was found on the hillside below Arnolis' house?
A: The gun was taken out from a shrub jungle just in front of his house.

1099. Q: How far is it from Arnolis' house to the spot from which the gun was taken out?
A: 4 or 5 fathoms."

Charlis's evidence of the acts done by Arnolis is as follows :-

"142. Q: Then what did you do; did you get back to Arnolis's house?
A: Then we went back to Arnolis's house with Arnolis and the Police officers.

143. Q: That is he returned to his own house?
A: Yes.

144. Q: Then what did Arnolis do at his house?
A: Arnolis returned home with us and picked up the gun from among shrubs near his house and handed it over to a constable or the Sergeant.

145. Q: Apart from the gun was anything else handed?
A: Arnolis also picked up two cartridges which were about two fathoms from the place where the gun was and handed them over to the Police the same occasion.

"146. Q: Were they same type of cartridges which were left at your house?
A: Yes.

147. Q: The articles handed to the Police by Arnolis were articles handed to Arnolis by you?
A: They were like those articles.

Court :

148. Q: Was this gun concealed under bushes when it was picked up by Arnolis?
A: Yes.

149. Q: Were the cartridges also concealed like that?
A: Yes.

150. Q: Under what?
A: Under a small plantain tree.

151. Q: How far away was the gun lying from Arnolis's house?
A: Not more than five fathoms.

152. Q: Can you handle a gun?
A: I have never used a gun."

The evidence of the witnesses Charlis and Thabrew regarding the conduct of Arnolis divorced from the oral testimony of Arnolis, which was vital for the purpose of proving that the gun and

cartridges he handed to Sergeant Thabrew were the very gun and cartridges that Charlis had brought, does not establish with that certainty that is required in a capital case that the gun and cartridges produced by Arnolis were the very gun and cartridges handed by Charlis, especially as Charlis is unable to say anything more than that P3 is like the gun he handed to Arnolis. Such evidence is ineffective as guns in use in the villages are alike in shape. The same remarks apply to his evidence as to the cartridges.

We now come to the ground of misdirection urged by learned counsel for the defence. It is in regard to the evidence of Arnolis. This is what the learned Judge said—

> "Now Arnolis is not a witness gentlemen, and Counsel for the defence was entitled to comment on that fact. Arnolis has not come and told you that Charles brought this gun and two cartridges on the night of the 6th and handed them over to him. Learned Crown Counsel has given you a reason why he was not called. Arnolis as I told you is the younger brother of the accused's mother, and the accused himself admitted that he and Arnolis are on good terms. The prosecution does not probably take the risk of calling Arnolis and getting him to contradict the evidence of Charlis. But in the circumstances, gentlemen of the jury, it was open to the defence to call Arnolis as a witness to tell you, 'It is not true that Charlis handed over this gun and cartridges to me as stated by him.'
>
> Learned counsel for the defence told you, gentlemen of the jury, that they took very great trouble in obtaining these certified copies of various cases to place before you. But why did they not take the precaution or the trouble of calling Arnolis as a witness to negative, to contradict the statement of Charlis?"

The above direction is wrong in law. The burden is on the prosecution to establish its case. It is not for the defence to prove the negative. It was the duty of the prosecution to summon Arnolis in order to establish that Charlis was speaking the truth when he said that he handed the gun and cartridges to Arnolis. He was a witness examined at the Magisterial inquiry and when his name was omitted from the list of witnesses how was the defence to divine that the prosecution intended to adopt the course it did in order to place before the Court evidence of what Arnolis did. The action of the prosecution in omitting from the indictment the name of such a material witness as Arnolis and at the trial seeking to place before the Court indirect evidence of acts done by him cannot have failed to prejudice the defence which has been deprived of the opportunity of cross-examining Arnolis in regard to evidence of such a vital nature. This is essentially a case in which the jury should have been directed that it was open to them to presume from the failure of the prosecution to call Arnolis that his evidence if produced would be unfavourable to the prosecution.

There is no question that on all the grounds urged by learned counsel the appellant must succeed in this appeal. The only question that remains for consideration is whether we should order a retrial or whether we should direct that a verdict of acquittal should be entered. We are of opinion that this is not a case in which the appellant should be put in jeopardy a second time. The offence was committed over two years ago and the case against the accused is full of imperfections which are sufficient to shake one's credit in the prosecution. Once the improperly admitted evidence is rejected the case rests on the belated testimony of witnesses who are by no means well disposed towards the appellant and whose inclination to falsely implicate him cannot be ruled out.

Charlis the key witness is the son of the appellant's father's enemy. The appellant's father was a witness for the prosecution in a case in which Charlis was charged in the Magistrate's Court of Matara for causing grievous hurt to one Pathiranage Don Henderick and convicted on his own plea and fined Rs. 50/-. Charlis's father disputed the appellant's father's right to a citronella plantation in a land called Koladuwewatte and there was litigation in consequence between them in the Rural Court. In an action against the appellant's father by one Samaratun Kankanange Don Andrayas in the District Court of Matara, Charlis's father was a witness for the plaintiff. Although Charlis went to the scene of the shooting when the headman was there, he did not inform him of the fact that the appellant had come to his house with a gun within a few minutes of his hearing a gun shot and had asked him to deliver a gun and two cartridges to Arnolis. He was at the scene when the Police arrived but made no statement. Even after he had accused the appellant of the murder he made no statement to the Police. Even when the Magistrate came to the scene the following day he made no statement although he was there when the Magistrate arrived. His first statement to the Police was six days after the shooting, on 12th October. The other witness Don Davith, who gave evidence of a threat uttered by the appellant, did not make a statement to the Police till 10th October. Similarly Peneris, and Heen Appuhamy to whom Peneris had said that he met the appellant going towards the scene of the crime that evening at dusk, did not make a state-

ment till 10th October. The appellant was at the scene of the crime helping others to build a shed to shelter the Police officers on duty from the rain and also a "messa" on which the corpse of the deceased was to be placed. He was there on the night of the shooting, the next morning and at the time the Magistrate came to the scene and at the time of the *postmortem*. No inference adverse to him can therefore be drawn from his conduct. There is also the circumstance that the deceased was a man with many enemies. He had been charged with having cut Nicholas *alias* Pinkoratuwe Loku Mahataya with a katty about six months before the murder and convicted and fined Rs. 140/-. About four months earlier Nicholas had threatened to cut the deceased's mother-in-law with a katty. About ten days before the shooting Nicholas had gone past the deceased's house threatening to eat the deceased. The deceased had also been charged in the Rural Court of Hakmana with striking a child of Pinkoratuwe Loku Mahataya and fined Rs. 5/-. The deceased's wife had stated to the Magistrate that she suspected Pinkoratuwe Loku Mahataya. A person called Pallehawatte Kiri Mahataya was also angry with the deceased.

The presence of the appellant near about the scene of the crime with a gun, without more, is not a circumstance from which any adverse inference should be drawn, because the scene is not far from his house and according to Charlis it is not unusual for villagers in that part of the country to go hunting at that hour.

We accordingly quash the conviction and direct that a verdict of acquittal be entered.

Appeal allowed.

Present: **Weerasooriya, J., and Sansoni, J.**

COMMISSIONER OF INCOME TAX

vs.

BADDRAWATHIE FERNANDO CHARITABLE TRUST

S.C. No. 1/1959—*Income Tax Case Stated.*

Argued on: 30*th and* 31*st March, and* 1*st April*, 1960.
Delivered on: 3*rd March*, 1961.

Income Tax Ordinance (*Cap.* 188), *sections* 2, 7 (1)*c*—*Trusts Ordinance* (*Cap.* 72), *section* 99(1)—*Charitable trust—Liability to income tax where purpose solely religious—Charitable purpose—Section* 2 *of the Income Tax Ordinance prior to amendment by Income Tax* (*Amendment*) *Act, No.* 44 *of* 1958—*Time when trust established for purpose of exemption.*

A trust was constituted on 30th January, 1952, the income from which had under the trust deed, to be first applied to pay off a mortgage existing on the trust property and thereafter for purposes solely connected with the advancement of religion. The mortgage debt was discharged in November, 1956. The trustees were assessed for income tax for periods subsequent to this date, but on appeal the Board of Review held them not liable. On a case stated from the decision of the Board:-

Held : (1) That the objects of the trust were not charitable purposes within section 2 of the Income Tax Ordinance as that section stood before its amendment by the Income Tax (Amendment) Act No. 44 of 1958, inasmuch as the advancement of religion or the maintenance of religious rites and practices were not comprehended by that section.

(2) That therefore the trust income was not exempt from tax.

(3) That the words 'established solely for charitable purposes' in section 7(1)*c* are used to denote a trust having for the time being legal effect or operation, its purposes being wholly charitable. The fact that the income was at an earlier date applied for non charitable purposes would not necessarily exclude the trust from the ambit of section 7 (1)*c*.

Cases referred to : *Oppenheim v. Tobacco Securities Ltd.*, (1951), 1 A.E.R. 31; 1951 A.C. 297.
Income Tax Special Purposes Commissioners v. Pemsel, 1891 A.C. 531.
Dilworth v. Commissioner of Stamps and Dilworth v. Commissioner for Land and Income Tax, 1899 A.C. 99.
Commissioner of Income Tax v. The Trustees of the Abdul Gaffoor Trust, 60 N.L.R. 361.

V. Tennekoon, Senior Crown Counsel, with *Mervyn Fernando*, Crown Counsel, for the appellant.

H. V. Perera, Q.C., with *S. Nadesan, Q.C.*, and *N. Nadarasa*, for the assessees-respondents.

WEERASOORIYA, J.

This is a case stated under section 74 of the Income Tax Ordinance (Cap. 188) on the application of the Commissioner of Income Tax.

By deed No. 1388 dated the 30th January, 1952, one W. D. Fernando (since deceased) transferred to himself, his three sons, two daughters and another, as trustees of the Baddrawathie Fernando Charitable Trust, certain premises known as Urumutta Estate valued at Rs. 600,000/- and subject to a mortgage of Rs. 180,000/-. The Baddrawathie Fernando Charitable Trust was constituted by a separate deed, No. 1389, executed by him at the same time. The following are the objects of the trust, as set cut in clause 2 of that deed:

(*a*) to aid and assist in Ceylon and elsewhere causes identified with the advancement and propagation of the Buddha Dharma in particular;

(*b*) for the advancement of the teaching of Buddhist Philosophy and Buddhist Pali Scriptural Texts at recognised places of learning;

(*c*) for the maintenance of Buddhist rites and practices associated with the worship of the Triple Gem;

(*d*) for the endowment and maintenance of deserving pious Buddhist monks;

(*e*) for the maintenance and endowment of Buddhist Missionary enterprise in foreign lands, such as the propagation and preaching of the Buddha Dharma in foreign lands where Buddhism does not form the religion of the majority of the people, and

(*f*) for any purpose beneficial or of interest to the Buddhist religion not falling within the preceding categories.

Clause 4 of deed No. 1389, in so far as is material on this case, provides that the trustees shall stand possessed of the trust estate upon trust:

"to apply the nett income thereof in discharge of the mortgage debt now existing in respect of the said 'Urumutta Estate' created by Mortgage Bond No. 2771 dated 14th August, 1950, attested by J. S. Paranavitana, Notary Public and after the discharge and cancellation of the said mortgage debt, the Trustees shall stand possessed of the Trust Estate upon trust to apply the nett income thereof for and towards all or any of the objects of the Trust in such proportions as the Trustees shall in their absolute discretion think fit and thereafter to accumulate any income not required for the aforesaid purposes or any of them with power in the absolute discretion of the Trustees to invest such accumulation in immovable property or in securities expressly mentioned in section 20 of the Trusts Ordinance No. 9 of 1917, and to hold such accumulation and/or investment upon the Trust terms and conditions contained herein. . . ."

For the year of assessment 1952/53 the trustees were assessed to income tax on the income of the trust estate on the basis that such income was not exempt under section 7(1) (*c*) of the Income Tax Ordinance inasmuch as the trust was not established solely for charitable purposes. One of the trustees unsuccessfully appealed against this assessment, first to the Commissioner of Income Tax and thereafter to the Board of Review.

The mortgage debt was not fully discharged until the 16th November, 1956. The income of the trust estate for the period 1st April, 1956, to the 16th November, 1956, was Rs. 37,300/-, and for the period 17th November, 1956, to the 31st March, 1957, Rs. 21,879/-. The trustees were assessed to income tax for the year of assessment 1957/58 on the income of these two periods. One of the trustees appealed to the Commissioner of Income Tax against the assessment to income tax amounting to Rs. 11,350/- in respect of the latter period. The Commissioner, acting under section 72 of the Income Tax Ordinance, referred the appeal to the Board of Review for decision. The Board of Review allowed the appeal, and the present case stated is against the decision of the Board.

The questions of law submitted for the opinion of this Court in the case stated are—

(1) Whether the income of the trust created by deeds Nos. 1388 and 1389 is exempt from income tax under section 7(1) (*c*) of the Income Tax Ordinance.

(2) Whether the words "charitable purposes" in section 7(1) (*c*) include religious purposes such as are indicated in deed No. 1389 dated 30.1.52.

(3) Can the trust be regarded in law as having been established solely for charitable purposes in view of clause 4 of deed No. 1389 which stipulates that the income of the trust property was firstly to be applied for the discharge of the mortgage debt then existing.

In considering these questions, the provisions of the Income Tax Ordinance which call for notice are paragraphs (*c*) and (*d*) of section 7(1) and the definition of "charitable purpose" in section 2. As originally enacted, paragraphs (*c*) and (*d*) of section 7(1) read as follows—

"7(1) There shall be exempt from tax—

(*a*) .....
(*b*) .....
(*c*) any income derived from property held under trust or legal obligation for religious or charitable purposes in so far as such income is applied for such purpose within the Island;
(*d*) the income of a religious or charitable institution derived from voluntary contributions and applied solely to religious or charitable purposes within the Island."

These paragraphs were subsequently repealed by the Income Tax Amendment Ordinance, No. 27 of 1934, and the following new paragraphs substituted therefor—

(*c*) the income of any institution or trust of a public character established solely for charitable purposes;
(*d*) the income of any religious body or institution whether established under any instrument in writing or not."

Paragraphs (*c*) and (*d*) have since then undergone further legislative changes with which we are, however, not concerned for the purposes of this case. The first two questions in the case stated refer to section 7(1) (*c*) as substituted by Ordinance No. 27 of 1934, and any reference hereinafter in this judgment to section 7(1) (*c*) will be to the substituted section 7(1) (*c*) unless otherwise stated.

The expression "of a public character" used in section 7(1) (*c*) to qualify the word "trust", as well as the equivalent expression "for the benefit of the public or any section of the public" in section 99(1) of the Trusts Ordinance (Cap. 72), appear to be statutory adaptations of the concept of English law that "a purpose is not charitable unless it is directed to the public benefit"—*per* Lord Simonds in *Oppenheim v. Tobacco Securities Ltd.*, (1951) 1 A.E.R. 31. Senior Crown Counsel Mr. Tennekoon, who appeared for the Commissioner of Income Tax, did not deny that the several purposes specified in paragraphs (*a*) to (*f*) of clause 2 of the trust deed No. 1389 are religious purposes or that they are directed to the public benefit as well. Hence it is not necessary to consider the argument advanced before the Board of Review on behalf of the Commissioner of Income Tax (and rejected by the Board) that the purposes specified in paragraph (*f*) cannot be regarded as directed to the public benefit and are, therefore, not charitable purposes. Question (1), which, perhaps, was formulated as a separate question in view of this argument, does not now arise for decision except on the basis of the answers to qustions (2) and (3).

The decision of Question (2), which is the substantial issue in this case, turns on the true construction of the expression "charitable purposes" in section 7(1) (*c*) of the Income Tax Ordinance in the light of the following definition of "charitable purpose" in section 2: "charitable purpose" includes relief of the poor, education, and medical relief.' The three objects specified in this definition, while undoubtedly charitable in the legal sense, do not comprise all the objects which are now generally regarded as falling within that expression. In *Income Tax Special Purposes Commissioners v. Pemsel*, (1891) A.C. 531, Lord Macnaghten classified charity in its legal sense as consisting of trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion and trusts for other purposes beneficial to the community not falling under any of the preceding heads. This classification of charity is incorporated in section 99(1) of the Trusts Ordinance which is as follows:

'The expession "charitable trust" includes any trust for the benefit of the public or any section of the public within or without the Island of any of the following categories—
(*a*) for the relief of poverty; or
(*b*) for the advancement of education or knowledge; or
(*c*) for the advancement of religion or the maintenance of religious rites and practices; or
(*d*) for any other purposes beneficial or of interest to mankind not falling within the preceding categories."

It was contended for the respondent that notwithstanding the omission of religious purposes from the definition of "charitable purpose" in

section 2 of the Income Tax Ordinance, the use of the word "includes" in the definition shows that the purposes mentioned therein are not exhaustive. The Board of Review not only accepted this contention but also stated as their view that the expresssion "charitable purposes" in section 7(1) (*c*) comprises "all purposes coming within the well recognised legal definition of that term"; and they, accordingly, accepted the further contention for the respondent that a purpose for the advancement of religion or for the maintenance of religious rites and practices is included in the expression. If I may say so with respect, I do not agree with this view.

It will be noted that in defining "charitable purpose" in section 2 of the Income Tax Ordinance the draftsman left out entirely the purposes mentioned in category (*c*) of the definition of a charitable trust in section 99(1) of the Trusts Ordinance (namely, the advancement of religion or the maintenance of religious rites and practices) while, of the purposes which though not specifically mentioned, may be regarded as falling under category (*d*), he selected only medical relief, and omitted the others. It is difficult to conceive of the draftsman having been oblivious of the provisions of section 99(1) of the Trusts Ordinance, which is the earlier Ordinance, when he came to define "charitable purpose" in section 2 of the Income Tax Ordinance. I do not doubt, therefore, that these omissions were deliberate. I think that the definition of "charitable purpose" in section 2 was intended to exclude from its ambit the advancement of religion or the maintenance of religious rites and practices. I am confirmed in this opinion by the distinction drawn in section 7(1) (*c*), as originally enacted between religious and charitable purposes, which were treated as separate categories. Section 7(1) (*c*) drew a distinction between a religious and a charitable institution. In view of these distinctions it would have been incongruous if "charitable purpose" in section 2 was defined as including religious purposes. I am not impressed by the argument that after the amendments to the original sections 7(1) (*c*) and 7(1) (*d*) by Ordinance No. 27 of 1934, to which I have already drawn attention, the definition of "charitable purpose" in section 2, though remaining unaltered, assumed a new signification which it did not bear prior to the amendments.

We were referred by learned counsel on both sides to various definitions in section 2 where the word "includes" is used in different senses. Although the word "means" is used in some of the definitions, the word "includes" appears to be used in other instances as the equivalent of "means"—see, for example, the definition of "Commissioner", "receiver", "trade" and "trustee". The word is also sometimes used in an extensive sense, as in the definition of "business", "Ordinance" and "person." The lack of uniformity in the sense in which the word "includes" is used in section 2 renders it unsafe, in my opinion, to construe the meaning of the word in the definition of "charitable purpose" by reference to the meaning which it bears when used in the definition of other terms.

According to Lord Watson in *Dilworth v. Commissioner of Stamps* and *Dilworth v. Commissioner for Land and Income Tax*, (1899) A.C. 99, "includes" is a word which is "very generally used in interpretation clauses to enlarge the meaning of words or phrases occurring in the body of a statute, and when it is so used these words or phrases must be construed as comprehending not only such words as they signify according to their natural import but also those things which the interpretation clause declares they shall include." Applying this *dictum* to the present case, and having regard to the definition of "charitable purpose" in section 2 of the Income Tax Ordinance, the expression "charitable purposes" in section 7(1) (*c*) would mean purposes appertaining to the relief of the poor (being the primary or ordinary meaning of the expression) and also education and medical relief which, though not within the primary or ordinary meaning, the definition declares that the expression shall include; but there would appear to be no ground for extending the expression further, so as to include religious purposes as well.

With effect from the 1st April, 1959, the following new definition of the expression "charitable purpose" in section 2 was introduced by the Income Tax (Amendment) Act No. 44 of 1958:—

> ' "charitable purpose" means a purpose for the benefit of the public or any section of the public in or outside Ceylon of any of the following categories :—
>
> (*a*) the relief of poverty;
> (*b*) the advancement of education or knowledge;
> (*c*) the advancement of religion or the maintenance of religious rites and practices or the administration of a place of public worship;
> (*d*) any other purpose beneficial or of interest to mankind not falling within any of the preceding categories.'

In this new definition, so radically different from that which it replaced, the word "means" is used instead of the word "includes". and all the cate-

gories of a charitable trust in section 99(1) of the Trusts Ordinance have been brought within the expression "charitable purpose." I am unable to derive from the terms of the new definition any assistance in the elucidation of the particular point under consideration, which is, what meaning should be given to "charitable purposes" in section 7(1) (*c*) in the light of the definition of "charitable purpose" in section 2 as it stood prior to the 1st April, 1959.

In my opinion Question (2) should be answered in the negative. It follows that Question (1) also has to be answered in the negative. As for Question (3), this does not seem to arise for decision because, in view of the answer of Question (2), none of the objects in clause 2 of deed No. 1389 are charitable purposes. I may state, however, that in regard to this question learned Senior Crown Counsel contended that the trust was established once and for all when deed No. 1389 was executed, and that even if the objects in clause 2 of it constitute charitable purposes, the directions in clause 4 that the nett income of the trust property must be applied towards the discharge of the mortgage debt before the income could be applied to all or any of the objects as set out in clause 2, took away from the trust the essential quality of being one established *solely* for charitable purposes. A similar argument was considered in *Commissioner of Income Tax v. Trustees of the Abdul Gaffoor Trust*, 60 N.L.R. 361 where the clause in the trust deed specifying the objects of the trust contained a proviso that during the lifetime of the grantor the trustees shall apply the nett rents, profits, dividends and income for such purposes and in such manner as he may in his absolute discretion direct, whether such purposes fell within the objects specified earlier or not; and the question that arose was whether the income of the trust property in respect of a period subsequent to the grantor's death was exempted from tax under section 7(1) (*c*). My brother H. N. G. Fernando, expressed the view in that case (in a judgment with which my brother Sinnetamby agreed) that "the language in section 7(1) (*c*) is only intended to denote a trust having for the time being legal effect or operation, its purposes being solely charitable."

In the case before us, since the mortgage debt has been wiped out, the directions in clause 4 of deed No. 1389 relating to the application of the income towards the discharge of the mortgage debt are now not operative and should be ignored in considering the present legal effect of the deed; and they no longer, in my opinion, stand in the way of the trust being construed as one established solely for charitable purposes provided, of course, the purposes in clause 2 are charitable purposes, which (for the reasons already stated) I hold they are not.

In accordance with the decision of Questions (1) and (2) the trustees are liable to pay income tax amounting to Rs. 11,350/- for the year of assessment 1957/1958 on the income from the trust property for the period 17th November, 1956, to the 31st March, 1957.

The respondent will pay the appellant's costs of the proceedings in this Court.

SANSONI, J.

I agree.

Appeal allowed.

Present: **T. S. Fernando, J.**

ALVAPILLAI SABARATNAM *vs.* SELLIAH SINNATHURAI*

S.C. Application No. 54 *of* 1960.
In the matter of an application for a mandate in the nature of a writ of Quo Warranto under section 42 *of the Courts Ordinance.*

Argued on: 31*st May*, 1960.
Decided on: 10*th June*, 1960.

Quo Warranto, writ of—Town Councils Ordinance, No. 3 *of* 1946, *sections* 33, 33*A* & 40—*Section* 33*A*(2) (*g*) *introduced by section* 7 *of the Local Authorities* (*Elections of Officials*) *Act, No.* 39 *of* 1961—*Election of Vice-Chairman—Has Chairman right to excercise casting vote.*

At a meeting held on 30-1-1960 *inter alia* for the election of a Vice-Chairman of a Town Council, the number of votes cast for the petitioner and the respondent being equally divided, the Chairman exercised his casting vote in favour of the respondent. The petitioner applied for a *Writ of Quo Warranto* challenging the validity of the election on the ground that the Chairman had no right to a casting vote.

*For Sinhala Translation, see Sinhala section vol. 1, part 10, p. 39.

Held : That the Chairman had no right to exercise a casting vote in view of section 33A (2) (*g*) of the Town Councils Ordinance as amended by section 7 of the Local Authorities (Election of Officials) Act No. 39 of 1951. In such a situation the election should be by drawing of lots. The election of the respondent was, therefore, void.

Per T. S. FERNANDO, J.—"In the case of an equal division in the voting on the question of the election of a Vice-Chairman, section 33A (2) (*g*) has the effect of withdrawing from the Chairman his right to a casting vote conferred by section 40 (3) of the Ordinance."

S. Sharvananda with *M. Shanmugalingam*, for the petitioner.

H. Wanigatunge with *H. Mohideen*, for the respondent.

T. S. FERNANDO, J.

In these proceedings the petitioner seeks to question the validity of the election of the respondent as Vice-Chairman of the Town Council of Point Pedro alleged to have taken place on 30th January, 1960. The decision of this application involves an interpretation of sections 33 and 40 of the Town Councils Ordinance, No. 3 of 1946 and of section 33A of the same Ordinance introduced by the enactment of section 7 of the Local Authorities (Election of Officials) Act, No. 39 of 1951.

The facts relevant to the application may be set down as follows :-

At a general election held for the purpose of election of the members of the Town Council for the period of three years 1960 to 1962, eight persons including the petitioner and the respondent were duly elected as members. Section 33(1) of the Town Councils Ordinance (hereinafter referred to as the Ordinance) requires the Government Agent to convene the first meeting of a newly elected Town Council. Such a meeting was duly convened for the 12th January, 1960 and, in accordance with the requirement of section 33(3), the Government Agent presided at that meeting, and one N. Nadarasa was elected Chairman. Section 33(4) enables the election of a Vice-Chairman to take place at the first meeting, but advantage does not appear to have been taken of the possibility of electing the Vice-Chairman on the same day, and the election of the Vice-Chairman was taken up only at the next meeting of the Council. The next meeting was held on 30th January, 1960 and the election of the Vice-Chairman was one of the items on the agenda for that meeting. According to the confirmed minutes of the meeting of the 30th January, a certified copy of which has been produced in the proceedings before me by the respondent, after the other items in the agenda had been disposed of, the meeting took up for consideration the last item of the day which was election of the Vice-Chairman. Two candidates viz. the petitioner and the respondent, were duly proposed and seconded for election to this office, and the minutes read that the proposals were voted upon and the voting turned out to be four members in favour of each candidate. The minutes further read that "the votes being equal, the Chairman gave his casting vote in favour of Mr. S. Sinnathurai." The minutes also show that one of the members immediately questioned the legality of the Chairman exercising a casting vote instead of the question being decided by lot.

The petitioner alleges in his affidavit that the members present determined the mode of election to be by open voting. This averment is denied by the respondent in his own affidavit where he adds that "the items of the agenda were decided upon by the voting of the members in open session according to law." It was contended by learned Counsel for the respondent that the statement that the members themselves determined at the meeting that there should be open voting in respect of the election of the Vice-Chairman is untrue; he stated that in respect of this item as well as the other items on the agenda for the meeting of the 30th January, voting took place in the ordinary way (i.e. open voting) without any resolution of the members being passed at any stage determining the method of voting. In entering upon a consideration of the validity of the impugned election I must therefore proceed on the basis that no resolution of the members as contemplated in section 33A (2) (*b*) of the Ordinance has been had at this meeting. The question whether there was or was not a resolution in respect of the mode of election does not, however, appear to me to make any material difference to the question before me having regard to the view I have formed of the legality of the claim that the Chairman at the meeting had a right to a casting vote.

As would be apparent from the foregoing, the petitioner contends that the Chairman had no right to exercise a casting vote while on behalf of

the respondent it is asserted that the Chairman had the right by virtue of section 40(3) of the Ordinance which was left unamended by Act 39 of 1951. Section 40(3) is in the following terms :-

> "Where the votes of the members present at any meeting are equally divided in regard to any question, the Chairman, Vice-Chairman or other member presiding at the meeting shall, in addition to his vote as a member, have a casting vote. Provided that in every case where the votes of the members are equally divided on the question of the election of a Chairman, such question shall be determined by lot and for the purpose of such determination lots shall be cast or drawn in such manner as the Government Agent in his sole discretion may decide."

If the election sought to be challenged in the present proceedings had taken place prior to the enactment of Act No. 39 of 1951, then, not being an election of a Chairman, the Chairman of the Council who was required by section 33(4) to preside at the meeting would have had a right to exercise a casting vote had the members been equally divided. Is the position in regard to the existence of such a right in the Chairman the same after the amendment introduced in the shape of section 33A? The petitioner contends that, after the introduction of section 33A, whenever the election of a Vice-Chairman may take place—whether it be at the first meeting after a general election, at an ordinary meeting or at a special meeting—section 33A(2) (*g*)* makes it imperative that, where the number of votes cast for the respective candidates for the office of Vice-Chairman is equally divided and the addition of one would entitle one of the candidates to be elected as Vice-Chairman, the determination of the candidate to whom the additional vote shall be deemed to have been given shall be made by lot.

Mr. Wanigatunge conceded that if the Town Council had proceeded to elect its Vice-Chairman at the first meeting held on 12th January, as it lawfully could have done, then, notwithstanding that section 33(4) of the Ordinance which requires the Chairman just elected to take over from the Government Agent and preside at the election of the Vice-Chairman, section 33A(2) (*g*) would have prevailed, that the presiding officer (viz. the Chairman of the Council) would have had no right to exercise a casting vote and that the determination would have had to be made by lot. He argued, however, that except at the first meeting after a general election, the Chairman's right to a casting vote given by section 40(3) is unaffected, whatever be the nature of the question that comes to be voted upon by the members. He appeared to say that, as the legislature has left it open to the Council to decide to elect a Vice-Chairman either at the first meeting after a general election or at a later meeting, if it does not decide to proceed to such an election at the first meeting, the Chairman has the right to a casting vote. As I pointed out to Counsel at the beginning of the argument, if the argument is sound it means that the question whether the Chairman shall have a casting vote on this matter of the election of the Vice-Chairman is virtually left to the discretion of the Chairman himself. Unless the plain meaning of the relevant sections of the Ordinance compels me to reach such a conclusion, it would in my opinion be wholly unreasonable to impute to the legislature an intention to permit the Chairman virtually to decide this matter himself.

Act 39 of 1951 is an Act amending the law relating to local authorities in order to make new provisions regarding, *inter alia*, the mode of election of the Mayors or Chairmen and the Deputy Mayors or Vice-Chairmen of such authorities. An examination of its provisions reveals that the legislature introduced in respect of the election of Mayors and Deputy Mayors of Municipal Councils and the Chairmen and Vice-Chairmen of Urban Councils and Village Committees provisions similar to those introduced in respect of Town Councils by the new section 33A of the Ordinance. I can find no indication in section 33A of a limitation or restriction of the procedure of determination by lot in the event of an equal division of votes in the matter of the election of a Vice-Chairman to the case of such an election taking place at the first meeting after a general election. It is an accepted rule of interpretation of statutes, that, if the co-existence of two sets of provisions would be destructive of the object for which the latter was passed, the earlier would be repealed by the later.—vide Maxwell on *Interpretation of Statutes*, 10th ed., page 168. In the case of an equal division in the voting on the question of the election of a Vice-Chairman, section 33A(2) (*g*) has the effect of withdrawing from the Chairman his right to a casting vote conferred by section 40(3) of the Ordinance. At any meeting of the Council the Chairman appears to have a casting vote on any

**Section 33A (2) (g) of the Town Councils Ordinance as amended by section 7 of the Local Authorities (Election of Officials) Act, No. 39 of 1951:—* "Where there are two candidates at any voting and the number of votes cast is equally divided and the addition of one vote would entitle one of the candidates to be elected as Chairman or Vice-Chairman, the determination of the candidate to whom the additional vote shall be deemed to have been given shall be made by lot to be drawn in the presence of the presiding officer in such manner as he shall direct."

question that arises for division except where the question is that of the election of a Vice-Chairman. Such election may take place at the first meeting after a general election, at an ordinary meeting or a special meeting convened in terms of section 39 of the Ordinance; the Chairman is required to preside at all proceedings held for the election of the Vice-Chairman—section 33(4); but at such election the Chairman has no right in view of section 33A(2) (*g*) to exercise a casting vote.

As the election of the respondent was effected by the Chairman exercising a casting vote instead of by the drawing of lots, the election has been held contrary to the express provisions of the relevant statute and is therefore, in my opinion, invalid.

For the reasons I have set out above, I declare the election of the respondent as Vice-Chairman of the Council on 30th January, 1960, void and that the petitioner is entitled to the remedy prayed for by him. The rule *nisi* issued on the respondent is made absolute. The respondent is ordered to pay the costs of the petitioner fixed at Rs. 250/-.

Application allowed

Present: **Gunasekera, J.**

EDWIN PEIRIS *vs.* PERERA, P.C. 2429 (Walasmulla)

Application No. 1991—*M.C. Walasmulla Case No.* 22584.

Argued on: May 25, 1961.
Decided on: July 13, 1961.

Contempt of court—Courts Ordinance, section 57*—Person requesting proctor for one party to do something to help the opposite party in the course of proceedings—Complaint to Court regarding such conduct—Conviction and sentence for contempt of court on failure to show cause against—Absence of provision empowering Magistrate to punish for such offence—Applicability of section* 15 *of the Criminal Procedure Code.*

The petitioner was called upon by the Magistrate, (purporting to act under section 57 of the Courts Ordinance), to show cause why he should not be punished for contempt of Court in that he interfered with the administration of justice in requesting a proctor appearing for one party "to do something" for the opposite party.

The petitioner replied that he had no cause to show and the Magistrate thereupon sentenced him to simple imprisonment for one month.

Held : (1) That there is no provision of law which empowered the Magistrate to punish the petitioner for the act imputed to him as a contempt of Court.

(2) That the learned Magistrate's view that offences cognisable under section 57 of the Courts Ordinance could be punished under section 15 of the Criminal Procedure Code is erroneous as that section does not prescribe the penalty for an offence. It only defines the limits of the punitive powers of a Magistrate's Court.

G. E. Chitty, Q.C., with *S. C. Crossette Thambiah*, for the petitioner.

Naguleswaram, Crown Counsel, for the Attorney-General.

GUNASEKERA, J.

This is a petition for the revision of an order made by the Magistrate of Tangalle sentencing the petitioner to one month's simple imprisonment for an alleged contempt of court.

An application under the Maintenance Ordinance was being heard before the Magistrate's court when the applicant's proctor, Mr. L. de S. Jayasuriya, interrupted the proceedings to make a complaint about the conduct of the petitioner. The Magistrate's record states that Mr. Jayasuriya informed him that the petitioner "came up to the Bar table and interrupted him and stated that the defendant in the maintenance case was his brother and asked him to do something about it." In consequence of this complaint the Magistrate called upon the petitioner—

> "to show cause why he should not be punished for contempt of court in that he interfered with the administration of justice in requesting Mr. L. de S. Jayasuriya, a Proctor, appearing for one party to do something for the opposite party."

The petitioner, who had no legal assistance, replied that he had no cause to show, and the Magistrate thereupon sentenced him to simple imprisonment for one month.

At the commencement of the proceedings against the petitioner the magistrate has recorded that he was acting under section 57 of the Courts Ordinance. This provisions vests every District court, Court of Requests and Magistrate's court with—

> "a special jurisdiction to take cognizance of, and to punish by the procedure and with the penalties in that behalf by law provided every offence of contempt of court committed in the presence of the court itself, and all offences which are committed in the course of any act or proceeding in the said courts respectively, and which are declared by any law for the time being in force to be punishable as contempts of court."

The penalty for an offence of contempt that these courts are thus empowered to punish is not prescribed by this section and must be sought elsewhere. It does not appear from the Magistrate's record, however, what provision of law was regarded by him as prescribing the penalty for the offence with which the petitioner was charged. At the hearing before me Mr. Chitty, who appeared for the petitioner, and Mr. Naguleswaram, who appeared for the Attorney General, were agreed that there was no provision of law which empowered the learned Magistrate to punish the petitioner for the act that was imputed to him as a contempt of court. I myself have not been able to find any such provision.

The learned magistrate's view of the matter is stated in a report that he has since submitted to this court in response to a request for his observations on a statement in the petition that he presumably purported to act under section 381(1) of the Criminal Procedure Code. He says that he did not purport to act under that provision and that his view of the effect of section 57 of the Courts Ordinance was that "offences cognizable under this section could be punished under section 15 of the Criminal Procedure Code." This view is clearly erroneous, for section 15 of the Criminal Procedure Code does not prescribe the penalty for any offence: it is one of the provisions of law defining the limits of the punitive powers of a Magistrate's court but does not itself attach a penalty to any offence.

I set aside the order made by the learned Magistrate and direct that the petitioner be discharged.

Application allowed.

IN THE COURT OF CRIMINAL APPEAL

Present: **Basnayake, C.J.** (*President*), **Sansoni, J., and Tambiah, J.**

THE QUEEN *vs.* A. K. PETER*

Appeal No. 24 *of* 1961 *with Application No.* 23 *of* 1961.

S.C. No. 11—*M.C. Gampaha No.* 50497/*A*

Argued on: April 24 *and May*, 8 1961.
Decided on: May 8, 1961.

Absence of Counsel retained by accused—Assigned counsel—Insufficient time given for preparation of case and for receiving instructions from the accused—Effect.

Held : That assigned counsel should be allowed sufficient time for the preparation of his case and for obtaining instructions from the accused.

M. M. Kumarakulasingham with *M. H. Amit* (assigned), for the accused-appellant.

J. G. T. Weeraratne, Crown Counsel, for the Attorney-General.

BASNAYAKE, C.J.

The only ground urged by learned counsel for the appellant is that when the trial commenced on 20th January, the accused's counsel who had been retained by him did not appear, and that at 11 a.m. on that day counsel was assigned to defend the accused and the case was taken up for trial at 12.30 p.m. It is submitted by learned counsel for the appellant that the time allowed for assigned counsel to prepare the case was not sufficient. He has drawn our attention to the fact that the defence was gravely prejudiced by the situation in which assigned counsel was placed. We agree that assigned counsel should be allowed sufficient time for the preparation of his case and for obtaining instructions from the accused. In the instant case sufficient time was not allowed. Learned counsel for the Crown agrees with submission of learned counsel for the appellant.

We therefore quash the conviction and direct a fresh trial.

Re-trial ordered.

*For Sinhala translation, see Sinhala section, vol. 1, part 10, p. 40.

END OF VOLUME LIX.